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The Fourth Amendment and Executive Authorization of Warrantless Foreign Security Surveillance

Andrew Puzder

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THE FOURTH AMENDMENT AND EXECUTIVE AUTHORIZATION OF WARRANTLESS FOREIGN SECURITY SURVEILLANCE

I. INTRODUCTION

The fourth amendment protects citizens from "unreasonable searches and seizures." To conduct a search, law enforcement officials must obtain a warrant, which is properly issued only when a neutral and detached judicial officer finds probable cause to believe that the search will reveal evidence of criminal activity. The Supreme Court has held that searches conducted without a judicial warrant are per se violative of the fourth amendment unless one of a few narrow exceptions is applicable.

1. U.S. CONST. amend. IV reads:
   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.


4. U.S. CONST. amend. IV. As the Court stated in Warden v. Hayden, 387 U.S. 294 (1967): There must of course be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction.


A number of lower federal courts have recognized a foreign security exception to the warrant requirement which permits the President or Attorney General to authorize warrantless physical or electronic searches in cases involving foreign agents or collaborators. Although the Supreme Court has yet to determine the constitutionality of this exception, the Executive has assumed its validity. This Note will assess the constitutional basis of the foreign security exception along U.S. 218 (1973) (search incident to custodial arrest); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent search); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) (border search); Chambers v. Maroney, 399 U.S. 42 (1970) (search of moving vehicle); Terry v. Ohio, 392 U.S. 1 (1967) (frisk permissible where it is reasonable to fear that a suspect is armed); Harris v. United States, 390 U.S. 234 (1968) (seizure of evidence in plain view); See v. City of Seattle, 387 U.S. 541 (1967) (altered standard of probable cause for administrative search); Warden v. Hayden, 387 U.S. 294 (1967) (exigent circumstances); Cooper v. California, 386 U.S. 58 (1967) (inventory search of automobile in long term custody); Schmerber v. California, 384 U.S. 757 (1966) (exigent circumstances); Ker v. California, 374 U.S. 23 (1963) (search incident to lawful arrest); United States v. Lee, 274 U.S. 549 (1927) (search incident to lawful arrest); Carroll v. United States, 267 U.S. 132 (1925) (search of moving vehicle). See generally J. LANDYNISKI, SEARCH & SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 87-117 (1966); Player, WARRANTLESS SEARCHES AND SEIZURES, 5 GEO. L. REV. 269 (1971); Sikma, COLLATERAL SEARCH: A SURVEY OF EXCEPTIONS TO THE WARRANT REQUIREMENT, 21 S.D.L. REV. 254 (1976).


Throughout this Note, "national security" refers to any threat to the structure or existence of the government. "Domestic security" refers to threats to the structure or existence of the government which originate from domestic sources, and "domestic security surveillance" refers to surveillance which is prompted by such threats. "Foreign security" refers to threats to the structure or existence of government which originate from foreign powers, their agents, or collaborators, and "foreign security surveillance" refers to surveillance prompted by such threats. See Zweibon v. Mitchell, 516 F.2d 594, 613 n.42 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976).

8. Cases cited in note 7 supra. See United States v. Ehrlichman, 546 F.2d 910, 925 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977) (specific authorization of President or Attorney General necessary to invoke foreign security exception); Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1975) (Executive must obtain a warrant where subject of surveillance is a domestic organization not the agent of or acting in collaboration with foreign power).

9. In cases where officials were required to secure search warrants for electronic surveillance the Court has indicated that its holdings do not reach cases involving the President's foreign affairs powers. United States v. United States District Court, 407 U.S. 297 (1972); Giordano v. United States, 394 U.S. 310, 314-15 (1969) (Stewart, J., concurring); Katz v. United States, 389 U.S. 347, 358 n.23 (1967).

10. See United States v. Barker, 546 F.2d 940, 950 (D.C. Cir. 1976) (Department of Justice asserts legality of warrantless searches related to foreign espionage or intelligence and authorized by the President or Attorney General); Exec. Order No. 12036, 43 Fed. Reg. 3674, 3685 (1978) (Carter administration provides for warrantless physical and electronic surveillance in cases involving "an agent of a foreign power"); Wash. Post, May 19, 1975, at 2, col. 1 (Ford administration asserted that federal agents could conduct warrantless physical searches in foreign espionage or intelligence cases).
with the constitutional validity of warrantless foreign security searches, and examine recent efforts to legislatively limit Executive discretion in this area.

II. FOREIGN SECURITY SURVEILLANCE AND THE FOURTH AMENDMENT

A. Historical Overview

In *Olmstead v. United States*, the Court held that wiretapping and the use of information so obtained as evidence in a criminal trial did not violate the fourth amendment. The Court interpreted “unreasonable searches and seizures” as meaning unreasonable physical searches and seizures. Because wiretapping involved a nontrespassory seizure of intangibles, it did not violate the fourth amendment. *Olmstead* therefore precluded any constitutionally-based limitations on nontrespassory electronic surveillance.

Congress reacted to *Olmstead* by enacting section 605 of the Federal Communications Act of 1934 which prohibits the interception or divulgence of “any communication” to “any person” unless authorized by the sender. In *Nardone v. United States*, the Court held that section 605 prohibited both governmental and private wiretapping.
and evidence obtained in violation of the Act was inadmissible in federal trials.\(^1\)

In March of 1940, Attorney General Jackson announced that the Department of Justice would discontinue the use of wiretapping as a general investigative tool.\(^2\) Two months later, however, in a confidential memorandum, President Roosevelt stated that *Nardone* was not applicable in cases involving national defense.\(^3\) He directed Jackson to authorize wiretapping in such cases while limiting investigations "insofar as possible to aliens."\(^4\)

In 1946, President Truman expanded the Roosevelt directive by authorizing wiretapping in "cases vitally affecting the domestic security or where human life [was] in jeopardy."\(^5\) The propriety of such directives went unchallenged in the courts because they authorized wiretap-

21. *Id.*; see [1968] U.S. CODE CONG. & AD. NEWS 2154. In the second *Nardone* case, the Court, pursuant to its supervisory powers over federal courts, held the fruits of such searches inadmissible at trial. *Nardone* v. United States, 308 U.S. 338, 341 (1939). *See also* Rathbun v. United States, 355 U.S. 107 (1957) (no violation where officer listening to telephone conversation had permission of one party); Schwartz v. Texas, 344 U.S. 199 (1952) (statute does not render evidence inadmissible in state courts); Weiss v. United States, 308 U.S. 321 (1939) (statute applies to intrastate as well as interstate conversations).


25. Memorandum from the Office of the Attorney General to President Truman, July 17, 1946, *reprinted in* Zweibon v. Mitchell, 516 F.2d 594, 674 (D.C. Cir. 1975) (Truman's notation of concurrence with the Attorney General's suggestions appears at the foot of the memorandum),
ping for investigatory purposes only.\textsuperscript{26} Congress failed to pass a bill limiting the President's authority in this area,\textsuperscript{27} and public debate was stifled by the politically repressive atmosphere of the time.\textsuperscript{28}

The Justice Department continued to authorize electronic surveillance pursuant to the Roosevelt/Truman guidelines\textsuperscript{29} until 1965 when

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\hline
Year & Telephone Wiretaps & Microphones & Year & Telephone Wiretaps & Microphones \\
\hline
1940 & 6 & 6 & 1958 & 166 & 70 \\
1941 & 67 & 25 & 1959 & 120 & 75 \\
1942 & 304 & 88 & 1960 & 115 & 74 \\
1943 & 475 & 193 & 1961 & 140 & 85 \\
1944 & 517 & 199 & 1962 & 198 & 100 \\
1945 & 519 & 186 & 1963 & 244 & 83 \\
1946 & 364 & 84 & 1964 & 260 & 105 \\
1947 & 374 & 81 & 1965 & 233 & 67 \\
1948 & 416 & 67 & 1966 & 174 & 10 \\
1949 & 471 & 75 & 1967 & 113 & 0 \\
1950 & 270 & 61 & 1968 & 82 & 9 \\
1951 & 285 & 75 & 1969 & 123 & 14 \\
1952 & 285 & 63 & 1970 & 102 & 19 \\
1953 & 300 & 52 & 1971 & 101 & 16 \\
1955 & 214 & 102 & 1973 & 123 & 40 \\
1956 & 164 & 71 & 1974 & 190 & 42 \\
1957 & 173 & 73 & & & \\
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\item Attorney General Edward H. Levi testimony, Nov. 6, 1975, hearings, vol. 5, pp. 68-70. The statistics before 1968 encompass electronic surveillances for both intelligence and law enforcement purposes. Those after 1968, when the Omnibus Crime Control Act was enacted, include surveillances for intelligence purposes only; electronic surveillances for law enforcement purposes were thereafter subject to the warrant procedures required by the Act.
\end{itemize}
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President Johnson ordered that the use of wiretapping, as a general investigative technique, be discontinued. In 1966, however, the Attorney General qualified Johnson's order, stating that wiretapping would continue in cases "involving the collection of intelligence affecting the national security."

B. Katz and Its Progeny

In its 1967 decision, Katz v. United States, the Court overruled Olmstead, stating that the fourth amendment's reach could no longer "turn upon the presence or absence of a physical intrusion . . . ." It held that absent prior judicial consent, electronic surveillance was an unreasonable search and seizure. In essence, Katz equated a reasonable search with one which met the warrant requirement or one of the traditional exceptions based on unusual or exigent circumstances. The Court was not faced with a national security issue, therefore, it reserved judgment on the exception's validity.

Shortly after Katz, Congress enacted the Omnibus Crime Control


34. 389 U.S. at 358. The device in question in Katz was a bug rather than a wiretap. Bugs are not restricted to use in intercepting telephone conversations. See A. WESTIN, PRIVACY AND FREEDOM 73-78 (1967).

35. 389 U.S. at 357-58. Stressing the need for a neutral determination of probable cause, Katz rejected a government argument that the Court should except surveillance of telephone booths from the warrant requirement. Id. at 358-59.

36. Id. at 358 n.23. Justice White stated that a warrant was unnecessary "if the President . . . or . . . the Attorney General has considered the requirements of national security and authorized electronic surveillance as reasonable." Id. at 364 (White, J., concurring). Justice Douglas took the contrary position finding that "spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers . . . ." Id. at 360 (Douglas, J., concurring). Douglas found the national security disclaimer a "wholly unwarranted green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels 'national security' matters." Id. at 359.
and Safe Streets Act of 1968 (Omnibus). Although generally prohibiting warrantless government eavesdropping, Omnibus expressly disclaims any attempt to "limit the constitutional power of the President . . . to obtain foreign intelligence information . . . ." In 1972, the Court rejected the argument that this disclaimer constituted an affirmative grant of power to the President, stating that "the Act simply did not legislate with respect to national security surveillance." Omnibus is therefore neutral as to the Executive's constitutional power to authorize warrantless foreign security surveillance.

The Court limited warrantless national security surveillance in United States v. United States District Court (Keith), holding the warrant requirement applicable in domestic security cases. Although it stated that "[t]he Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised," Keith was expressly limited to "the domestic aspects of national security." The Court has yet to decide whether a warrant is


Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.


41. Id.

42. 407 U.S. 297 (1972).

43. Id. at 321. Keith involved the surveillance of domestic groups that did not have foreign ties but that allegedly threatened national security. Id. at 300-01. See generally Church Comm. Report III, supra note 24, at 290-93.

44. 407 U.S. at 317 (footnote omitted).

45. Id. at 321. The Court declined to express an opinion "as to the issues which may be involved with respect to activities of foreign powers or their agents." Id. at 322.
required in cases involving foreign powers.

C. The Scope of the Proposed Foreign Security Exception

The present scope of the foreign security exception to the fourth amendment warrant requirement has been shaped in part by its unique history. When President Roosevelt first expounded the exception, he was merely interpreting the Federal Communications Act of 1934. Because Olmstead held that wiretapping did not violate the fourth amendment, Roosevelt's position was constitutionally sound, although possibly vulnerable as an imprecise construction of the statute. When Katz subsequently eliminated the distinction between physical and electronic surveillance and held warrantless electronic surveillance unconstitutional, the Executive continued to assert its right to use electronic surveillance in cases involving national security. The Executive then asserted that his power was based on an exception to the fourth amendment. Moreover, the elimination of the distinction between physical intrusion and electronic surveillance allowed the Executive to expand the foreign security exception to embrace both methods of search and seizure. This expansion, however, has rendered the foreign security exception more vulnerable to attack because the protection against warrantless trespassory searches is at the core of the fourth amendment.

46. See notes 17-24 supra and accompanying text.
47. See notes 11-16 supra and accompanying text.
48. See notes 32-36 supra and accompanying text.
49. See cases cited in note 7 supra; note 61 infra.
50. See notes 32-36 supra and accompanying text.
51. United States v. United States District Court, 407 U.S. at 313; Zweibon v. Mitchell, 516 F.2d 594, 618-19 n.67 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976). In support of this point, the court traced the fourth amendment's roots to Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (1765). In Entick, the court quashed an executive warrant to search the home of a political dissident. It unequivocally repudiated the validity of such warrants stating that "no power" has the right to "break into a man's house and study to search for evidence against him . . . ." Id. at 1038-39, 95 Eng. Rep. at 812, 817-18. See Boyd v. United States, 116 U.S. 616 (1886) (Court indicates that fourth amendment was framed with Entick in mind). See also Leach v. Three of the Kings Messengers, 19 How. St. Tr. 1001 (1765); Wilkes v. Wood, 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (1763). See generally J. LANDYNSKI, supra note 6, at 19-61.

The Supreme Court recently stated that "the Fourth Amendment's commands grew in large measure out of the colonists' experience with the writ of assistance and their memories of the general warrants formerly used in England." United States v. Chadwick, 433 U.S. 1, 7-8 (1977). See also Stanford v. Texas, 379 U.S. 476, 481-85 (1965); Marcus v. Search Warrant, 367 U.S. 717, 724-29 (1961). The writs, which were issued in the name of the King, were excessive warrants permitting his agents to search virtually anywhere at anytime. See C. BEARD & M. BEARD, HISTORY OF THE UNITED STATES 88-89 (1932); F. DIETZ, A POLITICAL AND SOCIAL HISTORY OF
If the validity of a foreign security exception is assumed, the inclusion of physical searches is plausible. When *Katz* extended fourth amendment prohibitions to electronic surveillance, there remained little reason to exclude trespassory searches from the foreign security exception. The only basis for such an exclusion would be that non-trespassory electronic surveillance is potentially more intrusive than its trespassory counterpart.

At least one appellate court has recognized that both physical and electronic searches would be included if courts recognize a foreign security exception. In *United States v. Barker*, defendants were accused of breaking into and physically searching the office of Daniel Ellsberg's psychiatrist. They asserted a good faith belief that the break-in was authorized by President Nixon pursuant to his powers over foreign affairs. The validity of this defense depended on whether it was reasonable to believe that in 1971 the President had the power to authorize warrantless physical surveillance. Judge Wilkey

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52. See notes 32-36 supra and accompanying text.


> Electronic surveillance is perhaps the most objectionable of all types of searches in light of the intention of the Fourth Amendment. It is carried out against an unsuspecting individual in a dragnet fashion, taking in all of his conversations whether or not they are relevant to the purposes of the investigation and continuing over a considerable length of time. If the government’s “reasonableness” rationale [that warrantless electronic national security surveillance is “reasonable” within the meaning of the fourth amendment] is accepted in this case, then it would apply *a fortiori* to other types of searches. Since they are more limited in time, place and manner, they would be even more “reasonable.”


54. 546 F.2d 940 (D.C. Cir. 1976).

55. *Id.* at 943-44. Defendants were members of President Nixon's special investigations unit. Under the authorization of John D. Ehrlichman, Assistant to the President for Domestic Affairs, they conducted a break-in and search of the office of Dr. Louis Fielding. Daniel Ellsberg, a patient, had been suspected of leaking classified government documents. *Id.*

56. *Id.* at 945.

57. Defendants based their defense on a mistake of fact. They believed that President Nixon had authorized the allegedly illegal surveillance. Although the court found this belief
held that their belief was reasonable because no court had yet precluded Presidential authority to conduct warrantless wiretapping in cases involving foreign agents or collaborators. Furthermore, since Katz had discarded the distinction between trespassory and non-trespassory wiretaps, Judge Wilkey concluded that when the Court in Keith reserved judgment as to the legality of warrantless foreign security wiretaps, it implicitly reserved judgment as to the validity of trespassory foreign security searches.

III. Exemption and Exception

Those federal courts that have upheld the Executive's power to authorize warrantless foreign security surveillance advance one of two arguments. The first is that the Executive is exempt from judicial supervision when exercising its foreign affairs powers.

58. 546 F.2d at 954.
59. Id. at 950.
60. Id. at 953-54. See notes 32-36 supra and accompanying text.
61. 546 F.2d at 952. See notes 43-45 supra and accompanying text. Judge Wilkey's determination that Keith reserved judgment as to the validity of both trespassory and nontrespassory warrantless foreign security searches and seizures may also have been influenced by a memorandum submitted to the Barker court by the Ford Administration Justice Department. It reads in pertinent part:

In regard to warrantless searches related to foreign espionage or intelligence, the Department does not believe there is a constitutional difference between searches conducted by wiretapping and those involving physical entries into private premises. One form of search is no less serious than another. It is and has long been the Department's view that warrantless searches involving physical entries into private premises are justified under the proper circumstances when related to foreign espionage or intelligence.

Id. at 950. For Justice Department policy on surreptitious entries generally, see CHURCH COMM. REPORT III, supra note 24, at 366-71.

President Carter has similarly defined the scope of the exception. Exec. Order No. 12036, 43 Fed. Reg. 3674 (1978) (Executive authorized warrantless physical and electronic surveillance in situations involving "an agent of a foreign power").

62. See cases cited in note 7 supra.

In Keith, the Court cited United States v. Clay, 430 F.2d 165 (5th Cir. 1970); United States v. Clay, 430 F.2d 165 (5th Cir. 1970); United States v.
Constitution does not explicitly provide such an exemption, courts have implied it from three Presidential powers: the Commander in Chief powers, the power over the nation's foreign relations, and the power to protect the nation from foreign encroachment. The second argument recognizes an exception to the warrant requirement based on the need for efficient operation of the Executive's foreign policy-making apparatus. This exception is rooted in considerations of judicial competence to deal with subtle and complex foreign security issues, security risks, the nature of ongoing intelligence activities, delay, and administrative burden.

A. Is the President Exempt From Fourth Amendment Strictures in Foreign Security Cases?

In United States v. Curtiss-Wright Export Corp., the Court stated


64. On the President's powers in the area of foreign affairs, see generally L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972); A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER (1976).


that the President has "plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations . . . ." 71 Tracing the government's foreign affairs powers back to the cessation of British rule, the Court noted that even if such powers had not been mentioned in the Constitution, they would have existed "as necessary concomitants of nationality." 72 The Court subsequently cited Curtiss-Wright in Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 73 for the proposition that 

[the President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not 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. 74

Some courts have relied on this language to hold the Executive exempt from fourth amendment judicial scrutiny when exercising its foreign affairs powers. 75 Others have asserted that Executive decisions in this area are either nonjusticiable 76 or are to be accorded broad judicial deference. 77

Even though the President has "plenary and exclusive" power over foreign affairs, at least one court has held the exercise of those powers subject to the Bill of Rights. 78 In Keith, the Court indicated that the

71. 299 U.S. at 320 (dictum). The issue in Curtiss-Wright was whether a congressional resolution granting the President authority to prohibit arms shipments to countries in armed conflict was an unconstitutional delegation of legislative power. The focus of this Note is on whether the President has the power to act without legislative authorization.

72. Id. at 318.
73. 333 U.S. 103 (1948).
74. Id. at 111.
78. Zweibon v. Mitchell, 516 F.2d 594, 621-27 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976). As stated by Professor Henkin, "[n]othing in the Constitution suggests that the rights of individuals in respect of foreign affairs are different from what they are in relation to other exercises of governmental power." L. Henkin, supra note 64, at 252. Speaking more directly to the
warrant requirement limited executive power in domestic security cases. Unless the courts can develop a principled distinction between domestic and foreign security, it is unlikely that the latter will be exempted from the warrant requirement.

B. Is There a Foreign Security Exception to the Warrant Requirement?

The Supreme Court has based exceptions to the warrant requirement on considerations of practical necessity and public policy. To withstand fourth amendment scrutiny, the foreign security exception must rely on "special circumstances" which "necessitate a further exception to the warrant requirement." The risks of judicial error, security leaks, and delay are present in varying degrees in most kinds of investigation. It is suggested that the distinctive factor in foreign security cases is that the risks are much greater. Domestic threats, because of their focus, can often be detected and neutralized prior to implementation, whereas foreign threats may develop beyond our borders before the government can act. Further, some have asserted that because foreign powers possess substantially greater military strength than domestic...
dissidents, they pose a greater threat to national security.\textsuperscript{82}

Certain domestic information, however, may also pose a grave threat to national security.\textsuperscript{83} For example, information on the planned sabotage of a nuclear plant or a civil disorder is, of course, extremely important. Yet, under Keith, domestic security surveillance is subject to prior judicial authorization.\textsuperscript{84} The critical issue, therefore, is whether the grave risks and burdens involved in the more serious foreign security cases justify an exception to the warrant requirement in all cases where there is a substantial connection with a foreign power.

The D.C. Circuit in Zweibon \textit{v. Mitchell}\textsuperscript{85} found that the asserted justifications for a foreign security exception were insufficient. The Jewish Defense League brought suit against the Department of Justice for damages arising from warrantless wiretapping.\textsuperscript{86} The Justice Department asserted the legality of the surveillance based upon prior authorization by the Attorney General pursuant to executive authority over foreign affairs.\textsuperscript{87} Former Attorney General Mitchell submitted an affidavit stating that the surveillance was "deemed essential to protect this nation and its citizens against hostile acts of a foreign power and to obtain foreign intelligence information deemed essential to the

\begin{itemize}
\item \textsuperscript{82} See Stockholm International Peace Research Institute, World Armaments: The Nuclear Threat (1977); Stockholm International Peace Research Institute, Resources Devoted to Military Research and Development (1972).
\item \textsuperscript{83} See United States \textit{v. Butenko}, 494 F.2d 593, 629-30 (3d Cir.) (Gibbons, J., dissenting), \textit{cert. denied}, 419 U.S. 818 (1974). The court in Zweibon \textit{v. Mitchell}, 516 F.2d 594 (D.C. Cir. 1975), \textit{cert. denied}, 424 U.S. 944 (1976), rejected the argument that foreign threats are more serious than domestic threats, stating that it not only relegates "the personal interests protected by the Fourth and First Amendments to the level of second-class rights, it also naively equates all foreign threats with such dangers as another Pearl Harbor." \textit{Id.} at 646. Noting that the government has taken an expansive view of its responsibility to acquire foreign intelligence information, Senator Joseph Biden stated that such surveillance might include not only efforts to counter Soviet espionage programs directed at our military and defense secrets but the relationship of American oil companies to ARAMCO in anticipation of an oil boycott. Positive intelligence could involve not only surveillance to determine the Soviet Union's problems with its wheat harvest, but efforts on the part of Soviet or Indian trade attaches to discreetly contact grain cooperatives in this country in anticipation of seeking grain to supplement their inadequate harvests.
\item \textsuperscript{84} 407 U.S. at 321. See notes 42-45 \textit{supra} and accompanying text.
\item \textsuperscript{86} \textit{Id.} at 605-06. Plaintiff's damages claim was based on \textit{Bivens v. Six Unknown Named Agents}, 403 U.S. 388 (1971) (federal civil cause of action implied when government infringes fourth amendment rights), and on Omnibus, \textit{supra} note 37 (civil remedy under \S\ 2520).
\end{itemize}
security of the United States . . . ."\(^{88}\)

Judge Wright's plurality opinion rejected this defense, finding the foreign security nexus too tenuous to distinguish the case from Keith.\(^{89}\) He also rejected the notion that Presidential foreign affairs powers are exempt from the fourth amendment,\(^{90}\) and discounted proposed justifications for a foreign security exception.\(^{91}\) Although not faced with the activities of a foreign agent or collaborator,\(^{92}\) the plurality opinion indicated that "absent exigent circumstances, no wiretapping in the area of foreign affairs should be exempt from prior judicial scrutiny, irrespective of the justification for the surveillance or the importance of the information sought."\(^{93}\)

1. Judicial Competence

The first argument considered in Zweibon asserted that the judiciary is incompetent to deal with the subtle and complex issues of foreign security.\(^{94}\) The court found this argument unpersuasive.\(^{95}\) Assuming that there is a graver risk of error in foreign security cases, there is no reason to believe that federal judges are insensitive to the delicate issues and risks.\(^{96}\) As stated in Keith, "[i]f the threat is too subtle or complex for our senior law enforcement officers to convey its

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\(^{88}\) Id. at 607 & n.18 (affidavit of the Attorney General of the United States filed on June 12, 1971, in United States v. Bieber, No. 71-CR-479 (E.D.N.Y. July 23, 1971)).

\(^{89}\) See id. at 641-51. See also notes 42-45 supra and accompanying text.

\(^{90}\) 516 F.2d at 633. The court ruled for plaintiffs on both the Bivens claim and the Omnibus claim. See note 86 supra. But see Burkhart v. Saxbe, 448 F. Supp 588 (E.D. Pa. 1978) (Omnibus does not apply to national security surveillance).

\(^{91}\) 516 F.2d at 641-53.

\(^{92}\) Plaintiffs' activities ranged from peaceful demonstrations to acts of violence and included the bombing of the Amtorg and Intourist-Aeroflot offices in New York. They were protesting the restrictive emigration policies of the Soviet Union. Id. at 608. The Justice Department asserted that the JDL's activities, which had provoked Soviet diplomatic protest, posed a serious threat of retaliation against United States citizens residing in Moscow and therefore the use of a warrantless foreign security wiretap was justified. Id. at 608-09.

\(^{93}\) Id. at 651. But see Hearings on the Foreign Intelligence Surveillance Act of 1976 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 9 (1976) (testimony of Attorney General Levi) [hereinafter cited as 1976 Hearings]. The Attorney General testified that while the "Zweibon decision . . . has broad dicta among its several opinions . . . its holding in fact was quite limited and consistent with Butenko and Brown." Id. The Zweibon court further held that the surveillance violated Omnibus. 516 F.2d at 659-70. See Note, Electronic Intelligence Gathering and the Omnibus Crime Control and Safe Streets Act of 1968, 44 FORDHAM L. REV. 331 (1975). But see Burkhart v. Saxbe, 448 F. Supp. 588 (E.D. Pa. 1978).

\(^{94}\) 516 F.2d at 641-47.

\(^{95}\) Id. at 647.

\(^{96}\) Id. at 641-42. In the domestic security context, the Court stated that "[t]here is no rea-
significance to a court, one may question whether there is probable cause for surveillance." 97

The court noted that the government could further protect its interests by seeking a warrant from whichever judicial officer it believed would be most sympathetic to its position. 98 Moreover, the government may seek a warrant from a second judge should the first one fail to authorize the requested surveillance. 99 The government already acknowledges the judiciary's competence to conduct post hoc review of wiretaps installed pursuant to the President's foreign affairs powers. 100 Because the reasonableness of a search cannot be based on information secured after it occurs, 101 there is no reason to presume that judges are incompetent to examine a proposed surveillance before it occurs. 102 Finally, any judicial error would probably be in the government's favor. 103

While the Zweibon analysis is structurally sound, there are problems in its approach. In criminal cases, search warrant applications are

97. 516 F.2d at 641 (citing United States v. United States District Court, 407 U.S. at 320).
98. 516 F.2d at 645.
99. Id. at 645 n.147.
100. Id. at 644 (citing United States v. Hoffman, 334 F. Supp. 504, 506 (D.D.C. 1971) (recognizing government admission that post hoc judicial review is appropriate in national security cases)).
101. Id. at 644-45 (citing e.g., Beck v. Ohio, 379 U.S. 89, 96 (1964); Wong Sun v. United States, 371 U.S. 471, 479 (1963); Washington v. United States, 414 F.2d 1119, 1122 (1969) (dictum)).
102. Id. at 645.
103. Id. at 645 n.146; cf. Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111, 114 (1948) (executive decision granting or denying the right to engage in overseas air transportation nonreviewable because executive foreign policy decisions are political not judicial); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (internment of United States citizens of Japanese ancestry constitutional as emergency war measure); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-22 (1936) (dictum) (President's "plenary and exclusive" power over foreign affairs not limited to powers specifically enumerated in Constitution); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) (government's recognition of foreign power unreviewable because foreign relations are committed to "the political" branches of the federal government).

See generally L. Henkin, supra note 64, at 205-25. See also cases cited in note 7 supra.
often rubber stamped. Given the complexity of some foreign security issues and the government’s ability to approach the most sympathetic judges with multiple warrant applications, judicial deference would tend to be greater in foreign security cases. Under these circumstances, the warrant requirement could become meaningless form.

In May, 1977, Senator Edward Kennedy introduced S. 1566, a bill designed to curb governmental abuse of judicial warrant procedures in cases involving foreign intelligence surveillance. The bill provides that the Chief Justice of the United States shall select seven federal district judges to hear foreign security warrant applications, and three judges from either the federal district courts or courts of appeals to serve as a special court of appeals. If an application is denied, the government could seek review in the special court of appeals, and upon further denial, in the Supreme Court. The application could not be filed in any other court.

105. The fourth amendment contemplates a “neutral and detached magistrate” rather than a sympathetic judge. See Johnson v. United States, 333 U.S. 10, 14 (1948). As set forth in Zweibon, if a judge refuses to grant a warrant, the government can go to another judge. See notes 98-99 supra and accompanying text. Under such circumstances the warrant requirement would impose a meaningless burden on the government; it would eventually secure a warrant.

(a) The Chief Justice of the United States shall publicly designate seven district court judges, each of whom shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this chapter, except that no judge designated under this subsection shall have jurisdiction of the same application for electronic surveillance under this chapter which has been denied previously by another judge designated under this subsection. If any judge so designated denies an application for an order authorizing electronic surveillance under this chapter, such judge shall provide immediately for the record a written statement of each reason for his decision and, on motion of the United States, the record shall be transmitted, under seal, to the special court of review established in subsection (b).

(b) The Chief Justice shall publicly designate three judges, one of whom shall be publicly designated as the presiding judge, from the United States district courts or courts of appeals who together shall comprise a special court of review which shall have jurisdiction to review the denial of any application made under this chapter. If such special court determines that the application was properly denied, the special court shall immediately provide for the record a written statement of each reason for its decision and, on petition to the United States for a writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

107. S. 1566, supra note 106, subsection (a).
108. Id. subsection (b).
109. Id.
110. "Each application for an order approving electronic surveillance under this chapter shall
Assuming the Chief Justice would select judges on the basis of past performance and expertise in foreign security cases, the integrity of the selection process should allay fears of judicial incompetence in this area. By limiting the number of judges to whom a warrant application could be presented and eliminating duplicate applications, S. 1566 would protect the substance behind a warrant requirement. The practice of shopping for a sympathetic forum would be halted; fourth amendment rights and the governmental interest in national security would be protected without recognizing an exception to the warrant requirement.

2. Security Risks

The D.C. Circuit next considered the security risks involved in conveying foreign security information to judicial officers. Although the Supreme Court rejected this consideration in a case involving domestic security, it is possible that greater risks are involved in foreign security cases. Yet, the court in Zweibon rejected this contention. Warrant proceedings are conducted ex parte. Further, the government can protect its interests by seeking the warrant only from judges it trusts to be discrete.

Any security problems posed by the presence of judicial administrative personnel can be eliminated by having the government provide the necessary clerical personnel. Given the number of people already involved in such decisions, the additional review of a federal judge "poses a miniscule marginal risk of a security breach."

be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under section 2523 of this chapter." Id. § 2524.

111. The bill fails to provide criteria for selecting foreign security judges. While common sense and the discretion of the Chief Justice would seem to dictate that experience and trustworthiness be prerequisites, Congress should include definitive guidelines prior to passage.

112. 516 F.2d at 647-48.


114. See notes 81-83 supra and accompanying text.

115. 516 F.2d at 647.


117. 516 F.2d at 647 n.157. The court cited a statement by former Attorney General Saxbe indicating that numerous individuals within the FBI and the Department of Justice are involved in the process of deciding whether surveillance will be initiated. Id. at 643. See Hearings on Electronic Surveillance for National Security Purposes Before the Subcomm. on Criminal Laws and Procedures and Constitutional Rights of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess. 235 (1974) (testimony of Attorney General Saxbe).
Under S. 1566, warrant proceedings would continue to be conducted ex parte. The bill further provides that such proceedings should be conducted expeditiously and that the court records be sealed and securely maintained. Unfortunately, S. 1566 fails to provide for government supplied administrative personnel; however, in light of Supreme Court approval of such a procedure and the lack of an express prohibition in S. 1566, an Executive request for this safeguard would probably be approved. The Chief Justice would certainly be aware of the need for trustworthiness when selecting foreign security judges; it is therefore highly unlikely that among seven carefully selected judges, the government would be unable to secure discrete review.

Given the analysis in Zweibon and the procedures set forth in S. 1566, the security risks posed by a warrant requirement would be minimized. Apart from S. 1566, Zweibon found existing safeguards sufficient. The Executive, Congress, and the Court could resolve any remaining security problems by establishing appropriate procedural safeguards; therefore, a security risk justification for an exception to the warrant requirement is unpersuasive.

3. Ongoing Intelligence-Gathering Activities

A third argument considered in Zweibon asserted a distinction between ongoing foreign security surveillance aimed at collecting strategic intelligence information and surveillance aimed at criminal prosecution. The government argued that because foreign security surveillance is not directed to securing evidence for use in a criminal prosecution, it is less offensive to fourth amendment values and therefore should be accorded greater judicial deference. The court, how-

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118. S. 1566, supra note 106, § 2525 (a).
119. Id. § 2523(c).
120. United States v. United States District Court, 407 U.S. at 321.
121. The Chief Justice probably could establish this procedure pursuant to the authorization to create security measures. S. 1566, supra note 106, § 2523(c). Because the bill provides that the records of proceedings are to be maintained under these security measures, it appears that the Chief Justice's authority would extend to the ex parte hearing.
122. See note 111 supra.
123. 516 F.2d at 648-49.
124. In his testimony before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Attorney General Levi attempted to distinguish intelligence from law enforcement surveillance, asserting that the former requires fewer constitutional safeguards. According to Levi:

The effect of a government intrusion on individual security is a function, not only of the
ever, rejected this rationale. Successful foreign security surveillance is likely to uncover evidence of criminal activity such as espionage, treason, or sabotage. The government has demonstrated its willingness to use the fruits of such surveillance in criminal prosecutions; therefore, any distinction based on whether the aim of the surveillance is investigatory or evidentiary is unpersuasive. Furthermore, the fourth amendment protects privacy interests which will be invaded regardless of the aim of the surveillance. The ongoing nature of foreign security surveillance merely increases the invasion by prolonging the intrusion. Under S. 1566, information obtained by judicially approved foreign security surveillance concerning a United States citizen or resident alien may be used "for the enforcement of the criminal law

intrusion's nature and circumstances, but also of disclosure and of the use to which its product is put. Its effects are perhaps greatest when it is employed or can be employed to impose criminal sanctions or to deter, by disclosure, the exercise of individual freedoms. In short, the use of the product seized bears upon the reasonableness of the search.

Hearings on Intelligence Activities Before the Senate Select Comm. to Study Governmental Operations With Respect to Intelligence Activities, 94th Cong., 1st Sess. 101 (1975) (testimony of Attorney General Levi) [hereinafter cited as 1975 Hearings].

125. 516 F.2d at 648-49.
127. Id. §§ 2381-91 (1970) (also covering sedition and subversive activities).
128. Id. §§ 2151-57.

An officer who has obtained a warrant based upon probable cause to search for particular items may in conducting the search necessarily have to examine other items, some of which may constitute evidence of an entirely distinct crime. The normal rule under the plain view doctrine is that the officer may seize the latter incriminating items as well as those specifically identified in the warrant so long as the scope of the authorized search is not exceeded.

1975 Hearings, supra note 124, at 100-01 (testimony of Attorney General Levi).
132. 516 F.2d at 649.

if its use outweighs the possible harm to national security;” and the
Attorney General approves its use in advance.\textsuperscript{133} Realistically, any
broad prohibition on government use of such information would be
unenforceable. The government could easily utilize illegally obtained
leads to secure admissible evidence.

The government has demonstrated that it will, in criminal prosecu-
tions, use information obtained from foreign security surveillance.\textsuperscript{134}
The assertion that such surveillance is less intrusive because it is not
aimed at discovering criminal activity, therefore, has little validity. But
apart from that distinction,\textsuperscript{Zweibon} recognized that ongoing surveil-
lance violates legitimate privacy interests. As such, it should be subject
to fourth amendment strictures.

4. \textit{Delay}

The government asserted that the delay inherent in the warrant pro-
cedure might result in a loss of information essential to national secur-
ity.\textsuperscript{135} Yet, competent foreign security operations require careful and
lengthy planning.\textsuperscript{136} Ample time should exist for obtaining a warrant.
If exigent circumstances should arise, a recognized exception to the
warrant requirement based on practical necessity would apply.\textsuperscript{137} It

\begin{itemize}
\item \textsuperscript{133} S. 1566, \textit{supra} note 106, § 2526 (a) & (b). The bill provides:
\begin{itemize}
\item \textsuperscript{(a)} Information concerning United States persons acquired from an electronic sur-
veillance conducted pursuant to this chapter may be used and disclosed by Federal
officers and employees without the consent of the United States person . . . for the
enforcement of the criminal law if its use outweighs the possible harm to national secu-
rit y. No otherwise privileged communication obtained in accordance with, or in viola-
tion of, the provisions of this chapter shall lose its privileged character.
\item \textsuperscript{(b)} The minimization procedures under this chapter shall not preclude the retention
and disclosure, for law enforcement purposes, of any information which constitutes evi-
dence of a crime if such disclosure is accompanied by a statement that such evidence, or
any information derived therefrom, may only be used in a criminal proceeding with the
advanced authorization of the Attorney General.
\end{itemize}
\textit{Id.}
\item \textsuperscript{134} See note 129 \textit{supra}.
\item \textsuperscript{135} 516 F.2d at 649.
\item \textsuperscript{136} Attorney General Saxbe set out detailed requirements for obtaining authorization of for-
eign security surveillance. If a request for warrantless surveillance originates in an FBI field
office, the proposal will be considered by eleven levels of supervision before it reaches the Attor-
ney General’s office. \textit{Hearings on Electronic Surveillance for National Security Purposes Before
the Subcomm. on Criminal Laws and Procedures and Constitutional Rights of the Senate Comm. on
F.2d at 643.
\item \textsuperscript{137} See \textit{Warden v. Hayden}, 387 U.S. 294 (1967) (exigent circumstances exception); \textit{Schmer-
§ 2525(d), also provides an exigent circumstances exception. The exception applies when the At-
torney General reasonably determines that:

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would therefore be illogical to grant a special exception for all foreign security cases simply because some may involve emergency situations when those situations are covered by an existing exception.

5. **Administrative Burden**

*Zweibon* rejected the administrative burden argument as it applies to both the judiciary and the Executive.\(^{138}\) Regarding the judiciary, the argument is that the complexity and seriousness of foreign security make these cases unduly burdensome and that the present caseload is so heavy that it should not be further saddled.\(^{139}\) Essentially, the complexity argument is one of judicial competence and was resolved in favor of the judiciary in a preceding section of the *Zweibon* decision.\(^{140}\) Regarding the effect on already heavily burdened caseloads, the court maintained that it is the task of the courts to deal with complex issues.\(^{141}\) A case otherwise subject to judicial review cannot be avoided for reasons of mere convenience. As stated by Chief Justice Marshall, the courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."\(^{142}\)

For the Executive, there are admittedly greater administrative burdens involved in securing a warrant than in conducting surveillance independent of judicial supervision.\(^{143}\) The burden of securing prior approval, however, is insufficient to justify an exception to the warrant requirement.\(^{144}\) As noted in *Zweibon*, the government has asserted

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\(^{138}\) *id.* \& (1) an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained, and

\(^{139}\) *id.* & (2) the factual basis for issuance of an order under this chapter to approve such surveillance exists, he may authorize the emergency employment of electronic surveillance if a judge designated pursuant to section 2523 of this chapter is informed by the Attorney General or his designate at the time of such authorization that the decision has been made to employ emergency electronic surveillance and if an application in accordance with this chapter is made to that judge as soon as practical, but not more than twenty-four hours after the Attorney General authorizes such surveillance.

*Id.* § 2525(d)(1) & (2).

138. 516 F.2d at 650-51.

139. *Id.* at 650.

140. See notes 94-103 supra and accompanying text.

141. 516 F.2d at 650-51.

142. *Id.* at 651 (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 262, 404 (1821)).

143. *Id.*

144. *Id.* See United States v. Robinson, 414 U.S. 218, 259 n.7 (1973) (Marshall, J., dissenting) ("Mere administrative inconvenience . . . cannot justify invasion of Fourth Amendment rights."); Chimel v. California, 395 U.S. 752, 768 n.16 (1969) (state's argument that it would be "unduly burdensome to obtain a warrant specifying" items to be seized, rejected as meritless).
that the number of foreign security wiretaps is small.\textsuperscript{145} The costs and burdens of securing a warrant in appropriate cases should therefore be proportionally small.\textsuperscript{146}

IV. CONGRESSIONAL REACTION

A. The Church Committee

In 1976, the Senate Select Committee to Study Government Operations With Respect to Intelligence Activities\textsuperscript{147} proposed that all non-consensual electronic surveillance of citizens and resident aliens be conducted under judicial warrants\textsuperscript{148} issued pursuant to Omnibus.\textsuperscript{149} The Committee proposed that less stringent standards be applied when a warrant is sought for the electronic surveillance of foreigners.\textsuperscript{150} Courts could issue these warrants when there is probable cause for believing the “target is an officer, employee, or conscious agent of a foreign power,”\textsuperscript{151} the Attorney General certifies that foreign security information essential to the national security is “likely” to be re-

\begin{table}
\begin{tabular}{|c|c|}
\hline
Year & Number of Wiretaps (in Parentheses) for Foreigners Only \tabularnewline
\hline
1945 & 519 (1959) \tabularnewline
1946 & 346 (1960) \tabularnewline
1947 & 374 (1961) \tabularnewline
1948 & 416 (1962) \tabularnewline
1949 & 471 (1963) \tabularnewline
1950 & 270 (1964) \tabularnewline
1951 & 285 (1965) \tabularnewline
1952 & 285 (1966) \tabularnewline
1953 & 300 (1967) \tabularnewline
1954 & 322 (1968) \tabularnewline
1955 & 214 (1969) \tabularnewline
1956 & 164 (1970) \tabularnewline
1957 & 173 (1971) \tabularnewline
1958 & 166 (1972) \tabularnewline
\hline
\end{tabular}
\end{table}

\textit{Id.} at 51. Professor Schwartz noted that the figures used in assembling this table were “understated, fragmentary and ambiguous.” \textit{Id.}

\textsuperscript{145} 516 F.2d at 651 n.182. The following table of national security wiretaps was compiled from White House figures and printed in Schwartz, \textit{Reflections on Six Years of Legitimated Electronic Surveillance}, in \textit{Privacy in a Free Society} 38 (1974) (final report of The Annual Chief Justice Earl Warren Conference on Advocacy in the United States):

\textsuperscript{146} 516 F.2d at 651 n.182.


\textsuperscript{148} \textit{Id.} at 327 (Recommendation 51).

\textsuperscript{149} \textit{Id.} (Recommendation 52). For a discussion of the procedures mandated by Omnibus, see note 165 infra.

\textsuperscript{150} \textit{CHURCH COMM. REPORT II}, supra note 147, at 327 (Recommendation 52). As to the constitutionality of distinguishing between United States citizens and foreigners, see notes 190-99 infra and accompanying text.

\textsuperscript{151} \textit{CHURCH COMM. REPORT II}, supra note 147, at 327 (Recommendation 52).
vealed, and the issuing judge adopts "procedures to minimize the acquisition and retention of nonforeign intelligence information about Americans." To protect foreign security information, the Committee proposed that foreign security electronic surveillance "should be exempt from the disclosure requirements of [Omnibus] as to foreigners generally" and Americans "involved in hostile foreign intelligence activities."

Regarding physical surveillance, the Committee stated that "[u]nauthorized entry should be conducted only upon judicial warrants issued on probable cause to believe that the place to be searched contains evidence of a crime . . . ." The Committee's recommendation, however, would allow surreptitious entry "against foreigners who are officers, employees, or conscious agents of a foreign power," if conducted pursuant to a judicial warrant issued under the less stringent standards applicable in cases involving electronic surveillance of foreigners.

B. Proposed Bills

In March, 1976, Senator Edward Kennedy, supported by Attorney General Edward H. Levi, introduced S. 3197. This bill would permit the issuance of a warrant for electronic surveillance of foreign agents—defined as including American citizens and resident aliens—upon a finding of probable cause to believe that the target is

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152. Id.
153. Id.
154. Id. at 328. Omnibus requires the issuing judge to notify the subject of electronic surveillance within a reasonable time but not later than ninety days from the expiration of the warrant. 18 U.S.C. § 2518 (8)(d) (1970). Omnibus further requires that the issuing judge, "upon the filing of a motion, may in his discretion make available to [the subject of electronic surveillance or] his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice." CHURCH COMM. REPORT II, supra note 147, at 328.
155. CHURCH COMM. REPORT II, supra note 147, at 328 (Recommendation 54).
156. Id. See notes 150-53 supra and accompanying text.
158. The bill defines "agent of a foreign power" as
(i) a person who is not a permanent resident alien or citizen of the United States and
who is an officer or employee of a foreign power; or
a foreign agent.\textsuperscript{159} It fails to require either certification by the Attorney General that foreign intelligence information essential to national security is likely to be obtained, or a showing of probable cause to believe that such information may be found at the place to be searched.\textsuperscript{160} Furthermore, the bill disclaims any limitation on the President's power to procure foreign intelligence information if it is acquired by means other than electronic surveillance; or the circumstances "are so unprecedented and potentially harmful to the Nation that they cannot be reasonably said to have been within the contemplation of Congress."\textsuperscript{161}

S. 3197 would provide a warrant requirement in foreign security electronic surveillance cases.\textsuperscript{162} It would, however, expand the defined group of foreign security surveillance targets by encompassing United States citizens and resident aliens\textsuperscript{163} while permitting surveillance of this expanded group without probable cause to believe the surveillance would reveal foreign security information.\textsuperscript{164} Furthermore, the procedural safeguards of S. 3197 are inadequate. The bill would permit nonconsensual surveillance of citizens and resident aliens without ad-
herence to certain Omnibus procedures. It specifically provides that its procedures "shall not preclude . . . disclosure, for law enforcement purposes, of any information which constitutes evidence of a crime . . . ." In light of the frequency with which the government uses such surveillance to obtain evidence of criminal activity, this provision is contrary to the Church Committee's preference for the protections of Omnibus.

The bill does not provide any procedural protection from physical surveillance. Its disclaimer as to inherent Presidential powers to conduct surveillance by means other than electronic surveillance raises questions of congressional interpretation of Presidential power in foreign security cases. If S. 3197 becomes law, the Executive would certainly continue to assert the validity of warrantless physical searches. Whether Congress can place any limits on the exercise of Presidential powers is an open question. Nevertheless, passage of S. 3197, with the disclaimer, would demonstrate that even Congress is

165. The Church committee recommended compliance with Omnibus as a prerequisite to such surveillance. See notes 148-50 supra and accompanying text. Omnibus requires, inter alia, that prior to issuing a warrant the presiding judge find probable cause to believe that a particular offense is being or has been committed, 18 U.S.C. § 2518(3)(a) (1970); that the applicant will obtain "particular communications concerning that offense," id. § 2518(3)(b); and, that the facilities subject to the requested surveillance are connected with that offense, id. § 2518(3)(d). See also notes 37-41 supra and accompanying text. Specifically, S. 3197 would permit electronic surveillance of noncriminal activity. Unlike Omnibus, the bill requires probable cause for believing that the subject of surveillance is a foreign agent. Compare S. 3197, supra note 157, § 2525(a)(3)(i), with 18 U.S.C. § 2518(3)(a) (1970).

166. S. 3197, supra note 157, § 2526(b).

167. See note 129 supra and accompanying text.

168. See notes 148-49, 165 supra and accompanying text.

169. See note 161 supra and accompanying text.

170. S. 3197, supra note 157, § 2528(a).

171. See note 61 supra and accompanying text. The bill disclaims any limits on the President's constitutional power to acquire foreign intelligence information by means other than electronic surveillance; the Executive, therefore, would lack any incentive to discontinue physical surveillance. Senator Bidwell characterized S. 3197 as, "in effect a 'backdoor' charter for foreign intelligence activities." FOREIGN INTELLIGENCE ACT REPORT, supra note 83, at 73. At the Senate hearings on S. 3197, former Attorney General Levi justified the disclaimer as to Presidential powers by stating his belief that "there is an area where the Congress can establish procedures to govern the exercise of power and I think this bill does that. And there is undoubtedly an area where it cannot, and this bill should recognize that." 1976 Hearings, supra note 93, at 20.

172. See Schick v. Reed, 419 U.S. 256 (1974) (Congress cannot limit Presidential power to grant pardons); Meyers v. United States, 272 U.S. 106 (1926) (Court upholds Presidential power to remove a postmaster in violation of a statute requiring prior Senate approval); L. HENKIN, supra note 64, at 92-94. See also United States v. Curtiss-Wright Export Corp., 299 U.S. 318, 320 (1936) (President has "plenary and exclusive power" over foreign relations). But see notes 174-78 infra and accompanying text.
uncertain as to the limits it can impose on the President’s conduct of foreign affairs.\textsuperscript{173}

Congress conceivably could assert concurrent power over foreign security surveillance by implication from the constitutional powers to: “define and punish . . . Offenses against the Law of Nations;”\textsuperscript{174} “regulate commerce with foreign Nations;”\textsuperscript{175} “declare War;”\textsuperscript{176} and, “make all Laws which shall be necessary and proper for carrying into execution” all powers vested by the Constitution “in the Government of the United States, or in any Department or Officer thereof.”\textsuperscript{177} The Supreme Court has stated that the conduct of foreign relations is committed by the Constitution to the executive and legislative branches.\textsuperscript{178} Thus, the concurrent powers theory has both constitutional and judicial support. As S. 3197 stands, its disclaimer provision would merely perpetuate the law’s imprecision in this area.

On May 18, 1977, Senator Kennedy, supported by Attorney General Bell, introduced S. 1566.\textsuperscript{179} As the Church Committee suggested, S. 1566 distinguishes citizens and resident aliens from foreigners in gen-

\textsuperscript{173} This uncertainty can be detected in the Senate Report on S. 3197 which describes the bill’s prefatory language on presidential powers as “designed to make it absolutely clear that this section constitutes neither a grant of, nor a limitation on, such power nor a congressional recognition of such power.” FOREIGN INTELLIGENCE ACT REPORT, supra note 83, at 46-47. It explained this position by stating that “[o]nly the Supreme Court can ultimately decide whether such power exists. Accordingly, the committee emphasizes the neutrality of the prefatory language.” Id. Senator Biden recognized that “[s]ection 2528 of the bill preserves intact the concept of inherent presidential authority to spy on Americans. This was of course the basic argument in defense of many Watergate illegalities. It is the only authority for the Federal government’s huge National Security Agency electronic surveillance program.” Id. at 73.

\textsuperscript{174} U.S. CONST. art. I, § 8, cl. 3. See generally L. HENKIN, supra note 64, at 72-74.
\textsuperscript{175} U.S. CONST. art. I, § 8, cl. 3. See generally L. HENKIN, supra note 64, at 69-71.
\textsuperscript{176} U.S. CONST. art. I, § 8, cl. 11. See generally L. HENKIN, supra note 64, at 80-81.
\textsuperscript{177} U.S. CONST. art. I, § 8, cl. 18. But see note 172 supra and accompanying text.
eral. For a citizen or resident alien to be classified as a foreign agent, the government would have to establish probable cause to believe that the suspect knowingly provided assistance to a foreign power in a manner harmful to the United States. Foreigners could be classified as foreign agents simply by being officers or employees of a foreign nation. Like S. 3197, the bill would permit the issuance of warrants upon a finding of probable cause to believe that the target is a foreign agent. It does not, however, require a showing of probable cause to believe that foreign intelligence information essential to national security will be obtained.

Although S. 1566 disclaims any limitation on foreign security surveillance by means other than electronics, it does not contain a dis-

180. CHURCH COMM. REPORT II, supra note 147, at 327-28 (Recommendations 52 & 54). See notes 148-56 supra and accompanying text.

181. The section of the bill that applies to citizens and resident aliens defines "[a]gent of a foreign power" as any person who

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

(ii) knowingly engages in activities that involve sabotage or terrorism for or on behalf of a foreign power;

(iii) pursuant to the direction of an intelligence service or intelligence network of a foreign power, knowingly collects or transmits information or material to an intelligence service or intelligence network of a foreign power in a manner intended to conceal the nature of such information or material or the fact of such transmission or collection, under circumstances which indicate the transmission of such information or material would be harmful to the security of the United States, or that lack of knowledge by the United States of such collection or transmission would be harmful to the security of the United States; or

(iv) conspires with or knowingly aids or abets any person engaged in activities described in subsections B(i) or (iii) above.

S. 1566, supra note 106, § 2521(b)(2)(B).

182. The section of the bill that applies to foreigners defines "[a]gent of a foreign power" as any person other than a citizen or resident alien who

(i) is an officer or employee of a foreign power;

(ii) knowingly engages in clandestine intelligence activities for or on behalf of a foreign power under circumstances which indicate that such activities would be harmful to the security of the United States; or

(iii) conspires with or knowingly aids or abets a person described in paragraph (ii) above.

Id. § 2521(b)(2)(A).

183. See id. § 2524(a)(7)(A, B, & C).

184. Id. See also note 160 supra and accompanying text.

185. The bill states that [n]othing contained in this chapter, or section 605 of the Communication Act of 1934 (47 U.S.C. 605) shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international communications by a means other than electronic surveillance as defined in section 2521(b)(6) of this title.

S. 1566, supra note 106, at 28.
claimer as to Presidential powers. The bill clearly provides that, along with Omnibus, it would constitute the exclusive means by which electronic surveillance could be conducted in the United States. Although the bill fails to espouse the concurrent powers theory, its failure to mention inherent Presidential powers implies an assertion of congressional authority over foreign security surveillance. It therefore leaves the door open for future legislation limiting Executive discretion.

The distinction between United States citizens, resident aliens, and other foreigners is troublesome. Under certain circumstances, United States citizens would still be subject to legal surveillance without the protections of Omnibus. Foreign employees such as ambassadors or foreign government business representatives certainly have frequent conversations with American citizens. Such conversations could be intercepted without the protections of Omnibus if a warrant were obtained against the foreign employee under S. 1566 procedures. Because the bill does not require a showing of probable cause to believe that essential foreign intelligence information is likely to be obtained, the government might be tempted to use a foreign security rationale to acquire information on United States citizens.

186. At the Senate hearings on S. 1566 Attorney General Griffin Bell recognized the lack of a disclaimer as a specific area "in which this bill increases protections for Americans as against [S. 3197]." 1977 Hearings, supra note 53, at 14-15. Senator Kennedy stated that S. 1566 "expressly limits whatever inherent power the President may have to engage in such electronic surveillance in the United States." Id. at 2. When Senator Thurmond, however, asked Attorney General Bell if it was his "position that even though this language is deleted from the bill, the inherent presidential power is preserved as interpreted by the courts?" the Attorney General responded: "Yes. Because we can't change the Constitution." Id. at 26.

188. See notes 174-78 supra and accompanying text.
189. See note 186 supra.
190. See notes 154 & 165 supra.
191. As stated by the Church Committee:

Because wiretaps and bugs are capable of intercepting all conversations on a particular telephone or in a particular area, American citizens with whom the foreign targets communicate are also overheard, and information irrelevant to the purpose of the surveillance may be collected and disseminated to senior administration officials.

CHURCH COMM. REPORT III, supra note 24, at 312. Specifically, the Committee noted that Presidents Nixon and Johnson were supplied with information on Congressmen through FBI surveillance of foreign establishments. Id. at 313-14. President Johnson obtained information on a prominent member of the Republican party through physical and electronic surveillance of the South Vietnamese Embassy. Id. at 314-15. See also 1977 Hearings, supra note 53, at 94-95 (comments of Morton H. Halperin).

192. See note 184 supra and accompanying text.
193. Suppose that an employee of a foreign embassy was a close friend of a political adver-
Furthermore, the fourth amendment does not distinguish between citizens and foreigners. It protects "persons." During the legislative hearings on S. 1566, Attorney General Bell admitted that "[t]here is no doubt that the fourth amendment protects aliens in the United States . . . ." Yet, according to the Attorney General, S. 1566 satisfies the fourth amendment by requiring a judicial warrant prior to the implementation of surveillance against foreigners, even though the warrant may issue under a lesser showing than is required for American citizens or resident aliens.

The case law provides support both for and against the Attorney General's position. The Supreme Court has stated that an alien is entitled to an "ascending scale of rights as he increases his identity with our society." Yet, it has also afforded full fourth amendment protections to aliens illegally in the United States. Moreover, the Court has declared alienage a suspect classification, protecting aliens from arbitrary and discriminatory governmental action. Thus, whether the Court would uphold S. 1566's distinction between United States citizens, resident aliens, and foreigners is an open question.

sary of the President. Under S. 1566, the government could legally tap the telephone of the foreign embassy employee, see note 191 supra and accompanying text, in hopes of overhearing politically valuable or incriminating conversations between the two friends. By requiring a showing of probable cause to believe that essential foreign security information is likely to be obtained by the proposed search, such executive abuses could be curbed. Cf. United States v. United States District Court, 407 U.S. 297, 317 (1972) (fourth amendment contemplates prior judicial determination, not the risk that executive discretion may be reasonably exercised); Katz v. United States, 389 U.S. 347, 358-59 (1967) (fourth amendment requires neutral determination of probable cause).

194. U.S. CONSt. amend. IV.
196. Id.
199. In Graham v. Richardson, 403 U.S. 365 (1971), the Court stated that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority . . . for whom such heightened judicial solicitude is appropriate." Id. at 372. On the rights of aliens generally, see L. Henkin, supra note 64, at 254-55; Gordon, The Alien and the Constitution, 9 CAL. W.L. REV. 1 (1972).
Perhaps the most serious defect in S. 1566 is that like S. 3197 it disclaims any limitation on foreign security surveillance by means other than electronic surveillance. This leaves serious questions as to the legality of warrantless foreign security physical searches unresolved. Thus, even if one of these bills were enacted, the foreign security issue would remain alive. Resolution would ultimately depend on an appropriate case reaching the Supreme Court or further legislation. In the interim, the Executive can continue to assert the validity of warrantless physical foreign security searches.

C. Why Congress Should Act

In January, 1978, President Carter issued Executive Order 12036 regarding United States intelligence activities. The order asserts that intelligence activities "must be conducted in a manner that preserves and respects established concepts of privacy and civil liberties." Yet, it would permit warrantless intelligence activities when the President and Attorney General authorize such activities upon a finding of probable cause to believe the target is an "agent of a foreign power." The order leaves the term "agent of a foreign power" undefined, and permits both warrantless physical and electronic surveillance. Furthermore, it fails to require probable cause to believe information deemed essential to national security is likely to be obtained.

The order is ripe for Executive abuse. It provides no guidelines for determining who is an "agent of a foreign power." Many individuals with merely a business, personal, or political connection to a foreign nation could conceivably be included. Its substantive protections are also unclear. The Executive offers only its good faith. Unfortunately,
executive good faith is an inadequate protection for individual constitutional rights.\textsuperscript{206}

The Executive, however, has indicated a willingness to abide by congressional legislation placing reasonable limits on foreign security surveillance.\textsuperscript{207} The existing potential for executive abuse should be sufficient to prompt legislative action. Yet independent of this, Congress should act because of the possibility of restrictive judicial reaction to the foreign security issue.\textsuperscript{208}

Should a foreign security issue reach the Supreme Court, its decision could take a number of directions. The Court could recognize inherent Presidential powers and determine that the Executive is exempt from fourth amendment prohibitions in foreign security cases.\textsuperscript{209} The Court might limit its holding by recognizing an exception to the warrant requirement based on the special circumstances and needs of national defense.\textsuperscript{210} In either situation, if the Court relied solely on inherent executive power, subsequent congressional action would be ineffective.\textsuperscript{211} Alternatively, the Court could determine that foreign policy decisions are within the domain of the political branches of government and recognize congressional as well as executive authority.\textsuperscript{212}

\textsuperscript{206} The fourth amendment owes its origin to its framers' fears of potential executive abuse of warrantless search powers. \textit{See} note 51 \textit{supra}.

\textsuperscript{207} \textit{See} 1977 \textit{Hearings, supra} note 53, at 13-17, 26 (statement and comments of Attorney General Bell).

\textsuperscript{208} Expeditious congressional action is also needed because violations of individual privacy, under the guise of a good faith belief in the legality of warrantless foreign security searches, will likely remain without civil remedy until the law is clarified. \textit{Cf.} United States v. Barker, 546 F.2d 940, 954 (D.C. Cir. 1976) (no civil liability because defendants reasonably believed their surreptitious warrantless search was legally authorized by the President); Zweibon v. Mitchell, 444 F. Supp. 1296 (D.D.C. 1978) (on remand from 516 F.2d 594 (D.C. Cir. 1975), \textit{cert. dened}, 424 U.S. 944 (1976)) (because the Zweibon surveillance was prior to Keith, it was reasonable, at the time, to believe that warrantless national security surveillance was legal; therefore, no civil liability should attach); Halperin v. Kissinger, 424 F. Supp. 838, 842 (D.D.C. 1976) (surveillance prior to Keith).


\textsuperscript{211} \textit{See} note 172 \textit{supra} and accompanying text. Alternatively, the Court might follow Zweibon and hold all foreign security searches subject to the warrant requirement. In that situation, prior congressional action would also not be very meaningful.

\textsuperscript{212} \textit{See} text accompanying notes 174-78. For a summary of cases in which the Court deferred to the political branches in the area of foreign affairs, see Baker v. Carr, 369 U.S. 186, 211-13 (1962). The Court in \textit{Baker} stated that

\begin{quote}
\textit{[t]here are sweeping statements to the effect that all questions touching on foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application or involve the exercise of a discretion demonstra-}
\end{quote}
S. 1566 is needed for its definition of those who are to be classified as agents of a foreign power. S. 1566 and Executive Order 12036 allow a warrant to issue on a lesser showing of involvement in foreign intelligence activities for foreigners than is required for United States citizens or resident aliens. As stated earlier, the constitutional validity of this classification is an open question. Yet, given the vagueness of Executive Order 12036, S. 1566 would at least provide more definitive procedural protections for the rights of United States citizens and resident aliens.

V. Conclusion

Neither Congress nor the Court has assumed responsibility for eliminating the current confusion surrounding foreign security surveillance. Thus, the Executive may now assert the legality of warrantless electronic and physical surveillance in cases involving foreign agents or collaborators. This state of affairs is unacceptable. From Entick v. Carrington to the surreptitious activities of President Nixon, one lesson cuts across history: Executive discretion is subject to abuse. Presidential power is too often used for private political gain at the expense of individual rights. The fourth amendment was adopted to...
prevent such abuse.221

This Note suggests that all warrantless searches and seizures authorized by the Executive are unconstitutional. The District of Columbia Circuit's approach in Zweibon v. Mitchell illustrates the fallacies in the reasoning of federal courts that have upheld warrantless surveillance. Potential abuse by the Executive of a foreign security exception to the fourth amendment warrant requirement demands expeditious action by Congress or the Court.

On April 20, 1978, the Senate passed S. 1566. See note 106 supra. As this Note went to press, the House had yet to act on its version of the bill.

Andrew Puzder

221. See note 51 supra.