

## Fourth Amendment Rights for Nonresident Aliens

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### Abstract

The U.S. National Security Agency has nearly unlimited authority to spy upon citizens of foreign countries while they are outside the United States. It goes almost without saying that such targeting of U.S. citizens, without any hint of individualized suspicion either of criminal wrongdoing or of being a threat to national security, would be constitutionally prohibited under the Fourth Amendment. However, the dominant view in the American legal community is that there is nothing constitutionally wrong, or even suspect, about such targeting of nonresident aliens.

This article argues that the dominant view of the law is wrong both descriptively and normatively. It is wrong with regard to the proper interpretation of the relevant constitutional case law, because that case law is more open ended and unclear than the dominant view represents it as being. And it is wrong with regard to the underlying legal and moral principles that should guide the interpretation and development of constitutional law. Those principles call for recognizing that nonresident aliens enjoy constitutional protection against unjust harms—a point argued for in a companion paper, “Constitutional Rights for Nonresident Aliens.” And those same principles imply that nonresident aliens enjoy the Fourth Amendment’s prohibition on unreasonable searches and seizures.

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## A. Introduction

The U.S. National Security Agency (NSA) has nearly unlimited authority to spy on citizens of foreign countries while they are outside the United States.<sup>1</sup> Section 702 of the Federal Intelligence Surveillance Act<sup>2</sup> (“Section 702”) allows the NSA not only to collect the “metadata” of nonresident aliens—the collection of which from U.S. citizens is now of dubious constitutionality<sup>3</sup>—but also to collect the content of their electronic communications. Moreover, Section 702 allows programmatic spying on whole groups of people; “it eliminated the requirement that a target be a ‘foreign power or an agent of a foreign power.’”<sup>4</sup> The only precondition for collecting this information—other than the requirements that the targets are nonresident aliens and that the collection is “conducted in a manner consistent with the Fourth Amendment to the Constitution of the United States”<sup>5</sup>—is that the aim is to “acquire foreign intelligence information.”<sup>6</sup> This requirement is so broad that it does not serve as a meaningful restriction at all.<sup>7</sup>

It goes almost without saying that such targeting of U.S. citizens, with no hint of individualized suspicion either of criminal wrongdoing or of being a threat to national security, would be constitutionally prohibited. The Fourth Amendment protects U.S. citizens “against unreasonable searches and seizures,”<sup>8</sup> and such targeted searching for information without individualized suspicion—indeed, without suspicion rising to the level of probable cause—has long been held unconstitutional.<sup>9</sup> The dominant view in the

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<sup>1</sup> 50 U.S.C. § 1881a(a) (2012). It provides that “the Attorney General and the Director of National Intelligence may authorize jointly . . . the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.” *Id.*

<sup>2</sup> This section was adopted as part of the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008).

<sup>3</sup> See *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013). *But see* *A.C.L.U. v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013), *vacated*, 785 F.3d 787 (2d Cir. 2015) (declining to address the constitutionality of collecting metadata under Section 215 of the PATRIOT Act).

<sup>4</sup> *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138, 1156 (2013) (Breyer, J., dissenting) (citing 50 U.S.C. § 1881a(g), in contrast with § 1804(a)).

<sup>5</sup> 50 U.S.C. § 1881a(b)(5) (2012).

<sup>6</sup> Such information is defined to include “information with respect to a foreign power or foreign territory that relates to . . . the conduct of the foreign affairs of the United States.” 50 U.S.C. § 1801(e)(2) (2012).

<sup>7</sup> Compare *id.*, with 50 U.S.C. § 1802 (2006) (permitting only the narrower surveillance of foreign powers or their agents and required the government to submit an application for every target of surveillance).

<sup>8</sup> U.S. CONST. amend. IV.

<sup>9</sup> See *Katz v. United States*, 389 U.S. 347 (1967). This is not to say that the protections afforded to U.S. citizens abroad under the Fourth Amendment are as strong as those provided domestically. See *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 157 (2d Cir. 2008) (holding that nonresident citizens benefit only from the

American legal community, however, is that there is nothing constitutionally wrong, or even suspect, about such targeting of nonresident aliens.

For example, the Privacy and Civil Liberties Oversight Board wrote that those targeted under Section 702 “lack Fourth Amendment rights because they are foreigners located outside of the United States.”<sup>10</sup> Recent decisions from the appellate courts affirm this view.<sup>11</sup> Even David Cole, who has argued that NSA spying on foreigners violates a global legal right to privacy—a right that is legally grounded in the International Covenant on Civil and Political Rights (ICCPR), Article 17<sup>12</sup>—has shied away from making the constitutional case. As he put it: “American law and politics have long taken the view that our constitutional . . . privacy protections are limited to persons within the United States, and U.S. citizens outside our borders.”<sup>13</sup>

This article contends that the dominant view of the law is incorrect, both descriptively and normatively. It is mistaken with regard to the proper interpretation of the relevant constitutional case law—which is more open-ended and unclear than the dominant view represents it as being—and with regard to the underlying legal and moral principles that should guide the interpretation and development of constitutional law. Those principles, I argue, call for recognizing that nonresident aliens enjoy the Fourth Amendment’s prohibition on unreasonable searches and seizures.

Recognizing that nonresident aliens enjoy Fourth Amendment rights is important for two interrelated reasons: Courts cannot otherwise act to protect their legal privacy rights, and courts have an essential role to play in protecting such rights.

With regard to the first point, the relevant federal law, Section 702, does not provide any legal protection to the privacy rights of nonresident aliens; it is the problem, not the solution. The relevant international law, the ICCPR, cannot itself give courts the authority

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Reasonableness Clause, and not the Warrant Clause, of the Fourth Amendment); *see also* *United States v. Stokes*, 726 F.3d 880 (7th Cir. 2013) (same).

<sup>10</sup> PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 86 (2014), <https://www.pclob.gov/library/702-Report.pdf>.

<sup>11</sup> *See Hernandez v. United States*, 757 F.3d 249, 265 (5th Cir. 2014) (citing other cases). The *Hernandez* case took a position that was unusually protective of the constitutional rights of a nonresident alien—holding that Fifth Amendment Due Process rights can be invoked by a “noncitizen injured outside the United States as a result of arbitrary official conduct by a law enforcement officer located in the United States.” *Id.* at 272. Nonetheless, it still rejected the idea that the Fourth Amendment would apply in those same circumstances. *Id.* at 263–67.

<sup>12</sup> David Cole, *We Kill People Based on Metadata*, N.Y. REVIEW OF BOOKS BLOG (May 10, 2014), <http://www.nybooks.com/blogs/nyrblog/2014/may/10/we-kill-people-based-metadata/>.

<sup>13</sup> David Cole, *We Are All Foreigners: NSA Spying and the Rights of Others*, JUST SECURITY BLOG (Oct. 29, 2013), <http://justsecurity.org/2668/foreigners-nsa-spying-rights/#more-2668>.

to protect the privacy rights of nonresident aliens. There are two reasons for that. First, the United States has taken the position that human rights treaties, like the ICCPR, apply only domestically, and thus do not protect nonresident aliens.<sup>14</sup> Second, even if this cramped reading of human rights treaties' application was rejected, the United States, in its instrument of ratification, declared that the ICCPR is not a self-executing treaty,<sup>15</sup> and Congress has done nothing to give plaintiffs a private right of action under the ICCPR. Thus, no nonresident alien could invoke the ICCPR as a basis for enforcing his or her privacy rights in a U.S. court. If the courts are to have a role in protecting the privacy rights of nonresident aliens, they can do so—given the current state of statutory and treaty law—only by invoking the constitutional rights of nonresident aliens. Courts may enforce constitutional rights even if the other branches of government have tried to deny people all statutory and treaty based protections of those same rights.<sup>16</sup>

With regard to the second point, it is often only courts that can protect the rights of those who lack a political voice. As the Supreme Court noted in *Graham v. Richardson*: "Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude [strict scrutiny] is appropriate."<sup>17</sup> The need for this solicitude is further explained by the fact that:

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<sup>14</sup> See Peter Margulies, *The NSA in Global Perspective: Surveillance, Human Rights, and International Counterterrorism*, 82 FORDHAM L. REV. 2137, 2138 (2014) (citing U.S. DEP'T OF STATE, SECOND AND THIRD PERIODIC REPORTS OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, annex I (2005), available at <http://www.state.gov/j/drl/rls/55504.htm#annex1>). It is noteworthy that the Obama administration seems to be breaking with the Bush administration on this point. Harold Koh, while serving as Legal Advisor to the State Department, authored a memorandum rejecting that reading and suggesting instead that the United States is obligated to respect the terms of the ICCPR wherever it has "effective control of the person or context at issue." U.S. Dep't of State, Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights (2010), available at <http://www.documentcloud.org/documents/1053853-state-department-iccpr-memo.html>. More recently, in November 2014, with regard to the Torture Convention, the Obama administration stated to the United Nations treaty-monitoring committee in Geneva, Switzerland, that it "covers all areas under U.S. jurisdiction and territory that the United States 'controls as a governmental authority,' including the prison at Guantanamo Bay, Cuba and 'with respect to U.S.-registered ships and aircraft.'" Karen DeYoung, *Obama Administration Endorses Treaty Banning Torture*, WASH. POST, Nov. 12, 2014 (quoting Acting State Department legal adviser, Mary E. McLeod). Interestingly, the Obama administration still has not taken the position that the treaty applies wherever the United States exercises effective control over persons. In that regard, it still sees itself as less restricted than the norm adopted by the UN treaty bodies, which "have interpreted jurisdiction in terms of a state's exercise of control over either persons or places." Sarah Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 251 (2010) (emphasis added).

<sup>15</sup> See David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 131 (1999).

<sup>16</sup> See generally *Boumediene v. Bush*, 553 U.S. 723 (2008) (declaring the Military Commissions Act of 2006, Pub. L. No. 109-366, § 950p, 120 Stat. 2600 (2006), unconstitutional insofar as it stripped the nonresident aliens detained in the military base in Guantanamo Bay, Cuba of their statutory habeas rights).

<sup>17</sup> *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938)). The Court afterwards carved out a "public function" exception to the use of strict scrutiny of

[D]emocracies are not particularly likely to protect human rights when the majority feels threatened by outsiders or by a minority group. In those settings, as in the 'war on terror,' the political branches, responsive as they are to majoritarian desires, are likely to sacrifice the rights of those without a powerful voice in the political process in the name of preserving the security of the majority. This is not a flaw unique to the United States, but is an inevitable feature of a majoritarian process. Precisely for that reason, courts have an essential role to play in protecting individual rights on behalf of those without a voice in the political process.<sup>18</sup>

Nonresident aliens may be protected in one way that domestic discrete and insular minorities may not: Their countries may use diplomatic pressure to ensure that U.S. policies respect their rights.<sup>19</sup> But this presupposes that other countries (1) care about the rights of their own citizens and (2) have leverage over the United States that could be used in negotiations to protect the rights of their citizens. In many instances, one or both of these presuppositions does not hold.

Admittedly, in the area of signals intelligence, diplomatic pressure has recently done a fair bit to protect the rights of nonresident aliens. The furor created by the release of information about the extent of U.S. spying, domestically and abroad, including spying on the cell phone of the German Chancellor,<sup>20</sup> seems to have led to executive action to

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laws that treat aliens unequally. Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 736 (1996). It would not apply to Fourth Amendment rights.

<sup>18</sup> David Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2008 CATO SUP. CT. REV. 47, 60 (2008) (citing DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2005) and JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980)). More specifically, in the privacy rights context, Cole has also pointed out that "Congress is far less motivated to do anything about the NSA's abuse of the rights of foreign nationals [than the rights of U.S. citizens]. They are 'them,' not 'us.' They don't vote." Cole, *supra* note 12.

<sup>19</sup> See J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 540 (2007) (explaining that the traditional answer to the worry that nonresident aliens may be abused by the United States is that "aliens abroad [have been] understood to be protected by international law, diplomacy, and policy set by Congress and the President"); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) ("If there are to be restrictions on searches and seizures which occur incident to . . . American action [abroad], they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.").

<sup>20</sup> See Mark Landler, *Merkel Signals That Tension Persists Over U.S. Spying*, N.Y. TIMES, May 2, 2014 (noting that German Chancellor Angela Merkel indicated "that Germany still had significant differences with the United States over surveillance practices and that it was too soon to return to 'business as usual.'").

protect the privacy rights of nonresident aliens. In January 2014, President Obama issued a Presidential Policy Directive, PPD-28, that stated, for example: (1) “[T]hat all persons should be treated with dignity and respect, regardless of their nationality or wherever they might reside, and that all persons have legitimate privacy interests in the handling of their personal information”;<sup>21</sup> (2) that the United States “must continue to ensure that our signals intelligence policies and practices appropriately take into account . . . the legitimate privacy and civil liberties concerns of U.S. citizens and citizens of other nations”;<sup>22</sup> (3) that the limits on the collection of bulk signals intelligence “are intended to protect the privacy and civil liberties of all persons, whatever their nationality and regardless of where they might reside”;<sup>23</sup> (4) that “U.S. signals intelligence activities must . . . include appropriate safeguards for the personal information of all individuals, regardless of the nationality of the individual to whom the information pertains or where that individual resides”;<sup>24</sup> (5) that “to the maximum extent feasible consistent with national security, [the] policies and procedures [for safeguarding personal information] are to be applied equally to the personal information of all persons, regardless of nationality;”<sup>25</sup> and (6) that the dissemination and retention of information shall be done only if dissemination or retention “of comparable information concerning U.S. persons would be permitted under Section 2.3 of Executive Order 12333.”<sup>26</sup>

This is an impressive commitment to respecting the privacy rights of nonresident aliens,<sup>27</sup> but a cautionary note is in order. This Presidential Directive was issued in response to a surge in international diplomatic pressure. What the President orders on one day can be changed by the President on another day. This Directive does nothing to change the underlying legal space, as established by Section 702, in which the United States can essentially spy on nonresident aliens without limit.

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<sup>21</sup> OFFICE OF THE PRESS SEC’Y, PRESIDENTIAL POLICY DIRECTIVE/PPD-28 1 (2014), <http://fas.org/irp/offdocs/ppd/ppd-28.pdf>.

<sup>22</sup> *Id.* at 2.

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

<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 6.

<sup>27</sup> How impressive it is depends on how well one thinks privacy rights are protected under Executive Order 12333. For a critical view, see John Napier Tye, *Meet Executive Order 12333: The Reagan Rule That Lets the NSA Spy on Americans*, WASH. POST, July 18, 2014. It also depends on how much wiggle room is permitted, given the qualification: “[T]o the maximum extent feasible consistent with national security.” This qualification could “eat the rule,” so that it falls a good deal short of a reasonable Fourth Amendment balance. On the other hand, the Fourth Amendment notion of reasonableness has to take security into account as well. See *infra* Part E. Therefore, the Presidential Directive and the Fourth Amendment might not come apart.

There are reasons to think that this Directive, operating in the world of signals intelligence, reflects a more stable reality than might be the case for other Presidential Directives. Benjamin Wittes has argued that Obama was able to use “values-based statements as justifications for policies that already exist, at least de facto, for purely functional reasons.”<sup>28</sup> According to Wittes, the reason that Obama can use such justification is that “[g]ood intelligence analysis . . . is all about discrimination between what’s important and what’s not. Privacy is a values name we give to a very similar form of discrimination—only framed from the point of view of the individual.”<sup>29</sup> In other words, a “reasonable” respect for privacy—what the Fourth Amendment might afford nonresident aliens—reflects a balance between the need for the information and the interests of the person whose privacy might be infringed in order to get the information. According to Wittes, the costs of sorting through and keeping information, especially when collected in bulk, result in a functionally similar balance being struck.

Is Wittes correct to suggest that the practice of the NSA did not need to be constrained because it was already, for “good intelligence” reasons, respectful of privacy values? Perhaps, but even if the dovetailing *should* work fairly well, and did work fairly well in this case, it is not clear that it will always work so well in the future. The problem is that good policy does not always carry the day. Ideology and politics can drive politicians to adopt bad policy if it suits their political agenda. Thus, one can imagine that a different President—for example, one with enemy lists more like Richard Nixon’s—would direct the NSA differently. And if a future president were to do so, there seems to be nothing in U.S. law that would stop him or her.<sup>30</sup> Courts must have a role in protecting nonresident aliens’ rights in order to ensure against such possibilities.<sup>31</sup>

If the United States were to acknowledge the moral and legal imperative to respect the rights of nonresident aliens, it would recognize that there is good reason to submit its actions, which affect the basic rights of nonresident aliens, to the review of a neutral judicial body, rather than U.S. courts. Even if U.S. judges try to take the constitutional rights of nonresident aliens seriously, their reasoning would likely be biased. As Mattias Kumm has written, “[A]ny claim by one state to be able to resolve these issues [concerning

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<sup>28</sup> Benjamin Wittes, *The President’s Speech and PPD-28: A Guide for the Perplexed*, LAWFARE BLOG (Jan. 20, 2014), <https://www.lawfareblog.com/presidents-speech-and-ppd-28-guide-perplexed>.

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

<sup>30</sup> Importantly, though there is legislation in Congress to reform NSA spying, it does not address section 702. See USA Freedom Act, H.R. 3361, 113th Cong. (2014).

<sup>31</sup> Standing may also prove to be a practical barrier preventing nonresident aliens from getting access to the courts to challenge Section 702. See *infra* Part F.

actions that could unjustly impact outsiders] authoritatively and unilaterally amounts to a form of domination.”<sup>32</sup>

Given the current political climate in the United States, however, such a suggestion is a complete non-starter.<sup>33</sup> The United States’s self-conception is too exceptionalist, its power too great, and its citizens too skeptical of the judgment and intentions of others for it to submit its actions to any such body. For the foreseeable future, it will engage in this “domination.” Even so, as a second best, its judiciary should seek to ensure that its actions respect its own core principles, no matter what Presidential Directives are in place. The judiciary should hold that nonresident aliens enjoy a range of constitutional protections against unjustifiable harm inflicted by the U.S. government, including the harm of having one’s private information searched without any individualized suspicion either of wrongdoing or of being a threat to the United States.

In a companion paper,<sup>34</sup> I argue that case law on constitutional rights—not limited to the Fourth Amendment—was never clearly against extending such rights to nonresident aliens, and now, in the wake of *Boumediene v. Bush*,<sup>35</sup> has moved in favor of extending them. In the companion paper I also argue that there are strong normative reasons in favor of extending constitutional rights to nonresident aliens.<sup>36</sup>

This article extends the general point to the specific case of nonresident aliens’ Fourth Amendment privacy rights against NSA spying. It proceeds in five parts. Part B provides an overview of the Fourth Amendment and the concerns raised by NSA spying on nonresident aliens, focusing on the example of spying on nonresident aliens in Germany. Part C argues that case law leaves open the possibility that nonresident aliens enjoy the Fourth Amendment protection against unreasonable searches and seizures. Part D argues that it would be neither impractical nor anomalous for courts to enquire into whether

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<sup>32</sup> Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law*, 20 IND. J. GLOBAL LEGAL STUD. 605, 613 (2013).

<sup>33</sup> This sort of intolerance for submitting state action to a neutral judicial body has a long history in the United States. U.S. CONST. art. III, § 2 gave citizens of one state the ability to seek a neutral forum, in a federal court, in which to pursue their claims against another state. The 11th Amendment, adopted in 1795, removed that basis for federal court jurisdiction.

<sup>34</sup> Alec Walen, *Constitutional Rights for Nonresident Aliens*, DREXEL L. REV. (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2533579](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533579).

<sup>35</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>36</sup> The “suggestion” that privacy concerns and Fourth Amendment rights are among the “fundamental” rights against unjust harm that must apply outside core U.S. territory goes back to *Downes v. Bidwell*, 182 U.S. 244, 282–83 (1901) (listing among the “natural rights enforced by the Constitution” “immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and . . . such other immunities as are indispensable to a free government”).



nonresident aliens enjoy Fourth Amendment protections, and that as a result courts *should* entertain suits by nonresident aliens for violations of their Fourth Amendment rights. Part E argues that the balance of considerations that goes into determining whether government action is reasonable or instead violates Fourth Amendment rights should treat nonresident aliens on a par with nonresident citizens, and that section 702's unconstrained permission to search the communications of nonresident aliens is therefore facially unconstitutional. Finally, Part F argues that a potential obstacle to the courts deciding that nonresident aliens enjoy a Fourth Amendment right against Section 702—the problem of standing—does not present an insurmountable barrier to bringing a suit to strike down Section 702 as unconstitutional.

## B. Background on the Fourth Amendment and NSA Spying in Germany

### I. The Fourth Amendment

The Fourth Amendment was adopted in reaction to British use of general writs, along with other abusive laws, that the colonists felt violated their basic right to privacy.<sup>37</sup> It was originally enforced in a limited way, prohibiting only trespass against a person and his or her physical property.<sup>38</sup> But that view was rejected in favor of a broader protection of privacy in *Katz v. United States* in 1967.<sup>39</sup> In *Katz*, the Court held that “the Fourth Amendment protects people, not places.”<sup>40</sup> Or, as Justice Harlan framed the issue in his concurring opinion in *Katz*, “[A] person has a constitutionally protected reasonable expectation of privacy.”<sup>41</sup> This excludes protection of information in the public domain but protects information that a person could reasonably expect to be private.

There are many reasons why privacy might be considered an important right. As Justice Brandeis stated in his dissent in *Olmstead*:

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<sup>37</sup> See WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 766 (2009) (“Privacy was the bedrock concern of the amendment, not general warrants.”); see also Tracey Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV. 1049, 1062 (2011) (summarizing Cuddihy’s position as holding that “privacy was at the forefront of the Framers’ thinking and should be in our minds as we encounter new Fourth Amendment cases”).

<sup>38</sup> *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (holding that Fourth Amendment protections did not apply “unless there has been an official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house ‘or curtilage’ for the purpose of making a seizure”).

<sup>39</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>40</sup> *Id.* at 351.

<sup>41</sup> *Id.* at 360. This framing has since become generally accepted.

Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value.<sup>42</sup>

Brandeis was clear that this concern with privacy was to be understood in the broadest sense. In his view, the Founders

conferred, as against the government, the right to be let alone—the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.<sup>43</sup>

Going beyond Brandeis's sweeping statement, one can identify two basic conceptions of privacy and four related reasons to value its protection. Framed in terms of interests, the different conceptions concern primarily (1) concealment: The interest in preventing others from knowing about one's activities and characteristics; and (2) discretion: The interest in controlling when and how others know about one's activities and characteristics.<sup>44</sup> These two interests give rise to four concrete types of value that are served by the protection of privacy.<sup>45</sup> First, there is an objective value in keeping parts of one's life under one's own control, sharing details or intimacies with at most a few select persons.<sup>46</sup> Second, many people subjectively value controlling at least some information about their lives, sharing

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<sup>42</sup> *Olmstead*, 277 U.S. at 475 n.3 (quoting *In re Pacific Ry. Commission*, 32 F. 241, 250 (C.C.N.D. Cal. 1887)).

<sup>43</sup> *Id.* at 478; see also Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 230 (1993) ("Even the most ardent foe of a broad interpretation of civil liberties is hard pressed to deny that the Fourth Amendment ranks as a fundamental right deserving strict judicial protection.").

<sup>44</sup> Daniel J. Solove lists six "general headings, which capture the recurrent ideas in the discourse." Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1092 (2002). As he acknowledges, they are a mix of "means to achieve privacy [and] ends or goals of privacy." *Id.* I think his list can be usefully boiled down to the two interests listed in the text.

<sup>45</sup> This is just one way of distinguishing the underlying concerns. I make no claim that it is the best way to identify the harms.

<sup>46</sup> See THOMAS NAGEL, *CONCEALMENT AND EXPOSURE & OTHER ESSAYS* 4 (2002) (arguing for the importance of concealment, or a private space, "as a condition of civilization").

details or intimacies with at most a few select persons.<sup>47</sup> Third, the protection of privacy, in both the concealment and the discretion senses, can help prevent a variety of harms that may flow from unwanted information collection and dissemination, including: “(1) breach of confidentiality, (2) disclosure, (3) exposure, (4) increased accessibility, (5) blackmail, (6) appropriation, and (7) distortion.”<sup>48</sup> Fourth, a special kind of vulnerability may arise from invasion of privacy, in both senses of the word: The government can fish through private information searching for means to prosecute or blackmail its critics and opponents.<sup>49</sup>

This list of reasons why individuals value privacy applies to nonresident aliens as well as to U.S. citizens. The first two concerns do not depend on who is being spied on or where. The third and fourth diminish somewhat as the distance between the privacy invader and the person whose privacy is invaded grows. A stranger is less likely to blackmail someone than a person who commences the invasion of privacy looking for information with which to blackmail, and it seems that governments are less likely to seek to silence critics who are not in the civic body than those who are. Nonetheless, these concerns do not disappear altogether. For example, if the United States discovers that a nonresident alien who it views as dangerous has also engaged in minor criminal activities, it may threaten to disclose that fact to the government where that person lives in an attempt to blackmail him or her and thereby take him or her out of action. Likewise, if it sweeps up information from a community and searches for people who are vulnerable to having their information disclosed—imagine someone who is having an extra-marital affair or is engaged in homosexual activity in a generally homophobic community—the United States could then try to blackmail that person into serving as an agent for the United States.<sup>50</sup>

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<sup>47</sup> Both this and the first harm can also be understood in terms of dignitary harms. See Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 487 (2006).

<sup>48</sup> *Id.* at 525.

<sup>49</sup> See Laurent Sacharoff, *The Relational Nature of Privacy*, 16 LEWIS & CLARK L. REV. 1249 (2012) (discussing many examples of government violating privacy rights in order to harass or intimidate its critics and opponents); see also DOUG HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008) (pointing out how vulnerable most people are to such harassment and intimidation: “Perhaps over 70% of living adult Americans have committed an imprisonable offense at some point in their life”).

<sup>50</sup> These worries explain one of the restrictions President Obama put on the collection of signals intelligence in PPD-28:

The United States shall not collect signals intelligence for the purpose of suppressing or burdening criticism or dissent, or for disadvantaging persons based on their ethnicity, race, gender, sexual orientation, or religion. Signals intelligence shall be collected exclusively where there is a foreign intelligence or counterintelligence purpose to support national and departmental missions and not for any other purposes.

OFFICE OF THE PRESS SEC’Y, *supra* note 21, at 3.

Some wonder if these sorts of privacy concerns are as relevant today, when people disclose so much of themselves on the Internet, as they were in an earlier time. But one should not exaggerate the extent to which privacy matters less now than before. Even if more people disclose information that would have been thought embarrassing to disclose twenty years ago, that does not mean that they are willing to disclose *everything*. Many people still share intimate information with only a select few people. Reading their email, capturing every keystroke they make on their computers or phones, or intercepting photos they post electronically but not on public sites would still expose them to the aforementioned harms.

## *II. NSA Spying in Germany*

The bombshell regarding NSA spying in Germany was the discovery that the NSA was tapping German Chancellor Angela Merkel's phone.<sup>51</sup> While the discovery of such spying was embarrassing to the United States, and arguably reflected poor judgment given the risk to U.S.-German relations, I will not argue that such spying was unconstitutional. Clearly Chancellor Merkel is "an agent of a foreign power,"<sup>52</sup> and I accept, at least for the sake of the current argument, that the United States' interest in protecting itself against threats provides sufficient justification for targeting the agents of foreign powers for spying.<sup>53</sup> The driving concern in this paper is Section 702, which allows the collection of the content of any and all communications of nonresident aliens if the aim is to "acquire foreign intelligence information."<sup>54</sup>

As previously noted, Presidential Directive 28 requires the NSA to take the privacy interests of German nonresident aliens into account. Under this Directive, the NSA is to treat them more or less as it would treat its own citizens—who are unquestionably protected by the Fourth Amendment.<sup>55</sup> If this were statutory language, there would be no reason to bring a constitutional case, not unless there was evidence that the language was disrespected in practice. Unfortunately, it is not statutory language. The statutory language is much more permissive.

The claim has been made that U.S. practice and German practice, with regard to signals intelligence, are fundamentally similar. "German officials assembled [a] vast database

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<sup>51</sup> LANDLER, *supra* note 20.

<sup>52</sup> See 50 U.S.C. § 1881b(c)(1)(B)(ii) (2006) (permitting the collection of foreign intelligence information upon a finding of probable cause that the target is "a foreign power, an agent of a foreign power, or an officer or employee of a foreign power").

<sup>53</sup> It is a separate question whether the definition of an agent of a foreign power is too broad.

<sup>54</sup> 50 U.S.C. § 1801(e)(2) (2012).

<sup>55</sup> *Supra* notes 21–26 and accompanying text.

without any ‘particularized suspicion of wrongdoing.’ They then used search terms to query the data. The U.S. section 702 program uses methods that are substantially similar to the German approach.”<sup>56</sup> The import of this claim is that since the European Court of Human Rights upheld the German program,<sup>57</sup> U.S. law under Section 702 must also pass muster under international law. And if it passes muster under international law, it is hard to see why the U.S. courts should be more restrictive.<sup>58</sup>

The problem with the foregoing argument is that U.S. law would pass muster under international law in substantial part because of the recent Presidential Directive,<sup>59</sup> but there is nothing secure about the Directive itself. In contrast with that insecure foundation for respecting privacy rights, the German Constitutional Court has held German law in-check. The court ruled that German collection of bulk data is constitutional, but that “certain provisions concerning transfer of the personal data by the [*Bundesnachrichtendienst*] to other agencies” was unconstitutional.<sup>60</sup> That type of limitation on the use of bulk signals data does not exist under Section 702. It is the lack of limitations—failure to put any restrictions on what can be done with data collected in bulk from nonresident aliens—that could ground a claim that Section 702 is facially unconstitutional under the Fourth Amendment. Scanning with a computer or looking for key words is one thing; following up, reading the transmissions, and transferring the content to other agencies, to be used in any number of ways as seems fit to members of various federal agencies, is another entirely.

### C. A Careful Reading of the Case Law

Having explained why nonresident aliens have a reason to be concerned with NSA spying under Section 702, we come now to the question of whether the Court has already held that nonresident aliens do not enjoy Fourth Amendment protections. The standard view—that the Supreme Court has held that the Fourth Amendment does not apply to nonresident aliens—is grounded in a superficial reading of *Verdugo-Urquidez*. In that case,

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<sup>56</sup> Margulies, *supra* note 14, at 2159.

<sup>57</sup> *Weber v. Germany*, 2006 XI Eur. Ct. H.R. 309.

<sup>58</sup> A similar argument could be mounted if proposed French legislation expanding the surveillance power of the French government goes into effect and is upheld by the European Court of Human Rights. See Alissa Rubin, *Lawmakers in France Move to Vastly Expand Surveillance*, N.Y. TIMES, May 4, 2015.

<sup>59</sup> Wittes denies this, but as noted already, he presupposes not only a dovetailing of good signals intelligence practices and respect for privacy, but also that the executive branch would reliably follow good signals intelligence practice. There is reason to doubt this. See Wittes, *supra* notes 28 and accompanying text; see also USA Freedom Act, H.R. 3361, 113th Cong. (2014).

<sup>60</sup> Paul M. Schwartz, *German and U.S. Telecommunications Privacy Law: Legal Regulation of Domestic Law Enforcement Surveillance*, 54 HASTINGS L.J. 751, 782 (2003).

Justice Rehnquist, writing nominally for a majority of five justices, held that “the Fourth Amendment [does not] appl[y] to the search and seizure by United States agents of property that is owned by [a nonresident alien] and located in a foreign country.”<sup>61</sup> It can be inferred from what Rehnquist wrote that the Fourth Amendment itself does not apply to nonresident aliens. If one counts votes, however, it is clear that the proposition that the Fourth Amendment, as a whole, does not apply to the search and seizure by United States agents of property owned by a nonresident alien and located in a foreign country received only four votes. Five Justices clearly rejected that position, including Justice Kennedy, who, while signing the majority opinion, wrote a concurring opinion in which he expressed a number of points of disagreement.

The vote count for the rejection of Rehnquist’s sweeping opinion is as follows: Justices Brennan and Marshall argued that the whole Fourth Amendment, including the Warrant Clause, applies to searches and seizures of the property of nonresident aliens. Justices Stevens and Blackmun, in separate opinions, agreed with Rehnquist only insofar as they agreed that the Warrant Clause does not apply to such searches and seizures.<sup>62</sup> Most importantly, Justice Kennedy agreed only that the Warrant Clause does not apply to such searches and seizures: “The conditions and considerations of this case would make adherence to the Fourth Amendment’s warrant requirement impracticable [or] anomalous.”<sup>63</sup>

If only the Warrant Clause was held inapplicable to searches and seizures of foreign property owned by aliens, then it is at least arguable that the rest of the Fourth Amendment applies to nonresident aliens. The rest of the Fourth Amendment is the more general protection “against unreasonable searches and seizures.” The problem is that it is largely unclear exactly what Justice Kennedy rejected in Justice Rehnquist’s opinion. Justice Kennedy said that he does “not believe” that his views “depart in fundamental respects from the opinion of the Court.”<sup>64</sup> But that, too, is unclear, and thus it is unclear just what in Rehnquist’s opinion is a mere plurality opinion. As a result, we must analyze the various arguments in Rehnquist’s *Verdugo-Urquidez* opinion carefully to determine if they were ever accepted by a majority of the Court, or are sound and should be accepted.

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<sup>61</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990).

<sup>62</sup> *See id.* at 279 (“I do not believe the Warrant Clause has any application to searches of noncitizens’ homes in foreign jurisdictions because American magistrates have no power to authorize such searches.”); *id.* at 297 (“I agree with the Government, however, that an American magistrate’s lack of power to authorize a search abroad renders the Warrant Clause inapplicable to the search of a noncitizen’s residence outside this country.”).

<sup>63</sup> *Id.* at 278. Justice Harlan, who coined the test, used the phrase “impracticable *and* anomalous.” *Reid v. Covert*, 354 U.S. 1 (1957) (emphasis added). But it makes more sense for either prong to suffice for holding that people do not enjoy a constitutional right in a particular context.

<sup>64</sup> *Verdugo-Urquidez*, 494 U.S. at 275.

*I. The Fourth Amendment and "The People"*

The first obstacle to reaching the conclusion that case law leaves an open question as to whether nonresident aliens should benefit from the protection "against unreasonable searches and seizures" is Justice Rehnquist's textual argument based on the fact that the Fourth Amendment speaks in terms of the right of "the people." Some amendments are framed in terms of "persons," some in terms of "citizens," some in terms of "the accused," and some in terms of "the people." Rehnquist's reading of the overall text of the Constitution "suggest[ed]" to him that "the people" "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."<sup>65</sup> This "suggestion" was not originally endorsed by five members of the Court in *Verdugo-Urquidez*. Justice Kennedy explicitly rejected it, writing: "I cannot place any weight on the reference to 'the people' in the Fourth Amendment as a source of restricting its protections."<sup>66</sup> Yet a more recent case, *District of Columbia v. Heller*, recognized an individual right to bear arms under the Second Amendment, and five Justices, including Justice Kennedy, embraced Justice Rehnquist's interpretation of "the people" in *Verdugo-Urquidez*.<sup>67</sup> Thus, it might seem that the Court has now embraced this reading of the Fourth Amendment, cementing the exclusion of nonresident aliens. There are, however, three reasons to reject this conclusion.

First, *Heller's* cementing of Rehnquist's reading of "the people" is dicta. The quotation to Rehnquist's discussion is used to establish the point that "the Second Amendment right is exercised individually and belongs to all Americans."<sup>68</sup> This use is logically independent of Rehnquist's use, which was to exclude nonresident aliens, or indeed resident aliens without "sufficient connection with this country," from benefitting from Fourth Amendment rights.

Second, Rehnquist's reading of "the people" as "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"<sup>69</sup> clearly cannot fit all uses of the phrase, even within the Bill of Rights. The Tenth Amendment speaks of the powers that are "reserved . . . to the people."<sup>70</sup> In this context, it is clear that "the people" refers to the

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<sup>65</sup> *Id.* at 265.

<sup>66</sup> *Id.* at 276.

<sup>67</sup> *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008).

<sup>68</sup> *Id.* at 581.

<sup>69</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

<sup>70</sup> U.S. CONST. amend. X.

citizenry.<sup>71</sup> And in the context of the Second Amendment, reading “the people” as broadly as Rehnquist has proven difficult for lower courts that have upheld 18 U.S.C. § 922(g)(5), which makes it a crime “for any person . . . who, being an alien, is illegally or unlawfully in the United States . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition.”<sup>72</sup> For there are aliens who have been in the United States illegally, but who have done so for an extended time, and who have “developed sufficient connection with this country to be considered part of that community.”<sup>73</sup> They clearly would have Fourth Amendment rights, but the courts have found that they do not have Second Amendment rights.<sup>74</sup> As one court put it:

[W]e do not find that the use of “the people” in both the Second and the Fourth Amendment mandates a holding that the two amendments cover exactly the same groups of people. The purposes of the Second and the Fourth Amendment are different. The Second Amendment grants an affirmative right to keep and bear arms, while the Fourth Amendment is at its core a protective right against abuses by the government.<sup>75</sup>

In other words, lower courts have found that the *Heller* Court’s embrace of Rehnquist’s position on the meaning of “the people” is at most “suggestive.” This also indicates that *Heller* should not be read as a clear embrace of Rehnquist’s use of that interpretation of the phrase to exclude nonresident aliens from protection under the Fourth Amendment.

Third, Rehnquist’s reading is substantively misguided and should be rejected. Emphasis on the text should be grounded in evidence that the word choice was deliberate and significant, as opposed to something adopted simply as a rhetorical flourish. But the historical evidence suggests that the choice of “the people” versus “persons” in the Bill of Rights was not particularly deliberate or significant. As J. Andrew Kent has argued, “[I]n practical usage, words like ‘man,’ ‘people,’ ‘subject,’ ‘individual,’ or ‘person’ are almost

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<sup>71</sup> See Gerald L. Neuman, *Whose Constitution*, 100 YALE L. J. 909, 972 n.380 (1991) (describing the gap between Justice Rehnquist’s reading of “the people” and its use in both the Tenth Amendment and the Preamble to the Constitution).

<sup>72</sup> 18 U.S.C. § 922(g)(5) (2012).

<sup>73</sup> *Verdugo-Urquidez*, 494 U.S. at 265.

<sup>74</sup> See, for example, the petitioner in *United States v. Huitron-Guizar*, 678 F.3d 1164 (10th Cir. 2012). He was brought to the United States from Mexico at age three and was prosecuted for violation of 18 U.S.C. § 922(g)(5) at age twenty-four. *Id.* at 1165.

<sup>75</sup> *United States v. Portillo-Munoz*, 643 F.3d 437, 440–41 (5th Cir. 2011).



always indistinct in scope.”<sup>76</sup> He adds, “If the differences in language signified immensely important differences in coverage, one might have expected to see detailed public debate about word choice during the framing of the U.S. Bill of Rights and consideration of the possible scope of different choices.”<sup>77</sup> He points out that there is no such evidence. Instead, as he illustrates, the Bills of Rights adopted by states seemed to use different words essentially for stylistic reasons:

New York’s ratification convention suggested a First Amendment-style assembly clause protecting “the People,” while its petition clause, found in the very same section, protected instead “every person.” A similar variability in wording is found in the Declaration of Rights of the 1780 Massachusetts Constitution. Many rights are described as being held by “the people,” while others are held by “subject[s].” A few rights protect “inhabitants,” “individual[s] of the society,” “person[s],” and “citizen[s].” In all of these precursors to the U.S. Bill of Rights, it is hard to discern a comprehensive political theory that explains the great variability in wording. For example, in the Massachusetts Constitution, the seemingly foundational and universal right to be tried only by independent and impartial judges is reserved for “citizen[s],” while the right to jury trial is given to “any person,” and the right to “obtain justice freely, and without being obliged to purchase it” belongs to “[e]very subject of the commonwealth.”<sup>78</sup>

In sum, there is no reason to take the Fourth Amendment’s use of “the people” to be anything other than a stylistic choice. Indeed, when one appreciates the stylistic infelicity of the alternative use of “persons”—“The right of persons to be secure in their persons, houses . . .”—the avoidance of that redundancy becomes by far the most reasonable explanation for the word choice.

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<sup>76</sup> Kent, *supra* note 19, at 515.

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

<sup>78</sup> *Id.* at 515–16. Another interesting example: “The Constitution refers to a ‘person’ accused of treason, but plainly this term cannot comprehend aliens abroad with no prior connection to the United States.” *Id.* at 514.

*II. Historical Purpose of the Fourth Amendment*

Rehnquist appeals to the history of the Fourth Amendment: “What we know of the history of the drafting of the Fourth Amendment also suggests that its purpose was to restrict searches and seizures which might be conducted by the United States in domestic matters.”<sup>79</sup> Rehnquist’s argument for this point, while mentioning concerns specific to the Fourth Amendment, would apply equally to every part of the Bill of Rights, namely that the drafters were concerned with the possibility that the federal government would abuse its power. Yet, the best reading of *Boumediene* rejects the conclusion that no part of the Bill of Rights could apply to nonresident aliens.<sup>80</sup> Moreover, there is good reason not to give too much weight to the fact that the original reason for adopting the Fourth Amendment—along with the other Amendments—was restraining the federal government’s domestic actions. When these Amendments were adopted, the United States was a fledgling power; it was not particularly concerned that it might wield its power indiscriminately against other nations.<sup>81</sup> Nowadays, the United States is a global power and its respect for, or disregard of, the rights of nonresident aliens is a much more pressing matter—morally, politically, and legally.<sup>82</sup>

Rehnquist also argues that there is “no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters.”<sup>83</sup> But Rehnquist’s supporting evidence is exclusively concerned with the 1798 “‘undeclared war’ with France”<sup>84</sup> and the correlated right to seize armed French vessels. This sort of behavior is perfectly consistent with the more limited proposition that the Fourth Amendment does

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<sup>79</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990).

<sup>80</sup> See Walen, *supra* note 34, Part I.C.

<sup>81</sup> Indeed, early cases show that the U.S. was particularly concerned to respect international law and thereby demonstrate that it was an upstanding member of the international community. See *Henfield’s Case*, 11 F. Cas. 1099, para. 5 (C.C.D. Pa. 1793) (“Providence has been pleased to place the United States among the nations of the earth, and therefore, all those duties, as well as rights, which spring from the relation of nation to nation, have devolved upon us.”).

<sup>82</sup> See also WALEN, *supra* note 34, Part II.A (discussing the limited relevance of the original understanding of the reach of the Constitution).

<sup>83</sup> *Verdugo-Urquidez*, 494 U.S. at 267.

<sup>84</sup> *Id.*

not limit the government when it comes to seizing enemy property during a war, whether declared or *de facto*.<sup>85</sup>

Moreover, the type of limitations on the Fourth Amendment's extraterritorial application that Rehnquist notes would have applied not only to nonresident aliens but also to citizens.<sup>86</sup> Indeed, there are still, in the modern period, Fourth Amendment exceptions that apply outside the United States to both citizens and aliens alike. Consider the rule regarding searches at the border: "Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."<sup>87</sup> Consider also the fact that there are Courts of Appeal decisions holding that U.S. citizens overseas, while protected against unreasonable search and seizure, are not protected by the Warrant Clause of the Fourth Amendment.<sup>88</sup> Rehnquist offers no reason to explain why this extraterritorial limitation of the Fourth Amendment should apply differently to nonresident aliens.

### *III. Argument by Comparison with the Fifth Amendment*

Rehnquist argues that the rejection of the applicability of the Fifth Amendment to nonresident aliens in *Johnson v. Eisentrager*<sup>89</sup> implies that the Fourth Amendment must not apply to nonresident aliens because the former concerns "the relatively universal term of 'person,'" while the latter "applies only to 'the people.'"<sup>90</sup> We have already seen the weakness of this textual argument.<sup>91</sup> Another problem with the argument is that it presupposes a reading of *Eisentrager*—that it emphatically "reject[ed] the] extraterritorial

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<sup>85</sup> The point is quite consistent with the reading of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), according to which that holding rejected Fifth Amendment rights only of nonresident *enemy* aliens, not nonresident aliens, per se. See WALEN, *supra* note 34, Part I.A.

<sup>86</sup> See Neuman, *supra* note 71, at 973 ("If these data suggest anything, however, it is that *no one* has Fourth Amendment rights outside the nation's borders . . .").

<sup>87</sup> *Carroll v. United States*, 267 U.S. 132, 154 (1925).

<sup>88</sup> *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 157 (2d Cir. 2008); *United States v. Stokes*, 726 F.3d 880 (7th Cir. 2013).

<sup>89</sup> 339 U.S. 763 (1950) (holding that German nationals, convicted by a U.S. military tribunal of war crimes and imprisoned in an U.S. Army base in Germany, had no Fifth Amendment due process rights, and right to habeas corpus).

<sup>90</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990).

<sup>91</sup> See *supra* notes 71–78 and accompanying text.

application of the Fifth Amendment<sup>92</sup>—that was emphatically rejected by the majority in *Boumediene*.<sup>93</sup>

This leaves Rehnquist with one other argument against extending Fourth Amendment protections to nonresident aliens: That doing so would be impracticable.<sup>94</sup> This is the sort of argument with which one must ultimately decide the issue, and it is thoroughly discussed in the next Part.

#### D. The Reasonableness of Applying the Fourth Amendment to Nonresident aliens

The default legal framework after *Boumediene* for extending constitutional rights—other than habeas—to nonresident aliens seems to be whether it would be impracticable or anomalous to do so.<sup>95</sup> This Part of the article considers the concerns raised by Justices Rehnquist and Kennedy with regard to the extension of Fourth Amendment protections to nonresident aliens and concludes that neither has articulated strong reasons supporting the claim that such an extension would be either impracticable or anomalous.

Rehnquist claims that extending Fourth Amendment rights to nonresident aliens would be impracticable because it would “disrupt the ability of the political branches to respond to foreign situations involving our national interest.”<sup>96</sup> In addition, he claims that the “global view of [the Fourth Amendment’s] applicability would plunge [Members of the Executive and Legislative Branches] into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad.”<sup>97</sup>

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<sup>92</sup> *Id.*

<sup>93</sup> See also Walen, *supra* note 34, Part I.A. The rejection of Rehnquist’s reading of *Eisenrager* by the Court in *Boumediene* also covers the next two arguments that Rehnquist makes. First, he writes: “Since respondent is not a United States citizen, he can derive no comfort from the *Reid* holding.” *Verdugo-Urquidez*, 494 U.S. at 270. That too was rejected in *Boumediene*. Second, he writes: The cases that hold that aliens have constitutional rights cannot help the respondent, because he “had no previous significant voluntary connection with the United States.” *Id.* at 271. That emphasis on a “previous significant voluntary connection” was also rejected in *Boumediene*.

<sup>94</sup> Rehnquist deployed one other argument that is so weak that I mention it only in this note. He claimed that the *Insular Cases* reject the “view that every constitutional provision applies wherever the United States Government exercises its power.” *Id.* at 269. But the contention that the Fourth Amendment’s prohibition of unreasonable searches and seizures applies to nonresident aliens does not depend on the claim that “every constitutional provision applies wherever the United States Government exercises its power.” *Id.*

<sup>95</sup> *Boumediene v. Bush*, 553 U.S. 723, 759 (2008); see also Walen, *supra* note 34, Part I.C.

<sup>96</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273–74 (1990).

<sup>97</sup> *Id.* at 274.

These are important concerns, but they do not call, in any straightforward way, for completely rejecting the application of the Fourth Amendment to nonresident aliens. They call, rather, for a careful and principled consideration of the limits of the Fourth Amendment's global applicability. For example, the Court might want to establish a categorical rule that spying on foreign powers and their agents—including agents of terrorist organizations<sup>98</sup>—is constitutionally permitted, at least as long as adequate procedures are in place for minimizing the collection of information from others.<sup>99</sup> The Court might also want to permit the bulk collection of communications from abroad, and the electronic scanning of them for key words, while insisting that there must be probable cause—based, at the very minimum, on analysis of key words and metadata—to believe that they are the messages of agents of a foreign power before individual messages are read by humans or passed on to other agencies. These, and other such rules, would protect nonresident aliens much like citizens are currently protected, and it would neither “disrupt the ability of the political branches to respond to foreign situations involving our national interest,” nor “plunge [Members of the Executive and Legislative Branches] into a sea of uncertainty.”

One of Justice Kennedy's objections to applying the Warrant Clause to searches and seizures overseas can also be raised as the objection that applying the Fourth Amendment's Reasonableness Clause to nonresident aliens is anomalous. This objection is premised on the claim that “differing and perhaps unascertainable conceptions of reasonableness and privacy . . . prevail abroad.”<sup>100</sup> The underlying worry reflects the fact that to benefit from the Fourth Amendment right to privacy, one must have a “reasonable expectation of privacy.”<sup>101</sup> If judges in the United States cannot be expected to know whether people in, for example, Germany, China, or Saudi Arabia have a “reasonable expectation of privacy” with regard to the content of their electronic communications, or anything else, then how can they hold that nonresident aliens in those countries enjoy the Fourth Amendment's ban on unreasonable searches and seizures?

This is a deep objection, which I will respond to at some length. But to start, it is worth noting that in some sense the answer, with regard to the collection of electronic data in Germany and the rest of Western Europe, is easy. The Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Private communication, such as in emails, is the

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<sup>98</sup> See 50 U.S.C. § 1801(a)(4) (2012) (defining a foreign power to include “a group engaged in international terrorism or activities in preparation therefor”).

<sup>99</sup> Thus activity under FISA, 50 U.S.C. § 1802, permitting the targeting of foreign powers or their agents, would be upheld.

<sup>100</sup> *Verdugo-Urquidez*, 494 U.S. at 278.

<sup>101</sup> *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

contemporary equivalent to the “papers” originally protected by the Fourth Amendment. Moreover, since *Katz*, it has been clear that unless a person “knowingly exposes [what he or she expresses] to the public,” he or she can expect to keep it private.<sup>102</sup> This expectation applies to Germans and other Europeans as well as U.S. citizens. And the importance of privacy in the context of electronic communications is, if anything, stronger in places like Germany than in the United States. As Ralf Poscher and Russell Miller wrote:

[M]any Europeans view a right to informational self-determination as a self-evident part of the liberty that is protected by basic rights . . . The right to informational self-determination is best understood as reinforcing other liberty interests—such as free speech or freedom of assembly—that might be threatened by the power that accompanies the possession of personal information. In this sense, the German right to informational self-determination has an anticipatory character. It anticipates a potential harm resulting from the collection, storage, and use of personal information. The right’s anticipatory character is obviously a product of Europeans’ experience with totalitarian regimes—not only in Germany—that used the massive collection of personal information to manipulate their citizens . . . Against this backdrop it is easy to understand the European desire to establish preventive legal protections against surveillance and the collection of personal information as a constitutional right.<sup>103</sup>

Thus, there is no reason for U.S. courts to worry that Europeans might not have a reasonable expectation of privacy in the content of their electronic communications.<sup>104</sup> What if they have an even stronger expectation of privacy? That, too, should not be a

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<sup>102</sup> *Id.* at 351.

<sup>103</sup> Ralf Poscher & Russell Miller, *Surveillance and Data Protection in the Conflict Between European and American Legal Cultures*, AM. INST. FOR CONTEMPORARY GERMAN STUDIES (Dec. 9, 2013), <http://www.aicgs.org/issue/surveillance-and-data-protection-in-the-conflict-between-european-and-american-legal-cultures/>.

<sup>104</sup> One might again—see Rubin, *supra* note 58—bring up the French example of moving to expand the surveillance powers of the state to challenge the claim that this sense of privacy is European-wide. One might argue, that is, that the French must have a less robust sense of privacy. But this does not follow. The French might simply feel more vulnerable to terrorism, and thus see a more compelling reason to sacrifice privacy for security. Moreover, it is not clear that the bill passed in the lower house in the French Parliament will survive the strong opposition to it to become law.

problem. Having reached the threshold for constitutional protection, the question is whether the United States has sufficient reason to intrude on their privacy in particular ways. That balance, as discussed below,<sup>105</sup> can be struck as it would be in the United States.

One problem with this approach to the fact that expectations of privacy may differ from place to place is that courts cannot extend the Fourth Amendment outside the United States without asking whether and how it would apply in places more different from the United States than Western Europe. Even if Germans and other Europeans have a sense of privacy more or less like that of U.S. citizens, one might worry that other people do not. One might be concerned, for example, about what courts should do if complaints are raised by plaintiffs from other parts of the world with a different, less privacy protective culture. As Justice Harlan wrote, explaining the idea of a “reasonable expectation of privacy”: “[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”<sup>106</sup> Both prongs may seem to present problems for extending the Fourth Amendment to countries, particularly those with totalitarian governments, where most people expect to be spied upon. Moreover, the existence of such countries raises a further problem: How can U.S. courts be expected to engage in foreign affairs to the extent necessary to make the distinction?

With regard to the first prong—the thought that people in such countries do not have a subjective expectation of privacy—it is important to read Harlan’s point correctly. Harlan could not have meant to suggest that when people are beaten down they also lose their rights. The fact that a local government violates the privacy rights of its residents does not give the United States the right to disregard their privacy interests as well. Of course, if the information truly is “public” already—if anyone who wants to get it can get it, say, by doing a Google search—then the United States inflicts no further harm by collecting it. But if the information is not fully “public,” but is only in the hands of a local, oppressive government, and thus additional damage to a person’s privacy interests could be done by the United States gathering and using that information, then it makes sense to ask whether persons in that situation think that they still have some residual privacy interest. People may wish to minimize the extent to which their personal information is exposed. As long as they wish to draw a line between their government having the information and the United States having it as well, they have a subjective expectation of privacy with regard to the United States. This is something to which a plaintiff could attest, and then the burden should shift to the government to show that the plaintiff is complaining in bad faith.

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<sup>105</sup> See *infra* Part E.

<sup>106</sup> *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

With regard to Harlan's second prong—referring to the expectations of privacy that a society would consider reasonable—it may seem that a stronger objection can be raised. For example, in certain societies, women expect to keep themselves much more hidden from public view than is normal in the West, and in other societies, information that is normally closely held in the United States, like one's income, may be the sort of information one is expected to share widely. Given that Harlan's point seems relativized to societal conceptions of reasonableness, these differences matter.

To see how they might make a difference, it is important to step back and get some perspective on how invoking a reasonable expectation of privacy works in Fourth Amendment jurisprudence. One might think that the job of a court would be to take any professed interest in privacy seriously, determine if it is reasonable, all things considered, and then weigh it against the competing state interest in collecting that information in the particular way the state seeks to collect it. But that is not how the Fourth Amendment works in practice. Instead, Fourth Amendment jurisprudence seeks to establish a set of categories or rules to guide lower courts, and if a plaintiff's complaint falls on the wrong side of the categorical line, it gets no Fourth Amendment protection at all, whereas if it falls on the right side of the line, then a balance must be struck. Thus, we find that what can be detected by well-trained dogs is fair game—a plaintiff has no constitutionally protected privacy interest in government-trained dogs not sniffing his or her belongings and discovering illegal substances therein.<sup>107</sup> By contrast, people have a constitutionally protected interest in not having high tech sensory equipment, such as devices that can detect the heat of grow-lights through walls, trained on their homes.<sup>108</sup> People have no constitutionally protected privacy interest in their property not being photographed from the air, documenting what could be seen with the naked eye,<sup>109</sup> but they do have a constitutionally protected interest, absent probable cause to believe that they are carrying contraband, in not having the police squeeze their luggage in the search for contraband.<sup>110</sup> They have no constitutionally protected privacy interest in things they tell to a government informant,<sup>111</sup> but they do have a constitutionally protected privacy interest in not having their conversations with another picked up by a bug inserted into a public payphone.<sup>112</sup> These distinctions aim to strike a balance: To allow the government to use widely available or familiar technology to gather information, but to draw lines so that there are still safe zones where individuals can rest assured that the government will not intrude. Even if it is

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<sup>107</sup> *Illinois v. Caballes*, 543 U.S. 405 (2005).

<sup>108</sup> *Kyllo v. United States*, 533 U.S. 27 (2001).

<sup>109</sup> *California v. Ciraolo*, 476 U.S. 207 (1986); *Florida v. Riley*, 488 U.S. 445 (1989).

<sup>110</sup> *Bond v. United States*, 529 U.S. 334 (2000).

<sup>111</sup> *Hoffa v. United States*, 385 U.S. 293 (1966); *United States v. White*, 401 U.S. 745 (1971).

<sup>112</sup> *Katz v. United States*, 389 U.S. 347 (1967).



difficult to discern a principled basis for drawing these lines,<sup>113</sup> knowing how the balance works in particular types of cases, and being able to reason by analogy to get a sense of how this balance is likely to work in other cases, is valuable for people who want to know when and in what ways they can expect the government's intrusions into their private affairs to be regulated.<sup>114</sup> It is also valuable for government agents who want to know when and how they can act without having to worry about privacy interests, and for lower courts that have to handle a wide range of more or less novel cases.<sup>115</sup>

This analysis of how Fourth Amendment case law works and what functions it serves provides an important insight into why applying the Fourth Amendment in other countries might be anomalous. In other countries, such lines—if they are drawn—can and will be drawn in different ways, just as in this country they could have been drawn differently. And it may seem anomalous for U.S. courts to draw such lines under the U.S. Constitution, thereby restricting U.S. government agents operating abroad, if they do not match the lines that would be drawn by the local courts where those agents operate. Why, for example, should the United States deny its agents, operating in country X, the freedom to squeeze packages on a bus if agents of country X do that just as regularly as U.S. airport security personnel inspect all baggage going through airports? But if such lines cannot be drawn on a global scale, then one is thrown back into an image of highly particularistic balancing of privacy and government interests. This is a methodology quite unrelated to actual Fourth Amendment jurisprudence. Moreover, if the Supreme Court's precedents cannot be cited by lower courts examining claims of nonresident aliens, then a central function of litigating typical Fourth Amendment cases has been lost.

This is a powerful argument, but its force should not be exaggerated. There are three reasons to think that extending Fourth Amendment rights to nonresident aliens would not, despite the preceding argument, be anomalous. First, the underlying task of determining when privacy interests are serious enough to put the burden on the government to show that it has sufficient reason to intrude on them makes as much sense outside the United States as inside it, and as much sense for nonresident aliens as for U.S. citizens. The task of creating standards that inform the citizenry of the conditions under which they have a safe harbor for privacy cannot be carried out for nonresident aliens. Their social norms will not be informed by U.S. courts. But that is not the only function of determining the balance. The other functions are to guide U.S. agents and to provide U.S. courts with a reasonable

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<sup>113</sup> See Orin Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503 (2007) (arguing that it is not that the Court has no principles, but that it has conflicting models that it uses differently, to fit different contexts).

<sup>114</sup> The idea that these lines are there—not just to reflect societal expectations of privacy, but to help set them—explains why the Court has never addressed whether certain subcultures, with different expectations of privacy, do not deserve different standards for constitutionally protected privacy interests. Different standards would undermine the law's function in *setting* reasonable expectations.

<sup>115</sup> This is the sort of utility emphasized by Kerr, *supra* note 113.

sense of when they should hold the government to the task of justifying its intrusions on privacy. These tasks make as much sense for cases involving nonresident aliens as for cases involving residents of the United States.

Second, there is no reason why U.S. courts cannot start with the defaults established by the U.S. Supreme Court, and then leave it to the parties to argue that local conditions call for an exception. That is, there is no reason why the U.S. government should not have the burden of showing that acts such as squeezing baggage on busses, bugging phones, or reading emails do not intrude upon constitutionally (or legally) protected privacy interests in some particular country. And, switching to the plaintiff's side, there is no reason why a person who feels violated, for example, by aerial photography of his property cannot argue that such snooping is so unheard of in his or her country that he or she has a constitutional interest in not being subject to it. In both cases, the answer to this question need not settle the matter. Even if nonresident aliens have a constitutional interest in not having their emails read, there may be sufficient reason for the government to do it. Whether there is sufficient reason or not, however, concerns a separate stage of inquiry. The present point is only that courts could handle having to consider whether a different standard should apply in a particular country. They can do so by looking to settled case law for a starting framework, and then placing the burden on the parties to argue for divergences from the standard templates.

Third, additional trouble for the U.S. government and courts is unlikely to arise from accommodating different conceptions of privacy. It is unlikely that nonresident aliens could often argue that they benefit from privacy protections that do not apply in the United States, at least not with regard to actions that the United States is likely to want to take. And the U.S. government would, presumably, rarely want to argue that privacy protections in another country are so low that it should be free there to engage in certain practices that would trigger Fourth Amendment concerns at home. Most likely, if plaintiffs bring Fourth Amendment complaints, the more plausible and direct route by which the United States could try to justify its actions—if using techniques that would raise Fourth Amendment concerns in the United States—would be to argue that in the context where they are being deployed, their use is reasonable, all things considered.

In sum, there is no reason why courts should find that entertaining complaints by nonresident aliens—that their privacy rights have been unconstitutionally violated—should be impracticable or anomalous.

#### **E. The Balance of Considerations**

Once it is accepted that nonresident aliens have a reasonable expectation of privacy with regard to the content of their private electronic communications, the question is whether this expectation grounds a right under the Fourth Amendment that could restrict the activities of the NSA. To answer that question, one must balance certain interests. As the

Supreme Court pointed out in *Maryland v. King*, a court must “weigh the promotion of legitimate governmental interests against the degree to which the search intrudes upon an individual’s privacy.”<sup>116</sup>

There is no denying that the government has a legitimate and powerful interest in collecting information that may be relevant to preventing terrorist attacks. The questions with regard to Section 702 are: (1) Can it pursue that interest effectively while also respecting the privacy rights of nonresident aliens? and (2) Is the interest in privacy great enough to outweigh any gain the government may obtain in efficiently finding information if it is not required to present sufficient individualized suspicion before intruding on the privacy of nonresident aliens.

The only way these questions can be answered in favor of upholding the Section 702’s permission to search the content of private communications from nonresident aliens, even without individualized suspicion, is if it can be argued (1) that the balance is not the same as it would be in the domestic context—where resident aliens enjoy the same protections as citizens—and (2) that the balance abroad should be different when spying on U.S. citizens and nonresident aliens. The first prong may be easy enough to establish: The U.S. government has a much richer set of police resources to determine who is suspicious inside the country than out; outside, barring extraordinarily good cooperation with foreign governments, it presumably needs the help of bulk signals intelligence. But the second prong is more difficult. It can be established only in two ways: Either the need to spy on nonresident aliens must be, as a general rule, greater than the need to spy on U.S. citizens, or nonresident aliens must possess a weaker version of Fourth Amendment rights than U.S. citizens.

There is little reason to think that the need for information from nonresident aliens is generally greater than from nonresident U.S. citizens. U.S. citizens abroad can engage in terrorism just as easily as nonresident aliens. One might suggest that a citizen’s connections to the United States could provide extra information to help distinguish dangerous from non-dangerous citizens who have gone abroad, but that thought cuts both ways. It may just as well give the government more reason to want to spy on a U.S. citizen, a reason that would be frustrated if the U.S. was required to respect the person’s Fourth Amendment rights. Moreover, this difference amounts to nothing more than a loose correlation. The NSA may know more about many nonresident aliens than about many nonresident citizens. Thus, this first basis for striking a different balance between nonresident citizens and nonresident aliens seems to come up short.

The second of these possibilities likewise should not ground an argument for different treatment of nonresident aliens and citizens. As previously established, privacy is an

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<sup>116</sup> *Maryland v. King*, 133 S. Ct. 1958, 1970 (2013) (internal quotation marks omitted).

important interest;<sup>117</sup> harming it, when the person has a reasonable expectation of privacy, for the sake of advancing a domestic interest—even one as important as security—must be justified. Moreover, as I argue in the companion paper to this article, nonresident aliens should enjoy fundamental rights protections that protect them against unjust harms.<sup>118</sup> These include protections against unjustified harms, even if inflicted for the sake of improving the welfare of U.S. citizens. The balance of interests implicit in the distinction between justified and unjustified harms is exactly what is tracked by the distinction between reasonable and unreasonable searches and seizures. In other words, the Fourth Amendment protection that nonresident aliens enjoy has to be the protection against unreasonable searches and seizures, the same protection that U.S. citizens enjoy. That sort of reasonableness requirement is facially inconsistent with section 702's unconstrained permission to search the communications of nonresident aliens.

#### F. The Problem of Standing

This article has argued that nonresident aliens benefit from the Fourth Amendment right not to be subjected to unreasonable searches and seizures. The argument also emphasized the importance of courts enforcing these rights.<sup>119</sup> Courts might not be able to play that role, however, if potential plaintiffs would lack the standing to bring suits arguing that Section 702 violates their constitutional rights. The argument in this section is that standing should not be an impediment to bringing such suits.

As the Supreme Court recently held in *Clapper v. Amnesty International*—a case in which U.S. citizens facially challenged the constitutionality of Section 702 because of the way it allowed their communications with nonresident aliens to be intercepted—to establish standing, a plaintiff's "injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling."<sup>120</sup> The plaintiffs in *Clapper* claimed to have standing because "they communicate[d] by telephone and e-mail with people the Government . . . believed to be associated with terrorist organizations, people located in geographic areas that [we]re a special focus of the Government's counterterrorism or diplomatic efforts, and activists who oppose[d] governments that are supported by the United States Government."<sup>121</sup> As Justice Breyer, dissenting in *Clapper*, wrote: The government "intercepting at least some of their private, foreign, telephone, or e-mail conversations" is "as likely to take place as are most future

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<sup>117</sup> See *supra* Part B.I.

<sup>118</sup> See Walen, *supra* note 34.

<sup>119</sup> See *supra* notes 17–19 and accompanying text.

<sup>120</sup> *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1147 (2013) (internal quotation marks omitted).

<sup>121</sup> *Id.* at 1145.

events that commonsense inference and ordinary knowledge of human nature tell us will happen.”<sup>122</sup> Nonetheless, the majority in *Clapper* held that the plaintiffs’ injuries were too speculative to give them standing to bring the case.<sup>123</sup> One could reasonably fear that the same would be true for any nonresident aliens who might wish to challenge the constitutionality of Section 702.

There are, however, a number of ways the standing obstacle may be circumvented. First, as the majority pointed out in *Clapper*, “[I]f the Government intends to use or disclose information obtained or derived from a § 1881a [i.e., Section 702] acquisition in judicial or administrative proceedings, it must provide advance notice of its intent, and the affected person may challenge.”<sup>124</sup> There may be nonresident aliens who the United States chooses to pursue in judicial or administrative proceedings who could raise the constitutional argument in just this way. Second, leaks of classified material, such as those leaked by Edward Snowden, may reveal particular information about the targeting of nonresident aliens under Section 702, and that may suffice to establish standing.<sup>125</sup>

Third, even if neither of these possibilities are available, plaintiffs who are nonresident aliens corresponding with the sorts of plaintiffs in *Clapper* may have a less speculative basis for bringing the suit. This is because at least two of the bases for finding that the *Clapper* plaintiffs’ claims were too speculative would not apply to their nonresident alien correspondents. The third basis for finding that the *Clapper* plaintiffs’ claims were too speculative included reference to minimization procedures that protect the privacy of U.S. persons.<sup>126</sup> Section 702 provides no such procedures to protect the privacy of nonresident aliens. The fifth basis for finding that the *Clapper* plaintiffs’ claims were too speculative was that they “can only speculate as to whether *their own communications* with their foreign contacts would be incidentally acquired.”<sup>127</sup> No such speculation is needed for the

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<sup>122</sup> *Id.* at 1155.

<sup>123</sup> Plaintiffs had a second theory of standing, namely that their reasonable fear that their communications would be intercepted “require[d] them to take costly and burdensome measures to protect the confidentiality of their communications.” *Id.* at 1151. But the Court held that accommodating speculative fears could not provide a back door to standing. *Id.*

<sup>124</sup> *Id.* at 1154. It is worth noting that federal prosecutors seem not to be respecting this claim by the Supreme Court, based in turn on assurances from the Solicitor General. In at least two cases, they have sought not to divulge whether information used in obtaining warrants was “derived from” FISA activity under Section 702. See Adam Liptak, *A Secret Surveillance Program Proves Challengeable in Theory Only*, N.Y. TIMES, July 15, 2013.

<sup>125</sup> See *Klayman v. Obama*, 957 F.Supp. 2d 1, 27 (D.D.C. 2013) (finding standing based on facts revealed by Edward Snowden). Note, however, that as this case continues on towards summary judgment, the government is still contesting the standing issue.

<sup>126</sup> *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138, 1150 (2013).

<sup>127</sup> *Id.*

nonresident aliens who are the NSA's targets—though, of course, they may be speculating about whether their own communication is targeted.

Fourth, the magnitude of the constitutional violation surely has some relevance to determining whether the Court would find standing. Standing requirements are contextual, not fixed. The bar is high for a constitutional challenge. As the Court wrote in *Clapper*: “[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.”<sup>128</sup> Surely that reasoning cuts both ways, however. The more important it is to question the constitutionality of a law, the lower the standing barrier should be. Imagine that Section 702 allowed the same effectively unlimited spying on resident citizens, and imagine that there had been no leaks describing who had been targeted, nor any prosecutions yet brought on the basis of this section. It is hard to imagine that a case seeking to enjoin the law could not be brought by someone with good reason to believe he or she would be its target. If, in fact, it should be just as unreasonable to spy in this way on nonresident aliens, standing should not prevent courts from establishing that point.

Even if some nonresident aliens can establish that they have suffered an injury that is “concrete, particularized, and actual or imminent,”<sup>129</sup> they must also establish that the injury is “fairly traceable to the challenged action; and redressable by a favorable ruling.”<sup>130</sup> The government might argue that the harm cannot be traced to Section 702 because, as the Court put it in *Clapper*, “The Government has numerous other methods of conducting surveillance.”<sup>131</sup> In particular, the government can spy on nonresident aliens by relying on Executive Order 12333, which allows the NSA to collect and store data outside of the FISA framework, as long as the collection occurs outside the United States.<sup>132</sup> That also means that the Court cannot redress the problem simply by enjoining the use of Section 702.

This, however, cannot pose a serious obstacle to a court addressing the Fourth Amendment rights of nonresident aliens. Any suit can include Executive Order 12333 insofar as it also treats nonresident aliens as fair game for spying, even without any individualized suspicion that they are engaged in criminal activity or are a threat.

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<sup>128</sup> *Id.* at 1147 (quoting *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997)).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 1149.

<sup>132</sup> Tye, *supra* note 27.

Finally, there is the problem of Presidential Directive, PPD-28.<sup>133</sup> Insofar as the Directive seems to fix Section 702's disregard of the privacy rights of nonresident aliens, it might seem to moot the problem. That is, it may remove any injury that could be the basis for standing. But there are reasons to think that a presidential directive that can be reversed by presidential fiat cannot by itself undue the harm of an unconstitutional statute. A similar issue has arisen in litigation concerning the collection of the metadata of U.S. persons under FISA § 215. While lawsuits arguing that this metadata collection was unconstitutional were pending, President Obama modified the way it was collected and stored.<sup>134</sup> Those modifications arguably solved the problem. Nevertheless, the plaintiffs in that case argued, "[T]he Government's voluntary modification of the program in the face of public outcry and national, indeed international, scrutiny does not protect the Plaintiffs or others from the Government resuming the prior practice when public attention fades."<sup>135</sup> The plaintiffs went on to cite two Supreme Court opinions in support of the claim that Presidential action cannot cure an unconstitutional statute and deprive plaintiffs of their day in court. First, they cite *Friends of the Earth v. Laidlaw Envtl. Services, Inc.*: "[I]t is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice' for 'if it did, the courts would be compelled to leave the defendant . . . free to return to his old ways.'"<sup>136</sup> Second, they cite, *United States v. Concentrated Phosphate Export Ass'n*, for the proposition that "[t]he heavy burden of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness."<sup>137</sup> Thus, it seems that there is no bar to nonresident aliens bringing suit to establish that Section 702 violates their rights under the Fourth Amendment.

### G. Conclusion

This article has argued that nonresident aliens should enjoy Fourth Amendment rights not to have their private electronic communications intercepted by the NSA without the same sort of individualized suspicion that protects U.S. citizens. Relying on results established in a companion paper, the argument posits that nothing in Supreme Court case law clearly implies that nonresident aliens lack constitutional rights, and that the recent *Boumediene* case suggests that nonresident aliens have at least some fundamental constitutional rights:

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<sup>133</sup> See OFFICE OF THE PRESS SEC'y, *supra* note 21.

<sup>134</sup> See Office of the Press Sec'y, *FACT SHEET: The Administration's Proposal for Ending the Section 215 Bulk Telephony Metadata Program*, THE WHITE HOUSE (March 27, 2014), <http://www.whitehouse.gov/the-press-office/2014/03/27/fact-sheet-administration-s-proposal-ending-section-215-bulk-telephony-m>.

<sup>135</sup> Plaintiffs' Reply to the Defendants' Opposition in Opposition to Plaintiffs' Motion for Partial Summary Judgment, *Klayman v. Obama II*, 957 F. Supp. 1 (No. 13CV00851), 2014 WL 2452492.

<sup>136</sup> *Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000).

<sup>137</sup> *U.S. v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968).

Those that it would not be impracticable or anomalous for them to have. The argument also relies on having established, in that same companion paper, that there are good normative reasons to hold that nonresident aliens benefit from constitutional rights not to be unjustly harmed. Ideally, a neutral agency would adjudicate between countries and nonresident aliens, but because the United States would undoubtedly refuse to submit itself to any such neutral agency, the Court should adopt the second best option—read respect for the basic rights of nonresident aliens into the U.S. Constitution.

This article has built on that foundation. It argued that nonresident aliens benefit from the Fourth Amendment in a way that would prohibit the NSA from spying on their personal electronic communications without individualized suspicion. This argument is appealing for three reasons. First, there is no case law explicitly blocking the general recognition of Fourth Amendment rights for nonresident aliens. Second, it is reasonable—neither impracticable nor anomalous—to extend Fourth Amendment rights to nonresident aliens. Finally, there is no reason why nonresident aliens should enjoy less robust Fourth Amendment protections than nonresident citizens.

This is a radical thesis, as it seems that even those who support a global right to privacy have thought it a claim too far. But at no point was the legal reasoning supporting it controversial.<sup>138</sup> The fact that it is radical is a reflection only of the extent to which those who have opposed the idea that nonresident aliens have constitutional rights have captured the legal imagination. Presumably, their position draws strength from the fear that “we” are vulnerable to “them.” But both legal and moral legitimacy require us to recognize how much “they” are vulnerable to “us.” Basic principles of legality and legitimacy require us to recognize their rights not to be unjustly harmed by us in the pursuit of our own national interests.

Finally, unless courts stand up for the Fourth Amendment rights of nonresident aliens, they will remain vulnerable to excessive NSA spying. It may be true that the NSA is not currently violating their right to privacy—no more than it violates the privacy rights of U.S. citizens—but this fact, if it is a fact, depends on a Presidential Directive that this President or the next president could revoke. The norms of good signals intelligence may imply that nonresident aliens should generally be safe from abusive NSA misuse of personal data, but there is no guarantee, outside of the Presidential Directive, that the NSA will continue to follow good signals intelligence protocol. The larger legislative framework in which the NSA operates provides no relevant constraints. As such, that framework should be deemed constitutionally invalid on its face.

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<sup>138</sup> It is worth keeping in mind how radical it once seemed that the Affordable Care Act could face a serious constitutional challenge, and then it came within one vote of succeeding. This case is, I believe, stronger than that one.