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ARTICLE

BEHAVIORAL ECONOMICS AND FREE MARKET SOLUTIONS: THE CASE OF AIRLINE SECURITY

Richard Hanania*

Abstract:
In most of the legal literature, how descriptive questions are answered often determine what normative suggestions an author makes. Rational choice theories are usually associated with free market policy recommendations, while partisans of the behavioral law and economics approach tend to advocate more paternalistic measures. This Article turns this traditional framework on its head, arguing that occasionally a behaviorist orientation can recommend the adoption of laissez-faire policies. The issue of airline security is used to demonstrate the point. People overestimate the risks of flying and terrorism, and empirical works suggests that government has gone too far in trying to protect consumers from themselves. This paper suggests that airline security be privatized or at least heavily deregulated, and invites further research into non-paternalistic implications of behavioral law and economics.

I. INTRODUCTION

Over the last few decades, policy-oriented legal scholarship has seen the rise of two similar but often antagonistic intellectual movements. Law and economics begins with the economic axiom that individuals are rational self-interested actors and, from that

perspective, analyzes the law and sometimes makes recommendations in order to arrive at economically efficient policy.[1] Behavioral law and economics also focuses on the real-world implications of policy, but relaxes the rational actor assumption. Rather, it tries to incorporate the lessons of behavioral research in order to arrive at what proponents of the approach would argue are more empirically justifiable conclusions.[2] Not far beneath the surface of the empirical debates regarding the role of behavioral psychology in the economic analysis of the law, there are differences of a more political nature. Law and economics scholarship has often led to recommendations for more free-market oriented policies.[3] Those who make use of behavioral psychology, on the other hand, are apt to support more paternalistic regulations.[4]

This Article hopes to use behavioral psychology in order to come to policy conclusions regarding a certain narrow area of the law, while making a broader point about the consequences of relaxing the rational actor assumption. I go against the dominant paradigm, where behavioral law and economics is usually used as a justification for more, rather than less, regulation of markets. The area of focus is a familiar one: that of airline security. Since the 9/11 attacks, complaints about government mandated security measures have been widespread.[5] Behavioral psychology cannot only show why, as will be argued, the federal government has overreacted to the threat of airline terrorism. I will also use

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[1] *See* Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 281–84 (1979).

[2] *See* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1471–74, 1476–85 (1998) ("[B]ehavioral economics allows us to model and predict behavior relevant to law with the tools of traditional economic analysis, but with more accurate assumptions about human behavior, and more accurate predictions and prescriptions about law.").

[3] *See* Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905, 912 (1980) (calling law and economics scholars "overt apologists for a grossly unequal Distribution of Wealth" and arguing, perhaps too soon, that they "have finally been forced to come out of the closet and debate ideology with the rest of us").

[4] *See infra* Part I.

[5] *See infra* Part III.A.

findings from the field in order to recommend that the matter should be left to airlines and consumers. In other words, because individuals are irrational, government should, to the greatest extent possible, stay out of the regulation of airline security.

Part I of this Article briefly sums up the debate between legal scholars that advocate using the tools of classical economics to analyze and reform the law and those who take a more behaviorist perspective. This is necessary to place the rest of the article into context. While behaviorists tend to favor more government paternalism, I argue that there is no reason why behavioral research cannot occasionally be used to argue for the opposite—less state interference in a policy area that is already heavily regulated. In Part II, after I briefly discuss the relevant law, I narrow the scope of the analysis to address the issues of terrorism and the fear of flying, which shows that the general population overestimates the risks of both. The question of how these irrational fears have affected government policy towards airline security is then discussed. Part III explicitly articulates the case for deregulation and discusses potential objections. While it is true that successful terrorist attacks can potentially result in major negative externalities, I show that under reasonable assumptions this factor cannot justify the amount of regulation that the government currently mandates. Finally, the Article concludes with some more general thoughts on the debate over the role of behaviorist research in conducting legal analysis and making policy recommendations.

The findings and recommendations of this Article could be applied more widely than they are. Not only does the fact that people overestimate the risks of flying indicate that government should stop regulating airline security, but it also implies that there should be less of a state role in airline safety in general. For the same reasons that there is little rational basis for the government to decide whether or not we should take off our shoes before boarding a plane, we may expect market forces to be able to minimize the risks of plane crashes due to faulty equipment or pilot error. There are two reasons why I have decided to focus on the specific issue of airline security—i.e. preventing terrorism—rather than general airline safety, which involves government licensing of pilots, inspections of aircraft, and other ways that the state perhaps unnecessarily and counterproductively comes

between providers and consumers.

First, it seems intuitively correct that when two irrational fears intersect, the level of irrationality compounds. As discussed more thoroughly in Part III, this belief finds support in the massive overreaction to threat of terrorism in the air. Shoe bomber Richard Reid was not able to directly kill a single person by blowing up the plane he was on but, because of the security precautions taken since his arrest, the country has been estimated to lose the equivalent of 14 human lives a year in time.[6] One shudders to think what kind of security measures the government would have adopted if successful terrorist attacks managed to kill 14 Americans a year. However, because in the current state of the world the loss in "life" is more evenly distributed across travelers, it is not seen to be as large of a concern.

The other reason I focus on airline security is that the measures taken by the government to defend travelers from terrorism are unusually intrusive. If the state simply regulates too stringently the safety of aircraft or the licensing requirements for pilots, that can lead to higher taxes or have other negative consequences for the population. But the issue is a matter of degree—a marginally higher tax rate usually does not fundamentally impair the enjoyment of people's lives. On the other hand, if someone today has a strong aversion to naked body scans or being patted down by government agents without good cause, then unless they can afford their own private airplane the only way that they can avoid these intrusions is to stop flying. This can limit career opportunities and otherwise dampen the enjoyment that many people get out of life.

Sunstein and Thaler differentiate "libertarian paternalism," which refers to policies that leave individuals with some degree of freedom of choice, from more coercive kinds of paternalism that do not.[7] The current regime of airline security is at the more

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[6] STEVEN D. LEVITT & STEPHEN J. DUBNER, SUPERFREAKONOMICS: GLOBAL COOLING, PATRIOTIC PROSTITUTES, AND WHY SUICIDE BOMBERS SHOULD BUY LIFE INSURANCE 65 (2009).

[7] RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 4–6 (2009) ("The libertarian aspect of our strategies lies in the straightforward insistence that, in general, people

coercive end of the spectrum, and this is problematic from the perspective of any philosophy that values personal autonomy and freedom of choice. No matter how much one objects to the searches that current regulations mandate, all but the wealthiest individuals must either submit to them or forgo airline travel. Of course, one may always choose to drive or take the train, but it is often extremely burdensome to do so when it is cheaper and more convenient to fly. If one's chosen occupation requires travel, having to use other methods of transportation might interfere with the ability to make a living. As will be shown in Part III, the extent of the humiliation that some passengers suffer goes beyond even these concerns. An approach that incorporates behavioral psychology goes a long way towards explaining the unpleasant experience that many Americans have had with the Transport Security Administration (TSA). More importantly, it also recommends major changes to the current system.

II. BEHAVIORAL LAW AND ECONOMICS AND GOVERNMENT PATERNALISM

Behaviorists seek to improve economic analyses of the law by incorporating lessons from the field of psychology.[8] Models that begin with the premise that actors are rational agents have tended to lead to policy recommendations that leave a relatively minor role for the state to intervene between contracting parties. This makes logical sense since the more agents are capable of acting in their own best interests, the less justification there is for the government to involve itself in their affairs.[9] However, because

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should be free to do what they like—and to opt out of undesirable arrangements if they want to do so.").

[8] Colin F. Camerer & George Loewenstein, *Behavioral Economics: Past, Present, Future*, *in* ADVANCES IN BEHAVIORAL ECONOMICS 3, 3 (Colin F. Camerer et al. eds., 2004). As is standard, I will refer to those who analyze the law from the perspective of behavioral law and economics as "behaviorists." *See* Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033, 1035 n.1 (2012).

[9] A notable exception is when there is a collective action problem, where economists predict that even agents that are self-interested and perfectly rational will not be able to maximize their well being without the help of state intervention. Margaret Levi et al., *Introduction* to THE LIMITS OF RATIONALITY 1, 9–10 (Karen Schweers Cook & Margaret Levi eds., 1990).

human beings possess limited information, cognitive resources, and will power, there are going to be times when actual behavior does not conform to the standard assumption of rationality.[10] Therefore, in the legal literature behavioral economics has most often been invoked in order to justify using the power of the state to encourage people and institutions to make better decisions regarding their affairs.[11] While these recommendations are presented as a kind of benign paternalism, it is not surprising that many who favor less government regulation of private behavior see this scholarship as a major threat to liberty.[12]

Behaviorists and law and economics scholars share many similarities in their methods and, from a fundamental perspective, the disagreements between the two camps may not be very deep. It is important to note that behaviorists usually seek many of the same goals of law and economics scholars. They adopt a utilitarian perspective that seeks to achieve the greatest degree of social good possible, as defined by the satisfaction of individual preferences. The journey of the behaviorist from positive analysis to normative paternalistic recommendations proceeds in a few steps. As a reference point, it begins with predictions about how, within a certain legal framework, orthodox rational choice theory would expect individuals to behave. From there, the behaviorist uses empirical research from natural experiments and the laboratory in order to show that the assumption of rationality is wrong or at least incomplete. Classical economics is said to fail in making some prediction because people are too limited in their knowledge, lack cognitive resources, have too little will power, or some combination of these factors.[13] As a result, modifications of the rational actor model lead to paternalistic policy recommendations.

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[10] Jolls, Sunstein & Thaler, *supra* note 2, at 1476–85.

[11] *See, e.g.*, Hersh M. Shefrin & Richard H. Thaler, *Mental Accounting, Saving, and Self Control*, *in* ADVANCES IN BEHAVIORAL ECONOMICS, *supra* note 8, at 395, 395; Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 582 (2001-2002).

[12] *See, e.g.*, Wright & Ginsburg, *supra* note 8, at 1067–80. For the contrary view, holding that one can both respect liberty and use government intervention to improve the choices people make, see Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

[13] *See supra* note 10 and accompanying text.

For example, it seems to make sense that people should save for old age. Polling individuals about their preferences can support this intuition, as we find out that people themselves think that they should save more. At the same time, the behaviorist would emphasize, it appears that people do not in actuality put much income aside for retirement. While the rational actor model would see the fact that people do not save as demonstrating individuals' revealed preferences, the behaviorist can argue that the true preference is actually quite different. Therefore, government policy can be used to incentivize, or nudge, people to save more in order to help make individuals better off on their own terms.[14]

There is no logical reason, however, why the lessons of empirical psychology—whether gathered in the laboratory or through analysis of publicly available data—cannot cut in the opposite direction and at least occasionally imply that the state should forgo some of its traditional responsibilities and leave private parties alone. For example, there is some experimental support for the old idea, prevalent among the American Founders, that power corrupts character.[15] This could be used to support the idea that it is better for government to be limited in power and divided in its functions. At a less general level, imagine that, in contrast to the well-known finding that by their own standards people do not save enough money, we learned that individuals put too much into their retirement plans.[16] Then, by further encouraging this kind of excess saving and administrating the social security program, the government is taking a preexisting problem and making it worse.

This Article takes a behavioral perspective and arrives at conclusions that call for less government intervention in private relationships between parties. The background assumption is that the policy area being discussed, airline security, is one that has

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[14] THALER & SUNSTEIN, *supra* note 7, at 105–19.

[15] *See, e.g.*, Philip G. Zimbardo, *Reflections on the Stanford Prison Experiment: Genesis, Transformations, Consequences*, *in* OBEDIENCE TO AUTHORITY: CURRENT PERSPECTIVES ON THE MILGRAM PARADIGM 193**,** 193–203 (Thomas Blass ed., 2009).

[16] Say, for example, they usually accepted a lower standard of living for many years and died leaving no heirs and never having spent much of their wealth.

been usually thought to be a government responsibility and treated as such. The explicit justification made for state involvement in this area, when one is given, is usually national security.[17] The implicit assumption is that in a world where airlines, airports, and consumers were left to work out what kinds of precautions to take against the dangers of terrorism and mentally unbalanced individuals, the market would provide a level of security that was insufficient. Government, therefore, intervenes in order to engage in paternalism or prevent externalities to the wider society.

To the extent that the TSA regime is based on a theory of paternalism, the regulations are implicitly supported by a psychological theory that says that people underestimate the risks of terrorist attacks in the air and therefore demand too little security. The problem is not the use of behavioral assumptions, but the fact that in this policy area, empirical findings cut in the other direction. People overestimate the risks of death from both terrorism and flying, and will, to the extent that they are irrational, demand too much airline safety.

The issue of potential externalities resulting from airline hijackings complicates the picture. After all, the vast majority of people who died in the September 11 attacks were not airplane passengers; they were citizens not privy to the relationship between airline consumers and producers. Also, terrorist attacks tend to have large economic and even geopolitical consequences. I hope to show, however, that in a private market people would likely demand so much excessive airline security that the potential for significant externalities is quite small, a point I address directly in Part III. In today's post-9/11 world, the odds of terrorists being once again able to fly hijacked airplanes into buildings are quite miniscule. Furthermore, the problem of externalities can be dealt with through government regulations short of the all-encompassing regime we currently have.

There are a number of cognitive biases that behaviorists have emphasized. For our purposes, the relevant shortcoming in decision-making is the fact that human beings have bounded

[17] *See, e.g.*, *About TSA*, TRANSP. SECURITY ADMIN., http://www.tsa.gov/about-tsa (last visited May 10, 2013).

rationality, which involves an inaccurate perception of risks.[18] Behaviorists occasionally recommend that, to counter this problem, government should, for example, require information disclosure. When people cannot be trusted to make good use of the relevant statistics, the state may take measures to counteract the over-optimism bias and other cognitive shortcomings that prevent even informed actors from behaving in their own best interests.[19] Applying this logic to the area of airline security means that if the data showed that people went too far in discounting the possibility of falling victim to a terrorist attack while traveling on an airplane, we may expect individuals to irrationally choose low prices over an adequate level of safety. A behaviorist might therefore be in favor of keeping in place the TSA-mandated procedures we have today or at least forcing the airlines to meet certain security requirements. Alternatively, if the over-optimism bias does not apply to the field of airline security, then we may favor letting the market decide the proper balance between convenience and affordability on one side and safety on the other.

In the future, lessons from this examination should be applied to other areas of the law. It is wrong to assume that irrational consumers are always in need of more regulation. Rather, there may be times when they have brought their biases into the political realm and demanded restrictions on market behavior beyond what is optimal. Once the machineries of regulation begin to run their course, biases of policy makers and the public may interact in ways that only make the original problem of excessive demand for government action worse.

III. FLYING AND TERRORISM: PERCEPTIONS AND REALITY

In the behavioral law and economics literature, there are two lines of reasoning used to arrive at policy recommendations. First, one shows that under laboratory conditions, people do not behave rationally in the traditional sense of the word; instead, they exhibit systematic biases. Then, the author takes the burden of trying to demonstrate that individuals behave in a similarly biased manner under real world market conditions. If the systematic bias observed in the laboratory matches the tilt of behavior under real

[18] Jolls, Sunstein & Thaler, *supra* note 2, at 1477–78.
[19] *Id.* at 1533–37.

world circumstances, then the implication is that we can design better public policy by taking that bias into account and to some extent correcting for it.

My methodology is similar. First, in order to demonstrate the biases I am arguing for in theory, I use surveys on risk perception. Both polling data and experimental results are compelling to the extent that the findings are robust and approximate real world conditions, and they can be validated via matching their results to how we see people behave when they are going about their lives. I show that the fear people have of terrorism and flying are both disproportionate to the actual risks involved, and explain the heuristics that cause this underlying irrationality. I go on to argue that by any reasonable measure of cost-benefit analysis, government has gone too far in trying to protect people from terrorists and plane crashes, and that the same can be said about the area of airline security, which is where these two kinds of fears intersect. Unlike most of the behavioral law and economics literature, I use an analysis of the political markets, rather than economic markets, to test the question of whether the theoretical irrationality found in experiments and surveys translates as predicted into real-world behavior. This is necessary because of the long government history of regulating airline safety and security. Although the pre-9/11 era allowed much more consumer choice than we have today, there has never been anything close to free market in airline security.

A. Irrational Fears

Few activities are safer than flying. The low accident rate is reflected in the finding that there are only 2.5 incidents per million flying hours.[20] When accidents do happen, people often survive: no more than 8% of people involved in such flying incidents are fatally injured.[21] Some statisticians have argued that flying is safer than riding in a train or car, or even sitting at home.[22] Despite this,

[20] Margaret Oakes & Robert Bor, *The Psychology of Fear of Flying (Part I): A Critical Evaluation of Current Perspectives on the Nature, Prevalence and Etiology of Fear of Flying*, 8 TRAVEL MED. & INFECTIOUS DISEASE 327, 327 (2010).
[21] *Id.*
[22] *Id.*

fear of flying is widespread. According to a study commissioned by Boeing, 17% of American adults answered in the affirmative when asked if they were afraid of flying.[23] Other researchers have reported prevalence rates as high as 40%.[24] Even before there were widespread fears of terrorism, the public and regulatory pressure to ensure airline safety was intense. An editor of a magazine specializing in the topic has said that "[n]o industry is more comprehensively overviewed as aviation," with Boeing reporting about 2,000 incidents a year to regulators.[25] For an activity as safe as flying, all of this has the markings of overregulation.

In a world with perfectly rational actors, consumers would perceive risk accurately and their levels of fear would be reflected in the precautions taken by consumers and producers and, consequently, in the prices of goods and services. We should expect consistency across different areas of activity. For example, if people are willing to pay X amount to reduce the risk of dying in a car accident by a certain percentage, then they should show a willingness to pay the same for a similar level of increased safety while riding in trains or flying in airplanes.[26] But according to the results of one study, individuals were found to be willing to pay twice as much for security in an airplane as they would be for the same level of safety in a taxicab.[27]

The story with terrorism is a similar one. One estimate puts the risk of an American dying in any given year from a terrorist attack at 1 in 5 million.[28] To put this number in perspective, the risk of dying in a car accident in any given year is 1 in 7,000,[29] and

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[23] *Id.* at 333.
[24] *Id.* at 332.
[25] Nicola Clark, *Public Perception of Fleet Safety Is a Challenge for the Airline Industry*, N.Y. TIMES, Feb. 29, 2012, at B3.
[26] Assuming that dying in one kind of accident is no better or worse than dying in any other, taking into account pain and suffering and other potential factors, such as, for example, pain to the surviving family members. But if dying in an airplane crash does not actually involve more physical pain than dying in another kind of transportation accident, but simply "feels" worse to those about to perish and their loved ones learning of the events, then that can also be considered a form of irrationality.
[27] Fredrik Carlsson, Olof Johansson-Stenman & Peter Martinsson, *Is Transport Safety More Valuable in the Air?*, 28 J. RISK & UNCERTAINTY 147, 159 (2004).
[28] LEVITT & DUBNER, *supra* note 6, at 65.
[29] James N. Breckenridge & Phillip G. Zimbardo, *The Strategy of Terrorism and*

when the federal government regulates pollutants it generally refuses to act unless the risk of annual death is higher than 1 in 700,000.[30] Even if we imagine worst-case possibilities, it is difficult to imagine the circumstances under which terrorism becomes a serious problem relative to other potential sources of harm. It has been calculated that if airline travel was at its pre-9/11 level and one plane per month was attacked, the odds of encountering terrorists on any particular airplane would still be more than 1 in 500,000.[31] Therefore, if we used the same metric of risk perception regarding airline security that we use for environmental protection in order to protect people in the air from dying in a plane crash, government should not act at all unless terrorists are able to down at least one flight every six weeks absent regulations. Terrorists have never shown anything close to such capabilities. As seen below, the actual amount of terrorism that exists is practically—not quite literally, but close to—zero. Despite these facts, the public perceives terrorism as a serious threat and seems to vote and act accordingly. According to CNN exit poll data from the 2004 American Presidential Election, for example, 19% of voters named terrorism as their most important issue and, of that group, 86% supported the reelection of George W. Bush.[32]

One of the main mechanisms behind these irrationalities in risk perception is the availability heuristic, a concept which says that people are more likely to fear events that are more dramatic, salient, and easy to remember.[33] Naturally, plane crashes and terrorist attacks tend to make the news, while the many more numerous deaths resulting from cancer or car accidents do not. Also, people react disproportionately to risks that are unfamiliar

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the Psychology of Mass-Mediated Fear, *in* PSYCHOLOGY OF TERRORISM 116, 120 (Bruce Michael Bonger, ed., 2007) (citation omitted).

[30] JOHN MUELLER & MARK G. STEWART, TERROR, SECURITY, AND MONEY: BALANCING THE RISKS, BENEFITS, AND COSTS OF HOMELAND SECURITY 49 (2011).

[31] Breckenridge & Zimbardo, *supra* note 29, at 120.

[32] David W. Moore, *Moral Values Important in the 2004 Exit Polls*, GALLUP (Dec. 7, 2004), http://www.gallup.com/poll/14275/moral-values-important-2004-exit-polls.aspx.

[33] Lennart Sjöberg & Elisabeth Engelberg, *Risk Perception and Movies: A Study of Availability as a Factor in Risk Perception*, 30 RISK ANALYSIS 95, 95 (2010).

and difficult to control.[34] The novelty of the 9/11 attacks was stressed by many commentators, and after more than a decade—despite no attack that has come anywhere near the original in magnitude—pronouncements that we are living in a "post 9/11 world" remain common.[35] The fact that people can control their cars while they must rely on others to navigate the skies safely contributes to the view that flying is more dangerous than it really is. And because terrorism, by its very nature, strikes randomly, people fear such attacks more than they rationally should.

Similarly, when thinking about the possibility of a catastrophic event, individuals engage in probability neglect, meaning that they focus on the negative results of a potential outcome without carefully considering the probability of it coming about.[36] Sunstein finds that this cognitive bias is especially pronounced when thinking about an emotional issue like terrorism.[37] Probability neglect can be seen in a thorough review of government reports on homeland security measures and popular works on terrorism.[38] As observers have pointed out, terrorists do not hope to achieve their goals directly through the amount of death and destruction caused. Instead, they hope to exploit cognitive biases in order to set in motion a chain of events, including an overreaction from the target society, that eventually moves them closer to the accomplishment of their aims.[39]

Finally, there is another special quirk of the human mind, one rooted in our evolutionary history, that makes us especially prone to be afraid of air travel. As creatures that cannot fly, nature has, for obvious reasons, equipped us with a fear of heights.[40] In

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[34] Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121, 121–22 (2003).
[35] *See, e.g.*, Joe Henderson, *In Post 9/11 World, Big Brother Has His Place*, TAMPA TRIB. (Apr. 20, 2013), http://tbo.com/list/news-columns/henderson-boston-has-proved-value-of-cameras-b82480769z1.
[36] Sunstein, *supra* note 34, at 122–29.
[37] *Id.*
[38] MUELLER & STEWART, *supra* note 30, at 13–20.
[39] Breckenridge & Zimbardo, *supra* note 29, at 117 ("[Terrorist] strategy is critically dependent upon the strategic benefits of inciting a perception of vulnerability that far exceeds realistic dangers . . . .").
[40] Kathy Behrendt, *A Special Way of Being of Afraid*, 23 PHIL. PSYCH. 669, 675–76 (2010).

today's world where being 30,000 feet in the air is usually safer than being on the ground, our reason and knowledge about statistics struggle against intuitions shaped over millions of years. The fact that so many people regularly travel by air while others are overcome by irrational fear shows that, in each situation, the part of our nature that triumphs depends on the individual and circumstances involved.

B. Real World Implications

The level of irrational fear people have regarding terrorism and flying is reflected in the way that political markets have regulated airline safety. Prior to the September 11 attacks, airlines and airports held most of the responsibility for providing security.[41] The federal government provided some regulations, such as the criminalization of bringing firearms or explosives onto an aircraft.[42] However, compared to the regime adopted in the early 2000s, the federal government generally allowed providers and consumers to balance security and convenience as they saw fit.[43] Shortly after the 9/11 attacks, however, President Bush signed the Aviation and Transportation Security Act (ATSA).[44] The bill made two main changes to airline security. By the end of 2002, the federal government was to take control over the screening of passengers, and the law mandated that all bags being transported on commercial airlines be checked.[45] Responsibility for administrating these changes was put in the hands of the TSA.[46]

Whether or not individuals agree with all the methods adopted by the TSA for preventing terrorism, the idea that the government has a large role to play in airline security mostly goes unquestioned. Legal scholarship on post-9/11 airline security has, like discussion in the political arena, assumed that some new mandatory regulations were justified as a response to terrorism.[47]

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[41] Kent C. Krause, *Putting the Transportation Security Administration in Historical Context*, 68 J. AIR L. & COM. 233, 235–36 (2003).
[42] 49 U.S.C. § 46505.
[43] Krause, *supra* note 41, at 242–43, 247–49.
[44] Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597 (codified as amended in scattered sections of 49 U.S.C.).
[45] *Id.* § 101.
[46] *Id.*
[47] *See, e.g.*, Krause, *supra* note 41, at 242-43 (writing that "[t]he advent of the

Economists, however, have raised questions about the costs of such measures and the incentives of the state to overvalue safety at the expense of other considerations.[48]

John Mueller and Mark Stewart have shown that the United States spent too much in trying to prevent terrorism in the decade after 9/11. They do so while making several assumptions that bias their analysis towards finding that current measures are in fact cost-effective. Importantly, they consider the economic costs of terrorism and, using methods widely accepted in cost-benefit analyses of government regulation, begin with an unremarkable estimate of $6.5 million value per human life.[49] The United States—through its private sector and federal, state, and local governments—spent in the ten years after the 9/11 attacks $1 trillion above the pre-9/11 baseline on preventing terrorism, if opportunity costs are included.[50] Using standard methods of cost-benefit analysis, in order to be justified these new measures would have needed to prevent either one September 11 attack every two years, or slightly more than 3 smaller attacks that kill dozens of people *a day*.[51]

The idea that new anti-terrorism measures have been this effective is far-fetched. The attack of September 11 was an extreme outlier, both in number of lives lost and financial cost. The events of that day killed more people than all transnational deaths due to terrorism from 1988 through 2000.[52] As the event was unique compared to what happened before and after, it is unlikely that new security measures prevented one such attack every two years. This is especially implausible when we consider the fact that after the September 11 attacks, the biggest obstacles to a repeat of the incident are arguably the relatively inexpensive precaution of reinforced cockpit doors and increased passenger and crew

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suicide hijacker required a comprehensive change to the historical policy of cooperation and acquiescence" between the airline industry and the federal government); Paul Stephen Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 COLUM. J. TRANSNAT'L L. 649, 727–28 (2002-2003).

[48] *See* Cletus Coughlin et al., *Aviation Security and Terrorism: A Review of the Economic Issues*, 84 FED. RES. BANK OF ST. LOUIS REV. 9, (2002).

[49] MUELLER & STEWART, *supra* note 30, at 56–65.

[50] *Id.* at 1–5.

[51] *Id.* at 81–86.

[52] *Id.* at 141–42.

vigilance, as seen in the cases of the overpowering of the shoe bomber, underwear bomber, and hijackers on United Airlines Flight 83.[53] Mueller and Stewart also analyze the risks of other kinds of major terrorist attacks including the use of nuclear weapons in an American city, and find that, considering the low probabilities involved, the post-9/11 increase in amount spent on preventing these kinds of catastrophes is, like other forms of anti-terrorism spending, unlikely to be cost-justified.[54]

The country appears to have suffered much more from the overreaction to terrorism than it has from any actual attack. People have changed their behavior in response to terrorism in ways that they would not have for threats that are much more likely and common. It took three years for airline travel to return to pre-9/11 levels.[55] Between October and December 2001, one analysis found an extra 1,000 traffic deaths on the road as some Americans decided to drive rather than fly.[56] Even as fears of terrorism have subsided, extra measures taken by the federal government to make people safer have kept them away from airports. And because driving is more dangerous than flying, new airline security measures still lead to an extra 500 road fatalities per year.[57]

Between 2001 and 2008, no less than 228 people were prosecuted for terrorism in the United States.[58] As of February 2013, John Mueller has elsewhere documented 52 cases of alleged or successful terrorism by Islamic extremists in the United States since the 9/11 attacks.[59] Of those incidents, only 7 plots were actually executed in some form, meaning that the terrorist caused damage or actually made an attempt, while the rest were allegedly

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[53] *Id.* at 138–47.
[54] *Id.* at 66–72.
[55] Breckenridge & Zimbardo, *supra* note 29, at 120.
[56] David Ropeik, *Risk Communication and Non-Linearity*, 28 HUM. & EXPERIMENTAL TOXICOLOGY 7, 8 (2009).
[57] MUELLER & STEWART, *supra* note 30, at 148.
[58] Jon Sherman, *"A Person Otherwise Innocent": Policing Entrapment in Preventive, Undercover Counterterrorism Investigations*, 11 U. PA. J. CONST. L. 1475, 1476 (2008-2009).
[59] *Terrorism Since 9/11: The American Cases*, OHIO ST. U., http://politicalscience.osu.edu/faculty/jmueller/since.html (last visited May 14, 2013).

prevented from coming to fruition by law enforcement.[60] Those 7 successful cases resulted in only 16 total deaths; the numbers would increase to 8 incidents and 20 deaths if the list were to be expanded to take into account the events surrounding the Boston Marathon in April 2013.[61] For the sake of comparison, if we assume that all terrorist plots that the government claimed to have foiled between 2001 and 2007 would have been successful, they would have lead to as many as 1,500 deaths total.[62] Such a ratio should make us suspicious: at least 75 people directly saved by law enforcement disrupting plots for every individual killed by actual terrorists.[63] Considering that dangerous weapons are readily available and the potential number of targets in this country is infinite, this seems very implausible. For the sake of comparison, any anti-crime initiative that boasted a reduction rate of close to 99% would be met with intense skepticism, especially if, as in the case of terrorism, potential perpetrators were thought to be widely dispersed, suicidal, and indifferent to how they caused widespread fear and destruction.

These common sense intuitions have been confirmed by an examination of individual case histories of terrorist plots allegedly disrupted by the government. Wadie Said has delved into the court records of eight cases of the "preventive prosecution of terrorists—arrests and prosecutions that occur before any dangerous plot can

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[60] The plots executed are numbers 1, 4, 17, 26, 32, 33, 34 on the website.

[61] From Mueller's list, the incidents resulting in death are: two in a 2002 shooting at an El Al ticket counter at LAX (number 4 on Mueller's list); one at a 2009 shooting at a military recruitment center in Little Rock (26); and thirteen at the military base in Fort Hood, Texas in 2009 (32). As noted in the text, the total number of Americans killed by Islamic extremists in the post-9/11 era increases to twenty when one includes the four dead in the April 2013 Boston Marathon attack and its aftermath. *See also* Jess Bidgood, *Older Brother Died of Gunshot Wounds and Blunt Trauma, Death Certificate Says*, N.Y. TIMES, May 4, 2013, at A20. As indicated in the text, that incident is not currently included in Mueller's database.

[62] MUELLER & STEWART, *supra* note 30, at 46, 53–54.

[63] The 75-1 ratio is biased in the direction of finding the opposite conclusion because deaths as a result of terrorism are taken from 2001 to the present, while the number of lives allegedly saved by the government does not account for any incidents past 2007. In other words, if an estimate was also provided for the number of deaths allegedly prevented by the federal government since 2007, the supposed "success rate" of counter-terrorism efforts would be even higher. *Id.* at 43-44.

come to fruition."[64] Each incident that he examined came from the post-9/11 era and resulted in convictions. The cases tend to show a similar pattern. First, informants would make contact with impressionable, sometimes severely mentally ill, individuals. The informants would then put pressure on these individuals until they agreed to participate in plots that they never would have thought of on their own, and involving weapons they never have had access to.[65] Thus, the total number of terrorists in the United States appears to be close to zero. However, even if we accept that all alleged post-9/11 plots would have come to fruition if not for the actions of law enforcement, and that the post-9/11 extra $1 trillion spent on anti-terrorist measures was necessary for these disruptions—two extremely implausible assumptions granted only for the sake of argument—the United States has massively overspent in order to prevent new attacks.

Mueller and Stewart focus on airline security in particular, analyzing the cost effectiveness of post-9/11 measures mandated by the government under a range of reasonable assumptions involving likely benefits in safety. In 2003, the FAA required 6,000 airplanes to install hardened cockpit doors for a total cost of around $40 million per year over ten years. Mueller and Stewart find that this measure is likely to have been justified.[66] Putting federal air marshals on flights and the installation of fully body scanners, or advanced image technologies (AIT), however, fail any reasonable cost-benefit analysis.[67] As with all their calculations, the authors include the potential externalities resulting from successful acts of terrorism, which usually dwarf the estimates of direct harms in lives lost and property destruction.

IV. POLICY DISCUSSION

The literature on the perception of risks and how it manifests in the political sphere has clear implications for public policy. This Part explains why airline security should be privatized, or at least scaled back towards pre-9/11 regulation

[64] Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687, 715 (2010).
[65] *Id.* at 715–32.
[66] MUELLER & STEWART, *supra* note 30, at 139, 145–47.
[67] *Id.* at 144, 147–48.

levels. In the context of the discussion, I will address two important factors relating to government regulation of airline security. First, up to this point I have referred to the fear that individuals have of terrorism and flying as irrational, without recognizing the social good involved in creating less fear, even when the underlying concern itself does not have a reasonable statistical basis. I also acknowledge the fact that airline consumers and producers are not the only parties with interests potentially relevant to their market transactions. As the events of September 11 reminded us, attacks on airliners could have significant consequences for the wider society. Both these points are dealt with throughout the discussion that follows.

A. The Case for Pre-9/11 Policy in a Post-9/11 World

As Part II has shown, if all we are worried about is preventing airline customers from dying in a crash, then private markets should be sufficient to meet this potential danger. This is because, compared to other risks, individuals tend to have fears about terrorism and flying that are disproportionate to the actual probabilities involved. Therefore, one could imagine a world where different kinds of airline security regimes proliferated, with customers being able to choose among them based on their levels of risk tolerance.

Arguably, "security theater" can be a social good because, while not actually making people much safer, it allows them to avoid panic and can even lessen demand for much costlier measures.[68] Yet this is no reason for government intervention as long as markets allowed airliners to implement measures that are at least as intrusive as those of the TSA.[69] The problem with having the government regulate the matter is that it forces everyone to

[68] Benjamin H. Friedman, *Managing Fear: The Politics of Homeland Security*, 126 POL. SCI. Q. 77, 104 (2011).

[69] This is ignoring the fear people may have of being the victims of a 9/11-like attack while going about their business in a skyscraper or elsewhere. However, it seems unlikely that many people have such worries and, even if they did as argued below, policy makers would be wise to put resources towards providing the public with more accurate assessments of the risks of terrorism. This is especially true when one considers the alternative, which is to continue to exacerbate irrational fears and seek the impossible goal of reducing the rate of terrorism from virtually zero to literally zero.

accept standards demanded by a fearful and fundamentally irrational majority.

The case for market choice is strongest when societal preferences vary widely. That seems to be the case with regards to airline security. After the September 11 attacks, but before the new TSA regulations were implemented, many avoided the airports out of fear of terrorist attacks.[70] Yet as the security measures mandated by the ATSA were later implemented, many chose to drive rather than fly because of the invasiveness and inconveniences involved in getting on an airplane.[71] Since driving is by most measures more dangerous than flying, this kind of substitution is undesirable and ends up causing more deaths than terrorism itself. A more privatized system would allow customers to choose their level of security, give them a more pleasant experience, and even save many of their lives.

The large differences in fear can be seen in the public reaction to the installation of AIT scanners at airports after the attempted underwear bombing on Christmas 2009. As flyers were now mandated to either go through a scanner that revealed their private areas or otherwise undergo an intrusive pat-down, many prominent public figures claimed that they would stop flying, and the media ran stories about fights between passengers and TSA agents across the country.[72] A casual reader of the news would have had the impression that the new security measures were widely unpopular. In fact, a 2010 poll found that AIT scanners were supported by 80% of the public.[73] Decisions that may be supported by most people but are strongly disfavored by others are those that should be left to private markets whenever possible, as

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[70] *See supra* notes 55–57 and accompanying text.
[71] *Id.*
[72] *See* Ashley Halsey III, *TSA to Pull Revealing Scanners from Airports*, WASH. POST (Jan. 18, 2013), http://articles.washingtonpost.com/2013-01-18/local/36409626_1_millimeter-wave-scanners-administrator-john-s-pistole-full-body-scanners; Andrea Stone, *Jesse Ventura No Longer Flies, Thanks To Transportation Security Administration*, HUFFINGTON POST (June 13, 2012, 12:05 PM), http://www.huffingtonpost.com/2012/06/13/jesse-ventura-tsa_n_1593114.html.
[73] Stephanie Condon, *Poll: 4 in 5 Support Full-Body Airport Scanners*, CBS NEWS (Nov. 15, 2010, 6:56 PM), http://www.cbsnews.com/8301-503544_162-20022876-503544.html.

mandating one standard for all is going to leave many worse off.

My arguments thus far have ignored other benefits of a free market in airline security.[74] But government control over passenger screening has caused incidents that would be unthinkable in a private market setting. Especially since the attack by the underwear bomber, the TSA has embarrassed passengers in a way that can only be explained by a combination of the perverse political incentives involved and simple government incompetence. ABC News has reported on what a humiliating experience going to the airport has become for many disabled Americans.

> There's already been outrage over the TSA agent who asked a Charlotte, N.C., woman who survived breast cancer to remove a prosthetic from inside her bra. There was also a bladder cancer survivor from Lansing, Mich., who said he was soaked in his own urine when a TSA agent's pat-down ruptured the seal on his urostomy bag.[75]

Despite government officials expressing regret over such incidents, less than two months later ABC reported a story under the headline "TSA Apologizes for Traumatizing Disabled Toddler."[76] These kinds of occurrences are illuminating as they involve not only instances of too much security, but show the TSA wasting time and resources on measures that no rational person could believe lead to enhanced safety. While such intrusive

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[74] For example, TSA employees are now unionized, and many critics argue that this makes them more expensive and less able to respond flexibly to new security threats. *See* Daniel DiSalvo, *The Trouble with Public Sector Unions*, 5 NAT'L AFF. 3, 3, 5, 8 (2010); *Screeners for T.S.A. Select Union*, N.Y. TIMES, June 24, 2011, at B4.

[75] Jane E. Allen, *Prosthetics Become Source of Shame at Airport Screenings*, ABC NEWS (Nov. 24, 2010), http://abcnews.go.com/Health/Depression/tsa-medical-humiliations-extra-pain-airports-people-prosthetic/story?id=12227882#.UWLReBn3jDk. *See also* Todd Starnes, *TSA Humiliates Injured Marine*, TOWNHALL.COM (Mar. 19, 2013), http://townhall.com/columnists/toddstarnes/2013/03/19/tsa-humiliates-injured-marine-n1538626.

[76] Gio Benitez, *TSA Apologizes for Traumatizing Disabled Toddler*, ABC NEWS (Feb. 21, 2013, 8:55 PM), http://abcnews.go.com/blogs/lifestyle/2013/02/tsa-apologizes-for-traumatizing-disabled-toddler/.

procedures may or may not be justified if they actually prevented attacks, the odds of the individuals searched in these incidents actually being terrorists are for all practical purposes zero.

The case for the privatization of airline security is strong enough when we assume that the government can be just as competent as the private sector in providing the right balance between security and safety, with the only relevant policy question being how much security is necessary. Thinking about the issue from a rational choice perspective, however, leads to the conclusion that the losses incurred by current regulations go beyond simply getting the balance wrong. It is likely that, with the TSA, we have ended up with measures that not only threaten civil liberties, but are, compared to what they replaced, both more costly to administer and less effective.

This does not mean that government does not have some advantages over private markets. The most obvious is its ability to gather intelligence and be aware of specific security threats. However, there is no reason that these tools cannot be utilized through regulations that are much less extensive than those we have in place. For example, the law could require that airlines, among other things, use the federal no fly list and provide private providers of security with information about any new methods that terrorists might use. Cooperation between the public and private sector is commonplace across many areas of the law and it usually does not lead to measures that are as restrictive as those we have currently regulating airline security.

B. Externalities

Of course, another attack like that of 9/11 would not only affect airline providers and consumers. This is why some argue that government intervention in the airline security market is necessary in order to counteract potential negative externalities.[77] If left to their own devices, self-interested producers and consumers would agree to levels of protection below what is socially optimal. The events of September 11 are said to provide evidence that government regulations before the attacks were too

[77] Coughlin et al., *supra* note 48, at 11–16.

lax.[78]

The potential externalities resulting from an attack on airliners can be classified as direct and indirect. First, direct costs result when airplanes are used as weapons, as happened in the September 11 attacks. People who are not part of the contracting relationship between providers and consumers may die and suffer property damage. Second, even if no one, other than the passengers and crew, is killed after terrorists attack an airplane—as would have happened had the underwear or shoe bomber been successful—people may still refrain from flying and the economy could suffer due to, among other factors, decreased consumer and investor confidence. Also, because of heuristics that create our tendency to overreact to terrorism, the overreaction itself may have to figure into an analysis of the costs of a successful attack. The damages in the economic and political realm are interrelated. Investors are more likely to sell off their stocks after a terrorist attack because they are expecting everyone else to do the same and consumers to spend less. Government gives terrorism a disproportionate level of attention—relative to the costs in lives and direct economic damage—because they believe that the economy will suffer a shock if an attack succeeds. These kinds of harms are indirect because they result from the way people change their behavior in response to terrorist attacks; they are not inherent to such events themselves. Below, I discuss why concerns about either kind of externality should not stand in the way of moving towards the privatization of airline security.

1. The Unlikeliness of Another September 11 Attack

The odds of another successful September 11-like hijacking, where a plane is used as a weapon, are extremely low. Before the events of that day, passengers and crew were told to cooperate with hijackers, who usually landed the planes they took control of and then began negotiations with authorities.[79] Today, however, victims of hijackings know that terrorists likely have other plans in mind. This is why the passengers on United Airlines Flight 93 fought off their attackers and tried to regain control of

[78] *Id.*
[79] MUELLER & STEWART, *supra* note 30, at 139–40.

their plane. It was also this increase in public vigilance, not TSA regulations, that stopped both the shoe bomber and underwear bomber. While these terrorists were not trying to hijack their airplanes, the fact that they were not even able to successfully detonate their devices casts doubt on the idea that a group of people could, after the 9/11 attacks, be able to take over an airplane and maintain control of it long enough for it to be used as a weapon.

Even if we are not inclined to rely on increased public vigilance to prevent another attack like that of September 11 and the direct costs associated with it, government measures short of the all-encompassing TSA regime can push the likelihood of such an event even closer to zero. For example, Mueller and Stewart find mandatory reinforced cockpit doors to be one of the few cost-effective post-9/11 airline security requirements.[80] The government has also started allowing some airline crews to carry aboard guns.[81]

Because of the heuristics that lead people to disproportionately fear terrorist attacks in the air, private parties contracting with one another would agree to a level of airline security that is at least as high as what is socially optimal. Increased public vigilance alone makes a repeat of the September 11 attacks highly unlikely, negating any worries about direct externalities. To the extent to which we do not believe that this would be enough to head off the dangers involved, government regulations that fall quite short of what we have now should do enough to assuage the fears of even the most risk-averse policymaker.

2. The Indirect Costs of Terrorism: A Self-Fulfilling Prophecy

One may accept the idea that it is unlikely that more lax regulation of airline security is going to lead to widespread death and destruction but still maintain that the indirect costs of a successful terrorist attack in the sky are likely to be so high that private markets alone would not be able to provide a sufficient

[80] *See supra* note 66 and accompanying text.
[81] MUELLER & STEWART, *supra* note 30, at 140–41.

level of security. Mueller and Stewart estimate the direct costs of the 9/11 attacks to be $50 billion to in lives and property lost, while the indirect costs to the larger economy were as high as $150 billion.[82] Government overreaction to terrorism is also itself a potential cost that must be factored into any analysis. Therefore, it is better to overreact today, rather than risk a successful attack that leads to an even larger overreaction tomorrow.

There are a couple of problems with this kind of reasoning. First of all, the novelty of the 9/11 attacks may have led consumers, markets, and government to overreact in ways that are not likely to be repeated.[83] Recent history supports this view. After the failed underwear bomber attack, airline travel did not fall as it did after 9/11.[84] Our tendency to see newer dangers as more threatening than they really are may continue to make us less likely to overreact to new terrorist attacks.

More fundamentally, to put large amounts of resources to stop terrorism because of the potential for indirect costs goes against the way we usually think about the best ways of dealing with cognitive biases. Partisans of such a view would need to argue in favor of costly regulations that restrict individual liberty in order to cater to human irrationality, without the government even trying to counter public misperceptions through education. But the fear of overreaction to terrorism has the characteristics of a self-fulfilling prophecy. Since 2001, not only has the American government failed to educate the public about how unlikely terrorist threats are, but it has used rhetoric that has exacerbated its worst fears. To take one example, in 2003 FBI Director Robert Mueller announced that there were thousands of trained al-Qaida agents in the country organized into terrorist cells. Despite nothing ever coming of this, Mueller made a similar statement two years later.[85] Similarly, in 2007 CIA Director George Tenet told CBS News that a "second or a third wave" of terrorists had made it into the United States.[86] Throughout this time period, high-level officials in the federal government would regularly predict terrorist attacks in the near

[82] *Id.* at 59–61.
[83] *Id.* at 166–68; Friedman, *supra* note 68, at 85–86.
[84] MUELLER & STEWART, *supra* note 30, at 167.
[85] *Id.* at 176–77.
[86] *Id.* at 178.

future. While some of this might simply be the result of bad intelligence, the fact that those responsible for national security have been so completely wrong so often should lead us to take a more cynical view. Confirming this intuition, former Secretary of Homeland Security Tom Ridge has reported that he was pressured to raise the terrorist threat level in order to help President Bush win reelection in 2004.[87] All of this indicates that government officials have figured out the incentives they have to overhype the dangers that the American people face, whether or not they themselves suffer the same cognitive biases that make the general population overly concerned with terrorism.

In contrast, scholars have written about ways that the government and others in positions of power and influence can help convey more accurate judgments about uncertain dangers. Friedman points out that the phrase "fear mongering" shows that there is a societal norm against blowing threats out of proportion; this accusation can be used to shame policy makers and pundits that exaggerate threats.[88] Also, the increase in national unity that results when terrorists attack can be channeled into more productive uses; government officials and others should stress that terrorists hope to accomplish their goals through spreading fear.[89] Overreacting is exactly what we should want to avoid if we want to ensure that we do not "let them win."

Friedman also recommends that leaders concerned about the tendency to overreact to terrorism keep this problem in mind when designing institutions. The establishment of the Department of Homeland Security, for example, created a new bureaucratic establishment with an incentive to hype up the threat of terrorism.[90] In the last decades of the twentieth century, concerns about overregulation in the fields of safety and health led to demands that new measures be subject to cost-benefit analysis. In the realm of national security, however, this tool is underutilized

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[87] Rachel Weiner, *Tom Ridge: I Was Pressured To Raise Terror Alert To Help Bush Win*, HUFFINGTON POST (Sept. 20, 2009, 6:12 AM), http://www.huffingtonpost.com/2009/08/20/tom-ridge-i-was-pressured_n_264127.html.
[88] Friedman, *supra* note 68, at 97.
[89] *Id.* at 98.
[90] *Id.* at 93–94.

both as a means to judge individual proposals on their own merits and as a way to make political actors think more carefully about which regulations improve social welfare.[91] And while educating the public on such topic is often difficult, there is good evidence that incorrect risk perceptions can be countered through education and the influence of the mass media.[92]

Finally, arguments about indirect costs of successful terrorists attacks can cut in the other direction. Less widely acknowledged than the dangers stemming from a successful terrorist attack are the indirect costs that result from too much security and the stoking of fear. Among these are the person-lives lost as a result of wasted time and the deaths that are due to people driving to their destinations in order to avoid TSA screening.[93] The very same availability heuristic that makes people overestimate the risks of terrorism leads them to miss or ignore these kinds of indirect deaths. In contrast, politicians can be sure that a successful terrorist attack will receive around the clock news coverage. Government can be expected to ignore the larger number of road deaths, among other costs, that its policies cause because few will make the connection between these fatalities and excessive security measures.

Although there are natural tendencies that make us inclined to irrationally fear terrorism, and especially the possibility of it happening in the air, this does not mean that we are doomed to accept the idea that we are slaves to our passions. People have limited cognitive resources, time, and attention, and lack the incentives to become informed. They receive cues from political elites, especially when feeling vulnerable. Compare FDR's famous statement that "We have nothing to fear but fear itself," with Rudolph Giuliani hysterically stating that "The idea that you can have an acceptable level of terrorism is frightening."[94] Other Western governments have done a much better job of not taking the problem of the irrational fear of terrorism and making it

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[91] *Id.* at 98–101.
[92] PAUL SLOVIC, *Informing and Educating the Public about Risk*, *in* THE PERCEPTION OF RISK 182 (2000).
[93] *See supra* notes 6, 55–57 and accompanying text.
[94] Richard W. Stevenson, *Bush Faults Kerry on Terrorism Remarks*, N.Y. TIMES, Oct. 12, 2004, at A23.

worse.[95] Cost-benefit analyses of post-9/11 counterterrorism measures taken in the United Kingdom, Australia, and Canada show that, even if these countries have overreacted to the terrorist threat, they have done so to a much lesser extent than has the United States.[96] This helps prove that, even if we may have cognitive biases that cause certain irrational fears, political leadership can have a major affect on whether and how much this problem translates into unwise policy. Also, like the rhetoric and decisions of political leaders, institutions can have a tendency to either exacerbate disproportionate fears or provide a check on them, and recent history has shown that incentives biasing officials towards overregulation in other fields can be countered by encouraging the use of cost-benefit analysis as both a policy and political tool. While some kind of overreaction to the threat of terrorism may be inevitable, the degree to which society allows itself to be paralyzed by fear is highly indeterminate, as are the indirect costs of successful attacks.

V. CONCLUSION

Behaviorists have brought to light many of the irrational tendencies of human nature and discussed the implications these quirks have for public policy. Much of this sort of analysis brings to mind a situation where the citizen is analogous to an inebriated individual trying to get into his car and the government plays the role of the good friend who hides the keys. People eat too much and save too little; therefore, the state should "nudge" them towards making healthier nutritional choices and putting more of their earnings away for retirement.[97] Just as the drunk would thank his friend in the morning, people should be able to realize that softer forms of governmental coercion can be in their own best interests.

This image of the relationship between the citizen and an enlightened government is inherently plausible and has a good deal of empirical support in some contexts. At the same time, the state does not always behave like the sober friend who takes away the

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[95] *See infra* note 96.
[96] MUELLER & STEWART, *supra* note 30, at 87–93
[97] THALER & SUNSTEIN, *supra* note 7, at 1–16, 105–19.

keys. Sometimes, it acts like the advertiser who is able tap into the fears and insecurities of a population in order to get individuals to buy products that they cannot afford and did not want before. Or, to stay with the analogy of the drunk driver, the state may act like a bartender who does not know when to cut a customer off. Unlike the advertiser or bartender, however, government has the ability to force even those who do not want the product it is selling to buy it.

The question of which vision more accurately describes a policy area can only be answered on a case-by-case basis. The connection between a rational actor view and a normative preference for free market policy seems to a certain extent natural. Most, if not all, arguments for government paternalism become weaker as one's faith in the rationality and willpower of individuals increases. At the same time, the defender of the free market may argue, individuals bring their cognitive biases into the political realm. In that setting, any cognitive limitations are often exacerbated by the fact that, unlike in market transactions, individual voters know that they are very unlikely to sway policy and can therefore be "rationally ignorant."[98] Government agents similarly have little incentive to gain as much information as possible and use it wisely.

Common heuristics explain why, after the September 11 attacks, voters demanded a high level of airline security. The federal government has exacerbated this problem because of the fact that the very same heuristics at work in the minds of the citizenry can naturally be expected to have an effect on policy makers. Some officials also have public choice incentives to continue to provide high levels of security, and therefore to hype up the threat of terrorism rather than place it in its proper context.

If airline security were completely privatized, cognitive biases would not go away. Peace of mind is a good, and some people have more difficulty achieving it than others, even if they

[98] The theory of "rational irrationality" goes one step further and argues that in the confines of the voting booth rational citizens can indulge emotional preferences without having to worry about the consequences of doing so, since the odds that an individual vote will turn most elections one way or the other are effectively zero. *See* BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES 114–41 (2007).

can be made to understand at an intellectual level that some of their fears are irrational. Allowing airline security to go back to being more of a matter of consumer choice, rather than national security, would not take away the ability of more sensitive individuals to pay a premium to assuage their fears. But, in a world where it is highly unlikely that terrorists will once again be able to use a plane as a weapon, there is no reason why security measures disproportionate to the actual level of terrorist threat should be forced upon everyone who wishes to fly.

Behavioral law and economics has focused on protecting people from themselves in private settings. Understanding how cognitive biases work in political markets, on the other hand, is arguably even more important. People who save too little or eat too much bare most of the consequences of their choices. This is a small problem compared to the damage that can be done by those who demand that the entire society expend an enormous amount of resources and sacrifice civil liberties in the name of dealing with a relatively minor threat.

Government has already overinvested in preventing terrorism by the standards of any reasonable cost-benefit analysis. There are indications, however, that the problem has the potential to get much worse. The goal of reducing the terrorist threat to zero—something society does not consider plausible or, even necessarily desirable, in any other policy area—in the name of national security has no plausible end point. In the decade after the 9/11 attacks, the federal government began investing in the protection of bridges. At the same time, it has shown no interest in making the 600,000 highway overpasses across the country safer, despite the fact that they are no less important to the national economy or vulnerable to attack.[99] Despite the vividness of the September 11 attacks, air travel is not fundamentally different from other forms of transportation. The statutory mandate of the TSA extends not only to airline travel, but, as its name indicates, other modes of transportation as well.[100] Recently, there have been indications that the TSA is beginning to take a more active role in regulating other kinds of mass transit.[101] In the near future, there

[99] MUELLER & STEWART, *supra* note 30, at 98–100.
[100] 49 U.S.C. §§ 101, 114(d).
[101] Jen Quraishi, *Surprise! TSA Is Searching Your Car, Subway, Ferry, Bus,*

may be no option out there for those who need to travel long distances but find current policy to be too intrusive or inconvenient. The bombing at the Boston Marathon in April 2013 proved that just about anything could be a terrorist target. In the intermediate aftermath of the attack, Senator Saxby Chambliss recommended that the federal government take responsibility for protecting "soft targets" such as sporting events.[102] The same logic would apply to shopping malls and just about everywhere else where people gather.

Thus far, the types of airport screenings required by the TSA have not spread to other areas of American life. At the same time, much of public discourse on terrorism continues to demand zero risk. Few are satisfied with the fact that the statistical risk of death as a result of terrorism would not justify government intervention in any other policy area.[103] Luckily, attacks have been few and far between and limited in damage, which has reduced demands for even more costly measures. One shudders to think what kind of policies would be considered reasonable if terrorists were ever able to kill Americans at a rate 1/10th as high as traffic accidents or regular murderers.

While the issues surrounding terrorism and our reactions to it are important, the discussion in the Article has only been one application of the general principle that cognitive biases can be used to argue for less government intervention. There are perhaps

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AND Plane, MOTHER JONES (June 20, 2011, 2:15 PM), http://www.motherjones.com/mojo/2011/06/tsa-swarms-8000-bus-stations-public-transit-systems-yearly.

[102] Josh Rogin, *Saudi National No Longer 'Person of Interest' in Boston Bombings, No Other Suspects*, FOREIGN POL'Y (Apr. 16, 2013, 4:02 PM), http://thecable.foreignpolicy.com/posts/2013/04/16/saudi_national_no_longer_person_of_interest_in_boston_bombings_no_other_suspects.

[103] *See supra* notes 28–32 and accompanying text. Conservatives have recently criticized President Obama over their claim that, under his watch, "five jihadists have reached their targets in the United States." No context is usually provided for this indictment. Nor is there an acknowledgment that the number of deaths involved are miniscule compared to how many can result from poor choices regarding other issues that a president has control over. *See* Daniel Harper, *Congressman: 'Five Jihadists Have Reached Their Targets in the United States Under Barack Obama'*, WKLY. STANDARD (Apr. 24, 2013, 4:40 PM), http://www.weeklystandard.com/blogs/congressman-five-jihadists-have-reached-their-targets-united-states-under-barack-obama_719094.html.

many examples out there of people believing that they are acting prudently or out of a concern for the public good, when in fact they are being overly cautious or wasteful. Sometimes, government encourages this excessive conscientiousness. For example, consumer affairs organizations have counseled against purchasing extended warranties.[104] Similarly, some have pointed out that there is little evidence that recycling is actually good for the environment, but that has not stopped policymakers from encouraging and reinforcing the commonly held belief that it can help save the planet.[105]

An understanding of behavioral psychology and accepting that people are often irrational need not always lead to support for policies that are more paternalistic than what we are used to. Airline security is one area where cognitive biases have led to policies more cautious and intrusive than what is optimal. The question of the extent to which this lesson applies to other areas of the law can only be answered through future research.

[104] *See* Mark Huffman, *Five Reasons Not To Buy An Extended Warranty*, CONSUMER AFF. (Nov. 14, 2005), http://www.consumeraffairs.com/news04/2005/extended_warranty.html.
[105] *See* John Tierney, *Recycling Is Garbage*, N.Y. TIMES MAG., June 30, 1996, at 24, *available at http://www.nytimes.com/1996/06/30/magazine/recycling-is-garbage.html?pagewanted=all&src=pm.*

JACKSON'S ZONE OF TWILIGHT: HOW THE FOREIGN INTELLIGENCE SURVEILLANCE ACT IS ADJUDICATED IN FRONT OF THE FEDERAL COURTS

Amanda DiPaolo & Karen Petersen*

Abstract:
When adjudicating cases dealing with the war powers of the executive, the Supreme Court has a tendency to answer questions limiting individual liberties in terms of the separation of powers rather than the language found in the Bill of Rights. This article proposes that the lower courts also address such cases using the language found in the separation of powers, as best exemplified in Justice Robert Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*. Looking at electronic surveillance in regard to national security post-*Katz v. United States* up to and including cases that emerged from the USA PATRIOT Act amendments to the Foreign Intelligence Surveillance Act and the Terrorist Surveillance Program, we show how one issue-area that began in Jackson's zone of twilight emerged to a congressional legislative scheme that governs the lower courts in a way that the Fourth Amendment does not. This research reiterates that the requirements of probable cause and reasonableness required by the Fourth Amendment can be met by lower standards in cases dealing

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with national security and at times can be forgotten altogether in favor of statutory interpretation.

I. INTRODUCTION

During his confirmation hearings in early 2006, Justice Samuel Alito was asked how he would "weigh and evaluate the president's war powers under Article II to engage in electronic surveillance with the warrant required by congressional authority under Article I in legislating under the Foreign Intelligence Surveillance Act."[1] Alito answered that one might look to Justice Robert Jackson's framework presented in *Youngstown Sheet & Tube Co. v. Sawyer*.[2] Alito explained that Jackson placed executive actions into one of the following three categories:

> [W]here the president acts with explicit or implicit congressional approval; where the president acts and Congress has not expressed its view on the matter one way or the other; and the final category, where the president exercises executive power . . . in the face of explicit or implicit congressional opposition to it.[3]

Chief Justice John Roberts made a similar comment just three months earlier at his own confirmation hearings when he stated that Jackson's *Youngstown* concurrence "set the framework for consideration of questions of executive power in times of war and with respect to foreign affairs . . . ."[4] Neither Alito nor Roberts relied upon the constitutional amendments put in place to protect individual rights against the encroachment of liberty by the federal government.

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[1] *U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court*, WASH. POST (Jan. 10, 2006, 12:49 PM), http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011000781.html.
[2] *Id*. (Alito, J., summarizing Jackson, J., concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863 (1952)).
[3] *See id.*
[4] *Transcript: Day Two of the Roberts Confirmation Hearings*, WASH. POST (Sept. 13, 2005, 6:49 PM), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301525.html.

Jackson's concurrence to the *Youngstown* decision was the result of President Harry S. Truman nationalizing the steel mills on the eve of a nationwide workers strike. Truman claimed it was necessary to nationalize the steel mills because a work stoppage would be detrimental to the armed forces overseas fighting in the Korean War. The Supreme Court, however, held that unilaterally taking possession of the mills was enacting law, and "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[5]

Jackson's concurrence provides the framework used by Alito and Roberts that looks for cooperation between the elected branches of government when deciding the constitutionality of executive action. The framework's first prong notes that "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[6] While the courts will be most lenient in these situations, at times, even a governmental action where the Executive and Congress work together can be held unconstitutional. If executive action is curtailed by the courts "under these circumstances, it usually means that the Federal Government as an undivided whole lacks power."[7]

The second prong of Jackson's framework is where warrantless electronic surveillance originally found itself. The second prong sets out the framework for dealing with the Executive who "acts in absence of either a congressional grant or denial of authority."[8] The Executive "can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[9] If Congress does not legislate on an issue-area, it might "enable, if not invite, measures on independent presidential responsibility. In this area, any actual

[5] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).
[6] *Id.* at 635 (Jackson, J., concurring).
[7] *Id.* at 636-37.
[8] *Id.* at 637.
[9] *Id.*

test of power is likely to depend on the imperatives of events and contemporary imponderables, rather than on abstract theories of law."[10]

The third prong of Jackson's *Youngstown* framework is where the Executive "takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[11] The scope of Executive authority in regard to Article II powers as Commander-in-Chief has been of renewed interest since September 11, 2001. Jackson's framework notes that the federal courts will decide such cases based on statutory questions at play rather than a textual analysis of the Constitution.[12] It is reasonable to expect the judiciary to strike down as void actions by the government that seemingly limits civil rights that are protected by the Constitution.[13] The Supreme Court, however, has been less concerned with constitutional provisions when national security is at play.[14]

This article examines the evolution of wiretapping for national security purposes in front of the federal courts. Do the lower federal courts follow the same pattern as the Supreme Court in deciding cases involving the limitation of individual liberties for security issues? Because the Supreme Court is hesitant to decide Foreign Intelligence Surveillance Act (FISA) cases on the merits,[15] we examine electronic surveillance at the lower court level to determine if the same motivating factors to seek cooperation between the elected branches of government exist in lower court decision making.[16] While it is our contention that the lower courts,

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[10] *Id.*
[11] *Id.*
[12] *Id.* at 643.
[13] *Id.* at 645-46.
[14] AMANDA DIPAOLO, ZONES OF TWILIGHT: WARTIME PRESIDENTIAL POWERS AND FEDERAL COURT DECISION MAKING 199 (2010).
[15] Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783.
[16] United States v. Bin Laden, 126 F. Supp. 2d 264, 275-76 (2000) ("[T]here is presently no statutory basis for the issuance of a warrant to conduct searches abroad. In addition, existing warrant procedures and standards are simply not suitable for foreign intelligence searches." (citation omitted)).

like the Supreme Court, walk delicately when addressing issues of security versus rights by using a separation of powers framework in deciding such issues, we also examine if geography matters. Are there some circuits that are more willing to address these issues under constitutional considerations than others? Does it matter if the issue is decided when the Executive and Senate are controlled by Democrats or Republicans?

The second section of this article will look at pre-FISA cases to show how electronic surveillance was placed within the second prong of Jackson's framework before Congress took action in passing legislation. Next, we will examine federal court cases after the passage of FISA that concern national security. Finally, we will examine more recent cases dealing with the amendments to FISA after the terrorist attacks of September 11, 2001, with the passage of the USA PATRIOT Act and the amendments to FISA.[17]

II. ELECTRONIC SURVEILLANCE FOR NATIONAL SECURITY PURPOSES PRE-FISA

In 1967, the Supreme Court interpreted the Fourth Amendment to include electronic surveillance, though the decision did not end the debate in regard to national security. Justice Stewart Potter reversed the lower court decision when the Supreme Court held in *Katz v. United States* that phone conversations were subject to the protections of the Fourth Amendment.[18] The Court held that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."[19]

Though the decision meant that a warrant was required prior to government officials being authorized to conduct

[17] Uniting And Strengthening America By Providing Appropriate Tools Required To Intercept And Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107–56, 115 Stat. 272.
[18] Katz v. United States, 389 U.S. 347 (1967), *rev'd,* 369 F.2d 130 (9th Cir. 1966).
[19] *Id.* at 353.

electronic surveillance, the majority opinion references footnote 23 that "[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving national security is a question not presented by this case."[20] The government would contend that the Court implied in the footnote that the Fourth Amendment's warrant requirement to conduct electronic surveillance was not required when national security was at stake.[21]

Shortly after *Katz*, Congress passed the Omnibus Crime Control and Safe Streets Act.[22] Title III of the Act detailed steps to be followed to get a warrant for criminal investigation-related electronic surveillance.[23] The 1968 legislation states in section 2511(3) the Executive may hold authority to conduct warrantless electronic surveillance in defense of the nation from foreign attack.[24] While the courts did not interpret section 2511(3) to be a grant of authority, it was acknowledged that the constitutionality to wiretap without a warrant in some limited circumstances may fall within the Article II powers of the president.[25] Section 2511(3) states that "[n]othing contained in this chapter or in section 605 of the *Communications Act* of 1934 . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities."[26] In the name of national security, Congress decided to leave open a window for the Executive to conduct electronic surveillance without a warrant. As a result, several lower courts affirmed the position of the Executive and Congress.[27]

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[20] *Id.*
[21] *Id.* at 359-60 (citing Douglas, J., concurring).
[22] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90–351, 82 Stat. 197.
[23] *Id.*
[24] *Id.* § 2511(3).
[25] David Kenny, *The Vicarious Exclusionary Rule in California*, 24 STAN. L. REV. 947, 964 (1972).
[26] Omnibus Crime Control and Safe Streets Act of 1968 § 2511(3).
[27] *See also* United States v. Butenko, 318 F. Supp. 66, 73 (D.N.J. 1970); United States v. Clay, 430 F.2d 165, 171 (5th Cir. 1970), *rev'd*, 403 U.S. 698 (1972);

Cassius Clay, also famously known as Mohammad Ali, found himself in court after he refused to join the military after being drafted for service. Five conversations that he was a party to were recorded and heard by the FBI. Cassius Clay, however, was not the actual target of the surveillance. While four out of five conversations were admittedly illegal, as they were recorded without a warrant, the government refused to hand over the transcript for one of the five conversations because they believed the wiretap to be legal despite the lack of warrant as the conversation was related to national security. In *United States v. Clay*,[28] Judge Robert Ainsworth held it was not the right place for the federal courts to make decisions on national security matters due to its lack of information. Judge John Sirica echoed a similar sentiment in *United States v. Enten.*[29] Judge Sirica reasoned that "[I]t is the [E]xecutive, and not the [J]udiciary, which alone possesses both the expertise and the factual background to assess the reasonableness of such a surveillance."[30]

Whereas the lower courts initially deferred to the Executive when national security was at play, the federal judiciary eventually would be unwilling to do so when domestic groups posed what the government perceived to be a national security concern. In *United States v. Smith*,[31] the respondent was found guilty of unlawful possession of firearms. Evidence was collected through the wiretapping of phone calls without a warrant for national security purposes. Judge Warren Furgerson refers to *Brandenburg v. Ohio*[32] when he demarcated clearly between domestic and foreign threats and held "in the area of domestic political activity the government can act only in limited ways."[33] The court continued that a warrant was required in all cases of domestic security threats and no national security exemption existed for such groups.

United States v. Brown, 317 F. Supp. 531, 536 (E.D. La. 1970).

[28] United States v. Clay, 430 F.2d 165, 171 (5th Cir. 1970), *rev'd*, 91 S.Ct. 2068 (1971).

[29] United States v. Enten, 388 F. Supp. 97 (E.D. D.C. 1971).

[30] *Id*. at 98.

[31] United States v. Smith, 321 F. Supp. 424 (C.D. Ca. 1971).

[32] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[33] *Smith*, 321 F. Supp at 429.

The same year as the *Smith* decision, in a district court case in Michigan, three defendants charged with conspiracy to bomb the Central Intelligence Agency office in Michigan was heard before the district court.[34] In *United States v. Sinclair*, Judge Damon Keith held similarly to Judge Furgerson as he concluded that domestic groups are considered to be a danger to national security and should still received the protections of the Fourth Amendment in terms of a warrant being required for electronic surveillance.[35] The rationale as to why was simple. If the government started treating domestic organizations like unfriendly agents of foreign powers, the rights of the U.S. citizen could be under attack. "[T]he Government's argument is that a dissident domestic organization is akin to an unfriendly foreign power and must be dealt with in the same fashion. There is great danger in an argument of this nature for it strikes at the very constitutional privileges and immunities that are inherent in United States citizenship."[36] The government believed the wiretaps to be legal because the group was classified by the government to be a threat to national security. The wiretaps were used to "protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government."[37] The federal government hoped that the Omnibus Act's section 2511(3) would prove to be the decisive factor in the court's decision. The court, however, placed emphasis on the First Amendment rather than the separation of powers and held that protections of the Fourth Amendment were essential when the targets of government surveillance are individuals or groups that disagree politically with the government.

The Supreme Court granted certiorari and upheld the lower court decision, but rather than focusing on the rationale offered by the circuit court, Justice Powell placed emphasis on the separation of powers by deciding the case along statutory grounds, and more in line with Jackson's *Youngstown* concurrence. In *United States v. United States District Court*, Powell emphasized that no exemption to the Fourth Amendment existed for domestic security cases, but explained that Title III was a "comprehensive attempt by Congress

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[34] DIPAOLO, *supra* note 14, at 103.
[35] United States v. Sinclair, 321 F. Supp 1074, 1080 (E.D. Mich. 1971).
[36] *Id*. at 1079.
[37] H.L. POHLMAN, TERRORISM AND THE CONSTITUTION: THE POST-9/11 CASES 19 (2007).

to promote more effective control of crime while protecting the privacy of individual thought and expression."[38] Title III in no way was a grant of authority to the Executive to wiretap without a warrant in times when national security concerns would dictate it. Instead, Powell argued, Title III "[S]imply left [P]residential powers where it found them."[39] In congressional debates at the time, evidence for Powell's position is offered. Powell quotes Senator Philip Hart who argued that section 2511(3) says nothing more than: "[I]f the President has such power, then its exercise is in no way affected by [T]itle III."[40]

In paving the way for the Congress to pass FISA, Powell highlights that the procedures set up in Title III to obtain a warrant did not have to be the same standards required in national security cases. It was up to Congress to decide what standards could be set up that would satisfy the requirements of the Fourth Amendment.

United States v. United States District Court was the last time the Supreme Court decided a case on the merits of the Executive's authority to conduct warrantless electronic surveillance in regard to domestic security and has never weighed in on the issue of foreign intelligence gathering. The district and court of appeals have, however, made dozens of rulings on the issue. In terms of Jackson's *Youngstown* framework, both before and after the *Keith* ruling, the collection of foreign intelligence was left outside the realm of the Fourth Amendment requirements of obtaining a warrant. The courts deferred to the Executive because there was a lack of legislation on the issue that left warrantless wiretapping for foreign intelligence situations in the second prong of Jackson's framework inside the zone of twilight.

While domestic national security cases squarely required a warrant after the *Keith* decision, the trend of upholding Executive actions in regard to foreign intelligence gatherings continued until the passage of FISA in 1978. The Fifth Circuit Court of Appeals upheld a firearm violation in *United States v. Brown*[41] when statements of an American citizen were incidentally recorded

[38] United States v. United States District Court, 407 U.S. 297, 302 (1972).
[39] *Id.* at 303.
[40] *Id.* at 307.
[41] United States v. Brown, 484 F.2d 418 (5th Cir. 1973).

because of a warrantless wiretap that had been authorized by the Attorney General for foreign intelligence purposes. Judge Griffin Bell held that a warrant was required for domestic security issues, but "because of the President's constitutional duty to act for the United States in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs" a warrant was not required.[42]

Again, in *United States v. Butenko*, the conviction was upheld because Judge Arlin Adams reasoned that the warrantless electronic surveillance of a suspected spy was lawful, because it was to gather foreign intelligence.[43] In *United States v. Buck*, the court went so far as to hold that "[f]oreign security wiretaps are a recognized exception to the general warrant requirement and disclosure of wiretaps not involving illegal surveillance is within the trial court's discretion."[44]

In 1978, the same year that Congress passed FISA, the district court for the Eastern District of Virginia held in *United States v. Humphrey* that if the wiretap was for the collection of evidence to be used in domestic criminal investigations, a warrant would be required, but that no Fourth Amendment requirements applied if the surveillance was for foreign intelligence gathering.[45] One reason the court thought the judicial process should not tie the hands of the executive was that agents of foreign governments had financial resources and technological advancements that were more reaching and professional than an individual or domestic group. Another way of saying what the court eluded to in *Humphrey* was found in *United States v. Truong Dinh Hung* when the Fourth Circuit Court of Appeals held that making the executive get a warrant when trying to collect foreign intelligence will actually "unduly frustrate" his duty to defend the nation as commander in chief.[46] In fact, the court went on to sum up pre-FISA cases by noting that "[j]ust as the separation of powers in

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[42] *Id.* at 426.
[43] United States v. Butenko, 494 F.2d 593, 604 (3d Cir. 1974).
[44] United States v. Buck, 548 F.2d 871, 875 (9th Cir. 1977).
[45] United States v. Humphrey, 456 F. Supp 51 (E.D. Va. 1978), *aff'd in part, and remanded sub nom.* United States v. Troung Dinh Hung, 629 F.2d 908 (4th Cir. 1980).
[46] United States v. Truong Dinh Hung, 629 F.2d 908, 913 (4th Cir. 1980).

Keith forced the executive to recognize a judicial role when the President conducts domestic security surveillance, so the separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance."[47]

The courts continued to handle national security threats from domestic groups very differently than threats from foreign powers. In *Zweibon v. Mitchell*, sixteen individuals, members of the Jewish Defense League (JDL), were convicted for their role in various protests against the Soviet government.[48] The protests were conducted to bring awareness of the restrictive policies regarding Soviet Jewish immigration. The Soviet Union threatened retaliation on American interests as they blamed the American government for the attacks. Evidence against the JDL members was collected with the help of electronic surveillance, and conducted without a warrant. Because the government argued that there was a foreign component to the group, a warrant was not required under the *Keith* rationale. The district court was not prepared to limit the Executive. The DC Court of Appeals held differently because these were individuals in the United States without connection to a foreign power; and therefore, domestic rules applied, including a warrant being required for the surveillance. That said, however, a distinction between a domestic group and a group with foreign connections was made. In reversing the decision of the lower court,[49] Judge Wright pointed out that Title III left open the possibility of what sort of requirements would be required to obtain a warrant for cases dealing with national security, but the Act did require a warrant for such cases as no national security exemption was provided.[50]

Following the rulings in *Keith* and *Zweibon*, the possibility for a Fourth Amendment exemption for the Executive to conduct warrantless electronic surveillance for national security concerns was closed, and while Title III left open the possibility for the

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[47] *Id.* at 914.
[48] Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975).
[49] Zweibon v. Mitchell, 363 F. Supp. 936, 942 (D.D.C. 1973) *rev'd*, 516 F.2d 594 (D.C. Cir. 1975).
[50] Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975); *see* Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979).

Executive to conduct warrantless electronic surveillance when the targets of the surveillance are connected to foreign intelligence information, Congress would pass legislation to require judicial oversight in that regard, too.

Table 1: Electronic Surveillance Cases: Pre-FISA

Prong	Case	Year	Region*	Political Control**
1st prong	United States v. Clay, 430 F.2d 165, 171 (5th Cir. 1970).	1970	5	D
1st prong	United States v. Ente, 388 F. Supp. 97 (1971).	1971	0	R
Constitutional	United States v. Sinclair, 321 F. Supp. 1074 (1971).	1971	6	R
Constitutional	United States v. Smith, 321 F. Supp 424 (1971).	1971	9	R
3rd prong	United States v. United States District Court, 407 U.S. 297 (1972).	1972		M
1st prong	United States v. Brown, 484 F.2d 418 (5th Cir. 1973).	1973	5	D
1st prong	Zweibon v. Mitchell, 363 F. Supp. 936 (D.D.C. 1973).	1973	0	D
1st prong	United States v. Butenko, 494 F.2d 593 (3rd Cir. 1974).	1974	3	R
3rd prong	Zweibon v. Mitchell, 516 F.2d 594 (1975).	1975	2	R
1st prong	United States v. Buck, 548 F.2d 871 (9th Cir. 1977).	1977	9	M
Constitutional	United States v. Humphrey, 456 F. Supp 51 (E.D. Va. 1978).	1978	4	D

Region of the Circuit Court (0=D.C., 12=FISA); **D=Democratic, M=Mixed (Divided Government), R=Republican

Table 1 shows the cases prior to the passage of FISA, but after the *Katz* decision. The table includes the basis for the court's decision, Fourth Amendment or statutory concerns, which party controls the executive branch and Senate, and the circuit court region. In the Pre-FISA era, courts operating under republican controlled government hear 45% of the electronic surveillance cases and decide 60% of those cases based on the Jackson framework. During the period of democratic control, courts hear 36% of the cases and decide 75% of them based on Jackson. Only 27% of electronic surveillance cases are decided on constitutional grounds during the Pre-FISA era, which means that 73% of these cases are decided using statutory interpretation rather than constitutional concerns.

III. THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA)

The Foreign Intelligence Surveillance Act[51] was the result of a Senate committee[52] that did extensive research after conducting interviews with more than 800 officials. There were over 21 public meetings and over 200 executive meetings held.[53] The conclusion of the research was that the FBI and CIA conducted a massive amount of warrantless electronic surveillance using the justification that the surveillance being required for national security.[54] As a result, after over forty years of unchecked electronic surveillance for foreign intelligence gathering,[55] Congress enacted FISA.

FISA did what Title III failed to do; it placed judicial oversight for electronic in regard to foreign intelligence. FISA "would substitute a clear legislative authorization pursuant to statutory, not constitutional standards."[56] The Act was designed to allow the Executive to collect foreign intelligence information, not evidence that a crime had been or was about to be committed. The electronic surveillance must be authorized by a FISA order, issued by the law's newly created Foreign Intelligence Surveillance Court (FISC), rather than a traditional Fourth Amendment warrant. FISA's requirement that the Executive get a FISA order in effect repealed section 2511(3) in Title 18 of the 1968 Omnibus Act that stated nothing in the Communications Act of 1934 nor Title III,

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[51] There are four types of surveillance that are approved under FISA. While the focus of this paper is on electronic surveillance, the law also covers physical searches, the use of pen registers and trace devices, as well as orders to disclose tangible items. FISA, Pub. L. No. 95-511, 92 Stat. 1783 (2010).

[52] The Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (Church Committee), http://www.intelligence.senate.gov/churchcommittee.html.

[53] Lisa Graves, *The Right to Privacy in Light of Presidents' Programs: What Project MINARET's Admissions Reveal About Modern Surveillance of Americans*, 88 TEX. L. REV. 1855, 1866, 1904 (2010).

[54] POHLMAN, *supra* note 37, at 20.

[55] Bruce Fein, *Presidential Authority to Gather Foreign Intelligence*, 37 PRESIDENTIAL STUD. Q. 23, 26 (2007).

[56] *NSA III: War Time Executive Power and the FISA Court: Hearing Before the Senate Comm. on the Judiciary* (March 28, 2006) (testimony of David Kris, Senior Vice President, Time Warner, Inc.), *available at* http://www.judiciary.senate.gov/imo/media/doc/Kris%20Testimony%20032806.pdf.

which limited the constitutional power of the President to take necessary actions to protect the United States against attacks.

By repealing section 2511(3), the perceived national security exemption to the warrant requirement of the Fourth Amendment for the Executive was placed under the control of judicial oversight, even if the surveillance was for foreign intelligence to protect national security. In fact, FISA included an exclusivity clause in the Act, meaning that the procedures set up by Congress were the exclusive means to govern electronic surveillance to collect foreign intelligence information,[57] thus shutting the door to possible arguments claiming inherent powers of the Executive.[58]

While the Supreme Court has never weighed in on the constitutionality of FISA,[59] for more than 20 years, most lower federal court challenges dealt with the validity of the Act itself. In every instance, prior to the amendments to FISA in the *Patriot Act*, the district and the circuit courts concluded that "the provisions of FISA [are] 'reasonable both in relation to the legitimate need of the Government for intelligence information and the protected rights of our citizens'… and therefore compatible with the Fourth Amendment."[60]

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[57] 50 U.S.C. § 1804(a)(7) (2010).
[58] 18 U.S.C. § 2511(2)(f) (2008).
[59] Traditionally, cases that are appealed to the Supreme Court concerning the constitutionality of FISA have not been granted certiorari, in February 2013 the Supreme Court decided a case dealing with FISA but held that the respondents did not have Article III standing. Clapper v. Amnesty Int'l USA, 133 S.Ct. 1138 (2013).
[60] Another case that applied similar legal reasoning includes *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987*). See also* United States v. Nicholson, 955 F. Supp 588 (E.D. Va. 1997); United States v. Isa, 923 F.2d 1300 (8th Cir. 1991); United States v. Spanjol, 720 F. Supp. 55, 58 (E.D. Pa. 1989); United States v. Cavanagh, 807 F.2d 787, 790-92 (9th Cir. 1987); United States v. Ott, 827 F.2d 473 (9th Cir. 1987); United States v. Belfield, 692 F.2d 141, 148 (D.C. Cir. 1982); United States v. Ott, 637 F. Supp. 62 (E.D. Cal. 1986); In the Matter of Kevork, 788 F.2d 566 (9th Cir.1986); United States v. Duggan, 743 F.2d 59 (2d Cir. 1984); United States v. Falvey, 540 F. Supp. 1306 (E.D.N.Y. 1982); United States v. Megahey, 553 F. Supp. 1180 (E.D.N.Y. 1982) (questioned the validity of Congress passing the law not as a violation of the Fourth Amendment but rather the Executive's ability to conduct foreign affairs). Even after the passage of the amendments to FISA after 9/11, challenges to the constitutionality of FISA itself, without taking into consideration any of the

While the lower courts have upheld the validity of the Act itself, on occasion they have done so by answering the constitutional questions, rather than addressing solely statutory concerns. This could be seen as unexpected. However, when challenges to the validity of the Executive's actions under the Act arise, the lower courts held that the Congress established FISC to issue the orders, or warrants, and that was deemed enough to satisfy the Fourth Amendment's warrant requirement in regard to electronic surveillance. With the lower courts upholding FISA as a constitutional regulation of electronic surveillance, the courts have also maintained that the Act "did not intrude upon the President's undisputed right to conduct foreign affairs, but protected citizens and resident aliens within this country, as 'United States persons.'"[61]

When challenges to the Act questioned the constitutionality of specific clauses, again, the lower courts consistently held FISA was not a violation of the Fourth Amendment. In *United States v. Poser*,[62] the Court of Appeals for the Ninth Circuit faced the question as to whether or not the standard of probable cause required by FISA was sufficient to meet the warrant requirement of the Fourth Amendment. When George Posey was charged with violating the Comprehensive Anti-Apartheid Act[63] for selling technical manuals relating to military and commercial aircraft to South Africa, he tried to get evidence thrown out that had been submitted at trial. The evidence was collected with electronic surveillance sanctioned under a FISA order, not a traditional warrant. The argument did not rest upon whether or not he was an agent of a foreign power, as many other challenges to evidence collected from FISA in fact rest upon, but rather the way Congress had written the law itself was unconstitutional because the probable cause standard was listed as "clandestine intelligence

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amendments, continued to find their way to the courts. *See* United States v. Damrah, 621 F.3d 474 (6th Cir. 2005); United States v. Benkahla, 437 F. Supp. 2d 541 (E.D. Va. 2006); United States v. Ahmed, 1:06-cr-0147-WSD-GGB (N.D. Ga. 2009).

[61] United States v. Falvey, 540 F. Supp. 1306, 1312 (E.D.N.Y. 1982), *as explained in* ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

[62] United States v. Poser, 864 F.2d 1487 (9th Cir. 1989).

[63] Comprehensive Anti-Apartheid Act, Pub. L. 99-440, 100 Stat. 1086 (1986) (repealed by Pub. L. 103-149, 107 Stat. 1505 (1993)).

gathering activities" and "activities involve or may involve violating criminal statutes[,]"[64] which were simply too vague and overbroad to satisfy the Fourth Amendment's probable cause standard. The court declined to entertain the argument because Posey could not show that he was affected by the vague writing of the congressional law. Because the claim concerned potential violation of rights but not to Posey himself, the court would not decide his case based on the rights of others potentially being violated.[65]

When challenges to the constitutionality of FISA failed, arguments shifted to relying on the Executive's actions as not conforming to the requirements of FISA, thus placing the Executive at odds with congressional intent and, as stipulated in Jackson's *Youngstown* concurrence, at the weakest of its constitutional power in front of the courts. These challenges to the appropriate applicability of FISA have also gone in the Executive's favor. The lower federal courts see the Executive's actions as working within the FISA framework, thus working in the first prong of the Jackson framework suggesting that when the Executive and Congress are in harmony, the federal government is at its most powerful.

In *United States v. Megahey*, Gabriel Megahey and other defendants filed a motion to have evidence obtained through a FISA order suppressed because it was used for criminal investigations rather than foreign intelligence gathering.[66]

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[64] 864 F.2d at 1490.

[65] *See* United States v. Cavanagh, 807 F.2d 787 (9th Cir. 1987) (rejecting the argument that the probable cause requirement of the Fourth Amendment was not satisfied under the general terms of FISA, and that the FISC is not a neutral judicial body but rather another branch of the Executive. The court held that Congress granted explicit authorization for this sort of electronic surveillance by setting up the framework in FISA to obtain the foreign intelligence information). Furthermore, the court held that the Supreme Court has already acknowledged in *United States v. United States District Court*, 407 U.S. 297, 92 S.Ct. 2125 (1972), that "a different standard of probable cause may be compatible with the Fourth Amendment if it is reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens." As such, it was determined that the guidelines for obtaining an order to conduct electronic surveillance set up in FISA were reasonable.

[66] United States v. Megahey, 553 F. Supp. 1180 (E.D.N.Y. 1982), *aff'g* 729 F.2d 1444 (2d Cir. 1983), *aff'd sub nom.* U.S. v. Duggan, 743 F.2d 59 (2d Cir. 1984),

Megahey was charged with smuggling guns to the Irish Republican Army.[67] The court held that the FISA order was to obtain foreign intelligence rather than for collecting evidence of a crime.[68] The court concluded that probable cause was shown that "the target of the electronic surveillance [was] a foreign power or an agent of a foreign power; that each of the facilities or places at which the electronic surveillance [was] directed [was] being used, or [was] about to be used, by a foreign power or an agent of a foreign power."[69] Several challenges to FISA came under the same probable cause argument, suggesting that the Executive and FISC misapplied the congressional law due to the primary purpose not

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superseded by statute, USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, *as recognized in* U.S. v. Abu-Jihaad, 630 F.3d 102 (2d Cir. 2010).

[67] *Megahey*, 553 F. Supp. at 1182.

[68] *Id.* at 1190.

[69] *Id.* at 1184. It should be noted that six months prior to the *Megahey* decision, the same court decided a similar case dealing with respondents who had been charged with conspiracy and arms related offenses in connection to the IRA. The question before the court was not, however, whether the evidence was obtained for foreign intelligence purposes but rather a challenge to the constitutionality of FISA, which the court rejected in *United States v. Falvey*, 540 F. Supp. 1306 (E.D.N.Y. 1982). For other lower court rejection of lack of probable clause claims, see United States v. Johnson, 952 F.2d 565 (1st Cir. 1991); United States v. Squillacote, 221 F.3d 542 (4th Cir. 2000); United States v. Sarkissian, 841 F.2d 959 (9th Cir. 1988); United States v. Berberian, 851 F.2d 236 (9th Cir. 1988); United States v. Ott, 827 F.2d 473, 475 (9th Cir. 1987); United States v. Badia, 827 F.2d 1458 (11th Cir. 1987); United States v. Bedfield, 692 F.2d 141, 147 (D.C. Cir. 1982). For more recent court challenges to the probable cause requirement, see United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004); United States v. Dumeisi, 424 F.3d 566 (7th Cir. 2005); United States v. Rosen, 447 F. Supp. 2d 538 (E.D. Va. 2006); United States v. Assi, No. 98-80695, 2009 U.S. Dist. LEXIS 93958 (E.D. Mich. Oct. 8, 2009); United States v. Shnewer, No. 07-459 (RBK), 2008 U.S. Dist. LEXIS 112001 (D.N.J. Dec. 29, 2009); United States v. Nicholson, No. 09-CR-40-BR, 2010 WL 1641167 (D. Or. Apr. 20, 2010); United States v. Sedaghaty, No. 05-60008-HO, 2010 U.S. Dist. LEXIS 37186 (D. Or. Apr. 13, 2010); United States v. Mehanna, No. 09-10017-GAO, 2011 WL 3652524 (D. Mass. Aug. 19, 2011). While probable cause was one area where the courts consistently held in the favor of the Executive, another construction of congressional intention was found in *In re Grand Jury Subpoena*, 597 F.3d 189 (4th Cir. 2010), when the circuit court of appeals for the Fourth Circuit confirmed the district court ruling that when Congress passed FISA's rules for when an individual could challenge evidence admitted into court from a FISA order, it must have intentionally left out grand juries because grand juries were included in Title III as an area where individuals could challenge evidence in court if the FISA order had been issued illegally.

being to collect foreign intelligence as articulated in *United States v. Truong Dinh Hung*.[70] *Hung* suggests rather that the purpose in general was not to collect foreign intelligence, but rather evidence for criminal investigations because the defendant was not shown to be an agent of a foreign power.

The lower courts also rejected the claim that the fruits of the electronic surveillance could not be used for criminal investigations, noting that Congress was well aware that criminal proceedings could result from evidence obtained with a FISA order to collect foreign intelligence. In *Megahey*, the court pointed out that the legislative history states "[i]ntelligence and criminal law enforcement tend to merge in [the area of foreign counterintelligence investigations] . . . [S]urveillance conducted under [FISA] need not stop once conclusive evidence of a crime is obtained, but instead may be extended longer where protective measures other than arrest and prosecution are more appropriate."[71] As such, because the surveillance was for the collection of foreign intelligence and not directed towards criminal prosecution, the evidence was legally obtained and could be admitted into court.[72]

Like many cases before it, in *ACLU v. Barr*,[73] the Court of Appeals for the District of Columbia rejected claims that the electronic surveillance collected with a FISA order was an unconstitutional violation of fundamental rights. *Barr* involved 24 plaintiffs, 8 of which were aliens to the United States, and only 2

[70] United States v. Truong Dinh Hunh, 629 F.2d 908 (4th Cir. 1980). While the holding in *Truong Dinh Hunh* suggests there is a warrant exception altogether for foreign intelligence gathering of foreign powers and their agents if there are national security implications involved, it is also the case that reasonableness of the surveillance still must be satisfied. For the primary purpose test, see United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984). For analysis regarding the purpose of surveillance being foreign intelligence, see United States v. Sarkissian, 841 F.2d 959 (9th Cir. 1988). *See also* United States v. Berberian, 851 F.2d 236 (9th Cir. 1988); United States v. Ott, 827, F.2d 473, 475 (9th Cir. 1987); United States v. Badia, 827 F.2d 1458 (11th Cir. 1987); United States v. Belfield, 692 F.2d 141, 147 (D.C. Cir. 1982).

[71] *Megahey*, 553 F. Supp. at 1189.

[72] *See also* United States v. Ning Wen, 447 F.3d 896, 897 (7th Cir. 2006); United States v. Hawamda, No. 89-56-A, 1989 U.S. Dist. LEXIS (E.D. Va. Apr. 17, 1989).

[73] ACLU Found. of S. Cal. v. Barr, 952 F.2d 457, 293 (D.C. Cir. 1991).

of which were permanent residents. The other plaintiffs to the case were attorneys who had provided legal advice to the individuals in question. The plaintiffs had claimed that FISA orders had been given out erroneously due to a lack of probable cause that the aliens were in fact agents of a foreign power. The court rejected this claim saying probable cause was shown. However, the plaintiffs also brought the claim in front of the court based not only on the past surveillance that was known to have taken place, but also on ongoing surveillance that the plaintiffs assumed was taking place based on the existence of previous surveillance. The district court had dismissed the allegations of ongoing surveillance because they "[W]ere speculative and unsupported by 'any specific facts.'"[74] The circuit court also dismissed the case because Congress had set up rules within FISA to deal with regulating such claims.

Table 2: Electronic Surveillance Cases: Post-FISA, Pre-9/11

Prong	Case	Year	Political Control**	Region*
1st prong	United States v. Megahey, 553 F. Supp. 1180 (1982).	1982	R	2
1st prong	United States v. Falvey, 540 F. Supp. 1306 (1982).	1982	R	2
1st prong	United States v. Belfield, 223 U.S. App. D.C. 417, 692 F.2d 141, 147 (D.C. Cir. 1982).	1982	D	0
constitutional	United States v. Truong Dinh Hung, 629 F.2d 908 (1982).	1982	R	4
1st prong	United States v. Duggan, 743 F.2d 59, 77 (2nd. Cir. 1984).	1984	R	2
Constitutional	United States v. Duggan, 743 F.2d 59 (2nd Cir. 1984).	1984	R	2
Constitutional	United States v. Ott, 637 F. Supp. 62 (E.D. Cal. 1986).	1986	R	9
Constitutional	In the Matter of Kevork, 788 F.2d 566 (9th Cir.1986).	1986	M	9
1st prong	United States v. Ott, 827, F.2d 473, 475 (9th Cir. 1987).	1987	R	9
1st prong	United States v. Badia, 827 F.2d 1458 (11th Cir. 1987).	1987	R	11
1st prong	United States v. Cavanagh, 807 F.2d 787, 790-92 (9th Cir. 1987).	1987	M	9
Constitutional	United States v. Pelton 835 F.2d 1067 (4th Cir. 1987).	1987	R	4
Constitutional	United States v. Pelton, 835 F.2d 1067 (4th Cir. 1987).	1987	R	4
1st prong	United States v. Sarkissian, 841 F.2d 959 (1988).	1988	M	9

[74] *Id.* at 467.

1st prong	United States v. Berberian, 851 F.2d 236 (1988).	1988	M	9
1st prong	United States v. Hawamda, No. 89-56-A, slip op. (E.D. Va. 1989).	1989	R	4
1st prong	United States v. Poser, 864 F.2d 1487 (1989).	1989	M	9
Constitutional	United States v. Spanjol, 720 F. Supp. 55, 58 (E.D. Pa. 1989).	1989	R	3
1st prong	ACLU v. Barr, 952 F.2d 457 (1991).	1991	D	0
1st prong	United States v. Johnson 952 F.2d 565 (1991).	1991	R	1
Constitutional	United States v. Isa, 923 F. 2d 1300 (8th Cir. 1991).	1991	R	8
Constitutional	United States v. Nicholson, 955 F. Supp 550 (1997).	1997	D	4
1st prong	United States v. Squillacote, 221 F.3d 542 (2000).	2000	R	4
1st prong	United States v. Hammoud, 381 F.3d 316; 2004	2004	R	4
1st prong	United States v. Dumeisi, 424 F.3d 566 (2005).	2005	R	7
Constitutional	United States v. Damrah, 621 F.3d 474 (6th Cir; 2005).	2005	R	6
1st prong	United States v. Rosen, 447 F. Supp. 2d 538 (2006).	2006	R	4
Constitutional	United States v. Benkahla, 437 F. Supp. 2d 541 (E.D. Va. 2006).	2006	R	4
1st prong	United States v. Ning Wen, 477 F.3d 896, 897 (7th Cir. 2007).	2007	R	7
1st prong	United States v. Assi, 2009 U.S. Dist. Lexis 93958 (2009).	2009	D	6
1st prong	United States v. Shnewer, Crim. No. 07-459 (RBK) (2009).	2009	D	3
Constitutional	United States v. Ahmed, 1:06-cr-147-WSD-GGB (2009).	2009	D	11
1st prong	United States v. Nicholson, 09-CR-40-BR; 2010	2010	D	9
1st prong	United States v. Sedaghaty, No. 05-60008-HO (2010).	2010	D	9
1st prong	In re: Grand Jury Subpoena, 597 F. 3d 189 (2010).	2010	R	4
1st prong	United States v. Mehanna, No. 09-10017-GAO (2011).	2011	D	1

*Region of the Circuit Court (0=D.C., 12=FISA); **D=Democratic, M=Mixed (Divided Government), R=Republican

Table 2 lists the Post-FISA, Pre-9/11 electronic surveillance cases along with which prong of the Jackson framework the decision fits, which party controls the executive branch and Senate, and the circuit court region. Courts operating under democratic controlled government hear 25% of the electronic surveillance cases during this era and decide 78% of these cases using the Jackson framework. Conversely, during republican control, courts hear 61% of the electronic surveillance

cases and decide 59% using the Jackson framework. During the Post-FISA, Pre-9/11 era, 33% of electronic surveillance cases are decided on constitutional grounds. These cases recognize the President and Executive working together under the framework set up by the legislature, and that FISA itself is constitutional or at the very least an adequate substitute for the protections offered by the Fourth Amendment. Interestingly, seventy-five percent of the cases decided on constitutional grounds are decided during times of republican control.

A. Amendments to FISA post 9/11

After 9/11, FISA was amended with the *USA PATRIOT Act of 2001* to allow the Executive greater ease in securing FISA orders to conduct electronic surveillance. In the Attorney General's application to FISC, it was no longer required to show that the primary purpose of the search was to gather foreign intelligence information. With the Patriot Act amendments, FISA's wording was changed from the purpose of the investigation to "a significant purpose" being to collect foreign intelligence information. As such, the types of investigations under FISA were expanded to include, in part, criminal investigations.[75] The Patriot Act amended FISA in several other significant ways, including the authorization of disclosing or sharing grand jury information containing foreign intelligence to federal officials, enhancing the ability of the Executive to use pen registers for the interception of electronic communications such as from the internet, as well as tapping cell phones.[76]

The Bush Administration would further change the requirements under FISA with their own interpretation of the Act's requirements. Attorney General John Ashcroft issued a memorandum on the minimization procedures on March 6, 2002. The memorandum explained that a FISA order would now "be used primarily for a law enforcement purpose, so long as a

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[75] ELIZABETH B. BAZAN & JENNIFER K. ELSEA, CONG. RESEARCH SERV., PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE INFORMATION 1-3 (2006), *available at* http:// www.fas.org/sgp/crs/intel/m010506.pdf.

[76] USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 203-18, 115 Stat. 272 (2001).

significant foreign intelligence purpose remain[ed]."[77] Co-operation between law enforcement and intelligence personnel would also be allowed according to the new procedures. The implications of the new procedures set out by the Bush Administration and the amendments to FISA in the Patriot Act meant a FISA order could be obtained for some criminal investigations, despite such investigations traditionally falling under the normal Fourth Amendment requirements for obtaining a warrant, thus meaning that FISA would no longer only be used in a preventive nature.

The Foreign Intelligence Surveillance Court unanimously rejected several key provisions of the Attorney General's controversial memorandum. In *In re All Matters Submitted to the FISC*,[78] FISC held that the Attorney General's memorandum violated a "provision of FISA that governed the retention and dissemination of FISA information."[79] The FISC then placed restrictions on the amount of cooperation between law enforcement agencies that was allowed under FISA, but the Bush Administration challenged the FISC ruling. The Foreign Intelligence Surveillance Court of Review (FISCR) was set up to review appealed cases from FISC, though it had never heard a case before this particular appeal.[80] The government's argument was that "the *USA PATRIOT Act* permitted a FISA order if there was a 'significant purpose' of collecting 'foreign intelligence information.'" As such, the primary purpose of the surveillance could be to collect evidence in a criminal investigation to prosecute the target of the FISA order, but the Fourth Amendment would not be violated so long as that "significant purpose" of collecting foreign intelligence information remained.[81]

FISCR sided with the government in its lone opinion. In *In re Sealed Cases*,[82] there was a three-judge unanimous decision that held that the government was correct in its assertion that FISA did

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[77] KATHERINE DARMER, CIVIL LIBERTIES VS. NATIONAL SECURITY IN A POST 9/11 WORLD 95 (2004).
[78] *In re* All Matters Submitted to the FISC, 218 F. Supp. 2d 611 (FISC. Ct. 2002), *abrogated by In re* Sealed Case, 310 F.3d 717 (FISC Ct. 2002).
[79] POHLMAN, *supra* note 37, at 17.
[80] DARMER, *supra* note 77, at 95-96.
[81] POHLMAN, *supra* note 37, at 32.
[82] *In re* Sealed Case, 310 F.3d 717 (FISC. Ct. 2002).

not exclude the use of foreign intelligence collection for criminal prosecution of national security crimes. In fact, the court went so far as to suggest that it was never the intention of Congress to limit the use of electronic surveillance in criminal prosecutions. FISCR suggests that the lower courts, not Congress, made the argument that FISA required that the "primary purpose" of the surveillance be for foreign intelligence gathering rather than simply "the purpose" of the surveillance.[83] The court of review made the argument that within the original meaning of FISA, surveillance could certainly be used for criminal prosecution since a part of fighting national security crimes was the prosecution of those accused of said crimes. However, because the Patriot Act changed the language of FISA from "the purpose" of the wiretap being for foreign intelligence gathering to "a significant purpose," the court decided that it is now at this point a requirement that the collection of foreign intelligence had to be a main component of the surveillance; however, criminal prosecution was still allowed.

Despite the controversial amendments to FISA, the federal courts have predominantly continued to uphold electronic surveillance under FISA orders, rejecting claims that the amendments violate the Fourth Amendment, relying on the FISCR opinion.[84] Further still, some courts have not looked at the constitutional issue at all, simply ruling on the statutory question of whether or not the "primary" purpose of the surveillance was to collect foreign intelligence. Such was the case in *United States v. Stewart*.[85] The court of appeals held, as was always the case before the Patriot Act, that evidence of crimes can be submitted in domestic court if the purpose of the surveillance was to obtain foreign intelligence.[86] Because the court deemed the purpose of the surveillance was for foreign intelligence gathering, they did not need to address the 9/11 Amendments changing the wording to a significant purpose of the surveillance being for foreign

[83] *Id.* at 732.
[84] *See* United States v. Mubayyid, 521 F. Supp 2d 125 (D. Mass. 2007) (stating that the duration of surveillance orders are reasonable); United States v. Holy Land Found., No. 3:04 CR 240 G, 2007 U.S. Dist. LEXIS 50239, *19-20 (N.D. Tex. July 11, 2007) (stating that the Fourth Amendment did not require the primary purpose of the surveillance to be foreign intelligence gathering).
[85] United States v. Stewart, 590 F.3d 93, 126 (2d Cir. 2009).
[86] *Id.* at 126.

intelligence gathering.[87] The standard of significant purpose of the surveillance need not be questioned when the stricter bar is met.[88] There is one significant outlier, at the district court level, however vacated on procedural grounds on appeal.

In *Mayfield v. United States,*[89] the plaintiffs claimed that the Patriot Act amendments to FISA were unconstitutional.[90] On March 11, 2004, bombs exploded on commuter trains in Madrid, Spain.[91] The explosion killed 191 and injured another 1600 individuals.[92] Fingerprints from a plastic bag with explosive detonators were found in a van near the bombsite.[93] While the FBI could not find a match for the fingerprint, they did receive latent prints from Spain with which they conducted further analysis.[94] They received 20 individuals who had similar aspects of the partial print.[95] Brandon Mayfield, a former member of the armed forces, was arrested, despite having not been out of the country since 1994.[96] Mayfield claimed that the FBI was aware of his Muslim faith and examined his fingerprints further as a result of his religion.[97] After the fingerprint was wrongfully matched to Mayfield, the FBI, approved by the Attorney General, applied to and received authorization from FISC to conduct both electronic

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[87] *Id.* at 126-27.
[88] *See also* United States v. Abu-Jihaad, 531 F. Supp. 2d 299, 304 (D. Conn. 2008); United States v. Shnewer, No. 07-459 (RBK), 2008 U.S. Dist. LEXIS 112001 (D.N.J. Dec. 29, 2009); United States v. Kashmiri, No. 09 CR 830-4, 2010 WL 4705159 (E. D. Ill. Nov. 10, 2010); United States v. Sherifi, 793 F. Supp. 2d 751 (E.D.N.C 2011). *See also* United States v. Warsame, 547 F. Supp. 2d 982 (D. Minn. 2008). In *Warsame*, the district court did express concern over the constitutionality of the "significant purpose" clause of the Patriot Act but was unwilling to address the constitutional question. In *United States v. Islamic Am. Relief Agency*, No. 07-00087-CR-W-NKL, 2009 U.S. Dist LEXIS 118505 (W.D. Mo. Dec. 21, 2009), the court followed the lead of the *Warsame* decision deciding solely on the facts of the case at bar that the surveillance was authorized for primarily foreign intelligence gathering.
[89] Mayfield v. United States, 504 F. Supp. 2d 1023 (D. Or. 2007).
[90] *Id.* at 1025.
[91] *Id.* at 1026.
[92] *Id.* at 1027.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 1028-29.
[97] *Id.* at 1028.

and physical surveillance of the Mayfield home.[98] The prints were sent to Spain, but the Spanish government concluded there was no match after conducting their own analysis.[99]

Specifically, Mayfield challenged the constitutionality of the Amendments to FISA that allowed the government to get a FISA order, thus bypassing the traditional Fourth Amendment's probable cause requirement that a crime had been committed.[100] As noted above, and argued by FISCR in its one decision, the court held that the Patriot Act amended the language of FISA to "break down the barriers between criminal law enforcement and intelligence gathering," by changing "the purpose" or the surveillance being to gather foreign intelligence to "a significant purpose."[101] The court concluded that it was the intent of Congress to break down that barrier.[102] Previously, for a wiretap to be used in criminal investigations, a search warrant would need to be obtained from a neutral magistrate, where probable cause that a crime has been committed would need to be shown.[103]

The district court in pointed out that the Supreme Court rejected the Executive's claim that domestic security was such a grave concern that the Fourth Amendment should have an exemption for domestic issues dealing with the nation's security in *United States v. United States District Court*.[104] Because a distinct line had been drawn between surveillance for criminal investigations and surveillance for foreign intelligence gathering, and in rejecting the decision made by the Foreign Intelligence Surveillance Court of Review, the district court concludes that FISA's amendments in the Patriot Act were an unconstitutional violation of the Fourth Amendment's probable cause requirements.[105]

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[98] *Id.* at 1028-29.
[99] *Id.* at 1028.
[100] *Id.* at 1029.
[101] *Id.* at 1031.
[102] *Id.*
[103] *Id.* at 1032.
[104] *Id.* at 1037 (citing United States v. United States District Court, 407 U.S. 297, 92 S.Ct. 2125 (1972)).
[105] *Mayfield*, 504 F. Supp. 2d at 1038 (quoting United States v. United States District Court, 407 U.S. 297, 92 S.Ct. 2125 (1972)).

In 2009, the Ninth Circuit Court of Appeals vacated and remanded the district court decision claiming that Mayfield lacked standing to pursue the Fourth Amendment claim because "his injuries already have been substantially redressed by the settlement agreement, and a declaratory judgment would not likely impact him or his family."[106] The court noted that to bring suit in federal court, the plaintiff had to show that a favorable judgment would redress the injury suffered.[107] While the court agreed there was an ongoing injury being suffered because the government was still holding some evidence collected from the searches, the court "[Did] not agree that a declaratory judgment would likely redress that injury,"[108] because a declaration that the amendments to FISA were unconstitutional would not require the government to destroy the evidence already in its possession.[109]

Though vacated on appeal, the district court ruling in *Mayfield* represents one of the rare instances where the courts hold that the federal government as a whole does not have the authority to act, even when working in the perceived interest of national security.[110] Jackson's *Youngstown* framework points out that when the elected branches of the federal government are working together, they are at their most powerful.[111] The courts will only disallow these actions when the government, in its entirely, lacks the constitutional authority to act in a certain regard.[112] While the district court believed these amendments to FISA to fit into the category, the appeals court failed to address the issue on its merits, and every other case that has come before the federal courts points to *Mayfield* as the outlier, but not the norm.

Table 3: Electronic Surveillance Cases: Post-9/11

[106] Mayfield v. United States, 588 F.3d. 1252, 1254 (9th Cir. 2009).
[107] *Id.*
[108] *Id.* at 1258.
[109] *Id.*
[110] *Mayfield*, 504 F. Supp. 2d 1023.
[111] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952).
[112] *Id.* at 637.

Era	Prong	Case	Year	Political Control	Region
Post FISA, post 9/11	3rd prong	In re All Matters Submitted to the FISC		R	12
Post FISA, post 9/11	1st prong	In re Sealed Case, Case No. 02-001 (2002).	2002	R	12
Terrorist Surv. Program	1st prong	ACLU v. U.S. Department of Justice, 265 F. Supp. 2d 20 (2003).	2003	R	0
Post FISA, post 9/11	3rd prong	ACLU v. NSA, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006).	2006	R	6
Terrorist Surv. Program	1st prong	People for the American Way Foundation v. NSA, 462 F. Supp. 2d 21 (2006).	2006	R	0
Terrorist Surv. Program	1st prong	El-Masri v. Tenet, 437 F. Supp. 2d 530 (2006).	2006	R	2
Terrorist Surv. Program	3rd prong	Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (2006).	2006	R	9
Post FISA, post 9/11	1st prong	United States v. Mubayyid, 521 F. Supp. 2d 125 (D. Mass. 2007).	2007	R	1
Post FISA, post 9/11	3rd prong	Mayfield v. United States, 504 F. Supp. 2d 1023 (2007).	2007	M	9
Post FISA, post 9/11	dismissed/no standing	ACLU v. NSA, 493 F. 3d 644 (2007).	2007	R	6
Post FISA, post 9/11	constitutional	United States v. Mubayyid, 521 F. Supp. 2d 125 (D. Mass. 2007).	2007	R	1
Post FISA, post 9/11	constitutional	United States v. Holy Land Foundation for Relief and Development, No. 3:04 CR 240G (2007).	2007	R	5
Post FISA, post 9/11	constitutional	Mayfield v. United States, 504 F. Supp. 2d 1023 (2007).	2007	M	9
Terrorist Surv. Program	1st prong	The New York Times Company v. Department of Defense, 499 F. Supp. 2d 501 (2007).	2007	R	2
Terrorist Surv. Program	1st prong	United States v. Aref, ~~04 CR 402 (2007).~~285 Fed. Appx. 784 (2008).	2008	R	2
Post FISA, post 9/11	1st prong	United States v. Abu-Jihaad, 531 F. Supp. 2d 299, 304 (D. Comm. 2008).	2008	R	2
Post FISA, post 9/11	1st prong	United States v. Warsame, 547 F. Supp. 2d 982 (2008).	2008	R	8
Post FISA, post 9/11	1st prong	Mayfield v. United States, 588 F.3d. 1252 (2009).	2009	M	9
Post FISA, post 9/11	1st prong	United States v. Shnewer, Crim. No. 07-459 (RBK) (2009).	2009	D	3
Post FISA, post 9/11	1st prong	United States v, Stewart, 590 F.3d 93 (2009).	2009	R	2
Post FISA, post 9/11	1st prong	United States v. Islamic Relief Agency, Case no. 07-00087-CR-W-NKL (2009).	2009	D	8
Post FISA, post 9/11	vacated/no standing	Mayfield v. United States, 588 F.3d. 1252 (2009).	2009	M	9
Terrorist Surv. Program	1st prong	Wilner v. National Security Agency, 592, F.3d 60 (2009).	2009	R	2
Terrorist Surv. Program	1st prong	In re: National Security Telecommunications Records Litigation; 633, F. Supp. 2d	2009	D	9

		(2009).			
Post FISA, post 9/11	1st prong	United States v. Kashmiri, No. 09 CR 830-4 (2010).	2010	D	7
Terrorist Surv. Program	1st prong	Electronic Frontier Foundation v. Director of National Intelligence, 595 F.3d 949 (2010).	2010	M	9
Post FISA, post 9/11	1st prong	United States v. Sherifi, NO. 5:09-CR-216-FL (2011).	2011	D	4

*Region of the Circuit Court (0=D.C., 12=FISA); **D=Democratic, M=Mixed (Divided Government), R=Republican

Table 3 lists the electronic surveillance cases heard after September 11, 2001, along with which prong of Jackson's framework the decision fits, which party controls the executive branch and Senate, and the circuit court region. Additionally, cases that fall under the Terrorist Surveillance Program (TSP) are designated as such (see following section for discussion). Courts operating under democratic controlled government hear 26% of the electronic surveillance cases during this era and decide 63% of these cases using the Jackson framework. During republican control, courts hear 58% of the electronic surveillance cases and decide 78% using the Jackson framework. During the Post-FISA, Pre-9/11 era, 10% of electronic surveillance cases were decided on constitutional grounds. Sixty-seven percent of the cases decided on constitutional grounds occur during periods of republican control. The remaining 37% are decided during divided government, which means no electronic surveillance cases heard after 9/11 and decided on constitutional grounds occurred during democratic control of the executive branch and the Senate.

In a logistic regression model, cases are significantly less likely to be decided on the basis of the constitution after September 11th when controlling for political control of the executive branch and the Senate.[113]

Table 4: The Use of Constitutional Framework for Deciding

[113] Due to the small sample size, an "exact logistic" regression was estimated as well, and produced nearly identical results.

Electronic Surveillance Cases Post-9/11

	Coefficient	p
Political Control	-0.47	0.19
Post 9/11	-1.44	0.04

N=73, Chi2=6.49, p>Chi2=.04

Simulated probabilities estimated using CLARIFY (King et al 2000) reveal a dramatic decrease in the probability that courts will use constitutional grounds to decide an electronic surveillance case after 9/11.

Table 5: The Probability of an Electronic Surveillance Case Being Decided on Constitutional Grounds Pre and Post-9/11

	Pre 9/11	Post 9/11
Republican Control	.40	.15
Mixed (Divided) Control	.29	.10
Democratic Control	.22	.07

Regardless of which party controls the executive branch and the Senate, the probability that lower courts will use constitutional grounds to decide an electronic surveillance case drops drastically after the attacks of September 11. The probability remains the highest when the Republican Party controls both the executive branch and the Senate, but that probability drops by 25% after 9/11.

B. The Terrorist Surveillance Program

While the amendments to FISA questioned Congress' ability to pass legislation that allows the Executive to further circumvent the warrant requirement of the Fourth Amendment in regard to electronic surveillance, in 2005 it was revealed in the media that the government was conducting surveillance on

Americans without seeking a FISA order or without seeking a warrant.[114] *The New York Times* reported on December 16, 2005, that the Bush Administration authorized the National Security Agency to intercept the international communications by Americans with known links to al-Qaeda and related terrorist organizations.[115] The surveillance was done without a warrant.[116] The following day, on December 17th, in a radio address to the nation, President Bush confirmed the story,[117] revealing to the public that after the terrorist attacks in 2001 the government set up the program to use warrantless wiretaps to "monitor the messages of foreigners that passed through communication links in the United States as well as those communications where one party was operating outside the United States."[118]

The Executive argued the program was constitutional on two grounds. First, foreign intelligence surveillance was a part of the President's "inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs."[119] Second, while FISA was passed in 1978 it did not "limit its own future authority by barring subsequent Congresses from authorizing the Executive Branch to engage in surveillance in ways not specifically enumerated in FISA."[120]

The lack of cases dealing with the TSP is likely the result of needing to prove standing to bring a suit against the government, and it is difficult to show an individual was or is indeed the subject of surveillance under the program. While there

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[114] James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005, updated Dec. 28, 2005) http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all&_r=0.
[115] *Id.*
[116] *Id.*
[117] President George Bush, *President's Radio Address*, THE WHITE HOUSE (Dec. 17, 2005, 10:06AM), http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051217.html.
[118] Jeffrey Addicott & Michael McCaul, *The Protect America Act of 2007: A Framework for Improving Intelligence Collection in the War on Terror*, 13 TEX. REV. L. & POL. 44, 63 (2008).
[119] Alberto Gonzales, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, U.S. DEP'T OF JUST. (Jan. 19, 2006), *available at* www.fas.org/irp/nsa/doj011906.pdf.
[120] *Id.* at 22.

are not many cases dealing with the constitutionality of the TSP, at least one that reached was heard by the lower court did not address the constitutionality of the program because the question did not come up before the court.[121] Instead, the decision rested upon whether or not there was enough evidence to convict the individual in question. In *United States v. Aref,*[122] Yassin Aref and Mohammed Hossain were convicted of supporting terrorism because they agreed to launder money as part of a fake plot to assassinate the Pakistani ambassador in New York City.[123] The deal to launder the money was set up between Aref and an undercover informant.[124] The conviction was appealed on grounds for not having had enough evidence to substantiate guilt and was filed in the U.S. Court of Appeals for the 2nd Circuit in Manhattan.[125] The appeals court affirmed the decision of the district court, but noted it would not address the constitutionality of the program because the question had not come before the court.[126]

Though the court was not inclined to decide the validity of the program in *Aref*, the court did not shy away from the issue in *ACLU v. NSA*.[127] Judge Anna Diggs Taylor held that the TSP to be illegal under statute because Congress passed FISA regulating such electronic surveillance activity.[128] Citing Jackson's *Youngstown* concurrence, Taylor points out that FISA remains the expressed policy of Congress and the President could not act contrary to its tenets in this case, by creating a program of surveillance outside of the perimeters of FISA.[129]

Taylor looked to Justice Jackson's *Youngstown* concurrence for guidance, pointing out that the NSA warrantless domestic surveillance program was not instituted in the absence of congressional legislation where the President would find himself perhaps sharing joint or concurring powers with Congress.[130]

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[121] *Id.*
[122] United States v. Aref, 285 Fed. Appx. 784 (2d Cir. 2008).
[123] *Id.* at 790.
[124] *Id.* at 789.
[125] *Id.*
[126] *Id.* at 794.
[127] ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006).
[128] *Id.*
[129] *Id.* at 777-78.
[130] *Id.* at 778.

Because Congress had passed FISA requiring an order from FISC to conduct electronic surveillance to gather foreign intelligence, President Bush took measures incompatible with the wishes of Congress when he bypassed FISC.[131] In passing, Taylor also addressed the constitutional questions, and, unlike so many times before, was willing to say that the Executive took a step too far, consequently violating the Fourth and First Amendments, despite the lack of emphasis in explaining the rationale for this decision.[132]

The ruling was overturned, however, on appeal. On July 6, 2007, the 6th U.S. Circuit Court of Appeals dismissed the case in *ACLU v. NSA*[133] due to a lack of standing on the part of the plaintiffs.[134] Judge Batchelder held that the "problem with asserting only a breach-of-privacy claim is that, because the plaintiffs cannot show . . . they have been or will be subjected to surveillance personally, they clearly cannot establish standing under the Fourth Amendment or FISA."[135] Despite the fact that the court held that standing was not shown, the court continued to address the constitutional questions at play in the case.[136] First, the requirements set up by FISA, even if followed, would make no difference in the case as "it is reasonable to assume that the FISA court would authorize the interception of this type of communication, and keeping this likelihood in mind, the issuance of FISA warrants would not relieve any of the plaintiffs' fears of being overheard."[137] Second, the court did not agree that the Executive violated the separation of powers by violating Title III and FISA's exclusivity requirements in the creation of the program.[138] While the ALCU argued that it was impossible to conduct surveillance outside the structure set up by both FISA and

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[131] *See id. Id.*
[132] *Id.* at 775-76 (stating that the Executive's actions are unconstitutional because in its blatant disregard of FISA, and since no prior warrant from a magistrate was obtained; there are no safeguards to ensure the surveillance fulfills the reasonableness standard required of the Fourth Amendment. The court also reasoned that FISA clearly states "[n]o U.S. person may be considered … an agent of a foreign power solely upon the basis of activities protected by the First Amendment to the Constitution.").
[133] ACLU v. NSA, 493 F. 3d 644 (6th Cir. 2007).
[134] *Id.* at 648.
[135] *Id.* at 657.
[136] *Id.* at 658-80.
[137] *Id.* at 671.
[138] *Id.* at 684.

Title III, Judge Batchelder explained that "the unavailability of the evidence necessary to prove (or disprove) that the NSA is engaging in 'electronic surveillance' compels a conclusion that the plaintiffs cannot demonstrate that either statute applies."[139] This ruling at the circuit court level differs wildly from its district court counterpart that was not willing to shy away from the constitutional questions at play.[140]

IV. CONCLUSIONS

While the federal courts agreed that FISA was constitutional and were not willing to say the federal government lacked probable cause for FISC to issue FISA orders for electronic surveillance, FISA was not only amended after the terrorist attacks in 2001, but again in 2007 with the Protect America Act[141] (PAA) and again in 2008 with the Foreign Intelligence Surveillance Act Amendments Act (FISAAA)[142] after much of the PAA expired. As a result of the amendments to FISA, a new flurry of cases arose in the federal courts after the terrorist attacks of 2001, but predominantly with the same result. While the district courts on a couple of instances wanted to limit the Executive, by and large the constitutional questions are overlooked in favor of statutory interpretation.

In terms of conducted analysis, new questions emerged, while the old ones persisted. Does geography matter? With some courts left leaning and others right leaning, does it matter which circuit a case is heard? While the overwhelming majority of cases use statutory interpretation rather than a close examination of the Fourth Amendment requirements in dealing with the Executive's authority to engage in electronic surveillance in national security

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[139] *Id.*

[140] While challenges to the constitutionality of the Terrorist Surveillance Program (TSP) itself have found limited access in front of the courts, largely due to the difficulty establishing standing. That said, however, there have been a number of other cases to go through the federal-courts system that are civil suits, relevant in legal reasoning though limited in its applicability to constitutional questions. *See* Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006); El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006).

[141] Protect America Act, Pub. L. 110–55, 121 Stat. 552 (2007).

[142] 50 U.S.C. 1801 (2010).

cases, when the President and Senate are both controlled by Republicans, the courts are slightly more likely to address constitutional concerns as the tables above demonstrate. Furthermore, professional motivation to be appointed to the Supreme Court (at least at the circuit level) may be a motivating factor in some instances, which means that the courts may consider the political party of the Executive and Senate when making decisions. Finally, at the Supreme Court level, the Court often makes institutional arguments suggesting that it is not the role of the judiciary to get involved in military affairs of the nation. Such arguments have crept into the electronic surveillance domain, but it is not an argument as prevalent at the district and circuit court levels as it is in Supreme Court jurisprudence. Does the willingness of the lower courts to leave those institutional roles out of the judicial decision-making process make it more likely they would address the constitutional questions? These are all areas of inquiry worthy of further investigation.

We thought the current state of the field would progress along the lines of the federal courts interpreting the power of the Executive in light of congressional actions. Statutes, court decisions, and actions of the Executive all pointed towards warrantless surveillance being a showcase of the twilight zone of executive/congressional authority that Jackson pointed to in his *Youngstown* concurrence, due to the Supreme Court doing so in other issues, including early surveillance cases before the Court stepped away from the issue in its entirety.