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# The European Counterterrorist as the Next U.S. Cold Warrior: Why the United States Should Select from the German and British Models of Procedure, Evidence, and Oversight for National Security Wiretapping

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**Abstract**

The War on Terror is not limited to the United States, but rather, requires the cooperation and dedication of European allies which also have suffered from deadly terrorist attacks. A casualty of President Bush's foreign policy at times during his term was the alienation of the United States' traditional European allies which have acquired invaluable experience in counterterrorist operations and strategy stemming from their historical circumstances. This Note will discuss the historical differences between the U.S. and European attention and approaches to counterterrorism to provide a context in which to contrast the spectrum of national security wiretapping procedures, standards of evidence, and oversight systems in the United States, the United Kingdom ("U.K"), and Germany. Part I briefly chronicles the historical derivation of the U.S. judiciary's response to electronic surveillance to recognize the broader philosophical and legal framework in which national security wiretapping inaptly remains. Part II is a comparative analysis between the United States and Europe: it discusses their differing notions of privacy and details their distinct pre- and post-9/11 intelligence structures and wiretapping strategies, ultimately highlighting the Europeans' savvied practicality for counterterrorism, which the German and British nonjudicial approaches to national security wiretapping best exemplify. Part III calls for the abolition of the FISC and the subsequent adoption of elements of the German and British procedures, evidentiary thresholds, and models of oversight for U.S. national security wiretapping involving foreign intelligence, with the recognition that such changes must conform to the U.S. system of checks and balances if Congress is to assume the role of overseer.

# NOTE

# THE EUROPEAN COUNTERTERRORIST AS THE NEXT U.S. COLD WARRIOR: WHY THE UNITED STATES SHOULD SELECT FROM THE GERMAN AND BRITISH MODELS OF PROCEDURE, EVIDENCE, AND OVERSIGHT FOR NATIONAL SECURITY WIRETAPPING

*Daniel Saperstein**

## *INTRODUCTION*

Throughout the Cold War, the legislative and executive branches of the U.S. government advocated a comprehensive and relatively bipartisan approach to contain the expansionism of the Soviet Union.[1] Before this half-century struggle against "international"[2] communism annexed its attention, the United States struck a Faustian bargain with the Soviet Union to achieve

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1. For a comparison of Cold War and post–Cold War trends in political consensus on foreign policy decision making, see James M. McCormick et al., *Politics and Bipartisanship at the Water's Edge: A Note on Bush and Clinton*, 30 POLITY 133, 146 (1977) (asserting decreased bipartisanship following the conclusion to the Cold War); Eugene Wittkopf & James McCormick, *Congress, the President, and the End of the Cold War: Has Anything Changed?*, 42 J. CONFLICT RESOL. 440, 457 (1988) (noting "greater discord" between Congress and the President after the Cold War).

2. *See* WALTER MEAD, SPECIAL PROVIDENCE: AMERICAN FOREIGN POLICY AND HOW IT CHANGED THE WORLD 61 (2001) (briefly discussing mythology propagated by Cold War U.S. politicians of Soviet-directed and globally-united "international communism" to more broadly address why segments of the U.S. populace mobilize in support of certain foreign policy actions). For a brief run-through of how leaders have sought to harness the support of particular segments of the U.S. citizenry in national security and foreign policy initiatives, see Lawrence Gelfand, *American Foreign Policy and Public Opinion: Some Concerns For Scholars*, 5 REVIEWS AM. HIST. 418, 418-425 (1977).

victory in the Second World War.[3] With the defeat of Nazi Germany, Fascist Italy, and Imperial Japan, the United States expeditiously embarked on a new crusade against its former Faustian counterpart, painfully realizing through recurrences of military blunder and overextension[4] that, to prevent the global spread of communism, it must remember to employ an arsenal with more diversity than mere military might and venture.[5] By strategically culling from a mixed quiver of political, economic, rhetorical, psychological, technological, and ideological arrows, the United States merged a potency of nuance persistent enough to pierce the heart of the "Evil Empire,"[6] with history as

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3. *See* JOHN LEWIS GADDIS, STRATEGIES OF CONTAINMENT: A CRITICAL APPRAISAL OF POSTWAR AMERICAN NATIONAL SECURITY POLICY 3 (1982) (emphasizing the bitterness of thy enemy's enemy alliance between Joseph Stalin and Franklin Delano Roosevelt by Roosevelt's quoting of an Old Balkan proverb to analogize his relationship with Stalin to walking with the Devil); Richard Ebeling, President of the Found. for Econ. Educ., Speech at Evenings at FEE: Dancing with the Devil: Roosevelt, Stalin, and the Lasting Legacy of the Yalta Conference (Feb. 5, 2005), *in* NOTES FROM FEE (Found. for Econ. Educ., Irvington, N.Y.), Mar. 2005, at 1 (commenting on the repercussions of Roosevelt's dance with Devil).

4. For a lengthy analysis of the ineptitudes of the Truman administration during the Korean War, see DAVID REES, KOREA: THE LIMITED WAR (1964). For a discussion of government dysfunction during the Vietnam War, see James Thomson, Jr., *How Could Vietnam Happen? An Autopsy*, ATLANTIC MONTHLY, Apr. 1968, at 47; IRVING JANIS, GROUPTHINK 97-130 (1982). For a concise analysis of the Bush administration's approach leading up to the Iraq War as a means of comparison to the aforementioned military entanglements of the Cold War, see James Rubin, *Stumbling into War*, 82 FOREIGN AFF. 46, 46-66 (Sept.-Oct. 2003).

5. *See* GADDIS, *supra* note 3, at 40 (documenting warnings of "excessive reliance on the military"); *see also* GEORGE F. KENNAN, MEMOIRS: 1925-1950, at 304 (1967) (contemplating victory in the "Long Telegram" by outlasting the Soviets in a war of wills with constant and vigilant containment achieved through many means); WALTER A. MCDOUGALL, PROMISED LAND, CRUSADER STATE: THE AMERICAN ENCOUNTER WITH THE WORLD SINCE 1776, at 167 (1997) (contending the U.S. Cold War response called for comprehensive defiance); Melvyn P. Leffler, *The American Conception of National Security and the Beginnings of the Cold War: 1945-48*, 89 AM. HIST. REV. 346, 371 (1968) (emphasizing a strategy of bolstering economic and social pressures against Soviet communism, not merely trumpeting war).

6. *See* Ronald Reagan, President of the United States, Address Before National Association of Evangelicals: Evil Empire Speech (Mar. 8, 1983), *available at* http://www.reagan.utexas.edu/archives/speeches/1983/30883b.htm (demonstrating that, through charged rhetoric, Reagan was as adept as any politician during the Cold War in portraying Soviet communism as a war against evil, carefully crafting the struggle as an ideological crusade that must be won for the preservation of core democratic and human values); *see also* HENRY KISSINGER, DIPLOMACY 765-66 (1994) (describing uniqueness of Reagan in vivifying threats through sermonizing oratory and uniting country under common purpose and pride). For a general discussion of the origins of

testament to the success of this multipronged strategy in stabilizing the world order during the Cold War and advancing U.S. triumph.[7]

In a post-9/11 world, the magnitude of the challenge and comprehensiveness of the strategy are similar to those of the Cold War, but of a vastly different character.[8] The United States does not face a rational state actor deterred by mutually assured destruction,[9] but a faceless, global terrorist organization devoted to religious fanaticism and martyrdom.[10] The United States must continue to adapt to a new enemy, as it deftly did following World War II, by reassessing and broadening its strategy to meet a uniquely different challenge, the War on Terror.[11] The 9/11

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the perceived uniqueness of the United States as a promised land, a notion known as "American exceptionalism," see MCDOUGALL, *supra* note 5, at 20; *see also* John Winthrop, Puritan leader and governor, Sermon: A Model of Christian Charity (1630) (analogizing United States to Matthew 5:14 quote: "Ye are the light of the world. A city that is set on a hill cannot be hid.").

7. *See* GADDIS, *supra* note 3, at 40 (noting innovation presents more potential for long-term success than armed force); Melvyn Leffler, *The Cold War: What Do "We Now Know"?*, 104 AM. HIST. REV. 501, 505 (1999) (contrasting Soviet dependence on military power alone with diverse power and appeal of democratic capitalism).

8. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) (quoting the government's concession that the unconventionality of the War on Terror makes it "unlikely to end with a formal cease-fire agreement"); Daniel Pipes, *Twilight Struggles: The Cold War and the Terror War, Alike and Not Alike*, NAT'L REV., Apr. 5, 2004, at 22 (differentiating Soviet practicality and reasonability from the irrationality of Islamic extremism); Nicholas Allen Kenney, *Terrorism: How It Is Unlike the Cold War*, AM. DIPL., Jan. 24, 2003, http://www.unc.edu/depts/diplomat/archives_roll/2003_01-03/essay_2and3/essay2_kenney.html (exploring challenges of prosecuting wars against enemies of dissimilar form and nature).

9. *See* Richard Betts, *The New Threat Of Mass Destruction: What If McVeigh Had Used Anthrax?*, FOREIGN AFF., Jan.-Feb. 1998, at 27 (noting that the threat has changed and standard strategies employed against the Soviet Union are not as applicable); *see also* Christopher Chyba, *Toward Biological Security*, FOREIGN AFF., May-June 2002, at 122-23 (illustrating the obsolescence of the old approaches to thwart terrorist weapons of mass destruction attacks, specifically biological ones).

10. For an understanding of the current threat and the recent history to precede it, see generally ROHAN GUNARATNA, INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR (2002); Daniel Benjamin & Steven Simon, *America and the New Terrorism*, SURVIVAL, Spring 2000, at 59; Jason Burke, *Think Again: Al Qaeda*, FOREIGN POL'Y, May-June 2004, at 18; Martha Crenshaw, *Why America? The Globalization of Civil War*, CURRENT HISTORY, Dec. 2001, at 425; Audrey Kurth Cronin, *Behind the Curve: Globalization and International Terrorism*, INT'L SECURITY, Winter 2002-2003, at 30.

11. *See* Scott Atran, *Mishandling Suicide Terrorism*, WASH. Q., Summer 2004, at 67 (arguing that the United States, Israel, Russia, and other nations on the front line in the War on Terror must understand that military and counterinsurgency measures are

Commission Report stressed that long-term success requires the adoption of "all elements of national power": statecraft, intelligence gathering, covert operations, law enforcement, economic policy, working alliances, and securing the home front.[12] Wiretapping must be part of that comprehensive counterterrorist strategy.[13] But application of any counterterrorist measure cannot and should not exist apart from the republican framework and democratic philosophy of the U.S. government, as the words of Benjamin Franklin indelibly forewarn that sacrificing liberty for security protects neither.[14]

In the pursuit of intercepting terrorist communications following September 11, 2001, the National Security Agency's ("NSA") warrantless wiretaps circumvented the executive-power-

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tactical, not strategic, reactions to suicide terrorism); *see also* Siobhan Gorman, *Homeland Security—Second-Class Security*, 36 NAT'L J. 1336 (2004) (discussing the Bush administration's more sustained focus on waging battle against terrorism in the foreign arena rather than protecting the home front, with post-9/11 homeland security a secondary concern relative to resources invested in foreign ventures); Robert A. Pape, *The Strategic Logic of Suicide Terrorism*, AM. POL. SCI. REV., Aug. 2003, at 1, 14 (positing that "homeland security and defensive efforts must be a core part of any solution," not solely offensive military action).

12. *See* THOMAS H. KEAN ET AL., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 363-64 (2004) [hereinafter THE 9/11 COMMISSION REPORT] (listing a series of recommendations to prevent another 9/11 attack); *see also* THE WHITE HOUSE, NATIONAL STRATEGY FOR COMBATING TERRORISM 12 (2003), http://georgewbush-whitehouse.archives.gov/news/releases/2003/02/counter_terrorism/counter_terrorism_strategy.pdf (defining victory against Al Qaeda, because of the nature of the War on Terror, as more elusive than past conflicts with treaty signing ceremonies capturing a "single, defining moment" of success).

13. *See* John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565, 572 (2007) (pointing out that not even critics question the importance of wiretapping in preventing Al Qaeda plots against America); *War Power*, NAT'L REV., Feb. 27, 2006, at 14, 16 (articulating the importance of wiretapping for the executive branch to wage a successful War on Terror).

14. For an account of Franklin's musings on government and diplomacy, see WALTER ISAACSON, BENJAMIN FRANKLIN: AN AMERICAN LIFE (2003). For a discussion of the nexus of security and liberty, see Laura Donohue, *Fear Itself: Counterterrorism, Individual Rights, and U.S. Foreign Relations Post 9-11*, *in* TERRORISM & COUNTERTERRORISM, 313, 332 (Russell D. Howard & Reid L. Sawyer eds., 2002) (emphasizing that *raison d'etat* (reason of the state) intensifies if attacks jeopardize a state's existence, and becomes pretext for extraordinary actions); *see also* Oliver Revell, *Counterterrorism and Democratic Values: An American Practitioner's Experience*, *in* CLOSE CALLS: INTERVENTION, TERRORISM, MISSILE DEFENSE, AND 'JUST WAR' TODAY, 237, 247 (Elliott Abrams ed., 1998) (musing that a dilemma inheres in U.S. citizens not entirely trusting government but expecting it to provide them protection).

limiting Foreign Intelligence Surveillance Act ("FISA"),[15] engendering a fierce reaction from civil libertarians and some constitutionalists.[16] Their arguments should warrant attention and elicit concern,[17] for the Bush administration and some legal scholars had argued that the President's authorization of the NSA to wiretap outside of the FISA-warrant framework under the so-called Terrorist Surveillance Program ("TSP") is an inherent and unfettered executive power to protect the nation combined in the take care, vesting, and commander-in-chief clauses of Article II of the U.S. Constitution—the basis for the Unitary Executive Theory.[18] There is grave danger in an unchecked executive ordering wiretaps without oversight in a war without foreseeable end.[19] Given the history of unrestricted executive wiretapping during wartime, on the other hand, minimizing or

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15. 50 U.S.C. §§ 1801-11, 1821-29, 1841-46, 1861-62 (2006).

16. *See* Dan Eggen & Dafna Linzer, *Judge Rules Against Wiretaps: NSA Program Called Unconstitutional*, WASH. POST, Aug. 18, 2006, at A01 (noting Judge Anna Taylor's opinion that it was not the intent of the Framers to grant the President uninhibited power such that his actions may jeopardize freedoms guaranteed in the Bill of Rights); *see also* Maria Godoy, *The NSA: America's Eavesdropper-in-Chief*, NPR, Feb. 3, 2006, http://www.npr.org/templates/story/story.php?storyId=5187293 (providing a history of the U.S. government's excesses intercepting communications, to warn of a repeat).

17. *See* Jeremy Neff, Comment, *Does (FISA + NSA) · AUMF – Hamdi = Illegal Domestic Spying?*, 75 U. CIN. L. REV. 887, 916 (2006) (arguing that courts must preserve U.S. liberty from governmental intrusion); James Bamford, Op-Ed., *Bush Is Not Above the Law*, N.Y. TIMES, Jan. 31, 2007, at A19 (likening warrantless wiretapping to subversion of the Constitution).

18. *See* U.S. Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President 1-42 (Jan. 19, 2006), *available at* http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf (presenting legal authorities to support the President's ability to wiretap without warrants); *see also* Yoo, *supra* note 13, at 567-72 (detailing the constitutional provisions of Article II and the history of U.S. hostilities to demonstrate the inherent and recognized ability of the executive to wiretap in the interest of national security, without warrants). For a history of executive usurpation of power from other branches of government, see generally Steven Calabresi & Christopher Yoo, *The Unitary Executive in the Modern Era, 1945-2001* (NW. UNIV. SCH. OF LAW: PUB. LAW & LEGAL THEORY PAPERS, Paper 12, 2004), http://law.bepress.com/nwwps/plltp/art12/. *But see* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 587-89 (1952) (explicitly rejecting the argument of merging three Article II clauses to justify reserved powers of the executive during wartime).

19. *See* A Debate Between Professor David Cole and Professor Ruth Wedgwood, 37 CASE W. RES. J. INT'L L. 509, 514-15 (2006) (evaluating dangers of unchecked presidential power in the context of the wiretapping debate); *see also Youngstown*, 343 U.S. at 587 (restraining power of executive branch to act uninhibitedly during wartime).

altogether removing judicial oversight of select national security probes may not be such a radical departure from the United States' historical commitment to liberty.[20] To recognize the legitimate countervailing security and liberty concerns but disabuse the notion of a per se incompatibility, this Note maintains that national security wiretapping law should balance these two interests to faithfully abide by the principles of the Constitution.[21] This Note proposes, however, that, to reach an equilibrium of beneficial reciprocity between security and liberty pursuits, the U.S. Congress should supplant the Foreign Intelligence Surveillance Court ("FISC") as the primary overseer branch monitoring national security wiretapping probes involving foreign intelligence—an assumption of Article I power long overdue.[22] Such a shift in oversight will restore the legislative branch to what the Constitution intends it to be: a coequal to the president in protecting this country from foreign-sponsored threats.[23] Confronting the threats of the Cold War healthily highlighted moments of great cooperation and tension

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20. *See* U.S. Dep't of Justice, *supra* note 18, at 14 (noting the consistency of no judicial oversight of electronic surveillance during the history of U.S. warfare in order to preserve for the President a fundamental tool of war). *But see Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) (reminding that tradition and practice "cannot supplant the Constitution").

21. *See* David Ignatius, *Eavesdropping and Evading the Law*, WASH. POST, Dec. 28, 2005, at A21 (touting the effectiveness of wiretapping but calling for appropriate legal safeguards). *See generally* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1 (weighing wiretapping in a dual prism of liberty and security).

22. *See Youngstown*, 343 U.S. at 654 (Jackson, J., concurring) (warning Congress to not let power "slip[] through its fingers"); THE 9/11 COMMISSION REPORT, *supra* note 12, at 105 (noting Congress' receding focus on national security in favor of domestic priorities); Tim Roemer, Op-Ed., *How to Fix Intelligence Oversight*, WASH. POST, Dec. 20, 2007, at A29 (exhorting Congress to develop a more effective system of oversight).

23. *See* U.S. CONST. art. I, § 8, cls. 1, 10-18, § 9, cl. 2 (articulating designated powers afforded to Congress to protect the nation); Hamdi v. Rumsfeld, 542 U.S. 507, 552 (2004) (Souter, J., concurring in part, dissenting in part) (clarifying that the President is not the commander-in-chief of the country, only the military); *Ex parte* Quirin, 317 U.S. 1, 26 (1942) (outlining Article I powers given to Congress to defend the country); *see also* John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1419-20 (1980) (encouraging Congress to meet its constitutional oversight responsibilities and commit itself to accountability for future wars). *See generally* Aziz Huq & Frederick Schwarz Jr., *Push Back: Now Congress Must Check the White House to Restore the Framers' Balance*, LEGAL TIMES (Wash., D.C.), Apr. 16, 2007, at 66 (identifying "long history" of congressional watchfulness over national security issues).

between the legislative and executive branches[24]—in the way, ironically, the founders designed and the courts affirmed it.[25] Functions of foreign affairs are not the appropriate jurisdiction for a third branch of government unschooled in delicate national security policy, without regular access to intelligence briefings, and beholden to a set of inapplicable legal standards.[26]

The War on Terror is not limited to the United States, but rather, requires the cooperation and dedication of European allies,[27] which also have suffered from deadly terrorist attacks.[28]

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24. *Compare* Robert Johnson, *Congress and the Cold War*, J. COLD WAR STUD., Spring 2001, at 76 (discussing the importance of recognizing the influential role of Congress during the Cold War), *with* Frédérick Gagnon, A Cold War–like Consensus? Toward a Theoretical Explanation of U.S. Congressional-Executive Relations Concerning National Security Policy After 9/11, (Mar. 17, 2004) (presented at the 2004 International Studies Association Annual Convention), *available at* http://www.allacademic.com/meta/p72869_index.html (analogizing congressional cooperation to subservience in effect). See also JAMES NATHAN & JAMES K. OLIVER, FOREIGN POLICY MAKING AND THE AMERICAN POLITICAL SYSTEM 1-2 (1994) (outlining institutional tensions of government decision making during the Cold War).

25. *See* THE FEDERALIST NOS. 47, 48 (James Madison) (postulating on the theory of separation of powers and checks and balances); JESSE CHOPER, JUDICIAL REVIEW AND NATIONAL POLITICAL PROCESS 263, 269, 275 (1980) (opining that the national political process, not the judicial branch, should decide constitutional questions concerning the intersecting powers of Congress and the President). *Compare* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (claiming the President should be unfettered in the realm of foreign relations), *with* Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006), Hamdi v. Rumsfeld, 542 U.S. 507 (2004), *and Youngstown*, 343 U.S. 579 (highlighting collectively the line of later decisions limiting the power of the executive in a time of war).

26. *See* Oetjen v. Centr. Leather Co., 246 U.S. 297, 302 (1918) (contending that foreign policy is "committed by the Constitution" to the President and Congress, not the judiciary); Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (maintaining that courts do not have "aptitude, facilities nor responsibility" to make foreign policy decisions, which are political and should be left to executive and legislative discretion); *Hamdi*, 542 U.S. at 579-83 (Thomas, J., dissenting) (arguing that the Court lacks expertise to second-guess the other two branches of government in the realm of national security); Editorial, *A Judge's Foreign Policy*, NAT'L REV., Sept. 11, 2006, at 15 (dismissing judges as ill-equipped to make foreign policy or national security determinations).

27. *See generally* Jessica Fugate, Op-Ed., *NATO in the Balance: United States Must Nurture European Allies*, WASH. TIMES, Jan. 9, 2002, at A15 (assessing the importance of European allies to wage the War on Terror); Anthony Blinken, *Winning the War of Ideas*, WASH. Q., Spring 2002, at 103 (arguing that success derives from both unilateral projection of force and *multilateralism*, by the example of Spanish authorities refusing to hand over alleged members of Al Qaeda linked to the September 11 attacks for fear of the U.S. using secret trials before military tribunals).

A casualty of President Bush's foreign policy at times during his term was the alienation of the United States' traditional European allies,[29] which have acquired invaluable experience in counterterrorist operations and strategy stemming from their historical circumstances.[30] This Note will discuss the historical differences between the U.S. and European attention and approaches to counterterrorism to provide a context in which to contrast the spectrum of national security wiretapping procedures, standards of evidence, and oversight systems in the United States, the United Kingdom ("U.K."), and Germany. Part I briefly chronicles the historical derivation of the U.S. judiciary's response to electronic surveillance to recognize the broader philosophical and legal framework in which national security wiretapping inaptly remains. Part II is a comparative analysis between the United States and Europe: it discusses their differing notions of privacy and details their distinct pre- and post-9/11 intelligence structures and wiretapping strategies, ultimately highlighting the Europeans' savvied practicality for counterterrorism, which the German and British nonjudicial approaches to national security wiretapping best exemplify. Part III calls for the abolition of the FISC and the subsequent

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28. *See* JAMES BECKMAN, COMPARATIVE LEGAL APPROACHES TO HOMELAND SECURITY AND ANTI-TERRORISM (2007) (discussing the history of terrorist attacks in Great Britain, Germany and Spain, both pre- and post-9/11); *see, e.g.*, Elizabeth Nash, *Madrid Bombers 'Were Inspired by Bin Laden Address'*, INDEPENDENT (London), Nov. 7, 2006, at 18; Rosie Cowan & Hugh Muir, *Attack on London: Four Bombs in 50 Minutes—Britain Suffers Its Worst-Ever Terrorist Attack*, GUARDIAN (London), July 8, 2005, at 2.

29. *See* Walter Rodgers, et al, *Analysis: Bush Leaves Europe Cold*, CNN, Jan. 21, 2004, http://www.cnn.com/2004/WORLD/europe/01/21/bush.analysis/ (noting that many Europeans were not impressed with President Bush); PEW RESEARCH CTR. FOR THE PEOPLE & PRESS, A YEAR AFTER IRAQ WAR: MISTRUST OF AMERICA IN EUROPE EVER HIGHER, MUSLIM ANGER PERSISTS (2004) http://pewglobal.org/reports/display.php?PageID=797 (statistically analyzing poor image of America in Great Britain, France, Germany, and Russia); *see also* Madeleine Albright, *Bridges, Bombs, or Bluster?*, FOREIGN AFF., Sept.-Oct. 2003, at 7 (positing that Europeans and Americans sense mutual incompatibility of viewpoints and priorities).

30. *See* RICHARD POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11, at 163-97 (2005) (urging the United States to learn from European struggles over longer period of time in fighting terrorism). *See generally* Directorate-Gen., Justice Freedom and Sec., European Comm'n, *Terrorism: The European Response* (Aug. 2004), http://ec.europa.eu/justice_home/key_issues/terrorism/terrorism_0904_en.pdf (noting a total of five thousand deaths over *thirty years* resulting from terrorism in the United Kingdom ("U.K."), Spain, and Ireland); BECKMAN, *supra* note 28 (chronicling European initiatives to combat terrorism).

adoption of elements of the German and British procedures, evidentiary thresholds, and models of oversight for U.S. national security wiretapping involving foreign intelligence, with the recognition that such changes must conform to the U.S. system of checks and balances if Congress is to assume the role of overseer.

## I. *THE HISTORICAL EVOLUTION OF U.S. WIRETAPPING LAW*

Part I traces the history of both U.S. criminal and national security wiretapping law in the prism of privacy rights. What may seem extraneous intends to establish deep historical and philosophical differences with Europe. A broader context is also relevant for a more profound understanding of the U.S. approach to counterterrorism post-9/11.

### A. *History of Wiretapping Law Pre-FISA*

The term "wiretapping" is increasingly difficult to define, yet traditionally it denotes the interception of telephone conversations.[31] The jurisprudence of wiretapping, or more broadly, electronic surveillance,[32] evolved in the early to mid-twentieth century as the Supreme Court struggled with nonphysical intrusions as sanctioned by or violative of the Fourth Amendment of the Constitution.[33] The landmark decision in *Olmstead v. United States* held that the Fourth Amendment did not include the intangible, such as phone calls, and thus a

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31. *See* WHITFIELD DIFFIE & SUSAN LANDAU, PRIVACY ON THE LINE: THE POLITICS OF WIRETAPPING AND ENCRYPTION 151 (1998) (discussing that "communications interception" is a more accurate term to capture the breadth of today's tapping targets, such as faxes or e-mails); *see also* LIANE WORNER, THE EFFECTIVENESS OF WIRETAPPING AND ELECTRONIC SURVEILLANCE TO FIGHT AGAINST TERRORISM: A COMPARATIVE ANALYSIS BETWEEN THE UNITED STATES AND GERMANY 60-63 (2004) (chronicling statutory and case-based history and definitions of wiretapping). This Note has adopted the term wiretapping in most instances because of its wide usage and connotation in public and political discourse.

32. *See* WHITFIELD & LANDAU, *supra* note 31, at 156 (noting that electronic surveillance includes both wiretapping and bugging face-to-face conversations); WORNER, *supra* note 31, at 61-63 (distinguishing different types of electronic communications and surveillance).

33. *Compare* Olmstead v. United States, 277 U.S. 438 (1928) (holding that wiretapping is outside the Fourth Amendment), *with* Katz v. United States, 389 U.S. 347 (1967) (holding that wiretapping is within the Fourth Amendment).

nontrespassory invasion did not qualify for constitutional protection.[34] Justice Brandeis, who, in his dissent, harkened to the spirit of his memorable defense of privacy written over thirty years earlier,[35] railed against the dangers posed to democracy by "instruments of tyranny and oppression."[36] His sentiments did not go unnoticed, as the Court began to chip away at *Olmstead* in subsequent decisions.[37] Reaching a reversal in *Katz v. United States*, the Court held that the Fourth Amendment safeguards people, not places.[38] With this decision, the Court altered the doctrine upon which U.S. wiretap law rested.[39] Contrary to prior decisions, which relied on statutory interpretation, *Katz* relied on constitutional principles.[40] The *Katz* Court did not extend its holding to national security,[41] although the *Keith* case later found the purview of the Fourth Amendment to encompass purely domestic national security wiretapping.[42]

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34. *See* 277 U.S. at 464 (reasoning that search and seizure restrictions do not pertain to evidence "secured by the use of the sense of hearing and that only").

35. *See generally* Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (detailing justifications for the right to privacy).

36. *See Olmstead*, 277 U.S. at 475-76 (Brandeis, J., dissenting) (criticizing the Court's "literal construction" of the Fourth Amendment).

37. *See* Nardone v. United States, 302 U.S. 379 (1937) (holding that information gathered from warrantless wiretaps by federal agents was inadmissible); *see also* Nardone v. United States 308 U.S. 338 (1939) (holding that indirect evidence derived from warrantless wiretaps was inadmissible); Weiss v. United States, 308 U.S 321 (1939) (minimizing the distinction between intrastate and interstate wiretapping).

38. *See* 389 U.S. at 351 (basing decision on emergent notions of privacy).

39. *See* Peter Swire, *Katz is Dead. Long Live Katz*, 102 MICH. L. REV. 904, 904 (2004) (declaring that the *Katz* decision revolutionized the conception of the scope of the Fourth Amendment); *see also* Edmund Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, S. CT. REV. 133, 134 (1968) (noting the Supreme Court's shift with *Katz* in interpreting the Fourth Amendment).

40. *See Katz*, 389 U.S. at 359 (undertaking a Fourth Amendment analysis). *See generally* WHITFIELD & LANDAU, *supra* note 31, at 167; ELIZABETH BAZAN, THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 2 (2002).

41. *See Katz*, 389 at 359-60, 364 (Douglas, J., concurring) (warning of the Court's "unwarranted green light" to allow for warrantless wiretaps in the interest of national security); WHITFIELD & LANDAU, *supra* note 31, at 176; *see also* 18 U.S.C. § 2511(3) (1968) (repealed 1978) (providing that warrant requirements would not limit the constitutional power of the President to take such measures as he deems necessary to protect the nation).

42. United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 321-22 (1972) (declining to broaden the scope of the President's surveillance power to activities of foreign powers within or outside of the United States); *see also* United States v. Truong Dinh Hung, 629

The *Katz* decision came two years after the Court had expressed that "[v]arious guarantees create zones of privacy," implying rights to privacy in the Fourth Amendment and five other amendments to the Constitution.[43] Subsequent decisions[44] would expand the right to privacy to three major areas: the right to engage in sex and marriage, the right to have an abortion, and the right to be free from searches that invade privacy.[45] The imperative of privacy was more evident as the excesses and, in some cases, abuses of government became more visible and known.[46] In January 1975, in the wake of the Watergate scandal, the U.S. Senate appointed an eleven-member special committee to examine and investigate wiretap abuses.[47] The so-called Church Committee, named after its chairman U.S. Senator Frank Church, concluded that the rampancy of government agency spying and the resultant wealth of collected personal information

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F.2d 908, 913 (4th Cir. 1980) (stating that warrant requirements do not apply to searches for foreign intelligence information).

43. *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (holding that the right to privacy surrounding the marriage relationship is a right older than Bill of Rights). *See generally* Robert Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197 (1965) (commenting on the evolution of the right to privacy).

44. *See* Roe v. Wade, 410 U.S. 113 (1973) (holding that the right to privacy encompasses a woman's decision whether or not to terminate her pregnancy); Eisenstadt v. Baird 405 U.S. 438 (1972) (holding that the right to privacy extends to an individual's, married or single, decision whether to bear or beget a child).

45. DARIEN A. MCWHIRTER & JON D. BIBLE, PRIVACY AS A CONSTITUTIONAL RIGHT: SEX, DRUGS, AND THE RIGHT TO LIFE 104 (1992) (enumerating three broad categories of rights to privacy). For a discussion that specifically relates to privacy issues involving wiretapping, see G. STEVENS & C. DOYLE, PRIVACY: WIRETAPPING AND ELECTRONIC EAVESDROPPING 1-67 (2002).

46. *See* THE 9/11 COMMISSION REPORT, *supra* note 12, at 74-75 (mentioning a precipitous drop in the favorability of the Federal Bureau of Investigation ("FBI") in American public opinion polls upon revelations of spying on political figures). *See generally* STANLEY KUTLER, ABUSES OF POWER: THE NEW NIXON TAPES (1997) (reporting an in-depth look at Nixon and his administration's secret and illegal actions).

47. *See* DONALD MUSCH, CIVIL LIBERTIES AND THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 3 (2003) (framing the history preceding the passage of the Foreign Intelligence Surveillance Act ("FISA")); U.S. Senate, Church Committee Created, http://www.senate.gov/artandhistory/history/minute/Church_Committee_Created.htm (last visited Sept. 13, 2009) (briefly reviewing the formation of the Church Committee).

exceeded the bounds of necessity.[48] The government defended its actions as necessary to secure national security interests, yet the Committee uncovered that the government's activities clearly extended into unrelated matters.[49] The result of the Committee's efforts, the Foreign Intelligence Surveillance Act of 1978, intended to govern national security investigations concerning foreign intelligence by requiring a court order to wiretap statutorily enumerated entities or persons.[50]

### B. *Foreign Intelligence Surveillance Act*

FISA requires that a surveillance order come from one of eleven district court judges constituting the FISC, with each judge appointed by the Chief Justice of the United States to serve no more than a term of seven years.[51] In addition, the Chief Justice appoints three judges to serve on the FISA Court of Review, which has jurisdiction to review denials of applications under FISA.[52] Under the specified classifications of FISA, "foreign powers"[53] or "agents of a foreign power,"[54] the latter of which includes the subclass of "U.S. persons"[55] as agents of a foreign power, are subject to wiretapping probes if the guidelines for the issuance of an order are properly followed.[56] FISA established that the evidentiary standard of probable cause is necessary to warrant labeling a target of electronic surveillance a foreign power or agent of a foreign power, and to determine if the facilities or places kept under surveillance are being or are

48. *See* MUSCH, *supra* note 47, at 4 (listing intelligence community practices warranting increased regulation); *see also* WHITFIELD & LANDAU, *supra* note 31, at 178 (speaking to the distrust of government and call to action post-Watergate).

49. *See* MUSCH, *supra* note 47, at 3-4 (discussing abuses of power in intelligence activities); THE 9/11 COMMISSION REPORT, *supra* note 12, at 75 (citing excesses of intelligence gathering efforts).

50. *See* 50 U.S.C. §§ 1801-11, 1821-29, 1841-46, 1861-62 (2006); *see also* WHITFIELD & LANDAU, *supra* note 31, at 179-80 (discussing the basic premise of FISA).

51. 50 U.S.C. § 1803(a), (d).

52. 50 U.S.C. § 1803(b).

53. 50 U.S.C. § 1801(a).

54. 50 U.S.C. § 1801(b).

55. 50 U.S.C. § 1801(i).

56. 50 U.S.C. §§ 1804, 1805(a) (2006).

about to be used by a foreign power or agent of a foreign power.[57]

In making a probable cause determination, a judge may account for prior activities, along with "facts and circumstances" concerning the current or future activities of the target.[58] A probable cause threshold is not, however, a requirement for establishing if a foreign power or agent of a foreign power that is not a U.S. person had or would commit a crime, although these respective classifications may predicate some criminal wrongdoing.[59] U.S. persons identified as agents of a foreign power receive a higher evidentiary ceiling than their foreign counterparts because their classification either premises or potentially involves criminal activity.[60] FISA provides for criminal sanctions[61] and civil liability[62] for prohibited activities.

As a constitutional compromise of roles for the three branches of government, FISA did not receive much public criticism from 1978 to 2001.[63] In the fallout from the 9/11 attacks, however, FISA garnered increased scrutiny for the so-called "wall" erected between the Federal Bureau of Investigation ("FBI") and the Criminal Division of the U.S. Department of Justice ("DOJ") inhibiting the FBI and other intelligence agencies such as the Central Intelligence Agency ("CIA") and NSA from sharing intelligence information with criminal investigators.[64] The wall's origins stem from the 1995 DOJ

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57. 50 U.S.C. § 1805 (a)(2)(A), (B).

58. 50 U.S.C. § 1805(b).

59. 50 U.S.C. § 1801(a), (b)(1).

60. 50 U.S.C. § 1801(b)(2).

61. 50 U.S.C. § 1809 (2006).

62. 50 U.S.C. § 1810 (2006). Lack of notice prevents the pursuit of remedies. *See id.* For a discussion of the "notice problem" for those entities or individuals unknowingly subject to unlawful electronic surveillance, see Andrew Adler, *The Notice Problem, Unlawful Electronic Surveillance, and Civil Liability Under the Foreign Intelligence Surveillance Act*, 61 U. MIAMI L. REV. 393 (2007).

63. *See* JAMES BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 84 (2007) (discussing the mild history of FISA before 9/11); Beryl Howell, *Foreign Intelligence Surveillance Act: Has the Solution Become a Problem?*, *in* PROTECTING WHAT MATTERS: TECHNOLOGY, SECURITY, AND LIBERTY SINCE 9/11, at 118 (2006) (illustrating post-9/11 developments as prompting concern with FISA).

64. *See* THE 9/11 COMMISSION REPORT, *supra* note 12, at 78-79 (providing a concise look at the construction of the FISA "wall," but ultimately calling the term misleading because of other obstacles that too prevented an intelligence exchange); *see also* Clayton

procedures initially intended to manage intelligence information sharing between DOJ prosecutors and the FBI, which became so "misunderstood and misapplied" that FBI intelligence and criminal operatives came to believe that they could not share information with one another.[65] The USA PATRIOT Act looked to bridge the divide between law enforcement and intelligence operatives by amending the language of FISA from requiring that "the purpose of surveillance was intelligence" to requiring that it be "a significant purpose," a shift intended to facilitate intelligence gathering and sharing.[66] Congress also legalized the use of roving wiretaps to allow a FISC judge to permit surveillance without specifying a particular telephone or carrier.[67] It is evident in these few examples that Congress has acted to update FISA, with more recent legislation intending to further that effect.[68]

The disclosure of the NSA warrantless wiretapping program compounded the worries of those already concerned by the perceived loss of civil liberties following the passage of the USA PATRIOT Act.[69] Although details remain largely classified, the

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Northouse, *Providing Security and Protecting Liberty*, *in* PROTECTING WHAT MATTERS: TECHNOLOGY, SECURITY, AND LIBERTY SINCE 9/11, at 13 (Clayton Northouse ed., 2006) (noting that the design of FISA was to preclude prosecutors from using it to sidestep more demanding requirements of regular criminal investigations).

65. *See* THE 9/11 COMMISSION REPORT, *supra* note 12, at 79 (chronicling missteps to misreading Department Of Justice procedures).

66. USA PATRIOT Act, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (2001) (amending 50 U.S.C. § 1804(a)(7)(B) (1982)) (codified as amended at 50 U.S.C. § 1804(a)(6)(B) (2006)). *See generally* BAKER, *supra* note 63, at 85; Howell, *supra* note 63, at 123-26. For a critical analysis of the "significant purpose" test, see George Varghese, *A Sense of Purpose: The Role of Law Enforcement in Foreign Intelligence Surveillance*, 152 U. PA. L. REV. 385 (2003).

67. USA PATRIOT Act § 206 (amending 50 U.S.C. § 1805(c)(2)(B) (2000)), *amended by* USA PATRIOT Improvement and Reauthorization Act of 2005, 109 P.L. 177, § 102(b), 120 Stat. 192, 195 (2006). *See generally* Northouse, *supra* note 64, at 15.

68. The Protect America Act of 2007 ("PAA"), Pub. L. No. 110-55, 121 Stat. 552 (2007), modernized FISA in four ways: collection of foreign intelligence on targets *outside* the United States does not require court approval, § 2, FISC review of procedures directed by the government at persons "reasonably believed" to be outside the United States, § 3, third party assistance for intelligence gathering efforts is permissible, § 2, and protection of third party assistants from private lawsuits, *id.* The PAA became the basis for the FISA Amendments Act of 2008, as many of its provisions were reauthorized. *See* Pub. L. No. 110-261, 122 Stat. 2436 (2008).

69. *See* Godoy, *supra* note 16 (expressing dismay at the government overstepping its constitutional bounds); *see also* Tom Daschle, Op-Ed., *Power We Didn't Grant*, WASH.

DOJ stated that the warrantless wiretapping of communications was limited to where at least one party was outside the United States, and where there was "a reasonable basis to conclude that one party to the communication [was] a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda."[70] The DOJ justified the program as permissible under both Article II of the Constitution and the Authorization for the Use of Military Force passed by Congress a week after September 11, 2001.[71] Opponents not only argued that lowering the standard of probable cause was in violation of the Fourth Amendment, but cited the lopsided statistics of wiretapping approvals by the FISC as proof that FISA did not hinder intelligence gathering efforts.[72] They stressed that failures of analysis and inter- and intra-agency disunity, not overly demanding evidentiary standards, were more responsible for the failure to thwart 9/11.[73]

The defenders of the program pointed to examples of evidentiary and procedural impediments that arose under FISA in prosecuting an unconventional War on Terror.[74] In testimony to the Senate Judiciary Committee in 2006, Mary DeRosa, a Senior Fellow at the Center for Strategic and International

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POST, Dec. 23, 2005, at A21 (arguing against an expansive interpretation of the powers delegated to the President by congressional legislation).

70. *See* The White House, Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051219-1.html (justifying the adequacy of the "reasonable basis" test in affording protections to targets of electronic surveillance).

71. *See* U.S. Dep't of Justice, *supra* note 18, at 1-2 (claiming both constitutional supremacy and, as a secondary argument, statutorily granted authority).

72. Elec. Privacy Info. Ctr., Foreign Intelligence Surveillance Act Orders 1979-2006 (May 2, 2008), http://epic.org/privacy/wiretap/stats/fisa_stats.html (reporting statistics from the FISA court that facially show that it has acted pre- and post-9/11 as a "rubber stamp").

73. *See* Testimony of Jerry Berman Before the Senate Select Committee on Intelligence on "Amending FISA: The National Security and Privacy Concerns Raised by S.2659 and S. 2586," http://www.cdt.org/testimony/020731berman.shtml ("The FBI lacks the ability to properly analyze the information it already collects.").

74. *See* Yoo, *supra* note 13, at 572-73 (listing obstacles to intelligence gathering under FISA); *see also Fixing FISA*, NAT'L REV., Oct. 15, 2007, http://article.nationalreview.com/?q=OTQ2NmE3MGMwZDMyYzAwN2E4NjQ4MjU2YWY1NzhlOTc= (arguing FISA stifles maximization of U.S. technological superiority and ability to protect citizenry).

Studies, cited "unduly difficult and time-consuming" administrative procedures for obtaining a warrant as the most common complaint about the FISA process.[75] In May 2002, FBI Special Agent Coleen Rowley wrote in a memo to the Director of the FBI of the "common perception" that a denial of a probable cause warrant in the criminal system presumed failing the "smell test" for FISA.[76] The FBI perception, according to Rowley, of "an excessively high standard of probable cause in terrorism"[77] became the subject in February 2003 of the Senate Judiciary Committee's inquiry into FISA implementation failures.[78] In a telling exchange between Senator Arlen Specter and a "key [FBI] Headquarters SSA [Supervisory Special Agent]," the latter "stated that he did not know the legal standard for obtaining a warrant under FISA."[79] Remarkably, an unnamed attorney for the FBI was not familiar with the controlling standard of probable cause, conveying that the FBI "did not have written procedures concerning the definition of 'probable cause' in FISA cases."[80] The report authored by Senator Specter and two other

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75. *FISA for the 21st Century: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 279 (2006) (statement of Mary DeRosa, Senior Fellow at the Center for Strategic and International Studies) (urging Congress to streamline FISA procedures).

76. *See Coleen Rowley's Memo to FBI Director Robert Mueller*, TIME MAGAZINE, May 21, 2002, http://www.time.com/time/nation/article/0,8599,249997,00.html (emoting that this misperception was so potent that she was "afraid" to act otherwise).

77. *Id.* (arguing for a new probable cause procedure to unburden "terrorism cases where time is of the essence").

78. PATRICK J. LEAHY ET AL., FBI OVERSIGHT IN THE 107TH CONGRESS BY THE SENATE JUDICIARY COMMITTEE: FISA IMPLEMENTATION FAILURES: AN INTERIM REPORT 16-18 (2003), *available at* http://specter.senate.gov/files/specterspeaks/ACF6.pdf, *reprinted in* 149 CONG. REC. 4534 (documenting not only the concerns of the Rowley Memo, but a litany of FBI dysfunctions).

79. *Id.* at 29, *reprinted in* 149 CONG REC. 4537 (stating that not only did the Supervisory Special Agent not know the legal standard for FISA warrants, but "did not have a clear understanding" of probable cause).

80. *Id.* at 30, *reprinted in* 149 CONG. REC. 4537. A relevant portion of the report states:

> Sen. Specter: . . . [Attorney #1] what is the legal standard for probable cause for a warrant?
> [Attorney #1]: A reasonable belief that the facts you are trying to prove are accurate.
> Question: Reason to believe?
> [Attorney #1]: Reasonable belief.
> Question: Reasonable belief?
> [Attorney #1]: More probable than not.

senators on the committee even admitted that "[g]iving a precise definition of probable cause is not an easy task."[81] The Director of National Intelligence J. Michael McConnell testified to the House Judiciary Committee in September 2007 that a showing of probable cause expends "substantial expert resources toward preparing applications . . . [diverting them] from the job of analyzing collection results and finding new leads, to writing justifications that would demonstrate their targeting selections would satisfy the statute," creating an "intolerable situation."[82]

Professor John Yoo of the University of California at Berkeley School of Law has asserted that FISA is a detriment to the rapidity with which U.S. intelligence agencies must move to uncover and foil inchoate terrorist plots.[83] He underscored that FISA and the USA PATRIOT Act falsely presuppose that it is not overly difficult to determine who is involved in terrorist activity.[84] He bemoaned the government's high burden to establish the rough equivalent of probable cause for the criminal justice system; that an encumbering Cold War process ossifies the distinct national security surveillance imperatives of the War on Terror; and that bureaucratic impediments slow down the

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Question: More probable than not?
[Attorney #1]: Yes, sir. Not a preponderance of the evidence.
Question: Are you familiar with "Gates v. Illinois"?
[Attorney #1]: No, sir.

However, "more probable than not" is not the standard; rather, "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause."

*Id.*, *reprinted in* 149 CONG. REC. 4537.

81. *Id.*, *reprinted in* 149 CONG. REC. 4537. "Yet, even with the inherent difficulty in this standard we are concerned that senior FBI officials offered definitions that imposed heightened proof requirements." *Id.*, *reprinted in* 149 CONG. REC. 4537.

82. Warrantless Surveillance and the Foreign Intelligence Surveillance Act: The Role of Checks and Balances in Protecting Americans' Privacy Rights (Part II)*: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 21 (2007) (statement of J.M. McConnell, Director of National Intelligence) (speaking specifically to surveying targets outside the United States); *see also* Byron York, *Why Bush Approved the Wiretaps: Not Long Ago, Both Parties Agreed the FISA Court Was a Problem*, NAT'L REV., Dec. 19, 2005, http://www.nationalreview.com/york/york200512191334.asp (highlighting burdensome process of seeking FISA warrants).

83. *See* Yoo, *supra* note 13, at 572-74 (railing against "bureaucratic impediments" to intercepting Al Qaeda communications).

84. *See id.* at 572-73 (recognizing continued flaws of antiterrorism legislation in providing optimal security provisions).

needle-in-a-haystack search for potential terrorist operations during the crucial early stages.[85]

Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit wrestled with relaxing the probable cause standard to reasonable suspicion, but, as he noted, "even that would be too restrictive."[86] By lowering the standard even further, on the other hand, he concluded that "judges will have no basis for refusing to grant the application."[87] His solution for a new surveillance approach was a two-fold compromise: (1)(a) establish "a steering committee" composed of the Attorney General, Director of National Intelligence, Secretary of Homeland Security, and a senior or retired judicial officeholder to exercise oversight in conjunction with the FISC and congressional intelligence committees; (1)(b) have the NSA report a list of warrantless surveillance targets within the previous six months to the FISC, which in turn may object in a report to the steering committee and congressional intelligence committees of any "inappropriate" actions; (2)(a) allow national security electronic surveillance *sans* FISA if Congress declares a national emergency and the President certifies "that such surveillance was necessary in the national interest"; (2)(b) narrowly define "national security" to activities endangering the nation; (2)(c) have a sunset period of five years if the state of national emergency has not been lifted; (2)(d) disallow the use of intercepted information for ordinary criminal investigations; 2(e) "require responsible officials" to certify to the FISC that no violations had occurred in the past year; and (2)(f) bar litigation challenging the NSA's warrantless wiretapping program.[88] Thus, the above views of politicians, intelligence analysts, special agents, judges, law professors, and journalists exhibit the wounds once healed by the Cold War passage of FISA but today reopened by the unique threats posed in the War on Terror.

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85. *See id.* at 572-74 (enumerating objections to FISA framework).

86. Richard Posner, Op-Ed., *A New Surveillance Act*, WALL ST. J., Feb. 15, 2006, at A16 (concluding that "needle-in-a-haystack" dilemma would still exist).

87. *Id.* (advocating warrantless surveillance subject to "tight oversight" rather than eased evidentiary standards).

88. *Id.* (surmising what a warrantless electronic surveillance statute would include).

## II. *A CONTINENTAL DIVIDE*

Part II shifts to the divergences in privacy perspectives, counterterrorist approaches, and models of wiretapping in the United States and Europe hastened by the Cold War. Some historians and security experts have argued that historical novitiate and intelligence structure deficiency have left the United States dangerously unprepared and misguided to meet the current challenge.

### A. *Perspectives on the Right to Privacy*

The correlation between the U.S. Supreme Court's limitations on wiretapping and its expansion of privacy rights is a useful philosophical starting point to gauge the broader "values" divide between the United States and its European counterparts. James Whitman discusses the European belief that the United States does not comprehend "the imperative demands of privacy at all."[89] He touches on an important dichotomy between dignity, which is more valued by the Europe, and liberty, which is more treasured by the United States.[90] This divergence corresponds to the different historical experiences and cultural modalities of the two coasts of the Atlantic, which reverberate in both the legislative and judicial arenas.[91] U.S. privacy as liberty centers on, ironically, the British maxim that a man's home is his castle,[92] for the design of the Fourth Amendment is to allow a

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89. James Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1155-56 (2004) (recognizing the extent of the divide). *But see* Lawrence v. Texas, 539 U.S. 558, 576-77 (2003) (appreciating European values by contemplating both liberty and dignity as notions of privacy).

90. *See* Whitman, *supra* note 89, at 1162 (outlining the derivation of the distinction); *see also* Marc McAllister, *Human Dignity and Individual Liberty in Germany and the United States as Examined Through Each Country's Leading Abortion Cases*, 11 TULSA J. COMP. & INT'L L. 491, 491-94 (2004) (differentiating Germany's human dignity approach from America's individual liberty approach); Robert Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2095 (2001) (contrasting theoretical conceptions of privacy as liberty and privacy as dignity).

91. *See* Post, *supra* note 90, at 2092 (distinguishing French restrictions from U.S. protections to enjoy bodily autonomy under the law). *See generally* BLANCA R. RUIZ, PRIVACY IN TELECOMMUNICATIONS: A EUROPEAN AND AN AMERICAN APPROACH (1997) (analyzing differences between German and American privacy norms).

92. *See* Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring) (positing that the home warrants special protection); United States v. U.S. Dist. Court,

man to find refuge in his own home free from unreasonable governmental intrusion.[93] On the other hand, the ubiquitous enemy of European privacy is the media, with its power to broadcast damaging personal information.[94] This incongruity in privacy concerns between U.S. and European electronic surveillance laws presents a deeper understanding of the evolution of the continental divide in national security wiretapping priorities and approaches.[95]

The principles discussed in Part I undergirding the landmark decisions of *Griswold v. Connecticut*,[96] *Katz v. United States*,[97] and *Roe v. Wade*[98] signaled the incremental nexus of privacy as personal liberty, and, in the wake of Watergate, the near-freedom from judicially unsupervised electronic surveillance—underscoring the extent to which the American historical experience during the mid- to late twentieth century shaped wiretapping law. By contrast, what loomed most in the European experience during the mid-twentieth century was the searing legacy of the Second World War.[99] In a comparative analysis of U.S. and European liberty, Professor Francesca Bignami of The George Washington University School of Law

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407 U.S. 297, 313 (1972) (concluding that entry of a home is the "chief evil" the Fourth Amendment addresses); Miller v. United States, 357 U.S. 301, 307 (1958) (citing the long history of the inviolability of the home).

93. *See* Wilson v. Layne, 526 U.S. 603, 610 (1999) (noting that the Fourth Amendment jealously guards the centuries-held principle of respect for the privacy of the home); Payton v. New York, 445 U.S. 573, 589-90 (1980) (recognizing that the zone of privacy for the home is plainly defined); Silverman v. United States, 365 U.S. 505, 511 (1961) (affirming the right to be free from unreasonable governmental invasion).

94. *See* Whitman, *supra* note 89, at 1161 (underscoring the sanctity of maintaining a person's reputation); Post, *supra* note 90, at 2094 (defining "privacy as dignity" as centered on preserving integrity of one's identity and self-respect).

95. *See* Whitman, *supra* note 89, at 1162 (concluding the continental divide as a clash of an Old World concern "not to lose public face" and a New World preoccupation with keeping the home "as a citadel of individual sovereignty"). *See generally* Post, supra note 90.

96. 381 U.S. 479 (1965).

97. 389 U.S. 347 (1967).

98. 410 U.S. 113 (1971).

99. *See* Francesca Bignami, *European Versus American Liberty: A Comparative Privacy Analysis of Antiterrorism Data Mining*, 48 B.C. L. REV. 609, 609-10 (2007) (articulating Nazi abuse of personal records of European nations is an experience unknown to the United States). For a thorough account of the devastation and human impact of World War II in Europe, see generally JOHN KEEGAN, THE SECOND WORLD WAR (1990).

conveys the formative influence of the Nazi experience on the Europeans, noting the example of the Nazis using Norway's government files to conscript Norwegians into the Axis army.[100] As a result, she notes, the object of European privacy law is to prevent large-scale government efforts to marshal and potentially manipulate information on individuals.[101] The breadth of the data mining performed by the NSA is more offensive to European privacy, for example, than a momentary wiretap in the interest of national security.[102] From dissimilar historical traumas, U.S. wiretapping concerns continue to resonate with the deprivation of liberty resulting from the "act" of invasion, while Europeans far less fear a fleeting intrusion than the permanent specter of records used to compromise their personal dignity.[103]

### B. *Counterterrorist Strategy*

#### 1. The European Seriousness of Purpose in Countering Terrorism and the Slow U.S. Response During the Cold War

Europe's seriousness of purpose in counterterrorism formed out of the tragedy of historical experience.[104] In the mid-1970s and early 1980s, Europe was still reeling from the embarrassment of the terrorist plot carried out at the Munich Olympics in 1972.[105] The woeful inadequacy of the West German response to

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100. *See* Bignami, *supra* note 99, at 609-10 (noting that Norwegian resistance fighters sabotaged what would ultimately be a Nazi failed attempt); Nils Petter Gleditsch & Nils Ivar Agøy, *Norway: Toward Full Freedom of Choice?*, *in* THE NEW CONSCIENTIOUS OBJECTION: FROM SACRED TO SECULAR RESISTANCE 115 (Charles C. Moskos & John Whiteclay Chambers II eds., 1993) (stating Nazis made varying degrees of success in conscripting Norwegians).

101. *See* Bignami, *supra* note 99, at 610 (stressing the historical trauma of World War II as a lasting influence on European privacy law).

102. *See generally* Bignami, *supra* note 99 (discussing the controversial use of the technique).

103. *See* Whitman, *supra* note 89, at 1162 (conveying centuries-old continental differences in a focus on privacy guarantees); Post, *supra* note 88, at 2095 (providing for theoretical understanding).

104. *See* Jan Oskar Engene, *Five Decades of Terrorism in Europe: The TWEED Dataset*, 44 J. PEACE RES. 109, 109-21 (2007) (presenting a statistical analysis of terrorism over fifty years in eighteen European countries). For a broader historical discussion, see generally YONAH ALEXANDER & KENNETH A. MYERS, TERRORISM IN EUROPE (1982).

105. *See* Alexander Wolff, *When The Terror Began*, TIME, Aug. 25, 2002, http://www.time.com/time/europe/magazine/2002/0902/munich/ (noting official

the hostage crisis and the bloodshed that soon ensued[106] sparked a new fervor in counterterrorist operations.[107] The West Germans formed a special antiterrorist detachment of their border police known as GSG-9 (Grenzschutzgruppe Neun), the French GIGN (Groupe d'Intervention de la Gendarmerie Nationale) handled the country's counterterrorist unit, and the British SAS (Special Air Services Regiment) dedicated itself to counterterrorist missions and activity.[108] Without the visceral experience of terrorism at home, the United States' response was lackluster, shrugging the example of Europe and its elite counterterrorist units. [109] Tragedy would soon after ensue with the failed rescue mission of the hostages held at the U.S. embassy in Tehran.[110]

The U.K. and Germany, along with France, Spain, and Italy, faced the permanent specter of terrorist threats at home.[111] From as early as the 1960s through the 1980s, West Germany

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indifference to and incompetence of counterterrorism and how much has changed); *see also* SIMON REEVE, ONE DAY IN SEPTEMBER: THE FULL STORY OF THE 1972 MUNICH OLYMPIC MASSACRE AND THE ISRAELI REVENGE OPERATION "WRATH OF GOD" 103-09 (2000) (assessing lack of German preparedness).

106. *See* BRUCE HOFFMAN, INSIDE TERRORISM 72 (1998) (noting the unpreparedness of the reaction).

107. *See* Ludo Block, *Europe's Emerging Counter-Terrorism Elite: The ATLAS Network*, TERRORISM MONITOR, (Jamestown Found., Wash., D.C.) Mar. 15, 2007, at 10-12 (emphasizing Munich as a watershed in the proliferation of elite counterterrorist units across Europe); Judson Knight, Germany, Counter-Terrorism Policy, Espionage Information, http://www.espionageinfo.com/Fo-Gs/Germany-Counter-Terrorism-Policy.html (last visited Mar. 28, 2009) (providing a look at German counterterrorist conceptions).

108. *See* HOFFMAN, *supra* note 107, at 72-73 (listing changes in European approach to counterterrorism); *see also* Block, *supra* note 107, at 10-12 (providing a look at the functions of counterterrorist units).

109. *See* Bruce Hoffman, *Is Europe Soft on Terrorism?*, 115 FOREIGN POL'Y 62, 73 (1999) (contrasting the American "moral crusade" mindset on counterterrorism with the more practical European approach). For further edification, see HOFFMAN, *supra* note 107, at 73.

110. For an in-depth account of the Iranian Hostage Crisis, see MARK BOWDEN, GUESTS OF THE AYATOLLAH: THE FIRST BATTLE IN AMERICA'S WAR WITH MILITANT ISLAM (2006); *see also* Jerrold D. Green, *Terrorism and Politics in Iran*, *in* TERRORISM IN CONTEXT 584 (Martha Crenshaw ed.,1995) (briefly summarizing the psychology of events leading up to the seizure of the U.S. embassy).

111. For a history of the threats facing the countries listed above, see generally BECKMAN, *supra* note 28; TERRORISM IN CONTEXT, *supra* note 110 (1995).

suffered terrorist attacks from the Red Army Faction.[112] As a result, political scientist and historian Konrad Kellen argued that in Germany there was a "total war" effort to safeguard the home front from terrorism, with armored limousines, special guards and official police, and computer-based surveillance a few of the bulwarks to help prevent attacks.[113] Similarly, the U.K. was a frequent victim of domestic terrorism from the Irish Republican Army since the 1960s.[114] Thus, the U.K. and Germany, unlike the United States, have battled domestic terrorism for several decades, acquiring far-reaching experience to design their laws to face the challenges of security.[115]

The stark dichotomy between the United States and Europe in the urgency to acquire effective counterterrorist tactics elucidates the phenomenon of terrorism spanning continental Europe before and after the Munich hostage crisis.[116] Professor Donatella della Porta at the European University Institute highlights that left-wing terrorism in Italy was nearly omnipresent during all of the 1970s and part of the 1980s.[117] Not counting the conflict in Northern Ireland, there have been more deaths in Spain from terrorist attacks relating to ethnic conflicts than any other Western country.[118] And the French colonial presence in

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112. *See* BECKMAN, *supra* note 28, at 89 (mentioning effects of German terrorism); *see also* Peter Merkl, *West German Left-Wing Terrorism, in* TERRORISM IN CONTEXT, *supra* note 110, at 160, 160-210 (presenting an in-depth history and analysis of threats to West Germany).

113. *See* Konrad Kellen, *Ideology and Rebellion: Terrorism in West Germany, in* ORIGINS OF TERRORISM: PSYCHOLOGIES, IDEOLOGIES, THEOLOGIES, STATES OF MIND 43, 45 (Walter Reich ed., Woodrow Wilson Ctr. Press 1998) (1990) (underscoring the extent of the German security reaction).

114. *See* BECKMAN, *supra* note 28, at 51 (noting occurrences of Irish paramilitarism); *see also* Charles Townshend, *The Culture of Paramilitarism in Ireland, in* TERRORISM IN CONTEXT, *supra* note 110, at 311, 311-51 (identifying a long history of terrorist activities of Irish paramilitary organizations).

115. *See* BECKMAN, *supra* note 28, at 89 (noting the persistence of terrorist threats to Europe, specifically Germany); *see also* Hoffman, *supra* note 109, at 73 (concluding that Europe has faced enduring dangers).

116. *See* Engene, *supra* note 104, at 109-21 (presenting a statistical corroboration).

117. *See* Donatella della Porta, *Left-Wing Terrorism in Italy, in* TERRORISM IN CONTEXT, *supra* note 110, 106, 106-59 (discussing the history of terrorist occurrences); *see also* Richard Drake, *Italy in the 1960s: A Legacy of Terrorism and Liberation*, 16 S. CENT. REV. 62, 63 (1999) (illustrating the trauma of terrorism on the Italian population).

118. *See* Goldie Shabad & Francisco Jose Llera Ramo, *Political Violence in a Democratic State: Basque Terrorism in Spain, in* TERRORISM IN CONTEXT, *supra* note 110,

Algeria during the mid-twentieth century, which spurred a terrorist insurgency, captured the press headlines in France.[119]

Hoffman asserts that the tragedy of 9/11 did not result from U.S. indifference to terrorism but from not becoming more counterterrorist savvy with the internationalization of terrorism beginning in the mid- to late twentieth century.[120] Unfortunate yet understandable in hindsight, a U.S. preoccupation with Cold War politics regularly relegated counterterrorism to the scrim of the national security agenda, a rather tangential concern dwarfed by the global chess match waged between itself and its superpower adversary.[121] Thus, the aforementioned authors and studies have advanced the notion that the Cold War period was a transitory moment of clarity for many European nations, which acquired a sobriety about counterterrorism that the United States did not in the decades prior to 9/11.[122]

### 2. U.S. Versus European Intelligence Agency Structure

The structuring of intelligence agencies is fundamental to the use and oversight of national security wiretapping. Reflected in the intelligence agency separation from criminal investigation, European legal systems starkly differentiate national security

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410, 410-69 (describing the history of terrorist attacks in Spain); *see also* William Douglass & Joseba Zulaika, *On the Interpretation of Terrorist Violence: ETA and the Basque Political Process*, 32 COMP. STUD. SOC'Y & HIST. 238, 238 (1990) (documenting the number of terrorist-related deaths).

119. *See* Martha Crenshaw, *The Effectiveness of Terrorism in the Algerian War*, *in* TERRORISM IN CONTEXT, *supra* note 110, 473, 473-513 (providing historical perspective and analysis). *See generally* Jeremy Shapiro & Benedicte Suzan, *The French Experience of Counter-terrorism*, SURVIVAL, Spring 2003, at 67 (outlining the French history of terrorism and counterterrorism over the last twenty years).

120. *See* Hoffman, *supra* note 109, at 68-72 (explaining that the American hard-line stance on international terrorism during the Cold War differed from the European focus on internal terrorism, the result of which was Europe developing more counterterrorist sensibilities to protect the home front from indigenous threats).

121. *See* HOFFMAN, *supra* note 107, at 73 (highlighting counterterrorism's backseat during the Cold War). For a look at the diversionary extremes of preoccupation with communist infiltration in America, see ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA (1998).

122. *See* HOFFMAN, *supra* note 107, at 72-73 (contrasting European seriousness about terrorism with American unresponsiveness); *see also* THE 9/11 COMMISSION REPORT, *supra* note 12, at 71-107 (chronicling the history and institutional failings of American counterterrorism since the Cold War).

from run-of-the-mill criminal inquiries.[123] A further bifurcation is visible in the intelligence agency set-up, with one agency gathering intelligence on potential threats from foreign powers, and the other focusing on the threats at home, whether foreign-sponsored or home-grown.[124] The two agencies do not warrant as much scrutiny as the police, with oversight exercised by either the executive or legislative branch, not the judiciary.[125] On the contrary, in the United States, the foreign intelligence agencies—the CIA for human intelligence and the NSA for signals intelligence—do not have domestic equivalents.[126] The FBI controls both criminal investigation and domestic intelligence operations, with more investigations devoted to criminal police work than national security protection.[127]

The structure of the German intelligence community includes the Federal Intelligence Service (BND), devoted to collecting intelligence outside of Germany; the Office for the Protection of the Constitution (BFV), providing for intelligence operations within Germany; and the Military Counterintelligence Branch (MAD), restricted to military counterespionage and internal security within the armed forces.[128] Oversight of the

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123. *See* BIGNAMI, *supra* note 99, at 621 (defining hidebound distinction of European national security and criminal law); *see also* RICHARD POSNER, COUNTERING TERRORISM: BLURRED FOCUS, HALTING STEPS 171-202 (2007) (arguing that the criminal justice system is the wrong venue for countering terrorism).

124. *See* Bignami, *supra* note 99, at 621 (noting the defined roles of European intelligence agencies); *see also* POSNER, *supra* note 30, 164-97 (evaluating European approaches to intelligence analysis and structure).

125. *See* Bignami, *supra* note 99, at 622 (stating the general trend in Europe); *see also* POSNER, *supra* note 123, at 171-202 (discussing "judicialization" of counterterrorism in U.S.).

126. *See* Bignami, *supra* note 99, at 622-23 (stating the functions of the two U.S. intelligence agencies); *see also* POSNER, *supra* note 123, at 33-69 (expressing concern with the current division of functions in the United States).

127. *See* Bignami, *supra* note 99, at 622-23 (citing realities of the division of labor for the FBI); *see also* POSNER, *supra* note 123, at 33-69 (arguing that the U.S. merger of criminal and national security pursuits yields a glaring deficiency in U.S. approach to counterterrorism).

128. *See* Shlomo Shpiro, *Parliament, Media and the Control of Intelligence Services in Germany, in* DEMOCRACY, LAW AND SECURITY: INTERNAL SECURITY SERVICES IN CONTEMPORARY EUROPE 294, 295-96 (Jean-Paul Brodeur et al. ed., 2003) [hereinafter Shpiro, *Parliament, Media & Control of Intelligence Servs. in F.R.G.*] (presenting an exclusive focus on Germany); Shlomo Shpiro, *Parliamentary and Administrative Reforms in the Control of Intelligence Services in the European Union*, 4 COLUM. J. EUR. L. 545, 550

intelligence community rests with an elaborate parliamentary system comprising four distinct parliamentary bodies with circumscribed powers, as detailed below.[129] Professor Shlomo Shpiro of Bar-Ilan University adds that sometimes overlooked is the supplementing role of the media in monitoring intelligence activities.[130] He concludes that parliamentary committees, along with the media, effectively keep close watch.[131]

In the U.K., the Security Service ("MI-5") and the Secret Intelligence Service (SIS or "MI-6") are sharply defined, dual-headed intelligence agencies.[132] MI-5 is primarily responsible for protecting the U.K. against national security dangers, while MI-6 gathers secret foreign intelligence, which MI-5 can use to protect the homeland.[133] MI-5 and MI-6 are subject to various forms of oversight, as detailed below.[134] Although MI-5 and MI-6 are rough equivalents to the FBI and CIA, respectively, Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit is an outspoken critic of the incongruous missions of the FBI and MI-5.[135] The U.S. approach to counterterrorism, he

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(1998) [hereinafter Shpiro, *Parliamentary & Admin. Reforms in Control of Intelligence Servs. in EU*] (discussing German intelligence in the context of other European nations).

129. *See* Shpiro, *Parliament, Media & Control of Intelligence Servs. in F.R.G.*, *supra* note 128, at 296-97; Shpiro, *Parliamentary & Admin. Reforms in Control of Intelligence Servs. in EU*, *supra* note 128, at 554-63 (delineating how oversight structure operates); *infra* notes 160-63 and accompanying text.

130. *See* Shpiro, *Parliament, Media & Control of Intelligence Servs. in F.R.G.*, *supra* note 128, at 305-08; Shpiro, *Parliamentary & Admin. Reforms in Control of Intelligence Servs. in EU*, *supra* note 128, at 575 (discussing the role of the media).

131. *See* Shpiro, *Parliament, Media & Control of Intelligence Servs. in F.R.G.*, *supra* note 128, at 311; Shpiro, *Parliamentary & Admin. Reforms in Control of Intelligence Servs. in EU*, *supra* note 128, at 559-60 (claiming smooth functioning relationship between oversight bodies and intelligence services).

132. *See* BECKMAN, *supra* note 28, at 56 (detailing process of intelligence gathering in Britain); *see also* Peter Gill, *Security and Intelligence Services in the UK*, *in* DEMOCRACY, LAW AND SECURITY: INTERNAL SECURITY SERVICES IN CONTEMPORARY EUROPE 265, 267 (2003) (detailing functions of MI-5 and MI-6).

133. *See* Gill, *supra* note 132, at 267, 270-71 (underlining the evolution of the approach); *see also* POSNER, *supra* note 30, at 166-67 (summarizing similar intelligence setup in other western countries).

134. *See infra* notes 173-178 and accompanying text.

135. *See* Richard Posner, Op-Ed., *Time to Rethink the FBI*, WALL ST. J., Mar. 19, 2007, A13 (declaring that the FBI is "incapable of effective counterterrorism" and should more resemble Britain's MI-5); *see also* Al Johnson, *Rethinking the FBI?*, AMERICAN THINKER, Apr. 5, 2007,

argues, must transition from an FBI criminal mindset—arrest, conviction, and sentencing—to the British outlook of prevention as its guiding philosophy.[136] He concludes that, unlike the United States, there is an exclusivity of focus and supremacy of integration and coordination in the intelligence services of the U.K. and other Western nations to secure the home front from terrorist attacks.[137]

The 9/11 Commission Report, of incalculable import in uncovering the unresponsiveness of the U.S. government to the threat of terrorism since World War II, prescribed a unification of intelligence agencies to improve communications among them, a recommendation which the Intelligence Reform and Terrorism Prevention Act ("Intelligence Reform Act" or "IRA") of 2004 codified.[138] Such a response is a natural one, as the uncooperative posture of the FBI, CIA, and other intelligence agencies surely did not help to prevent the attacks of 9/11.[139] The question remains, however, will a bureaucratic umbrella provide the panacea to a massive intelligence breakdown, or produce a similar failure?[140] According to Professor Anne O'Connell of the University of California, Berkeley School of Law, the optimal answer did not lie in the restructuring of the

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http://www.americanthinker.com/2007/04/rethinking_the_fbi.html (summarizing and analyzing Posner's views on the FBI).

136. *See* Posner, *supra* note 135 (indicating that, in the realm of terrorism, punishment is a poor substitute for prevention); *see also* POSNER, *supra* note 123, at 138 (criticizing the new National Security Branch of the FBI for its continued focus on arrests).

137. *See* Posner, *supra* note 135 (wittily suggesting that the FBI has the wrong set of teeth for counterterrorism); *see also* POSNER, *supra* note 123, at 155-56 (citing successes of the U.K. Security Service ("MI-5") as a model for United States to embrace).

138. *See* Intellignece Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 (2004); THE 9/11 COMMISSION REPORT, *supra* note 12, at 364; POSNER, *supra* note 30, at 2 (indicating report laid "factual and analytical foundations" of the Intelligence Reform Act).

139. *See* THE 9/11 COMMISSION REPORT, *supra* note 12, at 78-79 (discussing lack of communication); *see also* POSNER, *supra* note 30, at 153 (specifying intraagency strains are sometimes more present than inter-agency tensions).

140. *See* POSNER, *supra* note 30, at 5-6 (bemoaning the success of the 9/11 Commission, from squelching vigorous debate and dissent to its preconceived biases and flawed recommendations for intelligence restructuring). *See generally* Gorman, *supra* note 11, at 353 (arguing new agencies and increased bureaucracy muddy "lines of responsibility").

Intelligence Reform Act.[141] O'Connell points out that the 9/11 Commission Report stressed more unification and less redundancy in the intelligence community, but counters that redundancy can be beneficial because it diminishes the chance of a complete system breakdown.[142] Arguing that optimal intelligence restructuring in the U.S. context must embrace both unity and redundancy, she concludes that a mixed blend of cooperation and competition provides for more net benefits in a federal system built on such tensions.[143] It is unlikely that a sizeable country such as the United States, with a federal system that is inherently decentralized, can ever mirror the nonoverlapping intelligence agencies of Europe, nor should it so desire.[144]

3. Europe: Wiretapping Without the Oversight of the Courts

The need for judicial oversight of national security wiretapping in the U.K. and West Germany became the subject of litigation in late 1970s and early 1980s.[145] Invoking the European Convention on Human Rights ("ECHR"), German and British citizens challenged their respective countries' wiretapping practices as violative of the principles underlying agreed-upon

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141. *See* Anne J. O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1675 (2006) (arguing that this approach is too simplistic and does not account for needed nuance); *see also* POSNER, *supra* note 30, at 9 (analogizing the restructuring of the intelligence community to an "organizational nightmare").

142. *See* O'Connell, *supra* note 141, at 1675, 1678 (advocating for an economics perspective on the virtue of competition to understand the optimal solution); *see also* POSNER, *supra* note 30, at 148-49 (reasoning intelligence community needs redundancy as a "standard method of increasing safety").

143. *See* O'Connell, *supra* note 141, at 1675-76 (envisioning a mathematical prism in which to view the nature of the dilemma); *see also* POSNER, *supra* note 30, at 157-58 (elucidating the weaknesses of centralization and "pluralism" and recognizing that there is "no known organizational form" as a cure-all for dysfunction in intelligence gathering and sharing).

144. *See* O'Connell, *supra* note 141, at 1675, 1685 (injecting a dose of realism into the debate); *see also* POSNER, *supra* note 30, at 144 (reasoning that "size and heterogeneity" restrict an "optimal degree of centralization").

145. *See* Karen C. Burke, *Secret Surveillance and the European Convention on Human Rights*, 33 STAN. L. REV. 1113, 1117 (1981) (analyzing the outcome of wiretapping cases); *see also* James G. Carr, *Wiretapping in West Germany*, 29 AM. J. COMP. L. 607, 612 (1981) (discussing the subject of wiretapping litigation).

European international law.[146] In the landmark decision *Klass*, the European Court of Human Rights ("European Court") upheld the national power of the German government to wiretap without judicial approval for the purposes of national security.[147] This decision was a watershed with broader ramifications for the courts of the U.K. and other European nations to gauge.[148]

a. Germany

In 1968, West Germany adopted amendments to Article 10 of the Basic Law that enabled the federal government to evade the courts and permit surveillance of mail and telecommunications when national security interests were at stake.[149] *Klass* held that the new G-10 legislation did not violate the freedoms and rights established by Article 8 of the ECHR for checking executive wiretapping powers.[150] To order such surveillance there must first be a "written application giving reasons," with a Federal Minister or head of a federal state required to consult with the parliament-appointed G-10 Commission—save emergency situations but as soon as possible thereafter.[151] To the dismay of Author Karen Burke, the European Court, in her view, did not adequately gauge the ramifications of substituting parliamentary for judicial oversight of wiretapping.[152] As Iain Cameron writes, however, the G-10 law was "designed to be preventative in nature," deeming the lower

146. *See* Burke, *supra* note 145, at 1116, 1123 (discussing the landmark British and German cases).

147. *See* Case of Klass, 28 Eur. Ct. H.R. (ser. A) (1978); *see also* Burke, *supra* note 145, at 1117-18 (analyzing the holding of *Klass*).

148. *See* Burke, *supra* note 145, at 1123 (noting the importance of the decision).

149. Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses [Law Restricting Letters, Post, and Telecommunications Secrecy] (Gesetz zu Artikel Grundgesetz), Aug. 13, 1968 BGBl. 1 at 949 [hereinafter G-10]; *see also* BECKMAN, *supra* note 28, at 94.

150. *See Klass*, 28 Eur. Ct. H.R. (ser. A) at 28 (justifying G-10 legislation "as being necessary in a democratic society in the interests of national security"); *see also* Burke, *supra* note 145, at 1114.

151. G-10, art. 4, ¶ 9(3) (requiring application "must be substantiated."); *see also Klass*, 28 Eur. Ct. H.R. (ser. A) at 24 (noting satisfaction that "there exists an administrative procedure designed to ensure that measures are not ordered haphazardly, irregularly or without due and proper consideration").

152. *See* Burke, *supra* note 145, at 1115 (contending that such substitution is not sufficient).

standard of "actual indications" rather than "probable cause" or "reasonable grounds for belief" a more appropriate evidentiary benchmark for a non-judicial process.[153] "Actual indications" means that a particular offense against national security has been, is being, or is planned to be undertaken, with surveillance confined to the suspects and individuals with whom they are in contact.[154] According to the European Court, because the structuring of the G-10 law did not permit "exploratory or general surveillance," but limited the scope of the wiretapping probe to the mere "factual indications" of the planning stages and beyond of a crime against national security, standard judicial tests such as probable cause were inapplicable and unnecessary.[155]

The European Court found an adequate safeguard in the extrajudicial G-10 Commission, a quasi-legislative court, with a chairman qualified to hold judicial office, and two other members who did not have to be formally trained in the law, entrusted with supervisory responsibilities to oversee executive wiretapping activities.[156] With the G-10 Commission not adopting judicial procedures and the legislative branch exercising considerable political influence, Burke believed that the G-10 Commission did not adequately assure impartiality and independence.[157] The European Court, however, in a careful

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153. *See* IAIN CAMERON, NATIONAL SECURITY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 110 (2000) (discussing the incompatibility between rigorous legal standards and national security objectives).

154. G-10, art. 2, ¶¶ 3(1)-(2) (including membership in "association whose purpose or activity" is "offenses against the basic liberal democratic order."); *see also Klass*, 28 Eur. Ct. H.R. (ser. A) at 24 (accentuating that "measures may *only* be ordered if the establishment of the facts by another method is without prospects of success or considerably more difficult" (emphasis added)).

155. *See Klass*, 28 Eur. Ct. H.R. (ser. A) at 24 (outlining "series of limitative conditions" that ensure proper protocol); Burke, *supra* note 145, at 1120 (noting "judges were deemed incompetent to administer an authorization standard based on pure fact-finding").

156. *See Klass*, 28 Eur. Ct. H.R. (ser. A) at 26 (concluding G-10 Board and G-10 Commission were "independent of the authorities carrying out the surveillance" and "vested with sufficient powers and competence to exercise an effective and continuous control"); Burke, *supra* note 145, at 1120 (quoting argument that "political questions must be decided by politicians").

157. *See* Burke, *supra* note 145, at 1120 (using "doubtful" to describe "impartiality and independence" of G-10 Commission); *see also* Carr, *supra* note 145, at 609 (emphasizing non-judicial presence with respect to national security wiretapping).

assessment of "all the circumstances of the case," including "the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law," found the law and its system of oversight not to be violative of Article 8 of the Convention.[158] The court concluded "that the exclusion of judicial control does not exceed the limits of what may be deemed necessary in a democratic society."[159]

In Germany, some civil libertarians still assert that people under national security surveillance cannot effectively remonstrate against violations of privacy, left with only the hope that a supervisory body of or closely aligned to Parliament will objectively look at their case.[160] German law nonetheless requires that the G-10 Board, a parliamentary committee meeting every six months that consists of nine members of Parliament proportionally selected by party affiliation, exercise general supervision over the electronic surveillance activities of the government.[161] In addition, the aforementioned G-10 Commission, which is now made up of four deputies who are not members of Parliament but are politically affiliated, guarantees an individual analysis of each case, with the authority to either suspend or curtail national security wiretapping operations if contrary to law.[162] As a result, a nonjudicial check is the bulwark

158. *Klass*, 28 Eur. Ct. H.R. (ser. A) at 23 (declaring that "[the] Court must be satisfied" of "exist[ing] adequate and effective guarantees against abuse" under the "all the circumstances" test).

159. *Id.* at 26 (celebrating the "democratic character" of the oversight system).

160. *See* BECKMAN, *supra* note 28, at 105; *see also* Hoffman, *supra* note 109, at 72 (mentioning civil rights activists' fear of governments trampling on fundamental rights in Europe in the name of security).

161. G-10, art. 5, ¶ 14. For further clarification, see BECKMAN, *supra* note 28, at 105; CAMERON, *supra* note 153, at 127.

162. G-10 art. 5, ¶ 15; *see Klass*, 28 Eur. Ct. H.R. (ser. A) at 25 (noting review of surveillance can begin when first ordered, in the course of surveillance, or after its termination); Shpiro, *Parliamentary & Admin. Reforms in Control of Intelligence Servs. in EU* at 558. *But see* G-10, art. 4, ¶ 12; CAMERON, *supra* note 153, at 142 (stating that notification to individuals under surveillance is impermissible when "jeopardizing continuing intelligence operations."). Cameron states, however, that "it can be argued that all notifications damage continuing operations." *Id.* Non-notification naturally stymies the pursuit of remedies available to an individual subject to unlawful national security surveillance.

against excesses of wiretapping, with the German system evincing a clarity of executive power and legislative oversight in the arena of national security.[163]

b. United Kingdom

In 1979, the legality of British wiretapping practices was under challenge for the first time in *Malone v. Metropolitan Police Commissioner.*[164] Conventional executive practice necessitated a warrant from the Secretary of State to approve wiretapping, but the English court found it was not a legal requirement.[165] The court concluded that telephone tapping was an issue for Parliament to weigh, not the courts.[166] Although *Malone* was critical of unregulated executive power, the government's lone concession was the selection of a judicial monitor who did not have the power to discontinue the practice, or to inform Parliament.[167] The European Court, however, in *Malone,* ruled that British wiretapping rules indeed violated Article 8 of the ECHR.[168] The court held that to allow the executive legal discretion "expressed in terms of an unfettered power" was contrary to the rule of law.[169]

The 1984 decision prompted the 1985 enactment of the Interception of Communications Act ("IOCA"), in which the British Parliament promulgated specific rules for national security surveillance, codifying the role of the Home Secretary of State as dispenser of warrants.[170] James Beckman notes that the Act received criticism for not providing adequate safeguards

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163. *See Klass,* 28 Eur. Ct. H.R. (ser. A) at 26 (touting "sufficient independence" of executive authorities and legislative overseers); BECKMAN, *supra* note 28, at 94, 105.

164. *See* [1979] Ch. 344; Burke, *supra* note 145, at 1123.

165. *See Malone,* [1979] Ch. at 369. (reasoning that telephone tapping "involves no act of trespass"); Burke, *supra* note 145, at 1124.

166. *See Malone,* [1979] Ch. at 346.

167. *See* Burke, *supra* note 145, at 1127-28 (arguing that "[a] weak judicial monitor does not cure the inadequacy of the safeguards against abuse").

168. 82 Eur. Ct. H.R. (ser. A) (1984).

169. *Id.* at 33 (1984) ("[T]he law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.").

170. Interception of Communications Act, 1985, c. 56 (U.K.); *see* BECKMAN, *supra* note 28, at 58.

against civil liberties abuses because it did not delineate intelligible standards for issuing a warrant and empowered an executive branch official to authorize intercepts—in other words, the executive branch effectively remained its own arbiter of propriety.[171] The 2000 Regulation of Investigatory Powers Act ("RIPA") repealed the IOCA, with the RIPA guidelines for an interception warrant stipulating that the Secretary of State not issue a warrant unless it is "necessary" to the interests of national security and "the conduct authorized by the warrant is proportionate to what is sought to be achieved by that conduct."[172]

MI-5 and MI-6 are subject to ministerial, parliamentary, and judicial review in cases of improper electronic surveillance.[173] The RIPA replaced the IOCA Commissioner with the Interception of Communications Commissioner ("ICC") and supplanted the commissioners under the 1989 Security Service Act ("SSA") and the 1994 Intelligence Services Act ("ISA") with the Intelligence Services Commissioner ("ISC").[174] The Prime Minister appoints the ICC and the ISC to review warrant applications and report any abuses back to him.[175] An independent Investigatory Powers Tribunal, superseding and combining the tribunals of the IOCA, SSA, and ISA, considers individual complaints.[176] The Investigatory Powers Tribunal has

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171. *See* BECKMAN, *supra* note 28, at 58 (relaying conventional arguments of too much executive power).

172. Regulation of Investigatory Powers Act, 2000, c. 23, § 5(2)(a)-(3)(a) (U.K.).

173. *See id.*; Intelligence Services Act, 1994, c. 13 (U.K.); Security Service Act, 1989, c. 5 (U.K.); BECKMAN, *supra* note 28, at 58; MI-5, Oversight, http://www.mi5.gov.uk/output/oversight.html (last visited Sept. 28, 2009); The Parliamentary, Ministerial, Judicial and Financial Oversight of the British Secret Intelligence Service (SIS), http://www.mi6.gov.uk/output/legislation-and-accountability.html (last visited Sept. 28, 2009).

174. Regulation of Investigatory Powers Act §§ 57, 59. The Interception of Communications Commissioner ("ICC") and the Intelligence Services Commissioner ("ISC") must hold or have held "a high judicial office." *Id.* §§ 57(5), 59(5). *See generally* MI-6, Judicial Oversight, http://www.sis.gov.uk/output/judicial-oversight.html (last visited Sept. 28, 2009) (the ICC "examines the statutory conduct of the interception of communications by the agencies," and the ISC "looks at the statutory conduct of human and technical operations.").

175. Regulation of Investigatory Powers Act §§ 58, 60 (the reports should be annual).

176. *Id.* § 65. The tribunal currently has seven members. The President and Vice President must hold or have held high judicial office; the other members must be senior

"the power to make any such award of compensation or other order as they think fit" and to "order quashing or cancelling any warrant or authorisation."[177] Although the ICC and ISC Commissioners are senior judges, leaving the operations of MI-5 and MI-6 largely beyond the discretion of the courts insulates serious crimes against the state, such as terrorism and espionage, from the scrutiny deserving of more ordinary criminal investigations.[178] Thus, Part II reveals that, during the Cold War and beyond, the judiciary lurked in the distant shadows of British and German national security wiretapping oversight.

## III. *THE WRONG RESPONSE AND HOW THE RIGHT ONE STAYS TRUE TO OUR SYSTEM OF GOVERNMENT*

In a post-9/11 world, intelligence agency operations unimpeded by excessive judicial review position the U.K. and Germany as better equipped for counterterrorism than the FISA-burdened United States.[179] The European intelligence structure and its appropriate oversight, which, since the Cold War, helped to extirpate indigenous terrorist cells, suit today's task of defeating the threat of Islamic-extremist terrorists.[180] The United States, on the other hand, although watchful of communist subversion during the Cold War, never had to concentrate exclusively on terrorism at home in the way Europe had.[181] Part III emphasizes that the noble, but often misguided, post-9/11 remedies set forth by the U.S. federal government prolong the

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members of the legal profession. *See* Investigatory Powers Tribunal, Structure of the Tribunal, http://www.ipt-uk.com/default.asp?sectionID=7 (last visited Mar. 28, 2009).

177. *See* Regulation of Investigatory Powers Act § 67(7). *See also* The Investigatory Powers Tribunal, FAQs, http://www.ipt-uk.com/default.asp?sectionID=FAQ&Q=3 (last visited Mar. 28, 2009) ("If [the applicant's] complaint is upheld, the Tribunal *may* decide to disclose details of any conduct. If [the applicant's] complaint is not upheld, [the applicant] will not be told if any conduct has been taken against [him or her] or not." (emphasis added)).

178. *See* Gill, *supra* note 132, at 271 (showing a statistical breakdown of MI-5's priorities).

179. *See supra* notes 51-88, 117-71 and accompanying text (emphasizing that judicial cumbersomeness hinders speed and capacity of anti-terrorist response).

180. *See supra* notes 104-22 and accompanying text (arguing that an antiterrorism focus and tactics during the Cold War prepared Europe for the current War on Terror).

181. *See supra* notes 120-22 and accompanying text (noting that the U.S. historical evolution did not make counterterrorism a high priority).

lingering institutional and procedural inadequacies of U.S. intelligence agencies to prevent terrorist attacks on its soil.[182] First, the similar standards of review applied to criminal enforcement and national security best exemplify the continued blurring of what should be a sharp distinction.[183] Second, oversight of national security wiretapping is, as the U.K. and Germany demonstrate, an out-of-place function for the judiciary.[184] In accordance with the Constitution, the political branches of government should decide which national security wiretapping probes are necessary when collecting foreign intelligence.[185]

### A. *The Post-9/11 Approach*

One must first ask whether the breakdown of communication leading up to 9/11 resulted from more than mere intelligence infighting and disunity, but rather from the glaringly soft distinction between national security and criminal law stifling U.S. intelligence gathering efforts.[186] FISA's tragic misreading and accompanying misapplications of the probable cause threshold revealed an outmoded, overjudicial approach that should have been more accommodating and adaptable to War on Terror oversight.[187] Germany's "actual indications" or the U.K.'s "necessary" and "proportionate" standards are more appropriate for facing the twenty-first-century threats of irrational terrorist actors armed by their state sponsors with the potential to

182. *See supra* notes 138-43 and accompanying text (identifying the importance of intelligence structuring in prosecuting the War on Terror).

183. *See supra* notes 76-82 and accompanying text (contending that the potential for misconstruing probable cause threshold in FISA and criminal contexts still exists).

184. *See supra* notes 22-26 and accompanying text (arguing for the constitutionality of and wisdom in monitoring national security wiretapping outside of the judicial framework).

185. *See supra* notes 22-26 and accompanying text (emphasizing the clear constitutional delegation of national security and foreign affairs responsibilities to the President and Congress).

186. *See supra* notes 64-66, 76-82 and accompanying text (underscoring the depth of intelligence agency dysfunction beyond mere turf wars).

187. *See supra* notes 76-82 and accompanying text (recognizing the inadequacy of the probable cause threshold for the exigencies of fighting the War on Terror).

detonate biological, chemical, or nuclear weapons.[188] Adopting these clear, less demanding evidentiary burdens will forestall continued misinterpretations of seemingly similar standards in the national security and criminal contexts. The "FISA wall" evinced the fear of intelligence agencies' becoming forced to abide by the strict standards of the criminal justice system, so much so that they did not work with criminal investigators.[189] The linguistic somersaults of the USA PATRIOT Act and the more recent Protect America Act of 2007[190] and FISA Amendments Act of 2008[191] will not be sufficient in the long term to assuage such fears.[192] To tear down the "FISA wall," "walls" demarcating evidentiary standards branch oversight must rise to sharply distinguish criminal and foreign-intelligence national security wiretapping, instead of more bureaucratic IRA penumbras. Clarity cannot exist under FISA, but oversight modeled, in part, on the British and German approaches will calm intelligence agencies to work in concert with criminal investigators.

### B. *Fulfilling the U.S. Constitution*

The *Keith* Court's ruling that judicial oversight and a Fourth Amendment determination of probable cause are required for purely domestic national security wiretapping probes extends no further.[193] With the constitutionality of FISA still undecided by the Court, the *Keith* decision's explicit distinction between purely domestic and foreign-related national security wiretapping implies limits to the latter's evidentiary obligations under the Fourth Amendment and the scope of the judiciary in its oversight

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188. *See supra* notes 153-55, 172 and accompanying text (documenting relaxed evidentiary thresholds for British and German national security wiretapping models).

189. *See supra* notes 64-66 and accompanying text (highlighting the extent to which evidentiary misinterpretation stunted cooperation of intelligence and criminal operatives).

190. Pub. L. No. 110-55, 121 Stat. 552 (2007).

191. Pub. L. No. 110-261, 122 Stat. 2436 (2008).

192. *See supra* notes 66-68 and accompanying text (describing recent and current remedies to facilitating intelligence gathering and sharing).

193. *See supra* note 42 and accompanying text (explaining the distinction between purely domestic national security wiretapping and its foreign counterpart).

under the doctrine of separation of powers.[194] The Court's search in *Keith* for an "independent check upon executive discretion" ended with the judicial safeguards contemplated by the Fourth Amendment for purely domestic national security wiretapping—the domestic component of which may indeed present criminal law concerns best suited for judicial scrutiny.[195] In the matter of foreign-intelligence national security wiretapping, the people's chambers of Article I—elected to engage foreign policy and "provide for the common Defense and general Welfare of the United States"—best check the executive as urged in *Keith*, not the courts of Article III.[196]

This Note proposes what a post-FISA framework should resemble. Similar to Germany, select intelligence committees in each chamber of Congress should exercise general oversight of foreign intelligence national security wiretapping, while a "secret" commission or tribunal under the aegis of the committees, vested with the power to grant or deny applications by federal officers and discontinue illegal probes, should review individual cases.[197] Similar to the U.K., the President of the United States should appoint an Interception of Communications Commissioner—a judge or retired judge of high esteem—to draft annual reports to him and Congress on the commission's competence and adherence to the law and to make such reports available to the public. The commission should apply a two-pronged time-saving and easily understood non-judicial determination in review: first, whether there are actual indications or reasonable bases to believe the target is a foreign power or agent of a foreign power that poses a statutorily

194. *See supra* note 42 and accompanying text (noting that the *Keith* Court distinguished the power of the President in the context of foreign affairs and was not prepared to extend its holding to that realm).

195. *See supra* note 42 and accompanying text (discerning concerns of the Court in both preserving civil liberties and protecting imperatives of national security).

196. *See supra* notes 23-26, 42 and accompanying text (articulating the role of Congress in national security considerations).

197. *See supra* note 161-62 and accompanying text (detailing the parliamentary oversight system of German national security wiretapping). This Note would prefer a commission of similar size—three to five members—to its German counterpart. The members need not possess formal legal training, although such a background should not act as a disqualification. A background in intelligence would be preferable, but such members should be completely independent of any intelligence agencies.

defined national security threat; and second, whether the executive branch's probe was necessary for, and proportionate to, the expressed aims of the surveillance undertaken in the interests of national security.[198] Notwithstanding any statutorily recognized exceptions for exigent circumstances, if either of these two prongs will be, are being, or have been violated in any individual case, then FISA-modeled criminal sanctions and civil liability should be available to the victim to pursue before the commission or in a court of law.[199] The issue of providing notice to the individuals placed under unlawful electronic surveillance continues to present a quandary, as all three wiretapping systems discussed herein have limited disclosure for fear of compromising national security methods.[200] This Note concludes that such a balancing act, although imperfect, is necessary, for any blanket disclosure or nondisclosure provisions will sacrifice security for liberty or vice versa.

This Note's solution disagrees with the above-outlined approach advanced by Judge Posner for four reasons: (1) three of the four members of the proposed steering committee would not be independent of the President, with too much oversight power vested in the executive branch; (2) contrary to Posner's wariness, the U.K. and Germany demonstrate that lower evidentiary standards can be applied, in their cases, to all forms of national security wiretapping, albeit outside of the court context, and still properly conform to the demands of a democratic society; (3) oversight would not be the primary constitutional function of Congress but a shared responsibility with the two other branches, for Posner makes the FISC and the steering committee important overseers; and (4) the declaration of a national emergency should not be necessary to operate without judicial oversight, for a foreign-sponsored national

198. *See supra* notes 70, 153-55, 172 and accompanying text (discussing non-probable cause determinations used in national security wiretapping contexts).

199. *See supra* notes 162, 177 and accompanying text (noting compensation is also available to British and Germans victims of wrongful wiretapping intrusions).

200. *See supra* notes 62, 162, 177 and accompanying text (reminding that government must be careful to protect intelligence gathering operations from enemy advantage).

security threat is at any time an inherent national security concern for Congress to monitor, not the courts.[201]

As in Germany and the U.K., these standards should be applied flexibly but strictly enforced so Nixon-like enemy lists used to purge political foes remain a remembrance, and that criminal investigators cannot stealthily bypass the more stringent criminal law rules of evidence.[202] The true motivation behind the Church Commission hearings and its byproduct FISA was not necessarily to entrust the judiciary in perpetuity with national security wiretapping, but to curb the abuses of government officials and confront a growing imperial presidency at the time.[203] Under the original scheme of separation of powers, the branch of government overseeing U.S. national security and foreign affairs by order of the Constitution is Congress.[204] This Note hopes that reaffirming the role of Congress as national security overseer will encourage hands-on activeness of legislative officials to protect this country in a way not seen since the Cold War ended.

John Yoo is correct that FISA is an inappropriate Article III device that hamstrings the power of the executive branch, but the President alone should not have unrestricted authority.[205] The naked attempt of President Bush's administration to bypass both Congress and the courts sets a dangerous precedent.[206] The Framers did not countenance the Unitary Executive Theory, for it is a violation of the separation of powers upon which the longevity of the U.S. republic rests.[207] The Supreme Court has expressly rejected the syllogistic logic that Yoo adopts from

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201. *See supra* notes 86-88 and accompanying text (enumerating Posner's solutions to amending current FISA-exclusive approach).

202. *See supra* note 66 and accompanying text (warning of dangers of criminal investigations circumventing safeguards of criminal wiretapping law).

203. *See supra* notes 47-49 and accompanying text (remarking on abuses leading to formation of Church Committee and passage of FISA).

204. *See supra* notes 23-26 and accompanying text (noting congressional national security functions and oversight responsibilities).

205. *See supra* notes 18, 20 and accompanying text (presenting arguments for unchecked presidential power in protecting country from foreign-sponsored national security threats).

206. *See supra* note 18 and accompanying text (describing President's syllogistic logic to expand his power as commander-in-chief).

207. *See supra* notes 23, 25 and accompanying text (blanketing separation of powers prohibits foundations upon which Unitary Executive Theory rests).

President Harry Truman's Unitary Executive Theory argument in *Youngstown Sheet & Tube v. Sawyer (Steel Seizure).*[208] The Constitution delegates powers of national security to both Congress and the President, with the most weighted responsibility—declaring war—reserved for Congress.[209] The body of case law to emerge from the Supreme Court mirrors this Note's proposition that Congress must pursue its enumerated responsibilities in protecting both national security and civil liberties.[210]

Yoo raises some important points in support of TSP. This Note, however, finds his choice of case law and historical analogy troubling. He invokes the memorable but constitutionally hazy line from *United States v. Curtiss-Wright Corp.* that the President is the "sole organ" of the country in foreign relations.[211] The flawed logic of this decision should not form the basis for a more expansive power base of the President.[212] Yoo also makes the case that President Bush's prosecution of the War on Terror is akin to that of prior presidents during wartime, furnishing the examples of Abraham Lincoln's Civil War and FDR's World War II.[213] But such wars, for which warfare was conventional and an end was in sight, are not comparable to the current challenge.[214] Additionally, listing the uses and defenses of warrantless wiretapping probes from FDR to Bill Clinton may be of persuasive importance, but historical practice is not dispositive of constitutionality.[215] For Yoo to use history as an argument to not

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208. *See supra* note 18 and accompanying text (noting formative impact of *Youngstown Sheet & Tube Co.* in disputing the *Curtiss-Wright* notion of unitary Executive).

209. *See supra* note 23 and accompanying text (underscoring weight of responsibility founders placed on Congress in protecting country).

210. *See supra* notes 22-23, 25-26 and accompanying text (listing court cases reining in claimed incidental wartime powers of President).

211. *See supra* note 25 and accompanying text (noting rejection of *Curtiss-Wright* in subsequent Court decisions).

212. *See supra* notes 25-26 and accompanying text (presenting later Court cases disputing Court's assertion of presidential exclusivity in foreign affairs).

213. *See supra* note 8 and accompanying text (emphasizing that War on Terror is a new kind of war unparalleled in U.S. history).

214. *See supra* note 11 and accompanying text (noting uniqueness of current period in American foreign policy and national security).

215. *See supra* note 20 and accompanying text (recurrence of executive action is not an adequate justification for constitutionality).

exercise any outside oversight of executive wiretapping is ironic, for it is a history of abuse which beckons for oversight.[216]

Yoo's analysis focuses on Congress' failings in wartime leadership, as if the executive branch has not led, or more appropriate to say, misled the U.S. into war and then proceeded to bungle the war effort: Korea, Vietnam, and Iraq, to name a few.[217] He argues that the executive branch is far more capable to pursue the war against Al-Qaeda than its legislative counterpart, with which this author does not disagree.[218] As the Court professed in *Hamdi v. Rumsfeld*, however, "a state of war is not a blank check" for the President when the rights of the country's citizens are at stake.[219] An executive with complete and unfettered discretion to wiretap, even for national security purposes, betrays the original intent of the framers and the continued jurisprudence of the Supreme Court.[220] As a compromise between well-meaning advocates on both sides, Congress should occupy the middle ground between the ends of judicial oversight and executive freehand.[221]

Critics of this analysis may claim: (1) FISA is not a hindrance to the pursuit of terrorist activities, which the statistics facially evidence; and (2) bypassing judicial oversight violates our civil liberties and corrodes the U.S. constitutional republic and the separation of powers on which it rests. First, the statistics, which superficially signify nonintervention, are not dispositive.[222] The hampering effects of judicial oversight, as documented earlier by the burdensome criminal justice-like standards of evidence and review, deter intelligence agencies from not only

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216. *See supra* notes 46-49 and accompanying text (detailing background of Church hearings into abuses of intelligence gathering).

217. *See supra* note 4 and accompanying text (presenting blemished record of Presidents during Cold War and War on Terror in prosecuting military conflicts).

218. *See supra* note 13 and accompanying text (it is logical to assume that the branch entrusted with execution would be more effective in the prosecution of war).

219. *See supra* note 25 and accompanying text (noting Presidents have frequently ignored such warnings since then).

220. *See supra* notes 22-26 and accompanying text (chronicling settled history and re-emergent concerns on bounds of executive power).

221. *See supra* note 22 and accompanying text (arguing for more proactive approach of Congress on matters of national security and foreign affairs).

222. *See supra* notes 83-85 and accompanying text (statistics do not include the missed opportunities of preliminary analyses).

keeping a more constant and roving watch on terrorist activities, but from looking in harder places to find in order to conserve limited resources.[223] Second, and most important, the termination of FISA would in no way diminish the solemn reminder of the exceptionalism for which the United States must strive and exemplify.[224] This Note has neither advocated nor suggested the employment of extra-constitutional actions to prosecute the War on Terror; in fact, congressional oversight, not judicial review, of national security actions strengthens the Constitution.[225] Workable evidentiary standards and appropriately placed oversight are not anathema to the democratic experiment, as the German and British balancing of liberty and security so attest.

## *CONCLUSION*

Authors James Nathan and James Oliver argue that the anxiety of U.S. democracy during the Cold War centered on three elements: the constitutional and institutional strains between Congress and the President; the materialization of a national security bureaucracy after the Second World War; and the significance of U.S. public opinion.[226] These concerns ring just as true today, but the challenges that the U.S. faces need tailoring to meet the present conflict. The Cold War highlighted that a long ideological war can be successfully prosecuted and ultimately won in the face of great tensions between two branches of government. A third branch is certainly necessary to arbiter the major constitutional disputes that may arise between the other two branches of government. The regulation of tactics in the interests of national security, however, such as wiretapping foreign powers or agents of foreign powers, are political decisions that should not be outsourced to the unelected realm of third-party court work.

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223. *See supra* notes 83-85 and accompanying text (outlining arguments for new approach to better trail Al Qaeda).

224. *See supra* note 5 and accompanying text (the counterargument to any suggestion that without judicial review of particular national security tactics the republic is dead).

225. *See supra* note 23 and accompanying text (fulfilling original intent argument).

226. *See supra* note 24 and accompanying text (even though the Cold War and War on Terror differ with respect to tactics, strategic imperatives are similar).

This is as much a legal analysis as it is a moral imperative. It is not to unqualifiedly endorse the adoption of either the German or British model of national security wiretapping, but to look to our European allies for ways to improve upon the U.S. approach. The United States faces a momentous challenge, one that is akin to the Cold War contest. Yet it entails a new strategy. The United States has lacked the same seriousness of purpose as it had in fighting Soviet communism by ironically continuing to employ tactics and strategies that were then applicable but now obsolete. Looking back on the Cold War, what is most remarkable is the effectiveness of the incessant barrage of propaganda in maintaining the U.S. attention span over nearly half a century.[227] Overhyping the potentiality of nuclear war and the cohesiveness of communism across the globe, both Democratic and Republican administrations were able to cultivate a national interest in the nation's security interests. That notice and concentration is sorely lacking in the current War against Terror. The dangers of hyperbolic rhetoric and distractive responses from the real threat, such as the invasions of peripheral venues of concern like Korea and Vietnam during the Cold War and Iraq during the War on Terror, are tragically real. And this Note is under no delusion that there will always be the potential for abuse when wiretapping, but its excesses will not be responsible for the deaths of soldiers and civilians in a far away desert or jungle. It is the best chance the United States has to preserve lives both at home and abroad. To the credit of President Bush, he understood its vitality.

The War on Terror is real. We owe the victims resting in the rubble of Ground Zero to remember the rawness of September 11, 2001 and to never allow its repetition. The current British and German models on wiretapping exhibit a sophistication that the United States must too acquire to prevent another 9/11, while realizing that such a model must be consistent with our federal system and traditions. It is from the triumph of the Cold War and the tragedy of 9/11 that the United States can find inspiration and motivation, but by the example of the Europeans that the United States will find a recipe for success.

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227. *See supra* note 2 and accompanying text (demonstrating how exaggerated fears of international communist unity encouraged public awareness).