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One of the few areas of second-guessing that the Bush Administration's war on terrorism has encountered has come from legal scholars and others who have objected to certain provisions of the *Patriot Act*[1] that relate to criminal investigations and prosecutions. Arguments have been proffered that constitutional rights of individuals will be sacrificed in the name of protecting America from further acts of violence. These contentions have been met with a number of responses. Many have said that the events of September 11th have changed the world, and changed America, and one of the necessary adaptations requires that people in our country, and those about to enter it, must live with the increased precautions that have been deemed necessary.

There is also the view that to the extent the weight of the investigations and prosecutions will fall on foreign nationals, some of whom are in the United States in violation of immigration laws, these individuals should not be granted the full panoply of constitutional protections. The questions become more complex when one considers that the investigations that are underway may require that the arm of law enforcement reaches beyond our borders and into foreign lands.

In reality, while concerns about the *Patriot Act* may have focused the debate, they did not start it. For some time now, the federal government has been investigating terrorism both at home and abroad. In at least two opinions written by a district court judge in the Southern District of New York issues concerning the constitutional implications of government conduct towards suspected terrorists have been addressed.

Those decisions demonstrate that the arguments, both for and against aggressive enforcement, neglect to consider one critical factor in the equation of laws: the role of an independent judiciary.

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[1] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001.

While the politicians in the executive and legislative branches of the federal government propose policies and enact laws aimed at anti-terrorism efforts, it will ultimately be left to the judges to interpret both the constitutionality of those laws and their enforcement. An examination of judicial precedent over the years should provide comfort that, even in the face of a nation confronted with enemies bent on criminal activity, those left with the responsibility of ensuring that those laws comport with basic constitutional rights will respond with reason and justice.

This article presents a review of these recent federal opinions that have addressed the application of the Fourth Amendment and Fifth Amendment to extraterritorial conduct on the part of United States criminal investigators in the name of national security.

THE FIFTH AMENDMENT

Usama Bin Laden and numerous associates were charged in the Southern District of New York with bombings of American property on foreign soil and other related acts of terrorism. In a decision dated February 16, 2001[2], District Court Judge Leonard Sand addressed the claims of two of the defendants, who had been interrogated in Africa, that statements they made to investigators from the United States should be suppressed. The rulings of that court and the rationale underlying the decisions clearly demonstrate that even in the face of terrorism the Fifth Amendment will dictate the admissibility of statements in an American court.

The first of the defendants was Al-'Owhali, who was arrested on August 12, 1998, by Kenyan police officers from the Criminal Investigation Division of the National Police accompanied by a FBI agent and a New York City Police Detective. The arrest was for violating a Kenyan law that related to carrying identification papers. Al-'Owhali, who spoke English to a limited extent, was brought to a government facility and he was advised of his rights by the detective, who used a standard form employed by United States law enforcement officers operating abroad. These are those rights:

> We are representatives of the United States Government. Under our laws, you have certain rights. Before we ask you any questions, we want to be sure that you understand those rights.

[2] United States v. Bin Laden, et al., 132 F. Supp. 2d 168 (S.D.N.Y. 2001).

> You do not have to speak to us or answer any questions. Even if you have already spoken to the Kenyan authorities, you do not have to speak to us now.
>
> If you do speak with us, anything that you say may be used against you in a court in the United States or elsewhere.
>
> In the United States, you would have the right to talk to a lawyer to get advice before we ask you any questions and you could have a lawyer with you during questioning. In the United States, if you could not afford a lawyer, one would be appointed for you, if you wish, before any questioning.
>
> Because we are not in the United States, we cannot ensure that you will have a lawyer appointed for you before any questioning.
>
> If you decide to speak with us now, without a lawyer present, you will still have the right to stop answering questions at any time.
>
> You should also understand that if you decide not to speak with us, that fact cannot be used as evidence against you in a court in the United States.

The rights were read slowly to the suspect, who signed an alias in Arabic at the bottom portion of the form which read:

> I have read this statement of my rights and I understand what my rights are.
>
> I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.[3]

Al-'Owhali was then questioned for approximately an hour. However, another interrogation section was scheduled for the afternoon. Because of a concern that Al-'Owhali did not fully understand the rights, they were read again, but this time they were translated by an Arabic interpreter. Al-'Owhali indicated that he knew that the rights were the same as had been given to him in the

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[3] *Id.* at 173-174.

morning session, that he understood them, and again agreed to speak with the investigators.

Al-'Owhali was questioned for several hours on the first day of his incarceration in Kenya, and then on and off over the next week or so. On the four dates of interrogation following the 12th, he was initially referred to the initial form that he had signed waiving his rights, and then asked whether he would allow further questioning to take place. The investigators from the joint terrorism task force handled the interrogations; however, on August 22 a new and significant figure entered into the proceedings. This was an Assistant United States Attorney (AUSA) assigned to the embassy bombing investigation.

The AUSA presented to the suspect a document, a memorandum of understanding, that evinced the intention to try to bring him to the United States to stand trial. This was a condition that Al-'Owhali had asked for in exchange for revealing all that he knew about the bombing. Once the memorandum was described, the AUSA advised Al-'Owhali of his *Miranda* rights from memory, and adapted those rights to fit the precise situation of the interrogation. In that regard, the following advice was given concerning counsel:

> AUSA [redacted] told Al-'Owhali that he had the right to remain silent; that he had the right "to have an attorney present during this meeting;" that even if Al-'Owhali decided to talk he could always change his mind later; that Al-'Owhali's statements could be used against him in court, though the fact of his silence could not. AUSA [redacted] also said that he was an attorney for the U.S. government, not for Al-'Owhali. It was repeatedly stressed to Al-'Owhali that he was the "boss" at all times as to whether he wished to answer questions without a lawyer present. AUSA [redacted] told Al-'Owhali that there was no American attorney currently available for him in Kenya.

After these rights were read, and following a further discussion concerning Al-'Owhali's desire to be tried in the United States, the interrogation resumed. It was at that time that Al-'Owhali finally acknowledged his participation in the bombing in Kenya.[4]

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[4] *Id.* at 176-177.

The second set of statements that was addressed in Judge Sand's opinion were those of K.K. Mohamed, who was arrested in South Africa as a result of the embassy bombings. Mohamed was arrested by South African authorities, who were working along with a special agent of the FBI, and was informed by the South African investigators of his rights under that country's law: he did not have to speak, anything that he did say could be used against him, and he was entitled to an attorney.[5]

United States agents were then given the opportunity to question Mohamed. Their inquiry was preceded by the reading in English and translation into Mohamed's native Swahili of an advisement of rights that was the same used in the questioning of Al-'Owhali.

The facts that the questioning of both of these men took place on foreign soil, and that neither man was a citizen nor did they live in the United States, did not deter Judge Sand from concluding that the privilege against self-incrimination applied to their statements. This rule against self-incrimination applies to all defendants tried in American courts, notwithstanding their minimal connection to the United States. The only connection needed, in fact, is the one that invariably would bring such an issue to the forefront: the attempted use of a statement in an American courtroom. The district court noted that in *United States v. Verdugo-Urquidez*[6], the Supreme Court made it quite clear that a Fifth Amendment violation was one which occurred at trial, and not at the time a statement is obtained. As Judge Sand saw it, "any violation of the privilege against self-incrimination occurs, not at the moment law enforcement officials coerce statements through custodial interrogation, but when a defendant's involuntary statements are actually used against him at an American criminal proceeding."[7]

Once Judge Sand concluded that the Fifth Amendment protection against self-incrimination was applicable to the statements by those questioned abroad who ultimately become defendants in the United States, he determined that "a principled but realistic application of *Miranda's* familiar warning/waiver framework, in the absence of a constitutionally-adequate alternative, is both necessary

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5 *Id.* at 180.

6 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990).

7 132 F. Supp. 2d at 181.

and appropriate under the Fifth Amendment."[8] The judge emphasized that the necessity for the warnings may be even greater in foreign lands where there may be frequent instances where the conditions of interrogation that exist prior to the arrival of American law enforcement agents may be very coercive.

Nevertheless, Judge Sand had to resolve the practicalities of questioning abroad with the precepts of *Miranda* because "*Miranda* does not require law enforcement to promise that which they cannot guarantee or that which is in fact impossible to fulfill."[9] Therefore, the judge found that the "fair and correct approach"[10] was for the American questioners to inform the suspect of the right to counsel and, in light of the particular circumstances that they are in, "the possible impediments to its exercise."[11] In other words, the American law enforcement agents must candidly inform the suspects of the state of the availability of counsel in the country in which the questioning is taking place.

In light of this reading, the court found that the advisement of rights form used when Al-'Owhali and Mohamed were questioned was deficient. That form clearly gave the suspects the impression that the right to counsel was available in the United States, but was limited in that they "are not in the United States" so "we cannot ensure that you will have a lawyer appointed for you before any questioning."[12] That statement was inaccurate because it was indeed possible, both in Kenya and South Africa, for the two suspects to consult with attorneys. Not only did the law of both countries permit the protection of counsel, but the two men had the wherewithal to obtain attorneys.[13]

Still, in the end, Judge Sand found that there were reasons to admit at least some of the statements made by these suspects. When the AUSA read Al-'Owhali his rights he was told that he had the right to an attorney and that the only limitation was that no American lawyer was available at that time. Consequently, Al-'Owhali was not told that he would be refused access to counsel. Therefore, Al-'Owhali's statements made after he met the AUSA were held to be admissible.

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8 *Id.* at 186-187.
9 *Id.* at 188.
10 *Id.*
11 *Id.*
12 *Id.* at 190.
13 *Id.* at 191.

Mohamed's statements were admissible from the start, simply because he was told at the outset that under South African law he had the right to counsel if he wanted to consult with one. As a result, the court found that the deficiencies in the advisement of rights form used by the Americans was cured even before it was read.

THE FOURTH AMENDMENT

The Fifth Amendment analysis by Judge Sand concerning the admissibility of statements applies to statements of common criminals as well as terrorists. The court's focus was the violation of the Fifth Amendment, one that occurs at the time that a statement is offered into evidence in an American courtroom. Naturally, the question will arise concerning the application of the Fourth Amendment, where a violation of that provision takes place at the time of the illegal search or seizure.

In *United States v. Verdugo-Urquidez,*[14] the Supreme Court analyzed, in the context of searches abroad, the protections of the Fourth Amendment and who it protects. Verdugo-Urquidez was a Mexican drug kingpin, who was arrested in that country and then taken to the United States for prosecution. Agents of the Drug Enforcement Agency, working with Mexican law enforcement, searched two of Verdugo-Urquidez's residences in Mexico and seized inculpatory evidence. The products of these warrantless searches were suppressed by the district court, a ruling that was upheld by the Court of Appeals for the Ninth Circuit.[15]

The Supreme Court reversed that ruling. In its analysis, the Court noted a significant distinction between the Fourth and Fifth Amendments. Just as Judge Sand in *Bin Laden* wrote that the violation created by the deficient rights contained in the AOR takes place when the evidence is offered in court, the Supreme Court in *Verdugo-Urquidez* held that the violation of the rules surrounding search and seizure occurs when the government searches.[16] Nevertheless, the Court did not conclude that the fact that the violation took place abroad obviates Fourth Amendment coverage. Instead, the Court considered the question of the application of the Fourth Amendment to persons outside of the United States. The Court

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14 *See* note 6, *supra.*
15 856 F.2d 1214 (1988).
16 494 U.S. at 264.

looked to the plain language of the amendment and concluded that it protects "the people" from unreasonable searches and seizures, and that it therefore did not apply to someone who was not a United States citizen and otherwise had no other connection with our nation.[17]

The clear implication of *Verdugo-Urquidez* was that the Fourth Amendment applies to citizens of the United States even when they are not on American soil. How that amendment applies to American citizens involved in terrorist activities is an important question in our times, and once again, it was Judge Sand who had to develop an answer in the context of the terrorism prosecution of Usama Bin Laden and one of his associates.

One of the opinions issued in that case had to do with a suppression motion filed by Wadih El-Hage, an American citizen.[18] The location that was searched was El-Hage's residence in Kenya. As Judge Sand described it, the search was part of a lengthy United States effort to gather intelligence on members of Usama Bin Laden's al-Qaeda terrorist organization. By the summer of 1996, the investigative techniques employed included electronic surveillance of numerous telephones in Kenya, including some associated with El-Hage. By the following Spring, the Attorney General of the United States permitted the investigators to focus intelligence gathering on El-Hage and on August 21, 1997, his home was searched by Kenyan and American agents. Although the Kenyans had a warrant that authorized the search for stolen property the Americans did not use that warrant as a justification for their search.[19]

As part of his defense to his prosecution with other al-Qaeda associates, El-Hage moved to suppress the fruits of the wiretaps and the search. His challenge was based upon two arguments: 1) the searches were conducted without warrants; and 2) even if warrants were not necessary, they still violated the Fourth Amendment because they were unreasonable. The government's position was that the warrant requirement of the Fourth Amendment was inapplicable to the searches because they "were primarily conducted for the purpose of foreign intelligence collection."[20] In describing the

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17 *Id.* at 265.
18 126 F. Supp. 2d 264 (S.D.N.Y. 2000).
19 *Id.* at 269.
20 *Id.* at 270.

importance of the matters before him, Judge Sand wrote that they raised:

> . . . significant issues of first impression concerning the applicability of the full panoply of the Fourth Amendment to searches conducted abroad by the United States for foreign intelligence purposes and which are directed at an American citizen believed to be an agent of a foreign power . . . we believe this to be the first case to raise the question whether an American citizen acting abroad on behalf of a foreign power may invoke the Fourth Amendment, and especially its warrant provision, to suppress evidence obtained by the United States in connection with its intelligence gathering operations.[21]

The applicability of the Fourth Amendment to these searches was clear to the court. Judge Sand relied on *Verdugo-Urquidez* along with another Supreme Court case, *Reid v. Covert*[22], for the proposition that the Fourth Amendment, at least to some extent, provides protections for American citizens whose property is searched outside of the nation's borders. It was the breadth of that protection, however, that became the crux of the issue in this case.

The Government's primary contention was that "searches conducted for the purpose of foreign intelligence collection which target persons who are agents of a foreign power do not require a warrant."[23] In its evaluation of this claim, the court broke down the justifications for an exception to the warrant requirement. First, it recognized that the Attorney General, acting as a member of the Executive Branch, was implementing an aspect of Presidential power: the intelligence gathering related to the President's authority over foreign affairs. The court accepted that "[w]arrantless foreign intelligence gathering has been an established practice of the Executive Branch for decades."[24]

Next, the court examined precedent through which "several cases direct that when the imposition of a warrant requirement proves to be a disproportionate and perhaps even disabling burden

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21 *Id.*
22 354 U.S. 1, 77 S. Ct. 2222, 1 L. Ed. 2d 1148 (1957).
23 126 F. Supp. 2d 264 at 271.
24 *Id.* at 273.

on the Executive, a warrant should not be required."[25] Essentially, this argument, which was accepted by the court, emphasizes that the judiciary is not the best branch of government to be in control over matters of foreign intelligence collection. The practices involved in garnering intelligence are intertwined with sensitive issues of foreign policy, many of which involve matters of extreme confidentiality.

These concerns brought the court to the conclusion that in light of potential for judicial interference with the executive branch's foreign intelligence operations, judicial involvement should not precede the search, but instead, courts should "assess the constitutionality of the searches ex post. Requiring judicial approval in advance . . . would inevitably mean costly increases in the response time of the Executive Branch."[26]

The third consideration in assessing the need for a warrant for searches such as the one before the court focused upon statutory authority, or actually, lack thereof, for such a practice. The court observed that Rule 41(a) of the Federal Rules of Criminal Procedure does not permit a federal magistrate to expand jurisdiction for search warrants beyond the United States. In addition, application of traditional warrant practices to the exercise of foreign intelligence gathering would place an undue strain upon that very special system, because "the people and agencies upon whom the Executive relies in the foreign intelligence context for information and cooperation would undoubtedly be wary of any warrant procedures that did not adequately protect sensitive foreign intelligence information."[27]

After reviewing these "concerns" the court concluded that it was necessary to find that a foreign intelligence exception exists to the warrant requirement when searches are conducted abroad and those searches are targeting foreign powers or their agents. In relation to El-Hage, the court made the following findings in applying the exception. First, it recognized that al-Qaeda was a foreign power and that information provided to the court (through classified documents) established that El-Hage was one of its agents.[28] Next, it turned to the question of the primary motivation for the

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25 *Id.*
26 *Id.* at 275.
27 *Id.* at 277.
28 *Id.* at 277-278.

searches. Even though the evidence obtained from the searches was used in a criminal prosecution, the court noted that "[a] foreign intelligence collection effort that targets the acts of terrorists is likely to uncover evidence of crime."[29]

In finding that the efforts surrounding El-Hage were centered on foreign intelligence and not a criminal investigation, the court pointed out that there was no FBI agent involved in the electronic surveillance and that the searches and other surveillance were focused upon gathering information about al-Qaeda covert operations, including identity fraud and communications between members of al-Qaeda. In fact, a report found in El-Hage's computer contained inculpatory information concerning one his associates and that person's involvement in a 1993 terrorist attack on American troops in Somalia.[30]

However, the application of the exception hit a snag when it came to the electronic surveillance that predated the Attorney General's authorization of April 4, 1997. The last element of the court's exception to the warrant requirement was executive approval. This approval was not in place for the first ten months of the electronic surveillance. The government attempted to avoid the application of the court's analysis by claiming that the interceptions of El-Hage's conversations were only "incidental" to interceptions of primary targets of intelligence gathering.[31] However, acceptance of this view would have to be based upon a finding that El-Hage was an unanticipated interceptee. This was too difficult a claim for the court to accept when it came to El-Hage's home and cellular telephones.

As a result of this analysis, the court was left with a portion of the searches, those which came before the Attorney General's authorizations, that was unlawful.[32] Nevertheless, the court found that there was no point to suppress that evidence by virtue of the exclusionary rule. The court applied the traditional considerations of deterrence and good faith to these facts. As to the former, the court concluded that deterrence was not an issue when it came to these searches because they were not performed by the FBI for law enforcement purposes, but rather by other agents of the government

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29 *Id.* at 278.
30 *Id.* at 279.
31 *Id.* at 279-280.
32 *Id.* at 281-282.

who would have conducted the searches "even if there had been an awareness that the material recorded would be inadmissible at a future criminal trial of El-Hage."[33]

On the question of good faith, the court was convinced that the agents who conducted the electronic surveillance "operated under an actual and reasonable belief that Attorney General approval was not required prior to April 4, 1997, when El-Hage was specifically identified by the Government as a target of foreign intelligence collection."[34] In light of the minimal precedential guidance in this area, the court found that there were no illegal motives on the part of those who were conducting the surveillance.

Still, the Fourth Amendment does not stop with the warrant requirement, so the court had to continue its inquiry. Even when a search falls within an exception to the warrant requirement, as these searches did, it still must be "reasonable."[35] Although this is a concept that provides is more flexibility in the admission of searches when compared to the admissibility of statements, the burden was high in this case in light of the types of searches that were being challenged: the search of a residence and electronic surveillance.

Nevertheless, the court refused to accept El-Hage's position that the warrantless search of his home was per se unreasonable. Instead, the court concluded that the search of his home was justified by the foreign intelligence exception to the warrant requirement, and that it was conducted in a reasonable manner: "[t]he scope of the search was limited to those items which were believed to have foreign intelligence value and retention and dissemination of the evidence acquired during the search were minimized."[36]

Finally, the court rejected the argument that the electronic surveillance was unreasonable because it was conducted without limitation on all of El-Hage's conversations and those of his family for over one year. The court found that this surveillance was justified because of the broad, world wide network that was the subject of the intelligence-gathering, the use of foreign language and probable

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33 *Id.* at 283.
34 *Id.* at 284.
35 *Id.*
36 *Id.* at 285.

use of coded communications, and the fact that the phones were actually shared by various members of the al-Qaeda network.[37]

This total, comprehensive analysis resulted in the court's ultimate conclusion that the motion to suppress evidence should be denied without a hearing.

CONCLUSION

In each of these decisions Judge Sand paved new ground, although the recent changes in the world surely suggest that he will not be the last jurist to address these issues. Moreover, while he was confronted with new and unusually complex matters, the foundations for his legal conclusions came from many long established building blocks. He was able to bring together support for his conclusions from many earlier federal decisions.

Additionally, there are other cases dealing with analogous concepts that will surely prove useful in future opinions concerning Fourth, Fifth and Sixth Amendment issues and the investigation and prosecution of suspected terrorists. For example, more than twenty-five years ago Justice Friendly, writing in a concurring opinion for the Court of Appeals for the Second Circuit, commented on the necessity for airport searches when he noted that:

> When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger alone meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice to such a search so that he can avoid it by choosing not to travel by air.[38]

Those statements were made in support of the use of a profile by airport employees to identify potential hijackers.[39] Clearly, if the courts approved searches based upon those types of security measures twenty-five years ago then the events of last September will support even more intrusive precautions.

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[37] *Id.* at 286.

[38] United States v. Bell, 464 F.2d 667, 675 (2d Cir. 1972).

[39] *See also* United States v. Edwards, 498 F.2d 496 (2d Cir. 1974) (upholding search of carry-on baggage at airport).

While Judge Sand's ultimate rulings permitted the use of the challenged statements and seized evidence, that evidence first had to undergo substantial scrutiny in order to pass constitutional muster. An important part of the history of the judiciary is its role as a bulwark against overreaching government activity in the realm of search and seizure, even when that official conduct is done in the name of national security. In an explanation of the Fourth Amendment's role, Justice Brandeis wrote

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feeling and of his intellect . . . they sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[40]

This phrase has often been cited in dissenting and majority opinions to justify the views of judges that the government must, for the sake of the people, be subjected to limitations in its conduct.

Still, when excesses occur within the United States in the name of national security, that banner does not preclude the courts from evaluating those searches within the parameters of the Fourth Amendment. In *United States v. District Court*[41] the Supreme Court was confronted with electronic surveillance used in the investigation of a bombing of the office of the Central Intelligence Agency in Ann Arbor, Michigan. The Court held that the domestic use of electronic surveillance without prior judicial approval for the purpose of national security, when not targeting a foreign power, is not legal.[42]

In coming to this conclusion, the Court evaluated many of the same questions that Judge Sand had to address when he decided the search issues described above. However, the critical distinction be-

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[40] Olmstead v. United States, 277 U.S. 438, 478, 48 S. Ct. 564, 572, 72 L. Ed. 944 (1928).

[41] 407 U.S. 297, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972).

[42] *See also* Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (holding that the Attorney General of the United States was not absolutely immune from civil liability due to the use of illegal electronic surveillance in the name of national security).

tween the Supreme Court's ruling in *United States* and Judge Sand's assessment of the foreign searches in El-Hage's case is that Judge Sand was dealing with a foreign power.

There is no doubt that government investigators will continue to pursue leads in the fight against terrorism.[43] More and more prosecutions will develop and it is likely that law enforcement will maintain its aggressive posture in these investigations. In the end, however, it will be the courts that have the opportunity to pass on the legality of the government's conduct, and thereby have the final word on the viability of these prosecutions. As the cases described above clearly demonstrate, the courts will have ample constitutional authority to guide them.

[43] *See e.g.* United States v. Awadallah, 2002 U.S. Dist. LEXIS 1430 (January 31, 2002) (describing a perjury prosecution involving a person questioned within 10 days of the September 11, 2001 attacks).