

THE CONSTITUTION AND THE NSA WARRANTLESS WIRETAPPING PROGRAM: A FOURTH AMENDMENT VIOLATION?

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ABSTRACT

The tragic event of the Sept. 11 terrorist attack persuaded President George W. Bush to authorize the National Security Agency (NSA) to engage in a warrantless wiretapping program aimed at monitoring international phone conversations between persons residing in the United States and persons believed to be affiliated with terrorist organizations. A firestorm of controversy emerged with heated debate about the legality of the NSA program. Legal scholars' opinions about the legality of the program widely varied, with some suggesting that the program was a glaring violation of the law while others argued that the President was within the law and that his actions were necessary to protect the security of the nation.

This article addresses whether the NSA spying program violates the Fourth Amendment by examining various legal cases and policy issues. The existing legal literature addressing this question has primarily focused on whether the NSA program violates the Foreign Intelligence Surveillance Act. This article pushes the current debate further by addressing the equally important, but rather difficult question, of whether the NSA spying program violates the Fourth Amendment.

Since the government has not revealed the precise details of the NSA warrantless wiretapping program, the article will construct, and then examine the ramifications of, two different models of how the NSA program likely functions in order to assess the constitutionality of the program as a whole. The article argues that the narrow model of the NSA program is constitutional and would be upheld by the courts, whereas the expansive model of the NSA program would be declared unconstitutional because it violates the Fourth Amendment. The article emphasizes the critically important role that the neutral judge, by only issuing to the government warrants based upon probable cause, plays in upholding and safeguarding the cherished privacy rights the Fourth Amendment guarantees all Americans.

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I. INTRODUCTION

On September 11, 2001, America suffered the most serious and devastating attack ever perpetrated on U.S. soil.¹ The tragic event of the Sept. 11 terrorist attack persuaded President George W. Bush to authorize the National Security Agency (NSA) to engage in a warrantless wiretapping program aimed at monitoring international phone conversations between persons residing in the United States and persons believed to be affiliated with terrorist organizations. In December 2005, the public became aware of the warrantless wiretapping program when the *New York Times* ran a report on the program.² The specific details of the wiretapping program have not been disclosed to the public, but it is not disputed that the program allowed the NSA to monitor international phone calls and e-mails without first seeking a search warrant from a neutral judge.

Shortly after the public became aware that a critical element of the NSA program included allowing the NSA, a part of the Executive Branch, to monitor international communications without first seeking the approval of a neutral judge, a firestorm of controversy emerged with heated debate about the legality of the NSA program.³ Not surprisingly, legal scholars' opinions about the legality of the program widely varied. Some legal scholars suggested that the program was a glaring violation of the law and a gross invasion of the cherished privacy rights of the American people. Indeed, some even suggested that the NSA program was akin to the President proclaiming himself King and that this exercise of unchecked executive power amounted to tyranny.⁴ By contrast, other legal scholars argued that the President was within the law and that his actions were necessary to protect the security of the nation. Scholars on this side of the debate characterized the program as foreign intelligence surveillance and point to the fact

¹ See David S. Cloud & Neil King, *Terrorists Destroy World Trade Center, Hit Pentagon in Raid With Hijacked Jets—Death Toll, Source of Devastating Attacks Remain Unclear*, WALL ST. J., Sept. 12, 2001, at A1.

² James Risén & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1. The article states that “President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying, according to government officials.”

³ See generally Bob Egelko, *Can the President Eavesdrop on Private Citizens Without a Judge's Ok?*, S.F. CHRON., Jan. 8, 2006, at A1.

⁴ See also John Diamond, *NSA's Surveillance of Citizens Echoes 1970s Controversy*, USA TODAY, Dec. 19, 2005, at A6 (observing that Prof. Tribe asserts that NSA program violates the Fourth Amendment); see generally Laurence H. Tribe, *Bush Stomps on Fourth Amendment*, BOSTON GLOBE, May 16, 2006, at A15. Professor Tribe strongly believes that the NSA program violates the Constitution.

the President has broad power in this area.⁵ The division among legal scholars indicates that the issue of the legal validity of the NSA program is far from clear and is a rather close legal question. As is often the case with important legal questions, valid and strong arguments exist on both sides of the issue. The legal precedents that determine the legality of the NSA program are ones on which reasonable minds could differ regarding the correct interpretation. Nevertheless, often a stronger view, and sometimes even a “better view,” of the law emerges even with very close legal questions that have strong legal arguments on both sides of the issue.

This article addresses whether the NSA spying program violates the Fourth Amendment of the United States Constitution by examining various legal cases and policy issues. The existing legal literature addressing this question has primarily focused on whether the NSA program violates the Foreign Intelligence Surveillance Act. This article pushes the current debate further by addressing the equally important, but rather difficult question, of whether the NSA spying program violates the Fourth Amendment.

Since the government has not revealed the precise details of the NSA warrantless wiretapping program, the article will construct, and then examine the ramifications of, two different models of how the NSA program likely functions in order to assess the constitutionality of the program as a whole. One model is a broad, expansive NSA warrantless wiretapping program whereas the other model is a narrow, less invasive NSA warrantless wiretapping program.⁶ The differences between the two models of the program are constitutionally significant.

The expansive model of the NSA warrantless wiretapping program includes the following two important elements. First, the NSA can place a wiretap, located overseas, on a foreign terrorist suspect who resides in a foreign country.⁷ The NSA monitors all phone calls to and from his phone. Second, the NSA can place a wiretap, located in the United States, on a United States citizen

⁵ Indeed, the President himself argues that the program is constitutional and within his authority. See James Gerstenzang, *Bush Calls Spying Inquiry Inevitable*, L.A. TIMES, Jan. 12, 2006, at A8. President Bush defended the program, arguing that “if somebody is talking to Al Qaeda, we want to know why.” See also JUDGE RICHARD POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (Oxford 2006) (arguing that communications should be subject to interception in light of security concerns that emerge from the conflict with terrorists).

⁶ The government was likely using either the expansive model of the NSA program or the narrow model of the NSA program. Since which model of the program the government actually used is not public information, the article will use each model to analyze the constitutionality of the program.

⁷ In this article, “foreign terrorist suspect” refers to a non-United States citizen who lives outside of the United States.

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suspected of terrorism who resides in the United States and monitors all international phone calls made by or to this citizen.

The narrow model of the NSA warrantless wiretapping program includes the following single important element. The NSA only places a wiretap, located overseas, on a foreign terrorist suspect who resides in a foreign country to monitor all calls to and from his phone line. Under the narrow model of the program, the NSA never conducts warrantless wiretaps of the outgoing or incoming international telephone calls of a suspected terrorist who lives in the United States. Under the narrow model of the program, the only way the phone call of a United States citizen who lives in the United States would be recorded is if either that person placed an international phone call to the suspected foreign terrorist who is residing overseas or received a phone call from a suspected foreign terrorist who is residing overseas.

To illustrate how the broad and narrow models of the NSA program differ, consider the following example. Suppose one suspected terrorist lives in Iran and another suspected terrorist lives in California. Under the narrow NSA program, a phone call from the United States will only be recorded without a warrant if either the suspected terrorist from Iran calls someone in the United States or receives a phone call from someone in the United States. The international phone calls of the suspected California terrorist will not be monitored without a warrant. By contrast, under the expansive NSA program, all of the incoming and outgoing international phone calls of both the suspected terrorist living in Iran and the suspected terrorist living in California will be monitored without a warrant, regardless of whether the outgoing call is to a person not suspected of terrorism.

The critical difference between the expansive model of the NSA program and the narrow model is that, under the narrow model, the target of the warrantless wiretap is never a United States citizen living in the United States. Instead, the target of the wiretap is a foreign terrorist residing overseas. By contrast, under the expansive model, the target of the search can include a suspected terrorist who is a United States citizen living in the United States.

This article analyzes both the narrow model and the expansive model of the NSA program to determine whether the program violates the Fourth Amendment. The article argues that the narrow model of the NSA program is constitutional and would be upheld by the courts, whereas the expansive model of the NSA program would be declared unconstitutional because it violates the Fourth Amendment. The article emphasizes the critically important role that the neutral judge, by only issuing to the government warrants based upon probable cause, plays in

upholding and safeguarding the cherished privacy rights the Fourth Amendment guarantees all Americans.

II. APPLICATION OF THE FOURTH AMENDMENT TO THE NSA PROGRAM

The Fourth Amendment states that “[t]he 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.”⁸

In approaching a question of whether the Fourth Amendment has been violated, one must first determine if a “search,” conducted by or on behalf of the government, has taken place. If the government conduct in question does not constitute a search, then the amendment’s protection is not triggered. Second, the amendment has both a warrant requirement (requiring warrants issued must be based upon probable cause) and a reasonableness requirement. The warrant requirement and the reasonableness requirement represent two distinct approaches to the Fourth Amendment, meaning that in some situations courts will apply the warrants requirement to the exclusion of the reasonableness requirement and in other situations courts will forgo the warrant requirement to apply the reasonableness requirement. Tension exists between these two approaches to the Fourth Amendment. Generally, the warrant requirement is a stricter standard that provides more protection to citizens, while the reasonableness requirement gives more leeway to the government. While the Warren Court strongly favored the warrant requirement,⁹ the trend under the Rehnquist Court, and presumably the Roberts Court, is toward reasonableness.¹⁰

The Founding Fathers demanded passage of the Fourth Amendment to prevent the President of the United States and other members of the Executive Branch from using “general warrants” to violate the privacy rights of the colonists by subjecting them to arbitrary searches based on unfettered discretion.¹¹ The Founding

⁸ U.S. CONST. amend. IV.

⁹ *Katz v. United States*, 389 U.S. 347, 357 (1967). (“Searches conducted outside the judicial process . . . are per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.”)

¹⁰ *See, e.g., United States v. Knights*, 534 U.S. 112 (2001). Chief Justice Rehnquist observed that “[t]he Fourth Amendment’s touchstone is reasonableness . . .”

¹¹ *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 647 (Little, Brown & Co. 1891) (observing that the Fourth Amendment was largely a response to “the resort of the colonial authorities of Massachusetts Bay to ‘writs of assistance,’ as certain general search-warrants were called.

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Fathers did not want searches based upon general warrants, which continued into the reign of King George III in England and gave officers of the law full discretion to conduct a search at any time for any reason if they suspected a violation of the law, to be a part of law enforcement in the United States.¹² The Supreme Court of the United States has observed on numerous occasions that the abhorrent practice of general warrants provided the motivation for the passage of the Fourth Amendment.¹³

The Founding Fathers and their counterparts in England considered the use of a “general warrant” to violate the privacy rights of individual citizens to be an extremely serious offense contrary to the notion of a freedom, rather than a minor transgression.¹⁴ Freedom from general warrants was considered to be a core constitutional value, akin to the way freedom of speech is viewed today, and the prevailing belief was that general warrants should be avoided because of the danger they pose to liberty and freedom.¹⁵ In fact, large tort verdicts were awarded against the government using general warrants.¹⁶

The Founding Fathers primarily passed the Fourth Amendment with a probable cause requirement for warrants as a

These writs were general commands to search for smuggled goods whenever it was suspected that such could be found; they gave free rein to the officers . . .”).

¹² See CHARLES E. STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES 236 (Macmillan & Co 1884). The author asserts that “[t]he Fourth Amendment touches upon the question of protection against civil search without formal warrant, and the subject of general warrants.” He notes that the illegal practice of general warrants lingered into the reign of King George III before being ruled unlawful in the Wilkes case. See also *Wilkes Case*, (1763) 98 E.R. 489 (holding that general warrants are “unconstitutional, illegal, and also absolutely void.”)

¹³ See *Berger v. New York*, 388 U.S. 41, 58 (1968) (observing that general warrants were “a motivating factor behind the Declaration of Independence”); *Camara v. Municipal Court and County of San Francisco*, 387 U.S. 523, 528 (1967) (“The basic purpose of this [Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”); *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (“The security of one's privacy against *arbitrary* intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.” (emphasis added)).

¹⁴ See JOSEPH HOPKINS & THOMAS LLOYD, REPORT OF THE CASE OF TRESPASS & ASSAULT & BATTERY 135 (Byrne 1810) (observing that general warrants are a serious threat to liberty, “worse than the Spanish inquisition, a law under which no Englishman would wish to live an hour”).

¹⁵ See JAMES MADISON & JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 551 (Lippincott 1891) (observing that all general warrants “are dangerous, and ought not to be granted”).

¹⁶ See HOPKINS AND LLOYD, *supra* note 14 (observing that many juries awarded “exemplary damages” against the government for using general warrants).

result of their disdain for general warrants, but they also included a reasonableness requirement in the text. Although the history explaining the prohibition on “unreasonable searches and seizures” is not as clear as the history explaining the probable cause requirement, plausible theories attempt to explain the reasonableness requirement.¹⁷

One theory is that the reasonableness requirement was added to the text to serve as a defense against tort liability for a petty officer who was sued in civil court for conducting a search without a warrant.¹⁸ An officer of the law accused of conducting a warrantless search was absolved of tort liability if the search was found to be “reasonable.”¹⁹ According to this theory, the reasonableness requirement was written to function as the qualified immunity defense functions in the current legal system.

A second theory is that the reasonableness requirement was included in the Fourth Amendment to serve as the center of the Fourth Amendment’s meaning, and as an additional legal concept separate from the warrant requirement.²⁰ The reasonableness language in the Amendment was possibly added to create a legal standard (i.e., “reasonableness”) for warrantless searches conducted by law enforcement officers.²¹ The Founding Fathers wanted to restrain the conduct of the government in situations where it would not be possible to obtain a warrant, such as exigent circumstances.

A. Applicability of the Warrants Requirement to the NSA Program

Governmental wiretapping or any other form of governmental electronic eavesdropping into a conversation between two or more individuals who are communicating via telephone constitutes a search within the meaning of the Fourth

¹⁷ These theories are based upon an examination of documents around the time the amendment was passed, including comparable amendments found in state constitutions.

¹⁸ See *California v. Acevedo*, 500 U.S. 565, 581 (1991). There is some support by the Court for the view that the reasonableness requirement was placed in the Fourth Amendment to protect officers from civil suits.

¹⁹ “Reasonableness” is the foundation of the tort system. In a tort lawsuit, one often encounters standards such as “the reasonable man,” “the reasonable person,” and “the reasonable doctor.” See WILLIAM PROSSER, PROFESSOR ON TORTS (1941); RESTATEMENT (SECOND) OF TORTS (1979).

²⁰ See *Payton v. New York*, 445 U.S. 573, 585 (1980); see also *Warden v. Hayden*, 387 U.S. 294 (1967) (Douglas, J., dissenting).

²¹ See generally NELSON LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (John Hopkins 1937).

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Amendment.²² Thus, electronic eavesdropping is classified as a search against the person who was the target of the governmental eavesdropping.²³ In *Katz*, the Court unequivocally stated that a search warrant is required for wiretapping unless the situation falls into a narrow exception. Indeed, Justice Stewart, writing for the majority, observed “that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”²⁴ Therefore, without a well-delineated exception, the government must obtain a search warrant issued by a neutral judge in order to eavesdrop on a telephone conversation for the search to be held reasonable²⁵ and the electronic surveillance of telephone calls will

²² *Katz v. United States*, 389 U.S. 347 (1967). In this landmark case, Justice Stewart observed that “the Fourth Amendment protects people, not places.” The Court held that the wiretapping of an individual talking on a phone in a telephone booth was a “search” so the Fourth Amendment is triggered. In *Katz*, Justice Harlan, in his concurring opinion, formulated the reasonable expectation of privacy concept. The basic concept is that since a person who is talking on a pay phone has a reasonable expectation of privacy, a search occurs when the government intrudes upon that reasonable expectation of privacy. The Court further stated that the wiretapping “search” was per se unreasonable because a warrant was not issued by a neutral judge. The Court asserted the following:

The [g]overnment's activities in electronically listening to and recording defendant's words spoken into telephone receiver in public telephone booth violated the privacy upon which defendant justifiably relied while using the telephone booth and thus constituted a “search and seizure” within Fourth Amendment, and fact that electronic device employed to achieve that end did not happen to penetrate the wall of the booth could have no constitutional significance.

Id. at 353.

²³ Fourth Amendment standing is the doctrine the Court utilizes to overcome the following dilemma: If the government wiretaps *A* with a valid warrant issued by a judge based upon probable cause but overhears the words of *B*, who is the person on the other end of the phone for whom the government has no warrant based upon probable cause, then arguably the overhearing of *B* would cause the search to be classified as a “warrantless search.” However, if *A* attempts to exclude evidence on the grounds that the Fourth Amendment rights of *B* were violated, a court would not reach the merits of the claim by holding that *A* lacks standing to assert the Fourth Amendment rights of *B*. The general rule for Fourth Amendment standing is that a defendant cannot assert another’s Fourth Amendment rights in his own defense. Thus, *A* cannot move to exclude the evidence on the grounds that a warrantless search took place because the conversation of *B* was overheard during the eavesdropping. See *Rakas v. Illinois*, 439 U.S. 128, 133 (1978) (“Fourth Amendment rights are personal rights that . . . may not be asserted vicariously.”).

²⁴ *Katz*, 389 U.S. at 357.

²⁵ *Katz* reflects the strict warrants requirement view of the Fourth Amendment. Notice that the Court does not consider the individual circumstances to assess whether or not the search was reasonable. Rather, it crafts a bright-line rule which requires warrants unless a very narrow exception is available. *Katz*

require a search warrant issued by a neutral judge based upon probable cause.²⁶

Notwithstanding the strict warrants requirement expressed in *Katz*, the facts of the case involved purely domestic wiretapping for the sole purpose of enforcing the criminal law.²⁷ The Court expressly left open the question whether the warrants requirement would apply in cases concerning national security.²⁸ Despite the fact the Court expressly left the national security question open, Justice Douglas, in his concurring opinion, asserts that the warrants requirement would apply to the government in matters of national security because “[n]either the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be.”²⁹

A broad reading of *Katz* tends to suggest that the expansive model of the NSA warrantless wiretapping program violates the Fourth Amendment and would be unreasonable as a matter of law because it allows the government, in this case NSA security officers, to conduct a search without the prior approval of a neutral judge.³⁰ The neutral judge stands between the citizens and officers of the law and only issues warrants based upon probable cause.³¹ The only way the expansive model of the NSA program would not violate *Katz* under the broad reading of the case is if a narrow Fourth Amendment exception can be found to apply to the NSA program. On the other hand, under a narrow reading of *Katz*, the

maximizes the protection given to citizens and views the neutral judge as essential to upholding the Fourth Amendment’s prohibition on unreasonable searches.

²⁶ Interestingly, prior to the *Katz* decision in 1967 only a physical trespass counted as a search. Wiretapping was excluded from the definition of a search. *See Olmstead v. United States*, 277 U.S. 438 (1928).

²⁷ Defendant Charles Katz was convicted of violating a federal statute, 18 U.S.C.A. § 1084, proscribing interstate transmission by wire communication of bets or wagers. *See Katz*, 318 U.S. at 348.

²⁸ The Court stated that “[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.” *See Katz*, 318 U.S. at 358 n.23.

²⁹ *Id.* at 359. *See also McDonald v. United States*, 335 U.S. 451 (1948) (observing that the search warrant requirement of the Fourth Amendment is not a mere formality because it serves the critical function of interposing a neutral judge between the citizens and officers of the law).

³⁰ Recall, the expansive model of the NSA program includes both the warrantless wiretapping of all calls made to or from suspected foreign terrorists as well as the warrantless wiretapping of the international phone calls of suspected terrorist living within the United States. *See Introduction, supra.*

³¹ This is particularly true considering the *Katz* Court felt that the neutral judge is an essential part of the Fourth Amendment and that liberty is too precious to entrust to an interested law enforcement officer. In essence, the neutral judge protects the liberty interests of citizens.

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expansive model of the NSA program would not necessarily violate the Fourth Amendment because the NSA program is aimed at protecting national security rather than enforcing the general criminal law.³²

On the other hand, even a broad reading of *Katz* suggests that the narrow model of the NSA warrantless wiretapping program does not violate the Fourth Amendment because the target of the search is a foreign suspected terrorist located outside of the United States.³³ The underlying rationale of *Katz* was to protect the privacy interests of United States citizens by placing a neutral judge, who will only issue a search warrant based on probable cause, between citizens and the government. This rationale is inapplicable to the narrow model of the NSA program because it is only the privacy interest of the suspected terrorist, who is not a United States citizen and resides in a foreign country, whose privacy is invaded. Under this reading, the proper role of the neutral judge is to stand between United States citizens and the government, not to protect the privacy interest of foreign suspected terrorists overseas.

In *United States v. United States District Court*,³⁴ the Court considered a case in which a warrantless search was utilized only to advance national security. The case exclusively pertained to domestic terrorism rather than foreign surveillance of international terrorism. The Court held that the Fourth Amendment requires prior judicial approval for domestic surveillance, even though the surveillance was conducted exclusively for national security purposes.³⁵ The Court ruled that the liberty interest guarded by the

³² Protecting national security is treated differently than enforcing the general criminal law because the President has greater constitutional authority in this area. Indeed, one of the President's chief duties is to protect the nation and its citizens. A policy consideration that supports giving the President more leeway to conduct surveillance in matters of national security is that usually the evidence obtained will not be used as evidence to convict the search person of a crime but instead will be used to protect the nation.

³³ Recall, the narrow model of the NSA program includes only monitoring the phone calls of a suspected terrorist located in a foreign country overseas. Under the narrow model of the program, only people who either call the suspected terrorist or receive a call from the suspected terrorist will be monitored. See Introduction, *supra*.

³⁴ 407 U.S. 297 (1972).

³⁵ *Id.* Three defendants were charged with conspiracy to destroy government property. One of the defendants was charged with using dynamite to destroy a branch office of the Central Intelligence Agency (CIA). The actions of the defendants resemble the types of terrorist activities that confront the nation today. For example, see Joseph B. Treaster, *Terror In Oklahoma City: The Bomb—The Tools of a Terrorist—Everywhere for Anyone*, N.Y. TIMES, Apr. 20, 1995 at B8 (observing that a bomb made from fertilizers and widely available chemicals severely defaced a federal building when it exploded in Oklahoma City).

Fourth Amendment cannot adequately be protected if domestic national security surveillances are conducted solely at the discretion of the President or other members of the Executive Branch without the approval of a neutral judge.³⁶ Hence, the Court held that the warrant requirement of the Fourth Amendment applies to the government, even when the government is conducting the surveillance solely for national security purposes. The Court observed the following:

The Government argues that the special circumstances applicable to domestic security surveillances necessitate a further exception to the warrant requirement But we do not think a case has been made for the requested departure from Fourth Amendment standards. The circumstances described do not justify complete exemption of domestic security surveillance from prior judicial scrutiny. . . . Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech.³⁷

While in *United States v. U.S. Dist. Court*, the Court held that the warrants requirement applies in cases in which the government seeks wiretaps for purely domestic communications relating to terrorism, the Court stressed that holding in the case did not apply to cases involving international communications relating to terrorism. By contrast, the surveillance ordered under the NSA program involves a conversation between one party in the United States and another abroad. Therefore, the question remains whether the distinction between domestic and foreign surveillance matters for Fourth Amendment purposes.

An opponent to the expansive model of the NSA program would argue that the distinction between wiretapping, without a warrant, a conversation between two individuals in the United States versus one individual in the United States and another in a foreign country is of little significance. The President or Executive Branch officers are not less likely to conduct unreasonable searches just because one party happens reside in another country. After all, the need for a neutral judge still exists with the same force because people who conduct international phone calls from the United States are entitled to the same expectation of privacy as

³⁶ See *U.S. Dist. Court*, 407 U.S. at 317 (“The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates . . .”).

³⁷ *U.S. Dist. Court*, 407 U.S. at 318-20. Indeed, the Court explicitly declined to craft a national security-intelligence gathering exception to the Fourth Amendment for domestic security surveillance. Note that the Court leaves open the separate issue of surveillance related to foreign intelligence.

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those who only conduct domestic telephone calls within the United States. On the other hand, it is not clear that people who speak on international phone calls are entitled to the same privacy expectations as people placing domestic calls in the United States. People speaking on international phone lines arguably lack the privacy expectations of people placing domestic calls in the United States because it is legal for governments in most countries, including every country outside of Europe and most European countries, to tap phones since they lack a Fourth Amendment equivalent. This issue is very relevant today, as the United States moves toward a global economy, with international telephone conversations becoming a part of the daily routine of many Americans.³⁸

Proponents of the expansive model of the NSA program would assert the distinction is of great significance, as the President needs broad discretion to conduct foreign affairs and protect the nation from terrorists.³⁹ Proponents would say the distinction between foreign and domestic surveillance takes the NSA program outside the ambit of the Fourth Amendment warrants requirement.⁴⁰

When read together, *Katz* and *United States v. U.S. Dist. Court* arguably stand for the proposition that government surveillance programs, aimed at either protecting national security or enforcing the criminal law, must comply with the warrants requirement of the Fourth Amendment when one party to the conversation is within the United States, if the party in the United States is the target of the search. Indeed, every time the

³⁸ International business is now common and international phone calls are no longer unusual. Often, attorneys residing in the United States have clients in foreign countries and some of the communications that transpire are confidential and protected by the attorney-client privilege. Thus, international phone calls with high privacy expectations take place on a regular basis. Still, it is important to keep in mind that attorney-client privilege can exist where the Fourth Amendment does not.

³⁹ A parallel to the position that the foreign affairs distinction is significant is illustrated by the Act of State doctrine. Normally, when the government files an *amicus curie* brief on a domestic issue, a court should evaluate the brief based on its merits. However, the Act of State doctrine states that in matters concerning foreign affairs, such as the interpretation of a treaty between two countries, the court should defer to the position taken in the government's *amicus curie* brief. The theory behind the Act of State doctrine is that the President has the authority to engage in foreign affairs and courts should not substitute their judgment for the President's judgment. Thus, the Act of State doctrine illustrates that courts tend to be much more deferential in dealing with issues overseas than they are in adjudicating purely domestic issues. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *see generally* *Underhill v. Hernandez*, 168 U.S. 250 (1897).

⁴⁰ The President has constitutionally unique power with respect to foreign affairs and war. U.S. CONST. art. II, § 2.

government has utilized a highly invasive surveillance program to eavesdrop on private conversations, but bypassed the critically important protection of the neutral judge, the government has lost in the Supreme Court. The Court has made clear that it believes the neutral judge, who only issues a warrant upon a finding of probable cause, is essential to upholding the Fourth Amendment. Both domestic terrorism and international terrorism pose about the same threat level to the United States. People who place international phone calls from the United States have an expectation that the United States government will not monitor their international phone calls because it does not monitor domestic phone calls without a warrant. The same type of governmental abuse that is present if the government is allowed to wiretap domestically without a warrant for national security purposes is present if the government is allowed to wiretap international phone calls placed from the United States for national security purposes without a warrant. Therefore, a very strong argument can be made that *Katz* and *United States v. U.S. Dist. Court* would apply to the expansive model of the NSA program and the expansive model of the program violates the Fourth Amendment. Allowing NSA officials to conduct searches by wiretapping without the approval of a neutral judge, who will only issue the warrant based upon probable cause, is equivalent to handing the NSA official, who operates the expansive model of the program, a general warrant, the very type of warrant the Fourth Amendment was authored to destroy.

The expansive model of the NSA program is very similar to a “general warrant.” NSA officials, rather than a neutral judge, decide if there should be a wiretap, when to wiretap, who to wiretap, how long to listen to the wiretap, and so on. The NSA program places the privacy rights of Americans conducting highly private conversation on international phone lines in the hands of the Executive Branch. This is unacceptable under Fourth Amendment jurisprudence, as the neutral judge must stand between the government and the citizens (who have reasonable expectations of privacy while talking on the phone). The privacy rights of the American people should be in the hands of neutral judges rather than covert NSA officials.

By contrast, *Katz* and *United States v. U.S. Dist. Court*, when read together, arguably would not invalidate the narrow model of the NSA program because the party located in the United States is not the target of the search under the narrow model of the program.⁴¹ Indeed, the government has only been defeated in front of the Supreme Court as a result of the Fourth Amendment when it

⁴¹ Under the narrow model of the NSA program, the target of the search is the suspected foreign terrorist.

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seeks to utilize a highly invasive surveillance program to eavesdrop on private conversations placed within the United States by citizens. The critical aspect of *Katz* and *U.S. Dist. Court* is not that the target of the search called another person in the United States; rather it is the fact that the target of the search was located within the United States. Indeed, the underlying rationale in both cases is that the neutral judge, who issues warrants upon a finding of probable cause, must stand between the citizens and the government. In both cases the Court is concerned that the cherished privacy rights of citizens will be tarnished if the government is allowed to conduct surveillance without a warrant, even for the noble goal of protecting the security of the nation. The Court has declared that the privacy interests of those who reside in the United States are too precious to trust to the law enforcement officers, or even the President, to protect. Under the narrow model of the program, this concern disappears because there is no concern about protecting the privacy rights of a suspected foreign terrorist for either law enforcement or the President. Since the narrow model of the NSA program does not threaten the privacy interests of the citizens, it falls outside of the scope of *Katz* and *United States v. U.S. Dist. Court*.

A court would likely find that the expansive model of the NSA program violates the Fourth Amendment, but the narrow model of the NSA program does not violate the Fourth Amendment. A finding that the narrow model of the NSA program violates the Fourth Amendment would not only be inconsistent with precedent but would also defy rationale. Such a holding would mean that it is permissible to monitor all the phone conversations of the suspected foreign terrorist unless the suspected foreign terrorist either receives a call from a person in the United States or calls a person within the United States. The reality is that the government needs to monitor a suspected terrorist's calls to and from the United States the most. After all, if a terrorist were to plan an attack on the United States, he would likely call a terrorist within the United States for assistance. Thus, such a holding would mean that the United States can monitor all the phone calls of a suspected terrorist except when the monitoring is most likely to prevent a terrorist attack on the United States.

Even if a court were to find that both models of the program violate the Fourth Amendment, the question then becomes if there is an exception to the Fourth Amendment that is applicable to the NSA program. From time to time the Court has allowed narrow exceptions to the Fourth Amendment for compelling reasons.

The next part of the article will examine if the NSA program escapes a Fourth Amendment violation by an exception to

the Amendment. There are two possible exceptions from the Fourth Amendment: (1) the “special needs” doctrine and (2) the possibility of a foreign intelligence surveillance exemption.

1. Fourth Amendment Exceptions That Could Apply to the NSA Program

The expansive model of the NSA program likely violates the Fourth Amendment of the United States Constitution because it bypasses the critically important protection of allowing a search warrant to be issued only upon probable cause with the approval of a neutral judge. The narrow model of the NSA program, on the other hand, likely complies with the Fourth Amendment. Nevertheless, it is theoretically possible (but rather unlikely) that a court could find that even the narrow model of the NSA Program violates the Fourth Amendment. This section of the article exams two possible Fourth Amendment exceptions that could be applicable to the NSA warrantless wiretapping program under certain conditions: (1) the “special needs” exception and (2) the possibility of a foreign surveillance intelligence exception.

i. The “Special Needs” Exception

In recent years, the Court has been willing to allow governmental intrusion upon the Fourth Amendment rights of citizens in narrow circumstances when the governmental needs are beyond that of normal law enforcement.⁴² For example, the Court has crafted a Fourth Amendment exception for the search of those on parole,⁴³ for the search of those on probation,⁴⁴ for student drug testing,⁴⁵ for drug testing of railroad employees,⁴⁶ for searches that take place on the United States border,⁴⁷ for the search of prisoners,⁴⁸ for stop and frisk searches by police,⁴⁹ for the searching of students by school officials,⁵⁰ and for highway sobriety checkpoints.⁵¹ Given this trend, a valid question exists as to whether the “special needs” exception would apply to the NSA program.⁵²

⁴² The “special need” must be more than just the enforcement of the criminal law or apprehending those believed to be in violation of the criminal law.

⁴³ See *Samson v. California*, 547 U.S. 843 (2006).

⁴⁴ See *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

⁴⁵ See *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995).

⁴⁶ See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

⁴⁷ See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

⁴⁸ See *Hudson v. Palmer*, 468 U.S. 517 (1984).

⁴⁹ See *Terry v. Ohio*, 392 U.S. 1 (1968).

⁵⁰ See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

⁵¹ See *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

⁵² The Court must be cautious when it grants a special needs exception. Otherwise, the exception could swallow the rule.

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One justification for the application of the “special needs” exception to the Fourth Amendment is when the targets of the search are randomly selected or selected by a mathematical method that leave virtually no discretion to the Executive Officer who is conducting the search. For example, in *Michigan Dept. of State Police v. Sitz* the Court held that the special needs exception applied to a highway sobriety checkpoint because the officers conducting the checkpoint used uniform guidelines that gave no discretion to the officers conducting the search.⁵³ Because the guidelines provided a predetermined method of selection, the special needs exception applied.⁵⁴ Also, in *Vernonia School Dist. 47J v. Acton* the Court found a special needs exception for a school policy authorizing drug testing for student athletes because the school randomly selected students and the selection method did not give discretion to school officials.⁵⁵

The expansive model of the NSA program would not qualify for the special needs exception on the grounds that it uses selection methods that eliminate or heavily limit the discretion of NSA officers to conduct searches. Indeed, under the expansive model of the NSA program, the officer must use his discretion to determine who is likely a terrorist organization and to determine which calls that are made to that organization to monitor. While the precise details of the NSA program are not public knowledge, one can reasonably infer that under the expansive model of the program, the agency is given broad authority to utilize its discretion in selecting targets to be monitored. Given the large number of international calls placed to and from the United States, it would be virtually impossible for the NSA to conduct a successful expansive model of the program without giving its officials broad discretion. For example, a program that selects the 95th call for every 100 international calls would yield nothing. Rather, the NSA must use discretion to select who to monitor and how long to monitor.⁵⁶ Hence, the limited discretion justification

⁵³ See *Sitz*, 496 U.S. 444.

⁵⁴ Consider searches at the airport. An airport that allows security officers to search every fifth person who passes through the metal detector is far more likely to be granted a special needs exception than an airport who tells its security guards to use their discretion to search any passenger who looks suspicious. The former is using a system that leaves no discretion to the officer while the latter is giving full discretion to the officer—a practice that has a strong resemblance to the “general warrants” the Fourth Amendment sought to destroy.

⁵⁵ See *Vernonia School Dist.*, 515 U.S. 646.

⁵⁶ Of course, this discretion is not checked by the judgment of a neutral judge and probable cause. Thus, in essence, the NSA officer under the expansive model of the program seems to have a “general warrant” that allows him to search whenever he suspects a violation of the law might have taken place in the area of terrorism.

for the special needs exception is not present here in regards to the expansive model of the program.

By contrast, the narrow model of the NSA program would probably qualify for the special needs exception because it uses selection methods that eliminate or heavily limit the discretion of NSA officers to conduct searches. The narrow model of the NSA program focuses on a suspected foreign terrorists, who have no Fourth Amendment rights, and the United States citizen that is recorded is, randomly, whoever happens to be on that telephone line. The NSA cannot know in advance who the suspected foreign terrorist will call in the United States or who will call him from the United States. Thus, the United States citizen is not selected to be recorded by the discretion of the NSA official. Rather, the citizen is selected because, by chance, he either happened to call the suspected foreign terrorist or received a call from the suspected foreign terrorist. Thus, under the narrow model of the NSA program there is in effect a random selection method and the NSA officials are not given unfettered discretion to select who to monitor from the United States.⁵⁷

Another justification for the application of the special needs exception to the Fourth Amendment is that the intrusion into the privacy rights of the individual targeted by the search is very minimal. In *Terry v. Ohio*, the Court upheld a brief stop and frisk search that was essential for police officer safety in part because the degree to which the search invaded the individual's privacy was *de minimus*.⁵⁸ When a law enforcement officer confronts a suspect on at night in a dangerous area, it is not practical for him to obtain a search warrant. Therefore, it is constitutional for the officer to momentarily detain the suspect to conduct a brief pat down of the suspect's outer clothing if he is detained briefly and subjected to an arguably non-intrusive search procedure. Also, in *United States v. Martinez-Fuerte*, the Court upheld the questioning of individuals at border checkpoints partially because the questioning was very brief, suggesting that the invasion upon the motorists was very small.⁵⁹

Neither model of the NSA program would qualify for the special needs exception under the theory that the level of intrusion upon the target's privacy is minimal. Instead, both models of the NSA program are highly invasive and may constitute a serious breach of an individual's reasonable expectations of privacy.

⁵⁷ The NSA officials probably have to investigate to learn the identity of the US citizen.

⁵⁸ See *Terry*, 392 U.S. 1. A stop and frisk search involves the officer quickly patting down the outer clothing of a suspect he confronts on the street and taking no other action unless the officer determines that the suspect is carrying a weapon.

⁵⁹ See *Martinez-Fuerte*, 428 U.S. 543.

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Consider that many sensitive, personal, and confidential matters are discussed on international telephone conversations, including businesses discussing trade secrets, intimate conversations between lovers, and attorney-client privilege conversations between lawyers and clients.⁶⁰ It is hard to imagine what could be a more significant breach of an individual's reasonable expectation of privacy than to have an NSA official monitoring private conversations without the approval of a judge. Some businessmen would be outraged to learn that an NSA official had learned of their trade secrets; some individuals in intimate relationships would be outraged to learn that an NSA official had enjoyed their intimate conversation more than they did; some attorneys would be outraged to learn that NSA officials learned about the critical aspects of their case and were informing prosecutors. On the other hand, many businessmen who work for large corporations have assumed for years that the agents of both the United States government and the foreign governments have been monitoring their phone conversations with respect to foreign operations. Those familiar with the realities of international phone lines understand the lack of privacy on them. Notwithstanding the realities of international phone lines, the invasion of privacy by the NSA program is far from minimal so a special needs exception cannot be granted on the theory that the breach of privacy is small.⁶¹

Another justification for the application of the special needs exception to the Fourth Amendment is for situations where the target of the search is a member of a particular class who has a legally binding and objective reason to have a lower expectation of privacy than other citizens. For example, the Court has upheld

⁶⁰ The NSA program may seriously limit the ability of attorneys to represent their clients. Suppose an American lawyer wishes to effectively represent a person detained overseas by the United States government. The lawyer would either have to travel overseas to meet with the person to discuss confidential matters or communicate with the client via telephone at the risk of the government's learning about information critical to the successful defense. Thus, this would give the prosecutor an unfair advantage in the case. Defense attorneys would practically be confronted with a dilemma: either do not fully discuss sensitive information with the defendant and perform below par or perform at par only to be outperformed by the prosecution who utilized inside information gained from the NSA program. This situation would be unjust to any defendant, but without the oversight of a neutral judge there is nothing to prevent an overzealous government from engaging in such actions. On the other hand, foreign governments will be tapping these phone calls anyway. Thus, attorneys representing clients overseas face a dilemma, with or without the existence of the NSA program.

⁶¹ The fact that such invasions of privacy on international phone lines are expected and occur often does not make such invasions less intrusive or a minimal intrusion because it is a major intrusion that corporate leaders, international attorneys, and others have to encounter as a business reality.

suspicionless searches conducted by the police and probation officers without a warrant upon individuals currently on parole. The underlying reason for the Court decision in both cases was that persons on parole and probation have a lower reasonable expectation of privacy. The Court reasoned that being on parole or probation is somewhere between being a prisoner and being a free individual - the probationer or parolee has a higher reasonable expectation of privacy than does a prisoner but a lower expectation of privacy than does a free citizen living in the United States. The lower expectation of privacy stems from the fact that a person on parole or probation has been convicted of a crime and is still in the rehabilitative process. Thus, the Court has ruled that the Fourth Amendment does not apply as strongly to these individuals because their status within the legal system gives them an objective reason to have a lower expectation of privacy.

The expansive model of the NSA program would not qualify for the special needs exception because the targets of the search are members of a class who have a legally binding and objective reason to have a lower expectation of privacy, as the vast majority of individuals subjected to the expansive model of the NSA program are not currently on parole or probation, nor are they currently in prison. Even if the targets of the expansive model NSA program were currently on parole or probation, it is not clear that the program would be constitutionally permissible because the eavesdropping would not directly relate to enforcement of the parole or probation condition.

Indeed, many of those monitored by the expansive model of the NSA program have probably never been convicted of a crime in the United States. Many potential terrorists residing in the United States probably go out of their way to fit into society and avoid conflict with the police so that they are not registered as or suspected of being a terrorist. Additionally, some of those monitored by the United States are probably regular citizens with high reasonable expectations of privacy. Many of those monitored by the expansive model of NSA program have no legally binding and objective reason to expect the government to monitor them more closely than any other citizen. Thus, the expansive model of NSA program cannot be justified via the special needs exception on the grounds that it only subjects individuals with lower reasonable expectation of privacy to monitoring.

On the other hand, this exception might apply to the narrow model of the NSA program in the sense that a foreign suspected terrorist who is a target has no Fourth Amendment rights in the first place. Thus, the foreign suspected terrorist is actually a member of a particular class who has a legally binding and objective reason to have a no expectation of privacy. Arguably, as

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to the person in the United States, anyone who speaks with such an individual assumes the risk that such conversations will be monitored.

In sum, the expansive model of the NSA program cannot qualify for a Fourth Amendment exception under the special needs exception.⁶² As illustrated above, the expansive model of the NSA program fails to fall within any existing rationalization for the application of the exception because the program utilizes executive discretion to select targets for the program, is highly invasive upon the privacy expectation of those monitored, and monitors individuals who are not members of a particular class who have lower reasonable expectation of privacy. The narrow special needs exceptions do not apply to the expansive model of the program.

By contrast, the narrow model of the NSA program can qualify for a Fourth Amendment exception under the special needs exception. The narrow model of the NSA program falls within existing rationalizations for the application of the exception because the program utilizes random methods to select U.S. targets---whoever happens to be engaging in a phone conversation with the monitored suspected foreign terrorist residing overseas---rather than relying on executive discretion and those targeted are members of a class with no expectation of privacy. Even though the existing special needs exception might be applicable, the Court might chose to create another special needs exception for the United States person on one end of the conversation involving a “validly targeted” foreign terrorist on the other end. This newly crafted special needs exception would simply say that the government does not need a warrant to monitor the conversation of the U.S. person on the other end of the conversation with a “validly targeted” foreign terrorist.

Notwithstanding the inapplicability of the special needs exception to the expansive model of the NSA program, the possibility of a foreign surveillance exception to the Fourth Amendment exists. The next part of the article will examine the possibility of a foreign surveillance exception.

ii. The Possibility of a Foreign Surveillance Exception

The NSA program conducts warrantless wiretapping with the aim of protecting the security of the nation. The fact that the program is limited to the monitoring of international calls arguably makes the program a foreign surveillance program. Since the

⁶² Even though the special needs would not apply to the expansive model of the program as currently articulated by the Court, there is always a possibility the Court would choose to expand the doctrine further. However, if the Court continues to expand the special needs exception, there is a danger it will render the Fourth Amendment meaningless or ineffective.

program is limited to foreign surveillance, some would assert that the program does not fall within the ambit of the Fourth Amendment because the Fourth Amendment contains a foreign surveillance exception.

Although the Supreme Court has held that a domestic surveillance Fourth Amendment exception does not exist,⁶³ even when the surveillance aimed at national security, the Court has never ruled on the issue of whether there is a foreign surveillance exception to the Fourth Amendment. Hence, although no domestic security exception exists, the question remains open as to whether a foreign surveillance exception exists. In fact, federal circuit courts have issued split decisions on the existence of a foreign surveillance exception.

In *Zweibon v. Mitchell*, an appellate court explicitly rejected the idea that a foreign surveillance exception exists to the Fourth Amendment by holding that the Fourth Amendment warrants requirement applies to government surveillance that involves domestic organizations and individuals even when it fits under the classification of foreign intelligence surveillance.⁶⁴ The court asserted the following:

[W]e hold today only that a warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration with a foreign power, even if the surveillance is installed under presidential directive in the name of foreign intelligence gathering for protection of the national security.⁶⁵

The court also observed that “. . . there can be no doubt that an unconstitutional practice, no matter how inveterate, cannot be condoned by the judiciary.”⁶⁶ Although not a part of its holding, the court also asserted that “we believe that an analysis of the policies implicated by foreign security surveillance indicates that,

⁶³ See *United States v. United States Dist. Court*, 407 U.S. 297 (1972).

⁶⁴ The court noted the following:

“[t]he surveillance . . . was authorized by the President. . . in the exercise of his authority relating to the nation's foreign affairs and 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 security of the United States.” The justification for the wiretapping program in *Zweibon* seems similar to the justification for the current NSA wiretapping program.

516 F.2d 594 (D.C. Cir. 1975).

⁶⁵ *Id.* at 614. The court's use of the words “on a domestic organization” implies that the wiretap in *Zweibon* is located in the United States, not overseas. Thus, the *Zweibon* case cuts against the expansive model of the NSA program but does not cut against the narrow model of the NSA program.

⁶⁶ *Id.* at 616.

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absent exigent circumstances, all warrantless electronic surveillance is unreasonable and therefore unconstitutional.”⁶⁷ In rejecting the concept of a foreign surveillance exception, the court relied heavily on *Keith*, and emphasized the importance of having a neutral judge determine the necessity and scope of a warrant.

Since the issue in *Zweibon* before the court concerned foreign surveillance that involved domestic surveillance, it is clear that the court rejected the idea that a foreign surveillance exception to the Fourth Amendment should apply when the wiretap is located in the United States. It is not clear, however, that the *Zweibon* court would extend its no foreign surveillance exception ruling to situations where the wiretap or the target of the search is located in a foreign country. Thus, the expansive model of the NSA program, under *Zweibon*, would not qualify for a foreign surveillance exception. However, the narrow model of the NSA program would probably not run afoul of the *Zweibon* court because the wiretap is located in a foreign country and the target of the search is a suspected foreign terrorist overseas. At least, the *Zweibon* court leaves open the possibility of a foreign surveillance exception to the Fourth Amendment when the targets are only foreign persons who reside overseas.

On the other hand, in *United States v. Truong Dinh Hung*⁶⁸ an appellate court held that a foreign surveillance exception to the Fourth Amendment exists. The court stated that “. . . because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance.”⁶⁹ The court also observed that the President “possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance.”⁷⁰ The court further stated that “[f]ew, if any, district courts would be truly competent to judge the importance of particular information to the security of the United States.”⁷¹ Lastly, the court noted that it is “the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance.”⁷² Hence, the court concluded that, unlike in the area of domestic surveillance, in the area of foreign surveillance the President should be able to conduct surveillance

⁶⁷ *Id.* at 613-14.

⁶⁸ 629 F.2d 908 (4th Cir. 1980).

⁶⁹ *Id.* at 914.

⁷⁰ *Id.* at 913.

⁷¹ *Id.* at 914.

⁷² *Id.*

because of a foreign surveillance exception to the Fourth Amendment.⁷³

It is important to understand that in *United States v. Truong Dinh Hung*, the wiretap was located within the United States and the FBI did not have a warrant of any kind.⁷⁴ The *Truong Dinh Hung* court upheld the wiretap on the theory that a foreign surveillance exception exists to the Fourth Amendment.⁷⁵

Under *United States v. Truong Dinh Hung*, both the expansive model of the NSA program and, of course, the narrow model of the NSA program would be constitutional. Indeed, the *Truong Dinh Hung* court asserted that the foreign surveillance exception applies even when the wiretap is located in the United States and the call is placed by a person living in the United States from the United States. Thus, this court would hold that the expansive model of the NSA program is valid even though it is targeting suspected terrorists living within the United States.

Historically, courts have upheld the constitutionally of warrantless surveillance for the purpose of protecting the security of the nation. However, the historical cases that occurred prior to the *Katz* decision in 1967 are of little, if any, use because prior to 1967 use of a wiretapping device by governmental officials to eavesdrop on individuals was not considered a search for Fourth Amendment purposes.⁷⁶ Therefore, the courts did not find a Fourth Amendment violation because legally no search to the

⁷³ However, the appellate court observed that the foreign intelligence Fourth Amendment exception should be very narrow because of individual privacy concerns. See *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980) (“However, because individual privacy interests are severely compromised any time the government conducts surveillance without prior judicial approval, this foreign intelligence exception to the Fourth Amendment warrant requirement must be carefully limited to those situations in which the interests of the executive are paramount.”).

⁷⁴ See *id.* at 912 (“The telephone interception [by the FBI] continued for 268 days and every conversation, with possibly one exception, was monitored and virtually all were taped.”). A post-*Katz* court would certainly conclude a search had taken place. Thus, modern courts are forced to struggle with the issue of whether a foreign surveillance exception exists.

⁷⁵ See generally *id.* To protect privacy rights, this court adopted a test that stated that evidence obtained from foreign surveillance operations can be admitted in a criminal prosecution. Once the investigation changes from foreign surveillance to a criminal investigation, all evidence after that point must be excluded unless the government obtains a proper warrant. The basic concept is that the government can conduct foreign surveillance without a warrant but cannot classify a general criminal investigation as foreign surveillance to undermine the Fourth Amendment. The warrantless tap must actually be for foreign surveillance.

⁷⁶ See generally *supra* note 26 (observing that prior to the *Katz* decision in 1967 only a physical trespass counted as a search, thereby excluding wiretapping from the definition under the 1928 decision of *Olmstead v. United States*, 277 U.S. 438 (1928)).

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Fourth Amendment exists and can only rely on modern cases as precedent in confronting this novel question.

Tension exists between the two directly conflicting appellate cases of *Zweibon v. Mitchell*, which held that the warrants requirement of Fourth Amendment applies to foreign surveillance and *United States v. Truong Dinh Hung*, which held that there is a foreign surveillance exception to the Fourth Amendment.⁷⁷ While the *Zweibon* court declined to find a foreign surveillance exception when the wiretap was located within the United States, the *Truong Dinh Hung* court found a foreign surveillance exception when the wiretap was located within the United States. Each case draws on a different body of reasoning to support its conclusion. On the one hand, *Zweibon* emphasizes the critically important role warrants play in protecting the privacy rights of the individuals and limiting the discretion on a President only interested in the target of his investigation. On the other hand, *Truong Dinh Hung* emphasizes the critically important role of the President to protect citizens from threats abroad and emphasizes his skill and expertise in determining who is a valid threat and when surveillance is need. This is a skill which this appellate court asserts district courts lack. The emphasis in *Truong Dink Hung* is clearly on protecting citizens from attacks from foreign agents or operatives abroad.

Both *Zweibon* and *Truong Dinh Hung* offer compelling rationales to support their differing conclusions. It is very important that citizens be protected from invasion of privacy by their government, but it is also very important that citizens be protected from threats abroad by allowing the President to fully utilize his expertise and discretion to protect citizens. Determining if *Zweibon* or *Truong Dinh Hung* offers the more compelling rationale is a close question.

Zweibon probably represents the better view of the law by denying the government a Fourth Amendment foreign surveillance exception. The only reason this conclusion can be drawn is because of the Foreign Intelligence Surveillance Act (FISA).⁷⁸ Without the FISA, the question would be almost too close to call.⁷⁹

The FISA allows the President to receive a warrant quickly in national security matters from an arguably neutral judge who

⁷⁷ These cases illustrate a split in the circuits on the issue, as their holdings directly conflict on the same question.

⁷⁸ Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–1871.

⁷⁹ In practice, the FISA could color a court's consideration of the Fourth Amendment issue. Though policy plays an important role in the law, it is not clear that it is acceptable for a court to allow the FISA to influence its judgment of the Fourth Amendment question. Congress can create statutory rights beyond the Fourth Amendment but cannot expand the Fourth Amendment itself nor can it eliminate all Presidential constitutional power regarding national security.

understands matters that pertain to national security and foreign intelligence. The FISA allows the President to receive a warrant quickly, thereby removing the argument that he needs broad discretion to act quickly, and the FISA provides access to FISA judges who understand matters that relate to national security, thereby removing the argument that the normal district court judge is not competent to hear these types of cases. Indeed, the FISA offers a fair, but somewhat incomplete and imperfect, compromise to the dilemma at hand.⁸⁰ Under the FISA, citizens receive protection in many cases from the abuse of discretion by the President because a neutral FISA judge stands between their privacy rights and the President by reviewing the case to determine if a warrant should be issued. Thus, the President does not have a “general warrant.”⁸¹ Because of the existence of the FISA, a foreign surveillance exception to the Fourth Amendment is unnecessary to protect the nation. Hence, *Zweibon* holds the better view of the law.⁸²

The Court’s view on the basic function of the Constitution is relevant to determining if a foreign surveillance exception exists to the Fourth Amendment. One view is that the Constitution serves as a restraint on the actions of the government. The opposing view is that the Constitution conveys certain rights upon citizens and is essentially a document aimed at protecting

⁸⁰ The Fourth Amendment requires that a warrant be issued by a neutral judge based upon probable cause. Although the FISA provides for a neutral judge, the FISA allows him to issue a warrant even if there is no probable cause. Thus, FISA does not fully solve the Fourth Amendment problem. However, the neutral judge would probably function to make sure that the warrant issued is actually for foreign surveillance. By preventing the President from expanding his foreign affairs powers to domestic affairs, Fourth Amendment policies are protected.

⁸¹ However, in essence the FISA court has a general warrant. This is problematic for Fourth Amendment purposes. Yet, this general warrant only applies to foreign surveillance matters. It is better that a neutral judge have a general warrant than it is for the President to have one because the neutral judge is less involved in the matter at hand and can exercise clearer judgment. Also, if the President were given a general warrant, he could abuse it by using it in matters outside of foreign surveillance. However, the fact that the neutral FISA judge has the general warrant prevents this type of Presidential abuse.

⁸² FISA is clearly an imperfect compromise because the FISA warrants are not required to be supported by probable cause. However, it is arguably better than the two alternatives. If foreign surveillance required a warrant based on probable cause, the reality is that a lot of useful warrants could not be issued and this would endanger the security of the nation. On the other hand, if the President were given a blanket foreign surveillance exception to the Fourth Amendment, he could abuse the exception to the point that it swallows the rule. The FISA offers a compromise that utilizes the neutral judge to protect Fourth Amendment policies but at the same time creates a workable system whereby the government can protect the nation from harm.

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citizens.⁸³ The prevailing view has been that the Constitution conveys right upon citizens and works for their protection. Nevertheless, if one subscribes to the restraint on government view, then one would likely conclude that all foreign surveillance requires a warrant, even if no one involved is a citizen or is even in the United States. If one takes the view that the Constitution protects citizens, foreign surveillance would be constitutional in many cases. If the Fourth Amendment is deemed to apply, it would only be triggered when a citizen is affected.

Justice Brennan felt that the Constitution serves as a restraint on the action of the government.⁸⁴ He felt that the government must always comply with the Constitution, even if the government is operating outside of the country and citizens are not affected. By contrast, Chief Justice Rehnquist and the current Court hold the view that the Constitution protects citizens and does not function as a restraint on government.⁸⁵ Thus, the current Court would have no problem if the government violates Constitutional provisions provided that the actions take place outside the country and citizens are not affected.⁸⁶

The Court's current view favors not granting a Fourth Amendment exception for foreign surveillance. The warrant requirement would only be triggered when the surveillance involved personal communication via telephone in the United States or communications via United States citizens. This would leave the government free to conduct warrantless foreign intelligence surveillance outside of the United States in the vast majority of cases. By contrast, if the Court held the restraint view of the Constitution, it would favor granting a Fourth Amendment exception. Indeed, it would be awkward for CIA operatives across the world to have to obtain a warrant to monitor two individuals communicating in some remote corner of the world. Such a delay could harm the government's ability to protect the nation. However, the Court has made clear that it subscribes to the

⁸³ See generally *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). This case illustrates differing views of the basic function of the Constitution.

⁸⁴ In fact, Justice Brennan dissented in *United States v. Verdugo-Urquidez* and was in favor of upholding the appellate court's decision, which had asserted that "[t]he Constitution imposes substantive constraints on the federal government, even when it operates abroad."

⁸⁵ See *id.* at 266 (C. J. Rehnquist) (observing "that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory").

⁸⁶ See *id.* at 267 ("There is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters.").

protection of citizens view. Thus, requiring the government to obtain a warrant is fair because the Fourth Amendment will only be triggered in more narrow circumstances.⁸⁷

Thus, the expansive model of the NSA program probably will not be constitutional under the theory that the Fourth Amendment exempts foreign surveillance. While the question remains close, a court is likely to conclude that the expansive model of NSA program must comply with the warrants provision of the Constitution even though the aim of the program is foreign intelligence.⁸⁸ This is particularly true given existing precedent, the existence and applicability of the FISA, and the Court's current view on the basic function of the Constitution.

B. Applicability of the Reasonableness Approach to the NSA Program

The Court has never subjected a governmental wiretapping to the Fourth Amendment reasonableness test. Instead, it has always applied the warrants requirement. However, if an exception of the warrant requirement exists, it is necessary to find the program "reasonable." While the Court uses the reasonableness test to access the validity of search in other areas of the criminal law, it has probably declined to extend this test to wiretaps because the government knows in advance the target of the search so there is no exigent circumstance justifying bypassing the requirement. Nevertheless, in recent years the Court has narrowed the circumstances in which a warrant is required and expanded the circumstances in which a search is constitutionally valid, provided that it is reasonable. It is unlikely that the Court would apply the reasonableness test to the NSA wiretapping program. However, because of the Court's trend of expanding the reasonableness test, there is a slight possibility the Court would subject the NSA program to the less stringent reasonableness test. Thus, it is worth briefly examining how a Fourth Amendment reasonableness test would apply to the NSA program.

⁸⁷ The cases in which a Fourth Amendment exception is arguably most justified will not emerge in the Court because the Constitution is not applicable to people who are not United States citizens and are residing outside of the United States.

⁸⁸ Of course, the narrow model of the NSA program would not be problematic under the Court's current view because the wiretap is located overseas and the target is a suspected foreign terrorist located overseas. It is probably not even necessary to grant a Fourth Amendment exception to the narrow model of the NSA program simply because it does not fall within the ambit of the Fourth Amendment in the first place. However, if the Court determined that the narrow program was in violation of the Fourth Amendment, it would probably decide to craft a Fourth Amendment foreign surveillance exception to keep such programs operating.

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In *United States v. Knights*, the Court observed that “[t]he touchstone of the Fourth Amendment is reasonableness”⁸⁹ The Court further stated that reasonableness is determined by “assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”⁹⁰ Thus, the Court has directly asserted that it believes that reasonableness is an important aspect of the Fourth Amendment. The Court has also utilized a balancing test to determine if a search is reasonable.

The balancing test that the Court uses to determine reasonableness is a fact specific inquiry. This reasonableness balancing test is in sharp contrast to the warrants requirement, which is a bright-line rule with narrow exceptions. The reasonableness balancing test requires one to factually assess the degree that the NSA program intrudes upon citizen’s privacy rights, and it also requires one to factually assess or determine the extent that the NSA program advances legitimate governmental interests. After these two sides of the equation are determined, one weighs them against each other to see if the search is reasonable.⁹¹

A government program that is highly intrusive but of little benefit would be clearly unreasonable. A government program that invades privacy on a *de minimus* level but is extremely beneficial to public safety would clearly be reasonable. A government program that is highly intrusive but offers great benefits provides an arguable question of whether the program is reasonable. Also, a government program that only slightly invades privacy but provides a measurable, but somewhat insignificant benefit, presents an arguable question of reasonableness. Often, determinations of reasonableness are difficult because the level of privacy invasion is more than slight and the programs provide significant, but not great, returns. Nevertheless, the reasonable test must be utilized to answer close questions.

One argument would be that the expansive model of the NSA program is so invasive that it simply cannot be justified as reasonable under any circumstances. The degree to which the program invades citizen’s privacy tips the scale so far toward an unreasonableness finding that no benefit could tilt the scale the other way. This type of argument would assert that the expansive model of the NSA intrudes upon a liberty that is so fundamental to

⁸⁹ 534 U.S. 112, 118 (2001).

⁹⁰ *Id.* at 119.

⁹¹ This type of test requires that a judgment call be made. Invasion of privacy is one type of harm; increased risk of a successful attack on citizens is another. There is no formula that can determine if something is reasonable. Law is an art, not a science. In the end, human judgment, which takes life experiences into account, must be utilized to make the reasonableness determination.

being a citizen in a free country that nothing could make such a program reasonable. This type of argument has some appeal, but it seems to negate the nature of the balancing test. Yet, it is conceivable that some Fourth Amendment violations are so egregious that they tilt the scales toward an unreasonableness finding with such force that the scale is broken.⁹²

The expansive model of the NSA program is highly invasive, but is probably not so invasive that one would conclude it is *de facto* unreasonable regardless of its benefits. Granted, the fact that the program is highly invasive places great weight on the scales in the direction of an unreasonableness finding. However, this might be outweighed if it were revealed that this program alone prevents serious terrorists attacks in cities across the United States that otherwise would not have been prevented. On the other hand, the invasive nature of the program would not be outweighed if it were revealed that nothing even remotely beneficial came about because of the expansive model of the NSA program.

Another argument is that the expansive model of the NSA program is unreasonable as a matter of law because it fails to utilize the procedures outlined in the FISA. The program is highly invasive, but a less invasive means by which it can accomplish the same goals exist. Thus, the invasion of privacy should be weighed heavily, but the benefits should not be weighed heavily because the same or similar benefits can be achieved through the less invasive procedures in the FISA. Absent a showing that the program could not achieve similar results by following the FISA procedures, the program should be held unreasonable because it fails to use the least invasive means available to advance the governmental interest. Hence, once again the FISA favors finding the expansive model of the NSA program violates the Fourth Amendment.

The problem with subjecting either model of the NSA program to a reasonableness test is that the precise details and benefits of the program have not been revealed.⁹³ Because there are many facts that have not been revealed to the public regarding the NSA program, a thorough reasonableness evaluation will be very difficult.⁹⁴

⁹² For example, suppose the government passed a law requiring that all homes in the United States be equipped with twenty-four hour surveillance cameras in every room so that the NSA can watch for terrorist activities. Such a law would be *per se* unreasonable regardless of its benefits.

⁹³ Relevant details to evaluate the program would include, but not be limited to, who the program monitors, how long it monitors them, how it selects people to monitor, the number of people it has monitored, the ratio of successful wiretapping to unsuccessful wiretapping, and how many people in total it monitors per week.

⁹⁴ Unless, of course, one believes that the intrusion is so great that the program is unreasonable as a matter of law or that the fact the program fails to utilize the

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On the other hand, reasonableness of the program can accurately be accessed if one knows two key pieces of information: (1) the level of intrusiveness upon citizens and (2) the number of suspects apprehended by the program. It is clear that the expansive model of the program is highly invasive upon privacy rights. Thus, if the success rate of the program can be determined, so can the critical question of whether the program is reasonable under the Fourth Amendment. Since the program is highly invasive, it must greatly advance the government's interest to overcome the unreasonableness presumption. On the other hand, the narrow model of the program is not as invasive. Thus, it can advance the governmental interest less and still be considered reasonable.⁹⁵

According to the *Washington Post*, “[f]ewer than 10 U.S. citizens or residents a year . . . have aroused enough suspicion during warrantless eavesdropping to justify interception of their domestic calls.”⁹⁶ Also, the article suggests that the program usually eavesdrops on phone calls only to find that no terrorists are on the line: “But officials conversant with the program said a far more common question for eavesdroppers is whether, not why, a terrorist plotter is on either end of the call. The answer, they said, is usually no.”⁹⁷ Hence, according to the *Washington Post*, which confidentially interviewed members of the government, the NSA program is highly invasive but nets fewer than ten individuals a year. Still, the credibility of leaked stories through government officials hostile to the NSA program is suspect because people who leak stories often have a tendency to mix fact with fiction and are often trying to influence politics and policies.

If the facts stated by the *Washington Post* are correct, then the expansive model of the NSA program violates the Fourth Amendment because it is unreasonable. The program is highly invasive and also highly unsuccessful. In the vast majority of cases, there is not even a terrorist on the phone. It is unreasonable for the government to invade the privacy of numerous citizens to

FISA procedure makes it unreasonable as a matter of law. Both arguments are reasonable and a court could utilize them to declare the program unreasonable even without knowing all the facts. However, it seems that the warrants requirement is the proper framework for considering the NSA case.

⁹⁵ The expansive model of the program leans toward a finding that it is “unreasonable” simply because it targets calls placed from the United States by people living in the United States. By contrast, the narrow model of the NSA program leans toward a finding that it is “reasonable” simply because it targets suspected foreign terrorists who are located overseas. It is much more reasonable to set up a wiretap overseas to investigate because the privacy rights of citizens are not strongly implicated.

⁹⁶ See Barton Gellman, *Surveillance Net Yields Few Suspects: NSA's Hunt for Terrorists Scrutinizes Thousands of Americans, but Most Are Later Cleared*, WASHINGTON POST, Feb. 5, 2006, at A1.

⁹⁷ *Id.*

net less than ten individuals suspected of terrorism a year. The level of invasion of privacy is very high and the advancement of the legitimate governmental interest is very low. This provides a clear case for declaring the expansive model of the NSA program unreasonable. Indeed, it is unreasonable for the NSA to operate a program that bypasses the judiciary and infringes upon citizens' cherished privacy rights to net fewer than ten suspects per year.

On the other hand, even if the facts stated by the *Washington Post* are correct, the narrow model of the NSA program probably does not violate the Fourth Amendment because it is reasonable. Even though in many cases a terrorist may not be on one end of the phone line, it is reasonable for the government to monitor suspected terrorists overseas. It is also reasonable for them to listen to all conversations by the suspected foreign terrorists. To say that the narrow model of the program is unreasonable would be to say that it is only acceptable to monitor all the phone conversations of suspected foreign terrorists unless the suspected foreign terrorists either receive a call from a person in the United States or call a person within the United States. The reality is that the government needs to monitor a suspected terrorist's calls to and from the United States the most. After all, if a terrorist were to plan an attack on the United States, he would likely call an ally within the United States for assistance. Thus, finding the narrow model of the NSA program unreasonable would mean that the United States can monitor all the phone calls of a suspected terrorist except when the monitoring is most likely to prevent a terrorist attack on the United States. Therefore, a court would likely find that the narrow model of the NSA program is reasonable under any circumstances.

III. CONCLUSION

The expansive model of the NSA wiretapping program, which allows a member of the Executive Branch to monitor certain international phone calls without a warrant under the justification of protecting the security of the nation, violates the Fourth Amendment of the Constitution. The Fourth Amendment contains a warrant requirement and a reasonableness requirement. The expansive model of the NSA program violates both the warrant requirement and reasonableness test of the Fourth Amendment. Furthermore, the expansive model of the NSA program does not fit within any existing Fourth Amendment exception. Therefore, the expansive model NSA warrantless wiretapping program is unconstitutional.

By contrast, the narrow model of the NSA program does not violate the Fourth Amendment of the Constitution. The narrow model of the NSA program does not fall within the ambit of the

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Fourth Amendment and, even if it did, the program would qualify for an exception under the special needs exception and would also qualify under a narrow foreign surveillance exception to the Fourth Amendment. Additionally, the narrow model of the NSA program complies with the reasonableness requirement of the Fourth Amendment.

The Court would almost certainly subject the expansive model of the NSA program to the warrant requirement of the Fourth Amendment. The expansive model of the NSA warrantless wiretapping program violates the warrant requirement of the Fourth Amendment because it allows the President to infringe upon the privacy rights of American citizens without first seeking the approval of a neutral judge who may issue a warrant based upon probable cause. A neutral judge must stand between the privacy rights of citizens and the government, for such cherished rights are far too precious to entrust in the hands of an Executive member who is only focused on upholding the law. Indeed, the expansive model NSA program gives the President a “general warrant,” which collides directly with the Fourth Amendment.

In conclusion, the expansive model of the NSA program is probably unconstitutional while the narrow model of the NSA program is probably constitutional.