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Thank you, Judge Ray, for that introduction, and thank you for having me. It's a real privilege to be here.

It was probably questionable judgment to agree to speak to a group of judges about the Fourth Amendment, since most of you are more expert on most aspects of the Fourth Amendment than I am. Fortunately, Professor Logan has already done most of the work here.

I'm going to talk about something much more specific, which is the Fourth Amendment's application to foreign intelligence gathering.

I realize these issues are not likely to come before you in the Florida courts. But because the Fourth Amendment's intersection with technology and national security raises some very interesting and timely questions, I thought it might be useful to cover some of the ways the Fourth Amendment has been applied differently in that context. I hope this will be an interesting digression into a topic that you may see in the news even if you don't see it in your courtroom.

Let's begin by looking at the Fourth Amendment's text, which appears on the screen.

It's useful to go back to the text because if many people – including lawyers – were asked what the Fourth Amendment requires, they would probably say it prohibits the government from conducting a search without a judicial warrant based on probable cause. And under the caselaw that has developed over the years, that is true most of the time.

But the Fourth Amendment does not say that all searches must be based on a judicial warrant.

What the Fourth Amendment does always require – in the first clause – is that searches be *reasonable*. And, in the second clause, that where warrants do issue, they be based on probable cause.

I'm going to touch on two ways in which the courts have applied these Fourth Amendment provisions differently in the foreign intelligence context than in criminal cases.

I'll talk primarily about whether a warrant is required before the government can conduct a search to collect foreign intelligence. The punch line is that there is generally understood to be a foreign intelligence exception to the warrant requirement.

This could be thought of as either an analogue to or a subset of the "special needs" doctrine. In the special needs cases, as you know, the Supreme Court has

held the government does not need a warrant to conduct certain searches whose purpose is not traditional law enforcement, where requiring a warrant would interfere with achieving that purpose. So, for example, the Court held the government did not need a warrant to conduct random drug testing of railroad employees – the purpose of the search there was public safety, not furthering a criminal investigation.

I say the foreign intelligence exception is "generally understood" because the Supreme Court has never squarely ruled on the question, and there are still relatively few U.S. court of appeals decisions directly on point.

But before getting into that further, I'll touch very briefly on the probable cause requirement. The courts have held that, even if a warrant is required, a different sort of "probable cause" can satisfy the Fourth Amendment in foreign intelligence cases.

In the criminal context, as you know, probable cause means cause to believe that a crime has been committed. But in the foreign intelligence context, courts have held that probable cause can be satisfied by a showing that a telephone is being used, or is about to be used, by a foreign power or its agent.

I should explain what I mean by "foreign intelligence." This does not include everything you might call a "national security" investigation. There are

many offenses in the federal criminal code that relate to national security – for example, espionage or conspiracy to commit terrorist acts. An investigation designed to bring a criminal prosecution of one of those national security offenses is a criminal investigation.

Foreign intelligence collection is fundamentally different. Its purpose is not to gather evidence for a criminal prosecution, but to gather information – foreign intelligence – to help the President and his advisors make well-informed decisions about national defense and foreign policy matters. Foreign intelligence collection has a much longer-term perspective than your typical criminal investigation.

It is only relatively recently that courts had any involvement in searches conducted by the executive branch for foreign intelligence purposes.

The Constitution does not mention foreign intelligence, but the power to collect it is considered implied by the President's authority to conduct foreign affairs and act as commander in chief.

For much of American history, Presidents extrapolated from their power to gather intelligence the power to conduct searches without a judicial warrant. The government did not go to a court to seek a search warrant or wiretap order, and the courts were not called upon to judge the legality of those searches or wiretaps, so there was little or no caselaw on whether they were constitutional.

Discussion of these questions began to appear in judicial decisions in the 1960s and 1970s. In *Katz v. United States*, although the Court held the government should have gotten a warrant in that case, the Court included a footnote saying it was not deciding whether judicial approval was required in a situation involving "national security." Justice White's concurrence specifically opined that a warrant is not necessary where the President or Attorney General "has considered the requirements of national security and authorized electronic surveillance as reasonable."

The caselaw really began to develop after the Supreme Court's 1972 decision in the "Keith" case. That case arose from a criminal prosecution into the bombing of a CIA office in Michigan. The government admitted it had listened to the defendant's telephone conversations without a warrant, but argued for a general national security exception to the warrant requirement. The court rejected that argument, holding that the warrant requirement does apply in criminal "domestic security" cases.

But it specifically said it was not ruling on "the scope of the President's surveillance power with respect to the activities of foreign powers." That is, the Court did not decide whether the government had to get a warrant before conducting a search to gather foreign intelligence. That open question led to a number of lower court decisions addressing whether or not there was a foreign

intelligence exception to the warrant requirement. In the years immediately after *Keith*, all of the U.S. courts of appeals that squarely addressed that question held that it existed.

Courts gave several reasons for recognizing this exception. (1) One relates to the constitutional allocation of authority. Courts noted that the President is constitutionally preeminent – vis-à-vis the courts – with respect to foreign affairs. (2) The second has to do with competence. Courts noted that courts are not as well-versed in diplomacy or foreign intelligence as the President. (3) The third related to speed and efficiency. Courts were reluctant to impose procedural hurdles that would interfere with foreign intelligence collection.

But history intervened before that caselaw could develop much. In 1978, Congress passed the Foreign Intelligence Surveillance Act, or FISA. FISA requires the government to get permission from a special federal court (the Foreign Intelligence Surveillance Court, or "FIS Court") to conduct intrusive collection inside the United States for foreign intelligence purposes. At first, this requirement only applied to electronic surveillance – wiretaps – but over time Congress expanded it to cover other investigative tools.

Although the procedures required by FISA are similar to those in the criminal context, they do differ in a number of ways. For example, they require

the government to show probable cause that a telephone is used by a foreign power or agent of a foreign power, not a connection to a criminal offense.

Since the late 1970s, most of the caselaw on the foreign intelligence exception has addressed whether these differences between FISA's system and the criminal warrant system pass constitutional muster. (The courts have overwhelmingly held that they do.)

But even after FISA was enacted, the old questions about whether foreign intelligence searches are outside the warrant requirement have occasionally come before the courts. For example, in 2000, the Southern District of New York ruled on the constitutionality of a physical search and wiretap targeting a U.S. citizen located abroad (where FISA's provisions, at least at that time, did not apply).

In that case and in recent cases judging FISA's constitutionality, the lower courts have continued to acknowledge the existence of a foreign intelligence exception. In fact, in 2002, the FIS Court of Review, which hears appeals from FIS Court orders, stated that it "[took] for granted" that the President has "inherent authority to conduct warrantless searches to obtain foreign intelligence information."

So, let's assume that the foreign intelligence exception exists even though the Supreme Court hasn't said so. Defining its exact parameters is more difficult,

as lower court decisions differ in articulating when the exception applies. The caselaw is fairly consistent that the exception applies only to surveillance directed at a foreign power or its agent. But other questions have divided the courts, such as whether the exception applies only where the government's purpose is primarily foreign intelligence collection. I won't get into the details of that particular debate here.

Whatever the parameters of the foreign intelligence exception, it is only an exception to the warrant requirement, not an exception to the Fourth Amendment. As I noted earlier, there is no exception to the "reasonableness" requirement.

This is where things get really murky. When exactly is a warrantless search "reasonable?" The caselaw suggests that courts should consider the "totality of the circumstances" in balancing the intrusion on privacy interests with the governmental interest at stake. But what factors are relevant to the totality of the circumstances?

Recently, Justice Scalia has called the reasonableness standard "indeterminate" in the analogous special-needs context. And the FIS Court of Review has specifically rejected the notion that there is any set list of relevant factors, noting that that would be "at odds with the totality of the circumstances test."

One guidepost that several courts have used is how closely the procedures followed in a warrantless search resemble the procedures that would be followed to obtain a warrant. For example, the Third Circuit held that some form of probable cause was required for a warrantless search to be reasonable. But even that is not necessarily dispositive – the FIS Court of Review rejected the notion that warrantless searches had to adhere to the warrant clause's specific requirements in order to be reasonable.

So it is not surprising that the courts' reasonableness analyses have been ad hoc; they are necessarily tied to the facts and circumstances of each case.

They have often also been quite cursory.

One example of a court balancing individual interests with national security interests is only a couple of paragraphs and found in the "conclusion" of an opinion. The FIS Court of Review balanced the government's need for "foreign intelligence information to protect against national security threats" with the "protected rights of citizens." On one side of the ledger, the court noted simply that wiretapping is intrusive. On the other side, the court noted that the case "may well involve the most serious threat our country faces" and that the procedures under FISA "come close" to the standards for obtaining warrants. It thus upheld the FISA procedures in question.

I do want to point to one other case in which a federal judge has explicitly balanced privacy interests with governmental interests in the national security context, though that case was decided under the "special needs" doctrine and did not address a foreign intelligence exception to the warrant requirement. I bring this case up in part because it may have the most extensive balancing discussion I have seen in a judicial opinion, and in part because it arises in a very high-profile ongoing case. This case addresses the legality of the NSA's bulk telephony metadata program – known as the "215 program" after Section 215 of the Patriot Act.

In a nutshell, the 215 program involves bulk collection of telephone "metadata" – which phone number called which number at what time and for how long, but *not* the content of the calls, the subscribers' identities, or cell site location information. The data was held for up to five years in a database that could be queried if the government had "reasonable articulable suspicion" that a particular telephone number was connected with terrorism. Most of the data would never be responsive to a query and would therefore never be viewed by a human being, but would be automatically deleted at the end of the five-year period.

Several individuals brought suits in federal courts arguing that the program had violated their Fourth Amendment rights. Federal district courts split on the result. In New York, Judge Pauley dismissed the constitutional challenge on the

basis of the third-party doctrine, which Professor Logan has already discussed. The judge held that the records belonged to the telephone company, so the subscriber plaintiffs had no reasonable expectation of privacy in them. Numerous judges of the FIS Court had relied on the same doctrine when they gave the government permission to launch and continue the 215 program. I should note that Judge Pauley's decision was overturned by the Second Circuit, but on statutory grounds, not constitutional ones.

In the D.C. challenge, Judge Leon viewed the NSA's collection activity to be so different in scope from the collection the Supreme Court had analyzed in its third-party doctrine cases that he refused to apply that doctrine. Instead, he considered whether the warrantless search of the records was justified under the special needs doctrine, using a pure totality of the circumstances balancing analysis.

Judge Leon balanced plaintiffs' privacy expectations in their telephone metadata against the government's interests in gathering it for analysis. The Judge began by finding that plaintiffs had a "very significant expectation of privacy" in their aggregated telephone metadata and that the 215 program "significantly" intruded on that expectation.

He put on the other side of the balance the government's assertion that the program's purpose was to "identify[] unknown terrorist operatives and prevent[] terrorist attacks." He was dismissive of that justification, pointing out the government had not provided any cases where information from the program had thwarted an imminent attack. (I'm drastically shortening what is actually a fairly lengthy discussion.)

On balance, he found the plaintiffs were likely to succeed on the merits of their Fourth Amendment claim, and issued a preliminary injunction. I should note that very recently the appeals court vacated his decision on jurisdictional grounds.

To sum up, the caselaw requires courts to balance the totality of the circumstances in deciding whether a warrantless search is reasonable. But courts spill relatively little ink explaining the factors they believe to be relevant and how they weigh against each other.

One reason for this may be that it is difficult to measure either privacy interests or national security interests. This is something that I grapple with in my work on the PCLOB, as do officials throughout the intelligence agencies. Executive branch policymakers are supposed to determine how valuable a particular intelligence program is to protecting the national security, and how much the program intrudes on individual privacy interests, and taking both factors into

account (and assuming that the program is legal), decide whether it is a good idea from a policy perspective. This is very similar to what judges are expected to do when they assess constitutional reasonableness under the totality of the circumstances. This is hard stuff for executive branch officials, and I suspect it is no easier for judges.

Let's start with the difficulty of defining "privacy." Is privacy freedom from the exercise of governmental power? From the risk of embarrassment or reputational harm? Or freedom from economic harm due to the misuse of personal information? Is privacy your interest in controlling who knows what about you? Is it more generally "the right to be left alone?" It's unclear. There is no consensus, let alone one legally recognized definition.

We all have a pretty good sense of the privacy implications of a wiretap; it is intrusive and involves the real-time collection of the content of private communications. But what about your telephone metadata? Do you have the same privacy interest in the fact that your telephone number was connected to another number on a particular date and time?

The national security side of the equation is just as hard to measure. There is no one established way of judging the effectiveness of intelligence collection programs. That makes it very difficult to assign them a value, even though that is

exactly what a balancing analysis requires. One tendency is to value a program by asking how often it has produced information that was the key to discovering and defeating a previously unknown terrorist plot. This is the "silver bullet" measure. Judge Leon applied something like this standard in his decision on the 215 program.

The trouble with that is that silver bullets rarely exist in the intelligence world, where many small pieces of information are pieced together to form a bigger, longer-term picture. And there are many other legitimate measures of value: Did the program help flesh out details about a known terrorist – his collaborators, sources of financing, or whether he was trying to enter the United States? Did it produce reliable information that a suspected terrorist was *not* worth pursuing, enabling scarce resources to be redirected to more pressing needs? Or does it often produce information important enough to make its way into the President's daily security briefing?

So it is not a simple thing to measure either a privacy interest or a national security interest, and no easier to balance the two. Judges don't have an easy task when they are asked to determine whether a warrantless foreign intelligence search is reasonable.

Where do we go from here? I generally don't get into the business of predicting how the law will evolve, and I won't do so now either. It's hard to even say *whether* the law will develop further any time soon, because these cases don't come up that often, and when they are brought, they are often disposed of on procedural or jurisdictional grounds.

I will conclude with one interesting question to watch, which is what will happen if the Court alters the third-party doctrine. If that were to happen, judges would have to start doing what Judge Leon did in the 215 case I mentioned – grappling with the specific privacy implications of various types of records and information – from telephone metadata to bank records – and weighing them against specific governmental interests. For the reasons I mentioned, this would be difficult and because there is so little guidance on how to do it, could lead to a wide variety of results.

I'll end there.

Thanks again for having me.

I'd be happy to take questions.