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Foreign Security Surveillance—Balancing Executive Power and the Fourth Amendment

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NOTE

FOREIGN SECURITY SURVEILLANCE—BALANCING EXECUTIVE POWER AND THE FOURTH AMENDMENT

INTRODUCTION

Under the present state of the law, the President, based upon his own unilateral determination, may intercept any and all communications of persons he feels pose a threat to the national security. Despite recent attempts to provide effective, reasonable guidelines for requiring judicial authorization prior to intercepting such communications, no legislation has ensued.[1] The perennial stumbling block has been the difficulty encountered in striking a balance between the necessary and legitimate governmental use of electronic surveillance in protecting the national security and insuring the protection of personal liberties.[2] On March 29, 1976 the Senate Judiciary Committee began the fourth set of hearings on warrantless electronic surveillance in as many years.[3] The highlight of these hearings, the Foreign Intelligence Surveillance Act of 1976[4] (Foreign Intelligence Act) is the most recent, unsuccessful effort at striking a fair and just balance between these two competing interests.

The fourth amendment guarantees an individual the right to be free from unreasonable governmental searches and seizures.[5] The Supreme Court, in interpreting what has been termed an indispensible freedom,[6] " 'has em-

1. S. Rep. No. 1035, 94th Cong., 2d Sess. 9 n.2 (1976) [hereinafter cited as Senate Report], citing S. 743, National Security Surveillance Act of 1975, 94th Cong., 1st Sess. (1975); S. 1888, Bill of Rights Procedures Act of 1975, 94th Cong., 1st Sess. (1975); S. 2820, Surveillance Practices and Procedures Act of 1973, 93d Cong., 1st Sess. (1973); S. 4062, Freedom from Surveillance Act of 1974, 93d Cong., 2d Sess. (1974).

2. Senate Report, supra note 1, at 9, 11.

3. Id. at 9 n.3, citing Hearings on S. 743, S. 1888, S. 3197 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. (1976). [hereinafter cited as Senate Hearings]; Subcomm. on Surveillance of the Senate Comm. on Foreign Relations and the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, Warrantless Wiretapping and Electronic Surveillance, 94th Cong., 1st Sess. (1975); Joint Hearings Before the Subcomm. on Administrative Practice and Procedure and the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, Warrantless Wiretapping and Electronic Surveillance, 93d Cong., 2d Sess. (1974); Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, Warrantless Wiretapping, 92d Cong., 2d Sess. (1972).

4. S. 3197, 94th Cong., 2d Sess. (1976) [hereinafter cited as the Foreign Intelligence Act].

5. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

6. Almeida-Sanchez v. United States, 413 U.S. 266, 274 (1973), quoting Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting). Upon his return from the Nuremberg trials, Mr. Justice Jackson, greatly affected by the arbitrary governmental acts of the Nazi regime performed at the expense of personal liberties, wrote that "[t]hese [fourth amendment rights], I

phasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes' and that searches conducted outside of the judicial process . . . are *per se* unreasonable . . . ."[7] Review by an impartial judicial officer prior to a search or seizure has been the "time tested" method of effectuating fourth amendment protections,[8] and is subject only to a few carefully delineated exceptions.[9] Traditionally, however, the mandate of judicial process has been limited to those searches or seizures accompanied by an actual physical trespass, the absence of which precluded further fourth amendment inquiry.[10] It was not until 1967 that the Supreme Court, in *Katz v. United States*,[11] held that the spirit and protection of the fourth amendment cannot be limited by the presence or absence of physical trespass.[12] In removing this limitation the Court held that the electronic interception of private communications[13] constituted a search and seizure under the fourth amendment and

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protest, are not mere second-class rights but belong in the catalog of indispensible freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." Id.

7. Katz v. United States, 389 U.S. 347, 357 (1967) (citation omitted), quoting United States v. Jeffers, 342 U.S. 48, 51 (1951).

8. United States v. United States Dist. Court, 407 U.S. 297, 318 (1972). "The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government." Id. at 317 (footnote omitted). See, e.g., Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971); Katz v. United States, 389 U.S. 347, 356-57 (1967); Wong Sun v. United States, 371 U.S. 471, 481-82 (1963); Johnson v. United States, 333 U.S. 10, 13-14 (1948).

9. Almeida-Sanchez v. United States, 413 U.S. 266, 280-82 (1973) (Powell, J., concurring); United States v. United States Dist. Court, 407 U.S. 297, 318 (1972); Chimel v. California, 395 U.S. 752, 762-63 (1969); Terry v. Ohio, 392 U.S. 1, 20 (1968); Katz v. United States, 389 U.S. 347, 357 (1967); Jones v. United States, 357 U.S. 493, 499 (1958). It appears to be quite clear that the ultimate standard set forth in the fourth amendment is one of reasonableness. Cady v. Dombrowski, 413 U.S. 433, 439 (1973). Reasonableness turns only in part upon the warrant requirement. However, those instances which have been exempted from the warrant requirement have been based on exigent or other circumstances where delay would frustrate legitimate police activity. United States v. United States Dist. Court, 407 U.S. 297, 318 (1972) ("in general, [these exceptions] serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction"); Jones v. United States, 357 U.S. 493, 499 (1958). Thus we are left with the conclusion that whenever practicable the test of reasonableness will require a judicial warrant prior to a search or seizure.

10. Katz v. United States, 389 U.S. 347, 352 (1967); Goldman v. United States, 316 U.S. 129, 134-36 (1942); Olmstead v. United States, 277 U.S. 438, 457, 464, 466 (1928).

11. 389 U.S. 347 (1967).

12. Id. at 352-53.

13. The term electronic interception or surveillance includes the interception of communications by means of "bugging" and "wiretapping." Bugging is a technique by which oral communications, not transmitted by wire, are intercepted. Wiretapping is a technique by which any communication (not necessarily oral) transmitted by wire may be intercepted. Both techniques are

was thus subject to its mandate of judicial process.[14] However, the Court has never held the warrant provision applicable to the President's use of electronic surveillance when employed for the purpose of gathering foreign intelligence information to protect the national security.[15] On the other hand, the Court has never specifically carved out an exception from the warrant provision for these national security surveillances.[16] In essence there is a gap in the

included in the term electronic surveillance as used within this Note unless a distinction is otherwise indicated.

14. 389 U.S. at 353. Prior to its decision in Katz, the Court had held that absent an actual physical trespass the use of electronic surveillance did not constitute a search or seizure for purposes of the fourth amendment. Olmstead v. United States, 277 U.S. 438 (1928). A bugging device must be implanted upon either the sender or receiver of the oral communication, thus requiring a trespass. A wiretap, on the other hand, may be employed externally by tapping into wires at some point between the sender and receiver. Thus under the trespass test, while warrantless trespassory bugging devices were prohibited by fourth amendment warrant protection, those wiretaps conducted without a trespass were not.

15. In Katz, while holding the warrant requirement applicable to electronic surveillance, the Court explicitly declined to include in its holding those cases "involving the national security." 389 U.S. at 358 n.23. In refusing to include national security cases in its holding, however, the Court also neglected to define what would constitute a national security case. Id. Thus, it could be argued that any threat to the security of the nation—be it internal or external—was included in the term national security. In a subsequent decision, however, the Court distinguished between foreign and domestic national security cases. In United States v. United States Dist. Court (Keith), 407 U.S. 297 (1972), the Court held that those cases involving purely domestic aspects of the national security were subject to the warrant provision of the fourth amendment. Id. at 321. Thus the broad "national security" reservation in Katz had been reduced to include only "foreign security" cases since the Court, in Keith, refused to express any opinion as to the issues raised by the foreign aspects of national security. Id. at 308-09, 321-22.

The domestic aspects of the national security are those cases where the threat to the nation comes from a wholly internal source. A group or person is wholly domestic when it is neither a foreign power nor an agent of a foreign power. Thus a political organization based in the United States, receiving all economic and human resources from within the United States would be considered domestic.

The foreign aspects of the national security concern those cases where the threat to the nation comes from a foreign power or an agent of a foreign power. A foreign agent would seem to include any person or organization which works closely or conspires with, or under the direction of a foreign power. Thus a political organization based in the United States and composed totally of American citizens which receives substantial financial support from a foreign power would, apparantly, be considered a foreign agent.

For the purposes of this Note, given the above definition, the terms domestic and foreign security shall be used independently.

16. In a footnote to the Keith decision the Court noted the view of several authorities that, while prohibited in the domestic area, warrantless surveillances may be permissible in the foreign area. United States v. United States Dist. Court (Keith), 407 U.S. 297, 322 n.20 (1972). While at least one court has relied upon this footnote as carving out an exception to the warrant provision where foreign security is involved, United States v. Brown, 484 F.2d 418, 425-26 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974), it seems the better view, in light of the Court's refusal to express an opinion on the issue, 407 U.S. at 321-22, that the Court was merely citing these authorities for informational purposes rather than suggesting that an exception be carved out in the area of foreign security.

decisions concerning fourth amendment safeguards where national security surveillances are employed. Moreover, Congress has failed to enact any legislation regulating the use of national security surveillances.[17]

The Foreign Intelligence Act was aimed at filling the national security gap by requiring a judicial warrant prior to the implementation of national security electronic surveillances.[18] The Act was largely a response to the revelation of abusive warrantless electronic surveillance which was performed in the name of national security,[19] the most serious of which was found to exist during the Johnson and Nixon administrations. During these administrations conversations between certain legislators and foreign officials were intercepted by FBI wiretaps and bugging devices and the information forwarded to the President.[20] Although none of these legislators were the actual targets of the warrantless surveillances, their conversations were "overheard" through the intercepted communications of certain "foreign targets."[21] Thus, the types of abuses flowing from the national security gap,

17. Congress has enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1970). This Act was designed to provide the procedural requirements for obtaining an order (warrant) authorizing electronic surveillance employed in criminal investigations. Thus while the use of criminal surveillances has been regulated by federal legislation, no similar requirement exists in the foreign surveillance area.

18. Senate Report, supra note 1, at 11.

19. Senate Report, supra note 1, at 9-10.

20. N.Y. Times, May 10, 1976, at 14, cols. 4-7. It was felt by Presidents Johnson and Nixon that many of the protests against their respective Vietnam policies, particularly those voiced in certain Senate hearings, were generated by foreign officials. Id.

21. Id. These abuses are not limited to merely overhearing the conversations of American citizens while speaking to foreign officials (or agents), but include the possibility of these American citizens being classified as foreign agents by virtue of these communications and, in fact, becoming targets themselves. See text accompanying notes 58-60 infra.

For a number of other cases in which the national security was used to disguise certain questionable executive branch surveillances see generally 119 Cong. Rec. S 23026 (daily ed. Dec. 17, 1973). The more significant abuses were: (1) installation in 1969 of warrantless wiretaps on 13 government officials and four newsmen, purportedly because they were leaking or publishing sensitive foreign intelligence information. Two of these wiretaps were even continued after their subjects had left government service and had begun working on Senator Muskie's presidential campaign (see generally Hearings on the Role of Dr. Henry A. Kissinger in the Wiretapping of Certain Government Officials and Newsmen Before the Senate Comm. on Foreign Relations, 93d Cong., 2d Sess. (1974)), (2) White House authorization in 1969 of a burglary of the home of newspaper columnist Joseph Kraft for installation of an alleged national security wiretap; (3) invocation of national security in inducing the CIA to assist in the burglary of Daniel Ellsberg's psychiatrist's offices; (4) the 1970 drafting by the White House of a plan to engage in massive warrantless wiretapping and burglary which, although approved on national security grounds, was scrapped after objection from FBI Director Hoover; (5) surveillance by the Kennedy Administration of Dr. Martin Luther King, Jr. and other civil rights activists who were suspected of being Communist sympathizers or dupes.

Such examples, multiplied several times over, demonstrate the need for judicial scrutiny of Executive surveillance practices. Indeed, one might even question whether the Government would have had the audacity to present many of these practices to a neutral magistrate had a warrant been required.

though directed at foreign targets, directly affect American citizens.[22]

The purpose of this Note is to examine the Foreign Intelligence Act and those constitutional issues raised by its attempt to fill the national security vacuum. In this effort the history of the gap and the presidential claim of an inherent constitutional power to operate unencumbered by legislative strictures in the national security area will be investigated.

THE GAP

Over three decades ago President Franklin D. Roosevelt sent a confidential memorandum to Attorney General Jackson which authorized him "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."[23] The memo further requested that these investigative techniques be "conducted to a minimum and limit[ed] . . . insofar as possible to aliens."[24] This memo has served as the cornerstone for the assertion of seven administrations that the President can authorize warrantless electronic surveillance for national security purposes.[25]

This presidential power, it is claimed, is constitutionally based in the executive's power to conduct the nation's foreign affairs and, consequently, is immune from the constitutional restraints of the fourth amendment.[26] To assess the viability of this argument one must first understand the relationship between electronic surveillance and fourth amendment protections.

In *Olmstead v. United States*,[27] the Supreme Court held that absent a physical trespass, the interception of communications did not constitute a search or seizure within the meaning of the fourth amendment.[28] In rendering

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22. The purpose behind the amendments to the Constitution were to insure the protection of certain personal liberties from the possibility of governmental encroachment. This spirit of personal liberty was broader than any governmental encroachment contemplated at the time the amendments were enacted. As Justice Brandeis pointed out in his dissenting opinion to the Olmstead decision: "The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and . . . expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions." Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

23. Zweibon v. Mitchell, 516 F.2d 594, 674 (D.C. Cir. 1975) (en banc) (plurality opinion), cert. denied, 425 U.S. 944 (1976).

24. Id.

25. Id.; Senate Report, supra note 1, at 11-12; Senate Hearings, supra note 3, at 1.

26. E.g., Zweibon v. Mitchell, 516 F.2d. 594, 616-19 & nn. 65-66 (D.C. Cir. 1975) (en banc) (plurality opinion), cert. denied, 425 U.S. 944 (1976); Senate Report, supra note 1, at 13-15, Senate Hearings, supra note 3, at 1.

27. 277 U.S. 438 (1928).

28. Id. at 466. In establishing a trespassory/non-tresspassory distinction for purposes of fourth amendment protections, the Court included bugging as a search and seizure since bugging could be accomplished only by means of a physical trespass. Zweibon v. Mitchell, 516 F.2d 594, 618 & n.64 (D.C. Cir. 1975) (en banc) (plurality opinion), cert. denied, 425 U.S. 944 (1976). In his

the fourth amendment inapposite, the Court also removed the necessity for an assertion, by either President Roosevelt or subsequent administrations, of a presidential immunity since there were no constitutional restraints from which to be immune.[29] Thus it seems that both the Roosevelt memorandum and the subsequent presidential practice of authorizing warrantless national security surveillances were not claims to an immunity from constitutional restraints.[30]

It was not until 1967 that the Supreme Court, in *Katz v. United States*,[31] held that the electronic interception of personal conversations in and of itself constituted a search and seizure and was entitled to the protection of the fourth amendment.[32] In discarding its prior trespassory/non-trespassory distinction, the Court emphasized that "the Fourth Amendment protects people, not places"[33] and the legitimate expectations of conversational privacy were to be shielded from the uninvited ear of government.[34] The Court noted, however, that its opinion did not deal with foreign security matters and, consequently, avoided the question of "[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security . . . ."[35] The thrust of the Court's decision, the national security reservation notwithstanding, was to prohibit, for the first time, all warrantless electronic surveillance as an unconstitutional search and seizure. Consequently, in order to continue these surveillances it is necessary for the President to assert an immunity either from the fourth amendment as a whole, or merely from its warrant provision.[36]

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dissent Justice Brandeis vigorously opposed the majority's trespassory/non-tresspassory distinction as an invitation to the infringement of personal privacy. Olmstead v. United States, 277 U.S. 438, 473-75 (1928) (Brandeis, J., dissenting).

29. Zweibon v. Mitchell, 516 F.2d 594, 617-18 (D.C. Cir. 1975) (en banc) (plurality opinion), cert. denied, 425 U.S. 944 (1976).

30. Later cases had, however, construed section 605 of the Federal Communications Act of 1934, 47 U.S.C. § 605 (1970), superseded by 18 U.S.C §§ 2510-20 (1970), as prohibiting the interception of communications. E.g., Nardone v. United States, 302 U.S. 379 (1937). However, this was a statutory limitation upon wiretapping. Consequently, until Katz, there remained no constitutional restrictions on the President's power to conduct wiretaps.

31. 389 U.S. 347 (1967).

32. Id. at 353.

33. Id. at 351.

34. Id.

35. Id. at 358 n.23. It is possible to read this footnote as indicating that at least some satisfaction of the fourth amendment would be necessary. (The concurring opinions of Justices Douglas and White differed on this point. Compare 389 U.S. at 359 (Douglas, J., concurring) with 389 U.S. at 363-64 (White, J., concurring).) It therefore appears possible that where the national security is involved other safeguards (e.g., post-surveillance warrants) may render the surveillance reasonable. United States v. Butenko, 494 F.2d 593, 605 (3d Cir.) (en banc), cert. denied, 419 U.S. 881 (1974).

36. Zweibon v. Mitchell, 516 F.2d 594, 618-19, (D.C. Cir. 1975) (en banc) (plurality opinion), cert. denied, 425 U.S. 944 (1976). Congress, responding to the Katz decision, enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968 which established specific procedural requirements for obtaining a warrant authorizing the use of electronic surveillance. 18 U.S.C. §§ 2510-20 (1970). An integral part of this legislation was the controversial Title III Presidential

In *United States v. United States District Court (Keith)*[37] the Court addressed the issue of whether the President could be subject to the warrant requirement where the domestic aspects of national security were involved.[38] These include only those targets of electronic surveillance which are wholly domestic—*e.g.*, citizens of the United States who have neither direct nor indirect involvement with a foreign power or its agents.[39] In *Keith*, three United States nationals charged with conspiring to destroy government property sought full disclosure of conversations intercepted by electronic devices. The conversations were intercepted without a warrant to obtain information relevant to national security. The defendants alleged that the intercepted conversations might have tainted the evidence upon which the indictment was based and should properly be excluded since they were procured as a result of an illegal or unreasonable search or seizure.[40] The government's defense was that these wiretaps, installed for national security reasons pursuant to a constitutional power of the President, were reasonable for the purposes of the fourth amendment.[41] The Government asserted lack of judicial competence, the potential for security leaks, the need for strategic information gathering and an undue administrative burden as possible grounds for exempting such surveillances from judicial scrutiny.[42]

In considering the applicability of the fourth amendment warrant requirement to domestic security surveillances, the Court engaged in a balancing of

Disclaimer which provides, in part, that "[n]othing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation . . . to obtain foreign intelligence information . . . or to protect national security information against foreign intelligence activities." Id. § 2511(3). Disclaimer is the term ordinarily used to characterize 18 U.S.C. § 2511(3) (1970). E.g., Zweibon v. Mitchell, 516 F.2d 594, 663 (D.C. Cir. 1975) (en banc) (plurality opinion), cert. denied, 425 U.S. 944 (1976). On its face, this provision appears to disclaim any intention of legislating in the area of national security. Moreover, the entire Act, with the exception of the presidential disclaimer, is clearly directed toward electronic surveillance employed in the context of criminal investigations. It has been suggested, however, that this provision was not designed to be a final disclaimer but, rather, to depend upon subsequent judicial determination of the President's power to issue warrantless national security surveillances. Note, Electronic Intelligence Gathering and the Omnibus Crime Control and Safe Streets Act of 1968, 44 Fordham L. Rev. 331, 333-39 (1975). Should the Court hold that the President has the power to issue warrantless national security surveillances, the provision would disclaim any intent to legislate. However, should it be ultimately resolved that no such constitutional power exists, the disclaimer would have the reverse effect of subjecting the President to the Act's procedural requirements. Id.

37. 407 U.S. 297 (1972). It was against Judge Keith that a mandamus proceeding was brought to prevent disclosure of electronic surveillance information to a criminal defendant. This decision, therefore, is called the Keith case after District Judge Damon Keith.

38. Id. at 302.

39. See note 11 supra.

40. 407 U.S. at 299-300.

41. Id. at 318-19. The government interpreted the Title III Presidential disclaimer to mean that "'in excepting national security surveillances from the Act's warrant requirement Congress recognized the President's authority to conduct such surveillances without prior judicial approval.'" Id. at 303.

42. Id. at 318-21.

the basic governmental and individual interests at stake.[43] On the one hand was the duty of the President to protect the domestic security, and on the other the potential dangers that warrantless surveillances pose to an individual's privacy and freedom of expression.[44] These interests were balanced not only against each other but also against the basic tenets underlying the fourth amendment.[45] The Court held that the warrant requirement was applicable in cases involving the domestic aspects of national security intelligence gathering and specifically rejected the establishment of an exception to the warrant requirement in that area.[46]

The protection afforded by the *Keith* decision appears to be very limited. The only persons afforded protection are those who come under the classification of wholly domestic.[47] The Court neglected to specifically define what was and was not contained in the domestic aspects of national security cases.[48] Suppose a group or organization consists entirely of American citizens, yet is funded to some extent by a foreign power. Is this organization now precluded from the protection afforded by *Keith*? Moreover, if an individual has significant contact with a foreign power or its representatives, will such contact render this person a foreign agent for purposes of fourth amendment protections? Thus, any situation which is not wholly domestic may be classified as foreign and, therefore, precluded from the protection given by *Keith*.[49]

THE ACT

After more than three decades of warrantless electronic surveillance in the area of national security, the scope of presidential power and the constitutional restraints upon it remain a mystery.[50] The Foreign Intelligence Surveillance Act of 1976 would have done much to solve this mystery by imposing substantive and procedural controls on the use of electronic surveillance for

43. Id. at 310-13.

44. Id. at 316-18.

45. Id. at 321. Since no warrant had been obtained in this case, it was unnecessary for the Court to consider the applicability of Title III procedural requirements and the Court declined to do so. Id. at 308. Moreover, in construing the Presidential disclaimer provision it was found that the provision was totally neutral in that it neither conferred nor limited the President's power in the national security area—it merely left the presidential powers where it found them. Id. at 303. Thus, no congressional exemption to the warrant requirement was found to exist.

46. The thrust of the Keith decision appears to be that the warrant requirement may not be suspended merely because there exists a legitimate governmental need to engage in certain activity. Id. at 310-14. Moreover, if an exception is to be carved out of the warrant provision, the justification for such an exception must be somewhat compelling to justify the suspension of conversational privacy. Cf. id. at 319-21.

47. Id. at 309 & n.8.

48. Id.

49. Cf. id.

50. See Senate Report, supra note 1, at 18-20; Senate Hearings, supra note 3, at 7-13 (statement of Attorney General Levi); L.E.A.A. Newsletter, June 1976, at 6, cols. 1-3.

foreign intelligence purposes. Unfortunately, after extensive debate and amendment, time ran out and the Act was left for re-introduction in the 95th Congress. Nevertheless, an analysis of its provisions and possible effects is a valuable enterprise for a number of reasons. First, the Foreign Intelligence Act is the fifth such act proposed concerning the regulation of warrantless foreign security surveillances since 1973.[51] This indicates that in all probability another attempt to legislate in this area will soon be made. Second, the great need for legislation evidenced by past abuses renders the probability of future legislation almost a certainty.[52] Third, this Act, largely a composite of all its unsuccessful predecessors, is the result of all the hearings and debates surrounding the previous Acts and is likely to be relied upon when its successor is introduced. Thus, the new bill will probably be quite similar to the Foreign Intelligence Act of 1976.

As previously noted, the Act was directed specifically at filling the gap left by the *Keith* decision by addressing the foreign aspects of national security surveillances.[53] A foreign power, as defined by this Act, includes not only members of a foreign government, political party, or military force but also foreign commercial entities doing business in the United States and foreign based terrorist groups.[54] By its terms, the Act provides protection not only to those persons directly involved in the foreign government but also to those who, even though possibly opposed to the foreign government in power (*e.g.*, terrorist groups), may be so related to its political scene as to be a valuable source of intelligence information and, as such, a likely target of surveillance. An agent of a foreign power is similarly defined in very broad and inclusive terms. An agent may either be a non-permanent resident alien who is an officer or employee of a foreign power or any person, including an American citizen, who, under the direction of a foreign power, engages in "clandestine intelligence activities, sabotage, or terrorist activities, or who conspires with, or knowingly aids or abets such a person in engaging in such activities."[55]

These definitions would help to accomplish two goals. First, as protection afforded foreign powers and agents is increased, more protection is afforded to those American citizens who are likely to communicate with them. As noted previously, one need not be the target of a national security surveillance to have personal liberties violated since anyone communicating with a foreign power (or its agent) is vulnerable to the interception of communications.[56] Second, it avoids the application of a double standard of fourth amendment protections afforded to those persons who are wholly domestic. As the law stands now any persons (non-foreign power or agent) conversing with one another are assured that if their conversation is intercepted by the govern-

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51. Senate Report, supra note 1, at 9 & n.2.

52. Id. at 9-11; see note 21 supra.

53. Senate Report, supra note 1, at 8, 11-18.

54. Foreign Intelligence Act § 2521(b)(5). The term "foreign power" means those persons officially affiliated with a foreign power such as an ambassador, minister or the like.

55. Id. § 2521(b)(ii).

56. See text accompanying notes 20-21, 47-49 supra.

ment, it is done so pursuant to prior judicial authorization.[57] However, either person, if communicating with a foreign power, an agent of a foreign power, or anyone having a significant connection with either, has no such assurance.[58]

After defining its terms and scope, the Act goes on to provide specific procedural requirements to be followed in submitting applications to the court for an order authorizing a foreign intelligence surveillance.[59] These procedural requirements may be divided into administrative,[60] judicial,[61] and general safeguards.[62]

Concerning the administrative safeguards, the Act requires that before an application be made to the court it must first be authorized by the President and then approved by the Attorney General.[63] An application under this act is properly authorized by the President only when he has, in writing, empowered the Attorney General to approve applications for submission to the court.[64] The purpose of this procedure is to insure that the President in fact wants to carry on foreign intelligence surveillance and that the Attorney General is not acting upon his own determination that such surveillance is necessary.[65]

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57. This conclusion is dictated by the Supreme Court decision in United States v. United States Dist. Court, 407 U.S. at 314-21 (warrant required in cases involving the domestic aspects of national security intelligence gathering).

58. Thus, there is no assurance that such a surveillance is reasonable—i.e., based upon probable cause. The situation presented by this fact pattern appears to present severe first amendment problems. As indicated above, if an American citizen decides to communicate with a foreign official he runs two risks. First, there is the risk that if their communication is being intercepted as a result of the foreign official being a target of a national security surveillance, there is no assurance that the interception is reasonable since no judicial warrant need be secured. Thus, the surveillance may be based upon the sole determination of the current administration that such surveillance is necessary. Second, there is the risk that the American citizen by communicating with this foreign official will be deemed to have such significant foreign ties as to be himself classified as a foreign agent. Thus, a domestic person may refrain from communicating with a foreign official for fear of either a warrantless interception of the communication or being classified as a foreign agent as a result of the communication. In either case the chilling effect upon the person's freedom of speech and association are clear. Zweibon v. Mitchell, 516 F.2d 594, 633-35 (D.C. Cir. 1975) (en banc) (plurality opinion), cert. denied, 425 U.S. 944 (1976); cf. United States v. United States Dist. Court, 407 U.S. at 313 ("National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. Though the investigative duty . . . may be stronger in such-cases, so also is there greater jeopardy to constitutionally protected speech.").

59. Foreign Intelligence Act §§ 2522-27.

60. Id. §§ 2522, 2524, 2527.

61. Id. § 2525.

62. Id. § 2523.

63. Id. § 2522.

64. Id.

65. Only one written authorization is required to empower the Attorney General to approve applications in any number of surveillances for as long as the President lets the single authorization stand. See Senate Report, supra note 1, at 34.

The application itself is quite detailed to insure the existence and reliability of the facts giving rise to the particular surveillance. It is also necessary to reveal the identity of the targets of the surveillance, and the specific techniques to be employed. The application must further state the facts relied upon in classifying the targets as foreign, the information sought as foreign intelligence information, and how the government intends to minimize the interception of unrelated information.[66]

The judicial safeguards dictate that a judge shall, if the application was properly authorized by the President and approved by the Attorney General, enter an *ex parte* order approving the surveillance. The judge must affirm that the facts submitted to him establish probable cause to believe that the target is a foreign power or an agent of a foreign power and that the information sought is foreign intelligence information. Finally, he must confirm that the procedures are reasonably designed to minimize the collection of unrelated information.[67]

The general requirements essentially designate the judges to grant orders for electronic surveillance and the appellate route to be followed by the Attorney General upon the denial of an order.[68] The Act also provides that the Chief Justice of the Supreme Court shall designate seven district court judges, each of whom will have jurisdiction to hear applications for and grant orders approving electronic surveillance.[69] Further, the Chief Justice would, under the Act, designate three judges to comprise a special court of appeals to hear appeals by the United States from the denial of any application.[70] The Government would have the right to appeal an affirmance of a denial by that court to the Supreme Court. All appeals are to be heard and determined as expeditiously as possible.[71] The Act provides that applications and orders be sealed by the presiding judge and kept according to security measures to be established by the Chief Justice and the Attorney General.[72]

The final and, from a constitutional perspective, the most controversial section of the Act is that which squarely addresses the power of the President in the area of foreign intelligence gathering. Section 2528, entitled "Presidential Power,"[73] provides, in essence, that nothing contained in the Act was intended to affect the exercise of any constitutional power the President may

66. Foreign Intelligence Act § 2524.

67. Id. § 2525. Subsection (a) of this section specifies the findings the judge must make before he grants an order approving the use of electronic surveillance for foreign intelligence purposes. While the issue of the order is mandatory if all the requirements of subsection (a) are present, the judge has discretionary power to modify the order sought—e.g., the period of authorization or the minimization procedures to be followed.

68. Id. § 2523(a) & (b).

69. Id. § 2523(b).

70. Id.

71. Id. § 2523(c). The Attorney General has access to this special court of appeals as a matter of right. Id. § 2523(b). The appeal as of right applies even to appeals to the Supreme Court. Query if this also includes the right to a rehearing if the Supreme Court should deny the application?

72. Id. § 2523(c).

73. Id. § 2528.

have to gather foreign intelligence information through the use of electronic surveillance if either the surveillance falls outside the definition of electronic surveillance or "the facts and circumstances giving rise to the acquisition are so unprecedented and potentially harmful to the Nation that they cannot be reasonably said to have been within the contemplation of Congress in enacting this chapter . . . Provided, That in such an event the President shall, within a reasonable time thereafter, transmit to the Committees on the Judiciary of the Senate and House of Representatives" the facts surrounding this unprecedented situation.[74] The purpose of this section was to clearly establish the intent of Congress to legislate in the area of foreign intelligence gathering by regulating the exercise of presidential powers—be they constitutionally based or not—in all but two well defined situations: *i.e.*, if the surveillance did not come within the definition of electronic surveillance or the facts were unprecedented and potentially harmful.[75]

THE CONSTITUTIONAL RAMIFICATIONS OF IMPOSING A WARRANT REQUIREMENT ON THE PRESIDENT IN NATIONAL SECURITY CASES

The Applicability of the Fourth Amendment

The attempt to regulate foreign intelligence surveillance through the Foreign Intelligence Act raises three constitutional issues. First, given the sweeping language in a number of cases addressing the President's constitutional power to conduct foreign affairs, may the exercise of such power be implemented without regard for the fourth amendment? Second, assuming the applicability of the fourth amendment to the President's foreign affairs powers, will the warrant provision unduly fetter the legitimate exercise of these powers? Third, assuming that the warrant provision presents no undue restraint upon this power, does the Foreign Security Act, which would require more than merely obtaining a search warrant, unduly fetter these powers?[76]

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74. Id.

75. Senate Report, supra note 1, at 49-54; Senate Hearings, supra note 3, at 16-20.

76. During the hearings and in the final report of the Subcommittee on Criminal Laws and Procedures a fourth constitutional problem was raised. The subcommittee felt that the question of whether Congress may legislate in an area where the President has a constitutional power was a major barrier for this piece of legislation to hurdle. Senate Hearings, supra note 3, at 2 (remarks of Senator McClellan); Senate Report, supra note 1, at 50-51. In order to justify this Act the Committee relied exclusively upon the Supreme Court's decision in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). In Youngstown, President Truman, relying upon his constitutional war powers, ordered the seizure and operation of certain steel mills in order to avert a nation-wide strike of steel workers during the Korean War. The Court's opinion, narrowly drawn, held that the President had no power stemming either from Congress or the Constitution to seize steel mills. Id. at 585-86.

Justice Jackson, in his concurring opinion, wrote: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." Id. at 637 (Jackson, J., concurring). In the Senate Report this

The power to engage in foreign intelligence gathering may be implied as a necessary concomitant of the President's express powers as Commander-in-Chief of the armed forces,[77] as the officer in charge of the nation's foreign affairs,[78] and as the protector and defender of the Constitution.[79] While there is no dispute that from these express powers the implied power to engage in foreign security surveillances may be inferred, what remains to be decided is whether these constitutional powers render the fourth amendment inapplicable.

There are two leading Supreme Court cases which, though not concerned with the fourth amendment, are cited in support of the contention that foreign

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concurring opinion was constantly referred to. E.g., Senate Report, supra note 1, at 50-52, 75 n.13 (views of Senators Abourezk, Hart, and Mathias), 141 (minority view of Senator Tunney). Moreover, Attorney General Levi interpreted the Youngstown decision as indicating "that when a statute prescribes a method of domestic action adequate to the President's duty to protect the national security, the President is legally obliged to follow it." Senate Report, supra note 1, at 51 & n.36.

The subcommittee's absolute reliance upon Youngstown seems misplaced for two reasons. First, the Court's holding in Youngstown was that no constitutional power was found to exist to justify the President's activities. In regard to national security intelligence, the Supreme Court has recognized the existence of a Presidential power, although presently undefined, to gather such information. Cf. United States v. United States Dist. Court, 407 U.S. at 310-12. Thus, the recognized existence of a constitutional power seems to preclude any reliance (certainly absolute reliance) upon Youngstown. Second, in Youngstown, even assuming that the Jackson concurrence was the Court's holding, the Taft-Hartley Act was enacted before the President seized the mills. In contrast, in the case of national security intelligence gathering, the Court will be faced with legislation that comes after over thirty years of Presidential practice. See Senate Report, supra note 1, at 13-15; Senate Hearings, supra note 3, at 1. Moreover, given this prior executive practice, it is at least possible (reversing the Jackson reasoning in Youngstown) that where Congress takes measures incompatible with established presidential practice, their power is at its lowest ebb. Such a reversal of Jackson's reasoning, so heavily relied upon by the subcommittee, could prove devastating to any future attempt to legislate in the area of foreign security.

It seems that rather than stretching the Youngstown case to its limits (if, in fact, not surpassing them), the better course would be simply to rely upon the necessary and proper clause, U.S. Const. art. 1, § 8, cl. 18, which provides that Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . [the] Powers vested by this Constitution in the Government of the United States . . . ." Id. The classic construction of the powers expressed in the necessary and proper clause is that of Chief Justice Marshall in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (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 with the letter and spirit of the constitution, are constitutional." Id. at 421. Thus "[w]hatever legislation is appropriate . . . to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, . . . is brought within the domain of congressional power." Ex parte Virginia, 100 U.S. 339, 345-46 (1879). It seems, therefore, that the fourth amendment is a proper subject of legislative action to secure its guarantees. Cf. Katzenback v. Morgan, 384 U.S. 641 (1966) (Congress may legislate to secure the guarantees of the fourteenth amendment).

77. U.S. Const. art. II, § 2, cl. 1.

78. Id. § 2, cl. 1, 2.

79. Id. § 1, cl. 8.

intelligence surveillance is immune from the requirements of this amendment. In *United States v. Curtiss-Wright Export Corp.*,[80] the Court held that the federal government's domestic and foreign powers are of a very different scope because they differ in origin and nature. It then stated that in relation to foreign affairs the President alone has the power to act as representative of our nation. Moreover, the Court noted that confidential sources are necessary to the exercise of his duties, and, consequently, they should remain confidential.[81] Later, *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*[82] stated that in his capacity as Commander-in-Chief and as the organ of foreign affairs, the President "has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."[83]

Two recent circuit court decisions have expressly addressed warrantless foreign security surveillances and have resolved these cases based upon the sweeping language contained in *Curtiss-Wright* and *Waterman.*[84] The Fifth Circuit, in *United States v. Brown,*[85] held that warrantless foreign security surveillances were constitutionally permissible. The opinion declared that on the basis of "the President's constitutional duty to act for the United States in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs . . . the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence."[86] The Court added that any "[r]estrictions upon the President's power which are appropriate in cases of domestic security become artificial in the context of the international sphere."[87] In *United States v. Butenko*,[88] the Third Circuit reached the same conclusion, finding that these surveillances would be reasonable without a warrant even though some abuses may arise.[89]

The Third and Fifth Circuits' decisions are based on very conclusory analytic frameworks and tend more to confuse than to clarify the issues of presidential power and the applicability of constitutional restraints. In *Brown*, the court failed to pay even lipservice to the type of constitutional analysis suggested by the *Keith* decision: there was no attempt at balancing the various interests at stake. The Fifth Circuit merely stated that the President has the power to authorize intelligence gathering by means of warrantless electronic

80. 299 U.S. 304 (1936).

81. Id. at 315-20.

82. 333 U.S. 103 (1948).

83. Id. at 111.

84. United States v. Butenko, 494 F.2d 593, 602 (3d Cir.) (en banc), cert. denied, 419 U.S. 881 (1974); United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974). See also United States v. Smith, 321 F. Supp. 424, 426 (C.D. Cal. 1971) (dictum); United States v. Clay, 430 F.2d 165, 171 (5th Cir. 1970), reversed on other grounds, 403 U.S. 698 (1971).

85. 484 F.2d 418 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974).

86. Id. at 426.

87. Id.

88. 494 F.2d 593 (3d Cir.), cert. denied, 419 U.S. 881 (1974).

89. Id.

surveillance.[90] In *Butenko,* the Third Circuit ignored the Supreme Court's rejection of post-search sanctions as offering viable fourth amendment protections in the domestic area and relied, without explanation, upon this procedure as a means of affording adequate protection in the foreign security area.[91] Thus these decisions are better viewed as evidencing the on-going struggle between the constitutional issues raised by foreign security surveillances rather than as a clarification of these problems.[92]

In *Zweibon v. Mitchell,*[93] the District of Columbia Circuit, while limiting its holding to requiring a warrant prior to the surveillance of a domestic organization, questioned whether any national security exception to the warrant requirement would be constitutional.[94] Unlike the Fifth and Third Circuit cases, the *Zweibon* opinion, written by Judge J. Skelly Wright, presented a complete and detailed analysis of the issues raised by foreign security surveillances, paralleling the type of fourth amendment analysis employed by the Supreme Court in *Keith.*[95] After a brief survey of cases recognizing the vast scope of the President's power to conduct foreign affairs, the court dismissed the possibility that the fourth amendment may be inapplicable in the area of foreign security surveillances.[96] While recognizing that there is support for the proposition that the President's powers concerning foreign affairs are not limited to those specifically enumerated in the constitution, the *Zweibon* court stated that they did not override the fourth amendment but, rather, had to be reconciled with it.[97]

This conclusion appears to be well grounded. In *Curtiss-Wright,*[98] the Court itself recognized that "like every other governmental power, [the President's plenary power over foreign relations] must be exercised in subordination to the applicable provisions of the Constitution."[99] The question actually presented in *Curtiss-Wright* was the constitutionality of a congressional delegation of power in granting the President authority to prohibit arms

90. United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974).

91. United States v. Butenko, 494 F.2d 593, 605 (3d Cir.), cert. denied, 419 U.S. 881 (1974).

92. Senate Report, supra note 1, at 18 n.17 (noting the lack of systematic analysis of the Brown and Butenko decisions), 80 n.24 (additional views of Senators Abourezk, Hart, and Mathias reaching the same conclusion).

93. 516 F.2d 594 (D.C. Cir. 1975) (en banc) (plurality opinion), cert. denied, 425 U.S. 944 (1976).

94. Id. at 613-14.

95. Id. at 612-13.

96. Id. at 626-27, 633-34, 641. The Court considered the argument that the conduct of foreign affairs is an exercise of the President's political power and as such beyond judicial review. Id. at 620-21. Consideration was also given to the evidentiary privilege of the Executive concerning the production of documents whose publication might endanger either military or diplomatic secrets. Id. at 625-27. Although these points are beyond the scope of this Note, it should be noted that as to each argument the Court found no bar to its consideration of fourth amendment protections. Id. at 620-21, 625-26.

97. Id. at 627.

98. 299 U.S. 304 (1936).

99. Id. at 320.

shipments to an area of armed conflict.[100] The Court did not address the question of whether these powers are to be exercised in accordance with the strictures of the fourth amendment.[101] The *Waterman*[102] decision was cloaked in very broad language concerning the President's foreign affairs powers.[103] The question presented was the judicial review of certain presidential acts concerning foreign air transportation.[104] Again, the Court did not address the exercise of these powers in the context of the fourth amendment.[105] Thus, these cases, so often cited as establishing the breadth of the foreign affairs powers, do little more than identify and define these powers in a context where there was no assertion of an express countervailing constitutional limitation.

To conclude that the President's power in this area is to be tested outside the framework of the fourth amendment would, as the *Zweibon* court noted, be to ignore the series of cases which have adhered to the principle—even in time of war and civil insurrection—that the President cannot exercise his power without regard for the Bill of Rights.[106] For example, in *Ex parte Milligan*,[107] the Court prevented the President from suspending the sixth amendment right to jury trial where the courts were open and their process available.[108] A similar result was reached in *Duncan v. Kahanamoku*,[109] where the substitution of military law for civilian process was held unconstitutional despite allegations that Hawaii was in danger of attack and martial law was necessary for its protection.[110] Further support for this position can be found in *Home Building & Loan Association v. Blaisdell*,[111] where the Court, in dictum, stated that "even the war power does not remove constitutional limitations safeguarding essential liberties."[112] Finally, in *United States v. Washington Post Co.*,[113] the Government urged the court to restrain the publication of the contents of a classified study recounting the history of American decision-making on Vietnam policy, asserting that the defense interests of the United States would be greatly prejudiced.[114] The Court of Appeals for the District of Columbia Circuit held that the Government had

100. Id. at 314-15.
101. Zweibon v. Mitchell, 516 F.2d at 621-22.
102. 333 U.S. 103 (1948).
103. Id. at 111 (dictum).
104. Id. at 104-06.
105. Zweibon v. Mitchell, 516 F.2d at 622-23.
106. Id. at 621-23, 626-27.
107. 71 U.S. (4 Wall.) 2 (1866).
108. Id. at 121.
109. 327 U.S. 304 (1946).
110. Id. at 316-17.
111. 290 U.S. 398 (1934).
112. Id. at 426 (dictum).
113. 446 F.2d 1327 (D.C. Cir.) (en banc) (per curiam), aff'd sub nom. New York Times v. United States 403 U.S. 713 (1971) (per curiam).
114. Id. at 1328.

not overcome the first amendment's presumption against the constitutionality of prior restraints on the press[115] and the Supreme Court affirmed.[116]

The thrust of these decisions is that the President is subject to certain constitutional limitations in the exercise of his constitutional powers. This is not to say that, given a proper set of facts, the President could not have fully exercised his powers. Had the *Washington Post* case involved publication of information concerning an upcoming military offensive, or if acts of war had actually closed the courts in *Milligan* and *Duncan*, the Court, upon balancing the interests at stake, may have reached a different result. Thus, Presidential power must be exercised within the framework of constitutional restraints: both the constitutional power and its constitutional limitation must be balanced to insure the legitimate exercise of that power and the protection of the liberties likely to be affected.[117]

Does the Warrant Requirement Apply to a National Security Search?

Judge Wright's opinion in *Zweibon* is instructive on the issue of the reasonableness of a warrantless national security search.[118] Recognizing the importance of both foreign intelligence gathering and the protection of personal liberties, he concluded that the warrant requirement would best serve to harmonize both interests.[119] In reaching this conclusion five possible justifications offered by the government for exempting national security surveillances from prior judicial authorization were discussed.[120] These justifications—lack of judicial competence, security leaks, strategic information gathering, administrative burden, and delay—were virtually the same as those offered in *Keith*.[121] The *Zweibon* decision addressed each of these with the same scrutiny employed in *Keith* and reached the same result in the area of foreign security as *Keith* reached in the domestic area.

In both cases the Government posited that the judicial branch lacked the competence to effectively perceive and decide questions involving foreign security.[122] In *Keith*, the Supreme Court rejected this argument, stating: "If the threat is too subtle or complex for our senior law enforcement officers to convey . . . one may question whether there is probable cause for surveillance."[123] The *Zweibon* court was similarly unpersuaded where questions of foreign security were involved. Essentially, it refused to accept the idea that the Attorney General, chosen for his prowess as an attorney rather than as a diplomat, was more capable than a federal judge to perceive and analyze the

115. Id. at 1328-29.
116. 403 U.S. 713 (1971) (per curiam).
117. Cf. Zweibon v. Mitchell, 516 F.2d at 626-27.
118. Id. at 628-33.
119. Id. at 633-36.
120. Id. at 641-51.
121. 407 U.S. at 319-21.
122. Id. at 320; Zweibon v. Mitchell, 516 F.2d at 641-47.
123. 407 U.S. at 320.

issues raised by a foreign security surveillance.[124] This response seems quite appropriate. There is no reason why a federal judge, deemed by the Supreme Court to be sensitive and comprehending enough to pass upon probable cause in domestic security cases, will become any less so when dealing with foreign security cases.[125]

On the question of security leaks the Government, in both *Keith* and *Zweibon*, argued that the warrant provision would force the President to reveal highly sensitive information. It claimed that providing this information to the judiciary would increase the risk of a security leak which would, in turn, endanger the national security.[126] *Keith* did not recognize a perceptible increase in the risk of a security leak by virtue of a revelation to a federal judge in domestic security cases.[127] The *Zweibon* court found this argument no more compelling in the context of foreign security.[128] In addition to noting, as did *Keith*, that warrant proceedings are *ex parte*, *Zweibon* espoused preventive measures which could be taken to guard against security leaks. The Government, for example, could supply any clerical or secretarial personnel needed, thereby limiting the exposed material to a single judge and insuring the utmost secrecy.[129] The *Keith/Zweibon* conclusion seems to be correct, especially if the Executive supplies the necessary clerical personnel. However, the risk of security leaks would probably be diminished even further if a select group of judges, designated by the Chief Justice or another appropriate member of the federal bench, was appointed to hear all foreign security cases.

The Government urged in both cases that since these surveillances are aimed primarily at the collection and maintenance of strategic information they are less offensive to the fourth amendment than those surveillances designed to end in a criminal prosecution.[130] In *Keith*, the Court apparently accepted the Government's premise that the nature of domestic surveillances was essentially non-prosecutorial, but refused to accept that an individual's constitutionally protected freedoms are any less offended because of this.[131] In *Zweibon*, the court, in reaching the same conclusion, refused to accept the notion that foreign surveillances were non-prosecutorial.[132] The result reached in *Zweibon* seems eminently sensible. Whatever the purpose of a given surveillance may be, it seems clear that the same constitutional infringements will result from its uncontrolled use. It is the means and not the

124. 516 F.2d at 641-42, 644.

125. Cf. United States v. United States Dist. Court, 407 U.S. at 320.

126. Id. at 320-21; Zweibon v. Mitchell, 516 F.2d at 647-48.

127. 407 U.S. at 320-21.

128. 516 F.2d at 647.

129. 516 F.2d at 647; cf. Commission for Nuclear Responsibility v. Seaborg, 463 F.2d 788, 794-95 n.12 (D.C. Cir. 1971) (per curiam).

130. United States v. United States Dist. Court, 407 U.S. at 318-19; Zweibon v. Mitchell, 516 F.2d at 648-49.

131. 407 U.S. at 320.

132. 516 F.2d at 648.

ends of a given surveillance which the fourth amendment addresses.[133] Indeed if these surveillances were non-prosecutorial the need for fourth amendment protections would be heightened. Without a trial in which an attempt is made to use the evidence seized without a warrant (or its fruits) all judicial scrutiny would be bypassed. Thus the temptation to intercept non-security information would only increase.[134]

The added burden imposed upon the administration was also urged as a justification for an exception to the warrant provision.[135] This argument was summarily dismissed by *Keith*.[136] Likewise, the *Zweibon* court rejected the argument in the foreign context, refusing to carve out an exception to the protection afforded by the warrant provision based solely upon administrative burdens.[137]

The final justification offered in *Zweibon* was the danger caused by a delay in instituting a foreign security surveillance. It was posited that foreign security surveillance must be hastily employed and any delay, resulting from compliance with the warrant procedure, would cause the loss of crucial information thus threatening the national security.[138] The argument, admitted by the court to be the most persuasive, was both accepted and rejected in part. It was accepted in relation to the apparent necessity for an exception to the warrant requirement in exigent circumstances. These emergency situations, when time is of the essence, call for immediate executive action to prevent the loss of information vital to the national security. However, the court refused to suspend the warrant requirement in all foreign security cases because of the mere potentiality of a rare situation requiring such an exception.[139] Although no similar argument was made concerning domestic security in *Keith*,[140] the *Zweibon* result seems sound. The average length of a foreign security surveillance is between seventy and two hundred days.[141] Moreover, the average surveillance is well planned and must be approved by a number of administrative officials before it is employed.[142] Thus it appears that the emergency situation is clearly exceptional. To exempt all foreign security surveillances would be to let the exception govern the rule.[143] There may be situations, however, where a surveillance may have to be immediately instituted or the national security could be jeopardized. However, in these cases the fourth amendment and the President's constitutional powers can be

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133. See United States v. United States Dist. Court, 407 U.S. at 320; Zweibon v. Mitchell, 516 F.2d at 649.

134. United States v. United States Dist. Court, 407 U.S. at 320.

135. Id. at 320; Zweibon v. Mitchell, 516 F.2d at 650-51.

136. 407 U.S. at 321.

137. 516 F.2d at 651.

138. Id. at 649-50.

139. Id.

140. Senate Report, supra note 1, at 79 (views of Senators Abourezk, Hart, and Mathias).

141. Zweibon v. Mitchell, 516 F.2d at 650 & n.177.

142. Id. at 643.

143. Cf. id. at 650.

reconciled. Certain searches which must be instituted without delay have been held reasonable without a warrant.[144] Thus it would not be inconsistent with prior fourth amendment cases to hold that the President may, in order to carry out his constitutional duties, conduct warrantless national security surveillances where there is no time to obtain a warrant.

Another justification, not offered in the *Zweibon* case, but possibly more pursuasive, is that a foreign threat to the national security is more dangerous than a domestic threat. The argument would be that a foreign threat may have as its end a more drastic result than a wholly internal threat. However, both an internal and external organization could have as its objective the reorganization or elimination of our national structure. On the other hand, an important distinction between these two types of organizations is found in the resources available to a foreign and domestic organization. A domestic organization, by definition, will derive its resources from wholly internal sources.[145] This means that not only must the membership of the organization consist only of persons within the United States, but also that the funds necessary to carry on the organization must originate from donations of its members and domestic sympathizers. A foreign organization, on the other hand, has, in addition to all those resources open to its domestic counterpart, any resources available from a foreign source. Thus, not only may its membership be drawn from a larger area, but its operational costs may be received from a larger pocket.

Even conceding that a foreign threat may be inherently more dangerous than its domestic counterpart, there is no logical connection between this and making it unreasonable, in all cases, to secure a search warrant. Certain safeguards may be employed to account for any measurable difference between a foreign and a domestic security threat. Such safeguards could take the form of an escape clause whereby the President, confronted with an extremely dangerous situation, would be able to respond without first applying for a warrant. This would be much the same as the exigent circumstances exception noted above.[146] Just as with the delay argument, for the court to establish a general rule based upon the possibility of an emergency situation would be to let the exception govern the rule.[147] Clearly the better course, rather than foreclosing fourth amendment protections, would be to carve a specific exception to fit these circumstances: to subject the President to the warrant provision absolutely would, given an emergency situation, preclude him from fulfilling his constitutional duty to defend and protect the Constitution.

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144. E.g., United States v. Edwards, 415 U.S. 800, 802-03, 806-09 (1974) (discussion of the exceptions to the warrant requirement of search incident to a lawful arrest and seizure of evidence of criminal activity where it is likely to be destroyed); see note 9 supra and accompanying text.

145. Cf. United States v. United States Dist. Court, 407 U.S. at 309 n.8.

146. Zweibon v. Mitchell, 516 F.2d at 649-50.

147. Id.

DOES THE FOREIGN SURVEILLANCE ACT UNDULY FETTER THE CONSTITUTIONAL EXERCISE OF PRESIDENTIAL POWER?

The Inherently More Dangerous Foreign Threat

Assuming the validity of this argument—that a foreign threat is inherently more dangerous than its domestic counterpart—the Foreign Intelligence Act anticipates this problem. First, there is the exception clause in the presidential power section which contemplates an unprecedented emergency situation wherein the President is permitted to act upon his own determination that such action is necessary.[148] Second, there is the 24-hour emergency provision of section 2525(d) which enables the Attorney General to authorize a surveillance upon his own authority by merely notifying one of the seven designated judges.[149] Third, there is the speedy appellate route provided by section 2523 insuring rapid hearings and decisions upon the denial of any order authorizing a foreign security surveillance.[150] Given these three provisions, it is hard to imagine a situation, even assuming the greater potential danger posed by foreign threats to the national security, that is so bizarre as to evade both emergency provisions and the rapid appellate route and yet remain so deadly as to pose a significant threat to the national security.[151]

Lack of Judicial Competence

Assuming that this argument is more persuasive in foreign security cases, and that *Keith*'s rejection of this argument in the domestic area is not determinative in the foreign area, the Act, in designating certain federal judges to hear applications for and grant orders approving foreign security surveillances, seems to deflate it.[152] Even if they initially found the subject difficult to grasp, the limited number of judges so designated would soon develop expertise because of the frequency with which they would hear foreign security surveillance applications. Given the lifetime tenure of a federal judge and the relatively short tenure of an Attorney General, it may not be long before the bench will be required to inform the Attorney General of the pertinent subtleties.[153]

Risk of Security Leaks

In addition to the *ex parte* approach embraced by *Zweibon*, the Act provides that all applications and orders are to be sealed by the presiding judge and protected by security measures to be prescribed by the Chief Justice in consultation with the Attorney General.[154] Thus the Attorney General has

148. Foreign Intelligence Act § 2528.
149. Id. § 2525(d).
150. Id. § 2523. These appellate routes are open to the Government as a matter of right. Id.
151. See Senate Report, supra note 7, at 79 (views of Senators Abourezk, Hart, and Mathias).
152. Foreign Intelligence Act § 2523.
153. Zweibon v. Mitchell, 516 F.2d at 644 & n.138.
154. Foreign Intelligence Act § 2523.

a voice in insuring against the risk of security leaks by virtue of his own safeguards.[155]

Danger of Delay

This argument is vitiated by the three emergency provisions of the Act discussed in the above analysis of the inherently more dangerous foreign threat.[156]

Administrative Burden

In order to determine the added burden that the Act imposes upon the administration, one must first review the procedure currently employed before the implementation of a foreign security surveillance. At present, the request must be very specific and must be approved by the FBI at several levels: up to seven supervisors, three subordinate directors, and the Director of the FBI.[157] Further, the Attorney General must approve.[158] It appears that the application called for by the Act requires not only less detailed information but also significantly less procedural involvement. The Act, therefore, does not appear to measurably increase the burden the Government has already imposed upon itself.

THE NEED FOR A LEGISLATIVE RESPONSE

It is apparent that either the courts or Congress may require the President to obtain a warrant prior to employing a foreign intelligence surveillance. However, due to the superior protection which it gives to both fourth amendment rights and the national security, it is submitted that Congressional legislation is the alternative which should be chosen.

The judicial branch, absent any legislation concerning foreign security surveillances, would be able to afford fourth amendment protections in a number of ways: a case by case approach;[159] a general warrant approach with an exception for exigent circumstances which necessitate immediate action;[160]

155. Thus the Act provides the type of security measures which prompted the Supreme Court in Keith to conclude that the possibility of security leaks do not necessitate a departure from the warrant provision where domestic security is involved. See United States v. United States Dist. Court, 407 U.S. at 321. The Act is also consistent with the Zweibon treatment of the same argument. See Zweibon v. Mitchell, 516 F.2d at 647-48.

156. See notes 155-58 supra and accompanying text.

157. Zweibon v. Mitchell, 516 F.2d at 642-43.

158. Id.

159. This approach was suggested by the Third Circuit in United States v. Butenko, 494 F.2d 593 (3d Cir.) (en banc), cert. denied, 419 U.S. 881 (1974). The court left any fourth amendment protections to the sanctions incident to post-search litigation. Thus only after the surveillance had been discovered would its reasonableness be tested. Id. at 605.

160. This approach was suggested by the Zweibon decision. Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976). In Zweibon, the court, in dictum, concluded that absent exigent circumstances a warrant is necessary before employing a foreign security surveillance. Id. at 651 (dictum).

or an absolute warrant requirement.[161] These alternatives all fail to adequately protect either the national security or personal liberties affected by the surveillance. The case by case approach places the government in the unfortunate position of never being sure whether the surveillance they wish to employ requires a warrant. That determination is left for subsequent judicial scrutiny. Moreover, those who are supposedly protected by the warrant requirement would be protected in a retroactive way—only after an illegal surveillance were discovered would its validity be determined.[162] The second approach, while protecting both the national security and personal liberties to a limited extent, would still lend itself to executive abuse. The determination of what are exigent circumstances will necessarily be a subjective judgment on the part of the government. In the light of past abuses, the protection afforded by this approach seems inadequate.[163] The third approach, while appearing to protect personal liberties absolutely, would seriously jeopardize the national security. Placing the national security in this precarious position, in turn, jeopardizes the personal liberties thought to be protected since the liberties granted by our constitutional form of government are no more secure than the government itself. The President, faced with an emergency situation, could not act with the required speed and thus would be prevented from fulfilling his constitutional duty. Indeed, inasmuch as this approach would prevent the President from fulfilling his constitutional responsibility, it is, most likely, unconstitutional.[164]

These deficiencies noted, it seems the better course for Congress to provide comprehensive legislation along the lines of the Foreign Intelligence Act. Such legislation is capable of affording a greater degree of protection to both the national security and personal liberty. It could be tailored in such a way that the question of whether or not a given situation required prior judicial authorization would require little or no guesswork on the part of the Government. The Foreign Intelligence Security Act represents just such a comprehensive approach at filling the national security gap. Its provisions are sufficiently definite to protect the individual's liberties from governmental abuse yet flexible enough to provide for an emergency situation where the national security demands governmental action without prior judicial authorization. In essence, this Act appears to strike the necessary balance between the need for intelligence surveillance and the protection of personal liberties from its uncontrolled use. Hopefully, a similar act will be high on the list of Congressional priorities in 1977.

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161. This approach seems to have been adopted by the Supreme Court in Keith. Since the argument of delay never came up, the Court did not consider what would happen in the case of an emergency situation where the President had to act quickly. One can only assume the Court would create an exception in such a situation where the domestic security was threatened. Cf. United States v. United States Dist. Court, 407 U.S. at 318.

162. See United States v. Butenko, 494 F.2d 593, 605 (3d Cir.) (en banc), cert. denied 419 U.S. 881 (1974). Cf. United States v. United States Dist. Court, 407 U.S. at 316-18.

163. See note 21 supra.

164. Cf. United States v. United States Dist. Court, 407 U.S. at 310.