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Thomas Anthony Durkin

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# PERMANENT STATES OF EXCEPTION: A TWO-TIERED SYSTEM OF CRIMINAL JUSTICE COURTESY OF THE DOUBLE GOVERNMENT WARS ON CRIME, DRUGS & TERROR

Thomas Anthony Durkin\*

## I. INTRODUCTION

The November 2014 Valparaiso University Law School Law Review Symposium *National Security: Up Close and Personal* contributed significantly to the ongoing and necessary national debate on issues regarding our national security response to 9/11.<sup>1</sup> As such, it was an honor and privilege to be selected to participate in such an important discussion. However, as I began my remarks on *The Effect of Home-Grown Terrorism* panel by wryly suggesting that perhaps the word “fear” should have been inserted in the title, I suggest the same here to more accurately state the question from the vantage point defense lawyers encounter defending so-called “domestic terrorism cases” in the federal courts in Chicago and elsewhere in the country. From our firm’s courtroom

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\* Attorney at Law, Durkin Roberts & Grohman, Chicago, Illinois. Distinguished Practitioner in Residence at the Loyola University Chicago School of Law and Co-Director of its National Security and Civil Rights Program. Senior Research Fellow, Center on National Security, Fordham University School of Law. B.A., University of Notre Dame, 1968; J.D., University of San Francisco School of Law, 1973. Graduate Student At Large and Returning Scholar, University of Chicago, 2009 to the present. Law Clerk to the Honorable James Parsons, U.S. District Judge for the Northern District of Illinois; Assistant United States Attorney, Northern District of Illinois, 1978 to 1984; Fellow of the American College of Trial Lawyers and one of five lawyers selected nation-wide to be a participant in the John Adams Project, a joint collaboration of the American Civil Liberties Union and the National Association of Criminal Defense Lawyers to provide civilian counsel in the case of *United States v. Khalid Sheikh Mohammed* before the Military Commissions Trial Judiciary, Guantanamo Bay, Cuba. See <http://www.durkinroberts.com> [<http://perma.cc/9ATK-D32R>]. This Article would not have been possible without the research and assistance of Robin V. Waters, an Associate Attorney at Durkin Roberts & Grohman and Maud O. Jansen, a summer law clerk and student at the University of Chicago.

<sup>1</sup> Symposium, *National Security: Up Close and Personal*, 50 VAL. U. L. REV. (forthcoming 2016). The serious scholarship also addressing this debate is voluminous. For but a few examples, see BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 2-3 (2006); DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 1-2 (2002); LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY* 4-5 (2008); DAVID JENKINS, AMANDA JACOBSEN & ANDERS HENRIKSEN, *THE LONG DECADE: HOW 9/11 CHANGED THE LAW* 3-4 (2014); JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* 3 (2006); ANICETO MASFERRER, *POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY: SECURITY AND HUMAN RIGHTS IN COUNTERING TERRORISM* 1 (2012).

vantage point, it is the effect of the *fear* of homegrown terrorism that seems to be prevailing, surely not homegrown terrorism itself.<sup>2</sup>

However, fear is hardly something new to federal criminal practitioners. As I have argued elsewhere, fear driven war rhetoric legislation has already caused considerable damage to procedural due process rights by gradual judicial acquiescence in federal criminal prosecutions, and civil liberties in general, well in advance of 9/11.<sup>3</sup> Thus, I would like to build on this theme and argue that a continuous thread of gradual judicial acquiescence to fear generated by purported national emergencies—or if you will, “states of exception”—can be seen to weave its way through both the War on Crime and the War on Drugs. This gradual judicial acquiescence, albeit in the face of congressional legislation designed to thwart grave danger perceived to be destroying our inner cities, greased the skids, so to speak, for continued deference to the executive branch’s far more legitimate emergency measures in response to the events of 9/11. When it now comes to our Symposium topic of “homegrown” national security cases in the federal criminal courts, it is somewhat disingenuous not to acknowledge that a growing two-tiered system of procedural due process is becoming the everyday reality.

In doing so, a careful analysis of the insightful scholarship of Professor Michael J. Glennon of the Fletcher School of Law and Diplomacy at Tufts with respect to his recent article and book on national security and double

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<sup>2</sup> See also JOHN MUELLER, *TERRORISM SINCE 9/11: THE AMERICAN CASES 1* (2015). Indeed, as Professor Mueller points out a careful analysis of the actual threat terrorism poses reveals that an American has a one in 3.5 million chance of perishing at the hands of a terrorist. *Id.* at 30. To contextualize this figure with approximations, the risk of becoming a victim of homicide is one in 22,000; the risk of being killed in an automobile accident is one in 8000; and the risk of dying from cancer is one in 500. Obviously, the fear of such an attack far outweighs the actual risk, which only brings the urgency to analyze our national security choices into greater focus. MUELLER, *supra* note 2, at 22.

<sup>3</sup> See Thomas A. Durkin, *Apocalyptic War Rhetoric: Drugs, Narco-Terrorism, and a Federal Court Nightmare From Here to Guantanamo*, 2 NOTRE DAME J. INT’L & COMP. L. 257, 258–59 (2012) (discussing the fear politicians face about the way the public perceives their decisions made in regard to the war on terror); see also JAY FELDMAN, *MANUFACTURING HYSTERIA: A HISTORY OF SCAPEGOATING, SURVEILLANCE, AND SECRECY IN MODERN AMERICA* xvii (2011) (reviewing fear driven rhetoric in World War I). The Pen American Center opined that:

Precisely because it is legitimized via fear one can claim that “the war against terror” is a greater danger to democracy than terrorism itself . . . We can perhaps say, along with the philosopher Giorgio Agamben that we live today in a permanent state of emergency, where the reference to serious dangers almost works like a trump card—and the card trumps recognized democratic rights.

Brief of *Amicus Curiae* Pen American Center in Support of Plaintiffs’ Motion for a Preliminary Injunction and in Opposition to Defendants’ Motion to Dismiss at 21, *ACLU v. Clapper*, 2013 WL 5221583 (S.D.N.Y. 2013) (No. 13 Civ. 3994).

government will become a cornerstone.<sup>4</sup> It was Professor Glennon's observations on the theme of "double government" that confirmed my own courtroom intuition and growing suspicion that this two-tiered system of procedural due process was developing right before my eyes.<sup>5</sup>

Implicit in this entire analysis and critical to any assessment of our Symposium's national security conversation, is the very question of the judiciary's ability to uphold the Constitution and rule of law. Rather than trying to shoehorn these emergencies into the rule of law, it will be argued that judges would do the country a far better service by conceding that they cannot do their job, in some instances involving domestic national security prosecutions, while the country goes through these emergencies or states of exception.<sup>6</sup> A singular, but concrete example of a consequence of this "state of exception," in the contextual setting of a traditional Fourth Amendment challenge in *Franks v. Delaware* to a search warrant authorized by the Foreign Intelligence Surveillance Act ("FISA") recently decided in the widely publicized Seventh Circuit interlocutory opinion in the case of *United States v. Daoud*, will be analyzed.<sup>7</sup> This analysis will offer an insight into how a routine procedural due process Fourth Amendment challenge to search warrants can literally be read out of play in a FISA search warrant, based solely upon the untested certification of the Attorney General that national security will be harmed by the disclosure of the search warrant materials to the defense. Of particular note will be Judge Ilana Diamond Rovner's forthright concurring opinion in *Daoud* that concedes that *Franks* cannot be squared with FISA.<sup>8</sup>

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<sup>4</sup> See Michael J. Glennon, *National Security and Double Government*, 5 HARV. NAT'L SEC. J. 1, 1 (2014) (introducing the "double government" theory); see also MICHAEL J. GLENNON, *NATIONAL SECURITY AND DOUBLE GOVERNMENT* 4 (Oxford Univ. Press 2015) (explaining the rational actor model and the government politics model and introducing the idea that neither of these models are ideal in addressing national security issues).

<sup>5</sup> Glennon's "double government" theme has also been referred to by other commentators as "the shadows." TOM ENGELHARDT, *SHADOW GOVERNMENT: SURVEILLANCE, SECRET WARS, AND A GLOBAL SECURITY STATE IN A SINGLE-SUPERPOWER WORLD* 17-18 (2014); SCOTT HORTON, *LORDS OF SECRECY: THE NATIONAL SECURITY ELITE AND AMERICA'S STEALTH WARFARE* 87 (2015).

<sup>6</sup> This insight has been suggested by Professor David Dyzenhaus in his thoughtful work, *The Constitution of Law: Legality in a Time of Emergency*. While speaking in the context of the U.K.'s Emergency Act of 1937, Dyzenhaus admits that it could be the case that courts are no longer capable of doing their job of "maintaining the integrity of the legal order" DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 33 (2006).

<sup>7</sup> See *United States v. Daoud*, 755 F.3d 479, 483-84 (7th Cir. 2014) (analyzing the decision made in *Franks* and its applicability in the FISA context case); see also *Franks v. Delaware*, 438 U.S. 154, 171-73 (1978).

<sup>8</sup> See *Daoud*, 755 F.3d at 486-87 (describing why *Franks* cannot operate under the FISA context).

Finally, going a step further than Professor Glennon, as well as running the risk of overstepping my trial lawyer area of expertise by delving into the fields of legal and political theory, the proposition will be briefly advanced if this two-tiered system of justice might well be logically inherent in the very structure of our constitutional democracy. This expansion can only happen if one is willing to step outside the normal rhetoric of current national security case law which, at best, often pays only lip service to the rule of law, and dares to engage both the work of Carl Schmitt, Clinton Rossiter, Giorgio Agamben, and other political and legal theorists with respect to their scholarly views on Schmitt's famous premise that "[s]overeign is he who decides on the exception."<sup>9</sup>

This exercise necessarily entails a brief exploration into the relationship of the "state of exception" to sovereignty, and raises the difficult and ambiguous constitutional question implicit in Professor Glennon's double government theory as to the current locus of sovereignty in the United States insofar as declaring, implementing, and continuing our global war on terror that appears to have no realistic end in sight. The serious implications of the answer to this question, which by definition necessarily spills over into national security prosecutions in the federal courts, presents for Glennon nothing less than a question as to the very type of government with which we shall be left, which, I suggest, also must include whether we truly wish to continue to default our way into a two-tiered system of criminal justice in the federal courts.

The same question was also raised, with a bit of a twist, at an earlier national security symposium in 2006 at the University of Georgia by Texas Law Professor Sanford Levinson.<sup>10</sup> In a thought provoking symposium article analyzing the constitutional ramifications of Schmitt's "state of exception" as it pertains to the future of our overall constitutional democracy, Professor Levinson poignantly asked whether it might be possible to have "an [a]dult [c]onversation" about Schmitt and this complex sovereignty problem so that an intelligent decision might be made as to the very kind of political order in which we wish to live.<sup>11</sup> Whether that conversation has or can be had is anyone's guess. However, some seven years later, it is respectfully suggested that Professor Levinson's "adult conversation" appears to go on, if at all, only among academic elites, as it seems conspicuously absent in most national security

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<sup>9</sup> CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* xviii, 5 (George Schwab trans., 2005).

<sup>10</sup> See Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 701-02 (2006) (addressing the national security interests and introduction to morality).

<sup>11</sup> See *id.* at 748-50.

opinions of the judiciary, the halls of Congress, the White House, or for that matter, among lawyers and most certainly not in very many law schools. It is the hope that this Article might, in some small way, continue to spur such an adult conversation, as the constitutional stakes both Glennon and Levinson raise are nothing less than foundational.

## II. FEDERAL DOMESTIC NATIONAL SECURITY PROSECUTIONS & GLENNON'S DOUBLE GOVERNMENT REVELATIONS

According to a July 2014 publication co-authored by the Columbia Law School Human Rights Institute and Human Rights Watch, between 2002 and 2011, almost 500 individuals were convicted of terrorism, or terrorism-related offenses in the United States, and the federal government charged an average of about forty individuals every year.<sup>12</sup> As also noted by the report, these post-9/11 terrorism cases are disconcerting for the changes, practices, and procedures they have brought to the federal system:

Terrorism cases in the US since September 11, 2001[,] have raised serious fair trial concerns. This is largely due to investigative and detention tactics that occur prior to trial including prolonged solitary confinement during pretrial detention, as well as procedural impediments imposed by the US Congress or courts; use of prejudicial evidence such as evidence obtained through coercion; classified evidence obtained by warrantless wiretaps that cannot be fairly contested; and inflammatory evidence, including evidence about terrorism in non-terrorism cases that unfairly plays on jurors' fears.<sup>13</sup>

I hardly needed Columbia or Human Rights Watch to tell me things were out of whack in national security prosecutions in the federal courts. My first suspicion that something was seriously remiss in criminal prosecutions in the name of national security began in Guantanamo Bay. A day or two before my client, Ramzi bin al-Shibh, and his four co-conspirators—including alleged master-mind Khalid Sheikh Mohammed—were arraigned in the capital conspiracy case in the Military Commissions for plotting the 9/11 attacks, several civilian defense counsels and I were standing in line outside a trailer office waiting to

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<sup>12</sup> *Illusion of Justice: Human Rights Abuses in U.S. Terrorism Prosecutions*, COLUM. L. SCH. HUM. RTS. INST. & HUM. RTS. WATCH 13 (July 21, 2014), <http://www.hrw.org/reports/2014/07/21/illusion-justice-0> [<http://perma.cc/E8C7-4GYR>].

<sup>13</sup> *Id.* at 76.

obtain credentials.<sup>14</sup> We struck up a conversation with one or two of the prosecutors from the Office of Military Commissions (“OMC”), but the prosecutors seemed unwilling or unable to answer even the most basic questions about the case. In the course of the next few days, this pattern of unwillingness or inability to answer typical questions that prosecutors and defense counsel routinely share among themselves struck me as odd, but I dismissed it due to the seriousness of the case, OMC hierarchy, and the massive world-wide media attention it was attracting.<sup>15</sup>

Additionally, the same sense of uneasiness and prosecutorial double-speak began to raise its head in the domestic terrorism cases in which we became involved in the federal court in Chicago. Prosecutors from the Chicago U.S. Attorney’s Office, with whom we work on a regular basis and share a significant amount of trust lawyer-to-lawyer, began reacting the same way as the guys in the credential line in the Guantanamo Military Commissions. Rudimentary questions that would readily be answered in regular federal criminal prosecutions would more and more be met with the answer: “Not sure, I’ll have to get back to you.” Over time, it gradually became clear to us that either the local line-assistant prosecutors

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<sup>14</sup> On January 21, 2010, Susan L. Crawford, the Convening Authority for the Military Commissions, dismissed all the charges. See Letter from Susan J. Crawford, Convening Authority for Military Commissions, Regarding the Direction of the Convening Authority (Jan. 21, 2010) (reporting all charges against the named defendants are withdrawn and dismissed without prejudice). The group was then indicted in the Southern District of New York in *United States v. Khalid Sheikh Mohammed*. See Indictment, *United States v. Khalid Sheikh Mohammed*, (S14) 93-CR-180 (KTD). The case was subsequently brought back to the Military Commission in Guantanamo. See Verbatim Transcript of Combatant Status Review Tribunal Hearing at 1, *United States v. Khalid Sheikh Mohammed*, (S14) 93-CR-180 (KTD) (2007) (ISN No. 10013).

<sup>15</sup> See, e.g., Sylvain Cypel, *Le “Cerveau” Présumé du 11 Septembre Veut Mourir En Martyr* [The presumed “brains” of 9/11 wants to die a martyr], LE MONDE (June 6, 2008, 11:35 AM), [http://www.lemonde.fr/elections-americaaines/article/2008/06/06/le-cerveau-presume-du-11-septembre-veut-mourir-en-martyr\\_1054552\\_829254.html](http://www.lemonde.fr/elections-americaaines/article/2008/06/06/le-cerveau-presume-du-11-septembre-veut-mourir-en-martyr_1054552_829254.html) [<http://perma.cc/2PRW-Z96X>] (demonstrating the world-wide media attention); William Glaberson, *9/11 Suspects Arraigned at Guantánamo Hearing*, N.Y. TIMES (June 5, 2008), <http://nytimes.com/2008/06/05/washington/05cnd-gitmo.html> [<http://perma.cc/256C-8328>] (summarizing imprisonment and subsequent arraignment of the five detainees); Louise Radnofsky & Allegra Stratton, *Profiles: Guantánamo Trial*, THE GUARDIAN (June 5, 2008), <http://www.the-guardian.com/world/2008/jun/05/alqaida.guantanamo1> [<http://perma.cc/TZN6-XZKL>] (profiling the five men charged in connection with the 9/11 attacks); Carol Rosenberg, *Alleged 9/11 Architect: Martyr Me*, MIAMI HERALD (June 6, 2008), <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1929229.html> [<http://perma.cc/L7NV-3U7H>] (illustrating the events of the hearing where five accused 9/11 co-conspirators each independently rejected free American lawyers); Josh White, *9/11 Architect Tells Court He Hopes for Martyrdom*, WASH. POST (June 6, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/05/AR2008060500305.html> [<http://perma.cc/TV3V-NB56>] (discussing the position of Khalid Sheikh Mohammed in regard to the allegation of his involvement with the 9/11 attacks).

themselves did not know the answers to the questions, or even if they did, they were not permitted to respond to questions without permission. Clearly something significantly different was happening in these cases. It was not until reading Glennon's double government article, *National Security and Double Government*, that I finally began making sense out of my increasing uneasiness over what was happening with respect to who was actually running these prosecutions. In the article's first page abstract, Professor Glennon caught my attention. As he bluntly stated:

The public believes that the constitutionally-established institutions control national security policy, but that view is mistaken. Judicial review is negligible; congressional oversight is dysfunctional; and presidential control is nominal. Absent a more informed and engaged electorate, little possibility exists for restoring accountability in the formulation and execution of national security policy.<sup>16</sup>

It suddenly occurred to me that if presidential control over national security policy was nominal, why should anyone think that the prosecutorial control by the Chicago U.S. Attorney's Office was any different? In posing the question as to why national security policy would remain constant through the Obama Administration, notwithstanding the newly elected President's forceful criticism on the campaign trail, Glennon suggests that "[a] disquieting answer is provided by the theory that Walter Bagehot suggested in 1867 to explain the evolution of the English Constitution."<sup>17</sup> Citing Bagehot's classic, *The English Constitution*, Glennon lays out Bagehot's comparison between Britain's "'dignified' institutions" versus its "efficient" organizations that together comprised a "disguised republic."<sup>18</sup> As Glennon puts it, Bagehot's disguised republic "obscures the massive shift in power that has occurred, which if widely

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<sup>16</sup> Glennon, *supra* note 4, at 1-2. With the exception of one example of recent disclosure of dysfunctional congressional oversight, consider the congressional oversight of U.S. drone strikes, where the full legal basis for those strikes is withheld from the public. See Richard Weir, *Accountability on Drones Continues to Fall Short*, OPEN SOC'Y FOUND. (Aug. 12, 2015), <https://www.opensocietyfoundations.org/voices/accountability-drones-continues-fall-short> [<https://perma.cc/7CD7-D7HD>] ("Currently, congressional committees tasked with oversight of the program do not even have access to all of the administration's interpretations of relevant law. Since 2010, members of the Senate intelligence committee have requested the release of all the Office of Legal Counsel's opinions on targeted killing operations. Only four – of what is believed to be at least nine opinions – have been shared.")

<sup>17</sup> Glennon, *supra* note 4, at 10.

<sup>18</sup> *Id.* at 11-12.



understood would create a crisis in public confidence.”<sup>19</sup> In short, Glennon explained that it is the latter “‘efficient’ institutions” (the House of Commons, the Cabinet, and the Prime Minister) that Bagehot suggested did the real work of governing—not the “‘dignified’ institutions” (the monarchy and the House of Lords).<sup>20</sup> Turning to the United States, Glennon acknowledges that as was the case in the early days of Britain’s monarchy, power also originally lay in the hands of America’s “‘dignified’ institutions”—the President, Congress, and the courts.<sup>21</sup> While many Americans may well still believe these dignified institutions are the seat of governmental power, Glennon posits—consistent with our courtroom experience—that insofar as national security decisions are concerned, the public is sadly mistaken.<sup>22</sup> Justifying his sense of how disquieting things have become, Glennon puts things rather bluntly again:

[W]hen it comes to defining and protecting national security . . . America’s efficient institution makes most of the key decisions concerning national security, removed from public view and from the constitutional restrictions that check America’s dignified institutions.<sup>23</sup>

Glennon straightforwardly claims that the United States “moved beyond a mere imperial presidency to a bifurcated system—a structure of double government—in which even the President now exercises little substantive control over the overall direction of U.S. national security policy.”<sup>24</sup> Glennon advances the Bagehot analogy by describing America’s “dignified” institutions as “Madisonian[s]” while calling the United States “efficient” institutions as “Trumanite[s].”<sup>25</sup> These he describes as a “network of several hundred high-level military, intelligence, diplomatic, and law enforcement officials within the Executive Branch who are responsible for national security policymaking.”<sup>26</sup> Giving President

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<sup>19</sup> *Id.* at 11.

<sup>20</sup> *See id.* at 10–11 (asserting a difference between “‘dignified’ institutions” and “‘efficient’ institutions” as it pertains to governing). Glennon points out that Bagehot explained that the Monarchy and House of Lords were “dignified” in that they provide a link to the past, excite the public imagination, and exercise a hold on the public mind by evoking the grandeur of past ages through theatrical show, pomp, and historical symbolism. *Id.*

<sup>21</sup> *See id.* at 12 (discussing the distribution of power in the early United States as compared to early Britain).

<sup>22</sup> *See* Glennon, *supra* note 9, at 12 (illustrating the skewed viewpoint among Americans relating to national security).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *See id.* at 17–18 (categorizing the differing approaches and viewpoints as “Madisonian” and “Trumanite”).

<sup>26</sup> *Id.* at 18.

Truman this appellation is no accident.<sup>27</sup> Glennon explains in considerable historical detail Truman's founding role in the creation of the modern American national security state, and the passage of the historic National Security Act of 1947 ("the Act").<sup>28</sup> As Glennon explains further, it is the Act that "unified the military under a new Secretary of Defense, set up the CIA, created the modern Joint Chiefs of Staff, and established the National Security Council . . ." <sup>29</sup> The Act also established the National Security Agency.<sup>30</sup> Citing a landmark 2011 Washington Post study of the Act's growth, Glennon illustrates that there are now at least forty-six federal departments and agencies engaged in national security work with millions of employees and a total annual budget outlay of around \$1 trillion.<sup>31</sup>

Importantly, Glennon goes on to discuss how this double government was not a diabolical conspiracy, but instead, part of the same structural inheritance from the British of our adopted form of a constitutional republic.<sup>32</sup> Differing from Bagehot, however, Glennon demonstrates that our double government evolved in plain sight and is more structural than purposeful.<sup>33</sup> Glennon's point, as to the structure, is worth quoting in full:

Nonetheless, in the United States today, as in Bagehot's Britain, "[m]ost do indeed vaguely know that there are

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<sup>27</sup> See *id.* (explaining how President Truman is largely responsible for creating the United States' "'efficient' national security apparatus").

<sup>28</sup> See Glennon, *supra* note 9, at 19–21 (describing Truman's role in the origin of the efficient security state).

<sup>29</sup> *Id.* at 18.

<sup>30</sup> *Id.*

<sup>31</sup> See *id.* at 22 (accounting for the number of federal departments and agencies in the United States and the budget that accompanies national security work). Considerable scholarship, far beyond the scope of this Article, has been devoted to the National Security Act of 1947 and its ramifications. However, a basic understanding of the Act, its impact on present day America and our national security apparatus in general, is essential in attempting to grasp the national security world in which we find ourselves today even insofar as prosecutions in the name of national security are concerned. See generally MICHAEL J. HOGAN, A CROSS OF IRON: HARRY S. TRUMAN AND THE ORIGINS OF THE NATIONAL SECURITY STATE, 1945–1954 65 (1998) (indicating that the National Security Act of 1947 "established the modern mechanisms of the national security state"); IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 8–10 (2013) (examining the New Deal and analyzing the results of illiberal alliances); JOHN LUKACS, THE LEGACY OF THE SECOND WORLD WAR 189–91 (2010) (analyzing post-World War II America); JAMES T. SPARROW, WARFARE STATE: WORLD WAR II AMERICANS AND THE AGE OF BIG GOVERNMENT 42–43 (2011) (discussing Roosevelt's administration, the New Deal, and the building of "an arsenal of democracy").

<sup>32</sup> See Glennon, *supra* note 4, at 45 (explaining that, as in Bagehot's Britain, there are institutions involved in the governance of the United States that were not established by the constitution).

<sup>33</sup> See *id.* at 45–46 (noting that the evolution of America's double government has not been purposeful, but a response to society's needs).

some other institutions” involved in governance besides those established by the Constitution. But the popular conception of an “invisible government,” “state within,” or “national security state” is off the mark. The existence of the Trumanite network is no secret. The network’s emergence has not been the result of an enormous, nefarious conspiracy conceived to displace constitutional government. The emergence of the Trumanite network has not been purposeful. America’s dual national security framework has evolved gradually in response to incentives woven into the system’s structure as that structure has reacted to society’s felt needs. Yet, as a whole, Americans still do not recognize the extent to which Madisonian institutions have come to formulate national security policy in form more than in substance.<sup>34</sup>

As part and parcel of these structural incentives, Glennon goes on in a section entitled “The Reality of Madisonian Weakness” to explain quite cogently how while it appears that the President, Congress, and the courts set national security policy, “in reality their role is minimal.”<sup>35</sup> Taking issue with Harvard Professor Jack Goldsmith’s proposition that “[t]he main virtue of the [checks and balances] system lies in its ability to self-correct[.]” Glennon says instead that all three branches “exercise decisional authority more in form than in substance.”<sup>36</sup> Sadly, Glennon’s conclusion, rather than Goldsmith’s, seems closer to reality from our courtroom experience; but it would be foolhardy to question Professor Goldsmith’s prolific and serious scholarly contributions to the national security debate, albeit from his quite different perspective of government service.<sup>37</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 46.

<sup>36</sup> *Id.* at 46 n.242.

<sup>37</sup> See generally JACK L. GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 9–11 (2007) (narrating Smith’s experiences as the Head of the Justice Department’s Office of Legal Counsel); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law and Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816–17 (1997) (challenging the modern position that customary international law has the status of federal common law); Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667, 1668–69 (2003) (examining forms of criticism targeted at the United States regarding its failure to take affirmative action to help other nations, and critiquing the cosmopolitan duty argument); Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 89 (2003) (arguing that the current organization of the International Criminal Court (“ICC”) is unacceptable and laying out the mechanism that make ICC futile and perverse); Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 200 SUP. CT. REV. 175, 176–77 (2001) (analyzing issues concerning statutory

Certainly if Glennon's theory of double government is correct, and the President himself now exercises little substantive control over the overall direction of national security policy, it is understandable why local prosecutors from the U.S. Attorney's Offices, under the umbrella of his Department of Justice, were incapable of exercising control over domestic national security prosecutions.<sup>38</sup> Over time, and the more domestic national security cases we took on,<sup>39</sup> this became so clear to us that we took the liberty to inform District Court trial judges that we would no longer call the local U.S. Attorney's Office and its Assistants "the government."<sup>40</sup> Instead, we would hereafter simply refer to them in our pleadings as "the prosecutors."

While, of course, some of this banter was tongue-in-cheek courtroom theatrics, there may be more to this observation than meets the eye. First and foremost, it is our experience that very few people involved in the practice of federal criminal law—and this might well include many judges—are aware that the National Security Division of the Department of Justice ("NSD") does not report to the Assistant Attorney General of the Criminal Division, as would occur in every other federal criminal prosecution.<sup>41</sup> It is of no small consequence to this discussion that the Department of Justice Counterterrorism and Counterespionage Sections were taken out of the Criminal Division chain of command and merged into a newly created National Security Division as part of the USA

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foreign affairs preemption and arguing that an interpretive canon favoring federal foreign affairs interests is warranted).

<sup>38</sup> Glennon, *supra* note 9, at 12 ("The United States has, in short, moved beyond a mere imperial presidency to a bifurcated system—a structure of double government—in which even the President now exercises little substantive control over the overall direction of U.S. national security policy.").

<sup>39</sup> To date, our firm has been involved in the following national security or "domestic terrorism" cases in federal district courts since 9/11: *United States v. Abdelhaleem Ashqar*, 03-CR-978 (N.D. Ill. 2005); *United States v. Raja Lahrasib Khan*, 10-CR-240 (N.D. Ill. 2012); *United States v. Basaaly Moalin*, 10-CR-4246 (S.D. Cal. 2013); *United States v. Shaker Masri*, 10-CR-655 (N.D. Ill. 2012); *United States v. Adel Daoud*, 12-CR-723 (N.D. Ill. 2014); *United States v. Mohammed Khan*, 14-CR-564 (N.D. Ill. 2012). *Notable Cases*, DURKIN ROBERTS & GROHMAN, <http://www.durkinroberts.com/notable-cases/> [http://perma.cc/5NBE-KYUH].

<sup>40</sup> Defendant's Consolidated Reply in Support of His Pretrial Motions, *United States v. Adel Daoud*, 12-CR-723, 2014 WL 321384 (N.D. Ill. 2014).

<sup>41</sup> See U.S. Dep't of Just., *National Security Division Progress Report*, U.S. DEP'T OF JUST. NAT'L SECURITY DIVISION 2-3 (Apr. 2008), <http://www.justice.gov/sites/default/files/nsd/legacy/2014/07/23/nsd-progress-rpt-2008.pdf> [https://perma.cc/XHJ9-YAVR] (showing the Justice Department National Security Structure after the creation of the National Security Division).

PATRIOT Improvement and Reauthorization Act of 2006.<sup>42</sup> This Act created the Senate confirmation position of Assistant Attorney General (“AAG”) for National Security.<sup>43</sup> This chain of command bypasses the AAG of the Criminal Division, and requires the approval of the Director of National Intelligence (“DNI”) before the Presidential recommendation for appointment.<sup>44</sup>

Further, also hidden in Glennon’s plain sight, every national security or domestic terrorism prosecution must be approved *and supervised* by the same AAG of the National Security Division who was approved by the DNI.<sup>45</sup> The AAG remains as a “supervisory authority over the conduct of the case from its inception until its conclusion, including appeal.”<sup>46</sup> The U.S. Attorneys’ manual also mandates that line assistants must receive “express authorization of the National Security Division [(“NSD”)] or higher authority” to institute a case involving national security, and the NSD must be consulted:

[B]efore an arrest is made, a search warrant is obtained, a grand jury investigation is commenced, immunity is offered, an indictment is presented, an information filed, or a civil injunctive action is filed, a prosecution is declined, a count is dismissed, a sentencing commitment

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<sup>42</sup> See *id.* (depicting the changes to the Justice Department National Security Structure as part of USA PATRIOT Act, which eliminated the counterespionage and counterterrorism sections).

<sup>43</sup> See *id.* at 2 (noting that Congress established the National Security Division as part of the PATRIOT Act, which is led by the Assistant Attorney General for National Security).

<sup>44</sup> See Exec. Order No. 12333(1.1)(d)(2), 46 Fed. Reg. 59,941 (Dec. 4, 1981), <https://www.cia.gov/about-cia/eo12333.html#2.5> [https://perma.cc/PDV9-HZXR] (explaining the approval process). The Executive Order states:

The relevant department head shall consult with the Director [of National Security] before appointing an individual to fill a vacancy or recommending to the President an individual be nominated to fill a vacancy in any of the following positions: the Under Secretary for Defense for Intelligence; the Director of the Defense Intelligence Agency; uniformed heads of the intelligence elements of the Army, the Navy, the Air Force, and the Marine Corps above the rank of Major General or Rear Admiral; the Assistant Commandant of the Coast Guard for Intelligence; and the *Assistant Attorney General for National Security*.

*Id.* (emphasis added).

<sup>45</sup> See OFFICE OF THE UNITED STATES ATTORNEYS, U.S. ATTORNEYS’ MANUAL 9-90.100, <http://www.justice.gov/usam/usam-9-90000-national-security> [https://perma.cc/J5PU-76RS] (“[A]ll criminal cases relating to activities directed against the national security, as well as collateral offenses such as perjury that arise out of such activities, are to be supervised by the Assistant Attorney General (AAG), National Security Division.”) (internal citations omitted).

<sup>46</sup> *Id.*

or other disposition is made, or an adverse ruling or decision is appealed . . . .<sup>47</sup>

In short, this laundry list constitutes nearly every conceivable prosecutorial decision normally made by the U.S. Attorney's Office.<sup>48</sup> Thus, it may not necessarily be mere tongue-in-cheek criticism to suggest that local line assistant federal prosecutors assigned to a national security case are completely beholden to the AGG and the NSD, and indirectly the DNI, when it comes to the approval of every aspect of a domestic national security prosecution. This is of no small moment on a number of levels. First and foremost, major city U.S. Attorney's Offices such as the Southern and Eastern Districts of New York (New York City and Brooklyn), the Central District of California (Los Angeles) and the Northern District of Illinois (Chicago), have always prided themselves as being largely independent of the Department of Justice and Glennon's bureaucrats. Among practitioners, these offices are considered the premier offices in the country; and due to the volume and sophistication of the prosecutions, deservedly receive a considerable amount of respect and deference both from Washington and the judges in the districts in which they practice.

This independence, respect, and deference cuts a number of ways, but is critical to the overall daily operation of the federal criminal justice system. Defense lawyers and prosecutors necessarily must come to trust each other—or at least those lawyers considered trustworthy on both sides.<sup>49</sup> The everyday operation of the system requires that a relatively free flow of information exists between the parties. Plea agreements would come to a standstill if discovery cannot be readily produced and a prosecutor's word would be taken at face value regarding what else might be involved in the case.<sup>50</sup> Likewise, no agreement to cooperate could ever exist if the defense lawyer's assessment of the credibility of the client or his or her willingness to cooperate could not be taken at face value.<sup>51</sup>

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<sup>47</sup> *Id.* at 9-90.020. Assistants must also consult with the Counterintelligence and Export Control Section ("CES") of the National Security Division, in cases involving classified information (governed by the Classified Information Procedures Act). *Id.*

<sup>48</sup> *See id.*

<sup>49</sup> Unfortunately, trustworthiness is not a universal trait with violators on both sides of the equation. Nevertheless, like every good prosecutor comes to learn which defense lawyers can be trusted, the same is true on the defense side. Nor is this trustworthiness a sign of weakness, something some defense lawyers regrettably confuse with the ability to defend a client zealously.

<sup>50</sup> *See* Ellen Yaroshefsky, *Ethics and Plea Bargaining: What's Discovery Got to Do With It?*, 23 CRIM. JUST. 28, 30 (2008) (advocating for "open file" discovery and explaining that such discovery policies would result in guilty pleas being entered into earlier).

<sup>51</sup> The entire issue of cooperation with the government raises the hackles of some defense lawyers who pride themselves as never representing "cooperators." In the author's

This same everyday level of trust necessarily comes to exist between the lawyers and the court. For many of the same reasons that trust comes to exist between the lawyers, judges likewise need to rely upon the word of the lawyers before them. Just like a prosecutor must rely on the word of a defense lawyer that he or she wants to resolve the case without the need for a trial, judges need to be able to rely upon the word of the lawyers for each party whether a plea or trial is likely, what the issues are in the case, how long the case will take, that witnesses are being put on without the subornation of perjury and the like. The everyday functioning of the system requires that and more. While many defense lawyers would claim, with reasonable cause, that most federal judges too often rely upon the word of the government prosecutors in any kind of case, it is submitted that this cynicism is becoming well founded in cases brought in the name of national security. One reason for this problem may lie in an issue Glennon mentions early in his article while addressing the Obama Administration's approach to multiple national security issues as being essentially the same approach as the Bush Administration, including the Bush Administration's CIA programs and operations.<sup>52</sup> In reciting these similarities, Glennon notes that while his article only considers national security policy, it is important to understand that "elements of national security policy bear directly upon U.S. foreign policy generally and, indeed, upon domestic policy."<sup>53</sup> Glennon labels what he calls the "Bush/Obama view" and suggests this view considers "homeland

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experience, however, these lawyers are either good liars or always have a close associate to whom they can quickly refer the many clients in whose interest it is to cooperate. Regardless, a considerable portion of the everyday practice of federal criminal law requires discussions back and forth between the defense lawyer and prosecutor over what is commonly known as a "proffer." A proffer, short for "proffer of testimony," can be done either directly by the client pursuant to a "proffer letter" issued by the prosecutor offering a limited form of immunity; or through what is known as an "attorney proffer" where the defense attorney tells the prosecutor what the client would say if he or she were to testify. The latter cannot be used in any fashion against the client, unlike the limited immunity offered in a proffer letter whose limited immunity is more often swallowed by the exceptions. As a result, experienced defense practitioners usually only permit attorney proffers with respect to any client that may still wish to proceed to trial. This process, therefore, requires considerable give and take between lawyers.

<sup>52</sup> See Glennon, *supra* note 4, at 2-4 (listing the many issues the Bush Administration practiced and the Obama Administration continues to practice: sending terrorism suspects overseas for detention and interrogation; claiming the power to hold American citizens accused of terrorism without trial in military confinement; insisting that the President decides whether an accused terrorist will be tried by a civilian court or military tribunal; keeping the military prison at Guantanamo Bay open; arguing that detainees cannot challenge the conditions of their confinement; restricting detainees' access to counsel; resisting efforts to extend the right of habeas corpus to other off-shore prisons; arguing that detainees cannot invoke the Geneva Convention).

<sup>53</sup> *Id.* at 2 n.2.

security [as] the be-all and end-all of grand [foreign policy] strategy” that “required maintaining ‘the security apparatus that supported drone attacks on Al Qaeda targets’ in countries such as Yemen, which in turn has shaped U.S. engagement in the Middle East and the muted U.S. response to the Arab Spring.”<sup>54</sup>

Blurring the distinctions between modern national security, foreign policy and domestic policy from the idea of national security being more or less an issue belonging to the sphere of the military to a broader strategic concept has been traced to the post-World War II issue of obtaining “freedom from foreign dictation.”<sup>55</sup> This evolution has been attributed to a variety of causes, including the introduction of “total war” brought about by the two World Wars of the Twentieth Century, along with the complete mobilization of the citizenry for manpower which, in turn, could be said to also blur the distinction between “the battle front and the home front, as well as between combatants and non-combatants.”<sup>56</sup> As such, the idea of “total war” may well have been captured best shortly after World War II by President Truman in his memoirs, which also shines considerable light on the reasons behind pushing for the creation of the National Security Act of 1947, and perhaps, his comfort level with the decision to drop the Atomic Bomb on Hiroshima and Nagasaki:

[W]e live in an age when . . . there are no longer sharp distinctions between combatants and noncombatants, between military targets and the sanctuary of civilian areas. Nor can we separate the economic facts from the problems of defense and security. [The] President . . . must be able to act at all times to meet any sudden threat to the nation’s security.<sup>57</sup>

Here, it appears, Glennon, and commentators such as Gross and Ní Aoláin, get to the very nub of the problem created by the peculiarities of our modern global war on terror, national security emergencies and the current confusion that gets put in the lap of District Court Judges when it comes to these domestic national security cases. While it is rather obvious that both the War on Crime and the War on Drugs had political overtones driven by thinly disguised “tough on crime” emergency-like demagoguery, it was one thing for the courts to stand up and be counted

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<sup>54</sup> *Id.*

<sup>55</sup> OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN THE TIME OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 215 (2006).

<sup>56</sup> *Id.* at 216.

<sup>57</sup> *Id.* at 217.



on every now and then to apply traditional Fourth, Fifth, Sixth, or Eighth Amendment issues in that setting. Certainly, better late than never, the Supreme Court decision in *United States v. Booker* declared the mandatory U.S. Sentencing Guidelines unconstitutional, which is a classic example of some judicial backbone in this regard.<sup>58</sup>

When it comes to a global war on terror, however, and notwithstanding several Supreme Court decisions against the government in the context of Guantanamo, government losses are few and far between in the domestic courtroom realm.<sup>59</sup> While it may well be one thing to stand up every now and then to executive and congressional demagoguery over more traditional criminal prosecutions involving drugs or street crime, it seems rather too much to expect that judges would, or even perhaps should, be expected to do the same thing in the context of something as dire as the very security of the homeland, something inextricably mixed up in our minds with foreign policy and traditional concepts of war, military might, and existential threats, real or imagined. This concept is no doubt frothy stuff, and the conflation and confusion of fear generated issues—existential or otherwise—is good fodder for demagoguery over “national security,” which seems to have succeeded.

### III. A CASE STUDY FOR A TWO-TIERED SYSTEM: *UNITED STATES V. DAOU*

In *United States v. Daoud*, Judge Rovner, writing in her concurring opinion, stated:

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<sup>58</sup> 543 U.S. 220, 258 (2005).

<sup>59</sup> See *Boumediene v. Bush*, 553 U.S. 723, 771–72 (2008) (discussing that the constitutional privilege of habeas corpus extends to noncitizens held in Guantanamo, and the Military Commissions Act did not provide an adequate habeas substitute and constitutes an unlawful suspension of the writ of habeas corpus); *Hamdan v. Rumsfeld*, 548 U.S. 557, 567, 650 (2006) (holding the Detainee Treatment Act of 2005 did not strip the United States Supreme Court of jurisdiction to hear cases being tried before military commissions, and the Bush Administration’s Military Commissions lacked the power to proceed because the structure and procedures violated the Uniform Code of Military Justice and the Geneva Conventions); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (identifying that persons deemed enemy combatants have the right to challenge the legality of their detention before a judge or other neutral decision maker); *Rasul v. Bush*, 542 U.S. 466, 480 (2004) (providing federal courts with jurisdiction to consider habeas corpus petitions by or on behalf of persons detained at the U.S. Naval Station in Guantanamo Bay, Cuba); *By the Numbers: U.S. Prosecutions of Jihadist Terror Crimes Since 9/11*, CTR. ON NAT’L SEC. AT FORDHAM L. (July 2015), <http://www.centeronnationalsecurity.org/sites/default/files/CNS%20By%20the%20Numbers%20-%20U.S.%20Prosecutions%20of%20Terror%20Crimes%20Since%2009-11.pdf> [<http://perma.cc/N6SS-H9VV>] (stating that 462 terrorism cases have been prosecuted in the United States since 9/11, the government has a ninety-one percent conviction rate, and appellate courts have consistently sided with the government in most every FISA related issue).

I believe it is time to recognize that *Franks* cannot operate in the FISA context as it does in the ordinary criminal case. To pretend otherwise does a disservice to the defendant and to the integrity of the judiciary. We must recognize both that the defendant cannot make a viable *Franks* motion without access to the FISA application, and that the court, which does have access to the application, cannot, for the most part, independently evaluate the accuracy of that application on its own without the defendant's knowledge of the underlying facts. Yet, *Franks* serves as an indispensable check on potential abuses of the warrant process, and means must be found to keep *Franks* from becoming a dead letter in the FISA context. The responsibility for identifying a solution lies with all three branches of government, but as the branch charged with applying *Franks*, the duty falls to the judiciary to acknowledge the problem, make such accommodations as it can, and call upon the other branches to make reforms that are beyond our power to implement.

[ . . . ]

My purpose in engaging in this discussion has been to acknowledge a problem that thus far has not been addressed as deeply as it should be by the judiciary. Thirty-six years after the enactment of FISA, it is well past time to recognize that it is virtually impossible for a FISA defendant to make the showing that *Franks* requires in order to convene an evidentiary hearing, and that a court cannot conduct more than a limited *Franks* review on its own. Possibly there is no realistic means of reconciling *Franks* with the FISA process. But all three branches of government have an obligation to explore that question thoroughly before we rest with that conclusion.<sup>60</sup>

This conundrum Judge Rovner described might be fairly described as what is known in academic circles as a legal "black hole," or perhaps better put, a "legal grey hole[.]"<sup>61</sup> This issue and its consequences will

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<sup>60</sup> United States v. Daoud, 755 F.3d 479, 486, 496 (7th Cir. 2014).

<sup>61</sup> See Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs*, 115 COLUM. L. REV. 1029, 1030, 1034 n.23 (2015) (quoting the terms "legal black hole" and "legal grey hole," and also attributing the creation of the terms to professor David Dyzenhaus who stated "there are

raise its head again once we get to Carl Schmitt, Clinton Rossiter, and Giorgio Agamben when we take up the discussion of Schmitt's famous "state of exception."<sup>62</sup> Black holes, grey holes, the state of exception, and political theorists such as Schmitt, Rossiter, and Agamben are of little comfort to Adel Daoud, who currently awaits trial and would like nothing more than to be able to challenge the 2012 FISA search warrant issued against him by the Foreign Intelligence Surveillance Court ("FISC"). If nothing else, however, he accomplished something no defendant in the thirty-seven year history of FISA has done. He was not only the first defendant whose counsel was judicially awarded access to FISA search warrant materials, but he also caused at least one judge from the Seventh Circuit Court of Appeals to acknowledge the existence of a very real problem in national security prosecutions involving FISA.<sup>63</sup> While this admission is probably of little comfort to Daoud, the significance of the above statements of Judge Rovner, for our present purposes, is considerable. This is truly a remarkable opinion, and one deserving of far more attention than it has to date.

In order to appreciate the significance of this opinion, some background on the case—and its relationship to the political fall-out from the Edward Snowden foreign intelligence gathering revelations, in particular, will shed light on our latter discussion concerning Carl Schmitt's "state of exception," politics, and the rule of law.<sup>64</sup> On

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some legal constraints on executive action—it is not a lawless void—but the constraints are so insubstantial that they pretty well permit the government to do as it pleases").

<sup>62</sup> See GIORGIO AGAMBEN, *STATE OF EXCEPTION* 1-5 (Kevin Attell trans. 2005) (providing that while the state of exception has been thoroughly discussed by many scholars, there is still no theory of it in public law); CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 32 (1948) (explaining that there is no greater need for the use of extraordinary measures to overcome economic distress than to avoid war); CARL SCHMITT, *POLITICAL THEOLOGY* 5-7 (Thomas McCarthy ed., George Schwab trans. 1984) (describing this term as any kind of severe political or economic disturbance that requires the application of extraordinary measures).

<sup>63</sup> See *Daoud*, 755 F.3d at 486 (Rovner, J., concurring) (identifying that Daoud was presented with the same issue facing all defendants charged on the basis of FISA because to allege misrepresentations and ill will in a classified affidavit, he would have needed to read the affidavit).

<sup>64</sup> See *ACLU v. Clapper*, 959 F. Supp. 2d 724, 730 (S.D.N.Y. 2013) (discussing that the ACLU would have never learned about FISA's intelligence gathering operation had it not been for Edward Snowden's unauthorized disclosures). The court went on to say, however, that allowing a lawsuit based on revealing governmental trade secrets, including gathering telephone metadata, would open the door for any target of FISA to sue in any desired federal court. *Id.* at 742. In its closing remarks, the court stated "[t]he right to be free from searches and seizures is fundamental, but not absolute." *Id.* at 756; see also *ACLU v. Clapper*, 785 F.3d 787, 826 (2d Cir. 2015) (holding that the metadata program exceeds the scope of what Congress authorized and violates section 215 of the PATRIOT Act); OFFICE OF THE UNITED

September 15, 2012, Daoud, an eighteen-year-old from a northwest Chicago suburb, was arrested on a criminal complaint in the United States District Court for the Northern District of Illinois, charged with attempting to detonate a weapon of mass destruction in violation of 18 U.S.C. § 2331(a)(2)(D), and attempting to destroy a building by an explosive in violation of 18 U.S.C. § 844(i).<sup>65</sup> The weapon of mass destruction was a fake bomb created by the FBI in its undercover operation, after Daoud had been discovered talking to people overseas via the Internet.<sup>66</sup> Daoud was indicted on September 20, 2012, and shortly after the return of the indictment, the government filed a Notice of Intent to Use Foreign Intelligence Surveillance Act Information (“FISA Notice”).<sup>67</sup> The filing, as is required by the FISA statute, provided formal notice that the government intended to “offer into evidence, or otherwise use or disclose in any proceedings in this matter, information obtained and derived from electronic surveillance conducted pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended by 50 U.S.C. §§ 1801–1812 and 1821–1829.”<sup>68</sup>

After receiving the government’s notice that it intended to use FISA evidence against Daoud, our firm filed a motion for disclosure of the FISA materials supporting the warrant request to the FISC.<sup>69</sup> However, in any other criminal case, the government provides search warrant materials as a matter of course in routine discovery – without the need for a motion.<sup>70</sup> Then, pursuant to 50 U.S.C. §§ 1806(f), 1825(g), Attorney General Eric H. Holder filed a bare bones affidavit stating, under oath, that disclosure of

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STATES ATTORNEYS, *supra* note 45, at 9-90.010 (providing that the National Security Division shall be consulted before an adverse ruling is appealed in cases relating to national security).

<sup>65</sup> See *Daoud*, 755 F.3d at 480 (stating that the investigation began in May 2012 for the September 2012 indictment).

<sup>66</sup> The very interesting facts of the case and how the government went about its undercover investigation—including the use of an undercover agent posing as a terrorist who pretended to have contact with a radical Muslim cleric from Saudi Arabia, is set forth in this very detailed thirty-six page Criminal Complaint, Docket No. 1, *United States v. Adel Daoud*, (N.D. Ill.) Case No. 12-CR-723 (Coleman, J.).

<sup>67</sup> See Defendant’s Motion For Notice of FISA Amendments Act Evidence Pursuant To 50 U.S.C. §§ 1881e(a), 1806(c) at 1-2, *United States v. Daoud*, 755 F.3d 479 (7th Cir. 2014) (No. 1:12-CR-00723) [hereinafter Defendant’s Reply: Disclosure of FISA] (acknowledging that the government filed its notice of intent to use FISA evidence).

<sup>68</sup> *Id.*

<sup>69</sup> See Defendant’s Motion For Disclosure of FISA-Related Material and To Suppress the Fruits or Derivatives of Electronic Surveillance and Any Other Means of Collection Conducted Pursuant to FISA or Other Foreign Intelligence Gathering at 1-2, *United States v. Daoud*, 755 F.3d 479 (7th Cir. 2014) (No. 1:12-CR-00723) (illustrating that defense counsel argued that the information was improperly classified under FISA).

<sup>70</sup> See FED. R. CRIM. P. 16(a)(1) (reviewing the Federal Criminal Procedure Rule in regard to the government’s required disclosure during discovery).

such materials would harm national security.<sup>71</sup> Under the FISA statute, this filing automatically triggers an *in camera*, *ex parte* procedure to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted.<sup>72</sup> After review by the court, disclosure of the FISA materials can be disclosed to the defense “only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.”<sup>73</sup>

From the time of FISA’s inception in 1978, disclosure to defense counsel had never been deemed as necessary; and no defense counsel, therefore, had ever been granted access to FISA materials.<sup>74</sup> In a five-page order and memorandum opinion issued in response to our request on January 29, 2014, United States District Court Judge Sharon Johnson Coleman became the first to do so.<sup>75</sup> In her opinion granting disclosure of the FISA materials, Judge Coleman stated that she was “mindful of the fact that no court has ever allowed disclosure of FISA materials to the defense,” she nevertheless found that in Daoud’s case “disclosure may be necessary.”<sup>76</sup> Judge Coleman focused her opinion on the integral role that the adversarial process—the bedrock of the Sixth Amendment effective

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<sup>71</sup> See 50 U.S.C. §§ 1806(f)–(g), 1825(f)–(g) (2012) (explaining the procedures for *in camera* and *ex parte* review by a district court and the suppression of evidence). Holder’s affidavit reads in pertinent part as follows: “[T]hat disclosure of an adversary hearing would harm the national security of the United States and the Court shall then review the FISA materials *in camera* and *ex parte*.” Government’s Unclassified Memorandum in Opposition to Defendant’s Motion at 1–2, *United States v. Daoud*, 755 F.3d 479 (7th Cir. 2014) (No. 1:12-CR-00723); see also Brief of Appellant at 17–18, *United States v. Daoud*, 755 F.3d 479 (7th Cir. 2014) (No. 1:12-CR-00723) (opposing the motion to suppress FISA information). But this declaration itself, aside from the definitional issues already mentioned over the blurring of the lines on what constitutes national security, was not without its own controversy. See Government’s Unclassified Memorandum in Opposition to Defendant’s Motion, *supra* note 71, at 29–30 (arguing how the evidence obtained from the electronic sources is admissible under the good faith exception). As we pointed out to the Seventh Circuit to no avail, the government or whomever did not even get this declaration right. *Id.* at 41. Later in the very same declaration, Mr. Holder states merely that national security “could harm the national security interests of the United States.” Brief of the Appellant, *supra* note 71, at 10.

<sup>72</sup> See 50 U.S.C. § 1806(f) (“If the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review *in camera* and *ex parte* the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted.”).

<sup>73</sup> *Id.*

<sup>74</sup> Spencer Ackerman & Tom McCarthy, *Defence Lawyers Granted Access to FISA Surveillance Documents in Terror Case*, THE GUARDIAN (Jan. 29, 2014), <http://www.theguardian.com/law/2014/jan/29/defence-terrorism-case-fisa-documents-surveillance> [<http://perma.cc/KWA9-N5HA>].

<sup>75</sup> See *United States v. Daoud*, No. 12-CR-723, 2014 WL 321384, at \*3 (N.D. Ill. Jan. 29, 2014) (granting Daoud’s protective order).

<sup>76</sup> *Id.*

assistance of counsel clause—plays in safeguarding the rights of citizens, noting that the legality of surveillance is best made as part of an adversarial hearing.<sup>77</sup> Nor should it go unnoticed that Judge Coleman noted that the government had no meaningful response to defense counsel's argument that the national security interest at stake would be jeopardized in light of defense counsel's Top Secret/Sensitive Compartmented Information ("TS/SCI") clearances from the Department of Justice.<sup>78</sup>

As such, it is here that one can see the interplay between the "state of exception," politics, and the rule of law.<sup>79</sup> Even before Judge Coleman's ruling, the *Daoud* case had attracted considerable national media attention due to a rather fortuitous confluence of events.<sup>80</sup> First, the charges themselves were sensational to say the least.<sup>81</sup> An eighteen year old's attempt to blow up a bar in downtown Chicago, as well as the FBI's participation in such a "sting" operation, were highly newsworthy and controversial.<sup>82</sup> Second, while Daoud awaited trial, Edward Snowden leaked classified documents regarding the National Security Agency's

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<sup>77</sup> See *id.* at \*2 (elaborating on the order and the implications of the disclosure). The argument that a district court's in camera, ex parte review of FISA materials denies the defendant his or her Sixth Amendment right to effective assistance of counsel gained no traction when raised in several other FISA related cases. See *id.* (explaining that the court had no opinion on the constitutionality of FISA); see also *United States v. Warsame*, 547 F. Supp. 2d 982, 989 (D. Minn. 2008) (reasoning how the court's ability to carefully review FISA materials adequately safeguards individual's due process rights); *United States v. Benkahla*, 437 F. Supp. 2d 541, 554 (E.D. Va. 2006) (holding the defendant's Sixth Amendment right to counsel was not violated by the District Court's in camera, ex parte review of materials pursuant to FISA); *United States v. Belfield*, 692 F.2d 141, 149 (D.C. Cir. 1983) (stating that the failure of FISA to require disclosure and an adversary hearing does not violate the Sixth Amendment).

<sup>78</sup> See *Daoud*, 2014 WL 321384, at \*2 ("Without a more adequate response to the question of how disclosure of materials to cleared defense counsel pursuant to protective order jeopardizes national security, this Court believes that the probable value of disclosure and the risk of nondisclosure outweigh the potential danger of disclosure to cleared counsel.").

<sup>79</sup> See *id.* at \*3 (demonstrating Judge Coleman's analysis of the FISA application and related materials).

<sup>80</sup> See Jason Meisner, *Lawyers for Terrorism Suspect Take Fight to U.S. Supreme Court*, CHI. TRIB. (Jan. 6, 2015), <http://www.chicagotribune.com/suburbs/bolingbrook-plainfield/ct-bolingbrook-terrorism-supreme-court-met-20150106-story.html> [<http://perma.cc/4ECE-BER3>] (drawing national attention because of the similarities to Edward Snowden).

<sup>81</sup> See Alexandra Clark, *18-Year-Old Charged with Bomb Plot*, NBC CHI. (Sept. 17, 2012), <http://www.nbcchicago.com/news/local/Teen-Charged-with-Trying-to-Blow-Up-Bar-Downtown-169908976.html> [<http://perma.cc/8UWD-BPLY>] (charging Daoud with trying to use a weapon of mass destruction and attempt to damage and destroy a building by an explosive).

<sup>82</sup> See *id.* (explaining that FBI agents had been tracking Daoud).

mass data collection program in June of 2013—a watershed moment that sparked a national conversation about Internet and telephone privacy.<sup>83</sup>

Third, in a speech on the Senate floor urging lawmakers to reauthorize the now highly controversial FISA Amendments Act (“FAA”)<sup>84</sup> due to the Snowden disclosures, Senator Diane Feinstein (D-CA) used Daoud’s arrest as an example of FAA surveillance successfully thwarting an attack.<sup>85</sup> When the prosecution continued to deny that FAA surveillance produced evidence in Daoud’s case, notwithstanding Senator Feinstein’s statement, a subpoena was served on the United States Select Committee on Intelligence, which Senator Feinstein chaired. Counsel for the Office of Senate Legal Counsel, Morgan J. Frankel, responded to the subpoena by letter asserting the absolute privilege from compelled document production or testimony under the Speech or Debate Clause of the United States Constitution.<sup>86</sup> Nonetheless, Mr. Frankel went on to write, without waiving Senator Feinstein’s or the Intelligence Committee’s legal

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<sup>83</sup> See Barton Gellman et al., *Edward Snowden Comes Forward as Source of NSA Leaks*, WASH. POST (June 9, 2013), [http://www.washingtonpost.com/politics/intelligence-leaders-push-back-on-leakers-media/2013/06/09/fff80160-d122-11e2-a73e-826d299ff459\\_story.html](http://www.washingtonpost.com/politics/intelligence-leaders-push-back-on-leakers-media/2013/06/09/fff80160-d122-11e2-a73e-826d299ff459_story.html) [<http://perma.cc/AP2D-TTR4>] (demonstrating that Edward Snowden stole the PRISM program); Barton Gellman & Laura Poitras, U.S., *British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST (June 7, 2013), [http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497\\_story.html](http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html) [<http://perma.cc/Q79J-UQWM>] (exposing the government program named PRISM); Glenn Greenwald & Ewen MacAskill, *NSA Prism Program Taps into User Data of Apple, Google and Others*, THE GUARDIAN (June 7, 2013), <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data> [<http://perma.cc/RKR7-SRFY>] (explaining that the PRISM program collects various online user data).

<sup>84</sup> See 50 U.S.C. § 1881(a) (2012) (permitting the Attorney General and Director of National Intelligence (“DNI”) to “authorize jointly, for a period of up to [one] year . . . the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.”). Though the FAA prohibits the government from “intentionally targeting[ing] any person known at the time of the acquisition to be located in the United States,” the FAA can nonetheless sweep up the international communications of U.S. citizens and residents—and the Attorney General and DNI may authorize “mass acquisition” under § 1881(a) that encompasses thousands or millions of communications even where it is known in advance that the communications will originate or terminate inside the United States. *Id.*; see also Defendant’s Reply: Disclosure of FISA, *supra* note 67, at 6–7 (explaining the government’s opinion on § 1881).

<sup>85</sup> See 158 CONG. REC. 168 (2012) (showing that Senator Feinstein stated that a “plot to bomb a downtown Chicago bar” was among those attacks thwarted using FAA surveillance—which unmistakably references Daoud’s case); see also Defendant’s Motion for Disclosure of FISA-Related Material and To Suppress the Fruits and Derivatives of Electronic Surveillance and Any Other Means of Collection Conducted Pursuant to FISA or Other Foreign Intelligence Gathering, *supra* note 69, at 1–2.

<sup>86</sup> See Defendant’s Reply: Disclosure of FISA, *supra* note 67, at 2 (declining to comply with Daoud’s request for production).

privilege, that although Senator Feinstein spoke in support of reauthorizing Title VII of the Foreign Intelligence Surveillance Act, “Senator Feinstein did not state, and did not mean to state, that FAA surveillance was used in any or all of the nine cases she enumerated, including Mr. Daoud’s case, in which terrorist plots had been stopped.”<sup>87</sup> Instead, Mr. Frankel said that “nothing in Senator Feinstein’s remarks [were] intended to convey any view that FAA authorities were used or were not used in Mr. Daoud’s case or in any of the other cases specifically named.”<sup>88</sup> “Rather, her purpose in reviewing several recent terrorism arrests was to refute the ‘view by some that the country no longer needs to fear attack.’”<sup>89</sup>

Snowden’s public revelations permitted us to plead considerable allegations of FISA abuse that would not otherwise have been available.<sup>90</sup> To prove the value of transparency, his revelations were a treasure trove of disclosures of government abuse in the FISA process.<sup>91</sup> One internal NSA audit obtained by Snowden revealed that the NSA broke privacy rules or overstepped its legal authority thousands of times each year, and that the FISC, which has some authority over NSA operations, did not learn about certain NSA collection methods until they had been operating for many months.<sup>92</sup> In addition, pursuant to a directive from President Obama, and in an effort to control the damage in the wake of the public fallout from the Snowden leaks, the Director of National Intelligence (“DNI”), James R. Clapper, declassified and disclosed several FISC opinions, orders, pleadings, internal documents, and documents

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<sup>87</sup> *Id.* at 2.

<sup>88</sup> *Id.* at 3.

<sup>89</sup> *See id.* (quoting Senator Feinstein’s December 27, 2012, speech). The author leaves the meaning, or lack thereof, of this statement to speak for itself. The same can be said to the reference interjecting fear of future attacks.

<sup>90</sup> *See id.* at 3–4 (“The recent and ongoing disclosures of FISA related-materials weigh heavily against conducting proceedings shrouded by the veil of secrecy that the prosecutors request here. These disclosures are material to the Court’s analysis for two principal reasons. First, they demonstrate that discussion of these once-secret issues in the public sphere is appropriate and, indeed, necessary. Second, and perhaps a corollary to the first point, the disclosures of evidence how government attorneys have so repeatedly mislead judges—either directly or through omission—in *ex parte* settings and why the disclosure of FISA materials and an adversarial hearing is necessary to guard against such misrepresentations. To appreciate this rather startling point, the Court need look no further than recently disclosed FISC opinions.”).

<sup>91</sup> *See id.* at 12 (showing that criminal defendants were first notified of the use of FAA surveillance in 2013).

<sup>92</sup> *See* Barton Gellman, *NSA Broke Privacy Rules Thousands of Times Per Year, Audit Finds*, WASH. POST (Aug. 15, 2013), [https://www.washingtonpost.com/wrld/national-security/nsa-broke-privacy-rules-thousands-of-times-per-year-audit-finds/2013/08/15/3310e554-05ca-11e3-a07f-49ddc7417125\\_story.html](https://www.washingtonpost.com/wrld/national-security/nsa-broke-privacy-rules-thousands-of-times-per-year-audit-finds/2013/08/15/3310e554-05ca-11e3-a07f-49ddc7417125_story.html). [<http://perma.cc/S8C3-HQH4>] (showing how the NSA broke the law).



submitted to the FISC.<sup>93</sup> The FISC judges themselves, providing a scathing indictment of the NSA's electronic surveillance programs, detailed pervasive statutory violations, government misrepresentations, and non-compliance with FISC orders.<sup>94</sup>

In his opinion in *In re Production of Tangible Things from* [Redacted], Judge Reggie B. Walton of the District Court for the District of Columbia, himself no novice or shrinking violet when it comes to national security matters, documented numerous abuses, writing:

- “The government compounded its non-compliance with the Court’s orders by repeatedly submitting inaccurate descriptions of the alert list process to the FISC.”<sup>95</sup>
- “In summary, since January 15, 2009, it has finally come to light that the FISC’s authorizations of the vast collection program have been premised on a flawed depiction of how the NSA uses BR [Business Records] metadata. This misperception by the FISC existed from the inception of its authorized collection in May 2006, buttressed by repeated inaccurate statements made in the government’s submissions, and despite a government-devised and Court-mandated oversight regime. The minimization procedures proposed by the government in each successive application and approved and adopted as binding by the orders of the FISC have been so frequently and systematically violated that it can fairly be said that this critical element of the overall BR regime has never functioned effectively.”<sup>96</sup>

In a FISC opinion authored by Judge John D. Bates of the District Court for the District of Columbia, Judge Bates called the NSA’s

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<sup>93</sup> See James R. Clapper, *DNI Clapper Declassifies Additional Intelligence Community Documents Regarding Collection Under Section 501 of the Foreign Intelligence Surveillance Act*, OFF. OF THE DIRECTOR OF NAT’L INTELLIGENCE (Nov. 18, 2013), <http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/964-dni-clapper-declassifies-additional-intelligence-community-documents-regarding-collection-under-section-501-of-the-foreign-intelligence-surveillance-act-nov> [<http://perma.cc/S8C3-HQH4>] (illustrating the declassification of documents related to sensitive programs directed by President Obama).

<sup>94</sup> See, e.g., *In re Production of Tangible Things From* [Redacted] No. BR 08-13, 2009 WL 9150913, at \*1 (Mar. 2, 2009) (determining what is reasonable under the NSA surveillance of counterterrorism).

<sup>95</sup> *Id.* at \*3 (emphasis added).

<sup>96</sup> *Id.* at \*5.

surveillance under the FAA “deficient on statutory and constitutional grounds.”<sup>97</sup> In two of his highly critical opinions made public, the very national-security seasoned Judge Bates wrote critically:

- “[F]or the first time, the government has now advised the Court that the volume and nature of the information it has been collecting is fundamentally different than what the Court had been led to believe.”<sup>98</sup>
- “The sheer volume of transaction acquired by NSA through its upstream collection is such that any meaningful review of the entire body of transactions is not feasible.”<sup>99</sup>
- “[T]he government acknowledges that the NSA exceeded the scope of authorized acquisition continuously during the more than [Redacted] years of acquisition under these orders.”<sup>100</sup>

These FISA opinions and the general Snowden revelations were not only quite helpful to our argument in *Daoud*, but it should also be noted that they have been used to fashion several significant congressional modifications to FISA and FISC procedures, which were included in the recently passed USA Freedom Act.<sup>101</sup> Because of the controversy generated by the Snowden disclosures, and Senator Feinstein’s comments, the oral argument before Judge Coleman was widely covered by local and national press.<sup>102</sup> For the same reasons, Judge Coleman’s opinion issued a few months later on January 19, 2014, attracted significant media attention as well.<sup>103</sup>

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<sup>97</sup> *Id.* at \*1.

<sup>98</sup> *Id.* at \*9 (emphasis added).

<sup>99</sup> *Id.* at \*10.

<sup>100</sup> *In re Production of Tangible Things*, 2009 WL 9150913, at \*2-3 (emphasis added).

<sup>101</sup> See Jeremy Diamond, *NSA Surveillance Bill Passes After Weeks-long Showdown*, CNN POLITICS (Sept. 7, 2015), <http://www.cnn.com/2015/06/02/politics/senate-usa-freedom-act-vote-patriot-act-nsa/> [<http://perma.cc/3GBJ-FRVS>] (discussing that the bill’s passage resulted from the leak of NSA information by Edward Snowden).

<sup>102</sup> See Jason Meisner, *Judge Rejects Looking into if Surveillance Program Led to Terrorism Charge*, CHI. TRIB. (Jan. 20, 2014), [http://articles.chicagotribune.com/2014-01-20/news/chi-adel-daoud-hillside-bomb-plot-terrorism-20140120\\_1\\_such-surveillance-surveillance-program-electronic-surveillance](http://articles.chicagotribune.com/2014-01-20/news/chi-adel-daoud-hillside-bomb-plot-terrorism-20140120_1_such-surveillance-surveillance-program-electronic-surveillance) [<http://perma.cc/H9ZT-FJN2>] (expressing that media outlets and other political figures had commented on the *Daoud* case because of the Snowden exposures).

<sup>103</sup> See Jason Meisner, *Defense in Loop Bomb Plot Case to Get Secret Terror Court Filings*, CHI. TRIB. (Jan. 29, 2014), [http://articles.chicagotribune.com/2014-01-29/news/chi-adel-daoud-fisa-court-ruling-20140129\\_1\\_adel-daoud-terrorism-prosecutions-thomas-anthony-durkin](http://articles.chicagotribune.com/2014-01-29/news/chi-adel-daoud-fisa-court-ruling-20140129_1_adel-daoud-terrorism-prosecutions-thomas-anthony-durkin)

The government immediately filed an interlocutory appeal to the Seventh Circuit Court of Appeals, and after considerable briefing by the parties, oral arguments were held on June 4, 2014, including the filing of an amicus brief by the American Civil Liberties Union and the Electronic Frontier Foundation urging affirmance of Judge Coleman's order.<sup>104</sup> After the oral argument concluded, Judge Richard Posner, speaking for the panel, ordered the courtroom cleared for a second, *ex parte* oral argument, which he described as a "secret hearing."<sup>105</sup> *Ex parte* hearings, usually held in District Courts on matters involving FISA and CIPA, are scheduled in advance and rarely attract the attention of the press.<sup>106</sup> The Seventh Circuit, however, gave no public notice that it intended to conduct this secret hearing, which caught the press off guard and caused a bit of an uproar in the courtroom, with at least one reporter voicing an objection.<sup>107</sup> After the courtroom was cleared for the classified or secret oral argument, the U.S. Marshal's Office came to the courtroom door and checked the identification of the government lawyers, agents, and other personnel who would be permitted access to the closed hearing.<sup>108</sup> More than two-

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[<http://perma.cc/37A8-DQ75>] (stating that Judge Coleman's order will require federal prosecutors to make available search warrant applications, which are usually not viewed by defense counsel in terrorism prosecutions); *see also* Ackerman & McCarthy, *supra* note 74 (noting that Judge Coleman ruled Adel Daoud's defense should be made aware of the beginning of the surveillance by the FBI and other intelligence agencies); Charlie Savage, *Warrantless Surveillance Challenged by Defendant*, N.Y. TIMES (Jan. 29, 2014), <http://www.nytimes.com/2014/01/30/us/warrantless-surveillance-challenged-by-defendant.html> [<http://perma.cc/3XX8-XV5M>] (addressing a Colorado resident charged with terrorism offenses challenging the constitutionality of surveillance without warrants in the United States and Judge Coleman's ruling in Illinois); *Adel Daoud Terrorism Case: Arguments on Surveillance Set in Teen's Terrorism Case*, HUFF. POST (Jan. 3, 2014), [http://huffingtonpost.com/2014/01/03/adel-daoud-terrorism-case\\_n\\_4536652.html](http://huffingtonpost.com/2014/01/03/adel-daoud-terrorism-case_n_4536652.html) [<http://perma.cc/7QG3-TT52>] (discussing the Adel Daoud hearing and the arguments on expanded surveillance before Judge Coleman's ruling).

<sup>104</sup> *See* Brief of Amici Curiae American Civil Liberties Union, American Civil Liberties Union of Illinois, and Electronic Frontier Foundation in Support of Defendant-Appellee and Urging Affirmance at 25, *United States v. Daoud*, 761 F.3d 678 (7th. Cir. 2014) (No. 14-1284) (highlighting that the court granting the disclosure order protects the liberties and security of the nation).

<sup>105</sup> *See* Jason Meisner, *Appeals Court in Chicago Holds Highly Unusual "Secret" Session*, CHI. TRIB. (June 4, 2014), <http://articles.chicagotribune.com/2014-06-04/news/chi-appeals-courts-in-chicago-holds-highly-unusual-secret-session-20140604> [<http://perma.cc/ZTJ7-E7CE>] (noting that Judge Posner ordered the courtroom to be cleared after the arguments had been heard for a private session).

<sup>106</sup> *See id.* (expressing that in *ex parte* hearings, counsel are usually given notice of the hearing and the move by Judge Posner was unexpected).

<sup>107</sup> *See id.* (illustrating that the *ex parte* hearing not only caught the attorneys for the parties off guard, reporters also noted the unexpected nature of the hearing order by Judge Posner).

<sup>108</sup> *Id.*

dozen prosecutors and agents were counted as having advanced permission to re-enter the closed courtroom.<sup>109</sup>

After the arguments, we learned that the FBI conducted a sweep of the courtroom to check for bugs or recording devices the morning of the arguments, and the Seventh Circuit's courtroom staff "misinterpreted" this sweep and failed to turn on the recording devices that regularly record oral arguments for publication on the Court's website.<sup>110</sup> Thus, no recording or transcript was made of the public oral argument, although a stenographic transcript was made of the secret or classified *ex parte* hearing.<sup>111</sup> Court Clerk Gino Agnello was later quoted in the press as saying that "his staff sort of freaked out" before the hearing.<sup>112</sup> Agnello said the "[c]ourt staff who operated the audio recorder saw FBI agents sweeping the courtroom for bugs and 'misinterpreted' that to mean they shouldn't record the hearing."<sup>113</sup> Because of this embarrassing, unprecedented flub, the Seventh Circuit ordered a second day of oral argument, which occurred a few days later on June 9, 2014.<sup>114</sup>

In explaining the grant of a second oral argument, Judge Posner pointed out that recording oral arguments was not required by law, but due to the "high-profile case involving very serious criminal charges against the appellee" the Court was taking the "unusual step of ordering a second oral argument."<sup>115</sup> The description of the rather comedic aspect

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<sup>109</sup> See Michael Tarm, *Arguments in Chicago Focus on Secret FISA Records*, YAHOO NEWS (June 4, 2014), <http://news.yahoo.com/arguments-chicago-focus-secret-fisa-records-010333044.html> [<http://perma.cc/R6LP-8RAB>] (remarking that a number of people had advance clearance to remain in the courtroom for the secret hearing order by Judge Posner).

<sup>110</sup> See Kim Janssen, *Court Staff Goofs, Fails to Record Hearing in Terror Trial*, CHI. SUN-TIMES (June 5, 2014), <http://chicago.suntimes.com/politics/7/71/164804/court-staff-goofs-fails-to-record-hearing-in-terror-trial> [<http://perma.cc/A2NF-GD33>] (explaining that the court reporters misinterpreted the sweep of the courtroom for recording devices, which lead to the failure of recording devices in courtroom to be turned on for the secret hearing).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> See Meisner, *supra* note 105.

<sup>115</sup> See Oral Argument at 1:51, *United States v. Daoud*, 761 F.3d 678 (7th Cir. 2014) (No. 14-1284), <http://media.ca7.uscourts.gov/oralArguments/oar.jsp?caseyear=14&casenumber=1284&listCase=List+case%28s%29> [<http://perma.cc/T73B-TZYS>] (stating that the recording of the secret hearing was a misunderstanding and was not required by law). It is worth restating Judge Posner's exact statement on the record:

Now, I want to dispel what appears to be a misunderstanding, now, recording, whether it's . . . electronic or stenographic, or what have you, of oral arguments in federal court of appeals is not required by law, or anything; and the recordings are not required to be made public. Until our recording equipment was installed, no record was made by the court of the oral arguments. And initially, the recordings were available just to the judges and their staff to kind of refresh their recollection of

of all this is not meant as an attempt to embarrass the Court, but instead makes the point that the introduction of national security issues – down to the very sweeping of the courtroom for bugs by the FBI or whatever other intelligence agency might have been involved in the sweeping – introduces a level of tension that in addition to spooking the court personnel of the Seventh Circuit, cannot help but create an aura of fear that unnecessarily escalates the magnitude of the case and the seriousness of the very charges themselves.<sup>116</sup>

Within one week from the second oral argument, the Seventh Circuit, in a panel opinion authored by Judge Posner, reversed the District Court's grant of disclosure of FISA court materials. Notably, the Seventh Circuit issued both public and classified written opinions.<sup>117</sup> However, the significance of the court's opinion, for purposes of this discussion, lies not so much in the reversal; rather, it is in the reasoning of Judge Rovner's concurrence.<sup>118</sup>

Judge Rovner discussed the impossibility of reconciling a criminal defendant's Fourth Amendment right to a *Franks* challenge in the context

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the oral argument, but eventually we decided to make the recordings available to the public as well . . . what this means is since we're not required to make a public or indeed any record of oral arguments, we have no legal obligation to conduct a second oral argument in this case. But because the inadvertent failure to record uh occurred in the . . . its a high-profile case involving very serious criminal charges against the defendant, so we decided to take the unusual step of ordering a second oral argument even though the case itself is not being reheard, whether by the panel or by the full court, following the issuance of a decision . . .

*Id.*

<sup>116</sup> It is no secret that on days when national security cases are heard, courthouse security is often greatly enhanced. On hearing days when spectators are anticipated, it is not unusual for the U.S. Marshals' Service to have a bomb-sniffing dog walking the lobby or courtroom floor. On many occasions, even an extra metal detector is installed outside the courtroom door and the bomb sniffing dog sits next to the detector. Whether this is at the direction of the intelligence agencies or is intentionally orchestrated theater, is anyone's guess. As will be mentioned later, however, the author ascribes no ill will to any of the participants involved, including judges, court staff, security, court personnel, the U.S. Marshal Service, or the like. As should be expected, working day in, day out, in the courts, relationships are regularly formed, and the relationships at the Dirksen Federal Building in Chicago in the author's experience are, for the most part, exceptionally good and professional.

<sup>117</sup> See *United States v. Daoud*, 755 F.3d 479, 483 (7th Cir. 2014) (stating that it was the judge's "obligation" to determine whether defense counsel was entitled to FISA material); see also *United States v. Daoud*, 761 F.3d 678, 683 (7th Cir. 2014) (holding that the information collected from surveillance should not be suppressed); *infra* App'x A (displaying the redacted, classified written opinion is attached hereto as Appendix A). The thirteen-page opinion is worth a visual inspection by anyone who dares to think that the idea of a two-tiered system is fictional. *Infra* App'x A. Of the thirteen pages, at least half of the opinion is redacted, rendering it meaningless to both the defense counsel and the public. *Id.*

<sup>118</sup> See generally *Daoud*, 755 F.3d at 485 (Rovner, J., concurring) (showing the concurring opinion of Judge Rovner).

of a FISA search warrant, admitting that, without access to the FISA affidavit, a defendant could not identify misrepresentations in it—let alone establish if they were intentionally or recklessly made.<sup>119</sup> Judge Rovner bluntly stated that: “As a practical matter, the secrecy shrouding the FISA process renders it impossible for a defendant to meaningfully obtain relief under *Franks* absent a patent inconsistency in the FISA application itself or a *sua sponte* disclosure by the government that the FISA application contained a material misstatement or omission.”<sup>120</sup> Despite acknowledging that FISA arguably reads *Franks* out of existence, in the context of a FISA search warrant, Judge Rovner nonetheless decided that this problem calls for the “other branches to make reforms that are beyond our power to implement.”<sup>121</sup> Put simply, despite her characterization of *Franks* as “a vital part of the criminal process that subjects warrant affidavits to useful adversarial testing” and “a meaningful deterrent to an overzealous law enforcement official[.]” this vital Fourth Amendment procedural due process issue—available to any defendant in any other type of federal criminal case—falls down the rabbit hole in the face of an out of court, untested declaration of the Attorney General that disclosing FISA materials or holding an adversarial hearing would harm the national security of the United States.<sup>122</sup>

In addition to a constitutional procedural due process right slipping down this rabbit hole, it should be rather obvious that what is now only a hole could well turn into something the size of the Grand Canyon if, as mentioned earlier, “national security” can be so easily mixed up with foreign policy, domestic policy, concepts of traditional warfare, and existential threats to the homeland.<sup>123</sup> More importantly, if Glennon’s double government theory is correct that the president himself or his attorney general are not truly making the decision as to what may harm national security, can that very decision be trusted?<sup>124</sup> While it has not yet

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<sup>119</sup> See *id.* at 486 (Rovner, J., concurring) (describing how a *Franks* motion is based on material representations and omissions in a warrant affidavit).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 489 (Rovner, J., concurring).

<sup>123</sup> See *supra* notes 74–76 and accompanying text (exploring how national security can be mixed in various domestic aspects).

<sup>124</sup> What can readily be seen is the effort of the intelligence agencies to resist any effort to control their province. This agency concern is not limited to defense lawyers. A telling description of the issue is set forth in former CIA lawyer John Rizzo’s recent book. In discussing the use of classified evidence in espionage cases, and the tension created between the agency and the DOJ prosecutors, Rizzo candidly acknowledges: “We tell the DOJ that we will turn cartwheels to provide our intelligence secrets necessary to get a conviction, but we are going to push back hard if we think that DOJ is going for ‘overkill’ by putting sensitive

come to this on any grand scale, as might be expected with expanded foreign intelligence surveillance, the issue surrounding disclosure of FISA materials is beginning to appear in federal criminal prosecutions such as trade secrets and child pornography cases.<sup>125</sup> To be clear, there is no prohibition against the use of FISA materials in traditional criminal prosecutions provided that the advance authorization is obtained from the attorney general, proper notice is subsequently given to the court and to the aggrieved persons against whom the information is to be used, and that proper minimization procedures have been utilized.<sup>126</sup>

Nevertheless, who is to say that, much like the blurring of the definitional lines at the end of the two World Wars that in the modern, inter-connected, globalized neoliberal world we increasingly find ourselves in, all things economic will not become matters of “national security.”<sup>127</sup> There is plenty of historical precedent for the exercise of

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information into jeopardy when it doesn’t have to.” JOHN RIZZO, *COMPANY MAN: THIRTY YEARS OF CONTROVERSY AND CRISIS IN THE CIA* 67 (2014).

<sup>125</sup> See Notice of Intent to Use Foreign Intelligence Surveillance Act Information, *United States v. Hailong*, 4:13-CR-147 (S.D. Iowa) (providing notice to the defendant of 50 U.S.C. §§ 1806(c) and section 1825(d)); Post Indictment Arraignment Calendar, *United States v. Gartenlaub*, 8:14-CR-173 (C.D. Cal.) (illustrating the use of FISA in child pornography cases); see also GROSS & NÍ AOLÁIN, *supra* note 55, at 232 (“The government is using its expanded authority under the far-reaching law to investigate suspected drug traffickers, white-collar criminals, blackmailers, child pornographers, money launderers, spies, and even corrupt foreign officials.”).

<sup>126</sup> See 50 U.S.C. § 1806(b)–(c) (2012) (focusing upon the sections entitled Statement for Disclosure and Notification by United States in the § 1806 Use of Information statute); 50 U.S.C. § 1825(c)–(e) (2012) (narrowing upon the sections entitled Statement for Disclosure, Notification by United States, and Notification by States or Political Subdivisions within the general section 1825 Use of Information statute). Further, FISA expressly states that the government is not required to minimize information that is “evidence of a crime” whether or not it is also foreign intelligence information. See *id.* § 1801(h) (illustrating the definition of minimization procedures with regard to electronic surveillance); 50 U.S.C. § 1821(4) (2012) (providing the definition of minimization procedures for physical searches); see also *United States v. Isa*, 923 F.2d 1300, 1307 (8th Cir. 1991) (holding that the appellant’s Sixth Amendment rights had not been violated).

<sup>127</sup> See WENDY BROWN, *UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION* 22 (2015) (relaying the dire consequences to democracy of a neoliberal rationale in a globalized world). While the scope of Professor Brown’s work is beyond the confines of an article such as this one, a pair of chapters, in particular, entitled “Neoliberalism’s Remaking of State and Subject” and “Law and Legal Reason,” may instruct. As Professor Brown states:

As both individual and state become projects of management, rather than rule, as an economic framing and economic ends replace political ones, a range of concerns become subsumed to the project of capital enhancement, recede altogether, or are radically transformed as they are “economized.” *These include justice (and its subelements, such as liberty, equality, fairness), individual and popular sovereignty, and the rule of law.* They also include the knowledge and the cultural orientation relevant to even the most modes practices of democratic citizenship.

emergency powers in the economic realm as was evidenced by the New Deal's response to the Great Depression, and President Roosevelt's attempts to take control over American industry for the World War II war effort.<sup>128</sup> Is it too much to dare to suggest that the day might soon come when traditional economic fraud prosecutions—for example, matters involving commodities fraud at the Chicago Mercantile Exchange, or bid-rigging on a military transport plane being built by the Boeing Corporation headquartered in Chicago—could easily become “national security” prosecutions?

Thus, the question that begs answering is: do we wish to waive a judicial white flag in surrendering any meaningful role of the judiciary in matters merely alleged to involve national security, if that definition can be dictated by the Attorney General, his Assistant Attorney General of the National Security Division, the Director of National Intelligence, or whomever actually makes the decision?<sup>129</sup> Most certainly, there is plenty of history and precedent to answer in the affirmative. However, then we must ask whether we have the courage to admit it. This answer might not sit well with those fellow citizens, politicians, judges and lawyers with strong Madisonian attachments to links to our imagined past grandeur, filled as it is with more pomp and historical symbolism than substance.<sup>130</sup>

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*Id.* (emphasis added).

<sup>128</sup> See Roger I. Roots, *Government by Permanent Emergency: The Forgotten History of the New Deal Constitution*, 33 SUFFOLK U. L. REV. 259, 259–60 (2000) (detailing some of the New Deal's impact on America).

<sup>129</sup> See GROSS & NÍ AOLÁIN, *supra* note 55, at 232 (discussing the effects on the judiciary when the definition of national security can be changed). This definitional problem is at the heart of our following discussion of Schmitt, sovereignty, the “state of exception,” and not coincidentally “dictatorship.” For but one observation along the same lines:

The difficulties of distinguishing between economic and violent emergencies are part of a bigger problem of definitions. Exigencies provoke the use of emergency powers by governmental authorities. The vast scope of such powers and their ability to interfere with fundamental individual rights and civil liberties and to all governmental regulation of virtually all aspects of human activity—as well as the possibility of their abuse—emphasize the pressing need for clearly defining the situations in which they may be invoked. Yet, defining what constitutes a “state of emergency” is no easy task . . .

*Id.* at 5.

<sup>130</sup> To be fair, my pessimism may well be overstated, as can often admittedly be the case from the vantage point of the courtroom floor. There are certainly many legal scholars in addition to Judge Posner who would disagree that the sky is anywhere near falling or, I am sure, that we are developing a two-tiered system of criminal justice in the federal courts. As noted earlier, Professor Kent's recent article on the disappearance of black holes certainly views the glass as becoming more full than empty insofar as individual rights are concerned. See Kent, *supra* note 61, at 1030, 1034 n.23 (reviewing Kent's analysis of the black hole phenomenon). As also can be gleaned from Professor Kent's article, he has considerable academic scholarly support that things may in fact be getting better, including Jack



IV. ARE WE IN A PERMANENT STATE OF EXCEPTION OR CAN WE AT LEAST  
HAVE THE ADULT CONVERSATIONS PROFESSORS LEVINSON AND GLENNON  
URGE OUTSIDE THE ACADEMY

Procedural constitutional questions, in the relatively small amount of terrorist trials in the federal courts, pale by comparison to the risks the executive branch and its intelligence agencies face in their obligation to keep the nation safe.<sup>131</sup> It is certainly not suggested that those less concerned with civil liberties are no less genuinely dedicated or sincere in their motives. Like Professor Glennon, I readily admit that most individuals involved in the everyday prosecution of federal criminal cases, national security or otherwise, try to maintain every bit as much faithfulness to the system. However, the structural issues Glennon raises in his theory of double government go far beyond the good faith or sincerity of the lawyers or judges involved in the everyday workings of the system. Just as I appreciated the help when the Seventh Circuit panel suggested at the second oral argument in *Daoud* that its secret session was for the benefit of the defense lawyers, it is nothing personal to ask instead to be able to do it myself for the sake of the adversarial system.<sup>132</sup> In addition to chiding the growing lack of oversight of the Trumanites by the three Madisonian institutions, Professor Glennon does not spare any criticism on the citizenry itself, if one might still call the modern United States electorate “citizens.”<sup>133</sup>

Glennon does not believe there is any risk of sudden despotism in this country, any more than I fear the sudden implementation of a Star

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Goldsmith, Robert Chesney, Joseph Landau, Richard Pildes and Samuel Issacharoff’s similar optimism in the context of other national security issues. *Id.* at 1034–35. In fact, Professor Kent refers to the fact that Professor Dyzenhaus himself, “who focuses primarily on the United Kingdom, Canada, and Australia, sees evidence that courts are gradually closing legal black holes in those countries by ‘put[ting] a rule-of-law spine into the adjudication of national security.’” *Id.* at 1034. Whether this is truly “rule of law” spine, as compared to one of “rule by law,” remains to be seen.

<sup>131</sup> This is no doubt a gargantuan task and a solemn responsibility. An issue that often arises in discussions with those in positions of such responsibility, however, is what might be best described as the “if you only knew what I know” phenomenon. Having represented Ramzi bin al-Shibh in the 9/11 case, and the number of other domestic terrorism cases mentioned, I have come to get quite a bit of an insider’s perspective about the threat of terrorism post 9/11. Suffice it to say, admittedly without the benefit of the President’s daily intelligence briefings and other wider inside intelligence, I am still waiting to hear something that would change my opinion that we have overreacted.

<sup>132</sup> See generally Oral Argument, *United States v. Daoud*, 755 F.3d 479, 485 (7th Cir. 2014), [http://media.ca7.uscourts.gov/sound/2014/rs.14-1284.14-1284\\_06\\_09\\_2014.mp3](http://media.ca7.uscourts.gov/sound/2014/rs.14-1284.14-1284_06_09_2014.mp3) (providing a link to the audio file of Judge Posner).

<sup>133</sup> See BROWN, *supra* note 127, at 79–115 (giving a description of the ideological or rationality shift from *homo politicus* to *homo economicus*; in particular, the chapter entitled “Revising Foucault: *Homo Politicus* and *Homo Oeconomicus*”).

Chamber or the Spanish Inquisition in the Dirksen Federal Building in Chicago.<sup>134</sup> In fact, Glennon calls the risk of sudden despotism “trivial,” a bit more credit than I might cynically be willing to give to the state of our courts, but a reasonably fair description there nonetheless.<sup>135</sup> As Glennon says, it is the very lack of fear of “an abrupt turn to a police state or dictatorship installed with a coup-like surprise,” that created “a false sense of security in the United States.”<sup>136</sup> It is not the risk of a “strongman of the sort easily visible in history[,]” that Glennon thinks is apt to burst forth on the American scene, although it must be noted that Glennon’s article was written before Donald Trump emerged as an early leader in the 2016 Republican Primary polls.<sup>137</sup> Ignorance, or more kindly, apathy of the electorate might instead be a greater danger. This risk, Glennon warns, is a risk similar to the gradual structural incentives for the bureaucratic centralization of power in the hands of the Trumanite national security state.<sup>138</sup> A greater risk than the strongman, Glennon submits, is the “risk of slowly tightening centralized power, growing and evolving organically beyond public view, increasingly unresponsive to the Madisonian checks and balances.”<sup>139</sup> Glennon also cites the rather disturbing fact that in the twentieth century “some seventy democracies collapsed and quietly gave way to authoritarian regimes.”<sup>140</sup> Glennon argues that this risk of collapse directly “correlates with voter ignorance[,]” for, as he puts it further, “the term *Orwellian* has little meaning to a people who have never know anything different, who have scant knowledge of history, civics, or public affairs, and who in any event have likely never heard of George Orwell.”<sup>141</sup> Further, Glennon concludes his article with a poignant quote from Thomas Jefferson: “If a nation

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<sup>134</sup> See Glennon, *supra* note 4, at 13 (referencing the notion of a “sudden despotism”).

<sup>135</sup> See *id.* at 112 (stating that there is only a “trivial risk of sudden despotism”).

<sup>136</sup> *Id.* at 112–13.

<sup>137</sup> *Id.* at 113; see, e.g., Dan Balz & Scott Clement, *Poll: Trump, Carson Top GOP Race; Clinton Leads Dems but Support Drops*, WASH. POST (Sept. 14, 2015), [http://www.washingtonpost.com/politics/poll-trump-carson-top-gop-race-clinton-leads-dems-but-support-drops/2015/09/13/7961a820-58c2-11e5-8bb1-b488d231bba2\\_story.html](http://www.washingtonpost.com/politics/poll-trump-carson-top-gop-race-clinton-leads-dems-but-support-drops/2015/09/13/7961a820-58c2-11e5-8bb1-b488d231bba2_story.html) [<http://perma.cc/8HJF-E3K6>] (announcing the results of a recent poll showing Donald Trump leading the Republican presidential field).

<sup>138</sup> See Glennon, *supra* note 4, at 109 (concluding that the network within the federal government controlling national security matters evolved in response to “structural incentives rather than invidious intent”).

<sup>139</sup> *Id.* at 113.

<sup>140</sup> *Id.* Glennon attributes this statistic to Robert A. Dahl and notes that Dahl pointed out that the collapse of the seventy democracies took place during “the century of democracy’s greatest triumph.” *Id.* Glennon also quotes Dahl as saying poignantly “the most disastrous decisions in the twentieth century . . . turned out to be those made by authoritarian leaders free from democratic restraints.” *Id.* at 112.

<sup>141</sup> *Id.* at 113.

expects to be ignorant and free, in a state of civilization, . . . it expects what never was and never will be.”<sup>142</sup> Glennon poses a final question with respect to what form of government might ultimately emerge from America’s experiment with double government.<sup>143</sup> He then answers his own question by saying that the form of government that is likely to emerge is uncertain.<sup>144</sup> Then, Glennon warns ominously, “[t]he risk is considerable, however, that it will not be a democracy.”<sup>145</sup>

The same question, as to the form our government might take, is what causes me to ask whether we, as lawyers, also wish to accept the possibility of a permanent two-tiered system of justice in our federal courts.<sup>146</sup> It is this same sense of uneasiness and the same sense of a gradual increase of governmental centralized control over the criminal process in my forty plus year career fighting courtroom “wars,” be it against crime, drugs, or terror that leaves me with much the same ominous sense of dread. Again, it is not the fear of the Grand Inquisitor taking over as Chief Judge tomorrow that makes me nervous. Nevertheless, there is something horribly foreboding about being asked to leave an American courtroom in the name of “national security” – despite my having even higher security clearances than most prosecutors – so that those prosecutors can tell the court in an *ex parte* non-public secret proceeding what transpired with respect to how they obtained evidence to be used against one’s client. Conversely, there is something sickening to one’s sense of justice or fundamental fairness – whatever that may have meant once before – to be provided with redacted discovery, transcripts, appellate opinions, or transcripts of proceedings.<sup>147</sup> It is for this reason that the Seventh Circuit’s classified opinion has been

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<sup>142</sup> Glennon, *supra* note 4, at 113. Using the analogy of “Joe Six-Pack’s” ability to comprehend American football’s use of a nickel defense or whether to run a play-action fake on third down and two, Glennon explains that this voter apathy is neither unintelligent nor irrational, insofar as a single voter’s ability to determine an outcome of an election in any event, particularly in light of a lack of change in national security policy from one president to the next. *Id.* at 108. Calling the decision to run the play-option not much “conceptually” different than making the decision to strike a high value target driving with four unidentified co-conspirators in Yemen, Glennon posits that there is little obvious reason for one to become informed: “Why waste time learning about things one cannot affect?” *Id.*

<sup>143</sup> *Id.* at 113.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Glennon, *supra* note 4, at 113 (“What form of government ultimately will emerge from the United States’ experiment with double government is uncertain.”). Glennon also notes that the FISC “pioneered a two-tiered legal system.” *Id.* at 54.

<sup>147</sup> See, e.g., *United States v. Daoud*, 755 F.3d 479, 481 (7th Cir. 2014) (responding to a discovery request, the prosecutor filed two responses, a heavily redacted version to the defense counsel and a classified version accessible only to the court).

attached in the Appendix for all to view.<sup>148</sup> Perhaps if enough people, particularly lawyers, they, too, will be as concerned, but maybe not, and I would not bet on it.

Returning to *Daoud*, most of our attention has focused on Judge Rovner's concurring opinion to this point. However, there are some issues in Judge Posner's majority opinion that might give one pause to be concerned over the state of the adversarial process, if nothing else. Judge Posner goes out of his way to comment upon a defense objection to the closed proceeding after the first oral argument. He let it be known that our objection to the secret hearing was without merit as a matter of law, but also as a matter of fact.<sup>149</sup> Judge Posner explained that the "purpose of the hearing was to explore, by questioning the government's lawyer on the basis of the classified materials, the need for defense access to those materials (which the judges and their cleared staff had read)."<sup>150</sup> The Judge went on to point out that: "[i]n effect this was cross-examination of the government, and could only help the defendant."<sup>151</sup> With all due respect to Judge Posner, while he may be far smarter, I would venture to guess I am a far better cross-examiner. However, the point is hardly who is a smarter or a better cross-examiner. The point is that an encroaching two-tiered adversarial system, that the Seventh Circuit seems quite willing to countenance, does not bode well for the adversarial system to which we have grown accustomed.<sup>152</sup> Judge Posner's comment, that bodes perhaps even more poorly for the adversarial system, was in respect to the possession of security clearances by defense counsel.<sup>153</sup> As mentioned, this factor had been a significant factor in Judge Coleman's decision to permit production of the FISA materials.<sup>154</sup> Judge Posner's reprimanded Judge Coleman for thinking that "disclosing state secrets to

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<sup>148</sup> See *infra* App'x A (displaying the publically accessible, redacted, classified written opinion)

<sup>149</sup> See *Daoud*, 755 F.3d at 485 (Rovner, J., concurring) (noting that the legality of an ex parte hearing has been affirmed by two other circuits and could only have aided the defense, as it was a cross-examination of the prosecution).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> See Glennon, *supra* note 4, at 54 (noting the two-tiered legal system consists of one tier "comprised of public law, the other of secret law").

<sup>153</sup> See *Daoud*, 755 F.3d at 484–85 (holding that disclosing classified information to defense counsel, despite counsel's security clearance, could harm national security).

<sup>154</sup> See *supra* Part III (explaining that Judge Coleman relied on the fact that the prosecution had no meaningful rebuttal to the argument that disclosure in *Daoud* was reasonable because of defense counsel's security clearance); see also *United States v. Daoud*, No. 12-CR-723, 2014 WL 321384, at \*2 (N.D. Ill. Jan. 29, 2014) (discussing that the probable value of disclosure and the associated risks of nondisclosure outweighed the potential dangers of disclosure in regard to cleared counsel).

cleared lawyers could not harm national security.”<sup>155</sup> “Not true,” he stated.<sup>156</sup> Judge Posner’s explanation as to why this is the case lets defense lawyers know where they stand in his hierarchy:

Though it is certainly highly unlikely that Daoud’s lawyers would, Snowden-like, publicize classified information in violation of federal law, they might in their zeal to defend their client, to whom they owe a duty of candid communication, or misremembering what is classified and what is not, inadvertently say things that would provide clues to classified material.<sup>157</sup>

His statement needs to be considered in the context of the number of people deemed trustworthy enough to be allowed in the closed hearing after clearing the courtroom.<sup>158</sup> As previously mentioned, “about a dozen” prosecutors and government agents were permitted back into the courtroom.<sup>159</sup> Then, add to that the number of court personnel given clearances to assist the judges in reading the materials, which leaves one to guess that at least thirty-five or forty people must have been deemed trustworthy enough to attend the secret hearing.<sup>160</sup>

Nevertheless, this fact maybe not be the most frightening prospect of all. As Glennon suggests of the citizenry, maybe lawyers themselves have also reached the point that no one cares – or that the truth is that lawyers, like the rest of the citizenry, are more concerned about their safety than their liberty, as is so often suggested.<sup>161</sup> For this reason, Professor Levinson’s question about whether one can have “an adult conversation” about Carl Schmitt’s “state of exception” must be answered, since this question seems to also be at the root of Professor Glennon’s question as to

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<sup>155</sup> *Daoud*, 755 F.3d at 484.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* Prosecutors, agents, or court personal presumably must be more trustworthy based upon their lack of zealousness. Many might question this conclusion.

<sup>158</sup> See Meisner, *supra* note 105 (referencing the amount of individuals including the U.S. Attorney and about a dozen FBI agents and DOJ officials allowed to stay in the courtroom for the secret hearing after reporters, Durkin, and his co-counsel were asked to leave).

<sup>159</sup> *Id.*

<sup>160</sup> See *id.* (explaining who attended the secret meeting).

<sup>161</sup> See Glennon, *supra* note 4, at 93 (suggesting that the public is largely content with the “tradeoffs between liberty and security”). As just but one possibly telling vignette, the author was having a casual conversation with a well-educated, wealthy retired businessperson at a recent party. When the topic of closing Guantanamo came up, and the author mentioned having been there multiple times and the staggering average per-capita cost of each detainee, as compared to the costs in the BOP, the gentleman promptly stormed off suggesting that there was a simple solution to that problem: “Fill Guantanamo with more prisoners.”

what form of government we inherited.<sup>162</sup> The question might also be phrased as what form our court system must take in a constitutional democracy that finds itself in the midst of a perpetual emergency in an increasingly global neoliberal world still operating among competing issues of classic liberalism and nationalism.<sup>163</sup>

It may just well be that the success of the War on Terror's demagoguery might be explained by far more difficult problems than even double government, the lack of collective judicial courage, other Madisonian checks and balances, or a combination of all of the above.<sup>164</sup> While this explanation is hardly meant to excuse judicial acquiescence of oversight where oversight is often well due, the fear monger demagogues might instead be said to be winning based upon the same structural incentives Professor Glennon so successfully describes as causing such a centralized government power in the hands of the Trumanites in the first place.<sup>165</sup> For the same reason that one might come to distrust whether the Attorney General himself or his prosecutors in the field are calling the shots in domestic national security prosecutions, one might also come to question whether we have become a nation dedicated to rule by law as compared to a nation dedicated to the rule of law."<sup>166</sup> This structural

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<sup>162</sup> See *id.* at 113 (stating there is uncertainty as to what form of government will emerge from the United States' experiment with double government); Levinson, *supra* note 10, at 721, 748 (discussing the public emergencies that are considered "states of exception").

<sup>163</sup> See Glennon, *supra* note 4, at 113 (forming a judicial take on Glennon's statement that questioned what form of government will materialize during changing times). Much to his credit, however, Judge Posner does not shy away from engaging in this adult conversation and publicly discussed his views on national security and emergency powers. See generally RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 35-36 (2006) (pointing out that most judges are not experts when it comes to national security matters, and this lack of knowledge combined with "the judges' ideology, temperament, and intuition about relative risks" might result in the courts deferring to the executive branch, which generally possesses expertise in national security matters or the judges might be inclined "to take an adversary stance"). So, too, did former Chief Justice Rehnquist in his pre-9/11 book on emergency powers. See generally WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 224-25 (1998) (discussing judicial restraint in wartime and the need for courts to pay careful attention to the legal basis for government action curtailing civil liberty).

<sup>164</sup> See Glennon, *supra* note 4, at 18, 55 (discussing the Madisonian checks and balances model along with the judiciary not having "a will of its own" in the context of a double government).

<sup>165</sup> See *id.* at 26-28, 38, 109 (discussing the evolved centralized government perpetuated by the Trumanites' along with their "incentive to exaggerate risks and pander to public fears . . . in order to protect themselves from criticism").

<sup>166</sup> See DYZENHAUS, *supra* note 6, at 6 (discussing the distinction between "rule by law" and "the rule of law"). Professor Dyzenhaus defines "rule by law" as the "use of law as a brute instrument to achieve the ends of those with political power;" as opposed to "the rule of law" as "the constraints which normative conceptions of the rule of law place on the instrumental use of law." *Id.* Dyzenhaus suggests that recent attempts by academics in the United States

problem may be one larger and more disquieting than any of us care to admit—particularly for those of us who thought we were devoting our careers to the, so called, “rule of law.”<sup>167</sup>

In the academic world of political and legal theorists, the question is more commonly known as the problem of “the state of exception.”<sup>168</sup> These words owe their origin to the famous Weimar Germany jurist, Carl Schmitt, who put forth its definition in his 1933 classic, *Political Theology*.<sup>169</sup> Schmitt began the work by bluntly declaring that the “[s]overeign is he who decides on the exception.”<sup>170</sup> Early on, Schmitt notes that there is little argument in the abstract about sovereignty being the highest power of a state, but the arguments start over its concrete application.<sup>171</sup> That is, the question becomes “who decides in a situation of conflict what constitutes the public interest or interest of the state, public safety and order, *le salut public*, and so on.”<sup>172</sup> Schmitt’s answer, in rather simplistic terms for present purposes, is that a situation of extreme peril to the very existence of the state itself “cannot be circumscribed factually and made to conform to a preformed law.”<sup>173</sup> Thus, it can only be the executive to which this is entrusted, which leaves little space for judges, except perhaps solely to keep shoehorning the exceptions into some articulable semblance of the law.<sup>174</sup>

The seemingly, very esoteric academic question of sovereignty easily bleeds into our everyday courtroom world, whether we like it or not, or intended it or not, when we start throwing around war rhetoric in the name of national security in a domestic terrorism prosecution as if the literal existence of the nation is at stake. It is here—over the definition of

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“to respond to an allegedly different post-9/11 world turn out to support [Carl] Schmitt’s view . . . that law cannot govern a state of emergency or exception.” *Id.* at 19. Dyzenhaus warns that academics who do this might makes things worse “in much the same way as do judges who claim to be upholding the rule of law when there is merely rule by law.” *Id.*

<sup>167</sup> See *id.* at 6 (discussing how the “rule of law” involves “constraints which normative conceptions of the rule of law place on the instrumental use of law” and that “the choice to abide by the rule of law a matter of political incentives”).

<sup>168</sup> See Levinson, *supra* note 10, at 722 (“[T]he state of exception tends increasingly to appear as the dominant paradigm of government in contemporary politics, it should now be clear that there is in fact nothing new about the notion of what Hamilton called ‘exigencies’ or Schmitt viewed as ‘exceptions’ or ‘emergencies.’”) (quoting Giorgio Agamben, the Italian social theorist).

<sup>169</sup> SCHMITT, *supra* note 9, at 1.

<sup>170</sup> *Id.*

<sup>171</sup> See *id.* at 6 (“About an abstract concept there will in general be no argument, least of all in the history of sovereignty. What is argued about is the concrete application[.]”).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> See *id.* (discussing who will make decisions when a country is facing a “situation of conflict” when the exception is not codified).

“existential” threats – that seem to have taken us so quickly off the tracks since 9/11.<sup>175</sup> If I read Professor Levinson correctly – along with Schmitt, Rossiter and Agamben – it is this very complex sovereignty question of the “state of exception” that requires serious thought and consideration.<sup>176</sup> Like Glennon, Levinson concludes his 2006 Symposium Article for the *Georgia Law Review*, entitled *Constitutional Norms in a State of Permanent Exception*, with a sobering question as to whether it is even possible to have “an adult conversation” about this issue, the seriousness of which he sets forth in no uncertain terms:

We are, I believe, at a crossroads in American constitutional development. The United States – justifiably – feels itself threatened by attack, and we have an administration in power that is both stunningly ambitious with regard to its view of executive power and almost contemptuous of the claims of any other institutions or of the citizenry to engage in independent constitutional judgment. It is naïve to regard the Constitution as speaking clearly to the resolution of such dilemmas. This decision must be our own as to the kind of political order in which we wish to live.<sup>177</sup>

Levinson warns that this discussion of emergency powers or the “state of exception” is “ultimately a profoundly political one, with law, at least as traditionally conceived, having relatively little to do with the resolution of

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<sup>175</sup> See Daniel R. Williams, *After the Gold Rush – Hamdi, 9/11, and the Dark Side of the Enlightenment*, 112 PENN ST. L. REV. 341, 355–56 (2007) (claiming the United States faces no real existential threat).

<sup>176</sup> See Levinson, *supra* note 10, at 722, 748, 751 (discussing the importance of having a successful conversation regarding constitutional fundamentals when the United States feels threatened by attack); see also AGAMBEN, *supra* note 62, at 2 (arguing “the state of exception” appear to increasingly be a dominant government paradigm in contemporary politics, which threatens to dramatically change the structure of traditional distinctions between constitutional forms); ROSSITER, *supra* note 62, at 288 (“[A] great emergency in the life of a constitutional democracy will be more easily mastered by the government if dictatorial forms are to some degree substituted for democratic, and if the executive branch is empowered to take strong action without an excess of deliberation and compromise.”); SCHMITT, *supra* note 9, at 6 (explaining the exception can be described as a situation of extreme peril that endangers the state’s existence). Levinson mentions both authors prominently and each merits a full read in their own right. See generally Levinson, *supra* note 10, at 722 (mentioning both Schmitt and Agamben along with their theory on the state of exception). As noted by Levinson, in commenting on Rossiter’s distinctly Schmittian overtones, the book itself was “perhaps telling[], . . . republished after a half-century in 2002 with a cover picture showing the burning Twin Towers juxtaposed with a seemingly burning Constitution . . . .” *Id.* at 739.

<sup>177</sup> Levinson, *supra* note 10, at 748.



any truly live controversy.”<sup>178</sup> Phrased differently in the context of discussing the use of torture, Levinson asks: “To what extent should the President—and those subject to presidential command—view themselves . . . bound by . . . legal norms, or are such constraints better defined only as *political*?”<sup>179</sup> Furthermore, Levinson, points out that Schmitt’s “state of exception” was nothing new at the time in Weimar Germany, and similar emergency concepts have a lineage to the dictatorships of ancient Rome, and can find support in the “exigencies” mentioned in *The Federalist* by Alexander Hamilton.<sup>180</sup> In explaining his title’s reference to “permanent emergency,” Levinson goes on to suggest that “in some ways our entire history has featured the presence of emergencies.”<sup>181</sup> Most importantly for our purposes, Levinson points out that “no single emergency has had the permanence likely to be the case with the ‘global war on terror.’”<sup>182</sup> Eight years later, there can be little doubt about how permanent this global war remains.<sup>183</sup> Worse yet, Levinson predicts that even if the global war on terror were to end tomorrow “there would be more than enough ‘emergencies’ to assure that the basic tension” of which he speaks would remain.<sup>184</sup>

Thus, those deciding the permanence of the state of exception in our terror war can raise their heads in our courtrooms and alter the rules of criminal procedure based upon an unquestioned and untested certification signed by the attorney general, must become part of the adult conversation Levinson called for over eight years ago. This question, a

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<sup>178</sup> *Id.* at 722, 736.

<sup>179</sup> *Id.* at 702. In a separate 2004 article, Levinson cites a Schmitt quote to the same effect: “A normal situation has to be created, and sovereign is he who definitely decides whether this normal state actually obtains.” Sanford Levinson, *Torture in Iraq & The Rule of Law in America*, 133 DAEDALUS 5, 9 (2004). “All law is ‘situation law.’ The sovereign creates and guarantees the situation as a whole in its totality. He has the monopoly on this ultimate decision.” *Id.* at 9. Levinson asserts that “[t]his is precisely the argument being made by lawyers within the Bush administration.” *Id.* Here Levinson refers to the controversial Office of Legal Counsel memos created to justify the used of the infamous Enhanced Interrogation Techniques. *Id.* at 6.

<sup>180</sup> See Levinson, *supra* note 10, at 722 (illustrating the history of such concepts).

<sup>181</sup> *Id.* at 737.

<sup>182</sup> *Id.* Levinson interestingly points out a number of earlier nineteenth century wars, including what he sarcastically describes as wars against “our fellow citizens between 1861 and 1865,” or war against “myriads of American Indians who had the effrontery to resist our seizure of their homelands.” *Id.* He also wryly suggests that “[i]f we add to this the years featuring significant economic downturns or the occurrence of ‘natural disasters’ whose victims made a claim on the public fisc, I wonder if we would not find that years with proclaimed ‘emergencies’ outnumber placid years of ostensible normality.” *Id.*

<sup>183</sup> See *id.* at 737 (“But it should now be clear that in some ways our entire history has featured the presence of emergencies, even if no single emergency has had the permanence likely to be the case with the ‘global war on terror.’”).

<sup>184</sup> Levinson, *supra* note 10, at 737.

trial lawyer submits, is not one better left in the hands of the academics and ought seriously be discussed by members of the bar as well as the judiciary, as the answer from a courtroom perspective appears to be that there is little doubt, but that we have left this sovereign decision making in the hands of our Trumanite Double Government—or more precisely our intelligence agencies.<sup>185</sup> This should be every bit as disquieting as both Glennon and Levinson imply, for the very systemic reasons each suggests.<sup>186</sup> If these agencies can decide the very scope and duration of the War on Terror, just as they can decide whether a court can choose to provide defense lawyers with FISA search warrant applications, then we might do well to think of ourselves as “ruled by law,” instead of living under a “rule of law.”<sup>187</sup> As such, this statement is hardly a semantic academic difference.<sup>188</sup> From the standpoint of Mr. Daoud, it is the difference between saying to him like Judges Posner and Kanne did: “this is our law, Kid, tough luck;” as opposed to something like Judge Rovner said: “sorry, Kid, we judges can’t help you because our hands are tied and this has to be fixed by someone else.” Identical results, but at least the later is honest enough to admit the prospect of change.

Likewise, the implications with respect to the role of the judiciary that Judge Rovner brings to the forefront in *Daoud* cannot otherwise be

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<sup>185</sup> See Glennon, *supra* note 4, at 30–31 (discussing the decision-making process within the intelligence agencies).

<sup>186</sup> See *id.* at 96–97 (stating that both authors see the systemic reasons and discuss the narrowing of the scope of the state’s secrets privilege).

<sup>187</sup> See DYZENHAUS, *supra* note 6, at 2 (noting that courts have power to choose to provide defense lawyers with FISA warrant applications). The War on Terror finds its origin in The Authorization for Use of Military Force (“AUMF”) signed into law by Congress on September 18, 2001. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). The AUMF reads in pertinent part as follows:

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

*Id.* For a challenging exercise on the question of sovereignty and the role of the judiciary that could easily encompass an entirely separate article, one should read the very recent opinion of Judge Royce C. Lamberth of the United States District Court for the District of Columbia on the issue of whether Taliban detainees could still be held in Guantanamo based upon the AUMF in light of President Obama’s public pronouncements that the U.S. military involvement in Afghanistan has ended. *Al Warafi v. Obama*, 716 F.3d 627, 631–32 (D.C. Cir. 2013).

<sup>188</sup> See Defendant’s Reply: Disclosure of FISA, *supra* note 67 (discussing the recent disclosures of FISA materials to the courts). The difference according to Dyzenhaus is the difference between the use of law “as a brute instrument to achieve the ends of those with political power[.]” as opposed to the “constraints which normative conceptions . . . place on the instrumental use of law.” DYZENHAUS, *supra* note 6, at 6.

avoided either.<sup>189</sup> The seriousness of the judiciary's role in "state of exception" questions are raised quite straightforwardly in Professor Dyzenhaus' *The Constitution of Law: Legality in a Time of Emergency*.<sup>190</sup> In a chapter entitled "Judges and the Politics of the Rule of Law[.]" Dyzenhaus poses some propositions regarding judicial attempts, as he describes them much like we have witnessed in *Daoud*, "to pay lip service to the rule of law in situations where the rule of law cannot do any work . . ."<sup>191</sup> While commenting on the dismal British judicial record on wartime emergencies, but conceding that the courts could not do otherwise in light of the legislation, Dyzenhaus proposes, what might be said to foreshadow Judge Rovner's very candor in *Daoud*.<sup>192</sup> As he puts it, rightly so I would suggest, "for judges to try to pretend otherwise, to pay lip service to the rule of law in situations where the rule of law cannot do any work, is likely to make matters worse by giving to government the façade of the rule of law without the judges being able to enforce its substance."<sup>193</sup>

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<sup>189</sup> See *United States v. Daoud*, 755 F.3d 479, 482–83, 486, 496 (7th Cir. 2014) (describing that the federal judicial procedure is not always adversarial and not always completely public depending on the circumstances).

<sup>190</sup> See DYZENHAUS, *supra* note 6, at 60 ("[T]he state of exception is a claim about discretion writ large, but it depends on a claim about discretion in ordinary situations.").

<sup>191</sup> *Id.* at 27. Dyzenhaus, a Sessor of Law and Philosophy at the University of Toronto, makes these observation in the context of describing the dissent of Lord Atkin's dissent in the British House of Lords case of *Liversidge v. Anderson*. [1942] AC 26 (HL) 212–13. The case dealt with the question of war-time detention in the Emergency Powers (Defence) Act of 1939, but sounds as if it could well be relevant to our current day Guantanamo cases. DYZENHAUS, *supra* note 6, at 23–27.

<sup>192</sup> See DYZENHAUS, *supra* note 6, at 27 (discussing the court's power and record).

<sup>193</sup> *Id.* For example, Judge Rovner cited and discussed a number of other FISA-related opinions that contemplated the same issue as that in *Daoud* regarding the availability of *Franks*. *Daoud*, 755 F.3d at 483. As she noted, these other opinions acknowledge the importance of a defendant's right to a *Franks* hearing, but insisted nonetheless "that defendants must somehow make the same preliminary showing . . . that *Franks* would require in the usual criminal case." *Id.* at 490–91; see, e.g., *United States v. Belfield*, 692 F.2d 141, 148 (D.C. Cir. 1982) (expressing sympathy for similar difficulty defendant would have in attempting to show case was so complex that disclosure of FISA materials is warranted); *United States v. Alwan*, 2012 WL 399154, at \*9 (W.D. Ky. Feb. 7, 2012) ("Hammadi cannot offer any proof that statements in the FISA applications were false or were deliberately or recklessly made because Hammadi has not been able to examine the applications. The Court is cognizant of the substantial difficulties Hammadi has encountered in trying to assert a *Franks* violation."); *United States v. Mehanna*, 2011 WL 3652524, at \*2 (D. Mass. Aug. 19, 2011) ("The Court recognizes the defendant's difficulty in making such a preliminary showing where the defendant has no access to the confidential FISA-related documents here."); *United States v. Kashmiri*, 2010 WL 4705159, at \*5–6 (N.D. Ill. Nov. 10, 2010) ("The Court recognizes the frustrating position from which Defendant must argue for a *Franks* hearing. *Franks* provides an important Fourth Amendment safeguard to scrutinize the underlying basis for probable cause in a search warrant. The requirements to obtain a hearing, however, are seemingly unattainable by Defendant."); *United States v. Abu-Jihaad*, 531 F. Supp. 2d. 299, 311 (D. Conn. 2008) ("Since defense counsel has not had access to the

Dyzenhaus goes on to explain what he describes as “two further and no less serious concerns.”<sup>194</sup> The first is that this paying of “judicial lip service to the rule of law in exceptional situations has consequences for the way judges deal with ordinary situations.”<sup>195</sup> Quite consistent with our own courtroom experience, Dyzenhaus finds “that judges begin to be content with less substance in the rule of law in situations which are not part of any emergency regime, all the while claiming that the rule of law is well maintained.”<sup>196</sup> Going further, Dyzenhaus posits that “the law that addresses the emergency situation starts to look less exceptional as judges interpret statutes that deal with ordinary situations in the same fashion.”<sup>197</sup> These concerns, “[a]s a package . . . seem to show that once the exceptional or emergency situation is normalized . . . the exception starts to seep into other parts of the law.”<sup>198</sup>

Considerably more academic scholarship exists on the issues surrounding Schmitt’s “state of exception,” that are not within in the limits of this article, and equally far beyond the expertise of this author.<sup>199</sup> One particular author already mentioned, however, is well worth noting

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Government’s submission they—quite understandably—can only speculate about their contents.”); *United States v. Hassoun*, 2007 WL 1068127, at \*4 (S.D. Fla. Apr. 4, 2007) (“Defendant’s admit that their allegations are purely speculative, in that they have not been given the opportunity to review the classified applications.”); *United States v. Mubayyid*, 521 F. Supp. 2d 125, 131 (D. Mass. 2007) (“The Court obviously recognizes the difficulty of defendants’ position: because they do not know what statements were made by the affidavit in the FISA applications, they cannot make any kind of a showing that those statements were false. Nonetheless, it does not follow that defendants are entitled automatically to disclosure of the statements.”).

<sup>194</sup> DYZENHAUS, *supra* note 6, at 27.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*; see, e.g., Joshua L. Dratel, *Section 4 of the Classified Information Procedures Act: The Growing Threat to the Adversary Process*, 53 WAYNE L. REV. 1041, 1045 (2007) (explaining that courts can issue appropriate protective orders to preserve secrecy). For but one simple, but noteworthy development, protective orders regarding discovery are now demanded by the U.S. Attorney’s Office for the Northern District of Illinois in every criminal case. *Daoud*, 755 F.3d at 481. Judges are so accustomed to these requests that they are granted, as a matter of course, and most attempts to litigate them are met with judicial disdain as if it were comparable to civil discovery disputes. Even worse, many prosecutors take the position that attempting to litigate a motion for a protective order will be viewed as lack of cooperation should one wish to receive credit for cooperation at sentencing.

<sup>197</sup> DYZENHAUS, *supra* note 6, at 27.

<sup>198</sup> *Id.* This same phenomenon, in the context of U.S. courts post 9/11, has been labeled by some commentators and practitioners as “seepage.” See Stephen I. Valdeck, *Normalizing Guantánamo*, 48 AM CRIM. L. REV. 1547, 1547 (2011) (“Over the past decade, a growing chorus of courts and commentators has expressed concern that doctrinal accommodations reached in post-9/11 terrorism cases might spill over or ‘seep’ into more conventional bodies of jurisprudence.”).

<sup>199</sup> See DYZENHAUS, *supra* note 6, at 34 (explaining that Schmitt’s book discussed the issues surrounding the “state of exception”).

again.<sup>200</sup> The prolific Italian philosopher and political theorist, Giorgio Agamben, wrote a very relevant modern sequel to Schmitt's "state of exception," in a 2005 book of the same name.<sup>201</sup> Agamben hits on the use of the metaphor of war by U.S. Presidents in the twentieth century as being "an integral part of the presidential political vocabulary whenever decisions considered to be of vital importance are being imposed."<sup>202</sup> After discussing President Franklin D. Roosevelt's use of war rhetoric regarding the use of extraordinary executive powers in a series of statutes culminating in the 1933 National Recovery Act, Agamben sets his sights on President Bush's very same claim to sovereign powers in emergency situations after 9/11.<sup>203</sup>

In reference to the U.S. PATRIOT Act's authorization of indefinite detention and trial by military commissions, Agamben points out that "[w]hat is new about President Bush's order is that it radically erases any legal status of the individual, thus producing a legally unnamable and unclassifiable being."<sup>204</sup> As if to predict a recent controversial opinion of Judge Royce C. Lamberth, of the U.S. District Court for the District of Columbia declaring that a former Taliban detainee at Guantanamo cannot be released even after President Obama declared publicly on multiple occasions that our combat mission had ended in Afghanistan.<sup>205</sup> Agamben calls the detainees "object[s] of a pure de facto rule, of a detention that is indefinite not only in the temporal sense but in its very nature as well, since it is entirely removed from law and from judicial oversight."<sup>206</sup> Rather shockingly to our American sensibilities, Agamben goes on to state that "[t]he only thing to which it could possibly be compared is the legal situation of the Jews in the Nazi *Lager* [camps], who, along with their citizenship, had lost every legal identity, but at least retained their identity as Jews."<sup>207</sup> Even more to the same point, Agamben cites with approval the American philosopher and gender theorist Judith Butler's assertion

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<sup>200</sup> See *id.* ("Sovereign is he who decides on the state of exception.").

<sup>201</sup> See AGAMBEN, *supra* note 62, at 1.

<sup>202</sup> *Id.* at 21.

<sup>203</sup> See *id.* (addressing the President's sovereign powers in emergency situations).

<sup>204</sup> *Id.* at 3.

<sup>205</sup> See *Al Warafi v. Obama*, 716 F.3d 627, 632 (D.C. Cir. 2013) (concluding appellant did not successfully establish that he was a "medical personnel").

<sup>206</sup> AGAMBEN, *supra* note 62, at 3-4.

<sup>207</sup> *Id.* at 4. See also, NIKOLAS WACHSMANN, KL: A HISTORY OF THE NAZI CONCENTRATION CAMPS 626 (Farrar, Straus & Giroux eds. 2015) ("There was no direct trail from [early camp] Dachau in 1933 to Dachau in 1945. The concentration camps could well have taken a different direction, and in the mid-1930s, it even looked as if they might disappear. They endured because Nazi leaders, above all Adolf Hitler himself, came to value them as flexible instruments of lawless repression, which could easily adapt to the changing requirements of the regime.").

that “in the detainee at Guantanamo, bare life reaches its maximum indeterminacy.”<sup>208</sup>

Agamben goes into considerable detail discussing Carl Schmitt and ultimately disagrees with him over the place of the “state of exception” in the law or juridical order of things. First, Agamben points out that “the state of exception,” in Schmitt’s *Political Theology*, must also be understood in the context of Schmitt’s earlier book, *Dictatorship*.<sup>209</sup> Agamben shows that Schmitt first places “the state of exception” in the context of dictatorship, and that Schmitt then distinguishes between “commissarial dictatorship” and “sovereign dictatorship.”<sup>210</sup> Then, Agamben explains that a commissarial dictatorship “has the aim of defending or restoring the existing constitution” while a sovereign dictatorship becomes “a figure of the exception” that reaches its “critical mass or melting point.”<sup>211</sup> Essentially, Agamben parts company with Schmitt’s use of dictatorship insofar as it becomes a means within the law or structure of a constitution so as to permit the sovereign to declare a “state of exception” to preserve the existential survival of the state itself.<sup>212</sup>

This issue of constitutional dictatorship, mentioned earlier in our discussion of Professor Levinson, is not without its supporters and

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<sup>208</sup> AGAMBEN, *supra* note 62, at 4. Professor Judith Butler is the Maxine Elliot Professor in the Department of Comparative Literature and the Program of Critical Theory at the University of California, Berkeley and the Hannah Arendt Chair at the European Graduate School. *Department of Comparative Literature*, BERKELEY, [http://complit.berkeley.edu/?page\\_id=168](http://complit.berkeley.edu/?page_id=168) [<http://perma.cc/G59L-QL7E>]; *Judith Butler-Biography*, THE EUROPEAN GRADUATE SCH., <http://www.egs.edu/faculty/judith-butler/biography/> [<http://perma.cc/G59L-QL7E>].

<sup>209</sup> See AGAMBEN, *supra* note 62, at 32 (stating that these two books create a paradigm for a state of exception that has fully matured into its current state).

<sup>210</sup> See *id.* (describing the difference between “commissarial dictatorship” and “sovereign dictatorship”).

<sup>211</sup> *Id.*

<sup>212</sup> See *id.* at 50–51 (elaborating on the state of exception). Agamben writes that:

The state of exception is not a dictatorship (whether constitutional or unconstitutional, commissarial or sovereign) but a space devoid of law, a zone of anomie in which all legal determinations—and above all the very distinction between public and private—are deactivated. Thus, all those theories that seek to annex the state of exception immediately to the law are false; and so too are both the theory of necessity as the originary source of law and the theory that sees the state of exception as the exercise of a state’s right to its own defense or as the restoration of an originary pleromatic state of the law (“full powers”). But fallacious too are those theories, like Schmitt’s, that seek to inscribe the state of exception indirectly within a juridical context by grounding it in the division between norms of law and norms of the realization of law, between constituent power and constituted power, between norm and decision.

*Id.*

appears to have gained considerable traction in American legal and political consciousness around the time of the creation of the National Security Act of 1947 – not coincidentally, at the very same time the United States was taking over the role of hegemon with its development of the Atomic Bomb.<sup>213</sup> Much of the credit goes to the Cornell historian and political scientist, Clinton L. Rossiter. In his 1949 classic, appropriately entitled *Constitutional Dictatorship*, Professor Rossiter does not shy away or apologize for the fact that the United States has the bomb and will use it to become the most powerful nation on earth.<sup>214</sup> In his straightforward conclusion after an exhaustive study of the use of emergency powers throughout history by the United States, Great Britain, France, and the German Weimar Republic of 1919 to 1933: “From this day forward, we must cease wasting our energies in discussing whether the government of the United States is going to be powerful or not.”<sup>215</sup> The reason this is such an easy choice, says Rossiter with no holds barred, is because if the United States is not powerful, “we are going to be obliterated.”<sup>216</sup> Thus, since we have no choice other than obliteration, Rossiter says the country’s only problem is to “make that power effective and responsible, to make any future dictatorship a constitutional one.”<sup>217</sup> Not being bashful, Rossiter finally and proudly concludes that “[n]o sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself.”<sup>218</sup>

It is little wonder then, as was mentioned early by Professor Levinson, that Rossiter’s book enjoyed a renaissance when it was republished in 2002 with a cover juxtaposing the burning Twin Towers and the Constitution.<sup>219</sup> Before we take comfort in Rossiter that all is well, and we

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<sup>213</sup> See ROSSITER, *supra* note 62, at 314 (describing how the Bomb morphed the United States into a powerful positive state).

<sup>214</sup> See *id.* (stating that the United States will become more powerful or it will become obliterated).

<sup>215</sup> *Id.* There is little that Rossiter says that is not straightforward, blunt, and hinting at a great deal of faith in democracy and the exceptionalism of the United States. Rossiter begins the book by rephrasing President Lincoln’s question regarding his suspension of the writ of habeas corpus at the outset of the Civil War for the modern, post-World War II total war, nuclear world in which he found himself after returning from the Pacific where he had served as a Navy officer: “Can a democracy fight a successful total war and still be a democracy when the war is over?” *Id.* at 3. Lincoln had famously asked in July of 1861: “Is there in all republics this inherent and fatal weakness? Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?” *Id.* Rossiter unabashedly answers his modern version of Lincoln’s question in the affirmative as being borne out by the “incontestable facts of history.” *Id.*

<sup>216</sup> ROSSITER, *supra* note 62, at 314.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> See Levinson, *supra* note 10, at 739 (describing the cover of the book as a picture with the Twin Towers next to a burning Constitution).

are on solid constitutional footing, it is important to pay attention to eleven specific maxims Rossiter mandates for a successful constitutional dictatorship.<sup>220</sup> If I read them correctly, at a minimum we are at serious risk of being found in violation of a majority of the maxims. Two maxims require time limitations—if not a specific termination date—one specifically forbids the measures to be permanent in character or effect; and another requires that the decision to create a dictatorship never be placed in the hands of the people who will constitute the dictator.<sup>221</sup> The latter concern dovetails exactly into the question of sovereignty at risk in a double government.<sup>222</sup> Who is it, or in whose hands, we have surrendered our sovereignty, needs desperately to be discussed, presuming as all appearances indicate, that we continue to choose to live in the global terror war's apparently permanent "state of exception."<sup>223</sup>

Rossiter's discussion necessarily includes a review of his other warnings, especially for our purposes, his very first rule: "No general regime or particular institution of constitutional dictatorship should be initiated unless it is necessary or even indispensable to the preservation of the state and its constitutional order."<sup>224</sup> While I have strong doubts about

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<sup>220</sup> See ROSSITER, *supra* note 62, at 298–306 (listing eleven maxims regarding constitutional dictatorships).

<sup>221</sup> See *id.* at 299, 300, 303, 306 (stating that the men constituting a dictatorship should never decide to create one; measures should never be permanent; a dictatorship should not last beyond its termination; and dictatorships should not be created without instructions for its termination).

<sup>222</sup> See Book Note, *National Security and Double Government*, 47 GEO. WASH. INT'L L. REV. 447, 447 (reviewing MICHAEL J. GLENNON, NATIONAL SECURITY AND DOUBLE GOVERNMENT (2015)) (defining "double government" as a conglomerate of two institutions: the "Madisonian" government that consists of three branches of government and the "Trumanite" network of contractors and agents that work for government agencies and divisions).

<sup>223</sup> See *supra* Part II (analyzing the idea that the War on Terror does not have an end in sight).

<sup>224</sup> ROSSITER, *supra* note 62, at 298. The remaining maxims read in their entirety are as follows: (2) "[T]he decision to institute a constitutional dictatorship should never be in the hands of the man or men who will constitute the dictator[;]" (3) "[n]o government should initiate a constitutional dictatorship without making specific provision for its termination[;]" (4) "all uses of emergency powers and all readjustments in the organization of the government should be effected in pursuit of constitutional or legal requirements[;]" (5) "no dictatorial institution should be adopted, no right invaded, no regular procedure altered any more than is absolutely necessary for the conquest of the particular crisis[;]" (6) "[t]he measure adopted in the prosecution of constitutional dictatorship should never be permanent in character or effect[;]" (7) "[t]he dictatorship should be carried on by persons representative of every part of the citizenry interested in the defense of the existing constitutional order[;]" (8) "[u]ltimate responsibility should be maintained for every action taken under a constitutional dictatorship[;]" (9) "[t]he decision to terminate a constitutional dictatorship, like the decision to institute one, should never be in the hands of the man or men who constitute the dictator[;]" (10) "[n]o constitutional dictatorship should extend



how indispensable the need was for the enormity of our post 9/11 response, I could live with giving the intelligence community the benefit of the doubt that the threat of terrorism is as enormous as our response indicates.<sup>225</sup> What seems totally wrong however, is leaving the implementation of it all in the hands of those same people as Rossiter warns.<sup>226</sup>

Agamben arrives at the very same conclusion as Rossiter with respect to placing the juridical norm and the power to suspend it in the same hands.<sup>227</sup> While Agamben approaches it from a bit different and more complex philosophical angle, his warning is equally, if not more ominous to our discussion.<sup>228</sup> Agamben minces no words in telling us: “[W]hen they tend to coincide in a single person, when the state of exception, in which they are bound and blurred together, becomes the rule, then the juridico-political system transforms itself into a killing machine.”<sup>229</sup>

## V. CONCLUSION

After thirteen years and counting, there does not seem to be a realistic end in sight to our global war on terror and the changes it has brought and continues to bring to our legal system, as the recent Paris attacks while this

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beyond the termination of the crisis for which it was instituted[;]” (11) “the termination of the crisis must be followed by as complete a return as possible to the political and governmental conditions existing prior to the initiation of the constitutional dictatorship.” *Id.* at 299–300, 302–06.

<sup>225</sup> See *supra* Part II (describing the intelligence community’s response to terrorism following the 9/11 attack).

<sup>226</sup> See ROSSITER, *supra* note 62, at 299 (stating that the decision to create a dictatorship should not be placed in the hands of the people who are going to constitute the dictatorship).

<sup>227</sup> See AGAMBEN, *supra* note 62, at 86 (concluding that a state of exception can function properly if the juridical norm and the power to suspend it remain correlated but distinct).

<sup>228</sup> See *id.* (displaying Agamben’s discussion of the state of exception). Agamben puts it this way:

The state of exception is the device that must ultimately articulate and hold together the two aspects of the juridico-political machine by instituting a threshold of undecidability between anomie and *nomos*, between life and law, between *auctoritas* and *potestas*. It is founded on the essential fiction according to which anomie (in the form of *auctoritas*, living law, or the force of law) is still related to the juridical order and the power to suspend the norm has an immediate hold on life. As long as the two elements remain correlated yet conceptually, temporally, and subjectively distinct (as in republican Rome’s contrast between the Senate and the people, or in medieval Europe’s contrast between spiritual and temporal powers) their dialectic—though founded on a fiction—can nevertheless function in some way.

*Id.*

<sup>229</sup> *Id.*

Article was going to print sadly confirm.<sup>230</sup> Thus, the urgency of Professor Levinson's request for an adult conversation seems as every bit, if not more important today than it was when he called for it in 2006, and we have Valparaiso University to thank for renewing that very important conversation. Now some eight years later, if nothing else, it is certainly time to ask for lawyers outside of academia to join the conversation. Perhaps then we might get more judges to join us as well, as the stakes are certainly worth it – double government or not, two-tiered systems or not. Regardless of the ultimate outcome of the conversation, one thing is for sure, I would think – that is, I doubt very much that any of us will choose to leave our legal system in the hands of our intelligence agencies.

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<sup>230</sup> Adam Nossiter, *Paris Attacks Spur Emergency Edict and Intense Policing in France*, N.Y. TIMES (Nov. 23, 2015), [http://www.nytimes.com/2015/11/24/world/europe/in-france-some-see-the-police-security-net-as-too-harsh-paris-attacks.html?\\_r=0](http://www.nytimes.com/2015/11/24/world/europe/in-france-some-see-the-police-security-net-as-too-harsh-paris-attacks.html?_r=0) [<https://perma.cc/7ULY-ZYQS>] (“All over France, from Toulouse in the south to Paris and beyond, the police have been breaking down doors, conducting searched without warrants, aggressively questioning residents, hauling suspects to police stations and putting others under house arrest. The extraordinary steps are now perfectly legal under the state of emergency decreed by the government after the attacked on [November] 13 in Paris that left 130 dead—a rare kind of mobilization that will continue.”).

Appendix A

Filed with Classified  
Information Security Officer  
CISO \_\_\_\_\_  
Date 7/9/14

[REDACTED]

REDACTED / CLEARED FOR PUBLIC RELEASE

In the  
**United States Court of Appeals**  
For the Seventh Circuit

No. 14-1284

UNITED STATES OF AMERICA,

*Plaintiff-Appellant,*

v.

ADEL DAQUD,

*Defendant-Appellee.*

Appeal from the United States District Court for the  
Northern District of Illinois, Eastern Division.  
No. 12 CR 723 — Sharon Johnson Coleman, *judge*.

ARGUED JUNE 4 & JUNE 9, 2014 — DECIDED JUNE 16, 2014

SUPPLEMENTAL CLASSIFIED OPINION DECIDED JULY 14, 2014

Before POSNER, KANNE, and ROVNER, *Circuit Judges*.

POSNER, *Circuit Judge*. In our June 16 opinion reversing the district judge's order to disclose classified materials to defense counsel, we also held that the government's investigation of the defendant did not violate the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801 *et seq.* We promised to "issue a classified opinion explaining (as we are

[REDACTED]

[REDACTED]

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(forbidden to do in a public document) these conclusions, and why therefore a remand to the district court is neither necessary nor appropriate." This is that opinion.

The FBI's investigation of the defendant was triggered [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]  
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[REDACTED]

[REDACTED]  
the FBI's Chicago office immediately began investigating the defendant. Yahoo responded to a grand jury subpoena [REDACTED] confirming that the account [REDACTED] belonged to a "Mr. Adel Dabud." [REDACTED]

A few days later, an "online covert employee" of the FBI exchanged emails with [REDACTED] and thereby obtained his IP address; on [REDACTED], Comcast, responding to a grand-jury subpoena, confirmed that the IP address was associated with a residential account at 2317 Westwood Drive, Hillside, Illinois—the defendant's address, according to the Illinois Secretary of State Division of Motor Vehicles database. [REDACTED]

[REDACTED]



[REDACTED]

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[REDACTED]

[REDACTED]

The defendant argues that the evidence against him was "obtained or derived from electronic surveillance" that "was not lawfully authorized or conducted," 50 U.S.C. § 1806(g), and should therefore be suppressed. Lacking access to the warrant applications, he presents several conjectures about the warrants' possible illegality. We can restrict our analysis to the first FISA application, [REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED] *Cf. Wong Sun v. United States*,  
371 U.S. 471 (1963).

The FISA applications are free of any procedural defects. The applications were "made by a federal officer and approved by the Attorney General," 50 U.S.C. § 1805(a)(1), each of them listing the name and background of the special agent submitting the application and each of them containing the signatures of the FBI Director or Deputy Director and the Assistant Attorney General for National Security. The government also proposed and followed the required "minimization procedures" to ensure that no more information than necessary was collected from the target of the electronic surveillance and that the information once obtained would not be shared with anyone lacking a "need to know" it. 50 U.S.C. § 1805(a)(3); see also § 1801(h). The Foreign Intelligence Surveillance Court has already approved standing minimization procedures that are incorporated into each surveillance application. [REDACTED]

[REDACTED] And finally each of the applications "contains all statements and certifications required by section 1804." § 1805(a)(4); see also § 1804(a)(1)-(9).

Like any search warrant, a FISA application must be supported by probable cause. But FISA doesn't require the government to show probable cause to believe that the target of the proposed surveillance may be engaged in criminal activity; rather, it requires only probable cause to believe that the target is an "agent of a foreign power." 50 U.S.C.



[REDACTED]

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§§ 1801(b), 1805(a)(2). The term is somewhat misleading; an “agent of a foreign power” needn’t be a KGB spy. Rather, anyone—even if a United States citizen—who “knowingly engages in ... international terrorism, or in activities that are in preparation therefor, for or on behalf of” a “group engaged in international terrorism” qualifies. 50 U.S.C. §§ 1801(a)(4), (b)(2)(C); e.g., *United States v. Aldawsari*, 740 F.3d 1015, 1018–19 (5th Cir. 2014). And anyone who knowingly aids, abets, or conspires with an agent in furtherance of such activities is also deemed an agent of a foreign power. 50 U.S.C. § 1801(b)(2)(E).

The FISA applications contain ample evidence to support a finding of probable cause. [REDACTED]

[REDACTED]

[REDACTED] It would have been irresponsible of the FBI *not* to have launched its investigation of the defendant [REDACTED]

The defendant suggests that the applications may contain intentional or reckless material falsehoods, see *Franks v. Delaware*, 438 U.S. 154 (1978), in violation of the Fourth Amendment. *Franks* however made clear that “the deliberate falsity or reckless disregard [for the truth] whose impeachment is permitted today is only that of the affiant, not of any

[REDACTED]

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[REDACTED]

nongovernmental informant." *Id.* at 171. So even if the defendant is right to say that the [REDACTED] intelligence that triggered the FBI's investigation may be based on "multiple-level hearsay, rumor, surmise, and speculation," all that matters is whether it was unreasonable—in fact reckless—for the *affiant* to rely on it. It wasn't.

[REDACTED]

Next, the defendant suggests that the primary purpose of the surveillance may have been to obtain evidence of *domestic* criminal activity, which is not authorized by FISA. See *United States v. Belfield*, 692 F.2d 141, 147 (D.C. Cir. 1982). The

[REDACTED] disposes of this possible objection.

Finally the defendant suggests that in the spring of 2012 he had been conducting online research for a term paper on Osama bin Laden, and that this online research—which is protected by the First Amendment—may have triggered the government's investigation. If that's the case, then the electronic surveillance wouldn't have been authorized, because "no United States person [such as the defendant] may be

[REDACTED]

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considered ... an agent of a foreign power solely upon the basis of activities protected by the first amendment." 50 U.S.C. § 1805(a)(2)(A). (Relatedly, the defendant suggests that the surveillance may be illegal for the additional reason that it would have taken place before the defendant had turned 18. This is a non sequitur; there's no age restriction in FISA. [REDACTED]

[REDACTED]

The defendant suggests that at least some of the evidence against him may have been obtained as a result of surveillance conducted pursuant to the FISA Amendments Act of 2008 (FAA), Pub. L. 110-261, 122 Stat. 2436 (2008), and if so he's entitled to be notified of that fact. Unlike a traditional FISA application for electronic surveillance, an application under the FAA "does not require the Government to demonstrate probable cause that the target of the electronic surveillance is a foreign power or agent of a foreign power," as long as the surveillance targets "non-U.S. persons located abroad." *Clapper v. Amnesty International USA*, 133 S. Ct. 1138, 1144 (2013). The FAA also "eliminated the requirement that the Government describe to the court each specific target and identify each facility at which its surveillance would be directed, thus permitting surveillance on a programmatic, not necessarily individualized, basis." *Id.* at 1156 (dissenting

[REDACTED]

[REDACTED]

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option); see also 50 U.S.C. § 1881a(g). In short, it's easier for the government to conduct lawful electronic surveillance under the FAA than under the traditional FISA provisions.

Since as we said the government has met FISA's tougher standard, [REDACTED]

[REDACTED]

The defendant's challenge relies primarily on a December 27, 2012 Senate floor speech by Senator Feinstein, who said: "There have been 16 individuals arrest[ed] just this year alone. Let me quickly just review what these plots were. And *some of them* come right from this program [meaning the FAA]. The counter-terrorism come[s]—and the information came right from this program. And again, if members want to see that, they can go and look in a classified manner. ... Fourth, a plot to bomb a downtown Chicago bar ... ." [www.c-span.org/video/?c4467868](http://www.c-span.org/video/?c4467868) (emphasis added) (visited July 11, 2014).

The referenced "plot" is obviously the defendant's, and because the Senator used the examples to support the reauthorization of the FAA, the defendant not unreasonably interpreted her remarks to mean that the FAA had been used

[REDACTED]

[REDACTED]

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in his case. But an equally reasonable interpretation of the Senator's remarks is that she was merely saying that the defendant was one of the 16 individuals who had been arrested in 2012, some of whom had been arrested on the basis of such information. The Senate's Legal Counsel confirmed in a letter to defense counsel that "Senator Feinstein did not state, and did not mean to state, that FAA surveillance was used in any or all of the nine cases she enumerated, including [the defendant's] case, in which terrorist plots had been stopped. ... Rather, her purpose in reviewing several recent terrorism arrests was to refute the view by some that this country no longer needs to fear attack."

We asked the government after the classified oral argument to tell us whether "any FAA information play[ed] any role, no matter how minimal, in the investigation of [the defendant] or the decision to pursue an investigation of [the defendant]."

[REDACTED]

We close with a word on disclosure of the FISA material to defense counsel, which the Attorney General swore in an affidavit would "harm the national security of the United

[REDACTED]

[REDACTED]

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States." As we pointed out in our June 16 opinion, counsel's obligation to zealously represent the defendant comes with a real risk of inadvertent or mistaken disclosure: the risk is particularly worrisome in a case involving sensitive information [REDACTED]

[REDACTED]

[REDACTED]. The FISA applications in this case also revealed [REDACTED] the secrecy of which is unquestionably important to maintain.

[REDACTED]

  
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To summarize, the FISA applications in this case are supported by probable cause to believe that the defendant was an "agent of a foreign power," as FISA defines that term, and the information collected from the resulting surveillance should therefore not be suppressed.

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IN THE UNITED STATES COURT OF APPEALS  
SEVENTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 14-1284
	)	
Plaintiff,	)	
	)	
v.	)	Chicago, Illinois
	)	June 4, 2014
ADEL DAQUD,	)	3:00 p.m.
	)	
Defendant.	)	CLASSIFIED HEARING

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JUDGES RICHARD A. POSNER,  
MICHAEL S. KANNE, and ILANA DIAMOND ROVNER

APPEARANCES:

For the Government:	HON. ZACHARY T. EARDON United States Attorney, by MR. WILLIAM RIDGWAY Assistant United States Attorney 219 South Dearborn Street Suite 500 Chicago, Illinois 60604
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ALSO PRESENT:	MR. DANIEL O. HARTENSTEIN UNITED STATES DEPARTMENT OF JUSTICE
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TRACEY DANA McCULLOUGH, CSR, RPR  
Official Court Reporter  
219 South Dearborn Street  
Room 1426  
Chicago, Illinois 60604  
(312) 435-5570



1 MR. BARTENSTEIN: Yes, Your Honor, the courtroom is  
2 sealed for the protection of classified information, and the  
3 individuals and attendants are appropriately cleared.

4 JUDGE POSNER: Okay. Well, thank you very much. So  
5 then yes, now we have our classified hearing, and with the  
6 government's lawyers. And Judge Rovner has questions.

7 MR. RIDGWAY: Thank you, Judge.

8 JUDGE ROVNER: Let me just explain, and again, I  
9 apologize for my voice. I have a series of questions about how  
10 Daoud first came to the government's attention. I really  
11 carefully read the materials, and I fully understand that the  
12 government has taken the position that the FAA [REDACTED]

13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]

16 But because defense counsel is unable to explore this  
17 issue with you, and because this closed argument is our only  
18 opportunity to do so, I am going to pursue this area with you.  
19 So when and how did Daoud first come to the government's  
20 attention? And by Daoud I mean [REDACTED]

21 [REDACTED]  
22 [REDACTED] And by government, I mean any branch, any  
23 agency of the United States government. Not just the FBI, not  
24 just the Justice Department, or the Chicago FBI or any of the  
25 various terms that, you know, you have used [REDACTED]

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[REDACTED]

MR. RIDGWAY: Yes, Your Honor. [REDACTED]

[REDACTED]

[REDACTED]

And so you'll see information that's provided by --

JUDGE ROWNER: No, of course, I know that. But when  
and -- when?

MR. RIDGWAY: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] I would have to look at the

[REDACTED] I know that

there was some information [REDACTED]

[REDACTED] But that -- in terms of the source of  
the information, and to answer your question about the FAA,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

JUDGE ROWNER: If you look at page [REDACTED]

FISA application, under the section [REDACTED]

[REDACTED] it states that [REDACTED]

[REDACTED]

1 [REDACTED] I'm wondering if that [REDACTED] is an  
2 error, because [REDACTED]  
3 In other words, was [REDACTED] under investigation by [REDACTED]  
4 [REDACTED]  
5 MR. RIDGWAY: So the -- there was no -- the  
6 investigation was triggered by [REDACTED]  
7 [REDACTED]  
8 [REDACTED] Now, I apologise. I used the term [REDACTED] earlier, and I  
9 think it should have been --  
10 JUDGE ROVNER: [REDACTED]  
11 MR. RIDGWAY: [REDACTED] With reference to [REDACTED]  
12 JUDGE ROVNER: I knew that.  
13 MR. RIDGWAY: Thank you. I appreciate that. And I  
14 can get the -- actually I can get the application and go  
15 through that with you. [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED] I can go back -- I  
20 actually can go back and look at the application itself to make  
21 sure that I have got that correct if you don't mind.  
22 JUDGE ROVNER: Sure. I'd appreciate it. Thank you.  
23 (Brief pause.)  
24 MR. RIDGWAY: Your Honor, I don't believe that was an  
25 error. So if I get the timeline right, [REDACTED]

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[REDACTED]  
[REDACTED]  
[REDACTED]

JUDGE ROVNER: [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

MR. RIDGWAY: I'm sorry. Which page number are you referring to?

JUDGE ROVNER: Well, it would be the [REDACTED]

[REDACTED]  
[REDACTED]

MR. RIDGWAY: [REDACTED]

[REDACTED] if I recall correctly.

I'm having trouble finding where that -- where, what page you're referring to, but I believe [REDACTED]

[REDACTED]

JUDGE ROVNER: The government's addendum at page [REDACTED]

MR. RIDGWAY: Oh, I'm sorry, Your Honor. I am not able to find the portion that you're referring in my materials here. It may be that I'm just not -- it's not in the same order. It's -- the government's addendum [REDACTED]

[REDACTED]

1 JUDGE ROVNER: Yes. Does the government possess --  
2 has the government ever possessed any FAA materials related to  
3 Daoud in any way?

4 MR. RIDGWAY: Your Honor, [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]

9 JUDGE ROVNER: Say that again, please.

10 MR. RIDGWAY: [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]

14 JUDGE ROVNER: Are you aware of how and when [REDACTED]  
15 [REDACTED]  
16 [REDACTED]

17 MR. RIDGWAY: Your Honor, I believe that information  
18 is [REDACTED] The -- there may be  
19 [REDACTED] and so I don't have  
20 additional information for that.

21 JUDGE ROVNER: You know, I saw that you offered to  
22 show [REDACTED] to the District Court. Can you provide us with  
23 access to the [REDACTED]

24 MR. RIDGWAY: Your Honor, I should be able to do  
25 that, and I say that not having been in this posture before.

1 But we should be able to [REDACTED] to you.

2 JUDGE ROVNER: You offered them to the District  
3 Court, of course.

4 MR. RIDGWAY: We will work to get those as part of  
5 the record in this case.

6 JUDGE ROVNER: Was Senator Feinstein referring to  
7 Daoud when she referenced a person who attempted to set off a  
8 car bomb in Chicago?

9 MR. RIDGWAY: Your Honor, I don't know whether  
10 Senator Feinstein was referring to that. It seemed -- I think  
11 it seemed like in the context that it may have been a  
12 reference. I don't know what was the reasons why she said  
13 that. I think in the record, though, it's clear that the  
14 counsel for the Senate has made clear that that was not part  
15 of -- it was not meant to be understood as a statement that the  
16 EAA was used in this case, and that the defense has been  
17 misreading those comments.

18 I think the more important point is that the  
19 classified record makes clear that [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 JUDGE ROVNER: And only, you know, if you know [REDACTED]

25 [REDACTED] when [REDACTED] first received information [REDACTED]

1 [REDACTED]  
2 MR. RIDGWAY: Your Honor, I believe that information  
3 happened [REDACTED]  
4 [REDACTED]  
5 [REDACTED] I apologize. I can -- again,  
6 that would be --  
7 JUDGE POSNER: Well, I thought your classified briefs  
8 said [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 MR. RIDGWAY: In -- when it comes to information [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 JUDGE POSNER: From the [REDACTED]  
18 MR. RIDGWAY: [REDACTED]  
19 JUDGE POSNER: But that was before that, what, [REDACTED]  
20 MR. RIDGWAY: It was, it was before [REDACTED]  
21 Obviously it --  
22 JUDGE POSNER: Before [REDACTED]  
23 MR. RIDGWAY: It was information received before the  
24 [REDACTED]  
25 [REDACTED]

1           JUDGE POSNER: I'm going to ask about Franks, because  
2 in Franks the Supreme Court, you know, seemed to set aside the  
3 possibility that the Court could conduct its own review of the  
4 warrant application. Do you think we should dispense with the  
5 notion that a Court could adequately conduct a real Franks  
6 review when the Supreme Court has basically said it's not  
7 possible?

8           MR. RIDGWAY: I mean, no, Your Honor. Franks still  
9 applies in this setting. It just is a difficult -- it's a  
10 difficult burden for, for a Franks showing to be shown --

11           JUDGE ROVNER: I just don't see how --

12           MR. RIDGWAY: -- and presented.

13           JUDGE ROVNER: I myself don't see how it's possible.  
14 I just don't really see --

15           MR. RIDGWAY: Your Honor, it's very similar to the  
16 circumstances that I think in any case a defendant is always  
17 going to be making allegations about what he or she did. And  
18 to the extent those concrete allegations really give doubt  
19 about the underlying application materials, then, then that  
20 could be a circumstance in which it could be shown. I think  
21 Courts still have recognized it would be difficult. And under  
22 the procedures that Congress has created in 1806 (f), it would  
23 be difficult to make that showing.

24           Ultimately, though, that is -- that was the policy  
25 judgment that Congress made in terms of the sensitivity of the



1 information that's involved.

2 JUDGE ROVNER: [REDACTED]

3 [REDACTED]  
4 [REDACTED]  
5 MR. RIDGWAY: Your Honor, I don't know that I could  
6 give the answer to that question. [REDACTED]

7 [REDACTED] But I don't know that I can. We have  
8 submitted filings in terms of information that with respect to  
9 the FAA, that is, if the person was an aggrieved party and that  
10 information was used in order to obtain a FISA, then that would  
11 be derived from. So I think that is spelled out in one of the  
12 filings we had with the District Court. But I don't know  
13 whether I can answer your question in terms of whether it's [REDACTED]

14 [REDACTED]  
15 JUDGE ROVNER: And let me be sure that I understood  
16 you. [REDACTED]

17 [REDACTED]  
18 [REDACTED]  
19 MR. RIDGWAY: I personally do not know.

20 JUDGE ROVNER: You personally. Is there anyone in  
21 this room that does?

22 MR. RIDGWAY: I don't -- I don't know that, if there  
23 is someone who would be able to answer the question differently  
24 than I have answered it.

25 JUDGE ROVNER: Do you want to ask them?

1 MR. RIDGWAY: Sure.

2 (Brief pause.)

3 MR. RIDGWAY: Your Honor, no one is able to answer  
4 the question any differently except, you know, they have  
5 reflected that for me that there, [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 JUDGE ROVNER: And one last question. How does a  
15 person become an agent of a foreign power? [REDACTED]

16 [REDACTED]

17 MR. RIDGWAY: Your Honor, it -- [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

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[REDACTED]

JUDGE ROWNER: I'm very appreciative.

MR. RIDGWAY: Thank you.

JUDGE POSNER: Okay. Do you have anything?

JUDGE KANNE: No. [REDACTED]

[REDACTED]

MR. RIDGWAY: That's correct, Your Honor.

JUDGE KANNE: So that's the bottom line.

MR. RIDGWAY: That's the bottom line.

JUDGE POSNER: Okay. Well, thank you very much, Mr. Ridgway. And we will end our secret hearing.

MR. RIDGWAY: Thank you.

CERTIFICATE

I HEREBY CERTIFY that the foregoing is a true, correct and complete transcript of the proceedings had at the hearing of the aforementioned cause on the day and date hereof.

Tracey D. McCullough

June 10, 2014

Official Court Reporter  
United States District Court  
Northern District of Illinois  
Eastern Division

Date