THE FOURTH AMENDMENT AND EXECUTIVE AUTHORIZATION OF WARRANTLESS FOREIGN SECURITY SURVEILLANCE

I. INTRODUCTION

The fourth amendment protects citizens from "unreasonable searches and seizures."[1] To conduct a search, law enforcement officials must obtain a warrant,[2] which is properly issued only when a neutral and detached judicial officer[3] finds probable cause to believe that the search will reveal evidence of criminal activity.[4] The Supreme Court has held that searches conducted without a judicial warrant are per se violative of the fourth amendment[5] unless one of a few narrow exceptions is applicable.[6]

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

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

See United States v. United States District Court, 407 U.S. 297 (1972); Silverman v. United States, 365 U.S. 505 (1961); Johnson v. United States, 333 U.S. 10 (1948). *See generally* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51 (1937); Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1921); Reynard, *Freedom From Unreasonable Search and Seizure—A Second Class Constitutional Right?*, 25 IND. L.J. 259 (1950).

2. U.S. CONST. amend. IV. United States v. United States District Court, 407 U.S. 297, 316 (1972); Katz v. United States, 389 U.S. 347, 357 (1967); Wong Sun v. United States, 371 U.S. 471, 481-82 (1963); Johnson v. United States, 333 U.S. 10, 14 (1948); Agnello v. United States, 269 U.S. 20, 33 (1925). *See generally* Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47 (1974).

3. Johnson v. United States, 333 U.S. 10, 14 (1948).

4. U.S. CONST. amend. IV. As the Court stated in Warden v. Hayden, 387 U.S. 294 (1967):

> There must of course be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction.

Id. at 307. *See* Camara v. Municipal Court, 387 U.S. 523, 534 (1967); Beck v. Ohio, 379 U.S. 89, 96 (1964); United States v. New Jersey, 429 F.2d 950, 952 (3d Cir. 1970).

5. Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Katz v. United States, 389 U.S. 347, 357 (1967). *See also* Stoner v. California, 376 U.S. 483 (1964); Chapman v. United States, 365 U.S. 610 (1960); Rios v. United States, 364 U.S. 253 (1960); Jones v. United States, 357 U.S. 493 (1958); United States v. Jeffers, 342 U.S. 48 (1951).

6. Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Katz v. United States, 389 U.S. 347, 357 (1967). *See, e.g.*, United States v. Ramsey, 431 U.S. 606 (1977) (border search of mail); South Dakota v. Opperman, 428 U.S. 364 (1976) (inventory search of automobile); United States v. Matlock, 415 U.S. 164 (1974) (third party consent search); United States v. Robinson, 414

A number of lower federal courts have recognized a foreign security exception to the warrant requirement[7] which permits the President or Attorney General to authorize warrantless physical or electronic searches in cases involving foreign agents or collaborators.[8] Although the Supreme Court has yet to determine the constitutionality of this exception,[9] the Executive has assumed its validity.[10] This Note will assess the constitutional basis of the foreign security exception along

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U.S. 218 (1973) (search incident to custodial arrest); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent search); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) (border search); Chambers v. Maroney, 399 U.S. 42 (1970) (search of moving vehicle); Terry v. Ohio, 392 U.S. 1 (1967) (frisk permissible where it is reasonable to fear that a suspect is armed); Harris v. United States, 390 U.S. 234 (1968) (seizure of evidence in plain view); See v. City of Seattle, 387 U.S. 541 (1967) (altered standard of probable cause for administrative search); Warden v. Hayden, 387 U.S. 294 (1967) (exigent circumstances); Cooper v. California, 386 U.S. 58 (1967) (inventory search of automobile in long term custody); Schmerber v. California, 384 U.S. 757 (1966) (exigent circumstances); Ker v. California, 374 U.S. 23 (1963) (search incident to lawful arrest); United States v. Lee, 274 U.S. 549 (1927) (search incident to lawful arrest); Carroll v. United States, 267 U.S. 132 (1925) (search of moving vehicle). *See generally* J. LANDYNSKI, SEARCH & SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 87-117 (1966); Player, *Warrantless Searches and Seizures*, 5 GEO. L. REV. 269 (1971); Sikma, *Collateral Search: A Survey of Exceptions to the Warrant Requirement*, 21 S.D.L. REV. 254 (1976).

7. United States v. Butenko, 494 F.2d 593 (3d Cir.), *cert. denied*, 419 U.S. 881 (1974); United States v. Brown, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); United States v. Clay, 430 F.2d 165 (5th Cir. 1970), *rev'd on other grounds*, 403 U.S. 698 (1971); United States v. Hoffman, 334 F. Supp. 504 (D.D.C. 1971).

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

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

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

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

with the constitutional validity of warrantless foreign security searches, and examine recent efforts to legislatively limit Executive discretion in this area.

II. FOREIGN SECURITY SURVEILLANCE AND THE FOURTH AMENDMENT

A. *Historical Overview*

In *Olmstead v. United States*,[11] the Court held that wiretapping and the use of information so obtained as evidence in a criminal trial did not violate the fourth amendment.[12] The Court interpreted "unreasonable searches and seizures"[13] as meaning unreasonable *physical* searches and seizures.[14] Because wiretapping involved a nontrespassory seizure of intangibles, it did not violate the fourth amendment.[15] *Olmstead* therefore precluded any constitutionally-based limitations on nontrespassory electronic surveillance.[16]

Congress reacted to *Olmstead* by enacting section 605 of the Federal Communications Act of 1934[17] which prohibits the interception or divulgence of "any communication" to "any person" unless authorized by the sender.[18] In *Nardone v. United States*,[19] the Court held that section 605 prohibited both governmental and private wiretapping,[20]

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11. 277 U.S. 438 (1928).

12. *Id.* at 466. Olmstead was convicted of violating the National Prohibition Act by transporting and selling intoxicating liquor. The government obtained its evidence by wiretapping. *Id.* at 455-57.

13. *See* note 1 *supra*.

14. 277 U.S. at 466. Justice Brandeis filed a strong dissent stating that "writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping." *Id.* at 476 (Brandeis, J., dissenting). *See generally* J. LANDYNSKI, *supra* note 6, at 200-05.

15. 277 U.S. at 466.

16. The Court distinguished cases involving an unauthorized trespass of the defendant's premises. *Compare* Silverman v. United States, 365 U.S. 505 (1961) (trespassory electronic surveillance unconstitutional), *with* On Lee v. United States, 343 U.S. 747 (1952) (transmission of suspect's statement to officer stationed outside building constitutional), Goldman v. United States, 316 U.S. 129 (1942) (trespass not in aid of electronic surveillance constitutional), *and* Goldstein v. United States, 316 U.S. 114 (1942) (attachment of listening device to wall to allow federal agents to monitor conversations on other side constitutional).

17. Federal Communications Act of 1934, § 605, 47 U.S.C. § 605 (1970), *as amended by* Pub. L. No. 90-351, § 803, 82 Stat. 223 (1968).

18. *Id.* Section 605 provides, in pertinent part: "No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person."

19. 302 U.S. 379 (1937).

20. *Id.* at 382.

and evidence obtained in violation of the Act was inadmissible in federal trials.[21]

In March of 1940, Attorney General Jackson announced that the Department of Justice would discontinue the use of wiretapping as a general investigative tool.[22] Two months later, however, in a confidential memorandum, President Roosevelt stated that *Nardone* was not applicable in cases involving national defense.[23] He directed Jackson to authorize wiretapping in such cases while limiting investigations "insofar as possible to aliens."[24]

In 1946, President Truman expanded the Roosevelt directive by authorizing wiretapping in "cases vitally affecting the domestic security or where human life [was] in jeopardy."[25] The propriety of such directives went unchallenged in the courts because they authorized wiretap-

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

22. Press Statement of the Department of Justice released March 18, 1940, dated March 15, 1940; *see* Brownell, *The Public Security and Wiretapping*, 39 CORNELL L.Q. 195, 199 & n.16 (1954). Jackson believed that wiretapping would have to be discontinued unless Congress amended the statute. *See* Donnelly, *Comments and Caveats on the Wire Tapping Controversy*, 63 YALE L. J. 799, 800 & nn.2-4 (1954); Rogers, *The Case for Wire Tapping*, 63 YALE L.J. 792, 795 & n.14 (1954).

23. Confidential Memorandum for the Attorney General from President Roosevelt, May 12, 1940, *reprinted in* Zweibon v. Mitchell, 516 F.2d 594, 673-74 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

24. *Id. See* SENATE SELECT COMM. TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, WARRANTLESS FBI ELECTRONIC SURVEILLANCE, S. REP. No. 755, 94th Cong., 2d Sess., bk. III, at 279 (1976) [hereinafter cited as CHURCH COMM. REPORT III]. The Department of Justice further avoided the implications of *Nardone* and § 605 by interpreting its prohibition as applying only to publication or divulgence of information obtained through wiretapping, not to wiretapping per se. It permitted wiretapping provided the intercepted information was disclosed only within the Department. Evidentiary problems did not surface because the information obtained was never introduced at trial. *See* H. SCHWARTZ, TAPS, BUGS, AND FOOLING THE PEOPLE 9 (1977); Brownell, *supra* note 22, at 197-99; Donnelly, *supra* note 22, at 800-01; Donner, *Electronic Surveillance: The National Security Game*, 2 CIV. LIB. REV. 15, 18-20 (1975); Gasque, *Wiretapping: A History of Federal Legislation and Supreme Court Decisions*, 15 S.C.L. REV. 593, 600-01 (1963); Rogers, *supra* note 22, at 794-95; Theoharis & Meyer, *The "National Security" Justification for Electronic Eavesdropping: An Elusive Exception*, 14 WAYNE L. REV. 749, 753-68 (1968). *See generally* CHURCH COMM. REPORT III, *supra*, at 280-88.

25. Memorandum from the Office of the Attorney General to President Truman, July 17, 1946, *reprinted in* Zweibon v. Mitchell, 516 F.2d 594, 674 (D.C. Cir. 1975) (Truman's notation of concurrence with the Attorney General's suggestions appears at the foot of the memorandum),

ping for investigatory purposes only.[26] Congress failed to pass a bill limiting the President's authority in this area,[27] and public debate was stifled by the politically repressive atmosphere of the time.[28]

The Justice Department continued to authorize electronic surveillance pursuant to the Roosevelt/Truman guidelines[29] until 1965 when

cert. denied, 425 U.S. 944 (1976). *See generally* CHURCH COMM. REPORT III, *supra* note 24, at 282-83; Donner, *supra* note 24, at 23-29; Theoharis & Meyer, *supra* note 24, at 760-63.

26. *See* note 24 *supra*.

27. *See* Gasque, *supra* note 24, at 599-601; Theoharis & Meyer, *supra* note 24, at 757-68.

28. *See generally* C. BELFRAGE, THE AMERICAN INQUISITION 1945-60 (1973); R. CARR, THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES 1945-50 (1952); R. GRIFFITH, THE POLITICS OF FEAR: JOSEPH R. MCCARTHY AND THE SENATE (1970).

29. *See* CHURCH COMM. REPORT III, *supra* note 24, at 277-98. The table below, taken from Justice Department records and reprinted in the CHURCH COMM. REPORT III, *supra* note 24, at 301, shows the total number of warrantless FBI wiretaps and microphones in operation between 1940 and 1974.

Year	Telephone Wiretaps	Microphones	Year	Telephone Wiretaps	Microphones
1940	6	6	1958	166	70
1941	67	25	1959	120	75
1942	304	88	1960	115	74
1943	475	193	1961	140	85
1944	517	199	1962	198	100
1945	519	186	1963	244	83
1946	364	84	1964	260	105
1947	374	81	1965	233	67
1948	416	67	1966	174	10
1949	471	75	1967	113	0
1950	270	61	1968	82	9
1951	285	75	1969	123	14
1952	285	63	1970	102	19
1953	300	52	1971	101	16
1954	322	99	1972	108	32
1955	214	102	1973	123	40
1956	164	71	1974	190	42
1957	173	73			

Attorney General Edward H. Levi testimony, Nov. 6, 1975, hearings, vol. 5, pp. 68-70. The statistics before 1968 encompass electronic surveillances for both intelligence and law enforcement purposes. Those after 1968, when the Omnibus Crime Control Act was enacted, include surveillances for intelligence purposes only; electronic surveillances for law enforcement purposes were thereafter subject to the warrant procedures required by the Act.

See generally Brownell, *supra* note 22; Theoharis & Meyer, *supra* note 24; Comment, *Privacy and Political Freedom: Application of the Fourth Amendment to "National Security" Investigations*, 17 U.C.L.A. L. REV. 1205 (1970).

President Johnson ordered that the use of wiretapping, as a general investigative technique, be discontinued.[30] In 1966, however, the Attorney General qualified Johnson's order, stating that wiretapping would continue in cases "involving the collection of intelligence affecting the national security."[31]

B. Katz *and Its Progeny*

In its 1967 decision, *Katz v. United States*,[32] the Court overruled *Olmstead*, stating that the fourth amendment's reach could no longer "turn upon the presence or absence of a physical intrusion . . . ."[33] It held that absent prior judicial consent, electronic surveillance was an unreasonable search and seizure.[34] In essence, *Katz* equated a reasonable search with one which met the warrant requirement or one of the traditional exceptions based on unusual or exigent circumstances.[35] The Court was not faced with a national security issue, therefore, it reserved judgment on the exception's validity.[36]

Shortly after *Katz*, Congress enacted the Omnibus Crime Control

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30. Confidential Memorandum for the Heads of Executive Departments and Agencies from President Johnson, June 30, 1965, *reprinted in* Zweibon v. Mitchell, 516 F.2d 594, 674-75 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). *See generally* CHURCH COMM. REPORT III, *supra* note 24, at 285-88.

31. Memorandum from the Office of the Attorney General to all United States Attorneys, November 3, 1966, *reprinted in* Zweibon v. Mitchell, 516 F.2d 594, 675 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

32. 389 U.S. 347 (1967).

33. *Id.* at 353. Katz was convicted of violating 18 U.S.C. § 1084 (1970), by transporting wagering information interstate by telephone. In *Katz*, the Court declared that "the Fourth Amendment protects people, not places." 389 U.S. at 351. *See generally* Note, *From Private Places to Personal Privacy: A Post Katz Study of Fourth Amendment Protection*, 43 N.Y.U.L. REV. 968 (1968).

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

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

36. *Id.* at 358 n.23. Justice White stated that a warrant was unnecessary "if the President . . . or . . . the Attorney General has considered the requirements of national security and authorized electronic surveillance as reasonable." *Id.* at 364 (White, J., concurring). Justice Douglas took the contrary position finding that "spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers . . . ." *Id.* at 360 (Douglas, J., concurring). Douglas found the national security disclaimer a "wholly unwarranted green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels 'national security' matters." *Id.* at 359.

and Safe Streets Act of 1968 (Omnibus).[37] Although generally prohibiting warrantless government eavesdropping,[38] Omnibus expressly disclaims any attempt to "limit the constitutional power of the President . . . to obtain foreign intelligence information . . . ."[39] In 1972, the Court rejected the argument that this disclaimer constituted an affirmative grant of power to the President,[40] stating that "the Act simply did not legislate with respect to national security surveillance."[41] Omnibus is therefore neutral as to the Executive's constitutional power to authorize warrantless foreign security surveillance.

The Court limited warrantless national security surveillance in *United States v. United States District Court* (*Keith*),[42] holding the warrant requirement applicable in domestic security cases.[43] Although it stated that "[t]he Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised,"[44] *Keith* was expressly limited to "the domestic aspects of national security."[45] The Court has yet to decide whether a warrant is

37. 18 U.S.C. §§ 2510-20 (1970). Omnibus codified the guidelines for electronic surveillance set forth in Berger v. United States, 388 U.S. 41 (1967) and Katz v. United States, 389 U.S. 347 (1967); *see* S. REP. No. 1097, 90th Cong., 2d Sess. (1968). *See generally* CHURCH COMM. REPORT III, *supra* note 24, at 288-89; Note, *Electronic Surveillance, Title III, and the Requirement of Necessity*, 2 HASTINGS CONST. L. Q. 571 (1975); Note, *Wiretapping and Electronic Surveillance—Title III of the Crime Control Act of 1968*, 23 RUTGERS L. REV. 319 (1969).

38. Omnibus does not prohibit warrantless surveillance in certain emergency situations. 18 U.S.C. § 2518(7) (1970).

39. 18 U.S.C. § 2511(3) (1970) reads:

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

40. United States v. United States District Court, 407 U.S. 297, 306 (1972).

41. *Id.*

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

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

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

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

required in cases involving foreign powers.

C. *The Scope of the Proposed Foreign Security Exception*

The present scope of the foreign security exception to the fourth amendment warrant requirement has been shaped in part by its unique history. When President Roosevelt first expounded the exception, he was merely interpreting the Federal Communications Act of 1934.[46] Because *Olmstead* held that wiretapping did not violate the fourth amendment,[47] Roosevelt's position was constitutionally sound, although possibly vulnerable as an imprecise construction of the statute. When *Katz* subsequently eliminated the distinction between physical and electronic surveillance and held warrantless electronic surveillance unconstitutional,[48] the Executive continued to assert its right to use electronic surveillance in cases involving national security. The Executive then asserted that his power was based on an exception to the fourth amendment.[49] Moreover, the elimination of the distinction between physical intrusion and electronic surveillance allowed the Executive to expand the foreign security exception to embrace both methods of search and seizure.[50] This expansion, however, has rendered the foreign security exception more vulnerable to attack because the protection against warrantless trespassory searches is at the core of the fourth amendment.[51]

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46. *See* notes 17-24 *supra* and accompanying text.

47. *See* notes 11-16 *supra* and accompanying text.

48. *See* notes 32-36 *supra* and accompanying text.

49. *See* cases cited in note 7 *supra*; note 61 *infra*.

50. *See* notes 32-36 *supra* and accompanying text.

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

The Supreme Court recently stated that "the Fourth Amendment's commands grew in large measure out of the colonists' experience with the writ of assistance and their memories of the general warrants formerly used in England." United States v. Chadwick, 433 U.S. 1, 7-8 (1977). *See also* Stanford v. Texas, 379 U.S. 476, 481-85 (1965); Marcus v. Search Warrant, 367 U.S. 717, 724-29 (1961). The writs, which were issued in the name of the King, were excessive warrants permitting his agents to search virtually anywhere at anytime. *See* C. BEARD & M. BEARD, HISTORY OF THE UNITED STATES 88-89 (1932); F. DIETZ, A POLITICAL AND SOCIAL HISTORY OF

If the validity of a foreign security exception is assumed, the inclusion of physical searches is plausible. When *Katz* extended fourth amendment prohibitions to electronic surveillance,[52] there remained little reason to exclude trespassory searches from the foreign security exception. The only basis for such an exclusion would be that nontrespassory electronic surveillance is potentially more intrusive than its trespassory counterpart.[53]

At least one appellate court has recognized that both physical and electronic searches would be included if courts recognize a foreign security exception. In *United States v. Barker*,[54] defendants were accused of breaking into and physically searching the office of Daniel Ellsberg's psychiatrist.[55] They asserted a good faith belief that the break-in was authorized by President Nixon pursuant to his powers over foreign affairs.[56] The validity of this defense depended on whether it was reasonable to believe that in 1971 the President had the power to authorize warrantless physical surveillance.[57] Judge Wilkey

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ENGLAND 387-90 (1937); A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION 48 (4th ed. 1970); J. LANDYNSKI, *supra* note 6, at 30-37.

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

53. United States v. Barker, 546 F.2d 940, 953 nn.39 & 40 (D.C. Cir. 1976). The court noted that a good argument can be made that nontrespassory electronic searches are more intrusive than trespassory searches. *Id.* at 953 n.39. It based its conclusion on the following passage from United States v. Smith, 321 F. Supp. 424 (C.D. Cal. 1971):

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

546 F.2d at 953 n.39 (quoting 321 F. Supp. at 429) (bracketed materials added); *see* United States v. White, 401 U.S. 745, 756 (1971) (Douglas, J., dissenting); Berger v. New York, 388 U.S. 41, 56 (1967); Olmstead v. United States, 277 U.S. 436, 476 (1928) (Brandeis, J., dissenting). *See also Hearings on the Foreign Intelligence Surveillance Act of 1977 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 77-78 (1977) (statement of John H. F. Shatluck) [hereinafter cited as *1977 Hearings*]. *See generally* Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003 (1966).

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

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

56. *Id.* at 945.

57. Defendants based their defense on a mistake of fact. They believed that President Nixon had authorized the allegedly illegal surveillance. Although the court found this belief

held that their belief was reasonable[58] because no court had yet precluded Presidential authority to conduct warrantless wiretapping in cases involving foreign agents or collaborators.[59] Furthermore, since *Katz* had discarded the distinction between trespassory and nontrespassory wiretaps,[60] Judge Wilkey concluded that when the Court in *Keith* reserved judgment as to the legality of warrantless foreign security wiretaps, it implicitly reserved judgment as to the validity of trespassory foreign security searches.[61]

III. EXEMPTION AND EXCEPTION

Those federal courts that have upheld the Executive's power to authorize warrantless foreign security surveillance[62] advance one of two arguments. The first is that the Executive is *exempt* from judicial supervision when exercising its foreign affairs powers.[63] Although the

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mistaken, it stated that defendants "honestly and reasonably believed they were engaged in a top-secret national security operation lawfully authorized by a government intelligence agency." *Id.* at 949. Thus, the issue was whether it was reasonable to believe that such authorization would validate a search which was otherwise illegal. *Id.* at 949-50. On mistakes of law and fact, *see generally* Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1 (1957); Hentig, *The Doctrine of Mistake*, 16 U.K.C.L. REV. 17 (1947); Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35 (1939).

58. 546 F.2d at 954.

59. *Id.* at 950.

60. *Id.* at 953-54. *See* notes 32-36 *supra* and accompanying text.

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

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

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

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

62. *See* cases cited in note 7 *supra*.

63. United States v. Brown, 484 F.2d 418, 425-26 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); United States v. Clay, 430 F.2d 165, 170-72 (5th Cir. 1970), *rev'd on other grounds*, 403 U.S. 698 (1971); United States v. Hoffman, 334 F. Supp. 504, 507-08 (D.D.C. 1971). *But see* United States v. Butenko, 494 F.2d 593, 602-03 (3d Cir. 1974), *cert. denied*, 419 U.S. 881 (1974). In *Keith*, the Court cited United States v. Clay, 430 F.2d 165 (5th Cir. 1970); United States v.

Constitution does not explicitly provide such an exemption, courts have implied it from three Presidential powers:[64] the Commander in Chief powers,[65] the power over the nation's foreign relations,[66] and the power to protect the nation from foreign encroachment.[67] The second argument recognizes an *exception* to the warrant requirement based on the need for efficient operation of the Executive's foreign policy-making apparatus.[68] This exception is rooted in considerations of judicial competence to deal with subtle and complex foreign security issues, security risks, the nature of ongoing intelligence activities, delay, and administrative burden.[69]

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

In *United States v. Curtiss-Wright Export Corp.*,[70] the Court stated

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Smith, 321 F. Supp. 424 (C.D. Cal. 1971), and ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, ELECTRONIC SURVEILLANCE 120-21 (Approved Draft 1971) for the propostion that "warrantless surveillance . . . may be constitutional where foreign powers are involved." 407 U.S. at 322 n.20. *See generally* Shattuck, *National Security Wiretaps*, 11 CRIM. L. BULL. 7 (1975); Theoharis & Meyer, *supra* note 24; Note, *The Fourth Amendment and Judicial Review of Foreign Intelligence Wiretapping:* Zweibon v. Mitchell, 45 GEO. WASH. L. REV. 55 (1976); Note, *Foreign Security Surveillance and the Fourth Amendment*, 87 HARV. L. REV. 976 (1974); Note, *Present and Proposed Standards for Foreign Intelligence Electronic Surveillance*, 71 NW. U.L. REV. 109 (1976).

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

65. U.S. CONST. art. II, § 2. *See* United States v. Butenko, 494 F.2d 593, 602-04 (3d Cir.), *cert. denied*, 419 U.S. 881 (1974). *See also* United States v. Reynolds, 345 U.S. 1 (1953); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayshi v. United States, 320 U.S. 81 (1943); United States v. Russell, 80 U.S. (13 Wall.) 623 (1871); Ebel v. Drum, 52 F. Supp. 189 (D. Mass. 1943).

66. U.S. CONST. art. II, §§ 1, 2. *See* United States v. Butenko, 494 F.2d 593, 602-03 (3d Cir.), *cert. denied*, 419 U.S. 881 (1974); United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); United States v. Clay, 430 F.2d 165, 171-72 (5th Cir. 1970), *rev'd on other grounds*, 403 U.S. 698 (1971). This power was broadly interpreted in Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948); United States v. Belmont, 301 U.S. 324 (1937); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Totten v. United States, 92 U.S. 105 (1875).

67. *See* United States v. Brown, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974) (citing THE FEDERALIST No. 74, at 500 (A. Hamilton) (J. Cooke ed. 1961)). *See also* The Prize Cases, 67 U.S. (2 Black) 635, 638 (1862); Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827).

68. United States v. Butenko, 494 F.2d 593, 603-05 (3d. Cir. 1974), *cert. denied*, 419 U.S. 881 (1974).

69. *See* Zweibon v. Mitchell, 516 F.2d 594, 639-41 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); notes 80-146 *infra* and accompanying text.

70. 299 U.S. 304 (1936). *See generally* L. HENKIN, *supra* note 64, at 24-26; Lofgren, United States v. Curtiss-Wright Export Corporation: *An Historical Reassessment*, 83 YALE L.J. 1 (1973).

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

> [t]he President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.[74]

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

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

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

72. *Id.* at 318.

73. 333 U.S. 103 (1948).

74. *Id.* at 111.

75. United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); United States v. Clay, 430 F.2d 165, 171 (5th Cir. 1970) (alternative holding), *rev'd on other grounds*, 403 U.S. 698 (1971); United States v. Butenko, 318 F. Supp. 66, 72 (D.N.J. 1970), *aff'd*, 494 F.2d 593 (3d Cir. 1974), *cert. denied*, 419 U.S. 881 (1974). *See also* United States v. Smith, 321 F. Supp. 424, 426, 430 (C.D. Cal. 1971) (dictum). *But see* Zweibon v. Mitchell, 516 F.2d 594, 621-24 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

76. *See* Zweibon v. Mitchell, 516 F.2d 594, 623-24 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

77. Cases upholding a foreign affairs exemption generally find that in camera inspection of surveillance logs is sufficient protection of the subject's rights. *See, e.g.*, United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); United States v. Clay, 430 F.2d 165, 171 (5th Cir. 1970) (alternative holding), *rev'd on other grounds*, 403 U.S. 698 (1971).

78. Zweibon v. Mitchell, 516 F.2d 594, 621-27 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). As stated by Professor Henkin, "[n]othing in the Constitution suggests that the rights of individuals in respect of foreign affairs are different from what they are in relation to other exercises of governmental power." L. HENKIN, *supra* note 64, at 252. Speaking more directly to the

warrant requirement limited executive power in domestic security cases.[79] Unless the courts can develop a principled distinction between domestic and foreign security, it is unlikely that the latter will be exempted from the warrant requirement.

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

The Supreme Court has based exceptions to the warrant requirement on considerations of practical necessity and public policy.[80] To withstand fourth amendment scrutiny, the foreign security exception must rely on "special circumstances" which "necessitate a further exception to the warrant requirement."[81] The risks of judicial error, security leaks, and delay are present in varying degrees in most kinds of investigation. It is suggested that the distinctive factor in foreign security cases is that the risks are much greater. Domestic threats, because of their focus, can often be detected and neutralized prior to implementation, whereas foreign threats may develop beyond our borders before the government can act. Further, some have asserted that because foreign powers possess substantially greater military strength than domestic

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Bill of Rights, Professor Henkin states that "the Bill of Rights limits foreign policy and the conduct of foreign relations as it does other federal activities." *Id.* at 254. *See generally id.* at 251-79; J. LANDYNSKI, *supra* note 6, at 19-48. Speaking of the President's power over foreign relations, the Court noted in *Curtiss-Wright* that "like every other governmental power, [it] must be exercised in subordination to the applicable provisions of the Constitution." 299 U.S. at 320; Zweibon v. Mitchell, 516 F.2d at 621; *see* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934) ("even the war power does not remove constitutional limitations, safeguarding essential liberties"); *cf.* New York Times Co. v. United States, 403 U.S. 713, 718-19 (1971) (Black, J., concurring) (prior restraint of publication prohibited by first amendment even in national security situation); Reid v. Covert, 354 U.S. 1, 5, 17 (1957) (plurality opinion) (Executive cannot nullify constitutional prohibitions in trials of citizens abroad); Duncan v. Kahanamoku, 327 U.S. 304 (1946) (unconstitutional to substitute military for civilian law even though Hawaii was allegedly in danger of attack); Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 155-56 (1919) (dictum) (war power subject to fifth amendment); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866) (sixth amendment right to jury trial viable during war); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134 (1852) (government must compensate under fifth amendment even if property is legally taken to keep it from the enemy); *Ex parte* Merryman, 17 F. Cas. 144 (C.C. Md. 1861) (No. 9487) (President cannot suspend writ of habeas corpus). *But see* Hirabayashi v. United States, 320 U.S. 81 (1943) (internment of United States citizens of Japanese ancestry constitutional as emergency war measure). For a general discussion of these cases, see Zweibon v. Mitchell, 516 F.2d at 626-27; Note, *Foreign Security Surveillance and the Fourth Amendment*, 87 HARV. L. REV. 976, 978-79 (1974).

79. *See* notes 42-45 *supra* and accompanying text.

80. *See* note 6 *supra*.

81. United States v. United States District Court, 407 U.S. 297, 318 (1972).

dissidents, they pose a greater threat to national security.[82]

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

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

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82. *See* STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, WORLD ARMAMENTS: THE NUCLEAR THREAT (1977); STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, RESOURCES DEVOTED TO MILITARY RESEARCH AND DEVELOPMENT (1972).

83. *See* United States v. Butenko, 494 F.2d 593, 629-30 (3d Cir.) (Gibbons, J., dissenting), *cert. denied*, 419 U.S. 818 (1974). The court in Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 944 (1976), rejected the argument that foreign threats are more serious than domestic threats, stating that it not only relegates "the personal interests protected by the Fourth and First Amendments to the level of second-class rights, it also naively equates all foreign threats with such dangers as another Pearl Harbor." *Id.* at 646. Noting that the government has taken an expansive view of its responsibility to acquire foreign intelligence information, Senator Joseph Biden stated that such surveillance

> might include not only efforts to counter Soviet espionage programs directed at our military and defense secrets but the relationship of American oil companies to ARAMCO in anticipation of an oil boycott. Positive intelligence could involve not only surveillance to determine the Soviet Union's problems with its wheat harvest, but efforts on the part of Soviet or Indian trade attaches to discreetly contact grain cooperatives in this country in anticipation of seeking grain to supplement their inadequate harvests.

SENATE SELECT COMM. ON INTELLIGENCE, FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1976, S. REP. No. 94-1161, 94th Cong., 2d Sess. 123 (1976) [hereinafter cited as FOREIGN INTELLIGENCE ACT REPORT].

84. 407 U.S. at 321. *See* notes 42-45 *supra* and accompanying text.

85. 516 F.2d 594, 641-51 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

86. *Id.* at 605-06. Plaintiff's damages claim was based on Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (federal civil cause of action implied when government infringes fourth amendment rights), and on Omnibus, *supra* note 37 (civil remedy under § 2520).

87. 516 F.2d at 607.

security of the United States . . . ."[88]

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

1. *Judicial Competence*

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

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

89. *See id.* at 641-51. *See also* notes 42-45 *supra* and accompanying text.

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

91. 516 F.2d at 641-53.

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

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

94. 516 F.2d at 641-47.

95. *Id.* at 647.

96. *Id.* at 641-42. In the domestic security context, the Court stated that "[t]here is no rea-

significance to a court, one may question whether there is probable cause for surveillance."[97]

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

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

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son to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases." United States v. United States District Court, 407 U.S. at 320.

97. 516 F.2d at 641 (citing United States v. United States District Court, 407 U.S. at 320). The *Zweibon* court found further support for the proposition that judges are competent to analyze national security issues in the congressional response to United States v. Mink, 410 U.S. 73 (1973). *Mink* interpreted the Freedom of Information Act, 5 U.S.C. § 552 (1970), to preclude judicial review of materials that the Executive refused to disclose under an exception to the act which exempts from disclosure documents "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." *Id.* § 552(b)(1). Congress responded by amending § 552, specifically providing for in camera judicial review of exempt executive documents to determine whether they should be withheld. 516 F.2d at 642.

98. 516 F.2d at 645.

99. *Id.* at 645 n.147.

100. *Id.* at 644 (citing United States v. Hoffman, 334 F. Supp. 504, 506 (D.D.C. 1971) (recognizing government admission that post hoc judicial review is appropriate in national security cases)).

101. *Id.* at 644-45 (citing *e.g.*, Beck v. Ohio, 379 U.S. 89, 96 (1964); Wong Sun v. United States, 371 U.S. 471, 479 (1963); Washington v. United States, 414 F.2d 1119, 1122 (1969) (dictum)).

102. *Id.* at 645.

103. *Id.* at 645 n.146; *cf.* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111, 114 (1948) (executive decision granting or denying the right to engage in overseas air transportation nonreviewable because executive foreign policy decisions are political not judicial); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (internment of United States citizens of Japanese ancestry constitutional as emergency war measure); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-22 (1936) (dictum) (President's "plenary and exclusive" power over foreign affairs not limited to powers specifically enumerated in Constitution); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) (government's recognition of foreign power unreviewable because foreign relations are committed to "the political" branches of the federal government). *See generally* L. HENKIN, *supra* note 64, at 205-25. *See also* cases cited in note 7 *supra*.

often rubber stamped.[104] Given the complexity of some foreign security issues and the government's ability to approach the most sympathetic judges with multiple warrant applications,[105] judicial deference would tend to be greater in foreign security cases. Under these circumstances, the warrant requirement could become meaningless form.

In May, 1977, Senator Edward Kennedy introduced S. 1566, a bill designed to curb governmental abuse of judicial warrant procedures in cases involving foreign intelligence surveillance.[106] The bill provides that the Chief Justice of the United States shall select seven federal district judges to hear foreign security warrant applications,[107] and three judges from either the federal district courts or courts of appeals to serve as a special court of appeals.[108] If an application is denied, the government could seek review in the special court of appeals, and upon further denial, in the Supreme Court.[109] The application could not be filed in any other court.[110]

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104. *See generally* H. SCHWARTZ, TAPS, BUGS, AND FOOLING THE PEOPLE 23-26 (1977).

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

106. S. 1566, 95th Cong., 1st Sess. (1977) [hereinafter cited as S. 1566]. *See also* H.R. 7308, 95th Cong., 1st Sess. (1977) (House version of S. 1566). On April 20, 1978, the Senate passed S. 1566 by a vote of 95 to 1. *See* N.Y. Times, April 21, 1978, § 1, at 1, col. 1 (city ed.). S. 1566 provides:

> (a) The Chief Justice of the United States shall publicly designate seven district court judges, each of whom shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this chapter, except that no judge designated under this subsection shall have jurisdiction of the same application for electronic surveillance under this chapter which has been denied previously by another judge designated under this subsection. If any judge so designated denies an application for an order authorizing electronic surveillance under this chapter, such judge shall provide immediately for the record a written statement of each reason for his decision and, on motion of the United States, the record shall be transmitted, under seal, to the special court of review established in subsection (b).
>
> (b) The Chief Justice shall publicly designate three judges, one of whom shall be publicly designated as the presiding judge, from the United States district courts or courts of appeals who together shall comprise a special court of review which shall have jurisdiction to review the denial of any application made under this chapter. If such special court determines that the application was properly denied, the special court shall immediately provide for the record a written statement of each reason for its decision and, on petition to the United States for a writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

107. S. 1566, *supra* note 106, subsection (a).

108. *Id.* subsection (b).

109. *Id.*

110. "Each application for an order approving electronic surveillance under this chapter shall

Assuming the Chief Justice would select judges on the basis of past performance and expertise in foreign security cases,[111] the integrity of the selection process should allay fears of judicial incompetence in this area. By limiting the number of judges to whom a warrant application could be presented and eliminating duplicate applications, S. 1566 would protect the substance behind a warrant requirement. The practice of shopping for a sympathetic forum would be halted; fourth amendment rights and the governmental interest in national security would be protected without recognizing an exception to the warrant requirement.

2. *Security Risks*

The D.C. Circuit next considered the security risks involved in conveying foreign security information to judicial officers.[112] Although the Supreme Court rejected this consideration in a case involving domestic security,[113] it is possible that greater risks are involved in foreign security cases.[114] Yet, the court in *Zweibon* rejected this contention.[115] Warrant proceedings are conducted ex parte. Further, the government can protect its interests by seeking the warrant only from judges it trusts to be discrete.

Any security problems posed by the presence of judicial administrative personnel can be eliminated by having the government provide the necessary clerical personnel.[116] Given the number of people already involved in such decisions, the additional review of a federal judge "poses a miniscule marginal risk of a security breach."[117]

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

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

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

113. United States v. United States District Court, 407 U.S. at 320-21.

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

115. 516 F.2d at 647.

116. *Id. See also* United States v. United States District Court, 407 U.S. at 321 (approving a similar procedure in the domestic security context). *See generally* Note, *The "National Security Wiretap": Presidential Prerogative or Judicial Responsibility?*, 45 S. CAL. L. REV. 888, 901 (1972).

117. 516 F.2d at 647 n.157. The court cited a statement by former Attorney General Saxbe indicating that numerous individuals within the FBI and the Department of Justice are involved in the process of deciding whether surveillance will be initiated. *Id.* at 643. *See Hearings on Electronic Surveillance for National Security Purposes Before the Subcomm. on Criminal Laws and Procedures and Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 235 (1974) (testimony of Attorney General Saxbe).

Under S. 1566, warrant proceedings would continue to be conducted ex parte.[118] The bill further provides that such proceedings should be conducted expeditiously and that the court records be sealed and securely maintained.[119] Unfortunately, S. 1566 fails to provide for government supplied administrative personnel; however, in light of Supreme Court approval of such a procedure[120] and the lack of an express prohibition in S. 1566, an Executive request for this safeguard would probably be approved.[121] The Chief Justice would certainly be aware of the need for trustworthiness when selecting foreign security judges;[122] it is therefore highly unlikely that among seven carefully selected judges, the government would be unable to secure discrete review.

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

3. *Ongoing Intelligence-Gathering Activities*

A third argument considered in *Zweibon* asserted a distinction between ongoing foreign security surveillance aimed at collecting strategic intelligence information and surveillance aimed at criminal prosecution.[123] The government argued that because foreign security surveillance is not directed to securing evidence for use in a criminal prosecution, it is less offensive to fourth amendment values and therefore should be accorded greater judicial deference.[124] The court, how-

118. S. 1566, *supra* note 106, § 2525 (a).

119. *Id.* § 2523(c).

120. United States v. United States District Court, 407 U.S. at 321.

121. The Chief Justice probably could establish this procedure pursuant to the authorization to create security measures. S. 1566, *supra* note 106, § 2523(c). Because the bill provides that the records of proceedings are to be maintained under these security measures, it appears that the Chief Justice's authority would extend to the ex parte hearing.

122. *See* note 111 *supra*.

123. 516 F.2d at 648-49.

124. In his testimony before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Attorney General Levi attempted to distinguish intelligence from law enforcement surveillance, asserting that the former requires fewer constitutional safeguards. According to Levi:

The effect of a government intrusion on individual security is a function, not only of the

ever, rejected this rationale.[125] Successful foreign security surveillance is likely to uncover evidence of criminal activity such as espionage,[126] treason,[127] or sabotage.[128] The government has demonstrated its willingness to use the fruits of such surveillance in criminal prosecutions;[129] therefore, any distinction based on whether the aim of the surveillance is investigatory or evidentiary is unpersuasive. Furthermore, the fourth amendment protects privacy interests[130] which will be invaded regardless of the aim of the surveillance.[131] The ongoing nature of foreign security surveillance merely increases the invasion by prolonging the intrusion.[132] Under S. 1566, information obtained by judicially approved foreign security surveillance concerning a United States citizen or resident alien may be used "for the enforcement of the criminal law

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

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

125. 516 F.2d at 648-49.

126. 18 U.S.C. §§ 791-99 (1970).

127. *Id.* §§ 2381-91 (1970) (also covering sedition and subversive activities).

128. *Id.* §§ 2151-57.

129. 516 F.2d at 648. *See Hearings on Electronic Surveillance for National Security Purposes Before the Subcomm. on Criminal Laws and Procedures and Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 351 (1974) (testimony of J. Shattuck); *id.* at 330-33 (testimony of W. Bender). Aside from seeking criminal evidence, the national security rationale is sometimes used to obtain information for personal political gain. *See* HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, S. REP. No. 93-1305, 93d Cong., 2d Sess. 146-57 (1974); CHURCH COMM. REPORT III, *supra* note 24, at 312-15; 119 CONG. REC. 41864 (1973) (remarks of Sen. Nelson). As stated by former Attorney General Levi:

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

1975 Hearings, supra note 124, at 100-01 (testimony of Attorney General Levi).

130. 516 F.2d at 648-49. Interpreting the holding in *Katz*, Justice Harlan stated that "a person has a constitutionally protected reasonable expectation of privacy . . . ." Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

131. 516 F.2d at 649; *see* See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967); *see generally* Denenberg, *Administrative Searches and the Right to Privacy in the United States*, 23 INT'L & COMP. L.Q. 169 (1974); Note, *Administrative Search* Warrants, 58 MINN. L. REV. 607 (1974). *But see 1975 Hearings, supra* note 124, at 97-98 (testimony of Attorney General Levi).

132. 516 F.2d at 649.

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

The government has demonstrated that it will, in criminal prosecutions, use information obtained from foreign security surveillance.[134] The assertion that such surveillance is less intrusive because it is not aimed at discovering criminal activity, therefore, has little validity. But apart from that distinction, *Zweibon* recognized that ongoing surveillance violates legitimate privacy interests. As such, it should be subject to fourth amendment strictures.

4. *Delay*

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

133. S. 1566, *supra* note 106, § 2526 (a) & (b). The bill provides:

> (a) Information concerning United States persons acquired from an electronic surveillance conducted pursuant to this chapter may be used and disclosed by Federal officers and employees without the consent of the United States person . . . for the enforcement of the criminal law if its use outweighs the possible harm to national security. No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.
>
> (b) The minimization procedures under this chapter shall not preclude the retention and disclosure, for law enforcement purposes, of any information which constitutes evidence of a crime if such disclosure is accompanied by a statement that such evidence, or any information derived therefrom, may only be used in a criminal proceeding with the advanced authorization of the Attorney General.

Id.

134. *See* note 129 *supra*.

135. 516 F.2d at 649.

136. Attorney General Saxbe set out detailed requirements for obtaining authorization of foreign security surveillance. If a request for warrantless surveillance originates in an FBI field office, the proposal will be considered by eleven levels of supervision before it reaches the Attorney General's office. *Hearings on Electronic Surveillance for National Security Purposes Before the Subcomm. on Criminal Laws and Procedures and Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 235 (1974) (testimony of Attorney General Saxbe). *See* 516 F.2d at 643.

137. *See* Warden v. Hayden, 387 U.S. 294 (1967) (exigent circumstances exception); Schmerber v. California, 384 U.S. 757 (1966) (exigent circumstances exception). S. 1566, *supra* note 106, § 2525(d), also provides an exigent circumstances exception. The exception applies when the Attorney General reasonably determines that:

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

5. *Administrative Burden*

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

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

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(1) an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained, and

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

Id. § 2525(d)(1) & (2).

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

139. *Id.* at 650.

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

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

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

143. *Id.*

144. *Id. See* United States v. Robinson, 414 U.S. 218, 259 n.7 (1973) (Marshall, J., dissenting) ("Mere administrative inconvenience . . . cannot justify invasion of Fourth Amendment rights."); Chimel v. California, 395 U.S. 752, 768 n.16 (1969) (state's argument that it would be "unduly burdensome to obtain a warrant specifying" items to be seized, rejected as meritless).

that the number of foreign security wiretaps is small.[145] The costs and burdens of securing a warrant in appropriate cases should therefore be proportionally small.[146]

IV. CONGRESSIONAL REACTION

A. *The Church Committee*

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

145. 516 F.2d at 651 n.182. The following table of national security wiretaps was compiled from White House figures and printed in Schwartz, *Reflections on Six Years of Legitimated Electronic Surveillance*, in PRIVACY IN A FREE SOCIETY 38 (1974) (final report of The Annual Chief Justice Earl Warren Conference on Advocacy in the United States):

1945 - 519	1959 - 120
1946 - 346	1960 - 115
1947 - 374	1961 - 140
1948 - 416	1962 - 198
1949 - 471	1963 - 244
1950 - 270	1964 - 260
1951 - 285	1965 - 233
1952 - 285	1966 - 174
1953 - 300	1967 - 113
1954 - 322	1968 - 82
1955 - 214	1969 - 123
1956 - 164	1970 - 102
1957 - 173	1971 - 101
1958 - 166	1972 - 108

Id. at 51. Professor Schwartz noted that the figures used in assembling this table were "understated, fragmentary and ambiguous." *Id.*

146. 516 F.2d at 651 n.182.

147. SENATE SELECT COMM. TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. No. 755, 94th Cong., 2d Sess. bk. II, at 327-28 (1976) [hereinafter cited as CHURCH COMM. REPORT II].

148. *Id.* at 327 (Recommendation 51).

149. *Id.* (Recommendation 52). For a discussion of the procedures mandated by Omnibus, see note 165 *infra*.

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

151. CHURCH COMM. REPORT II, *supra* note 147, at 327 (Recommendation 52).

vealed,[152] and the issuing judge adopts "procedures to minimize the acquisition and retention of nonforeign intelligence information about Americans."[153] To protect foreign security information, the Committee proposed that foreign security electronic surveillance "should be exempt from the disclosure requirements of [Omnibus] as to foreigners generally" and Americans "involved in hostile foreign intelligence activities."[154]

Regarding physical surveillance, the Committee stated that "[u]nauthorized entry should be conducted only upon judicial warrants issued on probable cause to believe that the place to be searched contains evidence of a crime . . . ."[155] The Committee's recommendation, however, would allow surreptitious entry "against foreigners who are officers, employees, or conscious agents of a foreign power," if conducted pursuant to a judicial warrant issued under the less stringent standards applicable in cases involving electronic surveillance of foreigners.[156]

B. *Proposed Bills*

In March, 1976, Senator Edward Kennedy, supported by Attorney General Edward H. Levi, introduced S. 3197.[157] This bill would permit the issuance of a warrant for electronic surveillance of foreign agents—defined as including American citizens and resident aliens[158]—upon a finding of probable cause to believe that the target is

152. *Id.*

153. *Id.*

154. *Id.* at 328. Omnibus requires the issuing judge to notify the subject of electronic surveillance within a reasonable time but not later than ninety days from the expiration of the warrant. 18 U.S.C. § 2518 (8)(d) (1970). Omnibus further requires that the issuing judge, "upon the filing of a motion, may in his discretion make available to [the subject of electronic surveillance or] his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice." CHURCH COMM. REPORT II, *supra* note 147, at 328.

155. CHURCH COMM. REPORT II, *supra* note 147, at 328 (Recommendation 54).

156. *Id.* *See* notes 150-53 *supra* and accompanying text.

157. S. 3197, 94th Cong., 2d Sess. (1976) [hereinafter cited as S. 3197]. *See* FOREIGN INTELLIGENCE ACT REPORT, *supra* note 83, at 13. Prior to S. 3197, numerous foreign security bills had been proposed. *See, e.g.*, S. 743, 94th Cong., 1st Sess. (1975); S. 1888, 94th Cong., 1st Sess. (1975); H.R. 141, 94th Cong., 1st Sess. (1975); H.R. 414, 94th Cong., 1st Sess. (1975); H.R. 2603, 94th Cong., 1st Sess. (1975); H.R. 3133, 94th Cong., 1st Sess. (1975); H.R. 3855, 94th Cong., 1st Sess. (1975); H.R. 3874, 94th Cong., 1st Sess. (1975). *See generally* Note, *Present and Proposed Standards for Foreign Intelligence Electronic Surveillance*, 71 NW. U.L. REV. 109 (1976).

158. The bill defines "agent of a foreign power" as

> (i) a person who is not a permanent resident alien or citizen of the United States and who is an officer or employee of a foreign power; or

a foreign agent.[159] It fails to require either certification by the Attorney General that foreign intelligence information essential to national security is likely to be obtained, or a showing of probable cause to believe that such information may be found at the place to be searched.[160] Furthermore, the bill disclaims any limitation on the President's power to procure foreign intelligence information if it is acquired by means other than electronic surveillance; or the circumstances "are so unprecedented and potentially harmful to the Nation that they cannot be reasonably said to have been within the contemplation of Congress."[161]

S. 3197 would provide a warrant requirement in foreign security electronic surveillance cases.[162] It would, however, expand the defined group of foreign security surveillance targets by encompassing United States citizens and resident aliens[163] while permitting surveillance of this expanded group without probable cause to believe the surveillance would reveal foreign security information.[164] Furthermore, the procedural safeguards of S. 3197 are inadequate. The bill would permit nonconsensual surveillance of citizens and resident aliens without ad-

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(ii) a person who, pursuant to the direction of a foreign power, is engaged in clandestine intelligence activities, sabotage, or terrorist activities, or who conspires with, or knowingly aids or abets such a person in engaging in such activities.

S. 3197, *supra* note 157, § 2521(b)(1).

159. *See id.* §§ 2522-25. As stated in the Senate report:

S. 3197 amends Title 18, United States Code, by adding a new chapter after chapter 119, entitled "Electronic Surveillance Within the United States for Foreign Intelligence Purposes." The bill requires a warrant for any electronic surveillance conducted for foreign intelligence purposes of law enforcement. The combined effects of chapter 119 and this new chapter, if enacted, would be to require a warrant for any electronic surveillance conducted within the United States.

FOREIGN INTELLIGENCE ACT REPORT, *supra* note 83, at 13-15 (Summary of the Legislation). The bill requires that the presiding judge find, on the basis of the facts submitted by the applicant, probable cause to believe that, "(i) the target of the electronic surveillance is a foreign power or an agent of a foreign power, and, (ii) the facilities or place at which the electronic surveillance is directed are being used, or are about to be used, by a foreign power or an agent of a foreign power . . . ." S. 3197, *supra* note 157, § 2525(a)(3).

160. The bill requires that an executive officer certify that: "the information sought is foreign intelligence information;" "the purpose of the surveillance is to obtain foreign intelligence information;" and "that such information cannot feasibly be obtained by normal investigative techniques." *Id.* § 2524(a)(8) (A,B, & C). Senator Joseph Biden expressed doubts as to the constitutionality of a bill which "says in effect that where there is probable cause that the subject of a search is engaged in criminal activity there is no need to satisfy the judge that the search will seize evidence of criminal activity . . . ." FOREIGN INTELLIGENCE ACT REPORT, *supra* note 83, at 71-72.

161. S. 3197, *supra* note 157, § 2528(a) & (b).

162. *See* note 159 *supra*.

163. *See* note 158 *supra* and accompanying text.

164. *See* note 160 *supra*.

herence to certain Omnibus procedures.[165] It specifically provides that its procedures "shall not preclude . . . disclosure, for law enforcement purposes, of any information which constitutes evidence of a crime . . . ."[166] In light of the frequency with which the government uses such surveillance to obtain evidence of criminal activity,[167] this provision is contrary to the Church Committee's preference for the protections of Omnibus.[168]

The bill does not provide any procedural protection from physical surveillance.[169] Its disclaimer as to inherent Presidential powers to conduct surveillance by means other than electronic surveillance[170] raises questions of congressional interpretation of Presidential power in foreign security cases. If S. 3197 becomes law, the Executive would certainly continue to assert the validity of warrantless physical searches.[171] Whether Congress can place any limits on the exercise of Presidential powers is an open question.[172] Nevertheless, passage of S. 3197, with the disclaimer, would demonstrate that even Congress is

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

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

167. *See* note 129 *supra* and accompanying text.

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

169. *See* note 161 *supra* and accompanying text.

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

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

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

uncertain as to the limits it can impose on the President's conduct of foreign affairs.[173]

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

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

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

174. U.S. CONST. art. I, § 8, cl. 3. *See generally* L. HENKIN, *supra* note 64, at 72-74.

175. U.S. CONST. art. I, § 8, cl. 3. *See generally* L. HENKIN, *supra* note 64, at 69-71.

176. U.S. CONST. art. I, § 8, cl. 11. *See generally* L. HENKIN, *supra* note 64, at 80-81.

177. U.S. CONST. art. I, § 8, cl. 18. *But see* note 172 *supra* and accompanying text.

178. Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918). *See also* Zschernig v. Miller, 389 U.S. 429, 432 (1968) (state alien inheritance law unconstitutional because it intrudes "into the field of foreign affairs which the Constitution entrusts to the President and Congress"). Perez v. Brownell, 356 U.S. 44, 57-58 (1958) (Nationality Act of 1940 enacted pursuant to Congress' power to regulate relations with foreign nations); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1972) (Congress can limit President's foreign affairs powers in domestic situation with foreign affairs implications); Banco Nacional de Cuba v. Farr, 383 F.2d 116, 182 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1967) (Congress can legislate in the area of foreign affairs). *See generally* L. HENKIN, *supra* note 64, at 94-107; Henkin, *The Treaty Makers and Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903 (1959). S. 3197 adopts the concurrent powers theory contingently; limiting the President's power to use electronic surveillance in foreign security cases only if the courts determine that this power exists. S. 3197, *supra* note 157, § 2528(a) & (b). *See* FOREIGN SECURITY ACT REPORT, *supra* note 83, at 47-48.

179. *See* note 106 *supra*.

eral.[180] For a citizen or resident alien to be classified as a foreign agent, the government would have to establish probable cause to believe that the suspect knowingly provided assistance to a foreign power in a manner harmful to the United States.[181] Foreigners could be classified as foreign agents simply by being officers or employees of a foreign nation.[182] Like S. 3197, the bill would permit the issuance of warrants upon a finding of probable cause to believe that the target is a foreign agent.[183] It does not, however, require a showing of probable cause to believe that foreign intelligence information essential to national security will be obtained.[184]

Although S. 1566 disclaims any limitation on foreign security surveillance by means other than electronics,[185] it does not contain a dis-

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

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

> (i) knowingly engages in clandestine intelligence activities for or on behalf of a foreign power, which activities involve or will involve a violation of the criminal statutes of the United States;
>
> (ii) knowingly engages in activities that involve sabotage or terrorism for or on behalf of a foreign power;
>
> (iii) pursuant to the direction of an intelligence service or intelligence network of a foreign power, knowingly collects or transmits information or material to an intelligence service or intelligence network of a foreign power in a manner intended to conceal the nature of such information or material or the fact of such transmission or collection, under circumstances which indicate the transmission of such information or material would be harmful to the security of the United States, or that lack of knowledge by the United States of such collection or transmission would be harmful to the security of the United States; or
>
> (iv) conspires with or knowingly aids or abets any person engaged in activities described in subsections B(i) or (iii) above.

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

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

> (i) is an officer or employee of a foreign power;
>
> (ii) knowingly engages in clandestine intelligence activities for or on behalf of a foreign power under circumstances which indicate that such activities would be harmful to the security of the United States; or
>
> (iii) conspires with or knowingly aids or abets a person described in paragraph (ii) above.

Id. § 2521(b)(2)(A).

183. *See id.* § 2524(a)(7)(A, B, & C).

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

185. The bill states that

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

S. 1566, *supra* note 106, at 28.

claimer as to Presidential powers.[186] The bill clearly provides that, along with Omnibus, it would constitute the exclusive means by which electronic surveillance could be conducted in the United States.[187] Although the bill fails to espouse the concurrent powers theory,[188] its failure to mention inherent Presidential powers implies an assertion of congressional authority over foreign security surveillance.[189] It therefore leaves the door open for future legislation limiting Executive discretion.

The distinction between United States citizens, resident aliens, and other foreigners is troublesome. Under certain circumstances, United States citizens would still be subject to legal surveillance without the protections of Omnibus.[190] Foreign employees such as ambassadors or foreign government business representatives certainly have frequent conversations with American citizens. Such conversations could be intercepted without the protections of Omnibus if a warrant were obtained against the foreign employee under S. 1566 procedures.[191] Because the bill does not require a showing of probable cause to believe that essential foreign intelligence information is likely to be obtained,[192] the government might be tempted to use a foreign security rationale to acquire information on United States citizens.[193]

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

187. S. 1566, *supra* note 106, at 28.

188. *See* notes 174-78 *supra* and accompanying text.

189. *See* note 186 *supra*.

190. *See* notes 154 & 165 *supra*.

191. As stated by the Church Committee:

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

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

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

193. Suppose that an employee of a foreign embassy was a close friend of a political adver-

Furthermore, the fourth amendment does not distinguish between citizens and foreigners. It protects "persons."[194] During the legislative hearings on S. 1566, Attorney General Bell admitted that "[t]here is no doubt that the fourth amendment protects aliens in the United States . . . ."[195] Yet, according to the Attorney General, S. 1566 satisfies the fourth amendment by requiring a judicial warrant prior to the implementation of surveillance against foreigners, even though the warrant may issue under a lesser showing than is required for American citizens or resident aliens.[196]

The case law provides support both for and against the Attorney General's position. The Supreme Court has stated that an alien is entitled to an "ascending scale of rights as he increases his identity with our society."[197] Yet, it has also afforded full fourth amendment protections to aliens illegally in the United States.[198] Moreover, the Court has declared alienage a suspect classification, protecting aliens from arbitrary and discriminatory governmental action.[199] Thus, whether the Court would uphold S. 1566's distinction between United States citizens, resident aliens, and foreigners is an open question.

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

194. U.S. CONST. amend. IV.

195. *1977 Hearings, supra* note 53, at 16.

196. *Id.*

197. Johnson v. Eisentrayer, 339 U.S. 763, 770 (1950). *See also* Abel v. United States, 362 U.S. 217, 232-34 (1970) (dictum) (permissible to arrest alien, prior to deportation, on administrative warrant which failed to meet fourth amendment requirements).

198. Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (illegal alien afforded full fourth amendment protections). *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 379-72 (1971) (denial of welfare benefits based on alienage held to violate the equal protection clause of the fourteenth amendment); Au Yi Lau v. Immigration & Naturalization Serv., 445 F.2d 217, 223 (D.C. Cir. 1970) (fourth amendment protects aliens while in the United States), *cert. denied*, 404 U.S. 864 (1971).

199. In Graham v. Richardson, 403 U.S. 365 (1971), the Court stated that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority . . . for whom such heightened judicial solicitude is appropriate." *Id.* at 372. On the rights of aliens generally, see L. HENKIN, *supra* note 64, at 254-55; Gordon, *The Alien and the Constitution*, 9 CAL. W.L. REV. 1 (1972).

Perhaps the most serious defect in S. 1566 is that like S. 3197 it disclaims any limitation on foreign security surveillance by means other than electronic surveillance. This leaves serious questions as to the legality of warrantless foreign security physical searches unresolved. Thus, even if one of these bills were enacted, the foreign security issue would remain alive.[200] Resolution would ultimately depend on an appropriate case reaching the Supreme Court or further legislation. In the interim, the Executive can continue to assert the validity of warrantless physical foreign security searches.

C. *Why Congress Should Act*

In January, 1978, President Carter issued Executive Order 12036 regarding United States intelligence activities.[201] The order asserts that intelligence activities "must be conducted in a manner that preserves and respects established concepts of privacy and civil liberties."[202] Yet, it would permit warrantless intelligence activities when the President and Attorney General authorize such activities upon a finding of probable cause to believe the target is an "agent of a foreign power."[203] The order leaves the term "agent of a foreign power" undefined, and permits both warrantless physical and electronic surveillance.[204] Furthermore, it fails to require probable cause to believe information deemed essential to national security is likely to be obtained.

The order is ripe for Executive abuse. It provides no guidelines for determining who is an "agent of a foreign power."[205] Many individuals with merely a business, personal, or political connection to a foreign nation could conceivably be included. Its substantive protections are also unclear. The Executive offers only its good faith. Unfortunately,

200. Neither S. 3197, *supra* note 157, nor S. 1566, *supra* note 106, limit physical searches. The Executive could conceivably continue to assert the validity of warrantless foreign security physical searches after the passage of either or both bills.

201. Exec. Order No. 12036, 43 Fed. Reg. 3674 (1978).

202. *Id.* at 3684.

203. *Id.* at 3685.

204. The Order states that certain activities, including electronic and physical surveillance for which a warrant would be required if undertaken for law enforcement rather than intelligence purposes, shall not be undertaken against a United States person without a judicial warrant unless the President has authorized the type of activity involved and the Attorney General has both approved the particular activity and determined that there is probable cause to believe that the United States person is an agent of a foreign power. *Id.*

205. *See A New Loophole Entitled 'Agent of Foreign Power,'* St. Louis Post-Dispatch, Jan. 29, 1978, at D3, col. 1 (lists Clark Clifford, Jane Fonda, and Governor Jerry Brown as individuals who might be classified as agents of a foreign power).

executive good faith is an inadequate protection for individual constitutional rights.[206]

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

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

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206. The fourth amendment owes its origin to its framers' fears of potential executive abuse of warrantless search powers. *See* note 51 *supra*.

207. See *1977 Hearings, supra* note 53, at 13-17, 26 (statement and comments of Attorney General Bell).

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

209. *See, e.g.*, United States v. Brown, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 760 (1974).

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

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

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

> [t]here are sweeping statements to the effect that all questions touching on foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application or involve the exercise of a discretion demonstra-

S. 1566 is needed for its definition of those who are to be classified as agents of a foreign power.[213] Both S. 1566 and Executive Order 12036 allow a warrant to issue on a lesser showing of involvement in foreign intelligence activities for foreigners than is required for United States citizens or resident aliens.[214] As stated earlier, the constitutional validity of this classification is an open question.[215] Yet, given the vagueness of Executive Order 12036,[216] S. 1566 would at least provide more definitive procedural protections for the rights of United States citizens and resident aliens.[217]

V. CONCLUSION

Neither Congress nor the Court has assumed responsibility for eliminating the current confusion surrounding foreign security surveillance. Thus, the Executive may now assert the legality of warrantless electronic and physical surveillance in cases involving foreign agents or collaborators. This state of affairs is unacceptable. From *Entick v. Carrington*[218] to the surreptitious activities of President Nixon,[219] one lesson cuts across history: Executive discretion is subject to abuse. Presidential power is too often used for private political gain at the expense of individual rights.[220] The fourth amendment was adopted to

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bly committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views.

Id. at 211. The Court, however, noted that it would be an error "to suppose that every case or controversy which touches on foreign relations lies beyond judicial cognizance." *Id.* The Court has withheld judgment as to the validity of congressional classifications of aliens for admittance into this country even though the individuals contesting the classifications asserted deprivations of constitutional rights. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) (Court deferred to political branches although appellants alleged that immigration classification violated due process right to control familial relationship); Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (Court deferred to political branches although appellees alleged that Executive's exclusion of a visitor violated his first amendment rights). It is conceivable that the Court might defer to the political branches on the issue of the constitutionality of warrantless foreign security searches.

213. *See* notes 180-82 *supra* and accompanying text.

214. *Compare id., with* notes 204-05 *supra* and accompanying text.

215. *See* notes 194-99 *supra* and accompanying text.

216. *See* notes 205-06 *supra* and accompanying text.

217. *See* notes 181-82 *supra* and accompanying text. *But see* notes 191-93 *supra* and accompanying text. The contention here is not that the protections provided by S. 1566 are sufficient to protect individual constitutional rights, but merely that it provides more protection than Executive Order No. 12036.

218. 10 How. St. Tr. 1029, 95 Eng. Rep. 807 (1765). *See* note 51 *supra*.

219. *See* HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, S. Rep. No. 93-1305, 93d Cong., 2d Sess. 146-47 (1974); 119 Cong. Rec. 41864 (1973) (remarks of Sen. Nelson).

220. *See* notes 129 & 191 *supra* and accompanying text.

prevent such abuse.[221]

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

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

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221. *See* note 51 *supra*.