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## Searching for Accountability Under FISA: Internal Separation of Powers and Surveillance Law

Peter Margulies

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# SEARCHING FOR ACCOUNTABILITY UNDER FISA: INTERNAL SEPARATION OF POWERS AND SURVEILLANCE LAW

PETER MARGULIES\*

*The Foreign Intelligence Surveillance Act (FISA) has never been more controversial. Enacted to bolster surveillance's institutional framework after the excesses of J. Edgar Hoover's FBI, FISA's deficits have been front and center due to the Justice Department Inspector General's report on the flawed Carter Page FISA request and disclosures of excessive FBI querying of U.S. person information under § 702 of the FISA Amendments Act. This Article suggests that current problems have their roots in the failure of both the FBI and the Department of Justice (DOJ) to learn the lessons of FISA's origins and history.*

*Reading the pre-history of FISA requires a look at the troubled history of FBI-DOJ interaction on surveillance. From World War II to the wiretap on Dr. Martin Luther King, Jr. in the 1960s, the Justice Department has acquiesced in regulatory capture by the FBI. Under Hoover, the FBI used its information advantage and edge in personal relationships with the politically powerful to ramp up its surveillance mechanism. FISA was supposed to restore the institutional balance between DOJ and the FBI, but without commitment in practice FISA is just a flow chart. The Foreign Intelligence Surveillance Court (FISC) can reinvigorate dialogue between DOJ and the FBI, but it can do so only if DOJ and the FBI cooperate to provide the FISC with accurate information. That paradox has created an impasse that the Carter Page FISA request and § 702 querying excesses have highlighted.*

*To remedy the regulatory capture that continues to afflict the FISA process, this Article proposes a public advocate at the FISC, de novo high-level administrative review of FISA requests, introduction of machine learning models for quality control, and appointment of a special master for technology. These measures will not eliminate the risk of regulatory capture. But they will*

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*spur cultural change, enabling the gatekeeping framework of FISA to better balance liberty and security.*

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## I. INTRODUCTION

In foreign surveillance law, the great novelist William Faulkner’s observation is apt: “The past is never dead. It’s not even past.”<sup>1</sup> That observation rings true for Edward Snowden’s 2013 revelations about the scope of U.S. surveillance, which has continued to figure in scholarly commentary and case law.<sup>2</sup> It also seems apt for the Foreign Intelligence Surveillance Act of 1978 (FISA) itself,<sup>3</sup> which President Donald Trump criticized because of the flawed surveillance request regarding his former 2016 campaign aide Carter Page.<sup>4</sup> Indeed, the assiduously intrusive intelligence-gathering of longtime Federal Bureau of Investigation (FBI) Director J. Edgar Hoover has continued to drive judicial decisions.<sup>5</sup> Recent revelations of overreaching in the Carter Page request and querying of U.S. person information under section 702 of the FISA Amendments Act of 2008 (FAA)<sup>6</sup> suggest that the players in U.S. surveillance must re-learn the lessons of history.

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1. WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1951).

2. *See, e.g.*, TIMOTHY H. EDGAR, *BEYOND SNOWDEN: PRIVACY, MASS SURVEILLANCE, AND THE STRUGGLE TO REFORM THE NSA* (2017); Kenneth Propp & Peter Swire, *Geopolitical Implications of the European Court’s Schrems II Decision*, *LAWFARE* (July 17, 2020, 11:31 AM), <https://www.lawfareblog.com/geopolitical-implications-european-courts-schrems-ii-decision> [<https://perma.cc/Y5QL-CC9H>] (discussing a decision of the European Court of Justice holding that the transatlantic Privacy Shield data transfer agreement violated European Union law, based on Snowden’s disclosures about the reach of U.S. surveillance).

3. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801–1885(c) (2020)).

4. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF JUSTICE, *REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI’S CROSSFIRE HURRICANE INVESTIGATION* (2019) [hereinafter 2019 OIG FISA REVIEW].

5. *See Brick v. Dep’t of Just.*, 358 F. Supp. 3d 37, 41 (D.D.C. 2019) (holding that the Justice Department could exempt from disclosure under the Freedom of Information Act passages from records that the FBI under Hoover’s leadership had compiled about Eleanor Roosevelt, who apparently had “caught the attention . . . and provoked the ire” of Hoover for her progressive leanings).

6. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008) (codified as amended at 50 U.S.C. § 1881a (2020)). Technically, this section number refers to the provision’s place in one of several titles in FISA, including provisions that Congress added in 2008 in the FAA. The FAA itself used different numbering. *See* 122 Stat. 2437–38 (setting out current § 702 as part of § 101 of that legislation). But judicial decisions commonly refer to § 702 in the way that the text specifies. *See United States v. Hasbajrami*, 945 F.3d 641, 645 (2d Cir. 2019). This Article follows that convention.

A central lesson is the importance of a gatekeeping approach to surveillance. Gatekeeping is a familiar term from the private sector that refers to the lawyer's role in tempering corporate clients' aggressive tendencies.<sup>7</sup> Lawyers and other professionals, including accountants, internalize legal norms and place their reputations on the line in policing clients' representations to regulators.<sup>8</sup> In the FISA setting, gatekeeping relies on a robust internal separation of powers between the Justice Department and its best-known constituent unit, the FBI.<sup>9</sup> An open dialogue can ensure that targeting reflects intelligence needs and legal norms. Dialogue, not undue deference to FBI priorities or protocols, should drive decisions about surveillance targets. From 1941 to 1945, Attorney General Francis Biddle's determination to formalize Hoover's surveillance requests outlined an institutional model of dialogue between the Justice Department and its investigative arm.<sup>10</sup> But Attorney General Biddle was an imperfect regulator, and many of his successors did not even attempt to restrain the FBI's intrusions. Gatekeeping should expressly address the disturbing track record of surveillance from 1940 to the present: without due care, the burden of surveillance can all too readily fall on political opponents,<sup>11</sup> civil rights advocates,<sup>12</sup> and marginalized groups, like Muslim Americans.<sup>13</sup>

Judicial review through the Foreign Intelligence Surveillance Court (FISC)<sup>14</sup> should reinforce that internal institutional dialogue.<sup>15</sup> Courts cannot compensate for such dialogue's collapse. However, they can craft rules that will promote healthy interaction of intrabranched stakeholders.

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7. See JOHN C. COFFEE, JR., *GATEKEEPERS: THE ROLE OF THE PROFESSIONS AND CORPORATE GOVERNANCE* 5–6 (2006).

8. See Stavros Gadinis & Colby Mangels, *Collaborative Gatekeepers*, 73 WASH. & LEE L. REV. 797, 802–03 (2016).

9. See generally Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006) (discussing benefits of internal divisions of authority in executive branch).

10. FRANCIS BIDDLE, IN BRIEF AUTHORITY 167 (1962).

11. *United States v. U.S. Dist. Court for E. Dist. of Mich.*, S. Div., 407 U.S. 297, 313–14 (1972).

12. See Frank Rudy Cooper, *Surveillance and Identity Performance: Some Thoughts Inspired by Martin Luther King*, 32 N.Y.U. REV. L. & SOC. CHANGE 517, 521–25 (2008) (discussing FBI's surveillance of Dr. King).

13. Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MICH. L. REV. 1333, 1338 (2019) (discussing appearance of inequality in investigative, charging, and sentencing decisions).

14. See EDGAR, *supra* note 2, at 113–31 (describing operation and docket of FISC).

15. Cf. John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CAL. L. REV. 205 (2015) (arguing that in ordinary criminal procedure, courts should encourage law enforcement to develop sound structures of accountability to comply with the Fourth Amendment).

To succeed, the institutional approach must push back the forces of regulatory capture that frustrate oversight. Here, as in administrative law, regulatory capture leverages superior information and personal relationships.<sup>16</sup> FBI Director Hoover was a skilled practitioner of the art of regulatory capture.<sup>17</sup> Before the advent of FISA, a succession of attorneys general authorized most, if not all, of Hoover's surveillance requests, including wiretapping Dr. Martin Luther King, Jr.<sup>18</sup> To implement FISA's promise, judicial review should dislodge the grip of regulatory capture. If regulatory capture persists, surveillance's troubled history will also be its perpetual present.

Recent events have suggested that regulatory capture is alive and well in national security surveillance.<sup>19</sup> With the addition of the FISC as part of FISA, one might assume that orderly procedures and methodical deliberation would be the order of the day.<sup>20</sup> However, when regulatory capture prevails, FISA becomes little more than a PowerPoint flow chart: complicated to follow and not always helpful in practice. The legions of lawyers and pages of process yielded by FISA have sometimes hindered accountability. In an episode that the Justice Department's Inspector General described as a failure of both process and leadership, senior Justice Department lawyers signed off during the 2016 election on a flawed FISA request in the case of Carter Page, a former aide to the Trump campaign who had done business in Russia.<sup>21</sup>

In approving the flawed Carter Page FISA request and encouraging senior Justice Department officials to sign on, FBI Director James Comey and others in the Bureau stressed the FBI's reputation for superior information, much as Hoover had done decades earlier. Moreover, just as Hoover acted out of a conviction that he alone could save democracy from subversion, Comey acted

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16. Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1367 (2013).

17. See generally Athan Theoharis, *FBI Wiretapping: A Case Study of Bureaucratic Autonomy*, 107 POL. SCI. Q. 101, 103–04 (1992) (describing Hoover's approach).

18. JAMES COMEY, *A HIGHER LOYALTY: TRUTH, LIES, AND LEADERSHIP* 137 (2018).

19. This Article does not address the separate issue of surveillance of immigrants, primarily by the U.S. Department of Homeland Security. See generally Margaret Hu, *Digital Internment*, 98 TEX. L. REV. ONLINE 174 (2020); Margaret Hu, *Bulk Biometric Metadata Collection*, 96 N.C. L. REV. 1425 (2018); Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1122–26 (2013).

20. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801–1885(c) (2020)).

21. See 2019 OIG FISA REVIEW, *supra* note 4, at 379 (finding that senior officials in the FBI and the Justice Department “sufficiently familiar with the facts and circumstances [of the FISA request] . . . to provide effective oversight . . .”).

out of the conviction that other senior officials were playing politics.<sup>22</sup> In addition, current FBI surveillance practices, like those of the Hoover era, run the risk of targeting marginalized groups: here, Muslim-Americans.<sup>23</sup> Regulatory capture exacerbates that peril.

Highlighting the parallels between the regulatory capture engineered by Hoover during his half-century reign and the FBI's current overreaching should not obscure key differences. Director Comey was an institutionalist at heart who feared that the Justice Department was becoming too politicized to hold up its end of the institutional framework. Moreover, because of the power of the FISC and shifts in U.S. political culture and substantive law, no FBI director could recreate the web of intrusive and sometimes voyeuristic surveillance that Hoover had spun. However, the regulatory capture in the Carter Page episode and the FBI's "routine" and "maximal" use of U.S. person queries under section 702<sup>24</sup> trigger questions about how to restore the institutional model's structure of accountability. This Article proposes several new norms to remedy the regulatory capture signaled by the Carter Page FISA request and section 702 querying excesses, including a public advocate at the FISC, de novo administrative review, the introduction of artificial intelligence techniques such as machine learning to evaluate draft requests, and a remedy that creates a robust cap and trade system within the FBI for U.S. person queries.

The Article is in six Parts. Part I provides a general history of U.S. surveillance, starting with *Olmstead* and concluding with § 702. Part II outlines the theory of the institutional model, the internal separation of powers, and the threat posed by regulatory capture. Part III discusses regulatory capture's history, beginning with World War II, continuing with Attorney General Robert

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22. See COMEY, *supra* note 18, at 169–70. In this passage, Comey discusses his motivation for speaking publicly about the investigation of 2016 Democratic presidential candidate Hillary Clinton's emails. But it is important to separate Comey's intent from the effects of his decisions. It is reasonable to infer that a sincere commitment to nonpartisan law enforcement informed all of Comey's actions during this period. It is also reasonable to ask whether some of Comey's actions, including the approval of the Carter Page FISA request and Comey's public mentions of the Clinton email investigation, had an undue impact on the political process. On the Clinton investigation, see, for example, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF VARIOUS ACTIONS BY THE FEDERAL BUREAU OF INVESTIGATION AND THE DEPARTMENT OF JUSTICE IN ADVANCE OF THE 2016 ELECTION 219–31 (2018) (describing the lead-up to and reaction to Comey's press conference on Clinton's emails in July 2016). The circumstances of Comey's firing by President Trump in 2017 should not stifle those hard questions.

23. Sinnar, *supra* note 13, at 1335–37.

24. Memorandum Opinion and Order at 72, *In re* Section 702 2018 Certification (FISA Ct. Oct. 18, 2018), [https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018\\_Cert\\_FISC\\_Opin\\_18Oct18.pdf](https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opin_18Oct18.pdf) [<https://perma.cc/J5S3-PTRM>].

Kennedy's approval of Hoover's surveillance of Dr. King, and ending in the FISA era with the early 2000s' dispute about the "wall" between foreign intelligence and criminal prosecution. Turning to current issues, Part IV recounts the Carter Page episode and its ambiguous aftermath, while Part V analyzes excessive querying of § 702 data to illustrate the scope of the problem. Finally, Part VI suggests solutions to reinforce the institutional model and promote more effective dialogue between the FBI and the Justice Department.

## II. SURVEILLANCE'S CENTURY: A HISTORICAL OVERVIEW

The legal history of wiretapping in the United States is a dialectic between insistence on privacy and permitting intrusion in the interest of national security or public safety.<sup>25</sup> The history, particularly in the era from the 1930s through the early 1970s, reveals two disconnects: one between constitutional and statutory regimes, and the other—especially in FBI Director J. Edgar Hoover's heyday of intrusive domestic intelligence-gathering in the 1950s through the early 1970s—between law on the books and the law in practice.<sup>26</sup>

In the constitutional realm, the Supreme Court in 1928 refused to impose Fourth Amendment safeguards on surveillance in *Olmstead v. United States*,<sup>27</sup> despite a stirring dissent from Justice Brandeis.<sup>28</sup> That permissive approach led

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25. Wiretapping's prehistory involves the application of the Fourth Amendment to letters sent by the U.S. Post Office. See Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 STAN. L. REV. 553, 576–77 (2007) (arguing that earlier legislation creating the Post Office and norms that grew up around that institution informed the Supreme Court's observation in *Ex parte Jackson*, 96 U.S. 727, 733 (1878), that the Fourth Amendment protected against government inspection of the content of letters in the mail system).

26. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME—FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 492–96 (2004) (discussing President Nixon's program of surveillance, including proposals so vast that Hoover opposed them, perhaps because their scope would have spurred opposition that also carried over into Hoover's surveillance apparatus); FREDERICK A.O. SCHWARZ, JR. & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* 31–36 (2007) (describing findings of Church Committee on FBI surveillance); Emily Berman, *Regulating Domestic Intelligence Collection*, 71 WASH. & LEE L. REV. 3, 12–13 (2014) (discussing Hoover's program and response to public disclosure of Hoover's work); see also S. REP. NO. 94-755 (1976).

27. 277 U.S. 438 (1928). The roots of the Fourth Amendment in English law are beyond the scope of this Article. See David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1799 (2000) (analyzing factors that led to judicial invalidation of general warrants against English dissidents prior to U.S. independence and how the Framers perceived those precedents).

28. *Olmstead*, 277 U.S. at 471; see also Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 512–13 (2011) (discussing evolution of Fourth Amendment doctrine on wiretapping from *Olmstead* to the late 1960s based on wider public use of the telephone to replace in-person meetings).

to a massive growth in wiretapping by *state and local* law enforcement.<sup>29</sup> At the federal level, however, Congress prohibited wiretapping, in part because of popular indignation at enforcement of the Eighteenth Amendment—otherwise known as Prohibition.<sup>30</sup> While, as we shall see, longtime government practice and a secret letter from President Franklin Roosevelt in 1940 allowed wiretapping in cases of espionage and sabotage,<sup>31</sup> Congress did nothing at this time to modify its ban on wiretapping at the federal level.

When courts had the opportunity, they robustly construed the federal ban on wiretapping. In one prominent case, appellate courts vacated a criminal conviction of a U.S. citizen who sought to convey sensitive government documents to the Soviet Union. Both the D.C. Circuit and the Second Circuit cited the illegality of the wiretaps the government used.<sup>32</sup> However, as the Cold War accelerated and the McCarthy Era turned Americans fearful of Communism, a growing gap arose between Congress's statutory prohibition of wiretapping and actual FBI practice. FBI Director Hoover, who saw subversion even in ordinary political dissent, secretly bolstered his use of informants and wiretaps, although the latter were still modest when compared with state and local surveillance.<sup>33</sup> Successive Attorneys General approved much of Hoover's surveillance program, including the wiretapping of Dr. Martin Luther King, Jr.<sup>34</sup> At the same time, however, efforts to authorize federal wiretapping through legislation stalled, despite efforts in the Truman, Eisenhower, and Kennedy administrations.<sup>35</sup>

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29. See *Wiretapping—The Attorney General's Program—1962: Hearings on S. 2813 and S. 1495 Before the S. Comm. on the Judiciary*, 87th Cong. 47–51 (1962) [hereinafter 1962 Hearings] (testimony of Lawrence Speiser, American Civil Liberties Union) (noting that in New York City alone, police tapped 3,588 telephones in the years 1953–1954).

30. See *Nardone v. United States (Nardone I)*, 302 U.S. 379, 380 (1937); *Nardone v. United States (Nardone II)*, 308 U.S. 338 (1939).

31. See Neal Katyal & Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023, 1050 (2008).

32. See *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951); *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950).

33. See Mickie Edwardson, *James Lawrence Fly, the FBI, and Wiretapping*, 61 HISTORIAN 361, 376 (1999) (noting that Hoover told the Attorney General that no more than 200 federal wiretaps were operating at any given time).

34. See EVAN THOMAS, ROBERT KENNEDY: HIS LIFE 262–67 (2000); Philip A. Lacovara, *Presidential Power to Gather Intelligence: The Tension Between Article II and Amendment IV*, 40 LAW & CONTEMP. PROBS. 106, 108 (1976).

35. See William P. Rogers, *The Case for Wiretapping*, 63 YALE L.J. 792, 795–96 (1954) (explaining, in an article written by Deputy Attorney General and future Attorney General and Secretary of State, that both Truman and Eisenhower officials supported legislation); 1962 Hearings, *supra* note 29, at 1–10 (showing text of proposal supported by Kennedy administration).

In the late 1960s, developments in surveillance introduced greater judicial involvement and a confluence of constitutional and statutory law. The Supreme Court, in *Katz v. United States*,<sup>36</sup> overruled *Olmstead*, holding that the Fourth Amendment required a judicial warrant for wiretaps. Congress then established a procedure for judicial approval of federal wiretap requests in Title III of the 1968 Omnibus Crime Control and Safe Streets Act.<sup>37</sup> However, officials continued to believe that judicial approval was not required for surveillance in national security cases. In 1972, the Supreme Court held in *United States v. United States District Court (Keith)*<sup>38</sup> that Title III did not contain an implicit exception for surveillance based on domestic national security concerns. The Court also held, in an opinion by Justice Lewis Powell, that the Fourth Amendment required a warrant from a neutral magistrate in such cases.<sup>39</sup> Powell stressed the interaction of the First and Fourth Amendments, suggesting that untrammelled surveillance would target dissidents and disfavored groups.<sup>40</sup> In addition, Justice Powell suggested that Congress legislate regarding national security surveillance.<sup>41</sup>

In 1975, the Church Committee released its disturbing findings about the architecture of surveillance in previous decades under longtime FBI Director Hoover, whose celebrated reign turned precipitously into a history of discredit and shame.<sup>42</sup> In 1976, President Ford's Attorney General, former University of Chicago President Edward Levi, issued the Levi Guidelines, which sought to require Attorney General approval for most national security investigations.<sup>43</sup> In 1978, Congress enacted FISA which provided for judicial approval of surveillance conducted on a suspected agent of a foreign power.<sup>44</sup> In 2008, following the September 11 attacks and a secret executive branch effort to

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36. 389 U.S. 347, 356 (1967).

37. See 18 U.S.C. § 2511(2)(a)(ii)(A).

38. 407 U.S. 297 (1972).

39. *Id.* at 298.

40. *Id.* at 329–31.

41. *Id.* at 323.

42. See *Hearings Before the Select Comm. to Study Governmental Operations with Respect to Intelligence Activities of the United States Senate*, 94th Cong. 6–7 (1975) [hereinafter 1975 Church Comm. Report].

43. See U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS 19–26 (1976).

44. 50 U.S.C. §§ 1801–1885(c) (2020); see also *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984) (upholding FISA's constitutionality).



conduct surveillance beyond FISA's constraints, Congress broadened surveillance authority in the FAA.<sup>45</sup>

### III. THE INSTITUTIONAL MODEL AND THE THREAT OF REGULATORY CAPTURE

In the twists and turns of the relationship between the FBI and the Justice Department regarding wiretapping and other forms of electronic surveillance, the ideal has been a gatekeeping model that relied on a functioning dialogue between these two stakeholders. Gatekeepers are proactive in promoting legal norms and modeling candor with other players, such as the FISC in the FISA context. Often, gatekeepers stake their own reputation on the reliability of representations. Regulatory entities like the FISC value gatekeepers, who help redress the information deficits that regulators face in anticipating what strategies the subjects of regulation will employ.<sup>46</sup>

In FISA's gatekeeping drama, the Justice Department must have the final say, and must ask tough questions to determine whether surveillance is necessary and appropriate. Those questions produce useful information only when the FBI also takes its gatekeeping role seriously. Undue deference, credulity, or fear on the part of Justice Department lawyers undermines the conditions of dialogue that the gatekeeping model requires.<sup>47</sup> FBI personnel, including agents and the FBI's own lawyers, must internalize the benefits of this dialogue, instead of viewing it as an annoying formality that interferes with effective law enforcement. Judicial review can preserve the conditions that enable the gatekeeping model. However, judicial review also depends on the gatekeeping model to bring accurate and comprehensive surveillance requests to the courts. Because of this dependence, judicial review is not a panacea when

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45. § 1881a (2020). Section 702 of the FAA allows the FISC to approve a certification of procedures for targeting the content of communications of persons or entities reasonably believed to be located outside the United States, including situations when the persons or entities engage in "one-end foreign communications" that also include parties in the United States, U.S. citizens, or U.S. lawful permanent residents. The collection of the content of communications must be tied to the acquisition of foreign intelligence information. Beyond the certification, the FISC need not issue any specific order authorizing collection. *Cf. United States v. Hasbajrami*, 945 F.3d 641, 669–73 (2d Cir. 2019) (holding that the querying of § 702 data for U.S. person information constitutes a Fourth Amendment search and remanding to the district court to determine whether the procedures governing such queries make them "reasonable" for Fourth Amendment purposes). U.S. person queries and § 702 are discussed *infra* notes 262–73 and accompanying text.

46. See COFFEE, *supra* note 7, at 5; Kathryn Judge, *Information Gaps and Shadow Banking*, 103 VA. L. REV. 411, 446–47 (2017).

47. Of course, courts can also defer, sometimes excessively. See Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1412–18 (2009).

gatekeeping fails; indeed, judicial review can become a symptom of the problem.<sup>48</sup>

### A. Virtues of the Gatekeeping Model

The gatekeeping model displays the virtues of the intrabranched separation of powers.<sup>49</sup> When more than one individual has to sign off on a particular action, it is easier to see the proposed action in all dimensions.<sup>50</sup> This combats “group-think” and cognitive flaws such as confirmation bias, which frames each new input as evidence that reinforces a pre-determined conclusion.<sup>51</sup> In a decision with legal consequences, intrabranched consultation can elicit a range of legal, factual, and policy arguments. If a precedent can bear both a broad and a narrow reading, deliberation can assess the merits of each. If a decision is legally defensible but to some stakeholders might signal an unduly casual approach to civil liberties, deliberation can bring out that concern.<sup>52</sup> In the

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48. Cf. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2123 (1998) (suggesting that in the disposition on the merits of criminal cases, deliberation within prosecutors’ offices is often the main event, while judicial procedures often merely ratify what prosecutors have already decided).

49. See Katyal, *supra* note 9 at 2324; Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 426–27 (2009); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 895–901 (2009) (arguing that prosecutors’ offices should separate investigative decisions and decisions about disposition of cases). *But see* Jon D. Michaels, *An Evolving, Enduring Separation of Powers*, 115 COLUM. L. REV. 515, 535–37 (2015) (cautioning that focus on internal separation can obscure important values in constitutional framework).

50. This is also a core value for the Framers’ vision of external separation of powers. See THE FEDERALIST No. 63, at 347 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (commending institutions as the Senate that ideally will place “cool and deliberate sense of the community” over “temporary errors and delusions”); cf. HANNAH ARENDT, BETWEEN PAST AND FUTURE 242 (1954) (praising deliberation in which “an issue is forced into the open that it may show itself from all sides, in every possible perspective”).

51. Russell Golman, David Hagmann & George Loewenstein, *Information Avoidance*, 55 J. ECON. LIT. 96, 101–03 (2017); *see also* Miriam H. Baer, *Timing Brady*, 115 COLUM. L. REV. 1, 32–43 (2015) (discussing how cognitive biases increase probability that prosecutor who learns of exculpatory evidence late in proceedings will not disclose that evidence and will thus violate the Sixth Amendment’s fair trial guarantee, as interpreted by the Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963)); Kate E. Bloch, *Harnessing Virtual Reality to Prevent Prosecutorial Misconduct*, 32 GEO. J. LEGAL ETHICS 1, 17–24 (2019) (discussing how prosecutors’ cognitive biases contribute to wrongful convictions).

52. See JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 131 (2007); *see also* JACK GOLDSMITH, POWER AND CONSTRAINT 125–46 (2012) (noting the salutary influence of U.S. military lawyers on operational decisions, including targeting choices made in counter-insurgency contexts where “hearts and minds” of population have strategic and tactical importance, beyond strictly legal considerations); Robert F. Bauer, *The National Security*

surveillance context, lawyers can probe agents' confidence in the reliability of a source. Deliberation can elicit more complete data about the source's agenda.<sup>53</sup>

Intrabranched separation of powers is particularly important in an area such as national security surveillance. In this arena, a particular player in the executive branch will invariably stress the exigency of the matter. In the throes of that exigency, a single official or entity may succumb to group-think, ignoring or unduly discounting countervailing facts or values.<sup>54</sup> In addition, placing a decision with one official or unit may deter consideration of alternatives to surveillance. Of course, supplying this perspective can be the province of another branch of government, such as the courts. But, as noted above, courts are reactive and depend on the executive branch for information. Compared with courts, a functional system of intrabranched deliberation will often detect and address issues more effectively. A court will often do its best work in reinforcing that intrabranched deliberative process.<sup>55</sup>

#### B. Regulatory Capture as a Risk to the Gatekeeping Model

Unfortunately, the gatekeeping model faces a powerful foe: regulatory capture, a craft that helps the target of regulation disarm regulators. The history

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*Lawyer, In Crisis: When the "Best View" of the Law May Not Be the Best View*, 31 GEO. J. LEGAL ETHICS 175, 179 (2018) (suggesting that executive branch lawyers have a measure of discretion in deciding whether an aggressive or restrained reading of a legal standard is appropriate, depending on the exigency of the situation and other factors); cf. CHARLIE SAVAGE, POWER WARS 645–46 (2015) (discussing interplay of perspectives of executive branch lawyers about U.S. intervention in Libya). But see Jack Goldsmith, *Executive Branch Crisis Lawyering and the "Best View,"* 31 GEO. J. LEGAL ETHICS 261, 268–73 (2018) (arguing that discretion urged by Bauer can become excessive because of lawyers' urge to support policy decisions, especially in crises).

53. See Ellen Yaroshfsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishments*, 68 FORDHAM L. REV. 917, 955–56 (1999).

54. See GOLDSMITH, TERROR PRESIDENCY, *supra* note 52, at 177–83 (recounting how unduly aggressive legal advice enabled establishment of Terrorist Surveillance Program outside FISA in administration of President George W. Bush); Goldsmith, *Executive Branch Crisis Lawyering and the "Best View,"* *supra* note 52, at 268–73 (noting pull of exigency argument). More often than some other officials, J. Edgar Hoover tended to see exigency as a justification for aggressive investigation and sought to leverage that perception to build support within the government for his position, although even Hoover was on occasion reluctant to approve investigations. See Richard W. Steele, *Franklin D. Roosevelt and His Foreign Policy Critics*, 94 POL. SCI. Q. 15, 22 (1979) (relating that in June 1941, as President Roosevelt was trying to help Britain resist Nazi Germany in World War II, Roosevelt sought through an intermediary to persuade Hoover to investigate isolationist senator Burton K. Wheeler of Montana, but Hoover was wary of approving the idea).

55. For a related argument regarding ordinary criminal procedure and judicial review, see Rappaport, *supra* note 15 (suggesting that courts are more effective in vindicating Fourth Amendment rights when they encourage law enforcement agencies to devise protocols and observe those internal rules, rather than being needlessly prescriptive and imposing first-order rules on agencies).

of U.S. national security surveillance is a story about attempts to regulate the investigative arm of the Justice Department, starting with Attorney General Harlan Fiske Stone in 1924. Stone set a standard for restraint that embodied his warning that “a secret police may become a menace to free government and free institutions because it carries with it the possibility of abuses of power which are not always quickly apprehended or understood.”<sup>56</sup> Stone issued this warning in the wake of the infamous Palmer Raids which were initiated on radicals by then-Attorney General, A. Mitchell Palmer, in 1919 and 1920.<sup>57</sup> J. Edgar Hoover assisted in the raids.<sup>58</sup> Stone appointed him to lead the Bureau of Investigation in 1924 after Hoover asserted that he had learned the value of restraint.<sup>59</sup> Hoover’s primary course of study was the craft of regulatory capture.<sup>60</sup>

While regulatory capture usually is a mainstay of private businesses seeking to outmaneuver government agencies, the concept is also relevant to the FBI and wiretapping because the Constitution and federal statutes restrain the executive branch.<sup>61</sup> As the Framers knew, regulation of government is necessary, because human nature is imperfect, and “government itself [is] but the greatest of all reflections on human nature.”<sup>62</sup> Regulatory capture aims to undermine those restraints.

As in the private sector, a government agency subject to restraints can practice regulatory capture through the exploitation of information or relationships.<sup>63</sup> An entity subject to regulation may have more and better

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56. S. REP. NO. 94-755, at 3 (1976).

57. *Id.* at 2.

58. *Id.* at 26.

59. *Id.* at 23–24.

60. *See* STONE, *supra* note 26, at 249 (noting that Hoover was “obsessively organized” and “brilliant at building alliances, protecting turf, and undermining his enemies”).

61. *See* THE FEDERALIST No. 51, at 319 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that, “[i]n framing a government . . . you must first enable the government to control the governed; and in the next place oblige it to control itself”).

62. *Id.*; *cf.* ACLU v. Clapper, 785 F.3d 787, 810–21 (2d Cir. 2015) (finding that in enacting former § 215 of the USA PATRIOT Act, which authorized collection of papers and other tangible things “relevant” to an authorized national security investigation, Congress had not delegated power to the executive branch to collect call-detail information from all U.S. land-line telephone communications).

63. *See* PAUL TUCKER, UNELECTED POWER: THE QUEST FOR LEGITIMACY IN CENTRAL BANKING AND THE REGULATORY STATE 66–67 (2018) (describing different descriptive models of capture, including contention by some “Chicago School” theorists that Congress intended to establish agencies that regulated industries could dominate); Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL’Y 203, 204–06 (2006); Livermore & Revesz, *supra* note 16, at 1367.

information than agencies possess.<sup>64</sup> Regulators depend on the data and expertise that a lobbyist or other industry insider can generate. In addition, the representatives of regulated industries or entities may have personal relationships with regulators.<sup>65</sup> Those relationships may not produce conscious bias on the part of administrators. However, propinquity has its strengths, prodding regulators into siding with persons or organizations they are supposed to check. In addition, any regulator who dares to scrutinize a regulated entity more carefully may feel marginalized and therefore temper her objections to the regulated entity's decisions. Moreover, the proximity of regulated industry representatives to federal officers may yield knowledge about regulators' habits and weak spots, aiding efforts to counter or co-opt regulatory initiatives.

At crucial times, Hoover and other FBI personnel used these assets. Instead of a gatekeeping collaborator, the FBI became a wily regulated entity neutralizing gatekeeping efforts by the Justice Department. Sometimes the intent of regulatory capture's practitioners at the Bureau seemed to be maximizing power; more often, the motivation was probably staving off a perceived threat to the FBI's mission or independence. Either way, regulatory capture has imperiled the stability of the gatekeeping model.

#### IV. SURVEILLANCE AND REGULATORY CAPTURE: THREE WINDOWS IN TIME

The last eighty years have seen a push-pull between the gatekeeping model and regulatory capture. Key episodes dating back to 1940 reveal the dialectic between the two approaches. This Part focuses on three examples: (1) limited wiretapping in 1940 during the lead-up to U.S. entry into World War II; (2) wiretapping of civil rights figures and their associates in the 1960s; and (3) the FISA "wall" wars just before the 9/11 attacks over inadequate disclosures to the FISC.

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64. See Wendy E. Wagner, *Administrative Law, Filter Capture, and Information Capture*, 59 DUKE L.J. 1321, 1329–34 (2010). Wagner focuses on the costs that a regulated entity can impose on regulators through the submission of excessive information that a regulator cannot process. *Id.* at 1335–36. Older conceptions of capture take the more straightforward view that agencies depend on the subjects of regulation for information, giving regulated entities an opportunity to frame data in a way that advances their own agenda. See Roger Noll, *The Economics and Politics of Regulation*, 57 VA. L. REV. 1016, 1030 (1971) (remarking that "most of the information flowing to the agency will come from the regulated, who normally can afford to employ better resources").

65. J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543, 1545 (2018); Margot E. Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977, 994 (2014).

### A. 1940 and the War Years

In the eighteen months before the United States' entry into World War II and throughout the war, internal executive branch rules limited wiretapping to the investigation of espionage, sabotage, and subversion, and required the Attorney General's personal approval in each case.<sup>66</sup> But regulatory capture by the bureaucratically adept J. Edgar Hoover created a more complex picture. Both the creation of the limited approval policy—without congressional authorization—and the policy's shifting implementation owed much to Hoover's deft use of information and personal relationships.

#### i. Jackson's Short-Lived Wiretapping Ban and President Roosevelt's Secret Memorandum

The gatekeeping approach started with great fanfare in March, 1940 as new Attorney General Robert Jackson issued a blanket ban on wiretapping, citing Hoover's recommendation.<sup>67</sup> As the gatekeeping approach would urge, Jackson was asserting himself and signaling that the Justice Department would follow the law on wiretapping, including the Supreme Court's recent decision in *Nardone II*,<sup>68</sup> holding that wiretapping conflicted with the relevant federal statutes.<sup>69</sup>

Yet even this ostensibly clear framing of institutional choices included details that outlined a portrait of regulatory capture. Contemporary media accounts commented that Jackson had acted “[o]n the recommendation” of Hoover.<sup>70</sup> But both Hoover's views and Jackson's reasons for mentioning them are more complex. During his early years as FBI director, Hoover prohibited

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66. See Katyal & Caplan, *supra* note 31, at 1050.

67. See *Justice Department Bans Wire Tapping; Jackson Acts on Hoover Recommendation*, N.Y. TIMES, Mar. 17, 1940, at A1; WILLIAM R. CASTO, *ADVISING THE PRESIDENT: ATTORNEY GENERAL ROBERT H. JACKSON AND FRANKLIN D. ROOSEVELT* 32–33 (2018); Douglas M. Charles, *Informing FDR: FBI Political Surveillance and the Isolationist-Interventionist Policy Debate*, 24 *DIPLOMATIC HIST.* 211, 215 (2000); Katyal & Caplan, *supra* note 31, at 1048.

68. 308 U.S. 338 (1939).

69. Jackson's personal and policy views on wiretapping were more nuanced. Jackson believed that wiretapping was consistent with the Constitution, but that it was “a source of real danger if it was not adequately supervised.” ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 68 (John Q. Barrett ed., 2003). To minimize this risk, Jackson recommended restricting wiretapping to “highly responsible use in a limited number of cases, defined by law.” *Id.* at 68–69. Throughout his relatively brief tenure as Attorney General, which ended with Jackson's nomination to the Supreme Court and confirmation in July 1941, Jackson pressed for legislation permitting the Attorney General to approve wiretapping in the limited circumstances described above, along with provision for wiretapping in extortion and kidnapping cases. *Id.* at 69.

70. See *Justice Department Bans Wire Tapping; Jackson Acts on Hoover Recommendation*, *supra* note 67, at A1.

wiretapping by the FBI.<sup>71</sup> However, prior to *Nardone II*, Hoover resumed wiretapping with the approval of President Herbert Hoover's attorney general, William D. Mitchell, and Jackson's immediate predecessor as attorney general under President Roosevelt, Homer Cummings.<sup>72</sup> In his March 1940 announcement of the wiretapping ban, Jackson expressly observed that Hoover argued for categorically barring the practice.<sup>73</sup> Jackson's reasons for underlining Hoover's recommendation are cloudy, given the Justice Department's structure and organization.

Then and now, the FBI was part of the Justice Department, which the Attorney General heads.<sup>74</sup> Announcing a policy, an attorney general would generally not mention that a deputy attorney general or another subordinate in the Justice Department agreed. The audience for such an announcement would reasonably assume that subordinates agreed or at least acquiesced in the policy; the remedy for a serious disagreement would be resignation from the department. Yet Jackson found it both necessary and appropriate to prominently feature Hoover's role in the wiretapping ban. For an astute observer, this emphasis on Hoover suggested that a different conclusion by the FBI director on the legality or propriety of wiretapping may have prompted a more permissive Justice Department policy. Similarly, the highlighting of Hoover hinted that the director's reputation and relationships with powerful officials were integral to the ban's acceptance. But what Hoover granted, he could also take away.

In the next few months, in a virtuoso rendition of regulatory capture, Hoover successfully pushed the entire executive branch to permit wiretapping in national security cases.<sup>75</sup> Executing an end-run around Attorney General Jackson, in May 1940 Hoover warned Treasury Secretary Henry Morgenthau, who was known to be deeply concerned about the menace of Nazi Germany and Adolf Hitler's persecution of Jews and other minorities in Europe, that Jackson's wiretapping ban had hindered the FBI's efforts to catch German

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71. See CASTO, *supra* note 67, at 33.

72. Katyal & Caplan, *supra* note 31, at 1037. Roosevelt had also sought the FBI's assistance in investigating isolationist critics of Roosevelt's efforts to help the Allied powers in their fight against Adolf Hitler and Nazi Germany, although the record is unclear about whether the FBI installed wiretaps as part of this effort. See Steele, *supra* note 54, at 20–22; cf. Charles, *supra* note 67, at 219–20 (inferring based on available evidence that the FBI wiretapped at least some prominent isolationists, possibly including famed aviator Charles Lindbergh).

73. See *Justice Department Bans Wire Tapping; Jackson Acts on Hoover Recommendation*, *supra* note 67, at A1.

74. *Id.*

75. See CASTO, *supra* note 67, at 35–36; Katyal & Caplan, *supra* note 31, at 1049–50.

spies.<sup>76</sup> Morgenthau immediately advised President Roosevelt of Hoover's distress.<sup>77</sup> With his trademark decisiveness, Roosevelt rushed out a confidential memorandum to Jackson the next day, reading *Nardone II* narrowly as not barring surveillance in "grave matters involving the defense of the nation" such as espionage and sabotage.<sup>78</sup> Roosevelt retained the lineaments of an institutional approach, requiring that the attorney general approve wiretaps in such cases and urging Jackson to "limit these investigations . . . to a minimum" and confine them "insofar as possible" to foreign nationals such as the German spies whom Hoover wished to monitor.<sup>79</sup>

ii. Jackson, Biddle, and Fragile Institutional Controls on the FBI

Leaving aside whether Roosevelt's reading of *Nardone II* was unduly narrow and whether the president's order exceeded his power,<sup>80</sup> the track record

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76. Katyal & Caplan, *supra* note 31, at 1049–50.

77. *Id.*

78. See JACKSON, *supra* note 69, at 68.

79. *Id.*; BIDDLE, *supra* note 10, at 167; CASTO, *supra* note 67, at 35–36; Katyal & Caplan, *supra* note 31, at 1025.

80. Analyzing the constitutionality of Roosevelt's memorandum hinges on both its scope and the theory supporting it. The theoretical question is more fundamental, so it is worth examining first. In a twist of fate that may not be wholly coincidental, the framework for analysis is Justice Robert Jackson's concurrence in *Youngstown*. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); see also *id.* at 610–11 (Frankfurter, J., concurring) (asserting that legislative acquiescence should prompt judicial deference); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) (analyzing *Youngstown's* implications); Brett M. Kavanaugh, *Congress and the President in Wartime*, LAWFARE (Nov. 29, 2017, 3:00 PM), <https://bit.ly/2XzFMlv> [<https://perma.cc/3P8D-6RV3>]. Under Jackson's formulation, the president gets maximum deference for actions that Congress has authorized, some deference for action when Congress is silent, and the lowest level of deference for actions that are counter to statutory commands. Since the Communications Act barred wiretapping, as the Supreme Court found in *Nardone II*, the first category did not fit. Jackson himself suggested in his memoir of Roosevelt that this disposed of the entire question. See JACKSON, *supra* note 69, at 68–69 (noting that as Attorney General Jackson "had not liked" Roosevelt's approach but had gone along because Roosevelt had "limited the cases" where wiretapping would be used). Roosevelt's memorandum might fit into Jackson's second category of congressional silence, since the Communications Act concerned ordinary commerce and Congress had not addressed wartime wiretapping. But see Katyal & Caplan, *supra* note 31, at 1067 (arguing that since Roosevelt's memorandum was secret, Congress could not acquiesce). The fit between Roosevelt's memorandum and Jackson's third category—the president's Article II power—may turn on the memorandum's scope. If wiretapping were strictly limited to instances where evidence indicated a foreign connection, Roosevelt's memorandum could fit within the president's power as commander-in-chief or his power over foreign affairs. See *United States v. Hung*, 629 F.2d 908 (4th Cir. 1980). However, this argument would not support wiretapping where the foreign connection was tenuous or nonexistent. Some of the wiretaps under Roosevelt's memorandum fit under the foreign connection rubric, but some did not.



of wiretapping from May 1940 to the close of the war suggests that internal institutional controls were a meaningful check. There is no question that wiretapping occurred during this period that pushed Roosevelt's national security test to the limit, and probably beyond.<sup>81</sup> Indeed, we may never know the full extent of wiretapping during this period, because of Hoover's penchant for secrecy and the destruction of many records—on Hoover's prior instructions—by Hoover's secretary after his death.<sup>82</sup> For a majority of commentators, this adds up to a view that wiretapping was “extensively implemented” during this period.<sup>83</sup> But a more nuanced view based on the evidence suggests that wiretapping was more contained than the critics claim and that the civil libertarian Francis Biddle, whom Roosevelt appointed at Jackson's urging, was a more effective guardian than was Jackson.

Hoover's gift for regulatory capture was on full display in dealing with Jackson, who might have felt “once bitten, twice shy” after the shock of Hoover's May 1940 overture to Secretary Morgenthau and President Roosevelt. In his memoir, Jackson contended that he kept watch on the FBI and that while he did not review every request for a wiretap, FBI Director Hoover was “careful to remain within [the] bounds” set by Roosevelt's order.<sup>84</sup> But the reality was more ambiguous. Biddle recounted that Jackson felt Roosevelt's order opened the door to wiretapping “anyone *suspected of subversive activities*.”<sup>85</sup> According to Biddle, in such cases Jackson took a hands-off stance with Hoover.<sup>86</sup>

Jackson's reticence provided him with plausible deniability, but it also created a gulf between the information that Jackson had about Hoover's wiretapping and the knowledge that Hoover himself possessed. That information gap is a hallmark of regulatory capture. On the other hand, perhaps because Hoover did not want to force a confrontation with Jackson or test President Roosevelt's tolerance, documented wiretaps were relatively rare and typically had at least a putative national security purpose.<sup>87</sup> In addition, there

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81. At the urging of the White House, Hoover did compile files on some ordinary Americans who happened to oppose U.S. involvement in World War II. See STONE, *supra* note 26, at 248; S. REP. NO. 94-755 (1976).

82. See Theoharis, *supra* note 17, at 103.

83. See Katyal & Caplan, *supra* note 31, at 1058.

84. JACKSON, *supra* note 69, at 69.

85. See BIDDLE, *supra* note 10, at 167.

86. *Id.* at 167 (noting that Jackson “turned [wiretapping approvals] over to Edgar Hoover without himself passing on each case”); Edwardson, *supra* note 33, at 368; Theoharis, *supra* note 17, at 105.

87. See Theoharis, *supra* note 17, at 107 (reporting that available records show that presidents Roosevelt and Truman, taken together, requested a total of four FBI wiretaps on political opponents).

is evidence that Jackson and Hoover worked together effectively to stop an even greater threat to civil liberties: War Department proposals to monitor supposed labor subversion through wiretaps, break-ins, and an array of intrusive means.<sup>88</sup>

While Jackson was reticent, the institutional approach during this period picked up additional support from James Lawrence Fly, the Chair of the Federal Communications Commission (FCC).<sup>89</sup> The FCC had primary responsibility for enforcing the Communications Act, which the Supreme Court had read in *Nardone II* to bar wiretapping.<sup>90</sup> Fly rejected requests by Hoover to tap calls to or from Germany, Italy, occupied France, or other sensitive locations in Europe.<sup>91</sup> In addition, Fly's congressional testimony was a compelling counterweight to legislative proposals supported by Jackson to authorize wiretapping.<sup>92</sup> Although Roosevelt was apparently displeased by the dissonance between Fly and Jackson's themes,<sup>93</sup> Fly faced no retaliation, perhaps because he headed an independent regulatory commission.

Jackson's successor, Biddle, sought to reinforce the institutional constraints in President Roosevelt's May 1940 order.<sup>94</sup> Biddle, who later served as chair of the National Committee of the American Civil Liberties Union, declared

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In 1940, the FBI started an investigation of private detective Henry Grunewald, after charges surfaced that Grunewald was a German spy. *Id.* The investigation turned up no supporting evidence. *Id.* During Biddle's tenure as Attorney General, the FBI obtained oral permission to execute wiretaps on an Army Reserve officer, John G. O'Brien, and a prominent Washington socialite, Lilian Moorehead, who were friends of Provost Marshal General Allen W. Guillon. Guillon was allegedly plotting to overthrow the U.S. government and replace it with military rule. This wiretap also netted no actionable information. *Id.* at 107–09. Perhaps the most striking instance of wiretapping involved Inga Arvad, a columnist for a Washington newspaper, who allegedly once served as a publicity aide for Hitler and regularly contacted government officials as part of her work as a journalist. *Id.* at 109. While under surveillance, Arvad began an intense affair with then-U.S. Navy Ensign John F. Kennedy, the future president and son of Joseph P. Kennedy, the former U.S. ambassador to Great Britain and an intragovernmental opponent of U.S. aid to the Allies. *Id.* at 109–12. Hoover and Biddle, who approved the wiretap, may have been concerned that if Arvad was a German spy, she would try to blackmail the Kennedys and learn government secrets that Joseph Kennedy had been privy to as U.S. ambassador. *Id.* at 109–10. This wiretap also netted no actionable national security information, although Hoover retained the Arvad file, which provided greater leverage for Hoover once John F. Kennedy became president some twenty years later. *Id.* at 111. Perhaps a court such as the FISC would have denied requests for electronic surveillance in each of these cases. But a court may also have granted one or more of the requests, which were not fanciful or manifestly unrelated to national security, even though none produced actionable data.

88. See JACKSON, *supra* note 69, at 72.

89. Edwardson, *supra* note 33, at 365.

90. *Nardone II*, 308 U.S. 338, 340 (1939).

91. Edwardson, *supra* note 33, at 363.

92. *Id.* at 367.

93. *Id.* at 368.

94. BIDDLE, *supra* note 10, at 166.

wiretapping a “dirty business,”<sup>95</sup> and expressly recognized that it “violates privacy.”<sup>96</sup> According to Biddle’s 1962 memoir, a wiretap should require court approval.<sup>97</sup> Moreover, Biddle recognized that Hoover had an “obsession” with alleged Communists.<sup>98</sup> To guard against undue expansion beyond institutional constraints, Biddle insisted that he would only approve wiretaps in cases of espionage and sabotage.<sup>99</sup> Biddle generally issued written approvals of written requests from the FBI.<sup>100</sup> That documentation encouraged careful deliberation about both making requests and granting them. Looking back on his tenure at the Justice Department, Biddle summed up that he was “not in the habit of approving wiretaps,”<sup>101</sup> and that most approved taps concerned German and Russian agents.<sup>102</sup> Furthermore, Biddle noted, testifying to the collaborative relationship he had with FBI Director Hoover, he “occasionally turned down a request from Mr. Hoover.”<sup>103</sup> At other times, Biddle sought “more information” prior to making a decision.<sup>104</sup>

Despite his engagement on wiretapping, Biddle was not immune from the information gaps and cultivation of personal relationships that drove Hoover’s particular brand of regulatory capture. In his memoir, Biddle described with amusement, not opprobrium, Hoover’s habit of recounting “intimate details” about Biddle’s colleagues in the Cabinet.<sup>105</sup>

Hoover also ingratiated himself with Biddle through helping the Attorney General’s family. When Biddle’s wife, Katherine, took a cross-country trip to see the couple’s ailing son, Hoover apparently assigned agents to monitor the trip and pick up Katherine Biddle when she returned during a snowstorm.<sup>106</sup> Perhaps Hoover was just being kind, but his help underlined the Director’s ability to track the movements of officials and their families. Looking back on his dealings with Hoover, Biddle warned about the “future use of this great

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95. *Id.* at 168.

96. *Id.*

97. *Id.*

98. *Id.* at 261.

99. *Id.* at 167.

100. *Id.*

101. *Id.* at 166.

102. 1962 Hearings, *supra* note 29, at 290.

103. *Id.*; *see also* BIDDLE, *supra* note 10, at 167 (recalling “turning [Hoover’s requests] down when I thought they were not warranted”).

104. BIDDLE, *supra* note 10, at 167.

105. *Id.* at 258.

106. *Id.* at 259 (commenting that Biddle cherished Hoover’s help as something he “[could not] forget”).

[FBI] machine of detection with its ten million personal files” and its sacrosanct reputation.<sup>107</sup>

iii. Wiretapping and the Ordeal of Harry Bridges

The Jackson/Biddle era at the Attorney General’s office also involved surveillance of organized labor.<sup>108</sup> Consider one of the period’s best known immigration cases: the government’s unsuccessful attempt to deport the resourceful California labor leader Harry Bridges.<sup>109</sup> Here, regulatory capture shared the lead role with an *interbranch* factor: congressional fears of Communism.

Harry Bridges, who had emigrated from Australia, was a thorn in the side of ship owners because of his outspoken progressive views and his success at mobilizing dock workers.<sup>110</sup> Initially, Hoover expressed no interest in the labor leader, stating in 1938 that he had “nothing” on Bridges.<sup>111</sup> Congress in the late 1930s agitated for Bridges’ deportation.<sup>112</sup> To be deportable under the law at that time, the subject had to be a member of the Communist Party at the actual time of arrest on immigration charges.<sup>113</sup> After an administrative decision that Bridges was not at the time of his arrest a member of the Communist Party, and hence not deportable, Congress in 1940 changed the law, making even past Communist Party membership a ground for deportation.<sup>114</sup> According to Biddle, Robert Jackson, who was then Attorney General, was unhappy about Congress’s blatant effort to target Bridges.<sup>115</sup> Despite his unhappiness, Jackson expressly ordered the FBI to resume its investigation.<sup>116</sup>

Hoover, who apparently did not wish to seem less concerned than Congress about Communist influence in the labor movement, accommodated Jackson’s

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107. *Id.* at 261.

108. *Id.* at 304–05.

109. *See id.* at 296–307.

110. *Id.* at 298–99.

111. *See* C.P. Larowe, *Did the Old Left Get Due Process? The Case of Harry Bridges*, 60 CAL. L. REV. 39, 45 n.36 (1972).

112. BIDDLE, *supra* note 10, at 296–97.

113. *Id.* at 296.

114. *Id.* at 297.

115. *Id.*; STANLEY I. KUTLER, *THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR* 135 (1982).

116. KUTLER, *supra* note 115, at 135; DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 134 (2003). The record does not make it clear why Jackson felt obliged to continue the government’s efforts to deport Bridges. Jackson apparently felt that the case had become so visible that failing to pursue it would seem like a surrender. *Cf.* BIDDLE, *supra* note 10, at 297–98 (discussing a conversation between Jackson and Biddle after Jackson assumed his position as a Justice of the Supreme Court).

request with fresh surveillance.<sup>117</sup> Then the astute labor leader turned the tables. In a celebrated episode that received congressional attention, Bridges and his followers watched the watchers, taking photographs of ham-handed FBI attempts to conduct surveillance.<sup>118</sup> Ultimately, the Supreme Court rejected the second effort to deport Bridges, holding that the new law required proof of active membership in the Communist Party and that the government failed to meet that standard.<sup>119</sup> While the majority opinion by famed civil libertarian Justice William O. Douglas did not expressly address the government's surveillance of Bridges, Justice Frank Murphy's concurrence excoriated the government's clumsy attempts.<sup>120</sup> The Court's decision served as a reminder that surveillance can target champions of oppressed groups.<sup>121</sup>

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117. KUTLER, *supra* note 115, at 135; Edwardson, *supra* note 33, at 374.

118. BIDDLE, *supra* note 10, at 166; Edwardson, *supra* note 33, at 374; 1962 Hearings, *supra* note 29, at 290 (testimony of Francis Biddle).

119. *Bridges v. Wixon*, 326 U.S. 135, 154–57 (1945).

120. *Id.* at 157 (Murphy, J., concurring) (recounting with indignation that “[w]ire-tapping, searches and seizures without warrants and other forms of invasions of the right of privacy have been widely employed in this deportation drive”).

121. The period after World War II saw increased regulatory capture. Under President Truman's Attorney General, Tom Clark, who subsequently became a Justice of the Supreme Court, Roosevelt's memorandum was expanded to include a broader range of offenses, such as kidnapping, even though the exigency of a “hot” war was no longer present. See Katyal & Caplan, *supra* note 31, at 1061–62; Theoharis, *supra* note 17, at 112–21 (discussing increased wiretapping during Truman administration, including a wiretap on prominent Washington lawyer and former New Deal official, Thomas Corcoran). Citing *Nardone II*, the courts stepped in to vacate an espionage conviction in the case of Judith Coplon, in which the government had obtained information through wiretapping. See *Coplon v. United States*, 191 F.2d 749, 749 (D.C. Cir. 1951); *United States v. Coplon*, 185 F.2d 629, 629 (2d Cir. 1950). The *Coplon* case itself, however, did not represent an increase in wiretapping's scope since evidence showed that the defendant—a government employee in a sensitive position—had manifestly been conspiring with Soviet intelligence agents to share information and indeed had been arrested while in possession of classified documents in the course of a meeting with a Soviet operative. *Coplon*, 185 F.2d at 632; see also STONE, *supra* note 26, at 329 (discussing case). However, peripheral aspects of the case suggested that Hoover was shaking free of restraints that might have curbed his appetite for intrusions during the Jackson/Biddle era. For example, evidence at Coplon's trial included allegations that the renowned Broadway actress, Helen Hayes, had left-leaning sympathies—evidence that most likely came from a wiretap or an informant. See Edwardson, *supra* note 33, at 371–72. In addition, once the courts vacated Coplon's convictions, Hoover apparently used either a wiretap or an informant when a progressive organization, the National Lawyers' Guild, which advocated for further restrictions on federal wiretapping, sought a meeting with President Truman on the subject, and warned that it would expose FBI violations of the Communications Act in *Coplon* and other cases. See 1975 Church Comm. Report, *supra* note 42, at 469, 474.

*B. Robert Kennedy, J. Edgar Hoover, and Martin Luther King, Jr.:  
Regulatory Capture During the Civil Rights Revolution*

If the FBI's conduct during the Harry Bridges case was troubling, Hoover's approach to surveillance from the 1950s to his death in 1972 was far more intrusive.<sup>122</sup> In the most notorious example of Hoover's excesses, the FBI wiretapped and eavesdropped on the great civil rights leader, Dr. Martin Luther King, Jr.<sup>123</sup> Yet Hoover did not act alone. In a decisive display of regulatory capture in action, Hoover exploited his informational advantages and personal relationships to secure authorization for the wiretap from Attorney General Robert F. Kennedy.<sup>124</sup> The institutional framework of surveillance exhibited cracks during the war years; by the early 1960s, the structure largely collapsed.

The triumph of regulatory capture in the early 1960s is even more impressive because, at first blush, Attorney General Kennedy seemed like the perfect person to push back on Hoover's plans. Kennedy was young, informal, and action-oriented. He enjoyed outsized influence in the administration because he was the brother and closest advisor of President John F. Kennedy.<sup>125</sup> The new attorney general made an effort to bring Hoover to heel and clashed with him frequently, leading Hoover to feel that Kennedy intended to fire him.<sup>126</sup> However, Kennedy also viewed wiretapping as an appropriate tool of law enforcement and shared the view of attorneys general since Jackson that Congress should expressly authorize the practice.<sup>127</sup>

Kennedy took this position in 1962 congressional testimony.<sup>128</sup> Supporting a bill that would have authorized wiretapping and permitted it without a court order in cases of espionage, sabotage, treason, sedition, and subversive activities, Kennedy spoke of wiretapping's importance for law enforcement and

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122. While Hoover continued his intrusive regime, with Justice Department support, until his death, he refused to go along with a 1970 plan assembled by presidential aide Tom Charles Huston and endorsed by President Richard Nixon that would have drastically and without legal authorization expanded surveillance at home and abroad. Hoover's opposition prevented the plan's adoption. See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 259–60 (1973).

123. See THOMAS, *supra* note 34, at 262–63; Frederick A.O. Schwarz, Jr., *An Awakening: How the Civil Rights Movement Helped Shape My Life*, 59 N.Y. L. SCH. L. REV. 59, 66–68 (2015) (telling, as part of memoir by former chief counsel of the U.S. Senate Church Committee that in the 1970s investigated intelligence agency abuses, of FBI surveillance on King and attempts to intimidate and discredit him).

124. See THOMAS, *supra* note 34, at 262–63.

125. *Id.* at 262.

126. *Id.* at 117.

127. See 1962 Hearings, *supra* note 29, at 11.

128. *Id.*

national security.<sup>129</sup> Moreover, Kennedy acknowledged that attorneys general since Roosevelt's 1940 memorandum approved wiretapping in "national security cases."<sup>130</sup> However, Kennedy did not inform the Senate Judiciary Committee that Hoover's wiretapping had grown substantially since the Jackson/Biddle era.<sup>131</sup> In this sense, the regulatory capture that came to dominate intrabranched decisions also influenced interbranch relationships.

Perhaps sensing that the lack of adequate safeguards in the bill could lead to intrusive surveillance, legislators did not back the bill in sufficient numbers to achieve its passage.<sup>132</sup> Former attorney general Biddle may have contributed to this result through his own 1962 testimony. While Biddle spoke persuasively about the need for wiretapping, especially in organized crime cases, he urged Congress to require judicial approval for all wiretap requests.<sup>133</sup> By 1962, Biddle believed that intrabranched deliberation needed an assist from the courts.

Despite Kennedy's lack of complete candor with the Senate Judiciary Committee, there was reason to think that Kennedy would balk at approving a wiretap for Dr. King. Many contemporary observers felt that Kennedy was sincere in trying to advance the cause of civil rights through federal legislation and enforcement, despite the FBI's decades-long quiescence in this area and Kennedy's own wariness about protesters' practice of nonviolent confrontation.<sup>134</sup> Moreover, Kennedy was effective in prodding the FBI to do more on the enforcement front, although the FBI's longtime absence from the field left a great deal of work to do. However, Kennedy ended up agreeing to wiretaps on the civil rights movement that Hoover had proposed, despite the marked shortfall in evidence supporting Hoover's requests.<sup>135</sup>

As a consummate bureaucrat, one of Hoover's great strengths was persistence. Others might see writing a cascade of memoranda to the attorney general as a waste of time. For Hoover, it was one way to control the flow of

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129. *Id.*

130. *Id.*

131. *See generally id.* at 11–46.

132. *See* 1962 Hearings, *supra* note 29, at 292–93. The committee never held a vote. Craig M. Bradley, *Anti-Racketeering Legislation in America*, 54 AM. J. COMP. L. 671, 683 n.105 (2006). *But see id.* at 682–83 (describing alternate theory that legislation died in committee as result of President Kennedy's assassination coupled with Attorney General Kennedy's loss of political power and loss of enthusiasm for pro-wiretapping legislation).

133. 1962 Hearings, *supra* note 29, at 293.

134. *See* ARTHUR M. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 355 (1978); THOMAS, *supra* note 34, at 128–32. *But see* VICTOR NAVASKY, KENNEDY JUSTICE 243–44 (1971) (describing Kennedy administration's tendency to appoint judges holding white supremacist views to slots in the South).

135. THOMAS, *supra* note 34, at 262–63, 168–70; SCHLESINGER, *supra* note 134, at 355.

information and shape personal relationships. As a case study, consider Hoover's determined campaign to obtain Kennedy's approval of a wiretap on one of Dr. King's closest advisors, Stanley Levison.<sup>136</sup>

Hoover deluged Kennedy with urgent memoranda asserting that Levison, a wealthy New York lawyer, was actually a secret envoy of international Communism.<sup>137</sup> Hoover cited Levison's work with King to establish a Gandhi Society, named after the great Indian advocate of peaceful protest.<sup>138</sup> Levison hoped to launch the new group with a dignitaries' luncheon, featuring President Kennedy, Robert Kennedy, and former attorney general William P. Rogers.<sup>139</sup> Hoover spun this anodyne plan into a dastardly leftist conspiracy.<sup>140</sup>

Exploiting his influence in Congress, Hoover apparently fed this information to segregationist senator James Eastland of Mississippi, who chaired the Internal Security Subcommittee of the Senate Judiciary Committee.<sup>141</sup> Members of the Subcommittee asked Levison if he was a "spy for the Communist apparatus."<sup>142</sup> Levison contested legislators' power to grill him about his political opinions; he also invoked his Fifth Amendment rights to head off questions about Dr. King.<sup>143</sup> Levison's invocation of the Fifth Amendment was the capstone in Hoover's conspiracy theory. If Levison had taken the Fifth, he surely had something to hide; surveillance was the best way to discover whatever Levison sought to conceal.

Hoover also stoutly guarded his own information from Kennedy, who wanted some evidence of Levison's current Communist affiliation. Kennedy directed his deputy at the time, future Supreme Court Justice and former football hero, Byron "Whizzer" White, to ask to see Levison's FBI file.<sup>144</sup> Hoover declined, declaring that the file was too sensitive for review by the Deputy Attorney General of the United States.<sup>145</sup> Hoover's brusque rejection of this entreaty from the Justice Department's most senior officials illustrates the success of his regulatory capture strategy.

Hoover wielded information of a personal nature like a sword to keep Kennedy off-balance. With remarkable prescience and for over twenty years,

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136. THOMAS, *supra* note 34, at 169–70.

137. *Id.* at 170.

138. SCHLESINGER, *supra* note 134, at 353 (noting that Hoover misspelled the name of the new group as the "'Ghandi' Society").

139. *Id.*; THOMAS, *supra* note 34, at 170.

140. SCHLESINGER, *supra* note 134, at 353–54.

141. *Id.* at 354.

142. *Id.*

143. *Id.*

144. *See* THOMAS, *supra* note 34, at 170.

145. *Id.*



Hoover accumulated information on the affairs of Robert Kennedy's brother, John.<sup>146</sup> Disclosure of this information would have damaged President Kennedy's reputation and political standing. Hoover's implicit threat transformed Attorney General Kennedy's fabled toughness into timidity.

But Kennedy's approval of Hoover's wiretap requests was not only a product of Hoover's personal relationships with legislators or his hoarding of damaging data about the Kennedy family. In addition, both Kennedy and his Assistant Attorney General for civil rights, Burke Marshall, who later became a Yale law professor, believed that Hoover and his army of informants had "undisputed . . . expertise" on Communism in the United States.<sup>147</sup> Deferring to that expertise, Kennedy approved the wiretap.<sup>148</sup> It netted nothing of any interest whatsoever. However, in a case study of confirmation bias, Hoover turned the wiretap's sparse results against the target, asserting that it merely showed the depths of Levison's clandestine activities—even a wiretap could not reveal Levison's serpentine moves.<sup>149</sup> Hoover's success in purveying this contorted logic showed the FBI director's proficiency at undermining institutional constraints.

### C. FISA and the "Wall" Wars

Congress passed FISA in 1978 to firm up gatekeeping on foreign intelligence surveillance, blunting the risk of regulatory capture that spawned past abuses.<sup>150</sup> FISA added an additional interbranch player: the Foreign Intelligence Surveillance Court (FISC).<sup>151</sup> FISA also added a legal standard: to

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146. *Id.* at 167–70; Theoharis, *supra* note 17, at 111.

147. SCHLESINGER, *supra* note 134, at 381.

148. THOMAS, *supra* note 34, at 262.

149. SCHLESINGER, *supra* note 134, at 357–58.

150. 50 U.S.C. §§ 1801–1885(c) (2020); Lacovara, *supra* note 34. Prior to FISA's passage, President Ford's attorney general, Edward Levi, strove to reclaim the institutional ideal after its decades of decline. Levi directed the Justice Department to draft a legislative proposal that required a court order for electronic surveillance. S. REP. NO. 94-755, at 135 (1976). Griffin Bell, who served as attorney general under Ford's successor, Jimmy Carter, instituted more rigorous procedures, substantially cut back on wiretaps, and strongly supported FISA's enactment into law. *See Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intelligence*, 95<sup>th</sup> Cong. 6–10 (1978) [hereinafter 1978 Foreign Surveillance Hearings] (testimony of Attorney General Griffin B. Bell).

151. Academics, many of whom also have experience with proceedings under FISA, have on occasion been critical of the results on the ground, joined by a distinguished former public official who was present at FISA's creation. *See* LAURA K. DONOHUE, *THE FUTURE OF FOREIGN INTELLIGENCE: PRIVACY AND SURVEILLANCE IN A DIGITAL AGE* 69–72 (2016) (describing FISC and expressing

obtain an order from the FISC authorizing surveillance, the government had to show probable cause that a target was an agent of a foreign power.<sup>152</sup> Moreover, FISA resulted in a vastly changed organizational form. Because of the need to submit requests to the FISC, both the FBI and the Justice Department created teams of agents and lawyers to meet the legal needs that FISA had spawned.<sup>153</sup> However, proliferating players and bureaucratic units do not necessarily ensure the accountability that the institutional model contemplates. Instead, the added complexity of the framework merely multiplies the chances for regulatory capture. Events in the year 2000 described in this subsection confirmed that regulatory capture was alive and well in the complex FISA regime.

#### i. The FISA Flow Chart

Among its many roles, the FISC has the capacity to promote an appropriate institutional framework between the FBI and Justice Department lawyers.<sup>154</sup> Appearing before the FISC, Justice Department lawyers had to ensure that their requests met statutory criteria. When that did not happen, the FISC intervened

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skepticism about its ability to check the executive branch's penchant for surveillance); Aziz Z. Huq, *How the Fourth Amendment and the Separation of Powers Rise (and Fall) Together*, 83 U. CHI. L. REV. 139, 161–63 (2016) (stating the same); see also Margo Schlanger, *Intelligence Legalism and the National Security Agency's Civil Liberties Gap*, 6 HARV. NAT'L SEC. J. 112, 113 (2015) (suggesting that executive branch lawyers in surveillance agencies do not proactively address civil liberties issues in proposed policies). Additional debate has centered on whether the FISC, which hears matters ex parte with only the government present, violates the adversarial norm that infuses most, if not all, proceedings in Article III courts. Walter F. Mondale, Robert A. Stein & Caitlinrose Fisher, *No Longer a Neutral Magistrate: The Foreign Intelligence Surveillance Court in the Wake of the War on Terror*, 100 MINN. L. REV. 2251, 2297–301 (2016) (asserting that the FISC violates Article III); see also Orin S. Kerr, *A Rule of Lenity for National Security Surveillance Law*, 100 VA. L. REV. 1513, 1539–40 (2014) (suggesting that the FISC does not operate like a regular court, and is neither fish nor fowl, not fit to either assess policy or exercise judicial power); Peter Margulies, *Searching for Federal Judicial Power: Article III and the Foreign Intelligence Surveillance Court*, 85 GEO. WASH. L. REV. 800, 822–28 (2017) (arguing that FISC's role under § 702 is consistent with Article III); Stephen I. Vladeck, *The FISA Court and Article III*, 72 WASH. & LEE L. REV. 1161, 1170–80 (2015) (conceding that the FISC's role raises Article III issues, but contending that appropriate safeguards such as public advocate to argue against government position can alleviate constitutional concerns); Carrie Cordero, *Thoughts on the Proposals to Make FISA More Friendly*, LAWFARE (Aug. 12, 2013), <https://www.lawfareblog.com/thoughts-proposals-make-fisa-more-friendly> [<https://perma.cc/965M-C6Y8>] (arguing, based on experience as Justice Department lawyer and lawyer at the Office of the Director of National Intelligence, that the FISA process already has several layers of internal executive legal review and that adding layers or other participants in process may impede timely decision-making).

152. 50 U.S.C. § 1804(a)(3) (2020); *United States v. Duggan*, 743 F.2d 59, 59 (2d Cir. 1984).

153. See *infra* notes 154–72 and accompanying text.

154. See Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. 575, 627–28 (2010) (analyzing regulatory vision of FISC's role).

to require procedures that enhanced safeguards and intrabranch consultation.<sup>155</sup> To better understand the FISC's role, it is useful to describe the interactive process between the FBI and Justice Department lawyers that goes into a "traditional FISA" application.

The legal and practical demands of those proceedings entail a division of roles between the FBI and the Justice Department. The FBI handles initial investigation, assembling facts that indicate that a potential target is a foreign power or an agent of a foreign power.<sup>156</sup> Often agents, working with FBI lawyers, will draft a factual narrative, including affidavits or declarations.<sup>157</sup> Justice Department lawyers depend on agents to do investigative work and initial drafting.<sup>158</sup> Investigation is the FBI's principal task.<sup>159</sup> The FBI, which includes a contingent of experienced and capable staff lawyers, handles initial drafting because the Justice Department's National Security Division (NSD), which through NSD's Office of Intelligence (OI) is responsible for filing approximately 2,000 FISA requests with the FISC each year, must also screen proposed FISA requests by the FBI.<sup>160</sup> NSD lacks the personnel and resources for initial drafting of applications. Indeed, in theory, the NSD's distance from the initial drafting process gives it a salutary distance from the assumptions of FBI personnel. That distance is a central aspect of the post-FISA institutional surveillance framework.<sup>161</sup>

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155. *Id.* at 628–29.

156. This language spurred substantial controversy prior to FISA's enactment, since it allows surveillance based on conduct that may not be criminal. FISA's broader test prompted an unusual public dispute between senior members of the administration of President Jimmy Carter. Vice President Walter Mondale, who as a U.S. senator had been an active member of committees investigating past surveillance abuses, strongly favored limiting FISA requests to a criminal standard. *See* 1978 Foreign Surveillance Hearings, *supra* note 150, at 35; 2019 OIG FISA REVIEW, *supra* note 4, at 33–34; *see also* Lacovara, *supra* note 34, at 123–24 (outlining rationale for standard predicated on agency with respect to a foreign power). Attorney General Griffin Bell, a former federal judge, favored the "agent of a foreign power" standard that ultimately made its way into law. Courts have upheld the constitutionality of the broader FISA standard, reasoning that the foreign intelligence purpose of the statute justifies broader coverage. *United States v. Duggan*, 743 F.2d 59, 72–74 (2d Cir. 1984) (citing the exigency of addressing foreign threats, the difficulty of getting information about matters abroad through other channels, and the need to protect government sources and methods of intelligence collection); *In re Sealed Case*, 310 F.3d 717, 738–40 (FISA Ct. Rev. 2002) (stating the same).

157. *See* Lacovara, *supra* note 34, at 116–17.

158. *Id.*

159. *See* Rascoff, *supra* note 154, at 599–601.

160. 2019 OIG FISA REVIEW, *supra* note 4, at 39–42.

161. For a useful discussion of the importance of distance in interactions between agents and prosecutors in ordinary criminal cases, see Daniel Richman, *Prosecutors and Their Agents, Agents and*

The FISC, which consists of eleven federal district court judges selected by the Chief Justice of the Supreme Court for staggered seven year terms, first sees a proposed application—known as a “read copy”—which a FISC judge reviews on a preliminary basis with a staff attorney for the court, called a “legal advisor.”<sup>162</sup> The FISC judge or legal advisor may pose questions to the OI lawyer, who revises the application accordingly.<sup>163</sup> Contrary to some descriptions, the FISC is not a “rubber stamp”—questions at this level of review arise frequently.<sup>164</sup> Reflecting that careful approach, OI modifies requests in at least 20% of all applications.<sup>165</sup> Once the revisions are complete, the OI

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*Their Prosecutors*, 103 COLUM. L. REV. 749, 787 (2003). A complete FISA request for the FISC must be approved by a senior Justice Department official—typically, the Assistant Attorney General heading NSD, and in that person’s absence, the Deputy Attorney General or Attorney General herself. The request must also include certifications, usually executed by the Director or Deputy Director of the FBI, including a statement that “normal investigative techniques” will not yield the information that the request seeks. See 2019 OIG FISA REVIEW, *supra* note 4, at 36–37.

162. 2019 OIG FISA REVIEW, *supra* note 4, at 37–38.

163. *Id.*

164. ADMIN. OFF. OF THE U.S. CT., DIR. REP. ON FOREIGN INTEL. SURVEILLANCE CT ACTIVITIES (2019), [https://www.uscourts.gov/sites/default/files/fisc\\_annual\\_report\\_2019\\_0.pdf](https://www.uscourts.gov/sites/default/files/fisc_annual_report_2019_0.pdf) [<https://perma.cc/37KY-4LHY>].

165. *Id.* (noting that FISC modified 198 “traditional FISA” requests, denied thirty-two in part, and flatly denied 13, while granting 506); see also Letter from Judge Reggie B. Walton to Sen. Patrick J. Leahy (July 29, 2013) (informing Congress that upon submission of proposed application, FISC legal advisors will “often have one or more telephone conversations with the [OI] . . . to seek additional information or raise concerns about the application”) (citation omitted); Alan Rozenshtein, *Surveillance Intermediaries*, 70 STAN. L. REV. 99, 155 (2018) (explaining that “the repeat nature of the interactions [between NSD and the FISC] make generating trust and credibility important, and if the [government] . . . tries to pull a fast one in one instance, it knows to expect punishment from a skeptical court the next time it seeks authorization” for surveillance); Conor Clarke, *Is the Foreign Intelligence Surveillance Court Really a Rubber Stamp?*, 66 STAN. L. REV. ONLINE 125, 129 (2014), <https://www.stanfordlawreview.org/online/is-the-foreign-intelligence-surveillance-court-really-a-rubber-stamp/> [<https://perma.cc/86AG-95RQ>] (agreeing that repeat players in tribunals have an incentive to ensure that their applications have merit prior to submission); Emily Berman, *The Two Faces of the Foreign Intelligence Surveillance Court*, 91 IND. L.J. 1191, 1229–30 (2016) (discussing FISC procedure). But see ELIZABETH GOITEIN & FAIZA PATEL, WHAT WENT WRONG WITH THE FISA COURT? 4 (2015) (arguing that FISC review is insufficiently rigorous). Once an application goes through this process and is finalized, it is approved in a substantial majority of cases. See Berman, *supra* note 165, at 1206; Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J. L. & PUB. POL’Y 757, 834 (2014) (critiquing process). In cases involving novel legal issues, the FISC has the power to appoint an amicus curiae—an experienced national security lawyer who will advocate for a position contrary to the government’s stance. The USA Freedom Act of 2015 provided for establishment of a panel of amici. The FISC has tended to appoint amici in matters under more recent statutory authorization, such as § 702 of the FISA Amendments Act of 2008, which this Article discusses in the next Part. Typically, the “traditional FISA” matters described in this subsection of the Article, which arise out of the legislation enacted in 1978, turn on factual, not legal, issues. Hence, the FISC has not appointed amici in these cases.

attorney submits the request to the FISC, which may schedule a hearing or decide the matter based on written submissions.<sup>166</sup>

Under the FISA model, the FBI case agent—the agent who “works” the investigation—has responsibility for several key factual inquiries that minimize overbroad collection of information on U.S. citizens, lawful residents, or others physically present in the United States.<sup>167</sup> The FBI must assess the credibility of human or documentary sources of information.<sup>168</sup> If a source has an agenda of her own—which is often the case—the FBI should at least disclose information outlining that agenda, even if the FBI believes that the source’s information is nonetheless credible.<sup>169</sup> Second, the FBI must ferret out any possible neutral explanations for otherwise suspicious activity by a prospective target of FISA surveillance.<sup>170</sup> For example, as occurred in the Carter Page FISA request discussed in detail in the next Part, a prospective target may have served as a source or contact for the FBI itself or another U.S. intelligence organization such as the Central Intelligence Agency (CIA).<sup>171</sup> Third, the FBI must ascertain if the prospective target is currently a target of or is otherwise involved in a *criminal* investigation.<sup>172</sup>

Criminal involvement will not necessarily preclude a FISA application.<sup>173</sup> However, because FISA is not an end-run around the wider array of Fourth Amendment and statutory protections for criminal suspects, that information is always relevant to a FISA request.<sup>174</sup> As detailed below, the precise legal and factual relationship between a criminal investigation and a FISA request engendered pushback from the FISC that culminated in decisions in 2002 by the full FISC and the Foreign Intelligence Surveillance Court of Review (FISCR), the court that serves as the FISC’s appellate tribunal.<sup>175</sup>

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166. 2019 OIG FISA REVIEW, *supra* note 4, at 42.

167. *See id.* at 43–44. Although the inquiries detailed here have always been sound practices under FISA, they became formalized in 2002 as a result of the dispute between the FISC and the Justice Department discussed below.

168. *Id.* at 44.

169. *See id.* at 45.

170. *See id.* at 157.

171. *See id.*

172. *Id.* at 42.

173. *Id.* at 19–20.

174. *See id.* at 17.

175. *See All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 620 (FISA Ct. 2002), *rev’d, In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).

## ii. Tearing Down the Wall

While a proposed target's current involvement in a criminal investigation is relevant under FISA, the legal standard for assessing that relevance shifted in the USA PATRIOT Act, which Congress passed shortly after the 9/11 attacks.<sup>176</sup> Before the Patriot Act, courts had required that the *primary purpose* of a FISA request be the production of foreign intelligence information, *not* criminal prosecution of the target.<sup>177</sup> This test separated the expanded power to conduct surveillance under FISA, which does not require probable cause to believe the surveillance will unearth evidence of a crime, from ordinary federal criminal law, which requires such a showing.<sup>178</sup> For pre-9/11 courts, allowing FISA requests without a "primary objective" showing would circumvent safeguards against unreasonable searches and seizures under the Fourth Amendment.<sup>179</sup> To address this concern, the DOJ in the 1990s issued restrictions that established a "wall" screening off FISA investigators in the FBI from those doing ordinary law enforcement.<sup>180</sup> The DOJ lawyers who

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176. Fernando A. Bohorquez, Jr., *Challenges to Challenging the Patriot Act Limits on Judicial Review and A Proposal for Reform*, 77 N.Y. ST. B.A. J. 24, 24 (2005).

177. See *In re Sealed Case*, 310 F.3d at 725–27 (providing history of primary-purpose test while holding that FISA did not require this showing); *United States v. Hung*, 629 F.2d 908, 915–16 (4th Cir. 1980) (articulating basis for primary-purpose test in case arising out of pre-FISA conduct, in which the executive branch asserted that the collection of foreign intelligence stemmed from the President's Article II power and was not subject to ordinary Fourth Amendment protections).

178. *Hung*, 629 F.2d at 915.

179. *United States v. Duggan*, 743 F.2d 59, 77–78 (2d Cir. 1984). In practice, a showing under "traditional FISA" of probable cause to believe that a target is an agent of a foreign power will often also demonstrate a violation of federal laws requiring that a foreign agent register with the government. See *United States v. Rosen*, 447 F. Supp. 2d 538, 548–49 (E.D. Va. 2006). The real risk of abuse posed by FISA concerns the secrecy of the process. Since surveillance under FISA often does not result in a criminal prosecution, the target will often never know that she has been subject to surveillance and will have no chance to assess whether the surveillance was lawful. Indeed, even when FISA surveillance has played a role in a criminal prosecution, the statute makes it very difficult for a defendant to challenge or even learn of the basis for the FISA order. See *United States v. Daoud*, 755 F.3d 479, 485–91 (7th Cir. 2014) (Rovner, J., concurring) (describing statutory obstacles—rooted in desire to protect government sources and methods—to defendant learning of grounds for government's FISA request).

180. See Richard Henry Seamon & William Dylan Gardner, *The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement*, 28 HARV. J. L. & PUB. POL'Y 319, 367–76 (2005). Some have argued that the "wall" between foreign intelligence and law enforcement decreased the U.S. government's ability to detect and prevent the 9/11 attacks. *Id.* Addressing that issue is beyond the scope of this Article. However, examining the role of the "wall" does underline that the formulation of reasonable surveillance safeguards must reflect national security, as well as privacy and free speech. On the "wall" and its impact, see Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 HARV. J. L. & PUB. POL'Y 117 (2015); Deborah Samuel Sills, *Strengthen Section 702: A Critical Intelligence Tool Vital to the Protection of Our Country*, 7 AM. UNIV. NAT'L SEC. L. BRIEF 1, 67–68 (2017).

submitted FISA requests to the FISC were responsible for the wall's maintenance.<sup>181</sup>

After September 11, Congress as part of the USA PATRIOT Act took down the wall, requiring that the acquisition of foreign intelligence information merely be a "significant purpose" of FISA surveillance.<sup>182</sup> In subsequent decisions, both the FISC<sup>183</sup> and the Foreign Intelligence Surveillance Court of Review (FISCR)—the latter in its first reported decision—addressed this legislation, which the FISCR ultimately upheld as consistent with the Fourth Amendment.<sup>184</sup> However, before the FISCR reached this decision, the FISC weighed in on the FBI's failure in 2000 to preserve the then operative "wall," as well as the FBI's material omissions on other issues relevant to FISA requests.<sup>185</sup> While the "wall" is gone, the portions of the FISC opinion requiring procedures to ensure the accuracy of FISA requests are consistent with the post-9/11 statutory changes and, hence, are still relevant.

iii. The FISC Enters the Fray

In its 2002 decision, which reflected dissatisfaction that had been brewing at the FISC for several years, the FISC noted that the government in September 2000 had admitted that it had either misstated or omitted facts in seventy-five FISA requests related to major terrorist attacks against the United States.<sup>186</sup> Those flaws included an erroneous statement in an FBI Director's FISA certification that the proposed target was *not* under criminal investigation, inaccurate statements in FISA affidavits of FBI agents on separation of overlapping criminal and counterintelligence investigations, and omissions of material facts from FBI FISA affidavits on the prior relationship between the FBI and a target and the interview of a target by an assistant U.S. attorney.<sup>187</sup>

Compared to the 1960s wiretap on Dr. King, and even the Jackson/Biddle era, the FISA wall wars feature a more subtle link between regulatory capture and the flaws described above. FISA's bureaucratic compartments may often keep OI lawyers and FBI agents at arm's length. But "immersion" in an investigation can still exert a pull that distorts judgment.<sup>188</sup> For repeat players

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181. See Sills, *supra* note 180, at 86.

182. 50 U.S.C. § 1804(a)(6)(B).

183. See All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 620 (FISA Ct. 2002).

184. *In re Sealed Case*, 310 F.3d 717, 732–46 (FISA Ct. Rev. 2002).

185. *Id.* at 743.

186. *All Matters Submitted Case*, 218 F. Supp. 2d at 620.

187. *Id.*

188. Cf. Richman, *supra* note 161, at 804 (describing federal criminal prosecutions).

among lawyers and agents, “close-knit relationships” may also skew assessments.<sup>189</sup> Moreover, investigating agents have a built-in informational advantage regarding relevant facts. Agents have uncovered those facts through interviews, observation, and inspection of documents. Justice Department lawyers have no independent knowledge of the facts; they depend on what agents see fit to share. If agents drafting FISA requests do not share facts, Justice Department lawyers are in dire straits, not knowing what they are missing.<sup>190</sup> Justice Department lawyers who want to continue being “in the know” may be reluctant to call out an agent whose draft seems incomplete, for fear that this move will alienate the agent and ultimately give the lawyer less access to information.<sup>191</sup> This may be an unfounded fear, but the lawyer’s dependence on the agent for facts feeds that misapprehension. This sets the stage for regulatory capture, albeit capture more mundane than J. Edgar Hoover’s machinations.

To address some of these concerns, the FISC incorporated into its opinion safeguards that have come to be known as the Woods Procedures, named for the far-sighted FBI lawyer who drafted them.<sup>192</sup> The Woods Procedures—sometimes known as accuracy procedures—required that FBI agents compile an “accuracy file” at the time of their drafting of a FISA application.<sup>193</sup> That file includes all documentation supporting the agent’s finding of probable cause to believe that the target was an agent of a foreign power.<sup>194</sup>

By compiling and consulting the accuracy file, FBI agents can “show their work”—the research and investigative materials that were the basis for the FISA request. The accuracy file must include documentation of the three key issues addressed above: (1) “specific factual information” relevant to the probable cause finding; (2) criminal investigations involving the target; and

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189. *Id.*

190. As discussed later in this Article, artificial intelligence can help in this regard by flagging recurrent gaps.

191. See Richman, *supra* note 161, at 802–03 (discussing analogy between prosecutors and in-house corporate counsel, who may make a kind of Faustian bargain in which access to power and information prevails over lawyerly judgment).

192. See 2019 OIG FISA REVIEW, *supra* note 4, at 42; Memorandum from Michael J. Woods, Unit Chief, FBI Office of the General Counsel, National Security Law Unit, to FBI Field Offices (Apr. 5, 2001) [hereinafter Accuracy Procedures], [https://www.americanbar.org/content/dam/aba/administrative/law\\_national\\_security/woods-procedures-memo-2001.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_national_security/woods-procedures-memo-2001.pdf) [https://perma.cc/DUG7-QAL5]; see also David Kris, *Further Thoughts on the Crossfire Hurricane Report*, LAWFARE (Dec. 23, 2019, 4:19 PM), <https://www.lawfareblog.com/further-thoughts-crossfire-hurricane-report> [https://perma.cc/S2WQ-Q2DS] (providing background on the Woods Procedures).

193. Kris, *supra* note 192.

194. Accuracy Procedures, *supra* note 192, at 2.



(3) any “ongoing asset relationship” between the target and the FBI.<sup>195</sup> In addition, when a FISA request includes information from an FBI confidential informant—a confidential human source (CHS)—the accuracy file must include a memorandum or other specific documentation that a person responsible for the CHS, such as a handling agent, CHS coordinator, or appropriate supervisor of either officials, has reviewed the description in the FISA request of the CHS’s reliability and background and attests to the accuracy of the facts recounted in the request.<sup>196</sup>

The incorporation of the accuracy procedures was a watershed moment in surveillance’s institutional framework. Those procedures memorialized the commitment of the FBI and the Justice Department to a deliberative, methodical process. Through that process, the government can gain foreign intelligence information without sacrificing U.S. persons’ privacy, undermining equality, or inhibiting free speech.

As detailed in the next part’s discussion of the Carter Page FISA request, the accuracy procedures are necessary but may now be insufficient. Experience has revealed their deficits as well as their advantages. To get a firm idea of both, however, one must first follow the procedures in every case. Both failures in following the accuracy procedures and gaps in the procedures themselves played a role in the Carter Page FISA request.

## V. THE CARTER PAGE FISA REQUEST AND RECENT REGULATORY CAPTURE

The study of the institutional model and regulatory capture is not merely of academic interest; it relates to contemporary issues.<sup>197</sup> This part addresses problems in the FISA request for former 2016 Trump campaign aide Carter Page. The next part explores the FBI’s excessive queries of U.S. person information under § 702 of the FAA.

Regulatory capture contributed to the omissions in the 2016 FISA request regarding Page, a former Trump foreign policy campaign aide. The elaborate FISA process discussed in the last section did not detect the flaws in the Page

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195. 2019 OIG FISA REVIEW, *supra* note 4, at 42, 43 (citing to a 2016 FBI FISA guide and joint FBI-Justice Department guidance document from 2009 that updated the accuracy procedures originally outlined by Woods).

196. *Id.* at 43–44.

197. In an important piece, Professor Samuel Rascoff argued that a better institutional approach would be to center control and oversight of surveillance in the Office of the President. See Samuel J. Rascoff, *Presidential Intelligence*, 129 HARV. L. REV. 633, 637, 646, 648–50 (2016). *But see* Carrie Cordero, *A Response to Professor Samuel Rascoff’s Presidential Intelligence*, 129 HARV. L. REV. F. 104, 107–09 (2016) (arguing that an array of government bodies, including Director of National Intelligence, PCLOB, and FISC, should oversee intelligence collection).

FISA request.<sup>198</sup> Indeed, the dispersion of accountability due to FISA's levels of review masked those mistakes. Senior Justice Department officials deferred unduly to FBI personnel's supposedly superior information.<sup>199</sup> For their part, senior FBI officials leveraged personal interactions with Justice Department lawyers to marginalize skepticism about the merits of the request.<sup>200</sup>

Unfortunately, although the 2019 Inspector General's report did an excellent job in addressing the flaws in the Carter Page FISA request, subsequent intrabranch dialogue about the FISA process prompts concern that the Justice Department, in particular, has failed to internalize the lessons to be learned. The episode suggests that the current rules cannot adequately guard against the abuses of the past, such as the undue intrusion of national security surveillance into the political process. Its aftermath also prompts concerns that current rules do not adequately protect marginalized groups, such as Muslim-Americans.<sup>201</sup> This subsection first offers general background on the Russia probe and then FBI Director, James Comey and then turns to the Carter Page FISA request and its aftermath.

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198. See 2019 OIG FISA REVIEW, *supra* note 4, at 123–57.

199. *Id.* at 155 (quoting Sally Yates, who approved the request as Deputy Attorney General, as saying regarding foreign intelligence surveillance that FBI personnel “are experts in this” and believed it was “important”).

200. *Id.* at 140 (reporting that FBI Deputy Director responded to questions from NSD lawyer Stuart Evans—whose concerns tempered but did not eliminate the request's omissions—by stating, “we can't pull any punches and we've got to do [the request]”). FBI General Counsel James Baker, who had earlier served with distinction in the Justice Department, including a stint as head of OI's predecessor, the Office of Intelligence Policy and Review, sought to be proactive in reviewing the request, which he rightly believed would be fraught because of its relation to a presidential campaign. *Id.* at 134–35. Baker has written with great vision and insight about the role of artificial intelligence (AI) in counterintelligence policy and practice. See Jim Baker, *Artificial Intelligence—A Counterintelligence Perspective: Part I*, LAWFARE (Aug. 15, 2018, 1:31 PM), <https://www.lawfareblog.com/artificial-intelligence-counterintelligence-perspective-part-1> [<https://perma.cc/ER2B-5XEH>]. However, in the Page matter, Baker limited himself to a legal analysis of facts as stated in the draft application and did not ask if the facts presented were incomplete. See 2019 OIG FISA REVIEW, *supra* note 4, at 134–35. Baker trusted in the FISA flow chart's division of roles, in which FBI agents investigate and diligently report facts. This Article argues that the FISA flow chart cannot substitute for the institutional model's constant commitment to questioning assumptions. Senior officials have to be able to meet that challenge, although—as human beings who can only aspire to perfection—even the best lawyers, such as Baker, will sometimes fall short. Revising the FISA flow chart to bridge that gap is one of this Article's goals.

201. See *infra* notes 248–261 and accompanying text.

A. *The Crossfire Hurricane Investigation and FBI Director James Comey's Institutionalism*

Before exploring the Carter Page request's flaws in depth,<sup>202</sup> clarity is useful on two points: the overall predication for the Russia probe and the institutionalist perspective of then FBI Director James Comey. Ample evidence indicates that Russia interfered in the 2016 presidential election with the goal of helping then-candidate Donald Trump.<sup>203</sup> In addition, the report issued by Special Counsel Robert Mueller described numerous links between persons close to the Russian government and persons with ties to the Trump campaign.<sup>204</sup> The openness of Russian interference and the volume of Trump campaign-Russia contacts suggests that the campaign was at the very least the knowing beneficiary of Russian designs. In addition, in May 2016, Trump advisor George Papadopoulos informed officials from a country close to the United States that the Russians had offered to aid the Trump campaign by disclosing embarrassing information about the presumptive Democratic

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202. Before Justice Department Inspector General Michael Horowitz's report on the request, many commentators lacked the facts to reach the same negative conclusions. See Peter Margulies, *Legal Dilemmas Facing White House Counsel in the Trump Administration: The Costs of Public Disclosure of FISA Requests*, 87 *FORDHAM L. REV.* 1913 (2019) (rejecting criticism of the request). My own previous work was unduly hasty and superficial in finding no problems with the Page FISA request. See *id.* at 1922–24 (taking a one-sided view of Page's Russia ties and an excessively credulous view of the sourcing for the surveillance request). I have also analyzed the FBI and Justice Department failure in the Carter Page matter in a paper posted by the U.S. Privacy and Civil Liberties Oversight Board. See Peter Margulies, *FISA and the FBI: Fixing Material Omissions, Overbroad Queries, and Antiquated Technology* (forthcoming) (manuscript at 8–9), <https://documents.pclob.gov/prod/Documents/Projects/3d486bef-2611-4314-ac0b-f45489ad1b72/Fixing%20FISA-Margulies.09.21a.pdf> [<https://perma.cc/F962-Z4XE>].

203. See Michael N. Schmitt, "Virtual" *Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law*, 19 *CHI. J. INT'L L.* 30, 32 (2018).

204. See SPECIAL COUNSEL ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 ELECTION, Vol. 1, at 9 (2019). For valid counterintelligence reasons connected with the Russia probe, the FBI in January 2017 interviewed Michael Flynn, President Trump's National Security Adviser, about Flynn's transition-period contacts with Russian ambassador Kisylak. Flynn's responses in that interview led to Flynn's prosecution on charges of making false statements to federal investigators and to Flynn's guilty plea. Prosecutors working for Special Counsel Robert Mueller accepted Flynn's guilty plea as part of Mueller's Russia probe. After Mueller's office completed its work, the Justice Department, under Attorney General William Barr, moved to dismiss the charges against Flynn under Rule 48(a) of the Federal Rules of Criminal Procedure. See Mary B. McCord, *The Truth About the Flynn Case*, *N.Y. TIMES*, May 13, 2020, at A27; cf. *In re Flynn*, 973 F.3d 74 (D.C. Cir. 2020) (en banc) (denying petition for mandamus by defendant, supported by government, to compel district judge to grant government's motion to dismiss false statement charges against Flynn and the effect of denial of mandamus was to allow district judge to decide government's motion to dismiss, subject to appeal).

nominee, Hillary Clinton.<sup>205</sup> While Special Counsel Mueller did not find sufficient evidence of criminal behavior by Trump campaign figures to support prosecutions, that finding does not vitiate the initial predication for the FBI's Crossfire Hurricane investigation.<sup>206</sup>

Just as flaws in the Carter Page request should not obscure the Russia probe's predication, they should not vanquish then-FBI Director James Comey's standing as a longtime devotee of gatekeeping.<sup>207</sup> As Director, Comey was nothing like Hoover. Indeed, Comey has recounted that he kept on his desk, under glass, a copy of Hoover's memorandum requesting the King wiretap with Attorney General Robert Kennedy's signed approval.<sup>208</sup> According to Comey's insightful warning, viewing the memorandum daily from the same seat at which Comey read FISA applications reinforced the "value of oversight and constraint."<sup>209</sup>

Moreover, in his service with the Justice Department, Comey went well beyond lip service to this ideal. He lived it, for example when he, Robert Mueller, and Jack Goldsmith—as Deputy Attorney General, FBI Director, and Assistant Attorney General, respectively—during the George W. Bush administration, helped the ailing Attorney General John Ashcroft face down a request to continue the unlawful Terrorist Surveillance Program.<sup>210</sup> Indeed, that same institutionalist focus accounts for Comey's most well-known and controversial course of conduct during his tenure as FBI Director: his public discussion of the legality of Hillary Clinton's use of a personal email account for official business while she was Secretary of State.<sup>211</sup> There, Comey felt

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205. 2019 OIG FISA REVIEW, *supra* note 4, at 346.

206. *See id.* at 348–52. Indeed, based on an August 2020 report by the U.S. Senate Select Committee on Intelligence (SSCI), the extensive contacts that Trump campaign manager Paul Manafort had with a Russian intelligence officer would alone have justified the probe. *See* S. SELECT COMM. ON INTELLIGENCE, 116TH CONG., RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE U.S. ELECTION 56–70 (Aug. 2020) [hereinafter SSCI RUSSIA REPORT]; *cf.* Rebecca Roiphe, *A Typology of Justice Department Lawyers' Roles and Responsibilities*, 98 N.C. L. REV. 1077, 1126–27 (2020) (criticizing Attorney General William Barr for appearing to ally himself too closely to President Trump on a prosecutorial decision, thus undermining his own independence, by publicly disagreeing with OIG Review's conclusion that the Russia probe had adequate predication and for authorizing a separate investigation by U.S. Attorney for the District of Connecticut, John Durham, into the start of the Russia probe).

207. *See* James B. Comey, *Intelligence Under the Law*, 10 GREEN BAG 2d 439, 443–44 (2007) (discussing lasting cost to institutions caused by officials' short-sighted decisions based on fear).

208. *See* COMEY, *supra* note 18, at 137.

209. *Id.*

210. *Id.* at 80–92; GOLDSMITH, THE TERROR PRESIDENCY, *supra* note 52, at 177–82; Katyal & Caplan, *supra* note 31, at 1066.

211. COMEY, *supra* note 18, at 169–70.

pressured to “align with . . . Clinton campaign strategy.”<sup>212</sup> Comey’s institutionalism pushed back on that perceived pressure, leading to the public statements Comey made in the summer of 2016 and then, fatefully, just before Election Day.<sup>213</sup> Comey may have misread his interactions with then-Attorney General Loretta Lynch on the Clinton investigation.<sup>214</sup> But he did so out of sincere institutionalist conviction.<sup>215</sup>

Nevertheless, the approach of both Comey and other senior FBI and Justice Department officials to the Carter Page FISA request matched Comey’s cautionary tale of Hoover and Kennedy’s role in the wiretap on Dr. King. According to Comey, Hoover and Kennedy “thought they were doing the right thing . . . [w]hat they lacked was meaningful testing of their assumptions.”<sup>216</sup> That assessment also fits senior leadership’s posture on the Page FISA request.

### *B. Crossfire Hurricane and Perfect Storms: The Ill-Fated Carter Page FISA Application*

The perfect storm of the Page FISA application developed from three powerful vectors. First, FBI agents violated the accuracy procedures developed during the “‘wall’ wars” and omitted material exculpatory information,

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212. *Id.*

213. Miles Parks, Dana Farrington & Jessica Taylor, *The James Comey Saga, In Timeline Form*, WBUR NEWS (May 15, 2017), <https://www.wbur.org/npr/527773206/what-just-happened-the-james-comey-saga-in-timeline-form> [<https://perma.cc/8CJQ-PFJM>].

214. COMEY, *supra* note 18, at 169–70.

215. Both Comey and his deputy, Andrew McCabe, also acted summarily in arranging, over the objections of senior Justice Department officials, to interview President Donald J. Trump’s National Security Advisor, former Lieutenant General Michael Flynn, in January 2017—days after Trump had taken office—about Flynn’s contacts during the transition period with Russian ambassador Sergey Kislyak. In an episode that was already public knowledge, Flynn had previously lied about those contacts to Vice President Mike Pence. Justice Department officials, including Acting Attorney General Sally Yates and Acting Assistant Attorney General Mary McCord—both holdovers from the Obama administration—had argued that the FBI should first inform the Trump White House, in order to allow the White House to minimize any counterintelligence risk posed by the Russians’ knowledge that Flynn had lied to Vice President Pence. On Comey and McCabe’s instructions, FBI agents interviewed Flynn without either, (1) informing Yates or McCord or, (2) as Yates and McCord had recommended, informing the White House that Flynn had previously lied about his contacts with the Russian ambassador. *See* McCord, *supra* note 204; *see also* Senate Committee on the Judiciary “Oversight of the Crossfire Hurricane Investigation: Day 2,” (Aug. 5, 2020) (transcribing testimony of former Acting Attorney General Sally Q. Yates that she had not been informed in advance about Flynn’s FBI interview and that Comey had not personally informed her about Flynn’s contacts with the Russian ambassador prior to an earlier meeting with then President Obama and Vice President Biden about those contacts).

216. COMEY, *supra* note 18, at 137.

including Page's record as a contact for a U.S. intelligence agency.<sup>217</sup> Second, both agents and senior leadership failed, in Comey's words, to engage in "meaningful testing of their assumptions" that the reports by former British spy Christopher Steele about Page's contact with certain Russian intelligence officials were accurate.<sup>218</sup> Third, having failed to test their own assumptions, senior leadership, including Deputy Director Andrew McCabe, adopted the familiar strategy of regulatory capture with senior Justice Department officials, underlining the FBI's superior information and intense need for the filing of the FISA request.<sup>219</sup>

The FBI case agent on the FISA request had access to evidence of Page's prior work with another U.S. government intelligence agency—apparently the CIA—yet omitted this information from the draft FISA application.<sup>220</sup> That omission was clearly material, meaning it could have made a difference in NSD's willingness to file the request or the FISC's decision to grant it. Evidence of Page's recent work with the CIA on Russia cast the claims in the draft request in an entirely different light under FISA's "agent of a foreign power" standard.<sup>221</sup> If Page had previously disclosed his contacts with Russia to the CIA, that would undermine the claim that Page was a Russian agent. A faithful agent should not disclose contacts with her principal to a third party. Page's disclosures tended to show that he was not a Russian agent, after all.<sup>222</sup> Similarly, Page's unequivocal denials to an FBI confidential human source (CHS) of contacts with the Russian oligarchs mentioned in Christopher Steele's reporting suggested that Steele's spy story about Page was just that—a work of fiction.<sup>223</sup> At the very least, more senior FBI and Justice Department officials should have had access to this information, and should have included it in the FISA application if they decided to go forward with the request.<sup>224</sup>

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217. For a valuable analysis of OIG's findings, see Bernard Horowitz, *FISA, the "Wall," and Crossfire Hurricane: A Contextualized Legal History*, 7 NAT'L SEC. L.J. 1 (2019).

218. COMEY, *supra* note 18, at 137.

219. Horowitz, *supra* note 217, at 7–8.

220. See 2019 OIG FISA REVIEW, *supra* note 4, at 157–58; see also SSCIRUSSIA REPORT, *supra* note 206, at 530 (describing Page's contacts with U.S. intelligence community agencies).

221. See *United States v. Duggan*, 743 F.2d 59, 69 (2d Cir. 1984).

222. See 2019 OIG FISA REVIEW, *supra* note 4, at 157–58.

223. See *id.* at 145–47.

224. The August 2020 Senate Intelligence Committee report cast Page as a marginal participant in the Trump 2016 campaign whom Trump claimed to be one of five foreign policy advisors during a March 2016 meeting with the *Washington Post* editorial board. SSCIRUSSIA REPORT, *supra* note 206, at 534–36. The evidence suggests that Trump mentioned Page to assuage public perceptions of the campaign's "lack of expertise" on foreign policy. *Id.* at 534; see also Karen DeYoung, *GOP Foreign Policy Elites Don't Know Whether They'll Serve If Trump Is President*, WASH. POST (Apr. 15, 2016),

In addition, senior FBI officials sought to contain the concerns raised by NSD lawyer Stuart Evans about main source Christopher Steele's ties to then-candidate Trump's political opponents.<sup>225</sup> The FBI case agent was evasive before conceding the anti-Trump agenda of Steele's funder.<sup>226</sup> At Evans's insistence, echoed by then NSD Principal Deputy Assistant Attorney General Mary McCord, this information ended up in the FISA request.<sup>227</sup> Peter Strzok, the FBI official leading the Russia probe, could have viewed the information about Steele's political backers as a chance to revisit the entire rationale for the Page application. However, that would have involved rethinking his own assumptions. As Comey's memoir acknowledged, it is "painful to stare openly at ourselves."<sup>228</sup> It is far easier to fit evidence into our preconceived categories.

Instead of doing the difficult but necessary work that Comey described, Strzok blamed the messenger, worrying that Evans would share his misgivings with the FISC or the court's legal advisor and thus scuttle the application.<sup>229</sup> Strzok would have served the institutional model far more effectively by taking Evans's doubts to heart, particularly given the sensitivity of a FISA request for a former participant in a presidential campaign. Director Comey should have taken his own advice about the difficult but necessary chore of challenging assumptions, but instead both he and Deputy Director McCabe downplayed

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[https://www.washingtonpost.com/world/national-security/gop-foreign-policy-elite-doesnt-know-whether-theyll-serve-if-trump-is-president/2016/04/15/5cd1e87c-0016-11e6-b823-707c79ce3504\\_story.html](https://www.washingtonpost.com/world/national-security/gop-foreign-policy-elite-doesnt-know-whether-theyll-serve-if-trump-is-president/2016/04/15/5cd1e87c-0016-11e6-b823-707c79ce3504_story.html) [https://perma.cc/8ACB-JMBZ] (reporting that the Trump campaign had seemingly devoted little time and effort to assembling a foreign policy team, compared with other Republican and Democratic candidates for their respective party's presidential nomination). Page never met or spoke with Trump and appeared to have had few substantive interactions with anyone on the campaign. SSCI RUSSIA REPORT, *supra* note 206, at 536. Standing alone, the circumstances surrounding Trump's mention of Page should have occasioned doubts about Page's role. It seems incongruous to delegate responsibility for highly sensitive coordination with Russian intelligence to an individual whom no one on the campaign had known before March 2016 and whose mention by the candidate seemed like an ad hoc response to a public perception problem. The Senate Intelligence Committee Report asserts in a brief footnote that the FBI's "initial" interest in Page was justified. SSCI RUSSIA REPORT, *supra* note 206, at 555 n.3663. Perhaps the report's authors meant to suggest that the FISC would have made the right decision in granting the FISA request even if it knew of the information that the request omitted. However, the Senate Intelligence Report does not say this explicitly. More importantly, its recap of Page's marginal role in the Trump campaign and its stated inability to corroborate Christopher Steele's expansive claims about Page underscore the problems with the FISA request.

225. SSCI RUSSIA REPORT, *supra* note 206, at 886–87.

226. 2019 OIG FISA REVIEW, *supra* note 4, at 136.

227. *Id.* at 137.

228. COMEY, *supra* note 18, at 137.

229. 2019 OIG FISA REVIEW, *supra* note 4, at 137.

Evans's concerns about whether the FISA request was worth the candle and remained "supportive" of the application.<sup>230</sup>

At this juncture, senior officials resorted to the regulatory capture toolkit that Comey in his musings on Hoover had resolved to avoid. Cajoling Evans on the need for the request, McCabe invoked the historic relationship between the FBI and the Justice Department, noting that the Bureau "felt strongly" about the subject and declaring, "[W]e've got to do it."<sup>231</sup> Deputy Attorney General Sally Yates deferred to the FBI's informational advantages, later explaining that the FBI has "people who do this [investigation] all day, every day."<sup>232</sup> Comey, McCabe, and Yates's certitude would have been more convincing if they had tested their assumptions by obtaining and evaluating the exculpatory information that the FBI case agent possessed.<sup>233</sup> But instead they persuaded themselves that the FISA flow chart had erased the risk of regulatory capture.<sup>234</sup> In the process, they showed that a mere flow chart is not an adequate substitute for an institutional culture of accountability that extends from "line" personnel to senior leaders.

*C. Not on the Same Page: Bureaucratic Cross-Talk as a Substitute for Meaningful Remedies*

The intrabranch dialogue since the issuance of the December 2019 OIG Report on the Page FISA request has not been auspicious. Things started well: having reviewed the OIG report before it became public, the FBI under Comey's successor as Director, Christopher Wray, agreed to most of the changes that OIG recommended to firm up the FBI's accuracy procedures.<sup>235</sup> The FISC appointed an amicus curiae, national security law expert and former NSD head, David Kris, who made additional recommendations involving a

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230. *Id.* at 139.

231. *Id.* at 140.

232. *Id.* at 155.

233. In August 2020, an FBI lawyer pleaded guilty to falsifying an email from the CIA about Page's ties to the agency, although the lawyer's actions occurred after the initial FISA application. See Kristine Phillips & Kevin Johnson, *Ex-FBI Lawyer Clinesmith Pleads Guilty to Falsifying Email in Russia Probe in Durham's First Case*, USA TODAY (Aug. 19, 2020, 5:10 PM) <https://www.usatoday.com/story/news/politics/2020/08/19/ex-fbi-lawyer-kevin-clinesmith-court-1st-durham-case-russia/3393941001/> [<https://perma.cc/VAV9-8646>].

234. See 2019 OIG FISA REVIEW, *supra* note 4, at 155–56.

235. See OIG, Management Advisory Memorandum for the Director of the Federal Bureau of Investigation Regarding the Execution of Woods Procedures for Applications Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons 1–2 (Mar. 30 2020) [hereinafter OIG Memorandum]; U.S. Dep't of Just., Nat'l Security Div., Supplemental Response to the Court's Order Dated April 3, 2020 and Motion for Extension of Time, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. 19-02, 8 (June 2020) [hereinafter NSD June Response].



shift of responsibility to FBI field offices, greater use of automation, and a sustained effort to reform FBI culture.<sup>236</sup>

Kris's constructive suggestions contrasted with the counterproductive bureaucratic cross-talk between OIG and NSD. OIG's post-review update was overbroad in its criticism of NSD; NSD's response was unduly defensive. More detail on the back and forth between OIG and NSD demonstrates the challenges of intrabranch dialogue on surveillance. Detail also shows another consequence of today's regulatory capture that mimics the abuses of earlier eras: excessive focus on marginalized groups, which today means Muslim-Americans.<sup>237</sup>

#### i. The Cloudy Future of Accuracy Procedures

In March 2020, OIG issued a Management Advisory Memorandum that declared in stark terms that OIG had "[did] not have confidence" in the FBI's implementation of its accuracy procedures.<sup>238</sup> OIG noted that in a sample of twenty-nine FISA requests, four had no accuracy file at all—that is, no file

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236. See Letter from David S. Kris, Esq., to Judge James E. Boasberg, FISA Ct., *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, No. 19-02 (Jan. 15, 2020), <https://assets.documentcloud.org/documents/6656762/FISC-Misc-19-02-Amicus-Curiae-Letter-Brief.pdf> [<https://perma.cc/6D6Q-U97S>].

237. See Maryam Jamshidi, *Bringing Abolition to National Security*, JUST SECURITY (Aug. 27, 2020), <https://www.justsecurity.org/72160/bringing-abolition-to-national-security/> [<https://perma.cc/UA59-PA4Y>] (arguing for considering abolition of both substantive counterterrorism laws and surveillance regimes that in practice result in disproportionate targeting of Muslim-Americans, Arabs, and South Asians); Sahar F. Aziz, *Policing Terrorist in the Community*, 5 HARV. NAT'L SEC. J. 137, 195 (2014) (criticizing preventive approach to counterterrorism as needlessly instilling fear in Muslim-American community without producing meaningful results); Sinnar, *supra* note 13, at 1338 (criticizing these regimes); see also Emmanuel Mauleón, *Black Twice: Policing Black Muslim Identities*, 65 UCLA L. REV. 1326, 1349–63 (2018) (discussing disproportionate national security targeting of Somali-Americans); FAIZA PATEL & MEGAN KOUSHIK, COUNTERING VIOLENT EXTREMISM 17 (2017) (concluding that countering violent extremism (CVE) programs are intrusive and ineffective); cf. Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. LEGIS. 1, 20 (2005) (discussing enforcement rationale that Justice Department adopted after 9/11 attacks). In *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010), the Supreme Court upheld a statute prohibiting material support of foreign terrorist organizations designated as such by the Secretary of State, ruling that the statute was not void for vagueness and did not violate the First Amendment. For a qualified defense of the material support statute, see Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 HASTINGS L.J. 455, 462 (2012). See also Maryam Jamshidi, *How the War on Terror Is Transforming Private U.S. Law*, 96 WASH. U. L. REV. 559, 564–65 (2018) (arguing that certain private law litigation against banks and states such as Iran on behalf of families of victims of terrorist attacks has unduly broadened traditional tort concepts of causation and scienter). But see *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 690–700 (7th Cir. 2008) (explaining, in opinion by Judge Richard Posner, that expansion of causation and scienter is consistent with congressional intent and necessary to deter financing of terrorist groups).

238. OIG Memorandum, *supra* note 235, at 8.

prepared by the FBI case agent containing documentation of claims in the FISA request.<sup>239</sup> According to OIG, the remaining twenty-five requests in the sample had inadequate documentation.<sup>240</sup> OIG's focus on the accuracy procedures was apt, since the procedures required in the wake of the FISC "'wall' wars" help inculcate habits of diligent reporting up through the FISA flow chart—the very habits that broke down in the Carter Page request. However, OIG then went further, purporting to identify an eye-catching 390 issues in its sample of FISA requests, including unverified, inaccurate, and unsupported facts, plus typographical errors.<sup>241</sup> This is where the OIG report overstepped, since this number was both overstated and misleading.

NSD's response focused on OIG's inflated estimate of issues, but dodged OIG's point about accuracy procedures.<sup>242</sup> In its first response, NSD noted that most of the "issues" identified by OIG concerned non-material errors, and that about half of those were typographical errors—"typos," in common parlance.<sup>243</sup> This suggests that OIG severely overstated the accuracy issues in its sample.

However, NSD's highlighting of this OIG exaggeration masked NSD's failure to acknowledge that the accuracy procedures are integral to the cultural shift that amicus David Kris had sought. NSD did not dispute that accuracy files were missing or incomplete in *virtually every case in the sample*. Instead, it discounted that problem, stating that such gaps meant little as long as FBI agents could construct the file when pressed by NSD lawyers after the FISA request's approval.<sup>244</sup> NSD failed to acknowledge that the principal purpose of the accuracy file is ensuring *prior* to the FISA request's filing that the application's claims have support. The culture of comprehensive documentation is crucial to the health of the FISA process. Sadly, that culture evaporated in the Carter Page case. NSD's refusal to confront this issue does not bode well for future compliance.

In addition, NSD's description of the two material errors in the twenty-nine-case sample suggests the presence of significant problems in the FISA process, albeit not the pervasive problems claimed in OIG's March 2020 memorandum. The first material error concerned a description of an interview. The description

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239. *Id.* at 7.

240. *Id.*

241. *Id.* at 5.

242. See NSD June Response, *supra* note 235, at 8.

243. *Id.* at 4. The FISC and presumably amicus curiae David Kris will be able to judge if NSD's claims on materiality are accurate, although the public cannot see for itself, since virtually all the specific discussion in NSD's June filing is redacted.

244. *Id.* at 6–7. However, NSD did note that in the future it intended to focus "in part" on compliance with accuracy procedures. *Id.* at 7.

omitted what appeared to be relevant exculpatory information.<sup>245</sup> In other words, this was exactly the kind of error that caused problems in the Carter Page case.<sup>246</sup> Although NSD discounted the impact of this omission, citing other material in the FISA request,<sup>247</sup> that is also the rationale that FBI officials relied on regarding the Page FISA application.

ii. Accuracy About Marginalized Groups: The Case of Muslim-Americans

The second material error is equally troubling, because it amplifies the trope that national security surveillance targets Muslim-Americans.<sup>248</sup> In this case, the FISA request characterized the target as favoring a “particular terrorist group”—presumably named in the original request—while the supporting documents showed only that the target was “sympathetic to radical Muslim causes.”<sup>249</sup> Here, too, NSD assured the FISC that other evidence in the request would have led to its approval, despite the mistake.<sup>250</sup> But the error here is disturbing on a range of levels. First, as in NSD’s discussion of the first error, this “harmless error” argument puts a lot of weight on the other evidence in the request, just as officials did in rationalizing the Page FISA omissions. Second, the error here plays into concerns that the FISA process—and indeed much of current U.S. national security law—is skewed against Muslims.<sup>251</sup>

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245. *Id.* at 9.

246. See 2019 OIG FISA REVIEW, *supra* note 4, at 157 (detailing the omission of information in the submitted FISA application concerning Page’s dealings with an FBI agent, despite the case agent’s awareness of the fact).

247. NSD June Response, *supra* note 235, at 9. In assessing the validity of a search warrant in criminal cases, a court will find that an omission is material if it undermines a crucial argument for probable cause, and in making that decision will carefully assess whether other information in the warrant request supports the application. See *United States v. Clark*, 935 F.3d 558, 564–66 (7th Cir. 2019); see also *Franks v. Delaware*, 438 U.S. 154, 171–72 (1978) (holding that a criminal defendant need not hold a hearing on the validity of a search warrant, despite certain information in the warrant request stemming from law enforcement officer-affiant’s “deliberate falsehood or of reckless disregard for the truth” if sufficient other information supports the warrant request).

248. See *Aziz*, *supra* note 237; see also Jamshidi, *National Security Abolition*, *supra* note 237. Despite meriting criticism here for the substance of its arguments, the Justice Department deserves credit for discussing these material errors in a way that protected national security sources and methods while allowing the public to understand the nature of the problems described.

249. See U.S. Dep’t of Justice, Nat’l Security Div., Supplemental Response to the Court’s Order Dated April 3, 2020, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. 19-02, at 4 (July 2020) [hereinafter NSD July Response].

250. *Id.*

251. See Sinnar, *supra* note 13, at 1335–38; see also Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 127 YALE L.J. 1520, 1540 (2017) (discussing inequality in sentencing in cases involving material support of terrorism); *cf.* Aziz Huq,

Since the aftermath of the September 11 attacks, Muslims in the United States have been convenient targets of counterterrorism law and policy. A reset after September 11 was necessary, and tearing down the “wall” between foreign intelligence and criminal prosecution was part of that response.<sup>252</sup> But undue focus on Muslims in the United States has not comported with fairness or enhanced counterterrorism policy.

Immediately after September 11, senior officials ordered the detention of well over a thousand immigrants from the Middle East and South Asia who had no connection to the attacks and, in virtually all cases, not even a remote connection to terrorism.<sup>253</sup> The detainees, who often endured assaults and other abuses while in detention, ultimately sought relief in federal court.<sup>254</sup> However, the Supreme Court denied relief in two decisions, based on threshold findings that even initiating or conducting litigation would unduly impede the executive branch.<sup>255</sup> More recently, President Donald Trump banned immigrants from several majority-Muslim countries from entering the United States, although those banned qualified for visas as close relatives of U.S. citizens or lawful permanent residents.<sup>256</sup> Here, too, the Supreme Court exercised deference, avoiding a searching look at President Trump’s motivation for this untailored measure or its conflict with the nondiscrimination mandate of the Immigration

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*Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16, 19–23 (2012) (suggesting that the Supreme Court’s recent application of free speech principles has deferred unduly to government view of the threat posed by speech coordinated with designated foreign terrorist organizations and has thus skewed U.S. political debate).

252. See *supra* notes 176–196 and accompanying text.

253. See OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., *THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS* 41–42 (2003), <https://oig.justice.gov/sites/default/files/legacy/special/0306/full.pdf> [<https://perma.cc/4JVN-MBLB>] (finding that arrests of detainees arose from “chance encounters or tenuous connections” rather than “genuine indications” of terrorist ties); PETER MARGULIES, *LAW’S DETOUR: POLITICS, IDEOLOGY, AND JUSTICE IN THE BUSH ADMINISTRATION* 28–30 (2010) (discussing Inspector General’s report); COLE, *supra* note 116, at 30–35 (discussing post-9/11 detentions).

254. See *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

255. See *Ziglar*, 137 S. Ct. at 1866; *Ashcroft*, 556 U.S. at 685; see also A. Benjamin Spencer, *Pleading Conditions of the Mind Under Rule 9(b): Repairing the Damage Wrought by Iqbal*, 41 CARDOZO L. REV. 1015 (2020); Peter Margulies, *Curbing Remedies for Official Wrongs: The Need for Bivens Suits in National Security Cases*, 68 CASE W. RES. L. REV. 1153, 1174 (2018); Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L.J. 379 (2017) (discussing the story of ordinary immigrant striving behind *Iqbal*).

256. *Trump v. Hawaii*, 138 S. Ct. 2392, 2403 (2018).

and Nationality Act.<sup>257</sup> In addition, enforcement of provisions prohibiting material support of designated foreign terrorist groups has often focused on Muslim-Americans.<sup>258</sup> But it is not clear that federal investigative resources have flowed to the domestic terrorism threat that in recent years has accounted for more violence in the United States.<sup>259</sup>

A gatekeeping model of surveillance would be sensitive to this inequity and recent history of untailed responses. But the FISA request discussed in the Justice Department filing made the same glib but invidious connection between Islam and terrorism.<sup>260</sup> In the United States today, millions of people are “sympathetic” to radical causes of all kinds, on the Right as well as the Left. Most of these individuals will never—one hopes—become the targets of FISA surveillance. The error here suggests that certain religion-based beliefs make individuals plausible FISA targets, even as others escape scrutiny.<sup>261</sup> If that brand of thinking has infiltrated secret FISA applications, surveillance’s future may look much like its Hooverian past.

#### VI. QUERYING U.S. PERSON INFORMATION UNDER § 702 OF THE FISA AMENDMENTS ACT

While there is room for debate about how systemic the flaws in the Page FISA request are, it is clear that there are systemic flaws in the FBI’s compliance with standards regarding querying U.S. person information under § 702 of the FAA.<sup>262</sup> Unlike “traditional FISA” requests, which require a

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257. *Id.* at 2409; see SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 20–21 (2019) (explaining that the Court interpreted the statutory authority for President Trump’s ban “in isolation from the rest of the statute”); Peter Margulies, *The Travel Ban Decision, Administrative Law, and Judicial Method: Taking Statutory Context Seriously*, 33 GEO. IMMIGR. L.J. 159, 199–209 (2019) (stating the same).

258. Sinnar, *supra* note 13, at 1354–57.

259. *Id.*; Heidi R. Gilchrist, *The Vast Gulf Between Attempted Mass Shootings and Attempted Material Support*, 81 U. PITT. L. REV. 63, 81 (2019).

260. NSD July Response, *supra* note 249, at 4.

261. Both FISA and the Constitution would bar the government from using foreign surveillance powers on domestic terrorist groups. However, on a proper showing, the government could initiate surveillance on members of such groups under standard law enforcement authorities. The emphasis on foreign terrorism practiced by groups claiming the mantle of Islam has obscured the need to be vigilant about domestic groups, much as J. Edgar Hoover’s obsession with Communism hampered federal law enforcement in earlier decades.

262. 50 U.S.C. § 1881a (2012); *United States v. Hasbajrami*, 945 F.3d 641 (2d Cir. 2019); Memorandum Opinion and Order at 72, *In re Section 702 2018 Certification* (FISA Ct. Oct. 18, 2018), [https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018\\_Cert\\_FISC\\_Opin\\_18Oct18.pdf](https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opin_18Oct18.pdf) [<https://perma.cc/J5S3-PTRM>]; see also PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE

specific court order, § 702 requires only annual approval by the FISC of a government certification that its procedures for gathering and using information are consistent with the statute.<sup>263</sup> Moreover, because § 702 entails gathering a vast amount of data on a global scale, querying that data for information about U.S. persons—citizens, lawful permanent residents (LPRs), and persons located in the United States—triggers particularly pressing concerns under the statute and the Fourth Amendment.<sup>264</sup> The FBI’s failure to comply with its own standards raises subtle but important concerns about regulatory capture that echo the flaws revealed in the “‘wall’ wars” dispute with the FISC in 2002.

Congress enacted § 702 to codify certain aspects of the Terrorist Surveillance Program (TSP), established secretly outside of the FISA framework by President George W. Bush.<sup>265</sup> Under § 702, the government can target communications of persons or entities reasonably believed to be located outside the United States.<sup>266</sup> That authority includes “one-end foreign communications” in which one party is foreign and one is physically within the United States, a citizen, or an LPR.<sup>267</sup>

The targeting of persons or entities abroad under § 702 results in the incidental collection of large amounts of data on U.S. persons.<sup>268</sup> Both the National Security Agency (NSA), which operates the monitoring and collection

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FOREIGN INTELLIGENCE SURVEILLANCE ACT 93 (July 2, 2014), <https://fas.org/irp/offdocs/pcllob-702.pdf> [<https://perma.cc/Y4CH-2MBZ>]; Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004 (FISA Ct. Rev. 2008) (upholding predecessor of § 702 with similar provisions).

263. The FISC’s role under § 702 has raised special concerns about its compliance with Article III of the Constitution, which largely limits federal judicial power to resolution of cases and controversies. See Margulies, *Searching for Judicial Power*, *supra* note 151 (arguing FISC’s role complies with Article III); Vladeck, *supra* note 151 (arguing that a public advocate would enhance compliance). *But see* Mondale, Stein & Fisher, *supra* note 151 (arguing that FISC violates Article III constraints).

264. *Hasbajrami*, 945 F.3d at 671; see also JENNIFER STISA GRANICK, *AMERICAN SPIES: MODERN SURVEILLANCE, WHY YOU SHOULD CARE, AND WHAT TO DO ABOUT IT* 119–20 (2017) (describing scope of U.S. person data incidentally collected under § 702).

265. On the TSP, see Katyal & Caplan, *supra* note 31; Daphna Renan, *The Fourth Amendment As Administrative Governance*, 68 STAN. L. REV. 1039 (2016) (arguing for administrative law approach to oversight of broad surveillance programs such as § 702).

266. 50 U.S.C. § 1881a(a) (2012).

267. *Hasbajrami*, 945 F.3d at 649–58 (discussing statutory requirements and implementation); DAVID S. KRIS & J. DOUGLAS WILSON, *NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS* § 17:17 (2012); Donohue, *supra* note 180; Emily Berman, *When Database Queries Are Fourth Amendment Searches*, 102 MINN. L. REV. 577, 593–94 (2017); Rachel G. Miller, *FISA Section 702: Does Querying Incidentally Collected Information Constitute a Search Under the Fourth Amendment?*, 95 NOTRE DAME L. REV. 139, 140 (2020).

268. *Hasbajrami*, 945 F.3d at 661–62.

of information under the statute, and the FBI pose queries to this database that produce outputs regarding U.S. persons. The NSA's querying procedures have generally passed muster under the statute.<sup>269</sup> The FBI is another matter.

The FBI's querying standard limits it to questions that will uncover foreign intelligence information or evidence of crime.<sup>270</sup> Unfortunately, the FBI's implementation of this standard is overbroad. Moreover, its documentation of queries is minimal, making oversight hinge on anecdotes rather than comprehensive compliance data. In addition, confirming the problem of regulatory capture, the FISC found in 2018 that NSD reviews "only a small portion" of the FBI's queries and does so without "basic information" that would aid the identification of noncompliant queries.<sup>271</sup>

Given the vast trove of information collected globally under § 702 and the bar on targeting U.S. persons, U.S. person queries of incidentally collected § 702 information should be carefully tailored. As a first indication that the FBI has not complied with this common-sense precept, consider that the FBI in 2017 performed 3.1 million queries on its own database, which includes raw § 702 information.<sup>272</sup> That number seems too high to allow for tailoring. Compounding the problem, the FBI lacks a dedicated § 702 database, instead storing all information in one big vat of information.<sup>273</sup> As a result, virtually any query can return raw § 702 data.

The FISC agreed, finding that the FBI has posed a "large number of . . . queries that were not reasonably likely to return foreign-intelligence

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269. See PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 130 (July 2, 2014), <https://fas.org/irp/offdocs/pcllob-702.pdf> [<https://perma.cc/Y4CH-2MBZ>]; see also Memorandum Opinion and Order at 66, *In re* Section 702 2018 Certification (FISA Ct. Oct. 18, 2018), [https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018\\_Cert\\_FISC\\_Opin\\_18Oct18.pdf](https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opin_18Oct18.pdf) [<https://perma.cc/J5S3-PTRM>] (noting that the NSA, along with the CIA and the National Counterterrorism Center, ran a total of 7,500 queries in 2017 linked to U.S. persons).

270. Memorandum Opinion and Order at 66, *In re* Section 702 2018 Certification (FISA Ct. Oct. 18, 2018), [https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018\\_Cert\\_FISC\\_Opin\\_18Oct18.pdf](https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opin_18Oct18.pdf) [<https://perma.cc/J5S3-PTRM>]. Section 702's definition of foreign intelligence information includes attacks on the United States, espionage, sabotage, international terrorism, proliferation of weapons of mass destruction, and a more amorphous category concerning the "foreign affairs" of the United States. 50 U.S.C. § 1801(e) (2012).

271. Memorandum Opinion and Order at 74, *In re* Section 702 2018 Certification (FISA Ct. Oct. 18, 2018), [https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018\\_Cert\\_FISC\\_Opin\\_18Oct18.pdf](https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opin_18Oct18.pdf) [<https://perma.cc/J5S3-PTRM>].

272. *Id.* at 66.

273. *Id.* at 75.

information or evidence of crime.”<sup>274</sup> For example, at one point an agent queried 70,000 “communication facilities”—probably a mix of phone numbers and email accounts—“associated with persons with access to FBI facilities and systems.”<sup>275</sup> Apparently, the FBI did not examine the results of these queries, but stored this information, making it available for later examination.<sup>276</sup>

FBI agents ran queries that included § 702 information on a range of persons, including employees, contractors, and other visitors to FBI sites, without a concrete basis to believe that those queries would return evidence of a crime or foreign intelligence information. The FBI’s searches instead seemed to be “routine” and “maximal” checks, largely for the FBI’s convenience.<sup>277</sup> According to the FISC’s stark verdict, the FBI has simply displayed “misunderstanding of the querying standard—or indifference toward it.”<sup>278</sup>

Remedying this problem requires careful documentation and an assist from technology, particularly given the large number of FBI queries. Foreseeing this issue, Congress recently required that the Attorney General “ensure” the introduction of a “technical procedure” to record each U.S. person query.<sup>279</sup> Unfortunately, the FBI as of 2018 was nowhere close to implementing such a technological fix.<sup>280</sup> The FISC ordered the FBI to take “serious steps” to address its failure to comply with Congress’s mandate but allowed the FBI in the absence of a technical procedure to document queries in writing.<sup>281</sup>

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274. *Id.* at 68.

275. *Id.* at 68–69.

276. *Id.* at 69. In another episode, from 2018 through part of 2019, the FBI queried “identifiers”—presumably phone numbers or email addresses—for approximately 16,000 U.S. persons. Document Regarding the Section 702 2019 Certification, FISA Ct. 67 (Dec. 6, 2019) (Boasberg, J.). According to the FISC, this querying operation was egregiously overbroad. Queries for a paltry total of seven of the persons that the FBI scrutinized had some ties to an official investigation. *Id.* Queries of the remaining individuals—encompassing 15,900 U.S. persons—lacked that link.

277. Memorandum Opinion and Order at 72, *In re* Section 702 2018 Certification (FISA Ct. Oct. 18, 2018), [https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018\\_Cert\\_FISC\\_Opin\\_18Oct18.pdf](https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opin_18Oct18.pdf) [<https://perma.cc/J5S3-PTRM>].

278. *Id.*

279. 50 U.S.C. § 1881a(f)(1)(B).

280. Memorandum Opinion and Order at 56–61, *In re* Section 702 2018 Certification (FISA Ct. Oct. 18, 2018), [https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018\\_Cert\\_FISC\\_Opin\\_18Oct18.pdf](https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opin_18Oct18.pdf) [<https://perma.cc/J5S3-PTRM>].

281. *Id.* at 62. The FBI has implemented such technical fixes efficiently in the past. Confronting an unwieldy system for issuing national security letters (NSLs)—inquiries which seek information from corporations and other entities—the FBI successfully automated this process. *See* PETER



The FISC's remedies exhibit a degree of patience that neither the FBI's querying practices nor NSD's oversight warrants. The FBI-NSD interaction on U.S. person queries echo the regulatory capture of earlier eras. Consider the FISC's account of NSD's mild-mannered efforts to assess FBI compliance. According to the FISC, Justice Department personnel would "'try to figure out' from FBI query records" which queries met the legal standard.<sup>282</sup> When documentation was not available, Justice Department personnel would implore FBI agents to orally "recall and articulate the bases for selected queries . . . [s]ometimes the FBI personnel report that they cannot remember."<sup>283</sup> Perhaps FBI personnel truly forgot their original justifications for queries. In the alternative, perhaps claiming loss of memory was a convenient way to avoid acknowledging that an original justification was either inadequate or nonexistent. Neither scenario shows the effort needed for compliance with the statute. Under each scenario, FBI agents at one point or another possessed superior information about their own practices, leaving Justice Department personnel to flounder haplessly in the dark.<sup>284</sup>

In addition, the Justice Department's lax approach to informing the FISC of these compliance issues suggests that the FBI has continued the success in managing relationships that J. Edgar Hoover demonstrated in his decades-long tenure. The government delayed for months or even years in notifying the FISC

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STRZOK, COMPROMISED: COUNTERINTELLIGENCE AND THE THREAT OF DONALD J. TRUMP 46–47 (2020). The FBI could replicate this success with § 702 queries. In addition, a government review of the FBI's compliance issues suggests at least indirectly that noncompliance may have been relatively contained, not pervasive. See ATTORNEY GENERAL AND THE DIRECTOR OF NATIONAL INTELLIGENCE, SEMIANNUAL ASSESSMENT OF COMPLIANCE WITH PROCEDURES AND GUIDELINES ISSUE PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 55–56 (2019), [https://www.intelligence.gov/assets/documents/702%20Documents/declassified/19th%20Joint%20Assessment%20for%20702%20Dec%202019%20-%20Final%20for%20release%20\(002\)OCR.pdf](https://www.intelligence.gov/assets/documents/702%20Documents/declassified/19th%20Joint%20Assessment%20for%20702%20Dec%202019%20-%20Final%20for%20release%20(002)OCR.pdf) [<https://perma.cc/32ES-QEQ5>] (supplying in-depth description of related "batch queries" that netted excessive U.S. person data; comprehensive discussion conveys the sense that such episodes are rare).

282. Memorandum Opinion and Order at 74, *In re* Section 702 2018 Certification (FISA Ct. Oct. 18, 2018), [https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018\\_Cert\\_FISC\\_Opin\\_18Oct18.pdf](https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opin_18Oct18.pdf) [<https://perma.cc/J5S3-PTRM>].

283. *Id.*

284. If querying U.S. person information constitutes a search under the Fourth Amendment, querying that is lax either by design or because of a lack of effective oversight may also raise questions about whether querying practices are reasonable. An unreasonable search would violate the Fourth Amendment. *Cf.* *United States v. Hasbajrami*, 945 F.3d 641, 670–73 (2d Cir. 2019) (discussing factors supporting remand to district court for further findings on whether querying is reasonable).

of FBI noncompliance.<sup>285</sup> When pressed, Justice Department lawyers informed the FISC that one such delay—of eight months—arose due to “the time needed by the FBI to gather facts regarding the matter.”<sup>286</sup> An eight-month delay suggests that the FBI lacked an adequate justification for its queries or an effective system for documenting and reviewing its querying practices. The FISC observed that a lengthy delay indicated a “lack of common understanding within FBI and NSD” of the applicable legal standard.<sup>287</sup> Language of that kind indicates that the court was deeply dissatisfied with both the FBI’s querying practices and NSD’s oversight.

The FISC’s caustic characterization of NSD seems particularly notable, because repeat players in litigation usually care a great deal about their relationship with the court.<sup>288</sup> Here, there is a simple, albeit sobering, explanation. NSD valued its relationship with the FBI more than it valued its standing with the FISC.<sup>289</sup> As with the Carter Page FISA request, that is not how the FISA flow chart reads. But the FBI’s runaway querying practices and NSD’s ineffectual response show yet again that a flow chart is no match for regulatory capture.<sup>290</sup>

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285. Memorandum Opinion and Order at 76, *In re* Section 702 2018 Certification (FISA Ct. Oct. 18, 2018), [https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018\\_Cert\\_FISC\\_Opin\\_18Oct18.pdf](https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opin_18Oct18.pdf) [<https://perma.cc/J5S3-PTRM>].

286. *Id.*

287. *Id.* at 77.

288. See Clarke, *supra* note 165; Rozenshtein, *supra* note 165.

289. The discussion in the text underestimates the importance of a productive relationship between NSD lawyers and FBI personnel. Thousands of skilled, diligent, and experienced FBI agents regularly benefit Justice Department lawyers with their insights. The best agents will often share invaluable lessons with lawyers who may lack the agents’ seasoned perspective. See Richman, *supra* note 161, at 791. Institutional culture should extend a measure of deference to those lessons, while airing alternative arguments. Modifying procedures can facilitate that balance, although daily interactions between people will always play a substantial role.

290. The Justice Department did revise its policies to require approval of an FBI lawyer before an agent could view the results of a “categorical batch query” that might include thousands of emails and phone numbers without a specific link to foreign intelligence information or evidence of a crime. Memorandum Opinion and Order at 80, *In re* Section 702 2018 Certification (FISA Ct. Oct. 18, 2018), [https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018\\_Cert\\_FISC\\_Opin\\_18Oct18.pdf](https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opin_18Oct18.pdf) [<https://perma.cc/J5S3-PTRM>]. This is a useful step. But it is not sufficient to address the substantial problem that the FISC detected. In addition, Attorney General William Barr has announced two changes that will assist with compliance issues. One move entails creation of an FBI Office of Internal Auditing that will review FBI compliance with FISA and other programs. See William P. Barr, Att’y Gen., U.S. Dep’t of Justice, *Augmenting the Internal Compliance Functions of the Federal Bureau of Investigation* 1 (Aug. 31, 2020), [https://www.justice.gov/ag/page/file/1311696/download?utm\\_medium=email&utm\\_source=govdeliv](https://www.justice.gov/ag/page/file/1311696/download?utm_medium=email&utm_source=govdeliv)

## VII. NEW NORMS FOR THE INSTITUTIONAL APPROACH TO SURVEILLANCE

Combating the regulatory capture described above requires new norms. But those norms need to be sensitive to the equities in place. Both “traditional FISA” and § 702 contribute substantially to U.S. security. Moreover, despite this Article’s critique of the FBI’s past and present, a vigorous and proactive FBI is similarly vital. The key is fashioning norms that will underwrite meaningful dialogue between the FBI and the Justice Department while maintaining surveillance when it is necessary and appropriate. To that end, this part proposes four norms: (1) adversarial testing through a public advocate at the FISC, (2) de novo administrative review, (3) the introduction of artificial intelligence techniques such as machine learning to analyze FISA drafting and querying, and (4) a remedy that creates a robust cap and trade system within the FBI for U.S. person queries.

### A. Adversarial Testing

As a key addition to enhance the institutional model, FISA should provide for adversarial testing of requests. Currently, FISC proceedings are almost exclusively ex parte, except for a limited range of cases in which the court names amici curiae to address legal issues.<sup>291</sup> Amici have played a salutary role in cases like the 2018 FISC § 702 certification review.<sup>292</sup> Commentators have long called for a public advocate to address factual as well as legal issues.<sup>293</sup> It

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gov [<https://perma.cc/CA7A-G59K>]. The other move requires additional review of the case and accuracy files in traditional FISA cases and more in-depth review by senior officials of requests targeting federal elected officials, candidates for federal elected office, and their respective staffs. See William P. Barr, Att’y Gen., U.S. Dep’t of Justice, *Supplemental Reforms to Enhance Compliance, Oversight, and Accountability with Respect to Certain Foreign Intelligence Activities of the Federal Bureau of Investigation* 1 (Aug. 31, 2020), [https://www.justice.gov/ag/page/file/1311701/download?utm\\_medium=email&utm\\_source=govdeliv](https://www.justice.gov/ag/page/file/1311701/download?utm_medium=email&utm_source=govdeliv) gov [<https://perma.cc/B3RU-L6SR>]. These reforms are salutary institutional steps. However, they may still result in requests and queries that reflect the group-think of the Carter Page and § 702 U.S. person querying problems. The reforms discussed in the next section would provide substantial safeguards beyond Attorney General Barr’s proposals.

291. 2019 OIG FISA REVIEW, *supra* note 4, at 43.

292. Memorandum Opinion and Order at 85, *In re* Section 702 2018 Certification (FISA Ct. Oct. 18, 2018), [https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018\\_Cert\\_FISC\\_Opin\\_18Oct18.pdf](https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opin_18Oct18.pdf) [<https://perma.cc/J5S3-PTRM>].

293. See Margulies, *supra* note 151; Vladeck, *supra* note 151; Faiza Patel & Raya Koreh, *Improve FISA on Civil Liberties by Strengthening Amici*, JUST SECURITY (Feb. 26, 2020), <https://www.justsecurity.org/68825/improve-fisa-on-civil-liberties-by-strengthening-amici/> [<https://perma.cc/BF7E-FFZW>]; Andrew Weissman, *The Need for Increased Amicus Role in the FISA Process*, JUST SECURITY (Jan. 14, 2020), <https://www.justsecurity.org/68047/the-need-for-increased->

is time to take that step through creation of a public advocate at the FISC as part of legislative reform efforts now underway in Congress in the wake of the OIG Carter Page FISA report.<sup>294</sup>

A public advocate could engage in true adversarial testing of both certifications under § 702 and court orders under “traditional FISA.” Under § 702, a public advocate could periodically sample § 702 selectors or query terms, to determine that the selectors had a bona fide connection to the purposes of the statute and the queries were related to foreign intelligence.<sup>295</sup> Under traditional FISA, the public advocate could appear in all cases seeking surveillance or a sample of cases.<sup>296</sup> That sample could be chosen randomly, or based on certain criteria, including cases likely to raise civil liberties issues.

A sampling approach would reduce the disruption caused by an additional party to FISC proceedings, while retaining the “demonstration effect” that a public advocate would have on the FBI and NSD. Both of these units would internalize the lessons learned in contested proceedings and adopt those lessons in cases across the board. The need to anticipate opposing arguments on facts and law would also strengthen the hand of civil liberties and privacy officers within the FBI and the rest of the intelligence community. The FISC would benefit from the rigor of adversarial proceedings and apply that learning to the rest of its docket.

To further reduce disruption, a public advocate could have a broad range of participation modes available, from preliminary posing of questions about exculpatory information to full-fledged appearance in FISC proceedings. Before embarking on the latter, the public advocate could be required to certify that the case raised novel legal issues or included ambiguous facts that required clarification. In addition, the public advocate could also challenge requests retrospectively, seeking to terminate current surveillance if it were not necessary. Again, sampling is the most effective way to realize the gatekeeping benefits of a public advocate without impairing the agility of intelligence collection.

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amicus-role-in-the-fisa-process/ [https://perma.cc/977B-TEXQ]; see also Marty Lederman & Steve Vladeck, *The Constitutionality of a FISA “Special Advocate,”* JUST SECURITY (Nov. 4, 2013), <http://justsecurity.org/2013/11/04/fisa-special-advocate-constitution/> [https://perma.cc/64TZ-JF6T] (concluding that a public advocate would be constitutional).

294. On these efforts generally, see Julian Sanchez, *A Chance to Fix FISA*, JUST SECURITY (Mar. 27, 2020), <https://www.justsecurity.org/69437/a-chance-to-fix-fisa/> [https://perma.cc/FQN3-EA6R].

295. 50 U.S.C. § 1881a (2018).

296. § 1881a(a) (2012).

*B. De Novo Internal Review: The Red Team's Turn*

Sampling should also be used to select a limited number of cases for internal de novo review. The OIG report on the Carter Page FISA request showed that senior officials read applications without “testing their assumptions,” as Director Comey’s memoir put it.<sup>297</sup> To address this concern, the Justice Department and senior FBI officials should review a sampling of cases from the ground up, taking care to identify their assumptions and then flip them, to see if different assumptions explain the facts better or require further factual inquiry.

As part of this de novo review, both the FBI and the Justice Department should use “red teams” that consist of officials tasked with arguing against the government in internal deliberations. Red teams assert counterfactual premises and alternative scenarios. In this fashion, red teams can assist in debiasing—ridding deliberation of cognitive flaws.<sup>298</sup> For example, individuals “anchor” their perceptions in the scenarios they know and the work-products already in front of them.<sup>299</sup> That is one reason that line-ups in criminal cases can be invidious: they send a message that at least one individual in the line-up must be the person they saw commit a crime, when of course there is no guarantee that is the case. Similarly, people glide over mistakes in documents they have written, assuming that everything is fine, and sometimes mentally fill in omissions in ways that appear logical to their belief system. Debiasing seeks to disrupt this cognitive complacency, by exposing individuals and groups to alternative scenarios that can highlight sources of error and bias.<sup>300</sup>

In FISA, de novo red-teaming would work in the following way. In a project headed by a senior official, a team of FBI and Justice Department personnel would peruse a sample of FISA draft applications. Their goal would be to discern the weak points in each draft, including the points that need support or appear inconsistent with underlying documentation in the accuracy subfile. Red-teaming would also ensure that the agent preparing the draft

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297. COMEY, *supra* note 18, at 137; See 2019 OIG FISA REVIEW, *supra* note 4, at 123–26.

298. See Andrew Guthrie Ferguson, *Big Data Prosecution and Brady*, 67 UCLA L. REV. 180, 255 (2020); cf. Philip E. Tetlock, *Theory-Driven Reasoning About Plausible Past and Probable Futures in World Politics*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 749, 757–60 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002) (discussing debiasing); Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006) (stating the same); Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training De-Biasing?*, 21 HARV. NEGOTIATION L. REV. 1 (2015) (stating the same).

299. See Golman, Haggmann & Loewenstein, *supra* note 51; Zacharias Maniadis, Fabio Tufano & John A. List, *One Swallow Doesn't Make a Summer: New Evidence on Anchoring Effects*, 104 AM. ECON. L. REV. 277 (2014).

300. Bloch, *supra* note 51, at 20.

application comply with accuracy procedures. The agent would have an opportunity to respond to the red team's feedback. Then the agent would send the revised application to the Justice Department lawyer, who would also receive the red team's comments. The result would be a more accurate and comprehensive application. Moreover, by participating in this exercise, senior officials would have a working knowledge of unsafe assumptions and how to test them.

### C. Artificial Intelligence and Contesting Assumptions

To consolidate the lessons learned through de novo review, the FBI and NSD should not merely rely on human intelligence; they should use artificial intelligence (AI) too. AI techniques such as machine learning can efficiently address issues that the FISC, NSD, and FBI lawyers have detected and spot further issues that would otherwise escape attention.<sup>301</sup> While machine learning is far from perfect, software engineers who know law, technology, and institutional culture can minimize the risks from AI and maximize the benefits for legal compliance.<sup>302</sup>

Machine learning models can look forward and backward.<sup>303</sup> Looking at past work, models such as neural networks can identify patterns of errors that would elude human detection.<sup>304</sup> Machine learners such as decision trees can break down past decisions into their component parts, discerning the precise branch where a decision went in the wrong direction.<sup>305</sup> Looking toward the future, machine learners can spot flaws in the drafting process.<sup>306</sup> They can also

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301. Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 24 (2008).

302. DAVID FREEMAN ENGSTROM, DANIEL E. HO, CATHERINE M. SHARKEY & MARIANO-FLORENTINO CUELLAR, GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES 28–29 (2020), <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf> [<https://perma.cc/46TL-YD93>] (discussing how securities regulators use machine learning to spot insider trading); Emily Berman, *A Government of Laws and Not of Machines*, 98 B.U. L. REV. 1277, 1286–90 (2018); David Lehr & Paul Ohm, *Playing with the Data: What Legal Scholars Should Learn About Machine Learning*, 51 U.C. DAVIS L. REV. 653, 655 (2017); Peter Margulies, *Surveillance by Algorithm: The NSA, Computerized Intelligence Collection, and Human Rights*, 68 FLA. L. REV. 1045, 1063–71 (2016); cf. Margaret Hu, *Small Data Surveillance v. Big Data Cybersurveillance*, 42 PEPP. L. REV. 773, 812–16 (2015) (urging validation of machine learning models).

303. Balkin, *supra* note 301, at 13–14.

304. *Id.*

305. ENGSTROM, HO, SHARKEY & CUELLAR, *supra* note 302, at 40–41.

306. *Id.* at 11.

send alerts to agents who are using improper queries for § 702 or omitting material information from “traditional FISA” requests.<sup>307</sup>

Machine learning models can help identify and diagnose tendencies among FBI agents to make mistakes in either traditional FISA applications or § 702 U.S. person queries. Connecting a machine learning model, such as a neural network, to the devices used by FBI agents can identify biases and missteps and help educate agents to avoid those mistakes in the future.<sup>308</sup> A machine can also provide an alert to an agent about a potential First Amendment issue in a FISA request or an overbroad U.S. person query that could raise Fourth Amendment problems.

Consider a discrepancy noted earlier in this Article between a FISA request and the agent’s accuracy file, as reported by the Justice Department in a filing with the FISC in response to OIG’s Carter Page report.<sup>309</sup> The FISA request stated that the target had “become sympathetic toward a particular terrorist group.”<sup>310</sup> However, the support document in the accuracy file reported only that, according to an informant, the target had “become more sympathetic to radical Muslim causes.”<sup>311</sup> This difference is material, as the Justice Department acknowledged. A machine learning model with comprehensive inputs from FISC submissions, accuracy files, legal precedents, and other databases could have spotted this gap and sent out an alert. Perhaps, as the Justice Department asserted, other more relevant adverse data about the target might still have justified the FISA request.<sup>312</sup> On the other hand, an agent or a Justice Department lawyer might have had second thoughts about the application. Either way, all participants in the FISA process would have had correct information.

Of course, machine learning can also reflect bias.<sup>313</sup> Both winnowing out bias from AI and tuning up AI to detect bias involve careful assembly of

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307. Cf. Robert S. Litt, *The Fourth Amendment in the Information Age*, 126 YALE L.J. F. 8, 18 (2016).

308. See Cass R. Sunstein, *Algorithms, Correcting Biases*, 86 SOC. RES’CH 499, 502 (2019).

309. See NSD July Response, *supra* note 249, at 4; see *supra* notes 220–24 and accompanying text.

310. See NSD July Response, *supra* note 249, at 4.

311. *Id.*

312. *Id.*

313. See Ashley S. Deeks, *Predicting Enemies*, 104 VA. L. REV. 1529, 1563–65 (2018); Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043, 1080–81 (2019); Katherine J. Strandburg, *Rulemaking and Inscrutable Automated Decision Tools*, 119 COLUM. L. REV. 1851, 1877–78 (2019).

training data and validation of the model's outputs.<sup>314</sup> However, with a creative, inclusive, and responsible approach, AI can serve the institutional model.

#### D. Robust Remedies

The FISC's 2018 requirement that each agent explain in writing the basis for a query before viewing § 702 content<sup>315</sup> is a welcome change, but more vigorous remedies are necessary.<sup>316</sup> A robust and effective remedy would leverage peer learning among FBI agents while limiting overbroad queries.<sup>317</sup> One example would be a variant of a cap and trade approach used in environmental regulation.<sup>318</sup>

The underlying theory here would be democratic experimentalism.<sup>319</sup> Instead of a command and control approach to regulation, democratic experimentalism turns to the subjects of regulation to resolve, within boundaries, how to reshape their conduct in light of regulatory goals. When regulated parties have a measure of choice, they can use their own creativity, expertise, and experience to craft better solutions than a regulator could prescribe in advance.<sup>320</sup> The democratic experimentalist approach thus disarms regulatory capture at the source.

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314. See Hu, *supra* note 302, at 812–16.

315. Memorandum Opinion and Order at 92–96, *In re* Section 702 2018 Certification (FISA Ct. Oct. 18, 2018), [https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018\\_Cert\\_FISC\\_Opin\\_18Oct18.pdf](https://www.intelligence.gov/assets/documents/702%20Documents/declassified/2018_Cert_FISC_Opin_18Oct18.pdf) [<https://perma.cc/J5S3-PTRM>] (also noting that the amicus curiae in the case suggested this idea).

316. The government's agreement to require FBI lawyer approval of so-called categorical batch queries is also useful, but insufficient. *Id.* at 82.

317. Daniel E. Ho, *Does Peer Review Work? An Experiment of Experimentalism*, 69 STAN. L. REV. 1, 1 (2017).

318. Eric A. Posner & Cass R. Sunstein, *Should Greenhouse Gas Permits Be Allocated on a Per Capita Basis?*, 97 CAL. L. REV. 51, 76 (2009) (discussing optimal mix of ex ante and ex post effects in cap-and-trade regime); Catherine Powell, *We the People: These United Divided States*, 40 CARDOZO L. REV. 2685, 2738 (2019); Michael Greenstone, Cass R. Sunstein & Sam Ori, *Fuel Economy 2.0*, 44 HARV. ENV'T L. REV. 1, 6 (2020). For an analogous proposal on other forms of government action on national security, see Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195, 240–42 (2010) (discussing “innovation-eliciting” approach to oversight of executive actions on national security).

319. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 267 (1998); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1021–22 (2004); Ho, *supra* note 317, at 17–22.

320. This approach also resonates with the second-order approach to Fourth Amendment regulation advanced by John Rappaport. See Rappaport, *supra* note 15.



A cap and trade approach to U.S. person queries would put peer learning and shared expertise in the foreground. It would work in the following way. The FISC would allocate to each FBI field office a certain number of queries, with a higher cap allowed for queries that focus on particular individuals, not big batches. Even in the first year, the FISC would peg the number at one lower than the average queries posed by each office from the previous year. Each year the total cap would drop. In addition, each office would receive a certain number of slots for queries it could pose without a prior written explanation or clearance by an FBI lawyer. Those queries would also not be subject to de novo review or contest by the public advocate.

If a field office stayed below its allotted number of queries, it could convey its remaining query slots to other offices. In return, the other offices would convey their rights to an allotment of queries not requiring a priori explanation or review and not subject to de novo review or challenge by the public advocate. This would be a valuable benefit to offices that want the ability to query without the need for a written formal justification or an approval from another unit of the Bureau. A successful office would likely be one that encouraged group exchanges on formulating efficient queries. On the other hand, an office that was profligate with queries would soon realize the costs of that practice. Through workshops and white papers, an office that posed a total number of queries below the cap would explain its approach, educating its peers.

This approach would promote learning within FBI offices. It would also exploit the expertise and experience of agents. Instead of becoming resourceful at regulatory capture, agents would use their knowledge and skill to query more effectively. On its own, a cap and trade query policy might not make a huge difference. But together with provisions for a public advocate, internal de novo review, and the introduction of machine learning techniques, the net result would be a better balance of privacy, public safety, and national security.<sup>321</sup>

#### VIII. CONCLUSION

Discussion of machine learning and cap and trade regimes may signal that we have come a long way since FBI agents bungled surveillance on Harry Bridges in the 1940s. But perhaps we have not traveled very far, after all. On

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321. In some exigent situations, the “hard cap” on queries discussed in the text might be unduly rigid. For example, suppose the United States experienced another mass terror attack like the events of September 11, 2001. The cap would need an exemption or waiver provision to cope with the increased need for querying in such a crisis. But an exemption or waiver should retain some limits on indiscriminate queries. Those queries, like the wave of immigration detentions in the aftermath of September 11, can become part of an overreaction that does little to enhance security. *See Sinnar, supra* note 255, at 386.

paper, a gatekeeping model has governed surveillance since President Roosevelt's 1940 national security memorandum, positing the attorney general as the principal decisionmaker and the FBI as a subject of regulation. But the parchment account of surveillance law tells only part of the story. Regulatory capture has been a perennial theme. With deep roots in the extended tenure of J. Edgar Hoover as FBI Director, the manipulation of informational asymmetries and personal relationships has long been a powerful alternative narrative, if not an origin story in its own right.

Well-ensconced in law on the books, a gatekeeping model built on the internal separation of powers between the Justice Department and the FBI has struggled to survive on the ground. As Attorney General in 1940, Robert Jackson had some success, but Jackson's reluctance to document surveillance requests ceded discretion to Hoover. Jackson's successor, Francis Biddle, was more effective because he learned from Jackson that a more proactive approach to Hoover was necessary; although Biddle also permitted Hoover to push the envelope on what was imperative for national security, particularly in the FBI's voyeuristic surveillance of columnist Inga Arvad and her close friend, future president John F. Kennedy.

Hoover's machinations were in high gear during Robert F. Kennedy's tenure as Attorney General in the 1960s, exemplified by the surveillance of Dr. Martin Luther King, Jr. Hoover exploited his access to embarrassing information about the attorney general's brother, who by that time had become the president of the United States. In addition, Hoover exploited his relationship with his ally, the segregationist Senator James Eastland, to place Levison in a difficult position that would dissolve any scruples Kennedy might have had about approving Hoover's wiretap request.

With the enactment of FISA in 1978 in reaction to disclosure of Hoover's excesses, the bureaucratic flow chart changed, but regulatory capture remained a force. The "wall wars" of the early 2000s showed that even a court found it challenging to deal with the FBI's regulatory capture. The FBI regularly failed to disclose information that would have shown an unduly close relationship between the surveillance requested on putative foreign intelligence grounds and the government's prosecution of the target.

Current controversies tell the same tale of regulatory capture. In the Carter Page FISA episode, FBI officials became too invested in their narrative to test their assumptions and seek readily available exculpatory information about Page's U.S. intelligence contacts. Those senior FBI officials marginalized Justice Department doubts and claimed deference as their due.

In the § 702 querying case, the FBI made routine use of sweeping batch queries that turned up vast quantities of U.S. person information. The Justice Department scrambled to keep up and dawdled in notifying the FISC about the

FBI's maximalist practices. Despite the FISC's pride of place on the FISA flow chart, regulatory capture was still the headline.

A package of norms to address the recurring issue of regulatory capture must safeguard privacy while preserving the valuable work of the FBI and NSD. To accomplish these goals, this Article recommends a public advocate at the FISC, de novo administrative review of a sample of FISA requests, introduction of machine learning models, and robust remedies stressing peer review, including a cap and trade regime for U.S. person queries under § 702. These measures will not guarantee the eclipse of regulatory capture. But they will create a discourse in which the gatekeeping approach has a chance to hold its own.