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NOTES

The Foreign Intelligence Surveillance Act: Legislating a Judicial Role in National Security Surveillance

Since World War II American Presidents have claimed constitutional authority to conduct wiretapping and electronic surveillance for national security purposes.[1] Successive Presidents have sought to expand the scope of this claimed authority[2] and to protect it from judicial and legislative limitations.[3] For three decades courts failed to strike a clear balance between the President's national security surveillance powers and citizens' fourth amendment rights.[4] Congress, on its part, deferred to presidential claims of inherent authority in the national security area[5] until the abuses revealed during the Watergate scandals increased anxiety over the executive's exclusive

1. *See* text at notes 12-21 *infra*. This Note concerns electronic surveillance rather than unaided personal surveillance. The term "surveillance" refers to interception of wire, radio, or oral communications through the use of an electronic, mechanical, or other device. For specific statutory definitions of this term, see Title III of the Omnibus Crime Control and Safe Streets Act of 1968, § 2510, 18 U.S.C. § 2510 (1976); Foreign Intelligence Surveillance Act of 1978, § 101(f), 50 U.S.C. § 1801(f) (Supp. II 1978). The term "foreign intelligence surveillance" refers to electronic national security surveillance conducted within the United States for the purpose of gathering foreign intelligence. When the purpose of national security surveillance is to gather *domestic* intelligence, the fourth amendment requires the government to seek a warrant before conducting the surveillance. United States v. United States District Court, 407 U.S. 297, 314-21, 323-24 (1972). *See* text at notes 39-47 *infra*; note 31 *infra*.

2. *See* text at notes 12-21 *infra*. *See generally* Bernstein, *The Road to Watergate and Beyond: The Growth and Abuse of Executive Authority Since 1940*, 40 LAW & CONTEMP. PROB. 58 (Spring 1976).

3. *See, e.g.*, Right of Privacy Act, S. 928, 90th Cong., 1st Sess. (1967) (President Johnson's proposed legislation to prohibit electronic eavesdropping *except* in national security cases); Brief for the United States at 9-11, 15-19, 29-34, United States v. United States District Court, 407 U.S. 297 (1972); *compare* SENATE COMM. ON THE JUDICIARY, OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, S. REP. NO. 1097, 90th Cong., 2d Sess. 69, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2156-57, 2182-83, *with* Additional Views of Mr. Hart on Title III of S. 917, S. REP. NO. 1097, 90th Cong., 2d Sess. 174, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2227, 2235-36.

4. *See* text at notes 12-27 *infra*.

5. The warrant requirements established in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 211 (1968) (current version at 18 U.S.C. §§ 2510-2520 (1976)), did not apply to the gathering of foreign intelligence information. *See* 18 U.S.C. § 2511(3) (1976). Congressional proposals to regulate national security surveillance were relatively common after Watergate. *See, e.g.*, Foreign Intelligence Surveillance Act of 1976, S. 3197, 94th Cong., 2d Sess. (1976); National Security Surveillance Act of 1975, S. 743, 94th Cong., 1st Sess. (1975); Freedom from Surveillance Act of 1974, S. 4062, 93d Cong., 2d Sess. (1974); Surveillance Procedures Act of 1973, S. 2820, 93d Cong., 1st Sess. (1973); SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, BOOK II: INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 755, 94th Cong., 2d Sess. 265-341 (1976), *reprinted in* THE INTELLIGENCE COMMUNITY 872-947 (T. Fain ed. 1977). None of the proposed bills, however, reached a vote in either chamber until 1978.

exercise of the surveillance power.[6] This concern led the Ninety-fifth Congress to pass the Foreign Intelligence Surveillance Act of 1978 [FISA].[7] The FISA requires the executive to seek court approval before employing electronic surveillance to collect foreign intelligence within the United States. The Act creates a special court to hear government warrant requests and establishes judicial standards that limit the circumstances in which warrants can be issued. The Act also imposes civil and criminal penalties for conducting unauthorized surveillance or using information so obtained.[8]

Congressional opponents of the FISA argued that the bill was invalid under the separation of powers doctrine because it encroached on the President's constitutional authority to conduct foreign intelligence activities within the United States.[9] Although Congress passed the FISA over these objections, the courts have not yet resolved this constitutional issue. It is foreseeable that an executive agency or employee will respond to a civil or criminal prosecution for unwarranted surveillance by questioning the Act's constitutionality.[10]

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6. The view that unrestrained executive power might lead to abuse preceded Watergate, *see, e.g.*, A. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 264-66, 377 (1973); *see also* W. LAFEBER, AMERICA, RUSSIA, AND THE COLD WAR: 1945-1971, at 298 (2d ed. 1972); THE PRIVATE PAPERS OF SENATOR VANDENBERG 342 (A. Vandenberg, Jr. ed. 1952), but it was only after the actual abuses revealed during the Watergate scandals that anxiety about the executive's misuse of power became a prominent part of American political culture. *See, e.g.*, 3 CURRENT OPINION 94 (1975) (Americans believe that government wrongdoing and lack of leadership are leading causes of nation's problems); *cf.* 4 CURRENT OPINION 62 (1976) (sixty percent of Iowans feel Congress should dominate foreign policy); 4 CURRENT OPINION 61-62 (1976) (growing public aversion to "big government"); 2 CURRENT OPINION 4 (1974) (five to four majority favors Congress limiting President's war-making powers).

7. Pub. L. No. 95-511, 92 Stat. 1783 (1978) (Title I to be codified at 50 U.S.C. §§ 1801-1811 (Supp. II 1978)) [hereinafter cited as FISA]. The conference committee report is H. R. REP. NO. 1720, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4048. Debate and final passage are reported in 124 CONG. REC. S14,882-84 (daily ed. Oct. 9, 1978) and 124 CONG. REC. H12,533-43 (daily ed. Oct. 12, 1978). *See* Berlow, *Wiretaps Control Bill Sent to President*, 36 CONG. Q. 2964 (1978).

8. FISA § 110 provides that any person, other than a foreign power or an employee or officer of a foreign power, who has been the subject of electronic surveillance or about whom information obtained by surveillance has been improperly disclosed may bring a civil action seeking recovery of "actual damages, but not less than liquidated damages of $1,000 or $100 per day for each day of violation, whichever is greater," punitive damages, and reasonable attorney's fees. Section 109 provides that any person who intentionally engages in electronic surveillance under color of law except as authorized by statute, or who discloses or uses information so obtained knowing that the surveillance was unauthorized, is guilty of a crime punishable by a fine of up to $10,000, or imprisonment for not more than five years, or both.

9. *See, e.g.*, Dissenting Views on the Conference Report to Accompany S. 1566, The Foreign Intelligence Surveillance Act of 1978, H.R. REP. NO. 1720, 95th Cong., 2d Sess., *reprinted in* 124 CONG. REC. H11,682, H11,683-84 (daily ed. Oct. 5, 1978).

10. The Carter administration supported the Foreign Intelligence Surveillance Act, *see* S. REP. NO. 604, Part I, 95th Cong., 1st Sess. 4 (1977), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 3904, 3905; Bell, *Electronic Surveillance and the Free Society*, 23 ST. LOUIS U. L.J. 1, 7-9 (1979), and President Carter signed the Act into law, 14 WEEKLY COMP. OF PRES. DOC. 1853 (Oct. 27, 1978). Nevertheless, even the Carter administration may eventually challenge the Act in court. While the Act was pending before Congress, President Carter approved war-

This Note evaluates the constitutionality of the Foreign Intelligence Surveillance Act. Section I summarizes the legal history of national security surveillance from 1940 until the passage of the FISA, and briefly discusses the three major circuit court rulings on warrantless foreign intelligence surveillance. Section II describes the provisions of the Act.[11] Section III examines the Act's constitutionality, first considering the scope of congressional authority to regulate the conduct of foreign affairs, then considering whether the political question doctrine prevents judicial scrutiny of executive decisions to conduct foreign intelligence surveillance. The Note concludes that the FISA is an appropriate and constitutional exercise of congressional authority to accommodate presidential power and fourth amendment rights, and that the political question doctrine does not bar judicial review of executive foreign intelligence surveillance requests.

I. The Legal History of National Security Surveillance

In 1928 the Supreme Court ruled in *Olmstead v. United States*[12] that domestic wiretapping and surveillance was beyond the reach of fourth amendment protections unless accomplished by physical trespass into a constitutionally protected area.[13] *Olmstead* left the bur-

rantless foreign intelligence surveillance of at least one citizen within the United States. *See* Chagnon v. Bell, 568 F. Supp. 927 (D.D.C. 1979), *aff'd.* No. 79-1232 (D.C. Cir. Aug. 14, 1980); United States v. Humphrey, 456 F. Supp. 51 (E.D. Va. 1978) *aff'd. sub nom.* United States v. Truong, No. 78-5176 (4th Cir. July 17, 1980). Whether such surveillances continued after the Act's passage is unknown. Moreover, President Carter's signing of the bill will not bind future administrations which might oppose the Act on policy or constitutional grounds. *See* National League of Cities v. Usery, 426 U.S. 833, 841 n.12 (1976).

There is also debate whether the FISA goes far enough. One commentator questions the ability of a foreign security surveillance warrant requirement to adequately safeguard personal liberty, Note, *Present and Proposed Standards for Foreign Intelligence Electronic Surveillance*, 71 Nw. U.L. Rev. 109, 120-22 (1976). Another commentator views appearance before a neutral magistrate as an effective deterrent to the most questionable surveillances, Comment, *Electronic Surveillance — Foreign Intelligence — Wiretapping of an Alien Spy for Foreign Intelligence Purposes Does Not Violate Communications Act of 1934 or Fourth Amendment* — U.S. v. Butenko, 8 N.Y.U. J. Intl. L. & Pol. 479, 517 (1976). A careful middle ground, offering hope for a warrant requirement but cautioning against excessive optimism, is offered in Lacovara, *Presidential Power to Gather Intelligence: The Tension Between Article II and Amendment IV*, 40 Law & Contemp. Prob. 106, 126-31 (Summer 1976).

This Note does not debate the efficacy of the FISA. That issue is best resolved from experience with the Act. The Attorney General is required to regularly inform the House and Senate Select Committees on Intelligence of this experience. FISA § 108(a).

11. For discussion of the Act's predecessor, the Foreign Intelligence Surveillance Act of 1976, S. 3197, 94th Cong., 2d Sess. (1976), *see* Note, *Foreign Security Surveillance — Balancing Executive Power and the Fourth Amendment*, 45 Fordham L. Rev. 1179 (1977). For an extensive discussion of the Foreign Intelligence Surveillance Act of 1978 before Senate and House action and conference committee amendments, *see* Shapiro, *The Foreign Intelligence Surveillance Act: Legislative Balancing of National Security and the Fourth Amendment*, 15 Harv. J. Legis. 119 (1977).

12. 277 U.S. 438 (1928).

13. 277 U.S. at 464. *See also* Katz v. United States, 389 U.S. 347, 364-65 (1967) (Black, J., dissenting); Goldman v. United States, 316 U.S. 129 (1942). *But cf.* Silverman v. United

den of regulating domestic surveillance to Congress. Congress responded by enacting section 605 of the Communications Act of 1934,[14] which prohibits both unauthorized interception of any private radio or wire communications and unauthorized use or publication of any information contained in such communications. In *Nardone v. United States*, the Supreme Court held that evidence collected in violation of section 605 was inadmissible in federal criminal trials.[15]

Section 605 and the *Nardone* ruling had little impact on national security surveillance for two reasons. First, the inadmissibility of illegally obtained evidence only deterred national security surveillance when the government's objectives were limited to successful criminal prosecutions. Since collection of information was often in itself the government's primary motive, the exclusion of evidence was an ineffective deterrent.[16] Second, the executive branch concluded that section 605 did not apply to national security investigations. President Franklin D. Roosevelt, while agreeing with the "broad purpose of the [*Nardone*] decision relating to wiretapping investigations," remained "convinced that the Supreme Court never intended any dictum . . . to apply to grave matters involving the defense of the nation."[17] Thus in 1940 he authorized Attorney General Robert Jackson to approve wiretaps and to direct federal agents "to secure information by listening devices direct[ed] to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies."[18] Although Roosevelt requested both that these investigations be directed, insofar as possible, against aliens alone and

States, 365 U.S. 505 (1961) (spike microphone pushed through party wall and touching heating duct constituted physical intrusion).

14. Ch. 652, § 605, 48 Stat. 1064, 1103 (current version at 47 U.S.C. § 605 (1976)). *See* Nardone v. United States, 302 U.S. 379, 383 (1937) [hereinafter cited as *Nardone I*]; Nardone v. United States, 308 U.S. 338, 340 (1939) [hereinafter cited as *Nardone II*].

15. *Nardone I*, 302 U.S. 379 (1937). Nardone sought to exclude evidence obtained through a wiretap by federal agents. The agents had not invaded a "constitutionally protected area," *see, e.g.*, Silverman v. United States, 365 U.S. 505, 510 (1961), and the Court had not yet applied the fourth amendment to non-trespassory invasions of privacy, *see* Olmstead v. United States, 277 U.S. 438, 466 (1928). In *Nardone I*, the Court held section 605 applicable to law enforcement agents and barred the introduction of wiretap records, 302 U.S. at 383; in *Nardone II*, the Court barred the introduction of evidence derived from the wiretap, the "fruits" of the illegal surveillance. 308 U.S. at 340-43.

16. Some law enforcement officials did believe that section 605 unduly restrained them when their object was successful criminal investigation and prosecution. *See, e.g.*, Report by the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967); Rogers, *The Case for Wire Tapping*, 63 YALE L.J. 792, 793-97 (1954).

17. Confidential Memorandum from Franklin D. Roosevelt to Robert H. Jackson (May 21, 1940), *reprinted in* Zweibon v. Mitchell, 516 F.2d 594, 673-74 app. (D.C. Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976).

18. 516 F.2d at 674 app.

that they be limited in number,[19] later Presidents expanded surveillance beyond these limits. In 1946 President Truman accepted Attorney General Clark's proposal for an expanded surveillance program. Clark's plan did not limit surveillance to aliens; instead, it proposed the use of "these special investigative measures in domestic cases."[20] Electronic surveillance was used increasingly by each succeeding administration.[21]

Throughout this period of expansion, the legal doctrines governing wiretapping and other electronic eavesdropping remained fairly static. A dramatic turnabout in 1967 upset this equilibrium. In *Katz v. United States*,[22] the Supreme Court overruled *Olmstead* and held for the first time that warrantless electronic surveillance constituted an unreasonable search and seizure under the fourth amendment.[23] The Court held that government officers must obtain a warrant from a neutral magistrate[24] before employing wiretapping or electronic surveillance in the course of any state[25] or federal criminal investigation. But the Court presaged a possible exception:

> Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.[26]

This national security exception permitted increasing warrantless surveillance within the United States.[27]

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19. 516 F.2d at 674 app.

20. Letter from Tom C. Clark to Harry S. Truman (July 17, 1946), *reprinted in* Zweibon v. Mitchell, 516 F.2d at 674 app.

21. *See* SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, BOOK III: FOREIGN AND MILITARY INTELLIGENCE, S. REP. NO. 755, 94th Cong., 2d Sess. 301 (1976). *See also*, Lacovara *supra* note 10, at 106, 107-09. *See generally* Bernstein, *supra* note 2.

22. 389 U.S. 347 (1967).

23. The fourth amendment to the U.S. Constitution 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.

24. 389 U.S. at 356.

25. The fourteenth amendment applies the fourth amendment to the states. Ker v. California, 374 U.S. 23, 33 (1963), had established that the same "standards of reasonableness" required of the federal government under the fourth amendment are also required of the states. This holding was applied in a surveillance case, albeit one involving an intrusion into a constitutionally protected area, in Berger v. New York, 388 U.S. 41 (1967).

26. 389 U.S. at 358 n.23. Although the Court did not answer this question, three Justices briefly expressed their views on the national security exception in concurring opinions. Justice White argued that the President's article II powers and duties require an exception to the warrant requirement for national security cases. White offered no lengthy analysis or precedent supporting his conclusion. 389 U.S. at 364. Justice Douglas, joined by Justice Brennan, opposed the exception proposed by Justice White, arguing that the President's and Attorney General's duties to "vigorously investigate and prevent breaches of national security and prosecute those who violate federal laws" make it impossible for them to act as "disinterested, neutral magistrate[s]." 389 U.S. at 359-60.

27. *See, e.g., Surveillance Practices and Procedures Act of 1973: Hearings on S. 2820 Before*

In response to *Katz*, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[28] This Act set out procedures by which government officials could obtain warrants for electronic surveillance in criminal investigations. Unlike section 605 of the Communications Act of 1934, which simply prohibited all persons from intercepting wire and radio communications in most circumstances,[29] Title III set standards for court approval of these types of surveillance.[30] Section 605 provided penalties for violations by any person; Title III punished only illegal surveillance under color of law.

The standards of Title III of the Safe Streets Act failed to narrow the *Katz* exception because they did not apply to national security surveillances, whether classified as domestic or foreign.[31] Moreover, section 2511(3) of Title III disclaimed any congressional intent to expand or contract the President's authority "to obtain foreign intel-

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the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess. 233 (1974) (statement of Attorney General William B. Saxbe) (asserting a right to break into a citizen's home without a warrant and search for items that might be used in foreign espionage or intelligence cases); 6 *Political Abuse and the FBI: Hearings on S. Res. 21 Before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong., 1st Sess. (1975). "National security" was the justification for some of the most flagrant abuses of the Nixon administration. *See, e.g.*, Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), *cert. granted*, 100 S. Ct. 2915 (1980) (suit over 21-month warrantless wiretap of former National Security Council employee); Smith v. Nixon, 606 F.2d 1183 (D.C. Cir. 1979), *cert. applied for*, No. 79-882 (Dec. 7, 1979) (warrantless wiretap of New York Times reporter); United States v. Russo and Ellsberg, No. 9373 (C.D. Cal. May 11, 1973) (dismissal for government failure to produce wiretap records); H.R. REP. No. 1305, 93d Cong., 2d Sess. 146 (1974) (Second Impeachment Article charging President Nixon with authorizing "Electronic Surveillance or Other Investigations for Purposes Unrelated to National Security, the Enforcement of Laws or Any Other Lawful Function of His Office"; the report concluded that these surveillances were for "political purposes," *id.* at 35); 2 *Hearings Before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong., 1st Sess. 141-88, *reprinted in* THE INTELLIGENCE COMMUNITY 817-71 (T. Fain ed. 1977) (revealing the "Huston Plan," which proposed wiretaps of various domestic political groups without judicial approval); *Hearings on the Role of Dr. Henry Kissinger in the Wiretapping of Certain Government Officials and Newsmen Before the Senate Comm. on Foreign Relations*, 93d Cong., 2d Sess. (1974); *Hearings Before the Senate Comm. on Presidential Campaign Activities*, 93d Cong., 1st Sess. (1973) ("Watergate" *et al.*); 119 CONG. REC. 41864 (1973) (invocation by White House officials of national security justification for inducing the CIA to assist in the burglary of Daniel Ellsberg's psychiatrist's office).

28. Pub. L. No. 90-351, 82 Stat. 211 (codified at 18 U.S.C. §§ 2510-2520 (1976)). *See*, S. REP. No. 1097, 90th Cong., 2d Sess. 66-76 (1968), *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2153-63.

29. 47 U.S.C. § 605 (1976).

30. Pub. L. No. 90-351, 82 Stat. 211 (codified at 18 U.S.C. §§ 2510-2520 (1976)).

31. Whether an organization, and presumably the threat caused by that organization, is domestic or foreign is determined on the basis of its composition — U.S. citizens or noncitizens — and its connections — the significance of its "connection with a foreign power, its agents or agencies." United States v. United States District Court, 407 U.S. 297, 309 n.8 (1972). *But cf.* Zweibon v. Mitchell, 516 F.2d 594, 613-14 n.42 (D.C. Cir. 1975) (en banc) (plurality opinion), *cert. denied*, 425 U.S. 944 (1976) (threat posed by domestic Jewish Defense League was *foreign* security since its actions provoked a foreign power, the Soviet Union). This part of the *Zweibon* decision is criticized in Case Comment, *Title III and National Security Surveillances*, 56 B.U. L. REV. 776, 787-89 (1976).

ligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities."[32] In passing the Act in 1968, "Congress simply left presidential powers where it found them."[33]

Four years later, in *United States v. United States District Court*,[34] the Justice Department asked the Supreme Court to determine the scope of the President's power to approve a warrantless wiretap under the national security exception to the requirements of Title III. *United States District Court*, however, involved only "the domestic aspects of national security."[35] Richard Plamondon, who had been indicted for the bombing of a CIA office in Ann Arbor, Michigan, sought disclosure of the Government's electronic surveillance records and a hearing to determine whether the Government had used information from warrantless wiretaps to support his indictment. The Government claimed that its surveillance, though warrantless, was a lawful exercise of presidential power to protect national security. District Judge Damon Keith ruled[36] that the surveillance violated the fourth amendment and that records of the wiretaps therefore had to be disclosed to Plamondon under the rule of *Alderman v. United States*.[37] Both the Sixth Circuit Court of Appeals and the Supreme Court affirmed the District Court order.[38]

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32. Pub. L. No. 90-351, § 2511(3), 82 Stat. 214 (1968) (previously codified at 18 U.S.C. § 2511(3) (1976)), provided:

> Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143 [*sic*, probably meant to be 1103]; 47 U.S.C. § 605) 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 the authority of the President in the exercise of the foregoing powers may be received 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.

33. United States v. United States District Court, 407 U.S. 297, 303 (1972). *See also* 114 CONG. REC. 14751 (1968), *reprinted in* 407 U.S. at 306-07.

34. 407 U.S. 297 (1972).

35. 407 U.S. at 308-09, 321-22 (1972). The defendants were members of an organization that had no foreign ties. 407 U.S. at 300 n.2.

36. United States v. Sinclair, 321 F. Supp. 1074, 1079-80 (E.D. Mich. 1971).

37. 394 U.S. 165 (1969). *Alderman* concerned procedures for determining whether evidence offered in a criminal trial is tainted by illegal surveillance. A divided Court held that records of conversations illegally overheard, even in cases of national security surveillance, must be disclosed to the defendant. The Court did not decide, however, whether warrantless national security wiretapping was in fact unlawful. *See* Giordano v. United States, 394 U.S. 310, 314-15 (1969) (Stewart, J., concurring).

38. United States v. United States District Court, 444 F.2d 651, 664-69 (6th Cir. 1971), *aff'd.*, 407 U.S. 297, 321-24 (1972).

Although the Supreme Court limited its inquiry to the issue of whether warrants are required prior to surveillance in domestic security cases (*i.e.*, in cases where threats to national security originate from American citizens or groups), *United States District Court* established a balancing approach that applies to foreign security surveillance as well. The Supreme Court reasoned that Congress, in enacting Title III of the Omnibus Crime Control and Safe Streets Act, intended to leave the President's power undisturbed and the question of the warrant requirement for national security wiretaps unanswered.[39] Since Title III failed to determine the wiretap's legality,[40] the Court turned to the fourth amendment standard of "reasonableness."[41] According to the Court, this standard requires a balancing approach:[42] the Government's interest in protecting the domestic security, especially the President's duty to "take Care that the Laws be faithfully executed,"[43] must be weighed against the citizen's first and fourth amendment interests in privacy and free expression.[44]

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39. 407 U.S. at 306-07.

40. Justice White felt that the Plamondon surveillance did not fall within the § 2511(3) disclaimer. 407 U.S. at 341 (White, J., concurring). White also believed that the Attorney General's affidavit did not suggest that the surveillance was necessary to prevent overthrow of the Government by force or other unlawful means or to protect against any other clear and present danger to the structure or existence of the Government. 407 U.S. at 341. White argued that, absent the grave threat required by the plain words of § 2511(3), the disclaimer did not apply and the general warrant requirements of Title III had to be met. On these statutory grounds, Justice White concurred in the court's judgment without reaching the constitutional issue. 407 U.S. at 335-44.

Justice White's concurring opinion in *United States District Court* is an interesting contrast to his concurring opinion in Katz v. United States, 389 U.S. 347, 362-64 (1967). In *Katz*, Justice White claimed that the President had the inherent power to authorize warrantless wiretaps in "national security cases," 389 U.S. at 363; White did not distinguish the domestic and foreign aspects of national security. Justice White's statutory reasoning in *United States District Court* therefore implies either a change of view since *Katz* or a view that Congress could limit the President's inherent power. The latter seems to be the case:

> Thus, even assuming the constitutionality of a warrantless surveillance authorized by the President to uncover private or official graft forbidden by federal statute, the interception would be illegal under § 2511(1) because it is not the type of presidential action saved by the Act by the provision of § 2511(3). . . . [T]he United States does not claim that Congress is powerless to require warrants for surveillances that the President otherwise would not be barred by the Fourth Amendment from undertaking without a warrant.

407 U.S. at 338 n.2 (White, J., concurring); compare text at notes 118-41 *infra*.

41. 407 U.S. at 308-10. The Court cited Coolidge v. New Hampshire, 403 U.S. 443 (1971), for the proposition that the standard for a search's reasonableness is derived from the Warrant Clause. 407 U.S. at 309-10. According to the Court, the relevant test is not whether the search is reasonable, but whether it is reasonable to require the procurement of a search warrant. 407 U.S. at 315.

42. 407 U.S. at 314.

43. U.S. CONST. art. II, § 3.

44. 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.

The Court held that despite the President's constitutional mandate "to preserve, protect, and defend the Constitution of the United States,"[45] the fourth amendment reasonableness standard requires prior judicial approval of electronic surveillance in domestic security cases.[46] Additionally, the Court ruled that Congress had authority to legislate warrant procedures for the executive and judiciary to follow, at least in domestic security cases.[47]

The relevance of *United States District Court* to foreign security cases (*i.e.*, cases where threats to national security originate from foreign powers or their agents) is two-fold. First, the decision indicates that neither the interest in national security nor the interest in individual privacy[48] is a constitutional absolute, and that the two must therefore be balanced in deciding the question of a national security exemption from judicial approval of electronic surveillance. Second, the case establishes that when prior judicial approval of surveillance is constitutionally required (when fourth amendment interests prevail) or constitutionally permissible (when executive functions would not be unduly frustrated), Congress may prescribe "reasonable standards" for the warrant procedure.[49] Unless a qualitative constitutional difference between domestic and foreign security cases can be established, Congress therefore may legislate appropriate standards governing executive conduct and judicial approval of foreign security surveillance.[50]

Three circuit courts have struggled with the issue left unresolved by *United States District Court*: Does the President's power to con-

407 U.S. at 315. It is notable that the Court relied in part on citizens' first amendment interests of free speech and association as they overlap with fourth amendment privacy; this overlap is equally relevant to foreign affairs. *See* Note, *Foreign Security Surveillance and the Fourth Amendment*, 87 HARV. L. REV. 976, 987-88 (1974).

45. 407 U.S. at 310.

46. 407 U.S. at 314-21, 323-24.

The Government made four arguments: (1) that the warrant requirement would hinder preservation of domestic security; (2) that courts might make errors; (3) that breaches of security might occur; and (4) that domestic security surveillance should be included in the administrative search exemption (in existence between the decisions in Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), and Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); *see generally* Note, *Rationalizing Administrative Searches*, 77 MICH. L. REV. 1291 (1979)) since such surveillance was primarily for the purpose of obtaining information and not for criminal prosecutions. 407 U.S. at 318-19. The Court found these arguments unpersuasive. 407 U.S. at 319-21.

47. 407 U.S. at 322-24. *See* Nesson, *Aspects of the Executive's Power over National Security Matters: Secrecy Classifications and Foreign Intelligence Wiretaps*, 49 IND. L.J. 399, 411-13 (1974).

48. The Court here refers to privacy in the context of the fourth amendment, not in terms of a fundamental "right of privacy," *see, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

49. 407 U.S. at 322-24. *See* note 40 *supra*; Nesson, *supra* note 47, at 411-21.

50. *See* text at notes 107-17 *infra* for an analysis of constitutional distinctions between domestic and foreign affairs.

duct foreign affairs allow him to approve warrantless electronic surveillance for the purpose of obtaining foreign intelligence?[51]

In *United States v. Brown*,[52] the Fifth Circuit, relying on its pre-*United States District Court* holding in *United States v. Clay*,[53] concluded that the President has authority "over and above the Warrant Clause of the Fourth Amendment" to order foreign security surveillance.[54] In *Brown*, warrantless wiretaps of an undisclosed party had intercepted conversations with black activist H. Rap Brown. After examining the wiretap records *in camera*, the district court judge concluded that they contained nothing relevant to Brown's case and that they were legal wiretaps made for the purpose of gathering foreign intelligence.[55] On appeal, Brown contended that the wiretaps were illegal and that in camera review was therefore insufficient under *Alderman v. United States*.[56] The Fifth Circuit was not persuaded. It affirmed the district court on the basis of the President's "inherent power to protect national security in the context of foreign affairs."[57]

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51. Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976); United States v. Butenko, 494 F.2d 593 (3d Cir.) (en banc), *cert. denied sub nom.* Ivanov v. United States, 419 U.S. 881 (1974); United States v. Brown, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974).

The Ninth Circuit summarily adopted the decisions of the Third and Fifth Circuits in a case challenging the nondisclosure of foreign security surveillance records under the *Alderman* rule. *See* note 37 *supra*. The Ninth Circuit made no mention of the D.C. Circuit's opinion. United States v. Buck, 548 F.2d 871, 875-76 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977) ("Foreign security wiretaps are a recognized exception to the general warrant requirement and disclosure of wiretaps not involving illegal surveillance is within the trial court's discretion").

52. 484 F.2d 418 (5th Cir. 1973) (Griffin Bell, J.), *cert. denied*, 415 U.S. 960 (1974).

53. 430 F.2d 165 (5th Cir. 1970), *revd. on other grounds*, 403 U.S. 698 (1971).

54. 484 F.2d at 426.

55. United States v. Brown, 317 F. Supp. 531, 537 (E.D. La. 1970). On appeal the Fifth Circuit emphasized that Brown's involvement in the surveillance was "happenstance at most." 484 F.2d at 425.

United States v. Clay also involved the criminal prosecution of a defendant whose conversations the government had incidentally overheard in the warrantless surveillance of a party not involved in the proceedings. The district court judge concluded after in camera review of the wiretap that the records were irrelevant to the criminal case and denied disclosure. 430 F.2d at 166-67.

56. 394 U.S. 165 (1969). *See* note 37 *supra*.

57. 484 F.2d at 426. *Clay* and *Brown* do not persuasively resolve the constitutional issue, however, because the Fifth Circuit's balancing test in both cases differs in two important respects from the Supreme Court's weighing of interests in *United States District Court*. First, in *Clay* the Fifth Circuit "balance[d] the right of *the* defendant and the national interest." 430 F.2d at 171 (emphasis added). This particularized balancing, considering only the individual defendant before the court (who may not have been the surveillance target), contrasts with *United States District Court*, where the Supreme Court balanced the national security interest with "the needs of citizens [in general] for privacy and free expression." 407 U.S. 297, 315 (1972). Second, in evaluating the surveillance of an individual defendant, the Fifth Circuit prescribed an *ex post* test of whether a particular search and seizure was reasonable, rather than an *ex ante* test of whether it was reasonable to require the procurement of a warrant for the search. Compare note 41 *supra*, and cases cited therein. The Supreme Court rejected this approach for domestic security surveillance in *United States District Court*: "The Fourth

The Third Circuit reached a similar result in *United States v. Butenko*.[58] In *Butenko*, the court assessed the legality of a wiretap of the defendant's conversations with a Soviet citizen working at the Soviet mission to the United Nations. The Soviet employee was suspected of espionage. The Third Circuit rejected the defendant's claims under section 605 of the Communications Act of 1934[59] and thus reached the constitutional issue. Emphasizing a strong public interest in a judicially unimpaired flow of foreign policy information, the Third Circuit held that the surveillance was constitutional because it fell within a foreign intelligence gathering exception to the warrant requirement.[60] The court implied, however, that this exception might apply only to surveillance of individuals with direct ties to

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Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised." 407 U.S. at 317 (footnote omitted).

58. 494 F.2d 593 (3d Cir.) (en banc) (5-4 decision), *cert. denied sub nom.* Ivanov v. United States, 419 U.S. 881 (1974). *Butenko* was criticized severely in Comment, *supra* note 10.

59. 494 F.2d at 598-602. *See* note 14 *supra* and accompanying text. Section 605 was arguably applicable since the surveillance preceded the 1968 adoption of the Omnibus Crime Control and Safe Streets Act and its § 2511(3) disclaimer. *See* notes 28-33 *supra* and accompanying text.

60. 494 F.2d at 605. The *Butenko* majority purported to balance two constitutional interests: "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." 494 F.2d at 596. Nevertheless, the majority opinion's tenor and approach leave little doubt that the majority considered the security interest far more important. The majority even suggested that, were it not for *United States District Court*, it might have held that the President could "act unencumbered by the Fourth Amendment requirements of prior judicial approval and probable cause when he is dealing with national security matters." 494 F.2d at 602. Instead, the majority characterized the Government's interest as "surely weighty" — only a little less than absolute. 494 F.2d at 606. The majority thus contrasted the President's near absolute foreign affairs powers with the more limited scope of the fourth amendment. To demonstrate the fourth amendment's limitations, the majority pointed to four exceptions to the general requirement of judicial approval: an automobile search to prevent the transfer of contraband, a police officer's search incidental to a probable cause arrest, a police officer's frisk of a detained person believed to be armed and dangerous, and a "home visit" by a welfare worker. 494 F.2d at 604-05. Then, ignoring the first three exceptions, the majority read the "home visit" exception expansively to create a "public interest" exception to the fourth amendment, an exception that included "the efficient operation of the Executive's foreign policy-making apparatus." 494 F.2d at 605. A warrant requirement for foreign security surveillances, the majority believed, "would seriously fetter the Executive in the performance of his foreign affairs duties" by requiring officers to "interrupt their activities and rush to the nearest available magistrate." 494 F.2d at 605.

The majority carried these arguments beyond their logical limits. First, the believable assumption that requiring prior judicial approval would be undesirable in some exigent circumstances does not justify an exception from judicial approval in all foreign security surveillances. Second, and more importantly, to imply that the warrant requirement may be avoided whenever a public interest to do so exists makes the warrant requirement a constitutional nullity. The framers added the fourth amendment to the Constitution because they perceived a strong public interest in the warrant requirement. Constitutional values do not become irrelevant whenever they cause inconvenience and inefficiency. *See, e.g.*, United States v. United States District Court, 407 U.S. at 321 ("Although some added burden will be imposed upon the Attorney General, this inconvenience is justified in a free society to protect constitutional values"); Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

foreign governments.[61]

In *Zweibon v. Mitchell*,[62] the District of Columbia Circuit became the third federal appellate court to address the scope of the President's foreign intelligence gathering power. *Zweibon* involved a civil suit[63] against Attorney General John Mitchell and FBI special agents for damages resulting from electronic surveillance of the Jewish Defense League's New York headquarters.[64] The defendants admitted that they had conducted the surveillance, but they asserted that it was authorized by "the President's ability and constitutional authority to conduct the foreign relations of this country."[65] It is difficult to infer a clear holding from *Zweibon* because of the length and number of the opinions (the eight circuit judges filed five separate opinions) and the interrelated issues of statutory and constitutional violations and remedies. Nevertheless, the plurality opinion[66] appears to state that, absent exigent circumstances, the President must obtain a warrant for all national security surveillances, domestic and foreign, conducted within the United States.[67] While the three judges who signed the plurality opinion followed the spirit of the *United States District Court* balancing test,[68] they recognized that their conclusion was largely dictum:

[W]e need not rest our decision on so broad a holding, since we are

61. The court indicated that surveillance of international grain dealers or oil companies to obtain economic information relevant to U.S. foreign policy would probably be subject to the fourth amendment restrictions described in *United States District Court*. *See* 494 F.2d at 603 n.39.

62. Zweibon v. Mitchell (*Zweibon I*), 516 F.2d 594 (D.C. Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976). *Zweibon II* is *In re* Zweibon, 565 F.2d 742 (D.C. Cir. 1977) (per curiam), which required a jury trial of the "good faith" affirmative defense. *Zweibon III*, Zweibon v. Mitchell, 606 F.2d 1172 (D.C. Cir. 1979), *cert. applied for*, Nos. 79-881, 79-883 (Dec. 7, 1979), reversed the district court for the third time. The D.C. Circuit held that the warrant requirements of *United States District Court* and *Zweibon I* apply retroactively and that compensation may be sought under the *Bivens* doctrine, *see* note 63 *infra*, but not under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, *see* text at notes 28-30 *supra*. This holding partially reversed *Zweibon I*, and was first advocated in Case Comment, *supra* note 31, at 792-801. For a comprehensive discussion of *Zweibon I*, see Note, *The Fourth Amendment and Judicial Review of Foreign Intelligence Wiretapping*: Zweibon v. Mitchell, 45 GEO. WASH. L. REV. 55 (1976); Case Comment, *supra* note 31.

63. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (federal cause of action exists to remedy violations of the fourth amendment).

64. Jewish Defense League members had taken part in activities directed against Soviet officials and installations in the United States ranging from peaceful demonstrations to acts of violence, including bombings. Soviet officials made repeated and vigorous protests to the United States government; they threatened a chilling of international relations and retaliation against American citizens living in Moscow. Fearing these international consequences and hoping to prevent further criminal acts by the JDL, the Attorney General approved a warrantless wiretap. 516 F.2d at 608-11.

65. Zweibon v. Mitchell, 363 F. Supp. 936, 942 (D.D.C. 1973).

66. Circuit Judges Wright, Leventhal, and Robinson and Chief Judge Bazelon joined in the opinion (Chief Judge Bazelon dissented in part).

67. 516 F.2d at 651.

68. 516 F.2d at 628-51.

> only presented with a case in which foreign threats of retaliation against individual citizens abroad were provoked by the actions of the domestic organization which was subsequently wiretapped, rather than a case in which the wiretapped organization acted in collaboration with, or as the agent of, the foreign power from which the threat emanated.[69]

The remaining four judges also recognized that the plurality's broad holding was unnecessary: two declined comment on the foreign security exception to the warrant requirement, and two others concluded the plurality's holding was incorrect.[70] Although it purported to resolve the issue of foreign intelligence surveillance, the D.C. Circuit's decision left things even more uncertain than *United States District Court*.[71] As in *United States District Court*, the court seemingly invited Congress to delineate the appropriate procedures (and perhaps the substantive law as well) which the decision failed to establish.[72]

The *Brown, Butenko*, and *Zweibon* cases illustrate the legal confusion existing at the time Congress attempted to reconcile foreign intelligence gathering with individual liberty by enacting the Foreign Intelligence Surveillance Act.[73] This Note does not seek to resolve

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69. 516 F.2d at 651.

70. Judge Robb believed the case was controlled by the domestic security requirements of *United States District Court*; he therefore declined comment on the claimed foreign security warrant exception. 516 F.2d at 688 (Robb, J., concurring in the judgment) ("The Jewish Defense League is a domestic organization"). Judge McGowan argued that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 controlled the case. He also refused to address the issue left unresolved in *United States District Court*. 516 F.2d at 681, 683-87 (McGowan, J., concurring in the judgment) ("Judge Wright's discussion of the general problem of whether there should be a foreign security exception to the constitutional warrant requirement, though a scholarly effort of extraordinary proportions, seems to me unnecessary").

Judges Wilkey and MacKinnon concurred in the plurality's finding that the wiretaps were pursuant to the President's foreign affairs powers, and also in the holding that the warrantless surveillance was nevertheless a violation of the fourth amendment. 516 F.2d at 689, 706 (Wilkey and MacKinnon, JJ., concurring in part and dissenting in part). Neither, however, accepted the broad dictum of the plurality that all foreign intelligence surveillances required judicial warrants. They suggested (equally in dictum) that warrantless surveillances of foreign agents and collaborators — as distinguished from individuals or domestic organizations antagonistic to foreign powers — would be constitutional. 516 F.2d at 705, 706.

71. Compare 516 F.2d 594, 658-59 with 407 U.S. 297, 322-23.

72. *See* 516 F.2d at 658-59.

73. This issue has arisen in several other cases. The Ninth Circuit endorsed the holdings of the Third and Fifth Circuits in *Butenko* and *Brown* without discussion in United States v. Buck, 548 F.2d 871, 875-76 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977). *See* note 51 *supra*. The Fourth Circuit, in a case decided after the FISA's passage but arising from events that took place before the Act took effect, also declared a warrant unnecessary for electronic surveillance when the "primary purpose" of the surveillance is to gather or protect foreign intelligence information. United States v. Humphrey, 456 F. Supp. 51 (E.D. Va. 1978), *aff'd. sub nom.* United States v. Truong, No. 78-5176 (4th Cir. July 17, 1980). *See also* Jabara v. Kelley, 476 F. Supp. 561, 576 (E.D. Mich. 1979); United States v. Smith, 321 F. Supp. 424 (C.D. Cal. 1971). On the other hand, the District of Columbia District Court accepted and expanded the holding of *Zweibon I* in Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 159 (D.D.C. 1976) ("[A]bsent exigent circumstances, prior judicial authorization in the form of a warrant based on probable cause is required for electronic surveillance by the Army of American citi-

whether, in the absence of legislation, the President possesses constitutional power to conduct warrantless foreign intelligence surveillance.[74] That task has been attempted elsewhere.[75] Nor is it necessary to resolve that problem. If *Butenko* is correct and the President has extensive surveillance power in the absence of legislation, the relevant issue is whether he retains that power after passage of the Foreign Intelligence Surveillance Act. On the other hand, if the *Zweibon* plurality is correct and no foreign intelligence warrant exception exists, the question remains whether the specific requirements and procedures of the Act unconstitutionally restrain presidential power. Both questions involve issues of congressional authority to enact the Foreign Intelligence Surveillance Act and of judicial ability to carry out its requirements. To resolve these underlying issues, it will first be necessary to describe the standards and procedures of the Foreign Intelligence Surveillance Act in greater detail.

II. The Provisions of the Foreign Intelligence Surveillance Act

The Foreign Intelligence Surveillance Act employs detailed warrant application and authorization procedures to prevent indiscriminate use of electronic surveillance.[76] The Act calls upon the Chief

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zens or organizations located overseas when there is no evidence of collaboration with or action on behalf of a foreign power"). The Second Circuit successfully avoided the issue in United States v. Ajlouny, No. 80-1047 (2d Cir. Aug. 29, 1980).

74. *See* text at notes 34-51 *supra*.

75. *See, e.g.*, Lacovara, *supra* note 10; Nesson, *supra* note 47; Case Comment, *supra* note 31; Note, *supra* note 11; Note, *supra* note 62; Note, *supra* note 44; Comment, *supra* note 10; Note, *supra* note 10; Note, *Government Monitoring of International Electronic Communications: National Security Agency Watch List Surveillance and the Fourth Amendment*, 51 S. Cal. L. Rev. 429 (1978); Note, *The Fourth Amendment and Executive Authorization of Warrantless Foreign Security Surveillance*, 1978 Wash. U. L.Q. 397 (1978).

76. Section 101(f) of the FISA defines electronic surveillances as consisting of four partially overlapping categories:

> (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 targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement 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.

Justice to designate seven district court judges to serve overlapping terms on a special court that hears warrant requests.[77] The Chief Justice also designates three federal judges to form a special court with jurisdiction to review the denial of warrant applications.[78] If

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See generally Note, *A Reconsideration of the* Katz *Expectation of Privacy Test*, 76 MICH. L. REV. 154 (1977) (discussing the "reasonable expectation of privacy").

This definition does not encompass all that is commonly considered electronic surveillance for foreign intelligence purposes. For example, the National Security Agency (NSA) is capable of intercepting all electronic communications to and from the United States. The NSA can sort out these communications and identify communications to, from, or about any specific targeted individual or about any specified subject matter. *E.g.*, Halkin v. Helms, 598 F.2d 11, 12 n.1 (D.C. Cir. 1979) (Bazelon, C.J., dissenting), *denying rehearing en banc* of Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978); SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, BOOK III: FOREIGN AND MILITARY INTELLIGENCE, S. REP. NO. 755, 94th Cong., 2d Sess. 739-40 (1976). Apparently, the FISA gives the NSA complete discretion to monitor any and all international radio communications (including all international telephone conversations transmitted by satellite); interception of communications to or from untargeted individuals (for example, communications that the NSA distinguishes on the basis of subject matter) is not electronic surveillance under the Act's definitions. *See* FISA § 101(f). Some of the NSA's activities are therefore unaffected by the Act's standards and procedures. FISA § 101(f); *see* Note, *Government Monitoring of International Electronic Communications: National Security Agency Watch List Surveillance and the Fourth Amendment*, *supra* note 75, at 461 n.244. In addition, the section of the Act that calls for the destruction of information from "unintentional" acquisition of radio communications applies only "if both the sender and all intended recipients are located within the United States," thereby exempting some of NSA's activities from its strictures. *See also* note 89 and accompanying text *infra*.

The District of Columbia Circuit Court of Appeals recently upheld a Government claim of "state secrets" privilege, effectively dismissing a suit claiming infringement of fourth amendment rights by the NSA. Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978), *rehearing en banc denied*, 598 F.2d 11 (D.C. Cir. 1979). The court did not consider the impact of the FISA on the plaintiff's claims since the suit had been filed before the Act's passage. Halkins v. Helms, 598 F.2d at 18 n.32 (Bazelon, C.J., dissenting from denial of rehearing en banc).

77. FISA, § 103(a),(d). Chief Justice Burger made the first appointments on May 18, 1979. The first appointees to the Foreign Intelligence Surveillance Court were: Judge Albert V. Bryan, Jr. (E.D. Va.), seven-year term; Judge Frederick B. Lacey (D.N.J.), six-year term; Judge Lawrence Warren Pierce (S.D.N.Y.), five-year term; Judge Frank J. McGarr (N.D. Ill.), four-year term; Judge George L. Hart, Jr. (D.D.C.), three-year term; Judge James H. Meridith (E.D. Mo.), two-year term; and Judge Thomas Jamison MacBride (E.D. Cal), one-year term. *Appointments Announced: Foreign Intelligence Surveillance Courts*, 11 THE THIRD BRANCH, No. 5, May 1979, at 7.

The conference report indicates that these judges will serve on rotation in the District of Columbia with at least two on duty at any given time. H.R. REP. NO. 1720, 95th Cong., 2d Sess. 26-27, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4048, 4055-56. The court has nationwide jurisdiction and is placed in one location to minimize security risks. 124 CONG. REC. H12,538-39 (daily ed. Oct. 12, 1978) (remarks of Rep. Murphy of Illinois). In Senate hearings, Attorney General Bell expressed his faith that the judiciary is not a security risk, calling the judiciary "the most leakproof branch of the Government." *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. 47 (1977) [hereinafter cited as *Hearings on S. 1566*].

78. FISA § 103(b). The first appointees to the Foreign Intelligence Surveillance Court of Review were: Judge A. Leon Higginbotham, Jr. (3d Cir.), seven-year term; Judge James E. Barrett (10th Cir.), five-year term; Judge George Edward MacKinnon (D.C. Cir.), three-year term. *Appointments Announced: Foreign Intelligence Surveillance Courts*, 11 THE THIRD BRANCH, No. 5, May 1979, at 7.

this special appellate court denies a warrant, the Government may petition the Supreme Court for a writ of certiorari.

The Act's warrant application and authorization procedures require executive branch officials to state in writing the circumstances justifying each warrant. They require the judge hearing the application to state in writing the reasons for granting or denying each request.[79] Before issuing an order approving surveillance, the judge must conduct an ex parte proceeding to ensure that the application has the approval of the attorney general,[80] that it contains all the necessary statements and certifications,[81] and, most importantly, that there exists "probable cause to believe that — (A) the target of the electronic surveillance is a foreign power or agent of a foreign power . . . ; and (B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power."[82]

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79. In general, a warrant application for foreign intelligence surveillance requires the following:

(1) the approval of the Attorney General based upon his finding that the application satisfies the statutory criteria, FISA § 104(a);

(2) the identity of the federal officer requesting the warrant, FISA § 104(a)(1);

(3) the identity of the target, if known, or a description of the target, FISA § 104(a)(3);

(4) a statement of the facts and circumstances used to justify the belief that the target is a foreign power or an agent of a foreign power and that the premises targeted are used by a foreign power or an agent of a foreign power, FISA § 104(a)(4);

(5) a statement of the proposed "minimization procedures," FISA § 104(a)(5) ("Minimization procedures" defined in section 101(h), are means of limiting the acquisition, retention, and dissemination of information obtained from electronic surveillance which does not relate to the proper objects of the surveillance. *Compare* FISA §§ 101(h), 106, *with* Berger v. United States, 388 U.S. 41 (1967); *see generally* Scott v. United States, 436 U.S. 128 (1978) (Title III minimization procedures), and Fishman, *The "Minimization" Requirement in Electronic Surveillance: Title III, the Fourth Amendment, and the Dread* Scott *Decision*, 8 AM. U. L. REV. 315 (1979));

(6) a description of the information sought and the type of communications to be targeted, FISA § 104(a)(6);

(7) a certification by the Assistant to the President for National Security Affairs, or by another officer designated by the President from among those executive officers with duties in the area of national security of defense who are appointed by the President with the advice and consent of the Senate, that: (a) the information sought is foreign intelligence information, (b) the purpose of the proposed surveillance is to obtain that information, and (c) the information cannot reasonably be obtained by normal investigative techniques, FISA § 104(a)(7); *see* Exec. Order No. 12,139, 44 Fed. Reg. 30,311 (May 23, 1979);

(8) a statement of the method of surveillance and whether physical entry is required, FISA § 104(a)(8), *see* note 86 *infra*;

(9) a statement of the facts relating to previous warrant applications for surveillance directed at the same target, FISA § 104(a)(9); and

(10) a statement of the time period for which surveillance is requested, FISA § 104(a)(10).

80. FISA § 105(a)(1), (2).

81. FISA § 105(a)(5).

82. FISA § 105(a)(3). By requiring a showing of probable cause to believe that a targeted individual is an agent of a foreign power, the Act effectively requires probable cause to believe that a criminal law has been or is about to be violated before a United States person may be placed under surveillance. *See* note 83 *infra*; FISA § 101(b) (defining "agent of a foreign power"). *Cf.* Warden v. Hayden, 387 U.S. 294, 307 (1967) (requiring a nexus between the object of search and seizure and the alleged criminal behavior).

Even higher standards of review are imposed if the target of the requested surveillance is a "United States person":[83] the judge must

83. Under the Act "United States person" includes United States citizens, permanent resident aliens, and groups whose membership includes a "substantial number" of United States citizens and permanent resident aliens. FISA § 101(i). The Act provides that any person, other than a United States person, who "acts in the United States as an officer or employee of a foreign power" or as a member of an international terrorist group, or who is believed to engage in clandestine intelligence activities in the United States on behalf of a foreign power may be treated as an "agent of a foreign power." FISA § 101(b)(1). In addition, a United States person who knowingly aids, abets, engages in, or conspires to engage in clandestine intelligence activities, international terrorism, or sabotage on behalf of a foreign power also qualifies as an agent of a foreign power, but only when his or her activities involve or may involve the violation of a criminal statute. FISA § 101(b)(2). Among the federal criminal statutes most likely to be involved are assault on a foreign official, 18 U.S.C. § 112 (1976); bribery of public officials, 18 U.S.C. § 201 (1976); United States officer or employee acting as agent of foreign principal, 18 U.S.C. § 219 (1976); civil disorder, 18 U.S.C. § 231 (1976); congressional assassination, kidnapping, and assault, 18 U.S.C. § 351 (1976); falsification of military, naval, or official passes, 18 U.S.C. § 499 (1976); escape of prisioners of war or enemy aliens, 18 U.S.C. § 757 (1976); gathering, transmitting or losing defense information, 18 U.S.C. § 793 (1976); gathering or delivering defense information to aid foreign government, 18 U.S.C. § 794 (1976); other acts of espionage or disclosure of classified information, 18 U.S.C. §§ 792, 795-799 (1976); extortion and threats, 18 U.S.C. §§ 871-73, 876-78 (1976); interstate transportation of firearms, 18 U.S.C. § 922 (1976); various interferences with foreign governments or foreign affairs, 18 U.S.C. §§ 951-970 (1976); destruction of government communications lines, 18 U.S.C. § 1362 (1976); piracy, 18 U.S.C. §§ 1651-1661 (1976); presidential assassination, kidnapping and assault, 18 U.S.C. §§ 1751-52 (1976); disclosure of confidential information, 18 U.S.C. § 1905 (1976); concealment, removal, or mutilation of public records, 18 U.S.C. § 2071 (1976); sabotage, 18 U.S.C. §§ 2151-2157 (1976); treason, sedition, and subversive activities, 18 U.S.C. §§ 2381-2391 (1976); illegal exportation of war materials, 22 U.S.C. § 401 (1976); and offenses against neutrality, 22 U.S.C. §§ 461-465 (1976). The Act defines international terrorism as "activites [involving] violent acts or acts dangerous to human life" that violate the criminal laws of the United States or of any State, or would violate a criminal law if committed within the proper jurisdiction, and that appear to be intended to coerce a civilian population or influence government policy. FISA § 101(c).

As a result of these definitions, foreign embassy officers and employees, but not United States citizens, may be subject to surveillance without any prior indication of potential criminal conduct. The statute provides that no United States person may be considered an agent of a foreign power solely on the basis of activities protected by the first amendment. FISA § 105(a)(3)(A).

An agent of a foreign power, or a foreign power itself, may also be the subject of electronic surveillance to obtain foreign intelligence information. FISA § 102(b). The FISA defines foreign intelligence information as:

(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 foreign affairs of the United States.

FISA § 101(e). The Act therefore provides a stricter standard for the surveillance of United States persons than for the surveillance of foreign nationals. Note, however, that if the FISA affords less protection to foreign nationals than the fourth amendment, the government must comply with the stricter fourth amendment standard. The "people" protected by the fourth amendment are all persons within the territorial jurisdiction of the United States. *See, e.g.*, United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 155 (1923) (alien may assert exclusion-

find that the certifications of the executive officer are not clearly erroneous. The judge must base this finding on the statements made by the executive officer to support the certifications and on any other information the judge believes is necessary.[84] If these requirements are satisfied, an order approving the surveillance for a limited period[85] will issue.[86]

The FISA waives the warrant requirement in three situations.[87] First, the Attorney General may unilaterally authorize electronic surveillance in emergencies if judicial proceedings would unacceptably delay surveillance.[88] Second, federal officials need not obtain a warrant to intercept communications "exclusively between or among foreign powers" or to acquire "technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power . . . ."[89]

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ary rule in deportation proceeding); *cf.* Abel v. United States, 362 U.S. 217 (1960) (Court assumed that aliens, even those who had entered the country illegally and were engaged in espionage, were entitled to full fourth amendment protection; search made incidental to valid deportation arrest; conviction affirmed). This Note does not consider whether the statute's standards for foreign nationals meet fourth amendment requirements. Nevertheless, the reader should be aware that the Act does *not* require a showing of probable cause to suspect criminal activity before surveillance of foreign nationals may commence. *See* FISA §§ 101(b)(1), 105(a)(3), and note 82 *supra*.

84. FISA § 105(a)(5). The statements of the executive officer must support the conclusions that "(i) the information sought is the type of foreign intelligence information designated; and (ii) such information cannot reasonably be obtained by normal investigative techniques." FISA § 104(a)(7)(E). The judge may require other necessary information for his or her determinations. FISA § 104(d). In Senate hearings Defense Secretary Harold Brown expressed a concern that the word "necessary" in section 104(d) — which allows the judge to require the government to furnish additional information to support its application — might be interpreted to mean "substantially more than just 'useful' or 'helpful.'" *Hearings on S. 1566, supra* note 77, at 55. The legislative history neither confirms nor denies this possible interpretation.

Congress may have chosen the "clearly erroneous" standard over a "probable cause" standard for these factual findings in deference to executive claims of expertise in "highly sophisticated matters of national defense, foreign affairs, and counterintelligence." *Id.* at 15 (statement of Attorney General Bell).

85. Judicial orders may approve surveillance of individuals for up to 90 days; surveillance of foreign powers may be approved for up to one year. FISA § 105(d)(1). Extensions of current warrants "may be granted on the same basis as an original order upon application for an extension and new findings" for similarly limited periods of time. FISA § 105(d)(2), (3).

86. FISA § 105(a). The order approving an electronic surveillance must explicitly specify whether physical entry will be used to effect the surveillance. FISA § 105(b)(1)(D). This explicit approval of physical entry is not required by the fourth amendment, nor is it necessary under Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520 (1976). Dalia v. United States, 441 U.S. 238, 255-59 (1979).

87. In addition to these three exceptions, FISA § 105(f) allows non-targeted surveillance for equipment tests and personnel training when no alternative means of testing or training exists, provided that no information so obtained is retained or disclosed.

88. FISA § 105(e). This section also provides that the Attorney General or his designee must file a warrant application with a judge within twenty-four hours of such an emergency authorization. If the application is denied, the surveillance must be terminated and any collected information may not be disclosed.

89. FISA § 102(a)(1)(A). The Attorney General must certify that there is no substantial likelihood that a United States person would be a party to any acquired communications. A certification of the surveillance is filed with the statutory court, under seal to protect the se-

Third, the warrant requirement is waived during the first fifteen days following a congressional declaration of war.[90] This exemption allows Congress time to consider any amendments to the Act that "may be appropriate during a wartime emergency."[91]

In passing the FISA, Congress rejected any claim of inherent presidential power to conduct foreign security surveillance.[92] Although the majority of the House-Senate Conference Committee believed that the President possesses no inherent power to conduct wiretapping or electronic surveillance without court approval, it left the issue for final resolution by the Supreme Court:

> The conferees agree that the establishment by this act of exclusive means by which the President may conduct electronic surveillance does not foreclose a different decision by the Supreme Court. The intent of the conferees is to apply the standard set forth in Justice Jackson's concurring opinion in the Steel Seizure Case: "When a President takes measures incompatible with the express or implied will of Congress, his power is at the lowest ebb, for then he can rely only upon his own Constitutional power minus any Constitutional power of Con-

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crecy of the surveillance. FISA § 102(a)(3). No judicial approval of this specialized surveillance is required, and the certification remains sealed, unless: (1) a district court must determine the legality of the surveillance, FISA § 102(a)(3)(B) (a district court must consider in camera the application's validity if a party seeks to introduce surveillance information as evidence in a trial, hearing, or other court proceeding, FISA § 106(c), (d), and (f), or if any aggrieved person moves to suppress evidence obtained or derived from such surveillance, FISA § 106(e), (f)); or (2) the surveillance picks up the communications of United States persons, FISA §§ 101(h)(4), 102(a)(3)(A). In the latter case, the information may not be used for any purpose and must be destroyed within the twenty-four hours unless court approval of the original surveillance is obtained. FISA § 101(h)(4).

The advanced electronic surveillance permitted by § 102(a)(1)(A) is carried on exclusively by the National Security Agency (NSA); the exemption is therefore referred to as the NSA exemption. *See* H.R. REP. No. 1720, *supra* note 7, at 24, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4048, 4053; Berlow, *supra* note 7, at 2964-65.

90. FISA § 111.

91. H.R. REP. No. 1720, *supra* note 7, at 34, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4048, 4063.

92. *See, e.g., Hearings on S. 1566, supra* note 77, at 2, 14-15 (statements of Senator Kennedy and Attorney General Bell).

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 explicitly disclaimed any intent to affect the President's power in national security surveillance. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 2511(3), 82 Stat. 214 (previously codified at 18 U.S.C. § 2511(3) (1976)). The FISA repealed this disclaimer contained in Title III and amended the Safe Streets Act to provide in part:

> [T]he Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance . . . and the interception of domestic wire and oral communications [to obtain foreign intelligence information] may be conducted.

FISA § 201. The House version had designated the bill as "the exclusive *statutory* means" of foreign intelligence surveillance. H.R. 7308, 95th Cong., 2d Sess. § 201(b)(f), 124 CONG. REC. H9273 (daily ed. Sept. 7, 1978) (emphasis added). The word "statutory" was then deleted in conference. H.R. REP. No. 1720, *supra* note 7, at 35, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4048, 4064. Despite a vigorous argument of unconstitutionality, led by Representative McClory of Illinois, *see* Dissenting Views, *supra* note 9, at H11,683-85; 124 CONG. REC. H12,535-37, H12,540-42 (daily ed. Oct. 12, 1978), the Senate adopted the conference substitute by a voice vote, 124 CONG. REC. S17,884 (daily ed. Oct. 9, 1978), and the House of Representatives by a vote of 226 to 176, 124 CONG. REC. H12,542-43 (daily ed. Oct. 12, 1978).

gress over the matter." *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).[93]

The remainder of this Note assesses whether Congress found a constitutional means to legislate a judicial role in foreign security surveillance.

III. The Constitutionality of the Foreign Intelligence Surveillance Act

The Foreign Intelligence Surveillance Act raises difficult separation of powers issues. The Act is vulnerable to constitutional challenge as an intrusion by both Congress and the judiciary into the President's power to conduct foreign affairs. Two challenges to the Act's constitutionality seem particularly troublesome. First, the Act may exceed congressional power to interfere with inherent and exclusive presidential powers.[94] Second, the Act may require the judiciary to review presidential foreign policy decisions — a task beyond judicial competence.[95]

Before a court can review either of these challenges to the Act's constitutionality, it must decide that it has the power to do so. The recent case of *Goldwater v. Carter*[96] may indicate that federal courts would not assert that power. In *Goldwater*, the Supreme Court dismissed a Senator's complaint that President Carter lacked the constitutional power to abrogate a mutual defense treaty between the United States and Taiwan without Senate approval. Justice Rehnquist's plurality opinion in *Goldwater* suggests a sweeping application of the political question doctrine to all foreign affairs controversies. Justice Rehnquist began his opinion:

> I am of the view that the basic question presented by the petitioners in this case is "political" and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President.[97]

Justice Rehnquist did not declare whether his opinion was meant to overrule Justice Brennan's dictum in *Baker v. Carr* that "not every case or controversy which touches foreign relations lies beyond judicial cognizance."[98] That possibility, however, seems unlikely and untenable. Justice Rehnquist's political question dismissal relied essentially on two grounds: the Constitution's silence on treaty termi-

93. H.R. Rep. No. 1720, *supra note* 7, at 35 (footnote omitted), *reprinted in* [1978] U.S. Code Cong. & Ad. News 4048, 4064.

94. *See, e.g.*, Dissenting Views, *supra* note 9, at H11,683-84.

95. *See, e.g., Hearings on H.R. 7308 Before the House Permanent Select Comm. on Intelligence*, 95th Cong., 2d Sess. 224 (1978) (statement of Laurence H. Silberman).

96. 444 U.S. 996 (1979).

97. 444 U.S. at 1002 (plurality opinion).

98. 369 U.S. 186, 211 (1962).

nation[99] and the resources available to coequal branches to settle their disputes politically.[100] But these grounds are open to serious dispute. Justice Powell correctly pointed out that interstitial analysis is as much the Court's duty as textual analysis; neither inquiry necessarily demands "special competence or information beyond the reach of the Judiciary."[101] Justice Powell also cited the "Court's willingness on previous occasions to decide whether one branch of our government has impinged upon the power of another."[102]

Moreover, Justice Rehnquist's expansive interpretation of the political question doctrine has never been endorsed by a majority of the Supreme Court.[103] Even if a majority of the Court eventually embraces the plurality opinion in *Goldwater*, it is unlikely that the political question doctrine would be expanded to reach all foreign affairs questions. Professor Henkin's observation that "[t]he Supreme Court has never invoked the political question doctrine to dismiss an individual's claim that a foreign relations action deprived him of constitutional rights"[104] remains true. Since the FISA attempts to strike a balance that protects both national security and individual rights, its constitutionality falls within the category of questions which Henkin correctly identifies as non-political. The Court should not leave individual rights to the unlimited discretion of the political branches merely because the political action is clothed in the garb of foreign affairs.[105] It therefore seems reason-

99. Goldwater v. Carter, 444 U.S. 996, 1003 (plurality opinion). Justice Rehnquist thought Coleman v. Miller, 307 U.S. 443 (1939), was "directly analogous." *Coleman* asked whether a state could ratify a constitutional amendment that it had previously rejected. Chief Justice Hughes pointed to the Constitution's silence on the rejection of proposed constitutional amendments in declaring the issue a political question, 307 U.S. at 450 (plurality opinion); Justice Rehnquist pointed to the Constitution's silence on treaty abrogation, 444 U.S. at 1003 (plurality opinion).

100. 444 U.S. at 1004 (plurality opinion). Professor Henkin, several years before *Goldwater v. Carter*, argued that Congress and the President could not sue each other for alleged constitutional deficiencies. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 208 (1972).

101. 444 U.S. at 1000 (Powell, J., concurring). Justice Powell offered a hypothetical case: "Assume that the President signed a mutual defense treaty with a foreign country and announced that it would go into effect despite its rejection by the Senate." According to Justice Powell, Justice Rehnquist's analysis would classify this dispute a political question, even though Powell believed the hypothetical dispute would be clearly justiciable and, except for being an easier case on the merits, indistinguishable for political question purposes from the controversy before the Court. 444 U.S. at 999-1000.

102. 444 U.S. at 1001 (Powell, J., concurring). Justice Powell cited Buckley v. Valeo, 424 U.S. 1, 138 (1976); United States v. Nixon, 418 U.S. 683, 707 (1974); The Pocket Veto Case, 279 U.S. 655, 676-78 (1929); and Myers v. United States, 272 U.S. 52 (1926), as examples.

103. The doctrine was explicitly rejected by Justice Powell, 444 U.S. at 998, and by Justice Brennan, 444 U.S. at 1006-07. (Justice Brennan authored the Supreme Court's decision in Baker v. Carr, 369 U.S. 186 (1962)). Justices Blackmun, White, and Marshall expressed no opinion on the justiciability issue. 444 U.S. at 996, 1006.

104. L. HENKIN, *supra* note 100, at 485 n.6.

105. *Cf.* Narenji v. Civiletti, 481 F. Supp. 1132, 1145 (D.D.C. 1979) (selective deportation program for Iranian students violated equal protection), *revd.*, 617 F.2d 745, 748 (D.C. Cir. 1979), *cert. denied*, 100 S. Ct. 2928 (1980).

able for the federal courts, if called upon, to review the constitutionality of the Foreign Intelligence Surveillance Act.

A. *Congressional Power to Regulate Foreign Intelligence Surveillance Within the United States*

The President has the constitutional power to conduct foreign affairs.[106] During debate in the House of Representatives, several Congressmen vigorously argued that the FISA would improperly limit that power. Their argument rested on two contentions: first, that foreign-intelligence gathering within the United States is part of the conduct of foreign affairs; and second, that the FISA exceeds the scope of congressional power to regulate the conduct of foreign affairs. Careful analysis reveals that while the first contention may be true, the second is incorrect.

The conduct of foreign intelligence surveillance within the United States may fall within either the domestic or the foreign affairs powers of the President. If this surveillance is a domestic affair, Congress has plenary power to regulate it.[107] On the other hand, if this surveillance is a foreign affair, Congress may have considerably less regulatory authority, and the question of whether the FISA exceeds that limited authority becomes relevant.

Although important consequences may flow from the distinction between foreign and domestic affairs powers, the Supreme Court has offered little guidance in discerning whether a given problem involves foreign or domestic affairs. "For constitutional lawyers as for others, the line between domestic and foreign affairs is increasingly fluid and uncertain, sometimes unreal, always at most a division of emphasis and degree."[108] Two landmark cases illustrate this uncertainty in drawing a line between domestic and foreign affairs.

In *United States v. Curtiss-Wright Export Corp.*,[109] the Supreme Court held that a congressional resolution authorizing President Roosevelt to embargo arms to countries at war in the Chaco and to impose criminal penalties for violations of the embargo was not an improper delegation of legislative power.[110] This decision contrasted sharply with the Court's contemporaneous decisions striking down excessive delegations of legislative power to the executive in domestic affairs.[111] The different outcomes, according to Justice Suther-

106. *See* text at notes 119-21 *infra*, and notes 119 & 121 *infra*.

107. *See* U.S. CONST. art. I, § 1.

108. L. HENKIN, *supra* note 100, at 8-9. *See also* Manning, *The Congress, the Executive and Intermestic Affairs: Three Proposals*, 55 FOREIGN AFF. 306 (1977); Nye, *Independence and Interdependence*, 22 FOREIGN POL. 129 (1976).

109. 299 U.S. 304 (1936).

110. 299 U.S. at 322.

111. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v.

land, were the result of "fundamental differences between the powers of the federal government in . . . foreign and external affairs and those in . . . domestic or internal affairs."[112] But the Court failed to explain when a given action involved foreign affairs; it simply assumed that an arms embargo implicated the foreign affairs powers.

In *Youngstown Sheet & Tube Co. v. Sawyer*,[113] the Court held President Truman's wartime seizure of the steel mills invalid as an improper executive exercise of legislative power vested in Congress by Article I of the Constitution.[114] Despite the President's claim that the seizure was necessary to avert a strike that would have threatened the national defense,[115] the Court apparently treated the seizure as a domestic affair.[116] Once again, no clear principle for distinguishing foreign from domestic affairs emerged from the Court's opinion.

Curtiss-Wright and *Youngstown Sheet & Tube* offer little explicit guidance as to whether foreign intelligence surveillance within the United States is foreign or domestic. Like an arms embargo or a wartime plant seizure, this surveillance has both domestic and foreign impact, and is motivated by foreign policy objectives. Without a clear indication from the Court, one can only observe that at least in some circumstances — such as surveillance of a foreign spy within the United States — foreign intelligence surveillance under the FISA intuitively seems more foreign than domestic.[117] Relying on that in-

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United States, 295 U.S. 495, 537-38 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 431-32 (1935).

112. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315 (1936).

113. 343 U.S. 579 (1952). *See generally* M. MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977).

114. Article I, § 1 provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

115. Exec. Order No. 10,340, 14 Fed. Reg. 3139 (1952), *reprinted in* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 589.

116. 343 U.S. 579, 585-86, 587-88; 343 U.S. at 597-607 (Frankfurter, J., concurring); *see* L. HENKIN, *supra* note 100, at 340 n.11; Kauper, *The Steel Seizure Case: Congress, the President and the Supreme Court*, 51 Mich. L. Rev. 141, 175 (1952).

117. One could make a strong case to counter this intuition. *Curtiss-Wright* might be distinguished from *Youngstown Sheet & Tube* on the basis of congressional authorization; if Congress concurs in the President's invocation of inherent foreign affairs powers (as in *Curtiss-Wright*), the Court may categorize the matter as foreign; if Congress opposes the action (as in *Youngstown Sheet & Tube*), the Court may label it domestic. The point is that an action taken under the foreign affairs power may invoke the unenumerated powers of sovereignty; the Court is perhaps less hesitant to provide this extra-constitutional authority when the President and Congress concur. Under this analysis, the Foreign Intelligence Surveillance Act qualifies as domestic legislation, not as congressional usurpation of the President's foreign affairs powers, because Congress has explicitly circumscribed the Preident's authority rather than approving the President's warrantless surveillance activities.

Another distinction that makes the FISA appear domestic is concern for individual liberties. When the President's action threatens individual rights (as in *Youngstown Sheet & Tube*,

tuition, and thus assuming that foreign-intelligence gathering within the United States is part of the conduct of foreign affairs, the question of who may control the federal government's extensive powers in this area remains.

The allocation of foreign affairs powers between the President and Congress is not clearly defined.[118] The President exercises powers textually committed to him by the Constitution,[119] as well as powers implied from these textual assignments and powers inherent in national sovereignty. The President alone exercises some of the textually committed powers, such as making tactical decisions in troop deployment,[120] and some of the textually implied powers, such as recognizing or withdrawing recognition from foreign governments.[121] But Congress draws foreign affairs powers from these three sources as well, and presidential powers are not always exclusive. Where congressional and presidential authority overlap, congressional power often controls if asserted.[122]

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which, according to Justice Douglas, 343 U.S. at 631-32, involved an unconstitutional taking of property), the Court seems reluctant to ground presidential authority in extra-constitutional foreign affairs powers. *See* L. HENKIN, *supra* note 100, at 99. Since warrantless surveillances clearly implicate personal liberties, this is a second reason to characterize the FISA as domestic.

However strong the arguments that the FISA should be considered domestic legislation for purposes of constitutional analysis, the ambiguous legal distinction between foreign and domestic affairs precludes a conclusion of congressional authority based on this argument alone. This Note therefore analyzes congressional power in its weakest light — under the assumption that the FISA regulates foreign affairs.

118. The "modern" view of separation of powers does not contemplate a distinct, unalterable division of functions among totally independent branches of government, *see, e.g.*, Springer v. Philippine Islands, 277 U.S. 189, 201 (1928); Kilbourn v. Thompson, 103 U.S. 168, 190-91 (1881), but adopts a more flexible and pragmatic approach, *see, e.g.*, Nixon v. Administrator of General Services, 433 U.S. 425, 441-43 (1977); Springer v. Philippine Islands, 277 U.S. at 209 (Holmes, J., dissenting). *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2:2-:6 (2d ed. 1978). The flexible approach was first suggested in the Federalist Papers, THE FEDERALIST No. 47, at 325-26 (J. Cooke ed. 1961) (Madison), and later by Mr. Justice Story, J. STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 525 (5th ed. M. Bigelow 1905).

119. The President is Commander in Chief of the armed forces, U.S. CONST. art. II, § 2, cl. 1; he makes treaties with the advice and consent of the Senate, U.S. CONST. art. II, § 2, cl. 2; he nominates and appoints ambassadors with the advice and consent of the Senate, U.S. CONST. art. II, § 2, cl. 2; and he receives ambassadors and other public ministers, U.S. CONST. art. II, § 3.

120. *See* L. HENKIN, *supra* note 100, at 51-54, 107-08; *cf.* DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973) (court lacked power to review presidential decision to mine North Vietnamese ports and harbors).

121. This power is implied from the President's power to appoint ambassadors, U.S. CONST. art. II, § 2, cl. 2, and more directly from his authority to receive ambassadors and other public ministers, U.S. CONST. art. II, § 3. *E.g.*, United States v. Pink, 315 U.S. 203, 228-30 (1942); Oetjen v. Central Leather Co., 246 U.S. 297 (1918).

122. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring) (footnotes omitted):

> 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

Congress can muster authority to regulate foreign intelligence surveillance from two sources: its share of the powers inherent in national sovereignty, and its legislative powers under the Necessary and Proper Clause of the Constitution. In *Curtiss-Wright*, Justice Sutherland first theorized that some of the federal government's foreign affairs powers are inherent in national sovereignty rather than derived from the enumerated powers constitutionally delegated to the federal government by the states.[123] Although Justice Sutherland suggested that many of the extra-constitutional foreign affairs powers belong to the President,[124] at least some of these powers of sover-

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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 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.

On occasion Congress, with Supreme Court approval, has even totally deprived the executive of specific means of accomplishing his foreign policy objectives. For example, in Little v. Barreme (The "Flying Fish"), 6 U.S. (2 Cranch) 170, 177-78 (1804) (Marshall, C.J.), the Court held that congressional action authorizing the President to order seizure of American vessels bound *to* a French port thereby precluded the seizure of any American vessel bound *from* a French port. Without this legislation the President, as Commander in Chief, might have empowered the Navy to seize all American vessels bound either to or from a French port during the undeclared war with France.

123. 299 U.S. 304, 318 (1936). Sutherland had special interest in foreign relations. As a United States Senator he had been a member of the Senate Foreign Relations Committee. His early lectures and writings anticipated the foreign/domestic distinction he propounded in *Curtiss-Wright*. *See* G. SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 24-47, 116-26 (1919); G. SUTHERLAND, THE INTERNAL AND EXTERNAL POWERS OF THE NATIONAL GOVERNMENT, S. DOC. NO. 417, 61st Cong., 2d Sess. (1910). For a history and criticism of Sutherland's views, see Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); Lofgren, United States v. Curtiss-Wright Export Corporation: *An Historical Reassessment*, 83 YALE L.J. 1 (1973).

124. 299 U.S. at 319. Justice Sutherland's statement was dictum, of course; the result in *Curtiss-Wright* did not depend on where the non-textual foreign affairs powers were placed because both branches had acted concurrently. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring). Moreover, Justice Sutherland's suggestion is supported only by the more limited statement of then-Congressman John Marshall that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 ANNALS OF CONG. 613 (1800). This position only gives the President exclusive power to communicate with foreign governments. Of course, from his position of national spokesman the President necessarily "make[s] foreign policy" as he "conduct[s] foreign relations." L. HENKIN, *supra* note 100, at 47. This, however, does not imply that foreign policymaking is exclusively presidential. As Professor Henkin points out, "[t]he Court has never considered how the powers inherent in national sovereignty are divided among the branches." *Id.* at 324 n.28. Furthermore, at least some of these powers have been validly exercised by Congress. *See, e.g.*, Perez v. Brownell, 356 U.S. 44, 62 (1958) ("To deny the power of Congress to enact the legislation challenged here [regulating "the relations of the United States with foreign countries"] would be to disregard the constitutional allocation of governmental functions that it is this Court's solemn duty to guard"). *Perez* was later overruled by Afroyim v. Rusk, 387 U.S. 253 (1967), but no question of Congress' general power to legislate the conduct of foreign affairs was raised in *Afroyim*. Notably, Justice Frankfurter,

eignty have been exercised by and recognized as belonging to Congress.[125] The Supreme Court has recognized this inherent congressional power to regulate foreign affairs, particularly when American citizens or residents are involved: "Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation."[126] As Professor Henkin has observed, "[W]hatever the President might do during authorized war or by international agreement, Congress alone can spend, authorize war, legislate and regulate generally within the United States, even in matters regarding foreign affairs."[127] Congress can therefore draw authority to regulate executive branch foreign intelligence activities within the United States from its share of the federal government's implicit powers of sovereignty.[128]

The Necessary and Proper Clause of the Constitution may also empower Congress to regulate foreign intelligence surveillance within the United States. The Necessary and Proper Clause grants Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[129] The Supreme Court has interpreted this clause to permit varied congressional initiatives in the exercise of the federal government's many powers.[130] Indeed, the Court identified this clause as the source of Congress's implicit foreign affairs power: "Congress has broad power under the Necessary and Proper Clause to enact legislation for the regulation of foreign affairs."[131] The Necessary and Proper Clause carries added significance for the conduct of foreign relations since it authorizes Congress to implement not just its own powers, but all powers vested in any branch of

writing for the Court in *Perez*, cited *Curtiss-Wright* as support for congressional authority to legislate in foreign affairs. *See generally* Schlesinger, *Congress and the Making of American Foreign Policy*, 51 FOREIGN AFF. 78 (1972).

125. *See, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 44 (1963) (dictum); Perez v. Brownell, 356 U.S. 44 (1958); Blackmer v. United States, 284 U.S. 421 (1932).

126. Perez v. Brownell, 356 U.S. 44, 57 (1958).

127. L. HENKIN, *supra* note 100, at 99.

128. Of course, this assumes that the FISA regulates foreign affairs; if not, Congress' domestic legislative power under article I is surely adequate to support the legislation. *See* U.S. CONST. art. I, § 1, and text at notes 107-17 *supra*.

129. U.S. CONST. art. I, § 8, cl. 18.

130. *E.g.*, Berman v. Parker, 348 U.S. 26 (1954); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

131. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963). In Missouri v. Holland, 252 U.S. 416 (1920), for example, Justice Holmes found a basis in that clause for a statute implementing a treaty which, it was assumed, Congress could not have enacted in the absence of the treaty.

the federal government.[132] Hence, Congress can direct the President and regulate how he takes "Care that the Laws be faithfully executed."[133] The clause thus legitimizes laws, such as the Foreign Intelligence Surveillance Act, that support and regulate the President's foreign affairs and foreign intelligence activities.[134]

Courts may also view the Foreign Intelligence Surveillance Act as necessary and proper to protect individual rights. Although the Constitution does not explicitly grant Congress authority to advance the freedoms guaranteed in the original Articles or in the Bill of Rights,[135] the Preamble does state that one of the Constitution's purposes is to "secure the Blessings of Liberty,"[136] and the separation of powers established by the Constitution is largely directed toward that end.[137] It would be anomalous to infer individual rights and liberties from the structure and relationships of the Constitution[138] while not inferring congressional authority to promote and protect those individual rights and liberties.[139] At times the Supreme Court seems to recognize such a congressional power independent of the enforcement provisions of constitutional amendments.[140] More

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132. *See* W. VanAlstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROB. 102 (Spring 1976).

133. U.S. CONST. art. II, § 3. *See* note 40 *supra*.

134. *See* L. HENKIN, *supra* note 100, at 78. Congress has this power even when the President asserts authority to direct executive officers contrary to congressional order. In Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524 (1838), the Supreme Court ordered the Postmaster-General to expend funds over President Jackson's objection. The Court stated:

> There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the president. But it would be an alarming doctrine that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the president.

37 U.S. (12 Pet.) at 610.

135. *But compare* U.S. CONST. amend. XIV, § 5. If the FISA governed actions by the states, there would be no question that Congress could enact this legislation pursuant to the fourteenth amendment.

136. U.S. CONST. Preamble. The Preamble, however, is not the source of any substantive powers. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905).

137. *See, e.g.*, THE FEDERALIST Nos. 10, 28, 41, 47, 51.

138. *See* C. BLACK, STRUCTURE AND RELATIONSHIPS IN CONSTITUTIONAL LAW (1969).

139. *See* The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 533-36 (1871) (The Necessary and Proper Clause authorizes Congress to carry out unenumerated powers of the federal government; those powers are discerned by "considering the purposes they were intended to subserve"); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist [*sic*] with the letter and spirit of the constitution, are constitutional").

140. *See, e.g.*, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 396 (1971) (damages available for fourth amendment infringement inferred in the absence of congressional action; implying that Congress *could have* created a cause of action for damages for fourth amendment violations had it so desired); 403 U.S. at 402-06 (Harlan, J., concurring) (same); Welsh v. United States, 398 U.S. 333, 369-71 (1970) (White, J., dissenting) (Congress

often, the Court simply assumes that Congress can protect constitutional rights through legislation.[141] The Necessary and Proper Clause therefore justifies congressional passage of the FISA both because it is the textual source of congressional authority to regulate foreign affairs and because it indicates that Congress has the power to protect individual liberties.

Congress has adequate constitutional authority to regulate foreign intelligence surveillance. Both the Necessary and Proper Clause and Congress's share of the foreign affairs powers inherent in national sovereignty justify this regulation. Nevertheless, a court still might balk at enforcing the FISA if the Act so intrudes upon presidential power as to destroy his ability to protect the national security.[142] But the Act is not that intrusive. The executive branch still can collect foreign intelligence (albeit under limited judicial supervision),[143] and the exceptions to the strict warrant requirement[144] give the President needed flexibility. Nor does the Act fail to serve the interest of privacy: requiring the executive branch to articulate its reasons for electronic surveillance to a neutral arbiter is an accepted procedure for the protection of privacy.[145] Between the extremes of usurpation of presidential power and abandonment of individual liberties, the courts should give great deference to congressional surveillance standards.[146] The legislative shift from the "zone of twilight"[147] of section 2511(3) of the Omnibus Crime Control and Safe Streets Act[148] to the clear standard of the FISA merits judicial approval.

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may distinguish between religious and nonreligious conscientious objectors in recognition of first amendment values); *cf.* United States v. Guest, 383 U.S. 745, 757-60 (Congress may protect implicit right of interstate travel from private interference regardless of its textual source).

141. *See, e.g.*, United States v. United States District Court, 407 U.S. 297, 322-23 (1972); Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1976), held constitutional in, *e.g.*, United States v. Tortorello, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973).

142. The President's power to collect foreign intelligence was first recognized in Totten v. United States, 92 U.S. (2 Otto) 105 (1876).

143. Whether Congress could constitutionally abolish the President's surveillance powers entirely is not considered here. Congress has shown no inclination to take such action; it has always recognized the need for national security surveillances.

144. *See* text at notes 87-91 *supra*.

145. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967); Lacovara, *supra* note 10, at 126-31.

146. *See* United States v. United States District Court, 407 U.S. 297, 322-23 (1972); United States v. Truong, No. 78-5176, slip. op. at 12 n.4 (4th Cir. July 17, 1980); compare United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

147. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson J., concurring).

148. *See* notes 28-33 *supra* and accompanying text.

B. *Judicial Competence to Grant Foreign Intelligence Surveillance Warrants: The Political Question Doctrine*

By enacting the Foreign Intelligence Surveillance Act, Congress expanded the jurisdiction of the federal courts.[149] While Congress has some freedom to define the jurisdiction of the Article III courts,[150] this power has constitutional limits.[151] Congress may not, for example, insist on an advisory opinion from the courts,[152] nor may it deprive the Supreme Court of the power to protect constitutional rights.[153] Between these extremes of ungrantable and undeniable jurisdiction, Congress usually can alter federal court jurisdiction even if, in so doing, it changes the separation of powers.[154] Nevertheless, the political question doctrine may prove a barrier to congressional attempts to shift powers to the courts.

Under the political question doctrine, courts will refuse to decide an issue which "from its nature is not a subject for judicial determination."[155] Courts look to the constitutional allocation of powers among the branches of government, to judicial expertise, and to their

149. If the plurality's view in Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976), is accepted, the power is one which existed but which the courts had not previously exercised. Even if this view is not accepted, Congress has now defined the previously uncertain jurisdiction of the courts.

150. Article III, § 1 provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . .

Article III, § 2, cl. 2 provides:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the congress shall make.

151. Justice Curtis announced this position in Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856):

> [W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature is not a subject for judicial determination. At the same time, there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

59 U.S. at 284. *Accord*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950).

152. *E.g.*, Muskrat v. United States, 219 U.S. 346 (1911).

153. *See, e.g.*, Freedman v. Maryland, 380 U.S. 51, 58 (1965) (only a court can impose a final restraint on expressional activities); Crowell v. Benson, 285 U.S. 22, 54-57 (1932) (Hughes, C.J.), 285 U.S. at 86-88 (Brandeis, J., dissenting).

154. The Court in *Murray's Lessee*, for example, found that "[e]quitable claims to land by the inhabitants of ceded territories form a striking instance of . . . [the] class of cases" which Congress may or may not bring before the courts. 59 U.S. (18 How.) 272, 284 (1856). In La Abra Silver Mining Co. v. United States, 175 U.S. 423 (1899), the Supreme Court held that Congress could ask the judiciary to decide a question of fraud underlying a claim against Mexico which the Executive itself might have decided. 175 U.S. at 459-61.

155. 59 U.S. (18 How.) at 284; *see, e.g.*, Baker v. Carr, 369 U.S. 186, 198 (1962).

own sense of prudence to determine the reviewability of constitutional controversies under this doctrine.[156] Although some commentators argue that the political question "excuse" for refusing to exercise jurisdiction is grounded solely in public policy,[157] the Supreme Court insists that the political question standard is constitutionally based:[158] "The nonjusticiability of a political question is primarily a function of the separation of powers."[159]

The political question doctrine is pertinent to the FISA's constitutionality in two distinct ways: First, as discussed above, the doctrine determines whether the courts can resolve the Act's constitutionality.[160] Assuming that they may, the doctrine then determines whether the Act is a constitutional delegation of authority to the courts.[161] If issuing warrants for foreign intelligence surveillance involves political questions that Congress cannot delegate to the judiciary, the FISA is unenforceable.[162] If, on the other hand, these questions fall within judicial cognizance or "may be presented in such a form that the judicial power is capable of acting,"[163] the Act is constitutional.

The Supreme Court best defined the political question doctrine in *Baker v. Carr*:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a

156. *See* text at notes 164 & 169 *infra*.

157. *See, e.g.*, Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

158. Baker v. Carr, 369 U.S. 186 (1962). *But see* United States v. American Tel. & Tel. Co., 567 F.2d 121, 126 (D.C. Cir. 1977).

159. Baker v. Carr, 369 U.S. 186, 210 (1962).

160. *See* text at notes 96-105 *supra*.

161. In the usual application of the political question doctrine the issue is whether a court can resolve a question presented to it. The problem discussed in this part of the Note — whether a congressional act is invalid because it would present the courts with political questions for their resolution — is admittedly not a typical application of the doctrine. The constitutional concerns underlying the doctrine, however, are well suited to a consideration of this problem.

162. *E.g.*, United States v. Ferreira, 54 U.S. (13 How.) 40, 48 (1851); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

163. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856).

> political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[164]

Although the Court in *Baker* denounced "sweeping statements to the effect that all questions touching foreign relations are political questions"[165] and concluded that it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance,"[166] the Court did cite, as examples of political questions, a number of foreign relations problems.[167] Of course, there is often a need for executive discretion, nonjudicial standards, or a "single-voiced statement of the Government's views"[168] in the area of foreign relations. To decide whether these factors preclude the judicial activity envisioned by the FISA, this Note applies three tests suggested by *Baker v. Carr*: (1) "Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government?"; (2) "Would resolution of the question demand that a court move beyond areas of judicial expertise?"; and (3) "Do prudential considerations counsel against judicial intervention?"[169]

The Constitution commits the formulation and conduct of foreign policy to Congress and the President.[170] Although the Supreme Court has original jurisdiction over "Cases affecting Ambassadors,"[171] it recognizes that this is not an invitation to make foreign policy for the other branches; foreign policy decisions are committed to the unquestioned discretion of Congress and the President.[172] The federal courts will only review whether Congress or the President has the requisite authority to pass a law or take an action related to foreign relations; the policy underlying the law or action is not sub-

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164. 369 U.S. 186, 217 (1962).

165. 369 U.S. at 211, citing Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).

166. 369 U.S. at 211.

167. 369 U.S. at 211, *citing* Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Doe v. Braden, 57 U.S. (16 How.) 635 (1853); Taylor v. Morton, 23 F. Cas. 784 (C.C.D. Mass. 1855) (Curtis, Cir. J.), *affd.*, 67 U.S. (2 Black) 481 (1863).

168. 369 U.S. at 211 (footnote omitted). *See, e.g.*, *Ex parte* Hitz, 111 U.S. 766 (1884) (the executive determines a person's status as a representative of a foreign government); United States v. Klintock, 18 U.S. (5 Wheat.) 144, 149 (1820) (standards for recognition of foreign governments defy judicial treatment); Commercial Trust Co. v. Miller, 262 U.S. 51, 57 (1923) (need for finality in determining date of cessation of hostilities).

169. Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-16, at 71 n.1 (1978).

170. *See* text at notes 106-08, 118-34 *supra*.

171. U.S. CONST. art. III, § 2, cl. 2.

172. *See, e.g.* , Jones v. United States, 137 U.S. 202, 212 (1890); Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839); Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard the Tanker Dauntless Colocotronis, 577 F.2d 1196, 1203 (5th Cir. 1978), *cert. denied sub nom.* Occidental of Umm al Qaywayn, Inc. v. Cities Serv. Oil Co., 442 U.S. 928 (1979). *Cf.* Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (control of military forces is committed to the legislative and executive branches).

ject to judicial review.[173]

The Constitution's textual commitment of foreign policymaking to the political branches implies that Congress could not use the FISA to endow courts with pervasive authority to make foreign policy.[174] Congress probably could not require courts to decide whether the likelihood of successful surveillance and the foreign policy value of the intercepted information outweigh the risk and costs of discovery. Nor could the courts unilaterally decide to exempt resident aliens from allied countries from foreign intelligence surveillance. The risks worth taking for a given piece of information and the preferred treatment of citizens of different nations are questions of foreign policy beyond the proper scope of judicial review. While many court decisions will indirectly affect foreign policy, courts cannot directly intrude into the weighing of specific foreign policy considerations.

The FISA, however, does not require significant judicial intrusion into presidential foreign policymaking. The FISA directs judges to make three findings, none of which entail excessive review. First, the judge must find that the government has complied with the formalities and procedures of the Act.[175] This involves routine, unintrusive questions of jurisdictional fact.[176]

Second, the judge is required to determine if "there is probable cause to believe that — (A) the target of the electronic surveillance is a foreign power or an agent of a foreign power . . . ; and (B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power."[177] This requirement interferes little with executive policymaking authority. The Government need show only that a person (and place) falls within the class of persons (and places) covered by the Act. It need *not* show probable cause that useful in-

173. *See* L. HENKIN, *supra* note 100, at 213-14.

174. The opponents of the FISA feared that this was exactly what the Congress was doing. *See, e.g., Hearings on H.R. 7308 Before the House Permanent Select Comm. on Intelligence*, 95th Cong., 2d Sess. 221-22 (1978) (statement of Laurence H. Silberman):

> [T]he courts will be invited, indeed be obligated, to consider the following:
>
> First: What information is necessary to protect the United States against attack or other grave hostile acts? That is part of the definition of foreign intelligence. And that implies authority to determine which foreign countries are hostile to the United States, and I am certain after careful reading of some of these judicial opinions, there are certain judges who would be delighted to make that determination. But I think it is wrong.
>
> Second: What information, with respect to a foreign power, is deemed essential to the defense of the Nation or the successful conduct of foreign affairs, which implies authority to determine what is the successful conduct of foreign affairs?

See also 124 CONG. REC. H12,535 (daily ed. Oct. 12, 1978) (statement of Rep. McClory of Illinois).

175. *See* FISA § 105(a)(1), (2) & (4) and note 79 *supra*.

176. *Cf.* Crowell v. Benson, 285 U.S. 22, 54 (1932) (jurisdictional facts are those whose "existence is a condition precedent to the operation of a statutory scheme").

177. FISA § 105(a)(3).

formation will be obtained or that national security is threatened.[178] Even under the minimal probable cause inquiry of the FISA, of course, a court will occasionally refuse surveillance in circumstances where the government desires it. But the degree of judicial intrusion into foreign policymaking is minimal. And the significant fourth amendment rights at issue justify that minimal intrusion.

Finally, if a United States person is the target of the requested surveillance, the judge must find that the certifications of the executive officer[179] (including his assurance that the information sought is otherwise unavailable foreign intelligence information[180]) "are not clearly erroneous."[181] Even this clearly erroneous standard does not require excessive intrusion into foreign policy making. The executive branch makes the original policy decision on the importance of the surveillance and its necessity. The burden of proof for the executive officer can be easily met.[182] The executive branch need only produce some evidence that its judgment is defensible in an ex parte proceeding;[183] the judge can neither deny a warrant application that meets these standards nor order a surveillance undesired by the executive branch. The FISA therefore passes the first "political question" test.

Even if the FISA does not compel the courts to exercise powers committed by the Constitution to a coequal branch, the Act's procedures might still present a nonjusticiable political question if they embrace judicially unmanageable standards. The need for judicially manageable standards has been a common theme in political question cases. In *Luther v. Borden*,[184] the Supreme Court was asked to determine which of two competing governments was the "true" government of Rhode Island. The Supreme Court noted the staggering evidentiary problems[185] (as well as the need for a single answer to the question — an answer the President had already provided[186])

178. Only if the surveillance target is a United States person must the Government establish probable cause of criminal violation. FISA § 101(b)(2). *See* notes 82-83 *supra*.

179. *See* note 79 *supra*.

180. FISA § 101(e).

181. FISA § 105(a)(5).

182. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Commissioner v. Duberstein, 363 U.S. 278, 291 (1960), *quoting* United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

183. This, nevertheless, protects individuals from a naked and unreviewable executive assertion of national security. The required written application for judicial approval of surveillance is expected to enhance protection of individual privacy. *See* Lacovara, *supra* note 10, at 127-28.

184. 48 U.S. (7 How.) 1 (1849).

185. 48 U.S. (7 How.) at 41-42.

186. 48 U.S. (7 How.) at 44.

and refused to resolve the dispute. In *Coleman v. Miller*,[187] the Court in a plurality opinion refused to decide whether a proposed constitutional amendment lapses into oblivion if not ratified within a reasonable time. Chief Justice Hughes inquired rhetorically: "Where are to be found the criteria for . . . judicial determination?"[188] Finally, in *Chicago & Southern Air Lines v. Waterman S. S. Corp.*,[189] the Supreme Court held that federal courts could not apply ordinary procedures for judicial review of administrative action to presidential orders concerning international air routes: "[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions . . . are delicate, complex, and involve large elements of prophecy . . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility . . . ."[190]

On the other hand, the Supreme Court will not employ the political question doctrine to avoid a problem that, although difficult, is one of a type that courts regularly face. Although *United States v. Nixon*,[191] which involved questions of access to the White House tapes, had strong political overtones and compelled the Court to scrutinize activities of a coequal branch of government, no serious political question controversy arose because the issue of executive privilege was " 'of a type which [is] traditionally justiciable.' "[192]

The questions that courts must consider under the FISA do not seem "judicially unmanageable." To certify compliance with the Act, the judge makes findings of fact[193] that are part of the traditional judicial function.[194] The probable cause requirement[195] — that the surveillance target is a foreign power or an agent of a foreign power — is the crux of the required findings, and courts have had long experience with this standard in other warrant proceedings.[196]

187. 307 U.S. 433 (1939).

188. 307 U.S. at 453.

189. 333 U.S. 103 (1948).

190. 333 U.S. at 111.

191. 418 U.S. 683 (1974).

192. 418 U.S. at 697, *quoting* United States v. ICC, 337 U.S. 426, 430 (1949).

193. *See* text at notes 175-76 *supra*.

194. *See, e.g.*, FED. R. CIV. P. 52(a); compare the requirements for a warrant under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2518(1), (2) (1976 & Supp. II 1978).

195. *See* text at note 177 *supra*.

196. *See, e.g.*, 18 U.S.C. § 2518(3) (1976) (probable cause requirements for a criminal surveillance warrant in Title III of the Omnibus Crime Control and Safe Streets Act of 1968).

The Supreme Court has made clear that the probable cause standard is flexible, *see* Camara v. Municipal Court, 387 U.S. 523, 534-35 (1967), and that Congress may prescribe appropriate protective standards. *See* United States v. United States District Court, 407 U.S. 297, 322-23 (1972). The probable cause determinations required by the FISA are fairly easy for courts to apply. The requirement of probable cause of criminal conduct for the surveillance of United States persons is similar to the standard for criminal surveillance warrants.

Finally, the clearly erroneous standard for review of the certifications of the executive officer[197] is familiar to federal courts. Essentially, the standard requires minimal review of the veracity of an ex parte request; the executive officer need only provide adequate evidence to establish a reasonable belief that his certifications are correct.[198] This, like the other two types of findings, is within the judicial competence. All the standards of the FISA are judicially manageable.

The final reason the Supreme Court labels some issues as political questions is one of prudence: should the Court, in its discretion, resolve the issue? Because the prudential aspect of the political question doctrine is a matter of judicial discretion,[199] it is the least predictable of the doctrine's three inquiries.[200] Nevertheless, none of the "prudential" formulations of the political question doctrine in *Baker v. Carr*[201] justify rejecting the FISA. The first of these three formulations — that resolving the issue would require courts to express "lack of respect due coordinate branches of government" — seems inapplicable. To reject jurisdiction legislated by Congress would entail as much disrespect for Congress as enforcing the Act might entail for the executive.[202] The concern of the second formulation — "unusual need for unquestioning adherence to a political decision already made"[203] — is resolved by the terms of the Act. In emergencies (like that following a declaration of war), or exigent circumstances, the executive need not comply with the Act's general requirements.[204] The third formulation — "the potential of embarrassment from multifarious pronouncements"[205] — seems equally irrelevant to the FISA. Because neither the President's application nor the special court's response are public, no public confusion results, no private expectations are disturbed, and no interbranch conflict is apparent. Considerations of prudence, like those of deference

See 18 U.S.C. § 2518(3) (1976). The standard for all other persons requires only a factual finding of criminal-type activities, FISA § 101(b)(1)(B), or employment by a foreign power. FISA § 101(b)(1)(A). None of these probable cause determinations are beyond the judicial cognizance.

197. *See* text at notes 179-83 *supra.*

198. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 29.02 (1972).

199. *See* L. HENKIN, *supra* note 100, at 215-16.

200. For example, in Colegrove v. Green, 328 U.S. 549, 556 (1946), Justice Frankfurter successfully cautioned the Court "not to enter [the] political thicket" of voting district reapportionment, but he could not convince a majority of the Court on the same issue in Baker v. Carr, 369 U.S. 186 (1962).

201. 369 U.S. at 217, *quoted in* text at note 164 *supra.*

202. *Cf.* Goldwater v. Carter, 444 U.S. 996, 1001 (1979) (Powell, J., concurring) ("Interpretation of the Constitution does not imply lack of respect for a coordinate branch").

203. Baker v. Carr, 369 U.S. 186, 217 (1962).

204. *See* text at notes 87-91 *infra.*

205. 369 U.S. at 217.

and manageability, therefore do not require that courts refuse to enforce the FISA.

CONCLUSION

No single branch of government is especially "good" or especially "evil." All three branches of the federal government have disregarded or abused individual liberties at some time in American history.[206] The separation of powers doctrine contemplates that all branches of the federal government have a duty to protect personal freedoms,[207] especially when those freedoms are challenged by a claim as strong, and as legitimate, as preserving the national security. Alexander Hamilton argued in the Federalist Papers that the structure of the proposed government, accompanied by certain protections granted in the original articles of the Constitution,[208] made a Bill of Rights unnecessary.[209] Although this view was rejected with the adoption of the first ten amendments, the importance of the separation of powers in protecting individual rights has not been displaced.

Interpreted properly, the separation of powers doctrine holds not that each branch of government exercises exclusive powers, but rather that the branches share powers so that each can check abuses by the others.[210] The framers of the Constitution recognized both that ambitious, overreaching people exist and come to power,[211] and that other people, committed to protecting individual liberties and democracy, will choose to protect and preserve those liberties.[212] Any power vested without limitation in one branch of the government creates a potential for abuse unchecked by the other

206. *See, e.g.*, The Alien and Sedition Act, ch. 58, 1 Stat. 570 (1798) (congressional); "Watergate" and "national security" surveillances and break-ins, sources cited in notes 21 & 27 *supra* (executive); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (judicial).

207. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 18 (congressional power "to make all . . . Laws necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution . . ."); U.S. CONST. art. II, § 1, cl. 8 (presidential oath to "preserve, protect and defend the Constitution of the United States"); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Marshall, C.J.) (judicial refusal to give effect to congressional legislation inconsistent with the Constitution).

208. *E.g.*, the Writ of Habeas Corpus, U.S. CONST. art. I, § 9, cl. 2; the prohibition of ex post facto laws, U.S. CONST. art. I, § 9, cl. 3; the right to trial by jury in criminal cases, U.S. CONST. art. III, § 2, cl. 3.

209. THE FEDERALIST Nos. 84, 85, at 575-81, 587-88 (J. Cooke ed. 1961); *see generally* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 536-47 (1969).

210. THE FEDERALIST No. 47, at 323-27 (J. Cooke ed. 1961) (Madison); *see* G. WOOD, *supra* note 209, at 547-53.

211. "The supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude." THE FEDERALIST No. 76, at 513-14 (J. Cooke ed. 1961) (Hamilton). *Accord*, Scanlan, *The Federalist and Human Nature*, 21 REV. OF POL. 657 (1959).

212. *See generally* Wright, *The Federalist on the Nature of Political Man*, 59 ETHICS 1 (1949).

branches.[213]

Under this interpretation of the separation of powers doctrine, the Foreign Intelligence Surveillance Act survives constitutional attacks. Congress has authority to protect fourth amendment privacy interests by regulating the intelligence gathering activities of the President. The Act protects this personal liberty without unduly constraining foreign intelligence gathering in the United States. And the role of courts in reviewing surveillance applications is both constitutional and reasonable. Because it strikes a reasonable and constitutional balance between fourth amendment rights and executive authority to gather foreign intelligence, the Foreign Intelligence Surveillance Act is sustained, not defeated, by the doctrine of separation of powers.

213. THE FEDERALIST No. 48, at 332-35 (J. Cooke ed. 1961) (Madison).