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# FISA SURVEILLANCE AND ALIENS

*Amit K. Chhabra\**

“Threats to freedom of speech, writing and action, though often trivial in isolation, are cumulative in their effect and, unless checked, lead to a general disrespect for the rights of the citizen.”<sup>1</sup>

George Orwell

## INTRODUCTION

The April 2013 Boston Marathon attacks, together with Edward Snowden’s June 2013 release of documents revealing expansive U.S. governmental spying practices targeting U.S. citizens,<sup>2</sup> remind us that terror and governmental surveillance lurk in our midst and at times appear inseparable. Small-scale strikes at the American homeland have occurred since the founding of our republic. In response, the Constitution sets forth a treason doctrine to address domestic threats where the underlying acts are construed as “levying War” against the United States or in “adhering to [its] enemies, giving them Aid and Comfort.”<sup>3</sup> For better or worse, a fear of abuse allowed the doctrine to atrophy<sup>4</sup> though repeated attempts have aimed

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\* Adjunct Professor, New York Law School; Visiting Professor of Law, Saint George’s University. J.D., University of Notre Dame Law School; A.B., Cornell University. I would like to thank my family for their love and patience, as well as participants in the September 2013 Symposium, *Citizenship, Immigration, and National Security After 9/11*, 82 FORDHAM L. REV. 2037 (2014), jointly sponsored by the *Fordham Law Review* and the Center on National Security at Fordham University School of Law.

1. 4 GEORGE ORWELL, IN FRONT OF YOUR NOSE 1945–1950, at 447 (Sonia Orwell & Ian Angus eds., 1968).

2. *Edward Snowden*, BIO., <http://www.biography.com/people/edward-snowden-21262897> (last visited May 12, 2014). Among Snowden’s disclosures was a revelation that the Foreign Intelligence Surveillance Court ordered governmental collection of metadata from internet search engines like Yahoo and Google, as well as social networking sites including Facebook. The shock effect came from the fact that the disclosure was essentially a backdoor to rewriting the Constitution and showed that the court was now approving governmental requests to monitor institutions rather than merely individuals. Bill Mears & Halimah Abdullah, *What Is the FISA Court?*, CNN POL. (Jan. 17, 2014), <http://www.cnn.com/2014/01/17/politics/surveillance-court/>.

3. U.S. CONST. art. III, § 3. Along these lines, the Alien and Sedition Acts of 1798 allowed the president to detain and deport aliens from countries in open hostility to the United States, who were reasonably believed to be “concerned in any treasonable or secret machinations against the government.” Act of June 25, 1798, ch. 58, § 1, 1 Stat. 570, 571. Similarly, the Sedition Act criminalized spoken or written opposition to the government that evinced an intention to defame or excite in others such an opposition. Act of July 14, 1798, ch. 74, § 2, 1 Stat. 596, 596.

4. As an example, Senator Joseph McCarthy’s accusations came to be seen as unsubstantiated witch hunts. *Dec. 2, 1954: Anti-Communist Senator McCarthy Is*

to better equip the government in its ability to uncover subversion. In the wake of protests against the war in Vietnam and perceived leftist influence, for example, President Richard Nixon authorized domestic monitoring and surveillance.<sup>5</sup> Congress formally legalized these activities in the Foreign Intelligence Surveillance Act<sup>6</sup> (FISA) legislation. After the September 11, 2001, World Trade Center and Pentagon attacks, Congress further strengthened the government's surveillance tools by enacting the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001<sup>7</sup> (PATRIOT Act) and issuing a joint resolution—the Authorization for Use of Military Force<sup>8</sup> (AUMF)—which legalize the president's discretion to use military force at home and abroad in the so-called War on Terror.<sup>9</sup>

Still, legislation in this regard has traditionally included a carve-out for the free exercise of civil liberties.<sup>10</sup> In this vein—and in light of the PATRIOT Act<sup>11</sup> and AUMF<sup>12</sup> targeting threats to U.S. interests “both at home and abroad”<sup>13</sup>—we might expect our surveillance apparatus to be

*Condemned*, LEARNING NETWORK (Dec. 2, 2011, 4:12 AM), <http://learning.blogs.nytimes.com/2011/12/02/dec-2-1954-anti-communist-senator-joseph-mccarthy-is-condemned/>. Moreover, Whittaker Chambers abandoned his Communist allegiances and ultimately testified in the trial of Alger Hiss. William Fitzgibbon, *The Hiss-Chambers Case: A Chronology Since 1934*, N.Y. TIMES, June 12, 1949, at E8.

5. Mark Mazzetti & Tim Weiner, *Files on Illegal Spying Show C.I.A. Skeletons from Cold War*, N.Y. TIMES, June 26, 2007, at A1.

6. Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. §§ 1801–1885c).

7. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.).

8. The AUMF reads, in pertinent part:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541) (emphasis added).

9. Though one cannot reliably assert that certain terrorist attacks could have been prevented if courts had more fully developed the treason doctrine over the years, it does give us occasion to revisit the rationale and potential utility of a treason doctrine in light of the current national security focus on terrorism. The timing of such a review is apt, as we recently commemorated the one hundred and fiftieth anniversary of President Abraham Lincoln's Emancipation Proclamation, in which he charged several southern state governments of treason against the Union. Proclamation No. 17, 12 Stat. 1268 (1863). Can a reinvigorated treason doctrine assist in seeking out and meting justice to homegrown terrorists?

10. For example, even the Sedition Act included an opportunity for the accused to present a defense that the subject of his allegedly libelous publication was true. Act of July 14, 1798, ch. 74, § 3, 1 Stat. 596, 597. Only an abuse of the right to free speech encompassing “false, scandalous and malicious writing” would be punishable, rather than all writings. *See id.* § 2.

11. USA PATRIOT Act § 218.

12. Authorization for Use of Military Force § 2.

13. *Id.*

uniform and not dependent upon suspect categories of discrimination such as alien status.<sup>14</sup> By example, Americans after the Boston Marathon attack did not first ask whether the perpetrators were citizens or aliens. Rather, they initially asked whether global terror was the real culprit behind the two known Chechen perpetrators, the Tsarnaev brothers.<sup>15</sup> Only after it was determined that international terror organizations likely did not play a role,<sup>16</sup> did attention then center on whether the Tsarnaevs were citizens, permanent residents, or alien nonresidents. The outcome would determine whether the Federal Bureau of Investigation (FBI) or National Security Agency (NSA) could have more aggressively monitored—and potentially stopped them<sup>17</sup>—even in the absence of a clear nexus with international terrorism.<sup>18</sup> This is because FISA, as amended by the PATRIOT Act,

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14. Although the U.S. Supreme Court has specified that strict scrutiny is generally the appropriate standard in alienage discrimination cases, *Graham v. Richardson*, 403 U.S. 365, 375–76 (1971), it has used the rational basis test where Congress has already legislated a discriminatory standard against aliens as part of its plenary power in the immigration space. See *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976). A presidential order is similarly afforded deference in light of the executive’s traditional role in foreign affairs. *Id.* at 82. (“[T]he relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.”).

15. *Boston Marathon Terror Attack Fast Facts*, CNN U.S. (Apr. 14, 2014, 4:32 PM), <http://www.cnn.com/2013/06/03/us/boston-marathon-terror-attack-fast-facts/>.

16. David Crary & Denise Lavole, *U.S.: Bomb Suspects Likely Not Linked to Terror Groups*, DETROIT FREE PRESS, Apr. 23, 2013, at A1. By contrast, Colonel Grigory Chinturia of the Georgian Ministry of Internal Affairs reported that the prime perpetrator Tamerlan Tsarnaev may have attended North Caucasus events sponsored by the Jamestown Foundation and the Kavkazsky Fund; the latter was organized “to control processes taking place in the North Caucasus region” following the Georgia-South Ossetia conflict, i.e., to encourage instability and extremism. *Slain Boston Suspect Tsarnaev May Have Attended Terrorism Seminars in Georgia—Reports*, RUSS. TODAY (Apr. 29, 2013), <http://rt.com/news/attended-acts-terror-seminars-329/>. The Jamestown Foundation has categorically denied any contact with the Tsarnaev brothers. See *id.*

17. Evidence indicates that the FBI received a request from Russia to review Tamerlan Tsarnaev and categorized him as a radical Islamist, but investigators closed his file after a background check showed no terrorist activity. Later, when his YouTube page showed jihadist videos, his alienage status would be relevant: a citizen or permanent resident posting hateful messages would presumably be protected from monitoring if the sole basis of such speech was the First Amendment’s freedom to express one’s opinions, whereas an alien would not be. See Eric Schmitt & Michael S. Schmidt, *Officials Say They Didn’t Have Authority To Monitor Suspect*, N.Y. TIMES, Apr. 22, 2013, at A13. As it turned out, Tamerlan Tsarnaev was a legal permanent resident, so presumably a monitoring order could not be obtained if it was solely based on these videos. See Julia Preston, *F.B.I. Interview Led Homeland Security To Hold Up Citizenship for One Brother*, N.Y. TIMES, Apr. 21, 2013, at A15.

18. In order to make its case, the government would need to establish that a “significant purpose” of the surveillance sought was to monitor the tentacles of international terrorism. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 218, 115 Stat. 291 (codified in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.) (emphasis added). This might be possible even though ordinary criminal law enforcement is the primary motive. Additionally, the element of terrorism could determine whether the Tsarnaev brothers might be apprehended and Mirandized, or be interrogated before *Miranda* warnings are provided under the “public safety” exception. See *New York v. Quarles*, 467 U.S. 649, 655–56 (1984); Charlie Savage, *Delayed Miranda Warning Ordered for Terror Suspects*, N.Y. TIMES, Mar. 25, 2011, at A17; see also FED. BUREAU OF INVESTIGATIONS,

prescribes an exemption to governmental investigations of citizens and permanent residents acting pursuant to the First Amendment's protections for free expression; there is no comparable exclusion for aliens exercising such rights. Specifically, the FBI may apply for an investigation directed toward "obtain[ing] foreign intelligence information not concerning a United States person or . . . protect[ing] against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution."<sup>19</sup> In relying on a limited definition of "United States person" including only a citizen or lawful permanent resident,<sup>20</sup> FISA draws an alienage-based distinction with regard to the Foreign Intelligence Surveillance Court's (FISC) substantive ability to authorize monitoring.<sup>21</sup> On the one hand, U.S. citizens and permanent residents<sup>22</sup> are protected where their actions fall exclusively under the First Amendment's guarantees of freedom of speech and press; to lose protection, their conduct must evidence completed, current, or imminent criminality.<sup>23</sup> On the other hand, noncitizen, nonpermanent residents<sup>24</sup> ostensibly do not receive these protections.

The plight of the alien in the context of governmental surveillance is thus particularly fragile and leads to several lines of inquiry: Are aliens and U.S. persons equally entitled to constitutional safeguards, particularly with

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U.S. DEP'T OF JUSTICE, CUSTODIAL INTERROGATION FOR PUBLIC SAFETY AND INTELLIGENCE-GATHERING PURPOSES OF OPERATIONAL TERRORISTS INSIDE THE UNITED STATES (2010), available at <http://www.nytimes.com/2011/03/25/us/25miranda-text.html>. Moreover, if the Tsarnaevs were considered "unlawful combatants" they could be incarcerated indefinitely at Guantánamo Bay and would not have the right to counsel even if they were U.S. citizens. Memorandum from William J. Haynes II, Gen. Counsel, Dep't of Def., to Members of the ASIL-CFR Roundtable (Dec. 12, 2002), available at <http://www.cfr.org/international-law/enemy-combatants/p5312>. As it turned out, only one brother survived the escape attempt, and he is a U.S. citizen who was read his *Miranda* rights. Alexander Abad-Santos, *Dzhokhar Tsarnaev Is Walking, Talking and Claiming He's Innocent*, WIRE (May 30, 2013, 4:42 PM), <http://www.thewire.com/national/2013/05/dzhokhar-tsarnaev-walking-talking-and-claiming-hes-innocent/65741/>.

19. 50 U.S.C. § 1861(a)(1) (2006).

20. The section, in relevant part, defines a U.S. person as "a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in § 1101(a)(20) of title 8)." *Id.* § 1801(i).

21. This is because a FISC judge's order of approval responds to a § 1861(a)(1) application, which uses a restrictive definition of "U.S. person" that excludes aliens. *Id.* § 1861(c)(1).

22. For convenience, this Article refers to U.S. citizens and permanent residents collectively as "U.S. persons."

23. Section 1861(g) defines the term "minimization procedures" as those designed to ensure that applications for a court order minimize the retention and dissemination of nonpublic information concerning nonconsenting U.S. persons unless doing so is necessary to understand or assess foreign intelligence information. *Id.* § 1861(g). It also allows for the retention and dissemination of information that evidences a crime that "has been, is being, or is about to be committed." *Id.* Thus, where the sole basis of a citizen's conduct is the First Amendment, the conduct can nevertheless be the subject of information retained if it evidences past, current, or imminent criminal conduct.

24. For convenience, this Article refers to noncitizen, nonpermanent residents as "aliens."

respect to due process<sup>25</sup> and protections against unreasonable searches and seizures?<sup>26</sup> Are First Amendment rights properly limited to U.S. persons, or are they essential to an alien's liberty? Should aliens expect such rights where American citizens themselves are confronted with imminent acts of terror in their own homeland? Does this answer change if the danger is not perceived as imminent?<sup>27</sup> In the absence of a FISA amendment that eliminates separate monitoring standards for U.S. persons and aliens, should not a "public monitoring defender" at least be appointed to minimize the potential for prosecutorial and judicial error by attending FISC proceedings on behalf of suspected targets?<sup>28</sup> This Article concludes that such procedural safeguards are more effective at retaining America's reputation as a beacon of liberty. Additionally, we should learn from our history of depriving blacks and Japanese Americans of civil liberties on national security grounds;<sup>29</sup> we should thus apply monitoring orders aggressively but equally to aliens without succumbing to the easy temptation of depriving a vulnerable group of basic civil protections.

### I. FISA SURVEILLANCE: PROCEDURAL CONCERNS

Even before we consider the particularly vulnerable position of the alien in the context of monitoring, we see that there are many procedural concerns, even when citizens are targeted.

In order for federal prosecutors to actually obtain a monitoring order, they must appear in an *ex parte*, *in camera* proceeding before a secret FISC panel of judges.<sup>30</sup> This secrecy is seen as arising out of the "sensitive nature of the proceedings."<sup>31</sup> The *ex parte* nature of the proceedings means that neither the target of the monitoring order, nor the target's counsel, is present or even aware of the proceedings.<sup>32</sup> The presiding judge thereby does not have an opportunity to hear challenges to evidence presented by

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25. U.S. CONST. amend. XIV; *Id.* amend. V.

26. *Id.* amend. IV.

27. *See supra* note 20. The historical example of Japanese internment during the Second World War, for example, might tend to indicate that aliens should not expect such rights; on the contrary, they might reasonably be entitled to fear persecution.

28. Along similar lines, in the aftermath of Edward Snowden's disclosures in June 2013, former NSA analyst J. Kirk Wiebe has suggested that the lack of meaningful oversight of government spying means that both Congress and the FISC should have direct electronic access to the NSA's operations. Pema Levy, *NSA Metadata Surveillance: FISA Court Should Directly Monitor Spying Agency, Former NSA Analyst Says*, INT'L BUS. TIMES (July 25, 2013, 2:52 PM), <http://www.ibtimes.com/nsa-metadata-surveillance-fisa-court-should-directly-monitor-spying-agency-former-nsa-analyst-says>. Perhaps in recognition of the lack of notice for targets, the Department of Justice recently announced a change in its policy such that it now plans to provide notice of warrantless wiretapping. Patrick C. Toomey, *In Reversal, DOJ Poised To Give Notice of Warrantless Wiretapping*, ACLU (Oct. 18, 2013, 5:01 PM), <https://www.aclu.org/blog/national-security/reversal-doj-poised-give-notice-warrantless-wiretapping>.

29. *See infra* note 91.

30. U.S. FOREIGN INTELLIGENCE SURVEILLANCE CT. R.P. 17, 30.

31. *Foreign Intelligence Surveillance Court (FISC)*, ELECTRONIC PRIVACY INFO. CENTER, <http://epic.org/privacy/terrorism/fisa/fisc.html> (last visited May 12, 2014).

32. *Id.*

federal prosecutors. Thus, any discussion here of a distinction between the monitoring of U.S. persons and aliens should bear in mind that neither group is provided an opportunity to confront accusers, even though this opportunity is guaranteed by the Constitution in the context of ordinary criminal justice cases.<sup>33</sup>

Moreover, FISA courts have come under fire in light of perceived shortcomings in the application of justice reminiscent of Article I military courts, which are, however, constitutionally authorized. For example, in the Guantánamo Bay cases, the perception of a greater likelihood of “guilty”<sup>34</sup> outcomes in Article I courts was encouraged by congressional legislation<sup>35</sup> to stymie Department of Justice (DOJ) funding for the transfer of citizens to the United States, and thereby to guarantee a military commission trial.<sup>36</sup> With respect to FISA courts, such shortcomings might potentially include a greater potential for error and abuse of discretion than Article III federal courts due to a common appointment from one chief justice<sup>37</sup> who may choose like-minded judges. This commonality may encourage and reinforce view polarization or amplify each judge’s political leanings, without a party in interest willing to present a challenge. On the other hand, this arrangement might better suit a particular judge’s style of thinking by allowing him to focus on one subject without the distraction of conflicting arguments. By this measure, any change at all could meet stiff resistance by FISC judges, who are arguably in the best position to appreciate the contours of their own judging. Additionally, although the attorney general must report to Congress<sup>38</sup> on monitoring orders that have already been

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33. U.S. CONST. amend. VI.

34. See Dina Temple-Raston, *The Terror Courts Rough Justice at Guantanamo Bay* by Jess Bravin, WASH. POST, Mar. 29, 2013, at B7 (book review) (describing Bravin’s account of the Guantánamo military commission as one conceived by “a small group of Bush-era political appointees [that] managed to develop a parallel justice system designed to ensure a specific outcome”).

35. See, e.g., Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1116, 125 Stat. 38, 106 (codified at 12 U.S.C. §§ 5496a–5496b, 22 U.S.C. §§ 285dd–285ee).

36. For precisely this reason, the author along with the Federal Legislation Committee and the National Security Task Force of the Association of the Bar of the City of New York sent a letter discouraging Congress from enacting section 1116 of the 2011 Full-Year Continuing Appropriations Act. See Letter from Samuel W. Seymour, President, N.Y.C. Bar Ass’n, to Harry Reid & Mitch McConnell, U.S. Senators (Dec. 15, 2010), available at <http://www.nycbar.org/pdf/report/uploads/20072024-LettertoUSSenaterSection1116reTransferofNon-CitizenstoUS.pdf> (imploping Congress to consider, among other things, the superior ability of Article III federal courts to efficiently dispense justice, produce convictions, and to do so without the taint of Article I courts’ reputation for abuse of discretion and reduced ability to appeal).

37. Doug Mataconis, *Who’s in Charge of the FISA Court? John Roberts, and Apparently Just John Roberts*, OUTSIDE BELTWAY (July 7, 2013), <http://www.outsidethebeltway.com/whos-in-charge-of-the-fisa-court-john-roberts-and-apparently-just-john-roberts/> (criticizing the FISC as polarized because only one judge is a Democrat, while the other ten, like Chief Justice John Roberts, are Republicans).

38. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 118, 120 Stat. 192, 217–18 (2006) (codified in scattered sections of 8, 15, 18, 21, 28, and 42 U.S.C.) (requiring semiannual reporting to the House Permanent Select Committee on Intelligence and to the Senate Select Committee on Intelligence, among others); 50

granted by the FISC, there are no checks on potential procedural abuses *at the time* that an order is requested. However, the presence of a third party representing the target at the FISC hearing could help, as long as such a party is subject to confidentiality obligations.

## II. MONITORING DISTINCTIONS: U.S. PERSONS VERSUS ALIENS

On the surface, the executive branch does not aim to differentiate between U.S. persons and aliens. Rather, consistency with the Constitution and individual liberties is emphasized.

Accurate and timely information about the capabilities, intentions and activities of foreign powers, organizations, or persons and their agents is essential to informed decisionmaking in the areas of national defense and foreign relations. Collection of such information is a priority objective and will be pursued in a vigorous, innovative and responsible manner that is consistent with the Constitution and applicable law and respectful of the principles upon which the United States was founded.<sup>39</sup>

In an attempt to protect the homeland from possible hostile acts and foreign espionage, FISA regulates intelligence gathering even in the absence of a probable violation of law.<sup>40</sup> After 9/11, the PATRIOT Act widened FISA's distinction between U.S. persons, on the one hand, and resident aliens on the other hand. To obtain a FISA order against a U.S. person, federal prosecutors must demonstrate that the target has already breached or is about to violate U.S. law.<sup>41</sup> This ensures that individuals are not simply targeted because of their First Amendment-protected activities

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U.S.C. § 1807 (2006) (requiring the attorney general to transmit to the Administrative Office of the U.S. Court and to Congress an annual report setting forth the previous year's total number of applications of orders and order extensions, as well as the number of such orders and extensions that were granted, modified, and denied); *see also Foreign Intelligence Surveillance Act*, FED'N AM. SCIENTISTS, <https://www.fas.org/irp/agency/doj/fisa/#rept> (last visited May 12, 2014) (hosting *FISA Annual Reports to Congress* from 1979 to 2013).

39. Exec. Order No. 12,333, 3 C.F.R. 200, 210 (1982). This order was signed by President Ronald Reagan in 1981 and amended several times by subsequent orders, including most recently by President George W. Bush in 2008. Exec. Order No. 13,470, 3 C.F.R. 218, 218 (2009). It remains a source for determining the nature and reach of American intelligence gathering both domestically and abroad.

40. FISA surveillance is generally allowed where there is probable cause to believe that the target is a foreign power or an agent of a foreign power, even if no criminal activity is suspected. This follows from the statute language that allows electronic surveillance of either "(i) the acquisition of the contents of communications transmitted by means of communications used exclusively between or among foreign powers . . . [or] (ii) the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power." 50 U.S.C. § 1802(a)(1)(A) (2006); *see infra* Part III.B (discussing the probable cause determinations that a FISC judge must make before issuing a surveillance order).

41. *See supra* note 23. Procedures must be employed to limit the dissemination of nonpublic information (so-called "minimization procedures"), 50 U.S.C. § 1801(h)(1)–(2), as well as to enable the capture of information "that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes." *Id.* § 1801(h)(3). Moreover, the attorney general may "determine[] that the information indicates a threat of death or serious bodily harm to any person." *Id.* § 1801(h)(4).



including freedoms of speech, assembly, religion, and press.<sup>42</sup> If the information sought involves a U.S. person, it may only be used if its significant purpose is to protect against espionage or international terrorism.<sup>43</sup> However, the information gathering that contributes to the conclusion that a U.S. person is a foreign-power agent must not be “conducted solely upon the basis of activities protected by the First Amendment.”<sup>44</sup>

The alien does not receive these First Amendment protections. Thus, much of what appeals to immigrants about the idea of the “land of the free and the home of the brave”<sup>45</sup> remain mere ideas when they learn of distinctions within our surveillance apparatus. Ordinary speech or thoughts expressed live or online can be used against the alien, though not against the U.S. person. Rather, the alien is fully exposed to the PATRIOT Act’s section 218 prescription that foreign intelligence forms only a “significant purpose” of the surveillance sought. By this standard, though, the primary purpose may be to advance an ordinary criminal investigation using FISA surveillance as merely a pretext for violating the Fourth Amendment’s bar against unreasonable searches and seizures.<sup>46</sup> Unfortunately, the FBI’s ability to secretly obtain FISA court orders and also to withhold the text—and thus rationale—of the requested monitoring from the public ensures a limited number of citable examples of abuse.<sup>47</sup> Moreover, FISA court orders represent only a portion of government monitoring as the FBI is not bound to these orders and has ignored them in the past.<sup>48</sup> Nonetheless, recent reports have documented 111 instances of governmental surveillance involving First Amendment activities across thirty-three states,<sup>49</sup> as well as

42. U.S. CONST. amend. I.

43. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 218, 115 Stat. 291 (codified in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.); Suzanne Spaulding, *Homeland Security*, in JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW 1276 (2d ed. 2005).

44. Spaulding, *supra* note 43.

45. FRANCIS SCOTT KEY, THE STAR-SPANGLED BANNER (1814).

46. *See generally* Susan N. Herman, *The USA PATRIOT Act and the Submajoritarian Fourth Amendment*, 41 HARV. C.R.-C.L. L. REV. 67 (2006) (arguing that Fourth Amendment jurisprudence should be reexamined so that the judiciary is less willing to give deference to legislative and executive pronouncements in order to better serve its check-and-balance function).

47. Members of Congress have voiced their frustration with this conundrum, including former Congressman Bob Barr, who served as Vice Chairman of the Government Reforms Committee: “I don’t care if there were no examples so far . . . . We can’t say we’ll let government have these unconstitutional powers in the Patriot Act because they will never use them. Besides, who knows how many times the government has used them? They’re secret searches.” *Patriot Act Divides Bush Loyalists*, WASH. TIMES, Apr. 5, 2004, at A4.

48. Andrew P. Napolitano, *Is the FISA Court Constitutional?*, FOX NEWS (Sept. 26, 2013), <http://www.foxnews.com/opinion/2013/09/26/is-fisa-court-constitutional/> (citing the fact that the government has ignored the FISC’s holdings as evidence that they are merely advisory opinions); *see also* discussion *infra* Part III.B.1.

49. *See* ACLU, POLICING FREE SPEECH: POLICE SURVEILLANCE AND OBSTRUCTION OF FIRST AMENDMENT-PROTECTED ACTIVITY 4, 15 (2010), *available at* [https://www.aclu.org/files/assets/policingfreespeech\\_20100806.pdf](https://www.aclu.org/files/assets/policingfreespeech_20100806.pdf) (surveying governmental monitoring in instances of simple exercises of First Amendment freedoms of speech, press, and association

an overrepresentation of minorities in both the criminal justice and juvenile delinquency systems along with a concomitant lack of planning to determine the source of the disparity or to address it.<sup>50</sup> Although the bulk of this surveillance involves U.S. persons due to the greater likelihood of their civic participation in community groups, there is no indication that governmental practice would change merely because a target is a noncitizen; more likely, we can expect surveillance of the alien to be at least equally aggressive.

To aggravate matters, the PATRIOT Act requires the alien to submit “any tangible things” demanded.<sup>51</sup> With an infinite number of possible associations between an alien’s speech and an international terror organization’s avowed aims, ample opportunity exists for frivolous or unsubstantiated FBI surveillance and requests. In effect, too much discretion—and too little oversight<sup>52</sup>—provides an opportunity for law enforcement and unaccountable FISC judges to discriminate against aliens if they so choose. The cost of this distinction: a potential evisceration of the Fourth Amendment’s proscription against searches and seizures for newcomers subject to FBI or NSA monitoring.

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by citizens and others). This ACLU report cites, inter alia, the revocation of the top secret clearance of Moniem El-Ganayni, a naturalized U.S. citizen and Muslim American nuclear physicist by the Department of Energy after eighteen years of service following his public criticism as an imam in a mosque of the FBI’s treatment of Muslims in Pittsburgh, without alleging a security breach but instead questioning him about his religious beliefs and statements. *See id.* at 15. The report also cites the stealing by the Los Angeles County Terrorism Early Warning Center of files revealing a federal surveillance program targeting Muslim communities in Southern California. *See id.* at 4.

50. *See* ACLU, DISPROPORTIONATE MINORITY CONFINEMENT IN MASSACHUSETTS (2003), available at [https://www.aclu.org/files/FilesPDFs/dmc\\_report.pdf](https://www.aclu.org/files/FilesPDFs/dmc_report.pdf) (finding overrepresentation of minorities at every stage in the juvenile delinquency and criminal justice systems and failures by the state to identify and address the causes of the disparity and recommending steps to remedy it).

51. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 215, 115 Stat. 291 (codified in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.). The previous provision was far more limited, allowing records from only common carriers, public accommodation facilities, physical storage facilities, and vehicle rental facilities. *See In Brief—Access to Library Records by FISA Warrant Before and After the USA PATRIOT Act*, AM. ASS’N L. LIBR., <http://www.aallnet.org/Documents/Government-Relations/fisachart.pdf> (last visited May 12, 2014) (comparative chart). Unsurprisingly, this expansion was met with stiff opposition by library advocates that previously felt targeted for foreign intelligence information during the Cold War. EDWARD C. LIU, CONG. RESEARCH SERV., R40138, AMENDMENTS TO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA) EXTENDED UNTIL JUNE 1, 2015, at 10 (2011), available at <http://www.fas.org/sgp/crs/intel/R40138.pdf>.

52. Although the U.S. House Permanent Select Committee on Intelligence and the U.S. Senate Select Committee on Intelligence do review electronic surveillance practice submitted by the attorney general that did not seek a FISC court order *after* the fact, this review does not encompass FISC court order determinations. *See* 50 U.S.C. § 1802(a)(2) (2006).

*A. Does the U.S. Constitution Permit Such a Distinction?*

Although the additional protections for U.S. persons are laudable, the Constitution does not exist exclusively for their benefit. Thus, the words “we the people” rather than “we the citizens” are used. Where rights are reserved exclusively for citizens, though, they are accordingly specified.<sup>53</sup> Of course, protections for U.S. persons and aliens are not identical; if that were the case, citizenship would not be a measurable, tangible aspiration for immigrants to our country. But the Constitution is clear about the rights that immigrants do not receive: the right to vote and the right to hold federal public office.<sup>54</sup> Some Framers felt that newcomers, in order to have a say in who governs them, would first need to demonstrate their commitment to staying in the United States permanently and being subject to its laws.<sup>55</sup> Political privileges—voting and holding federal office—could be reserved for those that cared enough to endure the entire naturalization process.<sup>56</sup>

By analogy, international law echoes these findings: equality of human and social rights are generally granted to all in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and in a multitude of other nations’ charters.<sup>57</sup> Under some domestic charters, only reservations specifically naming rights exclusively for one group or another are deemed legitimate.<sup>58</sup> If practice differs from a charter,

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53. Thus, the Fifteenth Amendment limits the right to vote to citizens: “The right of *citizens* of the United States to vote shall not be denied.” U.S. CONST. amend. XV, § 1 (emphasis added). Moreover, Article I of the Constitution requires citizenship, among other things, for the office of U.S. Representative and Senator: “No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a *Citizen* of the United States. . . . No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a *Citizen* of the United States.” U.S. CONST. art. I, § 2, cl. 2, § 3, cl. 3 (emphasis added).

54. David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV. 367, 370 (2003) (acknowledging the Constitution’s enumeration of “the people” throughout and reciting only the right to vote and hold federal elective office as reserved to “citizens”).

55. Alexander Hamilton, for example, opposed Thomas Jefferson’s support for open immigration by arguing in favor of at least five years’ residency. 8 ALEXANDER HAMILTON, *Jefferson’s Message*, in THE WORKS OF ALEXANDER HAMILTON 291 (Henry Cabot Lodge ed., 1903) (“Some reasonable term ought to be allowed to enable aliens to get rid of foreign and acquire American attachments; to learn the principles and imbibe the spirit of our government; and to admit of a probability at least, of their feeling a real interest in our affairs.”). The putative concern—national security—was the stated reason for raising the residency period under the Naturalization Act of 1798 from five years to fourteen years, and the notification period of intent to acquire U.S. citizenship from three years to five years. Act of June 18, 1798, ch. 54, 1 Stat. 566, 566–67.

56. Hamilton went on to describe a phased-in naturalization process, “postponing all political privileges to the ultimate term.” HAMILTON, *supra* note 55.

57. Cole, *supra* note 54, at 372–74 (reviewing each in turn).

58. *See id.* at 374 (referencing Germany’s Basic Law that provides the freedom of assembly, Art. 8(1), and the freedom of movement within Germany to Germans only, Art. 11(1)). Similarly, the Constitution of India provides for equality before the law and equal protection of the laws to all persons, INDIA CONST. art. 14, but goes on to proscribe state discrimination only against citizens. *Id.* art. 15 (prohibiting state discrimination based on religion, race, caste, sex, or place of birth); *Id.* art. 16 (prohibiting state discrimination in

then the legislature and executive are not doing their job; i.e., they are failing to accurately portray the Constitution under their watch. For example, the American history of black segregation with courts' complicity indicates that we have violated our own equal protection principles contained in the Fourteenth Amendment.<sup>59</sup>

In effect, the instant distinction between First Amendment protections for U.S. persons and aliens would instinctively render this portion of FISA as amended by the PATRIOT Act unconstitutional.<sup>60</sup> By extension, FISC-authorized investigations that target aliens on the basis of this distinction are tainted as “fruit of the poisonous tree.”<sup>61</sup> In contrast, investigations of U.S. persons are not tainted because they are not subjects of discrimination.

### B. Courts and Case Law

In order for a monitoring order to be granted, a FISA panel must find probable cause to believe that the target is a foreign power or an agent of a foreign power,<sup>62</sup> and that the place at which the electronic surveillance is to be directed is being used or is about to be used by a foreign power or an agent of a foreign power.<sup>63</sup> Finally, it requires a finding that the application meets certain minimization requirements,<sup>64</sup> including procedures that limit both the acquisition of nonpublic information from nonconsenting U.S. persons as well as the dissemination of such information.<sup>65</sup>

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public employment). Further, the Constitution of India limits rights protections only to citizens. *Id.* art. 19 (declaring that all citizens have the right to freedom of speech). The Constitution of the Fifth French Republic is similar to the U.S. Constitution in enumerating the right to vote for citizens only. Compare U.S. CONST. amend. XV, § 1, and *Id.* amend. XIX, with 1958 CONST. 3 (Fr.).

59. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) (upholding state segregation laws under the doctrine that Justice John Marshall Harlan, in his dissent, characterized as “separate but equal”), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); see also U.S. CONST. amend. XIV.

60. FISA contravenes the Fourteenth Amendment’s equal protection for all “persons” by differentiating between “U.S. persons” and aliens. See Edward Lee, *The Public’s Domain: The Evolution of Legal Restraints on the Government’s Power To Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 183–84 (2003) (recognizing constitutional issues implicated for those targeted by the Bush Administration’s post-9/11 secret arrest and detention practices); *The Foreign Intelligence Surveillance Act of 1978 (FISA)*, JUST. INFO. SHARING: U.S. DEPARTMENT JUST. OFF. JUST. PROGRAMS (Sept. 19, 2013), <http://it.ojp.gov/default.aspx?area=privacy&page=1286> (acknowledging a distinction in surveillance standards for U.S. persons and others). This does not mean to suggest, however, that an action can easily be brought by a target. See Lee, *supra*, at 201 (“[I]t is difficult to see how an affected party could challenge an illegal search if the search is kept entirely secret.”); see also discussion *infra* Part III.B.3 (discussing the rational basis test as employed in equal protection challenges).

61. Although the “poisonous fruit” doctrine applies in the ordinary criminal investigative context, not in the federal surveillance context, the concept is similar. See *Nardone v. United States*, 308 U.S. 338, 341 (1966).

62. 50 U.S.C. § 1805(a)(3)(A) (2006).

63. *Id.* § 1805(a)(3)(B).

64. *Id.* § 1805(a)(4).

65. *Id.* § 1801(h).

### 1. Advisory Opinions

The very existence of FISA courts has even been charged per se unconstitutional, because they do not preside over an actual case or controversy.<sup>66</sup> Similarly, judicially prescribed prudential standards bar advisory opinions.<sup>67</sup> In this regard, a holding by the FISC as to whether foreign intelligence amounts to “a significant purpose” of a surveillance request would appear to be barred, especially in the absence of any confrontation by the target or its attorney.<sup>68</sup> Under such circumstances, there is no actual case or controversy before the court because only one party knows that there is a dispute.<sup>69</sup> Even more amazingly, the government can choose to ignore the FISC’s judgment;<sup>70</sup> this lends credence to the suspicion that FISA courts are merely providing advisory opinions.<sup>71</sup> Although these opinions do admittedly have teeth—the government can turn to the FISC’s unpublished opinion as evidence of its authorization—it can apparently choose to ignore the FISC determination. Along these lines, FISC Judge George Hart has opined that his court lacked jurisdiction over an order requesting a physical search;<sup>72</sup> this would appear to bolster the general claim that the FISA courts provide advisory opinions that the DOJ can ignore and are therefore unconstitutional.

### 2. Procedural Concern: A Limited Check on Executive Overreach

How have FISA courts treated the subject of governmental surveillance? Although most FISC proceedings are not shared with the public, it is possible to discern some ways that the FISC courts have ruled. The Foreign

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66. Napolitano, *supra* note 48; see also U.S. CONST. art. III, § 2.

67. See generally Comment, *The Advisory Opinion and the United States Supreme Court*, 5 FORDHAM L. REV. 94 (1936) (chronicling a long history of advisory-opinion resistance arising from separation-of-powers principles).

68. U.S. CONST. amend. VI.

69. Napolitano, *supra* note 48. By contrast, ex parte hearings in ordinary criminal or civil proceedings are one-sided. See Conor Clarke, *Is the Foreign Intelligence Surveillance Court Really a Rubber Stamp? Ex Parte Proceedings and the FISC Win Rate*, 66 STAN. L. REV. ONLINE 125, 132 (2014) (contending that ex parte hearings are “in tension with basic norms of due process—the right to notice, to a hearing, to confront adversaries”); Lee, *supra* note 60, at 202 (stating that ex parte procedures reduce the scope of information in the public domain related to governmental conduct).

70. This is apparently possible, in light of the DOJ’s recent response to a FISC order to make one of its own recent PATRIOT Act § 215 rulings public; the response was essentially no, to which the FISC merely asked the DOJ to better explain itself. See *FISA Court Tells the DOJ That It Needs To Explain Why It’s Ignoring Order To Declassify Surveillance Opinion*, TECHDIRT (Nov. 20, 2013, 3:47 PM), <https://www.techdirt.com/articles/20131120/10544925304/fisa-court-tells-doj-that-it-needs-to-explain-why-its-ignoring-order-to-declassify-surveillance-opinion.shtml> (quoting the DOJ as saying that “[a]fter careful review of the Opinion by senior intelligence officials and the U.S. Department of Justice, the Executive Branch has determined that the Opinion should be withheld in full and a public version of the Opinion cannot be provided”).

71. Napolitano, *supra* note 48.

72. *In re Application of the United States for an Order Authorizing the Physical Search of Non-residential Premises and Personal Property (FISA Ct., June 11, 1981)*, reprinted in S. REP. NO. 97-280, at 16, 18–19 (1981).

Intelligence Surveillance Court of Review (FISCR) affirmatively stated that FISA does not limit the executive's preemptive foreign intelligence power of conducting warrantless searches.<sup>73</sup> With regard to the nature and effectiveness of procedural safeguards between prosecutorial and investigative discretion and the right of Americans to be free from unreasonable intrusions upon their liberty, the lesson appears to be that there is little in the way of checking executive overreach except the FISC and FISCR themselves.

In this regard, the U.S. Supreme Court in *United States v. U.S. District Court*<sup>74</sup> built upon the Fourth Amendment's proscription of "unreasonable searches and seizures," discussing warrants issued only upon a showing of probable cause,<sup>75</sup> the concept of a "reasonable expectation of privacy,"<sup>76</sup> and the Omnibus Crime Control and Safe Streets Act's provisions related to electronic surveillance.<sup>77</sup> In weighing the president's obligation to "preserve, protect and defend the Constitution of the United States"<sup>78</sup> against the perennial fear that the president could use this power to declare any arbitrary group to be a "clear and present danger,"<sup>79</sup> the Court determined that

those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.<sup>80</sup>

The Court thus squarely concluded that Fourth Amendment concerns would be satisfied where court approval was obtained before the surveillance of domestic targets is initiated.<sup>81</sup> A warrant exception for domestic surveillance purposes was thereby effectively denied. The lesson:

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73. *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002).

74. 407 U.S. 297 (1972).

75. *Id.*

76. *Id.* at 302 (citing *Katz v. United States*, 389 U.S. 347 (1967)).

77. *Id.* (citing Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511(3)). The Court concluded that nothing in the Omnibus Act conferred any additional powers to the president beyond those already enumerated by the Constitution; rather, it was effective in clarifying that existing presidential powers could not be usurped by the Omnibus Act or other congressional legislation.

78. U.S. CONST. art. II, § 1. As an example of the president's power to mete out justice upon traitors, Professor Michael Paulsen points out that President Lincoln issued a decree in punishment of Confederate soldiers that executed captured black Union soldiers in violation of the *jus in bello*, or international humanitarian law. Order No. 252 (July 30, 1863) ("Order of Retaliation"), reprinted in *OUR CONSTITUTION: LANDMARK INTERPRETATIONS OF AMERICA'S GOVERNING DOCUMENT* 115, 115–16 (Michael Paulsen ed., 2012). Although the Order of Retaliation effectively served as a proscribed bill of attainder, U.S. CONST. art. I, § 9, cl. 3, it was not opposed; perhaps this was because Lincoln and the Union never actually ordered or intended to order any executions.

79. *U.S. Dist. Ct.*, 407 U.S. at 314 (quoting 114 CONG. REC. 14750 (1968)) (internal quotation marks omitted).

80. *Id.* at 317.

81. *Id.* at 323–24.

advanced court approval would be necessary before investigators could monitor their target. Again, only the court stands in the way of potential executive overreach. Of course, this case was decided before FISA was passed; as we know, FISA does not require a warrant in advance of surveillance but does authorize FISC review of order requests.<sup>82</sup>

### 3. The Substantive Test: Rational Basis

After FISA's enactment, the Second Circuit found that it strikes "an appropriate balance between the individual's interest in privacy and the government's need to obtain foreign intelligence information, and that FISA does not violate the probable cause requirement of the Fourth Amendment."<sup>83</sup> Moreover, it affirmed FISA's distinction between U.S. persons and aliens on national security grounds. "Although both the Fourth Amendment and the Equal Protection Clause afford protection to all aliens, nothing in either provision prevents Congress from adopting standards and procedures that are more beneficial to United States citizens and resident aliens than to nonresident aliens, so long as the differences are reasonable."<sup>84</sup> In this regard, the court recognized that it was appropriate for the political branches of government to determine these standards in light of their effect on foreign relations.<sup>85</sup> Minimal scrutiny would thus be given to alienage-based distinctions. The rational basis cited by the court was the greater likelihood that aliens are more likely to be engaged in FISA-proscribed activities than U.S. persons, as well as the practical need for the government to act more quickly where the target is less likely to stay in the country permanently.<sup>86</sup> Similarly, the Eastern District of Virginia upheld FISA in rejecting due process, equal protection, Fifth and Sixth Amendment challenges.<sup>87</sup>

## III. PRESCRIPTIONS

Under current law, the DOJ has too much discretion to obtain monitoring orders and is free to ignore orders with which it disagrees.<sup>88</sup> This simple fact flies in the face of the textual reality that aliens are entitled to the same rights as U.S. persons, except for the rights to vote and hold federal elective office.<sup>89</sup> Though Congress restricts the definition of U.S. person under the immigration law, there is no support in the Constitution itself for this disparate treatment.<sup>90</sup> This deprivation of basic civil rights for aliens is reminiscent of our historic deprivation of rights to specific groups, including blacks and Japanese Americans. Those intrusions upon liberty

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82. 50 U.S.C. § 1802(b) (2006).

83. *United States v. Duggan*, 743 F.2d 59, 74 (2d Cir. 1984).

84. *Id.* at 74.

85. *Id.* at 76.

86. *Id.*

87. *United States v. Nicholson*, 955 F. Supp. 588, 592 (E.D. Va. 1997).

88. *See supra* note 73; discussion *supra* Part III.B.1.

89. *See supra* note 54.

90. *See supra* notes 20–21.

were often similarly justified at the time on national security grounds.<sup>91</sup> In retrospect, they have been lamented as deplorable facts of our history. We should not repeat these unfortunate mistakes only because aliens are vulnerable to our laws. Instead, America can remain a beacon of liberty if it more aggressively uses monitoring orders with appropriate safeguards and equally applies its laws to protecting its residents—both aliens and U.S. persons—alike.

In order to bridge these imbalances, the institution of an Office of the Public Monitoring Defender (PMD) could provide some assurance that the potentially arbitrary, one-sided, or polarized views of federal prosecutors and designated judges would not go unchecked.<sup>92</sup> Such an office could prove useful in safeguarding the especially vulnerable rights of aliens that are the subject of monitoring orders and could balance the prosecution's choice of evidence presented and legal theories advanced.<sup>93</sup> In this way, U.S. persons and aliens alike can benefit from one more person objecting to governmental and investigative arbitrariness. Such an individual could be appointed by the president—as reflective of the attorney general's similar executive appointment—with the advice and consent of the Senate. Though this would certainly not provide as robust a safeguarding function as the

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91. Just as immigration laws sought to require a period of residency during which a new resident could lose foreign attachments and gain a genuine interest in American affairs, similar arguments advocated relocating Japanese Americans during the Second World War based on suspicions that they might retain their allegiance to Japan. President Franklin Delano Roosevelt, for example, authorized the creation of military zones that were used in Japanese internment because “successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities.” Exec. Order No. 9,066, 3 C.F.R. 1092, 1092–93 (Cum. Supp. 1938). Similarly, southern defenders of the institution of slavery before the Civil War argued, among other things, that a sudden abolition of slavery would cause widespread unemployment and chaos, thereby leading to anarchy and an end to southern affluence. *The Peculiar Institution: The Southern Argument for Slavery*, US HISTORY.ORG, <http://www.ushistory.org/us/27f.asp> (last visited May 12, 2014).

92. President Barack Obama recently adopted a recommendation along these lines in an address on NSA surveillance, in which he mentioned his intention to seek congressional authorization for a “panel of advocates.” President Barack Obama, Remarks by the President on Review of Signals Intelligence (Jan. 17, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence>; *see also* Shane Harris, *NSA Surveillance Will Change. Just Not Very Much.*, FOREIGN POL’Y (Jan. 17, 2014), [http://www.foreignpolicy.com/articles/2014/01/17/nsa\\_surveisurvei\\_will\\_change\\_just\\_not\\_very\\_much](http://www.foreignpolicy.com/articles/2014/01/17/nsa_surveisurvei_will_change_just_not_very_much). Unfortunately, he did not also introduce measures to ensure the FBI would not simply sidestep the FISC and conduct surveillance anyway.

93. A similar suggestion is for the adversarial input to come from the DOJ’s National Security Division, whose Oversight Section could oppose the government’s requests for an order either at the outset or submit a motion to suppress an order that the FISC has already approved. Orin Kerr, *A Proposal To Reform FISA Court Decisionmaking*, VOLOKH CONSPIRACY (July 8, 2013, 1:12 AM), <http://www.volokh.com/2013/07/08/a-proposal-to-reform-fisa-court-decisionmaking/>. The president’s own Privacy and Civil Liberties Oversight Board has alternatively suggested this role for a private group of lawyers. Megan Gates, *Privacy and Civil Liberties Board Chair Discusses Reform*, SECURITY MGMT. (Feb. 20, 2014), <http://www.securitymanagement.com/news/privacy-and-civil-liberties-board-chair-discusses-reform-0013174>. The sharing of sensitive information would likely necessitate security clearances for these private lawyers. *See id.*



Sixth Amendment's right to confrontation for the accused, it would help to unveil the shroud of secrecy that is often claimed as essential to avoid a target's flight or early deployment of destructive plans.

In order to act effectively, the PMD would need to be empowered to oppose FBI requests for court orders. Thus, the FISC panel's rules must be amended to require the consideration of the PMD's objections and proposals in its delivery of justice. Moreover, the PMD must be provided an appropriation for the funding of staff so that it can properly conduct legal research, hire experts, and develop necessary arguments. To avoid an FBI work-around to confronting the PMD, the president would also need to amend his authorization to the attorney general so as to designate the FISC as the exclusive forum for seeking orders and specifying FISC orders as a prerequisite to monitoring. To ensure that the envisaged confrontation is meaningful, the PMD would need to be independent of the attorney general's office. Thus, President Barack Obama's suggestion of a "panel of advocates" would not go far enough, as it would perpetuate the present one-sided structure. This is because non-meaningful confrontation is really no representation; such was the principle in *Gideon v. Wainwright*<sup>94</sup> that extended the Sixth Amendment's mandate of counsel for the accused in federal courts to state courts. The principle of confrontation need not be compromised merely because the accused in the national security context is not aware of his surveillance; the PMD as envisaged would certainly become aware of the surveillance.

This foundation could set in motion the administration of justice as we have come to know it in public courts. Indeed, our standards in the national security context should be just as high. Though we cannot require the same level of transparency as public courts, we must not allow the FISC's need for secrecy to be a mere excuse for evading principles in our Constitution such as a meaningful defense. As the FISC panel is obligated to obey the Constitution, this is the appropriate forum for the PMD to raise an equal protection and due process challenge to governmental monitoring of an alien on terms different from those of a U.S. person. The FISC panel can determine whether the statute defining U.S. persons as citizens and permanent residents is constitutional for purposes of a First Amendment challenge. By extension, similar changes should be adopted by the FISCR to ensure a meaningful defense in that forum as well.

Moreover, in light of porous borders and the reality of our interconnected world, we need to rethink the artificial distinction between allowing First Amendment rights in the monitoring context for U.S. persons but not for aliens. We must remind ourselves that such universal rights form the core of our freedoms. From the time of the pilgrims escaping religious persecution in seventeenth-century England, to our current age where Afghani Hindus come to our ports seeking the opportunity to live without fear of Taliban attacks due to their beliefs, freedom of conscience and

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94. 372 U.S. 335 (1963).

freedom to speak one's mind without harming others fuels American innovation and independent thinking.

Or are we willing to take the bait and target that which makes us American—our immigrants coming from around the world—in this age of terror? On 9/11, hijackers set out to symbolically attack what America stands for: a culture of professionalism where immigrants and citizens alike can come to work in a variety of occupations, learn together, and love one another.<sup>95</sup> If we continue to respond to terror by sacrificing these most precious American values, then perhaps the terrorists have succeeded in challenging our American dream. We can successfully resist challenges to our liberty if a party with a vested interest—such as a public monitoring defender—stands watch over our cherished diversity.

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95. As a former Morgan Stanley Dean Witter employee on the seventy-second floor of the second tower, the author can attest to World Trade Center employees' camaraderie across companies, especially as evidenced in the common dining room and in the Windows on the World restaurant. In recognition of Windows on the World's diverse staff, former employees opened a new restaurant called Colors in honor of their fallen colleagues.