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Bombed Away: How the Second Circuit Destroyed Fourth Amendment Rights of U.S. Citizens Abroad

“Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law.”¹

—Walter R. Mansfield

I. INTRODUCTION

In responding to the terrorist attacks of September 11, 2001, many believe the United States began charting a new course by which civil liberties were sacrificed in order to protect national security interests.² Yet even before those events, the United States had been targeted by international terrorism and the U.S. government had been forced to face the issue of how to address related threats within a legal framework.³ This Note focuses on an example of one such pre-9/11 attack; namely, the August 7, 1998, simultaneous bombings by al-Qaeda of the U.S. Embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya. While those attacks seem to have occurred eons ago in the chronology of international terrorism, a lingering related case has raised new issues pertinent not just to terrorism, but to criminal justice as a whole.

Specifically, in a surprisingly unheralded decision stemming from those bombings, the Second Circuit held in *In re Terrorist Bombings*

1. *United States v. Toscanino*, 500 F.2d 267, 274 (2d Cir. 1974) (citing *United States v. Archer*, 486 F.2d 670, 677 (2d Cir. 1973)).

2. See, e.g., John D. Podesta & Raj Goyle, *Lost in Cyberspace? Finding American Liberties in a Dangerous Digital World*, 23 YALE L. & POL’Y REV. 509, 510 (2005); Alissa Clare, Note, *We Should Have Gone to Med School: In the Wake of Lynne Stewart, Lawyers Face Hard Time for Defending Terrorists*, 18 GEO. J. LEGAL ETHICS 651, 654 (2005); Tara M. Sugiyama, Note, *The NSA Domestic Surveillance Program: An Analysis of Congressional Oversight During an Era of One-Party Rule*, 40 U. MICH. J.L. REFORM 149, 156 (2006).

3. For example, indictments and/or criminal prosecutions were pursued in response to the 1993 World Trade Center bombing, the 1994 plot to plant bombs on U.S. air carriers flying over the Pacific Ocean, and the 1996 bombing of the Khobar Towers military barracks in Saudi Arabia. See Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307, 310–11 (2003); see also Department of Justice, Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System, <http://www.usdoj.gov/opa/pr/2009/June/09-ag-564.html> (last visited Mar. 27, 2010) (highlighting both historic and current terrorism related prosecutions).

of *U.S. Embassies in East Africa (Fourth Amendment Challenges)* that the Fourth Amendment's warrant requirement is inapplicable to extraterritorial searches of U.S. citizens, even if those searches are conducted by U.S. officials.⁴ Though the searches in the case related to international terrorism, the Second Circuit's ruling did not create a related, narrowly tailored warrant exception, but instead applied across the board to any type of investigation that U.S. officials might conduct overseas against U.S. citizens. While the court stated that its decision was based in part on the fact that there was no precedent establishing that the warrant requirement should apply in such circumstances, this Note argues that the opinion actually signaled a significant and deleterious change in the approach toward protecting the Fourth Amendment rights of U.S. citizens abroad.

Part II of this Note begins with a discussion of the Fourth Amendment itself, including an examination of what protections the Amendment provides and why they are provided. Part III discusses whom is shielded by the Amendment's provisions and then, in order to establish a general framework for discerning when the Fourth Amendment is applicable, this Note provides an overview of important case law related to this issue. With this framework established, Part IV focuses specifically on *Terrorist Bombings* and explains the facts, procedural history, and rule of law to emerge from that controversy. Part V concludes with an analysis of the case and, given the developed law in this area, a critique of the decision reached by the Second Circuit.

II. BACKGROUND AND CONTEXT

Before moving specifically to *Terrorist Bombings*, this Part provides a framework for examining the Fourth Amendment issues presented by the case. First, it explores the relevant provisions of the Amendment, including the warrant and reasonableness requirements. The following section explains how the Supreme Court has enforced these requirements upon the executive branch in various circumstances. Specifically, it chronicles the development of Fourth Amendment jurisprudence as applied to extraterritorial searches of nonresidents, searches conducted against persons within

4. *In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fourth Amendment Challenges)* (*Terrorist Bombings*), 552 F.3d 157 (2d Cir. 2008).

the United States, and extraterritorial searches conducted against U.S. persons.

A. Provisions of the Fourth Amendment

The Fourth Amendment provides, in relevant part, that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation.”⁵ While the plain language of this Amendment might at first appear clear, its actual application has been less so; in fact, one Supreme Court Justice commented that “[t]he course of true law pertaining to searches . . . has not—to put it mildly—run smooth.”⁶ One of the most fundamental issues relates to the prerequisites that must be met in order to conduct a constitutional search under the Fourth Amendment. On one hand, the Amendment may be read in such a way that it establishes two different rights—one prohibiting unreasonable searches and one requiring probable cause to support any warrants that are in fact issued.⁷ Alternatively, the Amendment may in fact declare that a search is *only reasonable* when a warrant, establishing probable cause, is obtained.⁸ Though this exercise may seem somewhat academic in light of well-recognized exceptions to the warrant requirement⁹—which by their very existence would seem to render the second reading impossible—it is nevertheless important insofar as it establishes the presumptions behind Fourth Amendment jurisprudence. In other words, by recognizing these exceptions to the requirement as “exceptions,” the Court has implicitly indicated a presumption in favor of obtaining a warrant.

5. U.S. CONST. amend. IV.

6. *Chapman v. United States*, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).

7. WAYNE R. LAFAVE, 2 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1 (4th ed. 2004).

8. *Id.*; see also POLYVIOS G. POLYVIOS, SEARCH AND SEIZURE: CONSTITUTIONAL AND COMMON LAW 130–31 (1982).

9. Well-established exceptions to the warrant requirement include consensual searches, exigent circumstance searches (as, for example, when evidence is being destroyed, or officers are in “hot-pursuit” of a suspect), administrative searches, and searches incident to arrest. INGA L. PARSONS, FOURTH AMENDMENT PRACTICE AND PROCEDURE (2005).

1. The warrant requirement

Beyond simply implying a presumption in favor of search warrants, however, the Court has in fact repeatedly made explicit declarations favoring them. The Court has noted, for example, that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment.”¹⁰ And even in creating one of the most prominent exceptions to the warrant requirement, the *Terry* Court was careful to highlight that “police *must*, whenever practicable, obtain advance judicial approval of searches . . . through the warrant procedure.”¹¹ Thus, while there are indeed *exceptional* situations wherein a search warrant will not be mandated, the Court has nevertheless been clear as to what is the background norm.

Because the Court has been so persistent and adamant regarding this warrant requirement, it is worth briefly exploring the rationale behind such a position. While there are undoubtedly a number of reasons for the Court’s posture, two justifications are particularly worthy of examination here. The first rests on the nature of the right to be protected by the Fourth Amendment. Specifically, the Court noted over a century ago that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”¹² Indeed, as the Supreme Court explained more recently, the Fourth Amendment “codified a *pre-existing* right”¹³ to be free from unwarranted government searches that rested on principles of natural rights and natural law.¹⁴ With this understanding, it is easier to appreciate the gravity of the warrant

10. *Katz v. United States*, 389 U.S. 347, 357 (1967) (citations omitted); *see also* *Johnson v. United States*, 333 U.S. 10, 14–15 (1948) (“There are *exceptional circumstances* in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate’s warrant for search may be dispensed with.” (emphasis added)).

11. *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (emphasis added) (citing *Katz*, 389 U.S. at 347; *Beck v. Ohio*, 379 U.S. 89 (1964); *Chapman*, 365 U.S. at 610). For a more comprehensive study of *Terry* and the related “*Terry* stops,” see POLYVIU, *supra* note 8, at 231–59.

12. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

13. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008).

14. *See, e.g.*, John P. Feldmeier, Note, *United States v. Verdugo-Urquidez: Constitutional Alchemy of the Fourth Amendment*, 20 CAP. U. L. REV. 521 (1991).

requirement since “the Fourth Amendment does not purport to *create* a right,” but instead simply “enjoins government from *violating* a right assumed to exist.”¹⁵ In other words, warrants serve the function of creating “clear and unquestionable authority” for the government to conduct searches that would otherwise violate an inviolable right, and accordingly, the warrant requirement should not be lightly disregarded.

A second justification for the Court’s strong presumption in favor of a search warrant centers on constitutional principles of the separation of powers, which ultimately exist to protect individual rights. More directly, the Court has noted that to effectuate a legitimate search, a “neutral and detached magistrate [is] required by the Constitution.”¹⁶ Though this necessity is not explicitly set forth in the Constitution, its structure does imbue each branch with such checking functions on the other branches. Indeed, in expounding upon this notion, the Court has said:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate’s disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity¹⁷

Such language indicates an acknowledgment by the Court that when the warrant requirement is jettisoned from the Fourth Amendment, the rights of those subjected to searches are left to the unfettered prerogative of the executive. In recognition of the fact that such “unreviewed executive discretion may yield too readily to pressures . . . and overlook potential invasions of privacy,”¹⁸ the Court has

15. Zachary Margulis-Ohnuma, Note, *The Unavoidable Correlative: Extraterritorial Power and the United States Constitution*, 32 N.Y.U. J. INT’L L. & POL. 147, 169 (1999).

16. *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971); *see also* *Shadwick v. City of Tampa*, 407 U.S. 345, 348–50 (1972); *Warden v. Hayden*, 387 U.S. 294, 301–02 (1967).

17. *Johnson v. United States*, 333 U.S. 10, 13–14 (1948) (citation omitted).

18. *United States v. U.S. Dist. Court*, 407 U.S. 297, 317 (1972) (citing NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 79–105 (1937)).

stated that “those charged with [] investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks.”¹⁹

2. Reasonableness

As important as the warrant requirement clearly is, there is no doubt that the Fourth Amendment also requires that searches be “reasonable.”²⁰ Since the main focus here is on issues pertaining to the warrant requirement, a thorough examination of the “reasonableness requirement” necessarily falls beyond the scope of this Note. There are, however, a few things worth highlighting as predicates for analysis of the *Terrorist Bombings* case. First, the Court has declared that the “touchstone of the Fourth Amendment is reasonableness,”²¹ and “the balancing of competing interests.”²² Under this rubric, “the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interest.”²³ Flowing from this is the observation that the Court has repeatedly indicated that reasonableness is context-dependent.²⁴ Thus, there are no bright-line rules for the reasonableness of searches, and the inquiry will instead depend on the circumstances surrounding each search.²⁵ Finally, it is also important to recognize that the prohibition against unreasonable searches applies at both the initiation and the execution phases.²⁶ In

19. *Id.*

20. As noted previously, and despite the arguments presented above, some commentators have even suggested that, in light of the exceptions to the warrant requirement, it is arguable that the *exclusive* mandate of the Fourth Amendment is that a search be reasonable. POLYVIUO, *supra* note 8, at 131. Notably, however, Polyviou also asserts that the interpretation of the Fourth Amendment generally requiring a search warrant “command[ed] the support of the Supreme Court” at least at the time of his publication. *Id.*

21. *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

22. *Dunaway v. New York*, 442 U.S. 200, 219 (1979) (White, J., concurring).

23. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

24. *See, e.g.*, *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (“Reasonableness . . . is measured in objective terms by examining the totality of the circumstances.”); *United States v. Jacobsen*, 466 U.S. 109, 115 (1984) (“The reasonableness of an official invasion of the citizen’s privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred.”).

25. *Robinette*, 519 U.S. at 39.

26. Rachael A. Lynch, Note, *Two Wrongs Don’t Make a Fourth Amendment Right: Samson Court Errs in Choosing Proper Analytical Framework, Errs in Result, Parolees Lose*

other words, it must first be reasonable to perform a search, and then the search itself must be carried out in a reasonable manner.

Though reasonableness has been declared the “touchstone” of the Fourth Amendment, this last point suggests that a reasonableness determination still hinges, in most cases, upon the warrant requirement. The government official designated by the Constitution as the decider of whether a search is reasonable is a member of the judiciary. As noted above, this is because a judicial officer can examine probable cause evidence in a neutral and detached manner. While some suggest that determinations of reasonableness can be made *ex post*—that is, after a search—such an argument ignores the judicial officer’s responsibility to ensure that initiating a search in the first place is reasonable.²⁷

In sum, it suffices on this point to highlight the Court’s recurring language insisting that the Fourth Amendment generally requires that a warrant be obtained in order to preserve the constitutionality of a search. While there are indeed notable exceptions, the fact that such exceptions fail to comport with the rationale for the warrant requirement is indicative of the fact that they represent anomalies rather than rules. Though the Court has indicated that reasonableness is the touchstone of the Fourth Amendment, this could be seen as strengthening rather than undermining the warrant requirement, since the warrant procedure ensures that a magistrate deem a search reasonable before the magistrate even issues a warrant.

B. When the Fourth Amendment is Applicable to a Search

The Supreme Court has long-since established that “the Fourth Amendment protects people, not places.”²⁸ Though it is not entirely clear from the Amendment who these “people” are, it is plain that the Fourth Amendment imbues them with certain rights. This section examines the Court’s approach to the question of whether

Fourth Amendment Protection, 41 AKRON L. REV. 651, 676–77 (2008); Stacy E. Roberts, Note, *Bond and Beyond: A Shift in the Understanding of What Constitutes a Fourth Amendment Search*, 33 U. TOL. L. REV. 457 (2002).

27. To be sure, in instances where law enforcement officers rely on an exception to conduct a warrantless search, this is exactly the type of analysis the judiciary engages in. As has been argued above, however, the Court has expressed that warrantless searches should be the exceptions rather than the rule.

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

Fourth Amendment guarantees extend to searches in three different circumstances; namely, (1) extraterritorial searches of nonresident aliens by U.S. officials, (2) domestic searches of such persons within the United States, and (3) extraterritorial searches of U.S. citizens. By extracting the principles the Court has set forth in these situations, a framework can be established for application by extension to *Terrorist Bombings*.

1. Extraterritorial searches of nonresident aliens by U.S. officials

Whether or not constitutional provisions generally do, or should, apply to nonresident aliens is an issue subject to debate.²⁹ While an in-depth exploration of this question is not necessary here, it is important to give a brief examination of the applicability of the Fourth Amendment to nonresident aliens. One of the principal questions in this area is whether nonresident aliens fall within the contours of “the people” discussed in the Fourth Amendment. In *United States v. Verdugo-Urquidez*, the Court answered this inquiry by defining “the people” as: “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”³⁰ Consequently, the Court held that a nonresident alien, whose home in a foreign country had been searched without warrant by U.S. authorities, was not entitled to the protections of the Fourth Amendment because he was not “one of the people.”³¹ In explaining this result, the majority went to great lengths to highlight Verdugo-Urquidez’s status as a nonresident alien. Indeed, the Court noted that “it was never suggested that the [Fourth Amendment] was intended to restrain the actions of the Federal

29. See, e.g., J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463 (2007); Jon Andre Dobson, Note, *Verdugo-Urquidez: A Move Away from Belief in the Universal Pre-Existing Rights of All People*, 36 S.D. L. REV. 120 (1991); Leah E. Kraft, Comment, *The Judiciary’s Opportunity to Protect International Human Rights: Applying the U.S. Constitution Extraterritorially*, 52 U. KAN. L. REV. 1073 (2004).

30. 494 U.S. 259, 265 (1990) (citing U.S. *ex rel.* Turner v. Williams, 194 U.S. 279 (1904)). It is this language that has given rise to the phrase “U.S. persons”—the term of art that is used in portions of this Note. Significantly, it is still not entirely clear who this group entails, though it is clear that it encompasses those with “voluntary attachment to the United States” who also have a “sufficient connection” to the United States that they can be considered part of the community. *Id.* at 265, 274–75.

31. *Id.* at 265.

Government against *aliens* outside of the United States territory.”³² Further, although Verdugo-Urquidez had cited several cases that seemingly suggested that there was precedent for the applicability of the Fourth Amendment in his circumstances,³³ the Court emphasized that each of the cases he relied on addressed issues related either to U.S. citizens, or to aliens within the territory of the United States.³⁴

It is important to stress how vital the Court’s definition of “the people” who are protected by the Fourth Amendment was to the holding in *Verdugo-Urquidez*. In determining that nonresident aliens were not entitled to the Amendment’s safeguards, the Court appears to have relied significantly on principles of social compact theory, which suggests that people give up certain rights to a government in order to enjoy other benefits it grants. Indeed, the majority cited dissenting language from the Ninth Circuit’s *Verdugo-Urquidez* case positing that “the Constitution [is] a ‘compact’ among the people of the United States, and the protections of the Fourth Amendment were expressly limited to ‘the people.’”³⁵ Accordingly, as one commentator has suggested, “[n]ot being part of the compact that surrendered some rights to secure others, nonresident alien targets of U.S. law enforcement have . . . no *right* to challenge the actions of the U.S. Government.”³⁶

Despite the seeming simplicity of such an approach, it is also subject to several critiques. First, such social compact ideals reject the notion, explained above, that the Fourth Amendment simply codifies natural rights.³⁷ In other words, by failing to extend the Amendment’s safeguards to nonresident aliens subjected to searches by U.S. officials, the Court rejected the notion that such rights were in any way pre-existent to their codification. Moreover, the *Verdugo-Urquidez* majority created an odd situation whereby nonresident aliens are forced to comply with U.S. law even though they only receive a portion of its protection when they are prosecuted for

32. *Id.* at 266 (emphasis added).

33. *Id.* at 269–73.

34. *Id.*

35. *Id.* at 264 (quoting *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1231 (9th Cir. 1988) (Wallace, J., dissenting)).

36. Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT’L L. 444, 453 (1990).

37. See Mark. L. LaBollita, Note, *The Extraterritorial Rights of Nonresident Aliens: An Alternative Theoretical Approach*, 12 B.C. THIRD WORLD L.J. 363, 388 (1992).

violating it.³⁸ As the dissent put it, this “creates an antilogy: the Constitution authorizes our Government to enforce our criminal laws abroad, but when Government agents exercise this authority, the Fourth Amendment does not travel with them.”³⁹ Similarly, beyond any rights a defendant may or may not have under the Fourth Amendment, it seems troubling to accept the notion that U.S. authorities themselves are not bound by it. The majority apparently recognized this issue, given its assertion that a U.S. warrant “would be a dead letter outside the United States.”⁴⁰ Unfortunately, the Court failed to explain why a warrant would not increase the search’s legitimacy of police power *within* the United States.

Notwithstanding these disconcerting issues, however, the fact remains that the case does provide a clear indication of the Court’s position as to the applicability of the Fourth Amendment in these circumstances. After *Verdugo-Urquidez*, it is plain that nonresident aliens cannot depend on the Amendment to protect them from searches conducted outside the United States, even if U.S. authorities execute those searches.⁴¹ Equally apparent is that an important justification for this rule of law is that such aliens have not established a “sufficient connection” with the United States to be considered part of the U.S. community.

2. Searches conducted within the United States

In stark contrast to the applicability of the Fourth Amendment to overseas searches of nonresident aliens, the Amendment’s protections have, for some time, been strictly applied when conducted in the United States. That said, there are still intricacies in this doctrine that are important for an understanding of issues presented by *Terrorist Bombings*.⁴²

38. *Verdugo-Urquidez*, 494 U.S. at 282. The “portion” of protections refers to the fact that the Court did express that nonresident aliens prosecuted in the United States are still entitled to certain due process rights codified in the Fifth and Sixth Amendments. *Id.* at 264.

39. *Id.* at 282 (Brennan, J., dissenting).

40. *Id.* at 274 (majority opinion).

41. *See, e.g.*, *Rasul v. Myers*, 563 F.3d 527, 529, 531 (D.C. Cir. 2009); *United States v. Emmanuel*, 565 F.3d 1324, 1331 (11th Cir. 2009); *United States v. Bravo*, 489 F.3d 1, 8–9 (1st Cir. 2007).

42. Not the least of these issues relates to the collection of foreign intelligence information, which in light of the events of September 11, 2001, is an area of the law that has

In 1967, the Supreme Court decided *Katz v. United States*, which involved a warrantless wiretap by the FBI of a public phone booth in Los Angeles alleged to have been used for interstate wagering.⁴³ Despite the government's assertions that Fourth Amendment protections did not extend to a public phone booth, it was in *Katz* that the Court clearly established that the Amendment "protects people, not places."⁴⁴ Though the Court acknowledged that the officers had exercised restraint in initiating and executing the search, the majority nevertheless deemed it a violation of the suspect's constitutional rights, since "this restraint was imposed by the agents themselves, not by a judicial officer."⁴⁵ Indeed, the agents had not been "required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate . . . [and] were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order."⁴⁶ Without such judicial oversight, the Court recognized that an individual's rights would be secure only to the extent permitted by the executive's discretion, a scenario that was unacceptable under the Constitution.⁴⁷ After *Katz*, it was thus clear "that searches 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."⁴⁸

Perhaps the most interesting aspect of *Katz*, however, and one which presaged the pending explosive debate about the necessity of obtaining a warrant for intelligence collection, was a footnote in the opinion directed at the issue. Specifically, the majority noted that "[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case."⁴⁹ This footnote prompted Justice White to write in a concurring opinion

undergone drastic change in recent years. It is important to keep in mind, however, the scope of this Note and its focus on events that occurred in the late 1990s.

43. 389 U.S. 347, 348 (1967).

44. *Id.* at 351.

45. *Id.* at 356.

46. *Id.*

47. *Id.* at 358–59.

48. *Id.* at 357.

49. *Id.* at 358 n.23.

that a warrant should not be required if the President or Attorney General deemed a search necessary for national security purposes.⁵⁰ Feeling “compelled to reply” to Justice White’s opinion, Justice Douglas in turn underscored the difficulty with such a scenario in our constitutional system.⁵¹ The executive branch, he said, is not neutral and detached, nor should it be. Instead, “it should vigorously investigate and prevent breaches of national security and prosecute those who violate” the law.⁵² Nevertheless, because “spies and saboteurs” are protected by the Fourth Amendment as much as any other criminal, Justice Douglas asserted that the interposition of a neutral and detached judicial official is necessary to maintain the integrity of the process and to ensure that civil liberties are not sacrificed in the pursuit of justice.⁵³

The exchange between the two Justices is remarkable because it foreshadowed the clash in the late 1960s and early 1970s (not to mention in the post-9/11 era) between protecting “national security” interests and securing personal freedoms. That conflict came to a head in *United States v. United States District Court (“Keith”)*.⁵⁴ The suit sprang from charges related to the bombing of a CIA office in Michigan.⁵⁵ In preparation for the trial, the defendants filed a motion to compel the government to disclose surveillance information collected as part of their investigation.⁵⁶ The government in turn filed an objection with an affidavit from Attorney General John Mitchell explaining that the searches had been conducted at his direction, without warrant, in the interest of national security.⁵⁷ The Court was thus squarely presented with the issue of whether the executive branch could dispense with the warrant requirement in a domestic search if the purpose of the search was to collect national security information.

In resolving the matter, the Court addressed fundamental issues of our constitutional system, including presidential authority and

50. *Id.* at 364 (White, J., concurring).

51. *Id.* at 359–60 (Douglas, J., concurring).

52. *Id.*

53. *Id.* at 360.

54. 407 U.S. 297 (1972). The convention of referring to this case as “*Keith*” relates to the fact that Judge Keith was the district court judge who ordered that the government turn over the information it had collected.

55. *Id.* at 299.

56. *Id.* at 299–300.

57. *Id.* at 301.

separation of powers. The Court was careful, however, in framing the question, emphasizing that the Attorney General's affidavit indicated that the searches in this case were directed only at *domestic* threats, and there was otherwise no evidence of foreign involvement.⁵⁸ With this parameter established, the Court began its analysis by noting that the Constitution vests the president with the duty of preserving, protecting, and defending the Constitution, a responsibility that implicitly includes protecting the government from threats of overthrow.⁵⁹ While acknowledging that this power had to be tempered when it abutted civil liberties, the Court also noted that "unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered."⁶⁰ Nevertheless, the question was not whether the president *had* a domestic security role, but instead whether such a role had to be exercised in accord with the dictates of the Fourth Amendment.⁶¹ Citing Justice Douglas's concurrence in *Katz*, the Court reaffirmed that the Amendment "does not contemplate the executive officers of Government as neutral and disinterested magistrates."⁶² Instead, its directives require the interplay of both the executive to investigate and prosecute crime, and the judiciary to ensure that there is sufficient reason "to justify invasion of a citizen's private premises or conversation."⁶³ Consequently, the Court held that despite compelling justifications to the contrary, the warrant requirement applies even to domestic searches conducted for national security purposes. To hold otherwise would have failed to adequately protect individual liberties and preserve the values at the root of our constitutional system.⁶⁴

It was thus clear after *Katz* and *Keith* that, as a rule, a warrant would generally be required for searches conducted within the United States. One question that *Keith* had expressly left open, however, was whether the warrant requirement applied to searches

58. *Id.* at 308–09.

59. *Id.* at 310.

60. *Id.* at 312.

61. *Id.* at 320.

62. *Id.* at 317 (citing *Katz v. United States*, 389 U.S. 347, 359–60 (1967) (Douglas, J., concurring)).

63. *Id.* at 316.

64. *See id.*

within the United States conducted by U.S. agents for the purpose of *foreign* intelligence collection.⁶⁵ Given this open area of the law, lower courts understandably began filling it, though they did so in disparate ways. In the Third, Fourth, Fifth, and Ninth Circuits, for instance, courts created an exception to the warrant requirement whereby the judiciary would not have to pre-approve searches conducted under the auspices of foreign intelligence collection.⁶⁶ Conversely, in the Watergate-related case of *United States v. Ehrlichman*, the District Court for the District of Columbia declared that there was no national security exception to the warrant requirement for domestic searches “even when known foreign agents are involved” in the criminal activity.⁶⁷ Likewise, in a separate case, the D.C. Circuit held that the Fourth Amendment’s dictates did not yield to the President’s authority over national security issues.⁶⁸ In fact, the D.C. Circuit went so far as to criticize other courts for ignoring the question of whether there were “valid reasons for abrogating the warrant procedure when foreign relations are implicated”⁶⁹

Given this inconsistency, as well as the political and social environment of the post-Watergate era, the time was ripe in 1978 for Congress to pass the Foreign Intelligence Surveillance Act (FISA).⁷⁰ Since the Act plays a role in the searches at issue in *Terrorist Bombings*, a very general discussion of its provisions is in order.⁷¹

65. *Id.* at 321–22 (“[T]his case involves only the domestic aspects of national security. We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.”).

66. *United States v. Truong*, 629 F.2d 908, 912–16 (4th Cir. 1980); *United States v. Buck*, 548 F.2d 871, 875–76 (9th Cir. 1977); *United States v. Butenko*, 494 F.2d 593, 604–05 (3d Cir. 1974); *United States v. Brown*, 484 F.2d 418, 425–27 (5th Cir. 1973). For an analysis of these cases, and this issue generally, 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, 409–12 (2002).

67. 376 F. Supp. 29, 33 (D.D.C. 1974).

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

69. *Id.* at 633.

70. See Cedric Logan, Note, *The FISA Wall and Federal Investigations*, 4 N.Y.U. J.L. & LIBERTY 209, 217–18 (2009).

71. FISA is a very complex statute, which has undergone numerous changes since 1978, so this Note will necessarily only be able to address a few aspects of it. It is notable, however, that significant changes were incorporated via the USA PATRIOT ACT of 2001. Pub. L. No. 107–56, 115 Stat. 272 (codified in scattered sections of the U.S. Code). The limited scope of this Note, however, focuses on events transpired between approximately 1996 and 1998, so it will be necessary to focus attention on the state of the law at that time.

At its most fundamental level, FISA was enacted as an attempt to balance Fourth Amendment rights against the need to conduct domestic national security intelligence collection.⁷² In order to effect this purpose, the 1978 Act required that the executive branch (more precisely, the President, acting through the Attorney General) obtain an order from the Foreign Intelligence Surveillance Court (FISC) before conducting a search against U.S. persons for foreign intelligence purposes.⁷³ To obtain an order for such a search, FISA directed the Attorney General to show probable cause only that the target was a foreign power, or an agent thereof.⁷⁴ Among the Act's most important limitations was that, by its terms, FISA only applied to electronic surveillance conducted within the United States.⁷⁵ Though a 1994 amendment extended the FISC's authority to issue orders for physical searches, the Act's territorial aspect—that is, the limitation to searches within the United States—was not formally extended until 2008.⁷⁶ As will be discussed in more detail later, the reality was that FISA orders were often required even for extraterritorial searches. The point here, however, is to accentuate that there was no doubt after FISA passed in 1978 that judicial interposition in the form of the FISC was required even for foreign intelligence collection against U.S. citizens within the United States.

72. See, e.g., H.R. REP. NO. 95-1283, pt. 1, at 15 (1978) (“The history and law relating to electronic surveillance for ‘national security’ purposes have revolved around the competing demands of the President’s constitutional powers to gather intelligence deemed necessary to the security of the nation and the requirements of the Fourth Amendment.”).

73. 50 U.S.C. §§ 1804–05 (1982). If no U.S. person was targeted, the Attorney General was not required to receive pre-authorization, though the Attorney General was still required to certify to the FISC that he or she had personally authorized the search. 50 U.S.C. § 1802 (1982). A U.S. person was defined, in part, as a U.S. citizen or permanent resident alien. 50 U.S.C. § 1801 (1982). Interestingly, the FISA Court of Review (the FISC appellate court) has asserted that a FISA order “may not be a ‘warrant’ contemplated by the Fourth Amendment.” *In re Sealed Case Nos. 02-001, 02-002*, 310 F.3d 717, 741 (FISA Ct. Rev. 2002). While acknowledging the merit of arguments supporting this contention, for the purposes of this Note, the author accepts *arguendo* that FISA orders do satisfy the warrant requirement. Finally, it is worth noting that the general constitutionality of FISA was affirmed in *United States v. Duggan*, 743 F.2d 59, 73 (2d Cir. 1984).

74. Defined at 50 U.S.C. § 1801 (1978).

75. See Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified in scattered sections of the U.S. Code). Title I of FISA was entitled “Electronic Surveillance within the United States for Foreign Intelligence Purposes.” *Id.*

76. 50 U.S.C. § 1821 (1994). The FISA Amendments Act of 2008 codified the change to the territorial aspect of the Act.

Thus, with FISA's passage, the state of the law regarding searches within the United States at the time of the events surrounding *Terrorist Bombings* had generally been established. First, it was clear after *Katz* that domestic searches of U.S. persons for strictly criminal investigation purposes generally required a warrant.⁷⁷ The warrant requirement had also withstood the attack in *Keith*, wherein the Court had declared that warrants were generally required for searches related to domestic security. Though the law certainly took a more complex turn after *Keith*, the bottom-line is that FISA directed that a judicial panel pre-authorize any searches within the United States carried out upon U.S. persons for foreign intelligence collection purposes. In sum, there was *no* circumstance that generally permitted a search on U.S. persons within the United States without some sort of judicial review. A gaping hole left unaddressed by case law and FISA, however, was whether the warrant requirement applied to U.S. persons abroad.⁷⁸

3. Extraterritorial searches of U.S. persons

In *Terrorist Bombings*, the Second Circuit seems to have rightly recognized that “whether a warrant is required for overseas searches of U.S. citizens has not been decided by the Supreme Court, by our Court, or as far as we are able to determine, by any of our sister circuits.”⁷⁹ Given the aforementioned discussion, the central question regarding the applicability of the warrant requirement to U.S. persons abroad seems to be whether their circumstances are more similar to foreign searches of nonresident aliens, domestic searches of U.S. persons, or some combination of the two. This inquiry necessarily begins with the question of whether constitutional protections, and the Fourth Amendment in particular, apply at all to U.S. citizens who are overseas.

77. The author notes that they are “generally” required only so as to pay homage to the well-established exceptions.

78. As alluded to briefly above, this hole was filled somewhat with the FISA Amendments Act of 2008, which requires that a FISA order now be obtained for extraterritorial searches of U.S. persons conducted for foreign intelligence purposes. That amendment, in fact, has made the foreign intelligence collection issues in *Terrorist Bombings* somewhat moot. In proclaiming that the warrant requirement *never* applies to extraterritorial searches of U.S. citizens, however, the Second Circuit swept in criminal investigations, which, as this Note argues, seems inconsistent with the rest of Fourth Amendment jurisprudence.

79. *In re Terrorist Bombings of U.S. Embassies in E. Afr.* (Fourth Amendment Challenges) (*Terrorist Bombings*), 552 F.3d 157, 168 (2d Cir. 2008).

One of the landmark cases dealing with the extraterritorial application of the Constitution to U.S. citizens is *Reid v. Covert*, which established that the safeguards of the Bill of Rights generally extend to cover U.S. citizens abroad.⁸⁰ The case involved two women who had been tried in overseas military tribunals for killing their husbands. Though their husbands were in the military, neither woman was. Accordingly, they challenged their courts-martial as unconstitutional insofar as the courts-martial had deprived them of their Fifth and Sixth Amendment protections.⁸¹ Emphatically, the Court declared, “When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.”⁸² While *Reid* centered primarily on Fifth and Sixth Amendment safeguards, the Court spoke more generally of the applicability of the Constitution abroad. It said, for example, that the Constitution manifests that its “protections for the individual were designed to restrict the United States when it acts outside of this country, as well as here at home.”⁸³ Though there had been arguments that only certain rights should extend abroad, the Court stated that there was no logic behind suggestions that “picking and choosing among the remarkable collections of ‘Thou shalt nots’” was appropriate.⁸⁴

This line of reasoning was later generally extended to the Fourth Amendment, although overseas searches have involved additional analysis. Specifically, case law clearly establishes that the applicability of even the “reasonableness requirement” of the Fourth Amendment to searches conducted against U.S. citizens abroad depends on *who* conducts the search. If foreign officials conduct the search wholly, for example, the Fourth Amendment’s protections will not apply, even if evidence collected is subsequently turned over to U.S. officials pursuing a criminal prosecution.⁸⁵ The rationale behind this rule is that foreign officials cannot be expected to comply with the

80. 354 U.S. 1 (1957).

81. *Id.* at 3–5.

82. *Id.* at 6.

83. *Id.* at 7.

84. *Id.* at 8–9.

85. See *United States v. Janis*, 428 U.S. 433, 455 n.31 (1976); *United States v. Rose*, 570 F.2d 1358 (9th Cir. 1978); *Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1969).

U.S. Constitution and suppressing evidence they seize would have no deterrent effect on their conduct.⁸⁶ On the other hand, if a search is conducted as a so-called “joint venture” between U.S. and foreign officials, the reasonableness aspect of the Fourth Amendment is implicated.⁸⁷ Such a policy prevents U.S. officials from “attempting to shortcircuit the Fourth Amendment rights” of a suspect by tacitly condoning otherwise illegal searches solely because they were ostensibly conducted by foreign officials.⁸⁸ Finally, by implication, since the Fourth Amendment applies to these joint venture searches, it obviously extends to searches conducted entirely by U.S. officials. This position generally does not appear to be in dispute, as even the Second Circuit in *Terrorist Bombings* accepted that the searches at issue in that case had to adhere to the Amendment’s reasonableness requirement (though it rejected the applicability of the warrant requirement).

Beyond these doctrines established by case law, FISA has also played a role in extraterritorial searches.⁸⁹ As noted in the previous section, FISA, by its terms, was formally limited only to domestic searches. Though the contours of the Act may have seemed well defined, the reality of its application has been significantly less so. More directly, despite the Act’s domestic focus, one expert testified before Congress that “the Government often needed to obtain a court order before intelligence collection could begin against a target located overseas.”⁹⁰ The principle reason for this rested in the Act’s complex definition of electronic surveillance and the fact that Congress had not kept it up to date with changing technologies,

86. *See Rose*, 570 F.2d at 1361–62. Incidentally, the *Rose* court recognized a widely-accepted exception to this rule where the circumstances of the search “shock the conscience” of the court. In such cases, the evidence may be excluded, even if the search is conducted wholly by foreign officials. *Id.* at 1362.

87. *See, e.g., Stonehill*, 405 F.2d at 743. In order to have a joint venture, U.S. officials must “substantially participate” in the search. *Id.*

88. *Id.* at 746.

89. Due to the classified nature of FISA searches, it is difficult to discern to what degree any of these searches were conducted against U.S. citizens in particular. Given the testimony before Congress outlined below, the author presumes, for the sake of this argument, that searches against U.S. citizens occurred in at least some instances.

90. *Modernization of the Foreign Intelligence Surveillance Act: Hearing Before the H. Permanent Select Comm. on Intelligence*, 110th Cong. 5 (2007) (statement of Kenneth L. Wainstein, Assistant Attorney General, National Security Division, Department of Justice), available at <http://www.justice.gov/archive/ll/docs/final-wainstein-sjc-testimony-103007.pdf>.

which often allowed the user to be in a vastly different location than a telecommunications service provider.⁹¹ While certain government officials were critical of the fact that they had to obtain FISA orders for such overseas searches,⁹² their criticisms seem to have rested on the fact that foreigners should not be protected by FISA's procedures. This is evident in a statement made to Congress in 2006 by the National Security Agency's General Counsel that "the issue on which the need for a court order should turn . . . is whether or not the person whose communications are targeted is generally protected by the guarantees of the Constitution [P]eople outside the United States *who are not U.S. persons* . . . should not receive such protection."⁹³ Given this language, it seems clear that even within the Intelligence Community, there was at least some recognition that U.S. citizens abroad should be treated differently than foreigners. Indeed, in the FISA Amendments Act of 2008, Congress itself codified the requirement that FISC orders must be obtained before electronic surveillance of overseas U.S. persons can be carried out.⁹⁴

Thus, while the issue of the warrant requirement's applicability to U.S. citizens overseas had indeed not been squarely addressed by the courts or Congress by the time of the *Terrorist Bombings* case, there was clear evidence suggesting a concerted effort on the part of both to safeguard the Fourth Amendment rights of at least U.S. citizens. A wrinkle in this analysis, however, is Executive Order 12,036, which was issued by President Jimmy Carter in January of 1978.⁹⁵ This directive permitted warrantless physical searches against U.S. persons, but only if the President had generally authorized the type of activity involved, and the Attorney General had specifically approved its application to the particular search at issue.⁹⁶ Notably,

91. Basically, while the actual target of a search may have been in an overseas location, he might have been using electronic telecommunications providers either situated in, or in some manner passing through, the United States. By its terms, FISA required a FISC order for searches of this nature. For more information, see *Proposed FISA Modernization Legislation: Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. 8-9 (2007) (statement of Mike McConell, Director of National Intelligence).

92. See *Legislative Proposals to Update the Foreign Intelligence Surveillance Act: Hearing Before the H. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Robert L. Deitz, General Counsel, National Security Agency).

93. *Id.* at 5 (emphasis added).

94. 50 U.S.C. § 1802 (2008).

95. Exec. Order No. 12,036, 43 Fed. Reg. 3674 (1978).

96. *Id.* at 3685.

this order was issued before FISA was enacted, though President Ronald Reagan authorized a similar practice three years after FISA's passage.⁹⁷ In part 2.5 of the Reagan Order, the President granted the Attorney General authority "to approve the use, for intelligence purposes, within the United States or against a United States person abroad, of any technique for which a warrant would be required if undertaken for law enforcement purposes."⁹⁸ Importantly, this directive still required adherence to FISA, so the order basically only extended to warrantless physical searches and activities against overseas targets.⁹⁹ As grounds for asserting such power, the President referred to authority vested in him by the Constitution.¹⁰⁰

Of course just because the President asserted such authorization did not necessarily make it so. Indeed, there is strong evidence indicating that any inherent constitutional power the President may have had this area was abrogated by Congress when it passed FISA. A seminal case addressing this relationship between Congress and the President's inherent authority is *Youngstown Sheet & Tube v. Sawyer*.¹⁰¹ In *Youngstown*, Justice Robert Jackson established in a concurring opinion a framework through which the interaction between the two branches can be examined.¹⁰² First, Jackson said that when the President acts with congressional authorization, his power is at its zenith.¹⁰³ Next, where the President acts in the absence of either congressional approval or disapproval, "he can only rely upon his own independent power."¹⁰⁴ Indeed, this is an area Jackson called the "zone of twilight" because the powers of the two branches may overlap and create uncertainty.¹⁰⁵ Finally, when acting

97. Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1981). Executive Order 12,333 revoked order 12,036.

98. *Id.* at 59,951.

99. *Id.*

100. *Id.* at 59,941. Of note, President Reagan also asserted authority granted in the National Security Act of 1947, but as explained below, that Act had no relation to the section at issue here. See *infra* note 107.

101. 343 U.S. 579 (1952).

102. *Id.* at 635–38 (Jackson, J., concurring). Though this was only a concurring opinion, later cases indicate the acceptance of Justice Jackson's reasoning. See, e.g., *Medellin v. Texas*, 552 U.S. 491, 494 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375 (2000).

103. *Youngstown*, 343 U.S. at 635.

104. *Id.* at 637.

105. *Id.*

contrary to congressional will, the President's "power is at its lowest ebb."¹⁰⁶

At best, Executive Order 12,333 was an example of the President acting in the "twilight zone." Clearly there had been no statutory indication from Congress granting the President the authority he relied upon in issuing the directive.¹⁰⁷ While it can be argued that congressional disapproval had not been expressly manifest, and that a failure to express such displeasure indicated tacit support for the President's actions, the trajectory of case law and Congress's failure to reverse that tide—as well as FISA's passage itself—belie this argument. In fact, as one commentator has suggested regarding the Order, all "available evidence indicate[d] congressional hostility toward warrantless searches."¹⁰⁸ Such a posture is especially unsurprising given the political atmosphere of the post-Watergate era. After investigating government intelligence collection activities in the 1960s and 1970s, for instance, the Church Committee had noted: "We have seen segments of our Government, in their attitudes and action, adopt tactics unworthy of a democracy, and occasionally reminiscent of the tactics of totalitarian regimes."¹⁰⁹ Of course it cannot go unnoticed that Congress did not respond to the Reagan Order, but to suggest that this indicates express support would be a stretch. Indeed, as the Court has said in other contexts, drawing such a conclusion would require "piling inference upon inference," because of an "absence of direct proof."¹¹⁰ It would first have to be assumed, for example, that Congress did not believe that FISA had put the issue to rest. Next, it would have to be assumed that Congress's inaction was not the result, for instance, of the difficulties associated with the legislative process itself, or of an unawareness of the precise dictates and contours of the Reagan Order.¹¹¹

106. *Id.*

107. As explained above, President Reagan also asserted authority vested in him by the National Security Act of 1947. While this may indicate congressional support for some of the Order's provisions, the Act did not grant the President the authority asserted under section 2.5, the main provision at issue here.

108. David S. Eggert, Note, *Executive Order 12,333: An Assessment of the Validity of Warrantless National Security Searches*, 1983 DUKE L.J. 611, 637 (1983).

109. S. Rep. No. 94-755, book 2, at 3 (1976).

110. *Pereira v. United States*, 347 U.S. 1, 15 (1954).

111. *See, e.g., Johnson v. Transp. Agency*, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting).

The point is, of course, that there are numerous problems with viewing congressional inaction to Executive Order 12,333 as congressional acquiescence or approval to its directives. In its best light, then, Executive Order 12,333 was an example of the President acting in the “zone of twilight,” where he could rely only upon whatever inherent powers he may have had to authorize the activities the Order permitted. Given the conflict in this case between these powers and the Fourth Amendment, it seems quite reasonable to suggest that Congress felt such powers should yield to other constitutional rights. At worst, then, the issuance of the Order showcases the President acting at a time when his power was at its lowest ebb, since its dictates did not comport with apparent congressional will (and certainly judicial intent) regarding the appropriateness of warrantless searches—particularly when those searches were carried out against U.S. citizens.

III. *TERRORIST BOMBINGS*

With this groundwork established, this Part shifts focus specifically to the *Terrorist Bombings* case. The first section provides a summary of facts relevant to an understanding of the Second Circuit’s eventual ruling. Next, the Note summarizes the procedural history of the case, which is especially important since the Second Circuit, while reaching the same ultimate conclusion as the lower court, employed distinctly different reasoning to get there. Finally, this Part concludes by explaining the four factors the Second Circuit used to support its conclusion that the warrant requirement is inapplicable to foreign searches conducted against U.S. citizens.

A. Facts

While the *Terrorist Bombing* case involves issues all too familiar to Americans today, it began in a time when “al-Qaeda” was not part of the average person’s lexicon. American intelligence had been investigating Osama Bin Laden, however, since at least 1996, when he declared a war of terrorism against U.S. military personnel—a threat that he extended to all U.S. citizens in 1998.¹¹² Then, on August 7, 1998, al-Qaeda launched one of its first major attacks on the United States by simultaneously detonating truck bombs at the

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

U.S. Embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya.¹¹³ Between the two bombings, the death toll reached over 220.¹¹⁴ Two years later, fifteen defendants led by Osama Bin Laden were facing trial after having been indicted on 267 criminal offenses, including murder, maiming, and various conspiracy charges.¹¹⁵ Importantly, one of the defendants, known as Wadiah El-Hage, was a U.S. citizen.¹¹⁶

Though a U.S. citizen, El-Hage lived in Kenya from 1994 to 1997.¹¹⁷ During the time he was living in Nairobi, American officials became aware of his ties to al-Qaeda.¹¹⁸ In fact, from August 1996 to August 1997, U.S. officials monitored five telephone lines in Kenya that were alleged to have been used by al-Qaeda operatives.¹¹⁹ One of these lines was located in a building in which El-Hage lived, and another was a cell-phone used by several parties, including El-Hage.¹²⁰ Significantly, Attorney General Janet Reno had authorized specific targeting of El-Hage, but did not do so until April 4, 1997.¹²¹ Thus, there was no formal authorization for the searches conducted from August 1996 to April 4, 1997. On August 21, 1997, presumably based on information collected from all of these intercepts, U.S. officials, in cooperation with Kenyan authorities, conducted a physical search of El-Hage's home in Nairobi.¹²² Though they still had no U.S. warrant, American officials did present El-Hage's wife with a document subsequently "identified as a Kenyan warrant authorizing a search for 'stolen property.'"¹²³ Notably, however, U.S. officials later indicated that they placed no

113. LAWRENCE WRIGHT, *THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11* 306-07 (2006).

114. *Id.* at 308.

115. *Id.*

116. *In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fourth Amendment Challenges) (Terrorist Bombings)*, 552 F.3d 157, 159 (2d Cir. 2008). For more information about Wadiah El-Hage, see Oriana Zill, *A Portrait of Wadiah El Hage, Accused Terrorist*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/upclose/elhage.html>.

117. *Bin Laden II*, 126 F. Supp. 2d at 269.

118. *Id.*

119. *Id.*

120. *Id.*

121. *See Terrorist Bombings*, 552 F.3d at 159.

122. *Id.* at 160.

123. *Id.* (quoting *Bin Laden II*, 126 F. Supp. 2d at 269).

legal authority in the Kenyan warrant.¹²⁴ Given the classified nature of the case against El-Hage, it is difficult to know the nature of the evidence collected against him since, even at trial, it underwent in camera review. It is important to emphasize, however, that at least insofar as court records indicate, there were no further searches conducted against El-Hage until after the bombings, and he does not appear to have been detained at any point during that time. After the bombings in August of 1998, El-Hage returned to the United States and was subpoenaed to testify about al-Qaeda to a federal grand jury investigating the attacks.¹²⁵ Moreover, during August and September of 1998, El-Hage's home in Arlington, Texas was surveilled pursuant to a FISA order.¹²⁶ Eventually, El-Hage was arrested and charged for his participation in the embassy bombings.¹²⁷ The charges against El-Hage in particular included six conspiracies to kill U.S. citizens and destroy U.S. property abroad, twenty counts of perjury, and three counts of giving false statements.¹²⁸

B. District Court Disposition

In defense, El-Hage filed a motion in district court to suppress evidence seized in the warrantless searches carried out against him by U.S. officials. Specifically, El-Hage's motion to suppress focused on evidence seized from (1) the physical search of his Nairobi residence, (2) the electronic surveillance of the telephone lines he used in Kenya, and (3) the electronic surveillance, carried out pursuant to a FISA order, of his home in Texas.¹²⁹ As grounds for suppression, El-Hage asserted that the searches violated his Fourth Amendment rights because they were conducted without a warrant, or alternatively, because they were unreasonable.¹³⁰ On December 5,

124. *Bin Laden II*, 126 F. Supp. 2d at 269.

125. *United States v. Bin Laden (Bin Laden I)*, 92 F. Supp. 2d 225, 231 (S.D.N.Y. 2000).

126. *Bin Laden II*, 126 F. Supp. 2d at 268 n.2.

127. *Id.*

128. *United States v. El-Hage*, 213 F.3d 74, 77 (2d Cir. 2000).

129. *Bin Laden II*, 126 F. Supp. 2d at 268. Before the district court ruled on the motion to suppress as related to the Texas FISA search, El-Hage withdrew that motion. *In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fourth Amendment Challenges) (Terrorist Bombings)*, 552 F.3d 157, 160 (2d Cir. 2008).

130. *Bin Laden II*, 126 F. Supp. 2d at 270.

2000, the district court issued an opinion denying both El-Hage's request for an evidentiary hearing and his suppression motion.¹³¹

1. Evidentiary hearing

Instead, based on the government's assertion that a proceeding in open court would jeopardize continuing investigations into al-Qaeda, the court assessed the evidence against El-Hage in an in camera, ex parte review.¹³² Though the Supreme Court has affirmed the legality of such reviews,¹³³ as noted by the district court in this case, several courts have also cautioned against their overuse.¹³⁴ Given the unique facts of the conspiracy at issue in this case, however, the court was persuaded that an in camera, ex parte review was appropriate to preserve the integrity of the government's ongoing investigation.¹³⁵ This finding was supported, in the court's estimation, by the fact that El-Hage's motion predominately centered on legal rather than factual questions, so the benefits associated with an adversarial proceeding were less critical.¹³⁶ While it is hard to argue with the court's decision in light of the circumstances of the case, it bears emphasizing that a defendant in a case like this will almost always face a high hurdle in overcoming the government's arguments. Given the classified nature of much of the evidence, and the serious threats that such defendants are alleged to pose, it is hard to imagine them commonly prevailing in an effort to receive an evidentiary hearing.

2. Application of the Fourth Amendment overseas

After deciding on an in camera, ex parte review of the evidence, the court addressed whether the Fourth Amendment applied at all to overseas searches.¹³⁷ In exploring this issue, the court noted that "[t]he Government seems to concede the general applicability of the Fourth Amendment to American citizens abroad, but asserts that the

131. *Id.* at 286–88.

132. *Id.* at 286–87.

133. *See, e.g.*, *Taglianetti v. United States*, 394 U.S. 316, 317–18 (1969).

134. *Bin Laden II*, 126 F. Supp. 2d at 287 (citing *United States v. Butenko*, 494 F.2d 593, 607 n.78 (3d Cir. 1974); *United States v. Southard*, 700 F.2d 1, 11 (1st Cir. 1983)).

135. *Bin Laden II*, 126 F. Supp. 2d at 287.

136. *Id.*

137. *Id.* at 270–71.

particular searches contested in this case (which were conducted overseas to collect foreign intelligence) call for a more limited application of the Amendment.”¹³⁸ Thus, it is significant that the government never argued that there was *generally* no warrant requirement for overseas searches of U.S. citizens; instead, it argued a foreign intelligence *exception* applied. In its own analysis of the Fourth Amendment’s overseas applicability, the district court asserted that the Supreme Court’s decision in *Reid* appeared to suggest that the Amendment did apply to U.S. citizens abroad.¹³⁹ Consequently, while explicitly observing that “the extent of the Fourth Amendment protection, in particular the applicability of the warrant Clause, is unclear,” the court determined that at least some of the safeguards of the Amendment applied in this case.¹⁴⁰

3. *The foreign intelligence exception*

Consequently, the real issue at the district court level was whether there was an exception to the Fourth Amendment that applied to the searches in this case. At the outset of this analysis, the court dismissed any doubt that might have existed about the possibility that the search was a joint venture between U.S. and Kenyan authorities.¹⁴¹ Addressing this issue was necessary in light of the “warrant” that Kenyan authorities provided to El-Hage’s wife during the physical search of their Nairobi property.¹⁴² The court, however, rejected the idea that the search was a joint venture—which might arguably have provided El-Hage with more protection—based on the government’s assertion that “American authorities . . . did not rely upon the Kenyan warrant as legal authority for the search.”¹⁴³

With that matter settled, the court directed its attention to the government’s argument that a foreign intelligence exception applied

138. *Id.* at 270.

139. *Id.* at 270–71.

140. *Id.*

141. *Id.* at 271.

142. *Id.* at 271 n.6.

143. *Id.* (quoting Brief for Respondent at 4, No. 1:98CR01023). The assertion that a joint venture search might provide more protection is based on the fact that courts occasionally have viewed such searches skeptically, construing them as attempts by U.S. officials to “short-circuit” Fourth Amendment rights. *See supra* notes 87–88 and accompanying text. Had the court found a joint venture search, it is possible (though by no means necessary) that the court could have used such reasoning to grant the motion to suppress.

in this case to the warrant requirement. In examining this claim, the district court highlighted that the Supreme Court had recognized the issue in *Keith*, but had not resolved it.¹⁴⁴ While acknowledging that other district and circuit courts had squarely addressed the issue of a domestic intelligence exception, the district court professed that “[n]o court has considered the contours of such an exception when the searches at issue targeted an American citizen overseas.”¹⁴⁵ Significantly, the court also noted that since those cases had not applied to U.S. citizens abroad, and because they were adjudicated before FISA’s enactment, even if those situations were to arise again they would currently be governed by FISA anyway.¹⁴⁶ In other words, the court determined there was a complete dearth of precedential authority, and that it was in the awkward situation of having to decide a case when subsequent statutes had changed the legal landscape. As a result, the court turned instead to an analysis of the factors underlying the foreign intelligence exception to determine if its application was appropriate in this case.

According to the court, the executive’s authority over foreign affairs constituted a “determinative basis” for applying the foreign intelligence exception. Specifically, the court referenced the case of *United States v. Curtiss-Wright*, in which the Supreme Court had accepted the “plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”¹⁴⁷ As applied to the particular facts in the present case, the court noted that it was also “generally recognized that this authority includes power over foreign intelligence collection.”¹⁴⁸ That said, the court acknowledged that even in *Curtiss-Wright* itself, it was apparent that the president’s foreign affairs authority had to yield to other express restraints of the Constitution.¹⁴⁹ Despite this apparent nod to moderation, the court asserted that the executive had been engaging in warrantless foreign intelligence searches for decades.¹⁵⁰

144. *Bin Laden II*, 126 F. Supp. 2d at 271.

145. *Id.* at 272.

146. *Id.* at 272 n.8; *see supra* note 78 (discussing subsequent changes to FISA that have partially filled this gap in the law).

147. *Id.* at 272 (quoting *United States v. Curtiss-Wright*, 299 U.S. 304, 320 (1936)).

148. *Id.* (referring to *Totten v. United States*, 92 U.S. 105, 106 (1875); *Webster v. Doe*, 486 U.S. 592, 605–06 (1988)).

149. *Id.* at 273.

150. *Id.*

While “Congress ha[d] legislated with respect to domestic incidents of foreign intelligence collection . . . [it] ha[d] not addressed the issue of foreign intelligence collection which occur[ed] abroad.”¹⁵¹ Though the court stated that this supposed congressional silence was not dispositive, it clearly played a significant role in the ultimate outcome of the case.

Beyond the president’s foreign affairs power, the court felt that the costs associated with imposing the warrant requirement also called for application of the foreign intelligence exception. According to the court, the burdens of obtaining a warrant were apparently disproportionate to the benefits to be gained by doing so.¹⁵² Further, the court accepted the argument that the “judicial branch is ill-suited to the task of overseeing foreign intelligence collection.”¹⁵³ This contention had been advanced by the government, on the basis that a court would be unable to ascertain the full impact of its decisions upon foreign policy.¹⁵⁴ Moreover, the court found persuasive that “a procedure requiring notification to [a hostile] government could be self-defeating.”¹⁵⁵ Additionally, the court posited that requiring judicial review prior to a search in foreign intelligence cases would create unbearable delay for the executive.¹⁵⁶ Though an exigent circumstance exception already existed for such circumstances in domestic cases, the court was unconvinced “that the exigent circumstances doctrine provide[d] enough protection for the interests at stake.”¹⁵⁷ Finally, the court accepted the government’s argument that involving the judiciary in the pre-approval process would increase the possibility of security breaches.¹⁵⁸ The court was careful, however, in its attempt not to impugn the judiciary, stating

151. *Id.*

152. *Id.* (“[S]everal cases direct that when the imposition of a warrant requirement proves to be a *disproportionate* . . . burden on the Executive, a warrant should not be required.” (emphasis added)).

153. *Id.* at 274. While the court proceeded to say that the incompetence of the judiciary related to *domestic* intelligence had been somewhat undercut by *Keith*, it found the argument persuasive as related to *foreign* intelligence.

154. *Id.*

155. *Id.* Unfortunately, the court failed to explain why it believed such notification would be required.

156. *Id.* at 275.

157. *Id.*

158. *Id.*

that the “mere *perception* that inadvertent disclosure is more likely is sufficient to obstruct the intelligence collection imperative.”¹⁵⁹

Lastly, the foreign intelligence exception was necessary, according to the court, because there was, at that time, no procedure by which U.S. officials could obtain a warrant to conduct an overseas search.¹⁶⁰ In fact, the court noted that there was not even then statutory authority for searches conducted abroad for *standard* law enforcement purposes.¹⁶¹ El-Hage argued on this point that if the government was going to conduct extraterritorial searches, it must find a way to do so constitutionally. In responding, the court noted that the judiciary may have inherent authority of its own to effect the dictates of the Fourth Amendment.¹⁶² In other words, regardless of what statutory power may or may not exist, if a warrant was required, the judiciary had authority to issue it. While briefly acknowledging this possibility, however, the court ultimately determined that acquiring a warrant for the searches at issue in this case “would certainly have been impracticable given the absence of any statutory provisions empowering a magistrate to issue a warrant.”¹⁶³

Given the aforementioned justifications for the foreign intelligence exception, the court generally accepted the merits of the foreign intelligence exception and formally adopted it. In an attempt to remain true to the Fourth Amendment, however, the court was careful to explain how narrowly it had tailored the exception. As adopted, it included “only those overseas searches, authorized by the President (or his delegate, the Attorney General), which are conducted primarily for foreign intelligence purposes and which target foreign powers or their agents.”¹⁶⁴

159. *Id.* (quoting Brief for the Respondent, No. 1:98CR01023).

160. *Id.* at 275–76. In cases of domestic or international terrorism, current criminal procedure rules allow magistrates to issue warrants outside of their assigned districts if any related activity has occurred within their districts. FED. R. CRIM. P. 41(b)(3).

161. *Bin Laden II*, 126 F. Supp. 2d at 275 n.13.

162. *Id.* at 276–77.

163. *Id.*

164. *Id.* at 277 (citing *United States v. Truong*, 629 F.2d 908, 915–17 (4th Cir. 1980)).

4. Application of the foreign intelligence exception to searches conducted against El-Hage

After formally adopting the foreign intelligence exception as a general principle, the court next had to decide if it applied to this specific case. Briefly, in order to apply the exception to this case, the court determined that the government had to show that El-Hage was an agent of foreign power, that the searches were conducted primarily for foreign intelligence collection rather than criminal investigation, and that the president or attorney general had authorized the searches.

In addressing these issues, the court first stated that it was clear from its review of the evidence that there was probable cause to suspect that El-Hage was an al-Qaeda operative.¹⁶⁵ As such, he qualified as an agent of a foreign power, as defined by Congress.¹⁶⁶ Next, in assessing whether the search was primarily conducted for intelligence collection or a criminal investigation, the court said that although criminal evidence was certainly acquired from the searches, they had primarily been conducted as foreign intelligence efforts.¹⁶⁷ This finding was based on numerous factors, including the fact that the FBI was apparently not the lead agency when the searches were carried out.¹⁶⁸ The most challenging factor in applying the exception became the need for the searches to have been authorized by the executive. As noted above, Attorney General Janet Reno had authorized U.S. officials to target El-Hage on April 4, 1997.¹⁶⁹ The problem was that the searches against telephone lines he used had commenced well before that—specifically, in August of 1996. After a lengthy analysis, the court addressed this temporal gap by admitting the evidence based in large part on the good faith exception articulated in *United States v. Leon*.¹⁷⁰ Indeed, the court found that “the officials who conducted the electronic surveillance operated under an actual and reasonable belief that Attorney General approval was not required prior to April 4, 1997, when El-Hage was

165. *Id.* at 277–78.

166. *Id.* at 278 (citing 50 U.S.C. § 1801(a)–(b) (2008)).

167. *Id.* at 278–79.

168. *Id.*

169. *Id.* at 279.

170. *Id.* at 283–84 (citing *United States v. Leon*, 468 U.S. 897 (1984)).

specifically identified . . . as a target”¹⁷¹ Accordingly, suppressing the seized evidence would not, in the court’s estimation, have fulfilled the exclusionary rule’s underlying goal of deterrence.

Based on each of these findings, the court was persuaded that applying the foreign intelligence exception was appropriate in this case. Consequently, the court held that El-Hage’s Fourth Amendment rights had not been violated, even though no warrant had been obtained for the search of his home in Nairobi.¹⁷² In reaching this conclusion, it is again important to highlight that the district court did not find that the warrant requirement *never* applies to U.S. citizens abroad. Instead, its holding was limited to foreign intelligence collection operations.

5. Reasonableness

Finally, while the reasonableness requirement is not the primary focus of this Note, it should be noted that the court closely examined the searches at issue in this case to determine whether they had been conducted in a reasonable manner.¹⁷³ This is important because, had the court found the searches unreasonable, it could simply have disposed of the case on those grounds. Paramount to the reasonableness analysis was a review of the techniques employed by the government to minimize the privacy invasion while collecting information from El-Hage’s telephone conversations.¹⁷⁴ This scrutiny was necessitated based on El-Hage’s argument that the searches were unlimited and lacked specificity, therefore rendering them unreasonable.¹⁷⁵ Given the global and diffuse nature of the conspiracy, however, the court granted the government more leeway regarding the procedures it had used during the operation. Beyond the geographic hurdles, this was also necessary, the court said, because the alleged conspirators spoke a foreign language, used

171. *Id.* at 284.

172. *Id.* at 285.

173. Of course, as noted above, given the fact that the court rejected the warrant requirement, there is a strong argument that the searches were therefore inherently unreasonable. Furthermore, even if one were to accept that the searches were reasonable without the warrant, there are serious questions about whether the minimization efforts really were sufficient, and whether the length of the searches (over one year) made them at least “less” reasonable.

174. *Bin Laden II*, 126 F. Supp. 2d at 285–86.

175. *Id.* at 285.

communal phones, and could likely have used code language to discuss their planning activities.¹⁷⁶ With this extra latitude, the court had little trouble finding that the searches had been conducted in a reasonable manner.¹⁷⁷

Given the government's success in proving that the searches were reasonable, and in light of the court's application of the foreign intelligence exception to the warrant requirement, the court confidently rejected El-Hage's motion to suppress. It did so, however, in a very narrowly tailored fashion, limiting the exception to foreign intelligence searches authorized by the President or Attorney General. In fact, as noted above, this exception was so narrowly tailored that it was essentially swallowed up by the subsequent FISA Amendments Act of 2008.¹⁷⁸ Had the Second Circuit simply adopted the findings of the district court, this case would not be so troubling. Instead, however, the Second Circuit took a far more sweeping approach in addressing the *Terrorist Bombings* case on appeal.

C. Second Circuit Disposition

Ultimately, El-Hage's case went to trial and a jury convicted him of the charges.¹⁷⁹ Thereafter, he appealed, challenging, among other things, the district court's denial of his motion to suppress the evidence seized during the Kenyan searches, as well as the resolution of that motion without an evidentiary hearing.¹⁸⁰ Significantly, El-Hage argued that the foreign intelligence exception was inapplicable to the searches against him because they had been conducted as part of a criminal investigation rather than as an intelligence collection operation.¹⁸¹ He also continued to assert that the searches themselves were not conducted in a reasonable manner because they were overbroad.¹⁸²

176. *Id.* at 286.

177. *Id.*

178. *See supra* note 78.

179. *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 101–02 (2d Cir. 2008).

180. *In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fourth Amendment Challenges) (Terrorist Bombings)*, 552 F.3d 157, 159 (2d Cir. 2008). As indicated above, El-Hage withdrew his motion related to the FISA search of his Texas property. The propriety of that search, therefore, was not an issue before the Second Circuit. *See supra* note 129.

181. *Terrorist Bombings*, 552 F.3d at 164.

182. *Id.* at 174.

1. Evidentiary hearing

As a preliminary matter, the court rejected El-Hage's contention that he should have been afforded an evidentiary hearing on the motion to suppress.¹⁸³ In doing so, it reasserted the district court's rationale that the ongoing nature of the investigation of al-Qaeda required an *in camera* review. Specifically, while acknowledging El-Hage's interest in reviewing the evidence against him, and his need to challenge the assertions of the government, the court felt that "the imperatives of national security and the capacity of *in camera* procedures to adequately safeguard El-Hage's Fourth Amendment rights weighed against holding an evidentiary hearing" under the circumstances of the case.¹⁸⁴

2. Reasonableness

Regarding the reasonableness of the searches, the court likewise held that the "searches' intrusion on El-Hage's privacy was outweighed by the government's manifest need to monitor his activities as an operative of al-Qaeda because of the extreme threat al-Qaeda presented . . . to national security."¹⁸⁵ Moreover, while the court acknowledged that "El-Hage suffered, while abroad, a significant invasion of privacy," it also felt that the government was justified under the circumstances.¹⁸⁶ In other words, though the searches may have been overbroad in other contexts, they were appropriate in a case such as this given: (1) the complex and decentralized nature of al-Qaeda, (2) the fact that the value of intelligence information is not always immediately apparent, (3) the tendency for conspirators to speak in code, and (4) the difficulties associated with foreign language intercepts.¹⁸⁷ Because these factors presumably will be present in most international terrorism investigations, and given the potential gravity of the threat posed by

183. *Id.* at 165.

184. *Id.* at 166 (internal citation and quotation omitted).

185. *Id.* at 172–73. Significantly, given the court's rejection of the warrant requirement, this balancing test appears to be the new contour of Fourth Amendment rights in the Second Circuit for searches conducted against U.S. citizens abroad. Though not revolutionary (*see supra* notes 20–25 and accompanying text), such a balancing test related to a constitutional right is disturbing since the balancing will always occur *ex post*. Thus, the limits of one's rights will not be apparent until after a search has already been carried out.

186. *Terrorist Bombings*, 552 F.3d at 175.

187. *Id.* at 175–76.

such groups, one is left with the impression that a search would have to be blatantly unreasonable in order to be deemed a violation of the Fourth Amendment. Nevertheless, because the court determined that the searches were reasonable, the outcome of this case necessarily hinged on whether the searches violated the Fourth Amendment for being conducted without a warrant.

3. *The foreign intelligence exception*

On this issue, it is important to begin with the fact that the Second Circuit declined to adopt the foreign intelligence exception as applied to this case.¹⁸⁸ In apparent recognition of the difficult issues raised by El-Hage—namely, the complexities of parsing criminal investigations from intelligence collection operations—the court found application of the exception “inapt” here.¹⁸⁹ Indeed, because adopting the exception would have required “an inquiry into whether the ‘primary purpose’ of the search [was] foreign intelligence collection” as opposed to a criminal investigation, the court altogether abandoned any effort to apply the exception in this case.¹⁹⁰ Such a decision was actually unsurprising given developments in the law in the intervening years between the disposition of this case at the district and circuit court levels. More directly, the Foreign Intelligence Surveillance Court of Review had stated in a 2002 case that the so-called “primary purpose” test—that is, the determination of whether the primary purpose of a search was for criminal or intelligence purposes—rested on a false assumption that “once the government moves to criminal prosecution, its ‘foreign policy concerns’ recede”¹⁹¹ Because there was no easy way to discern the line between these two types of investigations, the Second Circuit simply refused to apply the exception in *Terrorist Bombings*.

188. *Id.* at 171–72.

189. *Id.* at 172.

190. *Id.* (citation omitted).

191. *Id.* (quoting *In re Sealed Case No. 02-001*, 310 F.3d 717, 743 (FISA Ct. Rev. 2002)). Readers familiar with FISA and its impact on the relationship between the Department of Justice and the Intelligence Community will recognize this as a rudimentary explanation of what has sometimes been termed “the FISA Wall” or, more simply, “the Wall.” After 9/11, “the Wall” received much attention, and much blame, for perceived failures in information sharing between the FBI and the Intelligence Community. For more information, see NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT, 78–80 (2004) and Cedric Logan, Note, *The FISA Wall and Federal Investigations*, 4 N.Y.U. J.L. & LIBERTY 209 (2009).

4. *Application of the Fourth Amendment overseas*

With the foreign intelligence exception therefore deemed inapplicable, the Second Circuit continued its analysis, as the district court had done, with an inquiry into whether the Fourth Amendment even applied at all to U.S. citizens located overseas.¹⁹² Relying on *Reid*, as well as cases from its own circuit, the court asserted that the Bill of Rights generally does apply extraterritorially to protect U.S. citizens against illegal conduct of U.S. authorities.¹⁹³ Nonetheless, the court noted that no case had precisely addressed whether the warrant requirement specifically applied under the circumstances of this case.¹⁹⁴ Having abandoned the relatively narrow foreign intelligence exception applied by the district court, the Second Circuit issued a sweeping opinion that the Fourth Amendment's warrant requirement "does not govern searches conducted abroad by U.S. agents," and that "such searches of U.S. citizens need only satisfy the Fourth Amendment's requirement of reasonableness."¹⁹⁵ This extensive holding was based on four factors the court felt weighed against the obligation to obtain a warrant; namely, (1) the absence of precedent mandating the requirement for a warrant in such circumstances, (2) the "inadvisability of conditioning our government's surveillance on the practices of foreign states, (3) a U.S. warrant's lack of authority overseas, and (4) the absence of a mechanism for obtaining a U.S. warrant."¹⁹⁶ Each of these factors will be examined in turn.

First, the court contended that there was no precedent suggesting that U.S. officials are required to obtain a warrant to conduct searches abroad.¹⁹⁷ In making this assertion, the court relied on language from *Verdugo-Urquidez*, wherein the Supreme Court had held, as explained above, that a warrant was not required for a search by U.S. officials against *aliens* abroad.¹⁹⁸ In dicta from that case, however, the Second Circuit noted that the Court had also said

192. *Terrorist Bombings*, 552 F.3d at 167.

193. *Id.* (citing *Reid v. Covert*, 354 U.S. 1, 77 (1957); *Rosado v. Civiletti*, 621 F.2d 1179, 1189 (2d Cir. 1980); *United States v. Toscanino*, 500 F.2d 267, 280-81 (2d Cir. 1974)).

194. *Id.*

195. *Id.*

196. *Id.* at 172.

197. *Id.* at 169.

198. *Id.*

that “the history of the drafting of the Fourth Amendment . . . suggests that its purpose was to restrict searches and seizures which might be conducted by the United States in domestic matters.”¹⁹⁹ Moreover, the court maintained that the warrant requirement’s language had been imbued with a different meaning when drafted than it has in modern times.²⁰⁰ Specifically, citing language from the dissent in *Payton v. New York*, the court suggested that the Fourth Amendment, as originally constituted, had been drafted not to protect criminal suspects, but to strengthen the authority of law enforcement agents.²⁰¹ Indeed, according to Justice White’s *Payton* dissent, the warrant requirement had not originally been offered to restrict law enforcement officials, but rather to grant them “delegated powers of a superior officer such as a justice of the peace.”²⁰²

In a footnote after this discussion, the court noted that the interest generally served in having a neutral and detached magistrate make a probable cause determination to ensure that issuing a warrant would be appropriate.²⁰³ Nevertheless, the court felt those interests were lessened in cases like this because judicial officials in the United States would have difficulty determining whether an overseas search was in fact reasonable, and because the executive’s power over foreign affairs “ought to be respected in these circumstances.”²⁰⁴ Accordingly, and in light of the additional findings above, the court determined that nothing in the historical record indicated that a warrant was required for foreign searches, whether against a U.S. citizen or not.²⁰⁵

As a second factor weighing against the warrant requirement for overseas searches, the court asserted that there was nothing to suggest that U.S. officials would be required to “obtain warrants from foreign magistrates before conducting searches overseas or, indeed, to suppose that all other states have search and investigation

199. *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990)).

200. *Id.*

201. *Id.* at 169–70 (citing *Payton v. New York*, 445 U.S. 573, 604–14 (1980) (White, J., dissenting)).

202. *Payton*, 445 U.S. at 607–08 (White, J., dissenting).

203. *Terrorist Bombings*, 552 F.3d at 170 n.7.

204. *Id.*

205. *Id.* at 169–70.

rules akin to our own.”²⁰⁶ Relying again on dicta from *Verdugo-Urquidez*, the court declared that “the Constitution does not condition our government’s investigative powers on the practices of foreign legal regimes.”²⁰⁷ Perhaps owing to the nonsensicality of this argument, there was only one paragraph related to this issue in the court’s opinion, so the contours of this factor are not entirely clear. The tenor seems to indicate, however, that the court was concerned that imposing the warrant requirement would mandate that U.S. officials who wished to conduct an overseas search obtain a warrant from the overseas judiciary (assuming there was one) rather than from a U.S. magistrate. As the court understandably did not wish for this result, its analysis led it to the conclusion that a warrant was not necessary.

In a related vein, the court felt that even if a U.S. magistrate were to issue a warrant for a search against a U.S. citizen abroad, that warrant would have little, if any, legal authority overseas.²⁰⁸ As support for this argument, the court noted the obvious fact that nations have their own sovereignty and that they therefore would not be constrained in any way to cooperate with a U.S. search warrant. In determining that such a warrant would be a “nullity,” the court thus stated that “[a] warrant issued by a U.S. court would neither empower a U.S. agent to conduct a search nor would it necessarily compel the intended target to comply.”²⁰⁹ Given the “dead-letter” nature of such a warrant under these parameters, the court clearly felt no compunction in jettisoning the warrant requirement from the Fourth Amendment for overseas searches against U.S. citizens.

Finally, in what was perhaps the soundest prong of its analysis, the Second Circuit felt that the warrant requirement must not apply to overseas searches, because there was simply no procedure in place whereby U.S. officials could obtain a warrant to conduct an overseas search against a U.S. citizen.²¹⁰ Though the district court had at least

206. *Id.* at 170.

207. *Id.* at 171.

208. *Id.*

209. *Id.*

210. As noted above, this gap in the law has been partially filled in since the disposition of this case. Federal criminal procedure rules have changed and FISA amendments now allow the issuance of FISA orders for foreign intelligence collection. The parameters of the rule and Act, however, still appear to leave a gap as to a mechanism to obtain warrants for overseas searches in strictly criminal investigations.

entertained the possibility of inherent judicial authority to issue such warrants, the Second Circuit decided instead that it “need not resolve that issue” in the present case.²¹¹

IV. ANALYSIS OF *TERRORIST BOMBINGS*

Despite the court’s apparent confidence to the contrary, it is extremely difficult to reconcile the holding in *Terrorist Bombings*—namely, that the warrant requirement does not apply to searches conducted by U.S. officials against U.S. citizens abroad—with the prior trajectory of case law and congressional action pertaining to Fourth Amendment jurisprudence. This section takes up an analysis of the Second Circuit’s opinion and explains why the decision is so troubling, and how it places U.S. citizens abroad at risk of inappropriate privacy invasions. As highlighted above, the court rested its holding on four factors; namely, (1) the absence of precedent requiring a warrant for overseas searches, (2) the inadvisability of conditioning our own government’s surveillance on the practices of foreign states, (3) a U.S. warrant’s lack of authority overseas, and (4) the absence of a mechanism for obtaining a U.S. warrant.

A. The Second Circuit’s Factors Making the Warrant Requirement Inapplicable

1. Absence of precedent mandating the requirement for a warrant

As its first factor explaining why the warrant requirement was inapplicable to overseas U.S. citizens, the Second Circuit noted an apparent dearth in precedent *requiring* a warrant in such circumstances. While there indeed has been no case expressly establishing that precise principle, all case law and congressional action that does exist certainly supports such a notion. *Katz* established, for instance, that warrantless searches are per se unreasonable.²¹² Moreover, as outlined above, after *Katz*, *Keith*, and the passage of FISA, there is no search in the United States itself that could generally be conducted without a warrant.²¹³ Given *Katz*’s further declaration that the Fourth Amendment applies to people

211. *Terrorist Bombings*, 552 F.3d at 171.

212. *Katz v. United States*, 389 U.S. 347, 357 (1967) (citations omitted).

213. *See supra* note 48 and accompanying text.

rather than places, it is hard to resolve the Second Circuit's unwillingness to apply the warrant requirement to a U.S. citizen overseas, when it would surely be required if that same person were in the United States. In fact, as mentioned above, though the government had argued for application of the foreign intelligence exception, even it did not make the argument in *Terrorist Bombings* that the warrant requirement was *generally* inapplicable to searches against U.S. citizens abroad.

Even for searches conducted abroad, the court's decision is on shaky ground. Specifically, while case law has established that evidence seized by foreign officials in a search against a U.S. citizen is admissible even if the search violates the Fourth Amendment, this latitude has not been extended to searches by U.S. officials. This makes imminent sense, given the fact that the rationale behind such a rule is that U.S. officials cannot expect foreign authorities to comply with U.S. laws. On the other hand, even if the search is the result of a cooperative joint venture between U.S. and foreign authorities, the fact that U.S. officials participate in any meaningful way does implicate the Fourth Amendment. Admittedly, to this point, these cases have only required compliance with the reasonableness aspect of the Amendment, but as this Note has attempted to explain, there are strong arguments against the notion that the reasonableness requirement can really be separated from the warrant requirement.²¹⁴

The strongest possible support for the Second Circuit's position probably rests in *Verdugo-Urquidez*, but even reliance on that case would be misplaced. *Verdugo-Urquidez* addressed searches related to *nonresident aliens* in foreign countries, and as emphasized above, the Court was careful to establish that the case hinged on the fact that the Fourth Amendment was never intended to "restrain the actions of the Federal Government against *aliens* outside of the United States territory."²¹⁵ While it might be argued that the case could nevertheless logically be extended even to U.S. citizens, such a position would require ignorance of the rationale offered by the *Verdugo-Urquidez* Court to explain the holding. Specifically, though nonresident aliens perhaps have indeed not established "sufficient connection" with the United States to be considered part of the U.S.

214. See *supra* note 10 and accompanying text.

215. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990) (emphasis added).

community, certainly U.S. citizens have.²¹⁶ Given the *Verdugo-Urquidez* Court's reliance on social compact ideas, the fact that U.S. citizens have given up some rights in order to be a part of the community should entitle them to partake in some of the benefits thereof. As specifically applied to the details of this case, for instance, the fact that U.S. citizens have no right to resist valid search warrants should entitle them to having one presented in the first place.

While the Second Circuit also implied in a footnote to this section that making probable cause determinations for the issuance of overseas intelligence-related warrants is outside the competence of the judiciary,²¹⁷ such a proposition has been flatly rejected by the Supreme Court. Though the primary focus in *Keith* had been on domestic national security issues, the Court nevertheless generally addressed the government's contention that political and national security issues were beyond the command of the judiciary.²¹⁸ Pointedly, the Court stated that judges "regularly deal with the most difficult issues of our society," and that there was "no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved"²¹⁹ Moreover, the Second Circuit's opinion itself bears this out. Though the court expressed that the warrant requirement should be abandoned because of a concern that "a domestic judicial officer's ability to determine the reasonableness of a search is diminished where the search occurs on foreign soil,"²²⁰ the court thereafter turned to an ex post analysis of the very issue—that is, whether the search at issue had been conducted reasonably. If the judiciary can be trusted to make such a determination ex post, it is not entirely clear why they cannot be given the same trust to conduct such a review ex ante. The most likely explanation for the Second Circuit's position on this matter is that it evidently accepted the government's argument that even the *perception* of a potential security breach would hinder like investigations. The trouble with this argument is that, taken to its extreme, it would require the judiciary to be completely excised from the process. For example, in

216. If U.S. citizens have not established enough of a connection, one would be hard pressed to explain who has.

217. *In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fourth Amendment Challenges) (Terrorist Bombings)*, 552 F.3d 157, 170 n.7 (2d Cir. 2008).

218. *United States v. U.S. Dist. Court*, 407 U.S. 297, 319–20 (1972).

219. *Id.* at 320.

220. *Terrorist Bombings*, 552 F.3d at 170 n.7.

denying El-Hage's evidentiary hearing, the court said that the ongoing investigation into al-Qaeda required that the evidentiary review be conducted out of the eye of the public, in an in camera, ex parte manner. But if the judiciary cannot be trusted not to breach security at the warrant issuance stage, surely its involvement at the evidentiary hearing stage has no less potential for harm when investigations continue in the midst of prosecutions.

The fact is that the judiciary abdicates its responsibility to act as a neutral and detached observer when it refuses to carry out its role as intermediary between the executive and individual citizens. While the judiciary indeed may not be as attuned to foreign affairs as the executive, the executive is not left completely at the mercy of a magistrate in this regard. Indeed, while, as noted above, a suspect often will not be represented when evidentiary reviews are made, the government—and more precisely, the executive—will be. Thus, concern over judicial ignorance ultimately returns to the fact that the executive must fulfill its obligation to persuade the judiciary that cause exists to perform a constitutional search.

2. Inadvisability of conditioning government surveillance on the practices of foreign states

Insofar as the record indicates, there was no suggestion by either of the *Terrorist Bombings* parties that the warrant requirement dictates that U.S. officials obtain a search warrant from an overseas magistrate (or some equivalent thereof) in order to conduct a valid search against an overseas U.S. citizen. Nevertheless, the court apparently felt compelled to proclaim that “nothing in the history of foreign relations of the United States would require U.S. officials [to] obtain warrants from foreign magistrates before conducting searches overseas or, indeed, to suppose that all other states have search and investigation rules akin to our own.”²²¹ It seems that this was a point on which all parties could have agreed because the issue was not that a warrant should be required in order to increase the legitimacy of the search from the perspective of a foreign government, but rather that obtaining a warrant is required to satisfy the U.S. Constitution. The Second Circuit seemed to have realized this distinction since it left in place the requirement that overseas searches meet the reasonableness aspect of the Fourth Amendment;

221. *Id.* at 170.

so it is unclear why it believed that the issuance of a warrant would be any different. The only insight comes from the court's reliance on language from *Verdugo-Urquidez*, wherein the Supreme Court had alluded to the fact that "the Constitution does not condition our government's investigative powers on the practices of foreign legal regimes" ²²² While true, this language misses the point, explored in more depth in section three below, that the Constitution does—or at least should—regulate the conduct of our own government.

Perhaps an issue tangentially related to this point was at work in the court's analysis of this factor. Namely, though the Second Circuit did not explore it in great detail, it did note the district court's observation that requiring a warrant for overseas intelligence-related searches could inordinately delay executive action to carry out such searches. Such a delay in the area of national security could admittedly have grave consequences. That said, there is no legitimate explanation offered by either court as to why such a scenario would not fall squarely within the already well-established bounds of the exigent circumstance exception to the warrant requirement. ²²³ In contrast to throwing the entire warrant requirement out the window, applying the exigent circumstance doctrine to overseas searches conducted for intelligence purposes would have been more in line with established Fourth Amendment doctrine.

3. U.S. warrant's lack of authority overseas

On a point related to the last factor, the court's assertion that a U.S. warrant would lack any legal authority overseas also misses the mark. With this contention, just as with the last, the court seems to center its attention on the impact of a warrant upon the foreign power exercising jurisdiction over the area searched. The significance of a warrant for an overseas search, however, does not lie in the warrant's influence upon foreign officials, but rather in the legitimacy it instills on the search, any seized evidence, and the U.S. judicial

222. *Id.* at 171.

223. The most that is said about this issue is the district court's assertion that, although El-Hage apparently attempted to make this point, the court was "not persuaded that the exigent circumstances doctrine provides enough protection for the interests at stake." *United States v. Bin Laden (Bin Laden II)*, 126 F. Supp. 2d 264, 275 (S.D.N.Y. 2000). Further, neither court acknowledged the fact that the electronic surveillance was conducted for approximately a year, leading one to question the legitimacy of the need for the exigent circumstances exception in this case anyway.

process itself. Indeed, foreign power or not, arguably the only way to comport with the very principles underlying the Fourth Amendment would be to obtain a warrant under such circumstances.

As noted above, the purpose of the warrant requirement is not to satisfy foreign officials, but to ensure that an overzealous executive does not trample the rights of those entitled to constitutional protection. Repeatedly, in *Johnson*, *Katz*, *Keith*, and *Ehrlichman*, for example, courts have rejected the notion that the executive is competent to serve as the neutral and detached official necessary to authorize a valid search. Congress apparently thought the same, given its language in FISA requiring the executive to obtain FISC approval for intelligence-related searches against U.S. persons. Though the executive may see the warrant requirement as a hurdle, or as some sort of a condemnation of its integrity, its point is not to impugn. Instead, the requirement for judicial interposition recognizes the fact that the American people do not expect, or indeed even wish for, the executive to be neutral. As Justice Douglas stated in *Katz*, the duty of the executive is to “vigorously investigate and prevent breaches of [the law] and prosecute those who violate” it.²²⁴ On the other hand, part of the beauty of our system is that it establishes a process whereby this vigor is tempered by the judiciary in order to ensure protection of constitutional liberties.

The issue, in short, is not the legitimacy that foreign officials vest in a U.S. warrant, it is rather the legitimacy that defendants facing charges in U.S. courts can confer in it. Obviously, as the Second Circuit rightly noted, a U.S. warrant may have no authority overseas—but that is beside the point. The real concern is the influence it carries within the United States, and the questions that arise about the legitimacy of a search conducted without a warrant. Although the executive might suggest that searches for national security purposes are unique, such a contention arguably strengthens rather than weakens the need for a judicial intermediary because of the otherwise plenary power the executive has regarding foreign affairs.

The Second Circuit had perhaps a stronger point, however, when it asserted that a U.S. warrant would not necessarily compel the intended target of a search to comply with its terms. This point can be addressed, though, in light of the acceptance of the Supreme

224. *Katz v. United States*, 389 U.S. 347, 359–60 (1967) (Douglas, J., concurring).

Court of certain social compact theories. More directly, the Court argued in *Verdugo-Urquidez* that a nonresident alien was not part of the U.S. “compact” because such a person has not given up any rights in order to obtain the benefits that flow from the Constitution. But where a person has, such an individual must recognize that with those benefits come certain prohibitions on one’s conduct. Thus, though the court seemed to ignore this fact, the truth is that a U.S. citizen would in fact be compelled to adhere to a search warrant simply by virtue of citizenship and by the fact that he has received the benefit of having a search warrant presented in the first place. In other words, receiving the benefits of the Fourth Amendment also requires that one adhere to the obligations associated with it.²²⁵

4. Absence of mechanism for obtaining a U.S. warrant

Although the Second Circuit chose not to resolve the issue of whether there was a mechanism for a U.S. magistrate to issue an overseas warrant, it stated that it was at least unclear whether such a procedure existed. Indeed, this factor was perhaps the most challenging aspect of the *Terrorist Bombings* case. As the district court had pointed out, at the time the case was originally prosecuted, there was no statutory provision authorizing the issuance of an overseas warrant for either criminal or intelligence-related investigations.²²⁶ But while the district court acknowledged that “the acquisition [of a warrant] would certainly have been impracticable,” it did not accept that it would have been impossible.²²⁷

Actually, the government itself had even conceded the possibility that a court’s authority to issue warrants was not contingent upon Congress’s establishment of a statutory procedure to do so.²²⁸ Without such a statutory scheme, however, the judiciary would have to rely upon its own inherent authority—whatever that might be—to carry out its constitutional obligation to issue warrants.²²⁹ The idea, though not exactly commonplace, was also not novel; El-Hage had

225. While some may argue that it cannot be assumed that a U.S. citizen abroad will consent to the search, this misses the point. The argument here is that, regardless of whether the individual consents, a warrant imbues the search with legitimacy.

226. *Bin Laden II*, 126 F. Supp. 2d at 276 n.13.

227. *Id.* at 276–77.

228. *Id.* at 277 n.16.

229. *Id.*

essentially made such an argument in his appeal, and the court itself outlined several cases that seemed to support such a possibility. For example, in *United States v. New York Telephone Co.*, the Supreme Court acknowledged, without rejecting the practice, that Courts of Appeals had authorized warrants under “an inherent power . . . to issue search warrants under circumstances conforming to the Fourth Amendment.”²³⁰ And the circuits, indeed, had been far more straightforward about the issue. The Seventh Circuit, for instance, had established that “the power to issue a search warrant was historically, and is still today, an inherent (by which we mean simply a nonstatutory, or common law) power of a court of general jurisdiction.”²³¹ Likewise, the Eighth Circuit also explicitly approved of the issuance of warrants without statutory authority in order to comport with the Fourth Amendment.²³² Thus, it would not have been astounding for the court to determine that, despite the procedural oddities, the government had an obligation to pursue a warrant for the searches against El-Hage, regardless of whether or not a court ultimately granted one. Unmistakably this argument imputes the government with a degree of foresight, but given the rights at stake, it does not seem unreasonable to require such.

B. A Better Way

To be sure, there is no doubt that the Second Circuit was caught between a rock and a hard place with the *Terrorist Bombings* case, especially given the state of the law at the time of its underlying events. Perhaps the court felt it was faced with two equally unappealing choices: either uphold the Fourth Amendment and likely allow an alleged mass-murderer to go free, or dismiss the dictates of the Fourth Amendment and deem the warrant requirement inapplicable overseas. With the issue framed this way, maybe the court’s disposition of the case is less troubling.

But there was a middle course. A better solution would have been for the Second Circuit to have simply affirmed the district court’s application of the foreign intelligence exception to the searches against El-Hage. Though this exception had subsequently

230. 434 U.S. 159, 169 n.14 (1977).

231. *United States v. Torres*, 751 F.2d 875, 878 (7th Cir. 1984).

232. *Bin Laden II*, 126 F. Supp. 2d at 276 n.16 (citing *United States v. Falls*, 34 F.3d 674, 678 (8th Cir. 1994)).

been absorbed by amendments to FISA, the appellate court could have legitimately adopted it in light of its widespread application across the circuits when the alleged crimes were committed. Further, because the exception had not been rejected on the basis of a faulty interpretation of law—but rather was abandoned owing only to the difficulty of applying it in certain circumstances—adopting it in *Terrorist Bombings* would not have been unreasonable. More precisely, in a case arising after the district court’s decision, the foreign intelligence exception had essentially been rejected by the Foreign Intelligence Surveillance Review Court because of the exception’s requirement that a court determine whether a search had been conducted primarily for criminal or intelligence purposes. In this case, given the nature of the searches against El-Hage, and the fact that they concluded almost a full year before any of the crimes with which he was charged were carried to fruition, the government had a very strong argument that the searches were primarily related to intelligence collection. Indeed, this was the very argument the government had in fact made at both the district and appellate court levels and the argument that the district court had accepted. But, in rejecting the foreign intelligence exception, the Second Circuit essentially painted itself into a corner—if there was no easy way to obtain a warrant, then it had to either suppress critical evidence or determine that there must not be a warrant requirement.

V. CONCLUSION

This Note ends where it began; namely, with the recognition that “[s]ociety is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law.”²³³ Apparently the evidence against El-Hage was damning, and clearly his alleged crimes were horrific. It would certainly have been a travesty, therefore, to allow him to escape punishment if he were guilty. It is perhaps a greater tragedy, however, to trample the constitutional rights of those who are wrongly subjected to the overzealousness of mistaken or misguided U.S. law enforcement officials. Fortunately, there is a small ray of hope since, as currently constituted, FISA now directs that if a “significant portion” of a search is conducted for foreign intelligence purposes, then a FISA

233. *United States v. Toscanino*, 500 F.2d 267, 274 (2d Cir. 1974) (citing *United States v. Archer*, 486 F.2d 670, 674–75 (2d Cir. 1973)).

order is required even for searches against U.S. persons abroad.²³⁴ The problem is that in not applying the foreign intelligence exception in *Terrorist Bombings*—regardless of its subsequent mootness after the events of the case—the Second Circuit stripped U.S. citizens abroad of their Fourth Amendment rights even for searches carried out during the course of criminal investigations. Hopefully, courts in other circuits will realize the impropriety of this decision and will decline to adopt it. In the meantime, U.S. citizens abroad will have to hope that they are not subject to investigations within the jurisdiction of the Second Circuit.

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234. 50 U.S.C. § 1804(a)(6)(B) (2008).

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