

1985

Warrantless Physical Searches for Foreign Intelligence Purposes: Executive Order 12,333 and the Fourth Amendment

William F. Brown

Americo R. Cinquegrana

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

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 (1986).

Available at: <https://scholarship.law.edu/lawreview/vol35/iss1/6>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

ARTICLE

WARRANTLESS PHYSICAL SEARCHES FOR FOREIGN INTELLIGENCE PURPOSES: EXECUTIVE ORDER 12,333 AND THE FOURTH AMENDMENT*

*William F. Brown***
and Americo R. Cinquegrana†

TABLE OF CONTENTS

I. Introduction	98
II. The Use of Warrantless Physical Searches for Foreign Intelligence Purposes	101
III. The Constitutional Underpinnings of Warrantless Physical Searches	104
A. The Warrant Clause of the Fourth Amendment	107
1. The Judicial Development of the Exception for Foreign Intelligence Gathering	108
2. The Barker/Martinez and Truong/Humphrey Investigations	119
3. The Relationship Between Physical Searches and Electronic Surveillance.....	124
4. Judicial Tests for Allowing Exceptions to the Warrant Clause	128
B. The Parameters of the Exception for Foreign Intelligence Gathering	137
1. Approval by the President or the Attorney General ..	137
2. The Target Is a Foreign Power, Its Agents or Collaborators	140

* The views stated in this article are the authors' own and not necessarily those of the Justice Department.

** Associate with the law firm of Steptoe and Johnson in Washington, D.C. B.A., 1977, University of Wisconsin; J.D., 1980, Harvard University. At the time of the preparation of this article Mr. Brown was an Attorney Adviser in the Office of Intelligence Policy and Review, United States Department of Justice.

† Deputy Counsel for Intelligence Policy in the Office of Intelligence Policy and Review, United States Department of Justice. B.A., 1968, University of New Hampshire; J.D., 1973, University of Virginia.

3. The Primary Purpose Test	141
4. The Effect of These Restrictions.....	145
C. The Reasonableness Clause of the Fourth Amendment ...	148
IV. Executive Adherence to the Requirements of the Fourth Amendment.....	150
V. Congressional Action and Warrantless Physical Searches for Foreign Intelligence Purposes	154
A. The Foreign Intelligence Surveillance Act—Congress’ Intent	155
B. Section 2236 of Title 18, United States Code	166
C. The President’s Powers v. Congressional Authority: the “Zone of Twilight”	171
VI. Conclusion	173

I. INTRODUCTION

He knocked boldly, knowing that a soft knock is more conspicuous than a loud one. He heard the echo, and nothing else. He heard no footfall, no sudden freezing of a sound. He called “Vladimir” through the letter-box as though he were an old friend visiting. He tried one Yale from the bunch and it stuck, he tried another and it turned. He stepped inside and closed the door, waiting for something to hit him on the back of the head but preferring the thought of a broken skull to having his face shot off. He felt dizzy and realised he was holding his breath. . . .

The table drawer contained sheets of plain paper, a stapler, a chewed pencil, some elastic bands, and a recent quarterly telephone bill, unpaid, for the sum of seventy-eight pounds, which struck him as uncharacteristically high for Vladimir’s frugal life-style. He opened the stapler and found nothing. He put the phone bill in his pocket to study later and kept searching, knowing it was not a real search at all, that a real search would take three men several days before they could say with certainty they had found whatever was to be found. If he was looking for anything in particular, then it was probably an address book or a diary or something that did duty for one, even if it was only a scrap of paper. He knew that sometimes old spies, even the best of them, were a little like old lovers; as age crept up on them, they began to cheat, out of fear that their powers were deserting them. They pretended they had it all in the memory, but in secret they were hanging on to their virility, in secret they wrote things down, often in some homemade code, which, if they only knew it, could be unbuttoned in hours or minutes by anyone who knew the game. Names and addresses of contacts, sub-agents.

Nothing was holy. Routines, times and places of meetings, worknames, phone numbers, even safe combinations written out as social-security numbers and birthdays. In his time Smiley had seen entire networks put at risk that way because one agent no longer dared to trust his head. He didn't believe Vladimir would have done that, but there was always a first time.††

Such passages routinely appear in espionage novels—the furtive look, the quick entry, and the surreptitious search of an apartment or office where the tools of espionage are believed to be secreted. Rarely, if ever, do the authors relate these activities to the legal principles that are adhered to by this nation and its government. In the fantasy world, there are no rules, and anything goes. Reality is more complicated. The need is there, but it must be tempered with proper attention to legal standards and limitations. This article is intended to examine those principles as they apply to a particularly sensitive type of activity—a physical search to collect foreign intelligence information.

Executive Order 12,333¹ was promulgated by President Reagan on December 4, 1981, to provide for “the effective conduct of United States intelligence activities and the protection of constitutional rights.”² Section 2.5 of that Order delegates to the Attorney General

the power to approve the use for intelligence purposes, within the United States or against a United States person abroad, of any technique for which a warrant would be required if undertaken for law enforcement purposes, provided that such techniques shall not be undertaken unless the Attorney General has determined in each case that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power.³

One of the techniques encompassed by this delegation from the President is warrantless physical searches of real and personal property to obtain foreign intelligence or counterintelligence information as those terms are defined in the Order.⁴

†† J. LECARRE, *SMILEY'S PEOPLE* 80, 82-83 (1979).

1. Exec. Order No. 12,333, 3 C.F.R. 200 (1981 Comp.), *reprinted in* 50 U.S.C. § 401 (Supp. V 1981).

2. *Id.*, Preamble, 3 C.F.R. at 200-01.

3. *Id.* § 2.5, 3 C.F.R. at 212.

4. *See id.* §§ 2.4(a)-(c), 3 C.F.R. at 212. Executive Order No. 12,333 defines “foreign intelligence” to mean “information relating to the capabilities, intentions and activities of foreign powers, organizations or persons, but not including counterintelligence except for information on international terrorist activities.” *Id.* § 3.4(d), 3 C.F.R. at 215. The Order defines “counterintelligence” to mean “information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons, or international terrorist activities, but not

Executive Order 12,333 is not the first public presidential pronouncement of responsibilities, functions, and limitations relating to the intelligence agencies of the United States government, nor is section 2.5 the first embodiment of presidential authority or delegation to the Attorney General regarding warrantless physical searches. In 1976 President Ford issued Executive Order 11,905.⁵ Section 5(b)(3) of that order prohibited the intelligence agencies from conducting “[u]nconsented physical searches within the United States; or unconsented physical searches directed against United States persons abroad, except lawful searches under procedures approved by the Attorney General.”⁶

In 1978 President Carter issued Executive Order 12,036,⁷ superseding the Ford Order⁸ and subsequently revoked by President Reagan’s Order.⁹ The Carter Order forbade warrantless physical searches either conducted in the United States or directed against United States persons abroad “unless the President has authorized the type of activity involved and the Attorney General has both approved the particular activity and determined that there is probable cause to believe that the United States person is an agent of a foreign power.”¹⁰

This article describes the constitutional justification for these assertions of Executive authority, a matter that recently has been the subject of critical analysis¹¹ and will assume increasing significance if the Congress acts upon its expressed interest in legislative alternatives to the status quo.¹² After briefly describing the use of warrantless physical searches to gather foreign

including personnel, physical, document or communications security programs.” *Id.* § 3.4(a), 3 C.F.R. at 214. The courts have not distinguished between these two types of intelligence when discussing such operations and have used many terms to describe foreign intelligence gathering. *See generally infra* text accompanying notes 59-218. Except where specified, this article will use the term “foreign intelligence” to include “foreign intelligence” and “counter-intelligence” as those terms are defined in Executive Order 12,333.

5. Exec. Order No. 11,905, 3 C.F.R. 90 (1976 Comp.), *reprinted in* 50 U.S.C. § 401 (Supp. I 1977).

6. *Id.* § 5(b)(3), 3 C.F.R. at 100.

7. Exec. Order No. 12,036, 3 C.F.R. 112 (1978 Comp.), *reprinted in* 50 U.S.C. § 401 (Supp. III 1980).

8. *Id.* § 4-101, 3 C.F.R. at 132.

9. *See* Exec. Order No. 12,333, § 3.6, 3 C.F.R. 216 (1981 Comp.).

10. Exec. Order No. 12,036, §§ 2-201(b), 2-204, 3 C.F.R. 126 (1978 Comp.).

11. *See* Note, *Executive Order 12,333: An Assessment of the Validity of Warrantless National Security Searches*, 1983 DUKE L.J. 611 [hereinafter cited as the recent Note or Note].

12. *See, e.g.*, SENATE SELECT COMMITTEE ON INTELLIGENCE, THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978: THE FIRST FIVE YEARS, S. REP. NO. 660, 98th Cong., 2d Sess. 18-19 (1984) [hereinafter cited as FIVE-YEAR REPORT]; SENATE SELECT COMMITTEE ON INTELLIGENCE, IMPLEMENTATION OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978—1981-82, S. REP. NO. 691, 97th Cong., 2d Sess. 5-6 (1982).

intelligence,¹³ the article discusses the judicial development of a foreign intelligence exception to the warrant clause of the fourth amendment.¹⁴ It also explains why this exception satisfies the tests the Supreme Court has developed to determine whether and when warrantless activities of this nature are permissible.¹⁵ The parameters the Judiciary has established for the use of this exception are also explained,¹⁶ as are the elements relied upon by the Judiciary and the Executive to ensure that warrantless physical searches used to gather foreign intelligence meet the reasonableness requirements of the fourth amendment.¹⁷ The Executive's adherence to these requirements also is described.¹⁸ Finally, the purposes and provisions of certain statutes, including the Foreign Intelligence Surveillance Act of 1978 (FISA),¹⁹ are reviewed to demonstrate that Congress has not yet enacted restraints or regulations concerning this foreign intelligence collection technique.²⁰

II. THE USE OF WARRANTLESS PHYSICAL SEARCHES FOR FOREIGN INTELLIGENCE PURPOSES

The United States intelligence structure has grown immensely in size, stat-

13. See *infra* text accompanying notes 21-32.

14. See *infra* text accompanying notes 33-163.

15. See *infra* text accompanying notes 164-218.

16. See *infra* text accompanying notes 219-90.

17. See *infra* text accompanying notes 291-308.

18. See *infra* text accompanying notes 309-26.

19. Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. §§ 1801-1811 (1982)). For a general discussion of FISA and its validity, see Note, *The Foreign Intelligence Surveillance Act: Legislating a Judicial Role in National Security Surveillance*, 78 MICH. L. REV. 1116 (1980); see generally HOUSE PERMANENT COMM. ON INTELLIGENCE, FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, H.R. REP. NO. 1283, pt. I, 95th Cong., 2d Sess. (1978) [hereinafter cited as HOUSE FISA REPORT]; SENATE SELECT COMM. ON INTELLIGENCE, FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, S. REP. NO. 701, 95th Cong., 2d Sess. (1978) [hereinafter cited as SENATE FISA REPORT]; FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, CONFERENCE REPORT, H.R. REP. NO. 1720, 95th Cong., 2d Sess. (1978) [hereinafter cited as FISA CONFERENCE REPORT]; see also *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984), *aff'g* *United States v. Megahey*, 553 F. Supp. 1180 (E.D.N.Y. 1982); *In re Grand Jury Subpoena of Martin Flanagan*, 691 F.2d 116, 118 n.2 (2d Cir.), *rev'g*, 533 F. Supp. 957, 959-61 (E.D.N.Y. 1982); *United States v. Belfield*, 692 F.2d 141 (D.C. Cir. 1982); *United States v. Falvey*, 540 F. Supp. 1306 (E.D.N.Y. 1982); *In re A Commission To Take Evidence Pursuant to the Criminal Code of Canada and the United States Code and Federal Rules, in Conjunction with a Canadian Prosecution, Styled The Queen v. Kevork*, Misc. No. 15,837 (C.D. Cal., filed Aug. 5, 1985); *United States v. Kozibioukian*, No. CR 82-460 (CMB) (C.D. Cal., filed June 14, 1983).

20. See *infra* text accompanying notes 327-412. The recent Note concludes, by comparison, that there is no constitutional justification for a national security exemption to the fourth amendment's warrant requirement and, alternatively, that Congress has preempted any presidential prerogative that does exist by enacting FISA and through "other congressional proceedings." Note, *supra* note 11, at 613.

ure, and capabilities since 1929 when Secretary of State Henry L. Stimson angrily ordered the elimination of the nation's tiny, and only, code-breaking unit based upon the belief, expressed later, that: "Gentlemen do not read each other's mail."²¹ Subsequently, even Mr. Stimson recognized the naïveté of this idealistic sentiment in the modern, more dangerous world.²² The value of an effective intelligence capability and the cost of an inadequate one have been illustrated time and again during our history. For example, thousands of lives and the bulk of the Pacific fleet could have been saved if sufficient and coherent intelligence information had been available in time to allow our government to conclude that the Japanese diplomatic peace initiative of late 1941 was an elaborate ruse, intended to lull America into complacency prior to the crippling raid on Pearl Harbor.²³

Executive Order 12,333 states: "Timely and accurate information about the activities, capabilities, plans, and intentions of foreign powers, organizations, and persons and their agents, is essential to the national security of the United States."²⁴ These are not controversial or partisan principles. For example, the Carter Executive Order on intelligence activities proclaimed such information to be "essential to informed decision-making in the areas of national defense and foreign relations."²⁵ Furthermore, former Attorney General Benjamin R. Civiletti believed: "The collection and utilization of intelligence information are essential ingredients of foreign policy and national security, and the dramatic increase in international tensions emphasizes our country's crucial need for timely and accurate foreign intelligence."²⁶ A companion principle, also recognized by responsible officials regardless of ideology or political affiliation, is that the essential nature of this information does not provide a general license for its collection in a manner that would violate the laws of the United States.²⁷ As former Attorney General William French Smith stated:

Ours is a nation of laws because we recognize the dangers when even well-intentioned officials exercise power in secret. Even as the preservation of our national security requires effective intelligence gathering, the preservation of our national principles requires ac-

21. H. STIMSON & MCG. BUNDY, ON ACTIVE SERVICE IN PEACE AND WAR 188 (1947).

22. See D. KAHN, THE CODEBREAKERS 360 (1967).

23. See, e.g., G. PRANGE, D. GOLDSTEIN, & K. DILLON, AT DAWN WE SLEPT 326-28, 335-36, 353-69, 421 (1981).

24. Exec. Order No. 12,333, Preamble, 3 C.F.R. 200 (1981 Comp.).

25. Exec. Order No. 12,036, § 2-101, 3 C.F.R. 125 (1978 Comp.).

26. Civiletti, *Intelligence Gathering and the Law: Conflict or Compatibility?*, 48 *FORDHAM L. REV.* 882, 883 (1980).

27. See, e.g., Exec. Order No. 12,333, Preamble, §§ 2.1, 2.2, 2.5, 3 C.F.R. 200, 210-11, 212 (1981 Comp.); Exec. Order No. 12,036, § 2-101, 3 C.F.R. 125 (1978 Comp.).

countability and obedience to law in the exercise of governmental authority—especially when secrecy is necessary.²⁸

The executive branch has traditionally gathered foreign intelligence without the sanction of warrants. Warrantless electronic surveillance has been used by the Executive to collect intelligence information since at least the mid-1800's when electronic communications systems first came into general use.²⁹ Warrantless physical searches have been used for a much longer period of time, since surreptitious entries were an available intelligence-gathering technique long before the targets and means for electronic surveillance became available.³⁰ These tools are not useful in all circumstances, but they can often produce intelligence that cannot reasonably be obtained by other means, such as physical surveillance or undercover agents.

Use of electronic surveillance and physical searches has produced major intelligence successes. Electronic surveillance authorized under FISA, for example, allowed the United States to break up the Walker spy ring and to frustrate the plans of an international terrorist group, the Armenian Secret Army for the Liberation of Armenia, to construct and detonate an explosive device at an Air Canada facility in California.³¹ As for physical searches, the warrantless opening of packages entrusted to a courier by a North Vietnamese agent in the United States for delivery to North Vietnamese representatives in Paris revealed that a State Department employee was providing foreign agents with classified documents damaging to the United States' position in the delicate negotiations then underway.³²

While a clandestine physical search may be a productive, easily imple-

28. Address by Attorney General William French Smith, Los Angeles World Affairs Council, Los Angeles Hilton Hotel, Los Angeles, California (Dec. 18, 1981).

29. See Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1, 7 (1963) (citing *Berger v. New York*, 388 U.S. 41, 45-46 (1967)); REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE 33-34 (1976); *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1248-56 (1972); see also SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT: BOOK III, SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 755, 94th Cong., 2d Sess. 273-351 (1976). This Senate committee commonly was known as the "Church Committee" after its Chairman, Senator Frank Church of Idaho [hereinafter cited as CHURCH COMMITTEE FINAL REPORT].

30. See CHURCH COMMITTEE FINAL REPORT, *supra* note 29, at 355-71; CENTRAL INTELLIGENCE AGENCY BICENTENNIAL PUBLICATION, INTELLIGENCE IN THE WAR OF INDEPENDENCE 30 (1976).

31. See *Wiretap Upheld in Navy Spy Case*, N.Y. Times, Aug. 17, 1985, at 7, col. 1; Government's Memorandum of Law In Opposition to Defendants' Motion to Suppress, *United States v. Kozibioukian*, No. CR 82-460 (CBM) (C.D. Cal., filed Mar. 4, 1983).

32. See *United States v. Humphrey*, 456 F. Supp. 51, 60-65 (E.D. Va. 1978), *aff'd sub nom. United States v. Dinh Hung Truong*, 629 F.2d 908, 911-12 (4th Cir. 1980), *cert. denied*,

mented method of obtaining valuable intelligence, it is also highly intrusive. In addition, because of the necessary secrecy attaching to these activities, there is always a danger that the power to authorize surreptitious entries of real or personal property will be exercised too freely and abused. Recognizing these concerns, the executive, legislative and judicial branches each have acted in ways appropriate to their constitutional functions to ensure that the use of this intelligence-gathering technique is carefully controlled, and that proper attention is devoted to pertinent constitutional, statutory, and procedural limitations.

III. THE CONSTITUTIONAL UNDERPINNINGS OF WARRANTLESS PHYSICAL SEARCHES³³

Intelligence gathering is an inherent element of the constitutional responsibilities assigned to the Executive.³⁴ The Executive's use of warrantless physical searches to collect foreign intelligence may be critical in certain situations to fulfill presidential responsibilities to conduct the foreign affairs of

454 U.S. 1144 (1982). For a discussion of this seminal case, see *infra* text accompanying notes 142-63. See also *infra* note 413.

33. The recent Note uses the terms "intrusive surveillance" or "nonelectronic surveillance." See, e.g., Note, *supra* note 11, at 611-12. Such imprecision, however, often generates confusion between techniques regulated by the fourth amendment (physical searches, mail opening, electronic surveillance) and other techniques such as physical surveillance and mail "covers" that are almost never subject to the warrant requirement. See, e.g., Note, *Executive Order 12,333: Unleashing the CIA Violates the Leash Law*, 70 CORNELL L. REV. 968, 978 (1985). Because the subject of this article is physical searches, that term is used rather than the more ambiguous alternatives.

34. E.g., *United States v. Butenko*, 494 F.2d 593, 603 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 881 (1974); see *infra* text accompanying note 78. There are three possible sources for the President's power to authorize warrantless searches or surveillance to collect national security information: (a) inherent, extraconstitutional executive powers, i.e., powers so inextricably linked to the office that the President need not look to the Constitution as the source of authority; (b) power necessitated by powers expressly granted the President in the Constitution; and (c) powers granted by the Congress in legislation. See Note, *supra* note 11, at 613. As Part V of this article will demonstrate, (c) is not available as a source of authority for physical searches because Congress has not granted the President such power in this area. While it could be asserted that the Executive's authority regarding warrantless searches flows from (a), this would run afoul of the well-accepted holding in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), that all federal power is subject to the fundamental restrictions of the Bill of Rights. *Id.* at 320. See Note, *supra* note 11, at 614-15. Even if this approach were available, however, there would remain the basic question of whether there is a "national security exception" to the warrant clause of the fourth amendment. This article uses the term "inherent" in a manner that brings it under (b)—a necessary attribute of constitutionally delegated powers of the President. Currently, most commentators on presidential authority use the term inherent in this context. See *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981); Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 497 (1946); see also *Developments in the Law*, *supra* note 29, at 1257-60; *infra* notes 36-46 and accompanying text.

the nation and to safeguard its security against foreign aggression or other hostile acts.³⁵

It is well settled that the Chief Executive possesses certain inherent powers that derive from functions assigned to that office under the Constitution and are not dependent upon a specific grant of authority from Congress.³⁶ It also is well settled that the President's responsibility for the conduct of the foreign relations of the United States is a primary source of these inherent Executive powers.³⁷ Similarly, the Constitution provides the President broad, independent responsibilities to maintain and to conduct the nation's defense that give rise to additional inherent powers.³⁸

The structure of article II of the Constitution necessitates a doctrine of inherent executive authority. As Chief Justice Taft stated: "The executive power was given in general terms strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed"³⁹ More recently, Justice Rehnquist wrote: "Congress cannot anticipate and legislate with regard to every possi-

35. See *Totten v. United States*, 92 U.S. (2 Otto) 105 (1875); but see Note, *supra* note 11, at 613-18.

36. See, e.g., *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 890-91 (1961) (presidential authority as Commander in Chief is sound basis for Navy commander's firing of employee for failure to meet security requirements); *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 109 (1948) (dictum) (upholding CAB denial of an air route, the Court acknowledges the President's authority as Commander in Chief and organ of foreign affairs); *Curtiss-Wright*, 299 U.S. at 319-20 (bar on arms sales abroad is lawful based on the President's plenary power in foreign affairs and broad congressional delegations of discretion). See generally *In re Debs*, 158 U.S. 564 (1895) (federal power to regulate interstate commerce includes authority to forcibly remove obstructions to freedom of such commerce and transport of mail); *In re Neagle*, 135 U.S. 1, 63-67 (1890) (President's responsibility to see laws are faithfully executed serves as basis for appointing federal marshal to protect Supreme Court Justice); *supra* note 34. The recent Note acknowledges that the Executive has the authority to do what is reasonably appropriate and relevant to the exercise of powers granted in the Constitution. Note, *supra* note 11, at 615-16. While the recent Note adds that this authority is limited to appropriate means and ends in consonance with the rest of the Constitution, it does not discuss what the rest of the Constitution requires in this regard.

37. See, e.g., *United States v. Belmont*, 301 U.S. 324, 330 (1937) (terms of agreement recognizing Soviet government are within the President's foreign affairs power); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) (recognition of sovereign governments is part of the President's foreign affairs power and forms the basis for judicial treatment of seizure of hides by Mexican military as an act of state); see also *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) (expropriation of property by Cuban government would not be respected as an act of state where the executive branch, with primary foreign affairs authority, identifies no harm to United States foreign relations).

38. See, e.g., *McElroy*, 367 U.S. at 886; see also *New York Times Co. v. United States*, 403 U.S. 713, 727-30 (1971) (Stewart, J., concurring) (Executive has broad power to protect confidential information, but damage from disclosure of the Pentagon Papers not sufficient to support prior restraint of publication).

39. *Myers v. United States*, 272 U.S. 52, 118 (1926).

ble action the President may find it necessary to take or every possible situation in which he might act."⁴⁰

The inconsistencies that run through the cases discussing inherent Executive authority are apparent and have been subject to critical analysis.⁴¹ These inconsistencies are not surprising, however, given the relatively small number of occasions and fragmentary factual settings within which the courts have had the opportunity to speak on the subject of Executive authority in national security matters. In addition, expansive statements of presidential authority ordinarily appear in discussions of the President's power within the foreign affairs area, while more narrow and seemingly inconsistent statements usually accompany efforts to limit Executive application of these inherent authorities to wholly domestic matters.⁴² Flaws in the reasoning of these cases result from the application of the relevant principle to the facts before the courts and not from basic infirmities in the underlying principle—the doctrine of inherent Executive powers. The Supreme Court has repeatedly confirmed this by reciting the doctrine in the course of upholding various types of Executive actions, however imperfect the underlying analysis may have been.⁴³

It is well settled that implementation of inherent Executive powers is subject to constitutional constraints.⁴⁴ Similarly, Executive powers must be exercised in accordance with the statutorily expressed will of Congress when Congress has not attempted to deprive the President of explicitly assigned constitutional authority.⁴⁵ Nevertheless, the existence of inherent powers

40. *Dames & Moore*, 453 U.S. at 678 (upholding President Carter's order freeing Iranian assets from United States judicial proceedings as part of the Iranian hostages agreement).

41. See, e.g., *Zweibon v. Mitchell*, 516 F.2d 594, 621 (D.C. Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976) (warrantless electronic surveillance of domestic group with no ties to a foreign power is not lawful); Note, *supra* note 11, at 613-18.

42. Compare *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), with *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976); see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 157-84 (1978).

43. The most recent application of the doctrine of inherent Executive authority is *Dames & Moore*, 453 U.S. 654 (1981). The Court held that President Carter had the authority to suspend claims against Iran and its nationals that were pending in American courts, despite the absence of any explicit statutory grant of such authority. *Id.* at 675-88.

44. See, e.g., *Curtiss-Wright*, 299 U.S. at 304, 319; *Zweibon v. Mitchell*, 516 F.2d at 594.

45. See, e.g., *Dames & Moore*, 453 U.S. at 668-69; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952) (Korean War era seizure of private steel mills is a law-making function and is not within the President's constitutional authorities); *United States v. Butenko*, 494 F.2d 593, 611 (3d Cir.) (en banc) (Seitz, C.J., concurring and dissenting), cert. denied, 419 U.S. 881 (1974) (overhearing of defendant on warrantless foreign intelligence surveillance was lawful and did not violate fourth amendment). While a few members of the majority suggested the President might have acted in the absence of prior congressional action, *Youngstown Sheet & Tube* was not fundamentally a case where the President had authority that Congress precluded or regulated. Instead, it involved labor relations, an area traditionally

does not necessarily imply the existence of unlimited powers.⁴⁶

A. The Warrant Clause of the Fourth Amendment

The fourth amendment clearly applies to all searches by the federal government, including those conducted for foreign intelligence purposes.⁴⁷ The key issue, however, is whether the warrant clause of that amendment, as distinguished from the reasonableness clause, applies to foreign intelligence searches. The warrant clause is not applicable to all searches, and the courts have recognized several types of exceptions to the warrant requirement.⁴⁸ These generally recognized exceptions include, among others, searches incident to arrest,⁴⁹ "stop and frisk" searches,⁵⁰ automobile searches,⁵¹ searches

assigned to Congress, where the President may not have independent power to act and the Congress had refused to delegate such power to him. *See* Ramirez de Arellano v. Weinberger, 568 F. Supp. 1236, 1239 (D.D.C.) (Richey, J.), *aff'd on other grounds*, 724 F.2d 143 (D.C. Cir. 1983), *rev'd on other grounds*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc); *vacated and remanded*, 105 S. Ct. 2353 (1985) (mem.); *Atlee v. Laird*, 347 F. Supp. 689, 701-02 (E.D. Pa. 1972), *aff'd sub nom.* *Atlee v. Richardson*, 411 U.S. 911 (1973) (mem.).

46. L. TRIBE, *supra* note 42, at 182-83. One may argue that FISA requires a warrant for national security-related electronic surveillance, that Congress has not explicitly authorized the President to engage in warrantless physical searches for foreign intelligence purposes, and that Congress could not grant such authority in disregard of the fourth amendment. Each of these statements is true, but each is clearly beside the point. Congress did not purport to proscribe or regulate physical searches in FISA. Accordingly, the standards set forth in that Act have no direct consequence in adjudging the existence and extent of presidential powers in areas other than electronic surveillance. For a discussion of Congress' intent in enacting FISA, see *infra* text accompanying notes 332-65. Further, the fact that Congress has not explicitly authorized the President to engage in warrantless searches says nothing about the power of the President to act in the absence of congressional authorization. Similarly, whether congressional authorization of warrantless searches would be consistent with the fourth amendment has little to do with the issue of presidential constitutional authority in the absence of congressional action. FISA itself suggests that Congress may authorize certain types of warrantless searches if sufficiently stringent substantive and procedural protections attend such action. *See* 50 U.S.C. § 1802(a) (1982 & Supp. I 1983).

47. The fourth amendment provides:

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

U.S. CONST. amend. IV. *See* *United States v. Butenko*, 494 F.2d 593, 602-03 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 881 (1974). For a discussion of this important case, see *infra* notes 70-81 and accompanying text.

48. The recent Note suggests that the Supreme Court has interpreted the fourth amendment to bar warrantless searches, even if reasonable. Note, *supra* note 11, at 618-19 & n.42. Nevertheless the Note acknowledges that such searches may be permissible in exigent circumstances. *Id.* at 618, 620 & n.46. As we shall show, however, the judicially developed exceptions to the warrant clause have not been limited to exigencies. *See infra* notes 49-57 and accompanying text.

49. *See, e.g., United States v. Robinson*, 414 U.S. 218 (1973); *Cupp v. Murphy*, 412 U.S.

of people and objects entering⁵² and leaving⁵³ the country, searches of boats on navigable waters,⁵⁴ searches of closed containers in automobiles that have been lawfully stopped,⁵⁵ searches of airplanes,⁵⁶ and searches of the scene of a fire to avoid its spread or reignition.⁵⁷ All of these exceptions are premised, in one way or another, on the circumstances surrounding the particular type of search.

The issue then becomes not whether the fourth amendment requires a warrant for all searches, but whether there is a valid and recognized exception to the warrant clause for reasonable foreign intelligence searches. The executive branch has consistently taken the position that foreign intelligence searches do indeed constitute another exception to the warrant requirement. The courts as well consistently have upheld this position and have recognized such an exception in the context of electronic surveillance. This article will first discuss the cases on electronic surveillance and then demonstrate that there is no reasonable basis for excluding physical searches, as distinguished from electronic surveillance, from the scope of this exception.⁵⁸

1. *The Judicial Development of the Exception for Foreign Intelligence Gathering*

Judicial development of an exception to the warrant clause for foreign intelligence gathering occurred primarily during the 1970's as the courts assessed the growing use of electronic surveillance. The exception did not emerge fully developed. Instead, aspects of the doctrine were added incrementally as the Judiciary achieved a better understanding of the legitimate

291 (1973); *Chimel v. California*, 395 U.S. 752 (1969); *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967).

50. *Terry v. Ohio*, 392 U.S. 1 (1968).

51. *Michigan v. Long*, 463 U.S. 1032 (1983); *United States v. Ross*, 456 U.S. 838 (1982); *United States v. Carroll*, 267 U.S. 132 (1925). See *Katz*, *United States v. Ross: Evolving Standards for Warrantless Searches*, 74 J. CRIM. L. & CRIMINOLOGY 172 (1983).

52. *United States v. Ramsey*, 431 U.S. 606, 616 (1977); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

53. *United States v. Duncan*, 693 F.2d 971, 977-79 (9th Cir. 1982); *United States v. Ajlouny*, 629 F.2d 830, 833-34 (2d Cir. 1980), *cert. denied*, 449 U.S. 1111 (1982); see *California Bankers' Ass'n v. Schultz*, 516 U.S. 21, 63 (1974) (dictum).

54. *United States v. Villamonte-Marquez*, 462 U.S., 579 (1983).

55. *United States v. Ross*, 456 U.S. at 838; *Katz*, *supra* note 51, at 172.

56. *United States v. Nigro*, 727 F.2d 100, 104-06 (6th Cir. 1984) (en banc); *United States v. Rollins*, 699 F.2d 530, 534 (4th Cir. 1983).

57. *Michigan v. Tyler*, 436 U.S. 499 (1978); see also *Michigan v. Clifford*, 464 U.S. 287 (1984). For a discussion of *Clifford*, the most recent Supreme Court exposition on the interplay and differentiation between the warrant clause and the reasonableness clause of the fourth amendment, see *infra* notes 262-72 and accompanying text.

58. See *infra* text accompanying notes 164-218.

need to gather foreign intelligence and the potential impact of increasingly sophisticated surveillance technology on the public's privacy interests. A detailed examination of the cases that explained and developed the exception demonstrates that the Judiciary, by acknowledging the validity of warrantless foreign intelligence gathering in fairly precise circumstances, has created a reasonable balance between these unavoidably conflicting imperatives.

While the Supreme Court has never directly considered an exception to the warrant clause for foreign intelligence gathering, several lower courts have addressed this issue. The first appellate decision on this point was *United States v. Clay*,⁵⁹ which involved the prosecution of Muhammad Ali, then known as Cassius Clay, on charges of refusing to submit to the selective service. During Ali's first appeal of his conviction, the government revealed that five telephone conversations involving Ali had been "overheard" on FBI wiretaps targeted against persons other than Ali. The Supreme Court vacated the conviction and remanded the case for a determination of whether the conviction had been influenced by the wiretapping.⁶⁰ The district court conducted an *in camera* review of the FBI's surveillance logs and ordered disclosure to Ali of the records relating to four of the intercepted conversations. The court did not require disclosure of the fifth conversation, however, holding it to be the product of "a lawful surveillance by the FBI pursuant to the Attorney General's authorization of a wiretap for the purpose of gathering foreign intelligence."⁶¹

On appeal, the United States Court of Appeals for the Fifth Circuit upheld the district court's treatment of the surveillance, including the basis for its refusal to disclose a portion of the materials.⁶² The court of appeals believed that neither the Constitution nor any statute forbade warrantless intelligence gathering, and concluded: "No one would seriously doubt in this time of serious international insecurity and peril that there is an imperative necessity for obtaining foreign intelligence information"⁶³

59. 430 F.2d 165 (5th Cir. 1970), *rev'd on other grounds*, 403 U.S. 698 (1971).

60. *Giordano v. United States*, 394 U.S. 310 (1969) (*per curiam*), *vacating and remanding United States v. Clay*, 397 F.2d 901 (5th Cir. 1968).

61. *Clay*, 430 F.2d at 166.

62. *Id.* at 168-72.

63. *Id.* at 172. The court specifically ruled that warrantless electronic surveillance was not prohibited by § 605 of the Communications Act of 1934, 47 U.S.C. § 605 (1982). *Id.* This act provides criminal penalties for divulging the contents of a wire or radio communication. The executive branch has interpreted "divulgence" in a manner that does not preclude use of such information solely within the government. For a discussion of the Act and this interpretation, see Goldsmith, *supra* note 29, at 10-13; THE CHURCH COMMITTEE REPORT, *supra* note 29, at 278-79. See generally *Nardone v. United States*, 308 U.S. 338 (1939); *Butenko*, 494 F.2d at 598-602.

Clay ultimately was reversed on other grounds by the Supreme Court.⁶⁴ Nevertheless, *Clay*'s conclusions regarding the permissibility of warrantless electronic surveillance subsequently were reaffirmed by the Fifth Circuit as part of the prosecution of H. Rap Brown on firearms charges in *United States v. Brown*.⁶⁵ The district court had conducted an *in camera* inspection of three documents describing conversations that, like those in *Clay*, involved the defendant but were obtained in the course of electronic surveillance of other persons. The court's review led it to conclude that the intercepted conversations had no bearing on the government's case and had not tainted the evidence supporting the defendant's conviction. In addition, the court concluded that the surveillances in question, which were warrantless and had been conducted for the purpose of gathering foreign intelligence information, were lawful.⁶⁶

The Fifth Circuit affirmed this holding in an opinion written by Judge Griffin B. Bell—later to serve as Attorney General in the Carter administration.⁶⁷ The court concluded that warrantless electronic surveillance used to gather foreign intelligence information was a valid exercise of the President's inherent constitutional powers.⁶⁸ In a concurring opinion, Judge Irving Goldberg agreed that this surveillance was "legitimate" and not a "spurious use of national security as a cover" for improper warrantless surveillance.⁶⁹

64. *Clay*, 403 U.S. at 698 (failure to identify reason for denial of conscientious objector status).

65. *United States v. Brown*, 484 F.2d 418, 426 (5th Cir.), *cert. denied*, 415 U.S. 960 (1973).

66. *United States v. Brown*, 317 F. Supp. 531, 535-37 (E.D. La. 1970).

67. *Brown*, 484 F.2d at 426-27.

68. The opinion concisely stated its conclusion in this regard:

[B]ecause of the President's constitutional duty to act for the United States in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs, we reaffirm what we held in [*Clay*], that the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence. Restrictions upon the President's power which are appropriate in cases of domestic security become artificial in the context of the international sphere.

Id. at 426 (citations omitted).

69. *Id.* at 427. Judge Goldberg emphatically stated:

There can be no quibble or quarrel with the findings and conclusions that the wiretap under consideration here had its origin and complete implementation in the field of foreign intelligence. This Court and the able district judge have conducted inescapably independent reviews of the action of the then Attorney General in authorizing this warrantless electronic surveillance. All agree in the determination that the wiretap was indeed directly related to legitimate foreign intelligence gathering activities for national security purposes; and that it was, therefore, a legal wiretap and not within the ambit of *Alderman v. United States*. This case in no way involved the spurious use of national security as a cover for warrantless electronic surveillance of accused and potential criminal defendants, domestic radicals, or political dissenters;

In *United States v. Butenko*,⁷⁰ the government successfully prosecuted John Butenko, an American citizen, and Igor Ivanov, a Soviet national, for conspiracy to transmit information relating to the national defense of the United States to the Soviet Union, i.e., espionage. While the defendants' post-conviction appeals were pending, the government revealed that the defendants had been overheard in the course of electronic surveillance conducted by the government. The United States Supreme Court vacated the convictions and remanded the matter to the trial court to determine whether the protections afforded to the defendants by the fourth amendment had been violated and whether the convictions had been tainted by any such violations.⁷¹

On remand, the district court conducted an *in camera* review of materials relating to the surveillance. It concluded that part of the surveillance, although warrantless, was conducted for the purpose of gathering foreign intelligence information and represented a lawful exercise of the President's inherent powers to conduct foreign affairs and to act as Commander in Chief.⁷² At the same time, the government conceded that part of the surveillance of Ivanov had been unlawful.⁷³ Nevertheless, the district court concluded that these activities had not tainted Ivanov's conviction.⁷⁴

Subsequently, a panel of the United States Court of Appeals for the Third Circuit upheld the lower court's finding that the illegal surveillance had not tainted the conviction. However, it concluded that the foreign intelligence surveillance had violated section 605 of the Communications Act of 1934 and, therefore, was illegal.⁷⁵ The government petition for an en banc hearing of the panel decision was granted and, subsequently, the full court affirmed all the findings of the district court.⁷⁶

and the panel opinion narrowly barricades warrantless wiretaps within the confines of legitimate foreign intelligence surveillance.

Id. (citations omitted). For further discussion of Judge Goldberg's concurrence, see *infra* notes 293-95 and accompanying text.

70. 384 F.2d 554 (3d Cir. 1967), *vacated and remanded sub nom.* Alderman v. United States, 394 U.S. 165 (1969); *on remand*, United States v. Butenko, 318 F. Supp. 66 (D.N.J. 1970), United States v. Ivanov, 342 F. Supp. 928 (D.N.J. 1972), *aff'd*, United States v. Butenko, 494 F.2d 593 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 881 (1974).

71. *Alderman*, 394 U.S. at 186.

72. *Butenko*, 318 F. Supp. at 71-74.

73. *Ivanov*, 342 F. Supp. at 930. The reasons for the government's concession are not set forth, but it may be that the surveillances had not been expressly authorized by the President or the Attorney General. See *id.* at 931 n.3; see generally *infra* text accompanying notes 219-47.

74. *Ivanov*, 342 F. Supp. at 936-42.

75. *United States v. Butenko*, 494 F.2d at 597.

76. *Butenko*, 494 F.2d 593. The full court rejected the panel's holding on § 605 of the Communications Act. *Id.* at 598-602.

The court's final decision recognized the significance of the issues before it:

The disposition of this appeal, which requires us to consider the relationship between the federal government's need to accumulate information concerning activities within the United States of foreign powers and the people's right of privacy as embodied in statute and the Fourth Amendment, represents, in effect, part of the federal judiciary's attempt to strike a proper balance between these two compelling, albeit not easily reconciled, interests.⁷⁷

In its discussion, the Third Circuit acknowledged that the Constitution did not expressly authorize the President to conduct foreign intelligence activities, but it concluded that such authority could be "implied from his duty to conduct the nation's foreign affairs."⁷⁸ While the court did not indicate that the fourth amendment was inapplicable to such surveillance, it did question "the necessity for *prior* judicial authorization" of such surveillance.⁷⁹

In analyzing the warrant requirement, the court recognized that certain "salutary effects" follow from requiring prior judicial approval of electronic surveillance for foreign intelligence purposes.⁸⁰ It also recognized, however, that the continuous flow of information necessary to "the efficient operation of the Executive's foreign policy-making apparatus" was the type of "strong public interest" that had prompted courts to dispense with the warrant requirement in other contexts.⁸¹

77. *Id.* at 596.

78. *Id.* at 603.

79. *Id.* (emphasis in the original). The recent Note favorably cites Judge Gibbons' dissenting conclusion that a warrant should be required except where there are exigent circumstances or where courts may not lawfully issue a warrant. Note, *supra* note 11, at 625 n.87. Neither Judge Gibbons nor the recent Note, however, explain where the courts would draw the authority to grant warrants for searches to gather foreign intelligence rather than evidence of a crime. Surely the Judiciary, as well as Congress and the Executive, is constrained by the absence of authority for a proposed action. Similarly, these texts fail to address the exigency presented by the fact that, in the absence of the means to acquire such a warrant, the sole alternative to Executive action may be the irretrievable loss of essential foreign intelligence information and consequent harm to the national security. See *infra* notes 185-200 and accompanying text.

80. *Id.* at 605.

81. The Court stressed:

It would be unfortunate indeed if . . . the President must act illegally to perform his constitutional duties. Yet, if the President must act secretly and quickly to investigate an attempt by a foreign agent to obtain important intelligence information, such a result may follow under Judge Gibbons' analysis [in dissent]. Also, foreign intelligence gathering is a clandestine and highly unstructured activity, and the need for electronic surveillance often cannot be anticipated in advance. Certainly occasions arise when officers, acting under the President's authority, are seeking foreign intelligence information, where exigent circumstances would excuse a warrant. To demand that such officers be so sensitive to the nuances of complex situations that

In *United States v. Buck*,⁸² the district court had ruled that the contents of a government wiretap did not have to be disclosed to the defendant, charged with firearms violations, "because it was expressly authorized by the Attorney General and lawful for the purpose of gathering foreign intelligence."⁸³ Relying on *Butenko* and *Clay*, the United States Court of Appeals for the Ninth Circuit agreed that: "Foreign security wiretaps are a recognized exception to the general warrant requirement"⁸⁴

In addition to these appellate court decisions, five district court opinions have addressed the Executive's authority to conduct warrantless electronic surveillance to gather foreign intelligence. In *United States v. Hoffman*,⁸⁵ Judge John Lewis Smith, Jr., who later became Chief Judge of the United States Foreign Intelligence Surveillance Court established by FISA,⁸⁶ held that the government lawfully intercepted the defendant's conversations during a warrantless electronic surveillance "conducted for the purpose of gaining foreign intelligence information."⁸⁷ Further, in *United States v. Stone*⁸⁸ the United States District Court for the District of Columbia held that warrantless surveillance conducted for foreign intelligence purposes and ap-

they must interrupt their activities and rush to the nearest available magistrate to seek a warrant would seriously fetter the Executive in the performance of his foreign affairs duties.

In sum, we hold that, in the circumstances of this case, prior judicial authorization was not required since the district court found that the surveillances of Ivanov were "conducted and maintained solely for the purpose of gathering foreign intelligence information."

Id. (footnotes omitted); *but see id.* at 608-15 (Seitz, C.J., concurring and dissenting); *id.* at 626-41 (Gibbons, J., dissenting in part). The recent Note questions the validity of this holding because of the author's opinion that the court did not explain sufficiently how a warrant requirement would interfere with the flow of foreign intelligence information. Note, *supra* note 11, at 624 n.83. If the fourth amendment is applicable, runs the argument, there is no constitutionally recognized government interest in unreasonable searches and, therefore, nothing is lost by requiring a warrant. This stands logic on its head since the issue is whether the fourth amendment warrant requirement applies at all. One of the essential elements in making that determination is whether the governmental purpose would be frustrated, i.e., whether something would be lost by requiring a prior judicial warrant. *See infra* text accompanying notes 181-218.

82. 548 F.2d 871 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977).

83. *Id.* at 875.

84. *Id.*

85. 334 F. Supp. 504 (D.D.C. 1971).

86. 50 U.S.C. § 1803 (1982); *see infra* notes 212-14 and accompanying text.

87. *Hoffman*, 334 F. Supp. at 508. In addition to the five opinions discussed here, a sixth district court held, in an opinion subsequently reversed on other grounds, that "a warrant is not required for foreign intelligence electronic surveillances authorized by the President where the target of the surveillance is an agent of or acting in collaboration with a foreign power." *Jabara v. Kelley*, 476 F. Supp. 561, 576 (E.D. Mich. 1979), *rev'd on other grounds*, 691 F.2d 272 (6th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

88. 305 F. Supp. 75 (D.D.C. 1969).

proved by the Attorney General did not violate section 605 of the Federal Communications Act of 1934.⁸⁹ The *Stone* court also found that the surveillance had occurred prior to the Supreme Court's holding in *Katz v. United States*⁹⁰ and had been conducted in a manner consistent with the pre-*Katz* interpretation of the fourth amendment.⁹¹ The United States District Court for the Central District of California in *United States v. Smith*⁹² offered the opinion, albeit in dictum, that although warrantless electronic surveillance was unconstitutional "in the domestic situation," it would be constitutional "in the area of foreign affairs" because of "the President's long-recognized, inherent power with respect to foreign relations."⁹³

In addition, the United States District Court for the Eastern District of New York in both *United States v. Falvey*⁹⁴ and *United States v. Megahey*⁹⁵ considered the foreign intelligence exception to the warrant clause in conjunction with their holdings that FISA is constitutional. The district court in *Falvey* concluded that when the primary purpose of the surveillance is the acquisition of foreign intelligence information, the President's "exercise of Article II power to conduct foreign affairs is not constitutionally hamstrung by the need to obtain prior judicial approval before engaging in wiretapping," but the "search and seizure resulting from the surveillance must still be reasonable."⁹⁶ The district court in *Megahey* discussed the earlier cases that recognized the President's authority in this area⁹⁷ and concluded: "In light of this precedent, it is evident that there is a strong case for the recognition of a foreign intelligence exception to the warrant requirement under the fourth amendment."⁹⁸

The Supreme Court has never spoken directly to the subject of warrantless electronic surveillance or physical searches to gather foreign intelligence information. Nevertheless, Justice Byron White's brief concurrence in *Katz*⁹⁹ expressed the view that warrantless electronic surveillance for "national se-

89. *Id.* at 80-82.

90. *Katz v. United States*, which held for the first time that electronic surveillance is a "search" within the meaning of the fourth amendment. *Katz*, 389 U.S. 347 (1967). For further discussion of *Katz*, see *infra* notes 99-103, 220-21, 280-86, and accompanying text.

91. *Stone*, 305 F. Supp. at 79-80.

92. 321 F. Supp. 424 (C.D. Cal. 1971).

93. *Id.* at 426.

94. 540 F. Supp. 1306 (E.D.N.Y. 1982) (McLaughlin, J.).

95. 553 F. Supp. 1180 (E.D.N.Y. 1982) (Sifton, J.), *aff'd sub nom.* *United States v. Dugan*, 743 F.2d 59 (2d Cir. 1984).

96. *Falvey*, 540 F. Supp. at 1311-12 (footnote omitted).

97. See *Megahey*, 553 F. Supp. at 1186-88.

98. *Id.* at 1188.

99. *Katz*, 389 U.S. at 362-64 (White, J., concurring). For further discussion of Justice White's statements in *Katz*, see *infra* notes 220-21 and accompanying text.

curity” purposes would be reasonable under the fourth amendment if the President or the Attorney General had authorized the surveillance for that purpose.¹⁰⁰ Justice William O. Douglas, in a concurrence joined by Justice William P. Brennan, strenuously objected.¹⁰¹ Justice Douglas viewed Justice White’s statements “as a wholly unwarranted green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels ‘national security’ matters.”¹⁰² Subsequently, as part of the remand of the *Clay* case discussed earlier,¹⁰³ Justice Potter Stewart acknowledged this dispute among these three Justices¹⁰⁴ and commented that “the issue remains open.”¹⁰⁵ Justice Stewart also noted that the Solicitor General had, “mystifyingly, sought to concede that the surveillances in [*Butenko* and *Ivanov*] were in fact unconstitutional, although he was repeatedly invited to argue that they were not.”¹⁰⁶ He then noted that “the Court declined to accept the Solicitor General’s proffered concession.”¹⁰⁷

Other Supreme Court decisions are helpful in an indirect sense to understand the context of the foreign intelligence exception. The government indictment in 1969 of several individuals for destruction of government property eventually led the Court to define more clearly the outer perimeter of this exception to the warrant requirement. One defendant’s telephone conversations had been overheard on wiretaps of other defendants that had been instituted without a warrant and approved by Attorney General John N. Mitchell on national security grounds. Judge Damon J. Keith of the United States District Court for the Eastern District of Michigan held that the surveillances were illegal and ordered the surveillance materials disclosed to the defense.¹⁰⁸ The government sought a writ of mandamus, but the United States Court of Appeals for the Sixth Circuit affirmed Judge Keith’s holdings.¹⁰⁹

The government again appealed and, in what has come to be known as the *Keith* decision,¹¹⁰ the Supreme Court considered “the delicate question of

100. *Katz*, 389 U.S. at 364.

101. *Id.* at 359-60 (Douglas, J., concurring). For further discussion of this opinion, see *infra* notes 280-86 and accompanying text.

102. *Katz*, 389 U.S. at 359.

103. See *supra* note 60 and accompanying text.

104. *Giordano v. United States*, 394 U.S. 310, 313-15 (1969) (Stewart, J., concurring).

105. *Id.* at 315.

106. *Id.* at 313-14 n.1 (emphasis in the original).

107. *Id.* at 314 n.1.

108. *United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971).

109. *United States v. United States District Court*, 444 F.2d 651 (6th Cir. 1971).

110. *United States v. United States District Court*, 407 U.S. 297 (1972) [hereinafter cited as *Keith*].

the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval."¹¹¹ The Court noted that resolution of the question required "sensitivity both to the government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion."¹¹² The Court posited the following two-part test to determine which interest would be paramount:

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.¹¹³

Applying this test to domestic security investigations, the Court concluded that in this context "an appropriate prior warrant" must be obtained to authorize governmental electronic surveillance.¹¹⁴

Keith acknowledged that many factors differentiate domestic security surveillances from those of "ordinary crime."¹¹⁵ Significantly, the Court also noted that its decision was limited to domestic security situations and did not reach surveillances for foreign intelligence purposes.¹¹⁶

111. *Id.* at 299.

112. *Id.*

113. *Id.* at 315.

114. *Id.* at 320. The recent Note seizes upon the failure of *Keith* to provide definitions or guidelines as to what constitutes "domestic" or "international" organizations and observes, in contradiction of the *Keith* holding itself, that such a distinction may be constitutionally irrelevant. Note, *supra* note 11, at 623. Congress apparently did not agree with this assertion when it provided different approval standards in FISA depending upon whether the surveillance is directed against domestic groups or against foreign powers. Compare 50 U.S.C. §§ 1801(a), 1801(b)(1) (1982) with 50 U.S.C. § 1801(b)(2) (1982); see *Megahey*, 553 F. Supp. at 1198-1200. The recent Note also points to the absence of a definition for the term "agent of a foreign power" in Executive Order No. 12,333 as evidence of a "problem" in drawing these distinctions. Note, *supra* note 11, at 623 n.73. The fact that FISA includes detailed definitions of this and other relevant terms in 50 U.S.C. § 1801 (1982), demonstrates that the Executive, Congress, and the Judiciary are able to develop meaningful distinctions in this area as necessary. See *infra* notes 319-21.

115. 407 U.S. at 322; see *infra* notes 201-02 and accompanying text.

116. 407 U.S. at 308-09, 321-22; see also *Giordano*, 394 U.S. at 313-15 (Stewart, J., concurring); *Katz*, 389 U.S. at 358 n.23; *id.* at 363-64 (White, J., concurring). The recent Note claims that both the Supreme Court in *Katz* and Congress, in enacting title III of the Omnibus Crime Control and Safe Streets Act one year later, expressly reserved their positions on the question of warrantless national security surveillances. Note, *supra* note 11, at 622. This is a two-edged proposition, however, since it indicates that both the Court and Congress clearly were aware of these Executive activities and either declined to comment or acquiesced in the status quo.

The recent Note also speculates, without further explanation, that the Supreme Court's res-

The most extensive and critical judicial analysis of the Executive's use of warrantless electronic surveillance for foreign intelligence purposes is contained in *Zweibon v. Mitchell*.¹¹⁷ In that case, members of the Jewish Defense League (JDL) sought damages for warrantless electronic surveillance by the government of their telephone conversations. The plaintiffs had no connection to any foreign power, but the JDL had been involved in demonstrations and violence directed at the diplomatic establishments of the Soviet Union and several Arab countries.¹¹⁸ The United States District Court for the District of Columbia concluded that the activities of the JDL were a clear threat to this country's foreign relations.¹¹⁹ Accordingly, because the court found the warrantless surveillances both reasonable and within the scope of the Executive's inherent power to conduct foreign relations, it concluded the surveillances were lawful under the fourth amendment.¹²⁰

On appeal, the United States Court of Appeals for the District of Columbia Circuit systematically examined the validity of all warrantless electronic surveillance.¹²¹ The plurality opinion in *Zweibon* extensively discussed the question of warrantless surveillances and, rejecting the holdings of *Butenko*, *Brown*, and *Clay*, suggested in dictum that there should be no exception to the warrant requirement, even for presidentially authorized foreign intelligence surveillances.¹²² The court was sharply divided, however, and a majority agreed only to hold, consistent with the Supreme Court's finding in *Keith*, that "a warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration with a foreign power," even if the surveillance was conducted "under presidential directive in the name of foreign intelligence gathering for protection

ervation of this issue in *Katz* "might imply" that any national security exception is limited to electronic surveillance to the exclusion of physical searches. Note, *supra* note 11, at 629. It also claims as more probable, however, that the "national intelligence network has traditionally relied much more heavily on electronic surveillance than on other types of searches." *Id.* (citing J. BAMFORD, *THE PUZZLE PALACE: A REPORT ON AMERICA'S MOST SECRET AGENCY* (1982)). No empirical or logical basis is presented for this statement, and it seems more appropriate to conclude that the Court did not refer to searches for the same reason it did not provide a holding on the national security exception—the issue was not present in the case. In any event, the Note does recognize that no principled distinction can be drawn, in fourth amendment terms, between electronic surveillance and physical searches. Note, *supra* note 11, at 629; see *infra* text accompanying notes 164-80.

117. 363 F. Supp. 936 (D.D.C. 1973), *rev'd*, 516 F.2d 594 (D.C. Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976).

118. *Zweibon*, 363 F. Supp. at 938-42, *rev'd*, 516 F.2d at 608-11.

119. *Zweibon*, 363 F. Supp. at 943-44.

120. *Id.* at 944.

121. *Zwiebon*, 516 F.2d at 611-73.

122. *Id.* at 651.

of the national security.”¹²³

In *United States v. Ajlouny*,¹²⁴ the United States District Court for the Eastern District of New York also considered the exception to the warrant clause for foreign intelligence gathering. A jury had found Ajlouny guilty of transporting stolen property in foreign commerce.¹²⁵ Prior to trial the government had informed the court that some of Ajlouny’s telephone conversations had been “overheard by the FBI ‘during the course of foreign intelligence national security electronic surveillances.’”¹²⁶ The trial court reviewed the surveillance records *in camera* and found that they had no bearing on the charges facing Ajlouny. The court also found the surveillance lawful because the Attorney General had approved it “to monitor what the court finds were persons, agencies and matters involving *foreign intelligence of legitimate concern to the national security.*”¹²⁷

On appeal, Ajlouny contended that the wiretapping violated his fourth amendment rights.¹²⁸ The United States Court of Appeals for the Second Circuit concluded that it did not have to decide whether warrantless foreign intelligence surveillance was lawful. It reasoned that the defendant would argue for exclusion of the evidence if the surveillance was unlawful, but the court did not believe the exclusionary rule should be applied in this case.¹²⁹ The Second Circuit explained that the Supreme Court had determined “that where ‘law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law,’ the imperative of judicial integrity is not offended by permitting unlawfully obtained evidence to be introduced at trial.”¹³⁰

The court then analyzed the surveillance of Ajlouny. It noted that no federal statute or Second Circuit decision required a warrant for foreign intelligence surveillance and that the “preponderant” view of other circuits was that warrantless surveillance of this type was proper. “In short, this is

123. *Id.* at 614. The recent Note cites *Zweibon* as evidence that the lower courts are divided on the question of whether there is a national security exception to the warrant requirement. Note, *supra* note 11, at 620 n.49. It later acknowledges, however, that even the *Zweibon* plurality opinion did not rule out warrantless surveillance of foreign powers, their agents, or collaborators. *Id.* at 625-26.

124. 476 F. Supp. 995 (E.D.N.Y. 1979), *aff’d*, 629 F.2d 830 (2d Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981).

125. *Ajlouny*, 629 F.2d at 832-33; see 18 U.S.C. § 2314 (1982).

126. *Ajlouny*, 629 F.2d at 838; *Ajlouny*, 476 F. Supp. at 999 n.2.

127. *Ajlouny*, 476 F. Supp. at 999 n.2 (emphasis in original) (citations omitted).

128. *Ajlouny*, 629 F.2d at 837.

129. *Id.* at 839-40.

130. *Id.* at 840 (citing *Stone v. Powell*, 428 U.S. 465, 485 n.23 (1976); *United States v. Peltier*, 422 U.S. 531, 537-38 (1975); *United States v. Reda*, 563 F.2d 510, 511-12 (2d Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 973 (1978)).

not a case where the government agents who initiated the surveillance of the defendant could be charged with knowledge that their conduct was improper.”¹³¹

The Second Circuit then concluded that the requirements of FISA, which had been enacted after the surveillances in question, substantially reduced the importance of deciding whether the Constitution independently requires a warrant for foreign intelligence electronic surveillance. Consequently, the court declined to rule on the constitutionality of warrantless foreign intelligence surveillance.¹³²

The enactment of FISA has diminished the practical significance of these decisions permitting the Executive to conduct warrantless electronic surveillance to gather foreign intelligence in the United States. Despite FISA, however, these cases, when taken together, provide a rational and cohesive analysis of the legal principles underlying the exception to the warrant clause for foreign intelligence gathering and the parameters of that exception. Before addressing these principles,¹³³ it is important to discuss the two cases that applied this analysis to physical searches for foreign intelligence purposes.

2. *The Barker/Martinez and Truong/Humphrey Investigations*

The exception to the warrant clause for foreign intelligence gathering has been applied to physical searches in two cases. In the first, a badly divided panel of the Court of Appeals for the District of Columbia Circuit reversed the convictions of Bernard Barker and Eugenio Martinez, who were convicted of conspiracy to violate the civil rights of Daniel Ellsberg’s psychiatrist by breaking into his office.¹³⁴ Barker and Martinez argued that their convictions should be reversed because they believed that their actions were properly authorized and, therefore, lawful. Two judges on the panel voted to reverse the convictions, but they were unable to agree on the reasoning for reversal. One judge, Malcolm R. Wilkey, argued, in part, that because warrantless foreign intelligence-gathering activities were reasonable under some circumstances, Barker and Martinez could have reasonably believed the statements of E. Howard Hunt that the search was lawful.¹³⁵ Judge Wilkey emphasized that the Justice Department had long acknowledged that it could identify no “constitutional difference” between wiretapping and

131. *Ajlouny*, 629 F.2d at 841.

132. *Id.* at 842.

133. See *infra* text accompanying notes 219-308.

134. *United States v. Barker*, 546 F.2d 940 (D.C. Cir. 1976). For discussion of this case, see *infra* notes 225-38, 248-51, and accompanying text. See also *infra* note 413.

135. *Barker*, 546 F.2d at 949-54.

“physical entries into private premises,” and that warrantless physical searches were permissible “under the proper circumstances when related to foreign espionage or intelligence.”¹³⁶

District Judge Robert R. Merhige, sitting by designation, also voted to reverse but on different grounds.¹³⁷ Judge Merhige declined to concur in the Attorney General’s position that there was a “national security” exception permitting warrantless intrusions into a citizen’s home or office because that issue was not before the court.¹³⁸ Circuit Judge Harold Leventhal dissented,¹³⁹ in part because Barker and Martinez had not asserted a belief that either the President or the Attorney General had personally authorized the search.¹⁴⁰ Such approval is widely recognized as one of the essential prerequisites for a lawful warrantless physical search to collect foreign intelligence.¹⁴¹

By far the most significant judicial statement regarding warrantless physical searches for foreign intelligence purposes arose out of the national security investigation that resulted in the conviction of Ronald Humphrey and Truong Dinh Hung in *United States v. Humphrey*.¹⁴² Truong was a Vietnamese citizen living in the United States.¹⁴³ In 1976 he persuaded another Vietnamese-American to carry packages of documents to representatives of the North Vietnamese government who were in Paris negotiating with American representatives.¹⁴⁴ Unbeknownst to Truong, his courier was also a CIA and FBI informant.¹⁴⁵ President Carter and Attorney General Bell authorized warrantless physical searches of the sealed packages and envelopes Truong had entrusted to the courier.¹⁴⁶ The three searches conducted under that authority revealed that the packages taken to Paris contained diplomatic cables and other classified United States government

136. *Id.* at 950 (quoting Memorandum for the United States as Amicus Curiae 2 (footnote and citation omitted)); see *infra* note 171 and accompanying text. Barker and Martinez made similar arguments when they sought to withdraw their pleas of guilty to the Watergate break-in. See *Barker*, 514 F.2d 208 (D.C. Cir.) (en banc), *cert. denied*, 421 U.S. 1013 (1975). A majority of the court affirmed the district court’s refusal to permit withdrawal of the pleas, but Judge Wilkey dissented, raising arguments similar to those discussed here. See *Barker*, 514 F.2d at 268-70.

137. *Barker*, 546 F.2d at 954-57.

138. *Id.* at 957 n.6.

139. *Id.* at 957-73.

140. *Id.* at 961-63.

141. See *infra* text accompanying notes 219-90.

142. *United States v. Humphrey*, 456 F. Supp. 51 (E.D. Va. 1978), *aff’d sub nom. United States v. Truong*, 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982).

143. *Truong*, 629 F.2d at 911.

144. *Id.* at 911-12.

145. *Id.* at 912.

146. *Id.* at 917 n.8; *Humphrey*, 456 F. Supp. at 62-63.

papers.¹⁴⁷ The government began an extensive investigation to determine the source of the documents, and Attorney General Bell authorized a wire-tap of Truong's telephone and microphone surveillance of his apartment.¹⁴⁸ The investigation eventually focused on Humphrey, an employee of the United States Information Agency, and President Carter authorized the clandestine installation of closed-circuit television equipment in Humphrey's government office.¹⁴⁹ Truong and Humphrey were eventually tried for espionage.¹⁵⁰

Truong and Humphrey moved to suppress the evidence the government had obtained through warrantless means, but the United States District Court for the Eastern District of Virginia concluded that when the government began electronic surveillance of the defendants it did so "for the primary, or even sole, purpose of foreign intelligence gathering."¹⁵¹ On this basis, the court adopted the reasoning of *Brown* and *Butenko* and concluded that there is an exception to the warrant requirement for properly approved surveillances conducted for the primary purpose of gathering foreign intelligence information.¹⁵² Applying this test, the court ruled that most of the electronic surveillance was lawful but that a portion of the surveillance should be suppressed because it had been conducted after the focus of the investigation had shifted from intelligence gathering to criminal prosecution.¹⁵³

The court also relied upon the foreign intelligence-gathering exception to the warrant requirement in assessing the validity of the warrantless physical searches that had been authorized by President Carter.¹⁵⁴ Although two of

147. *Truong*, 629 F.2d at 911-12.

148. *Truong*, 629 F.2d at 912.

149. *Id.* at 917 n.7; *Humphrey*, 456 F. Supp. at 59. The complex issues raised by electronic visual surveillance are beyond the scope of this article. See generally *United States v. Torres*, 583 F. Supp. 86 (N.D. Ill. 1984), *reversed and remanded*, 751 F.2d 875 (7th Cir. 1984); *In re An Application of the United States for an Order Authorizing Interception of Oral Communications and Videotape Surveillance*, 513 F. Supp. 421 (D. Mass. 1980) (Keeton, J.); *People v. Teichner*, 52 N.Y.2d 638, 422 N.E.2d 506 (1981), *aff'g* 90 Misc. 2d 638, 395 N.Y.S.2d 587 (Sup. Ct. 1977); Note, *Electronic Visual Surveillance and the Right of Privacy: When Is Electronic Observation Reasonable?*, 35 WASH. & LEE L. REV. 1043 (1978); Note, *Electronic Surveillance and the Fourth Amendment: The Arrival of Big Brother?*, 3 HASTINGS CONST. L.Q. 261 (1976). In any event, the enactment of FISA, which authorizes and requires judicial approval for the use of electronic visual surveillance for foreign intelligence purposes, moots the question of whether a warrant should be required for electronic visual surveillance in the United States to gather foreign intelligence. See 50 U.S.C. § 1801(f)(4) (1982).

150. *Truong*, 629 F.2d at 911.

151. *Humphrey*, 456 F. Supp. at 58.

152. *Id.* at 55-59; see also *infra* note 413.

153. *Id.* at 58-59.

154. *Id.* at 62-63.

the searches were deemed valid, the fruits of the third physical search were suppressed on the same ground that had been applied to suppress a portion of the warrantless electronic surveillance.¹⁵⁵ Because the primary purpose of the investigation had shifted from foreign intelligence collection to gathering criminal evidence, the foreign intelligence exception to the warrant requirement could not be applied to legitimate the third warrantless search.¹⁵⁶ Thus, the admissibility of the fruits of these warrantless searches was determined by applying the same analytical framework that had been applied to determine the admissibility of information acquired through the warrantless electronic surveillance.¹⁵⁷

Both Truong and Humphrey subsequently were convicted of espionage in a jury trial. On appeal, the United States Court of Appeals for the Fourth Circuit agreed with the district court "that the Executive Branch need not always obtain a warrant for foreign intelligence surveillance," at least where the Executive's primary purpose is to gather foreign intelligence.¹⁵⁸ The circuit court's explanation of the basis for this conclusion was particularly cogent, and elaborated on the differences between the Executive and the Judiciary that militate against requiring a prior judicial warrant.¹⁵⁹ Based

155. *Id.* at 63; see *infra* text accompanying notes 253-75.

156. 456 F. Supp. at 63.

157. *Id.* at 59.

158. *Truong*, 629 F.2d at 913-15.

159. The court explained:

For several reasons, the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following *Keith*, "unduly frustrate" the President in carrying out his foreign affairs responsibilities. First of all, attempts to counter foreign threats to the national security require the utmost stealth, speed, and secrecy. A warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive operations.

More importantly, the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance. The executive branch, containing the State Department, the intelligence agencies, and the military, is constantly aware of the nation's security needs and the magnitude of external threats posed by a panoply of foreign nations and organizations. On the other hand, while the courts possess expertise in making the probable cause determination involved in surveillance of suspected criminals, 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. Few, if any, district courts would be truly competent to judge the importance of particular information to the security of the United States or the "probable cause" to demonstrate that the government in fact needs to recover that information from one particular source.

Perhaps most crucially, the executive branch not only has superior expertise in the

on this reasoning, the appeals court upheld the district court's findings regarding both the warrantless electronic surveillance and the warrantless physical searches.¹⁶⁰

In a related case,¹⁶¹ *Chagnon v. Bell*, the United States Court of Appeals for the District of Columbia Circuit concluded that the Attorney General and other federal defendants enjoyed good faith immunity from claims for damages brought by individuals who had been overheard in the course of the *Truong* surveillances. As part of its analysis, the court indicated that *Zweibon* did not represent a judicial holding that there is no foreign intelligence exception to the warrant requirement.¹⁶² The court also observed: "Just as the Attorney General could have found no authoritative judicial or presidential statement proscribing warrantless wiretaps such as the *Truong* surveillance, any search for definitive legislative guidance would have been futile."¹⁶³

area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs. The President and his deputies are charged by the constitution with the conduct of the foreign policy of the United States in times of war and peace. Just as the separation of powers in *Keith* forced the executive to recognize a judicial role when the President conducts domestic security surveillance, so the separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance.

In sum, because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance.

Id. at 913-14 (footnotes and citations omitted); *but see* Note, *Foreign Security Surveillance and the Fourth Amendment*, 87 HARV. L. REV. 976, 980-94 (1974); *Developments in the Law*, *supra* note 29, at 1268-70. The recent Note briefly refers to the *Truong* opinion and describes the criteria relied upon there to sustain the warrantless searches conducted in that investigation as proof that prior judicial review is required. Note, *supra* note 11, at 624 n.81. While the courts ultimately determine whether these criteria have been satisfied, there is no indication in *Truong* that the court contemplated any "prior" judicial determination tantamount to a warrant that would dispense with the issue of inherent Executive authority. Rather, the courts have been content to review Executive efforts to satisfy judicial criteria in this area after the fact. *See, e.g., Truong*, 629 F.2d at 914-15; *Butenko*, 494 F.2d at 604-05; *Humphrey*, 456 F. Supp. at 57.

160. *Truong*, 629 F.2d at 915-17 & n.8. The enactment of FISA provides the Executive with a procedure to obtain prior judicial authorization for electronic surveillance in the United States to gather foreign intelligence, and the Executive is no longer required to rely upon the principles stated in *Truong* when conducting electronic surveillance for foreign intelligence purposes.

161. *Chagnon v. Bell*, 468 F. Supp. 927 (D.D.C. 1979), *aff'd*, 642 F.2d 1248 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 911 (1981).

162. *Chagnon*, 642 F.2d at 1259.

163. *Id.* at 1260; *see generally* *Mitchell v. Forsyth*, 105 S. Ct. 2806 (1985) (most recent Supreme Court discussion of the distinctions between domestic security and foreign intelligence investigations, the degree of immunity available to the Attorney General in national security-related matters, and the state of the law concerning these subjects in the early 1970s).

3. *The Relationship Between Physical Searches and Electronic Surveillance*

United States v. Truong is the chief case to have considered directly whether the Executive must obtain a warrant to conduct a physical search for foreign intelligence purposes. Most other cases that have upheld the national security exception have involved only electronic surveillance. Further, the Supreme Court in *Keith* stated that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed" ¹⁶⁴ In *Payton v. New York*, ¹⁶⁵ which held that the fourth amendment prohibits police from warrantless, nonconsensual entry into a home to make a routine felony arrest, the Supreme Court stated: "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable."¹⁶⁶ The Court concluded its discussion by observing:

The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."¹⁶⁷

Accordingly, an assessment of the relevant law indicates a paucity of judicial discussion regarding warrantless physical searches for foreign intelligence purposes and substantial emphasis by the courts concerning the weight of the fourth amendment as it applies to physical searches generally. Nonetheless, Executive authorization of warrantless physical searches for the purpose of gathering foreign intelligence information is squarely within the national security exception to the warrant requirement, and is clearly consistent with the fourth amendment principles enunciated by the Supreme Court.

In the first place, courts examining this issue have made no distinction

164. 407 U.S. at 313; *cf. id.* at 326-33 (Douglas, J., concurring); *infra* note 413.

165. 445 U.S. 573 (1980).

166. *Id.* at 586 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75, 477-78 (1971)); see *Michigan v. Clifford*, 464 U.S. 287 (1984); *Welsh v. Wisconsin*, 466 U.S. 740 (1984).

167. *Payton v. New York*, 445 U.S. 573, 589-90 (1980) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

between physical searches and electronic surveillance. In *Humphrey*,¹⁶⁸ Judge Albert V. Bryan, Jr., upheld two warrantless physical searches by reference to his earlier discussion of the propriety of the warrantless electronic surveillance.¹⁶⁹ The United States Court of Appeals for the Fourth Circuit analyzed the validity of these physical searches in a similar manner and thought so little of the possible distinction between the searches and electronic surveillance that it confined its entire discussion of the issue to a footnote.¹⁷⁰

The searches in *Truong* involved personal property, i.e., packages, and may be considered on that basis to have been less intrusive in character than searches of residential property. Nevertheless, neither court limited its analysis or hinted at any distinction between searches of premises and other types of searches. Nothing in either opinion suggests that the dispositive factor was that the searches involved packages rather than premises.

What is most significant about the opinions of both courts is that neither made a legal or policy distinction between the electronic surveillances and the physical searches. The courts applied the same analysis of the warrant clause to both forms of intelligence gathering and both were treated as fourth amendment "searches." Both courts held that there is an exception to the warrant clause for foreign intelligence gathering and that the permissible searches in these cases, whether physical or electronic, were conducted under the authority of that exception. The Justice Department had made the same argument before the District of Columbia Circuit during the earlier prosecution of John Ehrlichman.¹⁷¹

168. 456 F. Supp. 51 (E.D. Va. 1978); see *infra* note 413.

169. Judge Bryan held: "Prior to this search the FBI obtained authorization from the President to open the envelope without a warrant. This brings into play the foreign intelligence gathering exception to the warrant requirement discussed earlier." *Id.* at 62.

170. The entire discussion reads:

A letter and another package were searched without a warrant but with executive authorization. Because both of those searches took place before [the focus of the investigation became prosecutive], in accordance with our resolution of the issue of a foreign intelligence warrant exception, we conclude that neither of these warrantless searches violated the Fourth Amendment.

Truong, 629 F.2d at 917 n.8. The recent Note does not take account of the fact that both the trial and appellate courts in *Truong* applied the foreign intelligence exception to the warrant clause to sustain both warrantless physical searches and electronic surveillance. Note, *supra* note 11, at 624 n.81.

171. See Memorandum for the United States as Amicus Curiae, *United States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977), quoted in WATERGATE SPECIAL PROSECUTION FORCE, REPORT 145 (1975). The recent Note rejects Judge Leventhal's concurring opinion in *Ehrlichman* urging that constitutional protections should not be "whittled away on abstract grounds of symmetry" and that the foreign intelligence exception should not be made available for physical searches merely because it is available for electronic surveillance. See recent Note, *supra* note 11, at 627-28 (quoting *Ehrlichman*, 546

The *Zweibon* plurality opinion includes a similar conclusion, albeit in the context of general skepticism regarding any exception to the warrant requirement for intelligence gathering. In a lengthy footnote,¹⁷² the plurality noted that because the fourth amendment has its roots in the English experience with executive searches and seditious libel prosecutions, it was understandable that the Executive had not asserted a prerogative to search the papers and effects of dissidents based on its own determination that they threatened national security. Nonetheless, because *Katz* extended fourth amendment strictures to nontrespassory electronic surveillance, "there was no reason to allow an Executive exception to the warrant requirement in nontrespassory searches and seizures but not in trespassory searches and seizures."¹⁷³

No rational distinction may be drawn between nontrespassory and trespassory searches.¹⁷⁴ More to the point, no reasonable distinction is possible between two different types of trespassory searches. A microphone surveillance implemented by a trespassory entry to install the listening device is as intrusive as a properly limited physical search of the same premises. Once activated, the microphone will transmit all conversations within its range to the listener, including those of third parties and those involving matters totally unrelated to the purpose of the surveillance.¹⁷⁵

Similarly, a telephone surveillance, while ordinarily not requiring trespassory installation, also will reveal to the listener a broad range of communications involving any person on either end of any conversation over the instrument involved. Conversely, a properly controlled physical search for the indicia of espionage, such as codebooks or cipher paper (known in intelli-

F.2d at 938). Other commentators and jurists think electronic surveillance is more intrusive than physical searches and that the warrant requirement should focus on the governmental purpose behind the investigation, not the techniques used to pursue that purpose. *Id.* at 628. The recent Note urges that "principled interpretation of the Constitution requires 'abstract grounds of symmetry': if the Constitution produces different results in different cases, the need for coherence requires that tenable reasons so dictate." *Id.* Similarly, the Note states: "Overall, no principled distinction can limit the national security exception, if indeed it exists, to electronic surveillance." *Id.* at 629. The authors agree with this analysis. However, the logical consequence of its application is not a total rejection of the national security exception, but rather the recognition that the principles that have led the courts to identify a foreign intelligence exception to the warrant requirement for electronic surveillance also require the conclusion that warrantless physical searches conducted in furtherance of similar governmental purposes are lawful.

172. *Zweibon*, 516 F.2d at 618 n.67.

173. *Id.* at 619 n.67.

174. See generally *Katz*, 389 U.S. at 347; see also *Torres*, 751 F.2d at 884; *supra* note 171.

175. For a discussion of the even more intense intrusion that may result when the electronic surveillance is conducted through visual means, see *supra* cases and materials cited in note 149.

gence parlance as “tradecraft”), is much less likely to involve the acquisition of information concerning innocent third parties or information not relevant to a foreign intelligence investigation. It is clear, however, that a common feature of all these forms of information gathering is that they intrude to the core of the subject’s protected zone of privacy.

In many ways, a physical search may be less intrusive than an electronic surveillance. For instance, the actual duration of the intrusion is ordinarily much shorter because a physical search does not continue for days, weeks, or even months after the initial intrusion. The *Truong* electronic surveillance, involving over two hundred days of microphone and telephone monitoring of one defendant’s apartment, is a good example of the temporal intrusion that such activities may involve.¹⁷⁶ In addition to the lengthy monitoring of one defendant, television monitoring and videotaping in another defendant’s office was maintained for eighty-five days.¹⁷⁷

The *Truong* court’s conclusion that the electronic surveillance in that case was properly within the scope of the foreign intelligence exception and was reasonable is consistent with prior cases on warrantless foreign intelligence gathering and with general case law on electronic surveillance,¹⁷⁸ even given the Supreme Court’s emphasis on the highly protected nature of residential premises. Such a massive surveillance, however, demonstrates the degree of intrusion this eavesdropping may entail. It is difficult to argue that electronic surveillance of all activities occurring within a residence, through a transmitting device installed by trespass and activated continuously for over seven months, may be characterized somehow as less intrusive, either in kind or degree, than a properly limited physical search of the same premises.

What concerns the courts and commentators about physical searches is the substantial history of their use to suppress political dissent, including the infamous “writs of assistance” prior to the American Revolutionary War.¹⁷⁹ While there must be constant vigilance against the abuses that are possible

176. Judge Bryan concisely summarized the magnitude of this surveillance.

The intrusion in this case was massive. The interception on Hung’s apartment began on May 11, 1977, and ran continuously for two hundred and sixty-eight (268) days. . . . [T]he government estimates the number of calls involving Humphrey intercepted as approximately twenty (20) and the total number of calls intercepted as in excess of 500. The microphone in Hung’s apartment was installed May 27, 1977; it too ran continuously and for a period of two hundred and fifty-five (255) days. It is uncertain how many conversations of defendant Humphrey were monitored.

Humphrey, 456 F. Supp. at 59; *accord Truong*, 629 F.2d at 912.

177. *Truong*, 629 F.2d at 912 n.1; *Humphrey*, 456 F. Supp. at 59.

178. *See generally* *Scott v. United States*, 436 U.S. 128 (1978); *Keith*, 407 U.S. 297 (1972).

179. *See, e.g., Keith*, 407 U.S. at 326-33 (Douglas, J., concurring); *United States v. Ehrlichman*, 376 F. Supp. 29, 32-34 (D.D.C. 1974), *aff’d*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977).

through unfettered, abusive applications of Executive power, the limits presently imposed upon warrantless searches conducted under Executive authorization preclude the arbitrary and widespread application of that power for improper purposes. These limits are described at length below.¹⁸⁰

4. *Judicial Tests for Allowing Exceptions to the Warrant Clause*

The principles that support the Executive's authorization of warrantless physical searches are wholly consistent with the standards for determining the reasonableness of warrantless activities that were enunciated in *Keith*.¹⁸¹ The first measure is whether the citizenry's interests in privacy and free expression are better protected by a warrant requirement. The courts have imposed substantial conditions upon the Executive's use of warrantless electronic surveillance and, by extension, physical searches. These conditions¹⁸² include the following requirements: that the search be expressly authorized by the President or his alter ego, the Attorney General; that the search be clearly targeted against a foreign power or its agents; and that the primary purpose of the search be to gather foreign intelligence information.¹⁸³

These requirements are far from chimerical and present effective limitations on the Executive's ability to act without a warrant. The requirement that there be a connection between the subject of the activity and an identifiable foreign power is particularly difficult to establish in many situations since such a connection is usually clandestine. Nevertheless, any contemplated warrantless search will not be lawful unless such a connection is identified. This requirement alone insulates the vast majority of the American populace from any possibility of a warrantless physical search by the Executive because only a tiny fraction could ever be found to be agents of a foreign power as the courts have narrowly used that term. By using this singularly narrow standard, the courts have substantially protected individual rights of privacy and free expression, to the degree that imposing a warrant requirement for physical searches to gather foreign intelligence would add little or nothing.¹⁸⁴

180. See *infra* text accompanying notes 219-326.

181. See *supra* note 113 and accompanying text.

182. See *infra* text accompanying notes 219-90.

183. See, e.g., *Ehrlichman*, 546 F.2d at 910; *Zweibon*, 516 F.2d at 594; *Truong*, 629 F.2d at 908.

184. The recent Note asserts that even if the courts "rubber stamp" warrant requests for physical searches for intelligence purposes, the procedure itself will force the Executive to articulate the basis for the search in language "convincing beyond the immediate circle of those proposing to conduct the search." Note, *supra* note 11, at 620 n.44; see Note, *supra* note 159, at 988-92. If the courts were truly to "rubber stamp" such requests, little convincing would be necessary. Further, the Attorney General is outside "the immediate circle" de-

The second prong of the *Keith* test is whether a judicially imposed warrant requirement would “unduly frustrate the efforts of Government to protect itself”¹⁸⁵ Currently, the only formal mechanism the Executive may use to acquire a judicial warrant to conduct a physical search is rule 41 of the Federal Rules of Criminal Procedure.¹⁸⁶ That mechanism requires a variety of actions that are wholly inconsistent with the context and purposes of physical searches to gather foreign intelligence information. For example, rule 41(d) requires that the target of the search receive a copy of the warrant and a receipt for and inventory of the property seized.¹⁸⁷ Rule 41(g) requires the executing officer to return and file the warrant and the inventory with the clerk of court. Rule 41(c)(1) requires the Executive to show “reasonable cause” to justify serving the warrant during evening hours rather than in daylight.¹⁸⁸

scribed, as are the numerous federal officials and government attorneys who scrutinize such matters before they reach the Attorney General and the members and staff of the congressional intelligence committees who receive subsequent briefings on these activities. *Cf.* Testimony of Mary C. Lawton, Counsel to the Attorney General for Intelligence Policy, before the House Judiciary Subcomm. on Courts, Civil Liberties and the Administration of Justice, 10-11 (June 8, 1983) (describing the level of review of proposed surveillance for foreign intelligence purposes).

185. *Keith*, 407 U.S. at 315. Clearly, the criteria for determining when an exception to the warrant requirement exists revolve around whether the burden of obtaining a warrant is likely to frustrate the underlying governmental purpose and not whether the public interest justifies the search. *See* recent Note, *supra* note 11, at 629-30. While foreign intelligence gathering is acknowledged to be a legitimate and important purpose, it may be asserted that there will be little danger of frustration in this area because the courts will tend to defer to the government in national security matters. *Id.* at 632 n.129. In fact, the recent Note states that “frequent judicial errors” will likely result in more government searches than would otherwise be reasonable under the fourth amendment. *Id.* Even if this were true, and even if forecasting judicial mismanagement were an appropriate element for consideration in legal or national security policy making, relying on judicial fallibility would inspire little confidence in the efficacy of the warrant requirement and demonstrate little added protection for the citizenry.

186. FED. R. CRIM. P. 41.

187. Rule 41(d) states:

The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

FED. R. CRIM. P. 41(d).

188. FED. R. CRIM. P. 41(c)(1).

These provisions stand in stark contrast to the requirements for secrecy and stealth that are ordinarily inherent elements of any physical search for the purpose of gathering foreign intelligence or counterintelligence information. Compliance with requirements like those contained in rule 41 would require the Executive to prepare and file warrant applications and inventories that would provide foreign powers and their agents with extremely valuable information concerning the extent and nature of the information, sources, and methods that are the foundation of this nation's intelligence activities. Because there are no judicial secrecy procedures for protecting the warrant and the inventory, both would remain in the appropriate clerk's office and be open to inspection by anyone who wished to do so. Although the court may temporarily seal the warrant and inventory of the items seized, these documents cannot be kept under seal permanently.¹⁸⁹ This short-term amelioration would rarely, if ever, satisfy the needs of the government in foreign intelligence investigations where criminal action is a remote and rare occurrence.

The requirements of rule 41 serve a valuable purpose in the context of physical searches conducted for traditional law enforcement purposes. By their very nature, however, they would defeat the purposes and frustrate the objectives of such searches in the intelligence area. Further, the courts have held that these requirements are ministerial and are not required by the warrant clause of the fourth amendment.¹⁹⁰ In particular, the Supreme Court has never held that notice to the target of a search is invariably demanded by the fourth amendment; indeed, it has never clearly articulated the circumstances, if any, when notice is constitutionally required.¹⁹¹ A few courts¹⁹² have relied on *Berger v. New York*¹⁹³ and indicated in dicta that the fourth amendment may mandate notice to the target. Nevertheless, both *Berger* and *Katz* state only that the necessity for notice is like other steps in the search and seizure procedure and should be judged by a flexible "reasonable-

189. Cf. *In re An Application of the United States for an Order Authorizing Interception of Oral Communications and Videotape Surveillance*, 513 F. Supp. 421 n.* (D. Mass. 1980) (Keeton, J.) (noting that the order authorizing aural and visual electronic surveillance had been impounded for nine months until the targets were indicted). At least one court has suggested that a warrant could not be obtained for a wholly surreptitious search. See *infra* note 397 and accompanying text.

190. See, e.g., *United States v. McKenzie*, 446 F.2d 949, 954 (6th Cir. 1971); *United States v. Gross*, 137 F. Supp. 244 (S.D.N.Y. 1956) (Weinfeld, J.); see also *United States v. Harrigan*, 557 F.2d 879, 883 (1st Cir. 1977).

191. See *Katz*, 389 U.S. at 355 n.16; see also *Ker v. California*, 374 U.S. 23, 37-41 (1963).

192. *United States v. Bernstein*, 509 F.2d 996, 1000-01 (4th Cir. 1975), *vacated and remanded for further consideration of other grounds*, 430 U.S. 902, *rev'd on other grounds*, 556 F.2d 244 (1977); *United States v. Eastman*, 465 F.2d 1057, 1063-64 (3d Cir. 1972).

193. 388 U.S. 41 (1967).

ness" test that examines whether notice would frustrate the purposes of the search.¹⁹⁴

In *Berger*, the Supreme Court struck down New York's eavesdropping statute because it was not procedurally adequate to protect fourth amendment values. At the same time, the Court did not determine that a particular set of procedures is constitutionally required. In fact, the Court stressed that the fourth amendment's standards of reasonableness "are not susceptible of Procrustean application."¹⁹⁵ *Berger* also states that the requirements of the fourth amendment "are not inflexible, not obtusely unyielding to the legitimate needs of law enforcement."¹⁹⁶

The Court did find the statute challenged in *Berger* defective, in part because it lacked a procedure to show "special facts" or "exigent circumstances" to justify the secrecy necessary for the electronic surveillance to succeed.¹⁹⁷ However, the Court did not hold that notice to the target of a surveillance is absolutely required. Instead, it recognized that the presence of exigent circumstances could obviate the need to notify the target.

Physical searches to gather foreign intelligence depend upon stealth. If the targets of such searches discovered that the United States Government had obtained significant information about their activities, those activities would likely be altered, rendering the information useless. With few exceptions, the value of foreign intelligence depends wholly upon keeping the targets from whom it was obtained, and others, ignorant of the fact that the information is known to the United States. As such, a uniform notice requirement in this context would be devastating.

Rule 41(b) also limits the issuance of a warrant to searches seeking evidence or instrumentalities of a crime.¹⁹⁸ This requirement usually would preclude authorization of intelligence-related searches under rule 41 because only in rare circumstances could the Executive make a good faith representation that it desired a warrant to obtain evidence of a crime. In most cases,

194. *Katz*, 389 U.S. at 355 n.16; *Berger*, 388 U.S. at 60.

195. 388 U.S. at 53 (quoting *Ker*, 374 U.S. at 33).

196. *Berger*, 388 U.S. at 63 (quoting *Lopez v. United States*, 373 U.S. 427, 464 (1963) (Brennan, J., dissenting)).

197. *Berger*, 388 U.S. at 60; see generally *Dalia v. United States*, 441 U.S. 238, 247-48 (1974).

198. Rule 41(b) provides:

A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

FED. R. CRIM. P. 41(b).

the Executive intends to obtain foreign intelligence information that will further a foreign intelligence or counterintelligence investigation. An interest in criminal activity ordinarily is secondary, incidental, or absent entirely. Very few targets of foreign intelligence or counterintelligence investigations are ever prosecuted.¹⁹⁹ In addition, given the nature of clandestine intelligence activities, the Executive would rarely be able to describe the object of the requested search in advance with sufficient particularity to satisfy the probable cause requirement of rule 41. Thus, any generalized effort to use rule 41 for intelligence purposes would subvert the purposes of the rule.

The comparative lack of specificity required in foreign intelligence gathering does not mean, however, that the Executive uses warrantless foreign intelligence searches either to conduct general searches or to engage in speculative "fishing expeditions." The *Truong* experience demonstrates the inherent difficulties of these cases. The United States Government knew that a Vietnamese national had requested that certain packages be carried surreptitiously to Vietnamese officials abroad who were involved in sensitive negotiations with the United States. Although the government could not describe the contents of the packages, all the circumstances indicated that classified, diplomatic information was being passed to the foreign officials. Within this context, the government could not have satisfied the specificity requirements of rule 41, and the resulting inability to obtain a warrant would have frustrated the purpose of the searches. This would have left unremedied a significant breach of the national security. The government proceeded in this case not in an unrestrained fashion but in a manner consistent with the specific judicial requirements for warrantless foreign intelligence searches.

During investigations of criminal activity, the government may encounter similar difficulties. The specificity requirement is one of the major protections of the fourth amendment. It wisely places an obstacle between the people and their government that can be overcome only for good and sufficient reason. Nevertheless, it is inadvisable to indiscriminately transfer all the rules and procedures of criminal investigations to foreign intelligence investigations when the latter differ significantly from the former in terms of their foundation, scope, objectives, and consequences for the subject.²⁰⁰

199. See, e.g., SENATE FISA REPORT, *supra* note 19, at 12-13. It should be remembered that the intelligence-gathering techniques that are the subject of this discussion must meet the relevant legal standards not only when directed against United States citizens but also when targeted against foreign nationals in the United States who enjoy fourth amendment protection. See, e.g., *United States v. Abel*, 362 U.S. 217 (1960).

200. The recent Note points to § 2.5 of Executive Order 12,333, including circumstances where a warrant is required for law enforcement searches in the standard for Attorney General approval of intelligence searches, as evidence of executive branch "confusion" regarding the

The *Keith* decision recognized that even domestic security investigations are dramatically different from investigations of "ordinary crime" and may be handicapped by ordinary warrant requirements.²⁰¹ In addition, Congress has recognized that a foreign counterintelligence investigation differs markedly from an ordinary criminal investigation because the goal of counterintelligence is to stymie suspected espionage, with prosecution frequently a secondary consideration.²⁰²

Efforts to obtain foreign intelligence information, as opposed to counterintelligence, resemble criminal investigations even less. Such investigations, sometimes referred to as "positive" intelligence collection, seek to develop information about the policies and positions of foreign powers on a broad

scope of the warrant requirement. Note, *supra* note 11, at 634 n.139. The Note deduces that the Executive's position on the constitutionality of warrantless intelligence searches is based on the fact that the exclusionary rule is available only as a remedy for illegal law enforcement searches. *Id.* With the development of constitutional tort actions for money damages, according to the author, the absence of a remedy is no longer a basis for failing to obtain a warrant for intelligence searches. *Id.* Unfortunately, this analysis overlooks the substantial case law that supports the validity of warrantless intelligence searches, not because there is no remedy for a violation of relevant legal principles, but because those principles lead to a constitutional standard that is not violated by such searches. Far from indicating confusion, the Executive Order provision illustrates the precision and care with which the Executive has proceeded to ensure that the relevant judicial standards concerning expectations of privacy, developed largely in a law enforcement context, are met. The *Truong* case illustrates that the courts have little difficulty with these distinctions or the application of the exclusionary rule when the standards appear to have been applied inappropriately. See *Truong*, 629 F.2d at 912-17; *Humphrey*, 456 F. Supp. at 55-65.

201. The Court explained:

[D]omestic security surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime." The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. . . . Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.

Keith, 407 U.S. at 322.

202. The Senate FISA Report delineated these distinctions:

The criminal laws are enacted to establish standards for arrest and conviction; and they supply guidance for investigations conducted to collect evidence for prosecution. Foreign counterintelligence investigations have different objectives. They succeed when the United States can insure that an intelligence network is not obtaining vital information, that a suspected agent's future access to such information is controlled effectively, and that security precautions are strengthened in areas of top priority for the foreign intelligence service. Prosecution is a useful deterrent, but only where the advantages outweigh the sacrifice of other interests. Therefore, procedures appropriate in regular criminal investigations need modification to fit the counterintelligence context.

SENATE FISA REPORT, *supra* note 19, at 12-13; see also *infra* note 413.

range of issues, instead of trying to uncover the espionage activities of such powers. As such, they are wide-ranging and relatively unfocused. At the same time, however, positive intelligence collection rarely is targeted at specific individuals, as are most criminal and counterintelligence investigations, nor does it ordinarily focus on activities that might conceivably violate United States criminal law.

Thus, sound grounds exist for the conclusion that a judicially imposed warrant requirement for national security-related physical searches would frustrate the Executive's purposes. Given the limited added protection of individuals that such a requirement would achieve, the balancing required by *Keith* tips decisively against a warrant requirement in this area.

It has been argued that the test of *Camara v. Municipal Court*,²⁰³ rather than *Keith*, should be applied to warrantless physical searches.²⁰⁴ This overlooks the fact that the Supreme Court formulated the *Keith* test to analyze warrantless government intelligence-gathering activities in 1972, five years after the *Camara* decision. In *Camara* the Supreme Court majority stated:

In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not 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.²⁰⁵

Proponents of the *Camara* approach recast the holding as a three-part test: the governmental purpose behind the search, the degree to which a warrant requirement would tend to frustrate that purpose, and a balancing of the importance of the governmental purpose "discounted by the degree to which it remains unhampered by the warrant requirement, against the diminution in individual rights implicit in the loss of effective pre-seizure judicial scrutiny."²⁰⁶ The justification for warrantless physical searches for foreign intelligence purposes can withstand the application of this test as well.

The recognized legitimacy of the government's foreign intelligence purpose and the extent to which a generalized warrant requirement would frustrate that purpose have been previously discussed.²⁰⁷ As part of the basis for anticipating possible frustration, the Justice Department is credited with the

203. 387 U.S. 523 (1967).

204. See, e.g., Note, *supra* note 11, at 629-35.

205. *Camara*, 387 U.S. at 533.

206. See Note, *supra* note 11, at 630 (footnote omitted).

207. See *supra* text accompanying notes 21-32; *supra* notes 181-202 and accompanying text.

argument "that security matters are too subtle and complex for judicial evaluation."²⁰⁸ Several judges who have considered the national security exception for foreign intelligence investigations have agreed with the government's contentions in this regard.²⁰⁹

The government has indicated that the complexities of world affairs normally are not within the area of judicial expertise, and that proper evaluation of the nation's foreign intelligence needs frequently requires a thorough understanding of these complexities. Complexity is only one reason to anticipate that legitimate governmental purposes may be frustrated by mandating judicial involvement in this area. Ordinarily the judicial process is not designed to provide the security measures necessary to protect the often highly sensitive information that would be included in warrant applications related to national security. For example, when the Foreign Intelligence Surveillance Court was established by FISA, no sufficiently secure facility existed in the Washington, D.C. area for the court to conduct its required tasks, and the Judiciary had no funds available to prepare such a facility.²¹⁰

Foreign intelligence activities do not ordinarily involve investigation of criminal matters and are subject to very different considerations than law enforcement activities. Both of these factors increase the difficulties that courts accustomed to dealing primarily with domestic matters would encounter. Finally, if the government's actions in this area were delayed because of inflexible judicial procedures, the consequences could be severe and sometimes fatal. All of these factors represent substantial burdens on the Judiciary. They explain why *Keith* and three courts of appeals, in *Butenko*, *Buck*, and *Truong*, refused to intrude into this area, and a fourth, in

208. See Note, *supra* note 11, at 631. The recent Note dismisses this because it was rejected in *Keith*. *Id.* However, *Keith* involved domestic, not foreign, threats to national security, and the courts have recognized that the argument should not be rejected out of hand in other contexts. See *supra* text accompanying notes 60-87.

209. *Truong*, 629 F.2d at 913-14; *Zweibon*, 516 F.2d at 704 (Wilkey, J., concurring and dissenting). See *supra* note 159.

210. See HOUSE FISA REPORT, *supra* note 19, at pt. I, 71-72; Testimony of Judge George L. Hart, Jr., before the House Judiciary Comm. Subcomm. on Courts, Civil Liberties, and the Administration of Justice (June 9, 1983). The recent Note observes that the creation of the FISA court "significantly drains" the security issue of its "vitality." Note, *supra* note 11, at 632-33 & nn.133-34. On the contrary, the FISA court embodies special security features not found elsewhere in the federal court system and was designed especially to cope with the security issue. As is explained later in this article, however, the FISA court reviews only electronic surveillance requests and has no jurisdiction to issue orders with respect to physical searches. See *infra* notes 357-63 and accompanying text. The recent Note's intimation that enactment of FISA may indicate a congressional intent to preclude all warrantless activities by the President runs counter to the legislative history of that Act. *Id.* at 629 n.116. See *infra* text accompanying notes 332-65.

Zweibon, was unable to agree on a course of action.²¹¹

FISA created the Foreign Intelligence Surveillance Court,²¹² whose operations have demonstrated that a properly structured, specialized court can achieve the degree of expertise and security necessary to consider these issues. FISA itself demonstrates that a properly drawn statute can reconcile judicial functions with the policy discretion that must continue to reside in the executive branch.²¹³ At the same time, FISA does not represent a congressionally imposed, judicially mandated warrant requirement on the Executive. Rather, FISA is a complex vehicle that provides a custom-tailored warrant procedure for the exercise of Executive authority to conduct electronic surveillance for foreign intelligence purposes.²¹⁴

The development of this statute involved years of discussion by Congress and the Executive concerning the demands of the fourth amendment and the requirements of effective foreign intelligence and international terrorism investigations. As a consequence, FISA represents a compromise between the two political branches concerning how the government should exercise its foreign relations and national defense powers within the broad contours of judicially established fourth amendment principles.

The Judiciary agrees that it should not intrude too deeply into Executive efforts to collect foreign intelligence. Judicially imposed warrant requirements for physical searches for foreign intelligence purposes would be irresponsible because the Executive does not have even a marginally adequate mechanism to obtain such warrants.²¹⁵ Such a requirement would totally frustrate the Executive's needs in this undeniably important area. Instead, the courts have served their responsibilities well by carefully defining the limitations on these warrantless activities.

Judicial determinations permitting selected warrantless activities have not been established hastily, unreservedly, or indiscriminately. In *Brown*, the trial court found certain portions of the electronic surveillance to be unlawful.²¹⁶ The government conceded the illegality of certain portions of the

211. See *supra* text accompanying notes 59-141.

212. 50 U.S.C. § 1803 (1982).

213. See HOUSE FISA REPORT, *supra* note 19, at pt. I, 70.

214. The recent Note observes that Congress' failure to provide the means by which to obtain judicial warrants for other types of national security searches cannot alter the reach of the fourth amendment. Note, *supra* note 11, at 633 n.134. Of course, neither congressional action nor inaction may alter a constitutional standard. Again, however, the issue is not whether any constitutional requirements have been altered, but what the fourth amendment requirements are in this area and whether there is a national security exception to the fourth amendment warrant clause.

215. See *supra* notes 181-202 and accompanying text.

216. See *supra* notes 65-69 and accompanying text.

electronic surveillance in *Butenko*, but the courts upheld the validity of the remainder.²¹⁷ The *Truong/Humphrey* courts carefully analyzed the physical searches and the extensive electronic surveillance that had been performed, upholding the major portion but suppressing the remainder.²¹⁸

Whenever the Executive invokes the foreign intelligence exception to the warrant clause, the courts insist on stringent limitations that nullify its use in inappropriate circumstances. The courts also recognize, however, the practical imperatives that require continued recognition of the exception. In short, the Judiciary has determined that the balance required by *Camara* tips against a strict warrant requirement in this area and that the Executive's use of physical searches to obtain foreign intelligence information, embodied in section 2.5 of Executive Order 12,333, is constitutional.

B. *The Parameters of the Exception for Foreign Intelligence Gathering*

1. *Approval by the President or the Attorney General*

Several factors must be present to bring a physical search within the judicially recognized foreign intelligence exception to the warrant requirement. The courts have held that the lawful exercise of this intelligence-gathering authority requires the express approval of the President, or if such authority is properly delegated, by the Attorney General.²¹⁹ This requirement was first enunciated by Justice Byron White in his brief concurrence in *Katz*.²²⁰ Justice White stated: "We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable."²²¹

Similar high-level and centralized review is required by title III of the Omnibus Crime Control and Safe Streets Act of 1968,²²² where Congress has required that warrant requests for electronic surveillance of criminal activity must be approved by "[t]he Attorney General, or any Assistant Attorney General specifically designated by the Attorney General"²²³ The Supreme Court has interpreted this requirement very narrowly, rejecting the

217. See *supra* notes 70-81 and accompanying text.

218. See *supra* text accompanying notes 142-63.

219. See, e.g., *Brown*, 484 F.2d at 426-27.

220. *Katz*, 389 U.S. at 362-64 (White, J., concurring).

221. *Id.* at 364; but see *id.* at 359-60 (Douglas, J., concurring). For further discussion of Justice Douglas' opinion, see *infra* notes 280-86 and accompanying text.

222. 82 Stat. 211-25, 18 U.S.C. §§ 2510-2520 (1982) [hereinafter cited as title III].

223. *Id.* § 2516(1). Although an Assistant Attorney General is empowered to authorize an application, the statute requires judicial approval of the FBI's interception of wire or oral communication.

Executive's argument that other designated officials also could approve these warrant applications.²²⁴

The requirement that either the President or the Attorney General approve the exercise of the warrantless foreign intelligence-gathering authority was discussed at length during the prosecution of John Ehrlichman and others for the break-in at the office of Daniel Ellsberg's psychiatrist, Dr. Louis Fielding.²²⁵ At the time of the break-in, Ellsberg was under indictment for disclosing the Pentagon Papers, a classified history of America's involvement in Vietnam, to various publications. Ehrlichman had directed personnel employed by the Nixon White House to break into and search Dr. Fielding's office for information that would be detrimental to Ellsberg.²²⁶ Both the burglars and Ehrlichman were indicted for conspiracy to injure Dr. Fielding's enjoyment of his fourth amendment rights.²²⁷

In the United States District Court for the District of Columbia, the defendants argued that the break-in fell within the exception to the warrant requirement for "purely intelligence-gathering searches deemed necessary for the conduct of foreign affairs."²²⁸ The trial court rejected this contention and held that the Supreme Court's unwillingness in *Keith* to consider warrantless electronic surveillance for foreign intelligence purposes did not indicate "an intention to obviate the entire Fourth Amendment whenever the President determines that an American citizen, personally innocent of wrongdoing, has in his possession information that may touch upon foreign policy concerns."²²⁹ Ultimately, the district court found that President Nixon had not actually given "any specific directive permitting national security break-ins, let alone this particular intrusion."²³⁰ Accordingly, the district court rejected the defendants' contention that the Fielding break-in was

224. *United States v. Giordano*, 416 U.S. 505, 523 (1974).

225. *Ehrlichman*, 376 F. Supp. 29 (D.D.C. 1974) (Gesell, J.), *aff'd*, 546 F.2d 910 (D.C. Cir. 1976) (Wilkey, J.), *cert. denied*, 429 U.S. 1120 (1977).

226. *See generally Ehrlichman*, 546 F.2d at 914-16; WATERGATE SPECIAL PROSECUTION FORCE, REPORT 60-62 (1975); *Statement of Information: Hearings before the House Comm. on the Judiciary pursuant to H.R. Res. 803, A Resolution Authorizing and Directing the Comm. on the Judiciary To Investigate Whether Sufficient Grounds Exist for the House of Representatives To Exercise its Constitutional Power To Impeach Richard M. Nixon, President of the United States of America, Book VII—White House Surveillance Activities and Campaign Activities*, 93d Cong., 2d Sess. 33-36, 591-1337 (1974). This group of Nixon White House employees was popularly referred to as the "plumbers unit." *See id.* at 36. For a discussion of the Pentagon Papers and excerpts from them, *see id.* at 591.

227. *Ehrlichman*, 376 F. Supp. at 31; *see* 18 U.S.C. § 241 (1982).

228. *Ehrlichman*, 376 F. Supp. at 33.

229. *Id.*

230. *Id.* at 34.

a valid exercise of presidential authority. The defendants were later convicted in a jury trial.

On appeal to the United States Court of Appeals for the District of Columbia Circuit, Ehrlichman reiterated his contention "that the search was legal because [it was] undertaken pursuant to a delegable Presidential power to authorize such a search in the field of foreign affairs" ²³¹ Although echoing the district court's concern, ²³² the court of appeals concluded that the issue of whether the President had authority to approve a search in such circumstances need not be decided "one way or the other, and no inference should be drawn from [the court's] failure to discuss it." ²³³ The court ruled that, irrespective of that question, the lower court "was unquestionably correct . . . in its ruling that . . . the 'national security' exemption can only be invoked if there has been a specific authorization by the President, or by the Attorney General as his chief legal advisor, for the particular case." ²³⁴

This stringent approval requirement is based upon the "danger of leaving delicate decisions of propriety and probable cause to those actually assigned to ferret out 'national security' information" ²³⁵ The court of appeals explained that if the Judiciary was not scrutinizing foreign intelligence gathering, then approval by the President, or his "alter ego for these matters, the Attorney General," was "necessary to fix accountability and centralize responsibility for insuring the least intrusive surveillance necessary and preventing zealous officials from misusing the President's prerogative." ²³⁶ In announcing this conclusion the court expressly relied on Justice White's statements in *Katz*. ²³⁷ Finding no express authorization by the President to conduct this break-in, the court rejected Ehrlichman's argument that it did not violate the fourth amendment. ²³⁸

A similar holding was reached by the United States District Court for the Southern District of New York in *United States v. Kearney*, ²³⁹ where an FBI agent was charged with unlawful wiretapping and mail opening. Kearney sought discovery to establish that the targets of these activities posed a threat to the national security, thereby justifying his use of warrantless intrusive techniques. ²⁴⁰ Citing *Ehrlichman*, the district court denied the discovery

231. *Ehrlichman*, 546 F.2d at 913.

232. *Id.* at 923-25.

233. *Id.* at 925.

234. *Id.*

235. *Id.* at 926.

236. *Id.*

237. *Id.* at 926-27 (citing *Katz*, 389 U.S. at 362 (White, J., concurring)).

238. *Id.* at 927-28.

239. 436 F. Supp. 1108 (S.D.N.Y. 1977).

240. *Id.* at 1112.

request because Kearney was unable to show that either the President or the Attorney General had authorized his activity.²⁴¹ The court concluded that “any less of a requirement would give any minor yet zealous official a free hand to disregard the vital privacy interests which lie at the core of Fourth Amendment protection simply by conjuring up the ‘national security’ and ‘foreign influence’ spectre.”²⁴²

President Franklin D. Roosevelt appears to have been the first President to delegate authority to the Attorney General to approve warrantless wire-tapping to gather foreign intelligence.²⁴³ Subsequent Presidents have made similar delegations.²⁴⁴ President Carter, because of the limited nature of the delegations then in effect under Executive Order 12,036, personally approved the warrantless physical searches in the Truong/Humphrey investigation.²⁴⁵ Nevertheless, Attorney General Bell had authority to approve electronic surveillance and did authorize the telephone and microphone surveillances used in that investigation.²⁴⁶

Currently, section 2.5 of Executive Order 12,333 delegates the full authority of the President to the Attorney General to approve warrantless physical searches to gather foreign intelligence, and requires and empowers the Attorney General to review all uses of this technique.²⁴⁷ As such, the requirement for review by the Attorney General is satisfied under current executive branch procedures.

2. *The Target Is a Foreign Power, Its Agents or Collaborators*

The Fielding break-in was part of an investigation into conduct ostensibly involving the national security. Thus, it could be termed a “national security” investigation in the broadest sense, as *Keith* and *Katz* used that term.²⁴⁸ The activity investigated, however, involved only the disclosure of classified material to domestic publications. There was also no indication of the involvement of a foreign power or its agents. Accordingly, the warrantless use of intrusive techniques did not fall within the foreign intelligence exception

241. *Id.* at 1112-14.

242. *Id.* at 1113.

243. See Letter from President Franklin D. Roosevelt to the Attorney General (May 21, 1940), reprinted in *Barker*, 514 F.2d at 246; CHURCH COMMITTEE FINAL REPORT, *supra* note 29, at 279-81.

244. See *Barker*, 514 F.2d at 246-48; see generally CHURCH COMMITTEE FINAL REPORT, *supra* note 29, at 271-351.

245. *Humphrey*, 456 F. Supp. at 62-63; see *supra* text accompanying notes 142-63; Exec. Order No. 12,036, *supra* note 7, at §§ 2-201, 2-204.

246. *Truong*, 629 F.2d at 912; *Humphrey*, 456 F. Supp. at 54; see Exec. Order No. 12,036, *supra* note 7, at § 2-201(b).

247. See § 2.5, 3 C.F.R. at 212, *supra* note 1.

248. See, e.g., *Keith*, 407 U.S. at 321; *Katz*, 389 U.S. at 358 n.23.

and was inconsistent with the *Keith* holding that the Executive must obtain a warrant for searches that are part of domestic security investigations.²⁴⁹

As noted earlier, the Supreme Court carefully explained that the *Keith* holding did not reach “to activities of foreign powers or their agents.”²⁵⁰ *Truong* considered the activities left unaddressed by *Keith* and held that warrantless searches for purposes of foreign intelligence collection are proper “when the object of the search . . . is a foreign power, its agent or collaborators.”²⁵¹ Since neither Daniel Ellsberg nor his psychiatrist were accused of having such a relationship with any foreign power, searches directed against them could not have satisfied this requirement for a warrantless physical search.

Section 2.5 of Executive Order 12,333 expressly requires that any warrantless physical search for foreign intelligence purposes be based upon a determination by the Attorney General “that there is probable cause to believe that the [physical search] is directed against a foreign power or an agent of a foreign power.”²⁵² Thus, only a foreign power, its agent, or a collaborator may be the target of a warrantless physical search for foreign intelligence purposes.

3. The Primary Purpose Test

The Third Circuit in *Butenko* held that a judge reviewing a warrantless foreign intelligence surveillance must determine whether the “primary purpose” of the search was in fact to secure foreign intelligence information and whether “the accumulation of evidence of criminal activity was incidental.”²⁵³ The court also held that the government’s electronic surveillance did not require prior judicial authorization because the surveillance was “conducted and maintained solely for the purpose of gathering foreign intelligence information.”²⁵⁴

The defendants in *Truong* and *Humphrey* argued that the exception to the warrant requirement applied only when the purpose of the investigation was “solely” to gather foreign intelligence information and there was no intent to

249. *Keith*, 407 U.S. at 320-21; see *supra* notes 108-16 and accompanying text.

250. *Keith*, 407 U.S. at 308-09, 321-22; see *supra* note 116 and accompanying text.

251. *Truong*, 629 F.2d at 915; cf. *Zweibon*, 516 F.2d at 613 n.42 (discussing limitations on the Executive’s assertion of an exception to the warrant requirement for investigations of activities that may “affect” the nation’s relations with foreign powers); see also Note, *Government Monitoring of International Electronic Communications: National Security Agency Watch List Surveillance and the Fourth Amendment*, 51 S. CAL. L. REV. 429, 441-44 (1978).

252. See *supra* text accompanying note 3; see also *infra* note 413.

253. *Butenko*, 494 F.2d at 606.

254. *Id.* at 605 (quoting *Butenko*, 318 F. Supp. at 72).

prosecute the subjects.²⁵⁵ The trial court in the case rejected this contention, holding that reliance on the warrant exception was appropriate so long as the “primary,” rather than “sole,” purpose of the investigation was to gather foreign intelligence information.²⁵⁶ The Fourth Circuit affirmed,²⁵⁷ explaining:

We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.²⁵⁸

The two courts applied the same analysis to both the warrantless electronic surveillance and physical searches performed by the government.²⁵⁹

Thus, the courts agreed that a warrantless physical search is clearly lawful where the Executive’s primary objective is to gather foreign intelligence information. This is exemplified by the searches of the packages sent to Paris by David Truong.²⁶⁰ Truong’s conduct strongly suggested that he was engaged in clandestine intelligence activities directed against the United States, but the government did not know what information Truong had accumulated. Opening the packages permitted the government to learn what Truong was transmitting to the Vietnamese diplomats and allowed the United States Government to assess and prevent potential damage from disclosure of this information.

The court of appeals recognized that some foreign intelligence investigations may uncover criminal activity. Even though espionage prosecutions are rare, “there is always the possibility that the targets of the investigation will be prosecuted for criminal violations.”²⁶¹ Thus, although the activity under investigation may violate a criminal statute, this fact alone does not obviate the basis for the search—the government’s need to obtain relevant foreign intelligence. The *Truong* court was satisfied that a warrantless physical search is valid if the government’s primary purpose is to collect foreign intelligence rather than to prosecute the target, even if evidence of a crime is also acquired and the subject is eventually prosecuted.

255. See *Truong*, 629 F.2d at 915-16.

256. *Humphrey*, 456 F. Supp. at 57-59.

257. *Truong*, 629 F.2d at 915-16.

258. *Id.* at 915.

259. See *Humphrey*, 456 F. Supp. at 62-63; *Truong*, 629 F.2d at 917 n.8.

260. See *supra* notes 143-47 and accompanying text; see also *infra* note 413.

261. *Truong*, 629 F.2d at 915-16; see *supra* notes 201-02 and accompanying text.

In *Michigan v. Clifford*,²⁶² four Supreme Court Justices advocated use of principles similar to *Truong*'s primary purpose test to assess the validity of warrantless entries by fire investigators.²⁶³ The Court unanimously agreed that firefighters have the right "to make a forceful, unannounced, nonconsensual, warrantless entry into a burning building" and to remain there "while they continue to investigate the cause of the fire."²⁶⁴ A unanimous Court also determined that once the cause and location of the fire are determined, the rest of the premises may be searched only "pursuant to a warrant, issued upon probable cause that a crime has been committed, and specifically describing the places to be searched and the items to be seized."²⁶⁵

The Court was divided, however, over what the fourth amendment requires between these two extremes. Four Justices argued that a warrant was not required for further inspections when the purpose was "to determine the cause or origin of a fire."²⁶⁶ They observed that warrantless inspections for purposes other than to acquire evidence of a crime furthered the strong public interest in preventing the rekindling and spreading of fires.²⁶⁷ Because the post-fire inspection is contingent on the occurrence of a fire, an event over which the inspector has no control,²⁶⁸ these Justices would not require an administrative warrant, as is required for building code inspections.²⁶⁹

Justice Stevens accepted such warrantless entries as reasonable, but only when the fire inspectors "had either given the owner sufficient advance notice to enable him or an agent to be present, or had made a reasonable effort to do so."²⁷⁰ The remaining four Justices also focused on the purpose of the search, but argued that an administrative warrant was required for searches "to determine the cause and origin of a recent fire."²⁷¹

All the Justices agreed, however, that the fourth amendment does not require a warrant based upon probable cause that a crime has been committed when the purpose of the search is other than to collect evidence of a crime. The Justices also agreed that evidence uncovered during these warrantless

262. 464 U.S. 287 (1984).

263. *Id.* at 653-56 (Rehnquist, J., dissenting, joined by Burger, C.J., Blackmun, J., and O'Connor, J.).

264. *Id.* at 650 (Stevens, J., concurring).

265. *Id.*

266. *Id.* at 654 (Rehnquist, J., dissenting).

267. *Id.* at 654-55.

268. *Id.* at 655.

269. *See* *See v. Seattle*, 387 U.S. 541 (1967); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

270. *Clifford*, 464 U.S. at 303 & n.5 (Stevens, J., concurring).

271. *Id.* at 647 (opinion by Powell, J.).

inspections is admissible in subsequent criminal proceedings.²⁷²

These positions are consistent with the assertion that the warrant clause exception is applicable when the primary purpose of the search is to collect foreign intelligence information, rather than to uncover and prosecute criminal activity. Nevertheless, the requirements for notice or the acquisition of administrative warrants that were advocated by five of the Justices in *Clifford*, although perhaps feasible in the context of post-fire inspections, are not practical for foreign intelligence collection. As explained earlier, notice of a search would inform the target, and the foreign power for which the target is acting, of our government's state of knowledge and intentions, and thus frustrate or mitigate the search.²⁷³ An administrative warrant requirement in the foreign intelligence context would raise the same concerns discussed in regard to acquiring traditional search warrants.²⁷⁴

The Executive has argued that warrantless investigative activities should be upheld where there is a legitimate foreign intelligence interest without regard to the relative weight of that purpose or the coexistence of other factors.²⁷⁵ The difficulty of measuring and identifying when that purpose has risen to the level of intensity required under a "sole," "primary," "substantial," "preponderance," or some other qualitative standard hinders the use of such a test. The courts apply the primary purpose test to an investigation after it has been completed, and their task is aided by evidentiary hearings and the full documentary record of the investigation. Unfortunately, it is substantially more difficult for the Executive to apply these standards in the midst of an investigation, when the "record" is not yet complete and there is a substantial premium on speedy decisionmaking. Also, imposing a "primary purpose" test raises difficult practical issues such as whether and when a "crossover" from foreign intelligence to law enforcement procedures becomes necessary and how the differing standards of proof may be reconciled where much of the supporting information may remain highly classified.

Careful scrutiny of the purpose and motives of each investigation is essential. Equally important is the need to obtain as much information as possible

272. *Id.* at 647, 650, 654-56.

273. *See supra* notes 185-97 and accompanying text.

274. *See supra* notes 185-218 and accompanying text.

275. *Cf.* Government's Memorandum of Law in Opposition to Defendant's Motion to Suppress, at 36-38, *United States v. Hovsepian*, No. CR 82-917-MRP (C.D. Cal. 1983) (arguing that judicial review of a FISA "warrant" should not incorporate the primary purpose test); *see also Truong*, 629 F.2d at 915. In *United States v. Duggan*, 743 F.2d at 59, the Second Circuit concluded that FISA requires foreign intelligence information to be "the primary objective" of electronic surveillance conducted under that statute but that reviewing courts should not inquire beyond the executive branch certification of purpose unless there was a substantial preliminary showing of material false statements to the FISA court. *Id.*

so that the President or the Attorney General may make an informed judgment on the purpose of each proposed search. Given the nature and circumstances of foreign intelligence activities, if any standard must be imposed to ensure the legitimate use of this exception, then "primary" would appear to be a much more realistic and reasonable test of the purpose of the search than requiring the government to proceed with a warrantless search only if foreign intelligence collection is the "sole" purpose of the activity.

4. *The Effect of These Restrictions*

The *Truong* court concluded its discussion of the foreign intelligence exception to the warrant clause with an excellent summary of the requirements the Executive must meet to fall within the exception.

The exception applies only to foreign powers, their agents, and their collaborators. Moreover, even these actors receive the protection of the warrant requirement if the government is primarily attempting to put together a criminal prosecution. Thus, the executive can proceed without a warrant only if it is attempting primarily to obtain foreign intelligence from foreign powers or their assistants. We think that the unique role of the executive in foreign affairs and the separation of powers will not permit this court to allow the executive less on the facts of this case, but we also are convinced that the Fourth Amendment will not permit us to grant the executive branch more.²⁷⁶

The Executive's conduct of warrantless physical searches is fully consistent with these requirements.²⁷⁷ More importantly, these requirements prevent the Executive's warrantless searches from becoming "general" searches and, thus, ensure that this exercise of inherent Executive powers is consistent with the fourth amendment. The practical effect of these restrictions is to preclude application of this powerfully intrusive technique to all but a very few members of the general population.²⁷⁸ Further, these stringent criteria obviate the need for an independent magistrate's review of the Executive's use of physical searches to gather foreign intelligence.²⁷⁹

Justice Douglas' concurrence in *Katz*²⁸⁰ objected to Justice White's contention that the Court should not require prior judicial authorization of electronic surveillance involving national security if the President or the Attorney General had approved the surveillances as reasonable.²⁸¹ Justice

276. *Truong*, 629 F.2d at 916.

277. See *infra* text accompanying notes 309-26.

278. See *infra* text accompanying notes 248-52.

279. See *supra* note 184 and accompanying text.

280. 389 U.S. at 359-60 (Douglas, J., concurring).

281. *Id.* at 362-64 (White, J., concurring); see *supra* notes 220-21 and accompanying text.

Douglas argued that the fourth amendment rights of spies and saboteurs are not adequately protected "when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate."²⁸²

The Attorney General and the President may not be "disinterested" nor "neutral" as those terms are traditionally used to describe judicial officers in fourth amendment analysis.²⁸³ Nevertheless, the President and Attorney General are insulated from the immediate demands of an investigation and have a broader perspective of the law and the public interest than the intelligence officers directly involved in foreign intelligence-gathering efforts.²⁸⁴ Further, in the years that have followed Justice Douglas' objection to the recognition of any Executive authority in this area, the Judiciary has imposed restrictions that considerably limit the discretion of the Attorney General and the President lest they become caught up in the exigencies of the moment.

Justice Douglas' opinion indicated that he was particularly concerned about the Executive's use of warrantless techniques in criminal investigations. In addition to the Justice's reference to the President or Attorney General acting as "adversary-and-prosecutor," he observed that the Executive "should vigorously investigate and prevent breaches of national security and *prosecute* those who violate the pertinent federal laws."²⁸⁵ Justice Douglas also stressed that the fourth amendment made "no distinction . . . between types of crimes," and he rejected improvisation even though "a particular crime appears particularly heinous."²⁸⁶

The restrictions on the foreign intelligence exception are consistent with these statements. In particular, there is no attempt to distinguish among categories of crimes. Rather, these restrictions limit who may approve the use of this technique, who may be the target, and, most importantly, when the technique may be used. The Executive may acquire foreign intelligence information but may not use warrantless techniques when conducting an investigation for the purposes of prosecution. When the Executive directs the government's substantial prosecutive powers against an individual, the fourth amendment scrupulously protects that individual's rights by requir-

282. *Katz*, 389 U.S. at 360 (Douglas, J., concurring); see *Developments in the Law*, *supra* note 29, at 1268-70.

283. *E.g.*, *Keith*, 407 U.S. at 316-17; *Johnson v. United States*, 333 U.S. 10, 14 (1948).

284. *See, e.g.*, *Ehrlichman*, 546 F.2d at 926-28; see *supra* text accompanying notes 241-47. Further, at least as to the Attorney General, it is now clear that a knowing failure to respect the constitutional standards may result in personal liability for the approving official. *Compare Mitchell v. Forsyth*, 105 S. Ct. 2806 (1985), with *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

285. *Katz*, 389 U.S. at 359-60 (emphasis added).

286. *Id.* at 360.

ing advance judicial scrutiny of the government's justification and need for a search.

Furthermore, the Executive may not easily evade these judicially established requirements. A paramount concern is that the Executive will use warrantless physical searches to develop evidence of criminal activity without undergoing the scrutiny of a neutral magistrate. Such a search would seek to prosecute the target, however, and once the Executive did prosecute, all of its activities would be open to the piercing scrutiny of the court. In *Humphrey*, the district court painstakingly examined the Executive's conduct by reviewing the record of each day of the investigation. The court concluded that a portion of the Executive's warrantless activity had occurred after the primary purpose of the investigation appeared to have become prosecutorial.²⁸⁷ The evidence obtained after that date was excluded.²⁸⁸ The Fourth Circuit affirmed the exclusion of the evidence.²⁸⁹

Thus, there is little incentive for the Executive to subvert the purposes of the warrant exception by attempting to use it to develop evidence for a criminal investigation. Such an effort is likely to fail miserably and actually may endanger an entire prosecution. As for concern that the Executive will use warrantless physical searches to harass or invade the privacy of the citizenry, irrespective of criminal behavior, a money damages remedy for wrongful official conduct is available and serves as a powerful deterrent to abuse of this authority by government officials.²⁹⁰

The Judiciary has erected substantial barriers around warrantless foreign intelligence-gathering techniques, including physical searches. These effectively prevent Executive abuse of the warrant clause exception. First, either the President or the Attorney General must specifically approve a warrantless physical search, thereby curbing overzealous subordinates who may be too close to the investigation. Second, the target of the search must demonstrably be either a foreign power or an agent of or collaborator with a foreign power, thereby protecting the vast majority of Americans from any application of this technique. Finally, the purpose of the search must be to obtain foreign intelligence information, thereby prohibiting evasions of the warrant requirement when there is no foreign intelligence interest and the government wishes only to harass or prosecute the target of an investigation. These objective standards greatly limit the Executive's discretion to conduct searches that are inconsistent with the judicially enunciated principles that

287. *Humphrey*, 456 F. Supp. at 58-59.

288. *Id.* at 59.

289. *Truong*, 629 F.2d at 916.

290. See, e.g., *Mitchell v. Forsyth*, 53 U.S.L.W. at 4798; *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); see *Chagnon v. Bell*, 642 F.2d at 1248.

form the basis for an exception to the warrant clause. In systemic terms, these requirements also greatly reduce the degree of additional protection that would result from requiring prior judicial authorization of such a search.

C. *The Reasonableness Clause of the Fourth Amendment*

Although the courts have recognized several exceptions to the warrant clause,²⁹¹ the fourth amendment also requires that all searches, whether conducted with or without a warrant, be "reasonable."²⁹² Judge Irving Goldberg emphasized this point in the context of foreign intelligence gathering in his concurring opinion in *Brown*.²⁹³ Although agreeing that the warrantless surveillance in that case was lawful,²⁹⁴ Judge Goldberg believed the Judiciary to be responsible for ensuring that such activities are also reasonable.²⁹⁵

Judicial determinations of reasonableness depend upon all the circumstances of a particular case.²⁹⁶ This ad hoc approach depends to a great extent on differences in factual situations that make generalizations difficult. Nevertheless, *Butenko*, *Humphrey*, and *Truong* provide guidance on the factors that render warrantless foreign intelligence gathering reasonable.

Specifically, *Butenko* emphasized that the *minimum* requirement of reasonableness is that "some form of probable cause for the search and seizure must exist."²⁹⁷ The court in that case acknowledged that the probable cause standard could be modified when the government's interest in conducting

291. See *supra* notes 48-57 and accompanying text.

292. See *supra* note 47 for a complete quotation of the fourth amendment.

293. 484 F.2d at 418, 427-28 (special concurrence by Goldberg, J.).

294. *Id.* at 427; see *supra* notes 65-69 and accompanying text.

295. Judge Goldberg eloquently explained his view of the judicial role:

We must not trespass into the field of foreign intelligence and frustrate the executive in the pursuance of its obligations to conduct our foreign affairs. The Fourth Amendment, however, is no less a part of our Constitution than Article II, and its great protection against unreasonable invasions of privacy must remain inviolate. The fact that we develop the law of national security wiretaps largely *in camera* can never be allowed to lessen our zeal in the protection of fundamental rights. Indeed, the very secrecy surrounding our decisions requires that we give the closest scrutiny to executive assertions of national security interest.

Brown, 484 F.2d at 428. In *Falvey*, 540 F. Supp. at 1312, the court stated that warrantless electronic surveillance for foreign intelligence purposes "must still be reasonable" and concluded that FISA "fully comports with the Fourth Amendment."

296. See, e.g., *Scott v. United States*, 436 U.S. 128 (1978); see also *Truong*, 629 F.2d at 916.

297. *Butenko*, 494 F.2d at 604; see *Camara*, 387 U.S. at 534; cf. *Developments in the Law*, *supra* note 29, at 1262-68 (arguing that electronic surveillance to gather foreign intelligence without meeting the probable cause standard was unreasonable, with the possible exception of surveillance of "foreign government officials").

the search is compelled by "something other than a reasonable belief of criminal activity, especially when the scope of the intrusion is limited."²⁹⁸ Finally, the court stressed that warrantless foreign intelligence gathering must have the collection of foreign intelligence information as its primary purpose to be reasonable.²⁹⁹ Thus, *Butenko* viewed the primary purpose test as both a criterion for permitting warrantless electronic surveillance to gather intelligence and as a factor in ensuring the reasonableness of that activity.

Truong and *Humphrey* expanded and clarified the *Butenko* discussion of reasonableness. The courts in these cases carefully assessed the "massive" electronic surveillance that had been conducted by the government in its investigations.³⁰⁰ Both courts looked to the nature of the target, a suspected participant in an espionage ring, and the propensity of such targets to use "possible code language or oblique references."³⁰¹ The courts also examined the measures that were applied to limit, i.e., "minimize," the scope and breadth of the surveillance.³⁰² These courts viewed the primary purpose test only as a test of compliance with the exception to the warrant clause and not as a test of reasonableness.³⁰³ The discussion of reasonableness instead focused on the status of the target and the standards that governed the acquisition and handling of the information acquired.

The Executive conducts physical searches to obtain foreign intelligence information in accordance with these reasonableness requirements.³⁰⁴ In particular, section 2.5 of Executive Order 12,333 forbids warrantless physical searches to collect foreign intelligence unless "the Attorney General has determined in each case that there is *probable cause* to believe that the [search] . . . is directed against a foreign power or an agent of a foreign power."³⁰⁵ This modified standard of probable cause for foreign intelligence gathering is the same test Congress chose when it enacted FISA to regulate

298. *Butenko*, 494 F.2d at 606 (footnote omitted).

299. *Id.*

300. *Truong*, 629 F.2d at 912; *Humphrey*, 456 F. Supp. at 59; see *supra* text accompanying notes 142-63.

301. *Truong*, 629 F.2d at 917; accord *Humphrey*, 456 F. Supp. at 60; cf. *United States v. Clerkley*, 556 F.2d 709 (4th Cir. 1977) (discussing electronic surveillance under title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1982), *cert. denied*, 436 U.S. 930 (1978)); *infra* note 413.

302. *Truong*, 629 F.2d at 916-17; *Humphrey*, 456 F. Supp. at 59-60. The Supreme Court also has stressed the need for minimization during electronic surveillance and certain kinds of physical searches. See *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976).

303. See *Truong*, 629 F.2d at 915-16; *Humphrey*, 456 F. Supp. at 57-59; *infra* note 413.

304. For further discussion of the Executive's compliance with the requirements of the reasonableness clause, see *supra* text accompanying notes 309-26.

305. See § 2.5, *supra* text accompanying note 3 (emphasis added); *infra* note 413.

electronic surveillance in the United States for foreign intelligence purposes.³⁰⁶ In addition, the modified probable cause standard is consistent with the Supreme Court's statements in *Keith* that the fourth amendment would tolerate modified procedures that are more consistent with the needs and objectives of intelligence investigations.³⁰⁷ Furthermore, the FISA provisions that embody these principles have been upheld by every court that has considered them.³⁰⁸

IV. EXECUTIVE ADHERENCE TO THE REQUIREMENTS OF THE FOURTH AMENDMENT

Parts III.B and III.C of this article describe the requirements that a physical search must meet in order to satisfy the standards of the warrant clause exception for foreign intelligence gathering and the reasonableness requirement of the fourth amendment. Section 2.5 of Executive Order 12,333 prescribes certain general principles that govern the Executive's warrantless foreign intelligence-gathering activities. The Order also requires that techniques such as nonconsensual physical searches may not be used except "in accordance with procedures established by the head of the [intelligence] agency concerned and approved by the Attorney General."³⁰⁹

The appendix contains relevant provisions from the procedures governing the Department of Defense (DOD), which were approved by then Attorney General William French Smith on October 4, 1982.³¹⁰ These provisions are extracted from DOD Procedure 7, entitled "Physical Searches," and outline the factors that executive branch officials must consider to ensure that a proposed warrantless physical search to collect foreign intelligence is reasonable and satisfies the criteria of the exception to the warrant clause. A brief review of these factors, which are similar to those embodied in the relevant procedures adopted by the other United States intelligence agencies pursuant to Executive Order 12,333, indicates that the Executive is complying with the judicially established principles governing warrantless physical searches to collect foreign intelligence information.³¹¹

306. See Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801(a)-(b), 1805(a)(3) (1982).

307. *Keith*, 407 U.S. at 322-23.

308. See *Duggan*, 743 F.2d at 72-74; *Megahey*, 553 F. Supp. at 1190; *Falvey*, 540 F. Supp. at 1312; *Kozibioukian*, No. 15,837, slip op. at 1-2 (C.D. Cal. filed June 14, 1983).

309. Exec. Order No. 12,333, *supra* note 1, at § 2.4.

310. Department of Defense Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons, DOD Reg. 5240.1-R (Dec. 1982) [hereinafter cited as DOD Procedures].

311. See *supra* text accompanying notes 219-308. The recent Note protests that the protections of the warrant clause would be illusory if searches could be conducted "generally" with-

The DOD procedure governs all DOD physical searches for foreign intelligence purposes in the United States and all such physical searches of the person or property of any "United States person" abroad.³¹² The procedure permits DOD to conduct searches of those active duty military personnel subject to the Uniform Code of Military Justice, whether in the United States or abroad.³¹³ DOD may not conduct any other physical searches for foreign intelligence purposes in the United States, but must instead request that the FBI conduct such other searches.³¹⁴ Abroad, DOD may conduct its own physical searches of United States persons and their property.³¹⁵ However, all DOD requests for FBI searches in the United States and all DOD requests for approval of searches directed against United States persons abroad must be submitted to the Attorney General and must conform to the same standards.³¹⁶ Among other things, such requests must specifically identify the person or describe the property to be searched.³¹⁷ Thus, no general area or "dragnet"-type searches may be authorized.

A key element to ensure compliance with the warrant clause exception and establish the reasonableness of the search is the requirement for a showing of probable cause to believe the target of the search is a foreign power or an agent of a foreign power.³¹⁸ The DOD procedure requires that DOD provide the Attorney General with the information necessary to make such a finding.³¹⁹ Before the Attorney General may approve a warrantless physical

out a warrant when the necessary prerequisite conditions for a warrant are not present. Note, *supra* note 11, at 619 n.42. Apart from the erroneous presumption that the warrant clause is all-encompassing, it is clear that use of the warrantless search authority must be limited by development and application of proper standards. See *supra* notes 49-57 and accompanying text. The existing procedural structure ensures that searches to gather foreign intelligence are not conducted when the "prerequisite conditions," such as probable cause and Attorney General approval, are not present, and that general or indiscriminate searches to gather such information are not authorized. See *infra* note 413.

312. DOD Procedure 7, § A. "United States person" is a defined term and includes any United States citizen or permanent resident alien, any groups substantially composed of such persons, and all business entities incorporated in the United States and not directed or controlled by a foreign government. DOD Procedures, app. A, "Definitions," § 25.

313. DOD Procedure 7, *supra* note 310, at §§ C.1.a, C.2.a (referring to the Manual for Courts Martial issued under the Uniform Code of Military Justice).

314. *Id.* § C.1.b.

315. *Id.* § C.2.b.

316. *Id.* §§ C.1.a, C.1.b, C.2.a, C.2.b.

317. *Id.* § C.2.b(1).

318. See *supra* text accompanying notes 248-52, 291-308.

319. DOD Procedure 7, *supra* note 310, at §§ C.1.a, C.1.b, C.2.a, C.2.b(2). The elaboration of the term "agent of a foreign power" in the DOD Procedures illustrates that this and other relevant terms can be defined in a manner that precludes unreasonable exercise of the warrant clause exception for foreign intelligence gathering. See *infra* notes 320-21, 413.

search under this procedure, DOD must provide sufficient information to support a finding of probable cause to believe that the subject of the search:

- is engaged, for or on behalf of a foreign power, in clandestine intelligence activities, covert activities intended to affect political or governmental processes, sabotage, international terrorism or preparation for such activities, or is knowingly aiding, abetting, or conspiring with such a person; or
 - is an officer or employee of a foreign power; or
 - is unlawfully acting for or at the direction of a foreign power;
- or
- is in contact or collaborating with intelligence or security officers of a foreign power for the purpose of providing them with access to information that has been classified by the United States;
- or
- is a corporation or entity directly or indirectly owned or controlled by a foreign power.³²⁰

The character of the information that may be the object of a physical search is also specified in the DOD procedure. DOD must provide the Attorney General with statements of fact that support a finding that the search is necessary to obtain foreign intelligence or counterintelligence information that is “significant” and cannot be obtained by any less intrusive techniques.³²¹ This ensures that the search is necessary to satisfy significant gov-

320. DOD Procedure 7, *supra* note 310, at § C.2.b(2). Several of the other terms used in this section are also defined in the DOD Procedures. For example, “foreign power” is defined to include any foreign government, foreign-based political party or faction, foreign military force, foreign-based terrorist group, or any organization made up, in major part, of such entities. DOD Procedures, app. A, “Definitions,” § 12; *see* 50 U.S.C. § 1801(a) (1982). “International Terrorist Activities” is defined to mean activities by or in support of terrorists that either occur totally outside the United States or transcend national boundaries in terms of the means by which they are accomplished, the persons they are intended to coerce or intimidate, or the location where the terrorists operate or seek asylum. DOD Procedures, app. A, § 16; *see* 50 U.S.C. § 1801(c) (1982).

The DOD Procedures also specifically caution that merely because activities may benefit a foreign power, an agency relationship is not established without evidence that the activities are directed by or in concert with a foreign power. DOD Procedure 7, *supra* note 310, at § C.2.b(2)(c). The reference in the DOD Procedures to classified information means information properly classified under Exec. Order No. 12,356, because its disclosure would result in damage to the national security. National Security Information, 47 Fed. Reg. 14,874, 14,874, §§ 1.1(a)(1)-(3) (April 6, 1982).

321. DOD Procedure 7, *supra* note 310, at § C.2.b(3)-(4). As explained previously, the intelligence agencies define the term “foreign intelligence information” more specifically than have the courts. *See supra* note 4. In the DOD Procedures, “foreign intelligence” includes information relating to the capabilities, intentions, and activities of foreign powers, organizations or persons and international terrorists. DOD Procedures, app. A, § 11; *see* Exec. Order No. 12,333, *supra* note 1, at § 3.4(d). “Counterintelligence” includes information gathered to protect against espionage or other forms of clandestine intelligence activity, sabotage, or assas-

ernmental interests and has a legitimate foreign intelligence purpose that brings it within the exception to the warrant clause. DOD also must describe the nature of the foreign intelligence information it expects to acquire, state the intended scope of the search, and establish a factual basis for a finding that the intrusiveness of the search will be limited to that necessary to accomplish the intended purpose of the search.³²² These requirements are intended to focus the search as precisely as possible and to preclude any “general searches” of the type that prompted adoption of the fourth amendment warrant clause.³²³

Also integral to the DOD procedure are descriptions of how the intended fruits of a physical search will be disseminated and the controls that will govern the retention and dissemination of incidental information acquired about United States persons during the search.³²⁴ Provisions of the other DOD procedures may be drawn upon to provide general standards for the collection, retention, and dissemination of information concerning United States persons that is acquired by DOD in the course of its intelligence activities.³²⁵ These procedural elements supply the minimization standards that assist in making reasonable the use of warrantless physical searches for foreign intelligence purposes.

Finally, to ensure that serious consideration is devoted to these matters, only a limited number of senior DOD officials, all outside the immediate operational context, are authorized to transmit requests for approval of such searches to the Attorney General.³²⁶

Thus, the Executive has imposed procedural requirements on the conduct of warrantless physical searches that fully satisfy judicial requirements to invoke the warrant clause exception for foreign intelligence gathering. The searches are approved by the Attorney General, targeted exclusively against foreign powers and their agents or collaborators, and conducted only to acquire valuable foreign intelligence and counterintelligence information. The procedures also are consistent with the elements of reasonableness that have been identified by the courts because the procedures require showings of probable cause, necessity, specificity, narrow scope, limited intrusiveness,

sinations, when conducted on behalf of foreign powers, organizations, or persons, and international terrorism. DOD Procedures, app. A, § 5; *see* Exec. Order No. 12,333, *supra* note 1, at § 3.4(a).

322. DOD Procedure 7, *supra* note 310, at § C.2.b(5)-(6).

323. *See, e.g., Entick v. Carrington*, 2 Wils. 275, 95 Eng. Rep. 807 (K.B. 1765).

324. DOD Procedure 7, *supra* note 310, at § C.2.b(7).

325. DOD Procedures 2-4.

326. These officials are the Secretary and Deputy Secretary of Defense; Secretary and Under Secretary of the Army, Navy, or Air Force; and the Directors of the National Security Agency and the Defense Intelligence Agency. DOD Procedure 7, *supra* note 310, at § C.2.c.

minimization, and consideration by impartial officials removed from the actual investigation. Since these warrantless searches qualify under a specific exception to the warrant clause and are executed in a clearly reasonable manner, they satisfy the requirements of the Constitution elaborated by the Judiciary and, accordingly, are lawful.

V. CONGRESSIONAL ACTION AND WARRANTLESS PHYSICAL SEARCHES FOR FOREIGN INTELLIGENCE PURPOSES

At this point, several principles should be clearly understood. First, the President cannot exercise any authority, including the authority to approve warrantless searches to collect foreign intelligence, in contravention of the fundamental protections embodied in the Constitution.³²⁷ The preceding discussion demonstrates that the exercise of this authority in accordance with existing standards and procedures is not incompatible, but in fact is entirely consistent, with the constitutional principles the Judiciary has enunciated. Second, Congress may not grant the President authority that is inconsistent with the Constitution.³²⁸ Third, the President may act from independent authority, so long as this action is consistent with the Constitution, and Congress has not otherwise expressed its will.³²⁹ Finally, presidential authority and action in areas not expressly committed by the Constitution to the President alone may be shaped and regulated by congressional enactments.³³⁰

327. See, e.g., *Curtiss-Wright*, 299 U.S. at 320; *Zweibon*, 516 F.2d at 621; see *supra* notes 33-46 and accompanying text.

328. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819). This is not to say, however, that all warrantless searches in the United States for foreign intelligence purposes would be unconstitutional if authorized by legislation. See Note, *supra* note 11, at 635 n.144. FISA explicitly empowers the Attorney General to approve certain electronic surveillance without seeking the approval of the FISA court, and the constitutionality of those provisions has not been questioned. See 50 U.S.C. § 1802(a) (1982); *infra* note 345.

329. See *Youngstown Sheet & Tube*, 343 U.S. at 637 (Jackson, J., concurring); see also *infra* text accompanying notes 400-08.

330. *Id.* There may be some differences of opinion concerning the precise breadth of Congress' power to regulate the actions of the President in certain areas. See Note, *supra* note 11, at 636 n.148. While Congress generally may regulate the exercise of Executive power, it does not necessarily have the power to preclude Executive action altogether when to do so would frustrate a legitimate governmental purpose or prevent the Executive from fulfilling its constitutionally-assigned functions. See generally Rovine, *Congressional-Executive Relations and United States Foreign Policy*, 17 WILLAMETTE L. REV. 41, 52 (1980).

The language of *Youngstown Sheet & Tube*—"[presidential] constitutional powers minus any constitutional powers of Congress over the matter"—implies a residuum of executive authority in certain areas even where Congress may have acted to limit presidential discretion. See Note, *supra* note 11, at 636 n.146 (quoting *Youngstown Sheet & Tube*, 343 U.S. at 637). Thus, Congress would be within its constitutional powers if it enacted a statute requiring a warrant for physical searches related to foreign intelligence gathering and provided a suitable

Because Congress has not granted the President authority to conduct warrantless physical searches for foreign intelligence purposes, there is no basis for deliberating whether such a grant is either consistent or inconsistent with the Constitution. Rather, until Congress chooses to act at all in this area it is clear that the President is constitutionally empowered to act in the best interests of the nation's security.³³¹

A. *The Foreign Intelligence Surveillance Act—Congress' Intent*

After years of debate,³³² the Foreign Intelligence Surveillance Act (FISA) was enacted by the Ninety-Fifth Congress and signed into law by President

mechanism for acquiring such a warrant. Congress probably could not require a warrant, however, without providing such a mechanism since the absence of a procedure to obtain a warrant would effectively frustrate Executive action in this area. Nor could Congress enact standards that are so restrictive they effectively preclude the President from acting at all, even when the national interest clearly demands action. *See generally supra* notes 185-214 and accompanying text.

In this regard, although the Executive supported the enactment of FISA and Congress asserted that FISA's enactment marked the end of the Executive's inherent authority to conduct electronic surveillance in the United States for foreign intelligence purposes, the Executive has never conceded that its inherent authority does not survive the enactment of FISA. Such authority might be relied upon should circumstances ever arise where, for example, the "criminal standard" that is part of FISA could preclude the acquisition of foreign intelligence information that is clearly essential to the nation's security. *See* 50 U.S.C. § 1801(b)(2) (1982). Such a situation, where the national security is imperiled and no effective means are available to secure prior court approval, may be tantamount to exigent circumstances. Accordingly, surveillance might proceed on the basis of that exception to the fourth amendment warrant requirement. Whatever the rationale, the Executive has not foreclosed the possibility that it may be forced to act on its own authority outside the provisions of FISA or title III of the Omnibus Crime Control and Safe Streets Act of 1968. *See infra* note 334.

331. The recent Note explains that determining congressional intent is difficult, but asserts that the "available evidence" indicates congressional hostility toward warrantless physical searches. Note, *supra* note 11, at 637. However, no evidence is cited for this observation. Further, the Note is unclear what relevance should be attached to even widespread congressional hostility that is unaccompanied by legislative action. Contrary to the recent Note's assertions, what the record shows regarding warrantless physical searches for foreign intelligence purposes is intermittent expressions of concern by some members of Congress, profound indifference overall, and clear indications that Congress is not yet prepared to enact legislation reflecting those concerns. *See infra* notes 349-65 and accompanying text.

332. *See The Senate Judiciary Comm., Report to Accompany S. 1566*, S. REP. NO. 604, 95th Cong., 1st Sess. 7 (1977); *Foreign Intelligence Surveillance Act of 1977: Hearings on S. 1566 before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 1-3 (1977); *Foreign Intelligence Surveillance Act of 1976: Hearings on S. 743, S. 3197 before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 1-4 (1976); *Electronic Surveillance Within the United States for Foreign Intelligence Purposes: Hearings on S. 3197 Before the Subcomm. on Intelligence and the Rights of Americans of the Senate Select Committee on Intelligence*, 94th Cong., 2d Sess. 4-5 (1976).

Carter on October 25, 1978.³³³ Ten years before, Congress had enacted title III of the Omnibus Crime Control and Safe Streets Act, a statutory framework requiring judicial warrants for electronic surveillance conducted for law enforcement purposes.³³⁴ At the same time, Congress specifically disclaimed any intention to affect the authority claimed by a succession of Presidents to use warrantless electronic surveillance for foreign intelligence purposes.³³⁵ Despite the subsequent introduction of many proposals that would have addressed this area in one way or another,³³⁶ it was not until the Foreign Intelligence Surveillance Act of 1978 that Congress agreed to take effective action to regulate the exercise of the asserted presidential authority to conduct warrantless electronic surveillance to gather foreign intelligence.³³⁷

333. Pub. L. No. 95-511, 92 Stat. 1783, 50 U.S.C. §§ 1801-1811 (1982); 14 WEEKLY COMP. PRES. DOC. 1853 (Oct. 27, 1978).

334. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 211, tit. III; 18 U.S.C. §§ 2510-2520 (1982).

335. Title III provided specifically that:

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 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 national security information against foreign intelligence activities. 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. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

18 U.S.C. § 2511(3) (repealed 1978).

336. See, e.g., Foreign Intelligence Surveillance Act of 1977, S. 1566, H.R. 5632, H.R. 5704, H.R. 7308, H.R. 9745, 95th Cong., 1st Sess. (1977); Foreign Intelligence Surveillance Act of 1976, S. 3197, 94th Cong., 2d Sess. (1976); National Security Surveillance Act of 1975, S. 743, and Bill of Rights Procedures Act of 1975, S. 1888, 94th Cong., 1st Sess. (1975); Freedom from Surveillance Act of 1974, S. 4062, 93d Cong., 2d Sess. (1974); Surveillance Practice and Procedures Act of 1973, S. 2820, 93d Cong., 1st Sess. (1973).

337. The recent Note claims that the enactment of FISA allows for only one of three mutually exclusive references to be drawn regarding Congress' intentions toward warrantless physical searches for foreign intelligence purposes. First, FISA embodies implied approval of such searches; second, FISA is irrelevant to the validity of such searches; or third, FISA indicates general disapproval of such searches. Note, *supra* note 11, at 637-38. The Note concludes that the last inference, congressional disapproval of such searches, not only is the most logical of the three, but also is most compatible with the legislative history of FISA. *Id.* To the contrary, however, the substance and legislative history of FISA indicate a clear and knowing choice on the part of Congress to treat only electronic surveillance for intelligence purposes within the United States and to leave for another day the issues raised by other warrantless

FISA is 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. The substantive provisions of FISA describe the mechanism and the procedural requirements for obtaining approval from the Judiciary or the Attorney General to conduct various types of electronic surveillance of various types of targets.³³⁸ The key to understanding FISA lies in its definitions.³³⁹

FISA regulates "electronic surveillance," which is defined to include the interception of international communications to a target who is a United States person in the United States, wiretapping in the United States, interception of the microwave portions of telephone communications in the United States, and microphone, closed-circuit television, or other forms of electronic monitoring of activities in the United States, for the purpose of collecting foreign intelligence.³⁴⁰ Other important defined terms relating to the scope of FISA include "foreign power," "agent of a foreign power," "foreign intelligence information," "United States person," "wire communication," and "contents."³⁴¹ The purpose of this discussion is not to provide a thorough understanding of FISA but rather to show that this Act does not extend to physical searches.

techniques, including most electronic surveillance abroad and physical searches both in and outside the United States. As is clear from the discussion in this section, no inferences are necessary to arrive at the unmistakable conclusion that FISA is purposefully irrelevant to physical searches to collect foreign intelligence.

338. See, e.g., 50 U.S.C. §§ 1802-1805 (1982).

339. See *id.* § 1801.

340. The statute defines "electronic surveillance" to mean:

(1) the 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 targetting the United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;

(2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States;

(3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or

(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

50 U.S.C. § 1801(f)(1)-(4) (1982).

341. FISA defines these terms in the following manner:

The only searches that are explicitly referred to in FISA are trespassory

(a) "Foreign power" means—

(1) a foreign government or any component thereof, whether or not recognized by the United States;

(2) a faction of a foreign nation or nations, not substantially composed of United States persons;

(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;

(4) a group engaged in international terrorism or activities in preparation therefor;

(5) a foreign-based political organization, not substantially composed of United States persons; or

(6) an entity that is directed and controlled by a foreign government or governments.

(b) "Agent of a foreign power" means—

(1) any person other than a United States person, who—

(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section;

(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or

(2) any person who—

(A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;

(B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;

(C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power; or

(D) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

...
(e) "Foreign intelligence information" means—

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to—

(A) the national defense or the security of the United States; or

(B) the conduct of the foreign affairs of the United States.

...
(i) "United States person" means a citizen of the United States, an alien lawfully

entries necessary to effectuate and maintain electronic surveillance authorized under FISA.³⁴² The Act creates the United States Foreign Intelligence Surveillance Court, composed of seven federal district court judges.³⁴³ This court is specifically empowered to authorize such entries and to issue orders requiring landlords and others to cooperate with the government in this regard.³⁴⁴ The provisions authorizing the Attorney General, rather than the FISA court, to approve certain types of electronic surveillance do not expressly include similar authority.³⁴⁵ Nevertheless, the Justice Department has concluded that such authority is implicit in the specific authority vested in the Attorney General by the Act.³⁴⁶ Congress presumably must agree with this conclusion because it has been made aware of this opinion and has not registered disapproval or disagreement.³⁴⁷ No other provision of the Act

admitted for permanent residence (as defined in section 1101(a)(20) of the Immigration and Nationality Act), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section.

...
 (l) "Wire communication" means any communication while it is being carried by a wire, cable, or other like connection furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications.

...
 (n) "Contents", when used with respect to a communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication.

50 U.S.C. § 1801 (1982); see also *supra* text accompanying note 319.

342. 50 U.S.C. §§ 1804(a)(8), 1805(b)(1)(D) (1982).

343. 50 U.S.C. § 1803(a) (1982). An appeals court of three federal circuit court judges is also provided for appeals by the government of FISA court denials of its applications for authority to conduct electronic surveillance. *Id.* § 1803(b). It has not yet been necessary for the government to resort to such an appeal since the FISA court has not yet found it necessary to reject a government application. See FIVE-YEAR REPORT, *supra* note 12, at 8.

344. 50 U.S.C. § 1805(b)(2)(B)-(D) (1982).

345. The Attorney General may approve surveillance when it is targeted solely against communications among or between foreign powers and there is "no substantial likelihood" that any United States person will be a party to those communications. *Id.* § 1802(a)(1)(B). Congress based this authority on the conclusion that "foreign states and their official agents, to the extent that they are not subject to our laws, are not protected by the Fourth Amendment." HOUSE FISA REPORT, *supra* note 19, pt. I, at 69 n.34 (referencing a letter from John Harmon, Assistant Attorney General, Office of Legal Counsel, to Chairman Boland, dated April 18, 1978). This conclusion and statutory authority run counter to the recent Note's assertion that all warrantless searches are unconstitutional per se. See Note, *supra* note 11, at 635 n.144.

346. See SENATE SELECT COMMITTEE ON INTELLIGENCE, REPORT ON IMPLEMENTATION OF THE FOREIGN INTELLIGENCE ACT OF 1978 (1980-81), S. REP. NO. 280, 97th Cong., 1st Sess. 6-8 (1981).

347. *Id.*

explicitly or implicitly addresses physical searches.³⁴⁸

Congress has clearly and unequivocally stated its intention to have FISA control only particular types of warrantless electronic surveillance for foreign intelligence purposes. The final report of the House Permanent Select Committee on Intelligence concerning FISA,³⁴⁹ the most complete and authoritative part of the Act's legislative history, includes many statements indicating the sponsors of FISA were fully aware that its reach was limited.³⁵⁰

348. FISA expressly repealed the provision that had disclaimed any intention on the part of Congress in 1968 to affect the President's authority to conduct electronic surveillance for national security purposes. See Pub. L. No. 95-511, § 201(c), 92 Stat. 1783 (1978). For the text of the repealed provision, see 18 U.S.C. § 2511(3) quoted *supra* note 335. The recent Note cites S. 3617, a pre-FISA proposal that would have amended, rather than repealed, this provision of title III. The proposed amendment would have limited the disclaimer in title III so that it only exempted the President's authority to acquire foreign intelligence *by means other than electronic surveillance* as defined in the bill containing the amendment. Note, *supra* note 11, at 641. The recent Note also draws upon an explanation in a Senate Report that the intent of this amendment was to ensure that all electronic surveillance important to the national security would be encompassed in one way or another—either by the warrant procedure that would have been created by the bill or by the President's remaining inherent authority to conduct electronic surveillance of foreign powers. See *id.* at 641 n.168. The recent Note claims that because this amendment was not included in FISA as finally enacted, Congress showed its intent to restrict any inherent power that might exist in areas other than electronic surveillance. That is, the Note urges that by totally repealing the disclaimer of intent to affect inherent authority, rather than by amending the disclaimer and preserving it for nonelectronic techniques such as physical searches, Congress indicated its intent to limit inherent authority involving both electronic and nonelectronic means of collection. *Id.* at 642.

This assertion is groundless. In the first place, other provisions of the proposed amendment would have left the President with inherent authority to conduct warrantless electronic surveillance of foreign powers. Thus, rejecting the proposal in favor of a total repeal of the title III disclaimer comports with Congress' intent to preclude only further assertions of inherent Executive authority to conduct any warrantless electronic surveillance in the United States. Secondly, there is no affirmative indication in either the title III disclaimer, the proposed amendment, or FISA's simple repeal of the title III disclaimer, of any congressional intent to deal with any technique other than electronic surveillance.

349. HOUSE FISA REPORT, *supra* note 19; see also SENATE FISA REPORT, *supra* note 19; FISA CONFERENCE REPORT, *supra* note 19.

350. For example, the Report states:

The Committee has explored the feasibility of broadening this legislation to apply overseas, but has concluded that certain problems and unique characteristics involved in overseas surveillance preclude the simple extension of this bill to overseas surveillances. This is not to say that overseas surveillance should not likewise be subject to legislative authorization and restriction, but the problems and circumstances of overseas surveillance demand separate treatment, and this bill, dealing with the area where most abuses have occurred, should not be delayed pending the development of that separate legislation. The committee notes the administration's commitment to the development of a separate bill governing overseas surveillance and expects to work closely with the administration on that bill.

HOUSE FISA REPORT, *supra* note 19, pt. I, at 27-28. At another place, the Report explains: [T]his bill does not afford protections to U.S. persons who are abroad, nor does it regulate the acquisition of the contents of international communications of U.S. per-

The complex provisions of FISA and the statements of intent embodied in the legislative history clearly indicate Congress' recognition that the Act would not reach the full range of warrantless electronic surveillance activities the Executive was conducting at that time. Given this limited objective within the area of primary interest, i.e., electronic surveillance, one cannot reasonably conclude that Congress intended by silence or indirection to allow FISA to have any effect in the distinctly separate area of physical searches.³⁵¹

However, even these clear and rational inferences need not be relied upon as a measure of Congress' intent. The proponents of FISA not only knew how to be explicit, they exercised that knowledge:

The committee does not intend the term "surveillance device" as used in paragraph [1801(f)] (4) to include devices which are used incidentally as part of a physical search, or the opening of mail, but which do not constitute a device for monitoring. Lock picks, still cameras, and similar devices can be used to acquire information, or to assist in the acquisition of information, by means of physical search. So-called chamfering devices can be used to open mail. This bill does not bring these activities within its purview. Although it may be desirable to develop legislative controls over physical search techniques, the committee has concluded that these

sons who are in the United States, where the contents are acquired unintentionally. The committee does not believe that this bill is the appropriate vehicle for addressing this area. The standards and procedures for overseas surveillance may have to be different than those provided in this bill for electronic surveillance within the United States or targeted against U.S. persons who are in the United States.

Id. at 51; *see also id.* at 100.

351. The recent Note proclaims that Congress "surely" did not intend to require warrants for electronic surveillance and, at the same time, entirely exempt other types of intrusive activities from the warrant requirement. Note, *supra* note 11, at 638. This statement is contradicted by the subsequent recognition that FISA does not apply to electronic surveillance abroad or nonelectronic surveillance, i.e., physical searches, in the United States and abroad. *Id.* at 640 n.165.

The recent Note also cites the Church and Pike Committee reports as support for its conclusion that warrantless physical searches "fly in the face of clearly expressed congressional intent." Note, *supra* note 11, at 639. No citations are provided to support this assertion, however, aside from general statements from the reports to the effect that abuses had occurred and controls were advisable. *Id.* The only specific references given are to the legislative history of FISA, which only deals with electronic surveillance, and S. 2284, an ill-fated attempt at an omnibus intelligence charter. *See* Note, *supra* note 11, at 631; *see infra* notes 353-56 and accompanying text. These sources support the conclusion that there has been sporadic expression of congressional support for legislative controls on warrantless physical searches. Nevertheless, they lend no credence to the claim that any existing congressional enactment is intended to bar or regulate such searches.

The recent Note's reference to § 2236 of Chapter 18 of the United States Code is discussed *infra* text accompanying notes 367-99.

practices are sufficiently different from electronic surveillance so as to require separate consideration by the Congress. The fact that the bill does not cover physical searches for intelligence purposes should not be viewed as congressional authorization for such activities. In any case, any requirements of the fourth amendment would, of course, continue to apply to this type of activity.³⁵²

Subsequent events further demonstrate Congress' understanding of the limitations inherent in FISA and its unwillingness to date to enact legislation that would regulate warrantless physical searches. In early 1978, prior to FISA's enactment, then Senator Walter Huddleston of Kentucky, a leading member of the Senate Select Committee on Intelligence, introduced S. 2525, an omnibus intelligence charter that would have authorized and regulated the activities of United States Government intelligence entities.³⁵³ Among the 263 pages of detailed legislative provisions were the entirety of FISA,

352. HOUSE FISA REPORT, *supra* note 19, pt. I, at 53 (footnote omitted). In view of this acknowledgement that FISA was not intended to have any impact on warrantless physical searches, it is surprising that the recent Note should claim that the legislative history supports the conclusion that Congress meant to disapprove warrantless physical searches generally and that there is evidence the framers of FISA, relying upon the Church Committee Report, intended to require a warrant for physical searches for foreign intelligence purposes. Note, *supra* note 11, at 639 n.165.

Further, the recent Note misconstrues a portion of the FISA legislative history in attempting to demonstrate flaws in the Executive's position on these matters. It attributes to Attorney General Edward Levi the statement that the fourth amendment protects only United States citizens and has no application to foreign powers or their agents. *Id.* It then rebuts this position by noting that even a United States citizen could be an agent of a foreign power and that the courts have recognized fourth amendment protections for non-United States citizens in certain circumstances. *Id.* However, Attorney General Levi's actual testimony was much more artfully drawn and carefully considered than the Note allows:

[W]ho are "the people" to whom the Fourth Amendment refers? The Constitution begins with the phrase, "We the people of the United States." That phrase has the character of words of art, denoting the power from which the Constitution comes. It does suggest a special concern for the American citizen and for those who share the responsibilities of citizens. The Fourth Amendment guards the rights of "the people" and it can be urged that it was not meant to apply to foreign nations, their agents and collaborators. *Its application may at least take account of the difference.*

Electronic Surveillance Within the United States for Foreign Intelligence Purposes: Hearings Before the Subcomm. on Intelligence and the Rights of Americans of the Senate Select Comm. on Intelligence, 94th Cong., 2d Sess. 24, 30 (1976) (prepared statement of Attorney General Levi) (emphasis added). Thus, the Attorney General was not arguing that the fourth amendment does not protect United States citizens who may be agents of a foreign power, nor was he asserting that non-United States citizens have no fourth amendment protections at all. Rather, General Levi was explaining that, as has been recognized in FISA, there is a sound legal basis for providing different standards of protection under the fourth amendment for persons in different circumstances.

353. See *Hearings on the National Intelligence Reorganization and Reform Act of 1978*, S. 2525, *Before the Senate Select Comm. on Intelligence*, 95th Cong., 2d Sess. (1978). The House counterpart was H.R. 11,245.

which had not yet been approved, and additional sections that would have required approval by the FISA court of electronic surveillance of United States persons abroad and physical searches for intelligence purposes in the United States or directed against a United States person abroad.³⁵⁴

Subsequently, after two years of hearings and discussions with executive branch representatives, Senator Huddleston introduced S. 2284, a revised, more abbreviated version of an intelligence charter.³⁵⁵ This 180-page bill did not include the provisions of FISA, which had been enacted by that point, but did contain provisions that would have extended the authority of the FISA court to physical searches for intelligence purposes in the United States and to physical searches and electronic surveillance for such purposes directed at United States persons abroad.³⁵⁶ Ultimately, these provisions were not enacted. Thus Congress, during and immediately after its consideration of FISA, acknowledged by consideration and rejection of these provisions that neither FISA nor any other statute establishes controls over physical searches for foreign intelligence purposes.

If further proof is needed, a look at subsequent executive branch efforts to obtain FISA court approval of physical searches for intelligence purposes should suffice. In late 1980, the Justice Department disclosed that Attorney General Benjamin Civiletti had determined that requests for Attorney General approval of warrantless physical searches for foreign intelligence purposes should be brought to the FISA court for judicial review, even though the Executive continued to assert that the Attorney General and the President retained independent authority to approve such searches.³⁵⁷ This re-

354. *Id.* at 934, 944-45, 973-1016.

355. *See Hearings on the National Intelligence Act of 1980, S. 2284, Before the Senate Select Comm. on Intelligence, 96th Cong., 2d Sess. (1980).* The House counterpart was H.R. 6588.

356. *Id.* at 36-38, 45-47, 52-62, 158-70. The recent Note attributes statements that these proposals did not go far enough to facilitate foreign intelligence collection to Attorney General William French Smith's testimony on the National Intelligence Act of 1980. The Note also states that Attorney General Smith suggested that FISA had contributed to the "Imperial Judiciary" and proposed amending it to adopt a lower "essential to the national security" standard for domestic or foreign searches. *See Note, supra* note 11, at 641 n.165. These statements would be surprising to Attorney General Smith, since the testimony in question occurred before he became Attorney General and even before the election of President Reagan. In fact, Attorney General Smith never testified in any capacity on the proposed intelligence charter. The references are actually to the testimony of Jack Blake, who was at that time the President of the Association of Former Intelligence Officers.

357. *See* letter from Kenneth C. Bass, Counsel for Intelligence Policy, Department of Justice, to Edward R. Boland, Chairman of Permanent Select Committee on Intelligence, Oct. 27, 1980, *reprinted in* REPORT OF THE HOUSE PERMANENT SELECT COMM. ON INTELLIGENCE ON THE IMPLEMENTATION OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, H.R. REP. NO. 1466, 96th Cong., 2d Sess. 8-16 (1980). Note that attached to the letter is an explanatory memorandum to FBI Director William H. Webster.

sort to the FISA court, which would have been expected to have been well received if Congress were intent on requiring warrants for these physical searches, caused great consternation and some disagreement among the members of the intelligence oversight committees of Congress.³⁵⁸

Although the FISA court ultimately approved all three of the physical searches submitted by the Justice Department, the court itself evidenced concern over its authority to approve these searches and directed its clerk to develop a legal memorandum on the subject for the court.³⁵⁹ That memorandum concluded that the court had no authority to approve activities that did not fit within the definition of "electronic surveillance" as provided in the statute.³⁶⁰

In the spring of 1981, following the transition to a new administration and the confirmation of Attorney General William French Smith, the Justice Department submitted a memorandum of law to the FISA court reversing the position taken under the previous Attorney General and arguing that FISA provided no basis for FISA court approval of physical searches for foreign intelligence purposes.³⁶¹ On June 11, 1981, then Foreign Intelligence Surveillance Court Chief Judge George L. Hart, Jr., issued an opinion on behalf of the court concluding that it had no authority over such matters.³⁶² The intelligence committees of both the House and Senate reported and did not disagree with this development.³⁶³ Significantly, members of those committees have continued to point out that legislation to regulate warrantless physical searches continues to be on their agenda for future congressional consideration.³⁶⁴

There appears to be no reasonable basis for asserting that Congress in-

358. *Id.* at 5, 25-26; SENATE SELECT COMM. ON INTELLIGENCE, REPORT ON THE IMPLEMENTATION OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978 (1979-80), S. REP. NO. 1017, 96th Cong., 2d Sess. 9-10, 11-19 (1980).

359. H.R. REP. NO. 1466, *supra* note 357, at 17-24.

360. *Id.* See *supra* note 340.

361. See Memorandum of Law, *In re* Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property (U.S.F.I.S.C., June 11, 1981), reprinted in SENATE SELECT COMM. ON INTELLIGENCE, REPORT ON THE IMPLEMENTATION OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978 (1980-81), S. REP. NO. 280, 97th Cong., 1st Sess. 10-16 (1981).

362. *In re* the Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property (U.S.F.I.S.C., June 11, 1981), reprinted in S. REP. NO. 280, *supra* note 361, at 16-19; see also *infra* note 413.

363. See S. REP. NO. 280, *supra* note 361, at 3-4; HOUSE PERMANENT SELECT COMM. ON INTELLIGENCE, REPORT ON THE IMPLEMENTATION OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT, H.R. REP. NO. 318, 97TH CONG., 1ST SESS. 4 (1981).

364. See FIVE-YEAR REPORT, *supra* note 12, at 17-19; SENATE SELECT COMM. ON INTELLIGENCE, REPORT ON THE IMPLEMENTATION OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978 (1981-82), S. REP. NO. 691, 97th Cong., 2d Sess. 5-6, 11-13 (1982).

tended to do anything other than defer consideration of warrantless physical searches when it enacted FISA or that Congress is less than fully informed of the existence, legal basis, and continued exercise of this authority by the Executive. The Executive's position that its activities are lawful is based on a series of judicial decisions recognizing the existence of inherent Executive authority in the foreign intelligence area and on the authority implicit in the absence of any effective or practical means for prior judicial review of physical searches for foreign intelligence purposes.

In these circumstances, it must be presumed that the Judiciary by its findings, and the Congress by its enactment of FISA and lack of effective action regarding physical searches, have accepted the basic constitutionality of the Executive's activities. As has been explained recently by the Supreme Court:

Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive. On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility." At least this is so where there is no contrary indication of legislative intent and when . . . there is a history of congressional acquiescence in conduct of the sort engaged in by the President.³⁶⁵

365. *Dames & Moore*, 453 U.S. at 678-79 (citations omitted). The recent Note acknowledges the argument that Congress' failure to bar warrantless searches constitutes acquiescence in light of the history of these activities. Note, *supra* note 11, at 642-44. It asserts, however, that this argument is faulty on the grounds that: (a) acquiescence before 1967 is of dubious significance because the Judiciary had not considered electronic surveillance to be controlled by the fourth amendment prior to the *Katz* decision that year; (b) any inference of acquiescence is negated by the "turmoil" that has attended the exception to the warrant clause for foreign intelligence gathering; (c) the "timid and infrequent" use of this technique by the President; (d) the enactment of FISA; and (e) Congress' incomplete knowledge on this issue. *Id.* at 643-44.

On the contrary, there is probably no more robust record of congressional acquiescence, if not apathy, than exists with regard to warrantless foreign intelligence gathering activities. The 1967 *Katz* decision, holding that the fourth amendment applies to electronic surveillance, has no bearing on physical searches, which have never been viewed as outside the fourth amendment, either before or after *Katz*. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 464-66 (1928). Further, Congress recognized the existence of inherent executive authority prior to 1967 and subsequently expressed its intention not to deal with the issue when it enacted the disclaimer in title III in 1968. See 18 U.S.C. § 2511(3) (repealed 1978). The "turmoil" that has existed regarding the foreign intelligence exception to the warrant clause has drawn more

B. Section 2236 of Title 18, United States Code

It has been argued that another statute, section 2236 of title 18, United States Code, which makes it a crime to conduct a law enforcement search without a warrant,³⁶⁶ indicates Congress' intent to bar warrantless physical searches for foreign intelligence purposes and criminalizes such activities.³⁶⁷ Left unaddressed, however, is the question of why Congress continues to express concern regarding this issue, in the context of FISA and other bills such as the National Intelligence Charter,³⁶⁸ if section 2236 accomplished this result.

Actually, the legislative history and judicial interpretations of section 2236

attention to its use, refined its parameters, and diminished any congressional claim of lack of knowledge. Since the recent Note provides no basis either for the alleged "timid and infrequent" use of such searches, or for the earlier statement that techniques other than electronic surveillance are "rarely" used, little can be done to assess the relevance of these claims to the issue of Congress' awareness and acquiescence. Note, *supra* note 11, at 638. The enactment of FISA, accompanied by explicit refusals to encompass physical searches, demonstrates that Congress is aware of the Executive's activities and has deliberately refused to act. Finally, any claim of less than full cognizance by Congress is belied by the many statements of interest and concern that appear in the Church and Pike Committee reports, as well as the FISA legislative history and the periodic reports on FISA implementation that have been issued by the intelligence committees of both Houses since its enactment. Note, *supra* note 11, at 639-41. For example:

FISA does not apply to physical search techniques that would require a warrant for law enforcement purposes, but do not fit the FISA definition of electronic surveillance. Such other intrusive techniques are not authorized by statute for intelligence purposes, but may be used under procedures approved by the Attorney General pursuant to Executive Order No. 12,333.

FIVE-YEAR REPORT, *supra* note 12, at 3-4.

366. Section 2236 states:

Whoever, being an officer, agent, or employee of the United States or any department or agency thereof, engaged in the enforcement of any law of the United States, searches any private dwelling used and occupied as such dwelling without a warrant directing such search, or maliciously and without reasonable cause searches any other building or property without a search warrant, shall be fined for a first offense not more than \$1,000; and, for a subsequent offense, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

This section shall not apply to any person—

- (a) serving a warrant of arrest; or
- (b) arresting or attempting to arrest a person committing or attempting to commit an offense in his presence, or who has committed or is suspected on reasonable grounds of having committed a felony; or
- (c) making a search at the request or invitation or with the consent of the occupant of the premises.

18 U.S.C. § 2236 (1982).

367. See Note, *supra* note 11, at 638-39.

368. None of these bills contained any reference whatsoever to § 2236, an interesting omission since more than one of them would have authorized searches that would have come within the recent Note's interpretation of § 2236.

clearly demonstrate that the statute does not regulate physical searches to collect foreign intelligence information. This provision originally was enacted in 1921 as an amendment to the Volstead Act,³⁶⁹ the statute that initiated America's ill-fated ban on consumption of alcoholic beverages. Section 2236 was motivated by reports of overly aggressive conduct by prohibition enforcement agents. It was not included in the bill that was considered by the committees reporting on other amendments to the prohibition laws,³⁷⁰ but was instead added during discussion on the Senate floor.³⁷¹ The House objected to the Senate language as too sweeping and offered a substitute.³⁷² The Senate rejected the House version, and a third version was adopted by the conference committee.

The clear intent of the provision was to provide a criminal penalty for warrantless searches that the developing case law determined to be impermissible under the fourth amendment. The Conference Report indicates that Congress did not intend to create a statutory limitation on searches that was stricter than fourth amendment requirements.³⁷³ Instead, the congressional intent closely resembles the intention of the disclaimer regarding presidential conduct of electronic surveillance for national security purposes that Congress included in title III.³⁷⁴ Unfortunately, the legislative history of section 2236 does not specifically discuss whether or to what extent the section was intended to apply to searches for foreign intelligence purposes, nor does it discuss how such searches were regarded "under existing law" at the time.

Nevertheless, the section's legislative history clearly indicates that Congress' primary concern was to deter the significant number of warrantless raids conducted by prohibition agents,³⁷⁵ who were routinely stopping and searching pedestrians and automobiles without warrants.³⁷⁶ In addition,

369. See ch. 134, § 6, 42 Stat. 222-24 (1921).

370. See H.R. REP. NO. 224, 67th Cong., 1st Sess. (1921); S. REP. NO. 201, 67th Cong., 1st Sess. (1921).

371. See 61 CONG. REC. 4644 (1921).

372. See H.R. REP. NO. 344, 67th Cong., 1st Sess. (1921).

373. The Conference Report explained:

As the amendment is redrafted it does not take from the officers any right to search where under existing law such search right exists, and it does not confer upon them any right to make any search where under existing law they have none. The question of its constitutionality as granting any unlawful right of search is not involved. The provision agreed to simply provides that a penalty may be imposed on any officer for any search made maliciously and without reasonable cause.

H.R. REP. NO. 361, 67th Cong., 1st Sess. 3 (1921).

374. Pub. L. No. 90-351, § 802, 82 Stat. 197, 211 (1968) (repealed by Pub. L. No. 95-511, § 201(c), 92 Stat. 1797 (1978)); see *supra* note 335.

375. See 61 CONG. REC. 4646, 4722-24 (1921).

376. *Id.* at 4724, 5566.

Senators described with great indignation the warrantless search of an entire block of homes³⁷⁷ and all the cars parked at a religious event.³⁷⁸ Fatalities had occurred when innocent citizens had resisted the raiding officers, who frequently burst into homes without identifying themselves as federal agents.³⁷⁹ Thus, the warrantless intrusions that were the object of this legislation were the antithesis of searches to obtain foreign intelligence, whose success depends on stealth, precision, and caution.³⁸⁰

Very little case law has been developed under section 2236. There are no reported prosecutions under this section, although it is possible there have been a few unreported cases, especially during the 1920's. Judicial commentary on this section is so sparse that it can easily be summarized here. In *Baxter v. United States*,³⁸¹ the court held that the warrantless entry by agents of the Alcohol Tax Unit into a house where whiskey was stored to arrest a man under surveillance, and the subsequent warrantless search of the house, "plainly violated § 2236."³⁸² The court concluded that the defendant's motion to suppress evidence should have been granted and reversed his conviction.³⁸³ In *United States v. Coffman*,³⁸⁴ the court, discussing a motion to suppress, noted that the earlier codified version of section 2236 expressly excepted from its penalties, as does section 2236 itself, searches by officers serving a warrant of arrest.³⁸⁵

The case of *Hughes v. Johnson*,³⁸⁶ considered section 2236 in the context of a civil action. The owners of a poultry market that provided hunters with cold storage for game birds sought damages for the allegedly unlawful search of the market by federal game wardens. They contended that "the conduct of the wardens amounted to unlawful search and seizure and that the violation of such constitutional rights, made criminal by law (18 U.S.C. § 2236), is not protected by immunity"³⁸⁷ The United States Court of Appeals for the Ninth Circuit rejected the contention that the wardens needed a search warrant to inspect the plaintiffs' market and then concluded that the complaint failed to state that the plaintiff protested the wardens'

377. *Id.* at 5567.

378. *Id.* at 5751.

379. *Id.* at 5748-49.

380. *See supra* text accompanying notes 197-98.

381. 188 F.2d 119 (6th Cir. 1951).

382. *Id.* at 120.

383. *Id.*

384. 50 F. Supp. 823 (S.D. Cal. 1943).

385. *Id.* at 825.

386. 305 F.2d 67 (9th Cir. 1962).

387. *Id.* at 68.

entry or otherwise made known their lack of permission for the entry.³⁸⁸ The court of appeals reversed the district court's dismissal of the action, however, and remanded with instructions to grant the plaintiffs leave to file an amended complaint.³⁸⁹

The most significant judicial statements on section 2236 occurred in the course of the prosecutions of G. Gordon Liddy, FBI Director L. Patrick Gray, and FBI agents W. Mark Felt and Edward S. Miller. As part of his defense against charges that he conspired to violate the fourth amendment rights of Daniel Ellsberg's psychiatrist by breaking into his office,³⁹⁰ Liddy contended that he should have been charged under section 2236, a misdemeanor provision, in lieu of felony charges under section 241 of title 18, or that section 2236 should have been charged as a lesser included offense to a charge under section 241.³⁹¹ The United States Court of Appeals for the District of Columbia Circuit held that the prosecutor had the authority to proceed under the provision of his choice and that since the elements of proof for a charge under section 241 differed from those for section 2236, section 2236 could not be charged as a lesser included offense under section 241.³⁹² The court stressed that section 2236 "*requires proof that the defendant was engaged in 'the enforcement of law,'* and that he acted 'maliciously' in unlawfully searching the office building, while Section 241 is silent on both elements."³⁹³ Thus, the District of Columbia Circuit adopted the position that section 2236 only applies to a physical search conducted in the course of law enforcement activities.³⁹⁴

388. *Id.* at 69-70.

389. *Id.* at 70.

390. See *United States v. Liddy*, 542 F.2d 76, 78-79 (D.C. Cir. 1976); see generally *supra* notes 225-27 and accompanying text.

391. See *Liddy*, 542 F.2d at 81. Section 241 states:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 241 (1982).

392. *Liddy*, 542 F.2d at 82.

393. *Id.* (emphasis added).

394. Intelligence activities are included under the broad reference to "law enforcement" in the Privacy Act for purposes of that statute. 5 U.S.C. § 552a(e)(7) (1982); see *Jabara v. Webster*, 691 F.2d 272, 279-80 (6th Cir. 1982); *Moorefield v. United States Secret Service*, 611 F.2d 1021, 1025 (5th Cir.), *cert. denied*, 449 U.S. 909 (1980). Nevertheless, Congress and the courts

In the Gray-Felt-Miller prosecution, W. Mark Felt and L. Patrick Gray raised similar arguments as part of their defense to charges that they conspired to violate fourth amendment rights by ordering the surreptitious search of the homes of families and friends of Weathermen fugitives.³⁹⁵

United States District Judge William B. Bryant rejected the argument of Felt and Gray, but did so on a ground different than that stated in *Liddy*.³⁹⁶ He concluded that section 2236 was not intended to govern "covert activity" that required secrecy to succeed and for which no warrant could be issued.³⁹⁷

Thus, although the available record of interpretations of section 2236 is not extensive, the information that does exist supports the conclusion that section 2236 is not an impediment to properly approved warrantless physical searches for foreign intelligence purposes. Other interpretations may be possible based on the literal language of the statute, but the legislative history of

have acknowledged in other contexts that intelligence activities are not law enforcement activities. *See, e.g.*, National Security Act of 1947, ch. 343, § 102(d)(3), 61 Stat. 495, 498, 50 U.S.C. § 403(d)(3) (1982); *Weissman v. CIA*, 565 F.2d 692, 695-96 (D.C. Cir. 1977).

395. *See* *United States v. L. Patrick Gray III, W. Mark Felt, & Edward S. Miller*, No. 78-000179, slip op. at 5-6 (D.D.C. filed Aug. 17, 1978).

396. *Id.* at 5-7.

397. Judge Bryant's analysis is particularly germane to the issues here:

The most appealing argument of the defendants is that Section 2236 was enacted precisely to immunize to some extent federal law enforcement officers who overstep their legal authority in the pursuit of crime. They urge that the entries alleged in the indictment are exactly the kind of overzealous police behavior Section 2236 was meant to reach and immunize from prosecution as felonies.

The Court is not persuaded to this view. The statute speaks of the federal law enforcement officer who "searches any private dwelling used and occupied as such dwelling without a warrant directing such search" The surreptitious entries alleged in the indictment do not appear to be the warrantless searches to which § 2236 speaks. The warrant procedure assumes that an individual will know when and under what authority a government officer has the right to enter and search his house, and exactly what he does while there. It is an open process in which the individual whose home is searched is presented with a copy of the warrant. And even if no one is on the premises at the time of the search a copy of the process and a receipt for any property taken is left on the premises, Rule 41(d) F.R. Crim. P., usually tacked onto the door or in some other conspicuous place. If no seizure is in fact made, the copy of the warrant indicates as much.

The type of search described in this indictment depends for its efficacy on secrecy. It is most closely compared to wiretapping, which to be effective must be seizure of conversations of a person who does not know he is being monitored. There is no indication that Congress contemplated such covert activity in connection with Section 2236. In fact, the words of Section 2236 appear not to apply to the conduct alleged in this indictment since it speaks of a search conducted "without a warrant directing such search." No warrant could be issued for a surreptitious search. Thus it appears that the police conduct which the statute relegates to misdemeanor status is not the same as alleged in the indictment.

Id. slip op. at 6-7.

the section indicates that Congress was not attempting to exceed fourth amendment requirements to create a narrower statutory requirement. Rather, Congress was responding to flagrant violations of the Constitution by prohibition agents. Thus, as a deterrent to violations of constitutional rights, the section is an anachronism, enacted long before the Supreme Court created far more potent deterrents to this type of abuse.³⁹⁸

Judge Bryant's statements, albeit delivered in a different context, support the conclusion that section 2236 was designed to control the open flouting of the requirement to obtain a search warrant and never was intended to prohibit warrantless searches that are consistent with fourth amendment requirements. In short, section 2236 is not a bar to warrantless physical searches conducted under the inherent Executive authority to collect foreign intelligence information that has been recognized as an exception to the fourth amendment warrant requirement.³⁹⁹ Section 2236 does not affect the conclusion that warrantless physical searches for foreign intelligence purposes are not barred under existing law.

*C. The President's Powers v. Congressional Authority:
the "Zone of Twilight"*

In *Youngstown Sheet & Tube Co. v. Sawyer*,⁴⁰⁰ the Supreme Court rejected President Truman's assertion that as "the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States" he had the inherent authority to seize and operate "most of the Nation's steel mills"⁴⁰¹ to prevent the damage to national security that he foresaw resulting from the mills ceasing to operate during the Korean War. In a concurring opinion, Justice Robert Jackson presented a definitive discussion of the President's inherent authority and its relationship to the authority of Congress.⁴⁰² Justice Jackson postulated three possibilities for this relationship: (1) the President's authority is at its maximum when he exercises it pursuant to congressional authorization; (2) when the Congress has failed to express its position, the President acts on his own authority, but there is a "zone of twilight" where he and the Congress have concurrent authority; (3) when the President acts incompatibly with Congress' wishes, his authority is at its lowest ebb.⁴⁰³

398. *E.g., Bivens*, 403 U.S. 388 (1971).

399. *See supra* text accompanying notes 233-309.

400. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

401. *Id.* at 582.

402. *Id.* at 634-55.

403. The Justice eloquently wrote:

As discussed above,⁴⁰⁴ the Executive's conduct of warrantless physical searches does not conflict with either the expressed or implied will of the Congress. As such, the Executive's authority is not within the third category postulated by Justice Jackson. Similarly, Congress has not enacted a statute to authorize and regulate presidential power to conduct physical searches to gather foreign intelligence as it did in FISA with regard to electronic surveillance. Thus, Justice Jackson's first category also does not apply in this area. Accordingly, these Executive activities fall within the second of Justice Jackson's possibilities—the "zone of twilight." These actions are based on the President's independent responsibilities as Commander in Chief and to conduct the foreign relations of the nation. Congress may prove to have concurrent authority in these areas; however, since Congress has not attempted to exercise such authority, this congressional "inertia, indifference or quiescence" has effectively "enabled," "invited," and, in fact, made necessary, the Executive's actions.

Justice Jackson placed President Truman's seizure of the steel mills in the third category,⁴⁰⁵ and harshly criticized this action. He had no patience with the argument that this action constituted a legitimate exercise of the

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id. at 635-38 (citations omitted).

404. See *supra* text accompanying notes 327-99.

405. *Youngstown Sheet & Tube*, 343 U.S. at 640.

President's power as Commander in Chief⁴⁰⁶ and would not "indulge" the use of this power "turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor."⁴⁰⁷ At the same time, Justice Jackson did not intend to restrict the President's lawful role as Commander in Chief. To the contrary, Justice Jackson would "indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."⁴⁰⁸

This is the precise objective of the presidential Commander in Chief power when it is exercised to authorize warrantless physical searches directed against foreign powers, their agents or collaborators, to collect foreign intelligence. Such efforts seek to determine the intentions of "the outside world" in order to protect the security of this democracy. Congress has the constitutional authority, if it wishes, to place reasonable statutory controls on the use of this foreign intelligence-gathering technique. Until it does so, however, the Executive power remains in the "zone of twilight," where it deserves the widest latitude so long as it is directed outward and conducted within the confines of judicial precedent.

VI. CONCLUSION

The Constitution has been described as "an intentionally incomplete, often deliberately indeterminate structure for the participatory evolution of political ideals and governmental practices."⁴⁰⁹ As such, it does not lend itself to rigid, unchanging interpretations. Fourth amendment jurisprudence certainly illustrates this axiom. The relationship and meaning of the two clauses of that amendment have evolved markedly as the nation and society have changed. A particularly striking example is the United States Supreme Court's gradual abandonment of "the ancient niceties of property law" as advancing technology served to make electronic surveillance by the government more effective, more intrusive, and less dependent upon actual physical penetrations.⁴¹⁰

In the past, intelligence activities almost never were discussed, and entire agencies involved in intelligence collection were hidden behind the cloak of secrecy.⁴¹¹ Perhaps inevitably as the years passed, this led to controversial

406. *Id.* at 641-46.

407. *Id.* at 645.

408. *Id.*

409. L. TRIBE, Preface to AMERICAN CONSTITUTIONAL LAW iii (1978).

410. Compare *Katz*, 389 U.S. at 347, with *Goldman v. United States*, 316 U.S. 129 (1942), and *Olmstead v. United States*, 277 U.S. 438 (1928).

411. For example, there was a time when the acronym for NSA, the National Security

and questionable practices. The exposure of these practices resulted in efforts to pull back the veil and scrutinize both the practices and the collection techniques themselves. Many intelligence-collection techniques were examined to ensure that their use was necessary and consistent with the principles this government was established to protect.⁴¹²

This process included close scrutiny of physical searches for intelligence-collection purposes. The past fifteen years have been marked by significant discussions inside and outside the government regarding the efficacy and constitutionality of this intelligence-gathering technique. Law enforcement and intelligence agency employees alike have been made painfully aware of the requirement to obtain a warrant before conducting most physical searches. At the same time, however, it has become more apparent to the courts that a traditional search warrant is at times a cumbersome, inappropriate vehicle for regulating some searches, including those conducted for foreign intelligence purposes, and that equivalent protection may be obtained by more appropriate means.

The principles of the fourth amendment have been served while accommodating the shifting interests that develop in an increasingly complex social structure interacting with an exceedingly dangerous world. While it is true that the Executive is allowed to conduct warrantless searches when necessary to collect foreign intelligence information, this authority is confined and directed by legal standards in the same manner as are the many other types of governmental searches that are conducted without warrants. Section 2.5 of Executive Order 12,333 and its underlying procedures embody the judicial requirements that warrantless foreign intelligence searches must be targeted against foreign powers or their agents and collaborators, be based upon information sufficient to constitute probable cause, be approved by the Attorney General, and be attended by a variety of other safeguards to ensure the reasonableness of the search.

By its evolutionary processes, the Judiciary has identified the principles it believes are crucial to preserving the purpose of the fourth amendment—to protect the citizenry from the excesses of government. The Executive has incorporated these principles into procedures that govern the conduct of government officials in this regard. To this point, Congress has accepted the structure created by the other two branches and has not exercised its prerogative to enter the field.

Agency, established in 1952 by a classified presidential memorandum signed by Harry S. Truman, was said to stand for "No Such Agency." See J. BAMFORD, *THE PUZZLE PALACE*, 1-2, 281-82 (1982).

412. See generally CHURCH COMMITTEE FINAL REPORT, *supra* note 29.

Some argue that even greater protections could be obtained if all such government action were subject to a prior judicial warrant requirement. This may be true in an ideal sense, but the cost under current law and procedure would be the almost complete frustration of an important and legitimate governmental function. The framers of the Constitution clearly intended that the government they were creating would intrude into the lives of individuals as little as possible. They did not intend, however, that there should be no such intrusions.

At its core, government exists to protect the individual rights that are proclaimed in the Constitution. It is inevitable that the government's efforts to protect and preserve the Constitution will at times impinge on the rights the Constitution guarantees. Balance is the key, and the effort to balance these principles continues in a variety of contexts. Foreign intelligence gathering is simply one way the government attempts to discern the intentions and capabilities of the rest of the world as they relate to the interests of this nation. These efforts must always be consistent with constitutional principles, and core values cannot be sacrificed to the momentary anxieties of particular officials. However, binding the government too tightly in order to ensure maximum protection of individual rights in today's dangerous world may result in maximum danger to the continued existence of those rights on both an individual and a more generalized basis.

This article has attempted to demonstrate that a reasonably balanced regulatory system now governs physical searches for foreign intelligence purposes. The Executive has taken significant steps to prevent future occurrences of past excesses, and the Judiciary has recognized that foreign intelligence collection activities represent one of the several categories of governmental functions in which a warrant is not always required.⁴¹³ Both branches are essentially in agreement, and Congress has acquiesced in the result by its failure to enact legislation governing this activity. The current embodiment of this balance, section 2.5 of Executive Order 12,333, is a constitutionally valid exercise of the Executive's authority.

413. As this article was being prepared for printing, Judge Albert V. Bryan, Jr., also the author of *Humphrey*, upheld the legality of a warrantless physical search for foreign intelligence purposes in *United States v. Wu-Tai Chin*, Crim. No. 85-236-A, Memorandum Opinion and Order at 13-14 (E.D. Va. Jan. 29, 1986). This opinion reiterated the lack of FISA court authority to approve physical searches and discussed the unique characteristics of such searches. In addition, the definitions and standards of the Attorney General guidelines governing these searches were held to be sufficiently precise to withstand a due process challenge.

APPENDIX
PROCEDURES GOVERNING THE ACTIVITIES OF DOD
INTELLIGENCE COMPONENTS THAT
AFFECT UNITED STATES
PERSONS⁴¹⁴

FOREWORD

This DOD regulation sets forth procedures governing the activities of DOD intelligence components that affect United States persons. It implements DOD Directive 5240.1, and replaces the November 30, 1979 version of DOD Regulation 5240.1-R. It is applicable to all DOD intelligence components.

Executive Order 12333, "United States Intelligence Activities," stipulates that certain activities of intelligence components that affect U.S. persons be governed by procedures issued by the agency head and approved by the Attorney General. Specifically, procedures 1 through 10, as well as Appendix A, herein, require approval by the Attorney General. Procedures 11 through 15, while not requiring approval by the Attorney General, contain further guidance to DOD Components in implementing Executive Order 12,333 as well as Executive Order 12,334, "President's Intelligence Oversight Board."

Accordingly, by this memorandum, these procedures are approved for use within the Department of Defense. Heads of DOD components shall issue such implementing instructions as may be necessary for the conduct of authorized functions in a manner consistent with the procedures set forth herein.

This regulation is effective immediately.

.....

PROCEDURE 7. PHYSICAL SEARCHES

A. Applicability

This procedure applies to unconsented physical searches of any person or property *within* the United States and to physical searches of the person or property of a United States person *outside* the United States by DOD intelligence components for foreign intelligence or counterintelligence purposes. DOD intelligence components may provide assistance to the Federal Bureau of Investigation and other law enforcement authorities in accordance with Procedure 12.

414. See *supra* note 310.

B. *Explanation of Undefined Terms*

Physical search means any intrusion upon a person or a person's property or possessions to obtain items of property or information. The term does not include examination of areas that are in plain view and visible to the unaided eye if no physical trespass is undertaken, and does not include examinations of abandoned property left in a public place. The term also does not include any intrusion authorized as necessary to accomplish lawful electronic surveillance conducted pursuant to Parts 1 and 2 of Procedure 5.

C. *Procedures*

1. *Unconsented physical searches within the United States*

a. *Searches of active duty military personnel for counterintelligence purposes.* The counterintelligence elements of the Military Departments are authorized to conduct unconsented physical searches in the United States for counterintelligence purposes of the person or property of active duty military personnel, when authorized by a military commander empowered to approve physical searches for law enforcement purposes pursuant to rule 315(d) of the Manual for Courts Martial, Executive Order 12,198 (reference (h)), based upon a finding of probable cause to believe such persons are acting as agents of foreign powers. For purposes of this section, the term "agent of a foreign power" refers to an individual who meets the criteria set forth in subparagraph C.2.b.(2), below.

b. *Other unconsented physical searches.* Except as permitted by section A., above, DOD intelligence components may not conduct unconsented physical searches of persons and property within the United States for foreign intelligence or counterintelligence purposes. DOD intelligence components may, however, request the FBI to conduct such searches. All such requests, shall be in writing; shall contain the information required in subparagraph C.2.b.(1) through (6), below; and be approved by an official designated in paragraph C.2.c., below. A copy of each such request shall be furnished the General Counsel, DOD.

2. *Unconsented physical searches outside the United States*

a. *Searches of active duty military personnel for counterintelligence purposes.* The counterintelligence elements of the Military Departments may conduct unconsented physical searches of the person or property of active duty military personnel outside the United States for counterintelligence purposes when authorized by a military commander empowered to approve physical searches for law enforcement purposes pursuant to rule 315(d) of the Manual for Courts Martial, Executive Order 12,198 (reference (h)),

based upon a finding of probable cause to believe such persons are acting as agents of foreign powers. For purposes of this section, the term "agent of a foreign power" refers to an individual who meets the criteria set forth in subparagraph C.2.b.(2), below.

b. *Other unconsented physical searches.* DOD intelligence components may conduct other unconsented physical searches for foreign intelligence and counterintelligence purposes of the person or property of United States persons outside the United States only pursuant to the approval of the Attorney General. Requests for such approval will be forwarded by a senior official designated in paragraph C.2.c., below, to the Attorney General and shall include:

(1) An identification of the person or description of the property to be searched.

(2) A statement of facts supporting a finding that there is probable cause to believe the subject of the search is:

(a) A person who, for or on behalf of a foreign power, is engaged in clandestine intelligence activities (including covert activities intended to affect the political or governmental process), sabotage, or international terrorist activities, activities in preparation for international terrorist activities, or who conspires with, or knowingly aids and abets a person engaging in such activities;

(b) A person who is an officer or employee of a foreign power;

(c) A person unlawfully acting for, or pursuant to the direction of, a foreign power. The mere fact that a person's activities may benefit or further the aims of a foreign power does not justify an unconsented physical search without evidence that the person is taking direction from, or acting in knowing concert with, the foreign power;

(d) A corporation or other entity that is owned or controlled directly or indirectly by a foreign power; or

(e) A person in contact with, or acting in collaboration with, an intelligence or security service of a foreign power for the purpose of providing access to information or material classified by the United States to which such person has access.

(3) A statement of facts supporting a finding that the search is necessary to obtain significant foreign intelligence or counterintelligence.

(4) A statement of facts supporting a finding that the significant foreign intelligence or counterintelligence expected to be obtained could not be obtained by less intrusive means.

(5) A description of the significant foreign intelligence or counter-intelligence expected to be obtained from the search.

(6) A description of the extent of the search and a statement of facts supporting a finding that the search will involve the least amount of physical intrusion that will accomplish the objective sought.

(7) A description of the expected dissemination of the product of the search, including a description of the procedures that will govern the retention and dissemination of information about United States persons acquired incidental to the search.

c. Requests for approval of unconsented physical searches under paragraph C.2.b. must be made by:

(1) The Secretary or the Deputy Secretary of Defense;

(2) The Secretary or the Under Secretary of a Military Department;

(3) The Director, National Security Agency; or

(4) The Director, Defense Intelligence Agency.

