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COMMENTARY

National Security and Privacy: Of Governments and Individuals Under the Constitution and the Foreign Intelligence Surveillance Act

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I. INTRODUCTION

One of the most familiar forms of constitutional litigation pits the government as investigator or prosecutor against the individual as suspect or defendant. The government claims a right to do something, e.g., to seize or compel the production of documents, and the individual claims a right to refuse on the basis of some constitutional provision, usually grounded in the fourth or fifth amendment.[1] Federal and state courts ultimately resolve the competing claims and announce a constitutional principle.[2] During the last two decades, one set of competing claims has pitted the government's recognized interest in national security against individ-

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1. See, e.g., Andresen v. Maryland, 427 U.S. 463 (1976) (concluding that seizure of records violated neither fourth nor fifth amendment); Boyd v. United States, 116 U.S. 616 (1886) (finding subpoena to be an unreasonable search and potentially incriminating).

2. Most claims of national security and foreign intelligence gathering are resolved by federal courts, as the cases cited hereinafter indicate.

ual assertions of the right to be let alone.[3] Specifically, the government has asserted a right to engage in warrantless surveillance, without even probable cause, to gather intelligence information. Targets of the surveillance have urged that the government's action violates the fourth amendment.

Congress has enacted a special statute, the Foreign Intelligence Surveillance Act ("FISA" or "Act"),[4] and created a special court, the Foreign Intelligence Surveillance Court (FISC),[5] in an effort to balance governmental needs and individual rights. But the statute does not cover all situations in which the United States seeks intelligence information, and the special court does not have jurisdiction to regulate all intelligence gathering.[6] Even when the statute applies and the court has authority to decide whether or not to permit certain conduct, attacks on the statutory scheme focus on the absence of protections that are provided when criminal, as opposed to intelligence, investigations are undertaken.[7]

This Commentary concludes that the Foreign Intelligence Surveillance Act and the Foreign Intelligence Surveillance Court are constitutionally sound.[8] Indeed, they provide arguably greater protections than the fourth amendment requires. The Commentary also concludes that the cases examining foreign intelligence gathering that is not covered by the statutory scheme have generally reached correct results.[9] Although the conclusions reached support the current approaches taken by all three branches of government, the analysis of the Commentary is somewhat different from the analyses that can be found in the decisions and the debates on the appropriate balance between governmental and individual interests.

3. See, e.g., United States v. Brown, 484 F.2d 418 (5th Cir.) (defendant unsuccessfully complaining of warrantless wiretap), cert. denied, 415 U.S. 960 (1974); United States v. Clay, 430 F.2d 165, 171 (5th Cir. 1970) (court declining to permit defendant to know contents of wiretap made to gather foreign intelligence information), rev'd on other grounds, 403 U.S. 698 (1971).

4. Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801-11 (1982).

5. Id. § 1803.

6. See, e.g., Brown & Cinquegrana, Warrantless Physical Searches For Foreign Intelligence Purposes: Executive Order 12,333 and the Fourth Amendment, 35 Cath. U.L. Rev. 97 (1985).

7. See, e.g., United States v. Duggan, 743 F.2d 59 (2d Cir. 1984); United States v. Hellfeld, 692 F.2d 141 (D.C. Cir. 1982); In the Matter of Kevork, 634 F. Supp. 1002, 1012 (C.D. Cal. 1985), aff'd, 788 F.2d 566 (9th Cir. 1986).

8. See infra notes 66-93 and accompanying text.

9. See infra notes 25-43 and accompanying text.

The Commentary suggests that the balance is properly reached only by differentiating between government action that is directed at other nations, governments, or foreign forces and government action that is directed at individuals generally. The fourth amendment is not designed to protect foreign nations and their officials from U.S. intelligence gathering; it is designed to protect individuals generally. This analysis is set forth at greater length in the sections that follow. It leads to the conclusion that it may matter greatly whether the executive is engaged in law enforcement and related investigations on the one hand, or in intelligence gathering on the other hand. This conclusion, bluntly stated, means that some executive action is per se valid under the fourth amendment. Such an assertion will not and should not be accepted uncritically. Any conclusion that government action, even action labeled "national security," is free from the restrictions of the fourth amendment must be carefully examined, lest labels like "national security" and "foreign intelligence" become talismans that automatically trump assertions of individual rights.

Americans proclaim to the world a zest for freedom and a recognition of the right of every individual to claim a private domain into which government officials may not tread at will.[10] In private spaces individuals may think, write, share ideas, and experiment without government interference. The President and the Congress, even when they do not agree on the precise terms of the message, speak with one voice when they condemn nations of the world that deny individual freedom and that use public force to monitor and to harass those whose views are not precisely in line with the party wielding power.

It is probably the case that, with or without the Constitution adopted in 1789 and the Bill of Rights that followed in 1791, many of the freedoms that today are considered a matter of right would be respected simply because they reflect the ideas that gave birth to and nurtured a nation. But, essential or not, the Bill of Rights serves as a constant reminder that certain claims to individual freedom receive special recognition and helps to assure that the

10. They may not tread at all in most instances without showing some special need to do so—e.g., probable cause to take a certain action—and most of the time they may not invade private areas without prior judicial authorization—i.e., a warrant or court order approving the invasion. See, e.g., Mincey v. Arizona, 437 U.S. 385, 390-95 (1978).

values that define a nation are not irrevocably compromised in the course of dealing with the inevitable and real short-term problems that every country must face from time to time throughout its existence.[11]

The question that inevitably arises with respect to virtually all claims of right is, At what point does some societal interest predominate so that an individual right must give way? The answers provided by our courts indicate that no individual claim of right is so absolute that it will never yield, even in degree or manner of exercise, to the greater good.[12]

Identifying the point at which claims of liberty ought to be denied because of superior societal claims is neither an easy task nor one that is likely to produce universal agreement. U.S. courts do not accept governmental assertions that fundamental liberties must be sacrificed because of societal exigencies without carefully examining those assertions,[13] and it is to be hoped that they will continue to be vigilant in protecting liberty. But U.S. courts have recognized limits on judicial expertise, especially in matters of international affairs and national security that historically have involved secrecy and have been allocated to the President and the Congress.[14] It is also to be hoped that the courts will continue to

11. These problems are most notable in war time. No case better illustrates the point than Korematsu v. United States, 323 U.S. 214 (1944) (stating the strictest form of scrutiny for racial classifications and then upholding government action which, in hindsight, appears to have been something of an exaggerated response to the danger actually perceived). Interestingly, Korematsu had his conviction overturned by writ of coram nobis in Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) (Government failed to disclose crucial information to the courts upholding conviction.). The Court of Appeals for the Ninth Circuit recently reached the same result in Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987).

12. Thus, while providing extremely broad protection for all manner of speech, see, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (commercial speech); Buckley v. Valeo, 424 U.S. 1 (1976) (campaign spending), the Supreme Court has never interpreted the language of the first amendment—"Congress shall make no law . . . abridging the freedom of speech . . ."—as meaning what it says. Congress, in fact, may abridge the freedom to speak where advocacy of the use of force or of law violations "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam). States bound by the 14th amendment's incorporation of the 1st amendment also are permitted to act against speech when the danger is great enough. Id.

13. See, e.g., New York Times Co. v. United States, 403 U.S. 713 (1971) (rejecting a government effort to enjoin publication of a classified study).

14. See Dames & Moore v. Regan, 453 U.S. 654 (1981) (finding that Congress had authorized and approved certain actions by the President relating to assets and claims against Iran).

recognize the special role and the unique expertise that the other branches have played and developed in matters directly related to the nation's security. Personal liberty has prospered, both inside and outside U.S. courtrooms, because Americans have felt secure as a nation. The same courts that have protected individual liberty have permitted the other governmental branches to promote security through intelligence gathering.

The law that has developed with respect to intelligence gathering is not primarily judge-made. Executive regulations have set forth standards to govern the behavior of government officials,[15] and the FISA has been an important development. But the last word inevitably belongs to the judiciary, because it is asked to measure the executive and congressional actions against the Constitution.[16]

Essentially, U.S. courts have given executive officials enormous latitude in gathering foreign intelligence or national security information from foreign governments and their agents. It does not exaggerate the decisions to state that when United States officers engage in what would surely be denominated searches and seizures under any reasonable construction of the fourth amendment, as long as they are directing their actions at foreign governments and their agents they are not obliged by the fourth amendment to have a traditional warrant or probable cause as it is usually understood. To the extent that judicial supervision is required, it is as a result of the FISA, not the Constitution. The judicial deference to the executive branch narrows considerably, however, when officers direct their efforts at domestic threats. Such efforts ordinarily require compliance with the usual fourth amendment requirements of a warrant and probable cause.[17]

Although there has been criticism of the balance that has been struck,[18] it appears for the reasons stated below that, in upholding the FISA and in deferring to the executive and, at times, to Congress with respect to foreign intelligence gathering, the judges have

15. See, e.g., Executive Order 12,333, 3 C.F.R. 200 (1982), reprinted in 50 U.S.C. app. § 401 (1982) (setting forth goals, duties and responsibilities relating to U.S. intelligence activities).

16. Of course, the judiciary may defer to the judgments of other branches of government in arriving at the last word, but it regards its judgment as controlling. See United States v. Nixon, 418 U.S. 683 (1974).

17. See United States v. United States District Court, 407 U.S. 297 (1972).

18. E.g., Note, Executive Order 12,333: An Assessment of the Validity of Warrantless National Security Searches, 1983 Duke L.J. 611.

neither closed their eyes to legitimate claims of right nor given executive officials a blank check made payable to "national security." Rather, the decisions represent a fair balance of individual rights and societal requirements. But they have not satisfactorily explained the distinction between foreign intelligence gathering and domestic law enforcement: Security can be threatened by lawless domestic activities as well as by foreign activities. Thus, the question is why the fourth amendment should not apply to foreign intelligence gathering to the same extent it applies to domestic activities. The answer cannot be that intelligence gathering and law enforcement are mutually exclusive, for this is untrue. Nor is it the answer that foreign intelligence gathering does not use traditional forms of search and seizure, for search and seizure is a familiar way of gathering intelligence information, as the FISA demonstrates.

The decisions have not articulated the real distinction between foreign intelligence gathering and domestic investigations. That distinction is between governments and individuals as targets. The cases implicitly and correctly recognize that the Bill of Rights protects individuals, not governments. When executive attention is directed at the actions of governments, it is fairly examined under a standard that differs from that used in the typical case of executive action directed at particular people acting in a nongovernmental capacity. This Commentary examines the fourth amendment standards that the courts have developed and defends them pursuant to the analysis suggested above. The Commentary begins with an analysis of intelligence gathering from a purely constitutional perspective and then examines the ways in which the FISA is consistent with the constitutional perspective. Once the FISA has been addressed, some concluding thoughts are offered about surveillance falling outside the statute and about the relationship of the courts, the Congress and the President.

II. THE FOURTH AMENDMENT AND PRIVACY

A. *Expectations of Privacy*

In *Katz v. United States*,[19] Justice Stewart wrote for the Supreme Court as it found that a fourth amendment violation occurred when federal agents, investigating gambling activities, listened to a telephone conversation through electronic monitoring

19. Katz v. United States, 389 U.S. 347 (1967).

and thereby "violated the privacy upon which he [Katz] justifiably relied while using the telephone booth . . ."[20] The words Justice Stewart added are probably more quoted than any others with respect to the fourth amendment:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[21]

Although the Court concluded that the agents violated the fourth amendment because they acted without a warrant, even though their actions might have been totally proper with a valid warrant, it left open the question "[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security . . ."[22]

Since the *Katz* decision, the Supreme Court and lower federal and state courts have struggled to decide whether a variety of governmental conduct invades reasonable, legitimate or justifiable expectations of privacy.[23] That such expectations may exist even where the government makes a national security claim was defini-

20. Id. at 353.

21. Id. at 351-52 (citations omitted).

22. Id. at 358 n.23. Justice White filed a two paragraph concurring opinion which ended with the following sentence: "We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable." Id. at 364 (White, J., concurring). Justice White cited his dissent in the previous term's decision in Berger v. New York, 388 U.S. 41, 112-18 (1967) (White, J., dissenting). One might conclude from the citation that he had made a previous point in the earlier case, but the opposite point might be inferred from his *Berger* dissent. Justice White reasoned in *Berger* that states have a substantial interest in stopping organized crime, but that interest would not excuse them from the warrant requirement for electronic eavesdropping in organized crime cases. He concluded that the warrant requirement had been satisfied. Id. at 118. If a warrant was required notwithstanding the substantial interest, arguably a warrant should be required even where national security interests are involved. Justice Douglas responded to Justice White's *Katz* opinion with his own concurrence, stating that spies and saboteurs warranted the same fourth amendment protections as other suspects. *Katz*, 389 U.S. at 359-60 (Douglas, J., concurring). The thrust of his opinion goes to treating all criminal suspects alike, not to whether in a noncriminal investigation an exception from the warrant requirement might be reasonable.

23. See, e.g., United States v. Knotts, 460 U.S. 276 (1983) (use of electronic tracking beepers for surveillance)

tively established in *United States v. United States District Court.*[24]

B. *Domestic Intelligence Gathering:* United States v. United States District Court

The question whether the government may lawfully engage in domestic intelligence gathering without a warrant reached the Supreme Court in *United States v. United States District Court.*[25] The case arose when a criminal defendant made a pretrial request for information concerning electronic surveillance. The government filed an affidavit by Attorney General John Mitchell stating that he had approved wiretaps "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."[26] Thus, the government conceded that there had been electronic surveillance and that it had been authorized by the government's highest ranking lawyer rather than by a federal judge or court. The question that worked its way to the High Court was whether the Attorney General's authorization was adequate to satisfy the requirements of the fourth amendment. Justice Powell wrote for the Court and observed that the federal wiretapping statute specifically stated that it was not intended "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."[27] The Court reasoned that, in this language, Congress had neither recognized nor prohibited warrantless surveillance by the President; "Congress simply left presidential powers where it found them."[28]

In the end, the Court found the warrantless actions to be invalid. Justice Powell specifically noted, however, that "the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country."[29] The Court's concern was that the government might be able to suppress lawful dissent were it permitted to utilize an unchecked surveillance power.[30] It found the "domestic security concept" to possess "inherent vagueness"[31] and rejected the government's contention that "internal security matters are too subtle and complex for judicial evaluation."[32] It also rejected an argument that confidentiality might be compromised by a warrant procedure. At the end of his opinion, Justice Powell reiterated that the case did not involve "foreign powers or their agents."[33] In an unusual step, he added that the Court was not holding that the same statutory procedures required by the federal statute governing electronic surveillance in criminal investigations would be required for the gathering of intelligence information.[34] Thus, the Court invited Congress to formulate specific procedures for intelligence gathering, an invitation that Congress accepted when it enacted the FISA.

24. United States v. United States District Court, 407 U.S. 297 (1972).
25. Id.
26. Id. at 300 n.2.
27. Id. at 302 (quoting 18 U.S.C. § 2511(3)).
28. Id. at 303.
29. Id. at 308.

C. *Foreign Intelligence Gathering*

Following the Supreme Court's decision, lower courts were asked to decide whether a warrant was required for intelligence gathering directed at foreign governments and their agents. Their answer was "no."[35] But the holdings have been criticized.[36]

Typical of the analysis offered by the lower courts is that of the U.S. Court of Appeals for the Third Circuit in *United States v. Butenko.*[37] A majority reasoned that a warrant requirement might seriously impair the ability of the executive branch to engage in intelligence gathering and that the probable cause standard might also have to be modified to recognize the legitimate need for intel-

30. Id. at 314.
31. Id. at 320.
32. Id.
33. Id. at 322.
34. Id.
35. See, e.g., United States v. Butenko, 494 F.2d 593 (3d Cir.) (en banc), cert. denied sub nom. Ivanov v. United States, 419 U.S. 881 (1974); United States v. Brown, 484 F.2d 418 (5th Cir.), cert. denied, 415 U.S. 960 (1973).
36. In United States v. Butenko, 494 F.2d 593, 628-30, 635-36 (Gibbons, J., dissenting), Judge Gibbons dissented and argued that the claims of inherent presidential power were exaggerated. A plurality in Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976), raised questions about every argument put forth by the government to distinguish the Supreme Court's holding with respect to domestic surveillance.
37. United States v. Butenko, 494 F.2d 593, 605-06 (3d Cir.) (en banc), cert. denied sub nom. Ivanov v. United States, 419 U.S. 881 (1974).

ligence gathering.[38] In *United States v. Truong*,[39] the Court of Appeals for the Fourth Circuit found that the executive is more experienced than the judiciary in making foreign intelligence decisions, the executive has superior expertise making these decisions, and the decisions require flexibility.[40] Thus, a warrant should not be required as a prerequisite to foreign intelligence surveillance.[41] Neither these courts nor others that addressed the question[42] adequately explained why the same arguments did not apply to domestic intelligence gathering and why the Supreme Court's rejection of the arguments made to it did not require similar rejection of the arguments made with respect to foreign intelligence gathering.[43]

III. OF GOVERNMENTS AND INDIVIDUALS

The one item that is missing from these opinions appears to be most important when foreign intelligence gathering is considered: Which "people" are protected by the fourth amendment? My answer is that "the people" includes anyone against whom the United States claims the right to enforce its laws when the United States endeavors to enforce them,[44] but it does not include foreign governments per se or those persons who are the agents of such governments when they are not the targets of law enforcement activity.

Support for this answer can be found in the basic notion of sov-

38. Id. at 604-06.

39. United States v. Truong, 629 F.2d 908, 913-14 (4th Cir. 1980), cert. denied, 454 U.S. 1144 (1982).

40. Id. at 913-14.

41. Id.

42. See, e.g., United States v. Brown, 484 F.2d 418 (5th Cir.), cert. denied, 415 U.S. 960 (1973).

43. The most persuasive attack on the arguments made to distinguish foreign and domestic intelligence gathering was offered in a plurality opinion in Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976).

44. The amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. amend. IV.

45. The typical situation arises when the government seeks to enforce its criminal laws against suspects. Most searches and seizures, the subject of this discussion, occur in criminal investigations. Should the government seek to utilize searches and seizures in aid of enforcing civil laws, the fourth amendment also would apply as it does in ordinary cases not involving foreign officials or governments. See, e.g., G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977).

ereignty. The United States claims no power to legislate for other nations;[46] and the United States recognizes no power on the part of other nations to make laws governing its officials.[47] The concept of sovereign immunity is well-established and was recognized by the framers of the Constitution.[48] Foreign diplomats on U.S. soil make the same diplomatic immunity claim that U.S. diplomats make on foreign soil.[49] Since the basic notion of the Bill of Rights is to restrain the way in which the United States[50] exercises the power to make and enforce laws, it is of little relevance when the United States deals with another nation as a sovereign against whom it does not seek to legislate and execute lawmaking power.

When nations are pitted against other nations, the natural state of affairs recognized throughout history is that each has an interest in assuring that it is protected from the harm that the others might cause. To read into the fourth amendment and the other parts of the Bill of Rights restrictions on the actions of the U.S. government would be to bind it to behave as no other nation in the world is bound. Such a reading would place the United States in a position in which it might well be uniquely vulnerable. Surely this reading would not be warranted without some indication that the framers intended to tie the hands of the nation they were creating so that it would always be potentially disadvantaged in dealing with other nations. Such evidence is difficult to find. Nations have engaged in espionage from time immemorial, and spying hardly was unknown to those who fought England for freedom. And the fact that the Constitution flowed from a war involving a foreign power makes it appear extremely unlikely that the founders of a nation would have hobbled it at birth.

Thus, a sensible reading of the fourth amendment and the remainder of the Bill of Rights is that they protect individuals when the government moves to make and to enforce laws governing

46. This is recognized in cases holding that constitutional restrictions on U.S. officials do not bind foreign officials. See Saltzburg, The Reach of the Bill of Rights Beyond the *Terra Firma* of the United States, 20 Va. J. Int'l L. 741 (1980).

47. The best example is a treaty that must be executed. A treaty that is neither executed nor self-executing is simply not the law of the United States.

48. See generally Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136-37 (1812) (French vessel immune from U.S. jurisdiction).

49. See generally W. Bishop, International Law: Cases and Materials 709-26 (3d ed. 1971).

50. The fifty states also are restrained to the extent that the Bill of Rights is binding upon them through the incorporation doctrine and the 14th amendment. See, e.g., Duncan v. Louisiana, 391 U.S. 145 (1968).

them, and that they provide no protection to foreign governments. Obviously, people comprise and run governments. When intelligence gathering focuses upon them in their capacity as representatives of a foreign government, no fourth amendment inhibition is recognized. In the words of *Katz*, these individuals have no reasonable expectation that the United States will not act as all nations of the world act to gather intelligence information that is deemed essential to national security. This, I argue, is the key to the foreign intelligence cases.

Recognizing this as the key does not mean that the reasons given by various courts for recognizing flexibility on the part of the executive to gather intelligence are without merit. The executive is superior to the judiciary in determining the intelligence needs of a nation. So obvious is the point that it is never disputed. Rather, those who would involve the judges more in regulating foreign intelligence gathering simply say that the judicial supervision would not be too much of a drain on intelligence gathering. The problem with the reasoning used thus far by the courts is that it is subject to attack on the ground that it simply assumes that the dangers involved in judicial supervision of all foreign intelligence gathering are so great that an exception to the fourth amendment's general requirements has been justified. Experience under the FISA suggests that the reasoning is overbroad. Moreover, it makes the issue turn on an empirical question, which arguably might receive different answers at different times. My reading of the fourth amendment is different; the amendment, in my view, does not reach intelligence gathering directed at foreign powers. Thus, I need not argue about the dangers of judicial supervision at specific times or about the burdens of obtaining warrants. The issue depends not on empirical evidence, but upon an interpretation of the reach and the purpose of the fourth amendment. There is, in short, nothing in that amendment to prevent the U.S. government from choosing from among the same range of options in dealing with foreign governments as they choose from in dealing with the United States.[51]

51. In making the choice, the U.S. government obviously may elect to forgo measures which offend a basic sense of decency. Moreover, the applicability of the fourth amendment does not imply that the United States is not or ought not to be bound to respect fundamental notions of international law.

IV. THE PERMISSIBLE RANGE OF CONDUCT

A. *Self-Identified Foreign Officials and Agents*

The approach set forth thus far leads to certain conclusions concerning the legitimate exercise of executive power in the gathering of foreign intelligence. It suggests that when the U.S. government is acting either inside or outside the United States to gather intelligence information directly from officials, diplomats, or people who identify themselves as agents of foreign governments,[52] the fourth amendment is irrelevant. In situations in which a person proclaims that he or she is the officer or agent of a foreign nation, the only question that matters is whether the fourth amendment regulates our government's dealings with such a person in the process of seeking intelligence information. The negative answer provided here means that the government may engage in warrantless action and that it may do so merely because it wishes to gather foreign intelligence information; no probable cause or reasonable suspicion is required.

Not only does this analysis make the United States equal with the nations competing against it in the international arena, but it also recognizes the practical difference between domestic and foreign intelligence gathering. In the domestic arena, even though the government has no probable cause, it has the power to commence grand jury investigations, to utilize undercover agents, to lawfully monitor various activities, and to compel individuals and groups to provide various information to regulatory officials. The power to compel cooperation is nonexistent with respect to foreign agents operating in their own land, and it is limited with respect to foreign officials who are permitted to enter the United States. Informal investigations may be commenced and undercover agents may be utilized, but the difficulty in employing them in foreign camps is obvious.

One reason why the fourth amendment does not unduly inhibit the ability of the government to protect itself and its people in domestic situations is that other lawful means of investigation ex-

52. In this discussion, I do not attempt to identify precisely the limits of the term "agent," but the use of the term in the FISA would not be objectionable insofar as it applies to persons who act in the United States. 50 U.S.C. § 1801(b)(1) (1982). A broader reading of agent to include anyone who claims allegiance to a foreign government and works on its behalf would appear proper for persons who are located outside the territory of the United States. See id. § 1801(b)(2).

ist. These means involve lawful compulsion as well as informal investigation. Where lawful compulsion is not an option and informal investigation is impractical, recognition of fourth amendment protections would disable the government from protecting itself from external threats to an extent that many people would find unacceptable.

The fact that many people would prefer protection of their security to recognition of privacy rights cannot be determinative, of course, since the fourth amendment's place in the Bill of Rights signifies that it serves, in large part, to assure that the majority does not ride roughshod over the interests of a minority. But the rationale for enforcing the fourth amendment restraints upon ordinary domestic investigations does not support the extension of those rules to intelligence gathering directed at foreign nations and their officials and agents.

B. *Enforcing the Law Against Individuals*

When the United States claims authority to make laws that govern individuals, including entities, and acts to enforce its laws, as in *United States v. United States District Court*, the fourth amendment is fully effective. This is not to say that warrants are always required or that the standard for a warrant must be inflexible, for the Supreme Court has demonstrated that what is reasonable under some circumstances might not be reasonable under other circumstances;[53] it is only to say that the fourth amendment would be operative and would require a showing of reasonableness and appropriate judicial surveillance of governmental actions. Although the suggestion has been made that people who are neither citizens nor permanently connected with the United States are outside the scope of the fourth amendment's protection,[54] this argument is unconvincing.[55] When the government asserts its authority to regulate behavior and to enforce its regulations, there is no persuasive reason why it should be permitted to avail itself of the powers conferred upon it under the Constitution while excusing its recognition of the limitations the same Constitution places upon

53. See, e.g., New Jersey v. T.L.O., 469 U.S. 325 (1985) (ruling that no warrant was required for search of student; that reasonable suspicion, not probable cause, was required).

54. See Stephan, Constitutional Limits on International Rendition of Criminal Suspects, 20 Va. J. Int'l L. 777 (1980).

55. See Saltzburg, supra note 46, at 747 n.29.

the exercise of such power. Since this point has been made elsewhere,[56] it will not be repeated here.

C. *The Difficult Cases*

The most difficult cases arise when the U.S. government seeks to gather intelligence information by focusing on individuals who are plainly not formally recognized as officials or agents of foreign governments but who have some relationship with foreign governments. Suppose, for example, citizens of the United States with an interest in Soviet law establish some relationship with Soviet citizens.[57] May the government engage in warrantless surveillance and act without probable cause to monitor the exchange of information between the two citizens groups?

Another example requires little imagination: a foreign student, with family in another country, temporarily enters the United States while maintaining contact with people from home. Is the student protected by the fourth amendment from intelligence gathering by our officials?

These examples are difficult, but they are not as difficult as they become if one assumption is changed. As set forth, the examples assume that the relationship between the relevant people and a foreign nation is undisputed. If the assumption is that the government is not certain about the relationship but believes that it is a cover for intelligence gathering by another nation directed against the United States, complications arise. Who decides whether the government is correct? And what standard is to be used? These questions are addressed after the hypothetical cases are examined upon the assumption that the status of a person as a governmental official or agent is known and certain.

If the United States were engaging in surveillance for the purpose of enforcing civil or criminal statutes, there would be no question that the fourth amendment would apply to these examples under the analysis that has been set forth. Where, however, the purpose of the government's actions is to gather intelligence, not to enforce domestic law, there are three possible answers. One is that the fourth amendment protects all individuals from unreasonable searches and seizures; it does not specify that they are only pro-

56. Id.

57. The American Bar Association has established such a relationship. See Trial Observer Pact, 73 A.B.A. J., Aug. 1987, at 23.

tected where the purpose of the search and seizure is to enforce a domestic law rather than to gather information. Under this argument, the government may not search individuals within the jurisdictional reach of the United States, except those who are self-identified officials or agents of a foreign government acting in a governmental capacity.

A second argument is that the fourth amendment protects against unreasonable searches and seizures, and that it is not unreasonable to search where any connection between people within the jurisdictional reach of the United States and a foreign government can be demonstrated. Under this argument, the principal thrust of the fourth amendment would be to protect people from enforcement of domestic law against them without appropriate supervision and a proper showing of cause. The argument would distinguish between domestic law enforcement and intelligence gathering, deem all surveillance of people with foreign connections to be part of intelligence gathering, and permit the surveillance without warrants or probable cause.

Neither of these arguments is obviously wrong; either might command support. Yet, on balance neither is compelling. The first assumes that the fourth amendment contemplated and regulated the intelligence gathering that is commonplace today, something that is hardly self-evident. The second raises the danger of governmental invasions of privacy at any point that the words "foreign intelligence" are uttered. The specter emerges of surveillance premised upon travel abroad, study of foreign languages, correspondence with citizens of other countries, and membership in groups with connections or branches abroad.

There is a third argument that falls between these two. This argument is that the fourth amendment governs searches and seizures directed at individuals who are not identified agents of foreign governments, but intelligence gathering directed at foreign governments and their agents, which otherwise is outside the reach of the amendment, is not automatically brought back within its reach because there is a possibility that an investigation might indirectly reveal information or communications by individuals protected by the fourth amendment. In other words, governmental surveillance of a foreign student's telephone would not be permitted without judicial supervision simply because he or she had some connection with another nation--e.g., had traveled in that country or studied there. But governmental surveillance of a foreign agent's telephone would not be invalidated by a showing that someone who is not an agent participated in a conversation.

The third argument explicitly concedes that some people who have the right to fourth amendment protection may be indirectly subjected to government surveillance, and that this might happen without these people having any reason to believe that they are opening themselves to indirect snooping. The fact is, however, that the Supreme Court has held this risk may be imposed in a domestic context: a person whom the government could not search may be caught up in a proper investigation of someone else.[58] To reject the third argument is to open the door to efforts by foreign governments to circumvent intelligence gathering by deliberately establishing ties with people protected by the fourth amendment in order to make it difficult for the United States to engage in intelligence gathering. This prospect is sufficiently disturbing that the third argument is attractive notwithstanding its imperfections.

At this point, the two examples that began this subsection can be reexamined. The American group with ties to Soviet lawyers and the foreign student would receive the benefit of fourth amendment protection. It is possible, however, that some of their actions might be indirectly discovered by the U.S. government as a result of surveillance of officials or agents of a foreign nation.

Thus far, the analysis has treated intelligence gathering and law enforcement investigations as though they were independent and unrelated, which is not always the case. Some cases consider the situation in which a search begins as a foreign intelligence search but at some point turns into a criminal investigation, at least in part. *United States v. Truong*,[59] for example, holds that certain evidence seized after the primary purpose of an investigation had shifted from intelligence gathering to evidence gathering had to be suppressed as obtained in violation of the fourth amendment. It would seem, however, that as long as there is a legitimate intelligence aspect that would independently support surveillance, U.S. officials act lawfully when they continue their surveillance. Any evidence that they seize and ultimately decide to use as evidence in a case should be viewed as having been seized legally. Thus, like evidence which falls into the hands of law enforcement officials as be-

58. See Scott v. United States, 436 U.S. 128, 140, reh'g denied, 438 U.S. 908 (1978) (stating that agents may have to monitor conversations to decide whether or not they are relevant to investigation).

59. United States v. Truong, 629 F.2d 908 (4th Cir. 1980), cert. denied, 454 U.S. 1144 (1982).

ing in plain view,[60] evidence which is discovered during valid intelligence gathering should not be deemed to be illegally seized. Where, however, intelligence gathering has ended, and law enforcement has begun, the fourth amendment comes into play and the usual doctrines governing warrants and probable cause are applicable.[61]

The questions raised at the beginning of this subsection concerning the appropriate government approach when the status of an individual as a foreign agent or official is ambiguous or unknown remain, and they are not easily answered. For example, in the hypothetical cases previously considered, if the government believes that the American group or the foreign student actually is an agent of a foreign power, what role does the fourth amendment play? One answer is that the government must seek a judicial determination of agency before it may assume that the fourth amendment is inapplicable. Support for this argument is found in many statements by the Supreme Court to the effect that the warrant procedure is preferred and that the presumption is that there should be prior judicial supervision of police searches and seizures.[62] A second argument is that the government may act on the basis of its judgment that the target is an agent, but that the government will be found to have violated the Constitution if it turns out that its judgment was wrong.[63] Support for this argument can be found in doctrines like the automobile exception to the warrant requirement, which permits officers to search an automobile if they believe there is probable cause that evidence is contained therein.[64] If the officers are wrong and probable cause does not exist, they act improperly, but they are permitted to make the cause judgment in the first instance. Only later may a court review the officers' judgment. It is difficult to prove that either argument is more persuasive than the other.

60. E.g., Washington v. Chrisman, 455 U.S. 1 (1982).

61. Since the adoption of the FISA, federal courts have disagreed over the continuing validity of *Truong*. Compare United States v. Falvey, 540 F. Supp. 1306, 1314 (E.D.N.Y. 1982) with United States v. Megahey, 553 F. Supp. 1180 (E.D.N.Y. 1982), aff'd, 729 F.2d 1444 (2d Cir. 1983).

62. See, e.g., Mincey v. Arizona, 437 U.S. 385 (1978) (rejecting murder scene exception to warrant requirement).

63. A question might arise as to whether the Constitution would require a remedy if the government's judgment was wrong, but was a good faith error. Cf. United States v. Leon, 468 U.S. 897, reh'g denied, 468 U.S. 1250 (1984).

64. E.g., Chambers v. Maroney, 399 U.S. 42, reh'g denied, 400 U.S. 856 (1970).

Prior to the adoption of the FISA, the second answer would have been consistent with the behavior of U.S. law enforcement agencies.[65] The FISA made the first answer more descriptive of how the U.S. government behaves at the present time, at least within the United States. With this background, an examination of the FISA is instructive.

V. THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

The FISA[66] regulates electronic surveillance, which is rather broadly defined,[67] as it pertains to foreign intelligence information gathering within the United States. Certain statutory definitions are of great importance to this discussion. The term "foreign power"[68] is defined to include any foreign government or component thereof,[69] any faction of a foreign nation,[70] an entity openly acknowledged by a foreign government as under its direction,[71] a group engaged in or preparing for international terrorism,[72] a foreign-based political organization that is not substantially composed of United States citizens or aliens[73] admitted for permanent residence, and an entity directed and controlled by a foreign government.[74] The term "agent of a foreign power" includes any person, other than a citizen or alien admitted for permanent residence, who, *inter alia*, acts in the following capacities: as an officer or employee of a foreign power or terrorist group, for or on behalf of a foreign power who engages in clandestine intelligence activities in the United States against this country's interests and who en-

65. Most of the time that law enforcement agencies rely on exceptions to the warrant requirement or to the requirement of probable cause, they act without seeking any prior judicial ruling. They are sustained if their judgment was correct, and they may lose evidence or be subject to suit if their judgment was incorrect.

66. 50 U.S.C. §§ 1801-11 (1982).

67. Id. § 1801(f)(1)-(4).

68. Id. § 1801(a).

69. See id. § 1801(a)(1).

70. See id. § 1801(a)(2).

71. See id. § 1801(a)(3).

72. See id. § 1801(a)(4). This definition of a foreign power appears to be consistent with the reasoning offered herein for finding that foreign powers are outside the reach of the fourth amendment.

73. See id. § 1801(a)(5). The Act also defines an unincorporated association that has a substantial number of citizens or aliens admitted for permanent residence as a "United States person." Corporations incorporated in the United States, except one which qualifies under the foreign power definition, also are within the definition. Id. § 1801.

74. See id. § 1801(a)(6).

gages in or aids such activities, or as a person who engages in various forms of clandestine intelligence activities that may involve or further criminal acts, sabotage or terrorism.[76]

The Act establishes the FISC, on which seven federal district judges serve rotating terms.[78] It authorizes the Attorney General to apply to the court for approval of electronic surveillance for foreign intelligence gathering within the United States.[77] There are two types of orders, the difference between them turning on whether the target of the surveillance is an acknowledged foreign power.[78]

When surveillance of unacknowledged foreign powers or agents is sought, each application must include the name of the federal officer making the application, a statement showing that the President has delegated to the Attorney General the authority to approve such applications and that the Attorney General has exercised this authority, the identity or description of the target, and a statement of facts that support the applicant's affirmation that the target is a foreign power or an agent thereof.[79] Moreover, the application must additionally state the proposed "minimization" procedures, a detailed description of the nature of the information sought and the types of communications to be monitored.[80] An appropriate official must certify that the information sought is foreign intelligence information within the meaning of the Act[81] and that the information is unavailable through normal investigative techniques.[82] Finally, the application must state the past history of applications against the target and information concerning the means to be employed in carrying out the surveillance and its duration.[83]

If the target is an acknowledged foreign power and the premises subject to the surveillance are owned, leased or exclusively used by

75. See id. § 1801(b).
76. Id. § 1803(a).
77. Id. § 1802.
78. See id. § 1802(a). The FISA permits orders to be issued upon a showing that the targeted premises are totally within the control of a foreign power. Id. § 1804(b). The term "acknowledged foreign power" is used to identify these premises and targets that hold themselves out to be foreign powers under id. § 1801(a).
79. Id. § 1804(a).
80. Id.
81. Id. § 1801(e).
82. Id. § 1804(a)(7).
83. Id. § 1804(a)(8)-(11).

an acknowledged foreign power, much less is required by officials seeking to engage in surveillance. Their application need not describe the nature of the communications sought, the type of communications to be monitored, the means by which surveillance is to be accomplished, or the types of devices to be employed. The surveillance also can be for a longer period than is otherwise permitted by the Act.[84]

In the typical case of an acknowledged foreign power, the court need only find that the target is a foreign power or agent thereof and that the facilities at which the surveillance is directed are or will be used by the target.[85] If, however, the target is a "United States person," the judge who reviews the application must find that the assertion of certain items is not clearly erroneous.[86]

One important part of the Act permits the Attorney General to approve electronic surveillance without a court order if he files a certification with the court[87] stating that the communications to be intercepted are between acknowledged foreign powers or that "the acquisition of technical intelligence, other than the spoken communication of individuals," is to be obtained from premises under the "open and exclusive control" of such powers.[88]

The FISA was the product of careful and lengthy congressional investigation and debate.[89] It seeks to provide some controls on intelligence gathering and to do so in a way that plainly provides less protection to foreign governments and their agents than to U.S. citizens and aliens who have forged permanent ties with the United States.[90] In the clear case in which foreign governments exchange information, the Attorney General serves a reporting func-

84. Id. § 1804(b).
85. Id. § 1803(a)(3).
86. Id. § 1805(a)(5).
87. Id. § 1802(a)(3).
88. Id. § 1802(a)(1)(A). A report to the House Permanent Select Committee on Intelligence and the Senate Select Commitee on Intelligence is also required. Id. § 1802(a)(1).
89. One alternative to judicially-approved intelligence gathering was a consensus of executive officers as to the desirability of surveillance. See Lacovara, Presidential Power to Gather Intelligence: The Tension Between Article II and Amendment IV, 40 Law & Contemp. Probs. 106 (Summer 1976).
90. It should be noted that even in the case of a student who is only temporarily in the country, the Act requires that the judge who reviews a request find that the Attorney General has concluded that the target is an agent of a foreign power and has stated reasons for the conclusion. This is less protection than is afforded people whose ties are more permanent, but it does require the Attorney General to produce information for the court's records.

tion; there is no review by the court. The same is true when the target is the premises of a foreign government and technical information is sought. Where the target is an individual or group with no formal affiliation with foreign governments, the U.S. government bears a heavier burden of showing the relationship justifying the surveillance and the need for it. The government must establish, for example, probable cause to believe that the target of surveillance is an agent of a foreign power and, in making the determination, the court may not rely solely on activities protected by the first amendment.[91]

It appears that the FISA adopts an approach that is consistent with the fourth amendment framework set forth above. This is not to say that every aspect of the statute is constitutionally required, but it does suggest that the drafters had an informed view of the Constitution in mind in writing the law. The balance struck in the Act appears to be both constitutionally and practically sound.

Were there no FISA, the executive would not be barred by the fourth amendment from engaging in the same conduct that is regulated by the Act. Hence, the judgment offered here is that the FISA is not a constitutional necessity, but it indicates sensitivity on the part of the Congress and the President to privacy interests on the part of people whose interests should be carefully weighed. In going beyond the minimum standard required by the Constitution, the FISA demonstrates that our standards for liberty are not always set at the lowest possible level. We have the capacity to go beyond constitutional minima, and we do so without judges having any role in the effort except to assist in implementation of the protective scheme designed by the other two branches of government.

There have been attacks on the FISA and the operations of the FISC. Not surprisingly, they have been unsuccessful.[92] As one federal district judge recently concluded, there is no doubt that the FISA goes beyond the cases recognizing that the President may engage in foreign intelligence surveillance in providing procedural safeguards never before imposed upon the executive branch.[93]

91. 50 U.S.C. § 1805(a)(3) (1982).

92. See, e.g., United States v. Duggan, 743 F.2d 59 (2d Cir. 1984), United States v. Belfield, 692 F.2d 141 (D.C. Cir. 1982).

93. In the Matter of Kevork, 634 F. Supp. 1002, 1012 (C.D. Cal. 1985), aff'd, 788 F.2d 566 (9th Cir. 1986).

VI. CONCLUSION

The FISA does not cover all forms of intelligence gathering in the United States. It omits mention of warrantless physical searches, for example.[94] Filling the gap, Executive Order 12,333[95] delegates to the Attorney General the power to approve the use for intelligence purposes, either in the United States or against a United States person abroad, any technique for which a warrant would be required for law enforcement purposes. Before approving surveillance, the Attorney General must find probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power.

There has been debate over the validity of the order.[96] The analysis suggested here leads to the conclusion that the order meets constitutional standards, since foreign powers and their agents are outside the scope of fourth amendment protection. Once the Attorney General finds probable cause to believe that surveillance is directed at a foreign government, no warrant or additional cause is constitutionally required before surveillance may be undertaken.

Obviously, Congress could bring additional surveillance techniques, including warrantless searches, within the FISA. Alternatively, Congress could free the executive branch from the burden of complying with the FISA, completely or partially. There might come a point at which Congress would impose burdens on the executive that the latter would find unacceptable, and the question would be raised whether the President has such inherent power that he could ignore a statutory obligation. The history of the FISA and the needs of a nation suggest that it is more likely that both Congress and the President will continue to recognize the special needs of national security and will compromise on an approach to surveillance that provides appropriate protections without threatening the security of the nation.

The analysis suggested by this Commentary leaves to the President and to Congress the determination of the extent to which the United States will engage in all forms of intelligence gathering directed at foreign governments and their agents. The conclusion that the fourth amendment does not limit official governmental activities directed at foreign governments and individuals acting on

94. For a discussion of such searches, see Brown & Cinquegrana, supra note 6.

95. Executive Order 12,333, 3 C.F.R. 200 (1982), reprinted in 50 U.S.C. app. § 401 (1982).

96. E.g., compare Brown & Cinquegrana, supra note 6 with Note, supra note 18.

their behalf does not threaten the values that the amendment protects.

The fourth amendment protects, *inter alia*, the "cherished privacy of law abiding citizens."[97] It affords a zone of privacy that bars not only physical invasions but also snooping, particularly the kind done with sophisticated electronic surveillance that invades private conversations.[98] But the Bill of Rights is not intended to straitjacket the United States in its dealing with other sovereign nations. Such nations are neither bound by the U.S. Constitution nor protected by its provisions. Because governments consist of individual officers or agents, surveillance by one nation must be done through its agents and in the nature of things will be directed at information generated or held by agents of other nations. Agents of other nations stand in the shoes of the countries for which they are acting and receive no protection from the fourth amendment against U.S. intelligence gathering.[99]

The history and operation of the FISA provide several lessons with respect to intelligence gathering. First, arguments made by the executive branch in past cases that judges would be incapable of supervising searches directed at intelligence gathering probably were overstated. The FISC has operated with no apparent injury to U.S. intelligence gathering. Second, the notion in some of the decided cases[100] that any form of warrant requirement would be insufficiently flexible and would interfere with necessary executive actions is called into question by the FISA. Third, foreign governments and their officials and agents not only are on notice that intelligence gathering may be directed at them by the United States but also have not claimed that such intelligence gathering violates their rights under U.S. law, international law, or informal understandings of the proper scope of sovereign action.

The FISA covers activities in which other nations frequently engage, probably without supervision by their domestic courts. It signifies that even in a domain as sensitive as intelligence gathering

97. United States v. United States District Court, 407 U.S. 297, 313 (1972).

98. Id.

99. Cf. Dreier v. United States, 221 U.S. 394 (1911) (ruling that corporate officer must respond to subpoena for corporate records); Wilson v. United States, 221 U.S. 361 (1911) (ruling that privilege against self-incrimination does not protect against subpoena to corporation for records).

100. See, e.g., United States v. Truong, 629 F.2d 908, 913-14 (4th Cir. 1980), cert. denied, 454 U.S. 1144 (1982).

the protection of individual privacy is important. The Act strikes a balance that properly favors the privacy interests of individuals who are not acting on behalf of foreign governments. It also recognizes that intelligence surveillance of foreign governments and those persons holding themselves out as their agents is no cause for concern.

It will not always be easy to decide who should be treated as an agent of a foreign government and who should be treated as an individual protected by the fourth amendment. Hard questions will arise whether or not there is a statute like the FISA that governs segments of foreign intelligence gathering. Before the FISA was enacted, the Supreme Court observed, "No doubt there are cases where it will be difficult to distinguish between 'domestic' and 'foreign' unlawful activities directed against the Government of the United States where there is collaboration in varying degrees between domestic groups or organizations and agents or agencies of foreign powers."[101] These cases will arise in any international community in which communications travel the globe, individuals travel from country to country, and nations receive within their borders ambassadors, consuls, and other representatives of foreign States.

The case law that has developed demonstrates that hard cases do not lend themselves to simple solutions. With or without a FISA, judges would be called upon to determine the scope of any constitutional protection to which individuals lay claim. The cases have rejected simplistic arguments that any claim of national security or any attempt at intelligence gathering is reasonable and permissible under the fourth amendment.[102] They have also rejected equally simplistic arguments that foreign intelligence gathering should be analyzed in exactly the same way as government investigations directed at domestic organizations.[103]

As the line between official foreign action and individual action becomes muddy, it becomes difficult to determine who is entitled to fourth amendment protection and what form the protections should take. The basic point of this Commentary is that the courts should explicitly recognize what Congress and the President recognized in the FISA: the fourth amendment is not a protection for

101. United States v. United States District Court, 407 U.S. at 309 n.8.

102. Id. at 320.

103. See supra note 35.

foreign governments and intelligence gathering directed at them is permissible without regard to warrants, reasonable suspicion, or probable cause. When this is explicitly recognized, the common sense and constitutionality of the FISA are more readily understood. Instead of focusing on the wrong question—What kinds of searches and seizures are reasonable when the United States seeks foreign intelligence information?[104]—it is possible to ask the right questions: Who is properly treated as an agent or officer of a foreign government? And when is the U.S. government engaged in gathering evidence for prosecution rather than in intelligence gathering?

The FISA provides some but not all the answers.[105] Other answers will be provided in cases that challenge actions taken pursuant to the FISA or actions that fall outside the scope of the Act. Reasonable people might well differ on how far the United States should go in gathering foreign intelligence, especially when U.S. citizens and permanent residents who are not security threats are likely to be swept into a surveillance net. Conflicting interests will always be obvious; there will be an interest in promoting and extending personal privacy in a world with ever-increasing international aspects, and there will be an interest in protecting national security which might seem more fragile as a result of the ease with which international borders are crossed in a variety of ways.

The purpose of national security efforts and foreign intelligence gathering is, of course, to protect the freedoms which are the hallmarks of U.S. law and life, including the freedom to be left alone. But each effort to promote security poses some risk that it will compromise the very freedoms it is intended to further. Securing freedom while protecting security is the goal. It requires careful constitutional balancing, and careful constitutional balancing requires a clear understanding of what is within and without the protection of the fourth amendment. Individual targets of law enforcement activity are within; foreign governments are without. That is the starting point. It explains the structure of the FISA and why the Act strikes a reasonable balance. It also provides the first step

104. This is the wrong question because, for the reasons stated, the fourth amendment does not control the conduct of the United States when it is clearly seeking intelligence from a foreign government.

105. Under the FISA, the FISC must decide whether a person is an agent of a foreign government. This decision might well be difficult.

in striking a balance in the future, whether by statute, executive regulation, or judicial decision.