

A FIRST AMENDMENT BREACH: THE NATIONAL SECURITY AGENCY'S ELECTRONIC SURVEILLANCE PROGRAM

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I. INTRODUCTION

On December 16, 2005, journalists revealed that the U.S. government performed electronic surveillance on its citizens without a warrant or any other prior judicial involvement.¹ The government initially justified the National Security Agency's warrantless surveillance program ("NSA program") with the asserted need for protection of national security, in light of the attacks on September 11, 2001.² In response to increasing criticism of the program, President George W. Bush relied on both executive authority in Article II of the Constitution and the 2001 Congressional Authorization for the Use of Military Force³ (AUMF) as authorization for these wartime measures.⁴ The revelation of the NSA program provoked reporters to identify several problems with the administration's program.⁵ Commentators argued that the program violated both the Foreign Intelli-

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¹ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

² See Dan Eggen & Charles Lane, *On Hill, Anger and Calls for Hearings Greet News of Stateside Surveillance*, WASH. POST, Dec. 17, 2005, at A1; Press Release, American Bar Ass'n, Majority of Americans Say President Should Not Suspend Constitutional Freedoms without Court Order or Congressional Authorization (Feb. 10, 2006), available at <http://www.abanet.org/media/releases/news021006.html>.

³ Authorization for the Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001).

⁴ Memorandum from Elizabeth B. Bazan & Jennifer K. Elsea, Cong. Research Serv., Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information 27, 30, 33 (Jan. 5, 2005), available at <http://www.fas.org/sgp/crs/intel/m010506.pdf>.

⁵ See, e.g., Hope Yen, *Probe Sought on NSA Surveillance; Members of Congress Question Legality of Bush's Authorization*, WASH. POST, Dec. 19, 2005, at A5.

gence Surveillance Act (FISA)—a statute that places limits on surveillance of U.S. citizens for intelligence gathering purposes⁶—and the Fourth Amendment because of the government's failure to obtain warrants.⁷

The courts are in tension as to whether the NSA program violates both the First and Fourth Amendments.⁸ There is arguably a connection between the First and Fourth Amendments and the important role that both play in protecting U.S. citizens from invasions of privacy, the type of intrusions that the NSA program perpetrates.⁹ Legal commentators have not paid much attention to the additional and independent First Amendment concerns with the NSA program that were raised by the district court and the circuit court's dissenting opinion in *ACLU v. NSA*. This Comment seeks to address these concerns.

Congress proposed various amendments to FISA supposedly in order to cure any question of the NSA program's validity and to allow for more flexibility in foreign intelligence surveillance. Various members of the House and Senate proposed four separate bills, each amending FISA in a different way.¹⁰ The motivation behind these bills was to eliminate the warrant requirement under FISA and grant the executive branch the power to engage in warrantless wiretapping on U.S. citizens who place calls to foreign countries.¹¹ Most recently, the executive branch changed its position on the NSA program and stated that any surveillance would be subject to FISA court approval.¹²

⁶ The Foreign Intelligence Surveillance Act, 50 U.S.C.A. §§ 1801–1862 (West 2003 & Supp. 2007).

⁷ *Id.*

⁸ See *ACLU v. NSA*, 438 F. Supp. 2d 754, 775–76 (E.D. Mich. 2006) (holding that the NSA program violates both the First and Fourth Amendments), *vacated*, 493 F.3d 644 (6th Cir. 2007). The government appealed, and the U.S. Court of Appeals for the Sixth Circuit in a two to one split held that the particular plaintiffs do not have standing to challenge the program on any claims, including the First Amendment. *ACLU*, 493 F.3d at 673. The majority refused to rule on the legality of the program; however, the dissenting opinion not only found that the plaintiffs had standing, but also vehemently argued that the NSA program violated FISA and the Constitution. *Id.* at 720 (Gilman, J., dissenting).

⁹ See *infra* Part III.

¹⁰ See S. 3931, 109th Cong. (2006); S. 2455, 109th Cong. (2006); S. 3001, 109th Cong. (2006); H.R. 585, 109th Cong. (2006); see also ACLU Comparison Chart of NSA Legislation (Sept. 29, 2006), <http://www.aclu.org/safefree/general/26978leg20060929.html> [hereinafter ACLU Comparison Chart].

¹¹ See Dan Eggen, *Surveillance Bill Meets Resistance in Senate*, WASH. POST, July 21, 2006, at A9.

¹² Letter from Alberto Gonzales, Attorney General, to Patrick Leahy, Chairman, Comm. on Judiciary, and Arlen Specter, Ranking Minority Member, Comm. on Judi-

This new decision is still a source of controversy because of the government's failure to provide specific details about the program and its overall delay in implementing these new procedures.

The legislative enactments and the asserted change of position by the administration, however, would not obviate all of the constitutional infirmities of the NSA program. Even if the enactments remove any Fourth Amendment objections to the program, this Comment argues that the program independently violates the First Amendment. Specifically, this Comment argues that the NSA program violates the First Amendment associational rights of individuals subject to surveillance. Thus, the government must have a compelling state interest to excuse such a wholesale violation of constitutional rights. The government presumably justifies this violation of First Amendment rights by invoking the all-encompassing interest of national security, a justification this Comment argues is too broad in itself. Moreover, the NSA program circumvents the Fourth Amendment, which often works to protect First Amendment rights, because the government is neither obtaining a warrant nor satisfying FISA requirements.

This Comment seeks to unhinge the First Amendment analysis from the Fourth Amendment inquiry typically used to analyze government surveillance programs. In order to protect First Amendment associational rights, a separate inquiry is required. The government must demonstrate that the NSA program has sufficient procedural safeguards to be narrowly tailored to meet a genuine compelling state interest. This Comment relies on *ACLU v. NSA* as an example of how the government's surveillance program violates the First Amendment right of freedom of association and that, in order to protect this interest, the First Amendment may require additional procedural safeguards of its own.

Part II traces the history of FISA and government surveillance up through the most recent NSA surveillance program. Part III discusses FISA's warrant requirement and demonstrates that this requirement is essential to the Act's constitutionality. This Part argues that the absence of a warrant requirement in the NSA program, examined in the district court's opinion in *ACLU v. NSA*, also raises serious independent First Amendment concerns. Part IV discusses the First Amendment violation created by the NSA program, describing the nature of the harm at issue as harm to freedom of association, which requires a compelling state interest with the least restrictive means of

invasion. Part V then discusses the idea of applying Fourth Amendment requirements to a First Amendment inquiry. It highlights the concerns with this application, specifically discussed in *Zurcher v. Stanford Daily*¹³ and *Reporters Committee for Freedom of Press v. AT&T Co.*,¹⁴ and dismisses these concerns as not applicable to the NSA program. Part VI proposes that the easiest way to satisfy the First Amendment is to obtain a warrant and use Fourth Amendment procedures. However, if this is not possible, the First Amendment requires an independent inquiry of its own, essentially placing the requirement of strict scrutiny *ex ante* as opposed to the current *ex post* examination.

II. THE HISTORY OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT AND GOVERNMENT SURVEILLANCE

Historically, presidents justified the use of warrantless surveillance as necessary for matters involving national security.¹⁵ Virtually every president from Abraham Lincoln to Franklin Roosevelt authorized some type of warrantless surveillance during wartime to intercept the conversations of suspected spies.¹⁶ Congress first attempted to regulate electronic surveillance in 1968 through Title III of the Omnibus Crime Control and Safe Streets Act (“Title III”).¹⁷ Title III permitted law enforcement agents to use electronic surveillance only if a reviewing judge found probable cause to believe the target “is committing, has committed, or is about to commit” a particular enumerated offense, and that the surveillance would obtain incriminating communications about the offense.¹⁸ Even with this Act in place, the executive enjoyed great discretion to undertake surveillance for national security and virtually limitless power to engage in surveillance for foreign security channels.¹⁹ Increasingly, scandals arose as the executive continued to invoke surveillance under the guise of na-

¹³ 436 U.S. 547 (1987).

¹⁴ 593 F.2d 1030 (D.C. Cir. 1978).

¹⁵ Adam Burton, *Fixing FISA for Long War: Regulating Warrantless Surveillance in the Age of Terrorism*, 4 PIERCE L. REV. 381, 384 (2006).

¹⁶ *Id.* For example, President Lincoln authorized eavesdropping of telegraphed messages in order to detect enemy plans during the Civil War. *Id.*

¹⁷ Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, §§ 801–803, 82 Stat. 197, 211–225 (1968) (Title III codified as amended at 18 U.S.C. §§ 2510–2522 (2000)).

¹⁸ 18 U.S.C. § 2518(3) (1970).

¹⁹ *Id.* § 2511(3) (“Nothing contained in this chapter . . . shall limit the constitutional power of the President . . . to obtain foreign intelligence information deemed essential to the security of the United States . . .”).

tional security.²⁰ These suspect events began to tarnish the American public's belief in the truthfulness and legality of executive actions.²¹ Aware of this growing concern, courts tried to limit the amount of surveillance conducted, but the holdings did not extend beyond the domestic context.²² Congress refused to regulate foreign intelligence surveillance and instead "left presidential powers where it found them."²³ Even greater skepticism of the government's limitless authority emerged during the Watergate scandal, prompting the creation of a special congressional committee—the Church Committee—to investigate the issue.²⁴

In 1975 and 1976 the Church Committee published fourteen reports on the U.S. intelligence agencies and their alleged deficiencies and proposed certain recommendations to address these concerns.²⁵ One of these recommendations was FISA²⁶ and the Foreign Intelligence Surveillance Court (FISC),²⁷ which would oversee investigation of foreign suspects inside the United States. Congress approved FISA in 1978 with the goal of implementing a "secure framework"²⁸ by which the executive could obtain vital intelligence information while still adhering to the nation's goal of commitment to privacy and individual rights.²⁹

²⁰ Arthur S. Lowry, Note, *Who's Listening: Proposals for Amending the Foreign Intelligence Surveillance Act*, 70 VA. L. REV. 297, 311–13 (1984).

²¹ *See id.*

²² *See, e.g.*, *Katz v. United States*, 389 U.S. 347 (1967) (holding that the Fourth Amendment protections extended to electronic surveillance but failing to extend this holding to matters of national security); *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297 (1972) (holding that the executive did not have the power to authorize domestic electronic surveillance without prior judicial approval).

²³ *Keith*, 407 U.S. at 303.

²⁴ *See, e.g.*, S. REP. NO. 95-604, pt. 1, at 7 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 3904, 3908 (stating that abuses in electronic surveillance "were initially illuminated in 1973 during the investigation of the Watergate break-in" and that further abuses were shown by the Church Committee).

²⁵ *See* Assassination Archives & Research Ctr., Church Committee Reports (1976), <http://www.aarclibrary.org/publib/church/reports/contents.htm> [hereinafter Church Committee Reports] (providing links to all fourteen reports).

²⁶ Foreign Intelligence Surveillance Act, 50 U.S.C.A. §§ 1801–1862 (West 2003 & Supp. 2007).

²⁷ 50 U.S.C. § 1803 (2000).

²⁸ *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 461 (D.C. Cir. 1992) (quoting S. REP. NO. 95-604, pt. 1, at 15 (1977), *as reprinted in* U.S.C.C.A.N. 3904, 3916)).

²⁹ *Id.*

A. FISA Standards

FISA established the standards for obtaining a court order for foreign intelligence surveillance.³⁰ The FISC, initially seating seven district court judges, grants court orders approving electronic surveillance.³¹ In order for a federal officer to obtain authorization, the attorney general must certify the application after several criteria are met. First, the application must state the “identity, if known, or a description of the specific target of the electronic surveillance.”³² Second, the officer must submit a statement of the reasons for his belief that “the target of the electronic surveillance is a foreign power or an agent of a foreign power” and that the place at which the electronic surveillance is directed is used by that target.³³ Third, the application must contain “a detailed description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance.”³⁴ Last, the certifying official must state that he believes the surveillance will obtain foreign intelligence information.³⁵

After the official properly submits the application, the FISC will grant an *ex parte* court order if the court deems that, on the basis of the facts, “there is probable cause to believe that the target of the electronic surveillance is a foreign power or an agent of a foreign power”³⁶ and that the place where the surveillance is being directed is

³⁰ 50 U.S.C. § 1802(b) (2000); *United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984).

³¹ 50 U.S.C. § 1803(a) (2000). The number has been amended numerous times. In 2001, the USA PATRIOT Act expanded the court from seven to eleven judges and required that at least three of the judges be from within twenty miles of the District of Columbia. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 208, 115 Stat. 272, 283 (codified at 18 U.S.C. § 1803(a) (Supp. I 2001)).

³² 50 U.S.C.A. § 1804(a)(3) (West 2003 & Supp. 2007).

³³ 50 U.S.C. § 1804(a)(4)(A) (2000). FISA includes several definitions of “foreign power” and “agent of a foreign power.” Most pertinent to this Comment, “FISA defines ‘foreign power’ to include a group engaged in international terrorism or activities in preparation therefor.” *Duggan*, 743 F.2d at 69 (citing § 1801(a)(4)). “An ‘agent of a foreign power’ is defined to include both ‘any person other than a United States person, who . . . acts in the United States as . . . a member of a foreign power . . .’ and ‘any person who . . . knowingly engages in . . . international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power.’” *Id.* (citing § 1801(b)(1)(A), (b)(2)(C)).

³⁴ § 1804(a)(6).

³⁵ *Id.* § 1804(a)(7)(A).

³⁶ *Id.* § 1805(a)(3)(A) (“[N]o United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment . . .”).

used by that target.³⁷ This standard is much less stringent than under Title III, which required that a crime is being, had been, or would be committed for surveillance to take place.³⁸

Even so, it may appear that FISA makes it difficult for the government to obtain a court order to conduct surveillance.³⁹ This is not the case at all; in fact, through the end of 2004, the FISC rejected only five applications while granting 18,781 warrants.⁴⁰ Also, even if the government cannot obtain a warrant, there is an emergency procedure under FISA which authorizes the government to conduct surveillance without a court order.⁴¹ FISC will grant the emergency order if the attorney general determines that immediate action is needed with respect to electronic surveillance.⁴² The order is valid for seventy-two hours before it must be reviewed by the court.⁴³

After September 11, 2001, Congress enacted the USA PATRIOT Act⁴⁴ to amend several portions of FISA. Two of the amendments to FISA are relevant here because both enhanced the president's ability to collect foreign intelligence within the United States.⁴⁵ The first amendment lowered the surveillance standard. Previously, the col-

³⁷ *Id.* § 1805(a)(5).

³⁸ 18 U.S.C. § 2518(3) (2000).

³⁹ See William Kristol & Gary Schmitt, *Vital Presidential Power*, WASH. POST, Dec. 20, 2005, at A31.

⁴⁰ See Federation of American Scientists, FISA Annual Reports Made to Congress, <http://www.fas.org/irp/agency/doj/fisa/index.html#rept> (last visited Jan. 25, 2007). In 2005 and 2004, none of the applications submitted by the government were denied. Letter from William E. Moschella, Assistant Att'y Gen., to Hon. J. Dennis Hastert, Speaker of H. Rep. (Apr. 28, 2006), available at <http://www.fas.org/irp/agency/doj/fisa/2005rept.html>; Letter from William E. Moschella, Assistant Att'y Gen., to Hon. J. Dennis Hastert, Speaker of H. Rep. (Apr. 1, 2005), available at <http://www.fas.org/irp/agency/doj/fisa/2004rept.pdf>. In 2003, four applications were denied. Letter from William E. Moschella, Assistant Att'y Gen., to Ralph Mecham, Dir. Admin. Office of U.S. Courts (Apr. 30, 2004), available at <http://www.fas.org/irp/agency/doj/fisa/2003rept.pdf>. In 2002, 2001, and 2000, all applications were approved, and only a few were modified prior to approval. Letter from John Ashcroft, Att'y Gen., to Ralph Mecham, Dir. Admin. Office of U.S. Courts (Apr. 29, 2003), available at <http://www.fas.org/irp/agency/doj/fisa/2002rept.html>; Letter from John Ashcroft, Att'y Gen., to Hon. J. Dennis Hastert, Speaker of H. Rep. (Apr. 29, 2002), available at <http://www.fas.org/irp/agency/doj/fisa/2001rept.html>; Letter from John Ashcroft, Att'y Gen., to Hon. Richard B. Cheney, Pres. Sen., (Apr. 27, 2001), available at <http://www.fas.org/irp/agency/doj/fisa/2000rept.html>.

⁴¹ 50 U.S.C.A. § 1802(a)(1) (West 2003 & Supp. 2007).

⁴² *Id.*

⁴³ 50 U.S.C. § 1801(h)(4) (2000).

⁴⁴ USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of U.S.C.).

⁴⁵ See Grayson A. Hoffman, Note, *Litigating Terrorism: The New FISA Regime, the Wall and the Fourth Amendment*, 40 AM. CRIM. L. REV. 1655, 1657 (2003).

lection of foreign intelligence information had to be the *sole or primary purpose* of the investigation; post-PATRIOT Act, it need only be a *significant purpose* of the investigation.⁴⁶ Second, the Act further expanded FISA to permit “roving wiretap” authority, which allows the interception of any communication without specifying the particular telephone line, computer, or other facility to be monitored.⁴⁷ Although the amendments gave more power to the executive, FISA still requires that the government meet all of its procedures and obtain a court order before conducting foreign intelligence surveillance.⁴⁸

B. Warrantless Surveillance by the Government

Despite the high number of court orders granted by the FISC and the emergency procedures already in place, the government still engages in warrantless electronic surveillance on foreign agents within the United States.⁴⁹ The NSA implemented its program sometime after September 11, 2001, and it remained a secret until a *New York Times* article revealed its existence.⁵⁰ The exact details of the NSA program, labeled the Terrorist Surveillance Program (TSP) by the government,⁵¹ are unknown. Under this program, reauthorized by President Bush over thirty times since 2001,⁵² the NSA intercepts communications without a warrant or any form of court order.⁵³ It gathers information without the authorization of either the President or the Attorney General, but instead uses its own discretion to find probable cause that the target of the surveillance is associated with al Qaeda.⁵⁴ This program in no way complies with the procedures set out by FISA; indeed, according to General Michael Hayden, then-Principal Deputy Director for National Intelligence, the NSA pro-

⁴⁶ USA PATRIOT Act, § 218, 115 Stat. at 291.

⁴⁷ *Id.* § 206, 115 Stat. at 282.

⁴⁸ See 50 U.S.C. § 1805(a).

⁴⁹ See e.g., Risen & Lichtblau, *supra* note 1, at A1; see also President George W. Bush, State of the Union Address at the U.S. Capitol (Jan. 31, 2006), (transcript available at <http://www.whitehouse.gov/stateoftheunion/2006/index.html>) [hereinafter 2006 State of the Union Address].

⁵⁰ Risen & Lichtblau, *supra* note 1, at A1.

⁵¹ 2006 State of the Union Address, *supra* note 50.

⁵² *Bush Says He Signed NSA Wiretap Order*, CNN, Dec. 17, 2005, available at <http://www.cnn.com/2005/POLITICS/12/17/bush.nsa/>.

⁵³ Memorandum in Support of Plaintiff's Motion for Summary Judgment at 2, *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 06-CV-10204) (information taken from plaintiff's statement of undisputed material facts).

⁵⁴ *Id.* at 2–3.

gram, “is a more . . . ‘aggressive’ program than would be traditionally available under FISA.”⁵⁵

The NSA claims that the program intercepts only international communications and that the authority to do so is reviewed every forty-five days by the General Counsel and the Inspector General of the NSA.⁵⁶ The NSA further explains that the program only intercepts those calls entering or leaving the United States that involve someone associated with al Qaeda.⁵⁷ Yet, despite the government’s assurances, there is evidence to show that NSA surveillance is not targeted at specific individuals.⁵⁸ Instead the NSA program uses data mining to amass information mostly about the calls of ordinary Americans who are not even suspected of a crime.⁵⁹ The calling patterns are then analyzed in order to detect terrorist activity.⁶⁰ Despite these allegations, the Department of Justice firmly assures the public that it is not using the program to spy on innocent citizens but rather to focus narrowly on international calls associated with al Qaeda.⁶¹ The NSA claims that its power to engage in this kind of surveillance stems from two sources: the September 18, 2001, AUMF authorizing “all necessary and appropriate force” to engage in war with those responsible for the September 11 attacks;⁶² and Article II, Section 2 of the U.S. Constitution, which, the administration argues, grants the president inherent executive authority to take necessary measures to protect national security during wartime.⁶³

C. Proposed Amendments and Compliance with FISA

Recently, members of Congress have proposed legislation to change the scope of FISA to allow more flexibility in foreign intelli-

⁵⁵ Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Dir. for Nat’l Intelligence (Jan. 12, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html>.

⁵⁶ Friends Committee on National Legislation, *The White House Defines NSA Myths vs. Realities* (Oct. 17, 2007), <http://www.fcnl.org> (follow “Civil Liberties” hyperlink under “Issues”; then follow “Privacy Issues” hyperlink; follow “The White House Defines NSA Myths vs. Realities” hyperlink under “Resources”) [hereinafter *NSA Myths*].

⁵⁷ *Id.*

⁵⁸ Leslie Cauley, *NSA Has Massive Database of Americans’ Phone Calls*, USA TODAY, May 11, 2006, at A1.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *NSA Myths*, *supra* note 56.

⁶² Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

⁶³ Bazan & Elsea, *supra* note 4, at 27, 30, 33.

gence surveillance. Each bill proposes different amendments to FISA to deal with the president's authority regarding the NSA program.⁶⁴ One recent bill presented by former Senate Majority Leader, William Frist, titled the Terrorist Surveillance Act of 2006, would change many provisions of FISA, including a change that would allow warrantless surveillance of Americans' international calls and e-mails without any evidence of a relationship to al Qaeda.⁶⁵ In addition, the Wilson Bill proposed to change the definition of "electronic surveillance" to authorize surveillance of Americans' phone calls.⁶⁶ The bill specifically allows for the interception of communication either "from the . . . United States to overseas, or from overseas to the United States . . . without a court order so long as the government is not intentionally targeting a known person in the U.S."⁶⁷ This bill would "permit . . . vastly expanded government wiretapping of innocent Americans without a warrant and without probable cause."⁶⁸ Congress has not yet made any decisions regarding new legislation.

Even more recently, the Bush Administration announced its intention to comply with FISA when engaging in foreign surveillance. A letter from then-Attorney General Alberto Gonzales, stated that the President is committed to using lawful tools to protect the country and to developing a new program with the approval of FISA.⁶⁹ However, the Administration has not revealed details about the program or its compliance,⁷⁰ leading to the conclusion that the NSA program

⁶⁴ S. 3931, 109th Cong. (2006); S. 2455, 109th Cong. (2006); S. 3001, 109th Cong. (2006); H.R. 5825, 109th Cong. (2006); *see also* ACLU Comparison Chart, *supra* note 10.

⁶⁵ S. 3931, 109th Cong. (2006). This Bill would change FISA's definition so that the interception of calls and e-mails of American residents and businesses would no longer need a warrant unless the sender and all of recipients are within the United States. *Id.* at § 9(b).

⁶⁶ Electronic Surveillance Modernization Act, H.R. 5825, 109th Cong. §2(b) (2006).

⁶⁷ *Republican Vision of National Security: Republicans Move to Legalize Spying of Americans*, U.S. FED. NEWS, Sept. 28, 2006, at A1 (citing Press Release, Rep. Louise M. Slaughter, D-N.Y.). H.R. 5825 authorizes warrantless surveillance and searches of Americans for ninety days. *Id.* H.R. 5825 allows for warrantless electronic surveillance and physical searches of Americans after an "armed attack," a "terrorist attack," or in anticipation of an "imminent attack." *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See* Donna Leinwand, *Court to Oversee Wiretap Program; Lack of Warrants Fed Controversy*, USA TODAY, Jan. 18, 2007, at A1; Eric Lichtblau & David Johnston, *Court Unchanged to Oversee U.S. Wiretapping in Terror Cases*, N.Y. TIMES, Jan. 18, 2007, at A1; Richard B. Schmitt, Greg Miller & David G. Savage, *The Nation; Wiretap Review Plan Is Still Unclear; Bush and Gonzales Say the Domestic Spying Is Essentially Except for Its Legal Justification*, L.A. TIMES, Jan. 19, 2007, at A12.

remains the same. President Bush noted that “[n]othing has changed in the program except the court has said we’ve analyzed it and it’s a legitimate way to protect the country.”⁷¹ Because the administration failed to provide any specific information about the extent of its compliance with FISA, the administration’s decision—leaving open the possibility that in fact nothing has changed—does not affect the scope of this Comment. First, declining to address the merits of the case, the U.S. Court of Appeals for the Sixth Circuit in *ACLU v. NSA* ruled only that plaintiffs lacked standing. This case is on appeal to the Supreme Court and has yet to be ruled moot. Second, the debate still continues as to the exact role FISA is playing. Last, at any moment the president may revoke the program and re-implement it without complying with FISA.

III. THE WARRANT AS A FIRST AMENDMENT PROTECTION

A. *FISA Does Not Violate the First Amendment Due to the Warrant Requirement*

Congress enacted FISA in order to curb the executive’s power over surveillance and the invasion of both the First and Fourth Amendments by creating a “secure framework by which the executive branch [could] conduct legitimate electronic surveillance for foreign intelligence” while meeting Fourth Amendment requirements.⁷² However, immediately after Congress enacted FISA, it was challenged under the First Amendment.⁷³

In *United States v. Falvey*,⁷⁴ defendants, all of Irish ancestry, were accused of smuggling arms and equipment to the Irish Republican Army.⁷⁵ The defendants argued that FISA violated their First Amendment rights by allowing the government to use politically motivated surveillance of whatever group it chooses at a particular time.⁷⁶ The defendants claimed the surveillance would cause American sympathizers of these groups to be afraid to exercise their First Amendment rights for fear that their privacy would be invaded by

⁷¹ Schmitt, Miller & Savage, *supra* note 70, at A12.

⁷² *United States v. Falvey*, 540 F. Supp. 1306, 1311 (E.D.N.Y. 1982) (quoting S. REP. NO. 95-604, pt. 1, at 15 (1977), as reprinted in 1978 U.S.C.C.A.N. 3904, 3916); see also S. REP. NO. 95-604, pt. 1, at 7 (1977), as reprinted in 1978 U.S.C.C.A.N. 3904, 3908.

⁷³ See John J. Dvorske, Annotation, *Validity, Construction, and Application of Foreign Intelligence Surveillance Act of 1978 Authorizing Electronic Surveillance of Foreign Powers and Their Agents*, 190 A.L.R. FED. 385 (2003).

⁷⁴ 540 F. Supp. 1306 (E.D.N.Y. 1982).

⁷⁵ *Id.* at 1307.

⁷⁶ *Id.*

FISA.⁷⁷ The district court, rejecting this argument, held that FISA was not overbroad and did not violate the First Amendment by creating a chilling effect because of the specific protection in FISA that a warrant be issued before a court.⁷⁸ The court also found that the requirement that a judge and not the executive make the finding that a person is the agent of a foreign power before granting a warrant prevents any abuse of political groups.⁷⁹ FISA specifically states that no person may be deemed an agent of a foreign power based solely on activities protected by the First Amendment.⁸⁰ Therefore, for the government to obtain a FISA warrant there must be more suspicion than just a person's association with a particular political group.⁸¹ Based on these protections, the court held that FISA does not violate the First Amendment.⁸²

B. The Lack of a Warrant in ACLU v. NSA

In *ACLU v. NSA*,⁸³ the plaintiffs⁸⁴ alleged that the NSA program⁸⁵ violated their First and Fourth Amendment rights. The program authorized government officials to intercept without obtaining a warrant the international telephone or Internet communications of a number of persons and organizations within the United States.⁸⁶ The district court held that this program violated the Fourth Amendment⁸⁷ and, even more relevant for this Comment, the First Amendment.⁸⁸

⁷⁷ *Id.* at 1314.

⁷⁸ *Id.* at 1315.

⁷⁹ *Id.* at 1314.

⁸⁰ 50 U.S.C. § 1805(a)(3)(A) (2000).

⁸¹ *Falvey*, 540 F. Supp. at 1315.

⁸² *Id.*

⁸³ 438 F. Supp. 2d 754 (E.D. Mich. 2006).

⁸⁴ Under FISA, plaintiffs are defined as U.S. persons that have a rational belief that they have been subjected to government interceptions. *Id.* at 758.

⁸⁵ The government has termed the program the Terrorist Surveillance Program (TSP). 2006 State of the Union Address, *supra* note 49. To prevent confusion, this Comment does not use the term TSP, since persons outside the government generally do not use this terminology.

⁸⁶ *ALCU*, 438 F. Supp. 2d at 758.

⁸⁷ *Id.* at 775. The court held that the TSP violated the Fourth Amendment because the purpose of adopting the Fourth Amendment was to ensure that the Executive would not abuse its power to search, and thus searches outside the judicial process are per se unreasonable. *Id.* at 774–75 (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). Reasonableness, which is shown by asserting probable cause before a neutral magistrate, is required in all Fourth Amendment searches. *Id.* at 775. The TSP completely disregards any of these procedures set forth by FISA. *Id.*

⁸⁸ *Id.* at 775–76.

The district court found that the implementation of the NSA program caused a chilling effect on First Amendment freedom of association rights.⁸⁹ The district court ruled that the NSA program violated the First Amendment based on the premise that the Bill of Rights was created with the knowledge that “unrestricted power of search and seizure could . . . be an instrument for stifling liberty of expression.”⁹⁰ The district court found that without prior judicial approval, electronic surveillance creates a chilling effect on free speech and restricts one’s freedom of association.⁹¹ Based on this reasoning, the district court held that the NSA program violated the First Amendment by giving unrestricted authority to the president to conduct electronic surveillance and that the program did not meet the First Amendment test of employing the least restrictive means to achieve a compelling state interest.⁹²

The district court went on to explain that the NSA program created a chilling effect on First Amendment associational rights by referencing two cases.⁹³ First, in *Dombrowski v. Pfister*,⁹⁴ the Supreme Court of the United States held that repeated announcements by law officers that an organization is subversive or is a communist front frightened potential members and caused irreparable harm.⁹⁵ Second, in *Zweibon v. Mitchell*,⁹⁶ the district court ruled that tapping an organization’s office phone caused members to leave the organization since their names would be associated with the organization.⁹⁷ The most important concept taken from both cases is that, according to the district court in *ACLU v. NSA*, the only way that the government can engage in this kind of invasive surveillance is “upon a showing of a compelling governmental interest; and that the means chosen to further that interest are the least restrictive of freedom of belief and association that could be chosen.”⁹⁸

The government appealed the case, and the U.S. Court of Appeals for the Sixth Circuit held that the plaintiffs lacked standing;

⁸⁹ *Id.* at 776.

⁹⁰ *Id.* (citing *Marcus v. Search Warrants*, 367 U.S. 717, 724, 729 (1961)).

⁹¹ *See id.* at 776.

⁹² *ACLU*, 438 F. Supp. 2d at 776.

⁹³ *Id.* at 776.

⁹⁴ 380 U.S. 479 (1965).

⁹⁵ *Id.* at 488–89.

⁹⁶ 516 F.2d 594 (D.C. Cir. 1975).

⁹⁷ *Id.* at 634–35.

⁹⁸ *ACLU*, 438 F. Supp. 2d at 776 (citing *Clark v. Library of Cong.*, 750 F.2d 89, 94 (D.C. Cir. 1984)).

thus, the court did not reach the merits of the case.⁹⁹ The dissent found that plaintiffs¹⁰⁰ suffered an actual, concrete, and imminent harm sufficient to satisfy the standing requirement.¹⁰¹ The dissent believed that the NSA program forces plaintiffs to abrogate their duty of confidentiality under professional responsibility rules if they communicate with clients via e-mail or telephone.¹⁰² Further, the NSA program does not comply with the “minimization procedures” under FISA,¹⁰³ which work to protect privileged communications between attorney and client from interception or, if intercepted, from further disclosure.¹⁰⁴ As explained in the dissenting opinion, the NSA program’s failure to comply with minimization procedures forces plaintiffs to travel internationally to meet with clients face to face and cease telephone and email communications regarding sensitive subjects with overseas clients.¹⁰⁵ The plaintiffs fear that communications will be intercepted and potentially disclosed, breaching their attorney-client privilege.¹⁰⁶ The NSA program does more than create a subjective chill on speech; it also leaves plaintiffs with the dilemma of choosing between breaching their duty of confidentiality to their clients and breaching their duty of effective representation.¹⁰⁷ The plaintiffs’ fear of intercepted communications between themselves and clients is reasonable and places a burden on their First Amendment rights, which causes a concrete and imminent injury.¹⁰⁸

Further, the dissent argued that the plaintiffs have demonstrated a causal connection between the injury complained of and the NSA program.¹⁰⁹ The plaintiffs can no longer adequately perform their jobs in part because of the NSA program.¹¹⁰ If the NSA program did

⁹⁹ *ACLU v. NSA*, 493 F.3d 644, 696 (6th Cir. 2007).

¹⁰⁰ *Id.* at 695 (Gilman, J., dissenting) (focusing on only the attorney plaintiffs when discussing the issue of standing, stating that these particular plaintiffs have the strong argument for an injury in fact).

¹⁰¹ *Id.*

¹⁰² *Id.* at 696–97.

¹⁰³ *Id.* at 696. FISA’s minimization procedures require that a FISA application for surveillance “must include a description of minimization procedures that will be utilized to protect privileged communications.” *Id.* These procedures must “minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons.” *Id.* (citing 50 U.S.C. § 1801(h)(1)).

¹⁰⁴ *Id.* at 695.

¹⁰⁵ *ACLU*, 493 F.3d at 696 (Gilman, J., dissenting).

¹⁰⁶ *Id.* at 697.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 704.

¹¹⁰ *Id.*

not exist, plaintiffs would be protected by the minimization procedures set forth under FISA and would not have to cease telephone and electronic communication with overseas clients.¹¹¹ Lastly, the dissent argued that the plaintiffs' injury is realized whether or not plaintiffs know that they are being subjected to government surveillance.¹¹² Plaintiffs owe ethical obligations to their clients regardless of whether the communications with clients are actually being intercepted.¹¹³ The plaintiffs have been injured professionally and personally because of the NSA program. They were unable to speak freely with their clients, and thus their speech is chilled in violation of the First Amendment.

The majority in *ACLU v. NSA* disagreed with the dissent's analysis and instead dismissed the case for lack of standing and failed to reach any discussion of the merits.¹¹⁴ The Supreme Court previously ruled that plaintiffs need only show the reasonableness of the fear that leads the plaintiffs to respond in a way that may cause them some harm or injury.¹¹⁵ However, the majority ignored this point and claimed that the plaintiffs may have suffered a subjective chill but not a concrete, actual, or subjective injury to meet the standing requirement.¹¹⁶ The majority found that since no plaintiff can demonstrate that he or she has personally been subjected to surveillance, plaintiffs are unable to meet the standing requirement.¹¹⁷ The majority held that even if it found any injury in fact that plaintiffs' were unwilling to contact their overseas clients due to fear that the NSA would intercept their communications, there was still no causation.¹¹⁸ The majority argued that the absence of the warrant is not the cause of this fear, because even if a valid warrant were granted plaintiffs would not necessarily know of the warrant.¹¹⁹ In finding that plaintiffs lacked standing, the majority does not even acknowledge the idea of minimization that is the crux of the dissent's argument; it also fails to rec-

¹¹¹ *ACLU*, 493 F.3d at 704 (Gilman, J., dissenting).

¹¹² *Id.* at 705.

¹¹³ *Id.* at 706.

¹¹⁴ *Id.* at 673 (majority opinion). The majority separately analyzed each of plaintiff's six claims to determine if plaintiffs had standing on any claim. However, this Part of the Comment focuses on the majority's analysis of the standing requirement for the First Amendment claims.

¹¹⁵ See, e.g., *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 184 (2000); *Meese v. Keene*, 481 U.S. 465, 475 (1987).

¹¹⁶ *ACLU*, 493 F.3d at 652-57.

¹¹⁷ *Id.* at 662.

¹¹⁸ *Id.* at 667.

¹¹⁹ *Id.* at 668.

ognize the concrete injury that attorney plaintiffs suffer in not being able to speak openly with their clients.

The district court's decision and the court of appeals's dissent in *ACLU v. NSA* make plausible the argument that warrantless wiretapping violates the First Amendment, though it does not provide a fully theorized account of the arguments.¹²⁰ This Comment attempts to bolster this First Amendment claim by showing that national security is not a compelling enough state interest to justify a violation of First Amendment rights in this context. Even further, this Comment argues that if national security can be invoked as a compelling interest, then the government nevertheless fails to use the least restrictive means to satisfy the narrowly tailored requirement. This Comment proposes that a First Amendment claim needs an inquiry of its own, separate and apart from the Fourth Amendment, in order to fully protect First Amendment associational rights.

IV. THE FIRST AMENDMENT VIOLATION

A. *The History of First Amendment Freedom of Association: Strict Scrutiny*

The nature of the harm imposed by the NSA program is an infringement on freedom of association.¹²¹ When the government undertakes an action which inflicts an obvious injury on the individual solely because of his lawful belief, "it has the direct and consequential effect of chilling his rights to freedom of belief and association."¹²² Because of the great interest in not restricting First Amendment rights, the Supreme Court has held that "such governmental actions may be justified only upon a showing of a paramount or vital governmental interest."¹²³ The government must meet this burden as well as demonstrate that the means chosen to further its compelling interest are those least restrictive of freedom of belief and association.¹²⁴ Strict scrutiny review is necessary because "when a [s]tate attempts to make inquiries about a person's beliefs or associations, its

¹²⁰ The district court argument focuses on the Fourth Amendment violation, only briefly mentioning the First Amendment violation. *ACLU v. NSA*, 438 F. Supp. 2d 754, 773–77 (E.D. Mich. 2006). The appellate court dissent discusses only briefly the First Amendment violation and the merits of the case because the ultimate issue on appeal was standing. *ACLU*, 439 F.3d at 660.

¹²¹ See *supra* notes 49–63, 83–108 and accompanying text.

¹²² *Clark v. Library of Cong.*, 750 F.2d 89, 94 (D.C. Cir. 1984).

¹²³ *Id.* (citing *Elrod v. Burns*, 427 U.S. 347, 362 (1976)).

¹²⁴ *Elrod*, 427 U.S. at 362–63.

power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution.”¹²⁵

First Amendment rights are often infringed upon in government investigations.¹²⁶ Disastrous effects can occur if there are abuses of the investigative process which reveal information “about a person’s ‘beliefs, expressions, or associations . . . concern[ing] matters that are unorthodox, unpopular, or even hateful to the general public.’”¹²⁷ The First Amendment protects the rights of all citizens to hold any political belief and to belong to any lawful political party or association.¹²⁸ Strict scrutiny review is necessary even if a deterrent effect on the exercise of First Amendment rights arises only as an unintended result of the government’s conduct.¹²⁹

The Supreme Court first recognized the right of freedom of association in *NAACP v. Alabama*,¹³⁰ holding that the right protected the NAACP from having to disclose the names of its members to state officials.¹³¹ The Court believed that freedom of association was fundamental to First Amendment rights because effective advocacy of both public and private points of view, especially controversial ones, is greatly enhanced by group association.¹³² Thus, the Court recognized the vital relationship between freedom of association and privacy in one’s associations.¹³³ The Court stated that investigations into the names of the group’s members “may induce members to withdraw . . . and dissuade others from joining it because of fear of exposure of their beliefs . . . and of the consequences of this exposure.”¹³⁴ There-

¹²⁵ *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (holding that the First Amendment prevented the State Bar from barring an applicant solely on his or her membership in a certain political organization).

¹²⁶ *See Katz v. United States*, 389 U.S. 347, 350 n.5 (1967); *see also* Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and Privacy of Groups*, 46 ARIZ. L. REV. 621, 646–54 (2004).

¹²⁷ Memorandum in Support of Plaintiff’s Motion for Summary Judgment at 38, *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 06-CV-10204) (quoting *Watkins v. United States* 354 U.S. 178, 197 (1957)).

¹²⁸ *Elrod*, 427 U.S. at 356–57.

¹²⁹ *Id.* at 362 (quoting *Buckley v. Valeo*, 424 U.S. 1, 65 (1976)).

¹³⁰ 357 U.S. 449 (1958).

¹³¹ *Id.* at 466. The government claimed that it needed a list of the members of the NAACP in order to determine if the organization was conducting intrastate business in violation of an Alabama statute. *Id.* at 453. The Court held that the link was not substantial enough to require production of the list. *Id.* at 458–60.

¹³² *Id.* at 460.

¹³³ *Id.* at 462.

¹³⁴ *Id.* at 463; *see also* *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Paton v. LaPrade*, 469 F. Supp. 773 (D.N.J. 1978).

fore, the Court held that due to the serious harm that can occur, the government's conduct is subject to strict scrutiny.¹³⁵

*Clark v. Library of Congress*¹³⁶ demonstrates the type of harm that can affect a member of an association. In *Clark*, the plaintiff brought an action against his employer, the Library of Congress, for its investigation into his political beliefs and activities.¹³⁷ The FBI launched a full-fledged investigation into the plaintiff's activities after he attended several meetings of the Young Socialist Alliance, a group affiliated with the Socialist Workers Party.¹³⁸ As a result of the investigation, family and friends specifically advised the plaintiff that he should cease his political activities.¹³⁹ The plaintiff not only suffered great mental anguish but was chilled in the exercise of his First Amendment associational rights.¹⁴⁰ The court held that the Library failed to demonstrate the existence of any legitimate or compelling justification for investigating the plaintiff.¹⁴¹ The court stated that investigations of this manner are at times justifiable, but in this instance the only basis for the investigation was minimal information regarding the plaintiff's association with a lawful political group.¹⁴² This case clearly shows that the government must present a compelling interest other than the fear that a person is associating with an unpopular political group.

*Zweibon v. Mitchell*¹⁴³ further deals with the idea that unfettered government surveillance can abridge one's right to freedom of association. In *Zweibon*, the defendants, John Mitchell, then Attorney

¹³⁵ *NAACP*, 357 U.S. at 460–62; *see also Gibson*, 372 U.S. at 546. The *Gibson* Court explained that:

[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a *substantial relation between the information sought and a subject of overriding and compelling state interest*. Absent such a relation between the N.A.A.C.P. and conduct in which the State may have a compelling regulatory concern, the Committee has not “demonstrated so cogent an interest in obtaining and making public” the membership information sought to be obtained as to “justify the substantial abridgment of associational freedom which such disclosures will effect.”

Id. (quoting *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)) (emphasis added).

¹³⁶ 750 F.2d 89 (D.C. Cir. 1984).

¹³⁷ *Id.* at 91–92.

¹³⁸ *Id.* at 91.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 99.

¹⁴² *Clark*, 750 F.2d at 99.

¹⁴³ 516 F.2d 594 (D.C. Cir. 1975).

General of the United States, and nine special agents or employees of the FBI, installed wiretaps on telephones at the headquarters of the Jewish Defense League without prior judicial approval.¹⁴⁴ The court held that it was necessary to obtain a warrant before installing the wiretaps.¹⁴⁵ The court stated that prior judicial review is essential in order to protect the First Amendment rights of speech and association of those who might be chilled by the fear of unsupervised and unlimited executive power to institute electronic surveillance.¹⁴⁶

Most recently, the Supreme Court in *Boy Scouts of America v. Dale*¹⁴⁷ ruled that certain associations may discriminate against and exclude members. The Court held that the Boy Scouts, a private, not-for-profit organization, may exclude homosexuals because their conduct is inconsistent with the values that the Boy Scouts seek to instill in its members.¹⁴⁸ The Court further stressed the importance of the First Amendment right to “associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends,”¹⁴⁹ finding that, “[t]his right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.”¹⁵⁰ The Court’s decision acknowledges the importance of the independence of a group and that the government should defer to the group to let it determine its membership and its message.¹⁵¹ Both *Dale* and *NAACP* emphasize self-determination of groups in membership decisions and the right to protection from outside invasion, ultimately creating a “strong associational right, combining both expressive and privacy elements.”¹⁵² This ability to associate without interference is one of the fundamental bases of the American democracy.¹⁵³

¹⁴⁴ *Id.* at 605.

¹⁴⁵ *Id.* at 614. The district court ruled that the Executive branch should determine whether electronic surveillance required a warrant because of a clear threat to a country’s foreign relations. *Id.* at 607. The appellate court disagreed, holding that even if the surveillance was for foreign intelligence gathering and national security purposes, a warrant was still needed. *Id.* at 614.

¹⁴⁶ *Id.* at 634–35.

¹⁴⁷ 530 U.S. 640 (2000).

¹⁴⁸ *Id.* at 644.

¹⁴⁹ *Id.* at 647 (quoting *Roberts v. United States*, 468 U.S. 609, 622 (1984)).

¹⁵⁰ *Id.* at 647–48.

¹⁵¹ See *Fisher*, *supra* note 126, at 641.

¹⁵² *Id.* at 641–42.

¹⁵³ *Id.* at 642.

B. Injury in Fact

Government surveillance can pose numerous harms to individual persons and groups as well as one's freedom to associate with that group. The most obvious harm is that surveillance will hurt the reputation of a particular group and, even worse, chill members' voices within the group, ultimately weakening the group's ability to express itself.¹⁵⁴ The group may also be a target of surveillance because of an expressed political or religious view which is considered to be "extremist," therefore rendering a member unable to state his or her beliefs for fear of governmental intervention.¹⁵⁵ This political profiling creates broad sweeping surveillance and diverts the attention of law enforcement officials away from legitimate investigations.¹⁵⁶ Investigations of individuals tied to a suspect group may have the effect of distorting the group's identity and message.¹⁵⁷ Lastly, surveillance of a religious group's rituals and other expressive activities undermines the independence of a person's need to be free from the constraints of an all-conforming society.¹⁵⁸

Specifically, the NSA program causes harm due to the lack of judicial oversight prior to surveillance. This lack of judicial oversight allows the government to surveil specific persons or groups that it believes are agents of a foreign power or affiliated with a terrorist organization.¹⁵⁹ Surveillance of groups who the government believes might have any contact with persons the government suspects—perhaps even incorrectly—to be connected to terrorism will create a chilling effect and impinge upon one's freedom of association. These people will not be able to associate with the group they choose due to the prospect of warrantless wiretapping by the government.¹⁶⁰ Under the government's plan, the NSA can initiate surveillance on anyone for an unspecified duration, just because the supervisor believes that the person is associated with a terrorist group.¹⁶¹ This is a clear invasion of First Amendment rights, and the government does

¹⁵⁴ George Kateb, *The Value of Association*, in FREEDOM OF ASSOCIATION 35, 53–54 (Amy Gutmann ed., 1998).

¹⁵⁵ Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURVEY AM. L. 295, 299–300 (2002).

¹⁵⁶ Fisher, *supra* note 126, at 652.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See *supra* notes 58–63.

¹⁶⁰ See *supra* Part II.B.

¹⁶¹ Memorandum in Support of Plaintiff's Motion for Summary Judgment at 3, *ACLU v. NSA*, 438 F. Supp. 2d. 754 (E.D. Mich. 2006) (No. 06-CV-10204).

have a compelling interest or that the program uses the least restrictive means of invasion.

A central issue in *ACLU v. NSA* was whether plaintiffs, who did not know whether they were under surveillance, could demonstrate concrete “injury in fact” necessary to demonstrate standing.¹⁶² The district court held that the NSA program caused a concrete harm, which enabled the plaintiffs to satisfy the standing requirement.¹⁶³ The court of appeals, in a two to one split, reversed this decision, finding plaintiffs lacked standing.¹⁶⁴ However, this Comment focuses on the district court’s argument that these plaintiffs can demonstrate standing and that plaintiffs in the future may also demonstrate standing. A basic understanding of the rationale for finding that plaintiffs have standing is necessary to illustrate the limited class of plaintiffs who can invoke the First Amendment under the argument proposed by this Comment. In *ACLU v. NSA*, the plaintiffs were a group of prominent journalists, scholars, attorneys, and non-profit organizations who frequently communicated by telephone to the Middle East and Asia.¹⁶⁵ Some of these plaintiffs, based on the nature of their work, communicated with groups and individuals the U.S. government believed to be associated with terrorist organizations.¹⁶⁶ The plaintiffs, most specifically attorneys, suffered a concrete harm because they were unable to communicate with those individuals in connection with their work or, if they did communicate, ran the risk that the attorney-client privilege would be breached.¹⁶⁷ Based on this reasoning, the plaintiffs were able to make a plausible argument that they could establish standing.

Clearly, this Comment is not meant to imply that any citizen can argue that his or her speech is chilled based on the fear of investiga-

¹⁶² 438 F. Supp. 2d 754, 771 (E.D. Mich. 2006).

¹⁶³ *Id.* at 770. The issue of standing arises in any case involving freedom of association and a subjective chill of speech. *See Laird v. Tatum*, 408 U.S. 1 (1972) (holding that a plaintiff does not have standing based on a mere belief that his speech has been chilled not by a specific action against them but by the existence and operation of a system designed to gather and distribute intelligence).

¹⁶⁴ *ACLU v. NSA*, 493 F.3d 644, 648 (6th Cir. 2007).

¹⁶⁵ Memorandum in Support of Plaintiff’s Motion for Summary Judgment at 4, *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 06-CV-10204).

¹⁶⁶ *Id.* at 4.

¹⁶⁷ *Id.* at 4–6. The program has limited the ability of a professor to gain information about sensitive matters, a journalist to gain information because of the fear that names will not remain anonymous, and an attorney to properly assist clients by not allowing contact with key witnesses. *Id.* at 5–6. The program also creates financial costs to all of these plaintiffs because they are unable to communicate over the telephone and so must travel far distances in order to acquire vital information. *Id.* at 6.

tion; rather, the citizen must be in a situation similar to the plaintiffs in *ACLU v. NSA* and show an objective, concrete harm. This Comment assumes that only those plaintiffs who can establish standing can argue that the NSA program violates their First Amendment associational rights.

C. *Compelling State Interest or Narrow Tailoring?*

It is clear that to justify a First Amendment violation the government must have a compelling state interest.¹⁶⁸ The government is attempting to justify the NSA program on the compelling interest of national security. However, the state interest of investigating terrorism and preventing future attacks cannot exist in a situation where evidence of criminal behavior is lacking.¹⁶⁹ Mere suspicion of a particular group and political profiling cannot justify an intrusion into that group's activities and membership.¹⁷⁰ Danger to political dissent is heightened "where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'"¹⁷¹ It is so difficult to define national security that the risk of abuse is apparent. Allowing the executive branch to make its own decisions with regard to the needs of national security invites abuse of First Amendment rights, and public knowledge of this abuse can ultimately thwart the goal of national security.¹⁷² This is exactly the type of abuse that the government hoped to prevent by enacting FISA to stop a century of suspect presidential authority.¹⁷³ Therefore, the guise of national security is no longer a legitimate enough interest to allow the executive to engage in warrantless surveillance of the American people.

Due to the fear that has affected the American people since September 11, 2001, national security is a more compelling interest. Yet, even if this interest is recognized by a court, the government needs to further justify the wholesale violation of First Amendment rights by the NSA program. The government must meet the exacting scrutiny requirement by showing that the means of invasion are least intrusive. Here, the requirement of narrow tailoring is in no way met by the government. The NSA program allows eavesdropping on any Ameri-

¹⁶⁸ See *supra* Part IV.A.

¹⁶⁹ Fisher, *supra* note 126, at 662.

¹⁷⁰ *Id.*

¹⁷¹ United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 314 (1972).

¹⁷² See Memorandum in Support of Plaintiff's Motion for Summary Judgment at 37-38, *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 06-CV-10204) (citing *Zweibon v. Mitchell*, 516 F.2d 594, 635-36 (1975)).

¹⁷³ See *supra* notes 25-29 and accompanying text.

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can who is believed to be linked to a terrorist group.¹⁷⁴ Further, the NSA program is suspected of using data mining to collect information about calls made by Americans who are not suspected of any crime.¹⁷⁵ Exactly who the NSA program is spying on is unclear, but regardless, there are no safeguards in place to determine whether the particular target has engaged in an action to justify the surveillance. Thus, the NSA program violates both the compelling state interest and the narrow tailoring requirement. However, because there may be a time when this interest is compelling enough and when the government narrows the scope of the program, it is necessary to address other First Amendment safeguards that may need to be put in place in foreign surveillance inquiries. Part V of this Comment discusses the link between the First and Fourth Amendments and shows that the First Amendment needs its own independent inquiry, especially in light of the all-encompassing interest of national security.

V. THE LINK BETWEEN THE FIRST AND FOURTH AMENDMENTS:
APPLYING THE FOURTH AMENDMENT REQUIREMENTS
TO FIRST AMENDMENT INQUIRIES

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”¹⁷⁶ The Fourth Amendment states 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, and particularly describing the place to be searched, and the persons or things to be seized.¹⁷⁷

Although stopping physical entry into the home was the chief reason behind the enactment of the Fourth Amendment, its broader spirit now shields private speech from unreasonable surveillance.¹⁷⁸ It is apparent that the Fourth Amendment is meant to protect First Amendment rights and that without proper Fourth Amendment compliance, First Amendment values are left vulnerable. In national

¹⁷⁴ See Memorandum in Support of Plaintiff’s Motion for Summary Judgment at 3, *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 06-CV-10204).

¹⁷⁵ See *supra* Part II.B.

¹⁷⁶ U.S. CONST. amend. I.

¹⁷⁷ U.S. CONST. amend. IV.

¹⁷⁸ *Katz v. United States*, 389 U.S. 347 (1967); *Berger v. New York* 388 U.S. 41 (1967); *Silverman v. United States*, 365 U.S. 505 (1961).

security cases there is a “convergence of First and Fourth Amendment values not present in cases of ‘ordinary’ crime.”¹⁷⁹

A. “*Scrupulous Exactitude*” in Applying the Fourth Amendment

In *United States v. U.S. Dist. Court (Keith)*, the Court held that Fourth Amendment protections are especially necessary when the targets of surveillance are those suspected of unorthodoxy in their political beliefs.¹⁸⁰ The concept of protecting domestic security was so vague and there was such great difficulty in defining the domestic security interests that the Court believed dangers of abuse quite apparent.¹⁸¹ The Court stated that American citizens should not be forced to curb their private discussions about the government based on the fear of unauthorized governmental eavesdropping.¹⁸² Yet the Court recognized that the government also has a great interest in protecting national security that must be weighed against the danger that unreasonable surveillance will place on freedom of expression.¹⁸³ Therefore according to Justice Douglas’s concurrence, in order to properly address both interests, a warrant should be issued by a neutral magistrate and not be left to the sole discretion of the executive branch.¹⁸⁴ The Court rejected the government’s arguments that a requirement of prior judicial approval would impinge upon its ability to obtain intelligence and determined that, although there may be some burden on the attorney general in determining when a warrant should be granted, this use of a warrant is justified in order to protect constitutional values.¹⁸⁵

¹⁷⁹ *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 313 (1972) (addressing the question of the President’s power to authorize electronic surveillance in internal security matters without any prior judicial approval). The Court held that despite government concerns, a departure from Fourth Amendment requirements of prior judicial approval was not justified in that instance. *Id.* at 321. The Court limited the scope of the decision to the specific aspect of national security, not extending the holding to foreign powers or their agents. *Id.* at 321–22.

¹⁸⁰ *Id.* at 313–14.

¹⁸¹ *Id.* at 314.

¹⁸² *Id.*

¹⁸³ *Id.* at 314–15.

¹⁸⁴ *Keith*, 407 U.S. at 325. (Douglas J., concurring). Douglas joined the majority opinion; however, his concurrence gave a more in-depth analysis of the First Amendment implications in Fourth Amendment inquiries.

¹⁸⁵ *Id.* at 320–21. The government argued that requirement of prior judicial approval would hurt domestic security because the internal security matters are too subtle and complex for judicial evaluation and the element of secrecy would be lost. *Id.*

Although *Keith* was specifically limited to domestic security matters,¹⁸⁶ it sufficiently laid out the argument that the First and Fourth Amendments are linked and that, especially in the context of surveillance for national security matters, in the absence of prior judicial involvement one's First Amendment rights are vulnerable¹⁸⁷ There are numerous other cases that show the importance of creating safeguards when First Amendment rights are at stake.¹⁸⁸ When the government seeks to seize materials which may be protected by the First Amendment, the court issuing a warrant under the Fourth Amendment must apply the warrant requirements with "scrupulous exactitude."¹⁸⁹ "The commands of our First Amendment" teach that it is necessary to "safeguard[] not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.'"¹⁹⁰ Clearly, there is an extreme emphasis on the great need for precision when applying the Fourth Amendment to First Amendment inquiries.

Two other cases also reinforce the idea that there needs to be judicial oversight in First Amendment analyses. First, in *Freedman v. Maryland*,¹⁹¹ the Supreme Court reviewed a statute that proscribed the showing of a motion picture without first obtaining a license from the Maryland State Board.¹⁹² The Court held that this license requirement violated the constitutional guarantee of freedom of expression.¹⁹³ In making this assessment, the Court determined that there was a lack of adequate safeguards to protect expression, reiterating that only a judicial determination ensures the necessary sensitivity to freedom of expression.¹⁹⁴ In the second case, *A Quantity of Books v. Kansas*,¹⁹⁵ the Court addressed a Kansas statute that authorized the seizure of allegedly obscene books before a determination of their

¹⁸⁶ *Id.* at 321–22.

¹⁸⁷ *Id.*

¹⁸⁸ See, e.g., *Roeden v. Kentucky*, 413 U.S. 496 (1973); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Stanford v. Texas*, 379 U.S. 476 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964).

¹⁸⁹ *Stanford*, 379 U.S. at 485 (invalidating a warrant which authorized the search of a private home for books and materials relating to the Communist party and holding that the warrant must specifically list what is to be seized because of the delicate nature of First Amendment rights).

¹⁹⁰ *Frank v. Maryland*, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting) (citation omitted).

¹⁹¹ *Freedman*, 380 U.S. 51.

¹⁹² *Id.* at 52 & n.1.

¹⁹³ *Id.* at 60–61.

¹⁹⁴ *Id.*

¹⁹⁵ 378 U.S. 205 (1964).

obscenity.¹⁹⁶ The Court found that this statute presented the danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books.¹⁹⁷ Both of these cases show that a prior judicial determination needs to be made when First Amendment rights are at stake.¹⁹⁸ Yet the question still remains whether Fourth Amendment requirements can provide protection adequate to ensure that First Amendment rights are properly vindicated or whether a separate First Amendment inquiry is required.

B. Zurcher and Its Implications for the First Amendment

Since both the Fourth and First Amendments are inextricably bound together, few courts have addressed the issue of whether the First Amendment needs additional safeguards aside from those already provided by the Fourth Amendment. Yet, this question is of great importance when the government initiates warrantless surveillance for national security matters. It is especially important in situations, such as those present in *ALCU v. NSA*, where the government circumvents the Fourth Amendment requirement and even more important in situations where the Fourth Amendment is not asserted as an objection to the government's action.

In *Zurcher v. Stanford Daily*,¹⁹⁹ the Supreme Court examined the question of whether the First Amendment required independent safeguards and found that there are no additional procedural safeguards needed to protect First Amendment rights if the Fourth Amendment is satisfied.²⁰⁰ In *Zurcher*, a student newspaper brought suit, alleging that a police search had violated its First, Fourth, and Fourteenth Amendment rights because the scope of the warrant was overly broad and a newspaper's headquarters should not be the subject of an innocent third-party search²⁰¹ due to the confidential in-

¹⁹⁶ *Id.* at 206–07. The warrant authorized the sheriff to seize all copies of the books, and there was no hearing on the question of obscenity. *Id.* at 207–08. The Court found these procedures insufficient because they did not adequately safeguard against the suppression of nonobscene books. *Id.* at 207–08.

¹⁹⁷ *Id.* at 208.

¹⁹⁸ *See id.* at 212; *Freedman*, 380 U.S. at 60–61.

¹⁹⁹ 436 U.S. 547 (1978). The Police Department, after responding to a call to remove demonstrators, was forced to use drastic measures to calm people down. *Id.* at 550. *The Stanford Daily*, a student newspaper, published photos alongside an article the next day. *Id.* at 551. The police secured a warrant to search the newspaper office for the photos, on the basis that the photos might help to identify the assailants. *Id.*

²⁰⁰ *Id.* at 565–67.

²⁰¹ *Id.* at 551–52. The newspaper published an article about a violent protest at a hospital, containing articles and photographs of the event. *Id.* at 551. There was “no allegation or indication that members of the *Daily* staff were in any way involved in

formation that it possesses.²⁰² The district court held that where a newspaper is the subject of a third-party search, First Amendment interests require that a search is permissible only “in the rare circumstance where there is a *clear showing* that 1) important materials will be destroyed or removed from the jurisdiction; *and* 2) a restraining order would be futile.”²⁰³ This standard would place a precondition on the issuance of a warrant beyond just the requirement of probable cause.²⁰⁴ The U.S. Court of Appeals for the Ninth Circuit affirmed.²⁰⁵

The Supreme Court granted certiorari to determine whether an innocent third-party search was justified where the newspaper was not the subject of a criminal investigation but materials obtained might aid in the investigation.²⁰⁶ The Court reversed the decision of the Court of Appeals, finding that “[n]either the Fourth Amendment nor the cases requiring consideration of First Amendment values in issuing search warrants . . . call for imposing the regime ordered by the District Court.”²⁰⁷ The Court explained that by subjecting searches to a test of reasonableness and the requirement of the issuance of warrants by a neutral magistrate, First Amendment values are fully protected.²⁰⁸ The Court posited that “[t]here is no reason to believe” that a neutral magistrate could not guard against unreasonable searches, and if the magistrate follows “the requirements of specificity and reasonableness” for a warrant then no harm should occur.²⁰⁹

Zurcher ultimately stands for the proposition that when First Amendment values are at stake, the Fourth Amendment, when properly applied, can adequately protect these values and no further safeguards are needed.²¹⁰ Yet *ACLU v. NSA* shows that perhaps *Zurcher* needs to be reexamined in light of the NSA program, which does not comply with the Fourth Amendment requirement and independently violates the right of freedom of association. Some concerns arise in the context of creating an independent First Amendment inquiry.

unlawful acts at the hospital”; therefore, it was considered to be an innocent third party. *Id.*

²⁰² *Id.* at 551–52.

²⁰³ *Stanford Daily v. Zurcher*, 353 F. Supp. 124, 135 (N.D. Cal. 1972).

²⁰⁴ *Zurcher*, 436 U.S. at 565.

²⁰⁵ *Stanford Daily v. Zurcher*, 550 F.2d 464, 466 (9th Cir. 1977).

²⁰⁶ *Zurcher*, 436 U.S. at 550.

²⁰⁷ *Id.* at 565.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 566.

²¹⁰ *Id.* at 565–67.

C. *The D.C. Circuit's Concerns About Heightened First Amendment Standards*

In *Reports Committee for Freedom of the Press v. AT&T Co.*,²¹¹ Judge Wilkey of the U.S. Court of Appeals for the D.C. Circuit discussed the convergence of the First and Fourth Amendments and the consequences of affording more procedural safeguards to protect First Amendment rights.²¹² The court attempted to answer the question of whether the First Amendment affords plaintiffs extra “privacy by imposing substantive or procedural limitations on good faith criminal investigat[ions] . . . beyond the limitations imposed by the Fourth and Fifth Amendments.”²¹³ The plaintiffs, a group of journalists, brought suit against two telephone companies, claiming that they were entitled to prior notice before their long-distance billing records were released to government officials.²¹⁴ The court held that extra procedural safeguards are not necessary in the context of First Amendment investigations.²¹⁵ Judge Wilkey stated that

the guarantees of the Fourth and Fifth Amendments achieve their purpose and provide every individual with sufficient protection against good faith investigative action for the full enjoyment of his First Amendment rights of expression. To the extent an individual insists that he must shield himself from the prospect of good faith investigation and operate in secrecy in order to exercise effectively particular First Amendment liberties, he must find that shield and establish that secrecy *within the framework of Fourth and Fifth Amendment protections.*²¹⁶

The court ruled that individuals who “desire to exercise their First Amendment rights” must operate in “the zone of privacy secured by the Fourth Amendment.”²¹⁷ The court reasoned that “[w]hen individuals expose their activities to third parties, they similarly expose these activities to possible Government scrutiny.”²¹⁸

²¹¹ 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979).

²¹² *Id.* at 1053.

²¹³ *Id.* at 1054.

²¹⁴ *Id.* at 1036. Telephone companies, including the defendants in *Reporters Committee*, have a practice of releasing long distance calls when they are the subject of a government investigation, but only after a valid subpoena or summons is issued and notification is given to the caller, unless it would impede the investigation. *Id.* at 1036–38.

²¹⁵ *Id.* at 1058–59.

²¹⁶ *Id.* at 1054 (emphasis added).

²¹⁷ *Reporters Comm.*, 593 F.2d at 1058.

²¹⁸ *Id.*

In making the argument for no further First Amendment safeguards, *Reporters Committee* was concerned with newspapers and other media sources trying to immunize themselves from good faith investigation.²¹⁹ The court stressed that problems would arise because of the necessity of separating journalists, reporters, and a limitless number of people from others, essentially making a decision that some individuals' First Amendment rights are greater than others.²²⁰ The court believed that the law enforcement officers in each case would need to delineate the individuals and species of activity entitled to protection and that this additional requirement would place a great burden on law enforcement activities.²²¹ Lastly, since all investigation is somewhat linked to the First Amendment, the court determined that it was extremely difficult and time consuming to separate those cases that involve First Amendment values and those that do not.²²²

At one point, both the concerns suggested by Judge Wilkey and the holding in *Zurcher* were well received; however, it is now necessary to reexamine both approaches in light of *ACLU v. NSA*.²²³ Based on *ACLU*, it is apparent that the NSA program is harming a certain class of plaintiffs subjected to warrantless surveillance. The Fourth Amendment is not protecting these plaintiffs and other citizens unaware of the surveillance. It is necessary to address the First Amendment violations of the NSA program to show that adequate safeguards are not in place and that an independent inquiry is required.

VI. ANALYSIS

A. *Passing First Amendment Scrutiny: The Warrant*

The only way that the government can legitimately interfere with the freedom of association is to show a compelling state interest in the investigation and that the means chosen to achieve that interest are the least restrictive.²²⁴ Since the government kept the NSA program a secret, it is difficult to tell exactly who the targets of the surveillance are and how the government determines that that person is a foreign agent or a terrorist. The government argues that it implemented the program based on a genuine compelling state interest and that the program is the least restrictive of First Amendment

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 1060.

²²³ *See supra* Part III.B.

²²⁴ *See* *ALCU v. NSA*, 438 F. Supp. 2d 758, 776 (E.D. Mich. 2006).

rights.²²⁵ The government denies that the program engages in broad sweeping surveillance of all Americans.²²⁶

Regardless of the target of the surveillance, the government still needs to show a compelling interest in invading the right to freedom of association. The government has a great interest in preventing terrorism, especially after the attacks of 2001. Investigations are useful in gathering intelligence data for national security, and the lack of intelligence was a major cause of the September 11 attacks.²²⁷ Yet intelligence needs to be limited to and focused on areas that will be the most likely to yield information about terrorists.²²⁸ To state the obvious, simply because a group is engaged in non-mainstream political or religious activity does not prove that the group is involved in a crime or, for that matter, that it is likely to do so.²²⁹ The government cannot engage in sweeping surveillance under the justification that every person may be linked to a terrorist cell. This would be pointless, but even worse, it would violate the First Amendment, since even with this current threat there is no justification for complete deference to the executive branch with respect to associational rights.²³⁰ The government must meet exacting scrutiny, showing a compelling interest with the least restrictive means to justify this invasion.

The easiest way for the government to show that it has a compelling state interest that is narrowly tailored is to obtain a warrant. This would show an interest more particularized than national security in the abstract and prove that the government is not engaging in sweeping surveillance. By complying with the procedures set out by FISA for obtaining a warrant, the government would allow the court to make a prior judicial determination that the surveillance is reasonable and that the government has met all of the FISA criteria. If the government's interest is legitimate, it will almost always be able to secure a warrant.²³¹ Also, as previously discussed, the Supreme Court has already determined that because of the warrant requirement,

²²⁵ NSA Myths, *supra* note 56.

²²⁶ *Id.*

²²⁷ Deborah Solomon, *Questions for Tom Kean: Want to Know a Secret?*, N.Y. TIMES MAG., Jan 4, 2004, at 9. (“[T]here is a good chance that 9/11 could have been prevented by any number of people along the way. Everybody pretty well agrees our intelligence agencies were not set up to deal with domestic terrorism.”).

²²⁸ *Fisher*, *supra* note 126, at 657.

²²⁹ See Adam Liptak, *The Nation: Prisons to Mosques; Hate Speech and the American Way*, N.Y. TIMES, Jan. 11, 2004, at 3.

²³⁰ See *ACLU v. NSA*, 438 F. Supp. 2d 758, 775–76 (E.D. Mich. 2006).

²³¹ See *supra* Part II.A.

FISA does not violate one's freedom of association.²³² A warrant would clearly satisfy this narrow tailoring requirement because the use of prior judicial adjudication is exactly what the Supreme Court contemplated as adequate First Amendment protection—that is, that the Fourth Amendment needs to be applied with “scrupulous exactitude.”²³³

By obtaining a warrant, the government would show exactly who is a target of the surveillance and that there is a reasonable belief that the target is a threat to national security or a member of a foreign group suspected of engaging in terrorism. The government will most likely argue that obtaining a warrant is too burdensome and restricts the type of surveillance that is necessary in order to protect national security.²³⁴ However, *Keith*, though admittedly in the domestic context, weighed both the privacy interests of citizens and the national security interest of the government and determined that in order to properly address both interests a warrant should be issued by a neutral magistrate instead of giving the executive the sole discretion in the realm of surveillance.²³⁵ This same reasoning holds true in the context of foreign surveillance—the competing interests must be balanced and the most rational way to ensure that both interests are protected is to require a warrant.

B. Other Potential Safeguards

Although obtaining a warrant appears to be the simplest way to resolve the problem of foreign surveillance and protection of freedom of association, the government appears to believe otherwise.²³⁶ If the government's belief becomes a reality, freedom of association may not be properly protected. If the Fourth Amendment warrant requirement is not properly applied or is somehow bypassed, then First Amendment values are left vulnerable. The First Amendment relies heavily on Fourth Amendment protections. Although the First Amendment requires a compelling state interest and narrow tailoring,²³⁷ this whole inquiry can sometimes be forgone under the guise

²³² See *supra* Part III.B.

²³³ See *Stanford v. Texas*, 379 U.S. 476, 485 (1965); see also *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrant*, 367 U.S. 717 (1961).

²³⁴ See *NSA Myths*, *supra* note 56. “The NSA program is an ‘early warning system’ and is ‘a program with a military nature that requires speed and agility.’” *Id.*

²³⁵ See *supra* notes 180–90 and accompanying text.

²³⁶ See *supra* Part II.C (proposed amendments to FISA would do away with the requirement of a warrant).

²³⁷ See *supra* Part IV.A.

of national security.²³⁸ Therefore, when the Fourth Amendment is not providing adequate protections, or when the government is simply avoiding it, the First Amendment needs some separate inquiry of its own in order to protect independent associational values. This analysis will become necessary if the government can show that the warrant requirement is too burdensome or that somehow the NSA program still satisfies the Fourth Amendment, even without a warrant. Furthermore, this Comment proposes that these safeguards apply only to situations similar to *ACLU v. NSA* and national security surveillance, not to all First Amendment inquiries.

*Reporters Committee for Freedom of the Press v. AT&T Co.*²³⁹ raised concerns that prevented the court from recognizing First Amendment rights independent of the Fourth Amendment. These concerns would not exist in the context of NSA surveillance as demonstrated by *ACLU v. NSA*. The first concern that newspapers will try to immunize themselves from all surveillance²⁴⁰ is not related to foreign surveillance and is therefore easily dismissed. The second concern of *Reporters Committee*, that all investigation is linked to the First Amendment,²⁴¹ can also be dismissed in this instance. This Comment proposes that more First Amendment safeguards are necessary only in the context of the NSA program. Therefore, this would limit the concern that all investigation is related to the First Amendment and thus subjected to more safeguards, since this heightened inquiry would apply only to the NSA program. Thus the example of *ACLU v. NSA* can justify the argument that a separate First Amendment inquiry is necessary, showing that the twenty-eight-year-old *Reporters Committee* holding needs to be revised in light of the changing nature of surveillance and the limitless invasion of privacy.²⁴²

Another reason *Zurcher* and the concerns expressed in *Reporters Committee* should not apply in the NSA surveillance context is that in both of these instances some sort of warrant was issued.²⁴³ In *ACLU v. NSA*, there was no warrant issued,²⁴⁴ which allowed the government to instead engage in any type of surveillance that it deemed in the best interest of national security.²⁴⁵ This is easily distinguishable from

²³⁸ See *supra* Part IV.A.

²³⁹ 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979).

²⁴⁰ *Id.* at 1060.

²⁴¹ *Id.* at 1059.

²⁴² *ACLU v. NSA*, 438 F. Supp. 2d 754, 775–76 (E.D. Mich. 2006).

²⁴³ See *Zurcher v. Stanford Daily*, 436 U.S. 547, 551 (1978); *Reporters Comm.*, 593 F.2d at 1040.

²⁴⁴ *ACLU*, 438 F. Supp. 2d at 758.

²⁴⁵ See *id.*

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Zurcher, in which a warrant was issued based on probable cause.²⁴⁶ The initial safeguard of a warrant is not even in place under the NSA program. In the NSA program it is impossible to determine if the investigation is conducted in good faith because no warrant is issued—a judge never oversees any aspect of the surveillance.

This Comment does not propose total elimination of surveillance because that would defeat the purpose of investigation in the first place, but rather tries to ensure a sound reason for subjecting a particular person or group to surveillance. Based on the needs for protection, this Comment proposes that the First Amendment requires a separate inquiry, independent of the Fourth Amendment in the area of surveillance for national security measures. The easiest way to safeguard First Amendment interests is to heighten the requirements of the test already in place, which calls for a compelling government interest and the least restrictive means of achieving that interest. Instead of reviewing surveillance under the strict scrutiny standard to determine whether an individual's freedom of association has been violated in a post hoc manner, strict scrutiny review should be applied prior to allowing the surveillance. Normally, if one believes that his freedom of association has been infringed upon, he must go to court to force the government to show that the government surveillance can survive strict scrutiny review. However, strict scrutiny review should be applied prior to the invasion of associational rights. Before the government can engage in surveillance, it should present evidence to show that it has a compelling state interest and that the means used to achieve that interest are the least intrusive. The easiest way to meet this standard is to obtain a warrant, which will almost automatically satisfy both prongs of the test. However, if the government chooses not to engage in the supposed burden of obtaining a warrant, it can submit a document that describes why the surveillance is necessary and the potential targets of the surveillance before a committee, or perhaps even a separate branch of the FISA court. This branch would produce a much quicker turnaround than the warrant procedure because this specific committee would only review these particular applications. This requirement would need to be compelled by a statute in order to force the government to comply. This suggested standard of review applies a Fourth Amendment standard to a First Amendment inquiry, even when a Fourth Amendment challenge is not at issue. This standard would apply only to the unique situation presented in *ACLU v. NSA*,

²⁴⁶ 436 U.S at 551.

and would not extend to other types of surveillance or other First Amendment issues.

VII. CONCLUSION

It is apparent after the decision in *ACLU v. NSA*, and the revelation of the President's secret wiretapping program, that American citizens' First Amendment rights are being violated. The President's illegal encroachment into citizens' privacy is not a new problem; however, the implementation of FISA supposedly brought an end to the century-long problem. Yet the NSA program is not only bypassing FISA and the Fourth Amendment warrant requirement before engaging in this surveillance, it is completely ignoring First Amendment associational rights.

First, it is clear that there is a First Amendment violation. The particular plaintiffs are being harmed in their freedom to associate with groups and ultimately are chilled from engaging in their work and various other aspects of their lives. The government does not present a compelling interest other than national security, which may be too broad to adequately protect Americans. Even further, if the compelling interest is accepted, the NSA program fails the narrow tailoring requirement of First Amendment heightened scrutiny. The First Amendment requirement becomes even greater in matters of national security. Therefore, there is an apparent constitutional violation that needs to be addressed.

This Comment brings to light the fact that when Fourth Amendment protections are pushed aside, First Amendment rights are left with little protection of their own. Although in *Zurcher* and *Reporters Committee*, the courts rejected the argument that First Amendment rights receive more protection, these cases need to be reexamined in light of the NSA program. The concerns suggested in both cases are not present in the context of the NSA program. This Comment is limited to this particular situation and does not address the broad issue of government surveillance for all national security matters.

Based on the First Amendment failings, this Comment proposes first that the government can meet both prongs of exacting scrutiny by obtaining a warrant. This would ensure that the governmental interest of national security is narrowly tailored and only those persons who are truly foreign agents and for whom there is probable cause to target are under surveillance. However, if the government does not feel it can comply with the warrant requirement, then it is necessary that the First Amendment be detached from the Fourth Amendment

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and have an independent inquiry of its own. This procedure would essentially take the strict scrutiny standard and apply it ex ante as opposed to ex post, thus ensuring that First Amendment rights are not violated and that the government is not engaging in widespread warrantless wiretapping. This approach would curb many of the executive's illegal activities, meet the Executive's concerns for national security, and honor First Amendment association rights.