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Raymond Shih Ray Ku

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## UNLIMITED POWER: WHY THE PRESIDENT'S (WARRANTLESS) SURVEILLANCE PROGRAM IS UNCONSTITUTIONAL

*Raymond Shih Ray Ku\**

*In this essay, Professor Ku explores the constitutionality of the President's Surveillance Program (PSP), and critiques the Bush Administration's legal explanations supporting warrantless surveillance. Defenders of the program have relied upon the President's inherent executive authority, the Congressional Authorization for Use of Military Force, the FISA Amendment Act of 2008, and ultimately that under any of these sources of authority the warrantless surveillance authorized is consistent with the right of privacy protected Fourth Amendment to the U.S. Constitution. As such, Professor Ku uses the PSP to illustrate the how and why current constitutional analysis both ignores and subverts "the right of the people to be secure" guaranteed by the Constitution.*

### I. INTRODUCTION

"The Fourth Amendment protects power not privacy."<sup>1</sup> I wrote those words in the days following the terrorist attacks of 9/11, troubled that events would test this nation's commitment to the principle that "ours is a government of laws and not of men, and . . . we submit ourselves to rulers only if under rules."<sup>2</sup> Fourth Amendment jurisprudence was especially problematic not only because it is implicated whenever the government seeks to investigate wrongdoing, but also because even before we declared war against terrorism, the Supreme Court's "reasonable expectation of privacy" approach undermined the fundamental concerns and principles that prompted the Amendment's adoption. At best, the Justices lost the Constitutional forest for the doctrinal trees. At worst, they fundamentally shifted the political authority over questions of public and individual security from the

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\* Professor of Law, Co-Director, Center for Law, Technology & the Arts, Case Western Reserve University School of Law. I would like to thank my colleague Robert Strassfeld for inviting me to participate in this symposium as well as the editors of JIL for the hard work and assistance in preparing this essay for publication. This essay draws heavily from my prior work, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325 (2002).

<sup>1</sup> Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325 (2002).

<sup>2</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

people in both their constitutional and legislative capacity to the judiciary and executive, the two branches of government the framers specifically sought to restrain. Unfortunately, actions taken as part of the war on terror only confirmed my fears and exacerbated these constitutional problems.

In 2005, the *New York Times* reported that the National Security Agency (NSA) was engaged in secret surveillance activities within the U.S.<sup>3</sup> Subsequently, the President and his administration confirmed and defended what has been dubbed the President's Surveillance Program (PSP).<sup>4</sup> Understandably, President Bush justified this surveillance as a valuable tool in the war on terror. "The activities I have authorized make it more likely that killers like these 9/11 hijackers will be identified and located in time."<sup>5</sup> For the purposes of this discussion, this essay does not question either the need for or the effectiveness of this program. Instead, it questions the process of its adoption and implementation. While the full extent of the PSP is still unknown, what we do know about the program, and the steps that the Bush Administration and Congress took in response to the public disclosure of its existence, place the failings of our current constitutional jurisprudence into stark relief.

As I have written, the Fourth Amendment cannot be viewed in isolation but must be seen as a complement to other constitutional protections including the doctrine of separation of powers. The Fourth Amendment and the definition of executive power in our constitutional separation of powers protect the public from arbitrary and unlimited executive power. The need for this interpretation becomes clear when we recognize that decisions made to investigate dangerous and criminal activity are more than simply discretionary decisions about when to investigate or search a particular individual at a micro level, but are also macro-level decisions determining the scope of executive power and, correspondingly, the amount of privacy, security, and political authority that the public enjoys and exercises. Accordingly, I argued that the Fourth Amendment requires that searches conducted with new surveillance technologies must be treated as searches subject to Fourth Amendment restraints. Technologically assisted searches must either comply with the Warrant Clause or be authorized by a statute containing safeguards constitutionally equivalent to the protections afforded by the Warrant Clause. Only then are the people the supreme political authority, not their representatives.

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<sup>3</sup> James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

<sup>4</sup> See OFFICE OF INSPECTORS GEN. OF THE DEP'T OF DEF. ET AL., UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM (Jul. 10, 2009) [hereinafter OIG REPORT], available at <http://www.fas.org/irp/eprint/psp.pdf>.

<sup>5</sup> The President's Radio Address, 41 WEEKLY COMP. PRES. DOC. 1881 (Dec. 26, 2005), available at <http://www.gpoaccess.gov/wcomp/2005.html>.

Not only do the PSP and the actions taken by the President and Congress to authorize the PSP fail to satisfy these requirements, but also this program presents a problem I only alluded to in a hypothetical: “Could Congress . . . satisfy the Fourth Amendment requirement of reasonableness by simply passing a law authorizing law enforcement to adopt and use any technology it chooses?”<sup>6</sup> In other words, would it be consistent with the Constitution for Congress to essentially issue the President a blank check to engage in surveillance? At the time, I wrote:

Assuming that a legislature would pass such a statute, a highly dubious proposition, the answer must be no. While such a statute might satisfy the doctrine of separation of powers, it does nothing to address the concerns embodied in the Fourth Amendment. Such a statute does nothing to limit police discretion at either the macro or micro level. While legislatures may delegate broad discretionary powers to the executive branch in other areas of constitutional law, the Fourth Amendment would appear to limit such a delegation with respect to searches and seizures.<sup>7</sup>

This essay explains and elaborates upon this argument in light of the PSP and FISA Amendment Act of 2008 (FAA) demonstrating why a jurisprudence focused upon privacy fails to recognize and even obscures the vital constitutional interests at stake.

Part II of this essay briefly describes the PSP, the arguments that have been made, and the steps taken to defend the constitutionality of the program. While there are multiple sources of information on this topic, this essay draws primarily from the unclassified report on the PSP prepared by the Office of the Inspectors General. Drawing heavily on my earlier work on the subject, parts III and IV outline the arguments I have made regarding surveillance under our Constitution and why the reasonable expectation of privacy test ultimately undermines what should be more appropriately considered the right of the people to be secure. In Part V, this essay argues that the PSP perfectly illustrates the problems created by the Supreme Court’s approach towards government surveillance and why, even after Congressional authorization, the constitutional legitimacy of the PSP is still doubtful. In short, what matters most is not some substantive right of privacy, the invasions of which we deem to be unreasonable, but the process by which the three branches of government investigate and prosecute dangerous individuals.

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<sup>6</sup> Ku, *supra* note 1, at 1376.

<sup>7</sup> *Id.* at 1376–77 (footnote omitted).

## II. THE PRESIDENT'S SURVEILLANCE PROGRAM

In the weeks following the terrorist attacks of September 11, 2001, the President authorized the NSA to engage in new and highly classified surveillance activities including the warrantless interception of “communications into and out of the United States where there was a reasonable basis to conclude that one part to the communication was a member of al-Qa’ida or related terrorist organizations.”<sup>8</sup> This portion of the PSP was often referred to as the Terrorist Surveillance Program. Under that same Presidential Authorization, Other Intelligence Activities were also initiated, but the details of the authorization and those activities remain classified.<sup>9</sup> However, it has been alleged that with the cooperation of some of the nation’s telecommunications providers, the NSA began monitoring domestic telephone and Internet communications on an unprecedented scale.<sup>10</sup>

Initially, even when limited to the Terrorist Surveillance Program, the PSP appeared to violate the Foreign Intelligence Surveillance Act (FISA),<sup>11</sup> which was enacted to “provide legislative authorization and regulation for all electronic surveillance conducted within the United States for foreign intelligence purposes.”<sup>12</sup> Specifically, the PSP allowed the NSA to conduct electronic surveillance within the U.S. without a court order while FISA only authorized such surveillance pursuant to an order from the Foreign Intelligence Surveillance Court (FISC). FISA’s requirement of an FISC order was intended to ensure that certain factual conditions and legal standards were satisfied, thus justifying the surveillance.

Despite this conflict, the Bush Administration sought to justify the PSP on two grounds. First, it relied upon a threat assessment memorandum prepared by the Central Intelligence Agency (CIA).<sup>13</sup> As its description would indicate, this memorandum documented the intelligence agency’s assessment of terrorist threats to the U.S. from al-Qaeda and other terrorist organizations and, therefore, supported the desirability for such a program. Second, the Bush Administration relied upon legal memoranda prepared by Deputy Assistant Attorney General John Yoo in the Department of Justice Office of Legal Counsel (OLC) to justify the legality of the program.<sup>14</sup>

According to the OIG report, in a November 2, 2001 memorandum:

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<sup>8</sup> OIG REPORT, *supra* note 4, at 1.

<sup>9</sup> *Id.* at 5–6.

<sup>10</sup> *In re Nat’l Sec. Agency Telecomm. Records Litig.*, 633 F. Supp. 2d 949, 959 (N.D. Cal. 2009).

<sup>11</sup> 50 U.S.C. § 1801 (2008).

<sup>12</sup> S. REP. NO. 95-701, at 64 (Mar. 14, 1978), *reprinted in* 1978 U.S.C.C.A.N. 3973, at 3977.

<sup>13</sup> OIG REPORT, *supra* note 4, at 6–7.

<sup>14</sup> *Id.* at 10.

Yoo acknowledged that FISA “purports to be the exclusive statutory means for conducting electronic surveillance for foreign intelligence,” but opined that “[s]uch a reading of FISA would be an unconstitutional infringement of the President’s Article II authorities.” Yoo characterized FISA as merely providing a “safe harbor for electronic surveillance,” adding that it “cannot restrict the President’s ability to engage in warrantless searches that protect the national security.” According to Yoo, the ultimate test of whether the government may engage in warrantless electronic surveillance activities is whether such conduct is consistent with the Fourth Amendment, not whether it meets the standards of FISA.<sup>15</sup>

With regard to the Fourth Amendment:

Yoo dismissed Fourth Amendment concerns regarding the PSP to the extent that the Authorizations applied to non-U.S. persons outside of the United States. Regarding those aspects of the program that involved interception of the international communications of U.S. persons in the United States, Yoo asserted that Fourth Amendment jurisprudence allowed for searches of persons crossing the border and that interceptions of communications into or out of the United States fell within the “border crossing exception.” Yoo further opined that electronic surveillance in “direct support of military operations” did not trigger constitutional rights against illegal searches and seizures, in part because the Fourth Amendment is primarily aimed at curbing law enforcement abuses.

Yoo also wrote that the activity described in the Presidential Authorizations was “reasonable” under the Fourth Amendment and therefore did not require a warrant. In support of this position, Yoo cited Supreme Court opinions upholding warrantless searches in a variety of contexts, such as drug testing of employees and sobriety checkpoints to detect drunk drivers, and in other circumstances, “when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” . . . Yoo wrote that in these situations the government’s interest was found to have outweighed the individual’s privacy interest, and that in this regard “no governmental interest is more compelling than the security of the Nation.”<sup>16</sup>

With regard to the Other Intelligence Activities authorized as part of the PSP, Yoo argued, “we do not believe that Congress may restrict the President’s inherent constitutional powers, which allow him to gather intelligence necessary to defend the nation from direct attack.”<sup>17</sup> Until his resignation in May 2003, Yoo’s memorandum and its legal interpretation was the

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<sup>15</sup> *Id.* at 11 (alteration in original).

<sup>16</sup> *Id.* at 12–13 (citations omitted).

<sup>17</sup> *Id.* at 13.

Bush Administration's primary basis for supporting the legality of the PSP.<sup>18</sup>

Following Yoo's resignation, his OLC replacement and the new head of the OLC were troubled by Yoo's legal reasoning, and they began to develop a new justification for the legality of the PSP. Rather than rely solely upon the President's inherent authority, the OLC's new position argued that the Congressional Authorization for Use of Military Force (AUMF) gave the President the authority for most of the PSP. Under this theory, the President was authorized to direct the NSA to engage in surveillance as part of the AUMF authorization that the President "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks of September 11, 2001, . . . in order to prevent any future acts of international terrorism against the United States."<sup>19</sup> As such, the OLC believed that the AUMF addressed concerns raised about the President's authority under the doctrine of separation of powers and the limitations imposed by FISA.<sup>20</sup> Nonetheless, the OLC remained troubled that even that theory "would not be sufficient to support the legality of certain aspects of the Other Intelligence Activities that the President had authorized under the PSP."<sup>21</sup>

While it is clearly outside the scope of this essay, what ensued is perhaps one of the most intriguing series of events and disagreements within the Executive Branch in U.S. history. White House Counsel Alberto Gonzales and the President's Chief of Staff Andrew Card attempted to convince Attorney General John Ashcroft to sign off on disputed aspects of the PSP even though Ashcroft was in intensive care recovering from surgery. Having failed to obtain the concurrence of the Department of Justice, the President reauthorized the PSP for an additional forty-five days prompting threats of resignation from senior Department of Justice and Federal Bureau of Investigation officials including Attorney General Ashcroft and FBI Director Mueller.<sup>22</sup> In light of these concerns within his own administration, President Bush "decided to modify certain PSP intelligence-gathering activ-

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<sup>18</sup> *Id.* at 19.

<sup>19</sup> Letter from William E. Moschella, Assistant Attorney General, to Pat Roberts, Chairman of the Senate Select Comm. on Intelligence; John D. Rockefeller, IV, Vice Chairman of the Senate Select Comm. on Intelligence; Peter Hoekstra, Chairman of the Permanent Select Comm. on Intelligence; Jane Harman, Ranking Minority Member of the Permanent Select Comm. on Intelligence, at 2 (Dec. 22, 2005) (citing Authorization for Use of Military Force Against September 11 Terrorists (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)) [hereinafter DOJ Letter], available at <http://www.fas.org/irp/agency/doj/fisa/doj122205.pdf>).

<sup>20</sup> See OIG REPORT, *supra* note 4, at 20.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1, 21–26.

ities and to discontinue certain Other Intelligence Activities that DOJ believed were legally unsupported.”<sup>23</sup> In 2007, the President issued his final Presidential Authorization for the PSP because certain aspects of the PSP were authorized by orders from the FISC.<sup>24</sup>

Congress subsequently amended FISA giving the President the authority to engage in electronic surveillance of persons reasonably believed to be located outside the U.S. without a court order. Initially, this authorization was temporary under the Protect America Act,<sup>25</sup> but it became permanent under the FISA Amendment Act of 2008 (FAA).<sup>26</sup> While the FAA is most commonly known for providing telecommunications providers with immunity from civil liability for assisting the Bush Administration under the PSP,<sup>27</sup> it also established the process under which the President could engage in such surveillance in the future. Specifically, the FAA permits the Attorney General and the Director of National Intelligence to authorize jointly “the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.”<sup>28</sup> However, the investigation:

- (1) may not intentionally target any person known at the time of acquisition to be located in the United States;
- (2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States;
- (3) may not intentionally target a United States person reasonably believed to be located outside the United States;
- (4) may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States; and
- (5) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.<sup>29</sup>

To ensure compliance with these limitations, the FAA requires the Attorney General and the Director of National Intelligence to adopt targeting and

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<sup>23</sup> *Id.* at 29.

<sup>24</sup> See Letter from Alberto Gonzales, Attorney General, to Patrick Leahy and Senator Arlen Specter, Chairmen of the Comm. on the Judiciary (Jan. 17, 2007), available at [http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales\\_Letter.pdf](http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales_Letter.pdf).

<sup>25</sup> Pub. L. No. 110-55, 121 Stat. 552 (2007).

<sup>26</sup> Pub. L. No. 110-261, 122 Stat. 2436 (codified as amended at 50 U.S.C. § 1881(a) (2006)).

<sup>27</sup> 50 U.S.C. § 1885.

<sup>28</sup> *Id.* § 1881a(a).

<sup>29</sup> *Id.* § 1881a(b).

minimization procedures and guidelines.<sup>30</sup> The targeting and minimization procedures must be approved by the FISC.<sup>31</sup> Moreover, while there are exceptions for exigent circumstances,<sup>32</sup> the Attorney General and the Director of National Intelligence must submit under oath and seal a written certification to the FISC before an acquisition may begin.<sup>33</sup> This certification must attest that the acquisition will comply with the targeting and minimization procedures and guidelines, among other things.<sup>34</sup> The FISC can review the certification only to determine whether the required information is included.<sup>35</sup>

### III. THE RIGHT TO BE SECURE

To understand the constitutional deficiencies of the PSP, it is necessary to briefly summarize that what I have argued represents the Founder's Fourth Amendment. Claiming that the Fourth Amendment protects power not privacy does not mean that the Fourth Amendment has nothing to do with privacy—the amendment clearly addresses privacy, or, more precisely, the right of the people to be secure. Rather, the amendment is best understood as a means of preserving the people's authority over the government—the people's sovereign right to determine how and when the government may intrude into the lives and influence the behavior of its citizens. To paraphrase Justice Jackson, the Fourth Amendment protects more than privacy; it ensures that governmental invasions of individual privacy are based upon rules established by the people, rules our rulers must follow in order to engage in surveillance.<sup>36</sup> Current Fourth Amendment doctrine not only ignores this principle, it subverts it. By limiting the Fourth Amendment's application to instances in which the government invades a reasonable expectation of privacy as defined by the courts, the Supreme Court has shifted the authority for determining the scope of the government's investigative power from the people to judges and law enforcement.

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<sup>30</sup> *Id.* § 1881a(d).

<sup>31</sup> *Id.* § 1881a(i)(1)(A).

<sup>32</sup> *Id.* § 1881a(c)(2).

<sup>33</sup> *Id.* § 1881a(g)(1)(A).

<sup>34</sup> *Id.* § 1881a(g).

<sup>35</sup> *Id.* § 1881a(i)(2)(A).

<sup>36</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J. concurring) (“[O]urs is a government of laws, not of men, and . . . we submit ourselves to rulers only if under rules.”).

A. *The Fourth Amendment and the Founders' Concerns*

While some have suggested that this thesis is radical,<sup>37</sup> it is certainly more in line with the concerns that prompted the adoption of the Fourth Amendment in particular and the Constitution in general than the Supreme Court's current jurisprudence. According to conventional wisdom, the Fourth Amendment embodies the Founders' concerns over general warrants and writs of assistance as illustrated by three pre-constitutional search and seizure cases:<sup>38</sup> *Wilkes v. Wood*,<sup>39</sup> *Entick v. Carrington*,<sup>40</sup> and the Writs of Assistance Case.<sup>41</sup> These decisions are important because of two connecting themes: concern about the privacy of an individual's home and papers against the government and a staunch rejection of unbridled official power and discretion.<sup>42</sup> For example, the *Wilkes* case arose in response to efforts to punish John Wilkes, a well-known member of Parliament, for seditious libel as the author of a series of anonymously published pamphlets critical of King George III.<sup>43</sup> Lord Halifax, the British Secretary of State, issued a warrant that did not name Wilkes or any other individual by name, but instead directed officials "to make [a] strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper" and "to apprehend and seize [them], together with their papers."<sup>44</sup> The officials carrying out the

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<sup>37</sup> See Christian M. Halliburton, *How Privacy Killed Katz: A Tale of Cognitive Freedom and the Property of Personhood as Fourth Amendment Norm*, 42 AKRON L. REV. 803, 848–49 (2009) ("Professor Raymond Ku has argued the now radical proposition that the Fourth Amendment is about power, not about privacy.").

<sup>38</sup> See, e.g., *Olmstead v. United States*, 277 U.S. 438, 463 (1928) (noting that the "well known historical purpose of the Fourth Amendment" was "directed against general warrants and writs of assistance"). There is some debate over the relative importance of the writs of assistance. Compare AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 66 n.\* (1998) (arguing that the writ of assistance case played "very little role in the discussion leading up to the Fourth Amendment"), with Tracy Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 223–28 (1993) (arguing that the disputes over writs of assistance played an important role in colonial understanding of unreasonable searches and seizures). Because my argument does not depend upon the proper resolution of this debate, I will include the Writs of Assistance Case in this discussion. See William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396 n.9 (1995) (treating the Writs of Assistance Case as part of the Fourth Amendment canon despite this debate).

<sup>39</sup> 19 Howell's State Trials 1153 (K.B. 1763).

<sup>40</sup> 19 Howell's State Trials 1029 (K.B. 1765).

<sup>41</sup> See M.H. SMITH, *THE WRITS OF ASSISTANCE CASE* (1978).

<sup>42</sup> Stuntz, *supra* note 38, at 399–400, 406–08 (identifying the two themes connecting these cases as privacy and unbridled official discretion).

<sup>43</sup> *Wilkes v. Wood*, 19 Howell's State Trials 1153, 1159–61 (C.P. 1763).

<sup>44</sup> *The Case of John Wilkes*, 19 Howell's State Trials 982 (K.B. 1763).

warrant arrested Wilkes and forty-nine other suspects by breaking into their homes and seizing their personal papers.<sup>45</sup>

In response, Wilkes and several of the other suspects challenged their arrests by bringing trespass actions against the officials involved. In *Wilkes v. Wood*, Chief Justice Pratt instructed the jury that:

The defendants claimed a right, under precedents, to force persons' houses, break open escutores, seize their papers, . . . upon a general warrant . . . , and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.<sup>46</sup>

The jury found for Wilkes, awarding him one thousand pounds in damage,<sup>47</sup> and, in a separate suit against Lord Halifax, Wilkes was awarded an additional four thousand pounds.<sup>48</sup> As William Stuntz notes, the cases arising out of these arrests “stand for the proposition that [general] warrants are invalid . . . and that arrests must be grounded in some cause to suspect the arrestee personally of a crime.”<sup>49</sup> To the extent that the *Wilkes* decision influenced the Founders, it suggests that the Fourth Amendment was adopted as a means of restraining official discretion. As the Chief Justice emphasized in his jury instruction, the question raised by the case is whether anyone in the government has the power to search “wherever their suspicions may chance fall.”<sup>50</sup>

The concern over official discretion was similarly echoed with respect to writs of assistance. In the seventeenth and eighteenth centuries, British statutes gave customs officials virtually unlimited authority to search for and seize goods in violation of existing trade rules.<sup>51</sup> These writs of as-

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<sup>45</sup> Stuntz, *supra* note 38, at 399 (citing *Wilkes v. Wood*, 19 Howell's State Trials 1153, 1157 (C.P. 1763); NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 43–44 (1937); GEORGE RUDE, *WILKES AND LIBERTY* 23–24 (1962)).

<sup>46</sup> *Wilkes v. Wood*, 19 Howell's State Trials 1153, 1167 (C.P. 1763).

<sup>47</sup> *Id.* at 1168.

<sup>48</sup> Stuntz, *supra* note 38, at 399 (citing LASSON, *supra* note 45, at 45).

<sup>49</sup> Stuntz, *supra* note 38, at 400; *see also* *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (noting that the prohibition of general warrants was one of the central purposes of the Fourth Amendment); *Payton v. New York*, 445 U.S. 573, 583–85 (1980) (stating a similar proposition).

<sup>50</sup> *Wilkes v. Wood*, 19 Howell's State Trials 1153, 1167 (C.P. 1763).

<sup>51</sup> For example, the Act of Frauds of 1662 authorized customs officers “to enter, and go into any House, Shop, Cellar, Warehouse or Room, or other Place, and in Case of Resistance, to break open Doors, Chests, Trunks and other Package, there to seize, and from thence to bring, any Kind of Goods or Merchandize [sic] whatsoever, prohibited and uncustomed.” Act of Frauds § 5(2) (1662), *reprinted in* SMITH, *supra* note 41, at 25 (emphasis omitted).

sistance did not grant the authority to search; “rather, they enabled customs officers to compel others—constables, local officials, or even private citizens—to assist in carrying out the necessary searches and seizures.”<sup>52</sup> Nonetheless, as Stuntz notes, because they permitted searches based only upon the suspicion of the customs officer, “the writs became wrapped up with the search authority they sought to confirm.”<sup>53</sup> As another commentator observes, much like the general warrant, “[t]he odious features of writs of assistance were the unbridled discretion given public officials to choose targets of the searches,” and “the arbitrary invasion of homes and offices to execute the writs.”<sup>54</sup>

Consider James Otis’s now famous argument against the writs. According to Otis:

A man’s house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—may break locks, bars and every thing in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient.<sup>55</sup>

While Otis rhetorically invokes the right of privacy with his reference to the sanctity of the home, this right is clearly not absolute. The home is considered a castle only so long as the individual is “quiet” in it. This concession is quite appropriate and reasonable. Aside from questioning the validity of the underlying substantive crime, it is difficult to imagine any value that would justify an absolute right to hide evidence of a crime.<sup>56</sup> Accordingly, the problem with the writs was not the invasion of the castle, which is how privacy is commonly conceived, but the process justifying the invasion. The writs gave customs officers and their “menial servants” the right to enter any home whenever they pleased. The “liberty” Otis so eloquently argued for was not an absolute right of privacy, however defined. Instead, his liberty is the liberty recognized in *Wilkes*, freedom from arbitrary and unlimited government power.

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<sup>52</sup> Stuntz, *supra* note 38, at 405.

<sup>53</sup> *Id.*

<sup>54</sup> Shirley M. Hufstедler, *Invisible Searches for Intangible Things: Regulation of Governmental Information Gathering*, 127 U. PA. L. REV. 1483, 1487 (1979).

<sup>55</sup> James Otis, Address, reprinted in SMITH, *supra* note 41, at 344. Put another way, the writs place “the liberty of man in the hands of every petty officer.” *Id.* at 331.

<sup>56</sup> As Professor Stuntz has argued, *Wilkes* and *Entick* were essentially First Amendment cases in a regime in which there was not opportunity for direct substantive review. Stuntz, *supra* note 38, at 403.

The relative importance of limiting governmental power and discretion versus defining what is private is apparent when one considers that only one of the cases in the triumvirate turned on an absolute right to keep information from the government. Like Wilkes, John Entick authored a series of pamphlets that authorities considered libelous.<sup>57</sup> Unlike Wilkes, this was not a general warrant because Entick was specifically named. Nonetheless, Entick sued in trespass and was awarded three hundred pounds.<sup>58</sup> In upholding the jury's verdict, Pratt, now Lord Camden, concluded that "[p]apers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection."<sup>59</sup> Despite the fact that the government had obtained a valid warrant, the court concluded that searching and seizing of papers themselves was impermissible. This conclusion was to be echoed in American constitutional law in *Boyd v. United States*,<sup>60</sup> in which the Supreme Court held that one's papers are protected by the Fourth and Fifth Amendments.<sup>61</sup>

While the decision in *Entick* clearly recognizes the private nature of papers, most of Pratt's decision is spent questioning the authority and process by which the warrant was issued. In affirming the trespass verdict, *Entick* rejected the power and authority of the Secretary to issue a lawful warrant as well as the lawfulness of the process by which the warrant was issued and executed.<sup>62</sup> Criticizing the power of the Secretary of State as "pretty singular,"<sup>63</sup> he rejected the idea that the Secretary of State had the power to issue warrants that could not be challenged and reviewed by the judiciary<sup>64</sup> or immunize its issuer and agents from subsequent prosecution.<sup>65</sup> According to Pratt, the laws of England did not grant the Secretary such power.<sup>66</sup> Instead, the Secretary's claim "stands upon a very poor foundation, being in truth no more than a conjecture of law without authority to support it."<sup>67</sup> Similarly, Pratt considered the warrant unlawful because, even assuming that it was supported by oath, it was executed *ex parte*, without notice or a chance to be heard, upon unknown information and informants, and its

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<sup>57</sup> *Entick v. Carrington*, 19 Howell's State Trials 1029, 1031 (K.B. 1765).

<sup>58</sup> *Id.* at 1036.

<sup>59</sup> *Id.* at 1066.

<sup>60</sup> 116 U.S. 616 (1886).

<sup>61</sup> *Id.* at 634–35.

<sup>62</sup> *Entick*, 19 Howell's State Trials at 1059, 1063.

<sup>63</sup> *Id.* at 1045.

<sup>64</sup> *See id.* at 1045–59.

<sup>65</sup> *See id.* at 1059–62.

<sup>66</sup> *See id.* at 1057 ("The whole body of the law, if I may use the phrase, were as ignorant at that time of a privy counsellor's [sic] right to commit in the case of a libel, as the whole body of privy counselors are at this day.").

<sup>67</sup> *Id.* at 1053.

execution did not have to occur in the presence of a constable or the party.<sup>68</sup> These procedures were especially troubling because, if such a warrant were issued and executed against an innocent party:

[H]e is as destitute of remedy as the guilty: and the whole transaction is so guarded against discovery, that if the officer should be disposed to carry off a bank-bill, he may do it with impunity, since there is no man capable of proving either the taker or the thing taken.<sup>69</sup>

Fear of government power and discretion, therefore, runs through even the most privacy-centric decision.

It should be apparent from these examples that a primary goal of the Fourth Amendment is the same as that of the entire Constitution—to define and limit governmental power. While the sanctity of one’s home and papers,<sup>70</sup> as well as public disagreement with the substantive offenses,<sup>71</sup> clearly played an important role in these early cases, fear of unfettered governmental power resonates even more clearly. Moreover, to the extent the house and papers are to be protected, the text of the amendment, and its history suggest that the protection flows from restraining governmental discretion even when that discretion is specifically granted by statute. As Akhil Reed Amar suggests, the Fourth Amendment, therefore, is concerned with the agency problem, that is “protecting the people generally from self-interested government.”<sup>72</sup> The amendment affords this protection not by defining what is private, but by expressly limiting the government’s power to conduct searches. Accordingly, searches must be reasonable, and warrants may only issue when supported by probable cause.<sup>73</sup>

#### B. *Separation of Powers*

In light of this history, it should be apparent that the Fourth Amendment complements the doctrine of separation of powers. This doctrine addresses that one of the most perplexing problems of a government of laws and not of men is ensuring that the power wielded by the Executive Branch of the government, “whether wielded by a Prince or a President, is

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<sup>68</sup> *Id.* at 1064–66.

<sup>69</sup> *Id.* at 1065.

<sup>70</sup> For example, in the Writs of Assistance Case, James Otis argued that “[a] man’s house is his castle.” Otis, *supra* note 55. In *Entick*, Pratt argued that “[p]apers are the owner’s goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection.” *Entick*, 19 Howell’s State Trials at 1066.

<sup>71</sup> See Stuntz, *supra* note 38, at 406–07 (arguing that the response to these decisions can be explained by public opposition to the underlying charges and offenses).

<sup>72</sup> AMAR, *supra* note 38, at 67–68.

<sup>73</sup> U.S. CONST. amend. IV.

itself governed by and answerable to the law.”<sup>74</sup> Under American constitutional law, this is accomplished by requiring, at least in the domestic sphere, that executive power be governed either by the Constitution or by statute. The executive’s domestic role under the Constitution is best illustrated by the Supreme Court’s landmark decision in *Youngstown Sheet & Tube*.<sup>75</sup>

In 1951, a labor dispute between steel companies and their employees threatened steel production during the Korean War. Believing that a work stoppage would jeopardize the war effort, President Truman ordered the Secretary of Commerce to take possession of and run the steel mills. The steel companies argued that the President’s order violated the Constitution because it was not authorized by an act of Congress or any constitutional provision. In response, the President argued, *inter alia*, that he had the inherent power to issue such an order or at the very least that it was part of his power to “take Care that the Laws be faithfully executed.”<sup>76</sup> Writing for the Court, Justice Black agreed with the steel companies and held that the “President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”<sup>77</sup> With respect to the President’s argument that the order was consistent with his power to execute the laws, Black responded that “[i]n the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”<sup>78</sup> Instead, the Constitution limits his role to directing that “a congressional policy be executed in a manner prescribed by Congress,” and the Constitution does not permit him to direct that “a presidential policy be executed in a manner prescribed by the President.”<sup>79</sup> Since Congress did not authorize the President’s actions, a majority of the Justices concluded that Truman’s order was unconstitutional.<sup>80</sup>

In his now famous concurring opinion, Justice Jackson argued that the President claimed a power that “either has no beginning or it has no end. If it exists, it need submit to no legal restraint.”<sup>81</sup> Recognition of such a power, he argued, would be a step toward dictatorship and was precisely what the Founders hoped to avoid by limiting the President’s legislative power to recommendation and veto.<sup>82</sup> According to Jackson, “[w]ith all its

<sup>74</sup> 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-1, at 630 (3d ed. 2000).

<sup>75</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>76</sup> *Id.* at 584, 587 (quoting U.S. CONST. art. II, § 3).

<sup>77</sup> *Id.* at 585.

<sup>78</sup> *Id.* at 587.

<sup>79</sup> *Id.* at 588.

<sup>80</sup> In fact, when it enacted the labor laws the President claimed to be enforcing, Congress had specifically considered and rejected the idea of giving the President the power to seize striking facilities. *See id.* at 656–58 (Burton, J., concurring).

<sup>81</sup> *Id.* at 653 (Jackson, J., concurring).

<sup>82</sup> *Id.* at 653, 655.

defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.”<sup>83</sup>

Similarly, quoting Brandeis, Justice Douglas argued:

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.<sup>84</sup>

Thus, the doctrine of separation of powers protects against arbitrary and unfettered executive power by requiring executive decisions to be governed by either constitutional or statutory law.

It should be apparent that the Fourth Amendment and the doctrine of separation of powers share the same goal and are intended to serve the same function. As a complement to the doctrine of separation of powers, the Fourth Amendment may play one of two roles. Either the amendment establishes the minimum requirements that must be satisfied before the government may conduct a search when those searches are authorized by statute, or it guarantees that searches are always regulated by the Constitution even if they are not specifically authorized by statute.

This brief discussion of the Fourth Amendment’s history and its relationship to the Constitution’s separation of powers highlights two important principles. First, the Fourth Amendment was not intended as a vehicle to define privacy; rather, like the rest of the Constitution in general and the doctrine of separation of powers in particular, it is intended to limit executive power and discretion. Second, the only legitimate authority for determining the reasonableness of any exercise of governmental power is the people themselves through the Constitution or their legislative representatives by statute.

#### IV. THE PROBLEM WITH PRIVACY

In light of the Founder’s concerns, it should come as a surprise that the Supreme Court’s interpretation of the Fourth Amendment effectively stands the amendment on its head and, in so doing, shifts political authority from the people and their representatives to the executive and the judiciary. This power shift is accomplished by the way in which the Court frames the Fourth Amendment inquiry. In determining whether the Fourth Amendment applies, the Supreme Court asks whether the governmental activity is consi-

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<sup>83</sup> *Id.* at 655.

<sup>84</sup> *Id.* at 629 (Douglas, J., concurring) (citing *Myers v. United States*, 272 U.S. 52, 293 (1926)).

dered a search under the Constitution. For the most part, this inquiry loosely examines whether the government act is equivalent to the types of searches our nation's Founders considered problematic. If the activity is considered equivalent, then it is treated as a search, and according to the Court, the Constitution limits governmental power by imposing the requirement of a warrant supported by probable cause. If the activity is not equivalent, then government agents have unfettered discretion to engage in the activity in question with no Fourth Amendment oversight or restraint. With respect to emerging technologies, this approach leaves open the possibility that, despite the information gathering capabilities of these technologies, their use may not be regulated at all under the Constitution because, semantically, the Court may not consider their use to be searches. As others have noted, "[t]his approach fails to protect privacy rights, and permits their gradual decay with each improved technological advance."<sup>85</sup>

Moreover, in engaging in this semantic game, the Supreme Court's current Fourth Amendment doctrine allows the government to determine for itself the scope of its own powers. This is accomplished by assuming that law enforcement has the inherent power to adopt and utilize new technologies subject only to narrow Fourth Amendment protections for privacy, and unless a search invades a recognizable privacy interest, the amendment places no limits upon the government's ability to conduct that search. In many instances this means that law enforcement, including individual officers, is not bound by any legal or constitutional restraints in deciding what surveillance devices to use or when and how to use them.

In the abstract, allowing the government to obtain a suspect's secret password, to decipher encoded messages, or to monitor e-mail traffic may not trouble the casual observer. After all, these tools may not only make the government's job easier, but also, in some instances, they may be essential to combat technologically sophisticated terrorists and criminals. When interpreting the Constitution, however, the judicial function is not to balance the relative value or efficacy of such tools against the corresponding loss of privacy and cost to society, but to determine whether the people have made such a decision either in the Constitution itself or by conferring upon their representatives the decision-making authority to conduct such a balancing. Instead, the Justices have shirked this responsibility imposing their own value judgments upon society.

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<sup>85</sup> Melvin Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647, 650 (1988); see also David E. Steinberg, *Making Sense of Sense-Enhanced Searches*, 74 MINN. L. REV. 563 (1990) (criticizing the incoherence of the Supreme Court's sense-enhanced search cases and suggesting three factors that may better protect Fourth Amendment privacy).

In defense of the Justices, the adoption of this interpretive framework may be explained as recognition that it is often best to allow those investigating terrorism or criminal conduct significant discretion at what I will call the micro level—how best to exercise power in a particular situation and when to investigate a particular individual. When dealing with danger and the unknown, government agents must have the power to protect themselves as well as the public in uncertain and highly fluid situations. Likewise, through their unique experiences, government investigators develop special expertise and judgment, and society is better off when experienced officers are allowed to follow their hunches and target suspects to prevent harm from occurring or to capture the perpetrators after-the-fact. So when the government investigates a particular suspect, it is generally preferable to allow those with the investigative expertise to determine who should be investigated and what tools should be used in that investigation.

Deference, however, does not mean abandonment, and the Supreme Court's basic Fourth Amendment doctrine recognizes this micro-level concern by requiring that warrants be issued by a neutral, disinterested magistrate after a demonstration that there is probable cause to believe that the evidence sought will aid in a particular apprehension or conviction of a particular offense, and that the warrant particularly describes the items to be seized as well as the place to be searched.<sup>86</sup> As such, these requirements ensure that the process is impartial,<sup>87</sup> supported by evidence,<sup>88</sup> and carefully tailored,<sup>89</sup> all of which are responses to the lessons learned from the cases involving pre-constitutional English abuses.

However, we should not confuse police decision-making at the micro level with macro-level decisions that determine the scope of executive power in general. While the Constitution may permit a degree of deference at the micro level, it leaves little room at the macro level. The decision to adopt a new form of surveillance technology is just such a macro-level decision. The decision to monitor telephone calls and email messages is a determination to expand the powers and capabilities of the Executive Branch and, correspondingly, to reduce the level of privacy and security that the public may expect and enjoy. Whatever deference law enforcement may be entitled to with respect to micro-level discretion, it is entitled to none at the macro level. Unfortunately, the Court's current Fourth Amendment jurisprudence virtually ignores the distinction between micro and macro-level decision making and never questions from where the government derives its authority to adopt these new technologies.

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<sup>86</sup> See *Dalia v. United States*, 441 U.S. 238, 255 (1979).

<sup>87</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>88</sup> *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 316 (1972).

<sup>89</sup> *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

The Supreme Court's failure to question the source of the executive's power to adopt new technologies leads to a significant incongruity. The individual officer, a relatively low member of the Executive Branch, in many respects has more discretionary power than the President. Unlike the President, whose power in general must be granted either directly by the Constitution or by acts of Congress,<sup>90</sup> many of the activities the police engage in are not authorized by law at all but are, instead, conducted under "their broad general duties to enforce the law and keep the peace."<sup>91</sup> While the Supreme Court carefully scrutinizes presidential claims of inherent authority, it appears to assume the President's inherent authority when law enforcement is concerned.<sup>92</sup> In this respect, the Supreme Court's Fourth Amendment jurisprudence must learn from its evaluation of presidential power in the Steel Seizure Case. Unless the people grant the Executive Branch the power in question, either through the Constitution or through legislation, claims of inherent executive power are suspect.<sup>93</sup> As it stands,

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<sup>90</sup> See Ku, *supra* note 1, at 1340–43.

<sup>91</sup> Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 386 (1974); see also *Dow Chem. Co. v. United States*, 476 U.S. 227, 233 (1986) ("Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted.").

<sup>92</sup> One might argue that this assumption is warranted because state constitutions do not follow the same doctrine of separation of powers as the U.S. Constitution. While one can argue that state legislative power is broader than congressional legislative power, there is no support for the argument that the doctrine of separation of powers with respect to state executive power differs from the federal doctrine. As even a critic of this approach recognizes, "federal precedent sets the terms for much state separation of powers debate, and federal principles provide a presumptive standard for state constitutional decisions." Robert A. Shapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 80 (1998); see also *People v. Moore*, 102 N.E.2d 146, 151–52 (Ill. 1951) (recognizing that the doctrine of separation of powers only permitted the police to seize items specifically defined by state statute); Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 77 (1976) ("[T]he state supreme courts have uniformly held that the legislatures are the only branch of government possessing the power to legislate.").

<sup>93</sup> See Ku, *supra* note 1, at 1340–43; see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1957).

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

*Id.*

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers [granted by the Constitution] . . . . When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . . Presidential claim to a

under the Court's current approach, the people play absolutely no role in determining the extent and reasonableness of the government's power to search. Instead, the Court treats law enforcement as having unfettered government power to invade individual privacy and security subject only to a few not-so-well-defined but limited exceptions defined by the Court. Whatever role the Fourth Amendment might have played in regulating executive power consistently with the doctrine of separation of powers, in many instances it currently plays no role whatsoever. As discussed earlier, this state of affairs is precisely what the Founders feared most.

So what does the Constitution require? Under these circumstances, self-governance may be reinforced in two ways. If the Court maintains the *per se* rule against warrantless searches—what I have described as the “moderate thesis”—popular sovereignty is reinforced through the Fourth Amendment's Warrant Clause. This result is a perfectly reasonable and acceptable interpretation of the amendment and consistent with the principles of constitutional self-governance. If the Court chooses to expand its interpretation of reasonableness—what I have called the “radical thesis”—then reasonableness should only be expanded to include surveillance technologies authorized and circumscribed by statute with safeguards comparable to the requirements of the Warrant Clause. Under both of these approaches, the people, as the Founders intended, would determine the reasonableness of government power.

As the discussion of the amendment's pre-constitutional origins suggests, the Fourth Amendment could recognize two methods for determining when searches are reasonable.<sup>94</sup> The government could conduct a search without a warrant, provided that the people had the power to oversee those searches directly. Otherwise, the government must obtain a warrant supported by probable cause. Even though the Founders might have been concerned about warrants, the Fourth Amendment considers warrants reasonable when they are supported by “probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”<sup>95</sup> While a *per se* warrant rule narrows the methods for determining reasonableness—the common law jury or through legislation—a rigid adherence to the Warrant Clause still applies the people's definition of reasonableness as expressed in the Constitution. Accordingly, a *per se* rule remains faithful to the amendment's purpose of ensuring that the people determine when the government may search. As dis-

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power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

*Id.* at 637–38 (Jackson, J., concurring).

<sup>94</sup> See Ku, *supra* note 1, at 1332–43.

<sup>95</sup> U.S. CONST. amend. IV.

cussed above, the problem with the Supreme Court's Fourth Amendment doctrine was not the *per se* warrant rule, but rather the Court's willingness to create exceptions to the rule. By creating exceptions to the *per se* rule, the Justices replaced the judgment of the people with their own.

In certain areas of Fourth Amendment law, the Court has in fact relaxed the warrant requirement in reliance upon statutory authorization or administrative rules to uphold warrantless searches.<sup>96</sup> This expansion to technological surveillance is not required or necessarily desirable, but if it should occur, government use of technology absent a warrant should only be considered reasonable when authorized by a statute subject to judicial review. Only under these circumstances would the Fourth Amendment guarantee that the people determine the reasonableness of government searches and follow the Constitution's separation of powers.<sup>97</sup>

While having law enforcement develop and implement a process for administrative rulemaking is certainly valuable and worthwhile regardless of its Fourth Amendment implications, it should not be allowed to eliminate the safeguards embodied in the Warrant Clause. As discussed earlier, police decision-making and discretion can be separated into micro-level decisions and macro-level decisions.<sup>98</sup> Provided that they are followed, requiring investigative agencies to formulate internal rules and policies governing investigations would be a step towards limiting their agent's discretion at the micro level—that is, when and how to conduct searches. Administrative rulemaking, however, does not eliminate all concerns at the micro level because, standing alone, rulemaking does not guarantee that the rules adequately address micro-level concerns or that they are followed in any given

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<sup>96</sup> See, e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 872–73 (1987) (upholding state regulations authorizing probation officers to conduct warrantless searches of probationer homes based upon “reasonable grounds”); *New York v. Burger*, 482 U.S. 691, 711 (1987) (upholding warrantless inspection of an automobile scrap yard because a “statute informs the operator of a vehicle dismantling business that inspections will be made on a regular basis.”); *Donovan v. Dewey*, 452 U.S. 594, 603 (1981) (upholding warrantless inspection of coal mines under the Federal Mine Safety and Health Act provided that the inspection program “provides a constitutionally adequate substitute for a warrant.”); *Colorado v. Bertine*, 479 U.S. 367, 374 (1987) (“[R]easonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure.”). This limited relaxation of the warrant requirement in areas outside of day-to-day criminal investigation has been criticized as a form of privacy Lochnerism. See Stuntz, *supra* note 38, at 445; William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1047 (1995).

<sup>97</sup> Of course, one could also expand reasonableness to once again recognize the role of the common law jury. See AMAR, *supra* note 38, at 70. Doing so, however, would require the Supreme Court to re-examine its positions on sovereign immunity, official immunity, and habeas corpus.

<sup>98</sup> See Ku, *supra* note 1, at 1367–77.

investigation. Furthermore, administrative rulemaking does nothing to alleviate executive discretion at the macro level. As such, allowing administrative rulemaking to replace the warrant requirement suffers from the same fundamental problem of unbounded executive discretion. A dialogue on reasonableness would simply replace the dialogue on privacy with law enforcement and the judiciary calling the shots.

In contrast, requiring the use of surveillance technologies to be authorized by statute recognizes that the people should determine just how much power the government should wield. As discussed earlier, popular control over the government's power to search was the driving force behind the adoption of the Fourth Amendment. Moreover, requiring statutory authorization for law enforcement's power to search—even if it is not used to determine reasonableness—would bring search and seizure law in line with the doctrine of separation of powers governing executive power in general.

In addition to being the proper constitutional body to decide these questions, legislatures are institutionally more competent than courts to make the types of policy decisions associated with authorizing government surveillance. Since they are politically accountable, they are more likely to evaluate the policy implications of certain surveillance technologies, balancing, among other things, the threat to privacy and the potential for abuse. In other words, this is a balancing of the demands of public security from a potentially abusive government against the demands for public safety from groups and individuals who may do us harm. The legislative branch is also better able to develop a factual record with respect to the nuances and details of new technologies and their costs and benefits. Moreover, whatever one might think of the legislative process, it is more likely to take the interests of the general public into account in fashioning rules governing surveillance than courts who are asked to make such decisions in cases in which a search revealed evidence of a defendant's guilt, and the only remedy is exclusion of that evidence.

Of course, allowing legislatures to determine the government's power to search raises concerns about abusive or unresponsive legislative power. Admittedly, strict adherence to the warrant requirement avoids this problem by denying legislatures any power to deviate from the Warrant Clause.<sup>99</sup> Concerns about legislative abuse, however, should be alleviated by judicial review of these legislative determinations with the Warrant Clause as the guide. As the Supreme Court has done in the context of administrative searches, it should review statutory grants of power to determine whether the procedures adopted by legislatures are "constitutionally

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<sup>99</sup> One may argue that the tyranny of contemporary majorities is simply replaced by the tyranny of past majorities.

adequate substitute[s] for a warrant.”<sup>100</sup> Using the Warrant Clause as the touchstone for evaluating statutory safeguards would limit deviations from the amendment’s stated safeguards while ensuring that the legislation limited arbitrary and abusive searches.<sup>101</sup> Judicial review under these circumstances would return the judiciary to its traditional constitutional role of evaluating such judgments against a backdrop of constitutional principles and norms rather than allowing judges to sit as policymakers. While I have sketched two possible interpretations of the Fourth Amendment that would reinforce popular sovereignty, the question of which approach should be adopted is left for another day. Moreover, as the following section argues, the PSP fails to satisfy the demands of the Constitution under either the moderate or radical thesis.

#### V. WHY THE PSP IS UNCONSTITUTIONAL

In light of the history and changing legal justifications for the PSP, its constitutional legitimacy must be evaluated in essentially three separate moments. Each of these moments is represented by different legal arguments in support of the program’s constitutionality. The first of these moments is represented by the OLC’s initial interpretation prepared by John Yoo. The second is the OLC’s revised position relying upon the AUMF, and the third is represented by Congressional authorization of elements of the PSP following the passage of the FISA Amendment Act. Despite these three different moments and justifications, the constitutional legitimacy of the PSP remains suspect, as the following suggests, for different reasons.

The initial defense of the PSP as articulated by John Yoo clearly falls into the Fourth Amendment’s privacy trap that I have described and criticized above. Yoo ignores the question of separation of power and, instead, assumes that the Executive had the authority to initiate the PSP subject only to the limitations imposed by the Fourth Amendment.<sup>102</sup> Yoo then argued that the Fourth Amendment did not limit Executive authority under

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<sup>100</sup> *Donovan*, 452 U.S. at 603.

<sup>101</sup> Of course, the legislation should be subject to review in light of other constitutional concerns including equal protection. As one author has noted,

The warrant requirement injects the judgment of a “neutral and detached” magistrate and also has what may be the more important effect of compelling a contemporaneous recordation of the factors on whose basis the action is being taken. The probable cause requirement obviously can’t guarantee a lack of arbitrariness: invidious choices among those respecting whom there is probable cause are possible. By setting a substantive parameter at one end of the decision, however, it at least requires that persons not be singled out for arrest or search in the absence of strong indication of guilt, that is, on the basis of constitutionally irrelevant factors alone.

JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 172–73 (1980).

<sup>102</sup> See OIG REPORT, *supra* note 4, at 11–12.

the PSP because the NSA's activities would not amount to an unreasonable invasion of privacy.<sup>103</sup> While Yoo adopts an extremely aggressive position in favor of the PSP, his analysis is nonetheless consistent with the Supreme Court's interpretation of the Fourth Amendment pre-*Kyllo*. As such, his interpretation recognized no need to protect the right of the people to be secure at either the macro or micro level. Instead, the Executive Branch was free to invade the security of all Americans and arbitrarily target anyone it saw fit to target without any popular authorization or constraint. It should come as no surprise then that published reports indicate that innocent Americans were in fact inappropriately targeted, and government agents eavesdropped even on intimate conversations of members of our armed forces.<sup>104</sup> With respect to government surveillance, it is difficult to imagine a more egregious violation of our Constitution's protections and principles.

The OLC's revised position represents a marginal improvement at best. By relying upon the AUMF, the OLC recognized that the doctrine of separation of powers was, in fact, implicated by the PSP. Moreover, we are told that some still classified elements of the PSP were not approved by the Department of Justice as a result of this interpretation, and that the Bush Administration subsequently abandoned those aspects of the program.<sup>105</sup> Nonetheless, the OLC's position that the AUMF gave the president the authority to initiate the PSP is also an extremely aggressive interpretation of the law. Under the AUMF, Congress gave the President the authority to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks of September 11, 2001, . . . in order to prevent any future acts of international terrorism against the United States."<sup>106</sup> While it is possible that Congress intended to give the President sweeping new surveillance powers under this language, it is by no means clear or certain. The dubiousness of this interpretation is compounded by the fact that one would also have to imply from the general language of the AUMF that Congress intended these new powers to be exempt from the specific limitations it had previously imposed upon electronic surveillance under FISA and other statutes.

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<sup>103</sup> *See id.*

<sup>104</sup> *See Spying on the Home Front*, FRONTLINE, May 15, 2007, <http://www.pbs.org/wgbh/pages/frontline/homefront/view/#more>; Brian Ross et al., *Inside Account of U.S. Eavesdropping on Americans*, ABC NEWS, Oct. 9, 2008, <http://abcnews.go.com/Blotter/story?id=5987804&page=1>.

<sup>105</sup> *See discussion supra* Part II.

<sup>106</sup> Authorization for Use of Military Force Against September 11 Terrorists (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)), DOJ Letter, *supra* note 19, at 2.

Even if one accepts the argument that the AUMF authorized the President to adopt the PSP and that it constitutes specific statutory authorization that would be recognized as an exception to FISA, the AUMF argument addresses only separation of powers and macro-level Fourth Amendment concerns. Since the OLC continued to maintain that the PSP did not constitute an unreasonable invasion of privacy, it argued that the Fourth Amendment did not apply, and, therefore, none of the micro-level safeguards embodied in the Warrant Clause applied.<sup>107</sup> In essence, the OLC argued, as did John Yoo's initial memorandum, that the need "to detect and prevent a catastrophic attack" against the U.S. clearly outweighed any "privacy interests at stake."<sup>108</sup> Moreover, because the AUMF did not create alternative safeguards, it would not even qualify for consideration under the radical thesis of the Fourth Amendment.<sup>109</sup> In short, while the OLC's revised position may support the proposition that the President had the power to initiate the PSP, it did nothing to ensure that the President was using that power appropriately.

Finally, by adopting the FAA did Congress settle the constitutionality of the PSP, at least with regard to the Terrorist Surveillance Program? Unfortunately, the answer is maybe. While the FAA clearly settles the separation of powers and macro Fourth Amendment questions, it may fall short with regard to micro Fourth Amendment concerns. Under the FAA, Congress gave the President the authority to engage in electronic surveillance of persons reasonably believed to be located outside the U.S. without a court order and required the Executive Branch to adopt targeting and minimization procedures subject to the approval of the FISC before such surveillance could begin.<sup>110</sup> In general, the FAA is a vast improvement upon either of the OLC's positions. Congress expressly granted the President the authority he seeks. The authority granted is limited and must be exercised according to rules and procedures designed to protect the public and individuals from arbitrary surveillance and abuse of the granted surveillance power.<sup>111</sup> While the promulgation of these rules and procedures is delegated to the Executive Branch, the judiciary, as represented by the FISC, must approve the administration's rules and procedures before surveillance is authorized.<sup>112</sup> Under these circumstances, judicial review ensures that the rules and procedures adopted by the Executive Branch comply with the requirements of the FAA

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<sup>107</sup> DOJ Letter, *supra* note 19, at 4.

<sup>108</sup> *Id.*

<sup>109</sup> In light of OLC's aggressive interpretation, it certainly makes one wonder about the nature and scope of the surveillance activities under the PSP that were considered unsupported by this position.

<sup>110</sup> See discussion *supra* Part II.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

and the Fourth Amendment. As such, the FAA would appear to satisfy the macro-level concerns regarding such electronic surveillance.

The difficulty with the FAA arises with respect to micro-level security concerns. Because the FAA does not require a warrant, it fails to protect micro-level security as required by the moderate thesis. Therefore, the interesting question is whether the certification procedures adopted by the FAA satisfy the radical thesis. In other words, is certification an adequate substitute for the Warrant Clause's requirement that a search request be approved by a disinterested magistrate after a demonstration that there is probable cause to believe that the evidence sought will aid in a particular apprehension or conviction of a particular offense, and that the warrant particularly describes the items to be seized as well as the place to be searched?

As noted earlier, in lieu of a warrant, the FAA requires the executive to submit a certification subject to the approval of the FISC to engage in electronic surveillance.<sup>113</sup> The FAA defines what must be included in the certification, and primary among those elements are the certification that the acquisition complies with the targeting and minimization procedures and guidelines and that "a significant purpose of the acquisition is to obtain foreign intelligence information."<sup>114</sup> The certification does not have to "identify the specific facilities, places, premises, or property at which an acquisition . . . will be directed or conducted."<sup>115</sup> This certification must be submitted to the FISC, which reviews the certification "to determine whether the certification contains all the required elements."<sup>116</sup> According to the FAA:

If the Court finds that a certification submitted in accordance with subsection (g) contains all the required elements and that the targeting and minimization procedures adopted in accordance with subsections (d) and (e) are consistent with the requirements of those subsections and with the fourth amendment to the Constitution of the United States, the Court shall enter an order approving the certification and the use, or continued use . . . of the procedures for the acquisition.<sup>117</sup>

In light of this process, whether certification might satisfy the radical thesis of the Fourth Amendment depends upon how one interprets the obligation of the FISC. If the FISC must approve the request whenever all of the specified elements are included in the certification, then the FAA fails even the radical thesis because the FISC is not given any authority to determine whether the executive is exercising its power consistently with either

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<sup>113</sup> *Id.*

<sup>114</sup> 50 U.S.C. § 1881a(g)(2)(A)(v) (2006).

<sup>115</sup> *Id.* § 1881a(g)(4).

<sup>116</sup> *Id.* § 1881a(i)(2)(A).

<sup>117</sup> *Id.* § 1881a(i)(3)(A).

the statute or the Constitution. Instead, the FISC would appear to be relegated to ensuring only that the administration has dotted all the “i’s” and crossed all the “t’s.” However, if the phrase “consistent with the requirements of those subsections and with the fourth amendment to the Constitution of the United States” applies to the certification itself, and not simply to the targeting and minimization procedures in general, then an argument could be made that certification may be an adequate substitute for a warrant. In other words, if certification not only determines that the general need and procedures for engaging in surveillance are reasonable, but also has enough teeth to ensure that each request is reasonable under the Fourth Amendment because the targeting and minimization procedures are reasonable as applied, then an argument could be made in favor of the FAA’s constitutionality. However, this argument will only succeed if the statute is interpreted in this manner, if the Supreme Court adopts the radical thesis for interpreting the Fourth Amendment, and if it relaxes or overturns its longstanding *per se* warrant rule. Unfortunately, that is a lot of “ifs” to support the constitutionality of any program, let alone one of the most significant surveillance programs in this nation’s history. Once again, while the FAA goes a long way to improve upon the earlier Constitutional deficiencies of the PSP, it may not get all of the way there.

## VI. CONCLUSION

Critics will certainly argue that lives will be risked and lost and that the rules are different when the nation is at war or faces a threat such as terrorism. This criticism, however, misses the mark. The relationship between public safety and our Constitutional liberties is not a binary, zero-sum relationship. Recognizing the importance of one does not diminish the importance of the other. As represented by the Constitution’s choice of words, they are mutually reinforcing values, both reinforcing our “security.” Obviously, when dealing with serious threats to public security, our agents should be equipped with and have the power to use powerful and sophisticated tools and techniques. In general, this is not a question of whether, but how and when. One of the fundamental lessons this nation learned is that all power, including investigative powers, is easily abused and, as such, process matters.

Accordingly, the issue is not whether the PSP is valuable. The program and others like it may not only be valuable; they may be essential for our safety, but so too is the Constitution. The issue is who gets to make the macro and micro-level decisions of whether to have such a program and when to use it. As this essay argues, while the PSP may be unconstitutional, the constitutionality of the program is not difficult to fix. Either Congress can amend the FAA to expressly require compliance with the Warrant Clause or a constitutionally adequate alternative comparable to the Warrant

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Clause, or the FISC can interpret the certification process in the FAA as already requiring the incorporation of such safeguards.

Some will argue that it is more expedient or more efficient to leave these decisions to the Executive Branch rather than to the people, as expressed by the limits imposed by the Constitution either through the Fourth Amendment directly or by requiring legislative authorization and safeguarding. Others will argue that it is more expedient for Congress to issue the President a blank check when it comes to the war on terror, drugs, or crime. I challenge the premise that our Constitution is inefficient or that it stands in the way of security. The Constitution does not deny the government the power to keep our nation safe, but rather keeps our nation safe by ensuring that our representatives, even the President, do not abuse the power we entrust to them. The Constitution was adopted to preserve liberty, and there is no more important means of preserving liberty, especially in times of crisis, than prohibiting the exercise of unlimited and arbitrary power.