
The Bush Administration's Terrorist Surveillance Program and the Fourth Amendment's Warrant Requirement: Lessons from Justice Powell and the *Keith* Case

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This Article analyzes the Bush Administration's claim that the President has the authority to order warrantless electronic surveillance of communications between American citizens and persons abroad suspected of having connections with foreign terrorists groups. The Article begins by focusing on United States v. United States District Court, also known as Keith. The Keith ruling held that the President did not have the power to authorize warrantless wiretaps in national security cases.

The Keith case merits our attention today for several reasons. The result in Keith stunned the press and public. Equally remarkable was the fact that no Justice voted to uphold the government's claim that warrantless wiretaps in national security cases were reasonable under the Fourth Amendment.

Another important aspect about Keith is that it not only rejected President Richard Nixon's claim that he could authorize warrantless wiretaps, but it did so in a manner that unmistakably embraced the warrant requirement, a core precept of the Warren Court's Fourth Amendment jurisprudence.

Finally, understanding the scope and rationale of Keith is important today because its logic is equally applicable to the Bush Administration's claim that it has the power to monitor telephone and email communications between American citizens and persons suspected of having connections with foreign terrorist organizations. When evaluating

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this claim, it is instructive to recall how the Keith Court responded to President Nixon's similar claim that he had the power to authorize warrantless wiretaps in domestic security scenarios: the Court rejected it.

What Keith said about the President's authority in domestic security cases applies equally to warrantless electronic surveillance inside the nation's borders of American citizens whom the government suspects have ties to terrorist groups. In fact, there is no principled, constitutional difference between the Keith case and what the Bush Administration has done with the Terrorist Surveillance Program.

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INTRODUCTION

The 2007 UC Davis Law Review symposium analyzed *Katz v. United States*¹ and its impact on Fourth Amendment law forty years after that decision. Indeed, the subtitle of the symposium, “From Warrantless Wiretaps to the War on Terror,” subtly recognized that some of the concerns and questions surrounding electronic surveillance forty years ago — What is the constitutional status of wiretapping? Is the purpose behind the wiretap relevant to the constitutional inquiry? Does the Constitution prohibit all forms of wiretapping? If the Constitution does not bar wiretapping, how much discretion should government officials have to employ wiretapping or bugging? If government officials have good cause to wiretap, is that enough to satisfy constitutional concerns? Must government officials receive judicial approval before conducting wiretapping? And do Fourth Amendment safeguards control the President’s power to employ wiretapping? — are still being discussed and debated today as the nation decides how much privacy is appropriate during a war on foreign terrorism.

Katz answered most of these questions, for a while, anyway, when it held that wiretapping was subject to constitutional scrutiny and stated that warrants could issue to authorize electronic surveillance. The ruling in *Katz* has come to mean many things to many people. When it was first decided, *Katz* was described as a “seminal” and “landmark decision,” whose importance could not be overstated.² A few years later, Professor Anthony Amsterdam, in his classic article on the Fourth Amendment, wrote that *Katz* represented a value judgment about what the Fourth Amendment meant to a free society.³ However, with the ascendancy of the conservative Burger and Rehnquist Courts, the holding in *Katz* became less significant, if not inconsequential. Professor David Sklansky, the most perceptive modern interpreter of *Katz* and someone who has described *Katz* as “perhaps the most

¹ 389 U.S. 347 (1967).

² WAYNE R. LAFAVE, 1 *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 2.1, at 228 (1978) (noting that “it is no overstatement to say, as the commentators have asserted, that *Katz* ‘marks a watershed in fourth amendment jurisprudence’ because the Court ‘purported to clean house on outmoded fourth amendment principles’ and moved ‘toward a redefinition of the scope of the Fourth Amendment’” (footnotes omitted)).

³ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 *MINN. L. REV.* 349, 403 (1974).

influential search-and-seizure decision of the past half-century,”⁴ acknowledges that “[a]mong scholars *Katz* is widely viewed as something of a failure.”⁵ On *Katz*’s legacy, Sklansky writes that when one looks beyond the topic of electronic surveillance, *Katz* has not expanded the scope of the Fourth Amendment beyond the “trespass test”⁶ announced in *Olmstead v. United States*.⁷ Thus, the impact of *Katz* “has seemed to make little practical difference.”⁸

⁴ David A. Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 MISS. L.J. 143, 145 (2002) [hereinafter Sklansky, *Back to the Future*]. Additional analysis of *Katz* by Sklansky appears in David A. Sklansky, *Katz v. United States: The Limits of Aphorism*, in CRIMINAL PROCEDURE STORIES 223 (Carol S. Steiker ed., 2006) [hereinafter Sklansky, *The Limits of Aphorism*].

⁵ David A. Sklansky, “One Train May Hide Another”: *Katz*, *Stonewall*, and the Secret Subtext of Criminal Procedure, 41 UC DAVIS L. REV. 875, 883 (2008). As Sklansky and others know, *Katz* has not engendered much respect from some of the Justices either. See, e.g., *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (describing *Katz* as “self-indulgent” test). For example, Justice Antonin Scalia has remarked that “the only thing the past three decades have established about the *Katz* test (which has come to mean the test enunciated by Justice Harlan’s separate concurrence in *Katz*) is that, unsurprisingly, those ‘actual (subjective) expectation[s] of privacy’ ‘that society is prepared to recognize as “reasonable,”’ bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.” *Id.*; see also, Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1, 60-61 (2001) (observing test for privacy is circular, “for someone can have a reasonable expectation of privacy in an area if and only if the Court has held that a search in that area would be unreasonable”); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 808 (2004) (noting that reasonable expectation of privacy test “is largely circular: a person has a reasonable expectation of privacy when the courts decide to protect it through the Fourth Amendment”).

⁶ Sklansky, *supra* note 5, at 885.

⁷ 277 U.S. 438, 456-57 (1928). According to Sklansky, the Burger and Rehnquist Courts have repeatedly “read the Fourth Amendment to provide protections that are place-specific. Inside the home, the Fourth Amendment applies with special force; outside the home — in cars, on highways, in fields, in offices, and even in backyards — Fourth Amendment protection drops off dramatically. And even in the home, surveillance rarely rises to the level of a search unless it involves, if not technically a trespass, at least a physical intrusion.” Sklansky, *supra* note 5, at 885 (footnotes omitted).

⁸ Sklansky, *supra* note 5, at 885 (appears on page 8 of “04 2nd Edit to Author”); see also Kerr, *supra* note 5, at 807 (“The *Katz* ‘reasonable expectation of privacy’ test has proven more a revolution on paper than in practice; *Katz* has had a surprisingly limited effect on the largely property-based contours of traditional Fourth Amendment law.”); Peter P. Swire, *Katz is Dead. Long Live Katz*, 102 MICH. L. REV. 904, 904, 910 (2004) (arguing “that the demise of *Katz* has actually been understated,” and that under “the case law and emerging facts, there is a surprisingly strong case for believing that *Katz* . . . [is] no longer good law even for the contents of telephone calls”).

Although I agree with Sklansky's description of *Katz's* long-term impact on the scope of search and seizure doctrine, my discussion will focus on a ruling that could be characterized as a more constitutionally robust and stronger version of *Katz*. That ruling is *United States v. United States District Court*, also known as *Keith*.⁹ Although it involved "facts far more dramatic than those in *Katz*,"¹⁰ *Keith* ruled that the President violated the Fourth Amendment by authorizing warrantless wiretaps in national security cases. Today, in light of the War on Terror and the Bush Administration's claim of inherent authority to conduct warrantless electronic surveillance of communications between American citizens and persons suspected of having connections with foreign terrorist groups, *Keith* may be a more pertinent and significant case than *Katz*.

The background and ruling in *Keith* merit our attention today for several reasons. First, what is remarkable about *Keith*, at least in retrospect, is not just the result which, at the time, the press and public saw as "stunning,"¹¹ but also the fact no Justice voted to uphold the government's claim that warrantless wiretaps in national security cases were reasonable under the Fourth Amendment. Like its predecessors, the Nixon Administration claimed authority to wiretap

⁹ 407 U.S. 297 (1972). The title *Keith* is taken from the name of then-United States District Court Judge Damon Keith. Interestingly, Judge Keith was not the original judge in the case. "The case was originally assigned to United [States] District Court Judge Talbot Smith, but was randomly reassigned to Judge Keith when Smith recused himself for personal reasons." Samuel C. Damren, *The Keith Case*, CT. LEGACY (Hist'l Soc'y for the U.S. Dist. Court for the E.D. Mich.), Nov. 2003, at 2.

Judge Keith initially rejected the government's claim that the President had the inherent authority to authorize warrantless wiretaps in national security cases. The government's claim was a response to a defense motion in a criminal case that the government divulge all records of electronic surveillance directed at the defendants or unindicted co-conspirators. See *United States v. Sinclair*, 321 F. Supp. 1074, 1075-76, 1079-80 (E.D. Mich. 1971). After Judge Keith rejected the government's claim, he ordered the government to disclose any electronic surveillance directed at the defendants. The government then filed a writ of mandamus in the Court of Appeals for the Sixth Circuit to compel Judge Keith to vacate his order directing the government to disclose to defendant Lawrence Robert "Pun" Plamondon conversations of his overheard by the government. The Court of Appeals denied the petition. See *United States v. U.S. Dist. Court (Keith)*, 444 F.2d 651, 652, 667, 669 (6th Cir. 1971).

¹⁰ Sklansky, *The Limits of Aphorism*, *supra* note 4, at 250.

¹¹ Fred P. Graham, *High Court Curbs U.S. Wiretapping Aimed at Radicals*, N.Y. TIMES, June 20, 1972, at 1 (Special Insert); see also Glen Elsasser, *Court Rules Wiretaps Need OK*, CHI. TRIB., June 20, 1972, at 1A-11; John P. MacKenzie, *Court Curbs Wiretapping of Radicals*, WASH. POST, June 20, 1972, at A1; *The Supreme Court: Untapped*, NEWSWEEK, July 3, 1972, at 17, 17.

in domestic security cases without judicial approval. When *Keith* came to the Court, President Richard Nixon had appointed four new Justices considered to be law-and-order conservatives sympathetic to the President's position on wiretapping. In fact, one of those new appointees, Lewis F. Powell Jr., had written a controversial op-ed article supporting wiretapping in national security cases a few months before *Keith* was decided.¹² Moreover, Justice Byron White, a holdover from the Warren Court, had already gone on record in *Katz* as saying warrantless wiretaps in domestic security cases were reasonable if authorized by the President or the Attorney General. Thus, the Nixon Administration could not be faulted for being somewhat sanguine about its chances of success in *Keith*.¹³ Despite this background, eight Justices voted against the government.¹⁴

As Justice Powell's biographer, John Jeffries, Jr., has noted, Powell was intimately involved with the issue of electronic surveillance in national security cases shortly before *Keith* was decided.¹⁵ Therefore, it was fitting that Powell would weigh-in on the result in *Keith*. But based on what the public knew about Justice Powell's views on wiretapping in national security cases, the fact that Justice Powell wrote the opinion rejecting the President's claim was just as astonishing, if not more so, than the ultimate result reached in the case.

A second important aspect about *Keith* is that it not only reaffirmed *Katz* and extended its holding to national security cases, it did so in a manner that unmistakably embraced the warrant requirement, a core

¹² Lewis F. Powell, Jr., Op-Ed., *Civil Liberties Repression: Fact or Fiction?* — "Law-Abiding Citizens Have Nothing to Fear," RICHMOND TIMES-DISPATCH, Aug. 1, 1971, reprinted in *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings before the S. Comm. on the Judiciary*, 92d Cong. 213-17 (1971).

¹³ Cf. *The Law*, "New Curb on Bugging," TIME, July 3, 1972, at 30, 30 (noting that when *Keith* reached Court, "the Government thought its chances of enforcing [its] claim seemed promising").

¹⁴ Five Justices joined Justice Powell's opinion declaring that the President lacked the authority to conduct warrantless electronic surveillance. Chief Justice Warren Burger concurred in the result. Justice White concurred in the judgment. Without deciding the constitutional issue, Justice White concluded that the challenged electronic surveillance in *Keith* violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Justice Rehnquist did not participate in the case, presumably because he had worked on the wiretap issue when he served as head of the Office of Legal Counsel in the Nixon Justice Department and it was publicly stated that he supported the government's position. See *Remaking the Supreme Court: Nixon Sets a Pattern*, U.S. NEWS & WORLD REP., Nov. 1, 1971, at 15, 17 (stating that "Rehnquist has defended the Government's right to employ electronic surveillance against political extremists without prior court approval").

¹⁵ JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 376 (1994).

precept of the Warren Court's Fourth Amendment jurisprudence. Since the early part of the twentieth century, the legitimacy of the warrant requirement — the rule that police obtain a judge's warrant before commencing a search and seizure — was a topic of debate among the Justices. By the mid-1960s, however, the Warren Court settled the debate in favor of the rule. Thus, in *Katz*, Justice Potter Stewart confidently wrote for the majority that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.”¹⁶

In *Keith*, although the government, once again, sought to reopen the debate over the warrant requirement's validity, the Court was uninterested. Brushing aside the government's argument that the Fourth Amendment does not require warrants, but merely that searches be “reasonable,” Justice Powell's opinion for the Court unapologetically embraced the warrant requirement as “the very heart of the Fourth Amendment directive.”¹⁷ Unlike the initial Fourth Amendment opinion authored by another Nixon appointee a few months prior to *Keith*,¹⁸ Justice Powell's opinion was free of the fact-specific, totality-of-the-circumstances balancing often seen in search and seizure rulings then and now. To the contrary, Justice Powell's reasoning was succinct and categorical: The warrant requirement applied to national security wiretaps and there was no basis for exempting the President from the requirement. There was no nuance and no room for manipulation by the government. Significantly, no Justice filed a dissent to Powell's holding or criticized his reasoning.¹⁹

¹⁶ *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes omitted).

¹⁷ *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 316 (1972).

¹⁸ *Wyman v. James*, 400 U.S. 309 (1971), was Justice Blackmun's first opinion as a Justice. See LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 56 (2005). *Wyman* concerned the constitutionality of a New York statute that required welfare applicants to allow state officials to visit their homes as a condition of receiving welfare benefits. Justice Harry Blackmun's opinion upholding the statute was a fact-specific ruling that eschewed any *per se* rules regarding Fourth Amendment principles. When *Wyman* was decided, “most of the commentators viewed the decision as proof that Justice Blackmun would be the conservative law-and-order justice that Nixon had sought.” *Id.* at 62. Of course, Justice Blackmun would later be characterized in the popular press as a “liberal” Justice primarily because of his position on abortion. Interestingly, and despite his reputation as a “liberal,” Justice Blackmun later stated he “never regretted [his] vote in [*Wyman*] and would vote the same way again.” *Id.* at 63.

¹⁹ According to one source, after it became clear that Justice Powell would write an opinion strongly rejecting the President's position, Chief Justice Burger tried to

Justice Powell's recognition of the warrant requirement is significant because, before his appointment to the Court, Powell was thought to be a strong critic of the Warren Court's approach to deciding constitutional criminal procedure issues. For example, before coming to the Court, Justice Powell openly questioned the wisdom of *Mapp v. Ohio*,²⁰ which extended the federal rule requiring the exclusion of evidence obtained in violation of a defendant's Fourth Amendment rights to state criminal proceedings. And he harshly criticized *Miranda v. Arizona*,²¹ which ruled that suspects must be warned of their right to remain silent and have counsel present before being subjected to custodial police interrogation. Critics of the Warren Court saw the warrant requirement in the same light as the exclusionary rule and *Miranda* warnings, namely as illegitimate, extra-judicial law-making with no support in the text or history of the Constitution.²² Whatever he might have thought of the warrant requirement before *Keith* or after it,²³ Justice Powell's

assign the case to Justice White, "who, along with [Burger], wanted to duck the central constitutional question of whether the warrantless wiretap violated the Fourth Amendment." BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 223 (1979). Justice White, however, declined the assignment. Because Justice William Douglas was the senior Justice of the majority, he reassigned the case to Justice Powell "who held firm in the face of Burger's continuous pressure not to write a broad constitutional ruling." *Id.*

²⁰ 367 U.S. 643, 655 (1961).

²¹ 384 U.S. 436, 471 (1966).

²² See, e.g., TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 41 (1969) ("[O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the prime object of their concern. Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches"); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 761-81 (1994) (criticizing warrant requirement from historical, textual, and practical perspective).

²³ See, e.g., *Robbins v. California*, 453 U.S. 420, 429-36 (1981) (Powell, J., concurring) (adhering to result in *Arkansas v. Sanders*, but expressing concern that plurality's ruling applies warrant requirement in mechanical fashion to any item taken from car); *United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring) (noting that Warrant Clause of Fourth Amendment does not apply to investigative detention); *Arkansas v. Sanders*, 442 U.S. 753, 758 (1979) (affirming that search of private property must be pursuant to properly issued search warrant issued in compliance with Warrant Clause); *id.* at 766 (holding that warrant requirement applies to personal luggage taken from automobile to same degree it applies to such luggage in other locations); *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976) (holding that "the operation of a fixed checkpoint need not be authorized in advance by a judicial warrant"); *South Dakota v. Opperman*, 428 U.S. 364, 384 (1976) (Powell, J., concurring) (concluding that routine inventory searches of impounded

opinion in *Keith* made clear that the warrant requirement applied to the President even in situations where Executive Branch officials believed that the nation's security was at risk.

Finally, understanding the scope and rationale of *Keith* is important today because its logic is equally applicable to the Bush Administration's claim that it has the power to monitor telephone and email communications between American citizens and persons suspected of having connections with foreign terrorist organizations. The Bush Administration insists that the Fourth Amendment's warrant requirement does not apply to the Terrorist Surveillance Program ("TSP") conducted by the National Security Agency ("NSA") for at least two reasons. First, the President has the inherent authority, notwithstanding the Fourth Amendment, to conduct electronic surveillance of foreign powers.²⁴ Second, the surveillance conducted by the NSA is reasonable under the Fourth Amendment.²⁵ When evaluating the former claim, it is instructive to recall how the *Keith* Court responded to President Nixon's similar claim that he had the power to authorize warrantless wiretaps in domestic security scenarios: the Court rejected it.

Keith explained that "Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch."²⁶ The Court pointedly noted that the Amendment "does not contemplate the executive officers of Government as neutral and disinterested magistrates,"²⁷ and stated that the President and his aides "should not be the sole judges of when to utilize constitutionally sensitive means

automobiles do not require warrants); *United States v. Watson*, 423 U.S. 411, 427-32 (1976) (Powell, J., concurring) (noting that "historical and policy reasons" justify officer's "warrantless arrest in a public place even though he had adequate opportunity to procure a warrant"); *Almeida-Sanchez v. United States*, 413 U.S. 266, 282-84 (1973) (Powell, J., concurring) (finding that warrant is required for roving automobile searches in border areas).

²⁴ Brief of Appellants at 34, *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007) (Nos. 06-2095 & 06-2140); see also U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 6-10 (2006), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>. For a slightly different defense of the constitutionality of the TSP by a former official in the Bush Administration, see John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565, 566 (2007) (arguing that TSP "represents a valid exercise of the President's Commander-in-Chief authority to gather intelligence during wartime").

²⁵ Brief of Appellants, *supra* note 24, at 36.

²⁶ *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 316-17 (1972).

²⁷ *Id.* at 317.

in pursuing their tasks.”²⁸ *Keith* emphasized that its rejection of the President’s claim did not come from some new-fangled interpretation of the Fourth Amendment and was not inconsistent with the Court’s historic role in our constitutional system. Rather, *Keith* relied upon traditional notions of separation of powers when it explained that the warrant requirement is the “time-tested means”²⁹ protecting Fourth Amendment rights. For a search to be reasonable, according to *Keith*, the Amendment requires “a prior judicial judgment, not the risk that executive discretion may be reasonably exercised.”³⁰ Prior judicial approval is consistent with “our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.”³¹ What *Keith* said about the President’s authority in domestic security cases equally applies to warrantless electronic surveillance inside the nation’s borders of American citizens whom the government suspects have ties to terrorist groups. In fact, there is no principled, constitutional difference between the *Keith* case and what the Bush Administration has done with the TSP.³²

My discussion of *Keith* and its relevance to the TSP proceeds as follows. Part I highlights what the public knew about Lewis Powell’s views on wiretapping before he became a member of the Court. Part II focuses on Justice Powell’s opinion in *Keith*. While the result in *Keith* stunned the public, and may have surprised even the Nixon Administration, the opinion itself was noteworthy for a different, and more important, reason. Finally, Part III considers whether the TSP, as originally implemented, is constitutional.

As a matter of legal principle, everyone seems to agree that “the Constitution is above the Congress, and the President.”³³ The

²⁸ *Id.*

²⁹ *Id.* at 318.

³⁰ *Id.* at 317.

³¹ *Id.* (citation omitted).

³² *Cf. Russo v. Byrne*, 409 U.S. 1219, 1219 (1972) (writing for court, Circuit Judge Douglas stated: “It is argued that [*Keith*] involved ‘domestic’ surveillance, but the Fourth Amendment and our prior decisions, to date at least, draw no distinction between ‘foreign’ and ‘domestic’ surveillance”); John Cary Sims, *What NSA Is Doing . . . and Why It’s Illegal*, 33 HASTINGS CONST. L.Q. 105, 110 (2006) (asserting that “*Keith*’s recital of the threat to personal liberties posed by allowing surveillance to be put in place on the basis of ‘unreviewed executive discretion’ seemed to be as applicable to foreign intelligence wiretaps as to those directed at domestic security threats” (footnote omitted)).

³³ Yoo, *supra* note 24, at 597. I disagree with Professor John Yoo’s statement that “[c]laims that the NSA program violates the Constitution appeal not to a concern

penultimate question here is whether the President has the inherent power to authorize foreign intelligence searches, without judicial approval, of the communications of American citizens and lawful residents that occur inside the nation. The Bush Administration and its supporters contend that the President has that power, notwithstanding the Fourth Amendment. Alternatively, the government contends the TSP fits within the special needs exception to the Fourth Amendment's warrant requirement. Part III concludes that each of the government's arguments is incompatible with Fourth Amendment law and the meaning of *Keith*.

I. LEWIS POWELL AND WIRETAPPING: THE MAN THE COUNTRY KNEW

Lewis Powell gained national prominence when he became the president of the American Bar Association in August of 1964. "Becoming president of the ABA put Powell on the national map,"³⁴ and provided him a "bully pulpit" to air his views on a variety of legal subjects.³⁵ Although Powell had never prosecuted or acted as defense counsel in a criminal case, as ABA president, "[m]ostly, he talked about crime."³⁶ Indeed, Powell's speeches and writings would earn him a reputation as a law-and-order advocate and critic of the Warren Court's constitutional criminal procedure rulings. Eventually, Powell's name would be repeatedly mentioned when President Nixon was looking to fill vacancies on the Court with individuals who shared his judicial "philosophy," which meant taking strong positions about "crime in the streets" and opposing Warren Court rulings upholding the rights of criminal suspects.³⁷

about law, but rather to a concern about politics." *Id.* at 601. Certainly the arguments proffered here (and the arguments made by other critics of the TSP) are based on genuine concern over whether the President's authorization of the TSP is consistent with constitutional principle. See, e.g., David Cole, *Reviving the Nixon Doctrine: NSA Spying, the Commander-in-Chief, and Executive Power in the War on Terror*, 13 WASH. & LEE J. C.R. & SOC. JUST. 17, 18 (2006) (stating that Bush Administration's position on TSP is "emblematic of its approach to the war on terror," and arguing that Administration "has taken overly aggressive positions that unnecessarily run roughshod over fundamental principles of the rule of law").

³⁴ JEFFRIES, *supra* note 15, at 194.

³⁵ *Id.* at 210.

³⁶ *Id.*

³⁷ See *id.* at 214 (noting that because of Powell's reputation as critic of Warren Court, "[w]hen the administration of Richard Nixon looked for potential Supreme Court nominees, Powell's name naturally made the list"); see also JOHN W. DEAN, *THE REHNQUIST CHOICE* 16 (2001) (describing Powell as contender for Supreme Court seat because of his "philosophy," which was suggested by his criticism of Warren Court

As president of the ABA, on June 26, 1965, Powell delivered a "widely publicized"³⁸ address at the Fourth Circuit Judicial Conference entitled *State of Criminal Justice*,³⁹ in which he asserted that "[t]he strengthening and clarifying of criminal laws and the improvement in the administration of criminal justice, especially in its certainty and swiftness, will help restore the state of law and order which is so urgently needed."⁴⁰ In that speech, Powell expressed frustration with several recent Supreme Court decisions which, he charged, "significantly complicated the task of law enforcement."⁴¹

On July 26, 1965, President Lyndon B. Johnson established the Commission on Law Enforcement and the Administration of Justice ("Commission") to investigate the causes of crime, the existing system of criminal procedure, and to recommend appropriate legislation.⁴² Doubtlessly due to Powell's growing reputation "as a tough but fair-minded proponent of public order,"⁴³ President Johnson wanted Powell to chair the Commission. While Powell turned down the assignment as chair, he nevertheless agreed to serve on the Commission.⁴⁴ Two years later, the Commission issued a detailed report entitled *The Challenge of Crime in a Free Society*.⁴⁵

On the general topic of electronic surveillance, the Commission found that the confused state of the law was "intolerable," and that contemporaneous legal doctrine "serves the interests neither of

criminal procedure rulings).

³⁸ Isidore Silver, *Introduction to PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY* 18 (Avon Books 1968) (1967).

³⁹ Lewis F. Powell, Jr., *Address at the Fourth Circuit Judicial Conference: State of Criminal Justice (June 26, 1965)*, reprinted in *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings before the S. Comm. on the Judiciary*, 92d Cong. 258-63 (1971).

⁴⁰ *Id.* at 259.

⁴¹ *Id.* at 259 n.3, 260. Some of the rulings Powell mentioned were *Escobedo v. Illinois*, 378 U.S. 478 (1964), *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Mallory v. United States*, 354 U.S. 449 (1957). Powell, *supra* note 39, at 259 n.3, 261. In his farewell address as president of the ABA, Powell continued to talk about crime and court rulings. According to Dean John Jeffries, Powell told the ABA convention audience that while the rights of criminal suspects must be protected, the "first priority today must be a like concern for the right of citizens to be free from criminal molestations of their persons and property." JEFFRIES, *supra* note 15, at 211.

⁴² Silver, *supra* note 38, at 18-19.

⁴³ JEFFRIES, *supra* note 15, at 211.

⁴⁴ *Id.* at 212.

⁴⁵ PRESIDENT'S COMMISSION, *supra* note 38.

privacy nor of law enforcement.”⁴⁶ While all members of the Commission agreed that the status of the law on wiretapping and bugging was a mess, they disagreed on how to fix it, the desirability of a federal wiretap statute, and the threat to privacy that governmental wiretapping posed. A majority of the Commission's members, including Powell, favored the enactment of electronic surveillance laws consistent with the norms recently announced by the Supreme Court's ruling in *Berger v. New York*.⁴⁷

The majority also opined that the enactment of wiretap legislation “would significantly reduce the incentive for, and the incidence of, improper electronic surveillance.”⁴⁸ Other members of the Commission, however, had “serious doubts about the desirability” of wiretap legislation.⁴⁹ They believed that “without the kind of searching inquiry that would result from further congressional consideration of electronic surveillance,” there is “insufficient basis to strike th[e] balance against the interests of privacy.”⁵⁰ Significantly, there was apparent unanimity on the Commission that “[m]atters affecting the national security not involving criminal prosecution” were outside the Commission's mandate, and that the Commission's discussion of wiretapping was not “intended to affect the existing powers to protect that interest.”⁵¹ Powell, however, regretted “the weak and ineffective stance [the Commission was] taking on electronic surveillance.”⁵²

Although Powell shared the Commission's belief that federal wiretap legislation was needed, he broke from the majority when he wrote a supplemental statement — “Powell was careful not to call it a dissent”⁵³ — to the Report criticizing the Warren Court's recent

⁴⁶ *Id.* at 472.

⁴⁷ 388 U.S. 41, 55-60 (1967) (describing constitutional requirements for legislation authorizing electronic surveillance). The Court announced that legislation authorizing electronic surveillance must, first, comply with the Fourth Amendment's particularity clause by specifying the crime under investigation and which conversations are to be seized; second, require independent showings of probable cause for subsequent intrusions into suspect's privacy; third, require a termination date for electronic surveillance once the conversation sought is seized; and fourth, require a return on the warrant to a judicial officer. *Id.*

⁴⁸ PRESIDENT'S COMMISSION, *supra* note 38, at 473.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² JEFFRIES, *supra* note 15, at 213.

⁵³ *Id.* at 214.

rulings in *Miranda v. Arizona*, *Escobedo v. Illinois*,⁵⁴ and *Griffin v. California*.⁵⁵ Powell's harshest comments were directed at *Miranda*. He observed that while the implications of "the code of conduct" prescribed by *Miranda* remained unclear, "there can be little doubt that its effect upon police interrogation and the use of confessions will drastically change procedures long considered by law enforcement officials to be indispensable to the effective functioning of our system."⁵⁶ If enforced as written, Powell predicted that *Miranda* "could mean the virtual elimination of pretrial interrogation of suspects — on the street, at the scene of a crime, and in the station house — because there would then be no such interrogation without the presence of counsel unless the person detained, howsoever briefly, waives [his] rights."⁵⁷ Finally, Powell advocated amending the Constitution to correct the "imbalance" created by *Miranda*.⁵⁸ Although Powell's criticism of *Miranda* did not result in its demise, it did burnish his reputation "as a critic — a respectful and responsible but unmistakably conservative critic — of the Warren Court."⁵⁹

Even after Powell left the ABA presidency and the President's Crime Commission, his name continued to be associated with the topic of wiretapping and his views became even more controversial. In February of 1971, the ABA Criminal Justice Committee, on which Powell served, approved standards for the use of electronic surveillance.⁶⁰ Those standards permitted presidential wiretaps without prior judicial approval in cases involving a foreign power.⁶¹

⁵⁴ 378 U.S. 478, 490-91 (1964) (holding that where police violate Sixth Amendment right to counsel by taking suspect into custody for interrogation, denying suspect's request to consult with his lawyer, and failing to effectively warn suspect of his constitutional right to remain silent, none of suspect's statements during interrogation may be used against him at criminal trial).

⁵⁵ 380 U.S. 609, 615 (1965) (holding that Fifth Amendment's Self-Incrimination Clause prohibits "either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt" (footnote omitted)); see PRESIDENT'S COMMISSION, *supra* note 38, at 668-81.

⁵⁶ PRESIDENT'S COMMISSION, *supra* note 38, at 672.

⁵⁷ *Id.*

⁵⁸ *Id.* at 679-80.

⁵⁹ JEFFRIES, *supra* note 15, at 214.

⁶⁰ ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO ELECTRONIC SURVEILLANCE § 3.1 (Approved Draft 1971).

⁶¹ *Id.* The standards provided:

The use of electronic surveillance techniques by appropriate federal officers for the overhearing or recording of wire or oral communications to protect the nation from attack by or other hostile acts of a foreign power or to

By contrast, in cases involving domestic security issues, the ABA standards refused to take a position on the President's power to employ wiretapping without a court order.⁶² Powell would later explain his understanding of the ABA's wiretap standards during his Senate confirmation hearings. The ABA standards, Powell testified, allowed for wiretapping without a prior court order in national security situations involving a foreign power, but did not address "the far more troublesome area of internal security surveillance."⁶³

On April 15, 1971, Powell gave a speech to the Richmond Bar Association,⁶⁴ wherein he briefly touched on the "perplexing issue" of the President's authority to wiretap in national security cases.⁶⁵ While Powell assumed that the President had the power "to take all appropriate measures to protect the nation against hostile acts of a foreign power," he noted that "the President's authority with respect to internal security is less clear."⁶⁶ Powell then offered a few cryptic

protect military or other national security information against foreign intelligence activities should be permitted subject to appropriate Presidential and Congressional standards and supervision.

Id.

⁶² The commentary to the Approved Draft of standards explained that the Committee "rejected any reading of the Fourth Amendment that would invariably require compliance with a court order system before surveillance in the interest of the national security could be termed constitutionally 'reasonable.'" *Id.* § 3.1 cmt. at 12 (Approved Draft Supp. 1971). The commentary also noted that the Committee "was reluctant to approve any standard that might unduly circumscribe, even indirectly, the power of the President to protect the national security interest or to suggest that what is constitutional for the Commander-in-C[h]ief to do under one provision of the Constitution could somehow be termed constitutionally 'unreasonable' under the Fourth Amendment." *Id.*

Interestingly, the commentary to the standards ultimately approved by the Committee, which gave the President the power to employ warrantless surveillance in foreign security cases, suggests that the Committee had considered, and denied, giving the President similar power to use warrantless surveillance in domestic security cases: "The Committee considered and rejected language which would have recognized a comparable residuary power in the President not subject to prior judicial review to deal with purely domestic subversive groups." *Id.* § 3.1 cmt. at 121 (Approved Draft 1971). Notwithstanding this comment, the final standards approved by the ABA make no mention of the President's power to conduct electronic surveillance in domestic security cases.

⁶³ Powell, *supra* note 39, at 207.

⁶⁴ Lewis F. Powell, Jr., Address Before the Richmond Bar Association: Organized Crime and Electronic Surveillance — In Virginia? (Apr. 15, 1971), *reprinted in Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings before the S. Comm. on the Judiciary*, 92d Cong. 244-48 (1971).

⁶⁵ *Id.* at 247.

⁶⁶ *Id.*

observations that could be interpreted as suggesting that the President's authority to wiretap should not turn on the source of the threat to the nation. He stated:

There is an obvious potential for grave abuse, and an equally obvious need where there is a clear and present danger of a serious internal threat. The distinction between external and internal threats to the security of our country is far less meaningful now that radical organizations openly advocate violence. Freedom can be as irrevocably lost from revolution as from foreign attack.⁶⁷

Powell also mentioned that the controversy surrounding wiretapping was currently before the courts, including the recent Sixth Circuit ruling denying the President's claim of inherent authority to conduct domestic security wiretaps in *Keith*,⁶⁸ and that eventually "there may be a need for clarifying legislation."⁶⁹

Less than four months after his Richmond Bar Association speech, Powell's most contentious comments on wiretapping were published in an op-ed column in the *Richmond-Times Dispatch*.⁷⁰ The column was subsequently reprinted in the *FBI Law Enforcement Bulletin* and later in the *New York Times*⁷¹ during Powell's Senate Confirmation Hearings. Although the op-ed article was controversial for several reasons, one significant aspect of the article escaped the attention of the nation's press and most of the Senators who later questioned Powell about his views on wiretapping.

Prior to the publication of the op-ed article on August 1, 1971, Powell had generally associated himself with the view that court-approved wiretapping was lawful in criminal cases. He endorsed that position in 1967 when he served on the President's Commission on Crime. Powell had also unequivocally opined that the President had the inherent power to wiretap without judicial approval in situations involving foreign agents or foreign intelligence matters. He stated that opinion in his April 15, 1971, Richmond Bar Association speech.⁷² On whether the

⁶⁷ *Id.*

⁶⁸ *Id.* at 247 n.5.

⁶⁹ *Id.* at 247.

⁷⁰ Powell, *supra* note 12.

⁷¹ Lewis F. Powell, Jr., Op-Ed., 'America Is Not a Repressive Society,' N.Y. TIMES, Nov. 3, 1971, at 47.

⁷² Powell, *supra* note 64, at 247 ("I will say in passing that there is little question — at least there should be none — as to the power of the President to take all appropriate measures to protect the nation against hostile acts of a foreign

President had inherent authority to wiretap in domestic security cases, Powell initially seemed to purposefully equivocate. In his Richmond speech, he said the “President’s authority with respect to internal security is less clear.”⁷³ But, less than four months later, as a member of the ABA Criminal Justice Committee, he signed off on standards that could be interpreted as denying presidential authority to wiretap in domestic security cases. In the *Richmond-Times Dispatch* article, however, Powell “had apparently changed his mind” on this question.⁷⁴

Speaking generally, and departing from his normally moderate and cautious tone,⁷⁵ Powell’s op-ed article asserted that the “outcry against wiretapping is a tempest in a teapot,” and that “[l]aw-abiding citizens having nothing to fear” regarding federal electronic surveillance.⁷⁶ As to federal wiretaps in foreign and internal security cases, Powell noted that the Omnibus Crime Control and Safe Streets Act of 1968 “left this delicate area to the inherent power of the President.”⁷⁷ Powell then observed that critics of wiretapping have “focused on its use in internal security cases and some courts have distinguished these from foreign threats.”⁷⁸ Conceding the potential for abuse, “at least in theory,” when the President authorizes wiretaps for internal security cases, Powell retorted that “[t]his possibility must be balanced against the general public interest in preventing violence (e.g., bombing of the Capitol) and organized attempts to overthrow the government.”⁷⁹ Debunking the myth that the Justice Department was “usurping new power” by

power.”).

⁷³ *Id.*

⁷⁴ JEFFRIES, *supra* note 15, at 376 (“[T]he ABA supported the President’s claim of unilateral authority to order wiretaps in national security cases but *only* against foreign agents. Electronic surveillance in domestic security matters . . . would require a court order. Powell sat on the ABA committee that approved this requirement, but by 1971 he had apparently changed his mind.”).

⁷⁵ *See id.* at 239 (noting that op-ed article was “an uncharacteristically savage rebuttal” to critics who claimed America was repressive society and that Powell’s “usual reserve and moderation gave way to a shrill attack on ‘standard leftist propaganda’ about violations of civil liberties”).

⁷⁶ Powell, *supra* note 12, at 215.

⁷⁷ *Id.* at 214.

⁷⁸ *Id.* Powell also noted that the issue of the President’s inherent power to wiretap in domestic security cases was then currently pending before the Court in the *Keith* case. *Id.*

⁷⁹ *Id.* Powell’s hypothetical example of a “bombing of the Capitol” may have been a not-so-subtle reference to *Keith*, which involved a bombing of the CIA office in Ann Arbor, Michigan. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 299 (1972). In his testimony before the Senate, however, Powell claimed that he was not aware of the facts involved in *Keith*. *See* Powell, *supra* note 39, at 208.

wiretapping, Powell explained that the “truth is that wiretapping, as the most effective detection means, has been used against espionage and subversion for at least three decades under six Presidents.”⁸⁰

Most significantly, Powell dismissed the argument that the legality of the President’s inherent power to wiretap should turn on whether the government was seeking intelligence on foreign or internal security threats. Such a distinction may have been valid in the past, but now any distinction between foreign and domestic threats was “largely meaningless” because the “radical left” at home was “plotting violence and revolution” with Communist enemies abroad.⁸¹ Repeating a line from his April 15 Richmond Bar Association speech, Powell wrote: “Freedom can be lost as irrevocably from revolution as from foreign attack.”⁸² On this point, Powell was directly contradicting the position he had taken three months earlier as a member of the ABA’s Criminal Justice Committee, which had drawn the same distinction between foreign and internal threats, and had given the President wiretap authority only in cases involving foreign threats.⁸³ Powell also had a reply to critics who asked, why, if warrants are required for wiretaps in criminal cases, should not they also be required in domestic security cases. Powell endorsed the government’s claim that the need for secrecy precluded utilization of the warrant process. He suggested that “leftist radical organizations and their sympathizers in this country” would cooperate with Communist nations to reveal sensitive intelligence in domestic security cases.⁸⁴ “Public disclosure of this sensitive information would seriously handicap our counter-espionage and counter-subversive operations.”⁸⁵

Moving beyond the topic of wiretapping, Powell closed his op-ed article with more criticism of the Warren Court. He remarked that recent “dramatic decisions of the Supreme Court have further strengthened the rights of accused persons and correspondingly limited the powers of law enforcement,” naming *Miranda* and *Escobedo*

⁸⁰ Powell, *supra* note 12, at 214.

⁸¹ *Id.*

⁸² *Id.*; see also Powell, *supra* note 39, at 247.

⁸³ See JEFFRIES, *supra* note 15, at 376-77 (noting that by 1971, “[t]he fighting issue was warrantless wiretaps for domestic security”). According to Jeffries, “Powell admitted [in his *Richmond-Times Dispatch* article] that ‘some courts’ had distinguished internal security from foreign threats but did not mention that the ABA committee on which he sat had drawn precisely that distinction. He now took a different view.” *Id.*

⁸⁴ Powell, *supra* note 12, at 215.

⁸⁵ *Id.*

as two examples.⁸⁶ He subtly suggested that the Court was responsible for a criminal justice system that “subordinates the safety of society to the rights of persons accused of crime.”⁸⁷ Differing with this view, Powell wrote “[t]he need is for greater protection — not of criminals but of law-abiding citizens.”⁸⁸

On October 21, 1971, less than three months after Powell's controversial op-ed article, President Nixon surprised the nation with a television and radio broadcast announcing two unexpected nominees — Lewis F. Powell, Jr. and William H. Rehnquist — for vacancies on the Supreme Court.⁸⁹ The President told the nation that he had selected Powell and Rehnquist upon the belief that the nominees shared his own conservative judicial philosophy.⁹⁰ Nixon stated “I believe some court decisions have gone too far in the past in weakening the peace forces as against the criminal forces in our society. I believe the peace forces must not be denied the legal tools they need to protect the innocent from criminal elements.”⁹¹ Nixon's nomination announcement repeated themes from his 1968 presidential campaign white paper on crime, *Toward Freedom From Fear*.⁹² In that paper, Nixon accused the Supreme Court of “seriously hamstringing the peace forces” to the advantage of criminals, and called for new laws or even a constitutional amendment to “redress the balance” in favor of law enforcement.⁹³ It is not surprising, then, that much of the press treated the nominations of Powell and Rehnquist as part of Nixon's plan to change the “philosophy” of the Court and to reverse the Warren Court's criminal procedure rulings.⁹⁴

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See *Remaking the Supreme Court*, *supra* note 14, at 15.

⁹⁰ *Id.* at 16.

⁹¹ *Id.*

⁹² RICHARD M. NIXON, *TOWARD FREEDOM FROM FEAR* (1968), reprinted in 114 CONG. REC. 12,936, 12,936-39 (1968).

⁹³ *Id.* at 12,937.

⁹⁴ See, e.g., Richard Harris, *Comment*, NEW YORKER, Oct. 30, 1971, at 39, 39 (“Now that [Nixon] has finally made known his new choices — Lewis F. Powell, Jr. . . . and William H. Rehnquist . . . — he has taken another step towards transforming the Court from a progressive body into a reactionary body, as he promised.”); James M. Naughton, *Early Vote Asked*, N.Y. TIMES, Oct. 22, 1971, at 1 (“More important, Mr. Nixon said, was a determination to place upon the Court those . . . whose judicial philosophy would restore in the Court's rulings ‘that delicate balance between the rights of society and the rights of defendants accused of crimes against society.’”); *Remaking the Supreme Court*, *supra* note 14, at 16 (describing President Nixon's announcement of nomination of Powell and Rehnquist as “slap at the Supreme Court

In many ways, Powell was Nixon's ideal nominee. Nixon wanted a Southerner; Powell was from Virginia. Nixon wanted a person who shared his "conservative" judicial philosophy. Powell's speeches certainly identified him as a conservative critic of the Warren Court. Further, Nixon and his advisors believed that Powell was a law-and-order conservative.⁹⁵ Shortly before nominating Powell, Nixon and Powell chatted on the telephone, and Nixon told Powell that he would never nominate someone who didn't share his judicial philosophy, to which Powell responded: "I admire that very much."⁹⁶ Nixon had also been told that Powell "backed wiretapping," which pleased the President.⁹⁷

Concurrent with Nixon's nomination of Powell, *Keith* was pending on the Supreme Court's docket. The Court had postponed oral arguments in several important cases while the President tried to fill the two vacant spots.⁹⁸ During his confirmation hearings in the Senate, Powell heard many questions about his views on wiretapping, especially in regard to national security situations, and references to *Keith* came from more than one Senator and Powell himself.⁹⁹ In an effort to appease the Senators' concerns, Powell assured members of the Senate Judiciary Committee that he would keep "an open mind"¹⁰⁰ on the issue, but he refused to take a position on the issue of wiretapping for domestic security purposes.¹⁰¹ Powell mentioned that he had not read the Sixth Circuit's opinion in *Keith* and that he was not even aware of the actual facts presented in the case.¹⁰²

Senator Birch Bayh of Indiana was Powell's toughest interrogator on wiretapping, and he was skeptical of Powell's professed neutrality on the issue of domestic security wiretaps. Pointing to the *Richmond-Times Dispatch* op-ed article, Bayh suggested that Powell had already taken a strong position favoring the President's inherent power to wiretap in domestic security cases. Powell replied that he had "no fixed view" on the issue.¹⁰³ Powell then told Bayh that he wrote the

that was headed by former Chief Justice Earl Warren").

⁹⁵ See DEAN, *supra* note 37, at 16.

⁹⁶ *Id.* at 217.

⁹⁷ *Id.* at 234.

⁹⁸ *Remaking the Supreme Court*, *supra* note 14, at 16.

⁹⁹ Powell, *supra* note 39, at 206-13.

¹⁰⁰ *Id.* at 206.

¹⁰¹ *Id.* at 211 (testimony of Lewis F. Powell, Jr.) ("I think my Richmond Bar talk demonstrated, I have no fixed view on the delicate area of [domestic surveillance].").

¹⁰² *Id.* at 208.

¹⁰³ *Id.* at 213.

op-ed article not to address wiretapping, “but to address the issue of repression.”¹⁰⁴ He insisted that his comments on electronic surveillance were focused on the “hazy area where internal security and national security, where internal dissidents are cooperating or working affirmatively with, or are very sympathetic to countries, other powers, that may be enemies of the United States.”¹⁰⁵ Powell told the Senators that the topic “is a very difficult area,” and line-drawing in this area “is very perplexing.”¹⁰⁶ Whether Powell’s testimony was consistent with his op-ed article is debatable. As Dean Jeffries put it, Powell managed to “neither repeat nor retract” his views on wiretapping in the *Richmond-Times Dispatch* article, but “his published views strongly supported warrantless wiretapping in domestic security cases.”¹⁰⁷ In the end, whatever inconsistencies existed would not matter. Powell would soon be sitting on the Court.¹⁰⁸ On December 6, 1971, just over two months before oral arguments in *Keith*, the Senate confirmed Powell’s nomination to the Supreme Court.¹⁰⁹

II. THE *KEITH* OPINION

The issue in *Keith* concerned “the President’s power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval.”¹¹⁰ The events that prompted the case apparently were unimportant to the result, as Justice Powell’s opinion devotes exactly one sentence to the facts:

¹⁰⁴ *Id.* at 212.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 213.

¹⁰⁷ JEFFRIES, *supra* note 15, at 378.

¹⁰⁸ Fred P. Graham, *Senate Unit Ends Nominee Hearings*, N.Y. TIMES, Nov. 11, 1971, at 22 (“No opposition on the committee has materialized against Mr. Powell.”); see also John P. MacKenzie, *Hearings End on Nominees for Court*, WASH. POST, Nov. 11, 1971, at A1 (“Chairman Eastland voiced confidence that both men will win speedy confirmation.”); *National Notes*, N.Y. TIMES, Nov. 14, 1971, at E3 (“[I]t appears likely that Mr. Powell will win unanimous endorsement of all 16 members of the committee.”).

¹⁰⁹ Fred P. Graham, *Senate Confirms Powell by 89 to 1 for Black’s Seat*, N.Y. TIMES, Dec. 7, 1971, at 1.

¹¹⁰ *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 299 (1972). Later in the opinion in Part II, Powell notes that the issue before the Court had been left open in *Katz* and that the case “raises no constitutional challenge to electronic surveillance as specifically authorized by Title III of the Omnibus Crime Control and Safe Streets Act of 1968,” nor does the case require any “judgment on the scope of the President’s surveillance power with respect to the activities of foreign powers, within or without this country.” *Id.* at 308.

“One of the defendants, Plamondon, was charged with the dynamite bombing of an office of the Central Intelligence Agency in Ann Arbor, Michigan.”¹¹¹ There was, however, a bit more to the story.

Lawrence Robert “Pun” Plamondon was a co-founder of the White Panther Party, a radical group established in 1968.¹¹² He and his co-defendants were charged with conspiracy to destroy government property. Conversations incriminating Plamondon were captured on a government wiretap when he telephoned members of the Black Panther Party in Berkeley and San Francisco,¹¹³ whom the federal government had targeted for electronic surveillance.¹¹⁴ Eventually, Plamondon landed on the FBI’s Most Wanted List,¹¹⁵ was captured, and was indicted with his co-defendants. Before the federal criminal trial started,¹¹⁶ the defense filed a motion for the disclosure of any information of electronic surveillance obtained by the federal government concerning the defendants. The government

¹¹¹ *Id.* at 299.

¹¹² Damren, *supra* note 9, at 8. Plamondon and one of his co-defendants, John Sinclair, started the White Panther Party in Ann Arbor, Michigan. *Id.* According to Damren, the “*White Panther Manifesto*,” authored by John Sinclair, described the White Panthers as

[n]ot to be confused with any white supremacist or white power groups — quite the contrary. . . . Our culture, our art, the music, newspapers, books, posters, our clothing, our homes, the way we walk and talk, the way our hair grows, the way we smoke dope and fuck and eat and sleep — it is all one message, and the message is FREEDOM! . . . There’s only two kinds of people on the planet: those who make up the problem and those who make up the solution. WE ARE THE SOLUTION. We have no problems. Everything is free for everybody. Money sucks. Leaders suck. School sucks. The white honkie culture that has been handed to us on a silver platter is meaningless to us! . . . We have no illusions. Knowing the power of symbols in the abstract world of Americans we have taken the White Panther as our mark to symbolize our strength and arrogance. We’re bad.

Id. at 3.

¹¹³ See JEFFRIES, *supra* note 15, at 375; Sklansky, *The Limits of Aphorism*, *supra* note 4, at 251.

¹¹⁴ According to one account, most of “the information uncovered by the [Black] Panther wiretaps had to do with pregnancies, transportation and telephone problems, the lack of heat in offices, calls home to mom.” KENNETH O’REILLY, “RACIAL MATTERS”: THE FBI’S SECRET FILE ON BLACK AMERICA, 1960-1972, at 340 (1989).

¹¹⁵ JEFFRIES, *supra* note 15, at 375.

¹¹⁶ None of the participants in the trial could have predicted that the case would end up as a constitutional landmark. When the trial started, “not one of the principals, including United States Attorney [Ralph B. Guy] and his assistants, knew that the FBI had been secretly monitoring [Plamondon’s] phone conversations for months.” Damren, *supra* note 9, at 2.

acknowledged that Plamondon had been overheard by federal wiretaps, but contended Attorney General John Mitchell “approved the wiretaps ‘to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government.’”¹¹⁷

Although the government insisted that the President had the inherent power to authorize wiretaps in domestic security cases, District Court Judge Damon Keith rejected that claim and granted the defendants’ motion.¹¹⁸ Judge Keith’s decision was affirmed by the

¹¹⁷ *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 300 (1972) (footnote omitted).

¹¹⁸ *United States v. Sinclair*, 321 F. Supp. 1074, 1077, 1079-80 (E.D. Mich. 1971). The government argued “that the President, acting through the Attorney General, has the inherent Constitutional power: (1) to authorize without judicial warrant electronic surveillance in ‘national security’ cases; and (2) to determine unilaterally whether a given situation is a matter within the scope of national security.” *Id.* at 1077. The government’s legal stance was known as the “Mitchell Doctrine,” named after President Nixon’s first Attorney General John Mitchell. The “foundation of the Mitchell Doctrine was the contention that the President’s awesome responsibility for the safety of the nation was all-encompassing; his power to authorize warrantless wiretaps could not be made to turn on the target’s foreign ties. If anything, Mitchell insisted, the domestic threat was more exigent than the foreign one.” FRANK J. DONNER, *THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA’S POLITICAL INTELLIGENCE SYSTEM* 247 (1980). As one scholar has explained, the Mitchell Doctrine was prompted by the confluence of *Katz* and *Alderman v. United States*, 394 U.S. 165 (1969). *Katz* meant that evidence from warrantless electronic surveillance could not be used in federal prosecutions. *Katz*’s holding was problematic because, “[u]nless the administration could convince the courts that warrantless wiretapping [in national security situations] was not barred by the Fourth Amendment, the road to prosecution of radical and dissenting groups, winding through a thicket of national security surveillances, might be quite risky.” DONNER, *supra*, at 246. The problem for the government created by *Katz* was exacerbated by *Alderman*, which ruled that “surveillance records as to which any [defendant] has standing to object should be turned over to him without being screened *in camera* by the trial judge.” *Alderman*, 394 U.S. at 182. The “government was stunned” by *Alderman*’s disclosure rule and “protested that compliance would be highly embarrassing” because in some prosecutions, defendants had been overheard by wiretaps targeting foreign embassies. DONNER, *supra*, at 246. But the Nixon Administration’s protest over *Alderman* “concealed a deeper fear: the impact of the decision on the prosecution of domestic radicals and dissenters who had themselves been targets of microphone surveillance and wiretaps. If the records of such surveillance were released to the trial court, the entire national security game, with its dubious claims of linkages between domestic targets and foreign principals so substantial as to justify executive intervention, would be exposed.” *Id.*

In the Supreme Court, the government abandoned the claim that the President had inherent power to wiretap in domestic security cases, *see infra* note 122 and accompanying text, but it did urge the Court to “reconsider *Alderman v. United States* and hold that the requirement of automatic disclosure of interceptions to defendants

Court of Appeals for the Sixth Circuit.¹¹⁹ That is where things stood when *Keith* arrived at the Court.

The critical portions of Justice Powell's Fourth Amendment analysis in *Keith* are in Parts II and III of his opinion.¹²⁰ Part II sets the stage for Part III, which plainly rejects the government's claims that the President has the power to authorize warrantless electronic surveillance in domestic security cases. There are a few points worth highlighting about Part II of Powell's opinion. First, Justice Powell says little about the government's argument. After losing before Judge Keith, the government argued in the Court of the Appeals for the Sixth Circuit that the President had inherent authority to order national security wiretaps without prior judicial approval. According to the appellate court, the government insisted that "the President of the United States, in his capacity as Chief Executive, has unique powers of the 'sovereign' which serve to exempt him and his agents from the judicial review restrictions of the Fourth Amendment."¹²¹

In the Supreme Court, the government abandoned the "inherent powers" argument.¹²² There, the central theme of the government's

announced in that case is inapplicable [in cases involving national security] surveillance." Brief for United States at 36, *Keith*, 407 U.S. 297 (No. 70-153) (citation omitted). In *Keith*, the Court explained that it would not reconsider *Alderman's* holding. *Keith*, 407 U.S. at 324 n.21.

¹¹⁹ *United States v. U.S. Dist. Court (Keith)*, 444 F.2d 651, 669 (6th Cir. 1971).

¹²⁰ Before discussing the constitutional question, Justice Powell rejected the government's contention that § 2511(3) of Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520 (2000 & Supp. IV 2004), should be "viewed as a recognition or affirmation of a constitutional authority in the President to conduct warrantless domestic security surveillance." *Keith*, 407 U.S. at 303. The pertinent portion of § 2511(3) relied upon by the government provided:

Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.

18 U.S.C. § 2511(3). According to Justice Powell, § 2511(3) conferred no power on the President to wiretap in domestic security cases. *Keith*, 407 U.S. at 303.

¹²¹ *Keith*, 444 F.2d at 657.

¹²² See Transcript of Oral Argument at 32, *Keith*, 407 U.S. 297 (No. 70-153) ("We suggest in this regard that we are not asking for an exemption of the Fourth Amendment. We do not suggest the President is above the Fourth Amendment. We simply suggest that in the area in which he has limited and exclusive authority, the President of the United States may authorize an electronic surveillance, and in those cases it is reasonable."); cf. *id.* at 49 (according to counsel for respondent, "[We don't subscribe to the inherent power argument]"). Counsel noted that "[t]he government

argument was that the Fourth Amendment only requires that searches not be “unreasonable,” and that the President’s decision to authorize electronic surveillance in domestic cases satisfies the reasonableness standard.¹²³ Further, the government did not contend that authorization by the President or the Attorney General “itself establishes compliance with the Fourth Amendment standard of reasonableness.”¹²⁴ Rather, the government asked the Court “only to hold that the absence of prior judicial approval does not invalidate the search under th[e reasonableness] standard.”¹²⁵ The government requested the Court to adopt the principle stated in Justice White’s concurrence in *Katz*: “We should not require the warrant procedure and the magistrate’s judgment if the President . . . or . . . the Attorney General has considered the requirements of national security and authorized electronic surveillance as reasonable.”¹²⁶

Although the government denied it,¹²⁷ arguing that the warrant requirement does not apply to the President and that high-ranking Executive Branch officials can decide whether national security wiretaps are reasonable was the equivalent of arguing that the Fourth Amendment does not apply to the President. Justice Powell reached that conclusion in Part III of his opinion. In fact, very quickly — in the second paragraph of Part II — Justice Powell tips his hand on the outcome. He explained that whether the President has the authority to authorize wiretapping in national security cases without prior judicial approval “requires the essential Fourth Amendment inquiry into the ‘reasonableness’ of the search and seizure in question, and the way in which that ‘reasonableness’ derives content and meaning through reference to the warrant clause.”¹²⁸ This observation was a prelude to Justice Powell’s ultimate conclusion that the procedural safeguards of the Warrant Clause do control the President’s authority in this area.

made [the inherent power argument] in the lower court and in the Court of Appeals. It withdrew from [the inherent power argument] in its main brief in this case, and now it seems to be back to the inherent power argument.”).

¹²³ Brief for United States, *supra* note 118, at 6-7.

¹²⁴ *Id.* at 10.

¹²⁵ *Id.*

¹²⁶ *Katz v. United States*, 389 U.S. 347, 364 (1967) (White, J., concurring).

¹²⁷ See Transcript of Oral Argument, *supra* note 122, at 7 (“We do not contend here, Your Honors, the President of the United States, either individually or acting through the Attorney General, is exempt from the provisions of the Fourth Amendment or is above the provisions of the Constitution.”).

¹²⁸ *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 309-10 (1972) (citation omitted).

The second noteworthy feature of Part II of Powell's opinion is his reply to the government's claim that the surveillance at stake here was not as constitutionally intrusive as a physical search of a home or person, and is thus subject to different Fourth Amendment limitations. In its brief, the government asserted that surveillance of a telephone conversation, "and particularly where, as here, the speaker's own telephone has not been tapped but the overhearing results from his telephone call to a number that is under surveillance — involves a lesser invasion of privacy than a physical search of a man's home or his person."¹²⁹ The government conceded, as it had to after *Katz*, that wiretapping was subject to Fourth Amendment scrutiny. But the government contended that a "reasonableness" analysis "properly should take cognizance of the extent of the invasion of privacy involved."¹³⁰

Without explicitly acknowledging this argument, Justice Powell rejected it. After noting that physical entry of the home is the central concern of the text of the Fourth Amendment, he added that the Amendment's "broader spirit now shields private speech from unreasonable surveillance."¹³¹ According to Justice Powell, *Katz* "implicitly recognized that the broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment safeguards."¹³² Put another way, telephone wiretapping — whether such surveillance captures the words of the target of government interest or third parties who happen to call the target — is just as constitutionally offensive as a search of a home. Once this point is understood, no neutral principle supports the claim that different Fourth Amendment rules should apply to electronic surveillance.

Finally, at the end of Part II, Justice Powell raised a constitutional concern rarely seen in Fourth Amendment rulings of that period. Powell's concern surprised some observers of the Court in light of his previously published views. The Court's search and seizure docket in the late 1960s and early 1970s typically involved police investigations aimed at illegal narcotics or violent crime. Fourth Amendment cases implicating or threatening First Amendment free speech values were seldom addressed by the Court during this time.¹³³ Even rarer were

¹²⁹ Brief for United States, *supra* note 118, at 13 (citation omitted).

¹³⁰ *Id.*

¹³¹ *Keith*, 407 U.S. at 313 (citations omitted).

¹³² *Id.* (citation omitted).

¹³³ Although the Court rarely decided cases involving police searches and seizures that also implicated First Amendment concerns, occasionally such cases did surface.

cases where a criminal defendant argued that free speech concerns justified excluding evidence of criminality obtained from a government search. In fact, the defendants in *Keith* were not engaged in constitutionally protected free speech; they were charged with conspiring to bomb a CIA office in Ann Arbor, Michigan. Although Plamondon, the actual bomber, lacked a viable First Amendment claim against the government's attempts to introduce his incriminating conversations at trial, ironically, a critical component of the government's argument unintentionally aided his case in the Supreme Court.

The government stressed that the challenged surveillance was conducted "in order to gather intelligence information that the Attorney General, acting on behalf of the President, concluded was necessary to protect the national security."¹³⁴ Thus, the government's primary motivation in conducting domestic security wiretaps was not to develop evidence for future criminal prosecutions, "but protection of the fabric of society itself."¹³⁵ Protecting the "fabric of society itself," like protecting "national security" is a vague concept, subject to abuse. As the briefs of the defendants and several amici reminded the Court, warrantless electronic surveillance of political dissenters and opponents of the Vietnam War, including individuals like Martin Luther King, Jr., had been justified by Executive Branch officials in the name of "national security."¹³⁶ Indeed, the threat to First Amendment values of free speech and freedom of association posed by warrantless surveillance was a common, if not the predominant, theme in the

See *Roaden v. Kentucky*, 413 U.S. 496, 506 (1973) (holding that sheriff's warrantless seizure of allegedly obscene film, contemporaneous with and incident to arrest for public exhibition of film, violated Fourth Amendment); *cf.* *Heller v. New York*, 413 U.S. 483, 492-93 (1973) (permitting judicial officer authorized to issue warrant, who has viewed film and finds it to be obscene, to issue constitutionally valid warrant for film's seizure as evidence in prosecution against exhibitor of film without first holding adversary hearing on issue of probable obscenity). Later in the 1970s, in *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978), the Court upheld the execution of a search warrant targeting a student newspaper even when members of the newspaper staff were not suspected of crime or subject to arrest.

¹³⁴ Brief for United States, *supra* note 118, at 13.

¹³⁵ *Id.* at 14.

¹³⁶ Brief for the Defendant-Respondents at 106, *Keith*, 407 U.S. 297 (No. 70-153); Brief of the International Union et al. as Amic[i] Curiae in Support of Respondents at 34-36, *Keith*, 407 U.S. 297 (No. 70-153) [hereinafter International Union Brief].

briefs filed by the defendants and their supporting amici.¹³⁷ These arguments did not go unnoticed by Justice Powell.

Without disputing the motivations behind national security wiretaps or the legitimate need for such surveillance, Justice Powell noted that national security cases “often reflect a convergence of First and Fourth Amendment values not present in ‘ordinary’ crime.”¹³⁸ While acknowledging that Executive Branch officials may have a “stronger” investigative obligation in cases that threaten domestic security, Justice Powell stated that such cases also pose “greater jeopardy to constitutionally protected speech.”¹³⁹ These were surprising statements to be found in an opinion authored by Lewis Powell. Less than a year earlier, Powell’s *Richmond-Times Dispatch* op-ed article asserted that “the outcry over wiretapping is a tempest in a teapot,” and that “[l]aw-abiding citizens have nothing to fear” because governmental wiretaps “are directed against people who prey on their fellow citizens or who seek to subvert our democratic form of government.”¹⁴⁰ In the *Keith* case, however, Justice Powell’s focus was markedly different from his op-ed column. Now, rather than discussing the violent nature of Plamondon’s crimes and his nexus to others who might be plotting violence against the government, Powell was focused on the threat to constitutional liberties that came from Executive Branch wiretapping. Justice Powell now saw wiretapping as a clear danger to open and robust speech criticizing government policies:

History abundantly documents the tendency of Government — however benevolent and benign its motives — to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect “domestic security.” Given the difficulty of defining the

¹³⁷ See Brief for the Defendant-Respondents, *supra* note 136, at 102-15; International Union Brief, *supra* note 136, at 34-36; see also Brief of the ACLU and the ACLU of Michigan, Amici Curiae at 26-29, *Keith*, 407 U.S. 297 (No. 70-153). See generally Brief of American Friends Service Committee as Amici Curiae in Support of Respondents’ Position, *Keith*, 407 U.S. 297 (No. 70-153) (arguing that government’s eavesdropping power violates First Amendment right of association).

¹³⁸ *Keith*, 407 U.S. at 313.

¹³⁹ *Id.*

¹⁴⁰ Powell, *supra* note 12, at 215.

domestic security interest, the danger of abuse in acting to protect that interest becomes apparent The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.¹⁴¹

In Part III of Justice Powell's opinion, he unapologetically reaffirmed the warrant requirement. In addition, he emphatically rejected the government's argument that the President and his deputies can decide by themselves whether electronic surveillance in domestic security cases is reasonable under the Fourth Amendment. Perhaps the most remarkable thing in retrospect about this section of Powell's opinion is that he applied traditional Fourth Amendment norms to each of the government's claims in a manner that left no room for later manipulation.

Implicit in Justice Powell's analysis was the belief that the applicability of the warrant requirement does not turn on whether the challenged search is supported by a legitimate or unusual government need. The fact that national security wiretaps may promote pressing or important public interests — for example, gathering intelligence information to protect the nation — does not resolve the constitutional inquiry on whether the warrant requirement applies to such searches. Put another way, the fact that domestic security wiretaps “are necessary does not prove that it is necessary that they be made without a warrant.”¹⁴² The Court, Powell wrote, must consider “whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant before such surveillance is undertaken,” and “whether a warrant requirement would unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it.”¹⁴³

Without saying so, Justice Powell was relying, in part, on the formula announced in *Camara v. Municipal Court*.¹⁴⁴ In *Camara*, the State argued its legitimate interest in discovering and enforcing housing code violations justified warrantless administrative searches

¹⁴¹ *Keith*, 407 U.S. at 314.

¹⁴² Wayne R. LaFare, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1, 22.

¹⁴³ *Keith*, 407 U.S. at 315.

¹⁴⁴ 387 U.S. 523, 533 (1967).

of private homes.¹⁴⁵ Ultimately rejecting this argument, *Camara* explained that the applicability of the warrant requirement turns “not [on] whether the public interest justifies the type of search in question but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.”¹⁴⁶ *Camara* held that a homeowner could not be punished for refusing to allow a warrantless administrative search of his home and that the warrant requirement did apply to such searches.¹⁴⁷ Significantly, *Camara* endorsed the warrant requirement even though the facts, like *Keith*, did not involve a traditional police search for criminal evidence that would be used in a future prosecution.¹⁴⁸ Indeed, *Camara* would subsequently be interpreted as solidifying the warrant requirement as a core precept in Fourth Amendment law.¹⁴⁹ As Professor Wayne LaFave would later explain, the decision in *Camara* to apply the warrant requirement to housing inspections was based partially on the belief that “the warrant process in this setting is not so much a check upon unjustified searches as it is upon arbitrary searches.”¹⁵⁰ Each of these features of *Camara* seemed to influence Powell’s thinking in *Keith*.

For example, because the warrant requirement does not ebb and flow depending on the nature of the governmental interest promoted by the search or conduct under investigation, Powell easily and firmly rejected the government’s “reasonableness” argument. In its brief, the government emphasized that the “Fourth Amendment does not forbid all searches and seizures without a warrant, since there is no constitutional requirement that there must always be judicial authorization before a search or seizure can be made.”¹⁵¹ Therefore, according to the government, the Amendment only requires that

¹⁴⁵ *Id.* at 535-36.

¹⁴⁶ *Id.* at 533.

¹⁴⁷ *Id.* at 534.

¹⁴⁸ *Id.* at 528-29 (“[O]ne governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant.” (citations omitted)).

¹⁴⁹ Cf. Sklansky, *The Limits of Aphorism*, *supra* note 4, at 239 (observing that *Camara* “considerably bolstered the position of the warrant requirement as the ‘one unifying principle’ of search and seizure law” (footnote omitted)).

¹⁵⁰ WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 10.1(c), at 20 (4th ed. 2004).

¹⁵¹ Brief for United States, *supra* note 118, at 12 (citations omitted).

searches authorized by the President or Attorney General be reasonable.¹⁵²

Again, without citing the government's argument explicitly, Justice Powell unambiguously rejected it. He stated that "the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause."¹⁵³ He replied that the government's contention that the Amendment merely requires a general "reasonableness" standard "has not been accepted" by prior precedent.¹⁵⁴ To underline the point, and employing a somewhat uncharacteristic style, he observed: "The warrant clause of the Fourth Amendment is not dead language."¹⁵⁵ Powell concluded that the warrant requirement, and not a post hoc "reasonableness" standard, was the core means of protecting Fourth Amendment liberties. Seeking a magistrate's approval before commencing a search, a legal principle established two centuries earlier, was "the very heart of the Fourth Amendment directive."¹⁵⁶ Thus, "where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation."¹⁵⁷

Leaving no uncertainty about his reasoning or the result, Justice Powell unmistakably asserted that "Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch."¹⁵⁸ In other words, presidential discretion to conduct national security surveillance is inconsistent with the Fourth Amendment. Neither the President nor the Attorney General can act as the neutral and detached magistrate contemplated by the Fourth Amendment. Indeed, the government's claim that Executive Branch officials could decide on their own to conduct electronic surveillance was directly at odds with the origins and purpose of the Amendment: "The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating

¹⁵² *Id.* at 6 ("We submit that an electronic surveillance authorized by the Attorney General as necessary to protect the national security is not an unreasonable search and seizure solely because it is conducted without prior judicial approval.")

¹⁵³ *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 315 (1972).

¹⁵⁴ *Id.* at 315 n.16.

¹⁵⁵ *Id.* at 315.

¹⁵⁶ *Id.* at 316.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 316-17.

evidence and overlook potential invasions of privacy and protected speech.”¹⁵⁹ The government’s position was not saved by its concession that the decision to wiretap was subject to an “extremely limited”¹⁶⁰ post hoc judicial review. After-the-fact judicial review would only be available when the government initiated a prosecution, and, of course, there would be no judicial assessment for wiretaps which did not prompt criminal charges.¹⁶¹ For Justice Powell and the rest of the *Keith* majority, “[p]rior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights.”¹⁶²

The final section of Part III addressed the government’s argument that circumstances surrounding domestic security searches justify an exception to the warrant requirement. Here, the government pressed several points, the most prominent being that “prior judicial review would obstruct the President in the discharge of his constitutional duty to protect domestic security.”¹⁶³ Tellingly, Justice Powell’s reply to this claim was succinct and unequivocal: The President’s domestic security functions “must be exercised in a manner compatible with the

¹⁵⁹ *Id.* at 317 (citation omitted).

¹⁶⁰ Brief for United States, *supra* note 118, at 22. Under the government’s proposal, the Judiciary should approve electronic surveillance authorized by the Attorney General unless it appears that the Attorney General’s decision is “arbitrary and capricious, i.e., that it constitutes a clear abuse of the broad discretion that the Attorney General has to obtain all information that will be helpful to the President in protecting the government against ‘overthrow’ . . . by force or other unlawful means or against any other clear and present danger to [its] structure or existence” *Id.* (quoting Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (2000 & Supp. IV, 2004)). The government also asserted that a judge should not substitute his or her judgment “for that of the Attorney General on whether the particular organization, person or event involved has a sufficient nexus to protection of the national security to justify surveillance.” *Id.*

¹⁶¹ It could also be noted that under the government’s proposal, “where there was no intention to prosecute, the [subject of the wiretap] might suffer violation of his rights without ever learning about it. In addition, in a so-called intelligence investigation, there was no natural terminus of the surveillance, in contrast to a criminal investigation, in which the accumulation of wiretap evidence culminates in a decision either to seek an indictment or to end the investigation.” DONNER, *supra* note 118, at 248.

¹⁶² *Keith*, 407 U.S. at 318 (citation omitted).

¹⁶³ *Id.* The government also contended an exception to the warrant requirement was proper because domestic security wiretaps were “directed primarily to the collecting and maintaining of intelligence with respect to subversive forces, and are not an attempt to gather evidence for specific criminal prosecutions.” *Id.* at 318-19. Additionally, the government argued that judges lacked the competence to determine whether probable cause existed to protect national security, and that disclosure of national security information to judges created the risk of leaks from court personnel. *Id.* at 319.

Fourth Amendment.”¹⁶⁴ Recognizing that judicial approval of national security searches will impose “some added burden” on Executive Branch officials, Justice Powell stated that “this inconvenience is justified in a free society to protect constitutional values.”¹⁶⁵ Equally important for Powell was “the reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur.”¹⁶⁶

In sum, Justice Powell’s constitutional analysis in *Keith* was concise and directly aligned with the Warren Court’s Fourth Amendment precedent. Like his predecessors on the Warren Court, Justice Powell embraced the constitutional norm that law enforcement officials must, “whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure.”¹⁶⁷ Looking back, it is evident from Justice Powell’s opinion that there was nothing about the case that required a departure from mainstream Fourth Amendment doctrine. To the contrary, the threat to free speech interests that national security wiretaps posed provided more, not less, reason to insist on prior judicial approval before allowing such surveillance.

Accordingly, Justice Powell ruled that the warrant requirement, and not a “reasonableness” standard, is the yardstick for determining the constitutionality of electronic surveillance. As was true in *Katz*,¹⁶⁸ it did not matter that the challenged surveillance in *Keith* was reasonable under the totality of the circumstances.¹⁶⁹ The specific facts of the

¹⁶⁴ *Id.* at 320. Justice Powell also dismissed the government’s other justifications for an exception to the warrant requirement. He concluded that the purpose of the wiretap — whether it be for intelligence gathering or criminal investigation — did not justify an exception because either purpose “risks infringement of constitutionally protected privacy of speech.” He found no merit in the government’s judicial incompetence argument. There was no basis for finding that federal judges “will be insensitive to or uncomprehending of the issues involved in domestic security cases.” He added: “If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.” Lastly, he concluded that judicial review could be consistent with the government’s obvious need for secrecy. *Id.* at 320-21.

¹⁶⁵ *Id.* at 321.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 318 (citations omitted).

¹⁶⁸ See *Katz v. United States*, 389 U.S. 347, 356 (1967) (acknowledging that FBI agents who monitored Katz’s phone calls “acted with restraint”). While acknowledging that the agents had probable cause to monitor Katz’s calls and showed restraint by overhearing only the conversations of Katz himself, *id.* at 354, *Katz* explained that “the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer.” *Id.*

¹⁶⁹ See *Keith*, 407 U.S. at 317 (“It may well be that, in the instant case, the

defendants' crime were unimportant, just as the operational details of the Executive Branch's decision to wiretap the Black Panther Party were constitutionally irrelevant. What was relevant was that electronic surveillance of Plamondon's telephone calls had occurred without judicial approval. Rather than employing a totality test that measured the "reasonableness" of the government's surveillance, Justice Powell's analysis was more straightforward: the infringement of constitutional interests was too costly to allow national security wiretaps absent judicial approval.¹⁷⁰

Thus, Justice Powell concluded that the warrant requirement applies to national security searches authorized by the President, just as it applies to traditional law enforcement searches. Presidential discretion to authorize wiretaps directly conflicts with the purpose of the Fourth Amendment, which was to check the discretion of Executive Branch officials to invade the privacy of individuals. Finally, the government's concerns — including its concern that a warrant requirement would obstruct the President's duty to protect the nation's security — did not justify a new exception "from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance."¹⁷¹ Despite the "important" and "delicate" nature of the issue before the Court,¹⁷² Justice Powell provided a clear answer that left no room for evasion or debate — "warrantless wiretaps in domestic security cases were flatly unconstitutional."¹⁷³

Government's surveillance of Plamondon's conversations was a reasonable one which readily would have gained prior judicial approval.").

¹⁷⁰ See *Zweibon v. Mitchell*, 516 F.2d 594, 699 (D.C. Cir. 1975) (Wilkey, J., concurring and dissenting) (describing comparative analysis of *Keith*, which "found that the cost in terms of infringement on Fourth and First Amendment values was too high to justify allowing a national security surveillance to be conducted without a warrant").

¹⁷¹ *Keith*, 407 U.S. at 321.

¹⁷² *Id.* at 299.

¹⁷³ JEFFRIES, *supra* note 15, at 379. Justice White's concurrence in *Keith* contended that the challenged surveillance was illegal under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, and thus it was "unnecessary" and "improper" to reach the constitutional question of the President's power to authorize national security wiretaps. *Keith*, 407 U.S. at 340 (White, J., concurring). Of course, Justice White did not bother mentioning that he had already gone on record in *Katz* as concluding that the warrant requirement did not apply "if the President . . . or . . . the Attorney General[] has considered the requirements of national security and authorized electronic surveillance as reasonable." *Katz*, 389 U.S. at 364 (White, J., concurring). In any event, in *Keith*, Justice White took the view that the Attorney General's affidavit did not satisfy the statutory language of section 2511(3) of Title III.

III. WARRANTLESS ELECTRONIC SURVEILLANCE FOR FOREIGN INTELLIGENCE

In the weeks following the September 11, 2001 terrorist attacks, President Bush authorized the NSA to initiate the TSP.¹⁷⁴ While the precise details of the TSP remain confidential, the government has acknowledged that, as originally implemented, the program involves electronic surveillance without judicial approval. Specifically, the TSP covers “telephone and email communications where one party to the communication is located outside the United States and the NSA has ‘a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda.’”¹⁷⁵

A. *The ACLU's Challenge to the Terrorist Surveillance Program*

Disclosure of the TSP triggered a wave of criticism across the political spectrum.¹⁷⁶ Soon, a group of plaintiffs filed a federal lawsuit

According to Justice White, the affidavit did not allege that “the surveillance was necessary to prevent overthrow by force or other unlawful means or that there was any other clear and present danger to the structure or existence of the Government.” *Keith*, 407 U.S. at 341. As Dean Jeffries has explained, “[T]he result of White’s position was that the Administration would lose this particular case but could still claim that it had the right to act without a warrant in future cases.” JEFFRIES, *supra* note 15, at 379. Not only did Justice Powell reject that result, he said it in a way that left no wiggle room for the Nixon Administration or future administrations to lawfully evade Fourth Amendment restrictions in national security cases.

¹⁷⁴ The existence of the TSP was initially disclosed in the *New York Times*. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1. The next day, President George Bush acknowledged the operation of the TSP. *ACLU v. NSA*, 493 F.3d 644, 648 n.1 (6th Cir. 2007) (citations omitted).

¹⁷⁵ *ACLU*, 493 F.3d at 648 (citation omitted).

¹⁷⁶ See, e.g., ELIZABETH B. BAZAN, CONGRESSIONAL RESEARCH SERV., THE U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT AND THE U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW: AN OVERVIEW (2007) (analyzing constitutional and statutory issues raised by TSP); Jess Bravin, *Senator Plans to Seek Hearings on Bush's Surveillance Program*, WALL ST. J., Dec. 19, 2005, at A4 (citing criticism by Senator Russell Feingold and Harvard Law Professor Philip Heymann, who was deputy attorney general in Clinton Justice Department); Dan Eggen & Walter Pincus, *Ex-Justice Lawyer Rips Case for Spying; White House's Legal Justifications Called Weak*, WASH. POST, Mar. 9, 2006, at A3 (“A former senior national security lawyer at the Justice Department [David S. Kris] is highly critical of some of the Bush administration’s key legal justifications for warrantless spying.”); Neil King, Jr., *Senators Focus on Wiretapping Program; Legality of President's Moves Will Be the Crucial, but Hard to Answer, Issue at Hearings*, WALL ST. J., Jan. 18, 2006, at A4 (“Several former

challenging the legality of the TSP. The plaintiffs, who included journalists, academics, and lawyers, claimed that they regularly “communicate with individuals located overseas, whom the plaintiffs believe are the types of people the NSA suspects of being al Qaeda terrorists, affiliates, or supporters, and are therefore likely to be monitored under the TSP.”¹⁷⁷ Their lawsuit contended, inter alia, that warrantless electronic surveillance violated the Fourth Amendment.¹⁷⁸ The government replied that the district court should not address the merits of the plaintiffs’ constitutional claim because the plaintiffs could not prove that any of their conversations or email had ever been monitored by the TSP. Accordingly, the plaintiffs lacked standing to litigate their Fourth Amendment claim.¹⁷⁹

government lawyers and constitutional scholars, including Mr. [Morton] Halperin [who helped to draft the original Foreign Intelligence Surveillance Act law and is now the Washington Director of the Open Society Institute, a public policy think tank], have challenged Mr. Bush’s legal defense of the NSA eavesdropping program One critique, signed by 14 legal scholars and sent last week to certain members of Congress, said the analysis failed ‘to identify any plausible legal authority for such surveillance.’”); Eric Lichtblau, *Republican Who Oversees N.S.A. Calls for Wiretap Inquiry*, N.Y. TIMES, Feb. 8, 2006, at A12 (“[Four] of the 10 Republicans on the Senate Judiciary Committee voiced concerns about the [terrorist surveillance] program at a hearing where Attorney General Alberto R. Gonzales testified”); Beth Nolan et al., *On NSA Spying: A Letter to Congress*, 53 N.Y. REV. OF BOOKS 42 (2006) (criticizing legality of TSP); David E. Sanger & Eric Lichtblau, *Administration Starts Weeklong Blitz in Defense of Eavesdropping Program*, N.Y. TIMES, Jan. 24, 2006, at A18 (“Democrats and some Republicans have attacked the program as illegal and unconstitutional, and an analysis from the nonpartisan Congressional Research Service has strongly questioned its legal underpinnings.”); Anne Marie Squeo, *Gonzales Defends NSA Eavesdropping*, WALL ST. J., Feb. 7, 2006, at A3 (quoting Mary DeRosa, senior fellow at the Center for Strategic and International Studies, Washington public policy think tank, and member of National Security Council staff under President Clinton) (“[T]he analysis they’ve used for the NSA program . . . would make the president’s authority almost unlimited and the other branches of government almost irrelevant.”); see also Yoo, *supra* note 24, at 566-69.

¹⁷⁷ *ACLU*, 493 F.3d at 648.

¹⁷⁸ Brief for Appellees at 42, *ACLU*, 493 F.3d 644 (Nos. 06-2095 & 06-2140). The plaintiffs also claimed that warrantless surveillance under the TSP is a violation of the First Amendment, the Separation of Powers Doctrine, the Federal Administrative Procedure Act (“APA”), the Foreign Intelligence Surveillance Act (“FISA”), and Title III. *ACLU v. NSA*, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006).

¹⁷⁹ Throughout the litigation in the *ACLU v. NSA* case, the Administration has argued that the state secrets privilege “not only prevents plaintiffs from establishing their standing, it also precludes consideration of the merits of their claims.” Brief of Appellants, *supra* note 24, at 31. According to the government, the state secrets privilege precludes the type of fact-specific inquiry that would be needed to assess the merits of plaintiffs’ Fourth Amendment claims. See *id.* at 32 (“[T]he Supreme Court has long recognized that warrantless searches may be constitutional so long as they

Regarding the merits of the plaintiffs' claim, the government insisted that the procedural safeguards of the Fourth Amendment — judicial approval before searching, probable cause to justify the search, and particularity describing the communications to be seized — do not apply to the TSP because the President possesses the inherent power, notwithstanding the Fourth Amendment, to authorize warrantless electronic surveillance for foreign intelligence.¹⁸⁰ Additionally, the government argued that the TSP searches were reasonable under the special needs exception to the warrant requirement.¹⁸¹ The district court, after rejecting the government's contention that the plaintiffs lacked standing to bring their Fourth Amendment claim, ruled that the TSP violated the Fourth Amendment because it authorized searches without judicial approval.¹⁸² Accordingly, the district court issued a permanent injunction against further use of the TSP. The Court of Appeals for the Sixth Circuit, however, vacated the district court's order enjoining operation of the TSP. Without addressing the merits of any of the plaintiffs' constitutional or statutory claims,¹⁸³ the appellate court concluded that none of the plaintiffs had standing to litigate their claims.¹⁸⁴

are reasonable under the circumstances — a context-specific inquiry that directly calls for consideration of information protected by the state secrets privilege.”).

¹⁸⁰ *Id.* at 34-35.

¹⁸¹ *Id.* at 36-38.

¹⁸² *ACLU*, 438 F. Supp. 2d at 773-75.

¹⁸³ Before the appellate court's opinion was issued, on January 17, 2007, the Bush Administration announced that it was dismantling the TSP and would conduct future electronic surveillance for foreign intelligence under the terms of FISA. *See ACLU*, 493 F.3d at 710 (Gilman, J., dissenting) (quoting Letter from Alberto Gonzales, Attorney General of the United States, to The Honorable Patrick Leahy & The Honorable Arlen Specter 1 (Jan. 17, 2007)) (“[A]ny electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court.”). But during oral argument at the appellate court, counsel for the government acknowledged “that the President maintains that he has the authority to ‘opt out’ of the FISA framework at any time and to reauthorize the TSP or a similar program.” *Id.* at 712.

Regarding the merits of the plaintiffs' claims, the appellate court noted that their appeal raised “a cascade of serious questions.” *Id.* at 652 n.5. These included: “Has the NSA violated the United States Constitution — the First Amendment, the Fourth Amendment, or the Separation of Powers Doctrine? Or, has the NSA violated federal statute — the APA, FISA, or Title III? If the NSA has violated a federal statute, is that statute constitutional when applied to the NSA in this manner? If the NSA has violated either the Constitution or a valid federal statute, is an injunction justified? And, if an injunction is justified, what is its proper scope?” *Id.*

¹⁸⁴ *See ACLU*, 493 F.3d at 665-74.

The Fourth Amendment issue left unaddressed by the Sixth Circuit has been discussed and debated since Franklin Roosevelt's presidency.¹⁸⁵ In light of its ruling that the plaintiffs in *ACLU v. NSA* lacked standing to litigate their claims, it was proper for the Court of Appeals not to address the plaintiffs' constitutional and statutory claims against the TSP. Although the Supreme Court has yet to resolve the Fourth Amendment issue presented by the TSP, the Court may be compelled to address this issue in another case.¹⁸⁶ Moreover, the TSP and the Bush Administration's legal claims supporting it have generated a significant amount of attention and controversy.¹⁸⁷

B. *The Relevance of FISA*

Before discussing the government's most recent defense of the TSP, a brief description of the Foreign Intelligence Surveillance Act of 1978 ("FISA")¹⁸⁸ is appropriate for a few reasons. To begin with, there is a direct line connecting *Katz*, Title III, *Keith*, and FISA. Title III's authorization of electronic surveillance in criminal investigations was a response to *Katz*'s holding.¹⁸⁹ *Keith* extended *Katz*'s holding to national security cases and concluded that there was no reason to exempt the President from the warrant requirement.¹⁹⁰ FISA was a response to *Keith* and congressional findings that Executive Branch

¹⁸⁵ See DONNER, *supra* note 118, at 241-42; see also *Zweibon v. Mitchell*, 516 F.2d 594, 616 n.53 (D.C. Cir. 1975) (plurality opinion) (listing sources).

¹⁸⁶ See *In re NSA Telecomm. Records Litig.* No. 06-1791 VRW, 2007 WL 2127345 (N.D. Cal. July 24, 2007); *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007) (remanding to district court plaintiffs' claim that government's alleged violation of FISA trumps the state secrets privilege). There is also a criminal case in upstate New York which might provide a vehicle for challenging the TSP. See Adam Liptak, *Spying Program May Be Tested By Terror Case*, N.Y. TIMES, Aug. 26, 2007, at A1. In that case, a defendant, Yassin M. Aref, an imam who lives in Albany, New York, contends that he has proof that he was subjected to illegal surveillance by the NSA. *Id.*

¹⁸⁷ In addition to the articles already cited discussing the TSP, see also Wilson R. Huhn, *Congress Has the Power to Enforce the Bill of Rights Against the Federal Government: Therefore FISA is Constitutional and the President's Terrorist Surveillance Program is Illegal*, 16 WM. & MARY BILL RTS. J. (forthcoming 2007) (manuscript on file with author) (listing additional articles discussing TSP).

¹⁸⁸ FISA, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1871 (2000 & Supp. IV 2004)).

¹⁸⁹ See FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 247-75 (1970) (describing how Warren Court rulings, especially *Katz*, lead to enactment of federal wiretap legislation); see also Richard Harris, *Annals of Legislation: The Turning Point*, NEW YORKER, Dec. 14, 1968, at 68 (discussing politics surrounding enactment of Title III).

¹⁹⁰ See *supra* Part II.

officials had, under the guise of seeking foreign intelligence information, violated the Fourth Amendment rights of Americans by conducting warrantless electronic surveillance for political and illegitimate reasons.¹⁹¹

Understanding FISA and its scope is important for other reasons that pertain to the constitutionality of the TSP. FISA's enactment was not intended only to moot the issue left open in *Keith*, namely, whether the President had any inherent power to authorize warrantless surveillance within the United States. FISA also represented Congress's judgment that a judicial warrant was needed to ensure that electronic surveillance within the country, even for foreign intelligence purposes, satisfied the requirements of the Fourth Amendment.¹⁹² Put another way, the rulings in *Katz* and *Keith* did more than provide guidelines for FISA's structure. FISA was an acknowledgment by Congress that the Fourth Amendment required prior judicial approval before the communications of Americans

¹⁹¹ Cf. Robert Bloom & William J. Dunn, *The Constitutional Infirmary of Warrantless NSA Surveillance: The Abuse of Presidential Power and the Injury to the Fourth Amendment*, 15 WM. & MARY BILL RTS. J. 147, 159 (2006) ("Keith also recognized that different protective schemes may be required when distinguishing between efforts to conduct general criminal surveillance and those that involve domestic security. Congress would accept this invitation to provide a separate but integrated protective scheme for electronic surveillance driven by national security interests with the passage of FISA." (citations omitted)); Americo R. Cinquegrana, *The Walls (And Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 803 (1989) (noting that *Keith's* explanation "regarding the flexibility that would be permissible under the fourth amendment paved the way for FISA and its carefully tailored provisions for surveillance of foreign powers and their agents in the United States"); *id.* at 806 (stating that *Keith* "invited Congress to develop standards" for foreign intelligence surveillance that differed from Title III, and "[t]hese standards, according to [*Keith*], could include less precise findings of probable cause and even a specially designed court to authorize sensitive activities" (footnote omitted)); Sims, *supra* note 32, at 109 (explaining that *Keith* suggested "a possible way of reconciling a warrant requirement with the practicalities of the intelligence field"; that *Keith* "provides the backbone of the legislative compromise over foreign intelligence surveillance that became [FISA]"; and that between *Keith* and the enactment of FISA "Congress devoted substantial attention to infringements of civil liberties by agencies of the United States" (footnote omitted)).

¹⁹² See Nolan et al., *supra* note 176, at 44 ("[S]erious Fourth Amendment questions about the validity of warrantless wiretapping led Congress to enact FISA, in order to 'provide the secure framework by which the executive branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this nation's commitment to privacy and individual rights.'" (quoting S. REP. NO. 95-604, at 15 (1978))).

within the country could be monitored by the government for foreign intelligence purposes.¹⁹³

FISA has been described as “a very complex and difficult statute that reflects a multitude of compromises between the Executive, the Congress, and the various interest groups that influenced its development.”¹⁹⁴ Notwithstanding its complexity, certain features of FISA are straightforward and are especially pertinent when assessing the constitutionality of the TSP. FISA generally regulates the government’s power to use electronic surveillance and other investigative means within the United States for foreign intelligence purposes. Specifically, the statute allows the issuance of judicial warrants for foreign intelligence purposes from a secret court, the FISA court (“FISC”).¹⁹⁵ That court is comprised of a select number of federal judges appointed by the Chief Justice of the United States, and provides streamlined procedures and secrecy provisions unavailable under Title III.¹⁹⁶

More importantly, issuance of a FISA warrant differs from Title III and the traditional warrant process. Normally (and under Title III), a judge can issue a search or arrest warrant if she determines that the government shows probable cause that the target of the search or seizure has committed or is likely to commit a crime. Under FISA, however, a judge must issue a warrant if the application satisfies certain statutory criteria.¹⁹⁷ Specifically, if the government

¹⁹³ Cf. Huhn, *supra* note 187 (commenting that “Congress enacted FISA in 1978, and it is abundantly clear that FISA was intended to protect the Fourth Amendment rights of American citizens and lawfully resident aliens against encroachment by agents of the federal government acting under the shield of ‘national security’”); David S. Eggert, Note, *Executive Order 12,333: An Assessment of the Validity of Warrantless National Security Searches*, 1983 DUKE L.J. 611, 638 (“Congress passed the FISA in the aftermath of the *Keith* case and the abuses that occurred during the Watergate years. It is reasonable to assume that Congress believed the courts would require the president and the investigative agencies to obtain warrants before conducting searches, as defined in *Katz*.”).

¹⁹⁴ William F. Brown & Americo R. Cinquegrana, *Warrantless Physical Searches for Foreign Intelligence Purposes: Executive Order 12,333 and The Fourth Amendment*, 35 CATH. U. L. REV. 97, 157 (1985); see also Cole, *supra* note 33, at 20 (“At that time, and today, FISA comprehensively regulates electronic surveillance for foreign intelligence purposes within the United States. FISA, enacted in 1978 after revelations of widespread spying on Americans by federal law enforcement and intelligent agencies — including the NSA — struck a careful balance between protecting civil liberties and preserving the ‘vitally important government purpose’ of obtaining valuable intelligence to safeguard national security.” (footnotes omitted)).

¹⁹⁵ 50 U.S.C. § 1805 (2000 & Supp. IV 2004).

¹⁹⁶ *Id.* § 1803 (2000 & Supp. IV 2004).

¹⁹⁷ In pertinent part, § 1805(a) provides that:

demonstrates that “there is probable cause to believe that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power,” the FISA court must issue the warrant on these facts alone.¹⁹⁸ An American citizen or a lawful resident of the United States (a “United States person” in FISA terminology) will be considered “an agent of a foreign power” if he “knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power” which involve violation of the criminal laws of the United States.¹⁹⁹ There is general agreement that FISA’s probable cause standard is easier to satisfy than the probable cause standard employed under Title III and the Fourth Amendment.²⁰⁰

[T]he judge *shall* enter an *ex parte* order as requested or as modified approving the electronic surveillance if he finds that —

- (1) the President has authorized the Attorney General to approve applications for electronic surveillance for foreign intelligence information;
- (2) the application has been made by a Federal officer and approved by the Attorney General;
- (3) on the basis of the facts submitted by the applicant there is probable cause to believe that —
 - (A) the target of the electronic surveillance is a foreign power or an agent of a foreign power: . . . ; and
 - (B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;
- (4) the proposed minimization procedures meet the definition of minimization procedures under [FISA]; and
- (5) the application which has been filed contains all statements and certifications required by [FISA] and, if the target is a United States person, the certification or certifications are not clearly erroneous . . .

Id. § 1805(a) (emphasis added). As noted, if these statutory criteria are satisfied, the FISA court must issue the warrant. Although FISA court judges have no discretion to deny a warrant and the process “may appear to present a rubber stamp procedure, the purpose is to assure written accountability within the executive branch for the decision to engage in electronic surveillance, thus providing an internal check against arbitrariness.” Bloom & Dunn, *supra* note 191, at 163 n.136 (citations omitted).

¹⁹⁸ 50 U.S.C. § 1805(a)(3) (2000). FISA defines “foreign agent” to include persons engaged in international terrorism, *id.* § 1801(b)(1)(C)-(2)(C) (2000 & Supp. IV 2004), and defines “foreign power” to include “a group engaged in international terrorism or activities in preparation therefore.” *Id.* § 1801(a)(4) (2000).

¹⁹⁹ *Id.* § 1801(b)(2)(A)-(E).

²⁰⁰ *See, e.g.,* Bloom & Dunn, *supra* note 191, at 163-64 (asserting that probable

Additionally, FISA allows for warrantless surveillance during emergencies. Where government officials do not have the time to obtain a FISA warrant, the Attorney General may approve warrantless surveillance prior to requesting a warrant from the FISC, provided a subsequent request is made to the FISA court within seventy-two hours of the implementation of the warrantless surveillance.²⁰¹ FISA's scope also extends to wartime. The statute permits the Attorney General to approve warrantless surveillance for the first fifteen days following a declaration of war.²⁰²

Another unambiguous aspect of the statute was Congress's intention that FISA "shall be the exclusive means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted" in the United States.²⁰³ To underline its intent on this matter, Congress repealed § 2511(3), which had provided that "nothing . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect

cause standard under FISA is not as strict as under Title III and Fourth Amendment); Sims, *supra* note 32, at 110 (noting that FISA's probable cause test is "uniformly agreed to be a standard that is easier to meet than the Title III standard"); *id.* at 120 n.53 (noting that "essence of FISA legislative compromise was to give the government a way to obtain a warrant for electronic surveillance that did not require meeting the probable cause standard applied in ordinary criminal cases"). Bloom and Dunn have explained:

[T]he standard for probable cause in the FISA context is not as strict as for general crime control. FISA does not require a finding that a crime is imminent or that the elements of a specific crime exist, but it requires instead a more speculative standard that allows surveillance to occur at an earlier stage in the investigative process. This speculative standard is evidenced in the agency-based definition for an "agent of a foreign power." . . . In addition, the FISC judge must make this determination based upon the facts and circumstances provided by the executive branch. The probable cause requirement, therefore, defers greatly to the executive branch to allow it to determine when probable cause exists and then to provide the FISC judge only limited discretion to challenge such a determination.

Bloom & Dunn, *supra* note 191, at 164 (footnotes omitted).

²⁰¹ 50 U.S.C. § 1805(f)(2) (2000).

²⁰² *Id.* § 1811 (2000). A congressional report explained that this 15 day window for warrantless surveillance "allow[s] time for consideration of any amendment to [FISA] that may be appropriate during a wartime emergency." H.R. REP. NO. 95-1720, at 34 (1978), as reprinted in 1978 U.S.C.C.A.N. 4048, 4063.

²⁰³ 18 U.S.C. § 2511(2)(f) (Supp. IV 2004).

national security information against foreign intelligence activities.”²⁰⁴ Thus, by repealing § 2511(3) and designating FISA and its related provisions as the “exclusive means” for conducting electronic surveillance within the country, Congress unmistakably signaled its understanding that, assuming the President had the inherent power to conduct warrantless electronic surveillance for foreign intelligence matters prior to FISA’s enactment, he no longer had the authority to conduct such surveillance in contravention of federal law.²⁰⁵ In fact, as several of the briefs in *ACLU v. NSA* pointed out, “FISA’s legislative history provides further confirmation that Congress’s dual purpose in enacting FISA was (1) to ‘provide a legislative authorization for . . . electronic surveillance conducted within the United States for foreign intelligence purposes,’ and (2) to ‘moot the debate over the existence or non-existence’ of ‘any Presidential power to authorize warrantless surveillances in the United States.’”²⁰⁶

²⁰⁴ *Id.* § 2511(3) (1976) (repealed 1978); see also S. REP. NO. 95-604(I) (1977), as reprinted in 1978 U.S.C.C.A.N. 3904, 3908 (discussing reasons for repealing § 2511(3)).

²⁰⁵ See Nolan et al., *supra* note 176, at 43. In a letter to Congress, a group of constitutional scholars and former government officials wrote:

We do not dispute that, absent congressional action, the President might have inherent constitutional authority to collect “signals intelligence” about the enemy abroad. Nor do we dispute that, had Congress taken no action in this area, the President might well be constitutionally empowered to conduct domestic surveillance directly tied and narrowly confined to that goal — subject, of course, to Fourth Amendment limits. . . . But FISA specifically *repealed* [§ 2511 (3)] and replaced it with language dictating that FISA and the criminal code are the “exclusive means” of conducting electronic surveillance. In doing so, Congress did not deny that the President has constitutional power to conduct electronic surveillance for national security purposes; rather, Congress properly concluded that “even if the President has the inherent authority *in the absence of legislation* to authorize warrantless electronic surveillance for foreign intelligence purposes, Congress has the power to regulate the conduct of such surveillance by legislating a reasonable procedure, which then becomes the exclusive means by which such surveillance may be conducted.”

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

²⁰⁶ Brief of Center for National Security Studies and the Constitution Project as Amici Curiae at 8, *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007) (Nos. 06-2095 & 06-2140) (citing H.R. REP. NO. 95-1283, pt. 1, at 24 (1978)) (alteration in original); see also Brief for the Appellees, *supra* note 178, at 23 n.36 (explaining that House Conference Report “also makes clear that Congress intended FISA and Title III to extinguish (with limited exceptions provided in those statutes) the President’s authority to engage in warrantless surveillance”). The Appellees’ Brief further contended that “[t]he conferees rejected language that would have described Title III

Finally, FISA explicitly banned electronic surveillance within the United States “except as authorized by statute.”²⁰⁷ Although FISA and Title III provide the exclusive means for lawful electronic surveillance inside the nation’s borders, it is important to understand that FISA does not outlaw every type of electronic surveillance conducted by the federal government. For example, “no warrant is [required under FISA] if the target of the interception is a suspected terrorist overseas, or if the acquisition is done on any basis other than ‘by intentionally targeting’ a United States person.”²⁰⁸ Particularly relevant to an analysis of the TSP, FISA defines “electronic surveillance” as follows:

[T]he acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by *intentionally targeting* that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes²⁰⁹

Under this definition of “electronic surveillance,” the NSA can conduct warrantless surveillance of suspected terrorists located abroad that captures the communications of American citizens, provided that the surveillance does not intentionally target Americans or lawful residents of the United States inside the country. Indeed, under this definition “[n]o FISA warrant would be required even if the United States person were within the United States, unless the interception targeted the United States person.”²¹⁰

and FISA as the ‘exclusive statutory means’ by which electronic surveillance could be conducted, instead adopting language that makes those statutes ‘the exclusive means.’” *Id.* (quoting H.R. REP. NO. 95-1720, at 35 (1978) (Conf. Rep.), *as reprinted in* 1978 U.S.C.C.A.N. 4048, 4064).

²⁰⁷ 50 U.S.C. § 1809(a)(1) (2000).

²⁰⁸ Sims, *supra* note 32, at 127 n.69.

²⁰⁹ 50 U.S.C. § 1801(f)(1) (2000) (emphasis added).

²¹⁰ Sims, *supra* note 32, at 122; *see also id.* at 127 (“FISA does not flatly prevent NSA from intercepting, processing, analyzing and distributing international communications by, from, or about United States persons in the United States. . . . When interception takes place outside the United States, FISA regulates the *targeting* of communications to or from a particular United States person in the United States.” (emphasis added) (footnote omitted)).

C. *The Bush Administration's Argument Supporting Warrantless Foreign Surveillance*

The Bush Administration has conceded that the TSP does not comply with FISA's requirements.²¹¹ But this concession, according to the Administration, does not mean that the TSP violates the Fourth Amendment. Compliance with FISA is not required, according to the government, because the President "has inherent constitutional authority, notwithstanding the Fourth Amendment, to conduct warrantless surveillance of communications involving *foreign* powers such as al Qaeda and its agents."²¹² While *Keith* had no reason to address the point, the government's brief observed that every court of appeals to address the issue since then has ruled that the President has inherent authority under the Constitution, "not trumped by the Fourth Amendment," to employ warrantless surveillance to gather foreign intelligence information.²¹³ Shifting ground slightly by acknowledging that the Fourth Amendment does control the President's conduct, the government has also stated that "[a]lthough no warrant is required [for foreign intelligence searches], the Fourth Amendment requires that all searches be reasonable."²¹⁴ But, according to the government, "[u]nder the foreign intelligence doctrine, searches are reasonable as long as they are conducted to secure foreign intelligence information."²¹⁵

Alternatively, the Administration contends that even if the TSP is subject to conventional Fourth Amendment doctrine, it is consistent with the special needs exception to the warrant requirement because "its purpose is to detect and prevent further terrorist attacks by foreign agents from within the United States."²¹⁶ Under the special needs doctrine, government officials are permitted to conduct searches and seizures without any suspicion of criminality. Although

²¹¹ See Alberto Gonzales, Attorney General, and General Michael Hayden, Principal Deputy Director of National Intelligence, Press Briefing (Dec. 19, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html> (providing statement by General Hayden: "Yes, because the speed, because of the procedures, because of the processes and requirements set up in the FISA process, I can say unequivocally that we used [the TSP] in lieu of [FISA] and [the TSP] has been successful"); cf. Yoo, *supra* note 24, at 565 (describing that TSP "surveillance took place outside the framework" of FISA).

²¹² Brief of Appellants, *supra* note 24, at 34-35.

²¹³ *Id.* at 35.

²¹⁴ *Id.* at 36.

²¹⁵ *Id.*

²¹⁶ *Id.* at 37.

individualized suspicion and judicial warrants are generally required when the government intrudes into the privacy of citizens, the Court has recognized an exception to the probable cause and warrant requirements “when ‘special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’”²¹⁷

According to the government’s interpretation of the special needs exception, “reasonableness is determined by conducting a ‘fact-specific balancing’ of the Government interests underlying the search and the associated intrusion into privacy interests.”²¹⁸ Under the government’s calculus, the information required for this type of balancing would include “the nature of the al Qaeda threat; facts supporting the need for speed and flexibility in conducting surveillance beyond that traditionally available under FISA; details concerning TSP’s targeting decisions, its effectiveness in detecting and preventing terrorist attacks, and other operation information; and other specifics concerning the scope and nature of TSP surveillance.”²¹⁹ The government insists, however, that the state secrets privilege precludes that type of fact-specific inquiry.

In sum, the Bush Administration has defended the President’s authority to employ electronic surveillance for foreign intelligence in its broadest form. Essentially, the Bush Administration has taken the position that the Fourth Amendment, as interpreted by the Court, does not apply to the President when he authorizes electronic surveillance of communications that involve foreign powers or that relate to the activities of foreign terrorists such as al Qaeda and its supporters. It does not matter that TSP surveillance also intercepts the words or writings of American citizens while located inside the nation’s borders. According to the Bush Administration, neither FISA nor the conventional warrant requirement applies to the TSP.

D. Under Keith’s Mode of Analysis, Warrantless Foreign Surveillance Is Unconstitutional

When determining whether the President has the inherent power to conduct warrantless electronic surveillance for foreign intelligence, it is important that the issue be carefully framed and analyzed. Also, to the extent that precedent matters, it is equally important to recall how

²¹⁷ Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

²¹⁸ Brief of Appellants, *supra* note 24, at 37-38 (citations omitted).

²¹⁹ *Id.* at 38.

the analogous issue in *Keith* — whether the President has the inherent power to conduct warrantless electronic surveillance for domestic intelligence — was analyzed by the Court.

The Bush Administration characterizes the searches undertaken by the TSP as involving the foreign affairs power of the President. Therefore, the argument proceeds, the “foreign intelligence doctrine” not only eliminates the warrant requirement, but also resolves the constitutional question because “[u]nder the foreign intelligence doctrine, searches are reasonable as long as they are conducted to secure foreign intelligence information.”²²⁰ Without addressing the circular reasoning of this argument, the government’s position is the equivalent of asserting that the Fourth Amendment does not control the President when he authorizes searches for foreign intelligence information.²²¹ Certainly, the TSP relates to foreign affairs or involves foreign powers. But that fact does not end the constitutional inquiry, especially when the TSP monitors the communications of American citizens within the nation’s borders. As Judge Malcolm Wilkey has explained:

No matter how certain [the President’s] constitutional mandate in this or any other area, the President is never free to act in complete disregard of the protection guaranteed each individual by the Bill of Rights. If his foreign affairs authority affords the Executive department an exemption from the requirement of prior judicial approval, it is not because the President can ignore constitutional safeguards in the performance of his duties; rather, it is because, on balance, the exigencies of foreign intelligence gathering outweigh the constitutional value placed on prior judicial approval.²²²

²²⁰ *Id.* at 36.

²²¹ Whether for strategic reasons or otherwise, the government’s briefs in *ACLU v. NSA* never directly state that the Fourth Amendment does not control or apply to the President. Notwithstanding the subtle nature of the government’s most recent filings, other scholars have interpreted the Bush Administration’s legal arguments as the equivalent of arguing that the Fourth Amendment does not apply to the President. See, e.g., Cole, *supra* note 33, at 18 (noting that in “memorandum to Congress, the Bush Administration argued that the Commander-in-Chief may not be restricted in his choice of the ‘means and methods of engaging the enemy,’ and that President Bush is therefore free to wiretap Americans without court approval in the ‘war on terror’ even though Congress has made it a crime to do so” (footnote omitted)).

²²² *Zweibon v. Mitchell*, 516 F.2d 594, 699 (D.C. Cir. 1975) (Wilkey, J., concurring and dissenting), *cert. denied*, 425 U.S. 944 (1976).

Thus, in resolving the question whether the President has the power to order warrantless surveillance, it is not enough to assert that TSP interceptions target foreign powers. That fact only begins the inquiry, unless, of course, the Fourth Amendment does not apply when the President authorizes searches in this country involving foreign affairs. The Supreme Court has never held that the President is free to ignore the Bill of Rights whenever Executive Branch functions concern foreign affairs. Moreover, its rulings in recent cases raising analogous issues indicate that it is unlikely to take this position.²²³

²²³ Although space limitations preclude an extended discussion, even a cursory look at the Court's prior rulings recognize that the President's inherent powers under Article II of the Constitution does not permit him to run roughshod over federal law or the Bill of Rights. For example, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), President Harry S. Truman issued an order directing the Secretary of Commerce to take temporary possession of and operation over most of the nation's steel mills in order to avert a potential threat to national security. The Court rejected the argument that the President acted within his constitutional powers to avert a stoppage of steel production needed for weapons and other material during the Korean War. As Professor Laurence Tribe has noted, if the President does not have the inherent authority to temporarily remove the owners of the nation's largest steel mills during a war, "without confiscating, transferring, or otherwise touching the property's ultimate ownership," it is hard to understand why the President has the inherent authority to conduct discretionary, and apparently never-ending, electronic surveillance targeting the communications of citizens located in this country. Letter from Laurence H. Tribe, Professor, Harvard University, to Honorable John Conyers, Jr. 3 (Jan. 6, 2006) (on file with author).

Nor does the Court's recent ruling in *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004), which construed the Authorization for the Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), to permit detention of American citizens captured aboard while fighting American forces, support the Bush Administration's legal arguments regarding the TSP. According to the government, if the AUMF authorizes detention of Americans as an incident of war, then certainly the Bush Administration can take the lesser step of listening to the communications of citizens suspected of having ties to al Qaeda. But this argument makes no sense once one examines the scope of *Hamdi's* holding. The *Hamdi* plurality explicitly limited its holding to individuals who were "part of or supporting forces hostile to the United States . . . in Afghanistan and who engaged in an armed conflict against the United States there." *Hamdi*, 542 U.S. at 516 (internal quotation marks omitted). *Hamdi*, as Tribe explained, stands for the unexceptional point that statutory authorization to kill or shoot an enemy on the battlefield impliedly authorizes the military to take the less drastic step of detaining that enemy for the duration of the war. Tribe, *supra*, at 4-5. The power to conduct discretionary electronic surveillance against Americans, which the TSP allows, "is by no stretch of the legal imagination a 'lesser included power' contained within the power to repel future terrorist attacks by Al Qaeda on the United States." *Id.* at 5; *see also* Nolan et al., *supra* note 176, at 43 ("It is one thing, however, to say that foreign battlefield capture of enemy combatants is an incident of waging war that Congress intended to authorize. It is another matter entirely to treat unchecked warrantless *domestic* spying as included in that authorization, especially

Regarding precedent, the Bush Administration notes that *Keith* expressly reserved the question whether the President possesses inherent authority, “notwithstanding the Fourth Amendment,” to authorize warrantless surveillance for foreign intelligence.²²⁴ While this is certainly true, it is equally accurate that “Fourth Amendment analysis must begin with the recognition that the Supreme Court has never upheld warrantless wiretapping within the United States, *for any purpose*.”²²⁵ Also, it is obvious that the surveillance conducted by the TSP is factually distinguishable from the surveillance in *Keith* because it involves foreign intelligence. “[B]ut the problem remains whether the situations are constitutionally different.”²²⁶ If precedent matters,

where an existing statute specifies that other laws are the ‘exclusive means’ by which electronic surveillance may be conducted and provides that even a declaration of war authorizes such spying only for a fifteen-day emergency period.”). Indeed, the *Hamdi* plurality stated that “indefinite detention for the purpose of interrogation” of enemy combatants “is not authorized” by the AUMF. *Hamdi*, 542 U.S. at 521. “It follows a fortiori that indefinite subjection of American citizens who are not even alleged to be enemies, much less enemy combatants, to ongoing invasions of their privacy in the United States for purposes of obtaining valuable information is not authorized either.” *Tribe, supra*, at 5.

Finally, and probably most importantly, the *Hamdi* plurality indicated that it was not persuaded by the Bush Administration’s argument that the judiciary had no role to play when determining what amount of due process is guaranteed to an American citizen detained by the military as an enemy combatant. After holding that “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker,” 542 U.S. at 533 (citation omitted), the *Hamdi* plurality continued:

[W]e necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.

Id. at 535-36 (quoting *Youngstown Sheet & Tube*, 343 U.S. at 587). If the War on Terror does not provide the President “a blank check” to determine for himself the due process rights of Americans detained and classified as enemy combatants, that same “war” does not provide the President the power to determine by himself whether warrantless electronic surveillance of the communications of Americans is reasonable under the Fourth Amendment.

²²⁴ Brief of Appellants, *supra* note 24, at 34-35.

²²⁵ Cole, *supra* note 33, at 18.

²²⁶ *Zweibon*, 516 F.2d at 700 (Wilkey, J., concurring and dissenting).

“[t]hat question can only be answered by the same kind of balancing process the Supreme Court used in *Keith*.”²²⁷

The type of analysis employed in *Keith* was categorical, not a fact-specific, totality-of-the-circumstances approach.²²⁸ *Keith* analyzed the issue of whether the President had inherent power to order domestic security wiretaps “from the perspective of whether it is reasonable to except from the warrant procedure the *category* of cases involving that power, rather than whether it was reasonable to conduct a surveillance (with or without a warrant) under the particular circumstances involved in th[e] case.”²²⁹ *Keith* built on *Camara*’s formula for determining whether the warrant requirement governs domestic security wiretaps.²³⁰ *Keith* explained:

If the legitimate need of Government to safeguard domestic security requires the use of electronic surveillance, the question is whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant before such surveillance is undertaken. We must also ask whether a warrant requirement would unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it.²³¹

If the TSP is to survive constitutional scrutiny under the two-prong standard announced in *Keith*, the government will have to show that judicial approval for foreign intelligence searches is unnecessary to protect the privacy and free speech interests of citizens, and that “a warrant requirement would unduly frustrate the efforts of

²²⁷ *Id.*

²²⁸ *See supra* Part II.

²²⁹ *Zweibon*, 516 F.2d at 629 n.89 (plurality opinion) (emphasis added). After noting that the government defendants “cite *Keith* for the proposition that the Fourth Amendment is flexible, requiring that courts ‘examine the then competing circumstances and balance the basic values at stake,’” the *Zweibon* plurality then explained:

However, the *Keith* Court made it clear that the factors to be balanced were those values implicated by the *category* of cases of which *Keith* was but one example — the duty of the Government to protect the domestic security and the invasion of individual privacy and free expression that might result from abuse of warrantless surveillance. What the Court did *not* do was weigh the reasonableness of installing a wiretap under the specific circumstances of that case, where the subject of the wiretap had allegedly bombed a CIA office.

Id. at 630 n.91 (citations, brackets, and ellipsis omitted).

²³⁰ *See supra* Part II.

²³¹ *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 315 (1972).

Government” to deter or identify future terrorism against the United States or its interests.²³² Under *Keith*'s first prong, a court must initially decide whether “the needs of citizens for privacy and free expression may not be better protected by requiring a warrant” before foreign intelligence surveillance is undertaken.²³³ There are at least two good reasons why the warrant requirement should apply to the TSP notwithstanding the fact that the searches involve foreign intelligence. First, foreign intelligence surveillance is subject to the same type of political abuse that prompted *Keith* to conclude that the warrant requirement controls national security wiretaps. Second, the scope of the “inherent power” argument proffered by the Bush Administration is not confined to the intrusions originally contemplated under the TSP. This power is limitless and will overwhelm the Fourth Amendment rights of any person — citizen or non-citizen — on the mere order of the President.

The government insists that the President and Executive Branch officers have discretion to conduct electronic surveillance for “foreign intelligence information,”²³⁴ but “[l]ittle reflection is required to recognize that this is an extremely broad exemption whose employment by the Executive might be subject to inordinate abuse.”²³⁵ Similar to the concepts of “foreign security,” “foreign affairs,” “related to the conduct of foreign relations,” and “involving a foreign power,” the concept of “foreign intelligence information” is a vague and malleable standard.²³⁶ As was true in the 1970s, so it is true today that “given the way in which almost any activity can be said to relate, at least remotely, to foreign affairs or foreign policy making, the potential scope of [a foreign intelligence information] exemption to the warrant requirement is boundless, and thus a substantial danger to the values

²³² *Id.*

²³³ *Id.*; see also *Zweibon*, 516 F.2d at 632-33 (plurality opinion) (explaining that *Keith*'s analysis requires court to “determine whether a warrant requirement will better protect Fourth Amendment rights when foreign intelligence gathering is involved, and whether such a requirement would unduly fetter the legitimate functioning of the Government”). According to the court, “unless there are valid reasons for abrogating the warrant procedure when foreign relations are implicated, the President must comply with that traditional procedure.” *Id.* at 633.

²³⁴ Brief of Appellants, *supra* note 24, at 36.

²³⁵ *Zweibon*, 516 F.2d at 701 (Wilkey, J., concurring and dissenting).

²³⁶ See *id.*; cf. Note, *Foreign Security Surveillance and the Fourth Amendment*, 87 HARV. L. REV. 976, 977 (1974) (commenting that “[a]lmost any problem of governmental concern could be said to relate, at least remotely, to the national security, and to bear, at least potentially, on the country's relations with foreign powers”).

the Fourth Amendment was fashioned to protect.”²³⁷ The concerns Judge Wilkey articulated a quarter century ago about the Nixon Administration’s assertion of power to conduct “foreign affairs” searches equally apply to the “foreign intelligence doctrine” asserted by the Bush Administration:

Virtually every political action in this country has some international repercussions. Certainly all protests against this country’s foreign policy, as well as protests against the international or foreign policy of another country . . . would have to be included. Every group, to mention only one example, which actively protested this country’s involvement in the [Iraq] war [or the government’s Middle East policy] could have been subjected to a warrantless wiretap under the exemption proposed by the Government “Related to the conduct of foreign relations” and “involving a foreign power” are also extremely malleable criteria. Their utilization as standards for permitting warrantless surveillance activities would pose not only grave Fourth Amendment problems but also would threaten important First Amendment values.²³⁸

Moreover, if the Bush Administration’s legal position is sound, the President’s inherent power to authorize warrantless searches is not confined to contexts where one party to a telephone conversation or email message is located outside the country and is suspected of having ties to al Qaeda. Under the “inherent power” argument, the President can authorize surveillance of purely domestic communications between American citizens or persons lawfully residing in the country, provided “the communication has some link (however indirect) with terrorism (however the President defines it).”²³⁹ Further, the scope of the “inherent power” argument extends

²³⁷ *Zweibon*, 516 F.2d at 654 (plurality opinion).

²³⁸ *Id.* at 701 (Wilkey, J., concurring and dissenting).

²³⁹ See Brief of Center for National Security Studies, *supra* note 206, at 19-20 (explaining that the “inherent power” argument is “limitless in scope”).

Although the Administration has asserted that it has limited the secret NSA program only to communications where one party is abroad, and only where there is a basis to believe there is a link to a particular terrorist group (al Qaeda), its claimed “inherent authority” is not so limited. Because it depends on the President’s unreviewable assertion that a duly-enacted statute impedes efforts to combat international terrorism — even where the statute seeks to protect Americans in this country — the authority would permit him to conduct surveillance of domestic communications based merely on an NSA operative’s determination that the communication has some link (however

beyond electronic surveillance. It also includes the power to forcibly enter and search private homes. Indeed, several Presidents have asserted the authority to forcibly enter a citizen's home without judicial approval to search for items related to foreign espionage or intelligence.²⁴⁰ Finally, the President's power is "potentially infinite" when one considers the likelihood that the War on Terror will continue for the foreseeable future.²⁴¹ In sum, taking account of these concerns, a court could reasonably conclude that "the needs of citizens for privacy and free expression [will] be better protected by requiring a warrant" before foreign intelligence surveillance is commenced.²⁴²

The second prong of *Keith's* analysis requires determining whether a warrant requirement would unduly frustrate government efforts to detect or deter potential acts of foreign terrorism directed against the United States or its interests. In defending the TSP, the government has never directly addressed this point. It does suggest, however, that there are circumstances where intelligence officers lack "the speed and

indirect) with terrorism (however the President defines it).

Id.; cf. Nolan et al., *supra* note 176, at 44 ("According to Attorney General Gonzales, the NSA may wiretap any person in the United States who so much as receives a communication from anyone abroad, if the administration deems either of the parties to be affiliated with al-Qaeda, a member of an organization affiliated with al-Qaeda, 'working in support of al Qaeda,' or 'part of an organization or group 'that is supportive of al Qaeda.' Under this reasoning, a US citizen living here who received a phone call from another US citizen who attends a mosque that the administration believes is 'supportive' of al-Qaeda could be wiretapped without a warrant.").

²⁴⁰ E.g., Ronald J. Ostrow, *U.S. Reasserts Warrantless Search Rights*, WASH. POST, May 19, 1975, at A2 ("The Ford Administration has reasserted that federal agents have the right to break into a citizen's home without a warrant and to search for items that might be used in foreign espionage or intelligence cases."); R. Jeffrey Smith, *Administration Backing No-Warrant Spy Searches*, WASH. POST, July 15, 1994, at A19 (detailing President Clinton's assertion of inherent authority to conduct warrantless searches, including homes of U.S. citizens, for foreign intelligence purposes); Edward Walsh, *Carter Centralizes U.S. Intelligence Authority, Draws Fire*, WASH. POST, Jan. 25, 1978, at A2. See generally Brown & Cinquegrana, *supra* note 194 (describing and approving constitutional justifications and Executive Branch orders authorizing warrantless physical searches for foreign intelligence purposes). For a critique of the President's authority to conduct warrantless physical searches for foreign intelligence purposes, see Eggert, *supra* note 193, at 643.

²⁴¹ Brief of Center for National Security Studies and the Constitution Project as Amici Curiae, *supra* note 206, at 19 (arguing that President's "authority is potentially infinite because there is no foreseeable end to the present campaign against terrorism").

²⁴² *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 315 (1972).

the agility” to detect potential terrorist activity.²⁴³ Although the government does not identify or emphasize any single factor as justification for bypassing the warrant process, certainly the need for speed is a legitimate concern, without which important government interests might be defeated. The problem with this claim is that Congress has already accommodated this vital government interest in FISA. The statute provides for “emergency situation[s]” that allow warrantless electronic surveillance in cases where officials do not have time to obtain a FISA warrant.²⁴⁴ Under FISA, the Attorney General can authorize emergency surveillance before seeking a FISA warrant, provided a later request for such a warrant is undertaken within seventy-two hours of the start of the warrantless surveillance.²⁴⁵ Similarly, conventional search and seizure law permits immediate searches where exigent circumstances make it impractical to seek judicial approval prior to searching. Thus, the government’s need for speed and flexibility to identify and track potential terrorist activity, while undoubtedly an imperative interest, does not justify completely exempting Executive Branch officers from the warrant requirement.²⁴⁶

²⁴³ See Gonzales, *supra* note 211 (“The operators out at NSA tell me that we don’t have the speed and the agility that we need, in all circumstances, to deal with this new kind of enemy. You have to remember that FISA was passed by the Congress in 1978. There have been tremendous advances in technology”); see also Brief of Appellants, *supra* note 24, at 38 (stating that state secrets privilege precludes type of fact-specific analysis needed to evaluate reasonableness of TSP surveillance, including “facts supporting the need for speed and flexibility in conducting surveillance beyond that traditionally available under FISA”); Appellants’ Reply Brief and Cross-Appellees’ Responsive Brief at 45, *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007) (No. 06-2095 & No. 06-2140) [hereinafter *NSA Reply Brief*] (“The President and his top advisors have determined that the current threat to the United States demands that signals intelligence be carried out with a speed and methodology that cannot be achieved by seeking judicial approval through the traditional FISA process. While plaintiffs may take issue with the President’s assessment, his judgment is well supported by the facts, including facts concerning the nature of the al Qaeda threat, the activities the President has directed, and the superiority of those activities to traditional FISA-authorized surveillance.”); Yoo, *supra* note 24, at 576 (stating that “FISA imposes slow and cumbersome procedures on our intelligence and law enforcement officers”).

²⁴⁴ 50 U.S.C. § 1805(f)(1) (2000).

²⁴⁵ *Id.* § 1805(f)(2).

²⁴⁶ While acknowledging FISA’s allowance of emergency searches, Professor Yoo writes that this provision does not satisfy the government’s needs because “the Attorney General [cannot] use the emergency procedure if the probable cause standard [is] not met.” Yoo, *supra* note 24, at 577 (footnote omitted). When considering this concern, it is helpful to keep in mind that under the Fourth Amendment, probable cause is not a particularly vigorous standard. Probable cause does not require a more-likely-than-not showing of guilt, or even compliance with a preponderance of the evidence standard. Rather, “probable cause requires only a

While the government's concerns about speed and exigency are answered by FISA's allowance of emergency warrants and the Fourth Amendment's exigency exception, there may be other aspects of foreign intelligence searches that might unduly frustrate the government's interests if judicial warrants are required before such searches are permitted. For example, it has often been said that judges lack the competence, experience, and analytical acumen to evaluate foreign security threats identified by the government.²⁴⁷ Similar concerns were raised in *Keith*.²⁴⁸ Tellingly, the Bush Administration did not raise this concern in *ACLU v. NSA*. Perhaps, that is because the government's experience with FISA's warrant process has shown that judges on the FISC almost never deny an application for a surveillance warrant. The government's statistics for 2005 show that 2,074 warrant applications were presented to the FISC to conduct electronic surveillance, or conduct forcible entries or both. "Two applications were withdrawn before they were ruled on; 2,072 applications were granted, with 61 of those having been the subject of substantive modifications by the court; no application was denied in whole or part."²⁴⁹ The overwhelmingly large percentage of warrant applications approved by the FISC in 2005 is not unusual. Annual reports released by the Justice Department indicate that FISA's warrant process has not undermined the government's ability to obtain electronic surveillance warrants. According to government statistics,

probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 244 n.13 (1983). Thus, the emergency procedure of FISA is insufficient not because it does not recognize and accommodate the government's need for speed and the ability to react to exigent circumstances, but instead because it does not allow the government to conduct suspicionless searches of Americans. See *infra* notes 271-87 and accompanying text.

²⁴⁷ See Note, *supra* note 236, at 983-84 (describing various "judicial competence" arguments, which include: (1) "because of a relative lack of judicial competence in judging the reasonableness of foreign security surveillance, the likelihood of judicial error prejudicial to the Government is particularly great"; (2) "erroneous judicial prevention of surveillance will be particularly costly in this area because of the greater importance of the surveillances themselves"; and (3) "there are no 'manageable standards' for evaluating an international peril, and in that sense the question of whether such a peril justifies surveillance is arguably 'nonjusticiable'").

²⁴⁸ *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 319 (1972) ("The Government further insists that courts 'as a practical matter would have neither the knowledge nor the techniques necessary to determine whether there was probable cause to believe that surveillance was necessary to protect national security.'").

²⁴⁹ Sims, *supra* note 32, at 111 n.27 (citation omitted). For the report of 2006 statistics, see Letter to Nancy Pelosi, Speaker of the U.S. House of Representatives, from Richard A. Hertling, Acting Assistant U.S. Attorney General (Apr. 27, 2007), available at <http://www.fas.org/irp/agency/doj/fisa/2006rept.pdf>.

there have been nearly 19,000 surveillance applications to the FISC since 1978. “The FISC denied only four of these applications; granted approximately 180 applications with modifications; and granted the remaining 18,451 without modifications.”²⁵⁰ As predicted many years ago, what these statistics show is that federal judges are unlikely to deny requests from Executive Branch officials seeking foreign intelligence warrants.²⁵¹

In addition to the concerns about speed and judicial competence, another concern that has been raised against subjecting foreign intelligence searches to the judicial process is the need to avoid interference with the President’s constitutional duty to protect the nation against foreign security threats. The Bush Administration reiterates this theme when it asserts that “the President’s most basic constitutional duty is to protect the Nation against armed attack,” and notes that as Commander-in-Chief, the President’s powers “include

²⁵⁰ Brief for the Appellees, *supra* note 178, at 49-50 (citing OFFICE OF THE ATT’Y GEN., FISA ANNUAL REPORTS TO CONGRESS 1979-2004, available at <http://www.fas.org/irp/agency/doj/fisa/#rept>).

²⁵¹ See *Zweibon v. Mitchell*, 516 F.2d 594, 645 (D.C. Cir. 1975) (commenting pre-FISA that “judges are likely to be highly deferential to the Executive’s determination concerning need to install a wiretap, particularly where a judicial error might substantially harm the national interest” (footnote omitted)); *id.* at 702 (Wilkey, J., concurring and dissenting) (noting pre-FISA that “judges are fully aware of the special expertise the Executive department possesses in this area”). According to Judge Wilkey, “[i]f there is error in a court’s decision, it is likely to stem from excessive reliance on that expertise rather than too little respect for the Executive’s judgment.” *Id.*; see also Note, *supra* note 236, at 984 (same). The text is not meant to suggest that judges on the FISC act as a “rubber stamp” for the government. One possible reason why surveillance applications are rarely denied is because the government lawyers in charge of overseeing applications for FISA warrants carefully scrutinize those applications to ensure that the applications comply with all of FISA’s requirements. According to one former high-ranking government official:

FISA requires a lengthy review process, in which special FBI and [Department of Justice] 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. It takes time and a great deal of work to prepare the warrant applications, which can run 100 pages long.

Yoo, *supra* note 24, 576 (footnote omitted). Thus, it is not surprising that the government’s oversight process will remove applications that do not comply with FISA’s strict standards. As a result, the applications that do reach the FISC are very likely to survive the judges’ scrutiny.

secretly gathering intelligence information about foreign enemies.”²⁵² While the government rightly describes the President as being in charge of the nation’s foreign affairs, and as the supreme commander of the country’s armed forces, neither of these facts explains why a warrant requirement for foreign intelligence searches would frustrate the government’s legitimate interests. The argument is simply a variation on the “inherent power” theme and, like the “inherent power” argument, amounts to a claim that the Fourth Amendment does not apply to the President when he (or an Executive Branch officer) wants to invade the privacy of citizens in order to obtain foreign intelligence. “[T]he certainty of the President’s authority in [the field of foreign affairs and intelligence] cannot *ipso facto* justify the abrogation of constitutionally protected individual rights.”²⁵³ Nor does the long history of warrantless foreign intelligence surveillance by successive Presidents prove that the warrant requirement would defeat the government’s legitimate interests. A similar tradition existed for national security wiretaps, but the *Keith* Court saw no reason to view that presidential practice as justification for bypassing the judicial process.²⁵⁴

In support of its position that the warrant requirement does not apply to foreign intelligence searches, the government also emphasizes that every court of appeals to consider the issue since *Keith* has upheld the President’s inherent power to conduct warrantless surveillance involving foreign intelligence matters, whether within or without the country.²⁵⁵ But as the plaintiffs and their amici explain in *ACLU v.*

²⁵² NSA Reply Brief, *supra* note 243, at 44 (citations omitted). The government’s need for secrecy and the risk of disclosure have also been raised as concerns against the warrant requirement. FISA, however, has addressed these concerns. 50 U.S.C. §§ 1802(a)(3)-(4), 1805(c)(2) (2000 & Supp. IV 2004).

²⁵³ *Zweibon*, 516 F.2d at 702 (Wilkey, J., concurring and dissenting); *see also* Note, *supra* note 236, at 978 (explaining that President’s constitutional responsibilities as Commander-in-Chief and head of foreign affairs does not provide basis for exempting his actions from Fourth Amendment scrutiny). “Though such powers may exist independently of express constitutional or legislative delegation to a greater extent than do other executive powers, there is no support in the Constitution for the proposition that the fourth amendment, ostensibly a general limitation on otherwise legal governmental activity, applies any less fully to one set of powers than to another.” *Id.*

²⁵⁴ *Cf. Zweibon*, 516 F.2d at 616 (plurality opinion) (“*Keith* merely treated the similarly long-standing Executive practice of conducting surveillance ‘in cases vitally affecting the domestic security’ as indicative of the unchallenged Executive power to obtain intelligence information, not as determinative of the proper procedures to be followed in so doing.” (footnote omitted)).

²⁵⁵ *United States v. Truong*, 629 F.2d 908, 912-17 (4th Cir. 1980); *United States v.*

NSA, the justifications cited by these lower courts for recognizing a foreign intelligence exception to the warrant requirement no longer apply in a post-FISA world.²⁵⁶ For example, the Fourth Circuit relied on the fact that federal district court judges lacked sufficient expertise on foreign intelligence matters as a reason for not applying the warrant requirement.²⁵⁷ *Keith's* logic suggests that this concern is not a valid basis for bypassing the warrant requirement. Moreover, the alleged inability of judges to comprehend foreign security threats has not actually prevented the government from obtaining foreign intelligence warrants under FISA. In any event, Congress has directly addressed this concern by providing a specialized court to handle foreign intelligence surveillance requests.

Finally, in determining whether a warrant requirement for foreign intelligence searches would unduly frustrate governmental interests, a

Buck, 548 F.2d 871, 875-76 (9th Cir. 1977); *United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 425-26 (5th Cir. 1973); Brief of Appellants, *supra* note 24, at 35, 45 (citing *In re Sealed Case*, 310 F.3d 717, 742 & n.26 (FISA Ct. Rev. 2002)).

²⁵⁶ See also Cole, *supra* note 33, at 33 (noting that “apart from the dictum in *In re Sealed Case*, all the cases that have recognized inherent presidential authority to conduct foreign intelligence surveillance have addressed the president’s pre-FISA authority”). The government’s reliance on *In re Sealed Case* is curious. It cites the case for the proposition that the President has inherent authority, not trumped by the Fourth Amendment, “to conduct warrantless searches to obtain foreign intelligence information.” Brief of Appellants, *supra* note 24, at 35 (quoting *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002)). At issue in *In re Sealed Case* was the propriety of certain restrictions accompanying an order authorizing electronic surveillance that the FISC imposed. The restrictions were designed to erect a “wall” between intelligence officials and law enforcement agencies within the Executive Branch. The Foreign Intelligence Surveillance Court of Review held that the restrictions were neither mandated by FISA or the Constitution. In the course of reaching that decision, in pure dicta, the Court of Review noted that “[w]e take for granted that the President [has inherent authority to conduct warrantless searches to obtain foreign intelligence information] and, assuming that is so FISA could not encroach on the President’s constitutional power.” *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002). Thus, because *In re Sealed Case* involved facts where the FISC had issued an order permitting electronic surveillance, it is plain that it had no occasion to address, let alone decide, the constitutionality of warrantless electronic surveillance of American citizens.

²⁵⁷ See, e.g., *Troung*, 629 F.2d at 913-14 (explaining that “the courts are unschooled in diplomacy and military affairs, a mastery of which would be essential to passing upon an executive branch request that a foreign intelligence wiretap be authorized”). Because the Executive Branch is “constitutionally designated as the pre-eminent authority in foreign affairs,” . . . “the separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance.” *Id.* at 914; cf. *Butenko*, 494 F.2d at 605 (“[I]ntelligence gathering is a clandestine and highly unstructured activity, and the need for electronic surveillance often cannot be anticipated in advance.”).

court may consider Congress's judgment that warrants are necessary to secure the Fourth Amendment rights of citizens and lawful residents. In the past, the Supreme Court has been willing to consider Congress's determination that a particular type of search or seizure was reasonable under the Fourth Amendment.²⁵⁸ If congressional approval is relevant in determining the reasonableness of a challenged search or seizure, then it also seems appropriate to weigh Congress's judgment that certain types of warrantless searches are unreasonable. By enacting FISA, Congress determined "that court orders and other procedural safeguards are necessary to insure that electronic surveillance by the U.S. government within this country conforms to the fundamental principles of the Fourth Amendment."²⁵⁹ Fourth Amendment concerns played a significant part in Congress's thinking when FISA was adopted,²⁶⁰ Congress acted well within its constitutional powers by passing legislation designed to protect Fourth Amendment liberties even when such legislation implicates foreign affairs or foreign intelligence concerns.

More importantly, passage of FISA was not "an isolated or quixotic judgment of the legislative branch,"²⁶¹ but rather the result of years of debate which produced a carefully structured program that accommodates the government's needs to conduct searches for foreign intelligence information and also protects the Fourth Amendment interests of Americans. A central component of Congress's judgment was that a neutral magistrate's review was essential to ensure that

²⁵⁸ See, e.g., *United States v. Villamonte-Marquez*, 462 U.S. 579, 591-93 (1983) (holding that customs officials, acting pursuant to statute authorizing customs officers to board vessel to examine manifest and other documents, did not violate Fourth Amendment); *United States v. Watson*, 423 U.S. 411, 415-16 (1976) (holding warrantless arrest authorized by federal statute constitutional under Fourth Amendment because postal inspector had probable cause that crime had been committed).

²⁵⁹ S. REP. NO. 95-701, at 9, 13 (1978), as reprinted in 1978 U.S.C.C.A.N. 3937, 3977-78, 3982; see also S. REP. NO. 95-604, at 5, 18 (1977), as reprinted in 1978 U.S.C.C.A.N. 3904, 3906, 3919.

²⁶⁰ As one of the amici curiae briefs in *ACLU v. NSA* noted, "concerns over the constitutionality of domestic electronic surveillance were one motivation behind FISA. In enacting FISA, Congress legislated in the shadow of the Fourth Amendment, furnishing a 'secure framework by which the executive branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this nation's commitment to privacy and individual rights.'" Brief of Curtis A. Bradley et al. as Amici Curiae in Support of Appellees at 29, *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007) (No. 06-2095 & No. 06-2140) (quoting S. REP. NO. 95-604, at 15, as reprinted in 1978 U.S.C.C.A.N. 3904, 3916).

²⁶¹ *Watson*, 423 U.S. at 415-16.

Executive Branch decisions to utilize electronic surveillance do not violate the privacy rights of individuals.

In sum, the government's claims that the warrant requirement does not apply to the TSP are not persuasive. Specifically, even though FISA requires judicial approval when the government employs electronic surveillance that intentionally targets the communications of citizens and lawful residents within the United States, the statute also accommodates many of the government's legitimate interests in obtaining foreign intelligence. Indeed, "FISA is not as restrictive as is sometimes assumed."²⁶² As Attorney General Alberto Gonzales has acknowledged, FISA does not regulate the overseas communications of foreign persons.²⁶³ Nor does FISA cover the interception or monitoring of communications of American citizens which occur outside the United States.²⁶⁴

Moreover, the NSA may conduct warrantless electronic surveillance of the calls and email of a suspected terrorist living abroad even if those communications are sent or received by an American citizen or lawful resident in this country.²⁶⁵ FISA's warrant requirement is triggered only when governmental electronic surveillance "intentionally target[s]" a United States person, or the acquisition of protected communications "occurs in the United States," or both the

²⁶² Sims, *supra* note 32, at 127 n.69.

²⁶³ See *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 118 (2006) (statement of Alberto Gonzales, Att'y Gen. of the United States) [hereinafter *Wartime Executive Power*] ("As a general matter, if you're talking about non-U.S. persons outside the United States and, certainly, if the acquisition is outside the United States, you don't have to worry about FISA.").

²⁶⁴ See Sims, *supra* note 32, at 120 n.55 (citing 50 U.S.C. § 1801(f)(1) (2000 & Supp. IV 2004) (defining "electronic surveillance" as the acquisition of communications to or from "a particular, known United States person who is in the United States")) ("United States persons who are outside the United States were explicitly excluded from the reach of FISA."); Memorandum from Elizabeth B. Bazan & Jennifer K. Elsea, Congressional Research Serv., on Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information 20 (Jan. 5, 2006), available at <http://www.fas.org/sgp/crs/intel/m010506.pdf> ("The legislative history of [FISA] suggests that some electronic surveillance by the National Security Agency involving communications taking place entirely overseas, even involving U.S. persons, was not intended to be covered." (footnote omitted)).

²⁶⁵ See Sims, *supra* note 32, at 127 n.69 ("FISA requires a warrant before international electronic communications of United States persons within the United States are targeted. What is often overlooked is that a warrant is not required when those communications are acquired overseas through interception that targets someone else.").

sender and all intended recipients of the contents of any radio communication “are located within the United States.”²⁶⁶ Finally, if, as the government claims is true under the TSP, there is “a reasonable basis to conclude that one party to [a] communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda or working in support of al Qaeda,” FISA requires the judge to issue a warrant to monitor such communications.²⁶⁷

²⁶⁶ See 50 U.S.C. § 1801(f)(1)-(3) (2000 & Supp. IV 2004).

²⁶⁷ See *id.* § 1805 (2000 & Supp. IV 2004). The government has provided shifting explanations on whether the “reasonable basis” standard used in the TSP is the equivalent of the probable cause standard used in FISA or the Fourth Amendment. For example, on January 23, 2006, General Michael Hayden, the director of the NSA when the TSP began, suggested to reporters at the National Press Club that the TSP did not utilize a probable cause standard. See General Michael V. Hayden, Principal Deputy Dir. of Nat'l Intelligence, Address to the National Press Club, What American Intelligence and Especially the NSA Have Been Doing to Defend the Nation (Jan. 23, 2006), available at <http://www.fas.org/irp/news/2006/01/hayden012306.html>.

QUESTION: Just to clarify . . . what I've heard you say today and an earlier press conference, the change from going around the FISA law was to — one of them was to lower the standard from what they call for, which is basically probable cause to a reasonable basis

GEN. HAYDEN: You got most of it right. . . .

QUESTION: The question I was asking, though, was since you lowered the standard, doesn't that decrease the protections of the U.S. citizens? . . .

GEN. HAYDEN: I think you've accurately described the criteria under which this operates, and I think I at least tried to accurately describe a changed circumstance, threat to the nation, and why this approach — limited, focused — has been effective.

Id.

Later, however, Attorney General Gonzales told the Senate Judiciary Committee that the reasonable basis or reasonable grounds standard of the TSP is the same as probable cause. See *Wartime Executive Power*, *supra* note 263, at 99-100 (“The standard is a probable cause standard. . . . I think it is probable cause. But it is not probable cause as to guilt. . . . or probable cause as to a crime being committed. It is probable cause that a party to the communication is a member or agent of Al Qaeda [T]he standards are the same in terms of probable cause.”).

Attorney General Gonzales's comments are consistent with the written explanation given by Assistant Attorney General William E. Moschella to Congressman James Sensenbrenner, Jr., Chairman of the House Committee on the Judiciary. See Letter from William E. Moschella, Assistant Att'y Gen., U.S. Dep't of Justice, to The Honorable F. James Sensenbrenner, Jr., Chairman, H. Comm. on the Judiciary 7 (Mar. 24, 2006), available at <http://www.fas.org/irp/agency/doj/fisa/doj032406.pdf> (“The ‘reasonable grounds to believe’ standard [of the TSP] is a ‘probable cause’ standard of proof . . . and ‘probable cause’ is the standard employed under FISA for approving

E. *The Government's Need for Suspicionless Searches*

The foregoing discussion demonstrates that FISA facilitates the issuance of a warrant for electronic surveillance. Why then has the Bush Administration refused to comply with FISA? Professor John Cary Sims has proffered two possibilities: One, the probable cause test under the TSP “is easier to meet than the one that would be applied by the FISC.”²⁶⁸ Or, two, the government lacks the resources to prepare the many warrant applications that would be needed to comply with FISA, and the delays and risks associated with the FISA process are unacceptable.²⁶⁹ The second possibility, according to Sims, is not a valid basis for ignoring FISA because the Executive Branch “can exert substantial influence on the speed of the FISA process” through its own internal procedures and resource allocation decisions.²⁷⁰ Besides, if more attorneys or FISC judges are needed to process additional warrant applications, it is unimaginable that Congress would not provide the funding to handle the expanded workload.

The first explanation offered by Sims for the government's refusal to comply with FISA — a standard less stringent than FISA's probable cause test being used under the TSP — is more intriguing. He notes that if the number of United States persons being targeted under the TSP “has increased dramatically, that would strongly suggest that a lower standard of probable cause is being used.”²⁷¹ Also, if the TSP targets persons inside the United States “based on ambiguous contacts with suspected al Qaeda members,” Sims believes that the probable cause test being employed “is not as demanding as the one that would be applied by the FISC.”²⁷² Sims, however, has hesitated to offer a

applications for electronic surveillance.” (citing *Maryland v. Pringle*, 540 U.S. 366, 371 (2003))).

²⁶⁸ Sims, *supra* note 32, at 127.

²⁶⁹ *Id.* at 127.

²⁷⁰ *Id.* at 139.

²⁷¹ *Id.* at 138.

²⁷² *Id.* at 139. Professor Sims states that the facts in *Ybarra v. Illinois*, 444 U.S. 85 (1979), “may more closely resemble the circumstances of United States persons who have some contact with an al Qaeda adherent without manifesting membership in or allegiance to the group.” Sims, *supra* note 32, at 138-39. As Professor Sims explains, *Ybarra* held that a warrant to search a tavern and its bartender for drugs did not authorize a frisk of the patrons of the tavern who were present when the warrant was executed. I certainly agree with Professor Sims's implied conclusion that *Ybarra* rejects the notion that mere proximity to others suspected of criminal activity is sufficient proof of probable cause because every individual is “clothed with [their own] constitutional protection” under the Fourth Amendment. *Ybarra*, 444 U.S. at 91. An argument can be made, however, that *Maryland v. Pringle* has undercut much

definitive statement about the legality of the TSP because “[n]ot enough is publicly known about the [scope and mechanics of the] program to permit a full exploration of the constitutional assertions being made by the [Bush] Administration.”²⁷³

I share Sims’s judgment that it is likely that the TSP conducts searches that are inconsistent with FISA’s probable cause test. Searches authorized by the TSP that do not meet FISA’s probable cause standard undoubtedly violate the Fourth Amendment’s probable cause rule. In analyzing this point, it is important to recall that FISA’s probable cause test is not as strict as Title III’s or the Fourth Amendment’s probable cause standard. “While Title III requires a showing of probable cause that a proposed target has committed, is committing, or is about to commit a crime, FISA requires a showing of probable cause to believe that the target is a foreign power or an agent of a foreign power.”²⁷⁴ Where a United States person is involved, however, “an ‘agent of a foreign power’ is defined in terms of criminal activity.”²⁷⁵ But even when a United States person is suspected of engaging in clandestine intelligence activity, issuance of a FISA warrant does not require the same level of probable cause that is required for criminal cases. FISA defines clandestine intelligence activities as conduct that “may involve” or “involve[s]” violation of federal criminal statutes.²⁷⁶ By using such terms, “Congress clearly intended a lesser showing of probable cause for these activities than that applicable to ordinary criminal cases.”²⁷⁷

Although FISA calls for a lesser showing of probable cause, it still requires some showing of clandestine intelligence activity or knowing acts or plans for terrorism before Americans can be subjected to electronic surveillance. And that’s the rub. The NSA can monitor and intercept, without a FISA warrant, the overseas communications of a person in Afghanistan or Pakistan who it suspects is a terrorist. The government can also monitor the terrorist’s communications that come into or leave the United States. But if that terrorist calls or

of Ybarra’s logic. See, e.g., Tracey Maclin, *The Pringle Case’s New Notion of Probable Cause: An Assault on Di Re and the Fourth Amendment*, 2004 CATO SUP. CT. REV. 395 (arguing that logic and result in *Maryland v. Pringle*, 540 U.S. 366 (2003), conflicts with some of Court’s probable cause cases and weakens concept of individualized probable cause).

²⁷³ Sims, *supra* note 32, at 137.

²⁷⁴ Memo from Elizabeth B. Bazan & Jennifer K. Elsea, *supra* note 264, at 18.

²⁷⁵ *In re Sealed Case*, 310 F.3d 717, 738 (FISA Ct. Rev. 2002) (footnote omitted).

²⁷⁶ 50 U.S.C. § 1801(b)(2)(A)-(B) (2000 & Supp. IV 2004).

²⁷⁷ *In re Sealed Case*, 310 F.3d at 738.

emails someone in New York, can the government then target the future telephone calls and emails of that New Yorker? If the content of the communication between the terrorist and the New Yorker indicates that the New Yorker may be involved in clandestine intelligence activity or knowingly plotting sabotage or terrorism, a FISA warrant can be obtained to target the New Yorker's future communications. But what if the content of that communication is facially innocent? Officers at the NSA "might feel that the very fact that the suspected terrorist called the [New Yorker] raises suspicions about the [New Yorker], perhaps even strong ones."²⁷⁸ Several calls or emails between the terrorist and the New Yorker, "even if the contents of the communications appear innocent,"²⁷⁹ would be enough to satisfy FISA's probable cause standard that the New Yorker may be involved in activity that violates federal criminal law.²⁸⁰ But one or two innocuous communications between the terrorist and the New Yorker might not be enough to trigger targeting the future communications of the New Yorker.²⁸¹ Certainly, under a FISA-based approach, one or two innocuous communications would not justify electronic surveillance of other United States persons who are linked or "chained" to the New Yorker or someone else mentioned in the terrorist's communications.²⁸²

²⁷⁸ Sims, *supra* note 32, at 126.

²⁷⁹ *Id.*

²⁸⁰ *Cf. In re Sealed Case*, 310 F.3d at 738 (explaining that FISA's probable cause standard encompasses conduct that "may involve" clandestine intelligence activity because "these activities present the type of threats contemplated by the Supreme Court in *Keith*"). According to the court, *Keith* "recognized that the focus of security surveillance 'may be less precise than that directed against more conventional types of crime' even in the area of *domestic* threats to national security. Congress was aware of *Keith's* reasoning, and recognized that it applies *a fortiori* to foreign threats." *Id.* (citations omitted).

²⁸¹ Sims, *supra* note 32, at 126 (stating that one or two apparently innocuous communications between suspected terrorist and United States person "would probably not be enough to secure issuance of a FISA warrant").

²⁸² *Cf. Seymour M. Hersh, Listening In*, NEW YORKER, May 29, 2006, at 24, 24 (explaining how NSA maps calls from overseas locations to the United States triggering process known as "chaining," in which subsequent calls to and from the American number were monitored and linked"). The process worked, according to one high-level Bush Administration intelligence official, by taking "the first number out to two, three, or more levels of separation, and see if one of them comes back" — if, say, someone down the chain was also calling the original, suspect number. As the chain grew longer, more and more Americans inevitably were drawn in." *Id.* Under the chaining process, "tens of thousands of Americans had had their calls monitored in one way or the other." *Id.*; Risen & Lichtblau, *supra* note 174 (describing how, under TSP, officers at NSA began monitoring persons linked to al Qaeda figures,

The Bush Administration is apparently (and understandably) concerned that it obtains every communication coming from or entering the United States that is relevant to potential terrorism. The TSP “is based on the fear that some relevant communications may slip through the cracks, in a situation in which the government either cannot get a FISA warrant or is unwilling to do so.”²⁸³ But FISA bars electronic surveillance targeting United States persons unless some showing of clandestine intelligence activity or knowing planning for terrorism is made. And that, according to one defender of the TSP and former Bush Administration official, is “the real problem” with FISA — it “depend[s] on individualized suspicion — that searches and wiretaps must target a specific individual already believed to be involved in criminal activity.”²⁸⁴ Under this view, rather than complying with FISA, “searching for terrorists [should] depend on playing the probabilities, just as with roadblocks and airport screenings.”²⁸⁵ Or, as an exchange between Senator John Cornyn and Attorney General Gonzales illustrated, the TSP attempts to address a “gap” in FISA:

Isn't it true that the problem that this program has tried to address, the gap in FISA that it tries to address, is that, in order to get a warrant under FISA, the Government must have grounds to believe that the U.S. person it wishes to monitor is a foreign spy or terrorist? And even if a person is here on a student or tourist visa or no visa, the Government cannot get a warrant to find out whether they are a terrorist. It must already have reason to believe they are one The problem with FISA as written is that the surveillance it authorizes is unusable to discover who is a terrorist as distinct from eavesdropping on known terrorists.²⁸⁶

The TSP addresses this so-called “gap” in FISA by monitoring communications of United States persons to determine whether they

“creating an expanding chain”). “While most of the [telephone] numbers and [email] addresses were overseas, hundreds were in the United States. . . . Since 2002, the agency has been conducting some warrantless eavesdropping on people in the United States who are linked, even if indirectly, to suspected terrorists through the chain of phone numbers and e-mail addresses, according to several officials who know of the operation.” *Id.*

²⁸³ Sims, *supra* note 32, at 127.

²⁸⁴ Yoo, *supra* note 24, at 582 (footnote omitted).

²⁸⁵ *Id.*

²⁸⁶ *Wartime Executive Power*, *supra* note 263, at 118-19.

are working with or supporting terrorists. Put simply, the TSP conducts suspicionless searches to identify potential terrorists or their supporters within the nation's borders. Such searches, if that is what the TSP authorizes, not only conflict with FISA's restrictions, but also violate one of the few "absolutes in Fourth Amendment law"²⁸⁷ — namely, suspicionless and warrantless electronic surveillance of citizens' telephone and email communications within the nation's borders is unreasonable.

Alternatively, the Bush Administration has argued that the searches authorized by the TSP are consistent with the Fourth Amendment's special needs exception. To be sure, the Court's special needs cases have upheld suspicionless searches in a variety of settings and the NSA's ability to obtain foreign intelligence information is clearly a special need under the Court's precedents.²⁸⁸ The government insists that "[t]here is no basis for concluding that the Constitution [under the special needs exception] permits warrantless searches of high school students' lockers for drugs, but not warrantless searches of international communications with the enemy."²⁸⁹ Of course, the objectionable feature of the TSP is not "warrantless searches of international communications with the enemy."²⁹⁰ As noted, the NSA is free to monitor the overseas communications of al Qaeda members without judicial approval. The constitutional objection against the TSP is that it conducts warrantless (and apparently, suspicionless) searches of the private communications of Americans within the nation's borders.

The Bush Administration is surely correct that gathering foreign intelligence on terrorists and their supporters is an imperative governmental interest. However, the flaw in the government's special needs argument is the conclusion that the special needs exception allows warrantless searches whenever such searches promote important governmental interests. From its inception, the special needs exception has permitted suspicionless searches only where circumstances make the warrant requirement impracticable. "[T]he fact that FISA has been used successfully for almost thirty years

²⁸⁷ *Nat'l Treasury Employees Union v. von Raab*, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting).

²⁸⁸ *Cf. Chandler v. Miller*, 520 U.S. 305, 323 (1997) (noting that "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable' — for example, searches now routine at airports and at entrances to courts and other official buildings").

²⁸⁹ Brief of Appellants, *supra* note 24, at 37.

²⁹⁰ *Id.*

demonstrates that a warrant and probable cause regime is *not* impracticable for foreign intelligence surveillance.”²⁹¹ Until the government shows that FISA’s warrant process and watered-down probable cause standards make foreign intelligence gathering unworkable, the special needs exception cannot provide a constitutional foundation to support the TSP.

CONCLUSION

Two centuries ago, the Fourth Amendment was thought to guarantee that each citizen exercised sovereignty within his own home and enjoyed freedom from governmental intrusion within that space, unless the search or seizure was authorized by a specific warrant issued by a neutral magistrate. For some, the modern War on Terror requires a different balance when it comes to determining the meaning of the Fourth Amendment. The Bush Administration and those who support the TSP believe that the President and Executive Branch officials not only have the power to conduct warrantless electronic searches for foreign intelligence, but also the authority to decide when such surveillance is reasonable under the Fourth Amendment. Critics of the President’s program contend that the TSP violates the Fourth Amendment because it authorizes electronic surveillance of the communications of American citizens within the United States without prior judicial review.

In resolving this argument, it may be helpful to recall Justice Souter’s observation when the Bush Administration made a similar claim of Executive Branch authority to determine the liberty of an American citizen: “In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security.”²⁹² Under this view, the TSP violates the

²⁹¹ Cole, *supra* note 33, at 36; *see also* Bloom & Dunn, *supra* note 191, at 197-98 (arguing that special needs exception does not apply to TSP “because a practical warrant process exists to address the particular needs of this surveillance”). According to Bloom and Dunn, “[t]he explicit FISA emergency exception suggests that no ‘special needs’ exception would be applicable to electronic surveillance in nonconformance with those limits. . . . [W]ith a practical and obtainable warrant process, the justification for the surveillance based upon a ‘special needs’ exception would unduly expand the doctrine past its judicially constructed limits and divorce it from the exigency that supports dispensing with the traditional warrant requirement.” *Id.*

²⁹² *Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in judgment).

Fourth Amendment and is inconsistent with the holding and spirit of *Keith*, wherein Justice Powell noted:

The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.²⁹³

²⁹³ United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 317 (1972) (footnote and citation omitted).