
STUDENT NOTES

LET'S CALL A DUCK A DUCK: THE FOREIGN INTELLIGENCE EXCEPTION FROM *IN RE DIRECTIVES* SHOULD BE RESTRICTED TO COMBATING GLOBAL TERRORISM

JOHN ESTERHAY

INTRODUCTION

On November 13, 2009, United States Attorney General Eric Holder announced that five terrorists suspected of participation in the 9/11 attack and held at the Guantanamo Bay Detention Center would be transferred to U.S. federal court to stand trial as civilians.¹ He assigned jurisdiction to the Southern District of New York with assistance from the Eastern District of Virginia due to the fact that these two districts contain the World Trade Center site and Pentagon respectively; although, coincidentally (or perhaps not) prosecutors and judges in these two districts also have by far the most experience in counterterrorism cases to date.² Although these cases are hardly the first examples of international terrorist suspects being tried in U.S. federal court,³ they nevertheless represent a

¹ The Justice Blog, Attorney General Eric Holder at Today's Press Conference, <http://blogs.usdoj.gov/blog/archives/348> (Nov. 13, 2009).

² See Richard B. Zabel & James J. Benjamin, Jr., In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts: update and Recent Developments, Human Rights First 1, 7 (2009), available at <http://www.humanrightsfirst.org/pdf/090723-LS-in-pursuit-justice-09-update.pdf>.

³ See, e.g., United States v. Bin Laden, 92 F. Supp. 2d 225 (S.D.N.Y. 2000) (following the terrorist bombings of U.S. embassies in East Africa charged, and for some defendants fully resolved, in federal court) [hereinafter Bin Laden I].

sharp break with the Bush Administration's policy for handling such defendants.⁴

Meanwhile, on January 12, 2009, the U.S. Foreign Intelligence Surveillance Court of Review ("FISCR") released a redacted version of a classified opinion it had issued on August 22, 2008 for the case titled *In re Directives*, overturning the opinion by the lower Foreign Intelligence Surveillance Court ("FISC").⁵ This was only the second opinion by the FISCR⁶ since its creation in 1978 by the Foreign Intelligence Surveillance Act ("FISA").⁷ The court held "that a foreign intelligence exception to the Fourth Amendment's warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States."⁸ The U.S. Supreme Court has not yet ruled on the existence of a "foreign intelligence exception," and, prior to *In re Directives*, federal circuits were split on this issue.⁹ The precedent set by FISCR, however, is generally more crucial to foreign intelligence surveillance issues than any circuit opinion,¹⁰ so until the Supreme Court decides to weigh in, the FISCR's opinion will stand.

⁴ See, e.g., Brief for Respondents, *Rasul v. Bush*, Nos. 03-334 and 03-343 (Oct. 3, 2003) (containing the Bush Administration's original argument that federal courts lacked any jurisdiction over foreign nationals held at Guantanamo Bay). The U.S. Supreme Court rejected this argument in its ultimate decision. See *Rasul v. Bush*, 542 U.S. 466, 485 (2003).

⁵ See *In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act*, 551 F.3d 1004 (FISA Ct. Rev. 2008) [hereinafter *In re Directives*].

⁶ See Roger Pilon, *Constitutional Intelligence: Restoring Politics in the War on Terror*, 12 CHAP. L. REV. 655, 667-68 (2009). The existence of only two FISCR opinions in over thirty years is due to the fact that the proceedings are secret and *ex parte*, meaning an appeal only occurs if the lower FISC rules against the government, and the government decides to appeal. The first time this occurred was in 2002. See Cedric Logan, Note, *The FISA Wall and Federal Investigations*, 4 N.Y.U. J. L. & LIBERTY 209, 232 (2009). In fact, FISC never actually ruled against the government until 2002. See Jonathan D. Forgang, Note, *"The Right of the People": The NSA, the FISA Amendments Act of 2008, and Foreign Intelligence Surveillance of Americans Overseas*, 78 FORDHAM L. REV. 217, 236 (2009).

⁷ See Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-85(c) (2006)) [hereinafter FISA]; see also § 1803(b) (creating the court of review).

⁸ *In re Directives*, *supra* note 5, at 1012.

⁹ See Blake Covington Norvell, *The Constitution and the NSA Warrantless Wiretapping Program: A Fourth Amendment Violation?*, 11 YALE J.L. & TECH. 228, 249-253 (2009).

¹⁰ See David Bender, *Privacy and Data Protection Developments – 2009*, in FIFTEENTH ANNUAL INSTITUTE ON INTELLECTUAL PROPERTY LAW 131, 153-54 (Practicing Law Institute 2009) ("The predilections of this court are especially important in such matters [at issue in *In re Directives*] because unlike most legal issues, where each regional court of

These recent developments are important, in tandem, because it seems that policymakers in the Department of Justice have decided that the best course of action is to try foreign terrorism suspects in American federal courts even if they are apprehended in military operations on foreign soil. The *In re Directives* exception will provide a mandate to void any application of the Fourth Amendment for electronic surveillance in such cases.¹¹ The result could have far-reaching consequences beyond the five defendants currently scheduled for trial for their participation in the 9/11 attacks.

Part I of this article takes a brief look at the history of the foreign intelligence exception and its development both before and after the implementation of FISA. The background of foreign intelligence surveillance generally has been documented in depth by previous scholarship. This article, therefore, focuses on the path leading to the exception clarified in the recent *In re Directives* decision and its potential impact due to FISCR's crucial status as the court of review for such matters within the subject matter jurisdiction.

Part II of this article examines just what it means to allow electronic surveillance into federal criminal trials without Fourth Amendment protections. Specifically, the foreign intelligence exception contains a requirement that the "purpose" of the surveillance be to protect national security, but this Part analyzes that constraint and finds that it provides little to no protection because of the presence of a foreign intelligence motive in any global investigation and courts' reticence to address issues involving national security. Thus, such an exception could be expanded far beyond its initial reach to allow warrantless surveillance evidence into criminal trials of more mundane criminals.

Therefore, Part III develops a better requirement for voiding Fourth Amendment restrictions in criminal court – namely, any charge of terrorism. Other national security and foreign intelligence surveillance would be perfectly allowable, but would not be admissible in criminal trial without typical Fourth Amendment protections. Because of the unique threat posed by global terrorism, there should be an exception for global terrorists, but it should not be constructed as anything more or less than what it is.

appeal is free to reach its own decision, as a practical matter in most instances the FISCR alone will have the final say on subject matter within its jurisdiction.”).

¹¹ See *In re Directives*, *supra* note 5, at 1012.

PART I: THE EVOLUTION OF THE FOREIGN INTELLIGENCE EXCEPTION

The warrant requirement is a Constitutional right in the United States, and comes from the Fourth Amendment to the U.S. Constitution, which states that:

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.¹²

Although the Amendment does not clearly say that searches and seizures require a warrant, the U.S. Supreme Court has repeatedly ruled that warrantless searches and seizures are generally unreasonable, and thus in violation of the Constitution.¹³ This right to a warrant, as is clear from the Amendment's text, exists whether or not the Government intends to use the seized evidence in a criminal proceeding.¹⁴ For evidence that is used in criminal proceedings, however, the courts developed an efficient enforcement mechanism known as the *exclusionary rule*, which prohibits introduction by the Government prosecutors of evidence obtained without a warrant.¹⁵ Evidence uncovered incident or derivative to the illegal search is also excluded by the *fruit of the poisonous tree* doctrine.¹⁶ There is, therefore, a powerful Fourth Amendment warrant requirement for any evidence to be used in criminal court. This article focuses solely on the admissibility of evidence that is obtained without a warrant, but that is subject to the foreign intelligence exception, which operates to waive the exclusionary rule, rather

¹² U.S. CONST. amend. IV.

¹³ See, e.g., *Katz v. United States*, 389 U.S. 347, 357 (1967) (“[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions”) (citing previous Supreme Court precedent).

¹⁴ See U.S. CONST. amend. IV.

¹⁵ See *Weeks v. United States*, 232 U.S. 383, 393 (1914) (“If letters and private documents can thus be seized [without a warrant] and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.”).

¹⁶ See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (“The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all [e.g., to discover more evidence].”).

than the reasonableness of such searches and seizures outside a criminal prosecutorial setting.¹⁷

The Fourth Amendment addresses physical searches and seizures, but is silent on the subject of digital surveillance of communications because such technology was obviously outside the realm of imagination at the time of the ratification of the Bill of Rights. Nevertheless, there is a tentative theoretical parallel between the Government reading a defendant's personal papers and the Government listening to a defendant's phone calls or reading a defendant's emails, and courts equivocated, at first, on whether to put communications surveillance — commonly referred to as “wiretaps” — under the purview of the Fourth Amendment. When the Government first developed the ability to tap a phone line, the Supreme Court ruled that such surveillance fell outside Fourth Amendment protection, and, therefore, such surveillance did not require a warrant.¹⁸ In response, however, Congress quickly passed a law banning warrantless wiretaps.¹⁹

Ultimately, the Supreme Court reversed course in the 1967 *Katz* decision, and decided that a wiretap generally does indeed require a warrant to satisfy the Constitution,²⁰ a ruling which remains in force today. Congress voiced approval for the Court's reversal in *Katz* by subsequently enacting legislation that set procedures for federal electronic surveillance, including a warrant requirement. It is commonly referred to as a “Title III wiretap,” in reference to the legislative sec-

¹⁷ Most legal scholarship to date has focused on the reasonableness of warrantless surveillance outside a prosecutorial setting because, so far, the foreign intelligence exception, discussed *infra*, which applies to foreign agents believed to be outside the United States, has been viewed as unlikely to be applicable in domestic criminal cases. That calculus changes when foreign agents apprehended on foreign soil are tried in U.S. courts. See discussion, *infra*, Part II.

¹⁸ See *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (“The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation.”).

¹⁹ See Federal Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, 1103-04 (codified as amended at 47 U.S.C. § 605(a) (2006)).

²⁰ See *Katz v. United States*, 389 U.S. 347, 359 (1967) (“Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored ‘the procedure of antecedent justification that is central to the Fourth Amendment,’ a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case.”) (internal citations omitted).

tion.²¹ However, Title III specifically allowed warrantless surveillance for national security purposes, stating that the act did not limit the Government's ability "to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities,"²² and courts have ruled that the statute also has no extraterritorial application.²³ The *Katz* decision itself was silent on whether national security surveillance requires a warrant under the Fourth Amendment,²⁴ leaving the issue ambiguous, especially with regard to such surveillance conducted domestically.

The domestic national security surveillance question was answered a few years later in the 1972 *Keith* decision, when the Supreme Court ruled that domestic surveillance, even when conducted for national security purposes, requires a warrant under the Fourth Amendment.²⁵ However, *Keith* refused to consider foreign surveillance, reserving opinion on "the issues which may be involved with respect to activities of foreign powers or their agents."²⁶ That language is tracked by the foreign intelligence exception found in *In re Directives*.²⁷ The *Keith* decision also noted that the warrant standards and procedures for domestic national security surveillance could be different from Title III standards due to "different policy and practical considerations from the surveillance of 'ordinary crime.'"²⁸ Thus *Keith* simultaneously set the stage for allowing a separate set of warrant procedures for domestic national security surveillance, while leaving ambiguous what actually constitutes "domestic" security surveillance (which definitively requires a warrant)

²¹ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. III, 82 Stat. 197, 211-25 (1968) (codified at 18 U.S.C. §§ 2510-22 (2006)).

²² 18 U.S.C. § 2511(3) (1976), *repealed* by FISA, *supra* note 7, § 201(c), 92 Stat. at 1797.

²³ *See, e.g.*, *United States v. Barona*, 56 F.3d 1087, 1090 (9th Cir. 1995) (stating Title III "has no extraterritorial force" (quoting *United States v. Peterson*, 812 F.2d 486, 492 (9th Cir.1987))).

²⁴ *See Katz*, 389 U.S. at 359 n.23 ("Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.").

²⁵ *See United States v. U.S. Dist. Court*, 407 U.S. 297, 320 (1972) ("We recognize, as we have before, the constitutional basis of the President's domestic security role, but we think it must be exercised in a manner compatible with the Fourth Amendment. In this case we hold that this requires an appropriate prior warrant procedure.") [hereinafter *Keith*].

²⁶ *Id.* at 322 (emphasis added).

²⁷ *See In re Directives*, *supra* note 5, at 1012 and accompanying text.

²⁸ *Keith*, 407 U.S. at 322.

versus “foreign” security surveillance of Americans, which it did not examine.

Within the next few years, before the passage of FISA, several circuits articulated that the existence of the foreign intelligence exception to the Fourth Amendment allows foreign security surveillance of U.S. citizens, answering the question that *Keith* had left open.²⁹ Interestingly, the Supreme Court never ruled definitively on whether the Fourth Amendment applies to Americans outside U.S. jurisdiction,³⁰ although, in a plurality opinion, it found that the Constitution’s protections generally extend overseas.³¹ Nevertheless, prior to FISA providing its own answer (discussed in the next paragraph), five circuits wrestled with the question of foreign intelligence surveillance of Americans. In all five cases, however, the “foreign” intelligence surveillance was actually conducted on targets in the United States.³² Four out of the five found that a foreign intelligence exception applied.³³ The only dissenting circuit was the D.C. Circuit, and the opinion was only based on a plurality decision.³⁴ These cases, thus, brought the foreign intelligence exception into existence in a broad form without any qualifier about the target’s geographical status.

The issue did not resurface until 2000, partly because of the 1978 passage of FISA. In response to both the *Keith* decision and the

²⁹ See *infra* note 33.

³⁰ See Constance Pfeiffer, Note, *Feeling Insecure?: United States v. Bin Laden and the Merits of a Foreign-Intelligence Exception for Searches Abroad*, 23 REV. LITIG. 209, 215 (2004) (“The Supreme Court has never directly considered the applicability of the Fourth Amendment to a U.S. citizen searched abroad.”).

³¹ See *Reid v. Covert*, 354 U.S. 1, 6 (1957) (“When the Government reaches out to punish a citizen who is abroad, the shield which the *Bill of Rights* and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.”).

³² See *infra* note 34. The language in *Keith* permits this apparent contradiction. See *Keith*, *supra* note 25, and accompanying text. Foreign intelligence surveillance was defined in that case as monitoring communications of *foreign powers or their agents*, not by where the acquisition actually took place geographically or the location of the target. *Id.*

³³ See *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); *United States v. Buck*, 548 F.2d 871 (9th Cir. 1977); *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (vacated by *Alderman v. United States*, 394 U.S. 165 (1969)); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973); see also *Forgang*, *supra* note 6, at 245-48.

³⁴ See *Forgang*, *supra* note 6, at 248 (discussing *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975)).

Church Committee hearings,³⁵ Congress stepped in, once again, with legislation that provided warrant procedures for domestic security surveillance³⁶ and purported to define a divide between domestic and foreign security surveillance.³⁷ FISA took a fairly reasonable approach to this divide, requiring warrants for any surveillance occurring in the United States and directed at “U.S. Persons,”³⁸ which included permanent aliens as well as U.S. citizens.³⁹ Consequently, FISA did not put any restrictions on surveillance conducted on targets outside the United States, even if they were U.S. persons, thus leaving a gap where the current, narrower *In re Directives* foreign intelligence exception exists.⁴⁰ But, the legislation did require warrants for the kind of “foreign” intelligence surveillance at issue in the five circuit cases mentioned *supra*, effectively ending that line of inquiry for the time being.

In 2000, for the first time, a court finally examined the gap that FISA did not close, namely, warrantless foreign intelligence surveillance of an American citizen where the target is outside U.S. jurisdiction. The case was *United States v. Bin Laden*, which resulted from the 1998 U.S. embassy bombings in East Africa.⁴¹ One of the defendants was a U.S. citizen in Kenya who was subject to surveillance without a warrant.⁴² The court recognized that this was the first time this particular issue had been adjudicated⁴³ and found that the Fourth Amend-

³⁵ The Church Committee hearings were conducted by the U.S. Senate in 1975-76 to uncover possible abuses by intelligence agencies. The Committee was convened mainly to investigate the role intelligence agencies played in the Watergate scandal, but ended up issuing a series of reports about many perceived problems in the intelligence system, including warrantless surveillance. *See generally* SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, 94th CONG., 2d Sess. (1976).

³⁶ *See* FISA, *supra* note 7, tit. I (codified at 50 U.S.C. §§ 1801-11 (1982)).

³⁷ *See id.* §§ 101-02 (codified at 50 U.S.C. §§ 1801-02 (1982)).

³⁸ *Id.* §§ 101(f), 102(a)(1).

³⁹ *See id.* § 101(i).

⁴⁰ *See In re Directives*, *supra* note 5, at 1012; *see also* FISA, *supra* note 7, at §1802.

⁴¹ 126 F. Supp. 2d 264 (S.D.N.Y. 2000). This was another published ruling in the case referenced *supra* note 3 [hereinafter *Bin Laden II*].

⁴² *See id.* at 270.

⁴³ *See id.* (“Although numerous courts and Congress have dealt with searches in the United States for foreign intelligence purposes and other courts have dealt with searches of foreigners abroad, we believe this to be the first case to raise the question whether an American citizen acting abroad on behalf of a foreign power may invoke the Fourth Amendment, and especially its warrant provision, to suppress evidence obtained by the United States in connection with intelligence gathering operations.”).

ment did indeed apply overseas.⁴⁴ Nevertheless, the court ruled that there is a “foreign intelligence exception to the warrant requirement for searches targeting foreign powers (or their agents) which are conducted abroad.”⁴⁵ This is practically the exact language of the foreign intelligence exception in *In re Directives*. Interestingly, eight years later at almost the exact same time as the FISCR ruling in *In re Directives*, the Second Circuit issued a ruling on an appeal of *Bin Laden* declaring that there actually is no Fourth Amendment protection overseas, even for American citizens.⁴⁶ Thus the only circuit to even examine the foreign intelligence exception from *In re Directives* held that the exception is not required due to absence of an overseas warrant requirement in the first place. Regardless, the 2000 district court decision is very similar to the *In re Directives* ruling.

Other than the gap discussed above, surveillance law was fairly settled until September 11, 2001. The law developed rapidly after 9/11, however, partly in response to perceived failures in foreign intelligence with respect to the events leading up to the attacks.⁴⁷ Foreign intelligence surveillance procedure was altered in two ways. First, and very controversially, President Bush authorized a series of programs that expanded warrantless surveillance in a way which still has not been declassified entirely, making it difficult to know the scope of expansion.⁴⁸

⁴⁴ *See id.* This question, though, is still mostly an open one. *See* Norvell, *supra* note 9, and text accompanying note 29.

⁴⁵ *Id.* at 277.

⁴⁶ *See In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 171 (2d Cir. 2008) (“For these reasons, we hold that the Fourth Amendment’s Warrant Clause has no extraterritorial application and that foreign searches of U.S. citizens conducted by U.S. agents are subject only to the Fourth Amendment’s requirement of reasonableness.”).

⁴⁷ *See generally* NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004) (examining the institutional problems with intelligence and surveillance in the wake of the 2001 terrorist attacks). In particular, much of the post-9/11 intelligence reform for surveillance was driven by the pre-9/11, likely mistaken, belief that intelligence and criminal investigations had to be isolated from each other, commonly known as “the Wall.” *See id.* at 78-80, 328.

⁴⁸ *See* Norvell, *supra* note 9, at 230-32. Several of the legal opinions from the Office of Legal Counsel, Department of Justice (“OLC”) justifying warrantless surveillance have been released, which help to identify the contours of President Bush’s authorizations, and still others are referenced in declassified memos. *See, e.g.*, Memorandum for the Files: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, Off. Legal Counsel (Jan. 15, 2009), *available at* <http://www.justice.gov/opa/documents/memostatusolcopinions01152009.pdf> (describing and re-

Second, and more important to the discussion in this article, three important pieces of legislation, which impact the legal landscape for foreign intelligence surveillance, have been enacted in the last decade. The first was the USA PATRIOT Act in 2001,⁴⁹ which altered FISA to make clear that FISA material could be used in criminal investigations without violating the law.⁵⁰ The second was the Protect America Act of 2007,⁵¹ which legalized certain procedures used in President Bush's authorized programs, including surveillance of foreign-to-foreign communications routed through the United States and warrantless surveillance of communications between U.S. citizens in the United States and individuals outside the United States where the latter individuals are targeted.⁵² This provision was highly controversial, so the Act contained a six-month sunset provision,⁵³ and, ultimately, was allowed to lapse, although any programs authorized prior to the sunset date were exempted from expiration.⁵⁴ Even with its short window of operation, the Protect America Act is important to mention because the *In re Directives* court was hearing an appeal based on this statutory framework. Finally, the FISA Amendments Act of 2008 modified FISA into its current state.⁵⁵ Basically, foreign-to-foreign communications routed through the United States are still exempt from warrants,⁵⁶ but U.S. persons overseas now fall under FISA protection, expanding the

pudiating many of the previous OLC opinions regarding warrantless surveillance). However, the picture is far from complete.

⁴⁹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in numerous titles and sections of the U.S.C.) [hereinafter PATRIOT Act].

⁵⁰ *See id.* § 218 (codified as amended at 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B) (2006)) (changing requirement that foreign intelligence be "the purpose" of surveillance to "a significant purpose") and § 504 (codified at 50 U.S.C. §§ 1806(k)(1) and 1825(k)(1) (2006)) (expressly allowing law enforcement to collaborate with intelligence officials conducting FISA investigation, and that doing so would not preclude a finding that foreign intelligence was "a significant purpose"). These provisions were enacted specifically *In response* to the perceived existence of the Wall, *supra* note 47. The peculiar nature of the "purpose requirement" will be examined more fully in Part II, *infra*.

⁵¹ Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007).

⁵² *See id.* § 2 ("Nothing in the definition of electronic surveillance under section 101(f) shall be construed to encompass surveillance directed at a person reasonably believed to be located outside of the United States.") (repealed 2008).

⁵³ *See id.* § 6(c).

⁵⁴ *See id.* § 6(d).

⁵⁵ *See* FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2463.

⁵⁶ *See id.* § 101 (to be codified at 50 U.S.C. § 1881(a)) ("Procedures for targeting certain persons outside the United States other than United States persons").

scope of FISA to cover the gap discussed above.⁵⁷ The act ignited some controversy because even though it expanded warrant protection to Americans overseas, it allows for seven days (up from 48 hours) of warrantless surveillance in emergencies.⁵⁸

Returning to Fourth Amendment jurisprudence, the FISC found the foreign intelligence exception to exist in its second-ever ruling in 2008.⁵⁹ To reiterate, the court found “that a foreign intelligence exception to the Fourth Amendment’s warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States.”⁶⁰ The case arose from directives issued by the government to communications service providers under the Protect America Act to “assist it in acquiring foreign intelligence when those acquisitions targeted third persons (such as the service provider’s customers) reasonably believed to be located outside the United States.”⁶¹ This concern clearly flows from the controversial provision of the Protect America Act discussed above; even though the provision in question had lapsed, because previously authorized programs avoided expiration, the court deemed it worthy of adjudication.⁶² In the next Part, this article examines the exception in further detail, focusing on the purpose requirement and its unsuitability to cases actually tried in federal court.

PART II: THE PROBLEM WITH THE “PURPOSE REQUIREMENT”

The national security purpose requirement is the underlying fault with the foreign intelligence exception. Before analyzing that matter, however, it is useful to study the FISC-created exception generally. Although the *In re Directives* decision is very similar to *Bin Laden* in both language and justification of the foreign intelligence exception, it does not rely on—or even quote—*Bin Laden*, and there is one minor but, nonetheless, identifiable distinction. Both exceptions require that surveillance be conducted outside United States jurisdiction, but *In re Di-*

⁵⁷ See *id.* (to be codified at 50 U.S.C. § 1881(b)-(c) (“Certain acquisitions inside the United States targeting United States persons outside the United States” and “[o]ther acquisitions targeting United States persons outside the United States”).

⁵⁸ See *id.* § 108 (to be codified at 50 U.S.C. § 1843(a)(2) and (c)(1)(C)).

⁵⁹ See *In re Directives*, *supra* note 5.

⁶⁰ *Id.* at 1012.

⁶¹ *Id.* at 1006.

⁶² See *id.* at 1007.

rectives emphasizes that this crucial factor is satisfied based on *reasonable beliefs about the target's whereabouts*, whereas *Bin Laden* speaks about searches “conducted abroad.”⁶³ This discrepancy is notable, mainly, in that it tracks the development of legislative changes to FISA up to the point of the decision.⁶⁴ It is likely that the language in *Bin Laden* would be interpreted the same way as *In re Directives*, today, if the ruling in *Bin Laden* had not been modified by the Second Circuit.

Like *Bin Laden*, *In re Directives* assumes that the Fourth Amendment is applicable to U.S. citizens overseas, although it does not address the fact that this question is still open.⁶⁵ In terms of precedent, the FISCRC based its decision, in part, on one of the pre-FISA circuit cases, which found a broad foreign intelligence exception.⁶⁶ *In re Directives* is clear, however, that it is only authorizing the narrow exception like that in *Bin Laden*.⁶⁷ The FISCRC found that the authority for this exception flows directly from the Supreme Court line of cases that articulate an exception to the Fourth Amendment in “special needs” situations.⁶⁸

With a relatively uncomplicated and direct argument behind the ruling, it is useful to look in detail at the exception itself. The foreign intelligence exception from *In re Directives* has three requirements: (1) the target must be reasonably believed to be outside the United States, (2) the target must be a foreign power or the agent of a foreign power, and (3) surveillance is conducted for national security purposes.⁶⁹ The first condition is straightforward, and characterizes the divergence between the “broad” foreign intelligence exception of the pre-FISA circuits and the “narrow” exception as exists in *In re Directives* and *Bin Laden*. The nuance that officials conducting surveillance need only *reasonably believe* that their target is abroad is interesting insofar as it allows a margin of error when applying the exception that envisions its

⁶³ See *supra* note 43; *supra* text accompanying note 60.

⁶⁴ Prior to the legislative changes in the last decade, FISA procedures were triggered based on the location of the search, but the recent amendments have made it clear that the location of the target is the real concern. See *supra* notes 52 and 4956-57; *supra* text accompanying notes 52-61.

⁶⁵ See *In re Directives*, *supra* note 5, at 1009.

⁶⁶ See *id.* at 1010-12 (relying on *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir.1980)); see also *supra* text accompanying note 33.

⁶⁷ See *id.* at 1011 (identifying a “narrow foreign intelligence exception”).

⁶⁸ *Id.* at 1010 (citing several U.S. Supreme Court cases on the “special needs” exception).

⁶⁹ See *id.* at 1012.

application *within* the United States. This aspect is discussed in a broader context below to elucidate issues such as individuals masking their location, a common procedure among Internet hackers.

The second condition has its origins in language from the *Keith* decision.⁷⁰ Because the U.S. Supreme Court has not revisited this issue since *Keith*, all foreign intelligence surveillance must fit into the gap provided by that language; thus, FISA tracks the *Keith* language as well,⁷¹ going so far as to define “foreign power”⁷² and “agent of a foreign power”⁷³ as terms of art in the statute. Although FISA’s construction and the Constitutional exception are not necessarily equivalent, the thirty-plus year history of FISA suggests that these definitions can be considered settled in this area of law, meaning the second condition is conveniently simple as well.

The third condition—referred to throughout this article as the “purpose requirement”—is the only possibly complex factor in the exception. This requirement has a long and storied history, distinct but related to the history of the exception in general. The origin of the national security purpose factor goes back even further than *Keith* to the seminal *Katz* decision, which found that a warrant was required for a wiretap generally, but left an opening for warrantless surveillance for national security purposes.⁷⁴ *Keith* continued that logical thread by narrowing the opening to include only foreign national security surveillance. Unsurprisingly, the purpose requirement was statutorily enshrined in FISA as well, requiring “that the purpose of the surveillance is to obtain foreign intelligence information.”⁷⁵

For a variety of reasons, federal law enforcement and the Justice Department came to read this language as requiring that the “*primary purpose*” of surveillance be acquisition of foreign intelligence, as opposed to criminal prosecution.⁷⁶ The evolution to the stricter standard was based on the reality that every court to examine this issue from the passage of FISA until 9/11 either found or assumed primary purpose

⁷⁰ See *Keith*, *supra* note 25 and accompanying text.

⁷¹ See 50 U.S.C. § 1801(e) (2006) (defining foreign intelligence information using “foreign power” and “agent of a foreign power” language).

⁷² *Id.* § 1801(a).

⁷³ *Id.* § 1801(b).

⁷⁴ See *Katz*, 389 U.S. at 358, n.23.

⁷⁵ FISA, *supra* note 7, § 104(a)(7)(B) (amended by the PATRIOT Act, *supra* note 9, § 218).

⁷⁶ For a history of the Justice Department’s adoption of the “primary purpose” standard, see Logan, *supra* note 6, at 222-38.

to be the requisite threshold.⁷⁷ Every decision also found that threshold had been satisfied on the facts,⁷⁸ making it unnecessary for the government to contest the ruling. In practice, these decisions led to a 1995 memo specifying Justice Department procedures meant to avoid a court finding that the primary purpose of FISA surveillance had been something other than foreign intelligence.⁷⁹ The procedures, however, were extremely restrictive and constricted government capability by making it tremendously difficult to coordinate and communicate between intelligence and law enforcement, a development which came to be known as “the Wall.”⁸⁰

The Wall was identified as a crucial feature of intelligence failures leading up to 9/11,⁸¹ leading to its legislative dismantling by the PATRIOT Act.⁸² Specifically, that act changed FISA to require only that foreign intelligence acquisition be “a *significant* purpose” of surveillance.⁸³ The Department of Justice hastily drafted new procedures to take advantage of this alteration and provide coordination between law enforcement and intelligence.⁸⁴ The new statutory regime was quickly challenged as a violation of the Fourth Amendment, as interpreted by *Katz* and *Keith*, leading to the first and only other decision—besides *In re Directives*—by the FISC, *In re Sealed Case*.⁸⁵ *In re Sealed Case* found that not only does the significant purpose standard satisfy the Fourth Amendment,⁸⁶ but the Wall itself was unnecessarily constructed, because FISA, as written in 1978, allowed full coordination between law enforcement and intelligence.⁸⁷ *In re Directives* relies heavily on *In re*

⁷⁷ See William Funk, *Electronic Surveillance of Terrorism: The Intelligence/Law Enforcement Dilemma – A History*, 11 LEWIS & CLARK L. REV. 1099, 1123-24 (2007).

⁷⁸ See *id.*

⁷⁹ See Memorandum from Janet Reno, Att’y Gen. of the U.S., on Procedures for Contacts Between the FBI and the Criminal Div. Concerning Foreign Intelligence and Foreign Counterintelligence Investigations to Assistant Att’y Gen. of the Crim. Div., the Dir. of the FBI, Counsel for Intelligence Policy, and the U.S. Att’ys (July 19, 1995), available at <http://www.fas.org/irp/agency/doj/fisa/1995procs.html>.

⁸⁰ Logan, *supra* note 6, at 228-29.

⁸¹ See *supra* note 7.

⁸² See *supra* note 50 and accompanying text.

⁸³ 50 U.S.C. § 1804(a)(7)(B) (2006) (emphasis added).

⁸⁴ Logan, *supra* note 6, at 232-33.

⁸⁵ 310 F.3d 717 (FISA Ct. Rev. 2002) [hereinafter *In re Sealed Case*].

⁸⁶ See *id.* at 746 (“We, therefore, believe firmly, applying the balancing test drawn from *Keith*, that FISA as amended is constitutional because the surveillances it authorizes are reasonable.”).

⁸⁷ See *id.* at 727 (“In sum, we think that the FISA as passed by Congress in 1978 clearly did *not* preclude or limit the government’s use or proposed use of foreign intelligence

Sealed Case in its discussion of national security purpose, so it is reasonable to assume the purpose requirements from both cases are equivalent.⁸⁸

So what exactly is the problem with the purpose requirement? First, the significant purpose requirement as described *In re Sealed Case* is very weak, leading to the prediction that merely its invocation by government officials would be enough to satisfy the condition in a criminal prosecution. Article III judges are notoriously reluctant to intrude on the President's power to coordinate national security as "commander in chief," where "executive competence is at its zenith and judicial competence at its nadir."⁸⁹ *In re Sealed Case* speaks to this reality, noting that the FISC should not generally inquire "into the origins of an investigation nor an examination of the personnel involved. It is up to the Director of the FBI, who typically certifies, to determine the government's national security purpose, as approved by the Attorney General or Deputy Attorney General."⁹⁰ Accordingly, there will only be a court inquiry "if the FISA court has reason to doubt that the government has any real non-prosecutorial purpose in seeking foreign intelligence information The important point is that the relevant purpose is that of those senior officials in the Executive Branch who have the responsibility of appraising the government's national security needs."⁹¹

Of course, even if the significant purpose standard avoids FISC review *ex ante* in the case of a criminal prosecution, it will be subject to *ex post* review in the criminal proceeding to determine if the surveillance violated the Fourth Amendment, making evidence so-obtained inadmissible due to the exclusionary rule.⁹² However, even criminal courts are hesitant to overturn an executive branch finding of national security purpose, as is apparent from the fact that all courts to examine the issue have found the purpose requirement satisfied, even though

information, which included evidence of certain kinds of criminal activity, in a criminal prosecution.") (emphasis in original).

⁸⁸ *But see* discussion accompanying note 101, *infra*.

⁸⁹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 691 (2006) (Thomas, J., dissenting).

⁹⁰ *In re Sealed Case*, *supra* note 85, at 736.

⁹¹ *Id.*

⁹² *See, e.g.* *Bin Laden II*, *supra* note 41, at 277 ("All warrantless searches are still governed by the [Fourth Amendment] reasonableness requirement and can be challenged in *ex post* criminal or civil proceedings.").

they were reviewing surveillance under the more stringent primary purpose standard.⁹³

It is illuminating to give some examples of the superficial review of the government's purpose conducted by the courts. In the most recent decision, *United States v. Hammoud*, the Fourth Circuit found primary purpose was satisfied by the FBI's own affidavit that it "was primarily interested in obtaining foreign intelligence information" without further inquiry,⁹⁴ echoing a previous ruling in *United States v. Pelton*.⁹⁵ Meanwhile, in *United States v. Johnson*, the First Circuit emphasized only that government paperwork for the surveillance contained no "reference to any criminal liability or prosecution," avoiding a more in-depth review.⁹⁶ In *United States v. Sarkissian*, the Ninth Circuit also accepted the government's contention without comment,⁹⁷ as did the Eleventh Circuit in *United States v. Badia*.⁹⁸ The Second Circuit, in *United States v. Duggan*, went one step further by making the claim:

The FISA Judge, in reviewing the application, is not to second-guess the executive branch official's certification that the objective of the surveillance is foreign intelligence information. Further, Congress intended that, when a person affected by a FISA surveillance challenges the FISA Court's order, a reviewing court is to have no greater authority to second-guess the executive branch's certifications than has the FISA Judge.⁹⁹

In its discussion of the purpose requirement, *In re Sealed Case* relies on all of these cases — except for *Hammoud*, which was decided two years later — emphasizing the FISC's approval of federal court reticence in reviewing the government's intention.¹⁰⁰

It is important to note here that there is a fundamental distinction between the purpose requirement at issue in these circuit cases and *In re Sealed Case*, and the purpose requirement as an element of the foreign intelligence exception from *In re Directives*. The circuit cases and *In re Sealed Case* are analyzing the statutory purpose requirement in FISA—from a primary purpose and significant purpose standpoint, respectively—while the purpose requirement from *In re Directives* is an

⁹³ See *supra* text accompanying notes 76-78.

⁹⁴ 381 F.3d 316, 334 (4th Cir. 2004), *vacated on other grounds*, 543 U.S. 1097 (2005).

⁹⁵ 835 F.2d 1067, 1075-76 (4th Cir. 1987).

⁹⁶ 952 F.2d 565, 572 (1st Cir. 1991).

⁹⁷ 841 F.2d 959, 964 (9th Cir. 1988).

⁹⁸ 827 F.2d 1458, 1464 (11th Cir. 1987).

⁹⁹ 743 F.2d 59, 77 (2d Cir. 1984).

¹⁰⁰ See *In re Sealed Case*, *supra* note 85, at 726-27.

element of an exception to a *constitutional* right.¹⁰¹ A criminal court faced with the *In re Directives* exception would definitely not be able to go so far as to follow the *Duggan* suggestion for no judicial review since the exception is only reviewable at the prosecution stage. However, *In re Directives* itself does not make any distinction in its discussion of significant purpose, relying heavily on *In re Sealed Case*.¹⁰² It is, therefore, natural to assume that the FISC is endorsing the kind of low-level superficial review at work in the other cases for the foreign intelligence exception. After all, in that case the FISC declared, “this is the sort of situation in which the government’s interest is particularly intense.”¹⁰³

The second major problem with the purpose requirement is that the significant purpose standard allows criminal law enforcement and intelligence functions to be intertwined to such a degree that it is easy for the government to conduct warrantless surveillance with eventual arrest and prosecution in mind, fabricating tenuous national security justifications after the fact. Even when courts assumed primary purpose was the operative standard, they recognized that a considerable amount of overlap was allowed between law enforcement and intelligence operations. For example, in *Hammoud*, the court refused to consider whether “the FBI should have abandoned the surveillance when it became clear that no foreign intelligence information would be obtained.”¹⁰⁴ Regarding this question, *Duggan* provides the guiding principles for these cases, as the following passage is almost universally cited:

[W]e emphasize that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of such surveillance may later be used, as allowed by [FISA] as evidence in a criminal trial. Congress recognized that in many cases the concerns of the government with respect to foreign intelligence will overlap those with respect to law enforcement. Thus, one Senate Report noted that ‘intelligence and criminal law enforcement tend to merge in the area of foreign counterintelligence investigations. Surveillances conducted under FISA need not stop once conclusive evidence of a crime is obtained, but instead may be extended longer where protective measures other than arrest and prosecution are more appropriate.’¹⁰⁵

¹⁰¹ See *In re Directives*, *supra* note 5, at 1010-12.

¹⁰² See *id.* at 1011.

¹⁰³ *Id.*

¹⁰⁴ *United States v. Hammoud*, 381 F.3d 316, 334 n.7 (4th Cir. 2004), *vacated on other grounds*, 543 U.S. 1097 (2005).

¹⁰⁵ *United States v. Duggan*, 743 F.2d 59, 78 (2nd Cir. 1984) (quoting S. REP. NO. 95-701, at 11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3973, 3979-80); *see also* *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991); *United States v. Sarkissian*, 841 F.2d 959,

Meanwhile, in *Bin Laden*, the only other case besides *In re Directives* to find the narrow (constitutional) foreign intelligence exception, the requirement—under the primary purpose standard—is substantially the same as that in the cases interpreting FISA.¹⁰⁶ From this group of opinions it is clear that despite the development of the Wall, case law before the PATRIOT Act allowed for substantial coordination between law enforcement and intelligence.

In re Sealed Case went even further, emphasizing that foreign intelligence need not be the most important objective in FISA surveillance.¹⁰⁷ In that case the FISC ruled that, according to FISA prior to the passage of the PATRIOT Act, foreign intelligence surveillance actually *incorporated* “evidence of foreign intelligence crimes,”¹⁰⁸ meaning the government could collect FISA surveillance when prosecution of such a crime was the *only* objective.¹⁰⁹ By making this claim, the court declared that the construction of the Wall had been a mistake from the beginning because it created a “false dichotomy” that was neither written into FISA nor required by the Fourth Amendment.¹¹⁰ The opinion gives espionage and terrorism as two examples of “foreign intelligence crimes,”¹¹¹ and generally focuses on terrorism throughout as appropriate for criminal prosecution resulting from FISA surveillance. From this point of view, the passage of the PATRIOT Act limited government capability rather than expanding it because that legislation created a dichotomy where there was none before, even if it purported to change the standard from primary to significant purpose.¹¹²

965 (9th Cir. 1988); *United States v. Pelton*, 835 F.2d 1067, 1076 (4th Cir. 1987); *United States v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987).

¹⁰⁶ See *Bin Laden II*, *supra* note 41, at 278 (“A foreign intelligence collection effort that targets the acts of terrorists is likely to uncover evidence of crime. Recognizing this, courts have explicitly rejected a standard which would require that the Executive action be solely for foreign intelligence purposes and have allowed for the accumulation of evidence of criminal activity if it is incidental to foreign intelligence collection.”) (internal citations and quotations omitted).

¹⁰⁷ See *In re Sealed Case*, *supra* note 85, at 735-36.

¹⁰⁸ *Id.* at 735.

¹⁰⁹ See *id.*

¹¹⁰ *Id.*

¹¹¹ See *id.* at 727 (“The government’s overriding concern is to stop or frustrate the agent’s or the foreign power’s activity by any means, but if one considers the actual ways in which the government would foil espionage or terrorism it becomes apparent that criminal prosecution analytically cannot be placed easily in a separate response category.”).

¹¹² See *id.* at 735 (“Congress accepted the dichotomy between foreign intelligence and law enforcement by adopting the significant purpose test. Nevertheless, it is our task to

The Justice Department and the courts had never viewed FISA the way the FISCER interpreted it in hindsight,¹¹³ so, in practice, the significant purpose requirement *did* bolster coordination between law enforcement and intelligence because *In re Sealed Case* also construed the new standard very favorably to the government. The FISCER ruled that “[i]f the certification of the application’s purpose articulates a broader objective than criminal prosecution—such as stopping an ongoing conspiracy—and includes other potential non-prosecutorial responses, the government meets the statutory test.”¹¹⁴ To put it another way, if the government has *any* rationale in conducting the surveillance beyond “ordinary crime control,” then the significant purpose requirement is satisfied.¹¹⁵

Jumping forward to *In re Directives*, the description of the purpose requirement in that decision quotes the “ordinary crime control” language from *In re Sealed Case*, suggesting that the foreign intelligence exception has the same purpose requirement as FISA post-PATRIOT Act,¹¹⁶ even though the former is constitutional while the latter is statutory. Although the FISCER does not acknowledge this distinction, in theory, the purpose requirement for the foreign intelligence exception should be subject to the pre-PATRIOT Act analysis from *In re Sealed Case* that allows prosecution of foreign intelligence crimes like terrorism to be the *only* motivation for foreign intelligence surveillance because the exception is not altered by amendments to FISA or any other statute.¹¹⁷ In any event, whichever standard from *In re Sealed Case* applies, the reality is that the government can interweave law enforcement and foreign intelligence objectives to such a degree that the purpose requirement could easily be satisfied by a fabricated motivation after the fact, when the real purpose all along was to bring the defendant before a criminal court.

The trouble with the two problems just described comes into focus when the federal government starts routinely prosecuting overseas foreign intelligence targets in American courts, as the Attorney General has promised with the five detainees at Guantanamo responsible

do our best to read the statute to honor congressional intent. The better reading, it seems to us, excludes from the purpose of gaining foreign intelligence information a sole objective of criminal prosecution.”).

¹¹³ See *supra* notes 76-80 and accompanying text. See also *Katz*, 389 U.S. at 358 n.23.

¹¹⁴ See *In re Sealed Case*, *supra* note 85, at 735.

¹¹⁵ See *id.* at 746.

¹¹⁶ See *In re Directives*, *supra* note 5, at 1011.

¹¹⁷ See *id.* at 1011-12.

for planning 9/11. Granted, there is solid logic behind this particular decision, as the 9/11 attacks took place inside the United States. But, as the administration struggles to close the Guantanamo Bay facility, it is not incomprehensible that other defendants will be transferred to the federal criminal justice system without such associations.

What makes this worrisome is that the foreign intelligence exception could routinely come into play in criminal court to avoid application of the exclusionary rule. As long as the theoretical targets of foreign intelligence surveillance remained outside the reach of criminal prosecution, there was no reason to worry about possible effects on criminal law. That the foreign intelligence exception is a full exemption from Fourth Amendment protection makes it different from the contours of FISA, which simply provides a statutory regime for foreign intelligence surveillance. FISA has been utilized routinely to initiate criminal prosecutions, as emphasized by the case law documented above examining the statutory purpose requirement, but judges deciding on whether the FISA material is appropriate never make *direct* Fourth Amendment comparisons.¹¹⁸ In all of those cases, FISA was accepted as constitutional on the whole, and the specifics of the evidence were weighed against the statutory guidelines.¹¹⁹ Meanwhile, *In re Directives* was not a criminal prosecution, so it also was able to avoid a direct examination of the exception in evidentiary terms.¹²⁰

Accordingly, once defendants are brought into criminal court based on Fourth Amendment-exempt material, federal judges will be forced to weigh the specifics of the evidence against the national security purpose requirement in order to see if the exclusionary rule applies; although they could conceivably craft a new constitutional purpose requirement with greater robustness, it is far more likely that they will follow the lead of *In re Directives* and apply the same extremely weak statutory version. After all, that was the route taken by the court in *Bin Laden*, the only case to address this question head-on, and that case pre-dated *In re Directives* by eight years.¹²¹ The Second Circuit proceeded to review *Bin Laden's* reasoning and go one step further in deciding that the Fourth Amendment's warrant requirement did not

¹¹⁸ See *id.* at 1011.

¹¹⁹ See William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209 (2007).

¹²⁰ See *In re Directives*, *supra* note 5.

¹²¹ See *Bin Laden II*, *supra* note 41.

apply to Americans overseas at all.¹²² It becomes a real worry that, after facing more defendants in the same situations, courts will continue to expand this Fourth Amendment exemption based on a nebulous and ineffectual national security requirement that, due to ideas about executive competence, they are unwilling to challenge. Additionally, the FISC itself never ruled out the existence of the broad foreign intelligence exception for surveillance on United States soil that was envisioned by several circuits pre-FISA,¹²³ so the circuits could easily bring back that constitutional relic.

Even if one accepts this line of reasoning, it could be suggested that the real issue here is making it commonplace to prosecute foreign terrorist suspects in American federal courts rather than the foreign intelligence exception, because foreign surveillance targets (i.e., non-U.S. persons) overseas are *always* exempt from the warrant requirement.¹²⁴ The federal government has never needed an exception to intercept communications from such persons without warrants, and they have also been tried in U.S. courts. For example, all but two of the fifteen named defendants in *Bin Laden* are not American citizens¹²⁵—although it is the presence of one of those two citizens that led to the

¹²² The court laid out a detailed argument on four factors, namely “(1) the complete absence of any precedent in our history for doing so, (2) the inadvisability of conditioning our government’s surveillance on the practices of foreign states, (3) a U.S. warrant’s lack of authority overseas, and (4) the absence of a mechanism for obtaining a U.S. warrant.” *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 172 (2d Cir. 2008).

¹²³ See *In re Directives*, *supra* note 5, at 1011 (“The question, then, is whether the reasoning of the special needs cases applies by analogy to justify a foreign intelligence exception to the warrant requirement for surveillance undertaken for national security purposes and directed at a foreign power or an agent of a foreign power *reasonably believed to be located outside the United States*.”) (emphasis added). The FISC did not address this question for cases where the target is in U.S. jurisdiction, which was the subject of the rulings referenced *supra* notes 31-32. *Bin Laden* also recognized that the broad version within the United States might still be available while ruling only on the narrow version. See *Bin Laden II*, *supra* note 41, at 277 (“As has been outlined, no court, prior to FISA, that was faced with the choice, imposed a warrant requirement for foreign intelligence searches undertaken *within* the United States. With those precedents as guidance, it certainly does not appear to be unreasonable for this Court to refuse to apply a warrant requirement for foreign intelligence searches conducted *abroad*.”).

¹²⁴ See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990) (“The available historical data show . . . that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.”).

¹²⁵ See *Bin Laden I*, *supra* note 3, at 229.

decision referenced throughout this article—and the five defendants at Guantanamo Bay allegedly responsible for 9/11 are all aliens as well.¹²⁶

Nevertheless, the foreign intelligence exception is a significant judicial construction, even when considering a possible increase in only *non-citizen* foreign targets brought before American courts from overseas locations (e.g., zones of active military operation) for three main reasons. First, the exception allows warrantless surveillance based on *reasonable belief* by federal officials that the target is outside U.S. jurisdiction.¹²⁷ This obviously allows, in limited circumstances, warrantless surveillance on a target *within* the United States. Given that aggressive and widespread foreign terrorist organizations—like al Qaeda—make use of networks that include both leadership guidance from foreign soil and “homegrown” American citizens operating domestically in cells,¹²⁸ judges could start to assume that it is reasonable to lump all communicants together in a foreign terrorist group, leading to blanket assumptions about the whereabouts of defendants when the government is unable (or strategically unwilling) to pinpoint target locations. This practice would enable a serious encroachment on traditional domestic Fourth Amendment protections. Other related issues could involve defendants masking their location through hacking software—a common and uncomplicated procedure—or defendants who were conclusively outside the United States at one point but continue to communicate electronically after crossing American borders, both of which would allow warrantless surveillance inside the country. As will be discussed in Part III, *infra*, these allowances are not unreasonable for the extremely dangerous niche of global terrorists, but when applied only with the vague requirement that the surveillance be in the interest of national security, the restriction of Constitutional rights could be effectively unchecked.

¹²⁶ See Joanna Slater, *Decoding New York's 9/11 U-turn; Other Venues Explored for Prosecuting Alleged Mastermind After New Yorkers Balk at Cost and Disruption*, THE GLOBE AND MAIL (Canada), Feb. 20, 2010, at A18.

¹²⁷ See Bin Laden II, *supra* note 41, at 227.

¹²⁸ Bin Laden II, for instance, recognized this organization in discussing the relationship of American citizens to the rest of the defendants. See *id.* at 229 (“Assistance from American citizens was allegedly essential to al Qaeda’s operation. Two of the Defendants, Ali Mohamed and El Hage, both American citizens, are accused of assisting the organization by traveling throughout the Western world to deliver messages and engage in financial transactions for the benefit of al Qaeda.”) (internal citation omitted).

Second, even if judges refuse to use the reasonable belief qualifier to expand federal government capability, the exception itself allows for robust use of *incidental* intelligence collection. Surveillance of an individual confirmed to be overseas communicating electronically with an American citizen in the United States is perfectly fine, as is using the incidental evidence collected through such procedures, according to the FISC. ¹²⁹ The court did not actually go so far as to provide an opinion on whether such evidence could be used to initiate a prosecution, saying only that “[i]t is settled beyond peradventure that incidental collections occurring as a result of constitutionally permissible acquisitions do not render those acquisitions unlawful.” ¹³⁰ But, the court implied that the only way such evidence would be excludable for illegal seizure would be if the government “is surveilling overseas persons in order intentionally to surveil persons in the United States.” ¹³¹ It seems that as long as the government meets this standard it should be able to present the evidence in criminal court. This means that as long as federal officials can pinpoint one individual—citizen or not—who is outside the United States and falls under the exception, every communication from that individual with other persons will likewise be available for use in a prosecution, even if the other persons are in the United States. As a result, the exception could operate like a reverse “fruit of the poisonous tree,” providing a wealth of warrantless surveillance from only one root target.

Third, by singling out U.S. citizens in the exception, the FISC signals to federal criminal courts that Fourth Amendment protections can be rolled back for Americans under surveillance. Due to the fact that the FISA Amendments Act of 2008 instituted a FISA warrant requirement to wiretap U.S. persons overseas, ¹³² this might end up being the most important legacy of *In re Directives*; although, as discussed above, the possibility of a gap between the statutory and constitutional requirements could result in the new FISA obligations not being dispositive. ¹³³ Furthermore, just as 9/11 rapidly led to three pieces of legislation that modified FISA, so could another major terrorist attack in the near future. Even without the FISC weighing in, the Second Cir-

¹²⁹ See *In re Directives*, *supra* note 5, at 1015.

¹³⁰ *Id.*

¹³¹ *Id.* at n.9 (emphasis omitted).

¹³² See *supra* note 7 and accompanying text.

¹³³ See *supra* note 6 and accompanying text. This is especially a possibility if the constitutional foreign intelligence exception incorporates the pre-PATRIOT Act standards from *In re Sealed Case*. See *supra* notes 108-112 and accompanying text.

cuit found no warrant protections to exist for Americans overseas, and the broad foreign intelligence exception is still on the books in four other circuits.¹³⁴ This decision could provide a *carte blanche* for these circuits and others to continue restraining traditional Fourth Amendment rights in the arena of digital surveillance for “national security purposes.” The forty-year-old protections of *Keith* and possibly even *Katz* could find themselves under risk of serious encroachment, which is why the exception should be modified.

Even though *In re Directives* is still too fresh to have engendered scholarly comment, the nearly identical foreign intelligence exception created in 2000 by the Southern District of New York in *Bin Laden* ignited some discussion worth reviewing.¹³⁵ The observers were split on the desirability of such an exception. On one extreme, a 2006 article argues that the foreign intelligence exception is unnecessary because there should be no Fourth Amendment requirement abroad at all, even for American citizens.¹³⁶ Notably, this was exactly the Second Circuit’s finding in its 2008 ruling on the *Bin Laden* appeal.¹³⁷ While this question has never been definitively settled at the Supreme Court level, as discussed in Part I, the FISC has found otherwise,¹³⁸ meaning the nation’s preeminent court on foreign surveillance issues disagrees. Since Title III has no extraterritorial application,¹³⁹ the only federal wiretap warrants for overseas surveillance must be approved by the FISC, which is bound by *In re Directives*. Moreover, Congress has concurred by passing the FISA Amendments Act of 2008 which requires a FISA warrant for U.S. persons overseas.¹⁴⁰ The extraterritorial warrant requirement seems secure for now.

¹³⁴ See, e.g., *In re Sealed Case*, *supra* note 85, at 726 (discussing the challenges to FISA searches as addressed by the circuits).

¹³⁵ See Daniel Angel, *United States of America v. Usama Bin Laden: District Court Extends Application of Foreign Intelligence Exception*, 10 TUL. J. INT’L & COMP. L. 387 (2002); Pfeiffer, *supra* note 30; Corey M. Then, Note, *Searches and Seizures of Americans Abroad: Re-examining the Fourth Amendment’s Warrant Clause and the Foreign Intelligence Exception Five Years After United States v. Bin Laden*, 55 DUKE L.J. 1059 (2006); Carrie Truehart, Comment, *United States v. Bin Laden and the Foreign Intelligence Exception to the Warrant Requirement for Searches of “United States Persons” Abroad*, 82 B.U. L. REV. 555 (2002).

¹³⁶ See Then, *supra* note 135, at 1070-79.

¹³⁷ See *supra* note 46 and accompanying text.

¹³⁸ Although this is a necessary precondition to there even being a foreign intelligence exception as defined by *In re Directives*, the FISC curiously does not address the issue anywhere in its opinion. See *In re Directives*, *supra* note 5, at 1016-18.

¹³⁹ See *supra* note 23 and accompanying text.

¹⁴⁰ See *supra* note 57 and accompanying text.

On the other extreme, a 2002 article proposes that the *Bin Laden* exception violates the Fourth Amendment.¹⁴¹ The reasoning in that article is distinct from the present discussion because this critique does not find a direct conflict between the Fourth Amendment and the exception, but instead asserts that the exception could lead to future Fourth Amendment problems due to overbreadth and ineffectiveness as currently formulated.¹⁴² That article also argues that terrorists should be given *additional* protections,¹⁴³ a contention that is totally at odds with this article. Nevertheless, much of the reasoning underlying the exception's inadequacy is similar, including a desire for increased accountability of executive officials¹⁴⁴ and the importance of intrinsic value inherent in a warrant requirement.¹⁴⁵ The main concluding recommendation of the article is to require warrants for U.S. persons abroad,¹⁴⁶ which Congress eventually did in the FISA Amendments Act.

Finally, a 2004 article argues that *Bin Laden* got it just right.¹⁴⁷ While that article is correct to point out that the exception covers a gap that was never adjudicated prior to 2000,¹⁴⁸ meaning there was a lack of a warrant requirement before the exception anyway, it emphasizes that “[e]ach of the branches of government has shown a reluctance to impose a strict warrant requirement for foreign-intelligence searches abroad,”¹⁴⁹ which of course is no longer true after Congress's FISA Amendments. The article also claims that “a U.S. citizen rarely will be implicated in intelligence gathering outside of the United States when the target is an agent of a foreign power.”¹⁵⁰ That statement is mostly true, but it ignores the impact of incidental collection and reasonable belief about the target's location. This is unsurprising, since the *Bin Laden* ruling did not include either of these phrases,¹⁵¹ while the *In re Directives* ruling does. The author finishes her argument

¹⁴¹ See Truehart, *supra* note 135, at 596-99.

¹⁴² See *id.*

¹⁴³ See *id.* at 597 (“In addition, the need for a detached and neutral judge seems even greater in terrorism cases such as *Bin Laden*, where Executive Branch officials may be motivated by revenge and the need to appear tough on terrorism.”).

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ See *id.* at 599-600.

¹⁴⁷ See Pfeiffer, *supra* note 30, at 235-37.

¹⁴⁸ See *id.* at 235-36.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See *Bin Laden II*, *supra* note 41, at 277 (adopting the foreign intelligence exception). See also *supra* note 60 and accompanying text.

by emphasizing the policy reasons in support of a foreign intelligence exception.¹⁵² Part III will maintain that such goals are better served by an exception narrowed to global terrorism.

PART III: THE GLOBAL TERRORISM EXCEPTION

There is an easy fix for the foreign intelligence exception that will allow it to function effectively where it is necessary, namely in the prosecution of global terrorism. The new “global terrorism exception” should read as follows: “a global terrorism exception to the Fourth Amendment’s warrant requirement exists when surveillance is conducted to disrupt terrorist organizations and is directed at targets reasonably believed to be located outside the United States.” It is no coincidence that the three cases principally discussed in this article – *Bin Laden*, *In re Sealed Case*, and *In re Directives*—all arose either directly or indirectly from two of the most heinous terrorist attacks on American targets. While *Bin Laden* was an actual criminal prosecution of those responsible for the 1998 East Africa embassy bombings, the two FISCER decisions adjudicated challenges to legislation passed by Congress as a response to perceived weaknesses in the U.S. surveillance network in the wake of 9/11.¹⁵³ All three struggled with adapting foreign surveillance law to the new threat of the late 20th and early 21st century: the global terrorist.¹⁵⁴ These targets are mobile, stealthy, and clever in their usage of tactics to conceal plans and whereabouts, making successful preventative government action something akin to finding a needle in a haystack. The old FISA-Fourth Amendment balance designed with foreign nations—like the Soviet Union—in mind, simply did not suffice, which is why Congress acted so swiftly to legislate in the first place.¹⁵⁵

¹⁵² See Pfeiffer, *supra* note 30, at 236-37.

¹⁵³ See *Bin Laden II*, *supra* note 41; *In re Directives*, *supra* note 5; *In re Sealed Case*, *supra* note 85.

¹⁵⁴ See, e.g., *In re Sealed Case*, *supra* note 85, at 744-45 (discussing the necessary difference in approach between combating terrorism and combating espionage by foreign powers); *Bin Laden II*, *supra* note 41, at 271-72; *In re Directives*, *supra* note 5, at 1010-11.

¹⁵⁵ See, e.g., 147 CONG. REC. S10547-01, S10591 (Oct. 11, 2001) (statement of Sen. Feinstein in support of the PATRIOT Act) (“But in today’s world things are not so simple. In many cases, surveillance will have two key goals – the gathering of foreign intelligence, and the gathering of evidence for a criminal prosecution. Determining which purpose is the “primary” purpose of the investigation can be difficult, and will only become more so as we coordinate our intelligence and law enforcement efforts in the war against terror.”).

Here, at the dawn of the second decade of the 21st century, none of this is new information. And yet, these judicial decisions still fail to fully emphasize the unique difficulty in combating global terrorism. Both *Bin Laden* and *In re Directives*, instead, relied on the vague and ineffectual national security purpose requirement that judges, due to a fear of inadvertently harming American defense, refuse to define in any meaningful way. *In re Directives* only mentioned terrorism once, as merely a limited example of national security issues.¹⁵⁶ Therefore, the national security purpose requirement of the foreign intelligence exception should be changed to a “prevention of terrorism purpose requirement.” In doing so, all the weaknesses discussed *supra* in Part II can actually become strengths, and the new global terrorism exception will not put essential Fourth Amendment rights at risk in other, more ordinary, criminal prosecutions.

For starters, requiring surveillance to be for the purpose of preventing terrorism will bolster a purpose requirement that, as presently constructed, is effectively satisfied by an FBI affidavit saying it is satisfied. Although terrorism is notoriously difficult to define,¹⁵⁷ there is an extremely simple definition that criminal courts can effortlessly apply that requires no judicial interpretation: prosecutions of terrorism crimes will fall under the new global terrorism exception. Title 18 of the U.S. Code conveniently lists these offenses in Chapter 113B.¹⁵⁸ Granted, if Congress starts adding random crimes to this chapter without restraint, the courts might have to perform judicial review to ensure that the exception is truly limited to terrorism (as is discussed below); but, at present the contours of the purpose requirement would be straightforward and absolute. If the case *United States v. John Doe* includes a charged count of at least one of those crimes, then the exception shall apply to allow introduction of surveillance evidence obtained without a warrant on a target reasonably believed to be overseas; otherwise, there is no exception.¹⁵⁹ Since courts do not have to delve

¹⁵⁶ See *In re Directives*, *supra* note 5, at 1011.

¹⁵⁷ See generally, Alex Schmid, *Terrorism – The Definitional Problem*, 36 CASE W. RES. J. INT'L L. 375 (2004).

¹⁵⁸ See 18 U.S.C. §§ 2331-39 (2006).

¹⁵⁹ This definition only makes sense in cases that have gone to trial where the Fourth Amendment protects the defendant via the exclusionary rule. See *supra* note 17 and accompanying text. However, this article is primarily concerned with that type of application. The definition of terrorism for application of the exception outside a prosecutorial setting would necessarily be more indefinite; although, it would still certainly be better delineated than the current national security purpose requirement.

into the federal government's reasoning, their reluctance to tread on the executive's power to protect the country will not come into play.¹⁶⁰

Another "weakness" described in Part II was the reality that the foreign intelligence exception allows for an exceptional degree of intertwining intelligence and law enforcement functions. The term "weakness" is used questionably because it is not clear that increased coordination between those two executive roles is undesirable. However, the new global terrorism exception would only allow unfettered cooperation for terrorism investigations where it is clearly essential¹⁶¹ and would leave the balance unchanged from the FISA rules for everything else. The cooperation necessary to identify and disrupt terrorist networks *before* an attack could be achieved while avoiding spillover of executive power into other areas where there is no equivalent urgency.

Part II then identified three particular issues generated especially by the foreseeable trial of foreign terrorist suspects apprehended overseas in military operations. First, the fragile nature of the *reasonable belief* qualifier was acknowledged, which would perhaps allow a way to gather digital communications evidence on subjects within the United States without a warrant. Again, this is not really objectionable for pre-emption of global terrorist networks. The overseas requirement should be the same: federal officials should reasonably believe that the target is on foreign soil. However, if for whatever reason the target is actually in the United States, but the belief was reasonable—like any of the scenarios given in Part II—then, in the case of international terrorism, it is a small price to pay for successful prevention of a terrorist attack. More importantly, it ensures that the potential expansion of warrantless surveillance will not leak out of terrorism investigations.

The same reasoning applies tenfold to the second issue, incidental surveillance. If the warrantless collection of evidence reveals information about an unidentified individual with whom the original target was communicating and that individual is charged for terrorism of-

¹⁶⁰ The second requirement of the exception that the target be a foreign power or agent of a foreign power is similarly simplified under this construction because, if the defendant is being prosecuted for terrorism then that condition is satisfied by definition. See 50 U.S.C. § 1801(a)(4), (b)(1)(C), and (b)(2)(C) (2006) (defining foreign power and agent of a foreign power to be those groups and individuals engaged in "international terrorism"). The target will always be an "international" terrorist because he is overseas, assuming the third requirement is satisfied. As a result, the foreign power requirement was left out of the full text of the exception.

¹⁶¹ See, e.g., *supra* note 155.

fenses, then that operation should be deemed a successful disruption of a terrorism network. By limiting the criminal statutes for which the defendant can be charged, the global terrorism exception stops incidental surveillance from spilling over into inappropriate communications, but still allows monitoring of the most dangerous targets.

Finally, with regard to the last issue, the signaling effect of creating a Fourth Amendment exception for U.S. citizens is counterbalanced by the signaling effect of limiting the exception to global terrorism. As discussed in detail in Part II, the national security purpose requirement is practically meaningless and will not serve this purpose. But, terrorism, even for all its definitional issues, has a specific meaning that will constrain judges from limiting Fourth Amendment rights in other situations.

The most significant concern with the global terrorism exception is the possibility that Congress will enlarge the group of terrorism offenses to include crimes that are not substantively terrorism in any way, shape, or form. Judges would have to ensure that the exception's contours are not expanded by this maneuver. This would force the judiciary to make a judgment about whether a particular offense could appropriately be categorized as terrorism. Although the third branch of government typically shies away from making these types of definitional decisions, leaving such specifics to the executive and legislative branches, there are situations where courts have stepped into the fray.¹⁶² In fact, there is a well-known parallel exception that also authorizes warrantless searches, which the Supreme Court examined closely in 1925, a then-new reality of the modern world: the motor vehicle exception.¹⁶³ Over the almost ninety years since the creation of that exception, courts—even the Supreme Court—have been forced to consider issues as mundane as whether a mobile home¹⁶⁴ or an air-

¹⁶² See cases cited *infra*, notes 164-65.

¹⁶³ This exception was first formulated in the case *Carroll v. United States*, 267 U.S. 132, 154 (1925) (During the search of an automobile it is often “not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.”).

¹⁶⁴ See *California v. Carney*, 471 U.S. 386, 393 (1985) (“While it is true that respondent’s vehicle possessed some, if not many of the attributes of a home, it is equally clear that the vehicle falls clearly within the scope of the exception laid down in *Carroll* and applied in succeeding cases. Like the automobile in *Carroll*, respondent’s motor home was readily mobile. Absent the prompt search and seizure, it could readily have been moved beyond the reach of the police. Furthermore, the vehicle was licensed to ‘operate on public streets; [was] serviced in public places; . . . and [was] subject to extensive regulation and inspection.’ And the vehicle was so situated that an objective observer

plane¹⁶⁵ are motor vehicles. Federal judges clearly have the authority and sophistication to define a global terrorism exception as well, and they should do so to ensure that Fourth Amendment rights are maintained correctly.

CONCLUSION

Since 9/11, all three branches of government have struggled to adapt to the threat of global terrorism, and electronic surveillance has developed into one of the principal weapons to counter sophisticated terror networks. In a military operation on foreign soil, it is obviously proper that such communications surveillance should not require a warrant. As the ultimate battlefield in the “war on terror” shifts from the combat zone to the courthouse, however, the wiretap rules need to shift as well to ensure appropriate Fourth Amendment protections. The FISCR attempted to provide the best balance by creating the foreign intelligence exception, but when criminal prosecutions become the eventual objective, that exception leaves too much potential for abuse without appropriate safeguards.

This article’s proposed modification, the global terrorism exception, provides the appropriate leeway to federal officials without unnecessarily treading on Fourth Amendment rights. It is easily reviewed by judges in a prosecutorial setting and serves its purpose more effectively than the foreign intelligence exception. We need to make sure that the tools and weapons we give our government to fight the 21st century’s adversary are no more or less than what is required to protect both our safety and our liberty.

would conclude that it was being used not as a residence, but as a vehicle.”) (internal citations omitted).

¹⁶⁵ See, e.g., *United States v. Rollins*, 699 F.2d 530, 534 (11th Cir. 1983) (“Because the search was based on a legal arrest supported by probable cause . . . we conclude that the search was within the bounds of both ‘search incident to an arrest’ and the ‘automobile exception.’ Although these cases may involve automobiles rather than airplanes this court can see no difference between the exigent circumstances of a car and an airplane.”) (internal citations omitted).