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ALL ENEMIES, FOREIGN AND DOMESTIC: ERASING THE DISTINCTION BETWEEN FOREIGN AND DOMESTIC INTELLIGENCE GATHERING UNDER THE FOURTH AMENDMENT

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INTRODUCTION

Imagine two scenarios. In the first, an American citizen with a connection to al Qaeda conspires with his cohorts, also American citizens, to attack the United States using biological warfare agents. He surveils potential sites for the attack—a high-rise tower, an athletic stadium, a government facility—and acquires some of the materials needed to carry out the attack. Meanwhile, his coconspirators are busy in their makeshift lab concocting the biological agent to be used in the attack. The members of the group communicate with each other and with their financial and ideological backers overseas via cell phone, email, and in person. They live in an American city, biding their time as they wait for their superiors to give them the final go-ahead.

The second scenario is identical to the first, except that no overseas superiors direct and finance the operation. Instead, our terrorist cell is out on its own, unconnected to—though ideologically compatible with—al Qaeda. Even without its master in a foreign land, the group has the resources necessary to carry out the attack. In effect, the threat posed in both scenarios is identical.[1]

Despite the indistinguishable threats posed by these two groups, the United States government is substantially more likely to thwart an attack by the group in the first scenario. The President has greater authority to conduct counterterrorism surveillance and intelligence gathering against groups with foreign connections than against groups with no foreign connections. This dichotomy derives from the Supreme Court's decision in the *Keith* case, which held that a warrant is required for a domestic intelligence search to comport with the Fourth Amendment.[2] Thus, unlike investigations into groups with foreign connections, domestic terrorist investigations are subject to far more stringent requirements under the Fourth Amendment.[3]

Over the last few years, much of the scholarship on the Fourth Amendment and intelligence gathering has focused on foreign intelligence gathering within the United States.[4] President Bush's January 2005 au-

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[1] For examples of domestic terrorist threats, see Larry Copeland, *Domestic Terrorism: New Trouble at Home*, USA TODAY, Nov. 15, 2004, at 1A. The British have had a particular problem coping with the threat of domestic Islamist terrorism. *See* James Kirchick, *Fatal Flaw: Britain and Islamic Extremism*, NEW REPUBLIC ONLINE, June 21, 2006, https://ssl.tnr.com/p/docsub.mhtml?i=w060619&s=kirchick062106.

[2] United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 320 (1972).

[3] See *infra* notes 57–75 and accompanying text for a more thorough discussion of *Keith*.

[4] *See, e.g.*, Viet D. Dinh & Wendy J. Keefer, *FISA and the Patriot Act: A Look Back and a Look Forward*, 35 GEO. L.J. ANN. REV. CRIM. PROC. iii (2006); Laura K. Donohue, *Anglo-American Privacy and Surveillance*, 96 J. CRIM. L. & CRIMINOLOGY 1059 (2006); Jason A. Gonzalez, *Constitutional Aspects of Foreign Affairs: How the War on Terror Has Changed the Intelligence Gathering Paradigm*, 51 NAVAL L. REV. 289 (2005); David S. Jonas, *The Foreign Intelligence Surveillance Act Through the Lens of the 9/11 Commission Report: The Wisdom of the Patriot Act Amendments and the Decision of the*

thorization of warrantless electronic surveillance of al Qaeda-related communications with overseas connections has generated a wealth of commentary, most of it analyzing whether such conduct violates the Foreign Intelligence Surveillance Act (FISA),[5] or whether Congress can constitutionally limit the President's power to conduct foreign intelligence surveillance within the United States.[6] This Comment eschews the separation of powers questions that dominate these analyses. Instead, it attempts to fill a gap in the scholarship by focusing on purely domestic intelligence gathering that implicates the Fourth Amendment.

This Comment challenges the assertion made by many commentators that warrants, whether for domestic or foreign intelligence gathering in the United States, should be required because they provide a check on executive discretion. This Comment argues that warrants provide only marginal privacy-protection benefits while imposing real costs on domestic intelligence gathering—defined as intelligence gathering designed to thwart threats with no foreign connections. The Fourth Amendment's reasonableness touchstone should supplant the focus the Supreme Court has placed on warrants and probable cause in determining compliance with the Fourth Amendment in the domestic intelligence-gathering context. Reasonableness inherently involves the weighing of various interests on both sides of an issue and can therefore take into account the waxing and waning of threats posed against the United States.[7] Thus, an intrusive search designed to prevent a terrorist attack might be reasonable, but the same search using the same means solely to investigate a crime that has already been committed might be unreasonable.

By straight-jacketing itself into a warrant and probable cause analytical framework, the Court forces itself to find exception after exception when such a framework proves unworkable,[8] due to either the needs of the gov-

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Foreign Intelligence Surveillance Court of Review, 27 N.C. CENT. L.J. 95 (2005); Daniel V. Ward, Note, *Confidential Informants in National Security Investigations*, 47 B.C. L. REV. 627 (2006).

[5] Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C.A. §§1801–11 (2003 & Supp. V 2005)).

[6] *See, e.g.*, David Alan Jordan, *Decrypting the Fourth Amendment: Warrantless NSA Surveillance and the Enhanced Expectation of Privacy Provided by Encrypted Voice Over Internet Protocol*, 47 B.C. L. REV. 505 (2006); John Cary Sims, *What NSA is Doing . . . and Why It's Illegal*, 33 HASTINGS CONST. L.Q. 105 (2006); Katherine Wong, Recent Development, *The NSA Terrorist Surveillance Program*, 43 HARV. J. ON LEGIS. 517 (2006).

[7] *See generally* William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2142–60 (2002) (reviewing the history of the Fourth Amendment and arguing that its strictures have been relaxed in periods where crime has increased).

[8] *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994) (sarcastically arguing that under Supreme Court precedent interpreting the Fourth Amendment, "[w]arrants are not required—unless they are" and "[a]ll searches and seizures must be grounded in probable cause—but not on Tuesdays").

ernment or the nature of the particular search.[9] Such exceptions to the warrant requirement are understandable because a warrant presumption can, in many instances, be an effective way to enforce the Fourth Amendment's commands. However, given that in the domestic intelligence context, warrants are insufficient to protect Fourth Amendment interests and that the probable cause requirement for all searches makes effective intelligence gathering difficult,[10] the Court should extend an exception to the warrant requirement for domestic intelligence gathering.

Commentators advance many rationales to justify the warrant requirement in general, several of which this Comment addresses in Part II. However, it should be noted at the outset that the warrant application process conceivably could be the only review of intelligence activities by courts. Because counterterrorism officers must search widely to gather information on latent threats, a significant amount of the information gathered will ultimately be unrelated to any terrorist activity.[11] Thus, much of the information gathered through clandestine intelligence operations will not be used in criminal prosecutions, and these intelligence activities will never come to light. One could therefore assert that the warrant requirement is necessary to provide a judicial check on the executive's intelligence-gathering prerogative.[12] This Comment rejects this argument for two reasons. First, where intelligence officers' main concern is not preserving evidence for a future criminal prosecution but instead uncovering latent plans for a terrorist attack so that it can be prevented, the incentive to obtain a warrant—even where one is required—is greatly diminished because those officers know they are unlikely to ever need to justify the search before a court. Thus, the warrant requirement itself may be inadequate to ensure that a court reviews the domestic intelligence activities of the executive branch. President Bush's authorization of domestic wiretapping in violation of FISA[13] underscores this point. Second, insofar as a search is likely to come to light—whether through leaks to the news media, congressional oversight, or a criminal prosecution—the courts will then be available to review the intelligence-gathering operations in question. An intelligence officer will

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[9] Thus, a "special needs" search is justified both because it furthers a government need other than law enforcement, and because the nature of many of these searches ensures that they will not be used to abuse Fourth Amendment interests. *See infra* notes 39–43 and accompanying text.

[10] *Cf.* RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 6 (2006) ("Rooting out an invisible enemy in our midst might be fatally inhibited if we felt constrained to strict observance of civil liberties designed in and for eras in which the only serious internal threat (apart from spies) came from common criminals.").

[11] *See infra* notes 95–96 and accompanying text.

[12] *See* United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 325 (1972) (Douglas, J., concurring) (arguing that, because intelligence activities will frequently remain a secret, a warrant should be required; otherwise "the federal intelligence machine would literally enjoy unchecked discretion").

[13] *See generally* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

likely not know for sure whether she will need to justify a search before a court at some point in the future. Even if a warrant is not required, therefore, a wise officer will take steps to ensure that the search is reasonable, so as to ensure favorable judicial review at a later point. Thus, where a search is almost certain never to come to light (say, because the government has no intention of using the information in a criminal prosecution, but instead to further ongoing military operations), an officer has little incentive to seek a warrant, making the warrant requirement impotent. But because there is some likelihood that the search will be subject to judicial review, an officer likely will take steps to ensure the reasonableness of that search. Thus, this Comment argues that the debate over whether or not warrants should be required actually devolves into a debate over whether before-the-fact review is inherently better than after-the-fact review in the intelligence-gathering context. As noted more fully in Part II, warrants offer little benefit vis-à-vis after-the-fact review.

Furthermore, warrants impose real costs on intelligence gathering. The warrant's probable cause requirement stifles many legitimate intelligence-gathering activities that are vital to uncovering the plans of covert terrorist agents,[14] and the warrant application process itself can deter legitimate searches.[15] While commentators advance legitimate policy concerns to justify the warrant requirement,[16] this Comment argues that other measures can adequately address these concerns without imposing the costs of the warrant process on intelligence gathering.[17]

Given the warrant requirement's burden on counterterrorism and the availability of adequate alternatives to the warrant, the Court should break with its precedent in the domestic intelligence context—where the stakes are high—and adopt a rule that when the government gathers domestic intelligence to thwart a future attack, its conduct is governed solely by the reasonableness standard and only reviewed by courts after-the-fact. Although such an approach would require repudiating *Keith*, it can fit comfortably within the Court's current Fourth Amendment jurisprudence as an extension of either the "special needs" or foreign intelligence exceptions to the warrant requirement.[18] This Comment thus does not argue for a radical shift in the Court's Fourth Amendment case law.

Before proceeding further, it is important to note what this Comment does not do. Although this Comment's discussion of the efficacy of warrants and its ultimate finding that warrants should not be required for domestic intelligence surveillance could be used to justify foreign intelligence

[14] *See* Ward, *supra* note 4, at 647 ("[T]he interest in protecting national security by allowing the surveillance favors a lower quantum of proof for securing the ability to conduct surveillance . . . .").

[15] *See infra* notes 115–23 and accompanying text.

[16] *See infra* Part II.

[17] *See infra* Part III.

[18] *See infra* notes 39–55 and accompanying text.

gathering—to buttress the legality of the National Security Agency (NSA) domestic spying program authorized by President Bush after 9/11—this Comment in fact cuts the other way. While the rationales advanced in this piece support finding that the NSA program does not violate the Fourth Amendment, this Comment recognizes that Congress has the authority to regulate the intelligence-gathering apparatus of the executive branch;[19] thus, the NSA program was illegal at its outset for the simple reason that it violated FISA.

In arguing that the warrant requirement is an ineffective way to police intelligence activities and that it stifles legitimate intelligence gathering, this Comment proceeds in three parts. Part I discusses the history of the Warrant Clause of the Fourth Amendment, the case law surrounding the imposition of the warrant supported by probable cause "presumption," the exceptions to this presumption, and the maintenance of the warrant requirement for domestic intelligence searches. In particular, it focuses on the Court's atextual—although somewhat justified—imposition of the warrant requirement in the context of criminal investigations, and its unwise extension of that requirement to the national security arena. Part II analyzes several of the most prominent rationales for the warrant requirement in general, and specifically in the national security context. It argues that none of these rationales are sufficient to justify the warrant requirement for domestic intelligence searches. Finally, Part III argues that solutions other than the warrant requirement—some judicial, some legislative—can better protect Fourth Amendment interests. This Part discusses a few proposals that, due to the warrant presumption, have not received the attention they deserve.

Ultimately, this Comment concludes that the Supreme Court should discard the warrant requirement for searches conducted in order to uncover information to prevent future domestic terrorist attacks. None of the usual arguments for why a warrant should be required justifies the warrant requirement in the domestic intelligence-gathering context. Moreover, there are a number of other legislative and judicial means that would adequately protect the Fourth Amendment's values. In light of these alternatives, the warrant requirement is unnecessary and impedes the government's access to the information it needs to prevent terrorist attacks.

I. THE EVOLUTION OF THE WARRANT AND PROBABLE CAUSE REQUIREMENTS

The text of the Fourth Amendment does not by its terms require the government to obtain a warrant before conducting a search[20]:

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[19] *See infra* Part III (arguing for specific congressional regulations of the intelligence-gathering activities of the executive branch).

[20] *See* Amar, *supra* note 8, at 762 ("[W]arrants are not required, but any warrant that does issue is per se unreasonable if not supported by probable cause . . . ."); *cf.* Richard A. Posner, *Rethinking the*

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[21]

If the Framers intended to require warrants—even if only presumptively—they could have drafted the Amendment to make that command clear. Instead, they opted for language that limits the availability of warrants[22]: "[N]o Warrants shall issue . . . ." This reading suggests that the Fourth Amendment as understood at the time of its drafting disfavors the use of warrants.[23] Without the warrant requirement, the touchstone of the Fourth Amendment becomes a search or seizure's "reasonableness," which can be assessed by balancing the intrusiveness of the search against the societal interest in investigating or preventing the particular crime or threat at issue.[24]

The historical understanding of warrants at the time of the Framing supports the view that the Fourth Amendment was designed to limit the use

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Fourth Amendment, 1981 SUP. CT. REV. 49, 51 (noting that the Warrant Clause merely "sets forth the requirements that must be satisfied for possession of the warrant to constitute a defense to a tort action").

[21] U.S. CONST. amend. IV.

[22] *See* Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1486 (1985) ("[T]he purpose of the requirement that warrants be based upon probable cause and specify the 'place to be searched, and the persons or things to be seized' was designed to *limit* the use of warrants, which had been widely abused, and not to imply that a warrant was a fundamental criterion of a reasonable search, as the Court now maintains."); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 200 (1993) (noting the view of many members of the Burger and Rehnquist Courts that "the framers of the Fourth Amendment viewed judicial warrants as an evil and sought to limit their use").

[23] *But see* Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 822 nn.16–17 (1994) (citing sources arguing that the Fourth Amendment creates a warrant presumption); David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 SAN DIEGO L. REV. 227, 230 (2005) (arguing that the Fourth Amendment's history suggests it applies only to house searches and requires warrants for those searches). Although the text of the Amendment seems most naturally read to limit the use of warrants, Steiker and Steinberg show that there is historical evidence that at least some individuals at the Founding thought warrants should be required for at least certain searches. Steiker, *supra*, at 822 nn.16–17; Steinberg, *supra*, at 230. Even if this is true, however, it does not undermine the thesis advanced herein. None of these scholars argue that warrants are required for every search. As such, even they may concede that the warrant presumption yields to a heightened government interest, as this Comment argues.

[24] *See* California v. Acevedo, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) ("The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are 'unreasonable.'"); *In re* Sealed Case, 310 F.3d 717, 742 (Foreign Int. Surv. Ct. Rev. 2002) (arguing that because the warrant requirement does not apply to foreign intelligence gathering, review of such activity merely seeks to ascertain its reasonableness by balancing the need of the government for foreign intelligence against the protected privacy interests of those who are searched); Alissa C. Wetzel, Comment, Georgia v. Randolph*: A Jealously Guarded Exception—Consent and the Fourth Amendment*, 41 VAL. U. L. REV. 499, 499 (2006) ("The history of Fourth Amendment jurisprudence traces the struggle of successive courts to define 'reasonableness,' and balance the competing needs of personal privacy and police efficiency." (footnotes omitted)).

of warrants, not to require them for all searches.[25] In the pre-revolutionary colonies, a warrant primarily served to insulate a government official from civil liability from a lawsuit alleging trespass, which was the main method used to punish and deter such a search.[26] Thus, it was not the warrant that determined the legality of the search, which could have been perfectly acceptable without one. The warrant merely provided a defense at a later civil action. "Warrants then, were friends of the searcher, not the searched."[27]

The Supreme Court, however, has disclaimed this historical rationale for the warrant. Instead, the Court has exalted it as

> an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly over-zealous executive officers" who are a party of any system of law enforcement.[28]

Thus, the Court arguably has flipped the Fourth Amendment on its head by viewing warrants as constitutionally necessary for most searches, when in fact the Amendment was intended to limit their use.[29] Indeed, the Court has incorporated the Warrant Clause into its definition of an unreasonable search or seizure: "the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause."[30] A search, therefore, is often reasonable only if it is conducted pursuant to a warrant supported by probable cause and authorized by a neutral magistrate.

However, the sheer impracticality of requiring warrants in certain situations led the Court to create a slew of exceptions to this requirement.[31] As the *Katz* Court put it: "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[32] Perhaps the most well known of these

[25] *See* Coolidge v. New Hampshire, 403 U.S. 443, 492 (1971) (Harlan, J., concurring) (stating that the Court "stood the [F]ourth [A]mendment on its head" by requiring a warrant (quoting TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 23–24 (1969))); Amar, *supra* note 8, at 762 (arguing that never requiring a warrant "squares more snugly with the Amendment's specific words, harmonizes better with its historic context, and makes considerably more common sense").

[26] *See* Amar, *supra* note 8, at 774 ("[A] lawful warrant would provide . . . an absolute defense in any subsequent trespass suit."); Posner, *supra* note 20, at 50–51 ("Th[e rights protected by the Fourth Amendment] appear[] to include . . . property interests of the sort traditionally protected by tort actions for conversion and for trespass to real and personal property . . . .").

[27] Amar, *supra* note 8, at 774.

[28] *Coolidge*, 403 U.S. at 481 (internal citations omitted).

[29] United States v. Grubbs, 547 U.S. 90, 99 (2006) ("The Constitution protects property owners . . . by interposing, *ex ante*, the 'deliberate, impartial judgment of a judicial officer . . . between the citizen and the police.'" (quoting Wong Sun v. United States, 371 U.S. 471, 481–82 (1963))).

[30] United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 315 (1972).

[31] *See* RONALD JAY ALLEN ET AL., CRIMINAL PROCEDURE: INVESTIGATION AND RIGHT TO COUNSEL 462–552 (2005) (describing various exceptions to the warrant requirement).

[32] Katz v. United States, 389 U.S. 347, 357 (1967).

exceptions is for "exigent circumstances."[33] Under this exception, a warrantless search is constitutional when obtaining a warrant would be impractical due to an emergency of some sort, such as the need to enter a dwelling to render aid,[34] to arrest a murderer and search for other accomplices or victims,[35] or to preserve evidence of a crime.[36] The Court has created so many exceptions to the warrant requirement[37] that one commentator has asked whether in practice warrants are now the exception rather than the rule.[38]

The Court has also frequently cast aside the traditional warrant requirement for searches or seizures that are conducted for reasons other than criminal law enforcement—the "special needs" exception.[39] That is, the Court has allowed warrantless searches on less than probable cause when they "are designed to serve the government's 'special needs, beyond the normal need for law enforcement.'"[40] Under this exception, the Court has approved a checkpoint to query motorists about a hit-and-run accident[41] and

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[33] *See* ALLEN ET AL., *supra* note 31, at 463–79.

[34] Mincey v. Arizona, 437 U.S. 385, 392 (1978); *see also* United States v. Chipps, 410 F.3d 438, 442 (8th Cir. 2005).

[35] *Mincey*, 437 U.S. at 392.

[36] Illinois v. McArthur, 531 U.S. 326, 331–32 (2001). *But see* Welsh v. Wisconsin, 466 U.S. 740, 753–54 (1984) (holding that preventing the destruction of evidence should rarely justify the exigent circumstances exception when evidence was sought for a petty offense and was located in suspect's home).

[37] These exceptions include the following: the automobile exception: California v. Acevedo, 500 U.S. 565 (1991); United States v. Ross, 456 U.S. 798 (1982); Robbins v. California, 453 U.S. 420 (1981); Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977); the plain view exception: Horton v. California, 496 U.S. 128 (1990); the search incident to arrest exception: Thornton v. United States, 541 U.S. 615 (2004); United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752 (1969); the legislative and grand jury subpoena exception: Okla. Press Publ'g Co. v. Walling, 327 U.S. 186 (1946); the consent exception: Georgia v. Randolph, 547 U.S. 103 (2006); Illinois v. Rodriguez, 497 U.S. 177 (1990); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); the "special needs" exception: Illinois v. Lidster, 540 U.S. 419 (2004); Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995). Note that there are even exceptions to the exceptions. *See Welsh*, 466 U.S. at 750 (creating a "minor offense" exception to the exigent circumstance exception for the preservation of evidence when the evidence is in the suspect's home).

[38] *See* ALLEN ET AL., *supra* note 31, at 463 ("Cumulatively, the exceptions may be the rule—and warrants the real exception.").

[39] *See, e.g.*, Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) ("[The Court has] permitted exceptions [to the warrant and probable cause requirements] when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring))); Camara v. Mun. Court, 387 U.S. 523, 534 (1967) (holding that searches for municipal code violations do not require probable cause that a particular violation has occurred, but instead are governed by the reasonableness standard, though still requiring judicial approval of such searches); See v. City of Seattle, 387 U.S. 541, 545 (1967) (same); *cf.* City of Indianapolis v. Edmond, 531 U.S. 32, 41 (2000) (noting that the special needs exception to the warrant and probable cause requirements does not apply to situations where a program's "primary purpose [is] to detect evidence of ordinary criminal wrongdoing").

[40] *In re* Sealed Case, 310 F.3d 717, 745 (Foreign Int. Surv. Ct. Rev. 2002) (quoting *Vernonia*, 515 U.S. at 653).

[41] *Lidster*, 540 U.S. at 426–28.

allowed a public school to test its student-athletes for drugs at random.[42] Upon a showing of a special government need, the Court evaluates the constitutionality of a search merely "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests,"[43] i.e., by determining the search's reasonableness.

The special needs exception has also been used to justify warrantless intelligence gathering in the United States. In 2002, the Foreign Intelligence Surveillance Court of Review (FISCR)[44] heard an appeal by the government from the FISA court's imposition of certain restrictions on the government's foreign intelligence surveillance operation.[45] Amici, arguing in opposition to the government,[46] claimed that FISA warrants are not warrants within the meaning of the Fourth Amendment and thus any search conducted under such court authorization for the primary purpose of criminal prosecution is per se unreasonable.[47]

The FISCR sided with the government, concluding that "the question [is] whether FISA . . . is a reasonable response based on a balance of the legitimate need of the government for foreign intelligence information to protect against national security threats with the protected rights of citizens."[48] Under this framework, the court addressed the restrictions imposed by the FISA court, which were designed to further the proverbial "wall" between intelligence and law enforcement operations and personnel.[49] Amici argued that the wall was necessary to effectuate the Fourth Amendment's traditional warrant requirement for foreign intelligence searches conducted within the United States where the government's primary purpose is pursuing criminal prosecution.[50] The FISCR disagreed, holding that the Fourth Amendment does not require warrants for searches where a significant purpose of the search is foreign intelligence gathering.[51]

The FISCR's holding relied in part on the special needs exception. While noting that the special needs exception would only apply where the government has a purpose beyond criminal law enforcement, the FISCR

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[42] *Vernonia*, 515 U.S. at 664–65.

[43] Delaware v. Prouse, 440 U.S. 648, 654 (1979) (quoted in *Vernonia*, 515 U.S. at 652–53).

[44] The Foreign Intelligence Surveillance Court of Review was established by Congress to review decisions of the Foreign Intelligence Surveillance Court. *See* 50 U.S.C. § 1803(b) (2000). The only case ever heard by the FISCR is *In re Sealed Case*, 310 F.3d 717.

[45] *In re* Sealed Case, 310 F.3d at 719.

[46] Because proceedings before both the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review are ex parte—only the government participates—the court invited the American Civil Liberties Union and the National Association of Criminal Defense Lawyers to present the opposing side as amici curiae. *Id.*

[47] *Id.* at 737.

[48] *Id.* at 742 (citation omitted).

[49] *Id.* at 721.

[50] *See id.* at 722.

[51] *See id.* at 745–46.

held that the proper method of applying the exception is to analyze the programmatic purpose of FISA-related activities, not the purpose for which each individual search is undertaken.[52] Under this view, the goal of building a case for criminal prosecution can be the purpose of an individual surveillance activity, so long as such surveillance is part of the broader net under which FISA activities fall, namely the gathering of foreign intelligence. Thus, it is "[t]he nature of the 'emergency,' which is simply another word for threat, [that] takes the matter out of the realm of ordinary crime control,"[53] even though in almost all instances the threat itself may constitute a crime.[54] Ultimately, the court applied a balancing test and concluded that "FISA as amended is constitutional because the surveillances it authorizes are reasonable."[55]

Despite the unanimity of judicial opinion that a warrant is not required for foreign intelligence searches,[56] the Supreme Court has not extended the warrant exception to the domestic intelligence arena. Instead, its 1972 decision in the *Keith* case remains the controlling authority governing domestic intelligence searches.[57] In *Keith*, the Attorney General authorized warrantless electronic surveillance of three individuals who the government believed were involved in a conspiracy to blow up government property and who were ultimately indicted for such activity.[58] The defendants moved to suppress the evidence obtained through this warrantless surveillance, and the district court granted their motion.[59] Before the Supreme Court, the government argued that the wiretaps were required "to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Gov-

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[52] *Id.* at 745 ("But by 'purpose' the [Supreme] Court makes clear it was referring not to a subjective intent, which is not relevant in ordinary Fourth Amendment probable cause analysis, but rather to a programmatic purpose.").

[53] *Id.* at 746. The finding that a foreign intelligence search does not require a warrant did not rest solely upon the special needs exception. The President's constitutional authority to conduct foreign affairs and to protect the nation from foreign attack also informed the court's decision. *Id.* at 742. The court "assum[ed]" that the President had the constitutional authority to conduct warrantless foreign intelligence surveillance and then held that, because the FISA orders approached a classic warrant in substance, FISA operated to "amplify" the President's inherent constitutional authority. *Id.* at 742, 746.

[54] *Cf. id.* at 724–25 ("Obviously, the use of 'foreign intelligence information' as evidence in a criminal trial is one way the Government can lawfully protect against clandestine intelligence activities, sabotage, and international terrorism." (emphasis omitted) (quoting H.R. REP. NO. 95-1283, at 49 (1978))).

[55] *Id.* at 746.

[56] *See id.* at 742 (noting that "all . . . courts to have decided the issue" have found "that the President [has] inherent authority to conduct warrantless searches to obtain foreign intelligence information").

[57] United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297 (1972).

[58] *Id.* at 299–301.

[59] *Id.* at 301.

ernment,"[60] and that because of this, the surveillance was a "reasonable exercise of the President's power . . . to protect the national security."[61]

The Court held that the searches at issue were unconstitutional because they were conducted without a warrant.[62] The Court reasoned that the ultimate issue was "the 'reasonableness' of the search . . . in question, and the way in which that 'reasonableness' derives content and meaning through reference to the warrant clause."[63] With this warrant presumption as the backdrop, the Court turned to the President's constitutional authority. Justice Powell, writing for the Court, found that "[i]mplicit in [the President's duty to preserve, protect and defend the Constitution of the United States] is the power to protect our Government against those who would subvert or overthrow it by unlawful means,"[64] and that electronic surveillance could be a vital tool in such an endeavor.[65] Powell also noted that numerous Presidents since Harry Truman had sanctioned similar surveillance.[66]

Although acknowledging the seriousness of domestic threats and the need of the government to have the means necessary to combat them, Powell observed that there is, "understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens."[67] Powell also pointed out that national security surveillance can implicate freedom of expression protected by the First Amendment and may thus require greater scrutiny under the Fourth Amendment[68]: "History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies."[69]

With these competing interests in mind, Powell concluded that the issues were "whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant before such surveillance is undertaken"[70] and "whether a warrant requirement would unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it."[71] The Court bluntly found that the Fourth Amendment interests could not be adequately protected without warrants because the Executive may improperly give greater weight to its need to

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[60] *Id.* at 300.

[61] *Id.* at 301.

[62] *Id.* at 317.

[63] *Id.* at 309–10 (citing Coolidge v. New Hampshire, 403 U.S. 443, 473–84 (1971)).

[64] *Id.* at 310.

[65] *Id.* ("[T]he President . . . may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government.").

[66] *Id.* at 310–11 & n.10.

[67] *Id.* at 312.

[68] *Id.* at 313.

[69] *Id.* at 314.

[70] *Id.* at 315.

[71] *Id.*

gather incriminating information than to the privacy interests of citizens.[72] The "inherent vagueness of the domestic security concept,"[73] the breadth of the reach of intelligence gathering, and its potential to stifle political dissent, Powell explained, all counseled against an exception to the warrant requirement for domestic intelligence gathering.[74]

Despite its sweeping rhetoric attesting to the need for full Fourth Amendment protections in the domestic security context, the *Keith* Court opened the door to a relaxed constitutional requirement. In particular, the Court found that because the "exact targets . . . may be more difficult to identify"[75] in domestic surveillance than in ordinary crime control, Congress could enact legislation that placed different controls on the domestic intelligence-gathering machinery than on normal criminal investigations, subject only to the Fourth Amendment's reasonableness requirement. Congress, however, has not taken the Court up on its offer.

The Court's Fourth Amendment jurisprudence represents a general desire to subject executive action to ex ante judicial review where practicable. Although the text and history of the Fourth Amendment seem to cut against such a view, warrants can be effective at enforcing the Fourth Amendment while imposing—at least in some instances—only minor costs on the government. However, as the special needs and foreign intelligence cases demonstrate, the policy preference for warrants can yield to the legitimate needs of government, particularly where adequate safeguards other than warrants exist to protect the Fourth Amendment.[76] Thus, to understand whether the warrant requirement makes sense in the domestic intelligence-gathering context, the specific policy rationales for warrants must be scrutinized, and then weighed against the government's heightened need for information to combat domestic terrorism. It is to this analysis that the next Part turns.

II. THE POLICY RATIONALES FOR WARRANTS AND PROBABLE CAUSE IN THE DOMESTIC INTELLIGENCE-GATHERING CONTEXT

The Court has described the warrant supported by probable cause requirement as the heart of the Fourth Amendment.[77] Although the history of

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[72] *Id.* at 317. By characterizing the Executive's interest in domestic intelligence gathering as merely to gather "incriminating evidence," *id.*, Justice Powell trivialized the evil the government seeks to prevent via intelligence gathering against domestic counterterrorism threats by equating it with collecting evidence for an everyday criminal prosecution.

[73] *Id.* at 320.

[74] *Id.*

[75] *Id.* at 322.

[76] *See supra* notes 39–55 and accompanying text.

[77] *See* Sibron v. New York, 392 U.S. 40, 59 (1968) ("No search required to be made under a warrant is valid if the procedure for the issuance of the warrant is inadequate to ensure the sort of neutral contemplation by a magistrate of the grounds for the search and its proposed scope, *which lies at the heart of the Fourth Amendment*." (emphasis added)).

the adoption of the Fourth Amendment suggests that this view distorts the Framers' purpose,[78] many policy rationales support the efficacy of warrants in protecting Fourth Amendment interests. Supporters give various reasons for the warrant requirement, including that warrants: (1) interpose a detached and neutral decisionmaker between the zealous officer and the citizen;[79] (2) prevent overdeterrence of legitimate searches;[80] (3) preclude discrimination against minority groups;[81] (4) ensure that political dissent is not stifled by overreaching or abusive government agents;[82] and (5) protect against police perjury and judicial bias in ex post review.[83] This Part argues that none of these rationales justifies the warrant requirement in domestic intelligence searches, particularly in light of the substantive burdens the probable cause standard and the costly warrant process place on intelligence gathering. Although the harms identified by these rationales should be prevented, the political process or after-the-fact review can adequately address these harms without seriously impeding intelligence gathering. The remainder of this Part addresses each of these rationales that support the warrant requirement more fully. It ultimately concludes that none of these justifications support a warrant requirement in the domestic intelligence-gathering context.

A. Warrants Provide a Neutral and Detached Decisionmaker

Perhaps the most common reason given for requiring a warrant for most searches is that the requirement ensures that the passion and overzeal-

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[78] *See supra* notes 20–27 and accompanying text.

[79] *See Keith*, 407 U.S. at 316; William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 890 (1991).

[80] Stuntz, *supra* note 79, at 906–10. *But see* Posner, *supra* note 20, at 54. Judge Posner argues that, because monetary damages can be adjusted according to the severity of the government intrusion, and can distinguish between the criminal's protected and unprotected interests, monetary damages provide the best vehicle for achieving optimal deterrence. *Id.* Excluding the evidence from admission at trial (the usual remedy for a Fourth Amendment violation), on the other hand, cannot be adjusted according to the severity of the Fourth Amendment violation, and because a criminal has no legitimate interest in concealing his crime, the exclusionary rule either "deters too little or too much; only by accident would it deter optimally." *Id.*

[81] *See* Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 816 (1999); *cf.* Steiker, *supra* note 23, at 841 ("[I]n the last half century or so—the same period . . . as the time of the creation of the modern pillars of Fourth Amendment law—the Court's criminal procedure cases have frequently presented some of the most appalling racially discriminatory abuses of police power imaginable.").

[82] *See Keith*, 407 U.S. at 314; *id.* at 327 (Douglas, J., concurring) (arguing that the Fourth Amendment's protections are seriously implicated by domestic security because of "the recurring desire of reigning officials to employ dragnet techniques to intimidate their critics").

[83] Stuntz, *supra* note 79, at 914–15; *see also* ALLEN ET AL., *supra* note 31, at 346 (noting that the lack of credibility of defendants at suppression hearings "creates both the opportunity and the temptation for police perjury"); Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1312–13 (1994) (arguing that police perjury at suppression hearings is a significant problem); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1044 (1996) (arguing that the desire to do "justice" creates a huge incentive for police to lie to justify a search).

ousness of a police officer are checked by a dispassionate judge.[84] However, as one scholar notes, ex ante review by a judge is the exception rather than the rule in Anglo-American jurisprudence.[85] When a person decides to commit a certain act, she does not normally seek the opinion of a judge attesting to the legality of that act before she proceeds; she acts, and then sorts out the legal consequences later.[86] The fact that she knows there will be legal consequences ensures that she acts according to the law. Why the case of warrants should be different is not clear. As such, the real question is not whether review by a judge serves to alleviate the Fourth Amendment costs associated with overzealous intelligence gathering, but whether before-the-fact review does so inherently better than after-the-fact review.[87]

Proponents of the warrant requirement argue that requiring an executive official to receive permission from a judge prior to conducting a search prevents unconstitutional searches.[88] By adding a dispassionate decision-maker to the mix before a search is conducted, the argument goes, warrants ensure that an officer who does not adequately respect a subject's Fourth Amendment interests will be restrained by a judge.[89] However, after-the-fact sanctions such as money damages or criminal prosecution would similarly prevent unconstitutional searches through deterrence.[90] Moreover, because after-the-fact review is adversarial whereas warrant applications are ex parte, such review would better identify unconstitutional searches.[91] In fact, warrants could actually immunize unconstitutional searches because magistrates approve those searches without hearing from the searched person or his attorney regarding why the government may not have sufficient reason to search that person, and because courts later review such decisions deferentially.

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[84] *See supra* note 28 and accompanying text.

[85] Stuntz, *supra* note 79, at 882.

[86] *See id.* at 881.

[87] Again, one typical response to this assertion is that if warrantless intelligence activities remain secret then no court will ever review those activities. However, as noted in the Introduction, where intelligence agents know their activities likely will never come to light, they have little incentive to seek a warrant even if required. *See supra* note 13 and accompanying text.

[88] *See* United States v. Fernandez-Guzman, 577 F.2d 1093, 1097 (7th Cir. 1978) ("[S]earch warrants . . . serve a preventative function against unconstitutional invasion of privacy by police."); Stuntz, *supra* note 79, at 893; R. Bradley Lamberth, Comment, *The Inevitable Discovery Doctrine: Procedural Safeguards to Ensure Inevitability*, 40 BAYLOR L. REV. 129, 138 (1998) ("The [F]ourth [A]mendment warrant requirement prevents unconstitutional violations before they occur by requiring a neutral and detached magistrate to make the probable cause determination.").

[89] *See supra* notes 28–30 and accompanying text.

[90] *See* Posner, *supra* note 20, at 54 (arguing that tort remedies can provide "optimum deterrence" in the Fourth Amendment context); *infra* notes 109–14 and accompanying text; *infra* Part III.C.

[91] *See* Stuntz, *supra* note 79, at 881 ("[A]fter-the-fact review in suppression hearings or damages suits is both adversarial and in-depth, while review of warrant applications by magistrates is ex parte and cursory, so that one would expect that the ex post decisions better protect individuals' interests.").

The marginal benefits gained by the warrant requirement's prevention of the few unconstitutional searches that would not have been deterred by ex post review are not worth the costs of the warrant requirement. First, the warrant requirement is not confined to cases of harassment and inevitably encompasses good faith intelligence-gathering activity, i.e., those searches where an officer is acting upon a reasonable belief that his conduct is legal and that it furthers a legitimate governmental investigation.[92] Under these circumstances, requiring a warrant is both a substantive and a bureaucratic burden. The substantive burden can very well stifle a reasonable search completely: because a warrant can only issue upon probable cause, its requirement expressly bans a search based upon less than probable cause.[93] This is particularly problematic in the counterterrorism context, where the government frequently does not know in advance of gathering intelligence the identity of the terrorists or their plans.[94] Without such knowledge, it is impossible to support a probable cause finding, and therefore it is impossible to constitutionally conduct a search. That is why, when conducting a counterterrorism investigation, the officer must proactively seek the information necessary to identify terrorist activity—frequently with at most reasonable suspicion—in order to adequately perform her job.[95] "[I]ntelligence officers have to cast their net very wide to obtain the information that they need in order to build up a picture of terrorist activities."[96] The warrant requirement's probable cause standard, then, places a significant burden on domestic intelligence gathering—activities that can be as essential to national security as foreign intelligence gathering. Where the stakes are this high, the costs of such a burden should be alleviated at least in part by relaxing to below the probable cause standard the level of suspicion necessary to justify a search.[97] But because the Constitution requires probable cause

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[92] *Cf.* Posner, *supra* note 20, at 59 (arguing that most violations of the Fourth Amendment are not the result of harassment but of overzealous pursuit of the guilty).

[93] *See* Brinegar v. United States, 338 U.S. 160, 175–76 (1949) ("Probable cause exists where 'the facts and circumstances within . . . the officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." (quoting Carroll v. United States, 267 U.S. 132, 162 (1925) (internal punctuation omitted))). This standard is too high as a regulation of intelligence gathering. As noted below, proactive intelligence gathering requires that officers sometimes act without knowledge of criminal activity that would meet this standard. Thus, if applied to all intelligence searches, the traditional probable cause standard would stifle vital intelligence operations.

[94] Robert E. Hunter, Commentary, *Strike a Balance by Weighing Threats*, BALT. SUN, Feb. 5, 2006, at 25A ("In September 2001, no one had a clear sense of the scope or the extent of the threat that al-Qaida [sic] and others posed to the United States.").

[95] *See* U.S. Dep't of Justice, *Legal Authorities Supporting the Activities of the National Security Agency*, 81 IND. L.J. 1374, 1378 (2006) [hereinafter *DOJ Memo*] (quoting President George W. Bush as arguing that in order to "effectively detect enemies hiding in our midst and prevent [al Qaeda] from striking us again . . . we must be able to act fast and to detect conversations" among al Qaeda operatives).

[96] POSNER, *supra* note 10, at 92.

[97] *See supra* note 14.

before a warrant can issue, this necessarily entails eliminating the warrant requirement for domestic intelligence gathering.

Moreover, in those cases where the officer has probable cause, the warrant requirement does not protect the interests of the individual searched;[98] rather, it merely functions as a bureaucratic hurdle. In fact, it could actually hurt the individual searched: if he moves to suppress the evidence at trial or sues for a Fourth Amendment violation, the officer will be armed with a warrant to provide immunity.[99] This immunity could attach even if the judge inadequately reviewed the warrant application or actually colluded with the officer. Although evidence of such improper judicial review of a warrant application could void the warrant,[100] the ex parte nature of warrants, combined with the deferential review afforded a magistrate's warrant decision,[101] might prevent such evidence from coming to light.[102] Contrary to intuition, the warrant requirement may not adequately prevent unconstitutional searches and may actually immunize searches conducted outside the bounds of the Fourth Amendment. Therefore, the warrant requirement's substantial costs on national security far exceed its benefit of occasionally preventing unconstitutional searches.

B. Warrants Prevent Overdeterrence

Civil damages deter abusive searches by imposing costs upon the officers who perform them. If those damages are excessive, however, officers might be too cautious when deciding whether to search, in which case those damages would overdeter searches that are otherwise in society's interest. Warrants protect the officer who searches under the warrant's authority by immunizing the officer from civil liability flowing from a potential civil suit.[103] This conception of warrants comports with their historical use as a

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[98] This explains why the Court traditionally justifies the exclusionary rule, which it applies to government searches even where the officer has probable cause but fails to obtain a warrant, as a deterrent against the abuse of innocent citizens. *See* United States v. Leon, 468 U.S. 897, 906 (1984). Given that in this context, a search would occur when a warrant inevitably issues with probable cause, the warrant requirement does not operate to protect the individual searched. It protects only those individuals who are *not* searched because of lack of probable cause or because of an officer's disinclination to seek a warrant despite having probable cause.

[99] *See supra* note 26 and accompanying text.

[100] *Cf.* POSNER, *supra* note 10, at 101 (noting that a warrant is valid unless procured by fraud).

[101] *See Leon*, 468 U.S. at 967–68 (Stevens, J., concurring in part and dissenting in part) ("[I]n evaluating the existence of probable cause, reviewing courts must give substantial deference to the magistrate's determination. In doubtful cases the warrant should be sustained."); Illinois v. Gates, 462 U.S. 213, 236 (1983) ("[A]fter-the-fact scrutiny by courts of the sufficiency of [a warrant] affidavit should not take the form of *de novo* review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969))).

[102] *See* Stuntz, *supra* note 79, at 893 (arguing that the deference shown to a magistrate's warrant determination means that unconstitutional searches will go largely unreviewed).

[103] *See supra* note 26 and accompanying text.

defense to suits for trespass.[104] Commentators thus argue that warrants actually encourage the government to conduct lawful searches by limiting the government's liability before the search ever occurs.[105] This rationale, however, fails to justify a warrant requirement for domestic intelligence searches for several reasons.

First, if one suspects that the unavailability of warrants would lead risk-averse officers to refrain from conducting even legitimate searches for fear of monetary liability, then allowing, but not requiring, an officer to obtain a warrant solves this problem.[106] If an intelligence officer is unsure of whether he has probable cause to conduct a search, then that officer can seek the blessing of a judge to insulate himself (or, more likely, his employer) from potential liability. Moreover, this Comment argues that an officer should legally be able to search on *less than* probable cause, but the Constitution itself states that warrants will not insulate the officer in that situation because probable cause is a prerequisite to obtaining a warrant.[107] Thus, for those searches where an officer legally could obtain a warrant, the warrant requirement is unnecessary to prevent overdeterrence, and in those cases where an officer could not obtain a warrant because she could not establish probable cause, the warrant requirement completely prohibits what could be an otherwise reasonable search.[108]

A second reason for rejecting the argument that warrants are necessary to prevent overdeterrence of legitimate searches is that suits for damages are unlikely to deter legitimate searches. Underlying the argument that warrants are necessary to prevent overdeterrence of searches is the presumption that the offending officer will bear sufficient costs in a damages suit to deter

[104] *See supra* notes 23–27 and accompanying text (describing the historical purpose of a warrant).

[105] *See* Stuntz, *supra* note 79, at 906–07 (arguing that in the real world—where a judge's later application of the probable cause standard in a damages action is uncertain at the time of a search—warrants induce legal searches by alleviating the ex ante uncertainty regarding a search's constitutionality).

[106] *Cf.* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 895 (1999) (arguing that, vis-à-vis monetary damages, warrants protect against overdeterrence by "inoculating approved searches against damages liability").

[107] *See* U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause . . . .").

[108] One might respond to this point by noting that this Comment earlier argued that warrants do not protect the Fourth Amendment interests adequately because magistrates approve them in an ex parte setting, relying only on the government's evidence. *See supra* note 91 and accompanying text. Thus, warrants might not be as significant a burden on intelligence gathering as this Comment suggests. This Comment does not argue, however, that the probable cause requirement is always vigorously enforced. Instead, it argues that, whether enforced or not, the probable cause requirement is poor policy. If the probable cause requirement is strictly applied, then warrants burden intelligence gathering too much. If it is not enforced—with magistrates approving warrants on some lesser standard or upon a subjective determination of reasonableness—then there is little reason to subject a search to such ex ante review that largely forecloses later challenges to the search. It arguably is better to have a judge review the search later in an adversarial setting, where the subject of the search can defend his interests without being forced to overcome the presumption of reasonableness afforded a warrant.

future lawful searches by other officers.[109] However, the widespread practice of indemnifying officers for liability arising from the performance of their duties removes the cost-bearing burden from the officer, thereby eliminating most of the deterrent effect a potential damages suit would have against that officer personally.[110] Moreover, the Supreme Court's expansion of qualified immunity to officers in certain circumstances means that, frequently, the only cause of action for an unconstitutional search would be against the government agency directly.[111] In either case, deterrence is still present, but it would come via the searching officer's superiors, who would be under political and budgetary pressure to limit the costly practices of their employees. Monetary damages that would burden an intelligence agency's budget would deter some searches, but this is desirable because it would give the agency incentives to promulgate internal policies that would prevent unconstitutional searches without the burden of warrants.[112] Thus, the Supreme Court's decision to extend liability to municipalities under 42 U.S.C. § 1983[113] "has had, and will continue to have, as broad an effect on police operations as any criminal case decided by the liberal Warren Court" because the prospect of monetary liability has forced municipalities to respect the Constitution.[114] The political pressure, however, is unlikely to cost an agency's leadership as much as monetary damages would cost officers personally without indemnification. An officer, after all, likely fears loss of her own income more than she fears her department's smaller budget.

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[109] *See* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 354 (2003) (noting that punitive damages deter wrongdoing when they force the wrongdoer to internalize the costs of his acts).

[110] Officer indemnification is nothing new; it was common practice at the Founding. *See* Amar, *supra* note 8, at 812 ("Eighteenth century common law allowed suit against the officers personally, but everyone understood that the real party in interest was the government itself, which would typically be forced to indemnify officials who were merely carrying out government policy.").

[111] *See id.* at 812–13. Unfortunately, the Supreme Court has extended sovereign immunity to the states, effectively meaning that, when the actor who allegedly violated the Fourth Amendment is a state employee, qualified immunity could bar recovery all together. *See* Denise Gilman, *Calling the United States' Bluff: How Sovereign Immunity Undermines the United States' Claim to an Effective Domestic Human Rights System*, 95 GEO. L.J. 591, 593 (2007) (noting that the convergence of U.S. sovereign immunity and qualified immunity rules means that "victims of constitutional violations are often left without an opportunity to obtain compensation for the harm they have suffered"). This suggests that both qualified immunity for officers individually and state sovereign immunity are unwise and should be curtailed, if not completely abandoned, because they frustrate the enforcement of the Fourth Amendment via civil actions.

[112] *See* U.S. SENATE SELECT COMM. ON INTELLIGENCE & U.S. HOUSE PERMANENT SELECT COMM. ON INTELLIGENCE, JOINT INQUIRY INTO INTELLIGENCE COMMUNITY ACTIVITIES BEFORE AND AFTER THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001, S. REP. NO. 107-351, H.R. REP. NO. 107-792, at 354 (2002) [hereinafter INTELLIGENCE COMMITTEES REPORT] (noting testimony of General Odom, former head of the NSA, that the NSA, due to political pressure, instituted internal procedures that ensured that Fourth Amendment and other constitutional protections were not trammeled).

[113] *See* Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658 (1978).

[114] JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW 205 (1993).

Thus, although political or budgetary pressure will deter searches to some degree, it is unlikely that such searches will be *overdeterred*.

Finally, warrants may themselves overdeter. Put simply, obtaining a warrant is costly. As William Stuntz argues:

> [W]arrants may be costly *to the police*—not in terms of money or lost convictions, but in time and energy. . . . [O]ne of the primary reasons searches conducted with warrants tend so strongly to uncover evidence of crime is that getting warrants is such a hassle for police officers. In many cases, getting a warrant means a day's worth of paperwork plus sitting around the courthouse, all for the five-minute meeting with the magistrate. . . . [S]uch queuing costs may tend to discourage officers from using warrants [unless the warrant is likely to bear significant fruit].[115]

To lower the costs associated with obtaining a warrant, many jurisdictions have adopted streamlined warrant application procedures. For instance, magistrates in some places hear applications and issue warrants over the phone.[116] However, if ex parte review of in-person warrant applications is too biased in the government's favor,[117] then surely rushed over-the-phone applications—where the magistrate cannot even see the officer to judge his credibility or personally review any supporting documents or evidence the officer may have—only make the problem worse. Under these lax procedures, one begins to wonder if the warrant has any utility at all.

A warrant application process that affords any real protection—however slight—would necessarily impose significant costs on the officers seeking the warrant. This is cause for concern, especially in the domestic intelligence context. As one scholar notes, the police generally do not seek warrants in marginal cases (where the chance of uncovering evidence is significant but far from certain), suggesting that one of the reasons warrants are issued almost without exception is because they are only sought when it is obvious they will be granted.[118] However, proactive intelligence gathering should necessarily involve "false positives"—searches that, though reasonable, turn up no evidence of terrorist activity.[119] But because a warrant is required for a domestic intelligence search, and because the warrant process is costly, intelligence officers are deterred from seeking a warrant, and

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[115] Stuntz, *supra* note 79, at 908.

[116] *See* Michael John Harlow, Note, California v. Acevedo*: The Ominous March of a Loyal Foot Soldier*, 52 LA. L. REV. 1205, 1242 (1992) ("Many police departments can phone in warrant requests, and developing communications technology will only quicken the warrant process.").

[117] *See infra* notes 101–02, 167–68 and accompanying text.

[118] *See* Donald Dripps, *Living with* Leon, 95 YALE L.J. 906, 925–26 (1986) ("[T]he very high success rate of warrant searches suggests that warrants are not sought in cases of marginal suspicion. The police, thus, appear to decline the search warrant process even when a very substantial chance of obtaining admissible evidence exists.").

[119] *See* INTELLIGENCE COMMITTEES REPORT, *supra* note 112, at 353 (quoting Congressman Lee H. Hamilton for the proposition that "[i]ntelligence work requires that our government obtain information, and obtaining that information requires surveillance of people who have committed no crime").

therefore from searching at all. Many have argued that the FBI did not seek a warrant to search Zacarias Moussaoui's computer out of fear that a judge would not grant the warrant.[120] The fear of having a warrant application denied, then, leads to overly cautious intelligence gathering that necessarily decreases the amount of information counterterrorism agencies possess to combat threats from within. Although intelligence agencies, even absent a warrant requirement, could fail to conduct a search for fear that a judge will disapprove of the search in after-the-fact review, this scenario is unlikely because a judge in ex post review would apply the reasonableness standard,[121] which is less exacting and more favorable towards the government than probable cause.[122] As such, ex post review, consistent with the text of the Fourth Amendment (which only prohibits "unreasonable" searches), lowers the burden on the government to justify the search, which in turn would weaken an intelligence agent's fear that he would not be able to justify a search before a judge after the fact.

Even if an agency becomes less sensitive to the possibility of judicial disapproval of warrant applications, there is generally less evidence available to justify a warrant for a prospective terrorist attack than there would be for other crimes.[123] Thus, both the substantive requirements needed to obtain a warrant and the costs incurred in the process of obtaining it might prove so high that the warrant requirement actually stifles innovative national security measures. If the FBI is acting only when it strongly believes there is a specific threat—i.e., when it has probable cause of such a threat—it may well be too late, and it is certainly too timid. Thus, warrants deter or outright prevent counterterrorism intelligence gathering against all but the most obvious, known threats. This creates an unacceptable risk that the government will be denied information necessary to prevent the deaths of scores of its citizens.

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[120] *E.g.*, Corey M. Then, *Searches and Seizures of Americans Abroad: Re-Examining the Fourth Amendment's Warrant Clause and the Foreign Intelligence Exception Five Years After* United States v. Bin Laden, 55 DUKE L.J. 1059, 1076 (2006). Moussaoui plotted with the 9/11 conspirators to conduct those attacks. *See* Jerry Markon, *Moussaoui Planning to Admit 9/11 Role*, WASH. POST, Apr. 19, 2005, at A1.

[121] *See* Delaware v. Prouse, 440 U.S. 648, 654 (1979); *In re* Sealed Case, 310 F.3d 717, 742 (Foreign Int. Surv. Ct. Rev. 2002). Both cases articulate a balancing standard—the linchpin of reasonableness under the Fourth Amendment—for evaluating searches (like those dealt with in this Comment) in which the primary purpose is not traditional law enforcement, i.e., searches conducted pursuant to the special needs and foreign intelligence exceptions to the warrant requirement, respectively.

[122] *See* Max Guirguis, *Electronic Mail and the Reasonable Expectation of Privacy*, 8 J. TECH. L. & POL'Y 135, 160 (2003) (noting that probable cause is a more rigorous standard of review than reasonableness).

[123] *See* POSNER, *supra* note 10, at 101 (arguing that intelligence-related electronic surveillance cannot give an officer an articulable basis for probable cause such that a judge can issue a warrant because the officer will frequently only have limited knowledge of a subject's connection to terrorist activity).

C. *Warrants Protect Minority Groups from Discrimination*[124]

Much of the Supreme Court's criminal procedure jurisprudence was enacted to combat the racial discrimination that the Court believed permeated the criminal justice system.[125] The warrant requirement can limit discrimination by requiring that an officer seek the permission of a judge before searching an individual, who he would otherwise have the discretion to search, based on that officer's overt or latent prejudices. By limiting this discretion, the warrant requirement protects minorities from racial or other discrimination: "By injecting a neutral and detached magistrate into the picture, requiring the contemporaneous documentation of the facts, and specifying a minimum quantum of evidence for a warrant to issue, the Fourth Amendment provides indirect protection against invidious discrimination."[126]

Although racial discrimination is a problem in discretionary law enforcement, it is unlikely that it will be more of a problem in domestic intelligence gathering than in other contexts in which warrantless searches have been approved, such as *Terry* stops.[127] *Terry* allows the police to stop individuals based on a mere reasonable suspicion of criminal activity without first obtaining judicial approval.[128] As one commentator put it: "[A]ny review of police-community relations finds that there is hostility between the police and minority communities. A lot of that has to do with stop and frisk. Field interrogations that are excessive, that are discourteous, and that push people around, generate friction."[129] That is, where the police are allowed to conduct warrantless stop-and-frisks in settings where the police constantly interact with minorities, these officers have ample opportunities to act on any racial prejudices they may have. Racial tensions here seem inevitable without the sort of detached supervision that the warrant re-

[124] One should note at the outset that many domestic intelligence searches could not plausibly be the result of racial discrimination because they target majorities, e.g., white Christians. I am speaking now of, for instance, far-right fanatics who advocate the overthrow of the government and use terrorism to advance their objectives. Timothy McVeigh and the Oklahoma City bombing come to mind. *See* Tom Kenworthy & Lois Romano, *McVeigh Condemned to Death*, WASH. POST, June 14, 1997, at A01. Against these threats, it would be ridiculous to charge that concerns over racial discrimination should stand in the way of effective intelligence gathering. This Section, therefore, focuses on searches against minorities.

[125] *See* Steiker, *supra* note 23, at 841 ("[I]n the last half century or so—the same period . . . as the time of the creation of the modern pillars of Fourth Amendment law—the Court's criminal procedure cases have frequently presented some of the most appalling discriminatory abuses of police power imaginable.").

[126] Luna, *supra* note 81, at 816.

[127] *See* Terry v. Ohio, 392 U.S. 1 (1968).

[128] *Id.* at 27. Although the Court did not use the term "reasonable suspicion," later decisions have characterized the standard that way. *See* ALLEN ET AL., *supra* note 31, at 578.

[129] Jerome H. Skolnick, Terry *and Community Policing*, 72 ST. JOHN'S L. REV. 1265, 1267 (1998). The term "stop and frisk" is generally used to describe the stops based upon mere reasonable suspicion authorized by *Terry*.

quirement provides.[130] The Supreme Court, however, has allowed such searches without a warrant.[131] If numerous and widespread warrantless searches that often involve some form of racial discrimination are constitutional, the preventing-racial-discrimination rationale does not justify extending the warrant requirement to infrequent searches that are unlikely to be infested with racial overtones, such as domestic intelligence gathering.

This is not to say that racial, ethnic, and religious discrimination are not possible concerns in the intelligence-gathering arena. Evidence of racial discrimination, however, likely would lead an intelligence search to be deemed unreasonable under the Fourth Amendment.[132] This is true not only because of the tremendous costs borne by victims of discrimination but also because the search furthers no legitimate government objective: discrimination merely wastes resources that could be put to more productive use.[133] Because discrimination is wasteful, properly managed and accountable intelligence agencies have an incentive to avoid harassing minorities via illegitimate intelligence activities. The costs of racial discrimination when searches are conducted by well run intelligence-gathering agencies, therefore, are likely to be muted.

One might respond that, given the public perception in the wake of 9/11 that terrorist threats come primarily from the Muslim community, the potential for religious discrimination is more present than ever in the age of the War on Terror.[134] However, many, if not most, threats to mainland America that come from Islamist terrorists have a foreign connection.[135] The would-be terrorists are often immigrants and, even if not, they receive training, funding, and guidance from al Qaeda or affiliated groups over-

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[130] *See id.* Skolnick's account of *Terry* stops—where friction between the police and minority groups is particularly acute—makes sense in light of the discussion in this Part.

[131] *See supra* note 128 and accompanying text.

[132] *Cf.* Amar, *supra* note 8, at 808 (arguing that the impact of particular governmental practices on racial minorities should factor into a determination of whether those practices are reasonable, although noting that, because "courts organize Fourth Amendment discourse around warrants [and] probable cause," racial discrimination is hard to factor into current Fourth Amendment analysis).

[133] *See* Gerrit B. Smith, Note, *I Want to Speak Like a Native Speaker: The Case for Lowering the Plaintiff's Burden of Proof in Title VII Accent Discrimination Cases*, 66 OHIO ST. L.J. 231, 254 (2005) ("Economists view discrimination in general as being inefficient and a waste of resources."); *cf.* Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 885 (2003) ("Simple [racial] discrimination . . . wastes social resources by allocating jobs to less productive employees.").

[134] *See* Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 746 (2006) (noting that since the advent of the War on Terror, "Muslim minorities in the United States and Europe have been facing increasing discrimination in schools, the workplace, and society in general" and "[m]any have been essentialized as terrorists or terrorist sympathizers").

[135] *See DOJ Memo*, *supra* note 95, at 1377–78 (noting the threat posed by al Qaeda terrorists and that the NSA surveillance activities designed to thwart an al Qaeda attack—surveillance of calls between those in the U.S. and overseas—were aimed at the *international* terrorist threat posed by al Qaeda).

seas.[136] As a result, searches directed against these threats fall under the foreign intelligence exception to the warrant requirement.[137] Thus, even if the position advocated herein is not adopted, most of these activities are constitutionally outside the warrant process. It is only terrorist threats that are wholly domestic that are subject to the warrant requirement.[138] Given whatever threat to liberty the absence of a warrant requirement brings about, it seems anomalous to require a warrant in one instance and not in the next when the motivation for the search is the religion of the suspect being searched. Discrimination is discrimination, whether against an individual with foreign terrorist connections or without.

Further, where intelligence gathering is conducted discriminatorily, the courts stand ready to intervene. If intelligence agents harass any racial, religious, or ethnic minority, the courts can and should step in and enjoin discriminatory surveillance.[139] Although the secrecy of intelligence gathering may prevent such activity from ever coming to light so that it can be enjoined, the warrant is no solution: If an agent suspects his activity will never come to light, he foresees that no legal consequences will follow from breaking the law, and therefore he has no incentive to get a warrant, even if one is required.[140] In these instances, warrant requirements are powerless to stop unconstitutional searches. As noted earlier,[141] President Bush's authorization of warrantless electronic surveillance in violation of FISA shows the impotence of a warrant requirement where the Executive believes it unlikely that such surveillance will ever be made public. Despite this, Justice William Douglas argued that, because intelligence activities will frequently remain a secret, a warrant should be required, for otherwise "the federal intelligence machine would literally enjoy unchecked discretion."[142] This is a strange criticism; Justice Douglas does not acknowledge how, if

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[136] *See, e.g.*, NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 160–69 (2004) (describing the "Hamburg contingent" of 9/11 plotters, all of whom were foreign nationals who came to the United States to conduct the attacks); *id.* at 341 (noting a 1995 intelligence estimate that described a "worldwide network of training facilities and safehavens" available to terrorists threatening the United States).

[137] *See supra* notes 44–55 and accompanying text. Although a court order may be required to conduct such a search, that is solely due to FISA.

[138] *See* United States v. U.S. District Court (*Keith*), 407 U.S. 297, 324 (1972) (holding that, for domestic security surveillance, prior judicial approval is required); *supra* notes 57–75 and accompanying text.

[139] *See* Amar, *supra* note 8, at 815–16 (arguing that the Supreme Court should expand the availability of injunctions to practices that violate the Fourth Amendment). Courts, of course, can improperly allow racial discrimination to continue. If this occurs, however, then no legal standard can rectify the situation. Thus, the simple fact that courts can get it wrong and may not always prevent every discriminatory search is no answer to this Comment's argument that the legal standard under which courts review such searches should be altered.

[140] *See supra* note 13 and accompanying text.

[141] *See supra* note 13 and accompanying text.

[142] *See Keith*, 407 U.S. at 325 (Douglas, J., concurring).

the program never comes to light, the offending officer will have any incentive to seek a warrant ex ante. Moreover, if illegal activities do come to light, the offending officer will be subject to after-the-fact judicial review. As such, Justice Douglas's point merely leads to the question this Comment tries to answer: whether before-the-fact review is inherently better than after-the-fact review in the intelligence-gathering context. As noted throughout, this Comment argues that after-the-fact review is in many ways superior to the warrant application process in guarding against violations of the Fourth Amendment.

The political process can also protect against discriminatory abuses. First, any search regime that is spread out over the whole of the population—such as data-mining operations to search all electronic communications for certain words that would indicate a connection to terrorism—ensures that its costs are borne by the majority of people.[143] As a result, the majority will pressure elected officials in the legislative and executive branches to narrowly tailor or eliminate the program.[144] The public outcry over the disclosure of the existence of an NSA database containing millions of Americans' phone records proves this point too well.[145] Because the political process works in this context, courts do not need to conduct searching review of executive action.

Even those searches that are concentrated against a minority of people can be somewhat curtailed by the political process. Where costs are concentrated but benefits diffuse—a paradigmatic example being intelligence operations against a small segment of the population, e.g., Muslim communities—the segment of the population who suffers the costs can organize more easily than the large majority to protest the activity in the political branches or the courts because the larger group faces a collective action problem.[146] It is for this reason that narrow interest groups have success advancing their legislative programs even though a majority of the population

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[143] *See* ALLEN ET AL., *supra* note 31, at 633 ("[O]ne big advantage of a roadblock program is that it affects all motorists—no matter what their race, ethnicity, or socioeconomic class—equally.").

[144] *See id.* at 634 (noting that in the context of indiscriminate roadblocks, "because the political process might be expected to work pretty well . . . courts need not worry so much about regulating them"); Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 314 (2002) (arguing that cameras that surveil public places should not be subject to traditional warrant and probable cause analysis because "politically accountable officials would have to demonstrate solid grounds" for them).

[145] *See* Susan Page, *NSA Secret Database Report Triggers Fierce Debate in Washington*, USATODAY.COM, May 11, 2006, http://www.usatoday.com/news/washington/2006-05-11-nsa-reax_x.htm.

[146] *See* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1256 (2006) ("In the classical model of interest group behavior, small and narrow groups that face concentrated benefits from a legislative action will find it easier to overcome collective action problems than the larger public that faces small and dispersed costs.").

as a whole may be opposed to them.[147] The salience of counterterrorism policy to the nation at large, however, surely will mute at least some of the expected influence an organized minority interest group might assert.[148] Thus, while the political process could result in some meaningful protection of minority groups' Fourth Amendment interests, the political process would likely have to supplement, not supplant, legal action.

In short, although preventing invidious racial discrimination is a legitimate concern in the intelligence-gathering domain, warrants do little to solve the problem while imposing real costs. To be sure, ex post review by courts and political responses have frequently proven insufficient to protect minorities from discrimination. Undoubtedly more than just lawsuits or political pressure is needed to combat racism in intelligence gathering. What is important for the purposes of this Comment, however, is merely that warrants offer few marginal benefits compared to after-the-fact judicial review.

D. Warrants Prevent Stifling of Political Dissent

One of the principle reasons the *Keith* Court declined to extend the warrant exception to the domestic intelligence context is the perceived deleterious impact surveillance can have on political dissent. Put simply, the government's search power could be used to squelch legitimate political opposition.[149] However, this argument ignores the historical abuse of warrants to further political oppression. It also fails to account for the fact that criminal law in many cases allows the government to obtain a warrant to search political groups on the pretext of seeking evidence related to a minor offense, thus actually enabling searches designed to squelch political dissent.

The idea that warrants protect against political suppression is strange given the historical abuse of warrants by the government and the resulting distrust of them by the public:

> The British Crown employed general warrants to quash political dissent in England as early as the sixteenth century. The warrant was used against the

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[147] *See generally* Susan Block-Lieb, *Congress' Temptation to Defect: A Political and Economic Theory of Legislative Resolutions to Financial Common Pool Problems*, 39 ARIZ. L. REV. 801 (1997) (discussing the effects of organized interests upon federal bankruptcy law).

[148] *See* Marc R. Poirier, *Takings and Natural Hazards Policy: Public Choice on the Beachfront*, 46 RUTGERS L. REV. 243, 325–26 (1993) (arguing that the salience of land use regulations of beachfront property in the wake of natural disasters, given that land use regulation can mitigate the effects of hurricanes, suggests that the public could overcome collective action problems to combat the interests of those who wish to have the ability to use beachfront property in any way they choose).

[149] United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 313–14 (1972); *see also id.* at 327 (Douglas, J., concurring) (arguing that the Fourth Amendment's protections are seriously implicated by domestic security because of "the recurring desire of reigning officials to employ dragnet techniques to intimidate their critics").

> press, and authorized both the government and private persons to "seize, take hold and burn . . . books and things . . . offensive to the state."[150]

Even warrants issued by the judicial branch were viewed as a mere extension of the Executive's authority, both before and after the adoption of the Fourth Amendment.[151] As such, the idea that warrants will prevent, rather than further, political oppression is peculiar in light of the history surrounding the Fourth Amendment.

Despite the lack of historical pedigree for this argument, warrants could theoretically prevent political oppression. By interposing a neutral judge prior to a search that might implicate free speech concerns, the likelihood that the executive branch will impermissibly suppress such protected speech will be decreased.[152] Much like the argument that warrants prevent racial discrimination, however, this contention is flawed. First, a warrant requirement only protects the speech of political dissenters if the official conducting the search knows she will answer for any failure to obtain a warrant. In the intelligence context, however, it is likely that a significant portion of intelligence activity will never be used in a criminal prosecution. As a result of this, and of the unlikelihood that a subject who is not criminally prosecuted will ever learn about clandestine intelligence activity directed against her, an intelligence officer is not deterred from engaging in illegal intelligence gathering without a warrant.[153] The warrant requirement is as powerless here as it is in the racial discrimination context.[154]

Moreover, in those instances where an officer believes that the information she uncovers will be used in a criminal proceeding, she also knows that she will have to justify the search before a court. If the courts are concerned with the stifling of political dissent—as they should be—they can require a higher showing during after-the-fact review of the justification for the search in these situations. The reasonableness paradigm of the Fourth Amendment should take into account the legitimate political activities of the subject of a search as weighing against the government's need for information.[155] In this instance, then, it is the reasonableness requirement—

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[150] Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151, 190–91 (1994) (quoting Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1369 (1983)).

[151] *See* Amar, *supra* note 8, at 773 (arguing that, in the pre-revolutionary era, warrants issued by judges were viewed with contempt because such judges were viewed as agents of the Crown, and that this contempt did not change after the adoption of the Constitution because "[e]ven an Article III judge, after all, had been appointed by the President, looked to the President for possible promotion to a higher court, and drew his salary from the government payroll").

[152] *See Keith*, 407 U.S. at 317.

[153] *See supra* notes 140–42 and accompanying text.

[154] *See supra* notes 140–42 and accompanying text.

[155] *See* Amar, *supra* note 8, at 805 (arguing that activity protected by the First Amendment should receive greater protection from searches under the Fourth Amendment).

not warrants—that stands between the citizen and illegal or abusive surveillance.

Finally, there is a very real danger that warrants themselves will contribute to the stifling of political dissent, even today.[156] The government could use the pretext of enforcing low-level criminal statutes to obtain a warrant as a means of surveilling political organizations. Imagine the following scenario: a member of an anti-war group doubles as a low-level trafficker in marijuana. The government uses its limited knowledge of this drug-trafficking to get a wiretap of that individual's phone line, on the theory that he uses it to set up his drug deals. While listening in to the individual's conversations, intelligence officers learn detail after detail about the anti-war movement's activities, membership, and funding. Armed with a warrant authorizing such wiretapping, the government is immunized from review of these activities.

In cases such as this, the warrant requirement actually protects the government's surveillance of political organizations. Were such cases analyzed under the general reasonableness requirement—instead of asking merely whether the government had a proper warrant for the wiretap—the court could take into account the government's minor interest in the subject's petty drug offenses, and weigh it against the anti-war movement's significant interest in being free from government surveillance of its legitimate activities.[157] Although it is unclear how a court would resolve this issue when reviewing a search for reasonableness, at least instead of simply asking whether the government had a properly issued warrant, the courts could consider the anti-war movement's interests directly. Though the government could seek a warrant at its discretion even absent the warrant requirement, thus immunizing itself from liability, this is hardly a justification for the warrant requirement. Indeed, were more emphasis placed on the general reasonableness requirement instead of mere probable cause and warrants, a warrant-issuing magistrate could view the government's failure to inform him of the subject's protected political activities as fraud that would void the warrant.[158] However, under the warrant requirement regime, the emphasis shifts to probable cause, and eschews almost all other factors. Thus, when viewed in this light, warrants can contribute to—not protect against—political repression.

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[156] Note that this was the historical purpose for which warrants were issued. *See supra* notes 150–51 and accompanying text.

[157] *Cf.* Amar, *supra* note 8, at 780 (arguing that "no warrant should issue if the underlying search or seizure would be unreasonable, even if the minimal elements of the Warrant Clause are met" and using as an example the strip search of teenage girls by a male officer with only a fifty-five percent chance of uncovering contraband).

[158] *See* POSNER, *supra* note 10, at 101 (noting that a warrant is valid and therefore immunizes the officer executing it unless it was "procured fraudulently").

E. Warrants Protect Against Police Perjury and Judicial Bias

Police perjury and judicial bias in ex post review are two significant problems that some argue the warrant requirement alleviates. By requiring review before the search, warrants ensure that the decision to approve a search is based upon the officer's knowledge at the time of the search and not upon reasons invented by that officer to justify the search at a suppression hearing or civil damages action.[159] Thus, many deem ex post review inadequate because it frequently is based upon the officer's recollection of the information he had at the time, which is manipulable.[160]

Moreover, judicial bias may infect the ex post review process because it almost always occurs in the context of a suppression hearing.[161] The exclusionary rule,[162] and the fact that the police have proffered incriminating evidence against the suspect, creates a bias on the part of the judge to admit the evidence because if she does not, "[t]he criminal is to go free because the constable has blundered."[163] This, combined with the incentive provided to the police to perjure themselves,[164] makes it likely that an unconstitutional search will go without a remedy.[165] That is, where the officer who conducts a search lies about the true rationale for his search, and the judge is biased in favor of that officer, the likelihood that an unconstitutional search will go unremedied increases substantially. Thus, both the police perjury and judicial bias problems provide strong support for maintaining the warrant requirement for domestic intelligence searches because without the warrant requirement, after-the-fact review at a damages action or suppression hearing would provide the main judicial review of these searches. If this ex post review is inadequate because of perjury or bias, then the Fourth Amendment's substantive protections would be rendered meaningless.

Ultimately, however, neither of these arguments support maintaining the warrant requirement for domestic intelligence searches. First, the inher-

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[159] *Cf. supra* note 83 and accompanying text.

[160] Given the manipulability of an officer's recollection of events, and the incentive an officer has to lie—namely, it may be necessary to admit otherwise inadmissible evidence against a demonstrably guilty defendant—this could be a significant problem. *See* ALLEN ET AL., *supra* note 31, at 346.

[161] *See* Stuntz, *supra* note 79, at 911–13. A suppression hearing usually occurs before trial on motion of the defendant. The court can hear witnesses if necessary.

[162] *See supra* note 80.

[163] People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.). In this case, then-Judge Cardozo of the New York Court of Appeals famously expressed his disagreement with the Supreme Court's decision in *Weeks v. United States*, 232 U.S. 383 (1914), which applied the exclusionary rule in federal prosecutions. Cardozo insisted that, under the New York constitution, the New York courts did not have to exclude illegally seized evidence. *Defore*, 150 N.E. at 588.

[164] *See supra* note 83.

[165] *Cf.* Posner, *supra* note 20, at 54 (arguing that Fourth Amendment jurisprudence that eschews tort remedies in favor of the exclusionary rule ensures that unconstitutional searches, particularly of the innocent, will not be deterred because no court will ever hear about them).

ent bias against the searched in the ex parte warrant application process is greater than the potential for bias in after-the-fact review. Second, placing a higher evidentiary burden on the government to justify a warrantless search could alleviate any police perjury problems. Third, even if such bias and perjury occurs with enough frequency to seriously undermine ex post judicial review, the legitimate need of the government to obtain vital intelligence to prevent terrorist attacks outweighs the costs of such bias and lying. These responses are each discussed in turn below.

First, the argument that warrants are necessary to protect against judicial bias in ex post review presumes that this bias outweighs the inherent bias in a warrant application. Warrants are issued before a search occurs, ensuring that they are based upon the officer's knowledge at the time and not on fictional reasons made up after the search to justify it.[166] Warrant applications are ex parte, however: the subject of the search has no say or representative to defend his or her position.[167] Thus, unlike after-the-fact review, warrant applications are inherently biased towards the government because the issuing magistrate only hears its side of the story. As noted above, when combined with deferential review of issued warrants, current policy defers to that biased judgment.[168] Adversarial review after the fact, then, ensures that the judge hears both sides of the story in evaluating the legality of a search.[169] And when that judge is unbiased, she can fairly view the arguments from both sides, not just one. Moreover, the adversarial process itself ensures that if the searching officer is lying, his justification for the search will be challenged by counsel.[170] In short, although bias and police perjury in after-the-fact review are problems, the bias inherent in ex parte warrant applications is just as significant. As such, the problem of judicial bias in after-the-fact review does not justify the warrant requirement.

Second, any concern that a police or intelligence officer will lie or distort her rationale for conducting a search in after-the-fact judicial review could be alleviated by placing a higher evidentiary burden on the Executive to justify a warrantless search.[171] Courts could adopt a rule that an intelli-

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[166] *See* sources cited *supra* note 83.

[167] *See* Stuntz, *supra* note 79, at 888.

[168] *See supra* notes 101–02 and accompanying text.

[169] *See* Charles J. Keeley III, Note, *Subway Searches: Which Exception to the Warrant and Probable Cause Requirements Applies to Suspicionless Searches of Mass Transit Passengers to Prevent Terrorism?*, 74 FORDHAM L. REV. 3231, 3290–91 (2006) ("[The] adversarial setting offers greater assurances than an ex parte warrant application that courts will carefully review the search's reasonableness.").

[170] *Cf. id.*

[171] The government already has the burden to justify a warrantless search. *See* Coolidge v. New Hampshire, 403 U.S. 443, 455–56 (1971); McGann v. Ne. Ill. Reg'l Commuter R.R. Corp., 8 F.3d 1174, 1178 (7th Cir. 1993). Thus, where a judge is confronted with a warrantless domestic intelligence search whose only justification is the uncorroborated testimony of an intelligence officer, that judge should ascribe low probative value to that testimony, and demand more from the government before finding the

gence officer's recollection of the events leading up to the search is not on its own enough to satisfy the Fourth Amendment's reasonableness standard. By requiring further evidence to demonstrate the government's knowledge prior to the search, the courts will ensure that a testifying intelligence officer is not making up a rationale ad hoc to justify an unreasonable search. Such corroboration could include emails or correspondence whose date can be authenticated or other time-verifiable evidence, so that the government's knowledge prior to the search could be ascertained. Importantly, though, this evidence would be necessary not for the government to show probable cause, as in a warrant application, but instead for a court to merely determine the search's overall reasonableness. Although one might respond that this would just shift the police perjury back further in time, this argument is unpersuasive because before the search occurs the officer does not know what it will turn up, making it difficult if not impossible for him to concoct a lie that will match what he actually finds during the search. Moreover, even if one worried that placing a higher burden on the government to justify a search would actually encourage police perjury because officers would need to fabricate more evidence to justify a search, requiring evidence that can with great certainty prove that the government had legitimate reasons ex ante to conduct a search mitigates this problem. Warrants are simply not a prerequisite to protecting against police perjury in ex post review.

Finally, the warrant requirement's effective prohibition of any search conducted without probable cause places significant costs on intelligence gathering that likely outweigh any judicial bias or police perjury costs. The government's need is far more compelling when attempting to prevent a terrorist attack than it is in the context of ordinary crime control.[172] The effects of a terrorist attack—the loss of life and the likelihood that the government would be forced to take drastic measures in response to such an attack—dwarf the effects of common crime.[173] Moreover, the nature of fighting covert terrorism requires gathering information even from innocent people who unwittingly may have evidence pertinent to a terrorist attack and thus

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search reasonable. This will both encourage the government to ensure that it has some legitimate rationale to search and mitigate the threat posed by the dishonest testimony of intelligence officers.

[172] *See* POSNER, *supra* note 10, at 6–7 (noting that his argument for relaxed regulation of government intelligence activity is "limited to terrorism that has the potential to create a national emergency" because of the greater governmental interest in preventing such emergencies).

[173] Scholars have noted how terrorism has pressured politicians to enact laws to combat this threat, resulting in the curtailment of civil liberties. *See, e.g.*, Anita L. Allen-Castellitto, *Understanding Privacy: The Basics*, 865 PLI/PAT 23, 27 (2006) (noting that the 9/11 attacks created political pressure to immediately enact tougher laws relating to homeland security, resulting in a greater curtailment of individuals' privacy rights). Indeed, some scholarly commentary directly advocates specific policies to combat terrorism. *See, e.g.*, Topher Greene, *The Importance of Improving U.S. Immigration Law and the Changes Made Since 9/11*, 4 REGENT J. INT'L L. 101, 109–10 (2006) (arguing for tighter immigration measures that could prevent terrorists from entering the country without also infringing on the constitutional rights of foreign nationals).

requires casting a "bigger net" to gather the information necessary to identify potential threats.[174] The probable cause paradigm improperly constrains the size of that "net."

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As outlined above, none of the usual rationales for the warrant requirement withstand scrutiny in the domestic intelligence context. Because much intelligence activity will never come to light, fear of the potential consequences of not obtaining a warrant will not deter the government from abusing Fourth Amendment freedoms. Where such activity does come to light, lawsuits—individual and class action—against chronic abusers of Fourth Amendment rights will protect the Amendment's core interests. And although the problems of police perjury and judicial bias threaten to undermine ex post review of government surveillance, those problems can be alleviated through means other than warrants, such as requiring heightened review of the information used to justify the search at ex post adversarial hearings. Finally, the warrant requirement's probable cause standard imposes real costs on intelligence gathering by effectively prohibiting the government from gathering the information necessary to target many terrorist groups. Thus, the warrant requirement should be discarded for domestic intelligence searches. Discarding the warrant requirement does not require that one accept a government that can trample Fourth Amendment rights unaccountably. Warrants simply are not the solution to this problem. The final Part of this Comment advances measures that would better balance an individual's Fourth Amendment interests against the government's need for information.

III. BETTER SOLUTIONS TO INTELLIGENCE-GATHERING ABUSE

The Supreme Court, for better or worse, is the primary enforcer of the Fourth Amendment. Although this is understandable, given the Court's unique position and ability to check majoritarian excess that can lead to violations of civil liberties, it is unfortunate because it has created in Congress apathy toward its obligation to participate in the protection of Fourth Amendment values.[175]

This failure on the part of Congress to properly assert itself in the enforcement of constitutional rights need not continue. The enactment of FISA is a case in point. Given the widespread acknowledgement that the Constitution does not require that the President conduct foreign intelligence

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[174] POSNER, *supra* note 10, at 92.

[175] *Cf.* Dahlia Lithwick & Richard Schragger, *Pass the Buck: When Congress Passes Unconstitutional Laws*, SLATE, Oct. 7, 2006, http://www.slate.com/id/2151048/ (arguing that due to their reliance on the Supreme Court to nullify unconstitutional laws, members of Congress frequently vote for political reasons for laws that they say are unconstitutional).

surveillance in the United States pursuant to a warrant,[176] Congress—properly exercising its own powers in the foreign intelligence context—limited the President's authority in order to curb perceived intelligence-gathering abuse.[177] FISA requires the Executive to obtain a court order for surveillance, though such court orders are not Fourth Amendment warrants.[178] However, Congress did not hamstring the Executive by requiring court approval before the commencement of any and all electronic surveillance. In certain emergency situations, the Attorney General can authorize electronic surveillance for up to seventy-two hours before seeking court approval.[179] This is a practical recognition that intelligence gathering frequently requires the relaxation of the warrant requirement, but it still ensures that continued surveillance will be subject to congressional limitations.[180] Congress, then, has significant authority in the foreign intelligence arena to create such pragmatic solutions. There is no reason to assume that it could not enact legislation like FISA that is applicable to domestic intelligence. Moreover, even in the absence of congressional action, the Court could impose solutions by tailoring existing doctrines. The remainder of this Part discusses examples of possible legislative and judicial solutions.

A. Limitation on the Use of Seized Evidence for Purposes Other than Domestic Intelligence or Counterterrorism

One of the greatest potential abuses of a domestic intelligence exception to the warrant requirement would be to allow the exception to creep into everyday law enforcement. Indeed, it was this fear the Court addressed in the "special needs" cases by requiring that any police activity qualifying for the exception must not be for the "primary purpose" of law enforcement.[181] Because legitimate governmental interests outside of law enforcement overlap with criminal law—say, the government's legitimate concern with protecting its citizens prospectively from drunk drivers[182] or with protecting student athletes from the effects of drug use[183]—any exception to the

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[176] *See supra* note 56 and accompanying text (noting that every court to have decided the issue has held that the President has inherent authority to conduct warrantless foreign intelligence surveillance).

[177] *See* David Hardin, Note, *The Fuss Over Two Small Words: The Unconstitutionality of the USA PATRIOT Act Amendments to FISA Under the Fourth Amendment*, 71 GEO. WASH. L. REV. 291, 307 (2003) ("[FISA was enacted] to quell public and congressional concerns arising out of the Church Committee's findings of vastly unregulated foreign intelligence surveillances.").

[178] *See In re* Sealed Case, 310 F.3d 717, 741 (Foreign Int. Surv. Ct. Rev. 2002).

[179] 50 U.S.C. § 1805(f) (2000).

[180] *Cf. DOJ Memo*, *supra* note 95, at 1393 (arguing that Congress did not intend through FISA to prohibit electronic surveillance, but "to bring the exercise of that power under more stringent congressional control").

[181] *See* City of Indianapolis v. Edmond, 531 U.S. 32, 41–42 (2000).

[182] Illinois v. Lidster, 540 U.S. 419 (2004).

[183] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

warrant requirement potentially could be used as a mere pretext for retrospective law enforcement.

An easy solution to this problem exists: ban the use of evidence from a legal-but-warrantless domestic intelligence search in a criminal prosecution unrelated to the national security.[184] If such a rule existed, an intelligence officer's incentive to use domestic intelligence as a pretext for mere law enforcement would vanish because doing so would be of no use in a later criminal prosecution.[185] Although this would not deter the rare intelligence officer who abuses his authority solely for reasons of caprice or malice, the warrant requirement also does not prevent this problem: if the officer is acting not to uncover evidence but merely to harass or surveil individuals for his own pleasure, he need not obtain a warrant because he knows no court will ever review his actions, and thus he will not be held to account for them unless he is later sued.[186] A ban on the use of evidence gathered in warrantless domestic intelligence searches in criminal prosecutions for crimes unrelated to national security, then, provides as much protection from overzealous intelligence gathering as one can hope for in this area.

Were Congress not to enact such a ban, the Court could impose it via either the exclusionary rule or the "minimization principle."[187] One scholar argues that the Fourth Amendment's minimization requirement—where officers conducting a search are required to use procedures to limit the uncovering of private information unrelated to the subject matter of the search[188]—provides a constitutional basis for a ban on the use of evidence obtained from warrantless intelligence searches in criminal prosecutions for crimes unrelated to national security.[189] However, the minimization principle is designed to ensure that the government does not invade the constitutionally protected interests of the individual who is being surveilled.[190] Criminal activity, though, is not a constitutionally protected interest.[191] Thus, for this new constitutional argument to fit within the Court's Fourth

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[184] *See* POSNER, *supra* note 10, at 98 ("Concerns with privacy [stemming from warrantless surveillance] could be alleviated . . . by adopting a rule forbidding the intelligence services to turn over any intercepted communications to the Justice Department for prosecution for any offense other than a violation of a criminal law intended for the protection of national security.").

[185] *See* Christopher Woo & Amanda So, *The Case for Magic Lantern: September 11 Highlights the Need for Increased Surveillance*, 15 HARV. J.L. & TECH. 521, 536 (2002) (arguing that evidence seized via surveillance techniques outside the traditional warrant and probable cause paradigm—that is, evidence seized under FISA-like warrants—should be used only for prosecutions related to espionage or terrorism, because then "law enforcement officials will have little incentive to [seek national security intelligence] while really trying to obtain evidence for a conventional criminal trial").

[186] *See supra* Part II.C.

[187] Matthew R. Hall, *Constitutional Regulation of National Security Investigation: Minimizing the Use of Unrelated Evidence*, 41 WAKE FOREST L. REV. 61, 63 (2006).

[188] *See* United States v. McGuire, 307 F.3d 1192, 1199 (9th Cir. 2002).

[189] *See* Hall, *supra* note 187, at 63.

[190] *See supra* note 188 and accompanying text.

[191] *See supra* note 80.

Amendment jurisprudence, the Court would have to hold, for the first time, that even when the Executive uncovers unrelated criminal activity in the course of a lawful search, the fruits of that search could not be used to prosecute the unrelated criminality. This would be a fairly significant break from the Court's "plain view" doctrine.[192]

Further, the exclusionary rule mandates the exclusion of evidence seized unconstitutionally. Were the proposal advanced in this Comment to be adopted, however, evidence seized pursuant to a warrantless intelligence search would be constitutional—provided the search is reasonable. Thus, the exclusionary rule as currently understood would not require the exclusion of evidence seized pursuant to a warrantless intelligence-gathering search. However, if Congress fails to enact meaningful legislation to regulate the Executive's surveillance power, the Court should consider mandating the exclusion of the fruits of a warrantless domestic intelligence search in a prosecution for crimes unrelated to national security as a prophylactic measure to protect Fourth Amendment rights.

In short, banning the use of such evidence removes any incentive for the executive branch to use its domestic intelligence powers to circumvent the normal limits on its criminal investigatory power. Congress is the body most appropriate to enact such a prohibition. However, should Congress prove unwilling to do so, and should it become clear that the Executive is indeed abusing its domestic intelligence power to further everyday criminal law enforcement, the Supreme Court should consider extending the exclusionary rule or "minimization principle" to combat such abuse.

B. Require Politically Accountable Executive Officials to Approve All Warrantless Domestic Surveillance

FISA requires that the Attorney General approve any warrantless foreign intelligence surveillance in the United States.[193] This requirement should also be imposed on warrantless domestic intelligence searches because it accomplishes two objectives. First, it guarantees that the overzealous predilections of low-level intelligence officers do not drown out the legitimate privacy interests of those who are surveilled. Simply because the Attorney General is an executive officer does not mean that she would be less sympathetic to privacy concerns of surveillance subjects than would a judge. She is politically accountable, and thus must take into account how surveillance would impair the privacy of citizens if such surveillance were widespread. And further, it is just as possible for an executive officer as it is for a judge to be detached enough from the situation to make a neutral

[192] *See* Horton v. California, 496 U.S. 128 (1990); Arizona v. Hicks, 480 U.S. 321 (1987); New York v. Class, 475 U.S. 106 (1986). The plain view doctrine allows government agents to seize any evidence they see and can seize in the course of lawful activity, even without a warrant.

[193] 50 U.S.C. § 1804 (2000).

decision.[194] By interposing a high-level executive officer who can evaluate the search from the "big picture," requiring the Attorney General's approval functions much like a warrant, but without the burdensome process associated with obtaining one. Second, such a rule ensures that a politically accountable individual has the authority to decide to conduct a warrantless search.[195] Thus, if a search is conducted for an improper purpose, Congress and the electorate know whom to blame. For these reasons, Congress should require that the Attorney General or another high-ranking executive officer approve warrantless domestic intelligence searches.

C. Harsh Penalties for Those Who Abuse Their Authority

Just as harsh penalties deter individuals from committing crimes, penalties will deter those officials who abuse their authority to conduct warrantless surveillance or who misuse lawfully obtained information.[196] The power to conduct warrantless surveillance should not be taken lightly. Individuals conducting searches will come across personal information that should never become public knowledge unless necessary to protect the national security.[197] Thus, those officers who use information obtained through domestic intelligence to blackmail or intimidate subjects of surveillance should be exposed to criminal sanctions, including jail time and heavy monetary fines. Under such a regime, the abusive or malicious officer—who is not deterred by the ban on the use of evidence obtained via such surveillance in non-national security criminal prosecutions—will be deterred by the fear of punishment from misusing the information he has obtained through intelligence efforts.

D. Expanded Whistleblower Protection for Insiders Who Expose Illegal Surveillance

Expanded penalties for those who abuse intelligence-gathering authority are meaningless if those abuses never come to light. Honest intelligence officers who become aware of illegal surveillance or physical searches in violation of the Fourth Amendment should not be deterred from reporting such activity for fear of prosecution under laws that criminalize disclosure

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[194] *See* Silas J. Wassterstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 34–35 (1988) ("[T]here is surely no a priori reason that police officers must necessarily be unconcerned about the legal protection of [F]ourth [A]mendment rights. Conversely, there is no a priori reason why magistrates, who are law enforcement officers of a sort, should be especially sensitive to such rights.").

[195] *See* Hardin, *supra* note 177, at 314 (noting that the political accountability of the Attorney General is one of the safeguards of FISA).

[196] *See* ALLEN ET AL., *supra* note 31, at 728–37, 745–47 (discussing the availability of civil and criminal penalties for officers who violate the Fourth Amendment).

[197] *See* POSNER, *supra* note 10, at 90 (discussing some examples of private communications and information that can be intercepted by electronic surveillance).

of confidential information or activity[198] or internal sanctions by their superiors. Over the years, Congress has exempted much of the intelligence community from whistleblower protection laws, which protect employees who report illegal activities that occur within their companies or government agencies.[199] Congress should expand whistleblower protection to cover intelligence officers who report unconstitutional searches and seizures.

E. Oversight and Reporting Requirements

Congress could by law require the Executive to report to congressional oversight committees all warrantless searches and electronic surveillance conducted in the United States. Indeed, today the Justice Department is required to tell Congress the total number of FISA warrant applications granted, modified, and denied.[200] Without warrants, the need for oversight is even greater; thus, Congress should require the Executive to report to it each time a warrantless domestic intelligence search occurs. Extending this requirement to the domestic intelligence context will ensure that an independent body reviews all executive actions—even those that would otherwise never come to light because of failure to prosecute. Finally, Congress should disclose any illegal surveillance to the subjects of that surveillance so that they can seek redress in court or in an administrative proceeding.

F. Expanded Administrative Remedies for Violations of the Fourth Amendment

At the Founding, the primary remedy for a violation of the Fourth Amendment was a civil damages action.[201] However, the increasingly costly and time-consuming nature of civil lawsuits, combined with the likelihood that damage awards will be low, could deter an individual who has suffered a violation of her Fourth Amendment rights from asserting them in court.[202] Therefore, Congress should expand administrative remedies to give these individuals meaningful opportunities to assert their rights.[203] Such remedies could take the form of citizen review boards that hear citizen

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[198] *E.g.*, 18 U.S.C. § 1905 (2000) (criminalizing disclosure of confidential information by public employees).

[199] *See* 5 U.S.C. § 2302 (2000) (exempting the FBI, CIA, Defense Intelligence Agency, and other intelligence agencies from whistleblower laws).

[200] *See* Hardin, *supra* note 177, at 313.

[201] *See supra* note 26 and accompanying text.

[202] *See* ALLEN ET AL., *supra* note 31, at 729. However, two points are worth making. First, the modern class action makes pursuing widespread though trivial abuses economical. Second, the fact that damages are low is not necessarily a bad thing, lest we overdeter legitimate police conduct. *See supra* Part II.B.

[203] *See* Amar, *supra* note 8, at 816 (arguing that administrative remedies should be expanded for Fourth Amendment violations to combat the "slow and cumbersome" judicial system).

complaints and issue punishments,[204] or they could replicate lawsuits in a less costly setting by allowing claims to be brought before an administrative law judge.

Even if administrative remedies or civil actions for Fourth Amendment violations initially are costly, one should not discard such enforcement mechanisms as insufficient. Fourth Amendment law comes from the "ground up," not the "top down," meaning that the courts fashion clearer rules by giving more concrete meaning to terms like "unreasonable" and "probable cause" in the specific factual situations of actual cases.[205] Thus, if warrants were deemphasized, the courts would then have to craft practical solutions outside the warrant and probable cause paradigm for Fourth Amendment problems that arise. Although there may be growing pains in the beginning, over time a body of law would develop around the centrality of civil and administrative damages to remedy Fourth Amendment violations, thereby allowing the Court to craft a Fourth Amendment jurisprudence that maximizes the effectiveness of these remedies.

G. Other Solutions

Congress or the Court doubtless could impose other solutions to protect Fourth Amendment interests in the absence of the warrant requirement. For instance, the Court could require heightened scrutiny of searches that implicate the First Amendment,[206] or it could require some corroboration of an officer's recollection of events that gave him reason to believe a search was reasonable.[207] Congress could establish an independent agency whose sole job is to police the intelligence agencies and ferret out illegal activity. For our purposes, the most important thing to note is that many, if not all, of these solutions could better protect Fourth Amendment interests than traditional warrants, while giving the Executive the authority and flexibility it needs to combat domestic national security threats.

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[204] *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 962–63 (2006) (arguing that citizen review boards could be useful in reviewing police shootings and the use of racial profiling). Indeed, citizen review boards already exist to regulate the police in other settings. It thus seems a modest extension to incorporate the regulation of intelligence gathering under such a system. *See* Jesus A. Trevino, Comment, *Border Violence Against Illegal Immigrants and the Need to Change the Board Patrol's Current Complaint Review Process*, 21 HOUS. J. INT'L L. 85, 114 & n.238 (1998) (noting various cities that use citizen review boards to review police action).

[205] *See* Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149, 1198–1200 (1998) (arguing that the complexity and number of variables in Fourth Amendment cases make logical deduction from known, simple rules impossible in this context; therefore, Fourth Amendment doctrine arises from "cautious, incremental change").

[206] *See supra* note 155 and accompanying text.

[207] *See supra* note 171 and accompanying text.

CONCLUSION

Purely domestic intelligence searches present the confluence of two important factors: the government's heightened need for information to protect its citizens from terrorist attacks, and the Supreme Court's reliance on warrants as an integral part of Fourth Amendment doctrine. The two factors conflict: a warrant requirement hampers the ability of the government to gather the intelligence it needs to protect its citizens. The Supreme Court, however, could easily alleviate the burden placed on legitimate intelligence gathering by casting aside the warrant requirement and its attendant probable cause standard when it stands in the way of gathering information needed to protect against future terrorist attacks or other threats to national security. Warrants are impotent in deterring or preventing constitutional violations in the intelligence-gathering context while imposing considerable costs on the government. Bowing to both common sense and the President's constitutional authority, the courts have recognized such an exception in connection with foreign intelligence. Given the threat posed by domestic terrorists and the pliant nature of reasonableness under the Fourth Amendment, the Court should extend an exception to the warrant requirement for domestic intelligence gathering in light of the government's heightened need for counterterrorism intelligence.