

# FISA's Fuzzy Line between Domestic and International Terrorism

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## INTRODUCTION

The Foreign Intelligence Surveillance Act of 1978<sup>1</sup> (FISA) regulates, among other things, the government's acquisition of electronic surveillance within the United States for foreign-intelligence purposes. FISA allows a federal officer to seek an order from a judge at a specially designated court "approving electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information."<sup>2</sup> As long as the requisite foreign nexus can be shown, FISA warrants are preferable to their possible substitutes because they are easier to obtain and allow for more secretive and penetrating investigations.<sup>3</sup>

Consistent with FISA's foreign focus, the government may use the statute to investigate members of international terrorist groups within the United States.<sup>4</sup> However, the activities of purely domestic terrorist groups do not fall under FISA and must therefore be investigated using standard criminal-investigative tools.<sup>5</sup> Often, terrorists will easily be identified as international; members of designated "foreign terrorist organizations" operating within the United States are clearly international

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<sup>1</sup> Pub L No 95-511, 92 Stat 1783, codified as amended in various sections of Title 50.

<sup>2</sup> *United States v Duggan*, 743 F2d 59, 69 (2d Cir 1984), quoting 50 USC § 1802(b).

<sup>3</sup> See David S. Kris and J. Douglas Wilson, 1 *National Security Investigations and Prosecutions 2d* § 4:1 (West 2012), quoting United States Department of Justice, Office of the Inspector General, *A Review of the FBI's Handling of Intelligence Information Related to the September 11 Attacks* (Nov 2004), online at <http://www.justice.gov/oig/special/s0606/chapter2.htm> (visited Aug 12, 2014) (noting a DOJ report that says that "FISA coverage is always hoped for' in an FBI intelligence investigation").

<sup>4</sup> See 50 USC § 1801(a)(4) (listing "a group engaged in international terrorism" as a foreign power that can be subject to FISA surveillance).

<sup>5</sup> See *Foreign Intelligence Surveillance Act of 1978 Report*, HR Rep No 95-1283, Part I, 95th Cong, 2d Sess 44 (1978) (noting that in cases of domestic terrorism, "the Government must rely on . . . title III of the Omnibus Crime Control Act of 1968, contained in chapter 119, of title 18, United States Code").

terrorists. But the proliferation of modern communication technologies has caused increasing slippage between the definitions of domestic and international terrorism. For example, many homegrown terrorists are inspired by international groups to commit attacks in the United States.<sup>6</sup> In many cases, the government seems to classify these actors as international terrorists based on Internet activity that ranges from viewing and posting jihadist YouTube videos to planning attacks with suspected foreign terrorists in chat rooms, thus using FISA's formidable investigatory weapons against them.<sup>7</sup> The government is aided in this task by FISA's definition of international terrorism, which has an extremely vague and potentially loose internationality requirement.<sup>8</sup> An expansive interpretation of this requirement could be used to subject what might properly be considered domestic terrorist groups to FISA surveillance.

One should be concerned about both the existence and the effects of an expansive interpretation of FISA's internationality requirement. Not only would subjecting domestic terrorist groups to FISA surveillance violate FISA itself, but such an application might also be unreasonable under the Fourth Amendment. Moreover, the FISA application and surveillance process is very secretive, lacks a true adversarial process, and is devoid of meaningful oversight. This setting offers an ideal environment for the government to push statutory and constitutional boundaries. Indeed, recent revelations from Edward Snowden offer confirmation that the government is more likely to cross constitutional lines in the name of national security when these institutional factors are present.<sup>9</sup>

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<sup>6</sup> See, for example, *United States v Duka*, 671 F3d 329, 333 (3d Cir 2011); Complaint for Violations, *United States v Abdul-Latif*, Criminal Action No 11-228, \*11 (WD Wash filed June 23, 2011).

<sup>7</sup> For a discussion of classification based on Internet activity, see text accompanying notes 124–34.

<sup>8</sup> See 50 USC § 1801(c)(3) (sweeping in terrorist activities that “transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum”).

<sup>9</sup> For example, a US district court judge recently decided that there was a significant likelihood that the NSA's bulk telephony metadata program violated the Fourth Amendment. See *Klayman v Obama*, 957 F Supp 2d 1, 37–42 (DDC 2013) (arguing that such an indiscriminate invasion of nearly every citizen's privacy without prior judicial approval offends the Fourth Amendment). The judge issued a preliminary injunction but stayed it pending appeal. See *id* at 43. Notably, not all courts have reached this conclusion on the NSA metadata program. See, for example, *American Civil Liberties Union v Clapper*, 959 F Supp 2d 724, 749–52 (SDNY 2013).

This Comment proceeds as follows: Part I reviews FISA's historical background and details the procedures for acquiring and using a FISA warrant for electronic surveillance within the United States. Part II examines the text and legislative history of the statute, focusing on the internationality requirement of the international terrorism provision. This analysis concludes that the language is broad enough to cover individuals with extremely tenuous international connections, but that Congress did not intend such an inclusive interpretation of the language. In the absence of public court opinions analyzing FISA's internationality requirement, this Part then briefly assesses how courts have interpreted similar language in the Antiterrorism Act of 1990 (ATA).<sup>10</sup> Part II then analyzes the limited public record of two modern cases to argue that the government likely exploits FISA's language to encompass quasi-domestic groups that Congress did not intend the statute to cover.

Part III argues that the targeting of such quasi-domestic groups under FISA likely violates the Fourth Amendment. In so doing, this Part first examines why domestic and international terrorism are treated differently under the Fourth Amendment. After finding that domestic and international terrorism are distinguished by the latter's triggering of the government's foreign policy interests, this Part argues that FISA permits the targeting of groups that do not implicate these interests, posing serious constitutional concerns. This Part concludes by offering a more limited interpretation of FISA's language that avoids potential constitutional violations while staying true to FISA's text.

## I. FISA'S HISTORY AND STATUTORY FRAMEWORK

In order to discern FISA's content and its permissible scope, it is necessary to understand the history and mechanics of the Act. To that end, Section A briefly explores the political landscape in which FISA was enacted. Section B provides an overview of the statutory framework and the warrant-application process.

### A. Electronic Surveillance prior to FISA's Enactment

The law of electronic surveillance changed dramatically in 1967 when the Supreme Court determined in *Katz v United*

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<sup>10</sup> 18 USC §§ 2331–38.

*States*<sup>11</sup> that the Fourth Amendment's warrant requirement applies to the interception of telephonic communications.<sup>12</sup> Although this decision ushered in massive changes to permissible police conduct in investigating ordinary criminal activity, the *Katz* majority explicitly refused to consider whether its decision applied to cases involving national security.<sup>13</sup> One year after this decision, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968,<sup>14</sup> Title III of which sets out wiretapping warrant requirements for domestic criminal investigations. In line with *Katz*, the Act expressly disclaims that it requires warrants in the national-security context.<sup>15</sup>

However, just four years after the passage of Title III, the Court decided that the Fourth Amendment's warrant requirement does apply in domestic national-security cases in *United States v United States District Court for the Eastern District of Michigan*<sup>16</sup> ("Keith"). The case involved a criminal prosecution of three US citizens for conspiracy to bomb a CIA building in Michigan.<sup>17</sup> When the defendants moved to compel the United States to disclose surveillance materials, the government revealed that it had conducted surveillance of one of the defendants without prior judicial approval.<sup>18</sup> The government stated that the surveillance had been authorized by the attorney general "to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government."<sup>19</sup> The Sixth Circuit affirmed the district court's holding that such warrantless electronic surveillance violated the Fourth Amendment because the warrant requirement applies in the domestic national-security context.<sup>20</sup>

The Supreme Court agreed. The Court first held that Title III's national-security disclaimer did not grant authority to the

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<sup>11</sup> 389 US 347 (1967).

<sup>12</sup> See *id.* at 352–53.

<sup>13</sup> *Id.* at 358 n 23.

<sup>14</sup> Pub L No 90-351, 82 Stat 197.

<sup>15</sup> Crime Control Act § 2511(3), 82 Stat at 214, repealed by FISA § 201(c), 92 Stat at 1797. For an account of Title III's attempted codification of a national-security exception after *Katz*, see Owen Fiss, *Even in a Time of Terror*, 31 Yale L & Pol Rev 1, 14 (2012).

<sup>16</sup> 407 US 297 (1972).

<sup>17</sup> *Id.* at 299.

<sup>18</sup> *Id.* at 301.

<sup>19</sup> *Id.* at 299–300 (quotation marks omitted).

<sup>20</sup> See *United States v United States District Court for Eastern District of Michigan, Southern Division*, 444 F2d 651, 667 (6th Cir 1971).

government to engage in warrantless electronic surveillance in cases involving national security, but rather represented a decision of Congress not to limit (or expand) the executive's constitutional powers in this context.<sup>21</sup> It then held that, in cases involving national security, the executive's constitutional powers are limited by the Fourth Amendment's warrant requirement.<sup>22</sup> The Court observed that national-security cases often implicate a unique "convergence of First and Fourth Amendment values."<sup>23</sup> Although the government may have enhanced interests in investigating such cases, "Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs."<sup>24</sup> The Court also expressed concern that the risks of infringement on protected speech were heightened by "the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent."<sup>25</sup>

Although the Court held that the warrant requirement applies in national-security cases, it noted that warrants for "domestic security surveillance" do not necessarily have to meet Title III standards.<sup>26</sup> Rather, the Court stated that:

[T]he application and affidavit showing probable cause need not follow the exact requirements of § 2518 but should allege other circumstances more appropriate to domestic security cases; that the request for prior court authorization could, in sensitive cases, be made to any member of a specially designated court . . . and that the time and reporting requirements need not be so strict as those in § 2518.<sup>27</sup>

The Court recognized several distinctions between "ordinary crime" and domestic security that justified looser warrant requirements:

The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations

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<sup>21</sup> See *Keith*, 407 US at 301–08.

<sup>22</sup> See *id.* at 321.

<sup>23</sup> *Id.* at 313.

<sup>24</sup> *Id.* at 314.

<sup>25</sup> *Keith*, 407 US at 320.

<sup>26</sup> *Id.* at 322.

<sup>27</sup> *Id.* at 323.

against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency.<sup>28</sup>

Importantly, *Keith* limited the applicability of the warrant requirement in the national-security context to surveillance of "domestic organizations,"<sup>29</sup> expressing no opinion on the application of the Fourth Amendment to "activities of foreign powers or their agents."<sup>30</sup> In doing so, the Court left open the possibility that warrantless wiretapping was constitutional in the foreign-intelligence context and set the stage for the passage of FISA.<sup>31</sup>

## B. FISA's Enactment and Mechanics

In the wake of *Keith*, the executive branch's domestic investigatory power for foreign-intelligence purposes was rather nebulous, and concern grew that the executive branch was exploiting this uncertainty and other legal ambiguities to engage in expansive warrantless surveillance.<sup>32</sup> President Richard Nixon's warrantless surveillance of the Democratic Party in the Watergate Complex famously brought this concern to light.<sup>33</sup> The congressional investigation that followed the Watergate scandal unveiled rampant abuse of warrantless wiretaps by the executive branch, including surveillance supposedly related to foreign intelligence that targeted purely domestic political organizations.<sup>34</sup>

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<sup>28</sup> *Id.* at 322.

<sup>29</sup> See *Keith*, 407 US at 308–09. The Court defined a "domestic organization" as a group of US citizens that has "no significant connection with a foreign power, its agents or agencies." *Id.* at 309 n 8. The Court also noted that it would often be difficult to distinguish between domestic and foreign organizations but declined to provide guidance for doing so. See *id.*

<sup>30</sup> *Id.* at 321–22.

<sup>31</sup> See *id.* at 308–09.

<sup>32</sup> See *Intelligence Activities and the Rights of Americans, Book II, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, S Rep No 94-755, 94th Cong, 2d Sess 205 (1976) ("Church Committee Report") (finding that imprecise labels such as "national security," "foreign intelligence," "domestic security," and "subversive activities" led to the use of abusive investigatory techniques). See also David Hardin, Note, *The Fuss over Two Small Words: The Unconstitutionality of the USA PATRIOT Act Amendments to FISA under the Fourth Amendment*, 71 Geo Wash L Rev 291, 305 (2003) (discussing the Church Committee's findings of executive abuses of this warrantless investigatory authority).

<sup>33</sup> See Hardin, Note, 71 Geo Wash L Rev at 304–05 (cited in note 32).

<sup>34</sup> See Church Committee Report at 208–09 (cited in note 32) (finding that organizations on a CIA "Watch List," which allowed the FBI to open incoming and outgoing

Congress passed FISA in 1978 in an attempt to crystallize the domestic surveillance powers of the executive branch in the context of foreign intelligence.<sup>35</sup> The complex legislation that resulted has been amended several times,<sup>36</sup> but, for purposes of this Comment, it is necessary to achieve only a basic understanding of the structure of the warrant-application process.

Acting on the Court's recommendation in *Keith*, FISA mandated the creation of two special courts to consider surveillance applications under the statute: the Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review (FISCR).<sup>37</sup> The chief justice of the Supreme Court appoints district and circuit court judges to sit on these courts for terms no longer than seven years.<sup>38</sup> The government<sup>39</sup> may not ask multiple FISC judges to review the same application; rather, it must appeal adverse decisions to the FISCR.<sup>40</sup>

Each FISA warrant application must meet several requirements. The application must identify the target of the surveillance and describe both the nature of the information sought and the type of communications or activities that would likely be subject to surveillance.<sup>41</sup> The government also must propose procedures to minimize its use of the information sought and must

mail, included the Clergy and Laymen Concerned about Vietnam and the Student Non-violent Coordinating Committee).

<sup>35</sup> See Hardin, Note, 71 *Geo Wash L Rev* at 307 (cited in note 32).

<sup>36</sup> For two of the most significant amendments, see *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001* § 218, Pub L No 107-56, 115 Stat 272, 291, amending 50 USC §§ 1804(a)(7)(B), 1823(a)(7)(B); *FISA Amendments Act of 2008*, Pub L No 110-261 § 403, 122 Stat 2436, 2473-74, amending various sections of Title 50.

<sup>37</sup> See 50 USC § 1803(a)-(b).

<sup>38</sup> 50 USC § 1803(d).

<sup>39</sup> FISA allows any "[f]ederal officer" to apply for a FISA warrant for electronic surveillance. 50 USC § 1804(a). To date, the FBI and NSA are the only government agencies to publicly reveal that their agents use FISA. See, for example, *Testimony of Robert S. Mueller III, Director, FBI, before the United States Senate Committee on the Judiciary*, 108th Cong, 1st Sess (2003) (statement of Robert S. Mueller), online at <http://www.fbi.gov/news/testimony/the-war-against-terrorism-working-together-to-protect-america> (visited Aug 12, 2014) (summarizing recent reforms to the FBI's process for using FISA); *Statement for the Record of NSA Director Lt Gen Michael V. Hayden, USAF, before the House Permanent Select Committee on Intelligence*, 106th Cong, 2d Sess (2000) (statement of Michael V. Hayden), online at [http://www.nsa.gov/public\\_info/speeches\\_testimonies/12apr00\\_dirnsa.shtml](http://www.nsa.gov/public_info/speeches_testimonies/12apr00_dirnsa.shtml) (visited Aug 12, 2014) (acknowledging that the NSA had occasionally sought "FISA authorization to target a U.S. person in the United States").

<sup>40</sup> See Kris and Wilson, 1 *National Security Investigations and Prosecutions 2d* at § 5:4 (cited in note 3).

<sup>41</sup> 50 USC § 1804(a)(2)-(3).

certify that (1) the information sought is deemed to be foreign-intelligence information, (2) a "significant purpose of the surveillance is to obtain foreign intelligence information," and (3) "such information cannot reasonably be obtained by normal investigative techniques."<sup>42</sup>

FISA also requires a submission of facts that establishes probable cause that the target is a "foreign power or an agent of a foreign power."<sup>43</sup> Unlike in Title III, the target of surveillance need not be tied to a specific criminal offense.<sup>44</sup> Instead, to satisfy probable cause, the government must show some linkage to a "foreign power" as outlined in the definitional section of the Act (known as the "targeting provisions").<sup>45</sup>

Because of this peculiar probable cause requirement, the scope of the definitions of "foreign powers" effectively controls the potential reach of FISA-authorized surveillance. FISA lists seven different types of foreign powers, but they basically consist of foreign governments and entities controlled by those governments, foreign-based political organizations, and international terrorist groups.<sup>46</sup> FISA then has two sets of definitions of "agent of a foreign power,"<sup>47</sup> depending on whether the target is a "United States person."<sup>48</sup> There are several differences between the two agency provisions, but the main distinction is that the government must show that US persons *knowingly* engaged in

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<sup>42</sup> 50 USC § 1804(a)(6).

<sup>43</sup> 50 USC § 1804(a)(3)(A). FISA further demands a showing of probable cause that the facilities at which surveillance is directed are being used or will be used by a foreign power or its agent. 50 USC § 1804(a)(3)(B).

<sup>44</sup> See 18 USC § 2518(3)(a) (requiring "probable cause for belief that an individual is committing, has committed, or is about to commit" a specified predicate offense).

<sup>45</sup> 50 USC § 1801(a). Notably though, establishing probable cause that an individual is engaging in international terrorism requires a linkage to criminal activity because international terrorism under FISA denotes acts that violate the criminal laws of the United States. See 50 USC § 1801(c).

<sup>46</sup> See 50 USC § 1801(a).

<sup>47</sup> Compare 50 USC § 1801(b)(1) (providing requirements for targeting "any person other than a United States person"), with 50 USC § 1801(b)(2) (providing requirements for targeting "any person," including US persons). Technically, non-US persons can be targeted under either provision, but it would be impractical to do so under § 1801(b)(2) given the higher standards that it imposes.

<sup>48</sup> In its definition of "United States person," FISA includes citizens and permanent residents. It also includes US corporations and unincorporated associations of which a substantial number of US persons are members, as long as the corporation or association is not also a foreign power. See 50 USC § 1801(i). FISA does not explicitly define "non-US persons," but it can be inferred that the term includes anyone not covered in the definition of US persons.



forbidden activity on behalf of a foreign power.<sup>49</sup> Thus, for example, to surveil a US person suspected of being an al-Qaeda operative, the government would have to show that the person knowingly engaged in international terrorism on behalf of al-Qaeda.

Once the government submits its application, a FISC judge *must* approve the surveillance if he finds that the government has met the above requirements, provided that no US person was considered a foreign power or an agent of a foreign power solely based on activities protected by the First Amendment.<sup>50</sup> This represents the last step in the FISC's involvement with the FISA wiretap process: district court judges, rather than FISC judges, assess the application's compliance with FISA and FISA's compliance with the Fourth Amendment when evidence derived from the wiretaps is challenged in a criminal proceeding.<sup>51</sup>

Finally, after surveillance has been approved, FISA creates unique notice and discovery procedures that make its warrants distinct from, and less burdensome than, Title III warrants. FISA does not require that the government notify the target of surveillance unless the government intends to use information derived from the surveillance in a litigation proceeding,<sup>52</sup> typically a criminal proceeding in front of a US district court. Additionally, the government has to notify the defendant only of the fact that surveillance did occur; it does not have to reveal the timing of the surveillance or turn over the application for surveillance.<sup>53</sup> Indeed, these applications are presumptively not

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<sup>49</sup> See 50 USC § 1801(b)(2)(A)–(E).

<sup>50</sup> 50 USC § 1805(a)(2)(A).

<sup>51</sup> Prior to the PATRIOT Act, prosecuting international terrorists based on FISA-derived evidence was less common, as FISA required the government to show that “the purpose” of the surveillance was foreign intelligence gathering rather than criminal investigation or prosecution. See, for example, *United States v Duggan*, 743 F2d 59, 78 (2d Cir 1984). The PATRIOT Act made it much easier for the government to introduce FISA-derived evidence in criminal proceedings by allowing FISA surveillance when foreign intelligence is only a “significant purpose” of the surveillance. Compare FISA of 1978 § 102, 92 Stat at 1787, with USA PATRIOT Act § 218, 115 Stat at 291.

<sup>52</sup> 50 USC § 1806(c)–(d):

Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person . . . the State . . . shall notify the aggrieved person.

<sup>53</sup> See 50 USC § 1806(c)–(d).

discoverable.<sup>54</sup> This stands in stark contrast to Title III procedures, which generally require notice to the target within ninety days of surveillance regardless of whether the surveillance will be used against the target,<sup>55</sup> and do not permit fruits of electronic surveillance to be used in a criminal proceeding unless the aggrieved person has been given a copy of the warrant application.<sup>56</sup>

## II. FISA'S DEFINITION OF INTERNATIONAL TERRORISM

As noted in Part I, FISA's targeting provisions control the reach of the statute in terms of who can be subject to surveillance. With respect to surveillance of terrorist activities, FISA's definition of "international terrorism"<sup>57</sup> limits the statute's reach. This term is employed in three places in FISA's definitional section. First, FISA designates as a foreign power "a group engaged in international terrorism or activities in preparation therefor[e]."<sup>58</sup> Second, FISA considers any non-US person who "engages in international terrorism or activities in preparation therefore" to be an agent of a foreign power.<sup>59</sup> Finally, for a US person to be considered an agent of a foreign power with respect to terrorist activities, FISA requires the person to "knowingly engage[ ] in . . . international terrorism, or activities that are in preparation therefor[e], for or on behalf of a foreign power."<sup>60</sup> Since individuals are typically targeted as agents of foreign powers under the statute,<sup>61</sup> most surveillance of potential international terrorist activity will have to comply with one of the latter two requirements.

International terrorism has a three-pronged definition in FISA, and all three prongs must be met to satisfy the definition:

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<sup>54</sup> See 50 USC § 1806(g). See also Kris and Wilson, 2 *National Security Investigations* at § 31:4 (cited in note 3) (discussing the presumption against discoverability).

<sup>55</sup> See 18 USC § 2518(8)(d).

<sup>56</sup> See 18 USC § 2518(9).

<sup>57</sup> See 50 USC § 1801(c).

<sup>58</sup> 50 USC § 1801(a)(4).

<sup>59</sup> 50 USC § 1801(b)(1)(C). This is called the "lone wolf" provision. The main difference between this and the parallel provision applicable to US persons is that no agency relationship with a foreign power is required under the lone wolf provision. See Patricia L. Bellia, *The "Lone Wolf" Amendment and the Future of Foreign Intelligence Surveillance Law*, 50 *Vill L Rev* 425, 455 (2005).

<sup>60</sup> 50 USC § 1801(b)(2)(C).

<sup>61</sup> See HR Rep No 95-1283, Part I at 67 (cited in note 5) (noting that entities, not individuals, are meant to be targeted as "foreign powers").

- (c) "International terrorism" means activities that—
- (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;
  - (2) appear to be intended—
    - (A) to intimidate or coerce a civilian population;
    - (B) to influence the policy of a government by intimidation or coercion; or
    - (C) to affect the conduct of a government by assassination or kidnapping; and
  - (3) occur totally outside the United States, or *transcend national boundaries* in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.<sup>62</sup>

Subsections (c)(1) and (c)(2) together limit the applicability of the provision to activities that are serious violations of criminal law in the United States and that are intended to serve typical terrorist goals (intimidating a population, influencing government policy, and so forth).<sup>63</sup> Subsection (c)(3), however, is the focus of this Comment, as its language regarding criminal activities that "transcend national boundaries" defines the extent of the international nexus that is required to permit FISA surveillance. This internationality requirement is FISA's attempt to draw the line between domestic and international terrorism.

This Part seeks to understand precisely where FISA draws the line between domestic and international terrorist groups. It begins in Section A by considering the text and legislative history of FISA's definition of international terrorism. Section B then looks to a similar provision in the Antiterrorism Act to divine how courts might apply the international terrorism provision in FISA. Finally, Section C locates the outer boundary of FISA's definition of international terrorism by examining the limited public record of two modern FISA cases. This analysis finds minimal discernible international connections and therefore argues that FISA's definition of international terrorism has been

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<sup>62</sup> 50 USC § 1801(c) (emphasis added).

<sup>63</sup> The language of subsection (c)(1) also covers activities that individuals execute or plan to execute outside the United States that would be criminal violations in the United States. See Kris and Wilson, 1 *National Security Investigations* at § 8:25 (cited in note 3).

stretched further into the domestic sphere than was originally intended by Congress.

A. FISA's Definition of International Terrorism: Text and Legislative History

The text of FISA's international terrorism provision reveals very little about the line that Congress intended to draw between domestic and international terrorism. It is apparent that terrorist groups whose activities "occur totally outside the United States" are international terrorists.<sup>64</sup> It also seems clear that the phrase "transcend national boundaries" is supposed to demarcate the outer limits of all other international terrorist activities.<sup>65</sup> But this phrase is not very intuitively meaningful.

Merriam-Webster defines "transcend" to mean, "to rise above or go beyond the limits of."<sup>66</sup> So perhaps, following the plain language of the statute, a terrorist group is sufficiently international to qualify for FISA surveillance if anything it does that contributes to its unlawful activities crosses a US border. Even for 1978, though, this seems like an overinclusive interpretation. If a member of a white supremacist group in Alaska planned an attack on Alaskan soil by conferring with another member of the group in Washington State, it does not seem as though these individuals should be considered international terrorists simply because their communications passed through Canadian territory.<sup>67</sup>

In modern times, when international contacts are much more frequent, such an interpretation could lead to even more absurd results. Would a purely domestic anarchist group be engaged in international terrorism because a member visited a German citizen's blog to learn how to build a bomb? Such an incidental international link should not be sufficient to transform the entire nature of the activity. Thus, the plain language of the statute does not satisfactorily define where the legislature intended to draw the line between international and domestic terrorism.

FISA's legislative history is a bit more helpful in locating this line, although it leaves much to be desired. As an initial matter,

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<sup>64</sup> 50 USC § 1801(c)(3).

<sup>65</sup> 50 USC § 1801(c)(3).

<sup>66</sup> *Webster's Third New International Dictionary* 2426 (Merriam 1967).

<sup>67</sup> Indeed, FISA's legislative history indicates that similar facts would not support a finding of international terrorism. See text accompanying notes 79–83.

Congress considered domestic and international terrorist groups to be mutually exclusive. The Senate report accompanying FISA states that “[t]he committee does not intend to authorize electronic surveillance under any circumstances for the class of groups included by the Supreme Court within the scope of the *Keith* decision requiring judicial warrants for alleged threats to security of a purely domestic nature.”<sup>68</sup> The 1978 House report similarly notes that its definition of international terrorism “would not include groups engaged in terrorism of a purely domestic nature, which if surveillance is in order, should be subjected to surveillance under chapter 119 of title 18.”<sup>69</sup>

Given these fairly clear statements of intent, a useful initial exercise in discerning the scope of the eventually adopted “transcend national boundaries” language is to analyze the linguistic iterations leading up to its adoption. The FISA legislature adopted this phrase from a similar but more expansive definition of international terrorism in President Jimmy Carter’s Executive Order 12036,<sup>70</sup> which was issued in part “to provide a foundation for the drafting of statutory charters” related to foreign-intelligence activities.<sup>71</sup> In early Senate hearings on FISA, John Shattuck, the director of the ACLU, and Jerry Berman, the executive director for the Center for Democracy and Technology, both suggested that the language from the Executive Order would more clearly distinguish international and domestic terrorist groups than existing language requiring only that terrorism be conducted “for or on behalf of a foreign power.”<sup>72</sup>

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<sup>68</sup> *Foreign Intelligence Surveillance Act of 1978*, S Rep No 95-701, 95th Cong, 2d Sess 18 (1978), reprinted in 1978 USCCAN 3973, 3987.

<sup>69</sup> HR Rep No 95-1283, Part I at 30 (cited in note 5).

<sup>70</sup> 3 CFR 134 (1978). The executive order was more expansive in terms of the activities it considered terrorist acts. See 3 CFR 134 (explicitly including violent destruction of property as a terrorist activity). However, the subsection establishing the international nexus is almost identical to the provision found in FISA. See 3 CFR 134.

<sup>71</sup> See Jimmy Carter, *United States Foreign Intelligence Activities: Statement on Executive Order 12036*, 14 Weekly Comp Pres Docs 214, 214 (1978). The executive order also sought to ensure that foreign-intelligence activities were conducted lawfully and were subject to effective oversight. See *id.*

<sup>72</sup> *Foreign Intelligence Surveillance Act of 1978, Hearings on S 1566 before the Subcommittee on Intelligence and the Rights of Americans of the Select Committee on Intelligence*, 95th Cong, 2d Sess 125–26 (1978). Shattuck urged that the definition of terrorism “be amended to make it clear, as the Executive Order does, that we are talking about international, or internationally based groups and not domestic groups.” *Id.* at 125. Berman expressed concern that the current language could permit surveillance of groups “like the Communist Party USA because they allegedly were acting for or on behalf of a foreign power in some abstract sense.” *Id.* at 126. He believed that the language from the executive order more clearly limited surveillance to international terrorist groups. See *id.*

Subsequent versions of the House bill adopted the language of the executive order almost wholesale,<sup>73</sup> but not for the reasons that Shattuck and Berman articulated. Rather, the House viewed foreign-based terrorism as underinclusive, since terrorist groups often have no cognizable base and because it is possible for truly international groups to be based in the United States.<sup>74</sup> The Senate persisted in its use of the “foreign-based terroris[t]” language in its version of the bill, though, apparently believing that this language required an international nexus that was more protective of purely domestic and even quasi-domestic terrorist groups.<sup>75</sup> To resolve disagreement between the two houses on this and other provisions contained in the House amendments, managers from both houses issued a conference report that recommended (among other things) the adoption of the House’s international terrorism language.<sup>76</sup> Notably, the report seems to express a concern that this language could allow for the targeting of some domestic organizations.<sup>77</sup> Thus, the path of this particular provision reveals not only a battle over the extent to which marginally international terrorist groups should be covered by FISA, but also some uncertainty and concern about the reach of the language that Congress eventually adopted.

The House report provides the most thorough explanation of the legislature’s intended scope of the international terrorism definition generally and the internationality requirement specifically. In fact, given that courts faced with FISA challenges do not engage in public interpretations of this language,<sup>78</sup> the House report may be the only authority that provides meaningful insight into this provision. The report frames its analysis by noting that activities that transcend national boundaries must have a “substantial international character.”<sup>79</sup> It then proceeds

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<sup>73</sup> See HR Rep No 95-1283, Part I at 2 (cited in note 5).

<sup>74</sup> See id at 30.

<sup>75</sup> S Rep No 95-701 at 17–18 (cited in note 68) (stating that it did not intend the foreign-based terrorism provision to apply to “a domestic group with some foreign aspects to it”).

<sup>76</sup> *Foreign Intelligence Surveillance Act of 1978 Conference Report*, HR Rep No 95-1720, 95th Cong, 2d Sess 21 (1978), reprinted in 1978 USCCAN 4048, 4050.

<sup>77</sup> See id. As a condition of adopting the House’s international terrorism language, the conferees recommended that such a group’s activities be more closely tied to violations of criminal law “because domestic organizations may be included.” Id.

<sup>78</sup> Because of several FISA procedures, district court judges do not publicly reveal their bases for finding that a FISA application meets the internationality requirement. For a discussion of these procedures, see Part II.C.1.

<sup>79</sup> HR Rep No 95-1283, Part I at 46 (cited in note 5).

to list several activities of otherwise-domestic terrorist groups that would or would not meet this standard:

The fact that an airplane is hijacked while flying over Canada between Alaska and Chicago does not by itself make the activity international terrorism. A domestic terrorist group which explodes a bomb in the international arrivals area of a U.S. airport does not by this alone become engaged in international terrorism. However, if a domestic group kidnaps foreign officials in the United States or abroad to affect the conduct of that foreign government this would constitute international terrorism. If a domestic group travels abroad and places a bomb in a foreign airplane, this too would be international terrorism.<sup>80</sup>

This excerpt is not extraordinarily illuminating, but it does help establish some data points. First, the fact that a hijacking of a domestic flight over Canadian airspace does not transcend national boundaries indicates that the standard should not be satisfied by every activity that crosses a US border. At the other end of the spectrum, travelling to a foreign destination to engage in terrorist activities does meet the internationality requirement. The examples between these two extremes do not substantially narrow the focus, although it appears that targeting politically salient international interests within the United States creates a sufficient international nexus.

Beyond these examples, the House report further notes that a domestic terrorist group has a sufficient international nexus if it receives "direction or substantial support" from a foreign government or terrorist group.<sup>81</sup> This support must be "material, technical, training, or other substantive support" of the terrorist activities, rather than mere "moral or vocal support."<sup>82</sup> Finally, and importantly, the report states that "[a]ctivities parallel to or consistent with the desires of a foreign power do not by themselves satisfy the requirement that the foreign power is directing the domestic group."<sup>83</sup>

Three general conclusions can be drawn from this report. First, it seems clear that the phrase "transcend national

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<sup>80</sup> Id.

<sup>81</sup> Id.

<sup>82</sup> Id. The report also states, rather unhelpfully, that "[d]irection means direction and does not mean suggestions." Id.

<sup>83</sup> HR Rep No 95-1283, Part I at 46 (cited in note 5).

boundaries” was not intended to reach as far as its plain meaning permits. As was noted, the language could encompass any activities that go beyond US borders,<sup>84</sup> but the House report seems to envision a more substantial international connection. Second, while the examples might be seen as establishing the outer boundaries of a necessary international nexus, the legislature left plenty of gray area in which the government can operate. Third, this loose demarcation of the necessary international nexus becomes more difficult to interpret with each passing year, as the Internet increasingly makes international connections a part of everyday life.

## B. The Antiterrorism Act of 1990 and International Terrorism

The legislative history is helpful in outlining the international nexus necessary for an otherwise domestic terrorist group to qualify for FISA surveillance, but case law is always the better place to look in order to fill in such amorphous standards.<sup>85</sup> Due to the complete lack of FISA case law analyzing the sufficiency of a target’s international connection,<sup>86</sup> it is worthwhile to briefly discuss how courts have interpreted nearly identical language in a similar context. The Antiterrorism Act of 1990 allows US nationals to seek a civil remedy for injuries sustained as a result of international terrorism.<sup>87</sup> The ATA essentially adopted FISA’s definition of international terrorism,<sup>88</sup> so ATA cases may provide some insight into how a court should interpret FISA’s

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<sup>84</sup> For a discussion of the potential breadth of the statutory language, see text accompanying notes 66–67.

<sup>85</sup> See Norman Singer and J.D. Shambie Singer, 2B *Sutherland Statutes and Statutory Construction* § 50:1 (West 7th ed 2007).

<sup>86</sup> For a discussion of the procedural features of FISA responsible for this lack of case law, see Part II.C.1.

<sup>87</sup> See 18 USC §§ 2331–38. This statute is most often used to pursue financial supporters of terrorism. See Jennifer A. Rosenfeld, *The Antiterrorism Act of 1990: Bringing International Terrorists to Justice the American Way*, 15 *Suffolk Transatl L J* 726, 727–28 (1992).

<sup>88</sup> Both statutes employ the same “transcend national boundaries” standard. However, the ATA also internationalizes terrorist activities occurring “primarily outside” the United States, while FISA internationalizes only terrorist activities occurring “totally outside” the United States. Compare 18 USC § 2331(1)(C), with 50 USC § 1801(c)(3). This semantic difference should not make the ATA’s definition of international terrorism broader than FISA’s, because terrorist activities that occur primarily outside the United States under the ATA will also very likely transcend national boundaries under FISA. The ATA also defines domestic terrorism in contradistinction to international terrorism by confining it to activities that “occur primarily within the territorial jurisdiction of the United States.” 18 USC § 2331(5)(C).



international terrorism provision. An important difference between the two contexts is that a court interpreting the validity of a FISA application needs only to find that the government had probable cause to believe that an international nexus existed.<sup>89</sup> Courts applying the ATA, by contrast, need to actually find the existence of this nexus.<sup>90</sup> Thus, there should be a lower internationality threshold in the FISA context. Even so, ATA cases can demonstrate the types of activities for which the government will need to establish probable cause in the FISA context.

Most ATA case law focuses on issues other than the necessary international connection,<sup>91</sup> but a couple of interesting insights can be gleaned from the cases. First, an international transfer of funds to a foreign terrorist organization appears to be sufficient to create an international nexus.<sup>92</sup> Second, at least one court applying this standard indicated that courts ought not to interpret it very liberally. In *Smith v Islamic Emirate of Afghanistan*,<sup>93</sup> the estate of a 9/11 victim brought suit against the Islamic Emirate of Afghanistan, al-Qaeda, and Osama bin Laden, among others.<sup>94</sup> In considering whether these actors were international terrorists under the ATA, Judge Harold Baer noted that it was at least questionable that their actions in connection with 9/11 constituted international terrorism because many of the relevant activities occurred within the United States.<sup>95</sup> While he concluded that the training and funding that the terrorists received abroad satisfied the international-nexus requirement, Baer expressed concern that “an expansive interpretation of ‘international terrorism’ might render ‘domestic terrorism’ superfluous.”<sup>96</sup> In other words, Baer’s somewhat hesitant application of this standard was influenced by his concern that the ATA’s definition of “domestic terrorism” could be rendered a

<sup>89</sup> See 50 USC § 1805(a)(2).

<sup>90</sup> See 18 USC § 2333(a) (requiring that a plaintiff be injured “by reason of an act of international terrorism”).

<sup>91</sup> See, for example, *Boim v Holy Land Foundation for Relief and Development*, 549 F3d 685, 688–90 (7th Cir 2008) (addressing whether the ATA imposes secondary liability).

<sup>92</sup> See *Wultz v Islamic Republic of Iran*, 755 F Supp 2d 1, 49 (DDC 2010) (holding that the plaintiffs pled facts showing that wiring money from the United States to China, allegedly to fund a terrorist organization, “transcended national boundaries”); *Boim v Quranic Literacy Institute*, 127 F Supp 2d 1002, 1012 n 7 (ND Ill 2001) (holding that providing funds to Hamas through Swiss financial intermediaries meets this standard).

<sup>93</sup> 262 F Supp 2d 217 (SDNY 2003).

<sup>94</sup> *Id* at 220.

<sup>95</sup> *Id* at 221.

<sup>96</sup> *Id* at 221–22.

nullity. Although FISA does not define “domestic terrorism,” the legislative history’s clear distinction between domestic and international terrorist groups similarly weighs in favor of a stricter internationality requirement.

### C. Constructing the Internationality Requirement from FISA Cases

Three very basic points can be distilled from the preceding analysis: First, to obtain approval for FISA surveillance in the international terrorism context, the government could feasibly employ FISA’s text to target groups with tangential international connections.<sup>97</sup> Second, Congress’s desire that international terrorist groups have a substantial international character should limit the reach of the statute’s text.<sup>98</sup> Third, although FISA does not define domestic terrorism, Congress did not intend that FISA cover domestic terrorist activities.<sup>99</sup> Thus, interpretations of FISA’s internationality requirement should be limited by the extent to which they may cause international terrorism to overlap with the domain of domestic terrorism.<sup>100</sup>

However, the foregoing analysis does not reveal how the internationality requirement is actually applied in modern cases, nor does it reveal whether this application is consistent with FISA’s text and legislative history. To answer these questions, this Section first points out the procedural aspects of FISA that make answering these questions so difficult. Then, it reconstructs the facts of two recent cases in order to argue that the government may be expanding the definition of international terrorism beyond its intended boundaries.

#### 1. FISA’s procedural deficiencies.

Unfortunately, the following cases cannot definitively prove whether FISA currently operates as the enacting Congress intended. Such knowledge is shielded from the public by several procedural requirements that kick in when the government decides to prosecute an alleged international terrorist using evidence derived from FISA surveillance. These procedures make it possible for the government to push FISA’s targeting language

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<sup>97</sup> See notes 62–66 and accompanying text.

<sup>98</sup> See notes 79–83 and accompanying text.

<sup>99</sup> See notes 4–5 and accompanying text.

<sup>100</sup> See notes 68–77 and accompanying text.

past its limits and make discovery of such abuse especially difficult. This potential for abuse makes even an imperfect inquiry into the government's compliance all the more necessary.

First, the bases for the vast majority of FISA warrants are never reviewed after they receive FISC approval because of FISA's unique notice procedures. FISA requires the government to provide notice to a target of surveillance only when the government seeks to use information "obtained or derived from" FISA surveillance in an adversarial proceeding.<sup>101</sup> The majority of FISA wiretaps never result in criminal prosecution and are therefore never reviewed by a district court.<sup>102</sup> Once the government does decide to prosecute based on evidence derived from FISA surveillance, it invites scrutiny of its probable cause finding by a district court judge. However, if the government expansively interprets FISA's internationality requirement, it can avoid such oversight when it never uncovers a subsequent international connection—the cases most likely to receive the greatest ex post scrutiny—simply by exercising its prosecutorial discretion.

Second, even when the government does prosecute based on FISA-derived evidence, the barriers to discovery of FISA warrant applications make it difficult to ascertain the government's basis for initiating FISA surveillance. Once a defendant files a motion to disclose the FISA application, FISA permits the government to submit an affidavit from the attorney general stating that "disclosure or an adversary hearing would harm the national security of the United States."<sup>103</sup> Needless to say, the government presents this affidavit in response to every motion to disclose or suppress.<sup>104</sup> And once the government submits that affidavit, the district court judge can require disclosure only when "such disclosure is necessary to make an accurate determination of the legality of the surveillance."<sup>105</sup> At the time of this writing, only one court has ever deemed it necessary to require disclosure of FISA application materials, and then only because

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<sup>101</sup> 50 USC § 1806(c). See also Kris and Wilson, 2 *National Security Investigations and Prosecutions 2d* at §§ 29:4–29:5 (cited in note 3). Notice is likely not required when FISA evidence is used to obtain a Title III warrant. See *id.* at § 29:4.

<sup>102</sup> The government does not release enough FISA data to absolutely confirm this claim, but it can be inferred from parallel Title III data.

<sup>103</sup> 50 USC § 1806(f).

<sup>104</sup> See *United States v Kashmiri*, 2010 WL 4705159, \*3 (ND Ill) (implying that such affidavits are always presented, by observing that "a court has never permitted defense counsel to review FISA materials").

<sup>105</sup> 50 USC § 1806(f).

the defendant's counsel had top secret security clearance.<sup>106</sup> Moreover, that court was later reversed by the Seventh Circuit.<sup>107</sup>

One major problem with this practice is that the facts that constitute probable cause are never made public. This makes it very difficult for district court judges (and defendants) to evaluate whether the government has established a sufficient international connection. Furthermore, because the government almost never has to reveal FISA applications, it is difficult for the defendant to even argue that probable cause did not exist because he does not know when the surveillance started.<sup>108</sup> While the district court judge does see the application, his or her estimation of probable cause could be affected by hindsight bias in cases in which sufficient international links are exposed as a result of the surveillance. This is especially likely to occur considering that only the government is given the opportunity to present arguments to the judge with the full set of facts.

Finally, the shortcomings of the adversarial process in FISA prosecutions also contribute to the lack of transparency and the potential for government abuse. A defendant who actually receives notice of FISA surveillance can challenge that surveillance in a suppression hearing, but it is a hopeless endeavor. Once the attorney general submits an affidavit, FISA requires a court to examine the FISA application and materials *ex parte* and *in camera* in order to determine its compliance with FISA's procedures.<sup>109</sup> This procedure means that courts do not have to thoroughly justify their findings in orders or opinions. Nearly every court considering a defendant's motion to suppress FISA-derived evidence uses almost-boilerplate language to conclude that FISA's requirements have been met.<sup>110</sup> Indeed, there does not seem to be one published instance of a district court judge

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<sup>106</sup> See *United States v Daoud*, 2014 WL 321384, \*3 (ND Ill) (noting that it was the first court to require such disclosure).

<sup>107</sup> See generally *United States v Daoud*, 755 F3d 479 (7th Cir 2014), supplemented by *United States v Daoud*, 2014 WL 3734136 (7th Cir 2014) (redacted opinion).

<sup>108</sup> See *Kashmiri*, 2010 WL 4705159 at \*6 (acknowledging the "frustrating position" that the defendant is in due to a lack of information).

<sup>109</sup> See 50 USC § 1806(f).

<sup>110</sup> See, for example, *United States v Sherifi*, 793 F Supp 2d 751, 761 (ED NC 2011):

The court is satisfied that probable cause existed that the targets of surveillance or physical searches were foreign powers or agents of a foreign power, that this finding was not based solely on the basis of activities protected by the First Amendment, and that the facilities to be surveilled and property to be searched were owned, used, possessed by, or were in transit to or from an agent of a foreign power.

finding an insufficient international nexus after conducting in camera review.

The net effect of these procedural deficiencies has been to make ex post litigation an essentially toothless mode of FISA regulation. As a result, more responsibility is placed on the FISC to regulate FISA applications ex ante. However, from 2009–2012, the FISC received 6,305 FISA applications, rejected only 2, and modified only 98, or around 1.6 percent.<sup>111</sup> While these statistics closely track warrant acceptance rates under Title III,<sup>112</sup> in the Title III context the government at least faces the possibility that its warrant will be invalidated in a suppression hearing if it does not meet Title III's requirements.<sup>113</sup> The government does not have the same concern in the FISA context since there does not appear to be one instance of a judge granting a motion to suppress FISA-derived evidence. This lack of ex post enforcement makes the FISC's warrant-approval rates more troubling, especially given the government's demonstrated willingness to stretch ambiguous language in the name of national security when it faces little meaningful oversight.<sup>114</sup> Furthermore, since the bulk of FISA surveillance is never subject to any form of ex post regulation, there is a real concern that cases such as the two discussed below represent just a sampling of government overreaching.

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<sup>111</sup> For the data used to calculate these statistics, see US Department of Justice, Office of Legislative Affairs, *FISA Annual Reports to Congress*, online at <http://www.fas.org/irp/agency/doj/fisa> (visited Aug 12, 2014) (hosting reports with data from 2009 to 2012).

<sup>112</sup> See Administrative Office of the US Courts, *Table 7 Authorized Intercepts Granted Pursuant to 18 U.S.C. § 2519 as Reported in Wiretap Reports for Calendar Years 2002–2012* (2012), online at <http://www.uscourts.gov/uscourts/Statistics/WiretapReports/2012/Table7.pdf> (visited Aug 12, 2014).

<sup>113</sup> Every year, prosecuting officials file reports to account for arrests, convictions, and trials derived from Title III wiretaps in years previous. A summary of these supplemental reports from 2003 to 2010 reveals that there were 241 motions to suppress evidence obtained from Title III wiretaps during that time. Of those, 150 were denied, 18 were granted, and 73 were pending as of December 31, 2012. See Administrative Office of the US Courts, *Table 8 Summary of Supplementary Reports for Intercepts Terminated in Calendar Years 2003 through 2010* (2012), online at <http://www.uscourts.gov/uscourts/Statistics/WiretapReports/2012/Table8.pdf> (visited Aug 12, 2014).

<sup>114</sup> See note 32. Compare Motion and Memorandum of Law in Support of Motion to Suppress Fruits of Electronic Surveillance Conducted Pursuant to the Foreign Intelligence Surveillance Act, *United States v Abdul-Latif*, Criminal Action No 11-228, \*1 (WD Wash filed May 25, 2012) (“Abdul-Latif Motion to Suppress”), with Government's Unclassified Memorandum in Opposition to Defendant's Motion to Suppress the Fruits of Electronic Surveillance Pursuant to the Foreign Intelligence Surveillance Act, *United States v Abdul-Latif*, Criminal Action No 11-228, \*32–33 (WD Wash filed July 27, 2012) (“Government Reply to Abdul-Latif Motion to Suppress”).

2. The modern international nexus: *Abdul-Latif v United States* and *United States v Duka*.

FISA's procedural deficiencies make it very difficult to determine how the FISC and other courts apply the "transcend national boundaries" standard in modern cases. However, based on the public facts, complaints, indictments, and motions filed in two recent cases, there is at least some evidence that the government adopts a greatly relaxed interpretation of the international-nexus requirement. Of course, it is always possible that facts known only to the government diminish the utility of these examples. But the informational asymmetries inherent in the FISA regime should encourage, rather than discourage, efforts to reconstruct the facts of these cases.

*Abdul-Latif v United States*<sup>115</sup> involves a man named Abu Khalid Abdul-Latif (also known as Joseph Davis), who pleaded guilty in December 2012 to conspiracy to murder officers and agents of the United States and conspiracy to use weapons of mass destruction.<sup>116</sup> Officers arrested Abdul-Latif on June 22, 2011, during a staged weapons buy.<sup>117</sup> Three weeks of surveillance had revealed that he was conspiring with Walli Mujahidh (also known as Frederick Domingue Jr) and a friend-turned-FBI-informant to attack a military entrance processing station in Seattle using automatic weapons and hand grenades.<sup>118</sup> Both of the conspirators were US citizens.<sup>119</sup>

The government stated that its investigation of Abdul-Latif began on June 3, 2011, when someone that Abdul-Latif contacted to join the conspiracy reported him to the FBI.<sup>120</sup> While much of this investigation was based on conversations recorded by this informant, at some point prior to June 23, 2011, the FBI obtained a FISA warrant for physical and electronic surveillance of Abdul-Latif.<sup>121</sup>

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<sup>115</sup> No 11-228, slip op (WD Wash Aug 30, 2012).

<sup>116</sup> Plea Agreement, *United States v Abdul-Latif*, Criminal Action No 11-228, \*1 (WD Wash filed Dec 6, 2011). He was eventually sentenced to eighteen years in prison. See Judgment in a Criminal Case, *United States v Abdul-Latif*, Criminal Action No 11-228, \*2 (WD Wash filed Mar 25, 2013).

<sup>117</sup> Amended Complaint for Violations, *United States v Abdul-Latif*, Criminal Action No 11-228, \*34-36 (WD Wash filed June 23, 2011) ("Abdul-Latif Amended Complaint").

<sup>118</sup> *Id.* at \*4.

<sup>119</sup> Abdul-Latif Motion to Suppress at \*11 n 12 (cited in note 114).

<sup>120</sup> Abdul-Latif Amended Complaint at \*12 (cited in note 117).

<sup>121</sup> The government charged Abdul-Latif on June 23, 2011 and provided him notice of FISA surveillance on October 13, 2011. See *Abdul-Latif*, No 11-228, slip op at 1-2.

Based on the publicly available information in the case, it is likely that the government targeted Abdul-Latif under FISA as an individual “knowingly engag[ing] in . . . international terrorism, or activities that are in preparation therefor[e]”<sup>122</sup> on behalf of an international terrorist group. However, looking at the case after the fact, the conspiracy does not seem to have any international link: US citizens who apparently never left the country, nor received outside training or funding, planned an attack on domestic soil.<sup>123</sup> This certainly does not seem like the type of case for which FISA was intended. The relevant question, though, is not whether the government eventually established an international nexus, but whether there was probable cause to believe it existed at the time of the FISA application. Since it is unclear when the government submitted its FISA application, an examination of all possible international connections in the case can give at least some insight into the government’s definition of conduct that transcends national boundaries.

The defendant’s suppression motion and the government’s reply (at least the unclassified portions) focus on Abdul-Latif’s YouTube activity as a potential source of this international link.<sup>124</sup> Abdul-Latif has a series of videos on his YouTube account in which he preaches about Islam and the need for unification among Muslims.<sup>125</sup> In one video posted a little over a month before the government formally began its investigation, Abdul-Latif urged, “We must establish jihad. I don’t care what anybody says about that. You can turn me into the FBI or whatever. We need to establish jihad with the tongue, with the heart, and with the hand.”<sup>126</sup> Additionally, Abdul-Latif communicated with other YouTube members on comment boards and commented on the videos of YouTube account holders from foreign countries.<sup>127</sup> In

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<sup>122</sup> 50 USC § 1801(b)(2)(C).

<sup>123</sup> See generally Abdul-Latif Amended Complaint (cited in note 117).

<sup>124</sup> See Abdul-Latif Motion to Suppress at \*1 (cited in note 114); Government’s Reply to Abdul-Latif Motion to Suppress at \*32–33 (cited in note 114).

<sup>125</sup> See generally, for example, akabdullatif, *The Need to Be Unified* (Jan 17, 2011), online at <http://www.youtube.com/watch?v=AeK9qWfd2Nc&list=UU7x4LqjhcPXhiofWaoI41hA> (visited Aug 12, 2014) (urging Muslims to unify internationally); akabdullatif, *Envy of the Kuffar* (May 1, 2011), online at <http://www.youtube.com/watch?v=osTWFIZbtgw&list=UU7x4LqjhcPXhiofWaoI41hA> (visited Aug 12, 2014) (imploring viewers to follow the example of the prophet Muhammad and avoid envy).

<sup>126</sup> See akabdullatif, *Envy of the Kuffar* at 7:20 (cited in note 125).

<sup>127</sup> See Abdul-Latif Motion to Suppress at \*1 (cited in note 114) (implying that Abdul-Latif commented on videos posted by foreigners by admitting that these comments were the “extent of his involvement in international affairs”). It is difficult to tell whether any

its sentencing motion, the government pointed to one such comment board, in which Abdul-Latif wrote, “[M]ay Allah bless [Osama bin Laden] and all Muslims who . . . perform the jihad against the yahoodi – the american terrorist government.”<sup>128</sup>

Putting to one side the First Amendment concerns associated with using this Internet activity as a basis for probable cause,<sup>129</sup> there is a strong argument that such activity lacks a “substantial international character”<sup>130</sup> such that it transcends national boundaries under FISA. There is not a perfect 1978 analogue to anonymously proselytizing on YouTube comment boards, but this type of activity seems to create the sort of incidental international connections that Congress did not intend FISA to cover,<sup>131</sup> especially considering that Abdul-Latif may not have known that he was communicating with users from different countries. Perhaps it could be argued that his jihadist postings made him an accomplice of international terrorists who would be likely to act on his advice.<sup>132</sup> However, it seems a stretch to say that his vague exhortations of jihad to a virtually nonexistent audience—the videos had negligible viewing numbers before his arrest became public<sup>133</sup>—could make him a criminal accomplice to unspecified acts of terror.

Even if Abdul-Latif’s YouTube activity could transcend national boundaries, it would take creative legal posturing to argue that it did so “in terms of the means by which [his conspiracy was] accomplished.”<sup>134</sup> There is no evidence that Abdul-Latif received “direction or substantial support”<sup>135</sup> for his

of these accounts were associated with foreigners, but the defendant appears to concede as much in his motion to suppress.

<sup>128</sup> See Government’s Sentencing Memorandum, *United States v Abdul-Latif*, Criminal Action No 11-228, \*19–20 (WD Wash filed Mar 19, 2013).

<sup>129</sup> FISA prohibits a finding that a US person is an agent of a foreign power “solely upon the basis of activities protected by the first amendment.” 50 USC § 1805(a)(2)(A).

<sup>130</sup> HR Rep No 95-1283, Part I at 46 (cited in note 5).

<sup>131</sup> See notes 77–80 and accompanying text.

<sup>132</sup> See 18 USC § 2332b(a)(2) (prohibiting attempts, conspiracies, and threats to engage in “[a]cts of terrorism transcending national boundaries”).

<sup>133</sup> It appears that each of Abdul-Latif’s videos had, with one exception, less than thirty total viewers each before his arrest. See generally, for example, akabdullatif, *Envy of the Kuffar* (cited in note 125). (The author derived the number of views over time by selecting the statistics button under the total views.) The exception is a video called *The True Hijab*, which does not call for jihad. See generally akabdullatif, *The True Hijab* (Mar 5, 2011), online at <https://www.youtube.com/watch?v=UImnyhV8ujU&list=UU7x4LqjhcPXhiofWaoI41hA> (visited Aug 12, 2014).

<sup>134</sup> 50 USC § 1801(c)(3).

<sup>135</sup> HR Rep No 95-1283, Part I at 46 (cited in note 5).



conspiracy on YouTube. It would probably have to be argued that his YouTube activity provided him the moral support necessary to attempt his attack. But even if that is true, the legislative history specifically states that "moral or vocal support" is not enough to create the requisite international nexus.<sup>136</sup>

The only other publicly available information that could have helped establish an international nexus is that Abdul-Latif sought to attack a military installation.<sup>137</sup> This argument might have some force, especially since Abdul-Latif's intention was to impair the US military in its war against terrorism abroad.<sup>138</sup> However, *Keith* likely forecloses any argument that targeting a domestic military base is sufficient to transform the activity into international terrorism. In *Keith*, a domestic terrorist group conspired to bomb a CIA building in Michigan.<sup>139</sup> The bombing of a CIA facility could have greater international consequences than Abdul-Latif's planned attack on the military entrance processing station. Yet the *Keith* Court observed that the planned CIA bombing was unrelated to foreign affairs,<sup>140</sup> and Congress clearly stated that the type of domestic terrorist group in *Keith* is the kind that FISA was *not* intended to cover.<sup>141</sup>

Nor is Abdul-Latif's case the only one that evidences an expansive interpretation of FISA's internationality requirement. In *United States v Duka*,<sup>142</sup> the government used FISA surveillance to foil a planned attack on a military base in New Jersey by a group of five men "inspired by" al-Qaeda.<sup>143</sup> The investigation began in January 2006 when a Circuit City employee showed police a video that had been dropped off for copying and that depicted the defendants at a firing range yelling "jihad in the [United] States."<sup>144</sup> The investigation lasted eighteen months

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<sup>136</sup> *Id.*

<sup>137</sup> See Abdul-Latif Amended Complaint at \*16 (cited in note 117). One of the weaknesses inherent in this type of FISA analysis is that there are other possible international connections that are not publicly available. For example, it is possible that Abdul-Latif's coconspirator or the government informant had the necessary international ties. Notably, though, there is no indication of any international activity by any members of the group.

<sup>138</sup> *Id.* at \*37.

<sup>139</sup> *Keith*, 407 US at 299.

<sup>140</sup> *Id.* at 321–22 (stating that "this case involves only the domestic aspects of national security").

<sup>141</sup> See S Rep No 95-701 at 18 (cited in note 68).

<sup>142</sup> 671 F3d 329 (3d Cir 2011).

<sup>143</sup> Superseding Indictment, *United States v Shnewer*, Criminal Action No 07-459, \*3 (D NJ filed Jan 15, 2008).

<sup>144</sup> *Duka*, 671 F3d at 333–34.

and ended when the FBI arrested all five defendants after they completed a controlled arms purchase from a cooperating witness.<sup>145</sup> In the district court, the defendants filed motions to suppress the FISA-obtained evidence, arguing in part that the government did not have probable cause to believe that they were agents of a foreign power.<sup>146</sup> The judge rejected these motions without explanation.<sup>147</sup>

This case has a few interesting factual parallels to *Abdul-Latif*: the *Duka* group had no ostensible connections to a foreign terrorist group, the plot involved a planned attack on a military installation, and one of the group members had viewed and shared al-Qaeda propaganda videos as well as videos of jihadist beheadings on his laptop.<sup>148</sup> As discussed above, none of these factors militate in favor of finding that FISA's internationality requirement was satisfied.

Unlike *Abdul-Latif*, though, this case presents at least two other potential international connections. First, none of the defendants were born in the United States, and only two were US citizens.<sup>149</sup> While this fact provides an intuitive international connection, it should not be sufficient to satisfy FISA's internationality requirement because nothing about the defendants' citizenship or countries of origin necessarily contributed to the "means by which"<sup>150</sup> their conspiracy was accomplished. Indeed, it is difficult to imagine how an individual's citizenship or country of origin, on its own, could contribute to the means by which terrorist activities are carried out.

The second potential international link in this case is more substantial. The government's search warrant affidavit alleged that, during two recorded conversations, one of the defendants "stated that they would need to receive a 'fatwa' before they

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<sup>145</sup> *Id.* at 335.

<sup>146</sup> See, for example, Memorandum of Law in Support of Defendant Serdar Tatar's Motion for Disclosure of Materials under the Foreign Intelligence Surveillance Act, for Suppression of Electronic Surveillance, and for a Declaration that the Foreign Intelligence Surveillance Act Is Unconstitutional, *United States v Tatar*, Criminal Action No 07-459, \*8-11 (D NJ filed June 19, 2008) ("Tatar Motion to Suppress") (arguing that FISA-derived evidence should be suppressed because the FISA applications could not demonstrate probable cause that Tatar or the codefendant was an agent of a foreign power at the time of the application).

<sup>147</sup> See Supplemental Opinion, *United States v Shnewer*, No 07-459, slip op at 7 (D NJ Aug 14, 2008).

<sup>148</sup> See *Duka*, 671 F3d at 334-35; Tatar Motion to Suppress at \*6-7.

<sup>149</sup> See *Duka*, 671 F3d at 333-35 (describing the national origins of the defendants, three of whom were in the United States illegally during the events in question).

<sup>150</sup> 50 USC § 1801(c)(3).

could attack.”<sup>151</sup> It is possible that this statement, combined with the other known facts, sufficiently established probable cause of internationality because it seemed to indicate that the defendants were taking orders from someone involved in international terrorism. On the other hand, while this conversation might reveal some level of agency, there is insufficient information to determine whether the issuer of the fatwa had any international connection. Furthermore, it is entirely possible that the defendants were awaiting a public fatwa from a cleric with ties to international terrorism, but that the fatwa would in no way be directed at them. Under these circumstances, the defendants should not satisfy FISA’s internationality requirement because they would merely be acting “parallel to or consistent with the desires of a foreign power.”<sup>152</sup> Thus, while the additional international factors present in this case make it more difficult to analyze than *Abdul-Latif*, there is a strong argument that none of the potential international connections were sufficiently substantial to satisfy FISA’s internationality requirement.

These two cases, at least based on the publicly available information, indicate that the government may expansively interpret the necessary international nexus contra FISA’s legislative history. Moreover, the cases provide some evidence that the government is willing to exploit tangential international connections achieved through modern technology to satisfy this standard. Such interpretations are troubling because they potentially open up a broad range of effectively domestic activities to FISA surveillance.

### III. THE CONSTITUTIONAL LINE BETWEEN DOMESTIC AND INTERNATIONAL TERRORISM

Part II demonstrated that FISA has drawn an imprecise line between international and domestic terrorism. The requirement

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<sup>151</sup> Tatar Motion to Suppress at exhibit G at ¶ 31. The affidavit describes a “fatwa” as “a ruling on Islamic law issued by an Islamic scholar.” Tatar Motion to Suppress at \*10.

<sup>152</sup> HR Rep No 95-1283, Part I at 46 (cited in note 5). Even if the fatwa comment provided adequate probable cause, it is unclear whether this statement occurred before or after the initiation of FISA surveillance. The relevant conversations were not recorded using a FISA wiretap, but they occurred in late September 2006—almost nine full months after the investigation started. See Tatar Motion to Suppress at exhibit G at ¶ 31. Only if the FBI initiated FISA surveillance after this conversation occurred could it be used to satisfy probable cause. Unfortunately, due to the unique discovery procedures discussed above, see text accompanying notes 52–56, the government did not reveal when the surveillance in this case began.

that a group's activities transcend national boundaries, when combined with FISA's procedural secrecy and the proliferation of modern communication technologies, gives the government the ability and the incentive to push the definition of international terrorism beyond its intended boundaries. Additionally, two cases demonstrate that the government may have already crossed that line. Arguably, though, this boundary pushing is not problematic. It may seem anachronistic to contend that FISA is operating outside its intended boundaries when the world today is much more technologically advanced and globally integrated than the 1978 Congress could have envisioned. Such a broad interpretation of the internationality requirement still fits within the language's plain meaning and might be better seen as necessary statutory evolution than as a statutory violation. However, even if the targeting of quasi-domestic groups using an evolving interpretation of FISA's language is not a statutory violation, it is still possible that using FISA to investigate these groups violates the Fourth Amendment.

To answer whether such targeting violates the Fourth Amendment, Section A first explores why the Fourth Amendment demands different treatment of domestic and international terrorist groups. It argues that the government's foreign policy interests in the international terrorism context result in less Fourth Amendment protection for those groups. Section B demonstrates how FISA could be interpreted to cover groups that should properly be considered domestic under the Fourth Amendment. It then argues that two FISA procedures likely violate the Fourth Amendment when applied to domestic terrorist groups. Finally, Section C proposes a more limited interpretation of FISA's internationality requirement—one that is in line with the text and legislative history of the statute and that sorts terrorists based on the presence of the government's foreign policy interests.

#### A. The Fourth Amendment's Treatment of Domestic and International Terrorism

Although the Supreme Court has not explicitly said that members of international and domestic terrorist groups should receive differing levels of Fourth Amendment protection,<sup>153</sup> there

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<sup>153</sup> The *Keith* Court foresaw this issue, but expressly declined to address it. See *Keith*, 407 US at 309.

is strong implicit support for this proposition. The *Keith* Court, by limiting its decision to domestic organizations, implicitly acknowledged that the surveillance of international groups would trigger different considerations, even noting that warrantless surveillance “may be constitutional where foreign powers are involved.”<sup>154</sup> Moreover, Congress unequivocally stated that domestic terrorist groups should *not* be subject to FISA surveillance, implying that a different balancing of interests is at stake for the two groups.<sup>155</sup>

This distinction raises the question of why the two groups should be treated differently under the Fourth Amendment. Constitutional challenges to warrant procedures as applied to domestic or international terrorist groups invoke the reasonableness requirement of the Fourth Amendment, which calls for balancing the government’s interests in utilizing the procedures against the individual’s privacy interests.<sup>156</sup> Under this balancing framework, the most compelling argument for different Fourth Amendment treatment of these groups is that the investigation of international terrorism involves greater government interests than the investigation of domestic terrorism.<sup>157</sup>

Both domestic and international terrorism clearly implicate the government’s interest in national security, which the Supreme Court has repeatedly said is the most important government interest.<sup>158</sup> However, the investigation of international terrorism

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<sup>154</sup> Id at 321–22 & n 20.

<sup>155</sup> See S Rep No 95-701 at 18 (cited in note 68) (“The committee does not intend to authorize electronic surveillance under any circumstances for the class of groups included by the Supreme Court within the scope of the *Keith* decision requiring judicial warrants for alleged threats to security of a purely domestic nature.”).

<sup>156</sup> See *Keith*, 407 US at 314–15 (balancing the government’s interest in domestic security against the individual’s interests in privacy and free expression); *United States v Duggan*, 743 F2d 59, 73 (2d Cir 1984) (considering FISA’s procedures an adequate balancing of an “individual’s Fourth Amendment rights against the nation’s need to obtain foreign intelligence information”).

<sup>157</sup> This Comment focuses on the government-interest side of the equation because the privacy, security, and expressive interests of noncitizen members of international terrorist groups residing in the United States likely do not deviate substantially from citizen members of domestic terrorist groups. See *Arizona v United States*, 132 S Ct 2492, 2514 (2012) (Scalia concurring in part and dissenting in part) (“The Constitution gives all those on our shores the protections of the Bill of Rights.”); *United States v Verdugo-Urquidez*, 494 US 259, 278 (1990) (Kennedy concurring) (observing that the “full protections” of the Fourth Amendment would have applied to the search of a nonresident alien’s home within the United States).

<sup>158</sup> See, for example, *Haig v Agee*, 453 US 280, 307 (1981), quoting *Aptheker v Secretary of State*, 378 US 500, 509 (1964) (“It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”).

also triggers another important and related government interest: the protection and regulation of its foreign policy.<sup>159</sup> Although the Court does not typically provide great detail on the makeup of the government's foreign policy or foreign affairs interests,<sup>160</sup> at least two separate components can be distilled in the international terrorism context: (1) the government's interest in uniformly regulating its relations with other nations,<sup>161</sup> and (2) the government's international responsibility to control global terrorism within its own borders.<sup>162</sup> Thus, to determine the extent to which international terrorist groups should be treated differently from domestic terrorist groups under the Fourth Amendment, it is necessary to understand the nature of these foreign policy interests and how they affect Fourth Amendment analysis.<sup>163</sup>

The federal government has a well-established power to uniformly regulate its affairs with foreign nations.<sup>164</sup> Courts have invoked this interest in giving the president limited power to make agreements with foreign nations without the approval of Congress,<sup>165</sup> and in requiring the invalidation of state laws that unduly interfere with the nation's foreign policy.<sup>166</sup> More generally,

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<sup>159</sup> See *Haig*, 453 US at 307 ("Protection of the foreign policy of the United States is a governmental interest of great importance.").

<sup>160</sup> See, for example, *Hines v Davidowitz*, 312 US 52, 62 (1941) (noting the supremacy of the national government in the "general field of foreign affairs").

<sup>161</sup> See *Arizona*, 132 S Ct at 2498 (noting, in the immigration context, the government's "inherent power as sovereign to control and conduct relations with foreign nations").

<sup>162</sup> See HR Rep No 95-1283, Part I at 45 (cited in note 5). See also *Duggan*, 743 F2d at 74 (finding that terrorist groups based in the United States but conducting activities abroad can have "a substantial effect on United States national security and foreign policy").

<sup>163</sup> International terrorism also arguably implicates the government's national-security interest to a greater extent than domestic terrorism. See S Rep 95-701 at 14-15 (cited in note 68) (arguing that international terrorist groups are more difficult to investigate). These differences are difficult to articulate and may be of marginal importance, but cases implicating foreign policy interests are also likely to be cases in which these increased national-security interests are present.

<sup>164</sup> See *American Insurance Association v Garamendi*, 539 US 396, 413 (2003), quoting *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 427 n 25 (1964) (observing that the "concern for uniformity in this country's dealings with foreign nations' . . . animated the Constitution's allocation of the foreign relations power to the National Government").

<sup>165</sup> See, for example, *United States v Pink*, 315 US 203, 223 (1942) (noting that the president has the power to make certain agreements, other than Article II treaties, without the Senate's advice and consent).

<sup>166</sup> See, for example, *Zschernig v Miller*, 389 US 429, 432 (1968) (invalidating an Oregon statute as an impermissible state intrusion "into the field of foreign affairs which the Constitution entrusts to the President and the Congress"). This doctrine is called "foreign policy preemption." Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 Notre Dame L Rev 341, 348-49 (1999).

this interest seeks to prevent conduct that risks hampering future relations with other nations, such as when certain actions are likely to offend other nations or embarrass the United States.<sup>167</sup> In identifying conduct that implicates foreign policy interests, the Supreme Court has looked at whether the conduct has or is likely to spark diplomatic protest or complaint.<sup>168</sup> One need only observe the fallout from the Edward Snowden revelations to understand the far-reaching foreign policy effects of foreign-relations scandals.<sup>169</sup>

The surveillance of international terrorism can trigger the government's interest in regulating its foreign policy because so many international terrorist groups are intimately connected to political relations between the United States and foreign nations.<sup>170</sup> These political connections have Fourth Amendment ramifications because an elevated level of secrecy unnecessary in the domestic terrorism context is required when the government performs counterintelligence on these pseudopolitical foreign actors.<sup>171</sup> The government's interest in regulating its foreign policy can also be triggered when the target of a terrorist act appears to be an interest that, if attacked, would create diplomatic complications.<sup>172</sup>

The government's Fourth Amendment interests in the international terrorism context are also elevated by its need to root

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<sup>167</sup> See *Zschemig*, 389 US at 434–35 (noting that a state statute's "great potential for disruption or embarrassment" contributes to its interference with the nation's foreign affairs).

<sup>168</sup> See, for example, *id.* at 437 n 7 (noting that a state court case "prompted the Government of Bulgaria to register a complaint with the State Department").

<sup>169</sup> See Deb Riechmann, *NSA Spying Threatens U.S. Foreign Policy Efforts*, Huff Post Politics (Huffington Post Oct 26, 2013), online at [http://www.huffingtonpost.com/2013/10/26/nsa-spying-foreign-policy\\_n\\_4166076.html](http://www.huffingtonpost.com/2013/10/26/nsa-spying-foreign-policy_n_4166076.html) (visited Aug 12, 2014).

<sup>170</sup> See Christopher M. Blanchard, *Lebanon: Background and U.S. Policy* \*1 (Congressional Research Service Feb 14, 2014), online at <http://www.fas.org/sgp/crs/mideast/R42816.pdf> (visited Aug 12, 2014) (observing that Hezbollah—a US-designated "foreign terrorist organization"—formed a part of Lebanon's most recent governing coalition, having won almost 10 percent of parliamentary seats and two cabinet seats). Indeed, Hezbollah is often referred to as a "state within a state." See, for example, Josh Wood, *Hezbollah Rolls the Dice in Syria*, Aljazeera America (Sept 10, 2013), online at <http://america.aljazeera.com/articles/2013/9/10/hezbollah-rolls-the-diceinsyria.html> (visited Aug 12, 2014) (describing Hezbollah's direct involvement in Syria's civil war).

<sup>171</sup> See *Haig*, 453 US at 307, quoting *Snepp v United States*, 444 US 507, 511–13 (1980) ("[T]he appearance of confidentiality [is] so essential to the effective operation of our foreign intelligence service."); *United States v Curtiss-Wright Export Corp.*, 299 US 304, 320 (1936) ("Secrecy in respect of information gathered by [the president's confidential sources] may be highly necessary.").

<sup>172</sup> See HR Rep No 95-1283, Part I at 46 (cited in note 5) (considering the kidnapping of a foreign official within the United States to be international terrorism).

out terrorists within the United States who orchestrate violent acts in foreign countries. This interest is partially related to the first. Unlike in the domestic terrorism context, failure to squelch international terrorism within the United States strengthens those groups internationally, which can negatively affect the interests of foreign nations and their relationships with the United States. Moreover, in the spirit of comity, the government has a significant interest in eliminating these groups domestically in order to lend legitimacy to the US government's "demand[s] that other countries live up to this responsibility."<sup>173</sup> Indeed, the United Nations Security Council has recognized this international responsibility by establishing that every nation has "the duty to refrain from . . . acquiescing in organized [terrorist] activities within its territory."<sup>174</sup>

Aside from the doctrinal effects that these foreign policy interests have on Fourth Amendment balancing, a court is, as a practical matter, much more likely to defer to government interests and practices when foreign policy issues are at stake. This deference manifests itself in several different areas of law,<sup>175</sup> but it stems from the idea that the Constitution designates the president as the "sole organ of the nation in its external relations."<sup>176</sup> In a recent First Amendment decision, for example, the Supreme Court acknowledged its "lack of competence" in the realms of national security and foreign relations and accorded deference to the government's conclusions about what activities would "further terrorist conduct and undermine United States foreign policy."<sup>177</sup> Courts would likely accord similar deference to executive and legislative conclusions that special procedural tools

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<sup>173</sup> *Id.* at 45.

<sup>174</sup> *Resolution 1373*, UN Security Council, 4385th mtg (Sept 28, 2001), UN Doc S/RES/1373 1.

<sup>175</sup> See Note, *Developments in the Law: Access to Courts*, 122 Harv L Rev 1151, 1196 (2009) (observing that, since 2003, courts have more frequently awarded the executive branch greater deference in the foreign-relations sphere by invoking the political question doctrine). See also Ramsey, 75 Notre Dame L Rev at 348–49 (cited in note 166); *In re Terrorist Bombings of US Embassies in East Africa*, 552 F3d 157, 170 n 7 (2d Cir 2008) (arguing that there is less need for the government to obtain a warrant before conducting a search on foreign soil partly because the "wide discretion afforded the executive branch in foreign affairs ought to be respected").

<sup>176</sup> *Curtiss-Wright*, 299 US at 319 (citation omitted). See also *Haig*, 453 US at 292 ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.")

<sup>177</sup> *Holder v Humanitarian Law Project*, 561 US 1, 34–35 (2010) (citation omitted).



are necessary in the Fourth Amendment context to protect the nation's foreign policy.<sup>178</sup>

## B. Constitutional Issues with FISA's Internationality Requirement

Because foreign policy interests constitutionally distinguish international and domestic terrorist groups, FISA's internationality requirement, which attempts to sort these groups for Fourth Amendment purposes, must identify cases in which these interests are present. However, some interpretations of the nebulous FISA standard allow for the targeting of terrorist groups that should be considered domestic for Fourth Amendment purposes because they do not trigger foreign policy interests. This, in turn, permits the employment of certain FISA procedures against domestic groups that may violate the Fourth Amendment.

*Abdul-Latif* demonstrates how an expansive interpretation of FISA's internationality requirement<sup>179</sup> can permit the targeting of groups that do not implicate the two foreign affairs interests described above. In this case, the government engaged in FISA surveillance even though neither the target of the attack (a domestic military entrance processing station) nor Abdul-Latif's international YouTube activity risked creating a diplomatic crisis. Moreover, there is no available evidence indicating that Abdul-Latif may have been a link in a global chain of terror such that the government's duty to control international terrorism was triggered. Therefore, even if Abdul-Latif's conspiracy qualified as international terrorism under FISA—as the court seemed to think—the conspiracy still did not implicate the foreign policy interests necessary to merit such a designation under the Fourth Amendment.

Even assuming that such expansive interpretations of FISA's internationality requirement are rare, more limited interpretations that clearly satisfy FISA's language may similarly fail to trigger foreign policy concerns. To illustrate, a US citizen

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<sup>178</sup> Arguably, courts have already exhibited this deference by unanimously considering FISA's warrant procedures reasonable under the Fourth Amendment with less than rigorous analyses. See, for example, *United States v Johnson*, 952 F2d 565, 573 (1st Cir 1991); *United States v Pelton*, 835 F2d 1067, 1075 (4th Cir 1987); *United States v Cavanagh*, 807 F2d 787, 789–91 (9th Cir 1987); *Duggan*, 743 F2d at 73.

<sup>179</sup> For a discussion of how the government might employ such an expansive interpretation, see Part II.C.

purchasing weapons from a friend in Mexico for use in a terrorist attack in the United States almost certainly qualifies as international terrorism under FISA. Such activity “transcend[s] national boundaries in terms of the means by which [the terrorist acts] are accomplished”<sup>180</sup> because the guns used to perpetrate the attack have a substantial international character. However, it is not readily apparent that such activity would cause a foreign affairs crisis or that it would trigger a domestic duty to control international terrorism. Thus, this activity should be seen as domestic terrorism for Fourth Amendment purposes.

The overinclusive nature of FISA’s internationality requirement raises the important question whether FISA’s procedures would violate the Fourth Amendment when applied to terrorist groups that should be considered domestic because they do not trigger the government’s foreign policy interests. On one view, FISA’s procedures are reasonable even when applied to domestic terrorist groups. As mentioned above, the *Keith* Court noted that in the domestic terrorism context, warrants for electronic surveillance need not be identical to Title III warrants.<sup>181</sup> Rather, the warrants could utilize a less stringent standard of probable cause, have looser time and reporting requirements, and be sought at a specially designated court.<sup>182</sup> FISA’s procedures appear to roughly track these recommendations, as was noted by the FISC in a rare published case upholding the constitutionality of FISA warrant procedures in the foreign-intelligence context.<sup>183</sup> Therefore, FISA proponents would argue, FISA warrants are reasonable under the Fourth Amendment regardless of whether domestic or international terrorist groups are targeted.

Although FISA’s procedures generally track the recommendations made in *Keith*, there are at least two FISA procedures that seem inappropriate when applied in the domestic terrorism context, and which may render a FISA warrant unreasonable when applied to domestic groups. The most problematic of these is FISA’s notice requirement. FISA does not require notice to the

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<sup>180</sup> 50 USC § 1801(c)(3).

<sup>181</sup> *Keith*, 407 US at 322.

<sup>182</sup> See *id.* at 323.

<sup>183</sup> See *In re Sealed Case*, 310 F3d 717, 737–42 (FISA Ct Rev 2002) (comparing FISA procedures to Title III procedures and noting that the differences track *Keith*’s recommendations).

surveillance target unless the government intends to use the surveillance in a criminal proceeding,<sup>184</sup> and the Supreme Court has found such a lack of default notice to be a constitutionally significant factor in determining the reasonableness of a warrant.<sup>185</sup> The FISC justified FISA's notice procedure in the foreign-intelligence context by pointing to the conclusion in the FISA Senate report that "[t]he need to preserve secrecy for sensitive counterintelligence sources and methods justifies elimination of the notice requirement."<sup>186</sup> However, the Senate report from which the FISC quotes concluded that FISA's stark departure from the standard notice requirement was reasonable only in the context of *foreign* counterintelligence investigations.<sup>187</sup> While the investigation of truly international terrorism might rise to the level of foreign counterintelligence due to the pseudopolitical nature of many foreign terrorist organizations, the same cannot be said of domestic terrorism investigations. Investigations of domestic terrorism simply do not require the same level of secrecy because there is no risk of injuring the foreign policy of the United States. As the *Keith* Court suggested, investigations of domestic groups might justify a looser notice requirement than Title III in sensitive cases or in cases involving long-term surveillance,<sup>188</sup> but there is no apparent justification for a no-notice default rule when FISA is applied to domestic terrorists.

FISA's minimization procedures also raise constitutional concerns when applied to domestic terrorists. The Supreme Court has forbidden warrant schemes that give an officer the ability to seize "any and all conversations" from a targeted device or facility.<sup>189</sup> In an effort to prevent such broad information acquisition, FISA requires that the government adopt minimization procedures—"specific procedures" that limit the amount of information that the government can acquire, retain, and disseminate.<sup>190</sup> Although any suggested minimization procedures are subject to approval or modification by the FISC, the government has adopted standard procedures that, in practice,

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<sup>184</sup> See 50 USC § 1806(c)–(d).

<sup>185</sup> See *Berger v New York*, 388 US 41, 60 (1967) (finding that the lack of a notice requirement without a showing of exigency contributes to the unconstitutionality of a warrant scheme).

<sup>186</sup> *Sealed Case*, 310 F3d at 741, quoting S Rep 95-701 at 11–12 (cited in note 68).

<sup>187</sup> See S Rep 95-701 at 11–12 (cited in note 68).

<sup>188</sup> See *Keith*, 407 US at 323.

<sup>189</sup> *Berger*, 388 US at 59.

<sup>190</sup> 50 USC § 1801(h)(1).

permit the initial acquisition of all information from a monitored device or facility.<sup>191</sup> Title III, on the other hand, requires procedures that minimize the irrelevant information acquired in the first place.<sup>192</sup> FISA does require further minimization of information that is retained and disseminated, but these additional safeguards likely do not provide a meaningful filter to the acquisition process because the standards of retention are extremely low.<sup>193</sup> Moreover, data acquisition can continue indiscriminately for weeks before further minimization procedures are applied.<sup>194</sup>

The FISCR defended these loose minimization procedures in the foreign-intelligence context by arguing that intercepted communications are likely to be in foreign languages or in code and that plots with foreign actors are inherently more complex.<sup>195</sup> Presumably, a greater volume of information and greater leeway for determining the relevancy of information is necessary under these circumstances. However, these justifications do not apply to nearly the same extent in the domestic terrorism context. Rather, in a case of domestic terrorism, FISA would permit an officer to sift through (and possibly retain) weeks of private conversations of any person using the monitored device, all without a justification reasonably related to the circumstances of the surveillance. Such broad acquisition powers, in the absence of a practical justification, may well push an otherwise reasonable warrant closer to the type of general warrant that the Supreme Court has forbidden.<sup>196</sup>

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<sup>191</sup> See *Sealed Case*, 310 F3d at 740 (“[I]n practice, FISA surveillance devices are normally left on continuously.”).

<sup>192</sup> See 18 USC § 2518(5) (requiring that surveillance “be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter”).

<sup>193</sup> See *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F Supp 2d 611, 617–18 (FISA Ct 2002) (observing that minimization is required only at the retention stage if information *could not* be foreign intelligence). This standard could encompass vast amounts of information, especially given Congress’s statement that the government need not minimize “bits and pieces” of information that are not individually relevant to foreign intelligence, but which may become so over time when combined with other information. HR Rep No 95-1283 at 57–58 (cited in note 5).

<sup>194</sup> See *All Matters Submitted to FISC*, 218 F Supp 2d at 617.

<sup>195</sup> See *Sealed Case*, 310 F3d at 741.

<sup>196</sup> See *Berger*, 388 US at 58–60.

### C. An Alternative Interpretation of FISA's Internationality Requirement

Due to the strong possibility that certain interpretations of FISA's nebulous internationality requirement pose serious constitutional questions, a more tailored interpretation of the language is needed in order to precisely identify the foreign policy interests that distinguish international terrorism.<sup>197</sup> To that end, this Comment proposes that FISA's international terrorism provision should be satisfied only if an individual engages in terrorist activities<sup>198</sup> and there is probable cause to believe that either of the following internationality conditions are met: (1) the terrorist activities are intended to impair significant interests of a foreign power in the United States or abroad, or (2) the terrorist activities are achieved through a knowing provision or receipt of material support to or from a foreign organization or a foreign power. If this test is not satisfied, the government must meet the more rigorous warrant requirements of Title III in order to perform electronic surveillance on the individual or group in question (assuming that the individual or group does not qualify as any other "foreign power" or "agent of a foreign power" under FISA).

This interpretation of FISA's internationality requirement has several advantages. First, it provides a refined method of sorting between international and domestic terrorism that is more aligned with FISA's legislative history and better attuned to the foreign policy interests that underlie the constitutional distinction between the groups. The proposed test covers the typical case of international terrorism: an al-Qaeda agent operating in the United States would always be considered an international terrorist because he is knowingly providing material support to a foreign organization. The material-support requirement would embody the definition of "material support or resources" in 18 USC § 2339A(b)(1), which defines the minimum level of involvement in terrorist activities necessary to warrant

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<sup>197</sup> Courts often employ the canon of constitutional avoidance to advance alternative plausible interpretations of ambiguous statutory text when one interpretation poses constitutional concerns. See, for example, *Edward J. DeBartolo Corp v Florida Gulf Coast Building & Construction Trades Council*, 485 US 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

<sup>198</sup> FISA's terrorist-activity requirements would remain intact under this interpretation. See 50 USC § 1801(c)(1)–(2).

criminal prosecution. The statute defines “material support or resources” as:

[A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.<sup>199</sup>

This standard better ensures that international terrorists have the “substantial international character” that FISA’s enacting legislature desired.<sup>200</sup> Indeed, Congress intended that the support necessary to satisfy FISA’s internationality requirement be “material, technical, training, or other substantive support,” rather than “moral or vocal support,” closely approximating the spirit of the current material-support statute.<sup>201</sup>

On the other hand, purely domestic groups would never be engaged in international terrorism under this test unless they intend to impair significant foreign interests or knowingly provide or receive material support to or from a foreign organization or a foreign power. Defining what constitutes a “significant interest” of a foreign power will be one of the greatest challenges in implementing this test. However, as the test’s purpose is to identify situations in which the government’s foreign policy interests are triggered, “significant interests of a foreign power” should cover targets of terrorism that would cause diplomatic crises, such as attacks by domestic groups on foreign soil or attacks within the United States that are tantamount to acts of war (embassy attacks, assassinations of foreign dignitaries, and so forth).<sup>202</sup> It likely should not cover acts of terror by domestic groups within the United States that happen to victimize a disproportionate number of foreigners (such as an attack on a popular

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<sup>199</sup> 18 USC § 2339A(b)(1). The statute further defines “training” as “instruction or teaching designed to impart a specific skill, as opposed to general knowledge,” and “expert advice or assistance” as “advice or assistance derived from scientific, technical or other specialized knowledge.” 18 USC § 2339A(b)(2)–(3).

<sup>200</sup> HR Rep No 95-1283, Part I at 46 (cited in note 5).

<sup>201</sup> Compare *id.*, with 18 USC § 2339A(b)(1).

<sup>202</sup> This is in line with the examples of international terrorism listed in the FISA House report. See text accompanying note 80.

domestic tourist attraction).<sup>203</sup> Although there will clearly be a line-drawing problem,<sup>204</sup> a high threshold should be set in order to prevent the sort of expansionary interpretation that is possible under the current FISA regime.

Most importantly, this test more accurately categorizes groups that straddle the line between domestic and international terrorism, such as groups that act parallel to, but without direction from, an international terrorist group. It does so by greatly reducing the chance that tangential international connections will transform otherwise-domestic activity into international terrorism. For example, under the proposed test, Abdul-Latif would not be considered an international terrorist and his surveillance would have been subject to the more rigorous Title III procedures. The military entrance processing station that he planned to attack in Seattle would not constitute a significant foreign interest. Moreover, his international connections on YouTube would not satisfy the material-support standard because he neither provided nor was provided with anything approaching material support as defined in 18 USC § 2339A(b)(1), such as training or expert advice.<sup>205</sup> This is a sensible result because, as discussed above,<sup>206</sup> it is difficult to see how Abdul-Latif's conspiracy triggered any of the government's foreign affairs interests.

These borderline groups are further protected by the foreign-organization requirement. To take the example mentioned above, purchasing weapons from a friend in Mexico likely does not implicate foreign policy interests, unless that friend is part of a foreign organization, because such a purchase does not directly strengthen international terrorist networks. Moreover, there is no need for greater secrecy in such a case because the seller is

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<sup>203</sup> Again, Congress took a similar view on the boundaries of international terrorism. See HR Rep No 95-1283, Part I at 46 (cited in note 5) (considering the targeting of the international terminal of an airport to be insufficiently international to qualify as international terrorism).

<sup>204</sup> Determining what foreign interests in the United States constitute "significant foreign interests" probably is not a significant problem in practice because there are not many instances of domestic terrorist groups targeting foreign interests in the United States.

<sup>205</sup> Arguably, Abdul-Latif provided "personnel" to al-Qaeda by furthering their cause in the United States. The term "personnel" is undefined in § 2339A, but courts that have considered the issue have required at least "some form of coordination, joint action, or understanding." *United States v Abu-Jihaad*, 600 F Supp 2d 362, 400 (D Conn 2009). See also *United States v Lindh*, 212 F Supp 2d 541, 573 (ED Va 2002) (more strictly defining "personnel" as those who "function as employees or quasi-employees").

<sup>206</sup> See text accompanying notes 137–40.

unlikely to be intimately connected to the politics of a foreign nation. Rather, to trigger these interests, there should be a significant link to a foreign organization that at least resembles the types of foreign terrorist organizations designated by the secretary of state.<sup>207</sup> Additionally, to show that a group is a *foreign* organization, it would be necessary not to point to a base in a specific country, but rather to show that the group does not operate solely in the United States.

The foreign-organization requirement would also have prevented the actions of the group in *Duka* from falling into the category of international terrorism. The most serious potential international link in that case was the admission of one group member that the group would need to receive a fatwa before it could attack.<sup>208</sup> Arguably, this conversation evidences sufficient agency such that the *Duka* group was providing “personnel” under the material-support statute.<sup>209</sup> However, there is no evidence that the fatwa referenced in the conversation would have been issued by an individual affiliated with a foreign organization. Thus, even if the conversation constitutes material support, it does not meet the requirement that such support be provided to, or received from, a foreign organization or foreign power.

Another advantage of the proposed test is that it achieves greater precision in the sorting of terrorist groups while remaining consistent with FISA’s language, limiting it only to the extent necessary to prevent the targeting of groups that do not implicate foreign affairs interests. For instance, both FISA’s text and the proposed standard agree that members of purely domestic groups who seek asylum in a foreign nation are international terrorists. FISA explicitly recognizes this situation,<sup>210</sup> and under the proposed test, such a group would qualify as international because asylum qualifies as material support from a foreign power.<sup>211</sup> This makes sense because a domestic terrorist who seeks asylum in a foreign nation certainly risks causing a foreign-relations

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<sup>207</sup> See 8 USC § 1189(a)(1).

<sup>208</sup> See note 151 and accompanying text.

<sup>209</sup> See *Abu-Jihaad*, 600 F Supp 2d at 400 (requiring “some form of coordination, joint action, or understanding” to satisfy the statutory definition of “personnel”).

<sup>210</sup> See 50 USC § 1801(c)(3) (including in its definition of “international terrorism” activities that “transcend national boundaries in terms of . . . the locale in which their perpetrators operate or seek asylum”).

<sup>211</sup> See 50 USC § 1801(a)(1) (defining a foreign government as a foreign power); 18 USC § 2339A (defining “lodging” as a form of material support).



crisis.<sup>212</sup> Additionally, the material-support and “significant-foreign-interest” requirements mirror FISA’s language that international terrorist activities must “transcend national boundaries” either through the “means by which they are accomplished” or with respect to the “persons they appear intended to coerce or intimidate.”<sup>213</sup> While the test does limit the viable interpretations of FISA’s internationality provision, the foregoing discussion has demonstrated that it does so only in order to avoid potential constitutional violations by more precisely identifying cases in which the government’s foreign policy interests are at stake.

Finally, this test would potentially increase the efficacy of ex post judicial oversight of surveillance targeting by allowing for easy analogy to the existing definition of “material support or resources” and its accompanying case law. Instead of analyzing whether the target’s activities transcended national boundaries—a hopelessly nebulous standard with no helpful analogue elsewhere in the law—judges could look to existing material-support case law to make more-informed decisions about whether the government satisfied probable cause.<sup>214</sup> Moreover, the ability of defendants to access these comparative materials would provide some much-needed balancing to the skewed FISA adversarial process.

## CONCLUSION

FISA’s definition of international terrorism permits the government to draw a fuzzy line between international and domestic

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<sup>212</sup> For example, Russia’s grant of asylum to Snowden, whose actions arguably did not even rise to the level of domestic terrorism, provides support for this proposition. See Paul Sonne and Adam Entous, *Snowden Asylum Hits U.S.-Russia Relations: U.S. Blasts Move as Leaker Leaves Moscow Airport*, Wall St J (Aug 1, 2013), online at <http://online.wsj.com/news/articles/SB10001424127887323681904578641610474568782> (visited Aug 12, 2014).

<sup>213</sup> 50 USC § 1801(c)(3).

<sup>214</sup> The Supreme Court and several other courts have analyzed the material-support statute. See, for example, *Humanitarian Law Project*, 561 US at 15–26 (concluding that training members of a foreign terrorist organization on how to use international law to peacefully resolve disputes constitutes “training” and “expert advice or assistance” under 18 USC § 2339A); *United States v Farhane*, 634 F3d 127, 134–38 (2d Cir 2011) (holding that proposing to provide martial arts training to members of al-Qaeda qualified as a conspiracy to provide “training” under 18 USC § 2339A); *United States v Kassir*, 2009 WL 2913651, \*7–8 (SDNY) (holding that training young men for jihad when one conspirator had stayed at an al-Qaeda safe house, and running a website that facilitated the distribution of terrorist training materials constituted a provision of “training” and “expert advice or assistance” to al-Qaeda under 18 USC § 2339A).

terrorism. This uncertainty potentially allows the government to engage in FISA surveillance of terrorist groups that do not implicate the government's foreign policy interests. This, in turn, raises serious constitutional questions. To fashion a solution that avoids these constitutional issues, this Comment has identified the government interests that distinguish these groups for Fourth Amendment purposes and has proposed a more limited interpretation of FISA's internationality requirement. The proposed interpretation seeks to identify international terrorists by asking if they implicate these foreign policy interests. Beyond more accurately identifying terrorist groups, a more tailored internationality standard would give courts and defendants the tools necessary to counteract the distinct institutional advantage currently possessed by the government.