

# The Modest Role of the Warrant Clause in National Security Investigations

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## I. Introduction

The Warrant Clause of the Fourth Amendment states that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”<sup>1</sup> In criminal investigations, this clause plays a significant role. As the Supreme Court has emphasized, “it is a cardinal principle that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’”<sup>2</sup> In the setting of national security law, however, the opposite is true. The Warrant Clause plays a role,<sup>3</sup> but only a modest one. The Warrant Clause can inspire legislative action, or it can give a thumbs up or down to an existing legislative scheme. But the Warrant Clause does not play the significant role in the national security investigations that it plays in criminal investigations.

Why is the Warrant Clause of the Fourth Amendment so modest in national security investigations? One plausible reason is that national security investigations raise significant questions of presidential power under Article II.<sup>4</sup> Courts may be hesitant to use the heavy hand of the Warrant Clause when investigations involve presidential prerogatives. Or perhaps the Warrant Clause is narrow because Congress has imposed statutory warrant procedures that limit opportunities for constitutional challenge.<sup>5</sup> Perhaps. But I think there is another reason and one that is more conceptually interesting from a perspective of Fourth Amendment law. This Article will develop that argument. It argues that the Warrant Clause has been and will remain narrow because the extension of the Warrant Clause into national

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1. U.S. CONST. amend. IV.

2. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Of course, “specifically established and well-delineated” does not necessarily mean narrow. Nonetheless, warrants play an important role in the criminal law setting.

3. *See, e.g.*, *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 321 (1972) (imposing a warrant requirement for domestic national security investigations).

4. U.S. CONST. art. II.

5. *See, e.g.*, 50 U.S.C. § 1823(a) (2006) (imposing a statutory warrant requirement for physical searches in national security investigations).

security law has come at a cost of forcing courts to pose a question that judges know they cannot answer.

The dynamic goes back to a series of cases in the late 1960s and early 1970s when the Supreme Court dramatically expanded the scope of the Warrant Clause.<sup>6</sup> The Court reframed the Warrant Clause as a handmaiden of reasonableness: warrants are required only when a warrant requirement would be reasonable, and the warrants that are required are whatever warrants would be reasonable.<sup>7</sup> This double-barreled reasonableness test gave the Supreme Court the flexibility to insert the Warrant Clause almost anywhere, including the setting of national security investigations. But it came at a cost. The test created to give courts flexibility forces judges to ask a question they are poorly equipped to answer. Faced with uncertainty, most judges will remain cautious. As a result, the Warrant Clause will apply broadly in theory but work modestly in practice.

Courts are poorly equipped to answer when a warrant regime would be reasonable in the national security setting for four major reasons. The first is what I will call the “chicken-and-egg problem.” Courts do not know what kind of warrant they must imagine operating because the kind of warrant is itself left open by existing law. Second, the Judiciary cannot know whether the elected branches would set up courts with expert judges or with jurisdiction to issue those warrants, making it difficult for them to assess how such a warrant requirement would work. Third, courts cannot know the technology of surveillance that will apply or whether diplomatic agreements will harmonize the different legal regimes, making it hard to know how warrants would be executed. And fourth, uncertainty as to the law of when national security investigations trigger the Fourth Amendment at all leaves courts uncertain as to what set of facts they will be balancing.

Faced with these uncertainties, courts have and generally will construe the Warrant Clause quite narrowly in national security investigations.<sup>8</sup> The Warrant Clause can spark action, leaving the details up to Congress. The Clause can also be used to ratify or reject a specific legislative scheme. But it cannot play the same strong role in national security cases that it has traditionally played in criminal investigations. In the national security setting, the Warrant Clause must remain modest.

## II. The Surprisingly Flexible Warrant Standard

To understand the cautious role of the Warrant Clause in national security cases, a brief history of the warrant standard is necessary. The text of the Fourth Amendment suggests that the standard for obtaining warrants is

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6. *See infra* Part II.

7. *See infra* Part II.

8. *See infra* Part III.

immutable and that the warrant requirement is fixed.<sup>9</sup> This textual clarity masks a surprisingly amorphous standard, however. The historical development of the warrant standard shows that the Supreme Court has repeatedly changed the warrant standard, both in terms of when warrants are required and what the government must show to obtain a warrant. In expanding the Warrant Clause over time, the Court has applied a surprisingly malleable standard.

#### A. Arrest Warrants and Search Warrants Before 1967

There are two basic kinds of warrants: arrest warrants and search warrants. The purpose of a search warrant is to authorize a search of a place and the seizure of property found there;<sup>10</sup> the purpose of an arrest warrant is to authorize the arrest of a person.<sup>11</sup> Throughout much of our constitutional history, arrest warrants rather than search warrants played the primary role.<sup>12</sup> When the government charged a minor offense by information rather than indictment, the government would file an information but then need a warrant to authorize the suspect's arrest.<sup>13</sup> In 1877, Justice Bradley explained that an arrest warrant must establish "probable cause of belief or suspicion of the party's guilt."<sup>14</sup> The power to make an arrest then provided powers to make searches incident to arrest.<sup>15</sup>

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9. U.S. CONST. amend. IV. *See generally* Wayne R. LaFare, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1, 12–13 ("To say that the probable cause required by the Fourth Amendment is not a fixed test, but instead involves a sort of calculus incorporating all the surrounding circumstances of the intended search, constitutes a major departure from existing constitutional doctrine.").

10. A search warrant is "[a] judge's written order authorizing a law-enforcement officer to conduct a search of a specified place and to seize evidence." BLACK'S LAW DICTIONARY 1379 (8th ed. 2004). *See generally* FED. R. CRIM. P. 41(d)–(e) (explaining that once the issuing magistrate or judge is satisfied that grounds for the warrant application exist, that magistrate or judge may issue a warrant identifying the property to be seized and describing the specific place to be searched to find the identified property).

11. An arrest warrant is "[a] warrant . . . directing a law-enforcement officer to arrest and bring a person to court." BLACK'S LAW DICTIONARY, *supra* note 10, at 1616. *See generally* Steagald v. United States, 451 U.S. 204, 213 (1981) ("An arrest warrant is issued by a magistrate upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense and thus the warrant primarily serves to protect an individual from an unreasonable seizure.").

12. *See, e.g., Ex parte Burford*, 7 U.S. (3 Cranch) 448, 451–53 (1806) (considering the constitutionality of an arrest warrant and clarifying that probable cause required "good cause certain" to make the arrest).

13. *See, e.g., Carroll v. United States*, 267 U.S. 132, 157 (1925) ("In cases of misdemeanor, a peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence." (quoting 9 HALSBURY'S LAWS OF ENGLAND § 612, at 699 (1st ed. 1907))).

14. *In re Rule of Court*, 20 F. Cas. 1336, 1337 (Bradley, Circuit Justice, C.C.N.D. Ga. 1877) (No. 12,126).

15. *United States v. Maresca*, 266 F. 713, 721 (S.D.N.Y. 1920).

Before 1967, search warrants were a less widely used tool than arrest warrants due to the limitation of the “mere evidence” rule. Under the mere evidence rule, stated most definitively in *Gouled v. United States*,<sup>16</sup> search warrants could be obtained only to seize fruits of crime, instrumentalities of crime, or contraband.<sup>17</sup> In contrast, the government could not obtain a warrant for mere evidence.<sup>18</sup> The Court rooted this limitation in property law: under the Fourth Amendment, the Court held, the government’s power was limited to seizing property that the suspect had no right to possess.<sup>19</sup> During this period, the nature of the probable cause inquiry was straightforward. Probable cause was established based on a likelihood that contraband, fruits of crime such as stolen goods, or instrumentalities of crime were located in the place to be searched.<sup>20</sup>

#### B. Warden v. Hayden

The traditional meaning of warrants for Fourth Amendment law changed considerably in *Warden v. Hayden*,<sup>21</sup> a decision by Justice Brennan that abolished the mere evidence rule.<sup>22</sup> *Hayden* held that warrants could be obtained for evidence just as readily as it could be obtained for contraband or fruits of crime.<sup>23</sup> The Court reasoned that the Fourth Amendment had evolved from its property-based origins to a more general tool of regulating law enforcement that balanced government interests against privacy interests.<sup>24</sup> Because the “government has an interest in solving crime,” it was reasonable for the government to obtain a warrant for evidence needed to solve those crimes.<sup>25</sup> Warrants for mere evidence were reasonable and therefore permitted.<sup>26</sup>

*Hayden*’s extension of Fourth Amendment warrants to mere evidence created a new problem as to how to define probable cause. Property was contraband or stolen goods apart from how the government planned to use it. In the past, then, probable cause for a search warrant was readily defined in

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16. 255 U.S. 298 (1921), *abrogated by* *Warden v. Hayden*, 387 U.S. 294 (1967).

17. According to the Court, a warrant could be obtained only when “the public or the complainant” had a superior claim of property or possession of the item to be seized than the suspect or “when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.” *Id.* at 309.

18. *Id.*

19. *Id.*

20. See Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 TEXAS L. REV. 49, 54–56 (1995) (noting that before the Warren Court, “[t]he Court’s cases stressed that law enforcement authorities’ power to search was limited to instrumentalities and fruits of the crime or contraband”).

21. 387 U.S. 294 (1967).

22. *Id.* at 310.

23. *Id.* at 301–02.

24. *Id.* at 305–07.

25. *Id.* at 306–07.

26. *Id.*

the abstract as a level of cause showing that such items existed in the place to be searched.<sup>27</sup> In contrast, whether property counted as “evidence” depended on the context.<sup>28</sup> Property could be evidence for one case but not evidence for another.<sup>29</sup> The Court responded to this problem by ruling that the probable cause inquiry had to be measured based on a specific set of contemplated crimes and charges.<sup>30</sup> “[I]n the case of ‘mere evidence,’” Justice Brennan wrote, “probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction.”<sup>31</sup> As a result, probable cause had to include both evidence that a particular crime had been committed and that there was evidence of that crime in the place to be searched.<sup>32</sup>

### C. *Camara v. Municipal Court*

Although *Warden v. Hayden* signaled a major change in the traditional meaning of warrants, the more radical shift occurred soon after in *Camara v. Municipal Court*.<sup>33</sup> *Camara* reconsidered a line of Supreme Court precedents on the Fourth Amendment governing health and safety inspectors who wished to enter homes to check for code violations.<sup>34</sup> This was a major issue in American cities at the time because of concerns about urban slums and the prospects of urban renewal.<sup>35</sup> Just eight years earlier, in *Frank v. Maryland*,<sup>36</sup> the Supreme Court had upheld these warrantless housing inspections on the ground that they were necessary to enforce important health and safety laws.<sup>37</sup> The government had a pressing need to inspect homes for violations, the Court reasoned, and that ability “would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts.”<sup>38</sup>

In *Camara*, the Court overruled *Frank* and held that a warrant was required for such inspections.<sup>39</sup> But there was a catch: the warrant that was required was unlike any warrant previously known. Writing for the Court,

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27. See, e.g., *Steagald v. United States*, 451 U.S. 204, 213 (1981) (“A search warrant . . . is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place . . .”).

28. *Hayden*, 387 U.S. at 301–02.

29. *Id.* at 302.

30. *Id.* at 307.

31. *Id.*

32. *Id.* at 309.

33. 387 U.S. 523 (1967).

34. *Id.* at 527–28.

35. See, e.g., Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 31–32 (2003) (detailing the rise of government intervention in urban revitalization).

36. 359 U.S. 360 (1959), overruled by *Camara v. Mun. Court*, 387 U.S. 523 (1967).

37. *Id.* at 372–73.

38. *Id.* at 372.

39. *Camara*, 387 U.S. at 528.

Justice White reasoned that the core of the Fourth Amendment was reasonableness, and that reasonableness required a balancing of interests between the government's need for the search and the citizen's need for privacy and security.<sup>40</sup> Although the government needed a warrant based on probable cause to search a home, *what there was probable cause to believe* could vary based on what government interest was at play.<sup>41</sup> "To apply this standard," Justice White explained, "it is obviously necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen."<sup>42</sup>

From this perspective, the traditional search warrant of criminal law was merely one application of a general interest balancing that happened to occur in criminal cases:

[I]n a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is "reasonable" only when there is "probable cause" to believe that they will be uncovered in a particular dwelling.<sup>43</sup>

Justice White then applied that framework to the governmental interest of maintaining health and safety standards pursuant to city codes. "In determining whether a particular inspection is reasonable . . .," Justice White wrote, "the need for the inspection must be weighed in terms of these reasonable goals of code enforcement."<sup>44</sup> Justice White reviewed the social-science literature on public safety inspections and concluded that it would be reasonable to require warrants but allow those warrants to be issued to search entire areas of buildings based on a proof of need to do so.<sup>45</sup> Such a system would balance the governmental interest in maintaining health and safety standards with the interest in security from a government search.<sup>46</sup>

#### D. *United States v. United States District Court*

The first case applying the general balancing approach to the national security setting was *United States v. United States District Court (Keith)*,<sup>47</sup> generally known as the *Keith* case because the district judge was Judge

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40. *Id.* at 536–39.

41. *Id.* at 534.

42. *Id.*

43. *Id.* at 535.

44. *Id.*

45. *Id.* at 535–39.

46. *Id.* at 539.

47. 407 U.S. 297 (1972).

Damon Keith.<sup>48</sup> The issue in *Keith* was whether the Fourth Amendment required the government to obtain a warrant to conduct wiretapping of a U.S. citizen for domestic national security purposes.<sup>49</sup> In an opinion by Justice Powell, the Court balanced the interests of national security against domestic threats versus the benefits of a warrant requirement and concluded that it was reasonable to require the government to obtain a warrant before such monitoring occurred.<sup>50</sup> On one hand, the governmental interest in protecting the country was a vital one:

It has been said that “[t]he most basic function of any government is to provide for the security of the individual and of his property.” And unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered.<sup>51</sup>

On the other hand, protection from arbitrary government searches was also critical, especially in light of the threat to privacy and First Amendment values presented by a regime of warrantless searches when the government itself is a potential target.<sup>52</sup> Balancing the two interests, the Court concluded that a warrant requirement was a reasonable accommodation: “Although some added burden will be imposed upon the Attorney General, this inconvenience is justified in a free society to protect constitutional values.”<sup>53</sup>

Tracking *Camara*, however, the Court noted that the “warrant” required did not need to be an ordinary criminal law warrant.<sup>54</sup> “[D]omestic security surveillance may involve different policy and practical considerations from the surveillance of ‘ordinary crime,’” Justice Powell acknowledged.<sup>55</sup> Specifically, a reasonable warrant system could be based on different standards of probable cause and particularity than a criminal law warrant:

Different standards [for obtaining warrants] may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.<sup>56</sup>

In other words, the Court required a warrant because it was reasonable to require a warrant, but the warrant that was required was whatever standard

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48. Tracey Maclin, *The Bush Administration’s Terrorist Surveillance Program and the Fourth Amendment’s Warrant Requirement: Lessons from Justice Powell and the Keith Case*, 41 U.C. DAVIS L. REV. 1259, 1263 n.9 (2008).

49. *Keith*, 407 U.S. at 299.

50. *Id.* at 321.

51. *Id.* at 312 (quoting *Miranda v. Arizona*, 384 U.S. 436, 539 (1966) (White, J., dissenting)).

52. *Id.* at 316–20.

53. *Id.* at 321.

54. *Id.* at 322.

55. *Id.*

56. *Id.* at 322–23.

was reasonable to require. This is reasonableness piled on top of reasonableness: it essentially permits the Court to impose a warrant requirement if it can devise a standard for a warrant that makes such a requirement a workable one.

Cases like *Keith* and *Camara* are generally understood as important civil liberties cases.<sup>57</sup> The Supreme Court expanded the Warrant Clause in these cases, inserting the ex ante judicial review where it had not been inserted before. But the key for our purposes is realizing *how* the Court expanded the Clause's reach. The key move was to make the Warrant Clause a tool of double-barreled reasonableness: warrants are required when a warrant requirement would be reasonable, and the showing required to obtain the warrant is whatever showing would be reasonable to show.

### III. How the History of the Warrant Standard Explains the Narrow Warrant Clause in National Security Cases

The Supreme Court's expansion of the Warrant Clause in the late 1960s and early 1970s offers a potentially expansive rationale for requiring warrants that could apply in a wide range of settings in the national security context. Later courts have not applied it this way, however. Although the Supreme Court has not revisited the Warrant Clause in the national security setting since *Keith*, lower courts have for the most part construed the warrant requirement narrowly. For example, lower courts have rejected a warrant requirement for foreign intelligence surveillance,<sup>58</sup> rejected a warrant requirement for surveillance outside the United States,<sup>59</sup> and approved the relaxed statutory warrant standard for national security monitoring introduced by the USA PATRIOT Act of 2001.<sup>60</sup> But why? Why have the

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57. See, e.g., Maclin, *supra* note 48, at 1263, 1288 (describing *Keith*'s pro-warrant holding as "remarkable" and stating that "*Camara* would subsequently be interpreted as solidifying the warrant requirement as a core precept in Fourth Amendment law").

58. See, e.g., *United States v. Truong Dinh Hung*, 629 F.2d 908, 914 (4th Cir. 1980) ("[B]ecause of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance."); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977) ("Foreign security wiretaps are a recognized exception to the general warrant requirement . . ."); *United States v. Butenko*, 494 F.2d 593, 605 (3d Cir. 1974) (en banc) (holding that no warrant was required due to the trial court's finding that the surveillance in question was "conducted . . . solely for the purpose of gathering foreign intelligence information"); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973) ("[T]he President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence."). But see *Zweibon v. Mitchell*, 516 F.2d 594, 614 (D.C. Cir. 1975) ("[A] warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration with a foreign power, even if the surveillance is . . . in the name of foreign intelligence gathering for protection of the national security.").

59. See *In re Terrorist Bombings of U.S. Embassies*, 552 F.3d 157, 167 (2d Cir. 2008) (holding that the Warrant Clause does not apply outside the United States).

60. See *In re Sealed Case*, 310 F.3d 717, 746 (FISA Ct. Rev. 2002) ("[W]e think the procedures and government showings required under FISA, if they do not meet the minimum Fourth

lower courts interpreted the Warrant Clause narrowly in national security cases after *Keith*?

This Part offers a pragmatic argument for why the Warrant Clause has been applied narrowly in the national security setting. The core problem is that the malleable Warrant Clause requires courts to consider whether a warrant regime would be reasonable over a hypothetical set of facts. The court must imagine a set of hypothetical investigations, and it then must consider how those investigations would hypothetically operate with a hypothetical warrant requirement and whether that hypothetical regime would be reasonable. This is different from the usual question in Fourth Amendment cases. In traditional Fourth Amendment cases, the government will conduct a search or seizure, and the court must then say if that particular search or seizure was reasonable.<sup>61</sup> The review is *ex post*, and it is limited to a specific set of facts.<sup>62</sup> The malleable Warrant Clause forces judges to do something quite different. Courts must consider how national security investigations operate generally, and they then must ask how a hypothetical warrant requirement would operate within that understanding.

Courts are ill-equipped to answer such questions for four major reasons. The first is the chicken-and-egg problem: courts do not know what kind of warrant they must imagine operating because the kind of warrant is itself left open. Second, the Judiciary cannot know whether the elected branches would set up courts with expert judges or with jurisdiction to issue those warrants, making it difficult for them to assess how such a warrant requirement would work. Third, courts cannot know the technology of surveillance that will apply or whether diplomatic agreements will harmonize the different legal regimes, making it hard to know how warrants would be executed. And fourth, uncertainty as to the law of when national security investigations trigger the Fourth Amendment at all leaves courts uncertain as to what set of facts they will be balancing. Faced with these considerable uncertainties, courts have been and will continue to be tentative. The Warrant Clause may be in play in theory, but its actual reach in national security cases will remain modest.

#### A. *The Chicken-and-Egg Problem*

The first reason why the courts have applied the warrant requirement narrowly is what I call the chicken-and-egg problem. There are two basic questions raised by a regime of surveillance pursuant to a warrant: whether a

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Amendment warrant standards, certainly come close. We, therefore, believe firmly . . . that FISA as amended is constitutional because the surveillances it authorizes are reasonable.”)

61. *See, e.g., Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (determining that an already executed search warrant was “plainly invalid”).

62. *See, e.g., id.* (“The warrant in this case complied with the first three [constitutional] requirements: It was based on probable cause and supported by a sworn affidavit, and it described particularly the place of the search. On the fourth requirement, however, the warrant failed altogether.”).

warrant is required and what standard the government must satisfy to obtain a warrant. Under the approach to warrants articulated in *Keith*, however, each is based on the other. Whether a warrant is required is based on whether requiring a warrant is workable, but that depends on what standard is required for obtaining a warrant.<sup>63</sup> On the other hand, what standard is required for obtaining a warrant depends on what kind of standard would make a warrant standard workable.<sup>64</sup>

This raises an obvious difficulty: Which comes first, the requirement or the standard? It is akin to asking if you can afford a new car, with the caveat that the price of the car depends on what you can afford. Whether you can afford the car cannot be answered because the inquiry is circular: it depends on the price, which depends on what you can afford, which depends on the price, and so on. It is turtles all the way down.<sup>65</sup>

The same goes for national security warrants. When asked to answer whether the Fourth Amendment requires a warrant for a particular kind of national security monitoring, a court will not know what kind of warrant is at issue. A warrant is not required so long as a warrant requirement would be impractical,<sup>66</sup> but the court does not know what kind of warrant the court must evaluate to determine its practicability.<sup>67</sup> Again, it is like asking if you can afford a car but not disclosing the price: the honest answer is that the problem is indeterminate and cannot be answered on the facts provided. Faced with this kind of uncertainty, most courts are likely to be cautious.

For the most part, the most courts are likely to do in such a setting is (a) require a warrant but then leave the standard for obtaining the warrant unclear or (b) evaluate whether an existing and established statutory warrant system meets constitutional muster. *Keith* is an example of the former: the Supreme Court required a warrant, but then left open the question of what kind of warrant was actually required.<sup>68</sup> It was up to Congress to act and to choose a type of warrant that it would require. The decision of the Foreign

63. See *supra* notes 47–57 and accompanying text.

64. See *supra* notes 47–57 and accompanying text.

65. See *Rapanos v. United States*, 547 U.S. 715, 754 n.14 (2006) (citing CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 28–29 (1973)). The Court has offered one variation of this story:

[A]n Eastern guru affirms that the earth is supported on the back of a tiger. When asked what supports the tiger, he says it stands upon an elephant; and when asked what supports the elephant he says it is a giant turtle. When asked, finally, what supports the giant turtle, he is briefly taken aback, but quickly replies “Ah, after that it is turtles all the way down.”

*Id.*

66. See *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 322–23 (1972) (holding that because domestic security surveillance may involve different policy and practical considerations, the warrant application may vary according to the governmental interest).

67. *Id.*

68. See *id.* (holding that the warrant application may vary with the governmental interest and the citizen rights deserving protection without specifying what type of warrant is required).

Intelligence Court of Review in *In re Sealed Case*<sup>69</sup> is an example of the latter: the Court could review the choices made by Congress for the standard required to obtain a warrant and then pronounce it legally acceptable or not.<sup>70</sup> In both settings, the Warrant Clause played a relatively modest role. The main work in creating the law of foreign intelligence surveillance was up to Congress rather than the courts.<sup>71</sup>

*B. The Judiciary Cannot Control Expertise or Jurisdiction Ex Ante*

The second reason the Warrant Clause will tend to play a modest role in national security investigations is that whether a warrant system is reasonable depends on legislative choices that determine the Judiciary's competence and ability to issue warrants. Consider two variables in particular: whether the courts have expertise in national security issues and whether a warrant can be obtained to search that location. Both of these variables have been cited by courts as grounds for rejecting warrant requirements in national security cases.<sup>72</sup> But the real difficulty with these two variables is not that they suggest warrant requirements are impractical but rather that they depend on legislative action. The reasonableness of the warrant requirement hinges on legislative choices outside the Judiciary's control.

Consider the question of expertise. In *United States v. Truong Dinh Hung*,<sup>73</sup> the Fourth Circuit mostly rejected a warrant requirement for foreign intelligence surveillance primarily on the ground that judges lack the relevant expertise in national security issues: “[W]hile the courts possess expertise in making the probable cause determination involved in surveillance of suspected criminals, the courts are unschooled in diplomacy and military affairs, a mastery of which would be essential to passing upon an executive branch request that a foreign intelligence wiretap be authorized.”<sup>74</sup> The problem with this argument is that the expertise of a judge is a variable. It depends on the variable of the judge's training, schooling, and experience. While many

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69. 310 F.3d 717 (FISA Ct. Rev. 2002).

70. *See id.* at 736–46 (analyzing the consistency of FISA with the Fourth Amendment and finding no constitutional violation).

71. *See Keith*, 407 U.S. at 323–24 (noting that the Court does not attempt to guide congressional judgments and that approval of domestic security surveillance may be made in accordance with Congress's prescribed standards); *In re Sealed Case*, 310 F.3d at 736 (holding that FISA as amended did not require the Government to show that its main purpose of surveillance was not criminal prosecution).

72. *See, e.g., In re Terrorist Bombings of U.S. Embassies*, 552 F.3d 157, 168–71 (2d Cir. 2008) (determining that “[t]he question of whether a warrant is required for overseas searches of U.S. citizens has not been decided by the Supreme Court, by our Court, or . . . by any of our sister circuits” and ultimately holding that “the Fourth Amendment's Warrant Clause has no extraterritorial application and that foreign searches of U.S. citizens conducted by U.S. agents are subject only to the Fourth Amendment's requirement of reasonableness”); *United States v. Truong Dinh Hung*, 629 F.2d 908, 913 (4th Cir. 1980) (“[T]he judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance.”).

73. 629 F.2d 908 (4th Cir. 1980).

74. *Id.* at 913–14.

judges will not have the relevant experience, Congress can ensure that some will.

Our experience with the Foreign Intelligence Surveillance Court (FISC) is instructive. Judges are appointed to the FISC by the Chief Justice for seven-year terms.<sup>75</sup> To ensure that the FISC judges have expertise, the Chief Justice can select judges whose backgrounds and experience suggest they have experience or aptitude in surveillance and national security issues. The current membership of the FISC suggests that they were not chosen at random. Among its eleven current members, five have served as officers in the military.<sup>76</sup> A recent member of the court authored a widely respected treatise on electronic surveillance law.<sup>77</sup> Even apart from their past experience, the seven-year appointment to the FISC allows judges to develop expertise. The long-term appointment allows judges on the FISC to specialize in the topic, master the methods, and generally obtain an understanding of the Executive worldview.

My point is not that concerns of expertise are meritless. They are not. Rather, my point is that expertise is somewhat contingent on matters outside the control of the court trying to measure judicial expertise. The reality may be that judges will have expertise if Congress and the President value expertise and create a specialized court staffed with expert judges. But the court asked to assess judicial expertise cannot know what the other branches might do. The reviewing court cannot know how to measure the variable without future input from the other branches.

The same point goes for jurisdiction to issue a warrant. In a recent decision, *In re Terrorist Bombings of U.S. Embassies*,<sup>78</sup> the Second Circuit held that the Warrant Clause of the Fourth Amendment does not apply at all to searches or surveillance that occur outside the United States.<sup>79</sup> Part of the court's reasoning focused on "the absence of a mechanism for obtaining a U.S. warrant" to search overseas.<sup>80</sup> Indeed, traditionally warrants have only been allowed to search for property in that district.<sup>81</sup> Warrants to search and seize property abroad therefore have not been authorized.

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75. 50 U.S.C. § 1803(a), (d) (2006).

76. Presiding Judge John Bates served in the Army from 1968–1971. Malcolm Howard was in the Army from 1962–1972. George Kazen was in the Air Force from 1962–1965. Frederick Scullin was an infantry commander in Vietnam. Roger Vinson was a naval aviator from 1962–1968. Federal Judicial Center., Biographical Directory of Federal Judges, <http://www.fjc.gov/public/home.nsf/hisj> (search by each judge's last name).

77. Judge James G. Carr was a member of the FISC from 2002–2008. American Constitution Society for Law and Policy, The Honorable James G. Carr, <http://www.acslaw.org/node/15114>. He is the primary author of the noted treatise, *The Law of Electronic Surveillance*. JAMES G. CARR & PATRICIA L. BELLIA, *THE LAW OF ELECTRONIC SURVEILLANCE* (2002).

78. 552 F.3d 157 (2d Cir. 2008).

79. *Id.* at 159.

80. *Id.* at 172.

81. *See* FED. R. CRIM. P. 41(b)(1) ("[A] magistrate judge . . . has authority to issue a warrant to search for and seize a person or property located within the district . . .").

That decision appears to be a matter of legislative choice rather than constitutional command, however. In the same year as *In re Terrorist Bombings*, a new federal rule went into effect that permits a magistrate judge to issue warrants in “United States diplomatic or consular mission[s] in a foreign state.”<sup>82</sup> Although the rule is narrow in that it applies only to properties controlled by the United States, it seems to reflect the broader point that Congress could—if it wished—authorize U.S. judges to issue warrants authorizing foreign searches.

If the reasonableness of a warrant regime plausibly depends, at least in part, on whether judges have been authorized to issue warrants to conduct those searches, then judges called on to determine the reasonableness of a warrant regime face a problem. Just as they cannot predict whether Congress will create a specialized court, they cannot predict whether Congress will create the authority to issue the warrants that would make a warrant requirement reasonable.

### C. *Changing Technology and Diplomatic Agreements*

Changing technology and diplomatic agreements present a third problem for assessing the reasonableness of a warrant regime. The reasonableness of a warrant regime depends on the practical question of how warrants are executed. Justice Kennedy’s concurring opinion in *United States v. Verdugo-Urquidez*<sup>83</sup> is instructive. Justice Kennedy’s opinion considered some of the practical problems that would accompany a warrant requirement for searches outside the United States:

The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment’s warrant requirement should not apply [to searches outside the United States] as it does in this country.<sup>84</sup>

These concerns are sensible if you assume a physical search and the need for a local warrant that is obtained independently of a U.S. warrant. But if you change some of these assumptions, some of those concerns change as well.

Consider a foreign search that occurs by way of wiretapping or other direct access to electronic communications. Perhaps the United States accesses the communications from a monitoring site outside the United States.<sup>85</sup> Perhaps the foreign-to-foreign communications are routed through

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82. *Id.* R. 41(b)(5)(B).

83. 494 U.S. 259 (1990).

84. *Id.* at 278 (Kennedy, J., concurring).

85. See, e.g., Lawrence D. Sloan, Note, *ECHELON and the Legal Restraints on Signals Intelligence: A Need for Reevaluation*, 50 DUKE L.J. 1467, 1504 (2001) (warning that the “incidentally acquired information” rule, which permits the U.S. government to accept incidentally

the United States in the course of delivery.<sup>86</sup> Perhaps the communications are routed through foreign computers owned by a U.S. company that has close relations with the U.S. government. Or perhaps the communications are stored on a remote server, and U.S. officials can access the foreign server directly and download the targeted files.<sup>87</sup> In any of these instances, the government will access the communications directly: it does not need any help from foreign governments or foreign companies. While there may be sound diplomatic reasons not to act unilaterally,<sup>88</sup> often unilateral action will be possible. Further, accessing the communications might just require the flipping of a switch. In that environment, the practical concerns mentioned by Justice Kennedy no longer seem to provide a practical limitation on a warrant requirement.

Mutual legal assistance treaties and international agreements can also address some of those concerns. For example, the Council of Europe Cybercrime Convention attempts to harmonize the laws governing access to electronic communications among the signatory countries.<sup>89</sup> Under Section 2 of the Convention, each country must have procedural laws that roughly replicate the Electronic Communications Privacy Act,<sup>90</sup> which regulates the privacy of Internet communications in the United States. There must be rules governing access to subscriber information held by Internet Service Providers,<sup>91</sup> rules for access to content information,<sup>92</sup> rules governing search and seizure of stored computer data,<sup>93</sup> and the like. No two countries have to adopt the same standards for access, of course. But each country does need to have a roughly parallel legal structure so as to facilitate interaction in investigations that cross borders.<sup>94</sup>

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acquired information from foreign governments, could be used as a subtle circumvention of the law to monitor activity by U.S. citizens).

86. See generally *id.* at 1477–78 (describing how a significant amount of global Internet traffic is routed through the United States in the course of delivery even if that traffic does not originate or reach its final destination inside the United States).

87. See, e.g., *United States v. Gorshkov*, No. CR00-550C, 2001 WL 1024026, at \*1 (W.D. Wash. May 23, 2001) (chronicling an incident where U.S. agents used the defendant's password to log in to a Russian server from the United States and download files belonging to the defendant).

88. See, e.g., Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1320 (1985) (“This entire approach rests on a fallacy: even if we assume that the United States’ interests are legitimate, it does not necessarily follow that the United States is justified in acting unilaterally to achieve them.”).

89. See Anne Flanagan, *The Law and Computer Crime: Reading the Script of Reform*, 13 INT’L J.L. & INFO. TECH. 98, 109 (2005) (“[The Convention] is the first international treaty exclusively addressing issues surrounding computers and crime.”).

90. Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified as amended in scattered titles of U.S.C.).

91. Council of Europe, Convention on Cybercrime, art. 20, *opened for signature* Nov. 11, 2001, Europ. T.S. No. 185.

92. *Id.* art. 21.

93. *Id.* art. 19.

94. *Id.* art. 23–25.

Again, my argument is not that concerns over the diversity of legal regulation don't matter. Rather, it is that the significance of these concerns hinges on matters outside the Judiciary's control. Judges cannot make the President and Congress act to create a mutual legal assistance treaty or to join or reject an international convention on legal harmonization. Nor can judges predict whether the laws are likely to become more or less harmonized over time. As a result, they cannot readily predict to what extent the practical concerns with harmonization actually render a warrant requirement reasonable or unreasonable.

*D. Legal Uncertainty as to When the Fourth Amendment Is Triggered*

The fourth problem with assessing the reasonableness of a warrant regime in the national security area is uncertainty as to how the law applies to common facts. National security investigations rarely come before the courts, and that means that there are few opinions (at least few published opinions<sup>95</sup>) on some of the most important questions. For example, it remains highly uncertain precisely how much voluntary contact with the United States a person who is not a citizen or permanent resident alien must have to get Fourth Amendment rights.<sup>96</sup> It remains uncertain how the Fourth Amendment applies to access to streams of communications when the government believes the communications are among individuals who have no Fourth Amendment rights if it later turns out that the government's belief was wrong. The Fourth Amendment rights of U.S. citizens abroad also remain uncertain, with some courts looking to foreign law to identify the standard<sup>97</sup> and others looking to general reasonableness in terms of a balance between privacy and government interests.<sup>98</sup>

The effect of these uncertainties is to create significant uncertainty as to what type of facts the court needs to balance when considering whether a warrant requirement would be reasonable. Imposing a warrant requirement means imposing it over a set of facts. However, the uncertainty as to how the Fourth Amendment applies to these common fact patterns means that courts cannot know the set of facts to which they would apply the warrant requirement. Again, the uncertainty in the law counsels modesty in applying

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95. There is a possibility that the FISC has developed a secret body of Fourth Amendment law that governs the work of the FISC but that is not known to outsiders. As outsiders, we cannot know whether that body of law exists or what it says.

96. *See, e.g.,* United States v. Verdugo-Urquidez, 494 U.S. 259, 274–75 (1990) (refusing to extend Fourth Amendment protections to non-U.S. citizens living in different countries and saying that if such protections are going to be enacted it will be through the “political branches” by other means).

97. *See, e.g.,* United States v. Barona, 56 F.3d 1087, 1096 (9th Cir. 1995) (using the fact that Danish law was complied with to support the holding that Fourth Amendment violations did not occur).

98. *See, e.g., In re Terrorist Bombings of U.S. Embassies*, 552 F.3d 157, 167–71 (2d Cir. 2008) (listing various reasons to apply the reasonableness standard in such contexts).

a warrant requirement: courts cannot be sure how the warrant requirement would apply because they would not know the background set of facts over which the rule would be enforced.

#### IV. Conclusion

The surprisingly malleable Warrant Clause was originally understood as a boon to civil liberties.<sup>99</sup> In cases like *Camara* and *Keith*, the Supreme Court stepped in and imposed a warrant requirement where one had not been applied before. In expanding the Warrant Clause, however, the Court also watered it down: the malleable approach to reasonableness leaves so much uncertain that the Warrant Clause exists in theory but will be interpreted cautiously in practice. Courts do not have the tools or know the facts needed to make predictions as to whether a warrant requirement would be reasonable except in very limited circumstances. Boldly going forth and imposing a constitutional warrant requirement in such circumstances would be reckless absent significant judicial certainty that such a requirement would in fact be reasonable. As a result, the Warrant Clause tends to play a modest role in national security investigations. It can spark action, leaving the details up to the legislature, or it can ratify or reject a specific legislative working scheme. But it cannot play the same strong role in national security cases that it has traditionally played in criminal investigations.

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99. See *supra* note 57 and accompanying text.