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*

COREY M. THEN

> *The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place.*
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> —Justice John Harlan[1]

INTRODUCTION

The United States intelligence community subjects certain American citizens living abroad to secret wiretaps of their phones and physical searches of their homes, without obtaining a judicial warrant. Take for instance a Texan, living with his wife and young children in Kenya, whose every telephone conversation was monitored for a year and whose home was entered while he was away in order to confiscate his property. Should Americans care that their government might so intrude on their privacy without a warrant? Should those sentiments change when the Texan is an al-Qaeda operative who participated in the terrorist attacks on United States Embassies in Kenya and Tanzania, and who was later convicted of conspiracy to commit murder and destroy U.S. property?

Certainly, Americans should be concerned about their government's surveillance powers, especially during a war on terror that differs from any other conflict in our nation's history. Yet since a federal district judge decided five years ago in *United States v. Bin*

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1. Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring).

Laden[2] that a judicial warrant is not required to search Americans abroad when the information sought is primarily for foreign intelligence rather than criminal investigative purposes,[3] the judiciary has been silent on this point. Because the constitutionality of these warrantless searches is by no means settled, the recent five-year anniversary of *Bin Laden* makes this a fitting time to re-examine the judicial approach to searches of Americans living abroad during the war on terror and to determine whether a different standard is needed.

This Note argues that warrants to conduct electronic surveillance and physical searches of Americans abroad are neither constitutionally required nor an effective safeguard of liberty. Whereas the majority of the scant commentary on *Bin Laden* has criticized it for asserting a foreign intelligence exception[4] to the Fourth Amendment warrant requirement,[5] this Note attempts to shift the framework within which the *Bin Laden* court worked. Although *Bin Laden*'s acceptance of the foreign intelligence exception correctly prevented the court from having to exclude valuable evidence that helped convict an international terrorist, future courts should not be confined by the warrant requirement and the exclusionary rule.

Instead, this Note proposes that the Constitution does not require a warrant for searches and seizures of Americans abroad, whether the searches are for foreign intelligence gathering or normal criminal investigations. This proposition may at first seem an anathema, but Fourth Amendment jurisprudence is riddled with

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2. 126 F. Supp. 2d 264 (S.D.N.Y. 2000).

3. *Id.* at 275.

4. Foreign intelligence information is defined as information relating to, or if concerning a United States person, necessary to, the ability of the United States to protect against attacks by a foreign power, sabotage or international terrorism, or intelligence activities of a foreign power, or, information that is related or necessary to the national defense, security, or foreign affairs of the United States. 50 U.S.C. § 1801 (2000). Foreign intelligence gathering is frequently contrasted with normal criminal investigations throughout this Note.

5. *See* Justin M. Sandberg, Comment, *The Need for Warrants Authorizing Foreign Intelligence Searches of American Citizens Abroad: A Call for Formalism*, 69 U. CHI. L. REV. 403, 406 (2002) (supporting a categorical requirement to obtain a warrant regardless of whether the primary purpose of the search is foreign intelligence); Carrie Truehart, Case Comment, United States v. Bin Laden *and the Foreign Intelligence Exception to the Warrant Requirement for Searches of "United States Persons" Abroad*, B.U. L. REV. 555, 599 (2002) (proposing FISC procedures for unilateral U.S. searches of its citizens abroad). *But see* Constance Pfeiffer, Note, *Feeling Insecure?:* United States v. Bin Laden *and the Merits of a Foreign-Intelligence Exception for Searches Abroad*, 23 REV. LITIG. 209, 237 (2004) (concluding, with some reservations, that *Bin Laden* was correctly decided).

exceptions to the warrant requirement that prove it is not absolute.[6] Although a warrant is constitutionally required in many domestic searches, that does not lead indubitably to the conclusion that a warrant is required for searches outside of the United States. The many exceptions in modern Fourth Amendment jurisprudence suggest that courts have been heavily influenced by policy considerations in making their constitutional pronouncements regarding warrants.[7] Yet there is little in the text or history of the amendment that mandates a preference for warrants, and in the case of searches abroad, practical and policy considerations weigh against recognizing a warrant requirement. One of the central policy considerations behind recognizing a warrant requirement is to protect the privacy of American citizens against unreasonable searches, but this Note contends that, for searches occurring overseas, courts could ensure greater privacy protection by developing a more rigorous legal reasonableness standard[8] that opens the federal government up to greater civil liability.

In setting out this argument, Part I provides a brief history of the Fourth Amendment. Part II presents a detailed description of *Bin Laden* and the foreign intelligence exception. Part III challenges the

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6. This proposition is further supported by the fact that certain well-regarded commentators continue to challenge the assumption that the Fourth Amendment *ever requires* a warrant. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 768 (1994) (asserting that reasonableness, and not warrants or probable cause, is the fundamental value underlying the Fourth Amendment); *see also* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 885 (1991) ("The reasons for requiring warrants are genuine, but not strong; it is entirely plausible that the system would function better without them."). Professor Stuntz ultimately concludes that requiring warrants may have some desirable effects, but hedges when he says that "[o]n the merits, it is hard to say with any certainty which choice is right." *Id.* at 942.

7. Even supporters of the rule like Professor Donald Dripps admit that the "exclusionary rule cases are arbitrary." Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559, 1603–08 (1996). Professor Dripps posits that *Mapp v. Ohio*, 368 U.S. 871 (1961), which extended the exclusionary rule beyond federal to state and local governmental bodies, forced the Supreme Court to use policy-driven, "reasonable suspicion" tests in evaluating the constitutionality of stop-and-frisks, building inspections, and other "coercive street encounters." These types of searches were ordinarily the province of local police, and a harsh, inflexible application of the exclusionary rule would have made it extremely difficult for police to effectively perform their duties. *Id.*

8. Like probable cause, reasonableness "can be defined legally, in which case there will develop, over time, a detailed set of common-law rules for various kinds of recurring fact patterns. Or it can be defined factually, with the standard meaning whatever individual magistrates and judges say it means in particular cases." Stuntz, *supra* note 6, at 927. This Note argues for the expansion of a legal reasonableness doctrine.

application of the warrant requirement to overseas searches. Finally, Part IV proposes that a more stringent reasonableness inquiry would better comport with constitutional requirements and balance liberty and security interests.

I. RELEVANT FOURTH AMENDMENT CONSIDERATIONS

Over the last half century, the Supreme Court has interpreted the Fourth Amendment to require a warrant and probable cause for all searches and seizures, as well as the exclusion from trial of illegally obtained evidence.[9] Nonetheless, myriad exceptions and qualifications puncture the general rule,[10] and the amendment's text does not actually require warrants:

> 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.[11]

Individually, the Justices have attacked the Court's modern jurisprudence for abandoning the amendment's historical and textual antecedents.[12] One influential commentator has implored that "[w]e need to read the Amendment's words and take them seriously: they

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9. Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 260 (1984).

10. *See infra* notes 69–80 and accompanying text.

11. U.S. CONST. amend. IV (emphasis added).

12. *See, e.g.*, 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.'"); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665–66 (1989) (Kennedy, J.) ("[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."); Robbins v. California, 453 U.S. 420, 437–38 (1981) (Rehnquist, J., dissenting) ("[T]he so-called 'exclusionary rule' created by this Court imposes a burden out of all proportion to the Fourth Amendment values which it seeks to advance by seriously impeding the efforts of the national, state, and local governments to apprehend and convict those who have violated their laws."); Cady v. Dombrowski, 413 U.S. 433, 439 (1973) (Rehnquist, J.) ("Although vehicles are 'effects' within the meaning of the Fourth Amendment, for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars." (internal quotations omitted)).

do not require warrants, probable cause or exclusion of evidence, but they do require that all searches and seizures be reasonable."[13]

The Supreme Court has never considered the applicability of the Fourth Amendment to Americans abroad, but the amendment likely applies in at least some form. In *Reid v. Covert*,[14] an Air Force sergeant's wife was convicted in a military tribunal for the murder of her husband while stationed in England.[15] The Supreme Court granted the defendant's application for a writ of habeas corpus, proclaiming that the Constitution guaranteed her a jury trial because "the shield which the Bill of Rights and other parts of the Constitution provide to protect [one's] life and liberty should not be stripped away just because [one] happens to be in another land."[16] Nonetheless, only a plurality joined Justice Black's opinion. Justice Harlan's controlling concurrence extended Fifth and Sixth Amendment protections to the defendant, but rejected the plurality's sweeping language claiming that the Bill of Rights operates unconditionally abroad: "I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world."[17]

More recently, in *United States v. Verdugo-Urquidez*,[18] Chief Justice Rehnquist concluded for a divided Court that a Mexican criminal suspect could not invoke the Fourth Amendment to challenge a search and seizure, because the amendment's drafters did not contemplate nonresident aliens within "the people" that it would protect.[19] Justice Kennedy's concurrence explicitly rejected Justice Rehnquist's categorical exclusion for a more flexible approach, echoing Justice Harlan's statement in *Reid* that "the question of which specific safeguards . . . are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case."[20] Still, Chief Justice Rehnquist, and Justices Kennedy, and

13. Amar, *supra* note 6, at 759.
14. 354 U.S. 1.
15. *Id*. at 3.
16. *Id.* at 6.
17. *Id.* at 74 (Harlan, J., concurring).
18. 494 U.S. 259 (1990).
19. *Id.* at 265 (1990).
20. *Reid*, 354 U.S. at 74 (Harlan, J., concurring), *cited in Verdugo-Urquidez*, 494 U.S. at 278.

Stevens are in most instances careful to qualify their limitations on the Fourth Amendment to nonresident aliens.[21] These careful delineations make it likely that the Court views citizens living abroad, in contrast to nonresident aliens, as part of "the people." Thus, the Supreme Court would likely hold that at least some elements of the Fourth Amendment apply to Americans abroad, even though it has not yet confronted the question directly.[22]

II. *UNITED STATES V. BIN LADEN* AND THE FOREIGN INTELLIGENCE EXCEPTION

Bin Laden remains the only case that has directly addressed the question of whether the Fourth Amendment requires a warrant to conduct foreign intelligence surveillance on Americans overseas. It is instructive to consider the methodology underlying *Bin Laden* because many of the arguments that support a foreign intelligence exception to the warrant requirement also support the broader argument in Parts III and IV that this requirement should not be automatically applied overseas. Following a brief recitation of *Bin Laden*'s facts and holding, Section A reviews the constitutional and practical bases relied upon by Judge Leonard B. Sand in this case. Section B examines Judge Sand's application of the foreign intelligence exception to the surveillance of El-Hage. Section C explores Judge Sand's refusal to exclude evidence. Finally, Section D

21. Despite the general care to confine the holding only to nonresident aliens, Justice Rehnquist does note that "the drafting of the Fourth Amendment also suggests that its purpose was to restrict searches and seizures which might be conducted by the United States in *domestic matters*." *Verdugo-Urquidez*, 494 U.S. at 266 (emphasis added). Whether this foreshadows restricting the Fourth Amendment to domestic situations even when an American citizen is involved remains to be seen.

22. *See id.* ("[T]he purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory."); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 249 (1960) ("[A civilian dependent stationed abroad] is protected by the specific provisions of Article III [of the Constitution] and the Fifth and Sixth Amendments . . . ."); *Reid*, 354 U.S. at 40–41 ("[U]nder our Constitution courts of law alone are given power to try civilians for their offenses against the United States."); Powell v. Zuckert, 366 F.2d 634, 640 (D.C. Cir. 1966) ("[W]e think it clear . . . that the Fourth Amendment is violated by a general search [of one's home]."); Birdsell v. United States, 346 F.2d 775, 782 (5th Cir. 1965) ("[T]he Fourth Amendment does not apply to arrests and searches made by [foreign] officials in [a foreign country] for violation of [foreign] law, even if the persons arrested are Americans and American police officers gave information leading to the arrest and search.").

discusses the cursory review given to the reasonableness of the search in *Bin Laden.*

The defendant on trial in *Bin Laden*, Lebanese-born Wadih El-Hage, had emigrated to the United States, become a citizen, attended college at the University of Southwestern Louisiana, and lived in Arlington, Texas with his American wife and children.[23] His ties to Usama Bin Laden eventually caused him to move to Kenya, where the United States intelligence community secretly monitored five telephone lines linked to Al-Qaeda from August 1996 through 1997, some of which El-Hage used.[24] The attorney general did not authorize intelligence gathering aimed specifically at El-Hage himself until April of 1997.[25] On August 21, 1997, American and Kenyan intelligence officials, including one FBI agent,[26] jointly searched El-Hage's residence and seized a computer with contents linking him to the 1998 bombings of the United States Embassies in Kenya and Tanzania.[27] Kenyan authorities presented El-Hage's wife with a Kenyan warrant, but no U.S. warrant was ever obtained, and the United States explicitly disavowed relying on the Kenyan warrant for authority.[28]

El-Hage moved to suppress the evidence gained from electronic surveillance and the search of his home on the grounds that it was obtained without a warrant and, alternatively, that the searches were unreasonable.[29] Judge Leonard B. Sand ultimately held that: (1) the Fourth Amendment and its warrant requirement applies to Americans abroad;[30] (2) an exception to the warrant requirement exists for foreign intelligence searches;[31] (3) any evidence obtained prior to the attorney general's authorization to specifically target El-

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23. Oriana Zill, *A Portrait of Wadih El Hage, Accused Terrorist*, FRONTLINE, Sept. 12, 2001, http://www.pbs.org/wgbh/pages/frontline/shows/binladen/upclose/elhage.html.

24. United States v. Bin Laden, 126 F. Supp. 2d 264, 269 (S.D.N.Y. 2000).

25. *Id.*

26. This is notable because the common perception of the FBI is that it is a domestic law enforcement and intelligence agency, while the CIA focuses on foreign intelligence. In actual practice, this dichotomy does not always hold true. *See* RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS 31 (2005) ("[B]efore 9/11 the CIA and the FBI exaggerated the degree to which they were forbidden to share information . . . .").

27. *Bin Laden*, 126 F. Supp. 2d at 268–69.

28. *Id.* at 269.

29. *Id.* at 270.

30. *Id.* at 270–71.

31. *Id.* at 275.

Hage did not fit under this exception and was therefore unlawful;[32] (4) the exclusionary rule did not, however, apply to this unlawfully obtained evidence;[33] and (5) both the electronic surveillance and the physical search of El-Hage's home were reasonable.[34] Thus, El-Hage's motion to suppress evidence was denied.[35]

A. The Constitutional and Practical Bases for a Foreign Intelligence Exception

Judge Sand relied on the broadest language in the *Reid* and *Verdugo-Urquidez* opinions to permit El-Hage to assert a Fourth Amendment challenge, implicitly assuming that a warrant requirement exists overseas, but he ultimately determined that the warrant requirement was inapplicable under the *Bin Laden* facts.[36]

Prior to the enactment of the Foreign Intelligence Surveillance Act (FISA) in 1978,[37] four circuits had held that a U.S. citizen could be searched without a warrant, provided that there was probable cause to suspect that person was an agent of a foreign power and that the investigation was not for normal criminal purposes.[38] However, these holdings only addressed Americans within the United States, and the Second Circuit had not confronted the question of whether Americans could be searched without a warrant for foreign intelligence purposes. Therefore, Judge Sand articulated the exception by blending constitutional and practical justifications within three main categories: the president's constitutional power over foreign affairs, the policy costs of imposing a warrant requirement, and the absence of a warrant procedure.

Judge Sand's conclusion that the president has broad constitutional powers over foreign affairs and intelligence collection is well supported by precedent,[39] as is the fact that prior to FISA

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32. *Id.* at 280–81

33. *Id.* at 281.

34. *Id.* at 284–86.

35. *Id.* at 288.

36. *Id.* at 270, 279.

37. 50 U.S.C. §§ 1801–1863 (2000).

38. *See* United States v. Truong Dinh Hung, 629 F.2d 908, 913 (4th Cir. 1980); United States v. Buck, 548 F.2d 871, 875 (9th Cir. 1977); United States v. Butenko, 494 F.2d 593, 605 (3d Cir. 1974); United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973).

39. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (discussing the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"); Totten v. United States, 92 U.S. 105, 106

"[w]arrantless foreign intelligence collection ha[d] been an established practice of the Executive Branch for decades."[40] FISA changed this practice for Americans *within* the United States, requiring intelligence officials to obtain authorization from both the attorney general as well as a Foreign Intelligence Surveillance Court (FISC) before investigating.[41] Judge Sand viewed the fact that FISA did not address intelligence collection on Americans *abroad*, as well as the Supreme Court's silence on the issue, as favoring wide executive latitude.[42]

Judge Sand then switched to practical considerations, recognizing that any warrant requirement has frequently been disregarded when it "proves to be a disproportionate and perhaps even disabling burden on the Executive."[43] He asserted that requiring judicial approval in advance would decrease the speed of executive response to foreign intelligence threats, as well as increase the likelihood of security breaches, because the executive would have to take the judiciary into its confidence.[44] Judge Sand accepted the government's arguments that at a preliminary stage, courts would have great difficulty in measuring the impact of their decisions on U.S. foreign policy and cooperative relations with other governments. He also noted that

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(1875) (recognizing the president's power to conduct intelligence operations and to employ secret agents).

40. *Bin Laden*, 126 F. Supp. 2d at 273 (quoting William F. Brown & Americo R. Cinquegrana, *Warrantless Physical Searches for Foreign Intelligence Purposes: Executive Order 12,333 and the Fourth Amendment*, 35 CATH. U. L. REV. 97, 103 (1985) ("'Warrantless electronic surveillance has been used by the Executive to collect intelligence information since at least the mid-1800s . . . . Warrantless physical searches have been used for a much longer period of time.'")).

41. 50 U.S.C. § 1802(b) (2000).

42. *Bin Laden*, 126 F. Supp. 2d at 273 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II.")); *see also* United States v. United States Dist. Court, 407 U.S. 297, 321–22 (1972) (holding that there is no warrant exception for domestic security surveillances but "express[ing] no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents").

43. *Bin Laden*, 126 F. Supp. 2d at 273–74. Judge Sand also cited searches by probation officers, as in *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987), and searches related to the regulation of railroad employees, as in *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 619 (1989), as exceptions to the search warrant requirement outside of the foreign affairs context. *Bin Laden*, 126 F. Supp. 2d at 274.

44. *Bin Laden*, 126 F. Supp. 2d at 275.

requiring notification to certain governments that might be hostile to the United States could be ruinous.[45] Judge Sand used FISA's legislative history as evidence that Congress recognized these difficulties and consequently limited FISA's reach to searches within U.S. borders.[46] For instance, then-Attorney General Griffin Bell noted that because "there is a fair degree of cooperation between our Government and the police and intelligence services of other nations . . . . limitations on [overseas] surveillances could result in the loss of cooperation."[47]

Similarly, Judge Sand cited the absence of any statutory basis to issue a warrant abroad as a reason supporting the foreign intelligence exception. He relied on *Verdugo-Urquidez*'s statement that a warrant from an American magistrate "'would be a dead letter outside the United States'" to refute El-Hage's argument that the U.S. must abide by its own constitutional limitations in order to exercise jurisdiction extra-territorially.[48] While Judge Sand did not accept the proposition that obtaining a warrant for a foreign search would be impossible, he stated that it would "certainly have been impracticable" given the absence of a statutory basis, the unsuitability of traditional procedures to foreign intelligence collection, and the risk that sensitive information could be publicly revealed.[49]

B. Adopting and Applying the Foreign Intelligence Exception

After declaring the legality of a foreign intelligence exception, Judge Sand closely mirrored the procedures outlined in FISA for surveillance of Americans within U.S. borders to determine whether the exception would apply to El-Hage's situation. In doing so, he required that there be probable cause to suspect that the defendant is an agent of a foreign power; that the searches or seizures be *primarily*[50] for foreign intelligence purposes; and that the searches

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45. *Id.* at 274.

46. *Id.* (citing S. REP. NO. 95-701, at 7 n.2 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 3790, 3796, and H.R. REP. NO. 95-1283, at 27–28 (1978)).

47. *Foreign Intelligence Surveillance Act of 1978: Hearing on S. 1566 Before the Subcomm. on Intelligence and the Rights of Americans of the S. Select Comm. on Intelligence*, 95th Cong. 12–13 (1978).

48. *Bin Laden*, 126 F. Supp. 2d at 276 (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990)).

49. *Id.* at 277.

50. This requirement is more closely analogous to FISA's standard prior to passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and

first be authorized by the president or attorney general.[51] He determined that the surveillance and physical search of El-Hage's home satisfied each of these requirements, except for the electronic surveillance that was conducted prior to April 1997, when the attorney general first authorized intelligence collection aimed specifically at El-Hage.[52] After a lengthy analysis, Judge Sand ruled that the electronic surveillance of El-Hage prior to April, 1997 was not merely incidental to the efforts directed at Al-Qaeda, and that El-Hage had a reasonable expectation of privacy in his home that could only be abrogated by attorney general authorization.[53] The surveillance conducted prior to April 1997 was therefore unlawful and necessitated consideration under the exclusionary rule.[54]

C. Refusing to Employ the Exclusionary Rule

Judge Sand announced that the main purpose of the exclusionary rule, which holds that evidence obtained in contravention of the Fourth Amendment may not be used against a defendant at trial, is to deter overzealous searches by government agents.[55] He pointed to the exclusionary rule's prudential rather than constitutional nature, and decided that excluding the evidence at issue would serve no deterrent purpose because the intelligence officials were motivated to catch Bin Laden, and "surveillance would have been conducted even if there had been an awareness that the material recorded would be inadmissible at a future criminal trial of El-Hage."[56] Judge Sand also noted that "'the Court, in recent years, has refused to apply the rule to situations where it would achieve little or no deterrence.'"[57]

Obstruct Terrorism (Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). FISA previously required that to apply to FISC for an order to conduct foreign intelligence surveillance on Americans within the United States, the attorney general first had to find that the "purpose of the search is to obtain foreign intelligence information." 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B) (2000). The Patriot Act changed that language to "a *significant* purpose," thereby enabling FISC to issue an order for some searches that would be expected to garner normal criminal investigative information, as well as foreign intelligence. *Id.* (after 2001 change) (emphasis added).

51. *Bin Laden*, 126 F. Supp. 2d at 277.
52. *Id.* at 279.
53. *Id.* at 279–82.
54. *Id.* at 282.
55. *Id.* at 283.
56. *Id.*
57. *Id.* (quoting United States v. Ajlouny, 629 F.2d 830, 840 (2d Cir. 1980)).

In addition, Judge Sand applied the exclusionary rule's "good faith exception," which originally applied in the case of an invalid warrant,[58] to El-Hage's situation. Because intelligence officials "operated under an actual and reasonable belief that Attorney General approval was not required prior to April 4, 1997," Judge Sand offered good faith as an independent rationale against exclusion.[59]

D. Assessing the Reasonableness of the El-Hage Search

Finally, Judge Sand addressed the reasonableness of the searches in *Bin Laden* and summarily concluded that the warrantless physical search of El-Hage's home as well as the wiretaps, which were operated continuously for a year, were reasonable. Judge Sand determined the search of El-Hage's home was reasonable in its scope because it was performed during the daytime, the American official present identified himself in true name to El-Hage's wife, and the only items searched were those believed to have foreign intelligence value.[60] The long-term, continuous electronic surveillance was reasonable because of the covert and diffuse nature of terrorist groups, the fact that the conversations were in a foreign language, which made it likely that some could be in code, and the fact that known Al-Qaeda members regularly used El-Hage's phones.[61] Judge Sand also rejected El-Hage's assertion that warrantless residential searches were only permissible "in cases of exigency," instead allowing them "where a special need of the government is shown."[62]

III. CHALLENGING THE APPLICATION OF THE WARRANT REQUIREMENT TO OVERSEAS SEARCHES

Judge Sand was likely correct when he applied the Fourth Amendment to American citizens abroad, but he proceeded under the assumption that an exception to the warrant requirement would be needed in order for evidence against El-Hage to be admissible.[63] As a result, twenty-four pages of his opinion are spent expounding a

58. United States v. Leon, 468 U.S. 897, 922 (1984).
59. *Bin Laden*, 126 F. Supp. 2d at 284.
60. *Id.* at 285.
61. *Id.* at 286.
62. *Id.* at 285.
63. *Id.* at 270–71.

foreign intelligence exception, defending surveillance without a warrant, and twisting the exclusionary rule to admit "unlawful" evidence into the trial. Fewer than three pages at the end of the opinion concern the reasonableness of the searches.

This Note suggests that instead of assuming a warrant requirement exists and then looking for an exception, future courts should re-examine the meaning of the Warrant Clause and conclude that a warrant is not required to search American citizens abroad. As an alternative to requiring warrants, more weight should be given to the Reasonableness Clause. As a result, Fourth Amendment violations should be remedied not with the impractical exclusion of critical evidence, but with damages against those government actors who conduct unreasonable searches and seizures. Section A of this Part addresses the constitutional underpinnings and precedent regarding warrants before Part B turns to the practical consequences of administering them overseas.

A. Neither Precedent nor the Constitution Require a Warrant to Conduct Searches Overseas

Yale Professor Akhil Reed Amar has argued persuasively that the Fourth Amendment does not require any warrants at all, but *limits* them so that whatever warrants are issued must have probable cause and particularity.[64] The amendment's text and historical antecedents support this position. "The Framers did not exalt warrants, for a warrant was issued ex parte by a government official on the imperial payroll and had the purpose and effect of precluding any common law trespass suit . . . after the search or seizure occurred."[65] In the United States' early years, citizen targets could bring trespass suits and receive jury trials when officials unlawfully searched or seized their person or property.[66] In response, federal officials sought broad warrants because they provided absolute immunity from lawsuits. "Warrants then, were friends of the searcher, not the searched."[67] As a result, revolutionary Americans were skeptical of warrants, numerous early judges were aware of their immunizing potential, and even some modern Justices have

64. Amar, *supra* note 6, at 762, 771.
65. *Id.* at 771–72.
66. *Id.* at 774.
67. *Id.*

recognized their history of aggrandizing governmental power rather than protecting the citizen:[68]

> Far from restricting the constable's arrest power, the institution of the warrant was used to expand that authority by giving the constable delegated powers of a superior officer such as a justice of the peace. Hence at the time of the Bill of Rights, the warrant functioned as a powerful tool of law enforcement rather than as a protection for the rights of criminal suspects.[69]

In addition, the so-called warrant requirement is clearly a misnomer in that it is not absolute[70] and there is a laundry list of searches and seizures that either historically or currently do not require a warrant, including arrests in public places,[71] searches pursuant to arrests,[72] exigent circumstances,[73] consent searches,[74] plain view searches,[75] automobile searches,[76] searches of vessels on the high seas,[77] and foreign intelligence searches.[78] Americans are also regularly subjected to constitutional warrantless searches in their everyday lives, whether they are in public schools,[79] crossing national borders,[80] or on airlines[81]—searches which have become particularly intrusive in the aftermath of 9/11.

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68. *Id.* at 774, 778. For a more detailed and illuminating account of the historical underpinnings of the per se unreasonableness of broad warrants, see *id.* at 771–81.

69. Payton v. New York, 445 U.S. 573, 607–08 (1980) (White, J., dissenting, joined by Burger, C.J., and Rehnquist, J.).

70. Even Professor Dripps admits that "the warrant requirement is now pretty clearly confined to private premises," though he cautions against its abandonment. Dripps, *supra* note 7, at 1608.

71. United States v. Watson, 423 U.S. 411, 421–23 (1976).

72. United States v. Robinson, 414 U.S. 218, 223–24 (1973); Chimel v. California, 395 U.S. 752, 762–63 (1969).

73. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989); Warden v. Hayden, 387 U.S. 294, 298–300 (1967).

74. Illinois v. Rodriguez, 497 U.S. 177, 186 (1990); United States v. Matlock, 415 U.S. 164, 169–71 (1974).

75. Arizona v. Hicks, 480 U.S. 321, 326–27 (1987).

76. United States v. Chadwick, 433 U.S. 1, 12 (1977).

77. United States v. Peterson, 812 F.2d 486, 494 (9th Cir. 1987).

78. United States v. Truong Dinh Hung, 629 F.2d 908, 913 (4th Cir. 1980); United States v. Buck, 548 F.2d 871, 875 (9th Cir. 1977); United States v. Butenko, 494 F.2d 593, 605 (3d Cir. 1974); United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973).

79. New Jersey v. T.L.O., 469 U.S. 325, 337–43 (1985).

80. United States v. Martinez-Fuerte, 428 U.S. 543, 564–66 (1976).

81. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 n.3 (1989).

Thus, even if one does not accept Amar's theory in its entirety, the Fourth Amendment's history and text, as well as Supreme Court precedent itself, demonstrate that the current Warrant Clause jurisprudence is largely adjudicated on a fact-specific, case-by-case basis and hinges primarily on practical and policy considerations. Because neither the text nor the history of the Fourth Amendment suggest that warrants should be required for all searches, there is no reason that future courts must interpret the Fourth Amendment to require warrants overseas.[82] Undoubtedly, some people will resist this proposition, especially when they consider its scope: refusing to require warrants overseas would apply equally to surveillance activities aimed at collecting foreign intelligence as well as to collecting traditional criminal information. Yet before this idea is tossed away as a heavy-handed apology for unlimited intrusions upon privacy by Big Brother, one should understand that, unlike in the domestic context, U.S. judicial warrants are not routinely used for surveillance overseas; instead, American authorities normally rely on the pre-search protections of the host nation. In fact, there is no statutory authority for courts to issue such extraterritorial warrants, and prior to *Bin Laden*, no criminal case had considered whether a warrant was required for overseas searches.[83]

B. Requiring Warrants Overseas is Bad Policy and Administratively Impractical

Requiring a warrant to search or seize Americans overseas raises numerous practical and policy problems that may actually decrease the security of Americans abroad and within the United States. The most glaring administrative problem is that Rule 41 of the Federal

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82. Recall Justice Harlan's eloquent explanation that not all clauses of the Constitution apply equally in an overseas context. Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring); *see also* Irvin B. Nathan & Christopher D. Man, *Coordinated Criminal Investigations Between the United States and Foreign Governments and Their Implications for American Constitutional Rights*, 42 VA. J. INT'L L. 821, 822 (2002) ("[W]hile some constitutional restrictions apply in the same manner whether the United States acts abroad or domestically, other constitutional provisions are modified or rendered inapplicable when the United States acts abroad.").

83. Prior to the enactment of FISA, a federal district court did rule in a civil suit for damages that a warrant was required to wiretap Americans living in West Germany and that the plaintiffs had causes of action under the First and Sixth Amendments. Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 158–60 (D.D.C. 1976). That court, however, was not faced with the warrant requirement's onerous consequence of having to decide whether to exclude evidence of severe criminality.

Rules of Criminal Procedure limits the jurisdiction of a federal magistrate to the issuance of domestic warrants.[84] The Supreme Court considered but chose not to adopt a proposed amendment to Rule 41(a) that would have allowed for the issuance of "warrants to search property outside the United States."[85] Thus, the Supreme Court's previous statement that any warrant from an American magistrate "would be a dead letter outside the United States" still holds true.[86] This statement might be regarded as a direct refutation of any warrant requirement reaching overseas. Yet at the very least, it exposes an internal inconsistency in Judge Sand's opinion due to his reliance on a domestic Fourth Amendment framework: on one hand he relies heavily on the absence of an administrative warrant procedure to justify an exception, but on the other he implies that a warrant might be required if the surveillance was for a normal criminal investigation instead of foreign intelligence.[87] Yet if a warrant would be a "dead letter," it would undoubtedly be so in either context.

Congress could possibly rectify the current absence of a statutory basis by requiring a preclearance procedure in the United States for overseas searches and seizures; even if that procedure would be a "dead letter" in foreign nations, it might serve as a check on our government's criminal and intelligence agents. Yet the fact that

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84. FED R. CRIM. P. 41(b) (1994): Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

> (1) a magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district;
>
> (2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed; and
>
> (3) a magistrate judge—in an investigation of domestic terrorism or international terrorism (as defined in 18 U.S.C. § 2331)—having authority in any district in which activities related to the terrorism may have occurred, may issue a warrant for a person or property within or outside that district.

85. FED R. CRIM. P. 41(a) cmt. (1994). Interestingly, in *United States v. Moussaoui*, 365 F.3d 292, 301 (4th Cir. 2004), the Fourth Circuit indicated that judges do have authority to compel the testimony of witnesses who are abroad, but absolutely no mention was made of warrants. In the absence of statutory authority, a common law theory granting jurisdiction may be inconsistent with Rule 41(a)'s limitations on jurisdiction.

86. United States v. Verdugo-Urquidez, 494 U.S. 259, 274 (1990).

87. *See* United States v. Bin Laden, 126 F. Supp. 2d 264, 276–77 (S.D.N.Y. 2000) (rejecting the government's assertion that it would be impossible to secure a warrant for overseas searches and discussing the possibility of courts issuing a warrant without statutory authority based on their common law powers).

Congress has never bothered to enact such legislation, and has explicitly rejected extending FISA-like procedures to overseas intelligence gathering,[88] counsels against now finding a constitutional requirement of warrants overseas. Even if Congress were to change its course and extend FISA-like protections overseas, it is only logical to assume, as Judge Sand did in *Bin Laden*, that Americans abroad would not be given greater protection than Americans within the United States who fall under FISC jurisdiction. A constitutional requirement of warrants overseas, however, would do just that for foreign intelligence targets, because four circuits have already determined that a warrant is not required for Americans within the country.[89] And FISC's "rubberstamp"[90] approval of Justice Department requests for secret warrants—1,128 granted out of 1,128 requests in 2002,[91] 11,883 warrants with zero denials between 1978 and 1999,[92] and only two substantive modifications out of over 13,000 approved warrants in the court's first twenty-two years of operation[93]—is evidence that the procedural protections of a warrant (or something like it) might not be that great, at least for foreign intelligence targets.[94]

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88. "[L]egislation [governing foreign intelligence surveillance abroad] should be considered separately because the issues are different than those posed by electronic surveillance within the United States." S. REP. NO. 95-701, at 7 n.2 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 3970, 3976 ("[C]ertain problems and unique characteristics preclude the simple extension of [FISA] to overseas surveillances."); H.R. REP. NO. 95-1283, at 27–28 (1978).

89. *See supra* note 38.

90. Erwin Chemerinsky, *Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement*, 51 UCLA L. REV. 1619, 1627 (2004).

91. Tanya Weinberg, *PATRIOT Act Initiatives Disturb Civil Libertarians*, FORT LAUDERDALE SUN-SENTINEL, May 11, 2003, at B1.

92. Lawrence D. Sloan, Note, *ECHELON and the Legal Restraints on Signals Intelligence: A Need for Reevaluation*, 50 DUKE L.J. 1467, 1496 (2001); *see also* Electronic Privacy Information Center, FISA Orders 1979–2004, http://www.epic.org/privacy/wiretap/stats/fisa_stats.html (last visited Jan. 3, 2006) (presenting similar statistics).

93. Stewart M. Powell, *Secret Court Modified Wiretap Requests*, SEATTLE POST-INTELLIGENCER, Dec. 24, 2005, at A9, *available at* http://seattlepi.nwsource.com/national/253334_nsaspying24.html.

94. In 2005 it was revealed that the Bush administration authorized National Security Agency (NSA) surveillance of myriad overseas communications by terror suspects located within the U.S. without requesting warrants from FISC. Eric Lichtblau, *Bush Defends Spy Program and Denies Misleading Public*, N.Y. TIMES, Jan. 2, 2006, at A11. Attorney General Alberto Gonzales claimed that President Bush approved the program because the FISA court's approval process was too cumbersome but defended the program's legality. Powell, *supra* note 93, at A9. One report indicates that in 2003 and 2004, FISC ordered "substantive modifications" to 173 surveillance requests, when only two had been modified in the court's first twenty-two years. *Id.* It also rejected six requests for warrants—the first outright rejections in FISC's

In addition to these considerable practical difficulties, instituting a warrant requirement for overseas searches could be seriously detrimental to national security. Judge Sand detailed some of these dangers in formulating the foreign intelligence exception in *Bin Laden*: requiring law enforcement and intelligence agents located overseas to communicate with judicial authorities back in the United States or foreign judicial authorities would decrease the speed of the executive response,[95] increase the risk of security breaches, and could undermine cooperative relationships with other nations.[96] Needless to say, the danger emanating from these possibilities is magnified beyond ordinary proportions when dealing with terrorists rather than ordinary domestic criminals.

Furthermore, in an intelligence context, the incentives created by careerism, loyalty to one's own agency, and a rational fear that important information will be leaked already result in a tendency to hoard rather than share information amongst the nation's fifteen separate intelligence agencies.[97] The fact that intelligence agencies are reluctant to share amongst themselves foreshadows the considerable difficulty of forcing them to share with judges. Further, being required to share sensitive information with a magistrate judge in order to obtain a warrant may cause agencies to forego searches that should be conducted. For instance, FBI headquarters refused to follow the advice of one of its field offices to search the laptop of Zacarias Moussaoui because it thought its request for a warrant would be rejected.[98]

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history—prompting the Bush administration to unilaterally bypass FISA. *Id.* While this indicates that the existence of FISC may have prevented previous administrations from pursuing surveillance programs blatantly outside of FISA's provisions, it should also be remembered that Congress explicitly disavowed instituting a system similar to FISA for surveillance taking place overseas. In addition, the Clinton administration also maintained that it had authority to conduct warrantless domestic searches for foreign intelligence purposes. Former Deputy Attorney General Jamie Gorelick testified before the Senate Intelligence Committee on July 14, 1994 that "[t]he Department of Justice believes, and the case law supports, that the president has inherent authority to conduct warrantless physical searches for foreign intelligence purposes . . . and that the President may, as has been done, delegate this authority to the Attorney General." Byron York, *Clinton Claimed Authority to Order No-Warrant Searches*, NATIONAL REVIEW ONLINE, Dec. 20, 2005, http://www.nationalreview.com/york/york200512200946.asp.

95. United States v. Bin Laden, 126 F. Supp. 2d 264, 273–75 (S.D.N.Y. 2000).

96. *Id.*

97. *See generally* POSNER, *supra* note 26. Posner cautions that due to the lack of knowledge available to the public about certain agencies, this number is a close estimate.

98. *Id.* at 30.

Finally, by accepting a warrant requirement and then declaring an exception to it, Judge Sand was forced to address the attendant exclusionary rule and devise yet another exception. Exclusion of evidence as a remedy to a Fourth Amendment violation has been attacked on historical and practical grounds, including the fact that it was unheard of in early America,[99] that it does not enhance judicial integrity and fairness,[100] and that an illegal search is rarely a but-for cause of the introduction of evidence.[101] Seeking to deter the government by rewarding a criminal defendant with the windfall of excluding culpatory evidence treats him like "a private attorney general. But the worst kind."[102] "He is self-selected and self-serving. He is often unrepresentative of the larger class of law-abiding citizens . . . . [H]e is often despised by the public, the class he implicitly is supposed to represent. . . . He is . . . an awkward champion of the Fourth Amendment."[103] While the exclusionary rule does have its notable defenders in the domestic context,[104] like the warrant requirement, it is not absolute and is pockmarked with

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99. *See, e.g.*, United States v. La Jeune Eugenie, 26 F. Cas. 832, 843–44 (C.C.D. Mass. 1822) (No. 15,551). In this circuit opinion, future Supreme Court Justice Joseph Story remarked that

> [T]he right of using evidence does not depend . . . upon the lawfulness or unlawfulness of the mode, by which it is obtained. . . . [E]specially on trials for crimes, evidence is often obtained . . . by force or by contrivances . . . . Yet I am not aware, that such evidence has upon that account ever been dismissed for incompetency.

Id.

100. Professor Amar points out that courts in England and many other countries reject the exclusionary rule, as do American courts in civil cases, yet they are not considered unfair or lacking integrity. Amar, *supra* note 6, at 792; *see also* John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1031 (1974) (describing the rejection of the exclusionary rule in other countries besides the United States).

101. Amar, *supra* note 6, at 794–95. Since magistrates are more lenient in granting warrants than courts are in reviewing them, often a police force that would have been able to obtain a warrant but failed to apply for one under the belief that the search would fit a judicial exception will later lose the evidence to the exclusionary rule. When a magistrate would have insulated the search from review by granting a warrant, a subsequent judicial application of the exclusionary rule does not mean the illegality of the search was a but-for cause of the introduction of the evidence.

102. *Id.* at 796.

103. *Id.*

104. *See, e.g.*, Roger J. Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 DUKE L.J. 319, 321–22. In explaining his reluctant acceptance of the exclusionary rule, Traynor said:

> [I]llegal searches and seizures [became] a routine procedure subject to no effective deterrent . . . . It was one thing to condone an occasional constable's blunder, to accept his illegally obtained evidence so that the guilty would not go free. It was quite another to condone a steady course of illegal police procedures that deliberately and flagrantly violated the Constitution of the United States . . . .

Id. at 322.

exceptions.[105] Even if the exclusionary rule is considered the better of imperfect options in the domestic context, its deficiencies are significantly magnified when applied to terrorists like El-Hage due to the enormous damage terrorists can inflict upon the nation.

Even though the evidence against El-Hage was not ultimately excluded, the *Bin Laden* methodology—an approach that requires judges to call evidence "unlawful" and then find a loophole to admit it—might itself decrease security. Within military and intelligence circles, the concept of "lawfare" has emerged.[106] Nations and terrorist groups hostile to the United States have realized that they can no longer compete with American military might. Understanding the respect for law in Western societies, they seek instead to gain tactical advantages by altering worldwide perception of the legality of the U.S. government's actions.[107] Though the concept of lawfare is primarily thought of as a tool to disrupt tactical operations in full scale wars, its logic also extends to intelligence gathering and joint criminal investigations between the United States and foreign countries. Just as "perceptions of illegalities can have real operational effects"[108] in war, they may also erode the willingness of foreign countries to cooperate in surveillance activities and of United States citizens to support them. Al-Qaeda and organized crime are keenly aware of this potential.[109] Thus, headlines like CNN's the day after *Bin Laden* was announced, which proclaimed, "Judge says illegal phone

105. *See* Warden v. Hayden, 387 U.S. 294, 301–02 (1967) (holding the exigent circumstances exception to the warrant requirement applicable to "mere evidence" found by police while searching for the defendant); Hoffa v. United States, 385 U.S. 293, 303 (1966) (holding admissible a conversation obtained through the defendant's misplaced trust in an informant); Schmerber v. California, 384 U.S. 757, 765 (1966) (holding that Fifth Amendment privilege does not protect physical evidence); Linkletter v. Walker, 381 U.S. 618, 620 (1965) (refusing to give *Mapp* retroactive effect; implicitly but conclusively rejecting a Fifth Amendment rationale for the exclusionary rule).

106. *See* Brigadier General Charles J. Dunlap, Jr., USAF, Presentation at Duke University School of Law: Beating Law Books Into Swords: An Airman's Perspective on Law, Lawyers, and the Rise of 'Lawfare' in Modern Conflicts (Apr. 7, 2005).

107. *Id.*

108. *Id.*

109. For example, organized crime has attacked the ability of Colombian leaders to cooperate in international efforts to reduce the trafficking of drugs by staining them with the perception of participation in illegal activities. "In a country where kingpin rebels live by intimidation and bribery, it would not be surprising to find peasants turning up in Colombian courts to press false charges–anonymously–against the most capable military leaders. Indeed, there is proof that is happening." Mary Anastasia O'Grady, *What About Colombia's Terrorists?*, WALL ST. J., Oct. 5, 2001, at A17.

taps can be used in bomb trial,"[110] are self-imposed injuries that would be avoided with a different judicial approach to the Fourth Amendment.[111]

The *Bin Laden* methodology runs into yet another difficulty when one recognizes that classifying an individual as an agent of a foreign power is becoming exceedingly difficult.[112] Terrorist groups like Al-Qaeda have responded to the war on terror by morphing themselves from centralized, hierarchical organizations to decentralized, entrepreneurial, terrorist individuals.[113] As a result, intelligence officials may suspect an individual of terrorist activities but never be able to show that he is an agent of a foreign power. Under the *Bin Laden* methodology, warrantless surveillance of this new breed of unaffiliated terrorists might not fit under the foreign intelligence exception, so the entire surveillance effort would be termed unlawful, and future courts would be faced with the same awkward predicament of whether to exclude incriminating evidence or fashion a convoluted exception.

Thus, the history, text, and precedent surrounding the Fourth Amendment do not compel an overseas warrant requirement, and numerous practical and policy difficulties make it impractical and potentially dangerous to implement. Instead, the personal liberty that the Fourth Amendment aims to protect can be better safeguarded with a more stringent reasonableness standard that is enforced by a damages remedy.

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110. CNN.com, *Judge Says Illegal Phone Taps Can Be Used in Bomb Trial*, http://archives.cnn.com/2000/US/12/19/embassy.bombings.ap/ (last visited Mar. 9, 2006).

111. In no way does the author intimate that freedom of the press should be infringed to prevent unsavory headlines. Rather, the argument is simply that Judge Sand's characterization of the evidence as unlawfully obtained is incorrect.

112. Heather MacDonald, John M. Olin Fellow, Manhattan Inst. for Policy Research, Remarks at Duke University School of Law, Center for Law, Ethics, and National Security, and the Program in Public Law: Strategies for the War on Terrorism: Taking Stock (Apr. 7, 2005).

113. *See* Jessica Stern, *The Protean Enemy*, FOREIGN AFF., July/Aug. 2003, at 27, 34 (providing a compelling account of Al-Qaeda's "Protean nature," encouragement of leaderless "virtual network[s]" and "lone-wolf terrorists," and ability to avoid detection by gaming law enforcement agencies); *see also* Jonathan Kay, *Terror Goes Po-Mo*, NAT'L POST (CANADA), Sept. 27, 2003, *available at* http://memri.org/bin/media.cgi?ID=61603 (summarizing presentation of the International Policy Institute for Counter-Terrorism at "Post-Modern Terrorism: Trends, Scenarios and Future Threats" conference in Herzliya, Israel in September of 2003).

IV. FORMULATING A NEW APPROACH

In order to overcome some of the difficulties in using the *Bin Laden* methodology for searches of Americans abroad, this Part offers suggestions for a new judicial application of the Fourth Amendment overseas. The majority of the ideas come from the existing debate in the domestic context, but their application to overseas searches may be particularly helpful in addressing the differing practical considerations as well as security and liberty interests that must be balanced overseas. Section A discusses a stronger reasonableness standard, and Section B contours a potential damages remedy. These ideas are offered as a first start for commentators and judges to build upon and improve in thinking about a new approach to the Fourth Amendment overseas.

A. A Stronger Reasonableness Standard

The cursory review of the reasonableness of the searches in *Bin Laden* is again worth noting, as it accounts for a mere two and-one-half pages in a twenty-six-page opinion. Under current Fourth Amendment doctrine, this is not surprising: "Because of the [Supreme] Court's preoccupation with warrants . . . the Justices have spent surprisingly little time self-consciously reflecting on what, exactly, makes for a substantively unreasonable search or seizure."[114] The full answer to what constitutes an unreasonable search or seizure will depend upon future courts giving it greater weight and spending more time grappling with the issue in relation to specific scenarios. Nonetheless, this Part sets out certain elements of searches and seizures of Americans abroad that are immediately identifiable as important to a reasonableness analysis, and concludes with a discussion of potential damages remedies.

First, future courts should consider the probability of obtaining information from the proposed search (essentially probable cause), but also multiply that probability by the amount and value (together the "magnitude") of that information, and then weigh the result against the intrusiveness of a search or seizure to the individual. If the intrusiveness is greater than the probability times the magnitude, then the search would be per se unreasonable. While perfect quantification of these factors is impossible, judges routinely weigh interests in

114. Amar, *supra* note 6, at 796, 801.

multiple legal contexts, from torts[115] to securities regulation,[116] and even detractors of civil remedies agree that judges could adequately weigh these factors.[117] This need not be the only consideration under reasonableness, but rather a first hurdle for government officials.

For example, in *Bin Laden*, intelligence officials had a very high probability of obtaining incriminating evidence from electronic surveillance because the officials had previously identified the phone lines as being used by Al-Qaeda members. The magnitude of the information that could be received was also high because of its potential to help prevent terrorist attacks, thereby justifying the very intrusive methods. In contrast, using uninterrupted electronic surveillance for a year to investigate a low-level American drug peddler would be unreasonable because the magnitude of the offense would not justify such a severe intrusion on privacy.

Further, the intelligence agents in *Bin Laden* did eventually request and receive attorney general approval, and such approval may well emerge as a prerequisite under a reasonableness inquiry in order to conduct the most intrusive searches, particularly residential and electronic searches. Merely obtaining attorney general approval would not show that the search is per se reasonable—the 2005 revelation that Attorney General Alberto Gonzales approved a spying program to monitor citizens' telephone calls without consulting FISA cautions against such a conclusion. In fact, such blatant disregard of a Congressional statute would likely make the searches per se unreasonable. Yet requiring attorney general approval for highly intrusive searches does at least force attorneys within a presidential administration to debate the legality of the searches and seizures they approve. For instance, former Attorney General John Ashcroft reportedly refused to authorize the current spying program even after Gonzales implored him to approve it while

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115. *See* The T.J. Hooper, 60 F.2d 737, 739–40 (2d Cir. 1932) (establishing that failure to take appropriate prophylactic measures when they would cost less than the probability of an accident multiplied by its potential consequences results in liability for negligence).

116. *See* SEC v. Tex. Gulf Sulfur Co., 401 F.2d 833, 849 (2d Cir. 1968) (holding that, in insider trading cases, whether a fact is material depends upon the probability of the event's occurrence multiplied by its anticipated magnitude).

117. Dripps, *supra* note 7, at 1618 ("I have little doubt that it is *technically* feasible to create effective civil remedies for Fourth Amendment violations."); *see also* Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 162 (D.D.C. 1976) ("Questions of causation and valuation of damages are always thorny but never insuperable; courts traditionally have undertaken to answer both.").

he was in the hospital with pancreatitis, and former Assistant Attorney General James Comey resigned over the administration's decision to disregard FISA's proscriptions.[118] The attorney general and the Department of Justice face enormous pressure from citizens and the media to protect civil liberties, and in Congress's explicit declination to apply FISA overseas, such pressure may offer a necessary check on the types of searches that are approved. Future administrations may learn from the harsh public criticism of President Bush's abuses of power, including a rebuke from Republican Senator John McCain and the opening of Judiciary Committee hearings by Chairman and Republican Senator Arlen Specter,[119] that conducting unreasonable searches is bad policy.

In addition, some of the reasoning that is currently performed under the Warrant Clause is more appropriate under the Reasonableness Clause. For example, much controversy has surrounded the Patriot Act's amendment to FISA that gives FISC jurisdiction over searches with a "significant" foreign intelligence purpose rather than only searches with a sole or primary foreign intelligence purpose.[120] But this determination is exceedingly arbitrary, because foreign intelligence collection will often lead to criminal prosecutions, and it fails to consider the multiple roles that the intelligence agencies play.[121] Making a warrant requirement hinge on a judicial determination of when a search's purpose may have switched from foreign intelligence collection to a normal criminal investigation, as *Bin Laden* suggests is appropriate,[122] places far too much consequence on the selection of a cutoff date. The singular importance of this determination would be dramatically lessened under a reasonableness framework. Under such a framework, a search that had the primary purpose of collecting foreign intelligence would justify more intrusiveness than a search that only had a

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118. *See* Daniel Klaidman et al., *Palace Revolt*, NEWSWEEK, Feb. 3, 2006, at 34 (describing the vigorous debate amongst high-level White House attorneys over what types of surveillance fall within the president's powers).

119. Adam Nagourney, *Seeking Edge in Spy Debate*, N.Y. TIMES, Jan. 23, 2006, at A1.

120. *Compare* Chemerinsky, *supra* note 90, at 1627 ("The broad definition of terrorism and the government's power to use FISA for law enforcement is especially troubling because the Patriot Act gives the government significant new powers to gather information.") *with In re* Sealed Case, 310 F.3d 717, 746 (FISA Ct. Rev. 2002) ("We, therefore, believe firmly, applying the balancing test drawn from *Keith*, that FISA as amended is constitutional because the surveillances it authorizes are reasonable.").

121. United States v. Bin Laden, 126 F. Supp. 2d 264, 278 (S.D.N.Y. 2000).

122. *Id.* (citing United States v. Truong Dinh Hung, 629 F.2d 908, 916 (4th Cir. 1980)).

significant foreign intelligence purpose, but it would be only one factor in a much broader reasonableness inquiry. Moreover, whereas *Bin Laden* counted the special factors attendant to cooperating with foreign governments as a significant cost to requiring a warrant, these factors could instead be considered in judging whether the execution of a particular search was reasonable.

Indeed, at least one commentator has recommended replacing per se rules of domestic Fourth Amendment jurisprudence with a transnational approach to reasonableness.[123] Under this approach, either "international human rights norms and the search-and-seizure practices of the world's major legal systems," or the practices and expectations of the host country could be considered.[124] In his *Verdugo-Urquidez* concurrence, Justice Kennedy hinted at the latter when he said that "the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad" were reasons not to require a warrant.[125] This line of thought echoes an opinion Justice Kennedy wrote as a circuit judge that made reasonableness the primary inquiry in determining the legality of warrantless foreign searches and in which he refused to exclude criminal evidence of drug smuggling obtained from warrantless wiretaps.[126]

Finally, the values implicated by other protections in the Bill of Rights could be incorporated into the Fourth Amendment analysis.[127] "A government policy that comes close to the limit set by one of these independent clauses [in the Bill of Rights] can, if conjoined with a search or seizure, cross over into constitutional unreasonableness."[128] For example, searching an American news publication's overseas office could trigger heightened Fourth Amendment safeguards and higher standards of justification prior to searching because of the obvious First Amendment values at stake.[129] FISA partially recognized this idea by making it clear that an American citizen cannot be considered an agent of a foreign power

123. Eric Bentley, Jr., *Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After* Verdugo-Urquidez, 27 VAND. J. TRANSNAT'L L. 329, 371 (1994).

124. *Id.*

125. 494 U.S. 259, 278 (1990) (Kennedy, J., concurring).

126. United States v. Peterson, 812 F.2d 486, 491–93 (9th Cir. 1987).

127. Amar, *supra* note 6, at 805.

128. *Id.*

129. *See id.* (discussing the "special dangers posed by the government's searching and seizing documents from the press").

"solely upon the basis of activities protected by the First Amendment."[130] In addition to the First Amendment, searches of attorneys' offices might trigger heightened Fourth Amendment requirements due to Sixth Amendment attorney-client privilege concerns, and searches disproportionately focused on certain racial groups could implicate the Equal Protection Clause and require more stringent standards for searches.[131] If judges become willing to place greater emphasis on reasonableness, the list of factual scenarios that implicate other values in the Bill of Rights would undoubtedly expand and lead to protections from governmental interference without the unique defects that warrants have in the international context.

To illustrate how this idea might operate, consider the facts of *Berlin Democratic Club v. Rumsfeld*.[132] The United States Army subjected Americans living in Berlin during the Cold War (including attorneys, ministers, and journalists) to extensive electronic surveillance because their activities, which included supporting Senator McGovern for president in 1972 and the impeachment of President Nixon, were considered potentially disruptive to Coalition morale.[133] The court ultimately concluded that the plaintiffs had alleged cognizable First and Sixth Amendment violations, but premised these violations on the fact that surveillance was conducted without a warrant.[134] Instead of dealing with the tenuous warrant inquiry, the court could have easily dismissed the defendants' motion for summary judgment on Fourth Amendment reasonableness grounds. Because First and Sixth Amendment rights were strongly implicated, as well as the fact that the plaintiffs were not suspected of being agents of a foreign power or even of serious criminal activities, any use of wiretaps would have been considered a clear abuse of government power under a reasonableness standard. In addition to recognizing private causes of action under the First and Sixth Amendments, the court could also have awarded damages for

130. 50 U.S.C. § 1805(a)(3)(A) (2000).

131. Amar, *supra* note 6, at 806.

132. 410 F. Supp. 144, 158 (D.D.C. 1976).

133. *Id.* at 147.

134. *Id.* at 161 ("Taken together with the allegations of illegal electronic surveillance, the complaint sets forth a concerted military effort to discredit certain groups of individuals for allegedly innocent activities.").

unreasonableness under the Fourth Amendment, which leads to the final point.

B. The Damages Remedy

Americans can currently sue federal officials for Fourth Amendment violations, yet they cannot sue the federal government itself. The reasonableness doctrine is decidedly underdeveloped, and warrants often immunize federal officials from liability.[135] Expanding the reasonableness doctrine to recognize more instances where a suit for damages is appropriate and removing the immunizing potential of warrants would offer Americans abroad greater protection from their government, as would permitting suits directly against the federal government, though that debate is not taken up here. Still, an expanded reasonableness regime raises new questions. For instance, in cases like *Berlin Democratic Club*, where the individuals were not suspected of any crime, suits for damages clearly offer greater privacy protection because there is no expectation of a criminal trial where the exclusionary rule may be applied. But in a case where the surveilled individual is clearly guilty of a crime, will courts ever be able to find the search that produced the incriminating evidence unreasonable and then award damages? The answer is "yes" for two reasons. First, judges make even more awkward judgments all the time by excluding incriminating evidence rather than compensating for it. Second, as judges confront new cases through this lens, certain actions will be recognized as unreasonable as a matter of law. Law enforcement and intelligence agencies operating abroad will be deterred from searching one's home or applying electronic surveillance, unless there is a very high likelihood of criminal activity or of obtaining very valuable information due to the seriousness of the issue being investigated, lest they be slapped with a hefty damages judgment.

Damage judgments also raise indemnity questions, such as whether it is fair for taxpayers to pay for abuses of power by law

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135. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971) the Supreme Court recognized a private right of action under the Fourth Amendment against federal officials who violate the Amendment. While the federal government itself has sovereign immunity, many commentators have urged its abolition. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1211 (2001); Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 438–39 (1962). The approach to the Fourth Amendment offered here provides yet another justification for allowing suits directly against the government.

enforcement. Yet the public already pays dearly for such abuses in the currency of lost convictions rather than in dollars and cents.

From an operational perspective, in most cases the plaintiff should have the option to be tried by a jury, which "is perfectly placed to decide, in any given situation, whom it fears more, the cops or the robbers."[136] In the context of national security cases, however, this raises an additional complication. Should jury trials for damages be allowed when sensitive foreign intelligence information could be revealed? If the government is willing to release information in a criminal trial before a jury, then the same information, with the same cautionary procedures, should be used in a corresponding civil trial. As for those cases where the government would not be willing to release sensitive information in a criminal trial, or simply doesn't have enough evidence to prosecute one, but is caught in what the plaintiff alleges is an unreasonable search, a court could weigh the competing interests in camera. Only if the information is absolutely vital to the national interest could the court decide not to grant a jury trial and evaluate the search's reasonableness itself.

One might also ask what good a finding that a search was unreasonable would do for a criminal defendant who is convicted on evidence so obtained. Yet that is the very point of abandoning the exclusionary rule in an overseas context,[137] because the rapist, the murderer, or the international terrorist should not be turned loose. "Thus, the courts best affirm their integrity and fairness not by closing their eyes to truthful evidence, but by opening their doors to any civil suit brought against wayward government officials, *even one brought by a convict*."[138] The victim of an unreasonable search, even if a criminal, should receive damages that compensate in accordance with the actual injury suffered, rather than receive the windfall of excluded evidence. And to effectively deter the government, punitive damages might sometimes be an appropriate reward, especially when one acknowledges that some unreasonable searches will never come to

136. Amar, *supra* note 6, at 818.

137. This is not to say that no evidence should *ever* be excluded; abandoning the exclusionary rule simply means that exclusion is not a requirement, but may be used as just another tool in a reasonableness inquiry. In the case of a very intrusive search that reveals only minor criminal violations, a judge might consider the search so unreasonable that in addition to monetary damages, the evidence should be excluded. Maintaining "the suppression remedy as a shotgun in the closet" for the most unreasonable searches might well prevent reckless violations of Fourth Amendment standards. Dripps, *supra* note 7, at 1623.

138. Amar, *supra* note 6, at 793 (emphasis added).

light. Unlike exclusion, however, punitive damages are a flexible remedy. When the victim has done no wrong, society may choose to award the punitives directly to the victim, but when the victim is a criminal, the punitives could be diverted into some sort of socially beneficial fund.[139]

One final objection might be that if they have the right to a jury trial, many defendants will file separate civil suits alleging unreasonableness after their criminal trial, even when they lose. Yet judges could still screen these claims at the summary judgment stage to see if they could succeed as a matter of law.[140] Or the criminal jury might be asked, in addition to their finding of guilt or innocence, to determine whether a search or seizure was unreasonable, a threshold that the defendant would have to overcome in order to later file a civil claim.

CONCLUSION

In an era of globalization and the war on terror, *Bin Laden* is merely a precursor to future cases that will force courts to consider the propriety of government searches of Americans abroad. Rather than flail through the incoherent domestic doctrine, future courts would be wise not to recognize a warrant requirement in the overseas context. Such a move would be supported by the Fourth Amendment's history and text as well as by the government's current practices, and would obviate a need for any foreign intelligence exception. Articulating a more stringent reasonableness standard is possible without a great deal of judicial innovation due to the lack of Fourth Amendment jurisprudence in the overseas context, and would avoid the logistical problems and dangers to security associated with requiring warrants abroad. Finally, readily awarding damages to victims of unreasonable searches would better deter government officials than the current exclusionary rule and, thus, make the

139. Professor Amar suggests a fund to educate Americans about the Fourth Amendment and comfort victims of crime and police brutality. *Id.* at 815. If the exclusionary rule were only abandoned in the overseas context, perhaps these damages could be used to compensate victims of international crime and terrorism and to promote tolerance between people of all nations.

140. Again, this Note only addresses searches and seizures of Americans abroad. If reasonableness principles did come to dominate domestic Fourth Amendment jurisprudence, the number of civil suits filed would likely be great. Perhaps the volume of cases might best be handled by establishing panels to prescreen cases for a likelihood of success on the merits before passing them to a judge, or by assigning prescreening to magistrates who, incidentally, would be spending less time reviewing requests for warrants.

American people for whose protection the Fourth Amendment was written more "secure in their persons, houses, papers, and effects."[141]

141. U.S. CONST. amend. IV.