RECENT DEVELOPMENTS

United States of America v. Usama Bin Laden: District Court Extends Application of Foreign Intelligence Exception

I. INTRODUCTION

The terrorist organization al-Qaeda was created in 1989 with the goal of financing, training, and conducting terrorist activities against the West, particularly the United States of America.[1] Training camps and safe-houses were established throughout the Middle East and Africa in order to facilitate these activities.[2] Businesses were created in order to purchase, transport, and store the necessary equipment for such activities.[3] Assistance from U.S. citizens was allegedly critical in order for al-Qaeda members to travel freely throughout the Western world and conduct financial transactions on behalf of al-Qaeda.[4] U.S. citizen El-Hage, a defendant, is one of a number of defendants charged with various crimes arising from their alleged participation in al-Qaeda and that organization's participation in the bombings of the U.S. embassies in Kenya and Tanzania.[5]

In 1996, the intelligence community discovered that al-Qaeda had established a presence in Kenya.[6] Intelligence sources further isolated five telephone numbers in Kenya being used by al-Qaeda.[7] One of the

1. *See* United States v. Bin Laden, 92 F. Supp. 2d 225, 229 (S.D.N.Y. 2000).
2. *Id.*
3. *Id.*
4. *Id.*
5. *See* United States v. Bin Laden, 126 F. Supp. 2d 264, 268-70 (S.D.N.Y. 2000).
6. *See id.* at 269.
7. *Id.*

phone numbers was located in an office in the same building where the defendant lived, and a second number belonged to a cell phone used by the defendant.[8] Based on this evidence/presence, in 1997 the Attorney General authorized intelligence efforts specifically focused on the defendant.[9] Pursuant to that authorization, American intelligence officials, in conjunction with Kenyan officials, conducted a search of the defendant's residence where several items of intelligence value were seized.[10]

Following the 1998 terrorist bombings of the U.S. embassies in Kenya and Tanzania, the defendant was arrested and charged in the United States District Court for the Southern District of New York, with various crimes arising out of his alleged participation in the bombings.[11] The defendant moved to suppress evidence obtained from the electronic surveillance of his telephone lines and the evidence seized during the search of his residence in Kenya.[12] The defendant argued that the surveillance and subsequent search of his residence were illegal because neither was conducted pursuant to a valid search warrant.[13]

The district court, in denying the defendant's motions to suppress evidence from both the seizure of items from his residence in Kenya and from surveillance of his telephone lines, held that (1) in regard to the seizures in his residence, Fourth Amendment protection extended to U.S. citizens abroad; (2) that the foreign intelligence exception to the Fourth Amendment extended to U.S. citizens abroad; (3) that the foreign intelligence exception applied to the defendant because he was (a) an agent of a foreign power, (b) the search was conducted primarily for intelligence purposes, and (c) the search had been authorized by the President or Attorney General; (4) that the search was not unreasonable in light of the exception to the waiver requirement and the limited scope of the search; (5) in regard to the evidence obtained from electronic surveillance of the defendant's telephone lines, that while such surveillance was unlawful, excluding the evidence was improper because it would have no deterrent effect; (6) the surveillance was undertaken in good faith by the officials involved; and (7) the surveillance was not undertaken for an unreasonable amount of time given the nature of the threat and time needed to translate the conversations.[14]

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8. *Id.*
9. *See id.*
10. *See id.*
11. *See id.* at 268.
12. *Id.* at 269.
13. *Id.* at 270.
14. *Id.* at 270-88.

The district court denied the defendant's motion to suppress evidence seized during the search of his residence.[15] While extending the protection of the Fourth Amendment to U.S. citizens abroad, the court also extended the 'foreign intelligence gathering exception' of the Fourth Amendment to searches conducted against U.S. citizens abroad.[16] The court adopted the three-part test outlined in *United States v. Truong*[17] to determine when the exception is met.[18] First, the individual must be an agent of a foreign power;[19] second, the search must be conducted *primarily* for foreign intelligence purposes;[20] and third, the search must be authorized by the President or the Attorney General.[21] The court found that all three elements were met.[22] In addition, the court found that the search was not unreasonable in light of the exception to the warrant requirement and the limited scope of the search.[23]

The district court also denied the defendant's motion to suppress evidence obtained from the electronic surveillance of his telephone lines.[24] While finding that the surveillance was unlawful, the court ultimately held that excluding the evidence would be improper because it would have no deterrent effect.[25] Furthermore, the surveillance was undertaken in good faith by the officials involved.[26] In addition, the court found that it was not undertaken for an unreasonable amount of time considering the nature of the threat and the time needed to translate the conversations.[27] As a result, the court held that the unlawfully obtained evidence was admissible.[28] *United States v. Bin Laden*, 126 F. Supp. 2d 264 (S.D.N.Y. 2000).

II. BACKGROUND

The United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

15. *Id.* at 277.
16. *Id.*
17. *See* United States v. Truong, 629 F.2d 908, 915-16 (4th Cir. 1980).
18. *Bin Laden*, 126 F. Supp. 2d at 277.
19. *Id.* at 277-78.
20. *Id.* at 278.
21. *Id.* at 279.
22. *Id.* at 277-79.
23. *Id.* at 285.
24. *Id.* at 288.
25. *Id.* at 282.
26. *Id.*
27. *Id.* at 286.
28. *See id.* at 282.

> violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized.[29]

The founding purpose of the Fourth Amendment was to prevent the type of arbitrary subversion of liberty practiced by the English Crown against the colonists in the new world.[30] Throughout the colonial period, general writs of assistance were issued by the Crown's governors empowering revenue officers to search an individual's residence for contraband *at that officer's discretion*.[31] This authority was often abused by revenue officials concerned more with uncovering incriminating evidence to use against the residence owner than revenue collection.[32] Placing an individual's liberty in the hands of every minor government official was viewed by the colonists as the worst exercise of arbitrary power and inconsistent with individual freedom.[33] With this memory of arbitrary British action fresh in the constitutional Framer's minds, James Madison successfully advocated for the adoption of the Fourth Amendment as protection for U.S. citizens against such arbitrary action by their own government.[34] To what extent the Constitution's collective protections against arbitrary government actions extended was left to the courts.

A. Application of the Fourth Amendment Abroad

In *Reid v. Covert*, the Court addressed the application of the protections against arbitrary government action outside the United States.[35] The case, actually a consolidation of two factually similar cases, involved the issue of whether the wife of a U.S. serviceman stationed abroad, who had murdered her husband and was subsequently tried by a U.S. military tribunal, had been denied her Fifth and Sixth Amendment rights.[36] The Court held that the constitutional guarantees against arbitrary government action are not lost simply because a citizen is

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29. U.S. CONST. amend. IV.
30. *See* Boyd v. United States, 116 U.S. 616, 625 (1886).
31. *Id.* (emphasis added).
32. *Id.*
33. *Id.* (citing James Otis, *Against the Writs of Assistance (1761)*, *in* DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY, VOL. I: FROM THE FOUNDING THROUGH THE AGE OF INDUSTRIALIZATION 30 (Melvin I. Urofsky & Paul Finkelman eds., 2d ed. 2002)).
34. *See* RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 290-91 (Univ. Press of Va. 1990) (1971).
35. *See* Reid v. Covert, 354 U.S. 1, 1-6 (1957).
36. *Id.* at 3-5.

abroad.[37] The Court relied on Article III section 2 of the Constitution, which provides that when a crime is "'not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.'"[38] The Court inferred from this language that the Framers intended the constitutional restrictions on arbitrary government action to apply domestically and abroad.[39]

In *United States v. Verdugo-Urquidez*, the Supreme Court qualified its holding in *Reid*.[40] *Verdugo-Urquidez* involved the issue of whether the Fourth Amendment applied to a search and seizure by U.S. Drug Enforcement Agents of property owned by a Mexican citizen in Mexico.[41] The Court held the protection against unreasonable searches and seizures embodied in the Fourth Amendment did not extend to non-U.S. citizens abroad.[42] The Court reasoned that "the people" in the Fourth Amendment was a term of art referring to individuals who were a part of and had developed a significant connection to the U.S. community.[43] However, in holding that the Fourth Amendment's protections did not apply to non-U.S. citizens abroad, the Court did not necessarily extend the Fourth Amendment to U.S. citizens located abroad.[44]

B. Intelligence Exception to the Fourth Amendment

The use of warrantless electronic surveillance for national security purposes has been practiced by every President since World War II.[45] In 1940, President Franklin D. Roosevelt authorized Attorney General Robert Jackson to collect information by electronic surveillance on individuals suspected of "subversive activities against the Government of the United States."[46] Six years later, President Harry S. Truman agreed with Attorney General Tom Clark on the need to use electronic

37. *Id.* at 5-6.
38. *Id.* at 7 (quoting U.S. CONST. art. III, § 2).
39. *Id.* at 8.
40. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990).
41. *Id.*
42. *Id.* at 274-75.
43. *Id.* at 265.
44. *See id.* at 270.
45. *See* William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 19-35 (2000) (discussing the history of domestic intelligence for national security purposes).
46. *Id.* at 28.

surveillance measures to protect domestic security.[47] By 1954, such practices expanded to the point where the Federal Bureau of Investigation (FBI) was conducting electronic surveillance "whenever the national interest so required" and without prior approval from the Attorney General.[48] This exceptional authority reached its height in the 1960s when Attorney General Robert Kennedy used foreign intelligence gathering techniques developed by the National Security Agency not only for national security purposes, but to monitor domestic criminal figures as well.[49]

In 1967, the United States Supreme Court finally weighed in and set limits on the executive use of electronic surveillance in *Katz v. United States*.[50] The Court held that the Fourth Amendment's warrant requirement categorically extended to electronic surveillances.[51] As a result, the government violated the Fourth Amendment when it electronically eavesdropped on conversations without a warrant.[52] However, the Court explicitly declined to extend its ruling in *Katz* to cases involving "national security."[53] A year later, Congress reacted to the *Katz* decision and enacted Title III of the Omnibus Crime Control and Safe Streets Act (Crime Control Act).[54] In doing so, Congress attempted to balance the need for surveillance of criminal activity with the right to individual privacy by codifying the appropriate method of acquiring judicial authorization for electronic surveillance.[55]

In *United States v. United States District Court for the Eastern District of Michigan* [hereinafter *Keith*], the Court addressed the issue left open in *Katz*: whether an exception to the protections provided for in the Fourth Amendment exists for intelligence gathering purposes when pursued in the interest of national security.[56] In *Keith*, the case dealt with the issue of whether the Fourth Amendment applied when gathering

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47. *See* United States v. United States Dist. Court for the E. Dist. of Mich., 407 U.S. 297, 311 n.10 (1972) [hereinafter *Keith*] (case is referred to by the name of the district court judge who first presided over the case, Judge Keith).

48. Banks, *supra* note 45, at 28-29.

49. *Id.* at 31.

50. *See* Katz v. United States, 389 U.S. 347, 350-53, 357-58 (1967).

51. *Id.* at 353.

52. *Id.* at 359.

53. *Id.* at 358 n.23 (stating "[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case").

54. *See* Banks, *supra* note 45, at 48 (referring to the Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, § 802, 82 Stat. 197,212 (1968)) (codified as amended at 18 U.S.C. § 2510-2522 (1994 & Supp. V 1999)).

55. *Id.* at 48-49.

56. *See Keith*, 407 U.S. 297 (1972).

intelligence on a domestic organization intending to attack the U.S. government.[57] The three defendants were accused of conspiring to destroy government property; additionally, one was also accused of successfully bombing an office of the Central Intelligence Agency (CIA) in Michigan.[58]

The defendants moved to compel the government to turn over electronic surveillance tapes that the government had collected of the defendants planning to destroy government property.[59] The government planned on using these tapes at trial against the defendants.[60] The government argued that while a warrant was not procured in advance of the surveillance, the surveillance was lawful as a reasonable exercise of the Executive's duty to protect national security.[61] Furthermore, the government argued that Title III of the Crime Control Act explicitly recognized the President's authority to conduct warrantless surveillances in pursuit of national security.[62]

In rejecting the government's argument, the Court found that nothing in the Crime Control Act conferred authority upon the President to conduct domestic intelligence gathering without a warrant.[63] At best, Justice Powell asserted, the Crime Control Act recognized that the President had some authority to gather intelligence through electronic surveillance.[64] Furthermore, the legislative history indicated that the Crime Control Act disclaimed any intent to limit the constitutional authority of the President, not to confer additional powers upon the

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57. *Id.* at 299.
58. *Id.*
59. *Id.*
60. *Id.* at 299-300.
61. *Id.* at 301.
62. *Id.* at 303 (citing 18 U.S.C. § 2511(3)).
63. *Id.* The Court found the language of § 2511(3) to be "essentially neutral" so far as the President's electronic surveillance was concerned. *See id.* Title 18 U.S.C. § 2511(3) (1968) reads in part:

> Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government (emphasis omitted).

64. *See Keith*, 407 U.S. at 303.

President.[65] Regarding the President's inherent authority to protect national security, the Court noted that history was strewn with examples of governments, some with the best of intentions, that had abused civil liberties while exercising their authority to protect domestic security.[66] The Court believed that the Framers correctly separated powers and divided functions among the three branches of government in order to protect U.S. citizens from arbitrary actions by their government;[67] in this case, the duties of the executive to enforce, investigate, and prosecute laws, and the duty of the neutral judiciary to issue warrants when reasonably necessary for the executive branch to carry out its assigned role, protect the individual citizen from arbitrary action by the government.[68]

While recognizing the role the Constitution delegates to the President in protecting the national interests of the United States, the Court found that the President must carry out this task within the limits of the Constitution.[69] Justice Powell remarked that a certain level of inconvenience was justified when protecting such an important value as liberty.[70] As a result, the Court ultimately held that, in this instance, no exception existed to the warrant requirement for *domestic* intelligence gathering purposes.[71] However, the Court stressed that its decision was only applicable to domestic intelligence gathering.[72] The Court emphasized that intelligence gathering involving foreign powers or their agents was not specifically addressed by its decision.[73] The Court made the distinction between surveillance for law-enforcement purposes and surveillance for intelligence gathering purposes, opining that an

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65. *Id.* at 304-08 (citing 114 CONG. REC. 14,751 (1968), the sole floor debate regarding the intent of 18 U.S.C. § 2511(3)); 114 CONG. REC. 14,751 (1968) (confirming Congressional intent not to limit the constitutional authority of the President with the passage of § 2511(3):

> Mr. MCCLELLAN. Mr. President, we make it understood that we are not trying to take anything away from [The President of the United States].
> Mr. HOLLAND. The Senator is correct.
> Mr. HART. . . . In addition, Mr. President, as I think our exchange makes clear, nothing in section 2511(3) even attempts to define the limits of the President's national security power under present law, which I have always found extremely vague . . . Section 2511(3) merely says that if the President has such a power, then its exercise is in no way affected by title III.).

66. *See Keith*, 407 U.S. at 314-15.
67. *See id.* at 317.
68. *See id.*
69. *Id.* at 320.
70. *Id.* at 321.
71. *Id.*
72. *Id.*
73. *Id.* at 321-22.

exception may be necessary for the latter.[74] Furthermore, the Court implied that the district court dictum in *United States v. Smith* regarding foreign intelligence surveillance was probably correct.[75]

In *Smith*, the court noted that warrantless surveillance, while unconstitutional in a domestic setting, would probably be constitutional in an international setting.[76] The court made this distinction based on the Executive's long recognized inherent power in the area of foreign affairs.[77] Furthermore, the court noted that constitutional limitations on the Executive's authority in domestic situations appear artificial in the international sphere.[78] However, the district court refused to rule on whether such an exemption from the warrant requirement actually existed for foreign intelligence gathering purposes.[79]

1. Electronic Surveillance Situations

Notwithstanding the Supreme Court having never expressly ruled on the issue, numerous lower courts since *Keith* have ruled on whether an exception to the Fourth Amendment's warrant requirement does in fact exist for electronic surveillances made for the purpose of gathering foreign intelligence.[80] In *United States v. Clay*, the United States Court of Appeals for the Fifth Circuit concluded that the executive branch had the constitutional authority to authorize surveillance for foreign intelligence

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74. *See id.* at 322. In 1978, Congress finally acceded to Justice Powell's request and passed the Foreign Intelligence Surveillance Act (FISA) 50 U.S.C. §§ 1801-1829 (1994). FISA provides a framework for foreign intelligence collection *within the United States*. The Act authorizes the President to conduct surveillances or searches within the United States for the purpose of foreign intelligence gathering if the target is a foreign power or agent. *See* 50 U.S.C. § 1802(a)(b). Requests for surveillances or searches are submitted by the Attorney General to a specially created Foreign Intelligence Surveillance Court (FISC) comprised of seven judges selected by the Chief Justice. *See* 50 U.S.C. §§ 1802-1804. The FISC is empowered to approve surveillances of an agent of a foreign power and its decisions are appealable to a specially created Court of Appeals. *See* 50 U.S.C. § 1803(b). Arguably, all of the cases cited at note 80, *supra*, would be governed by FISA today.

75. *Keith*, 407 U.S. at 322 n.20 (finding that, in some cases, "warrantless surveillance, though impermissible in domestic security cases, may be constitutional where foreign powers are involved.") (citing United States v. Smith, 321 F. Supp. 424, 425-26 (C.D. Cal. 1971)).

76. 321 F. Supp. at 426.

77. *Id.*

78. *Id.* at 430.

79. *Id.* at 426.

80. *See* United States v. Butenko, 494 F.2d 593, 605 (3d Cir. 1974); United States v. Clay, 430 F.2d 165, 171 (5th Cir. 1970), *rev'd on other grounds*, Clay v. United States, 403 U.S. 698 (1971); United States v. Buck, 548 F.2d 871, 875 (9th Cir. 1977) (all upholding warrantless domestic intelligence surveillance of foreign agents). *But cf.* Zweibon v. Mitchell, 516 F.2d 594, 614 (D.C. Cir. 1975) (questioning in dictum whether warrantless surveillances are ever constitutional).

gathering without a warrant.[81] The issue in *Clay* was whether the government should be allowed to use as evidence a copy of an electronic surveillance tape made by FBI agents of the defendant, a U.S. citizen, while engaged in a phone call.[82] The government argued that the wiretap was created while gathering information on another individual during an unrelated foreign intelligence investigation and that the defendant was only incidentally recorded.[83] Furthermore, the government argued, the Attorney General had approved the wiretap and release would injure national security.[84] The court balanced the right of the individual with the national security interest of the United States and found that disclosure was unnecessary because the wiretap was made for the sole purpose of obtaining foreign intelligence and none of the information obtained would aid the prosecutor in its case.[85] The court alluded to the inherent power the President enjoys in foreign affairs as the basis for its decision.[86]

Three years later, in *United States v. Brown*, the Fifth Circuit was presented with the chance to reaffirm its rationale behind *Clay*.[87] The court explained that the Constitution delegates to the President the responsibility to protect national security.[88] While protecting the national security of the United States in a domestic capacity, the President is naturally restricted by the Fourth Amendment warrant requirement; however, in a foreign affairs capacity, no such restriction exists.[89] The restrictions upon the President in a domestic setting simply become artificial in an international setting.[90] In addition, the court found support for its ruling in a common theme running through the Federalist Papers, namely, that it is the President's duty to safeguard the nation against hostile foreign powers.[91]

In *United States v. Butenko*, the United States Court of Appeals for the Third Circuit went even further in acknowledging the authority vested in the President to conduct warrantless foreign intelligence

81. *Clay*, 430 F.2d at 171.
82. *Id.* at 166.
83. *Id.* at 170.
84. *Id.*
85. *Id.* at 171.
86. *See id.* ("'It would be 'intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.'") (citations omitted).
87. United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973).
88. *Id.*
89. *Id.*
90. *Id.* (citing United States v. Smith, 321 F. Supp. 424, 430 (C.D. Cal. 1971)).
91. *See id.* at 426 (citing The Federalist No. 64, at 434-36 (John Jay); The Federalist No. 70, at 471 (Alexander Hamilton); The Federalist No. 74, at 500 (Alexander Hamilton) (J. Cooke ed., 1961)).

surveillances.[92] At issue in *Butenko* was whether the government had violated the Fourth Amendment warrant requirement when it electronically recorded conversations—without the Attorney General's approval—between a U.S. citizen spying on the United States and his Soviet contact.[93] The court ruled that prior judicial authority was not required where surveillance was conducted solely for the purpose of foreign intelligence gathering.[94] Instead, the court determined that a more effective way to prevent indiscriminate surveillance of domestic organizations, while meeting the needs of foreign intelligence gathering, was to rely on the good faith of the Executive and the deterrent effect of sanctions imposed upon that branch, should an unlawful surveillance occur.[95] The Third Circuit was hesitant to interfere with the President's foreign policy authority and recognized the burden a warrant requirement would place on the Executive in carrying out clandestine activities.[96]

The United States Court of Appeals for the Ninth Circuit has also concluded that the President has the constitutional authority to authorize warrantless surveillances for foreign intelligence gathering purposes.[97] The issue in *United States v. Buck* was whether the government's wiretap of the defendant had to be disclosed where the Attorney General expressly authorized the wiretap for intelligence gathering purposes.[98] The court relied exclusively on the *Butenko* and *Clay* decisions in holding that foreign security wiretaps are an exception to the Fourth Amendment's warrant requirement.[99]

The United States Court of Appeals for the D.C. Circuit, however, sent a mixed message regarding the Presidential authority to conduct warrantless surveillances for intelligence gathering purposes in *Zweibon v. Mitchell*.[100] The issue in *Zweibon* was whether the President had the authority to authorize warrantless surveillance of a political organization whose goal was to protest the Soviet Union's treatment of Jews in that country, thereby interfering with United States-Soviet relations.[101] The court professed that, absent exigent circumstances, all warrantless surveillance was unconstitutional.[102] However, Judge Wright refused to

92. *See* 494 F.2d at 593 (3d Cir. 1974).
93. *Id.* at 596.
94. *Id.* at 605.
95. *Id.*
96. *Id.*
97. *See* United States v. Buck, 548 F.2d 871, 875 (9th Cir. 1977).
98. *Id.*
99. *See id.*
100. *See* 516 F.2d 594, 619 (D.C. Cir. 1975).
101. *See id.* at 605-09.
102. *Id.* at 613-14.

hold so broadly and limited the ruling to cases where the domestic organization or individual had no affiliation with a foreign power.[103] In these instances, the court held there is no foreign intelligence exception to the warrant requirement.[104]

2. Physical Search Situations

In *United States v. Ehrlichman*, the D.C. District Court addressed the issue of whether an exception to the Fourth Amendment's warrant requirement exists for searches made for foreign intelligence gathering purposes.[105] Five federal agents (defendants) were accused of unlawfully breaking into a California physician's office for the purpose of obtaining medical records on one of the physician's patients.[106]

The defendants argued that the President had the authority to authorize warrantless searches if such actions were in the interests of national security and were executed pursuant to the President's grant of authority.[107] The court held that no such authority existed and that the break-in was clearly unlawful under the Fourth Amendment.[108] The D.C. District Court recognized *Butenko*, *Brown*, and *Zweibon* for the proposition that an exception to the warrant requirement exists for foreign intelligence gathering purposes.[109] However, the court noted that the exception in those cases was for electronic surveillance, not physical searches.[110] The court maintained that electronic surveillance was relatively unobtrusive when compared to physical searches.[111] Harkening back to James Otis' criticism against arbitrary British intrusion,[112] the court explained that the Fourth Amendment was enacted precisely to prevent the current situation, namely, arbitrary action by the government against its citizens.[113]

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103. *Id.* at 614.
104. *See id.*
105. *See* 376 F. Supp. 29 (D.D.C. 1974).
106. *Id.* at 31.
107. *Id.*
108. *Id.* at 33.
109. *Id.*
110. *Id.*
111. *Id.*
112. *See* John Adams, *Adam's "Abstract of the Argument" (April 1761)*, *in* 2 LEGAL PAPERS OF JOHN ADAMS 134, 144 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). Otis, whose argument was abstracted by John Adams, challenged the British writ of assistance as a "monster of oppression" and a "remnant of Star Chamber Tyranny." *Id.*
113. *Ehrlichman*, 376 F. Supp. at 32-34 ("The Court cannot find that this recent, controversial judicial response to the special problem of national security wiretaps indicates an intention to obviate the entire Fourth Amendment whenever the President determines that an American citizen, personally innocent of wrongdoing, has in his possession information that may

Four years later, in *Truong*, the United States Court of Appeals for the Fourth Circuit addressed the same issue of whether an exception to the Fourth Amendment's warrant requirement exists for physical searches made for foreign intelligence gathering purposes.[114] The defendant was accused of espionage in forwarding classified U.S. diplomatic cables to representatives of the Socialist Republic of Vietnam (North Vietnam) in Paris.[115] Unbeknownst to the defendant, his contact was an informant for the CIA and FBI.[116]

In an attempt to locate the ultimate source of the classified information, the FBI wiretapped the defendant's phone, bugged his home, and inspected all documents forwarded by the defendant to his contact prior to being delivered to Paris.[117] The defendant argued that the government, by failing to secure a warrant, violated his Fourth Amendment rights.[118] The court held, regarding the surveillance, that a foreign intelligence exception to the Fourth Amendment did exist.[119] The court reasoned that the President requires speed and secrecy when protecting the national security.[120] Furthermore, the court was persuaded by the unparalleled expertise the executive possessed in this area over the judiciary.[121] In addition, the court found support in the constitutional grant of authority over foreign affairs to the executive branch.[122]

The Fourth Circuit went further than other circuit courts and outlined a test for determining how to satisfy the foreign intelligence exception to the Fourth Amendment.[123] First, the object of the surveillance must be a foreign power or an agent of a foreign power; second, the surveillance must be conducted *primarily* for foreign intelligence purposes; and third, implicit in the court's reasoning, the President must in fact authorize the warrantless surveillance.[124] Only if

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touch upon foreign policy concerns. Such a doctrine, even in the context of purely information-gathering searches, would give the executive a blank check to disregard the very heart and core of the Fourth Amendment and the vital privacy interests that it protects."). *Id.* at 33-34 (citations omitted).

114. *See* United States v. Truong, 629 F.2d 908, 911 (4th Cir. 1980).

115. *Id.* at 911-12.

116. *Id.* at 912.

117. *Id.*

118. *Id.*

119. *Id.* at 914 (citing United States v. Butenko, 494 F.2d 593, 605 (3d Cir. 1974); United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973); United States v. Clay, 430 F.2d 165, 171 (5th Cir. 1970), *rev'd on other grounds*, Clay v. United States, 403 U.S. 698 (1971)).

120. *Id.* at 913.

121. *Id.*

122. *Id.* at 914.

123. *See id.* at 915-16.

124. *Id.*

all three of these elements are met is the President excused from the warrant requirement of the Fourth Amendment.[125] The court went on to apply this test not only to the electronic surveillance but also to the physical search of the defendant's packages.[126] In so doing, the court made no reference to the distinction between electronic surveillance and physical searches made by the D.C. District Court in *Ehrlichman*.[127]

III. NOTED CASE

In the noted case, Judge Sand, writing for the United States District Court for the Southern District of New York, began his analysis by addressing the issue of whether the Fourth Amendment applies to U.S. citizens abroad.[128] The court relied exclusively on the *Reid v. Covert* decision where the Supreme Court extended the Fifth and Sixth Amendment guarantees to U.S. citizens abroad.[129] By extrapolation, Judge Sand held the Fourth Amendment should also apply to U.S. citizens abroad.[130] As a result, the district court permitted the defendant to bring a Fourth Amendment challenge.[131]

The court next addressed the actual extent of the warrant requirement of the Fourth Amendment when applied to U.S. citizens abroad.[132] The court noted that several circuits have recognized an exception to the warrant requirement for searches conducted against foreign powers or their agents within the United States, but that no court has addressed whether this exception applies to *U.S. citizens abroad*.[133] Judge Sand then analyzed the constitutional and practical bases for such an exception in evaluating whether to adopt the foreign intelligence exception to the warrant requirement.[134]

The first factor the court considered was the President's authority in the foreign affairs arena.[135] Judge Sand relied on numerous Supreme

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125. *Id.* at 915.

126. *Id.* at 917.

127. *See id.*; United States v. Ehrlichman, 376 F. Supp. 29, 33 (D.D.C. 1974) (noting the distinction between electronic surveillance and the far more obtrusive physical search).

128. United States v. Bin Laden, 126 F. Supp. 2d 264, 270 (S.D.N.Y. 2000).

129. *Id.* (citing Reid v. Covert, 354 U.S. 1, 5-6 (1857)).

130. *See id.* at 270-71.

131. *Id.* at 271.

132. *Id.*

133. *Id.* (citing United States v. Butenko, 494 F.2d 593, 605 (3d Cir. 1974); United States v. Clay, 430 F.2d 165, 171 (5th Cir. 1970), *rev'd on other grounds*, Clay v. United States, 403 U.S. 698 (1971); United States v. Truong, 629 F.2d 908, 913 (4th Cir. 1980); United States v. Buck, 548 F.2d 871, 875 (9th Cir. 1977)).

134. *Id.* at 272.

135. *See id.*; *see, e.g.*, Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (stating that the judiciary should not interfere with the foreign affairs and intelligence

Court decisions holding that the Constitution has delegated foreign policy decisions wholly to the political branches of the federal government.[136] While acknowledging that the court has a role to play in ensuring that civil liberties are not subverted in the name of national security, Judge Sand recognized that the Executive's implementation of warrantless foreign intelligence searches is an established practice.[137] Furthermore, the court noted, while Congress has "spoken" regarding foreign intelligence searches conducted domestically,[138] it has remained silent regarding foreign intelligence searches conducted abroad.[139]

The second factor the court considered was the cost of imposing a warrant requirement for foreign intelligence searches conducted abroad.[140] While cognizant of the important civil liberties protected by the warrant requirement, the court also recognized that the warrant requirement in many situations would unduly frustrate the executive branch's performance of its assigned responsibilities.[141] Judge Sand found that a search for foreign intelligence was one of these instances.[142] Inevitably, the efficacy of the President would be substantially hindered if a warrant was required prior to conducting foreign intelligence searches abroad.[143] Furthermore, the court was influenced by the contention that requiring a warrant would increase the possibility of security breaches.[144]

The third factor the court considered was the absence of a warrant procedure for searches conducted abroad.[145] Judge Sand found that existing warrant procedures are totally unsuitable for foreign intelligence gathering.[146] Furthermore, the court found the *Verdugo-Urquidez*

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services with regard to such affairs because such decisions "are wholly confined by our Constitution to the political departments of the government, Executive and Legislative." They are "delicate and complex" and only should be undertaken by those "directly responsible to the people whose welfare they advance or imperil."); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (discussing the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"); Totten v. United States, 92 U.S. 105, 106 (1875) (recognizing the President's power to conduct foreign intelligence operations and to employ secret agents).

136. *See id.*

137. *See id.* at 273.

138. *Id.* (referring to FISA, 50 U.S.C. §§ 1801-1829 (1972)).

139. *Id.* (noting that FISA only applies to foreign intelligence searches conducted within the United States).

140. *See id.*

141. *Id.*

142. *Id.* at 274.

143. *Id.* at 275.

144. *Id.*

145. *See id.*

146. *Id.* at 276 (noting jurisdictional problems and distinguishing between law-enforcement and intelligence gathering).

decision implies that the warrant procedures are not only inappropriate for foreign intelligence searches conducted against foreign agents, but that they are also inappropriate for foreign intelligence searches conducted against U.S. citizens.[147] While the court did not find it impossible to issue a warrant for foreign intelligence searches conducted against U.S. citizens abroad, it did find it impractical.[148]

As a result of this analysis, Judge Sand chose to adopt the foreign intelligence exception to the warrant requirement of the Fourth Amendment that targets U.S. citizens abroad.[149] The court noted, however, that this exception was to be narrowly construed, and adopted the *Truong* test to determine when the exception applies.[150] First, the U.S. citizen must be an agent of a foreign power; second, the search must be conducted primarily for intelligence gathering purposes; and third, the search must be authorized by the President or the Attorney General.[151]

Judge Sand next moved to the application of the newly extended exception to the current case.[152] Using the definition of 'foreign power' embodied in FISA, the court found that al-Qaeda is a foreign power.[153] Furthermore, relying on classified information provided by the government, the court found that there was probable cause to find that the defendant was an agent for this foreign power.[154]

The court further determined that the primary purpose for the search of the defendant's residence was intelligence gathering.[155] While not dispositive, the court was influenced by the fact that agents from the FBI were not present during the electronic surveillance of the defendant and were only incidentally present during the subsequent search.[156] The court was ultimately persuaded that the primary purpose of the

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147. *See id.* (citing United States v. Verdugo-Urquidez, 494 U.S. at 259, 274 (1990)) (noting that a warrant issued by a U.S. judge would be a "dead letter" outside the United States); *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring) (explaining factors that inhibit requiring a warrant for foreign intelligence searches include a lack of local U.S. judges to issue warrants and different attitudes towards reasonableness and privacy).

148. *Bin Laden*, 126 F. Supp. 2d at 276-77.

149. *Id.* at 277.

150. *Id.*; *see also* United States v. Truong, 629 F.2d 908, 915-16 (4th Cir. 1980).

151. *See Bin Laden*, 126 F. Supp. 2d at 277.

152. *See id.*

153. *Id.* at 278 (citing 50 U.S.C. § 1801(a)-(b) (1999)). Section 1801(a)(4) defines a foreign power as, inter alia, a group engaged in international terrorism or activities in preparation of terrorism.

154. *Id.* Section 1801(b)(2)(c) defines a foreign agent as one who "knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power."

155. *Id.*

156. *Id.*

investigation was to gather intelligence on al-Qaeda by again relying on classified information provided by the government.[157] The classified information demonstrated that the individuals under surveillance, including the defendant, were providing others with false documents and acting as a relay point for messages to and from al-Qaeda headquarters.[158] Furthermore, the subsequent search of the defendant's house revealed explicit admissions that this particular group was responsible for the deaths of U.S. military personnel in Somalia during the 1993 United Nations humanitarian relief effort.[159] The court was convinced that while multiple objectives certainly existed, the primary reason for the search was to gather intelligence.[160]

The court next addressed the electronic surveillance of the defendant. The court found that the foreign intelligence exception did not apply to the phone surveillance because there was, at the time, no authorization for such surveillance by the Attorney General.[161] However, the government argued that pre-authorization surveillance was not targeted at the defendant, but at the al-Qaeda.[162] It contended that the intercepts were thus "incidental" and the government's only constitutional obligation to the defendant was to minimize these incidental intercepts.[163]

Judge Sand, in rejecting this argument, found that the defendant had a reasonable expectation of privacy in his home and cellular phones, and, therefore, the government's surveillance was unlawful.[164] The court acknowledged case law establishing that "incidental" interception during an otherwise lawful surveillance does not violate the Fourth Amendment warrant requirement;[165] however, the court concluded that "incidental" in these cases referred to situations where the identity of the individual intercepted was unknown or his/her participation was unanticipated.[166] In this instance, the government was suspicious of the defendant's connection with the al-Qaeda network from the beginning, the defendant was certainly not an unanticipated user of his own phone line, and the

157. *Id.* at 279.
158. *Id.*
159. *Id.*
160. *Id.*
161. *See id.* at 279.
162. *Id.*
163. *Id.* at 279-80.
164. *Id.* at 281.
165. *Id.* (citing United States v. Figueroa, 757 F.2d 466, 470-472 (2d Cir. 1985); United States v. Tortorello, 480 F.2d 764, 775 (2d Cir. 1973); United States v. Kahn, 415 U.S. 143, 157 (1974)).
166. *Id.* at 280.

defendant was believed to be a participant in the activities under investigation.[167] As a result, the court decided that the government should have obtained approval from the President or the Attorney General prior to conducting the electronic surveillance.[168]

Notwithstanding this finding, the court maintained that excluding the evidence obtained from the unlawful surveillance of the defendant's home would be improper.[169] The court's basis for this ruling was twofold. First, the rationale behind the exclusionary rule is to deter future unlawful official behavior.[170] In many instances, courts will disregard the exclusionary rule and admit unlawfully obtained evidence when exclusion would not have the desired deterrent effect.[171] In this instance, Judge Sand was satisfied that the surveillance would have been conducted despite the knowledge that evidence obtained would be inadmissible in court.[172]

Second, the good faith exception to the exclusionary rule provides for the admissibility of evidence later deemed unlawfully obtained.[173] In this instance, there was no clear rule as to whether the government required a warrant or not.[174] The court found that the officials conducted the surveillance under an "actual and reasonable belief" that neither a warrant nor the approval of the Attorney General was needed.[175] Judge Sand determined that the official's interpretation of case law in this area was reasonable even if ultimately incorrect.[176] As a result, while the surveillance of the defendant's residence was unlawful, the evidence obtained from the surveillance was admissible.[177]

The court next turned to the reasonableness requirement of the Fourth Amendment.[178] Concerning the search of the defendant's residence, the court noted that all of the previous cases allowing for a foreign intelligence exception to the warrant requirement emerged in

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167. *Id.* at 281.
168. *Id.* at 282.
169. *Id.*
170. *Id.* (citing Elkins v. United States, 364 U.S. 206, 217 (1960); United States v. Calandra, 414 U.S. 338, 347 (1974); Pennsylvania Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998)).
171. *Id.* (citing United States v. Ajlouny, 629 F.2d 830, 840 (2d Cir. 1980) (explaining that "the Court, in recent years, has refused to apply the [exclusionary] rule to situations where it would achieve little or no deterrence")).
172. *See id.* at 283.
173. *Id.*
174. *See id.* at 284.
175. *Id.*
176. *Id.*
177. *Id.*
178. *See id.*

electronic surveillance situations.[179] The court compared case law concerning the relative level of intrusiveness between physical searches and electronic surveillance.[180] Case law describes the level of intrusiveness as high in both instances, leading the court to conclude that neither deserves greater protection from the Fourth Amendment.[181] Furthermore, the court discovered several cases that have permitted warrantless searches in extreme circumstances, or for special needs.[182] As a result, Judge Sand held that the search of the defendant's residence was not per se unreasonable.[183] In addition, the court determined that the manner in which the search was conducted was reasonable.[184] The search was limited in scope and performed during the day, only those items believed to have intelligence value were searched, and an itemized list of everything seized was provided.[185]

Concerning the electronic surveillance of the defendant's residence, the court noted that while surveillance for disproportionate amounts of time tends to be unreasonable, the government is given greater latitude when the scope of the defendant's activities is extensive.[186] In this case, the court found that the excessive length of time spent monitoring the defendant's residence was reasonable.[187] The court was influenced by the fact that most of the conversations were in a foreign language, requiring extensive translation efforts by the government.[188] Furthermore, both phones were communal and used by a variety of individuals, some who

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179. *See id.* (citing United States v. Ehrlichman, 376 F. Supp. 29, 33 (D.D.C. 1974); United States v. Truong, 629 F.2d 908, 917 (4th Cir. 1980)).

180. *See id.* at 284-85 (citing Payton v. N.Y., 445 U.S. 573, 590 (1980) (holding that the Fourth Amendment draws a firm line at the entrance of the house and without exigent circumstances, that line cannot reasonably be crossed without a warrant); Berger v. N.Y., 388 U.S. 41, 63 (1967) (describing that electronic eavesdropping invades the innermost secret's of one's office or home and that there are few threats to liberty greater than the use of such devices without warrants)).

181. *Id.* at 285.

182. *Id.* (citing Griffin v. Wisconsin, 483 U.S. 868 (1987) (finding a special need exception for the warrant requirement in the State probation system); McCabe v. Life-Line Ambulance Serv., 77 F.3d 540, 545, 549 (1st Cir. 1996) (holding that police officers could enter a residence without a warrant for the exclusive purpose of detaining a recalcitrant and dangerous mentally ill person)).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 285 (citing United States v. Clemente, 482 F. Supp. 102, 107 (S.D.N.Y. 1979); United States v. Scott, 516 F.2d 751, 758 (D.C. Cir. 1975); United States v. Hoffman, 832 F.2d 1299, 1308 (1st Cir. 1987)).

187. *See id.* at 286.

188. *Id.*

worked for al-Qaeda and some who did not.[189] This resulted in large amounts of time spent monitoring numerous potential suspects.[190]

Judge Sand concluded his analysis by turning to the issue of whether a suppression hearing was necessary.[191] The court found that case law permits the use of in camera, ex parte reviews.[192] Noting that in camera, ex parte reviews should only be used when necessary, the court determined that it was necessary in this case.[193] Judge Sand was persuaded by the need for such an interview due to the continuing threat of al-Qaeda and the need to maintain the secrecy of the ongoing investigation.[194] The court noted that while a factual question was raised in this motion (i.e., whether the search was conducted for intelligence or law enforcement purposes), it was easily disposed of by the court.[195] Judge Sand pointed out that most of the issues raised in the motion were legal matters, and therefore the need for an adversarial-based hearing on the motion was simply unwarranted.[196] The court concluded by denying the defendant's motion to suppress evidence obtained from the government's surveillance and subsequent search of his residence.[197]

IV. ANALYSIS

In the noted case, Judge Sand appropriately extends Fourth Amendment rights to U.S. citizens abroad.[198] Nothing in the text of the Fourth Amendment states that the protection against arbitrary government action ceases once a citizen leaves U.S. territory.[199] Furthermore, Judge Sand correctly interprets and applies the holding of *Reid v. Covert*.[200] *Reid* declared that the "shield which the Bill of Rights

189. *Id.*
190. *Id.*
191. *See id.*
192. *Id.* at 286-87 (citing Taglianetti v. United States, 394 U.S. 316, 317-18 (1969) (explaining that the Court does not require an adversary proceeding and full disclosure for resolution of every issue raised by electronic surveillance, and that an in camera judgment may take place if the task is not too "complex and the margin of error too great" to completely rely on such a judgment); Giordano v. United States, 394 U.S. 310, 313 (1969) (explaining that a court does not have to hold an adversary hearing to determine the lawfulness of a surveillance); United States v. Belfield, 692 F.2d 141, 149 (D.C. Cir. 1982) (explaining that it has been held numerous times that the legality of electronic, foreign intelligence surveillance should be determined on an in camera, ex parte basis)).
193. *Id.* at 287.
194. *Id.*
195. *See id.*
196. *Id.*
197. *Id.* at 288.
198. *Id.* at 270.
199. *See* U.S. CONST. amend. IV.
200. *See Bin Laden*, 126 F. Supp. 2d at 270-71.

and other parts of the Constitution provide to protect [the defendant's] life and liberty should not be stripped away just because [the defendant] happens to be in another land."[201] While specifically addressing whether to apply the Fifth and Sixth Amendment protections to U.S. citizens abroad, the Supreme Court's use of such expansive language effectively encompasses all of the protections of the Constitution.[202] The Court stated:

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.[203]

In addition, the Court in *United States v. Verdugo-Urquidez*, while rejecting the extension of Fourth Amendment rights to non-U.S. citizens abroad, implies that the ruling would have been different if the defendant had been a U.S. citizen.[204] Chief Justice Rehnquist went to extraordinary lengths in his historical account of the Fourth Amendment to show that its sole purpose was to protect "the people" of the United States against arbitrary action by their own government.[205] "The people," the Court asserts, refers to U.S. citizens and aliens who have developed substantial ties with the United States.[206] As a result, while refusing to extend constitutional protections to non-U.S. citizens with no voluntary ties to the United States, when read together with *Reid*, the Court implicitly grants U.S. citizens abroad Fourth Amendment rights. In short, Judge Sand appears to have correctly anticipated what the Supreme Court would have held in this instance.

The real interest in the noted case, however, is in the extension of the foreign intelligence exception to physical searches and electronic surveillance conducted against U.S. citizens abroad.[207] Judge Sand correctly points out that this issue is unique.[208] Domestic intelligence

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201. Reid v. Covert, 354 U.S. 1, 6 (1957).

202. *See Bin Laden*, 126 F. Supp. 2d at 270-71. *But see Reid*, 354 U.S. at 75 (Harlan, J., concurring in result) (finding that the factual situation determines whether a particular constitutional safeguard applies).

203. *Reid*, 354 U.S. at 5-6.

204. *See* 494 U.S. 259, 270 (1990) ("[*Reid*] decided that United States citizens stationed abroad could invoke the protection of the Fifth and Sixth Amendments. . . . Since respondent is not a United States citizen, he can derive no comfort from the *Reid* holding.").

205. *Id.* at 266.

206. *Id.* at 270-71.

207. *See Bin Laden*, 126 F. Supp. 2d at 277.

208. *See id.* (noting that no courts have addressed the application of the foreign intelligence exception to U.S. citizens overseas).

gathering is controlled by *Keith*[209] and foreign intelligence gathering conducted within the United States is controlled by FISA.[210] Placing restrictions on the U.S. government's power abroad, however, has purposely been avoided by both the judiciary[211] and legislature,[212] that is, unless a U.S. citizen is involved.[213] Judge Sand, however, does follow the current trend in the case law. *Clay*, *Brown*, *Butenko*, and *Buck* all refused to limit the prerogative granted to the President in the exercise of his foreign affairs authority.[214] Furthermore, even the *Zweibon* court, which believed that warrantless surveillance was in principal unconstitutional, refused to curtail the President's autonomy in the international setting.[215] As a result, Judge Sand correctly anticipates what other courts would have held in this instance.

While intelligence gathering conducted abroad against a non-U.S. citizen correctly has no constitutional restrictions, the President's Article II authority runs headlong into the Bill of Rights when a U.S. citizen is the subject of intelligence gathering efforts. The gap between the President's constitutional authority and real authority is enormous.[216] The Constitution is not so much a blueprint for government as a framework for "the people" to discuss mutual concerns.[217] As the nation has lurched from crisis to crisis, the skeleton of government created by the Framers has evolved in such a way that powers originally reserved to the people or the states have been conferred upon the federal government.[218] The noted case simply continues this drift. Judge Sand's holding essentially allows the President to search a citizen's residence *at the President's discretion*, the precise evil the Framers intended to prevent by adopting the Fourth Amendment.[219] The fact that the citizen is abroad is irrelevant because

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209. *Keith*, 407 U.S. 297, 321 (1972).

210. *See supra* note 74.

211. *See Keith*, 407 U.S. at 321-22 (refusing to give an opinion regarding intelligence gathering targeting foreign powers).

212. *See supra* notes 63 and 74.

213. *See* Reid v. Covert, 354 U.S. 1, 5 (1957) (rejecting the proposition that when the U.S. government acts against U.S. citizens overseas it can do so free of the Bill of Rights).

214. *See* United States v. Buck, 548 F.2d 871, 875 (9th Cir. 1977); United States v. Butenko, 494 F.2d 593, 605 (3d Cir. 1974); United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973); United States v. Clay, 430 F.2d 165, 171 (5th Cir. 1970), *rev'd on other grounds*, Clay v. United States, 403 U.S. 698 (1971).

215. Zweibon v. Mitchell, 516 F.2d 594, 614 (D.C. Cir. 1975).

216. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

217. *Id.*

218. *See id.*

219. *See Keith*, 407 U.S. 297, 313 (1972).

the *Reid* court specifically held that a citizen's rights do not end at the U.S. border.[220]

The *Truong* test[221] is no safeguard to arbitrary Presidential action because the "primarily for intelligence purposes" standard is open to numerous interpretations; furthermore, such a determination is made after the fact.[222] Additionally, the history of the U.S. government is replete with examples of arbitrary governmental action carried out in the name of "national security," a twin brother to foreign intelligence gathering.[223] The Framer's placement of a neutral arbitrator between the government and its citizens for purposes of searches was intentional.[224] History taught them that an unchecked executive was willing to violate even basic privacy rights in the search for incriminating evidence.[225] The better rule is to accept a certain amount of inconvenience as the price paid for liberty.[226] As even Judge Sand recognized in his opinion, it would be ironic if in defending the nation we subvert one of the liberties that makes the nation worth defending.[227]

Another point of interest in the noted case is the refusal of the court to distinguish between electronic surveillance and physical searches.[228] Notwithstanding the *Truong* decision,[229] case law appeared to be making this distinction.[230] However, this distinction is erroneous in light of *Katz*, which held that the Fourth Amendment protects "people," not "places."[231]

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220. Reid v. Covert, 354 U.S. 1, 5 (1957) (stating that physical entry is the chief evil against which the language of the Fourth Amendment is directed).

221. *See* United States v. Truong, 629 F.2d 908, 915 (4th Cir. 1980).

222. United States v. Bin Laden, 126 F. Supp. 2d 264, 288 (S.D.N.Y. 2000) (noting that while a law enforcement agent [FBI Agent Coleman] was present during the search, in a law enforcement capacity, the search was still considered primarily for intelligence gathering purposes).

223. United States v. Ehrlichman, 376 F. Supp. 29, 31-32 (D.D.C. 1974).

224. *See Keith*, 407 U.S. 297, 316-17 (1972).

225. *See id.* at 317.

226. *See Keith*, 407 U.S. at 321 (stating that some inconveniences were justified in a free society to protect constitutional values).

227. *See Bin Laden*, 126 F. Supp. 2d at 273 (citing United States v. Robel, 389 U.S. 258, 264 (1967)).

228. *Id.* at 285.

229. *See* United States v. Truong, 629 F.2d 908, 917 (4th Cir. 1980).

230. *See* United States v. Butenko, 494 F.2d 593, 605 (3d Cir. 1974) (finding a foreign intelligence exception to the warrant requirement for electronic surveillance); United States v. Clay, 430 F.2d 165, 171 (5th Cir. 1970), *rev'd on other grounds*, Clay v. United States, 403 U.S. 698 (1971) (finding a foreign intelligence exception to the warrant requirement for electronic surveillance); United States v. Buck, 548 F.2d 871, 875 (9th Cir. 1977) (finding a foreign intelligence exception to the warrant requirement for electronic surveillance); United States v. Ehrlichman, 376 F. Supp. 29, 33 (D.D.C. 1974) (finding a foreign intelligence exception does not exist for physical searches).

231. Katz v. United States, 389 U.S. 347, 351 (1967).

Judge Sand correctly mends this error in holding that the level of intrusiveness is relatively similar and therefore both electronic surveillance and physical searches should be treated equally.[232]

V. CONCLUSION

Judge Sand's extension of the foreign intelligence exception to situations abroad involving U.S. citizens is better appreciated in light of the particular circumstances surrounding the noted case.[233] The defendant is, after all, an active member of an organization that issued a directive stating, "Muslims should kill Americans – including civilians – anywhere in the world where they can be found."[234] Furthermore, the evidence obtained from the surveillance and subsequent search showed that the defendant was complicit in murdering U.S. soldiers attempting to deliver food to starving Somalians and assisted in bombing American personnel and their host country national support staff in U.S. embassies in Kenya and Tanzania.[235] Excluding the evidence obtained from the surveillance and subsequent search would have taken Herculean amounts of courage. The legal justification to find the evidence admissible took equivalent amounts of judicial scrutiny. In this regard, Justice Brandeis' words of caution bear repeating:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning but without understanding.[236]

Daniel Angel*

232. *See* United States v. Bin Laden, 126 F. Supp. 2d 264, 285 (S.D.N.Y. 2000).
233. *See* United States v. Bin Laden, 92 F. Supp. 2d 225, 229-31 (S.D.N.Y. 2000).
234. *Id.* at 230 (citations omitted).
235. *See id.* at 230-31.
236. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

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