

# STEPPING ON (OR OVER) THE CONSTITUTION'S LINE: EVALUATING FISA SECTION 702 IN A WORLD OF CHANGING "REASONABLENESS" UNDER THE FOURTH AMENDMENT

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*The Foreign Intelligence Surveillance Act (FISA) section 702 program collects vast amounts of information—some on citizens located inside the United States—without requiring a judicially authorized search warrant. Over one hundred federal terrorism prosecutions have involved evidence gathered through section 702 warrantless interceptions. However, this program may violate the Constitution's Fourth Amendment prohibition on unreasonable searches. Consideration of section 702's use is timely, as federal courts have signaled that they are ready and willing to rule on its constitutionality.*

*Federal courts and government oversight panels, relying on jurisprudence established in prior foreign intelligence cases, have narrowly approved section 702 interceptions. However, two significant shifts in constitutional jurisprudence that courts have yet to consider cast doubt on whether warrantless wiretaps under section 702 are consistent with the protections provided in the Fourth Amendment. First, the Supreme Court has increased scrutiny on traditional criminal wiretaps searches based on rationales that are also applicable to FISA section 702. These cases constrict the government's ability to conduct surveillance without judicial approval. Second, the Supreme Court has moved away from the previous "deference" given to the executive branch in areas of national security. While past courts might have created exceptions to domestic criminal wiretap rules that would have protected searches conducted for national security purposes from constitutional scrutiny, the present judiciary is unlikely to do so. Courts now freely venture into areas at the heart of national security and rule on these issues where past courts would have demurred. Both of these developments create a very real possibility that a future court will find that FISA section 702 violates the Fourth Amendment.*

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INTRODUCTION.....	743
I. THE BIRTH OF FISA SECTION 702: THE HISTORY OF WARRANTLESS WIRETAPS, THE TERRORIST SURVEILLANCE PROGRAM, AND THE FISA AMENDMENTS ACT OF 2008.....	746
A. <i>Katz</i> and Title III .....	748
B. <i>Keith</i> Opens the Door for a National Security Exception .....	750
C. The Foreign Intelligence Surveillance Act: Congress Legislates an Alternative to the National Security Exception .....	753
D. The Terrorist Surveillance Program and the Resurgence of the National Security Exception ...	755
E. The FISA Amendments Act of 2008: The Birth of the Section 702 Program .....	756
II. CURRENT CONCERNS ABOUT SECTION 702 SEARCHES..	759
A. The 2010 Portland Christmas Tree Bomber and Section 702 .....	759
B. The PCLOB Report .....	762
1. “About” Communications.....	764
2. Multi-Communication Transactions.....	765
III. STRENGTHENING THE FOURTH AMENDMENT AND RESULTING IMPLICATIONS FOR WIRETAPS .....	766
A. Nationality and Geography .....	768
1. The Fourth Amendment’s Application to Places .....	769
2. The Fourth Amendment’s Application to Persons .....	772
3. Above All, It Must Be Reasonable .....	777
B. The Warrant Requirement’s Application to Surveillance.....	779
C. Fitting FISA Section 702 into an Exception to the Warrant Requirement.....	782
IV. COURTS HAVE OVERCOME THEIR RELUCTANCE TO RULE IN AREAS OF NATIONAL SECURITY .....	789
CONCLUSION.....	793

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*[T]he Constitution is the cornerstone of our freedoms, and the government cannot unilaterally sacrifice constitutional rights on the altar of national security.*

—United States Foreign Intelligence Surveillance Court of Review, *In re Directives Pursuant to Section 105b of the Foreign Intelligence Surveillance Act*<sup>1</sup>

## INTRODUCTION

One of the most effective law enforcement and national security tools in combatting the threat of terrorism is also one of the most controversial.<sup>2</sup> Section 702 of the Foreign Intelligence Surveillance Act (FISA) provides broad authority for the government to monitor the communications of foreign nationals on foreign soil without the requirement of a search warrant.<sup>3</sup> Recent revelations from both Edward Snowden and declassified information from the intelligence community released in response to the leaks have shown that the intelligence program conducted pursuant to section 702 collects vast amounts of information, including information on U.S. citizens from searches conducted within the United States.<sup>4</sup> Both federal courts and govern-

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1. *In re Directives Pursuant to Section 105b of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1016 (FISA Ct. Rev. 2008).

2. See, e.g., John Yoo, *The Legality of the National Security Agency's Bulk Data Surveillance Programs*, 37 HARV. J.L. & PUB. POL'Y 901 (2014) (discussing the controversy over section 702 of FISA); see also 158 CONG. REC. 8384 (2012) (statement of Sen. Feinstein) (stating that there were one hundred arrests between 2009 and 2012 and that section 702 was used in a portion of them); *Feinstein on FISA Amendments Act and Domestic Terror Cases* (C-SPAN broadcast Oct. 8, 2013), <http://www.c-span.org/video/?c4467868/feinstein-fisa-amendments-act-domestic-terror-cases> (providing user-submitted video footage of Senator Feinstein's statement).

3. 50 U.S.C. § 1881a (2013); see also Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 HARV. J.L. & PUB. POL'Y 117 (2015) (providing a comprehensive description of the section 702 program).

4. See Barton Gellman et al., *In NSA-Intercepted Data, Those Not Targeted Far Outnumber the Foreigners Who Are*, WASH. POST (July 5, 2014), [http://www.washingtonpost.com/world/national-security/in-nsa-intercepted-data-those-not-targeted-far-outnumber-the-foreigners-who-are/2014/07/05/8139adf8-045a-11e4-8572-4b1b969b6322\\_story.html](http://www.washingtonpost.com/world/national-security/in-nsa-intercepted-data-those-not-targeted-far-outnumber-the-foreigners-who-are/2014/07/05/8139adf8-045a-11e4-8572-4b1b969b6322_story.html) (detailing how the surveillance files provided by Snowden reveal the extent to which the data of citizens is being collected under section 702); Press Release, Office of the Dir. of Nat'l Intelligence, DNI Declassifies Intelligence Community Documents Regarding Collection Under Section 702 of the Foreign Intelligence Surveillance Act (Aug. 21, 2013), <http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/915-dni-declassifies-intelligence-community-documents-regarding-collection-under-section-702-of-the-foreign-intelligence-surveillance-act-fisa> (detailing some of the declassified documents released in response to the Snowden leaks).

ment oversight committees have begun to analyze whether the section 702 intelligence program violates the Fourth Amendment of the U.S. Constitution.<sup>5</sup> Section 702 intelligence has contributed to over one hundred arrests for terrorism-related offenses.<sup>6</sup> The fate of these arrests' prosecutions—and the efficacy of federal courts as a forum for terrorism prosecutions—rests in part on the constitutionality of FISA section 702.

The Supreme Court has never determined whether the Foreign Intelligence Surveillance Act or the FISA Amendments Act (FAA), which contains section 702, are constitutional.<sup>7</sup> However, lower federal courts have analyzed this issue.<sup>8</sup> So far, they have determined—with some reluctance—that section 702 is constitutional.<sup>9</sup> Still, these courts have not considered the full application of Fourth Amendment protections to section 702 intelligence collection.

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5. See *United States v. Mohamud*, No. 3:10-CR-00475-KI-1, 2014 WL 2866749, at \*26–27 (D. Or. June 24, 2014) (finding that section 702 did not violate the Fourth Amendment but that its constitutionality was a “very close question”); PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 86–97 (2014), <https://www.pclob.gov/library/702-Report.pdf> [hereinafter PCLOB REPORT] (detailing the PCLOB’s review of the Fourth Amendment issues raised by the surveillance program operated under section 702); see also Glen Greenwald & Ewen MacAskill, *NSA Prism Program Taps in to User Data of Apple, Google and Others*, GUARDIAN (June 6, 2013), <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data> (noting that several senators raised concerns over the unchecked surveillance allowed by section 702).

6. PCLOB REPORT, *supra* note 5, at 109–10.

7. See *id.* at 90 (noting that the Supreme Court has not “spoken” on the existence of a foreign intelligence exception to the Fourth Amendment’s warrant requirement); see also *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 138 (2013) (rejecting a challenge to FISA on the ground that plaintiffs lacked standing to sue). The Supreme Court’s reluctance to reach the merits of the case in *Clapper* has been interpreted as an indication that they will never rule on the constitutionality of FISA. See, e.g., Adam Liptak, *Justices Turn Back Challenge to Broader U.S. Eavesdropping*, N.Y. TIMES (Feb. 26, 2013), <http://www.nytimes.com/2013/02/27/us/politics/supreme-court-rejects-challenge-to-fisa-surveillance-law.html>.

8. See *Mohamud*, 2014 WL 2866749, at \*26–27; Brief of Defendant, *United States v. Muhtorov*, 2013 U.S. Dist. LEXIS 61756 (D. Colo. Jan. 29, 2014) (No. 12-cr-00033) (challenging the constitutionality of the FAA); cf. *United States v. Daoud*, No. 12-cr-723, 2014 WL 321384 (N.D. Ill. Jan. 29, 2014) (ordering the government to show defense counsel classified materials related to the FISA surveillance of defendant but refusing to “express any opinion with respect to the constitutionality of FISA or its procedures”), *rev’d*, 755 F.3d 479 (7th Cir. 2014).

9. See *Mohamud*, 2014 WL 2866749, at \*26 (finding that section 702 did not violate the Fourth Amendment but that its constitutionality was a “very close question”); *United States v. Muhtorov*, No. 1:12-cr-00033-JLK, slip op. at 1–5 (D. Colo. Sept. 24, 2012) (finding that an argument could be made that FISA could “circumvent the Fourth Amendment” but stating “that situation does not exist here”).

Two significant shifts in constitutional jurisprudence cast doubt on the constitutionality of warrantless wiretaps conducted under section 702. First, members of the Supreme Court have shown a willingness to increase scrutiny of warrantless searches under the Fourth Amendment and constrict the government's ability to conduct surveillance without judicial approval.<sup>10</sup> This increased scrutiny has thus far happened away from the national security arena and in the traditional criminal law realm of electronic surveillance.<sup>11</sup> Nevertheless, federal prosecutors have recently begun notifying defendants of FISA-derived evidence.<sup>12</sup> This will likely bring the issue of FISA's constitutionality before the courts,<sup>13</sup> and may result in the application of a more searching standard of review to section 702.

Second, the Supreme Court has been disinclined to give the same level of "deference" to the executive in areas of national security that it once did.<sup>14</sup> The Court now freely ventures into issues at the heart of national security, as the Justices acknowledge the Court's traditional

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10. See *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) ("[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."); see also *id.* at 964 (Alito, J., concurring in the judgment) ("[W]here uncertainty exists with respect to whether a certain period of GPS surveillance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant.").

11. *Jones*, 132 S. Ct. at 949 (majority opinion) (holding that the government's installation of a GPS device on a target's vehicle constituted a "search" under the Fourth Amendment).

12. See Charlie Savage, *Federal Prosecutors, in a Policy Shift, Cite Warrantless Wiretaps as Evidence*, N.Y. TIMES (Oct. 26, 2013), <http://www.nytimes.com/2013/10/27/us/federal-prosecutors-in-a-policy-shift-cite-warrantless-wiretaps-as-evidence.html>.

13. See Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. TIMES (Oct. 26, 2013), <http://www.nytimes.com/2013/10/17/us/politics/us-legal-shift-may-open-door-for-challenge-to-secret-wiretaps.html> ("[T]he Justice Department is setting up a potential Supreme Court test of whether [the FAA] is constitutional by notifying a criminal defendant—for the first time—that evidence against him derived from the eavesdropping.").

14. Compare *Haig v. Agee*, 453 U.S. 280, 309 (1981) (recognizing the President's authority to revoke a passport for national security or foreign policy reasons), and Robert F. Turner, *First Principles: Are Judicial and Legislative Oversight of NSA Constitutional?*, 14 ENGAGE 84, 85–86 (2013), <http://www.fed-soc.org/publications/detail/engage-volume-14-issue-2> (arguing that the Supreme Court and Congress's "longstanding deference to presidential discretion" lasted "into the second half of the twentieth century"), with *Boumediene v. Bush*, 553 U.S. 723, 795 (2008) (striking down, on constitutional grounds, a statutory provision that denied alien detainees the writ of habeas corpus), and *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (holding that aliens held in federal custody outside the United States were entitled to the constitutionally guaranteed writ of habeas corpus), and *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (holding that the due process afforded to a citizen-detainee had been constitutionally insufficient).

deference but proceed to rule on central national security issues.<sup>15</sup> While courts, government civil-liberties panels, and academics have yet to consider how these shifts in Supreme Court jurisprudence will impact the constitutional analysis of section 702 wiretaps, there is a very real possibility that future courts will find FISA section 702 an unconstitutional violation of the Fourth Amendment.

To understand the background of this problem, Part I of this Article reviews the history of warrantless national security wiretaps and the adoption of section 702 as part of the FISA Amendment Acts of 2008. Part II discusses the recent judicial decisions and government oversight board findings concerning section 702 that have thus far upheld the program's constitutionality but with significant reservations and limitations. Part III discusses relevant Fourth Amendment case law that courts have not yet considered in the context of section 702; in particular, it focuses on the growing restrictions on government surveillance in the traditional criminal law area both before and after the passing of section 702 and how the recent case law may affect the lawfulness of section 702. Part IV outlines cases in which the judicial branch applied a decreased amount of deference in national security affairs and argues that courts are now very willing to rule against the government on national security issues. Finally, this Article concludes that current jurisprudence has laid the groundwork that a future court may use to find that FISA section 702 violates the Fourth Amendment's prohibition on unreasonable searches.

## I.

### THE BIRTH OF FISA SECTION 702:

#### THE HISTORY OF WARRANTLESS WIRETAPS, THE TERRORIST SURVEILLANCE PROGRAM, AND THE FISA AMENDMENTS ACT OF 2008

To understand the current concerns over intelligence searches, one must first consider the development of this area of the law. "National security wiretaps" conducted without judicial warrants began as early as the presidency of Franklin Delano Roosevelt.<sup>16</sup> The Federal

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15. See *Boumediene*, 553 U.S. at 796–97; *Rasul*, 542 U.S. at 487; *Hamdi*, 542 U.S. at 531–32.

16. See, e.g., *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (presenting a memorandum from President Franklin D. Roosevelt to Attorney General Robert Jackson authorizing the use of "listening devices" as an investigative agent against "persons suspected of subversive activities against the Government of the United States"); see also Herbert Brownell, Jr., *The Public Security and Wire Tapping*, 39 CORNELL L.Q. 195, 196–98 (1954) (reviewing the Supreme Court's consideration of wiretaps in the 1930s and contending that "[n]one of these decisions . . . held that wiretapping by

Bureau of Investigation (FBI) and other law enforcement agencies later expanded the use of these wiretaps with the permission of the executive but without judicial approval.<sup>17</sup> However, these warrantless wiretaps remained relatively rare and were seldom used as evidence in criminal cases until the 1970s.<sup>18</sup> There was little concern or controversy in the legislative or judicial branches regarding the executive's use of these warrantless wiretaps.<sup>19</sup>

Prior to 1967, there was tacit judicial approval of all warrantless telephone surveillance.<sup>20</sup> In its 1928 decision in *Olmstead v. United States*, the Supreme Court held that telephone surveillance did not violate the Fourth Amendment because it did not constitute the requisite physical trespass.<sup>21</sup> Although this created the possibility of unrestrained government telephone surveillance, the executive and legislative branches later reduced that risk by prohibiting the use of wiretaps

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federal officers in and of itself was illegal. . . . This may have accounted for the continued adherence to the position taken by the Justice Department until 1940 that mere interception of wire communications is not prohibited . . . .”). “National Security” wiretaps, which are sometimes called foreign intelligence wiretaps, are a government surveillance tool utilized for reasons other than traditional law enforcement purposes. They are often cited as falling within the “special needs” exception to the Fourth Amendment’s warrant requirement because they are used to gather foreign intelligence or to protect the United States from a foreign threat. See Owen Fiss, *Even in a Time of Terror*, 31 YALE L. & POL’Y REV. 1, 25–28 (2012).

17. Memorandum from Herbert Brownell, Attorney Gen., to J. Edgar Hoover, Dir., Fed. Bureau of Investigation 1 (May 20, 1954) (advising Hoover that he could evade the Supreme Court’s rejection of wiretaps in *Irvine v. California*, 347 U.S. 128 (1954), if the information gathered through a wiretap was not to be used for prosecution); Memorandum from Nicholas Katzenbach, Attorney Gen., to J. Edgar Hoover, Dir., Fed. Bureau of Investigation (Sept. 27, 1965), quoted in S. SELECT COMM. TO STUDY GOVT’L OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755, at 287 (1976), [http://www.intelligence.senate.gov/sites/default/files/94755\\_III.pdf](http://www.intelligence.senate.gov/sites/default/files/94755_III.pdf) (setting forth guidelines for the use of wiretaps in light of “current judicial and public attitudes”); Press Release, U.S. Dep’t of Justice (Sept. 12, 1973), reproduced in 14 CRIM. L. REP. 2042, 2042 (1973).

18. See L. Rush Atkinson, *The Fourth Amendment’s National Security Exception: Its History and Limits*, 66 VAND. L. REV. 1343, 1346–47 (2013).

19. See *id.* at 1347 (“[A] clear legal framework regulated the scope of national security investigations, and records reveal a palpable *opinio juris*—a sense of legal obligation—that governed the constitutional boundaries of security operations.”).

20. See generally *Olmstead v. United States*, 277 U.S. 438, 458–66 (1928) (considering the Court’s Fourth Amendment jurisprudence and determining that past precedent dictated that wiretapping could not amount to a search or seizure).

21. *Id.* at 465–66. In *Olmstead*, law enforcement’s bug was placed on telephone wires in a public area (in this case, the basement of a large office building), thus there was no physical trespass over defendants’ property. *Id.* at 456–57, 465–66.

as evidence in court proceedings.<sup>22</sup> This created a civil liberties “compromise” where government agents had few limitations on their ability to use wiretaps but had little incentive to do so for any purpose other than to gather foreign intelligence.<sup>23</sup> Some began to see this compromise as a “national security exception” to the Fourth Amendment’s warrant requirement, which permitted the use of national security wiretaps without a warrant but prohibited the resulting intelligence from being introduced at trial.<sup>24</sup> The Supreme Court revised its view on wiretaps in 1967, bringing this method of surveillance under the protection of the Fourth Amendment while leaving open the possibility that national security wiretaps could be allowed without a search warrant in certain circumstances.<sup>25</sup>

### A. *Katz and Title III*

In 1967, the Supreme Court altered its position on wiretaps and held that they are “searches” and must be conducted in a manner consistent with the Fourth Amendment.<sup>26</sup> In *Katz v. United States*, the Supreme Court determined that the FBI violated the Fourth Amendment when it obtained a telephone wiretap without first seeking a judicially authorized warrant.<sup>27</sup> Even though the wiretap did not involve a trespass, the Supreme Court held that it nonetheless constituted a Fourth Amendment “search” and was unconstitutional unless the agents obtained a judicially authorized search warrant to conduct the

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22. See Communications Act of 1934, Pub. L. No. 73-416, § 605, 48 Stat. 1064, 1103–04 (codified as amended at 47 U.S.C. § 605 (2013)); Department of Justice Appropriation Act of Mar. 1, 1933, Pub. L. No. 72-387, 47 Stat. 1371, 1381 (prohibiting the use of wiretapping as a means of obtaining evidence of violations of the National Prohibition Act); *Nardone v. United States*, 302 U.S. 379, 382 (1937) (interpreting section 605 as forbidding the introduction of the contents of an intercepted telephone message into evidence).

23. Atkinson, *supra* note 18, at 1347 (“Well into the 1970s, the executive branch assumed that the national security exception permitted only, in the words of FBI Director J. Edgar Hoover, ‘purely intelligence’ focused investigations.”). As the evidence obtained through a wiretap was inadmissible in court, the wiretap was rendered a far less useful tool in criminal investigations. Therefore, wiretaps were primarily used only by those who gathered information for its intelligence value.

24. See *id.* at 1358–86 (detailing the use of the national security exception between the end of World War II and the passage of FISA in 1978); see also *Katz v. United States*, 389 U.S. 347, 353 n.23 (1967) (refraining from determining the existence of an exception to the Fourth Amendment’s warrant requirement in a situation involving national security).

25. *Katz*, 389 U.S. at 353 n.23.

26. *Id.* at 353.

27. *Id.* at 359.

wiretap.<sup>28</sup> The Court further held that searches without judicially authorized search warrants “are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions.”<sup>29</sup> The same year as *Katz*, the Supreme Court issued two other opinions reinforcing its commitment to the principle that searches without warrants carry a presumption of unreasonableness unless they fit into a narrow group of exceptions.<sup>30</sup>

*Katz* involved a wiretap for a criminal investigation into illegal gambling that had no national security implications.<sup>31</sup> Nonetheless, the Court addressed national security wiretaps through dicta in its well-known footnote twenty-three.<sup>32</sup> This footnote specifically raised the question of “[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving national security” but did not provide an answer as the “question [was] not presented by this case.”<sup>33</sup> This footnote suggested the possibility that agents could conduct national security and foreign intelligence searches without obtaining a search warrant.<sup>34</sup>

A year after *Katz*, Congress provided additional support for the proposition that warrantless wiretaps are constitutional if done for intelligence or national security reasons. It enacted a broad framework for criminal wiretaps in Title III of the Omnibus Crime Control and Safe Streets Act of 1968.<sup>35</sup> The Act specifically addressed, but did not definitively resolve, the issue of whether the executive branch could

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28. *Id.* The Supreme Court overruled its prior decision in *Olmstead* when it determined that the Fourth Amendment could be violated without a physical trespass. *Id.* at 519 (“[U]ntil today this Court has refused to say that eavesdropping comes within the ambit of Fourth Amendment restrictions.”).

29. *Id.* at 357.

30. *Id.*; see *Cooper v. California*, 386 U.S. 58, 59–60 (1967) (noting that a warrantless search of an automobile may be reasonable due to an automobile’s mobility); *Warden v. Hayden*, 387 U.S. 294, 298–300 (1967) (holding that a warrantless search in pursuit of an armed robber was valid as “the exigencies of the situation made that course imperative”).

31. *Katz*, 389 U.S. at 354.

32. *Id.* at 358 n.23. This footnote is well-known in the national security arena because it planted the seed for the modern national security exception to the Fourth Amendment’s warrant requirement. See Atkinson, *supra* note 18, at 1379–80 (discussing the historical significance of footnote twenty-three).

33. *Katz*, 389 U.S. at 358 n.23.

34. See Stephanie Cooper Blum, *What Really Is at Stake with the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform*, 18 B.U. PUB. INT. L.J. 269, 273–75 (2009) (detailing how footnote twenty-three led to legislation that “seemed to suggest that ‘national security’ wiretaps in both domestic and international investigations could continue”).

35. Pub. L. No. 90–351, tit. III, 82 Stat. 197 (codified as amended at 18 U.S.C. §§ 2510–2522 (2013)).

obtain wiretaps outside the Title III criminal framework for intelligence or national security reasons.<sup>36</sup> Congress stated that Title III was not intended to “limit the constitutional power of the President . . . to protect the Nation against actual or potential attack,” “to obtain foreign intelligence information,” or “to protect the United States against any clear and present danger to the structure or existence of the government.”<sup>37</sup> This ambiguous language allowed the executive, legislative, and judicial branches of government to each develop their own interpretation of Title III as a limitation on the executive’s power to conduct warrantless surveillance.

The executive branch interpreted *Katz*’s footnote twenty-three and Congress’s Title III statement as tacit approval of an evolving national security exception to the warrant requirement.<sup>38</sup> The legislative branch’s intent may have been to reserve this issue for later consideration.<sup>39</sup> The judicial branch at first showed an inclination to agree with the executive branch’s analysis.<sup>40</sup> In *United States v. Clay*, the U.S. Court of Appeals for the Fifth Circuit permitted a warrantless wiretap “for the purpose of obtaining foreign intelligence information.”<sup>41</sup> But this issue remained largely unresolved until 1972, when the Supreme Court severely limited the potential scope of a national security exception to the Fourth Amendment’s warrant requirement.<sup>42</sup>

### B. Keith Opens the Door for a National Security Exception

In *United States v. U.S. District Court*, the Supreme Court squarely addressed the issue of a “national security exception”<sup>43</sup> in a case now commonly referred to as *Keith* (named after the federal dis-

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36. *Id.* § 2511(3) (repealed 1978).

37. *Id.*

38. Letter from John C. Keeney, Assistant Attorney Gen., U.S. Dep’t of Justice, to Hugh E. Kline, Clerk of the Court, D.C. Circuit (May 9, 1975) (defending the President’s constitutional authority to conduct warrantless surveillance), *quoted in* S. SELECT COMM. TO STUDY GOVT’L OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, *supra* note 17, at 369–70.

39. *United States v. U.S. Dist. Court (Keith)* 407 U.S. 297, 303–04 (1972) (interpreting Congress’s intention with Title III as “[leaving] presidential powers where it found them”).

40. *See United States v. Clay*, 430 F.2d 165, 171 (5th Cir. 1970) (declining to read Title III as “forbidding the President, or his representative, from ordering wiretap surveillance to obtain foreign intelligence in the national interest”), *rev’d on other grounds*, 403 U.S. 698 (1971).

41. *Id.* at 170.

42. *See Keith*, 407 U.S. at 303–04.

43. Others have referred to the national security exception more generally as a “special needs” exception. *See Fiss, supra* note 16, at 25–28. This Article uses the phrase “national security” exception because it is more specific to the present topic.

trict judge who wrote the lower court opinion).<sup>44</sup> The Court found that a national security wiretap conducted inside the United States and without a search warrant violated the Fourth Amendment.<sup>45</sup> But in doing so, the Court created the possibility that the Court would permit warrantless national security wiretaps in future cases.

Under the facts of *Keith*, the government charged three members of the White Panther Party with the bombing of a Central Intelligence Agency (CIA) office in Michigan.<sup>46</sup> The prosecution's evidence included warrantless wiretaps of one of the defendant's telephone conversations.<sup>47</sup> The government claimed these conversations were lawful, despite the fact that they had been obtained without judicial approval, because they had been authorized by the Attorney General "to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government."<sup>48</sup> The lower courts disagreed with the prosecution and held that the wiretaps were unlawful.<sup>49</sup>

The Supreme Court affirmed the lower courts' rulings and held that "prior judicial approval is required for . . . domestic security surveillance."<sup>50</sup> However, the Court did not foreclose all warrantless national security searches, as it limited its decision to searches within the United States that did not involve foreign powers.<sup>51</sup> The Court "express[ed] no opinion as to, the issues which may be involved with

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44. *Keith*, 407 U.S. 297, 318; see also Atkinson, *supra* note 18, at 1381–84 (describing *Keith* as maintaining a "limited security exception").

45. *Keith*, 407 U.S. at 320–21.

46. *Id.* at 299; see *United States v. U.S. Dist. Court*, 444 F.2d 651, 653 (6th Cir. 1971) (lower court opinion); Samuel C. Damren, *The Keith Case*, CT. LEGACY (Historical Soc'y for the U.S. Dist. Court for the E. Dist. Mich., Ferndale, Mich.), Nov. 2003, at 1 (detailing a history of the facts of the case).

47. *Keith*, 407 U.S. at 300.

48. *Id.* This argument mirrored similar language included in Title III. See 18 U.S.C. § 2511(3) (1968) ("Nothing contained in this chapter . . . shall limit the constitutional power of the President 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.") (repealed 1978).

49. *Keith*, 407 U.S. at 301.

50. *Id.* at 324. The Court softened its holding by limiting the warrant requirement to the type of domestic surveillance at issue in the case and by inviting Congress to propose "reasonable standards" that may apply in domestic national security searches. *Id.*

51. *Id.* at 321–22.

respect to activities of foreign powers or their agents.”<sup>52</sup> *Keith* accordingly left unanswered the issue of whether a search warrant is required for a national security search involving a foreign spy or an agent of a foreign government. But by refraining from addressing searches that involve foreign countries or their spies, the Court suggested that a reduced level of judicial scrutiny may be permissible in cases involving extraterritorial national security threats. After noting this potential exception, the Court clarified that if a national security exception to the Fourth Amendment’s warrant requirement does exist, it does not apply to purely domestic national security wiretaps.<sup>53</sup>

*Keith* is cited for the proposition that there is a national security exception to the Fourth Amendment’s warrant requirement.<sup>54</sup> But in addition to suggesting the possibility of this exception for searches outside the United States, *Keith* is significant in that the *Keith* Court required a warrant for searches conducted inside the United States.<sup>55</sup> As we will see in Parts III and IV, *infra*, FISA section 702 is a violation of this requirement.<sup>56</sup> Many section 702 searches are conducted from within the United States.<sup>57</sup> If we adhere to the holding of *Keith*, a search warrant is necessary for any such collection conducted inside the United States.

After *Keith*, the Nixon administration continued to sanction national security wiretaps without judicial approval and applied the “national security exception” implied in *Keith* to cases involving foreign powers.<sup>58</sup> Lower courts also continued to affirm warrantless searches under this national security exception throughout the 1970s.<sup>59</sup> The Fourth Circuit went further, expanding the national security exception by sanctioning a warrantless physical search in the name of foreign intelligence gathering—even though the search was conducted pursu-

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52. *Id.*

53. *Id.* at 321–24.

54. *Id.*; see Atkinson, *supra* note 18, at 1381.

55. *Keith*, 407 U.S. at 320.

56. See discussion *infra* Parts II–III.

57. See generally Gellman et al., *supra* note 4 (revealing the extensive interception of domestic web users’ data under section 702).

58. Press Release, U.S. Dep’t of Justice, *supra* note 17.

59. See, e.g., *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977); *United States v. Butenko*, 494 F.2d 593, 605 (3d Cir. 1974) (en banc) (approving a warrantless search conducted for the purpose of gathering foreign intelligence information); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973) (“[T]he President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence.”). But see *Zweibon v. Mitchell*, 516 F.2d 594, 651 (D.C. Cir. 1975) (en banc) (plurality opinion) (“[A]bsent 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.”).

ant to a trespass that would have been unconstitutional under *Olmstead*.<sup>60</sup>

These cases established that the government's power to conduct searches and intercept communications is far broader in the national security arena than in traditional domestic criminal cases. This notion survived even after Congress significantly altered the foreign intelligence-gathering framework with the enactment of the Foreign Intelligence Surveillance Act.<sup>61</sup>

### *C. The Foreign Intelligence Surveillance Act: Congress Legislates an Alternative to the National Security Exception*

Congress passed the Foreign Intelligence Surveillance Act of 1978 (FISA) both as a response to government abuses of wiretaps and to answer the *Keith* Court's invitation to address the issue of national security wiretaps.<sup>62</sup> FISA created a comprehensive statutory framework for the executive branch to obtain judicially sanctioned wiretaps to gather foreign intelligence and provide for national security.<sup>63</sup>

Congress clearly declared its view that wiretaps for intelligence purposes require judicial authorization through the then-newly created Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review's appellate review process, which were to oversee requests for surveillance warrants.<sup>64</sup> The existence of these courts would appear to completely eliminate the judicially theorized national security exception. However, FISA limited the scope of its authority by narrowing definitions of "surveillance" and excluding certain types of international wiretaps as outside the statute's warrant requirement.<sup>65</sup> The Act defines "electronic surveillance" as surveillance of a communication "to or from a person in the United States."<sup>66</sup> Communications that occur outside the United States among non-U.S. persons do not qualify.<sup>67</sup> Therefore, the FISA re-

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60. *United States v. Truong Dinh Hung*, 629 F.2d 908, 912–17 (4th Cir. 1980).

61. *See* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95–511, 92 Stat. 1783 (codified as amended in scattered sections of 8, 18, and 50 U.S.C.).

62. *See* William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209, 1211, 1226–27 (2007) (detailing the historical context in which FISA was enacted).

63. *See* 50 U.S.C. § 1801 (2013). A detailed review of judicially authorized wiretaps under FISA is beyond the scope of this Article, which will focus on the constitutionality of wiretaps conducted without a judicial warrant.

64. *See id.*; *see also* Blum, *supra* note 34, at 277–80 (summarizing the procedures of the FISC and Foreign Intelligence Surveillance Court of Review (FISCR)).

65. § 1801(f)(1)–(2).

66. *Id.*

67. § 1801(i). A U.S. person is defined by FISA as a U.S. citizen, an alien who is a lawful permanent resident, a corporation that is incorporated in the United States, or

quirement of a judicially authorized warrant does not apply to the interception of these communications.<sup>68</sup> But if the government wishes to intercept a communication of a targeted person inside the United States who is communicating with a non-U.S. person, it needs to obtain a FISA warrant.

After *Katz*, Title III, *Keith*, and FISA, the potential scope of a national security exception to the Fourth Amendment's warrant requirement was significantly narrowed but the exception nonetheless remained viable.<sup>69</sup> Neither the courts nor Congress had specifically stated that a search warrant was required for a wiretap of communications between someone in the United States and someone in a foreign country, as long as the intended target was a non-U.S. person outside the United States.<sup>70</sup> After September 11, 2001, the Bush administration argued that no such requirement existed as a justification for its own warrantless wiretap program—the Terrorist Surveillance Program (TSP).<sup>71</sup>

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an association a substantial number of members of which are U.S. citizens or lawful permanent residents. *Id.* As a general rule in conducting intelligence, U.S. persons are entitled to greater civil liberties protections than those who are not U.S. persons. See DEP'T OF DEF., DIRECTIVE 5240.1-R 15, PROCEDURES GOVERNING THE ACTIVITIES OF DoD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS (1982) (placing limits on the Defense Department's ability to collect intelligence—including wiretaps—on U.S. persons). See generally *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990) (“[T]he purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government.”).

68. See *Verdugo-Urquidez*, 494 U.S. at 275 (holding that the Fourth Amendment does not apply to the search and seizure of a nonresident alien's property located in a foreign country). Some have argued that FISA additionally was not intended to allow the interception of a communication between someone in the United States and a foreigner outside the United States where the purpose of the surveillance was to target the foreign individual. See *Strengthening FISA: Does the Protect America Act Protect Americans' Civil Liberties and Enhance Security?: Hearing on the Foreign Intelligence Surveillance Act and Implementation of the Protect America Act Before the S. Comm. on the Judiciary*, 110th Cong. 4, 6–7 (2007) (statement of J. Michael McConnell, Director of National Intelligence), [http://www.fas.org/irp/congress/2007\\_hr/092507mccconnell.pdf](http://www.fas.org/irp/congress/2007_hr/092507mccconnell.pdf). At the same time, if the communication is completely without any connection to the United States, the Fourth Amendment is likely not applicable to the interception, and there is no need to consider whether the national security exception applies. *Verdugo-Urquidez*, 494 U.S. at 271.

69. See Atkinson, *supra* note 18, at 1398–1400 (explaining that a wiretap that did not involve a trespass [*Katz*], was for national security purposes [Title III], was not purely domestic [*Keith*], and did not fit the within the definitions of FISA would still be permissible under a “national security” exception to the warrant requirement).

70. *Id.* at 1400–01; see also *In re Directives Pursuant to Section 105b of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1008 (FISA Ct. Rev. 2008) (recognizing a foreign intelligence exception to the Fourth Amendment's warrant requirement).

71. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), <http://www.nytimes.com/2005/12/16/politics/bush-lets->

*D. The Terrorist Surveillance Program and the Resurgence of the National Security Exception*

On October 4, 2001, President George W. Bush authorized the TSP in a classified executive order that permitted the National Security Agency (NSA) to wiretap communications from al-Qaeda members to individuals within the United States.<sup>72</sup> This program required high-level findings by the executive branch that the target was a member of a terrorist organization, but did not require approval from a judge.<sup>73</sup> The TSP was conducted in secret for several years until its existence was publicly revealed by the *New York Times*.<sup>74</sup>

Only one federal district court evaluated the constitutionality of the program before it was stopped.<sup>75</sup> In *ACLU v. NSA*, the district court held that the TSP violated both the Fourth Amendment and statutory law because it permitted searches without judicially authorized warrants.<sup>76</sup> The district court found that the TSP had “undisputedly been implemented without regard to FISA and of course the more stringent standards of Title III, and obviously in violation of the Fourth Amendment.”<sup>77</sup> Ultimately, the Sixth Circuit reversed the decision but not on the merits.<sup>78</sup> The appellate court never reached the issue of the Terrorist Surveillance Program’s constitutionality, as it held that the plaintiffs lacked standing.<sup>79</sup>

In the wake of *ACLU v. NSA* and a FISC opinion that also raised concerns about the TSP, the executive branch sought congressional approval for a similar surveillance program in an effort to bolster the legitimacy and constitutionality of its practices.<sup>80</sup> Congress agreed and

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us-spy-on-callers-without-courts.html?\_r=0 (revealing that President Bush had authorized the National Security Agency to conduct surveillance on both Americans and others inside the United States without requiring a court-approved warrant).

72. See Public Declaration of James R. Clapper, Dir. of Nat’l Intelligence ¶ 6, *Jewel v. NSA*, 2010 U.S. Dist. LEXIS 5110 (N.D. Cal. Dec. 20, 2013) (No. 08-cv-04373). See generally *Risen & Lichtblau*, *supra* note 71.

73. Public Declaration of James R. Clapper, *supra* note 72, ¶¶ 35–36.

74. See *Risen & Lichtblau*, *supra* note 71 (noting that the White House had asked the *New York Times* not to publish its article revealing the existence of the administration’s secret program); see also Public Declaration of James R. Clapper, *supra* note 72, ¶ 6 (stating that the existence of TSP collection activities was declassified by President Bush on December 20, 2013).

75. See *ACLU v. NSA*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007).

76. *Id.*

77. *Id.* at 775.

78. *ACLU v. NSA*, 493 F.3d 644, 688 (6th Cir. 2007).

79. *Id.*

80. *Id.* (reversing the lower court’s ruling on the procedural ground that the plaintiffs lacked standing, which highlighted the risk that a future court would rule the

passed the FISA Amendment Act of 2008 (FAA).<sup>81</sup> The FAA eliminated the relevance of the statutory violation noted by the district court, but any search pursuant to the FAA was still required to comply with the Fourth Amendment.

*E. The FISA Amendments Act of 2008: The Birth of the Section 702 Program*

On July 10, 2008, the President signed into law the FISA Amendments Act, which added a new avenue for the approval of surveillance measures.<sup>82</sup> Under this legislation, the Attorney General and the Director of National Intelligence can authorize wiretaps of foreign persons outside the United States to obtain foreign intelligence.<sup>83</sup> The authorizations permit interception for up to one year and require little judicial oversight.<sup>84</sup> As will be demonstrated below, there are “procedures” that must be followed before a wiretap can be authorized, but at no point is there consideration of whether any particular interception is constitutional or whether the program as a whole complies with the Fourth Amendment.<sup>85</sup>

Before interception begins, the executive branch is required to obtain approval from the FISC, but this approval is for a very limited purpose.<sup>86</sup> The FISC reviews the “targeting procedures” to ensure that the government will only target “persons reasonably believed to be located outside the United States” and will not target purely domestic communications.<sup>87</sup> The FISC must also ensure that there are proper minimization procedures and that the Director of National Intelligence

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program unconstitutional if a petitioner had standing to bring a claim); *see also* Ellen Nakashima & Joby Warrick, *House Approves Wiretap Measure*, WASH. POST (Aug. 5, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/04/AR2007080401744.html>.

81. Pub. L. No. 110-261, 122 Stat. 2436. In 2007, Congress passed the Protect America Act as an amendment to FISA. Pub. L. No. 110-55, 121 Stat. 552 (2007). This was viewed as a “stopgap measure” that allowed Congress to debate and then enact the FAA in 2008. *See In re Directives Pursuant to Section 105b of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1007 (FISA Ct. Rev. 2008). The FAA, which remains current law, partially repealed the Protect America Act. FISA Amendments Act, tit. IV, sec. 403, 122 Stat. at 2473.

82. FISA Amendments Act, tit. VII, 122 Stat. at 2437–67 (codified as amended at 50 U.S.C. § 1881 (2013)).

83. 50 U.S.C. § 1881a(a) (2013).

84. *Id.*; *see also In re Proceedings Required by 702(i) of FISA Amendments Act of 2008*, No. 08-01, 2008 WL 9487946, at \*2 (FISA Ct. Aug. 27, 2008) (describing judicial review under section 702).

85. *Id.* at \*1–2, \*5.

86. § 1881a(i)(2)(B).

87. *Id.*

and Attorney General have certified that a “significant purpose” of the surveillance is to obtain “foreign intelligence information.”<sup>88</sup> Finally, the FISC must determine that the targeting “shall be conducted in a manner consistent with the [F]ourth [A]mendment to the Constitution.”<sup>89</sup> However, the FISC has made clear that it will not consider “the constitutionality” of FISA section 702 or the FAA.<sup>90</sup>

The FISC approves general procedures but does not issue warrants based on individualized findings for any specific target,<sup>91</sup> as the FAA permits targeting of non-U.S. persons outside the United States to gather “foreign intelligence” based on individualized decisions made by senior members of the executive branch, rather than the judicial branch.<sup>92</sup> Unlike FISA, the FAA does not specify where the interception must occur.<sup>93</sup> Therefore, any conversation between two foreign nationals outside the United States that happens to transit the United States could be intercepted without a warrant.<sup>94</sup> Even a conversation between a foreign national outside the United States and a U.S. person can be intercepted so long as the foreign national is the target of the intelligence gathering.<sup>95</sup>

Unlike the Terrorist Surveillance Program (TSP), which required an executive determination that one party to the communication was associated with al-Qaeda,<sup>96</sup> the FAA does not require that the government show any connection between the target and a foreign power, an

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88. § 1881a(i)(2)(C), (g)(2)(A)(v); *see also* NAT’L SEC. AGENCY, CIVIL LIBERTIES & PRIVACY OFFICE, REPORT: NSA’S IMPLEMENTATION OF FOREIGN INTELLIGENCE SURVEILLANCE ACT SECTION 702, at 2–3 (2014), <http://www.dni.gov/files/documents/0421/702%20Unclassified%20Document.pdf> (describing the procedures through which FISC approval is obtained). Minimization procedures are protocols to reduce the amount of information collected that is not relevant to the purpose of the search and also to detail what to do with information collected that is not relevant to the purpose of the search. § 1801(h).

89. § 1881a(b)(5), (g)(2)(A)(iv).

90. *In re* Proceedings Required by 702(i) of FISA Amendments Act of 2008, No. 08-01, 2008 WL 9487946, at \*4–5 (FISA Ct. Aug. 27, 2008) (“The Court is not required, in the course of this Section 702(i) review, to reach beyond the Government’s procedures and conduct a facial review of the constitutionality of the statute.”).

91. *Id.* at \*2. This lack of individual suspicion creates significant constitutional problems, as demonstrated in Part IV, *infra*.

92. § 1881a(g).

93. *See* § 1881a.

94. *See* § 1881a(b)(1)–(4).

95. § 1881a(b)(1).

96. *See* Public Declaration of James R. Clapper, *supra* note 72, ¶¶ 35–36; *see also* Press Briefing by Attorney Gen. Alberto Gonzales and Gen. Michael Hayden, Principal Deputy Dir. for Nat’l Intelligence, in Wash., D.C. (Dec. 19, 2005), <http://georgewebush-whitehouse.archives.gov/news/releases/2005/12/20051219-1.html>.

agent of a foreign power, or a terrorist group.<sup>97</sup> Nor is the government required to list the facilities, telephone lines, e-mail addresses, computers, or physical property that will be searched.<sup>98</sup> In short, the government does not have to tell the judiciary which individuals it is targeting, on what phone or electronic device, or, importantly, whether it will intercept the communication within or outside the United States.<sup>99</sup> A search under the FAA appears to have few of the protections contemplated in the Fourth Amendment.

Yet the FAA maintains more legitimacy than the TSP under one measure; the FAA was approved by Congress and signed into law,<sup>100</sup> whereas the TSP was an executive action that was arguably contrary to FISA, a federal law.<sup>101</sup> When the President acts in the national security arena pursuant to authority granted him by Congress, he is acting in his most protected status at the height of his constitutional authority.<sup>102</sup> This would suggest that courts reviewing the constitutionality of intelligence gathering under section 702 should give the program wide deference. But even national security laws must be subordinate to the Constitution's Fourth Amendment protections. As will be demonstrated below, past cases reviewing section 702 have neither given a full endorsement of the FAA nor analyzed section 702 with respect to the full body of relevant Fourth Amendment case law. A future court almost surely will do so, and it will face significant questions regarding the constitutionality of section 702.<sup>103</sup>

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97. § 1881a.

98. § 1881a(g)(4).

99. See *supra* text accompanying notes 92–97.

100. See § 1881a.

101. See Public Declaration of James R. Clapper, *supra* note 72, ¶ 6.

102. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring) (describing the levels of authority maintained by the President when acting with the express or implied consent of Congress).

103. Some notable experts argue that the Supreme Court is unlikely to address this issue. See Orin Kerr, *Is the Supreme Court Likely to Rule on FISA Section 702?*, LAWFARE (Oct. 29, 2013, 7:00 AM), <http://www.lawfareblog.com/2013/10/is-the-supreme-court-likely-to-rule/>. Lower courts have already begun to rule on this issue and must continue to do so if prosecutors continue to introduce evidence derived from section 702 searches. See *United States v. Mohamud*, No. 3:10-CR-00475-KI-1, 2014 WL 2866749, at \*26 (D. Or. June 24, 2014) (upholding the prosecution's introduction of section 702 evidence against defendant).

## II.

## CURRENT CONCERNS ABOUT SECTION 702 SEARCHES

One court and one government oversight board have reviewed the constitutionality of FISA Section 702.<sup>104</sup> Both have concluded that the is law constitutional, but both also expressed significant reservations and limitations.<sup>105</sup> This Part examines the holdings of these cases and highlights what the courts both did and did not consider.

A. *The 2010 Portland Christmas Tree Bomber and Section 702*

The U.S. District Court for the District of Oregon is the only court that has ruled on the constitutionality of section 702.<sup>106</sup> In 2010, Mohamed Mohamud was arrested in an FBI sting operation while attempting to detonate an FBI-made imitation bomb at a Christmas tree lighting ceremony in downtown Portland.<sup>107</sup> Mohamud was convicted at trial of attempting to use a weapon of mass destruction.<sup>108</sup> Unbeknownst to him, the evidence against him included information derived from section 702 surveillance.<sup>109</sup> Prior to trial, the government failed to notify the defendant that there was section 702 evidence against him, but provided notice only of evidence collected pursuant to other sections of FISA.<sup>110</sup> After trial, the government amended its notice to include section 702 evidence.<sup>111</sup> Citing the delay in notice, claiming misconduct on the part of the government, and challenging the constitutionality of the search, Mohamud filed a motion to vacate the conviction.<sup>112</sup> His constitutional argument included the claim that

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104. *Mohamud*, 2014 WL 2866749, at \*26; PCLOB REPORT, *supra* note 5, at 9. The significance of both will be discussed in Parts III.A and III.B, *infra*.

105. *See Mohamud*, 2014 WL 2866749, at \*26 (finding that section 702 did not violate the Fourth Amendment but that its constitutionality was a “very close question”); PCLOB REPORT, *supra* note 5, at 9 (“[T]he core of the Section 702 program fits within the . . . standard for reasonableness under the Fourth Amendment . . . . Outside of [that] core certain aspects of the Section 702 program push the program close to the line of constitutional reasonableness.”).

106. *Mohamud*, 2014 WL 2866749, at \*26.

107. Colin Miner et al., *F.B.I. Say Oregon Suspect Planned “Grand” Attack*, N.Y. TIMES (Nov. 27, 2010), <http://www.nytimes.com/2010/11/28/us/28portland.html>. *See generally* Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Oregon Resident Convicted in Plot to Bomb Christmas Tree Lighting Ceremony (Jan. 31, 2013), <http://www.fbi.gov/portland/press-releases/2013/oregon-resident-convicted-in-plot-to-bomb-christmas-tree-lighting-ceremony> (providing background on the investigation and trial).

108. *Mohamud*, 2014 WL 2866749, at \*1.

109. *Id.* at \*1–2.

110. *Id.* at \*1.

111. *Id.*

112. *Id.* at \*2.

section 702 violated the Fourth Amendment.<sup>113</sup> However, he did not raise, and the court did not consider, several other applicable constitutional arguments.<sup>114</sup>

The district judge upheld the introduction of section 702 evidence and found that no search warrant was required for the collection of such evidence.<sup>115</sup> In support of this finding, the court cited two leading cases for the proposition that the Fourth Amendment's warrant requirement did not apply to searches conducted *outside* the United States.<sup>116</sup> Yet, the court did not consider whether the search at issue in the case had been conducted *inside* the United States. The search at issue in the case most likely was conducted inside the United States (and there was no evidence by the government that indicated it was conducted extraterritorially).<sup>117</sup> If the section 702 search was conducted within the United States, then the court's analysis of precedent regarding extraterritorial searches was not relevant. For unlike extraterritorial searches, a search conducted inside the United States requires a search warrant unless an exception to the warrant requirement applies.<sup>118</sup>

The *Mohamud* court further supported its judgment by holding that the "foreign intelligence exception" (another name for the national security exception) to the warrant requirement applies to searches conducted under section 702.<sup>119</sup> This exception has the additional support of case law from the Foreign Intelligence Surveillance Court of Review (FISCR).<sup>120</sup> The FISCR<sup>121</sup> had previously applied the foreign intelligence exception "when surveillance is conducted to

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113. *Id.* at \*12.

114. The defendant conceded that the Fourth Amendment does not apply to aliens outside the United States. *Id.* Additionally, neither the defendant nor the court considered the significance of where the search was conducted and whether searches conducted inside the United States deserve a higher level of scrutiny than extraterritorial searches.

115. *Id.* at \*26.

116. *Id.* at \*15 (citing *In re Terrorist Bombings*, 552 F.3d 157, 167 (2d Cir. 2008); and then citing *United States v. Barona*, 56 F.3d 1087, 1092 n.1 (9th Cir. 1995)).

117. The opinion does not mention where the section 702 search occurred. But the authority to compel production of electronic communications is limited to the jurisdiction of the federal courts. *See* 50 U.S.C. § 1881a(h) (2013). There is a strong likelihood the search was conducted inside the United States, where electronic communication service providers would be subject to the jurisdiction and authority of federal statutes and U.S. courts. *Id.*

118. U.S. CONST. amend. IV; *see also* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (stating the Fourth Amendment applies to searches in the United States).

119. *Mohamud*, 2014 WL 2866749, at \*15–18.

120. *See In re Directives Pursuant to Section 105b of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1012 (FISA Ct. Rev. 2008).

obtain foreign intelligence for national security purposes and is directed against foreign power or agents of foreign powers reasonably believed to be located outside the United States.”<sup>122</sup> The phrase “directed against” suggests, but does not expressly state, that the search can be conducted inside the United States if the target is foreign.<sup>123</sup> The court also considered and rejected an alternative whereby the government would be required to get a search warrant—which is additional evidence that the collection was within the United States, where a warrant would carry legal effect.<sup>124</sup> Such an interpretation supports the *Mohamud* court’s determination that a foreign intelligence exception can be applied to domestic searches if the target is foreign.<sup>125</sup> But the court expanded the foreign intelligence exception even further by applying it to section 702, which requires no such finding that the target of the interception is a foreign power or agent of a foreign power.<sup>126</sup> Both the *Mohamud* court and the FISC’s expansions of the foreign intelligence exception must be considered in the next step in the constitutional analysis, which requires a finding that the warrantless search is nonetheless “reasonable” under the Fourth Amendment.<sup>127</sup>

In addition to failing to consider whether the searches in question were conducted inside the United States,<sup>128</sup> the district court in *Mohamud* also declined to consider whether section 702 was facially invalid.<sup>129</sup> The court instead limited its ruling to whether section 702

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121. The FISC is a federal circuit court that reviews appeals from the FISC. See § 1803(b); see also *United States Foreign Intelligence Surveillance Court of Review*, U.S. FOREIGN INTELLIGENCE SURVEILLANCE CT., <http://www.fisc.uscourts.gov/FISC> (last visited Sept. 27, 2015).

122. *In re Directives*, 551 F.3d at 1012.

123. *Id.*

124. *Id.* at 1011–12.

125. *United States v. Mohamud*, No. 3:10-CR-00475-KI-1, 2014 WL 2866749, at \*18 (D. Or. June 24, 2014) (concluding that the foreign intelligence exception applies despite the “incidental collection of U.S. persons’ communications” under section 702).

126. *Id.* Section 702 requires only a high-level executive official’s determination that a significant purpose of the acquisition is to gather foreign intelligence information. 50 U.S.C. § 1881a(g)(2)(A)(v) (2013).

127. See *Mohamud*, 2014 WL 2866749, at \*19 (“Application of the foreign intelligence exception does not end the analysis: ‘even though the foreign intelligence exception applies in a given case, governmental action intruding on individual privacy interests must comport with the Fourth Amendment’s reasonableness requirement.’” (quoting *In re Directives*, 551 F.3d at 1012)). In its analysis of surveillance conducted under the FAA’s precursor, the FISC found the warrantless search reasonable. *In re Directives*, 551 F.3d at 1014–15.

128. See *supra* text accompanying notes 115–18.

129. *Mohamud*, 2014 WL 2866749, at \*13–14.

was constitutional as applied to the defendant.<sup>130</sup> With these limitations and omissions, the court then determined that the Fourth Amendment's requirement that searches be reasonable applies to section 702.<sup>131</sup> Applying the same test used in *In Re Directives*, the court balanced the government's interests with the privacy implications of the searches to determine the reasonability of the surveillance.<sup>132</sup>

Balancing the "totality of the circumstances" to which they had limited the case, the court found that section 702 was "reasonable" as applied to Mohamud.<sup>133</sup> The court conducted a detailed review of section 702's procedures and then balanced the government interests in conducting the search with the privacy concerns presented by the search.<sup>134</sup> The purpose of the search—to thwart a terrorist threat to blow up downtown Portland—was a significant factor that weighed heavily in the government's favor.<sup>135</sup> However, while the threat of an imminent terrorist attack weighed heavily in favor of the reasonableness of *this* search, not all section 702 searches will be supported by such a strong government interest, and a future court's balancing test may accordingly come to a different result.

The court failed to consider the true "totality" of the circumstances. The location of the search and the lack of a judicial determination of a connection to a foreign power should have also been included in the court's analysis. Given a future case where these factors are included and considered as circumstances that suggest an unreasonable search, and where the government interest does not involve an imminent terrorist attack, the section 702 search may be held constitutionally unreasonable. Similar concerns that section 702 collection may be unreasonable were noted in a report by a government oversight board charged with examining and determining the constitutionality of FISA programs like section 702.

### B. *The PCLOB Report*

The Privacy and Civil Liberties Oversight Board (PCLOB) was created in response to a recommendation from the 9/11 Commission

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130. *Id.*

131. *Id.* at \*19.

132. *Id.* at \*20–27; *see also In re Directives*, 551 F.3d at 1012–15.

133. *Mohamud*, 2014 WL 2866749, at \*27. The court failed to consider factors including the (presumable) domestic location of the search and the lack of a judicial determination of a connection to a foreign power.

134. *Id.* at \*20–27.

135. *Id.* at \*22 ("It is undisputed the government's interest in protecting the national security is compelling.").

to establish an independent board within the executive branch.<sup>136</sup> The PCLOB was intended to review government action in order to ensure it both protected the nation from terrorism and respected the privacy and liberties concerns of Americans.<sup>137</sup> The PCLOB is authorized to:

- (1) analyze and review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties; and
- (2) ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the Nation from terrorism.<sup>138</sup>

In response to its statutory obligation and at the request of a bipartisan group of U.S. senators, the PCLOB conducted a review of the section 702 program to evaluate its constitutionality and to recommend changes in order to protect privacy and civil liberties.<sup>139</sup> The Board “carefully considered the totality of the circumstances surrounding the Section 702 Program that must be considered in assessing the program’s reasonableness under the Fourth Amendment.”<sup>140</sup> Surprisingly, the Board declined to “render a judgment about the constitutionality of the [section 702] program as a whole.”<sup>141</sup> In other words, it refrained from determining whether section 702 violates the Fourth Amendment.<sup>142</sup>

Although the PCLOB declined to determine whether section 702 was constitutional, it did note several “areas of concern” about its constitutionality and made recommendations to improve section 702 searches.<sup>143</sup> The PCLOB’s analysis reveals significant constitutional concerns with section 702.<sup>144</sup> The Board’s report detailed that section 702 searches are difficult to limit and can accordingly result in the unintended interception of communications beyond the scope of the Fourth Amendment.<sup>145</sup> The PCLOB identified two types of unintended interceptions that create constitutional problems: (1) the inter-

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136. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 395 (2004).

137. *Id.*

138. 42 U.S.C. § 2000ee(c) (2013).

139. *See* PCLOB REPORT, *supra* note 5, at 1.

140. *Id.* at 97.

141. *Id.*

142. *Id.*

143. *Id.*

144. *See id.* (“[F]eatures of the Section 702 program . . . push the entire program close to the line of constitutional reasonableness.”).

145. *See id.* at 38–39 (noting the government’s concession that wholly domestic communications can be acquired under section 702 collection).

ception of “about” communications and (2) the interception of “multi-communication transactions.”<sup>146</sup>

### I. “About” Communications

The section 702 program can unintentionally intercept wholly domestic communications—i.e., communications in which all participants are within the United States—through “about” collection.<sup>147</sup> This term describes communications that are neither to nor from a targeted person, but that include content that references a targeted person.<sup>148</sup> In other words, if two U.S. persons are discussing a non-U.S. person who is a target of the section 702 program, the NSA may intercept that communication.<sup>149</sup> As an entirely domestic conversation, however, a search warrant should be required for its interception.<sup>150</sup> While the NSA attempts to avoid collecting these “about” communications, current technology makes it difficult—perhaps impossible—to completely prevent their interception.<sup>151</sup> The NSA estimates that it incidentally collects tens of thousands of these “about” communications each year.<sup>152</sup> These interceptions, if intentional, would clearly be prohibited by the Fourth Amendment.<sup>153</sup> The PCLOB has previously suggested that the unintentional, but known, interception of communi-

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146. *Id.* at 39–41, 120–26.

147. *Id.* at 119.

148. *Id.*

149. See Charlie Savage, *N.S.A. Said to Search Content of Messages to and from U.S.*, N.Y. TIMES (Aug. 8, 2013) (reporting that the NSA “is searching the contents of vast amounts of Americans’ email and text communications into and out of the country, hunting for people who mention information about foreigners under surveillance”); cf. PCLOB REPORT, *supra* note 5, at 119–20 (“[The *New York Times*]’ belief represents a misunderstanding of a more complex reality . . . [A]n Internet communication between third parties, not involving the target, can be acquired by the NSA if it contains a reference, for instance, to the email address of a target.”).

150. See PCLOB REPORT, *supra* note 5, at 122 (“Nothing comparable is permitted as a legal matter or possible as a practical matter with respect to analogous but more traditional forms of communication.”).

151. *Id.* at 121, 123. According to the PCLOB report, the NSA has the ability to search for certain “identifiers” such as an email address, but cannot limit the search to exclude instances when that identifier is associated with a wholly domestic communication. *Id.* at 120–21.

152. *Id.* at 38–39.

153. See *id.* at 122 (noting that the government may not open mail without a warrant or listen to telephone conversations without probable cause); see also *United States v. Jacobsen*, 466 U.S. 109, 114 (1984) (“[T]he Fourth Amendment requires that government agents obtain a warrant before examining the contents of [a package sent through the mail.]”); *Katz v. United States*, 389 U.S. 347, 353 (1967) (holding that the government violated defendant’s privacy rights by recording his telephonic communications without a warrant); *Ex parte Jackson*, 96 U.S. 727, 733 (1877) (holding that the protection of the Fourth Amendment extends to mail).

cations beyond the scope of section 702 may be constitutionally permissible.<sup>154</sup> Whether courts will permit these communications to be introduced into evidence remains an open question under the Fourth Amendment.

## 2. *Multi-Communication Transactions*

The section 702 program can also intercept communications that begin internationally but result as wholly domestic.<sup>155</sup> Internet communications are not always a single communication from one person to another. Emails and other communications can be forwarded to third parties, while other web communications allow multiple people to communicate with each other.<sup>156</sup> The latter category of Internet communications are called multi-communication transactions (MCTs).<sup>157</sup> A non-U.S. person outside the United States may initiate a communication and that communication can later be forwarded or transmitted between two U.S. persons living within the United States. These MCTs would still contain the identifiers of a target person but are in fact communications between U.S. persons.<sup>158</sup> The NSA mistakenly intercepts such MCTs under the section 702 program.<sup>159</sup>

The NSA estimates that each year, it intercepts as many as 8000 MCTs for which it knows that both parties are within the United States and as many as 140,000 MCTs for which it does not know whether the user who initiated the communication was located inside or outside the United States.<sup>160</sup> These intercepted communications fall outside of the section 702 requirements and should require a judicially approved search warrant.<sup>161</sup> The PCLOB, however, declined to determine whether the mistaken interception of MCTs is a Fourth Amendment violation.<sup>162</sup>

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154. PCLOB REPORT, *supra* note 5, at 94–95 (observing that such would depend on whether the surveillance regime’s “rules affecting the acquisition, use, dissemination, and retention of the communications of U.S. persons appropriately balance the government’s valid interests with the privacy of U.S. persons”).

155. *See id.* at 41.

156. *See id.* at 40–41.

157. *Id.* at 39.

158. *See id.* at 40.

159. *See id.*

160. *See id.*

161. *Cf. id.* at 41 (noting that there are additional rules governing NSA surveillance procedures due to the “greater likelihood that . . . collection of Internet transactions, in particular MCTs, will result in the acquisition of wholly domestic communications and extraneous U.S. person information”).

162. *See id.* at 97.

The holes in the *Mohamud* decision and the PCLOB's report suggest that section 702 rests upon shaky constitutional footing. Both bodies failed to fully consider all of facts before them.<sup>163</sup> And there is additional relevant case law that must be considered in determining the constitutionality of section 702.<sup>164</sup> Recent cases involving criminal wiretaps have strengthened the Fourth Amendment's protections for wiretaps and may also impact the constitutionality of section 702.<sup>165</sup>

### III.

#### STRENGTHENING THE FOURTH AMENDMENT AND RESULTING IMPLICATIONS FOR WIRETAPS

Wiretaps authorized under FISA section 702 are Fourth Amendment "searches" under *Katz*.<sup>166</sup> As discussed in the previous sections, there is a significant body of case law addressing the application of the Fourth Amendment to both warrantless searches and searches involving foreign persons or other countries.<sup>167</sup> Section 702 raises constitutional concerns when it permits domestic searches of U.S. citizens.<sup>168</sup> In addition, domestic searches of foreign nationals under section 702 may also violate the Fourth Amendment's proscription on unreasonable searches.<sup>169</sup>

Courts have divided the Fourth Amendment into two separate protections.<sup>170</sup> The first requires the government to obtain a judicially

163. Neither considered the domestic nature of these searches. *See supra* text accompanying notes 119–22. The PCLOB Report does not affirmatively state that the collection occurs domestically, but it does note that: (1) wholly domestic communications are sometimes intercepted unintentionally; (2) there are an unknown number of the communications where at least one person is inside the United States; and (3) that the collection is done through the "internet backbone," part of which must access the United States. PCLOB REPORT, *supra* note 5, at 8–9, 35.

164. *E.g.*, *Boumediene v. Bush*, 553 U.S. 723, 795 (2008) (striking down, on constitutional grounds, a statutory provision that denied alien detainees the writ of habeas corpus); *In re Terrorist Bombings*, 552 F.3d 157, 167 (2d Cir. 2008) (applying the Fourth Amendment to a search of a home and interception of a telephone line in Kenya).

165. *See* discussion *infra* Part III.

166. *See Katz v. United States*, 389 U.S. 347, 353 (1967) ("The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.").

167. *See* discussion *supra* Part I.A.

168. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 267 (1990) (limiting the Fourth Amendment to searches conducted within the United States).

169. *See id.* at 270–71 (citing cases that establish that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country").

170. U.S. CONST. amend. IV; *see also In re Terrorist Bombings*, 552 F.3d 157, 167–68 (2d Cir. 2008).

authorized warrant to search and seize property.<sup>171</sup> The second requires that government searches not be “unreasonable,”<sup>172</sup> which subjects the warrant requirement to certain exceptions.<sup>173</sup> Courts have hesitated to apply the warrant requirement outside the United States,<sup>174</sup> but are still likely to require that foreign searches be “reasonable.”<sup>175</sup> This division of the Fourth Amendment into two separate clauses has lent support to the argument that section 702 searches can be “reasonable” even if they lack a judicially authorized search warrant.<sup>176</sup> Still, reasonableness turns in part on the connection to the United States of the person being searched.<sup>177</sup> Searches of U.S. citizens are given more scrutiny as compared to searches of foreign citizens with little connection to the United States, which are given less.<sup>178</sup>

Communications between a U.S. citizen and a foreign national on foreign soil may also raise constitutional concerns regarding both ends of the intercepted communication. These concerns can be divided into three parts. First, does the Fourth Amendment cover section 702 searches conducted against U.S. citizens and foreign nationals on foreign soil? Second, if the Fourth Amendment does cover these searches, is a warrant required or is there an applicable exception to the warrant requirement? Third, if there is an exception to the warrant requirement, does section 702 collection fall within that exception? This Part will analyze each of these questions in turn.

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171. See U.S. CONST. amend. IV; see also *In re Terrorist Bombings*, 552 F.3d at 167.

172. See U.S. CONST. amend. IV; see also *In re Terrorist Bombings*, 552 F.3d at 168.

173. *In re Terrorist Bombings*, 552 F.3d at 168.

174. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 267 (1990); see also Jonathan W. Gannon, *From Executive Order to Judicial Approval: Tracing the History of Surveillance of U.S. Persons Abroad in Light of Recent Terrorism Investigations*, 6 J. NAT'L SEC. L. & POL'Y 59, 76–79 (2012) (“Courts thus far have offered limited guidance concerning surveillance of U.S. persons overseas.”).

175. See Carla Crandall, *Bombed Away: How the Second Circuit Destroyed Fourth Amendment Rights of U.S. Citizens Abroad*, 2010 BYU. L. REV. 719, 735–36 (“[T]he applicability of even the ‘reasonableness requirement’ of the Fourth Amendment to searches conducted against U.S. citizens abroad depends on who conducts the search.”); see also *In re Terrorist Bombings*, 552 F.3d at 171 (“[F]oreign searches of U.S. citizens conducted by U.S. agents are subject only to the Fourth Amendment’s requirement of reasonableness.”).

176. See *In re Terrorist Bombings*, 552 F.3d at 171.

177. Compare *Verdugo-Urquidez*, 494 U.S. at 274 (holding that the search of a foreigner’s home is not protected by the Fourth Amendment), with *United States v. Truong Din Huong*, 629 F.2d 908, 911 (4th Cir. 1980) (noting that the Fourth Amendment does apply to warrantless surveillance of U.S. citizens).

178. See sources cited *supra* note 177.

### A. Nationality and Geography

Traditionally, the Fourth Amendment was not a significant bar to foreign intelligence wiretaps for two principal reasons.<sup>179</sup> First, the Supreme Court established that the Fourth Amendment did not provide guarantees to all persons but only to “the people,” a class of persons with some connection to the United States, excluding the foreign citizens who are often the basis of wiretaps in the national security arena.<sup>180</sup> Second, the Supreme Court has traditionally limited the reach of the Fourth Amendment to either domestic searches or searches conducted in areas where the United States and its courts have legal authority.<sup>181</sup>

Proponents of this jurisprudence argue that the Constitution was meant to restrict government action only over its own soil.<sup>182</sup> Other courts have similarly argued that they should not extend certain constitutional protections to areas outside the United States.<sup>183</sup> Their opinions explain that they cannot authorize a search in an area outside the United States’ jurisdiction because they would not have the legal authority to issue a search warrant in such an area.<sup>184</sup>

A recent case has subverted the view that the scope of the Fourth Amendment is limited only to areas under the United States’ control and to certain people with sufficient connections to the United States.<sup>185</sup> While the main principle—that the Fourth Amendment protects U.S. persons and those on U.S. soil—is still valid,<sup>186</sup> the Second Circuit has found a way to extend the Fourth Amendment’s reach to those outside the United States.<sup>187</sup> If courts continue this trend, section 702 searches may be in peril.

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179. See *Verdugo-Urquidez*, 494 U.S. at 266, 274–75.

180. See *id.* at 274–75.

181. See *id.*

182. *Id.* at 266–67.

183. *In re Terrorist Bombings*, 552 F.3d 157, 167 (2d Cir. 2008) (holding that the warrant requirement does not apply to searches conduct abroad by U.S. agents, but that the reasonableness requirement does apply).

184. See *id.* at 171; *Verdugo-Urquidez*, 494 U.S. at 279 (Stevens, J., concurring in the judgment) (“I do not believe the Warrant Clause has any application to searches of noncitizens’ homes in foreign jurisdictions because American magistrates have no power to authorize such searches.”); see also *id.* at 297 (Blackmun, J., dissenting) (“[A]n American magistrate’s lack of power to authorize a search abroad renders the Warrant Clause inapplicable to the search of a noncitizen’s residence outside this country.”).

185. See *In re Terrorist Bombings*, 552 F.3d at 167.

186. See *Verdugo-Urquidez*, 494 U.S. at 267 (majority opinion).

187. See *In re Terrorist Bombings*, 552 F.3d at 167.

### 1. *The Fourth Amendment's Application to Places*

The Fourth Amendment historically had limited application in foreign affairs, either because the target was not protected by the Fourth Amendment<sup>188</sup> or because the search was conducted pursuant to an exception to the Fourth Amendment's warrant requirement.<sup>189</sup> However, recent court opinions have expanded the reach of the Fourth Amendment's protections.<sup>190</sup>

As recently as 1990, the Supreme Court held that the protections of the Fourth Amendment do not apply to everyone but only to a subset of individuals that are part of the "people of the United States."<sup>191</sup> In *United States v. Verdugo-Urquidez*, the Supreme Court held that a resident of Mexico with no voluntary connection to the United States was not protected by the Fourth Amendment and could not seek to suppress the warrantless search of his home in Mexico by the Drug Enforcement Agency.<sup>192</sup> Because the defendant had no significant voluntary connections to the United States, he was not one of the "people of the United States" entitled to Fourth Amendment protection.<sup>193</sup>

*Verdugo-Urquidez* appears to provide support for the constitutionality of section 702, since the targets of these searches—like the defendant in *Verdugo-Urquidez*—are non-U.S. persons who are reasonably believed to be outside the United States.<sup>194</sup> But there is a significant difference between the search permitted in *Verdugo-Urquidez* and the data collection contemplated by section 702. In *Verdugo-Urquidez*, the search at issue was conducted in Mexico.<sup>195</sup> This fact was important to the Court, which noted that the Framers did not appear to intend that the Fourth Amendment "apply to activities of the United States directed against aliens *in foreign territory*."<sup>196</sup> But section 702

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188. See *Verdugo-Urquidez*, 494 U.S. at 274–75.

189. *Rosado v. Civiletti*, 621 F.2d 1179, 1189 (2d Cir. 1980) (extending the Bill of Rights extraterritorially only to U.S. citizens (citing *Reid v. Covert*, 354 U.S. 1 (1957))).

190. See, e.g., *In re Terrorist Bombings*, 552 F.3d at 167 (holding that the Fourth Amendment's reasonableness requirement applied to a search conducted in Kenya).

191. *Verdugo-Urquidez*, 494 U.S. at 266, 274–75.

192. *Id.* at 274–75; see Fiss, *supra* note 16, at 22 (noting that *Verdugo-Urquidez* "arguably could be read as placing foreigners abroad in a constitutional free fall").

193. *Verdugo-Urquidez*, 494 U.S. at 266, 274–75.

194. 50 U.S.C. § 1881a(b) (2013).

195. *Verdugo-Urquidez*, 494 U.S. at 274–75.

196. *Id.* at 267 (emphasis added).

collection is distinctly different from the search in *Verdugo-Urquidez*, as it can be conducted *within the United States*.<sup>197</sup>

There is significant reason to believe that the Supreme Court would have ruled differently had the search been conducted within the jurisdiction of the United States.<sup>198</sup> Justice Kennedy's concurrence states, "[T]he Constitution does not require United States agents to obtain a warrant when searching the foreign home of a nonresident alien. If the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment would apply."<sup>199</sup> The Supreme Court has considered and extended Fourth Amendment protections to those unlawfully present in the United States,<sup>200</sup> so the fact that a search is conducted within the United States remains significant to the Fourth Amendment analysis.<sup>201</sup>

The primary reason for not requiring a warrant to conduct a search outside the United States, even when the search involves U.S. citizens, is that U.S. courts lack jurisdiction to issue foreign warrants.<sup>202</sup> In *Verdugo-Urquidez*, Justice Kennedy concluded that "the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country."<sup>203</sup> The majority opinion echoes Justice Kennedy's view that the location of the search was of paramount importance.<sup>204</sup>

Section 702 collection is unlike the search allowed by *Verdugo-Urquidez* in that it can be conducted inside the United States, where the Fourth Amendment does indeed apply.<sup>205</sup> And while some of the

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197. See § 1881a(a). The statute requires that the person targeted is "reasonably believed to be located outside the United States," but makes no mention of where the search is to be conducted. *Id.*; see also *supra* Part II.B (discussing the interception of wholly domestic communications that occurs under section 702).

198. *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring).

199. *Id.*

200. See *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (indicating that the Fourth Amendment applies to a search of a person unlawfully present in the United States); *Oliva-Ramos v. Attorney Gen.*, 694 F.3d 259 (3d Cir. 2012) (holding that the Fourth Amendment can apply in removal proceedings of persons unlawfully present in the United States).

201. See *Lopez-Mendoza*, 468 U.S. at 1050; *Oliva-Ramos*, 694 F.3d at 259.

202. *Verdugo-Urquidez*, 494 U.S. at 278.

203. *Id.*

204. *Id.* at 274–75 (majority opinion) ("At the time of the search, [the defendant] was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application.")

205. See 50 U.S.C. § 1881a(a) (2012); § 1881a(b)(2). These two provisions, when read in conjunction with each other, imply that section 702 intercepts are permissible even if one of the participants in the communication is inside the United States, as

interceptions under section 702 involve communications between two foreigners on foreign soil, others involve communications that were sent or received within the United States.<sup>206</sup> Neither *Mohamud* nor the PCLOB Report considered the constitutional implications of these domestic searches.<sup>207</sup> If the search in *Verdugo-Urquidez* had occurred inside the United States, the Supreme Court may have ruled differently and required a search warrant.<sup>208</sup> A court reviewing this issue in the future may determine that a domestic search, even of non-U.S. persons, is by itself sufficient to trigger the Fourth Amendment's protections and thus requires a judicially approved search warrant. At a minimum, the fact that the search is within the United States must be considered in determining whether the search is reasonable under the totality of the circumstances.<sup>209</sup>

Even if the domestic nature of section 702 collection is not enough by itself to trigger the Fourth Amendment's protections, there is a second reason why *Verdugo-Urquidez* does not foreclose the application of the Fourth Amendment to section 702. A foreigner outside the United States can have the "sufficient connections" to the United States that *Verdugo-Urquidez* determined were necessary to trigger the Fourth Amendment protections.<sup>210</sup> Nevertheless, section 702 permits warrantless searches of all non-U.S. persons who are located outside the United States, even if the targets have significant ties to the United States that grant them Fourth Amendment protections under *Verdugo-Urquidez*.<sup>211</sup> *Verdugo-Urquidez* suggests that a warrantless search under these circumstances would be unconstitutional.<sup>212</sup>

A third scenario could also result in an unconstitutional application of section 702. Section 702 states that searches are permissible so long as the target is "*reasonably believed* to be located outside the

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long as the target of the interception is "reasonably believed" to be outside the country.

206. See *supra* Part II.B.

207. See *supra* Part II.

208. See *Verdugo-Urquidez*, 494 U.S. at 271 (distinguishing cases that establish "that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country"); see also *id.* at 278 (Kennedy, J., concurring).

209. *Id.* at 271 (majority opinion); *id.* at 278 (Kennedy, J., concurring).

210. *Id.* at 283–84 (Brennan, J., dissenting) (noting that the government argued that a non-citizen who has "sufficient connections" to the United States has Fourth Amendment protections); see, e.g., *Bayo v. Napolitano*, 593 F.3d 495, 502 (7th Cir. 2010) (en banc) (holding that illegal aliens in the United States are entitled to other constitutional protections like due process).

211. 50 U.S.C. § 1881a(a) (2013); *Verdugo-Urquidez*, 494 U.S. at 283–84.

212. *Verdugo-Urquidez*, 494 U.S. at 271 (majority opinion).

United States.”<sup>213</sup> In other words, a search conducted within the United States of a person also located inside the United States would be authorized under section 702 if officials “reasonably” but mistakenly believed the person was *outside* the United States.<sup>214</sup> A U.S. citizen inside the United States would likely be afforded the maximum protections under the Fourth Amendment,<sup>215</sup> and it is unlikely that a reviewing court would permit a warrantless domestic search under such circumstances.

These concerns demonstrate that even if *Verdugo-Urquidez* were the final word on extraterritorial searches, it would still give us ample reason to question the constitutionality of certain applications of section 702. However, *Verdugo-Urquidez* was not the last word on the extraterritorial reach of the Fourth Amendment. Other courts have distinguished *Verdugo-Urquidez* by finding that some provisions of the Fourth Amendment do apply extraterritorially and that the Fourth Amendment can apply to persons with limited connection to the United States.<sup>216</sup>

## 2. *The Fourth Amendment’s Application to Persons*

It was once well-settled law that the Fourth Amendment did not apply to foreign persons living outside the United States.<sup>217</sup> However, in the last decade, the Supreme Court has expanded the reach of the Constitution to foreign persons.<sup>218</sup> The Seventh Circuit has followed the Supreme Court’s lead and has applied the Constitution’s protections to foreign persons both inside and outside the United States.<sup>219</sup> These cases show an expansion of the reach of the Constitution in general—and the Fourth Amendment in particular—that creates concerns for section 702.

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213. § 1881a(a) (emphasis added).

214. *See id.*

215. *Verdugo-Urquidez*, 494 U.S. at 266 (explaining that the Fourth Amendment was intended to “restrict searches and seizures which might be conducted by the United States in domestic matters”).

216. *See, e.g., United States v. Stokes*, 726 F.3d 880 (7th Cir. 2013) (holding that the Fourth Amendment’s warrant requirement did not apply to search of home in Thailand); *In re Terrorist Bombings*, 552 F.3d 167, 167 (2d Cir. 2008) (applying the Fourth Amendment to a search conducted in Kenya).

217. *Verdugo-Urquidez*, 494 U.S. at 274.

218. *See Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that aliens detained as enemy combatants in Guantanamo Bay were entitled to the privilege of habeas corpus).

219. *See Bayo v. Napolitano*, 593 F.3d 495, 502 (7th Cir. 2010) (en banc) (holding that illegal aliens in the United States are entitled to due process).

*Verdugo-Urquidez* held that the Fourth Amendment does not protect foreign persons during foreign searches if they lack sufficient ties to the United States.<sup>220</sup> But that left open the possibility that the Fourth Amendment may apply to those outside the United States with significant connections.<sup>221</sup> Section 702 permits warrantless targeting of persons who are outside the United States without providing an exception for those with significant ties to the United States.<sup>222</sup> If the Fourth Amendment protects U.S. citizens when they are outside the United States, these interceptions under section 702 of communications by persons with sufficient connections to the United States may be unconstitutional.

The Supreme Court has not definitively addressed whether the Fourth Amendment protects Americans living outside of the United States,<sup>223</sup> although a plurality has determined that the Constitution applies generally to Americans living abroad.<sup>224</sup> In *Reid v. Covert*, the Supreme Court held that the Bill of Rights protects Americans living overseas.<sup>225</sup> Following the *Reid* opinion, lower courts, using analogous reasoning, began to apply portions of the Fourth Amendment outside of the United States.<sup>226</sup>

In the *Terrorist Bombings of the Embassies in East Africa* case, the Second Circuit applied the Fourth Amendment's reasonableness requirement to a search of a home and the interception of a telephone line in Kenya.<sup>227</sup> The search was conducted against a U.S. citizen, so the only issue before the court was whether the Fourth Amendment applied outside the United States.<sup>228</sup> The court reiterated that "the Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed against United States citizens."<sup>229</sup> The court applied the Fourth Amendment's requirement of reasonableness and

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220. *Verdugo-Urquidez*, 494 U.S. at 274.

221. *See id.* at 271.

222. 50 U.S.C. § 1881a(a)–(b) (2013).

223. 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).

224. *See Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (plurality opinion).

225. *Id.* at 5–6. *Reid* overturned the court-martial of an American citizen, who was the wife of an officer in the Air Force stationed in Japan, on the grounds that the Bill of Rights prohibited the prosecution of civilians in military courts. *Id.* at 3–6.

226. *Zweibon v. Mitchell*, 516 F.2d 594, 613 n.42 (D.C. Cir. 1975) (acknowledging that warrantless surveillance of foreign agents is permissible so long as it meets the Fourth Amendment's reasonableness requirement); *United States v. Marzook*, 435 F. Supp. 2d 778, 788–91 (N.D. Ill. 2006) (same).

227. *In re Terrorist Bombings*, 552 F.3d 157, 171 (2d Cir. 2008).

228. *Id.* at 167.

229. *Id.* (quoting *United States v. Toscanino*, 500 F.2d 267, 280–81 (2d Cir. 1974)).

then determined that the government's actions in the case were reasonable.<sup>230</sup> Significantly, the court rejected the district court's finding of a "foreign intelligence" exception to the Fourth Amendment's warrant requirement but nonetheless subjected the searches to the sole requirement of reasonableness, as it held that the Warrant Clause had no extraterritorial application.<sup>231</sup> Other courts have either held that a foreign intelligence exception permits these searches<sup>232</sup> or have left the issue of foreign intelligence searches' constitutionality unresolved.<sup>233</sup>

The Fifth and Ninth Circuits preceded the Second Circuit in applying the Fourth Amendment's reasonableness standard to searches conducted outside of the United States<sup>234</sup> and emphasized that the Fourth Amendment protects Americans from U.S. government searches conducted outside of the United States.<sup>235</sup> Other circuit courts have not expressly decided the issue, but have permitted warrantless foreign intelligence searches as long as the reasonableness requirement of the Fourth Amendment were met.<sup>236</sup>

Section 702 prohibits the intentional targeting of U.S. citizens abroad but permits the interception of communications of U.S. citizens—inside or outside of the United States—incidental to the targeting of foreigners.<sup>237</sup> Further, courts have permitted the use of intelligence gathered through these warrantless interceptions in criminal cases.<sup>238</sup> It is these searches that may prompt a future court, following the precedent of *Reid* and its progeny, to hold that a

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230. *Id.* at 171–74.

231. *Id.* at 171–72.

232. *See, e.g.,* *United States v. Truong Dinh Hung*, 629 F.2d 908, 912–13 (4th Cir. 1980) (holding that the government does not always need to obtain a warrant to conduct foreign intelligence surveillance).

233. *See Gannon, supra* note 174, at 80–93.

234. *See United States v. Barona*, 56 F.3d 1087, 1094 (9th Cir. 1995); *United States v. Conroy*, 589 F.2d 1258, 1264–65 (5th Cir. 1979) (“The Fourth Amendment . . . shelters our citizens wherever they may be in the world from unreasonable searches by our own government.”).

235. *Barona*, 56 F.3d at 1094 (“The term ‘People of the United States’ includes American citizens at home and abroad.”); *Conroy*, 589 F.2d at 1264–65 (noting that the Fourth Amendment protects citizens “wherever they may be in the world”).

236. *See United States v. Buck*, 548 F.2d 871, 876 (9th Cir. 1977); *United States v. Butenko*, 494 F.2d 593, 602–03 (3d Cir. 1974); *United States v. Clay*, 430 F.2d 165, 170–71 (5th Cir. 1970), *rev'd on other grounds*, 403 U.S. 698 (1971).

237. 50 U.S.C. § 1881a(b) (2013) (limiting only the intentional targeting of persons inside the United States and U.S. persons outside the United States).

238. *See, e.g., United States v. Mohamud*, No. 3:10-CR-00475-KI-1, 2014 WL 2866749, at \*14–15 (D. Or. June 4, 2014) (declining to suppress evidence obtained through a section 702 interception of a U.S. citizen incidental to the targeting of a non-U.S. person).

warrantless search of a U.S. citizen is constitutionally unreasonable under the Fourth Amendment.

An illustrative example is *United States v. Truong Dinh Hung*, a case in which the Fourth Circuit permitted a warrantless search under pre-FISA rules but on grounds that may not support a search conducted under section 702.<sup>239</sup> The defendant, a Vietnamese citizen living in the United States, was convicted of espionage for providing classified information to the Vietnamese government.<sup>240</sup> Some of the evidence against the defendant was obtained through warrantless national security wiretaps.<sup>241</sup> The Fourth Circuit, in analyzing the defendant's challenge to these wiretaps, agreed with the district court that the executive branch did not always need to obtain a warrant for foreign intelligence surveillance.<sup>242</sup> The court reasoned that "the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would . . . 'unduly frustrate' the President in carrying out his foreign affairs responsibilities."<sup>243</sup> The court then cautioned that the foreign intelligence exception to the Fourth Amendment's warrant requirement must be narrowly construed to situations "in which the interests of the executive are paramount."<sup>244</sup>

The court of appeals limited the scope of the foreign intelligence exception such that it does not apply to searches conducted pursuant to section 702.<sup>245</sup> The court stressed that "because individual privacy interests are severely compromised any time the government conducts surveillance without prior judicial approval, this foreign intelligence exception to the Fourth Amendment warrant requirement must be carefully limited."<sup>246</sup> The court determined that warrantless wiretaps of U.S. citizens are allowed only where the object of the search is a "foreign power, its agent or collaborators."<sup>247</sup> The court explained that

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239. *United States v. Truong Dinh Hung*, 629 F.2d 908, 911 (4th Cir. 1980).

240. *Id.*

241. *Id.* at 912.

242. *Id.* at 913.

243. *Id.* (quoting *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 315 (1972)).

244. *Id.* at 915.

245. *See id.*

246. *Id.*; see also Robert C. Power, *Intelligence Searches and Purpose: A Significant Mismatch Between Constitutional Criminal Procedure and the Law of Intelligence-Gathering*, 30 PACE L. REV. 620, 677–78 (2010) (describing many of the expansive investigative tools available to the government).

247. *Truong Dinh Hung*, 629 F.2d at 915; see also *Zweibon v. Mitchell*, 516 F.2d 594, 613 n.42 (D.C. Cir. 1975) (acknowledging that if a "[foreign intelligence] exception to the warrant requirement were recognized . . . it would be possible to allow warrantless surveillance of foreign agents regardless of the information sought").

the exception should not apply in cases when there is no connection to a foreign power, because “the executive’s needs become less compelling; and the surveillance more closely resembles the surveillance of suspected criminals, which must be authorized by warrant.”<sup>248</sup> In other words, *Truong Dinh Hung* allowed a foreign intelligence exception to the warrant requirement only where there was a demonstrated connection between the surveillance and a foreign power.<sup>249</sup> Absent that connection, the Fourth Circuit would have required the government to obtain a search warrant.<sup>250</sup>

Section 702 eliminated the requirement that the target be a foreign power or an agent of a foreign power.<sup>251</sup> Additionally, no judicial finding regarding the importance of the information being gathered is now required.<sup>252</sup> A senior executive official must merely find that the information sought is for “foreign intelligence.”<sup>253</sup> Under the reasoning of the court in *Truong Dinh Hung*, such a low bar for justification that requires little proof of a compelling governmental interest suggests that the warrantless search may not be constitutional.<sup>254</sup>

These cases demonstrate that courts have found opportunities to afford protections of the Fourth Amendment beyond U.S. borders. Recent courts have extended other portions of the Constitution overseas and continue to show a willingness to consider further extensions. In *Boumediene v. Bush*, the Supreme Court held that the Constitution reaches aliens located in Guantanamo Bay, an area in Cuba that is under the exclusive control of the United States.<sup>255</sup> And in *Bayo v. Chertoff*, the Seventh Circuit similarly found that the Constitution’s due process protections applied to an alien who entered the United States unlawfully.<sup>256</sup> The defendants in *Boumediene* and *Bayo* had lit-

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248. *Truong Dinh Hung*, 629 F.2d at 915.

249. *See id.*

250. *See id.*

251. *See* 50 U.S.C. § 1881a(a)–(b) (2013).

252. *Id.*

253. § 1881a(a).

254. *See Truong Dinh Hung*, 629 F.2d at 915 (“[T]he absence of a foreign connection and the importance of individual privacy concerns contained within the Fourth Amendment lead to a requirement that the executive secure advance judicial approval for surveillance.”).

255. 553 U.S. 723, 771 (2008) (holding that the Constitution’s Suspension Clause reaches aliens technically outside the United States but within territory it exclusively controls).

256. 535 F.3d 749, 752–54 (7th Cir. 2008) (extending the principle that waivers of constitutional rights must be knowing and voluntary to alien not yet admitted by physically on American soil), *rev’d on other grounds*, *Bayo v. Napolitano*, 593 F.3d 495 (7th Cir. 2010) (en banc).

the voluntary connections to the United States.<sup>257</sup> Nevertheless, the courts found reason to afford constitutional protections to the defendants.

These cases, all of which were decided based on the specific balancing of the specific facts and government interests before those courts, demonstrate that U.S. citizens enjoy Fourth Amendment protections wherever they are located, whereas aliens can obtain Fourth Amendment protections by demonstrating sufficient connections to the United States.<sup>258</sup> This principle conflicts with section 702, which allows the search of U.S. citizens in foreign territories and the search of non-U.S. persons with significant connections to the United States.<sup>259</sup>

### 3. *Above All, It Must Be Reasonable*

In each of the opinions discussed above, the courts used different reasoning to come to a similar conclusion: if a person has sufficient connections to the United States to benefit from Fourth Amendment protections, they can receive some constitutional protections when they are outside the United States.<sup>260</sup> None of the circuits required a search warrant, but all required—or were willing to contemplate requiring—that the search be “reasonable.”<sup>261</sup> Still, the framework of section 702 may make it less “reasonable” than the intelligence searches reviewed by these courts.

The first significant difference between section 702 of FISA and the searches reviewed above is that section 702 does not require any

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257. See *Boumediene*, 553 U.S. at 723 (“Petitioners are aliens detained at Guantanamo after being captured in Afghanistan or elsewhere abroad and designated enemy combatants.”); *Bayo*, 535 F.3d at 750 (observing that the defendant was an illegal alien who used a stolen passport to enter the United States.).

258. See *Boumediene*, 553 U.S. at 765; *Bayo*, 535 F.3d at 752; *In re Terrorist Bombings*, 552 F.3d 157, 167, 171 (2d Cir. 2008).

259. See 50 U.S.C. § 1881a(b) (2013) (implying that searches of a U.S. person outside of the United States or of a non-U.S. person located in the United States is allowed as long as their communications were not “intentionally” acquired).

260. See *In re Terrorist Bombings*, 552 F.3d at 167 (explaining that searches of U.S. citizens conducted abroad need only satisfy the Fourth Amendment’s reasonableness requirement); *United States v. Barona*, 56 F.3d 1087, 1094 (9th Cir. 1995) (applying the Fourth Amendment’s reasonableness requirement to an extraterritorial search of U.S. citizens); *United States v. Truong Dinh Hung*, 629 F.2d 908, 911 (4th Cir. 1980) (explaining that foreign intelligence exception will be applied only when the object of the search or surveillance is “a foreign power, its agent, or collaborators”); *United States v. Conroy*, 589 F.2d 1258, 1264–65 (5th Cir. 1979) (“The Fourth Amendment . . . shelters our citizens wherever they may be in the world from unreasonable searches by our own government.”).

261. *In re Terrorist Bombings*, 552 F.3d at 167; *Barona*, 56 F.3d at 1094; *Truong Dinh Hung*, 629 F.2d 908, 916–17; *Conroy*, 589 F.2d at 1264–65.

determination of a nexus to a foreign power or an agent of a foreign power.<sup>262</sup> Instead, the Attorney General and the Director of National Intelligence must confirm that “a significant purpose of the acquisition is to obtain foreign intelligence information.”<sup>263</sup> This certification may not be sufficient to meet the requirement for the foreign intelligence exception in *Truong Dinh Hung*, which requires that the search be conducted in the service of government interests that are “paramount.”<sup>264</sup> Section 702’s mere requirement of a “significant” purpose to gather foreign intelligence, as compared to the requirement that the target is an agent of a foreign power, may still be sufficient to render a warrantless search reasonable.<sup>265</sup> However, it is a relatively minor factor on the government’s side of the scale, when considered in a court’s weighing of the totality of the circumstances to determine if a search is “reasonable.”<sup>266</sup>

While the government may still rely on *Verdugo-Urquidez* in arguing that non-U.S. citizens with no connection to the United States are not entitled to any Fourth Amendment protection, there is a significant gap between the warrantless searches permitted by section 702 and the scope of *Verdugo-Urquidez*. For example, a foreign citizen may not be a “U.S. person” as defined by FISA but still have connections with the United States sufficient to trigger Fourth Amendment protections.<sup>267</sup>

There is one other glaring difference between section 702 collection and traditional FISA searches that may allow a future court to hold section 702 unreasonable under the Fourth Amendment. Section 702 does not require the government to specify in its FISC application for approval what telephone, computer, or e-mail address is being searched nor, more importantly, where the search is being con-

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262. See § 1881a(g)(2).

263. § 1881a(g)(2)(A)(v).

264. *Truong Dinh Hung*, 629 F.2d at 915.

265. *In re Directives Pursuant to Section 105b of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1011 (FISA Ct. Rev. 2008) (“This court previously has upheld as reasonable under the Fourth Amendment the Patriot Act’s substitution of ‘a significant purpose’ for the talismanic phrase ‘primary purpose.’” (quoting *In re Sealed Case*, 310 F.3d 717, 742–45 (FISA Ct. Rev. 2002))).

266. *Truong Dinh Hung*, 629 F.2d at 916–17 (examining the circumstances of the case and determining that the surveillance was reasonable).

267. See § 1801(i) (defining a “U.S. Person”). For example, a person who illegally entered and remained in the United States for many years would not be a “U.S. Person” within the definition of the statute but likely would have Fourth Amendment protections. See *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (indicating that the Fourth Amendment applied to a search of undocumented immigrants).

ducted.<sup>268</sup> In contrast, criminal search warrants must state clearly what is being searched and where it is located.<sup>269</sup> This specificity requirement is a fundamental protection written into the Fourth Amendment.<sup>270</sup> Additionally, as discussed above, section 702 permits the collection of foreign communications within the United States (because the communication between two foreign persons may be transmitted in the United States).<sup>271</sup> The fact that the search was conducted within the United States, without more, may be a “sufficient connection” for a future court to find that the Fourth Amendment applies. If the court is unable to connect the search to a foreign power, the foreign intelligence exception may not apply, and the warrantless search may be held unreasonable.

### B. *The Warrant Requirement’s Application to Surveillance*

The Supreme Court’s decision in *United States v. Jones*, which strengthened the application of the Fourth Amendment to wiretaps and other types of surveillance, marks another development in the Court’s jurisprudence that may impact the future of section 702.<sup>272</sup> In *Jones*, the Supreme Court held that the installation of a GPS device on a vehicle and the four-month use of that device to monitor the vehicle’s movements constituted a “search” under the Fourth Amendment.<sup>273</sup> A close examination of the majority and concurring opinions raises serious concerns for the constitutionality of section 702.

The Court found the surveillance constituted a search because the officers had committed a physical trespass by placing a tracking device on the defendant’s car.<sup>274</sup> Because most modern wiretaps and foreign intelligence surveillance are done without a physical trespass (by searching computer servers or obtaining the information from service providers), *Jones* seems at first blush to be irrelevant to FISA section

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268. See § 1881a(d), (g)(i) (listing all of the targeting procedures and guidelines for certification and failing to include as a requirement a declaration of which device is being targeted or where the search will be located).

269. FED. R. CRIM. P. 41(e)(2).

270. U.S. CONST. amend. IV.

271. See *supra* Part II.B; see also § 1881a(d), (g)(i); Julia Angwin et al., *AT&T Helped U.S. Spy on Internet on a Vast Scale*, N.Y. TIMES (Aug. 15, 2015), [http://www.nytimes.com/2015/08/16/us/politics/att-helped-nsa-spy-on-an-array-of-internet-traffic.html?\\_r=0](http://www.nytimes.com/2015/08/16/us/politics/att-helped-nsa-spy-on-an-array-of-internet-traffic.html?_r=0) (revealing that “AT&T’s provision of foreign-to-foreign traffic has been particularly important to the N.S.A. because large amounts of the world’s Internet communications travel across American cables”).

272. *United States v. Jones*, 132 S. Ct. 945 (2012).

273. *Id.* at 949.

274. *Id.*

702 collection.<sup>275</sup> However, the concurring opinions suggest that a majority of the current Court may also find that prolonged warrantless surveillance—even with no physical trespass—is also a search that violates the Fourth Amendment.<sup>276</sup>

Two concurring opinions—one by Justice Alito (joined by three other Justices) and another by Justice Sotomayor—found the surveillance at issue unconstitutional for reasons other than the plurality’s trespass holding. These five Justices constitute a shadow majority within the greater majority opinion and would have determined that the search was unconstitutional even without a physical trespass.<sup>277</sup> Thus, a closer examination of the concurring opinions is warranted, as it will likely offer a preview of the debate on the future of section 702, and there is already a majority of Justices who have strong views that are contrary to section 702.

Justice Alito followed the reasoning of the *Katz* Court, a case that the majority also cited with approval.<sup>278</sup> In *Katz*, the Supreme Court found a Fourth Amendment violation even though the interception occurred in a telephone booth in public view on a street.<sup>279</sup> The Court reasoned that the defendant still had a reasonable expectation of privacy even though he was in public view.<sup>280</sup> In *Jones*, Justice Alito used a similar analysis to determine that long-term surveillance, even if only employed while the defendant is in a public place, violates the defendant’s reasonable expectation of privacy.<sup>281</sup> Justice Alito reasoned that prolonged GPS surveillance provides the government with detailed and personal information about an individual that, in the aggregate, constitutes a Fourth Amendment search.<sup>282</sup>

275. *See id.* at 954 (“It may be that [long-term surveillance] through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.”).

276. *See id.* at 954 (Sotomayor, J., concurring); *see also id.* at 957 (Alito, J., concurring in the judgment).

277. *Id.* at 955 (Sotomayor, J., concurring); *see also id.* at 964 (Alito, J., concurring in the judgment).

278. *See id.* at 964 (Alito, J., concurring in the judgment) (“The best that we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated.”); *see also id.* at 953 (majority opinion) (“Situations involving merely the transmission of electronic signals without trespass would remain subject to *Katz*.”).

279. 389 U.S. 347, 352–53 (1967).

280. *Id.* at 353.

281. *Jones*, 132 S. Ct. at 964 (Alito, J., concurring in the judgment).

282. *See id.* (“[S]ociety’s expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual’s car for a very long period.”).

Justice Sotomayor agreed with Justice Alito,<sup>283</sup> but went even further by arguing that the reasonable expectation of privacy may extend to information given to third parties.<sup>284</sup> Justice Sotomayor maintained that prolonged monitoring “in investigations of most offenses” may be constitutionally unacceptable.<sup>285</sup> Justice Sotomayor reasoned that “GPS monitoring generates . . . a wealth of detail about [a person’s] familial, political, professional, religious, and sexual associations.”<sup>286</sup> While any one item might be constitutionally permissible, Justice Sotomayor feared that the government’s power to assemble such a significant amount of private information was “susceptible to abuse.”<sup>287</sup>

Justice Sotomayor’s concerns with surveillance of information disclosed to third parties may offer a preview of her section 702 analysis. Her opinion notes that such surveillance—which includes interception of telephone conversations, e-mails, and web searches—may be entitled to Fourth Amendment protection.<sup>288</sup> These methods of data collection are an important component of foreign intelligence collection<sup>289</sup> and can provide much more detailed information than the mere physical location of a GPS device.<sup>290</sup>

The concurrences in *Jones* clearly stress the need for a judicially authorized search warrant when conducting domestic surveillance through a tracking device.<sup>291</sup> The reasoning of these opinions, if applied to section 702 wiretaps, may result in the invalidation of such searches. Section 702 surveillance, like the search at issue in *Jones*, is

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283. See *id.* at 955 (Sotomayor, J., concurring) (“As Justice Alito incisively observes, the same technological advances that have made possible nontrespassory surveillance techniques will also affect the *Katz* test by shaping the evolution of societal privacy expectations.” (citing *Jones*, 132 S. Ct. at 962–63 (Alito, J., concurring in the judgment))).

284. *Id.* at 957.

285. *Id.* at 955.

286. *Id.*

287. *Id.* at 955–56.

288. *Id.* at 957.

289. President Barack Obama, Speech on NSA Phone Surveillance (Jan. 17, 2014) (calling these methods of data collection “a powerful tool”).

290. See *Jones*, 132 S. Ct. at 957 (“People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers.”).

291. See *id.* at 956 (“I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse.”); see also *id.* at 964 (Alito, J., concurring in the judgment) (“[W]here uncertainty exists with respect to whether a certain period of GPS surveillance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant.”).

both invasive and conducted without requiring a judicial officer's probable cause determination.<sup>292</sup> In fact, one lower court followed the reasoning in the concurring opinions of *Jones* and applied it directly to FISA cases.<sup>293</sup>

C. *Fitting FISA Section 702 into an Exception to the Warrant Requirement*

A district court that recently examined foreign intelligence searches conducted under FISA programs other than section 702 expressed concerns about the constitutionality of these searches.<sup>294</sup> Significantly, the court applied the *Jones* decision to the warrantless foreign intelligence searches at issue in the case.<sup>295</sup> Its reasoning may raise concerns about the constitutionality of section 702 as well.

In *Klayman v. Obama*, the D.C. District Court applied the Supreme Court's analysis in *Jones* to the FISA section 215 program and determined that it violated the Fourth Amendment.<sup>296</sup> Section 215 and section 702 are separate surveillance programs that amended FISA in 2001 and 2008, respectively.<sup>297</sup> The FISA section 215 program acquires "metadata"—bits of information such as telephone numbers

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292. 50 U.S.C. § 1881a(a), (g)(i) (2013); *see also* United States v. Mohamad, No. 3:10-CR-00475-KI-1, 2014 WL 2866749 (D. Or. June 24, 2014) (explaining that section 702 permits the "widespread capture, retention, and later querying, dissemination, and use of the communications of American citizens" without the protection afforded by a warrant); *Klayman v. Obama*, 957 F. Supp. 2d 1, 14, (D.D.C. 2013) (explaining that government "collects, compiles, retains, and analyzes . . . metadata, such as information about what phone numbers were used to make and receive calls, when the calls took place, and how long the calls lasted"), *vacated*, 800 F.3d 559 (D.C. Cir. 2015).

293. *See Klayman*, 957 F. Supp. 2d at 30.

294. *See id.* at 37.

295. *Id.* at 31 (applying the *Jones* shadow majority's concurring opinions to the facts).

296. *Id.* at 3. The D.C. Circuit vacated the injunction issued by the district court and remanded the case for further investigation on whether the plaintiffs had standing to bring the suit. *Klayman*, 800 F.3d at 562. The appellate court did not address the district court's analysis of the constitutionality of section 215. *See id.* The Second Circuit reviewed the bulk collection program conducted under section 215 and determined that the government's collection exceeded the authority granted to it by FISA. *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015). However, the court of appeals did not address whether section 215 was constitutional, and it remains permissible to use section 215 to collect individualized metadata.

297. Section 215 of the Patriot Act amended 50 U.S.C. § 1861, *see* 50 U.S.C. § 1861 (2013), and section 702 of the FISA Amendments Act amended 50 U.S.C. § 1881a, *see* § 1881a.

that do not include the content of the communication.<sup>298</sup> Traditionally, the government did not need a search warrant or even a judicial probable cause determination to obtain this information.<sup>299</sup>

The *Klayman* court first had to determine whether the acquisition of this information even constituted a “search” under the Fourth Amendment.<sup>300</sup> The Supreme Court had ruled thirty-five years earlier in *Smith v. Maryland* that the government’s procurement of similar information about telephone numbers did not constitute a search.<sup>301</sup> However, in their later decision in *Jones*, the Supreme Court distinguished *Smith* in two ways. The majority opinion supplemented the “reasonable expectation of privacy” test used in *Smith* with a reemphasized common-law trespass approach, under which the surveillance at issue constituted a “search.”<sup>302</sup> In contrast, Justice Sotomayor’s concurrence suggested that the Court reconsider the *Smith* Court’s suggestion that an individual has no reasonable expectation of privacy in the information voluntarily disclosed to third parties.<sup>303</sup> The *Klayman* court examined and relied on this reasoning in arriving at the conclusion that it was “significantly likely” that section 215 surveillance was a violation of the plaintiffs’ reasonable expectation of privacy.<sup>304</sup> While the district court’s opinion focused on section 215, its analysis remains strongly applicable to section 702.<sup>305</sup>

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298. See § 1861(a)(1); OBAMA ADMIN., ADMINISTRATION WHITE PAPER: BULK COLLECTION OF TELEPHONY METADATA UNDER SECTION 215 OF THE USA PATRIOT ACT (2013), <https://info.publicintellgence.net/DoJ-NSABulkCollection.pdf>.

299. *Klayman*, 957 F. Supp. 2d at 30–31 (citing *Smith v. Maryland*, 442 U.S. 735 (1979)). In criminal cases, this information could be obtained through a grand jury subpoena for historical information or through an order from the court that required the government counsel and a magistrate judge to certify that the data collection was “relevant” to an ongoing investigation. FED. R. CRIM. P. 17; 18 U.S.C. § 2703(d) (2013). Both of these methods required much less than probable cause. Section 215 uses a similar framework for acquiring this information for foreign intelligence purposes. 50 U.S.C. § 1862(b)(2)(B) (requiring only “specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power”).

300. *Klayman*, 957 F. Supp. 2d at 17, 30 (“The threshold issue that I must address . . . is whether plaintiffs have a reasonable expectation of privacy that is violated when the Government indiscriminately collects their telephony metadata . . . . If they do . . . a Fourth Amendment search has thus occurred . . . .”).

301. 442 U.S. 735, 742 (1979) (holding that a person does not have a legitimate expectation of privacy with respect to numbers dialed on her phone because those numbers are automatically turned over to a third party).

302. *United States v. Jones*, 132 S. Ct. 945, 949–50 (2012).

303. *Id.* at 957 (Sotomayor, J., concurring) (citing *Smith*, 442 U.S. at 742).

304. *Klayman*, 957 F. Supp. 2d at 32–37.

305. *Id.*

Section 215 collects information traditionally viewed as deserving of lesser Fourth Amendment protections than that collected under section 702, which includes both the content of the communications and all of the accompanying metadata.<sup>306</sup> If the Fourth Amendment applies to section 215 searches of metadata—the *Klayman* court found that it is likely that it does<sup>307</sup>—it is likely that the Fourth Amendment will also apply to section 702 searches.

Additionally, under the *Klayman* court’s analysis, section 702 searches clearly fall within the category of searches contemplated by the Fourth Amendment.<sup>308</sup> The *Klayman* court emphasized that one of the driving purposes behind the Fourth Amendment is to prevent the government from acquiring a significant amount of private information without a judicial determination of probable cause.<sup>309</sup> The section 702 program, which collects the content of communications in addition to their metadata,<sup>310</sup> provokes the same concerns that drove the *Klayman* court to find that section 215 was “surely” an infringement on the right to privacy.<sup>311</sup>

*Klayman* is not the only case to determine that a portion of the FISA Amendments Act of 2008 violates the Constitution. In 2011, the FISA Court found that targeting and minimization procedures proposed by the government to apply to MCTs under section 702 were “inconsistent with the requirements of the Fourth Amendment.”<sup>312</sup> Although the FISC later approved revised targeting procedures,<sup>313</sup> this case demonstrates the FISA Court’s willingness to find portions of the section 702 program unconstitutional. The FISC’s decision is made all the more compelling by the court’s restriction against analyzing the

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306. *Compare Smith*, 442 U.S. 742, 745–46 (1979) (holding that there was no reasonable expectation of privacy in telephone numbers dialed), *with Katz v. United States*, 389 U.S. 347, 353–54, (1967), *and* 18 U.S.C. § 2511 (2013) (requiring a search warrant based on probable cause for federal wiretaps that collect the content of communications).

307. *Klayman*, 957 F. Supp. 2d at 32.

308. The only caveat is the evolving jurisprudence regarding whether the Fourth Amendment protects non-U.S. persons in searches conducted outside the United States. *See* discussion *supra* Part III.A.

309. *See Klayman*, 957 F. Supp. 2d at 41–42 (impressing the importance of preserving privacy against the government and concluding that section 215 infringes on “that degree of privacy” the Founders enshrined in the Fourth Amendment).

310. *See* Donohue, *supra* note 3, at 79 (citing Letter from James R. Clapper, Dir. of Nat’l Intelligence, to Ron Wyden, U.S. Senator 2 (June 27, 2014)).

311. *Klayman*, 957 F. Supp. 2d at 42.

312. Redacted, 2011 WL 10945618, at \*28 (FISA Ct. Oct. 3, 2011).

313. Redacted, 2012 WL 9189263, at \*4 (FISA Ct. Aug. 24, 2012).

constitutionality of the statute as a whole.<sup>314</sup> The court based its decision merely on the targeting and minimization portions of the FAA,<sup>315</sup> and the FISC is not the only court that examined section 702 and found reason for concern.<sup>316</sup>

The FISC decision in *In re Directives* demonstrates how the constitutional concerns posed by the mass collection of information without a warrant or judicial determination of probable cause can be present in a section 702 search.<sup>317</sup> The court reviewed a FISC decision that denied a challenge to the 2007 Protect America Act (PAA), a short-term statute that contained a provision identical to section 702 but was enacted prior to the FAA.<sup>318</sup> A communications service provider challenged the law as a violation of the Fourth Amendment.<sup>319</sup> The FISC examined three issues: (1) whether the Fourth Amendment requires a search warrant in foreign intelligence searches, (2) whether a foreign intelligence search requires that the primary purpose (as opposed to a significant purpose) of the search is to gather foreign intelligence, and (3) whether the government's application of the PAA satisfied the reasonableness prong of the Fourth Amendment.<sup>320</sup> Ultimately, the court upheld the warrantless surveillance under the PAA,<sup>321</sup> but its reasoning leaves open the possibility that another federal court analyzing FISA section 702 cases may come to an alternative conclusion.

The court first determined that a search warrant was not required and expressly held that there is a foreign intelligence exception to the warrant requirement.<sup>322</sup> The court noted that the foreign intelligence exception applies “when surveillance is conducted to obtain foreign

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314. See 50 U.S.C. § 1881a(i)(1)(A) (2013) (“The Foreign Intelligence Surveillance Court shall have jurisdiction to review a certification submitted in accordance with subsection (g) and the targeting and minimization procedures adopted in accordance with subsections (d) and (e), and amendments to such certification or such procedures.”).

315. *Redacted*, 2011 WL 10945618, at \*5.

316. *Mayfield v. United States*, 504 F. Supp. 2d 1023, 1038 (D. Or. 2007), *vacated*, 599 F.3d 964 (9th Cir. 2010).

317. *In re Directives Pursuant to Section 105b of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1009 (FISA Ct. Rev. 2008); see also *supra* Part II.A.

318. *In re Directives*, 551 F.3d at 1006. See generally *Protect America Act of 2007*, Pub. L. No. 110-55, 121 Stat. 552, *repealed by* FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436, 2473.

319. *In re Directives*, 551 F.3d at 1009.

320. *Id.* at 1009–15. The USA Patriot Act replaced the FISA warrant requirement of a “primary purpose” with “significant purpose.” 50 U.S.C. § 1804(a)(7)(B) (2013); see also Michael T. McCarthy, *Recent Developments: USA Patriot Act*, 39 HARV. J. ON LEGIS. 435, 443–44 (2002).

321. *In re Directives*, 551 F.3d at 1016.

322. *Id.* at 1011–12.

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.”<sup>323</sup> This second criterion is problematic for section 702 searches because section 702 does not require any finding of a connection to a foreign power or an agent of a foreign power as a prerequisite for a search.<sup>324</sup> Therefore, a strict reading of the *In re Directives* foreign intelligence exception would result in a determination that section 702 does not qualify for this exception to the warrant requirement.<sup>325</sup> Therefore, a judicially authorized search warrant would be required for foreign intelligence surveillance conducted under section 702 without a finding of a connection to a foreign power.

In addressing the second issue posed by the case, the court determined that the foreign intelligence exception applies even under the “significant purpose” test.<sup>326</sup> This holding does not appear to negatively impact FISA section 702.<sup>327</sup>

Finally, the court held that the foreign intelligence wiretaps conducted under the PAA, including the extraterritorial wiretaps, satisfied the Fourth Amendment’s requirement of reasonableness.<sup>328</sup> The court recognized that finding that the foreign intelligence exception applied to surveillance under the PAA was not sufficient to “grant the government carte blanche,” reasoning that “governmental action intruding on individual privacy interests must comport with the Fourth Amendment’s reasonableness requirement.”<sup>329</sup> To determine whether this requirement was met by the PAA, the court then balanced the government interests in conducting the wiretaps with the resulting intrusions on privacy.<sup>330</sup> The court found, based on the facts in the case, that the government interest presented was that of national security, an interest among the “highest order of magnitude.”<sup>331</sup>

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323. *Id.* at 1012 (emphasis added).

324. *See* §1881a(g).

325. *See In re Directives*, 551 F.3d at 1012.

326. *Id.* at 1011.

327. Previous cases had found that the foreign intelligence exception applied where the “primary purpose” was the gathering of foreign intelligence. *See United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980); *United States v. Megahey*, 553 F. Supp. 1180, 1189–90 (E.D.N.Y. 1982), *aff’d sub nom. United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984). *In re Directives* expanded the exception for FISC purposes to allow warrantless searches that met the lower “significant purpose” standard. 551 F.3d at 1011.

328. *In re Directives*, 551 F.3d at 1016.

329. *Id.* at 1012.

330. *Id.* at 1012–16.

331. *Id.* at 1011–12.

In analyzing the privacy interests presented by the case, the court applied a balancing test that would be difficult for section 702 searches to meet.<sup>332</sup> Accounting for the important governmental interest at stake, the court examined whether the “protections afforded to the privacy rights of targeted persons are reasonable.”<sup>333</sup> In its analysis of the PAA program, the court reasoned that “the more a set of procedures resembles those associated with the traditional warrant requirements, the more easily it can be determined that those procedures are within constitutional bounds.”<sup>334</sup> The court ultimately found the PAA constitutional under this balancing test, as it determined that the PAA procedures’ requirements of a showing of particularity, meaningful probable causation determination, showing of necessity, and durational limit, when balanced against “the vital nature of the government’s national security interest and the manner of intrusion,” satisfied the Fourth Amendment’s reasonableness requirement.<sup>335</sup> However, the court’s introduction of this privacy-focused test may open the door for a subsequent court to find that section 702 surveillance is not constitutionally reasonable.

Unlike the PAA, section 702 does not require a determination that “probable cause existed to believe that the targeted person is a foreign power or an agent of a foreign power.”<sup>336</sup> This negatively affects both sides of the balancing test as applied to section 702. Without a connection to a foreign power, the government interest in national security is reduced, since there is no determination that the interception is connected to a potential enemy of the United States.<sup>337</sup> Without requiring a probable cause finding by a government official, the privacy protections become significantly less than those provided by judicially authorized search warrants.<sup>338</sup> Both of these changes alter the balance of the test away from a finding that the search was reasonable; they may be enough to tip the scales into a constitutionally unreasonable search.

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332. *Id.* at 1012.

333. *Id.*

334. *Id.* at 1013 (citing *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002)).

335. *Id.* at 1016.

336. *Id.* at 1014 (describing PAA procedures).

337. See 18 U.S.C. § 1881a(a) (2013) (not requiring a finding of probable cause for authorization of surveillance).

338. See § 1881a(i). The authorizing government officials must certify and attest that the surveillance meets certain requirements. § 1881a(g). However, without a recognizable legal standard such as probable cause in the statute, there is no way to determine the government officials’ degree of certainty in their targets.

*In re Directives* contains a limitation that diminishes any argument purporting to show its support for section 702. The court repeatedly noted that their decision was based on the facts “as applied” in the case, where they had found compelling case-specific information to sustain the search as reasonable.<sup>339</sup> Section 702 is extremely broad and permits a wide range of surveillance, which may include scenarios that lead a future court to arrive at a different “as applied” balance of Fourth Amendment reasonableness.<sup>340</sup> There is much room for future courts to review section 702 and find its limitations insufficient to protect individuals’ privacy.

The cases discussed in this Part demonstrated that courts are expanding the reach of the Constitution’s protections by applying them either to U.S. citizens wherever they are found<sup>341</sup> or to foreign citizens in an increasing variety of situations.<sup>342</sup> A review of these extraterritorial applications of the Fourth Amendment suggests that courts are looking to expand the Constitution’s reach further.<sup>343</sup> In addition to applying Fourth Amendment requirements extraterritorially, courts are now willing to extend constitutional protections to non-citizens in certain contexts, especially when these individuals are being prosecuted by the United States in domestic courts.<sup>344</sup>

Moving to the national security realm, one must ask if the courts would choose to rule in this area if they had the opportunity to do so. As will be demonstrated below, government officials can no longer rely on the traditional reluctance of federal courts to intrude in the

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339. *In re Directives*, 551 F.3d at 1010.

340. *See id.* at 1009–10 (deeming the challenge to the PAA an “as applied” challenge, as the statute had been applied to the petitioner “in a specific setting”). Section 702 could authorize collection of broad foreign intelligence information that is not directly related to a terrorist attack, which would involve a somewhat lesser national security interest. Section 702 also permits collection of information on U.S. citizens if they are “reasonably believed” to be foreign nationals outside the United States.

341. *See* *United States v. Jones*, 132 S. Ct. 945, 949 (2012); *In re Terrorist Bombings*, 552 F.3d 157, 171 (2d Cir. 2008); *United States v. Mohamud*, No. 3:10-CR-00475-KI-1, 2014 WL 2866749, at \*12–13 (D. Or. June 24, 2014) (discussing the Fourth Amendment implications of accidentally collecting on U.S. persons inside the United States); *Klayman v. Obama*, 957 F. Supp. 2d 1, 24 (D.D.C. 2013), *vacated*, 800 F.3d 559 (D.C. Cir. 2015) (applying the Fourth Amendment to the intentional collection of information on U.S. citizens inside the United States when the target of the collection is a non-U.S. person located outside the United States).

342. *See* *Boumediene v. Bush*, 553 U.S. 723, 771 (2008); *United States v. Truong Dinh Hung*, 629 F.2d 908, 911 (4th Cir. 1980); *In re Directives*, 551 F.3d at 1009.

343. *See, e.g., In re Terrorist Bombings*, 552 F.3d at 167.

344. *Truong Dinh Hung*, 629 F.2d at 916 (applying the Fourth Amendment reasonableness requirement to surveillance of a Vietnamese citizen); *Klayman*, 957 F. Supp. 2d at 24.

areas of national security and foreign intelligence.<sup>345</sup> In recent years, courts have overcome this disinclination and ruled on issues on which they had previously shown great deference to the executive branch.

#### IV.

#### COURTS HAVE OVERCOME THEIR RELUCTANCE TO RULE IN AREAS OF NATIONAL SECURITY

Federal courts have traditionally shown extreme reluctance to rule on issues relating to national security and foreign intelligence, but they are no longer so apprehensive. This Part explores the judiciary's evolution, from deferential to the executive branch in national security matters, to willing to rule on the constitutionality of surveillance. It concludes by positing what this jurisprudence may signify for the future of section 702.

Traditionally, the Supreme Court and lower courts have treaded carefully in foreign affairs and deferred to the judgment of the executive branch by following the Supreme Court's stance in *Haig v. Agee*: "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."<sup>346</sup> The Supreme Court reiterated this longstanding policy in *Jama v. Immigration & Customs Enforcement*.<sup>347</sup> The Court emphasized its "customary policy of deference to the President in matters of foreign affairs."<sup>348</sup> Federal circuit courts respected this tradition and continued to acknowledge "the deference owed 'the executive in cases implicating national security.'"<sup>349</sup> The Fourth Circuit outlined the rationale behind this view in its decision affirming a warrantless foreign intelligence search:

[T]he executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance. The executive branch, containing the State Department, the intelligence agencies, and the military, is constantly aware of the nation's security needs and the magnitude of external threats . . . . [T]he

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345. See, e.g., *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.").

346. See *id.*; see also *Turner, supra* note 14, at 85–86 (discussing the Supreme Court and Congress's "longstanding deference to presidential discretion").

347. 543 U.S. 335, 348 (2005).

348. *Id.*

349. *Rattigan v. Holder*, 689 F.3d 764, 769 (D.C. Cir. 2012) (quoting *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 926–27 (D.C. Cir. 2003)); see also *Zweibon v. Mitchell*, 516 F.2d 594, 658 (D.C. Cir. 1975) ("[T]he judiciary has shown great deference to Executive judgments on foreign affairs matters . . . .").

courts are unschooled in diplomacy and military affairs, a mastery of which would be essential to passing upon an executive branch request that a foreign intelligence wiretap be authorized.<sup>350</sup>

These courts justified their deference as a consequence of the Constitution's delegation of certain powers to the executive branch.<sup>351</sup>

However, over the past decade this obsequious jurisprudence has been eroded.<sup>352</sup> Courts recently have begun to venture into areas traditionally within the exclusive realm of the executive. In *Hamdi v. Rumsfeld*, the Supreme Court even challenged longstanding precedent to find that the executive branch had exceeded its authority in the area of foreign affairs and national security.<sup>353</sup> While the Supreme Court acknowledged that the governmental interests at stake were "weighty and serious,"<sup>354</sup> it proceeded to find that they did not bar a citizen from "mak[ing] his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge."<sup>355</sup> Although the conduct of the military in times of armed conflict was an area in which the courts traditionally have shown the most deference,<sup>356</sup> the Supreme Court nonetheless held that the due process afforded a U.S. citizen detained as an enemy combatant was constitutionally insufficient.<sup>357</sup>

The Supreme Court again curtailed the executive's military authority in *Rasul v. Bush*.<sup>358</sup> Justice Kennedy, in his concurrence, cited the Court's own arguably controlling precedent in *Johnson v. Eisentrager* as indicative of the existence of a "realm of political authority over military affairs where the judicial power may not enter."<sup>359</sup> *Eisentrager* determined that federal courts lacked jurisdiction over German war criminals detained by the U.S. military in a facility in Germany shortly after World War II.<sup>360</sup> The Court found that it lacked

350. *United States v. Truong Dinh Hung*, 629 F.2d 908, 913–14 (4th Cir. 1980) (citations omitted); *see also* *N.Y. Times Co. v. United States*, 403 U.S. 713, 727–30 (1971) (Stewart, J., concurring); *United States v. Belmont*, 301 U.S. 324, 330 (1937).

351. *See* sources cited *infra* notes 358–59.

352. *See* *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

353. *Hamdi*, 542 U.S. at 536–37.

354. *Id.* at 531 (emphasizing the fact that courts have hesitated "to intrude upon the authority of the Executive in military and national security affairs" (quoting *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988))).

355. *Id.* at 536–37.

356. *See, e.g., Egan*, 484 U.S. at 530.

357. *Hamdi*, 542 U.S. at 532–33.

358. 542 U.S. 466 (2004).

359. *Id.* at 487 (Kennedy, J., concurring in the judgment) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 777–79 (1950)).

360. *Johnson*, 339 U.S. at 790–91.

jurisdiction in part because the detainees had never set foot on U.S. soil.<sup>361</sup> The *Rasul* Court found that the petitioners in the case differed from the *Eisenstrager* detainees “in important respects,” and thus was able to distinguish *Eisenstrager*.<sup>362</sup> The Court accordingly held that foreign nationals detained by the U.S. military outside of the United States can be entitled to the constitutionally guaranteed writ of habeas corpus.<sup>363</sup>

The detainees in *Rasul* had no connection to the United States other than the fact they were being detained by the U.S. military in a territory under U.S. control.<sup>364</sup> As section 702 is predicated on the belief that individuals with few connections to the United States will have little to no constitutional protection, the Supreme Court’s willingness to extend such protections to the Guantanamo detainees—who may have had little contact with the United States—suggests trouble for the statute.

The Supreme Court again ventured into national security affairs in *Boumediene v. Bush*.<sup>365</sup> In *Boumediene*, the Court held that a statute denying alien detainees the writ of habeas corpus was unconstitutional.<sup>366</sup> Before deeming the executive and congressional actions at issue unconstitutional, the Supreme Court acknowledged its tradition of respecting the national security decisions of the executive branch:

[P]roper deference must be accorded to the political branches. Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.<sup>367</sup>

The Court nonetheless analyzed the question of whether the Constitution’s Suspension Clause applies extraterritorially to noncitizen detainees at Guantanamo Bay.<sup>368</sup> The Court held that the writ of habeas corpus protected these detainees despite their limited connec-

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361. *Id.* at 777–78.

362. *Rasul*, 542 U.S. at 476.

363. *Id.* at 484 (relying heavily on the unique characteristics of the detention at Guantanamo Bay).

364. *Id.* at 480–81.

365. 553 U.S. 723 (2008).

366. *Id.* at 795 (holding that a provision of the Military Commissions Act that denied federal courts jurisdiction to hear habeas corpus actions pending at the time of its enactment was an unconstitutional suspension of the writ of habeas corpus).

367. *Id.* at 796–97 (citations omitted).

368. *Id.* at 766–71.

tion to the United States (the fact of their detention).<sup>369</sup> This bodes poorly for section 702, as it demonstrates the Court's readiness both to venture into national security affairs and to extend the Constitution's protections to a foreign national with little voluntary connection to the United States.

These cases show that the Supreme Court is willing to enter into issues at the very heart of national security—military detention during wartime—even while claiming to give deference to the other branches of government. Courts regularly must determine the status and rights of a person who is being detained by the government.<sup>370</sup> Their willingness to extend judicial oversight to the practice of military detention is reflected in their jurisprudence, which is marked by clear legal standards and objective tests.<sup>371</sup> The Court has been similarly willing to rule on the issue of the admissibility and constitutionality of evidence in criminal cases, which is how a challenge to section 702 is likely to present itself.<sup>372</sup>

The Court's military detention jurisprudence has established a precedent for judicial intervention into foreign affairs and sent a message that the courts' historic deference in national security affairs is waning. If courts are willing to address issues relating to military detention and other government actions during armed conflicts, they likely will not hesitate to venture into the constitutionality of section 702, especially when information collected pursuant to section 702 is introduced as evidence in federal court.

The use of section 702 information as evidence in federal court makes it virtually certain that its constitutionality will soon be decided. Before the products of section 702 searches can be admitted into evidence in a criminal trial, federal judges must rule on the evi-

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369. *Id.* at 728.

370. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) ("It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."); *Ex parte Quirin*, 317 U.S. 1, 28 (1942) ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946).

371. *Hamdi*, 542 U.S. at 532–33 (holding that specific due process provisions apply to detainees at Guantanamo Bay); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the conviction of a U.S. citizen based on elements of crime listed in an exclusion order); *Ex parte Quirin*, 317 U.S. at 28 (holding that military commissions have jurisdiction to prosecute offenses against the laws of war according to the "rules and precepts" of the laws of war).

372. *See, e.g., United States v. Jones*, 132 S. Ct. 945, 949 (2012) (considering the admissibility of evidence obtained by warrantless use of a GPS device).

dence's admissibility and defendants must have an opportunity to challenge its constitutionality.<sup>373</sup> In traditional FISA cases, federal prosecutors would send a notice to the defendant that the government intended to introduce evidence that had been obtained through the use of the Foreign Intelligence Surveillance Act.<sup>374</sup> But even then, the government rarely notified the defendant exactly what provision of FISA was used to obtain the information.<sup>375</sup>

Recently, federal prosecutors made the decision to notify defendants when they intend to use information derived from surveillance conducted under section 702.<sup>376</sup> As a result, defendants, for the first time, will have the opportunity to allege that evidence derived from section 702 and introduced against them was obtained during a search that violated the Fourth Amendment.<sup>377</sup> These issues must be resolved by the court for the trial to proceed.<sup>378</sup> Therefore it is likely these issues will be addressed at the trial level and, ultimately, at the appellate level in the near future. Given the Supreme Court's recent lack of deference in national security cases, it is unlikely that these reviewing courts will acquiesce to the executive branch in their evaluation of the constitutionality of section 702.

#### CONCLUSION

Section 702 is an extraordinarily broad grant of authority for the executive branch to exercise surveillance on foreign nationals outside the United States.<sup>379</sup> Furthermore, its breadth may be too great to meet the evolving standards of the Supreme Court and other federal courts now applying the Fourth Amendment to areas of national security. Over time, the national security exception to the Fourth Amendment's warrant requirement has been narrowed, if it even still exists. Courts have also strengthened the application of the Fourth Amendment's protections to surveillance and expanded it to apply extraterritorially in many circumstances. At the same time, judicial deference to the executive in other areas of national security has decreased. Defendants, for the first time, have the notice and opportunity to challenge these searches. The combination of all of these factors will likely cause a future court to determine that FISA section 702 is an unconsti-

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373. See FED. R. CRIM. P. 41(h).

374. See Savage, *supra* note 12. After receiving notice, a defendant in a federal terrorism trial may file a suppression motion.

375. *Id.*

376. Savage, *supra* note 13.

377. *Id.*; see also Savage, *supra* note 12.

378. See FED. R. CRIM. P. 41(h).

379. See 50 U.S.C. § 1881a(a)-(b) (2013).

tutional search under the Fourth Amendment. Prosecutors who are increasingly relying on section 702 evidence in terrorism trials do so at their own peril, as they are only tempting an unfavorable appellate review.