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Profiling by any other name could be the Foreign Intelligence Surveillance Act

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PROFILING BY ANY OTHER NAME COULD BE THE FOREIGN
INTELLIGENCE SURVEILLANCE ACT

by

EVAN M. MALLOY

A thesis submitted in partial fulfillment of the requirements
for the Honors in the Major Program in Legal Studies
in the College of Health and Public Affairs
and in The Burnett Honors College
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Thesis Chair: Dr. Cynthia Brown

ABSTRACT

The undergraduate thesis began with the research question of whether the Islamic community is being profiled by the use of the Foreign Intelligence Surveillance Act (FISA) following the terrorist attacks on September 11, 2001. At the beginning of the project, the researcher's hypothesis was that Muslim community had fallen victim to profiling through the use of electronic surveillance conducted by the American government. The research presented reveals a pattern of profiling and injustices against many different groups of Americans throughout the history of United States surveillance laws starting with the illegal alcohol producers in the 1920's. Amendments to FISA have set necessary modern electronic surveillance regulations back 30 years. The researcher brings to light the injustices the Islamic community has endured out of the panic caused by the attacks on 9/11.

The research presented was achieved by using empirical legal studies techniques of incorporating a mix-methods approach to utilize both quantitative and qualitative research components. The researcher developed a spreadsheet that included all published federal opinions of prosecutions involving FISA since its enactment in 1978. Statistical data was analyzed using frequency and average software, known as Stata, and the results of study suggest an extreme increase in the amount of prosecutions involving the Islamic community since 9/11 compared to prior.

DEDICATION

For my loving family, friends and brothers, who never let me give up or gave up on me.

For everyone who gave so much of their own time and talents to the successful completion of my thesis and especially Dr. Cynthia Brown for giving me the confidence to further my undergraduate career and making me the student I am today.

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Chapter 1. Introduction

As soon as man had the ability to communicate beyond face-to-face interaction, the government aggressively pursued interception of those communications. The accessibility of electronic communications allows for anyone with basic computer skills, including the government, to gain access to that information. The government has an interest in protecting its citizens from foreign and domestic threats, and federal authorities monitor electronic communications and conduct surveillance on individuals and groups to detect and interpret potential threats. Most notably, the federal government has demonstrated a pattern of eavesdropping on the communications of religious groups, members of racial and political movements and other organizations who are believed to pose threats. With modern technology moving at an unseen rate in the recent decade, the researcher must ask if the laws protecting a citizen's right to privacy are keeping up.

The risk of infringement of a person's right to privacy has also increased due to the panic caused by modern terrorist acts. The attacks on 9/11 came as a nationwide shock to most in the country who thought America was protected by thousands of miles and an ocean between the United States and the radicals committing terrorist acts. Without question, if an individual or group attacks or threatens the well being of United States' citizens then there is a duty for officials to investigate the alleged attackers and their associates. There are indications, however, the federal government is conducting surveillance far beyond what is necessary to find the wrongdoers and prevent further

atrocities against the American people.¹ The important question is whether the government's impinging on citizens' rights is justified in order for authorities to fulfill their obligations to prevent threats against the Country and to keep Americans safe. To further examine the dilemma, the researcher references an old theory "it is better to let a truly guilty man walk than an innocent man be convicted." This theory contains far heavier consequences in the realm of threats against the American people, but its meaning is still clear. The research indicates the government is impeding on Americans' rights and privacies without proper and just cause. The focus of study will be the American Islamic community and what, if any, rights the community enjoys are being violated by the national security efforts of the United States.

The government seemed just as unprepared as its people following one of the nation's darkest days, September 11, 2001. The country's leaders endured a tremendous amount of criticism and pressure about how the attacks should have or could have been prevented. The study's focus is not on how the attacks could have been prevented, but on how changes to surveillance laws altered the way law enforcement and national security officials conduct surveillance. Specifically, the study is concerned with what impact the changes in surveillance have on Americans' constitutional rights.

The actions taken following 9/11 diminished many previously fought for standards of what it takes to gain full and uncontrolled access to Americans' private

¹ See generally Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201 (2004).

information. Before the attacks on 9/11, regulation of the government's surveillance on potential foreign threats and their domestic accomplices came from the Foreign Intelligence Surveillance Act (FISA).² FISA was enacted in 1978 and its original purpose was to end an era of out-of-control surveillance conducted by the National Security Agency (NSA).³ FISA established regulations governing who could be targeted and measures for warranted surveillance on individuals with an alleged national security interest. Most notably, FISA established that only individuals thought to be agents of foreign powers could be subjected to this kind of surveillance.⁴

FISA was a little used and little known piece of legislation before 9/11, but soon it became the tool the government would employ to carry out new surveillance standards to "better protect" its citizens from past, present, and future threats. FISA and its standards first began their evolution quickly after 9/11 under the USA PATRIOT Act and many changes since. These changes will be discussed in greater detail, but overall weakened the standards for approval of surveillance. At the same time, the ones investigating and conducting the surveillance gained an unprecedented amount of freedom in the approval process.

² Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1885c (2008).

³ Jonathan D. Forgang, Note, *"The Right of the people": The NSA, the FISA Amendments Act of 2008, and Foreign Intelligence Surveillance of Americans Overseas*, 78 FORDHAM L. REV. 217, 223 (2009).

⁴ *Id.*

The Foreign Intelligence Surveillance Court (FISC) is the body of power in the approval process for FISA orders.⁵ Amendments to FISA have reduced the FISC's authority to fully review a FISA order. The reduction on what it takes to get permission to obtain surveillance orders today is far less than what FISA originally required. FISA's purpose as enacted was to prevent unjust surveillance on American citizens without proper standards for suspicion being met.

The government's use of surveillance is not a new phenomenon nor is the government's monitoring of a variety of assemblies of American citizens. The government has infiltrated and conducted electronic surveillance on groups of Americans throughout modern history, always justifying the intrusions as an attempt to prevent further aggression. Beginning with alleged bootleggers during prohibition at the turn of the 20th century, to the government's profiling and detaining of Japanese Americans during the Second World War, to today's alleged monitoring of Muslim Americans following September 11, 2001, the government has consistently engaged in a practice of invading Americans' privacy.

Throughout history, the United States has shown a pattern in acting before thinking in a time of panic after crisis. Following such gross conduct the government has demonstrated remorse by apologizing and then strengthening standards for domestic surveillance to prevent the possibility of reoccurrence. The enactment of FISA was one of the steps taken to make sure only the most significant threats would be the basis for approval for electronic surveillance. However, the government has a proven

⁵ Richard H. Seamon, *Domestic Surveillance for International Terrorists: Presidential Power and Fourth Amendment Limits*, 35 HASTINGS CONST. L.Q. 449, 460 (2008).

history of repeating its mistakes and disregarding lessons learned. The amendments to FISA have set back the standards for electronic surveillance thirty years and the mistakes corrected previously are free to occur again.

The primary focus of this research is to examine governmental eavesdropping on one particular group of Americans, Muslims and Islamic groups inside the United States. The researcher will demonstrate that Muslim Americans are being profiled by the use of surveillance through FISA and the evidence or intelligence obtained.

Protecting America from harm is necessary to ensure safety from both internal and external threats, but at the same time the government's intrusions should be limited to absolute necessity. Just as warrants for surveillance and search and seizures for common crimes have extremely high standards, so should they be in place for issues related to national security. FISA orders allow for officials to gain full access to an organization's or person's finances, history, and personal affairs. Without due process being given to those under investigation by the government, much that our country stands for is lost. This country is built on the protection of its citizen's rights against government intrusion. Even though the severity and consequences of the matters relating to FISA and national security may be higher than others, the government should not take action without proper cause. The government argues that FISA matters are extremely time sensitive and original FISA language hinders their ability to prevent terrorism. The researcher does not argue that some threats are time sensitive and require quick action, but the amendments to FISA have been enacted in a way to treat all security interests in this way. The study will show the government has not in all

instances acted in good faith in regards to federal prosecutions in which FISA was used. It is this that causes the researcher to question the standards and application of FISA.

The researcher will demonstrate in some cases that the government is persecuting individuals and groups in a way that goes far beyond finding true justice. Doing so, the examiner will use case law of federal prosecutions where FISA is used as evidence and a tool for the collection of intelligence information. The research provides an example of a case in which the United States continued prosecution even after others had been successfully convicted of the crime. This raises a legitimate concern of why the government is unwilling to accept its own mistakes unless there is another reason for prosecution. The researcher shows the controllers of surveillance may have hidden agendas in the acquisition of individuals for investigation and the prosecutions for them.

FISA is a key weapon in the government's arsenal for monitoring terrorists and terror cells both inside the United States and abroad. A criticism of FISA is that the statutory standards for acquiring court orders to conduct secret surveillance of targets are less rigorous than those required by the Electronic Communications Privacy Act of 1986 (Title III)(ECPA), for non-terrorist warrants and other ordinary law enforcement investigative surveillance techniques. The disconcerting part about the way the Department of Justice (DOJ) employs FISA is if the rules and regulations of FISA are minimally satisfied, then there is ample room for mistakes to occur. This could allow the possibility for an innocent individual's reputation to be tarnished permanently.

After 9/11, Congress amended FISA and changed its original purpose to provide a statutory scheme for gathering intelligence by the nation's Executive Branch.⁶ The change resulted from the terror attacks and, initially, Executive Branch authorities conducted research to identify potential terror threats. The attacks of 9/11 have impacted the way the government conducts surveillance at every turn. The pressure from the American people to find the wrongdoers from that day and prevent further aggressions against the country resulted in quick action by the government and has lead to many mistakes in the years following. The escalation of conflict between the United States and the Islamic based terrorist network has further persisted in the suspension of many Muslims living in the United States.

Although there are sufficient instances in which Muslim Americans and Islamic groups are being persecuted by the government, a large cross section of non-Islamic citizens have as well been impacted. FISA surveillance can just as easily be used to investigate individuals conducting business with suspected national security threats. The individuals working with these groups may not truly know who they are dealing with. Even so, the unknowing individual's financial records and personal information can become part of a government investigation with a FISA order. The researcher will further demonstrate later that, in more than one circumstance, the government has construed information on non-terror suspects to further its investigation. Another logical concern is the security of information not pertinent to the investigation the government poses and the safety and security of those contents. This research supports findings of

⁶ *Id.* at 238.

governmental misuse by the use of FISA and the sanctity of those documents is as well in question.

To some, stripping the rights of certain individuals to prevent further attacks from occurring may be acceptable after the attacks on 9/11; however it has been over nine years since those attacks. Originally, leaders predicted further aggressions from the radical Muslim community on U.S. soil, but none have occurred. An assumption may be that because of the government's aggressive surveillance they prevented additional terrorist attacks, but what if there were never any others that would have occurred? That would mean that many Americans' privacy rights were diminished and all of their personal information obtained for no good reason.

This research will prove the government has gone far beyond what is necessary to gain order and control in the modern era as far as terrorism is concerned. It will also demonstrate that the actions taken to diminish the standards and regulations of FISA have and continue to leave ample room for mistake and irreparable damage to many citizens' reputations in the United States. The profiling of the Islamic community by the use of FISA surveillance and evidence is a very real and continuing problem and, unless proper legislation is made to prevent it from continuing to occur, only more Americans will fall victim to improper intrusions by the government. Questioning the government's use of FISA is necessary to ensure the rights of American citizens.

Chapter 2. Literature Review

According to research, the United States government has demonstrated a heightened interest in monitoring racial groups or religious organizations following any large scale incident that threatens the country.⁷ The interest has been sufficiently intensive to raise concerns of a governmental pattern of prejudice to these individuals.⁸ The most recent major threatening event occurred on American soil on September 11, 2001 by Jihadist terrorists.⁹ Although the terrorists represented an extremist sect of the Islamic faith, the result is that the primary target of government surveillance today is anyone who is thought to be assisting or harboring Islamic or modern style terrorists.¹⁰

The history of the United States government's electronic surveillance of its citizens has deep roots that begin with prohibition and bootleggers.¹¹ The government without warrants began a practice of intercepting telephone conversations of suspected producers of untaxed and illegal alcohol.¹² The first Supreme Court decision on wiretaps resulted from these early intrusions.¹³ In *Olmstead v. United States*, the

⁷ Lininger, *supra* note 1 at 1210-27.

⁸ See generally Kim Lane Scheppele, 22nd Annual Edward v. Sparer Symposium: Terrorism and the Constitution: Civil Liberties in a New America: Law in a Time of Emergency: States of Exception and the Temptations of 9/11, 6 U. PA. J. CONST. L. 1001 (2004).

⁹ *Id.* at 1003.

¹⁰ Lininger, *supra* note 1 at 1212-15.

¹¹ Neal Katyal & Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023, 1035 (2008).

¹² Brenton Hund, *Disappearing Safeguards: FISA Nonresident Alien "Loophole" is Unconstitutional*, 15 CARDOZA J. INT'L & COMP. L. 169, 177 (2007).

¹³ *Id.*

Supreme Court examined if the interception of Roy Olmstead's personal phone calls violated his Fourth Amendment rights.¹⁴ The Court held that because the wiretaps were not a physical trespass, that a citizen's Fourth Amendment rights to search and seizure could not be violated.¹⁵ In reaction to the *Olmstead* decision, the Federal Communications Act of 1934 was passed by Congress to impose the first domestic wiretap regulations.¹⁶ The restrictions protected citizens Fourth Amendment rights for telephone interception, but because it was limited to domestic wiretapping, it did nothing to regulate surveillance for national security matters.¹⁷

In the 1940's, tensions about whether the United States would become part of World War II were finally answered following the attacks on December 7, 1941.¹⁸ Pearl Harbor was a surprise attack assisted and coordinated by Japanese loyalists on the ground living in Hawaii.¹⁹ The thought of the enemy living next door and aiding the motherland in further aggressions against the United States led to one of the largest examples of racial profiling in the country's history.²⁰ Courts quickly passed curfews

¹⁴ *Olmstead v. United States*, 277 U.S. 438 (1928).

¹⁵ Hund, *supra* note 13 at 177.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Eric L. Muller, *Loyalty and Criminal Justice: A Mini-Symposium: The Japanese American Cases- A Bigger Disaster Than We Realized*, 49 HOW. L.J. 417, 421 (2006).

¹⁹ *Id.*

²⁰ Patrick O. Gudridge, *Judgments Judged and Wrongs Remembered: Examining the Japanese American Civil Liberties Cases on their Sixtieth Anniversary: The Constitution Glimpsed from Tule Lake*, 68 LAW & CONTEMP. PROB. 81, 83 (2005).

and restrictions on Japanese Americans living in the United States, but the anxiety of further attacks assisted by Japanese living within the borders fueled a campaign that would lead to the destruction of the human rights of Japanese Americans.²¹ In early 1942, Japanese Americans were forcibly relocated to camps in the western United States to reduce the potential for further aggression against Americans.²² The government relocated an in excess of 100,000 Japanese American residents to camps with poor conditions and few amenities.²³ The United States perceived these Japanese Americans to be potential spies, much like the ones used by Japan in the attack on Pearl Harbor in Hawaii.²⁴ Although the war relocation camps were not death camps, the extreme conditions and poor amenities resulted in death to many detainees.²⁵

In the 1950's and 1960's, a new target emerged as fear of communism mounted. Justified by concerns that the United States could be unknowingly harboring communist spies, Truman justified his use of wiretapping and secret surveillance to peer into the lives of Americans.²⁶ This fear became known as the "Red Scare."²⁷ The Red Scare is

²¹ *Id.*

²² Garrick B. Pursley, Note: *Thinking Diversity, Rethinking Race: Toward a Transformative Concept of Diversity in Higher Education*, 82 TEX. L. REV. 153, 162 (2003).

²³ Robert F. Turner, *Torture, Enhanced Interrogation, and the War on Terror*, 32 CAMPBELL L. REV. 529, 536 (2010).

²⁴ Pursley, *supra* note 23, at 162.

²⁵ Turner, *supra* note 24, at 536.

²⁶ William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U.L. REV. 1, 26-28 (2000).

²⁷ Laura K. Donohue, *Criminal Law: Anglo-American Privacy and Surveillance*, 96 J. CRIM. L. & CRIMINOLOGY 1059, 1073 (2006).

a dark period in the country's history, and a time when Americans accused others and family members of being spies.²⁸ To root out those who could be potential threats, Truman created the National Security Agency (NSA).²⁹ The NSA's authority to eavesdrop created many problems because there were few laws regulating how the NSA obtained permission to invade a citizen's Fourth Amendment right to privacy.³⁰ The controversy surrounding the red scare led to many changes in, but not the disbanding of the NSA it is still around today.

After 9/11, the NSA began data mining telephone conversations and records of millions of Americans in an effort to weed out further persons living in the United States who might be aiding foreign powers.³¹ The federal authorities required the assistance of the nation's telecommunications companies, and made thousands if not hundreds of thousands of requests for subscriber information.³² Great controversy surrounded the requests, but because of the secrecy of the government's actions, the requests did not become public for some time.³³ Even today, it is not known publicly which companies complied with the government's requests and which refused.³⁴ Eventually, some

²⁸ *Id.*

²⁹ See generally Francesca Bignami, *European versus American Liberty: A Comparative Privacy Analysis of Antiterrorism Data Mining*, 48 B.C. L. REV. 609 (2007).

³⁰ Michael A. Froomkin, *The Metaphor is the Key: Cryptography, the Clipper Chip and the Constitution*, 143 U. PA. L. REV. 709, 714 (1995).

³¹ Bignami, *supra* note 30, at 613.

³² *Id.* at 614.

³³ *Id.*

³⁴ *Id.*

companies challenged the government's secret data mining requests through legal action in federal court.³⁵ When asked to determine whether the NSA did have the authority to require the release of private information, the courts ruled that they did.³⁶

Governmental surveillance continued throughout the sixties and early seventies, but this time with a new target, African American civil rights groups.³⁷ J. Edgar Hoover, became very interested in these civil rights groups and in particular the conversations and actions of Martin Luther King (MLK).³⁸ The government claimed its surveillance on MLK and other civil rights groups was necessary because of the suspicion that the communist party had infiltrated them.³⁹ Some, including Hoover, thought the alleged communists that had infiltrated these groups would try to attempt to use the momentum of the civil rights movement to further a communist agenda.⁴⁰

During the civil rights movement, the government actually recorded African American religious sermons and monitored the homes of civil rights leaders, including MLK.⁴¹ At one point in the MLK investigation, the government had fifteen different recording microphones to tape his sermons and personal conversations within his own

³⁵ *Id.* at 615.

³⁶ *Id.*

³⁷ See generally Tara M. Sugiyama & Marisa Perry, *Note: The NSA Domestic Surveillance Program: An Analysis of Congressional Oversight during an Era of One-Party Rule*, 40 U. MICH. J.L. REFORM 149 (2006).

³⁸ Lininger, *supra* note 1, at 1209.

³⁹ *Id.* at 1211.

⁴⁰ *Id.*

⁴¹ *Id.* at 1208.

home.⁴² In addition, the government tried a number of times with at least one success to infiltrate MLK's inner circle.⁴³ Hoover wanted to infiltrate MLK's inner circle because of a paranoia he had that MLK had an agenda far greater than that of equality in America.⁴⁴ He was once quoted saying "they had to dig deep in the garbage to come up with this one" when MLK was awarded "Man of the Year" by Time Magazine.⁴⁵ It was no secret to the public that the administration did not enjoy the efforts of the civil rights movement or MLK and this provides an example of the government using its power to conduct surveillance beyond the pursuit of national security.

After Hoover's era, United States Attorney General Edward Levi implemented stricter guidelines for government surveillance of religious groups to prevent excessive and unwarranted tactics the government employed during the civil rights movement.⁴⁶ These guidelines became known as the "Levi Guidelines."⁴⁷ Effective until 2002, the Levi Guidelines were then reduced by Attorney General John Ashcroft as a result of the attacks by radical Muslims on 9/11.⁴⁸

In the eighties, electronic surveillance slowed due to stricter regulations and little foreign conflict. In the nineties, however, after the Oklahoma City bombing, radical

⁴² *Id.*

⁴³ *Id.* at 1209.

⁴⁴ *Id.* at 1208

⁴⁵ *Id.*

⁴⁶ *Id.* at 1211.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1212.

Christian groups became the main targets of surveillance techniques.⁴⁹ The United States government became very weary of what these home-grown radical groups could be planning, particularly given the fears surrounding the potential computer collapse at the turn of the millennium.⁵⁰ The bombings of abortion clinics in the nineties led to further suspicions and surveillance of radical Christian groups.⁵¹ The numerous terrorist attacks gave rise to surveillance throughout the era in an attempt to circumvent future assaults from these domestic terrorist cells.⁵² A significant number of Americans became targets of electronic surveillance and physical searches because of their religious affiliation due to the attacks of just a few radicals.⁵³

Two decades earlier, Congress recognized that surveillance of Americans by the Executive Branch seemed to be getting out of hand. To investigate alleged abuses of authority by the Executive Branch concerning its warrantless monitoring of American citizens, Congress formed the Church Committee named for Congressman Frank Church.⁵⁴ The Church Committee published a report in 1976 outlining forty years of domestic warrantless surveillance by United States presidents.⁵⁵ The committee's

⁴⁹ *Id.* at 1226.

⁵⁰ *Id.* at 1227.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ William C. Banks, *9/11 Five Years on: A look at the Global Response to Terrorism: The Death of FISA*, 91 MINN. L. REV. 1209, 1225 (2007).

⁵⁵ *Id.*

findings concluded that "too many people have been spied upon by too many Government agencies and Government has often undertaken the secret surveillance of citizens on the basis of their political beliefs, even when those beliefs posed no threat of violence or illegal acts on behalf of a hostile foreign power."⁵⁶ The report at its heart stressed the need to separate foreign and domestic surveillance threats.⁵⁷ In 1978, due to the unregulated NSA conduct, the Watergate scandal and the Church Committee reports, Congress passed FISA as a measure to provide guidance and create restrictions for surveillance of United States citizens residing here or in other countries.⁵⁸ As enacted, FISA is specifically designed to limit the presidential and Executive Branch's authority to conduct surveillance of American citizens.⁵⁹

The FISC was established as an authority to review Department of Justice (DOJ) requests for surveillance under the FISA umbrella.⁶⁰ The FISC's authority prevented the government from widely going unchecked and conducting unethical surveillance.⁶¹ The FISC's creation was to prevent conduct like the NSA surveillance in the sixties and seventies. However, much of the FISC's authority has been reduced following 9/11 and

⁵⁶ *Id.* at 1226.

⁵⁷ *Id.*

⁵⁸ Donohue, *supra* note 28, at 1090.

⁵⁹ Elizabeth Johnson, Note: *Surveillance and Privacy under the Obama Administration: The Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 and the Attorney General's Guidelines for Domestic FBI Operations*, 5 ISJLP 419, 435-37 (2010).

⁶⁰ Seamon, *supra* note 5, at 460.

⁶¹ Forgang, *supra* note 3, at 235.

past mistakes that made the court originally necessary are occurring once again.⁶² Prior to 2008 amendments, FISA orders had to state the surveillance or search criteria, and the requests must show there is probable cause in order for the FISC to give approval.⁶³ The requests today only require the FISC to give a general procedural ruling and the FISC no longer determines Fourth Amendment level probable cause or specific details of requests for review.⁶⁴ Appointed by the Chief Justice of the United States Supreme Court, the FISC bench consists of eleven U.S. District Court Judges and the government is the only party present during the FISC hearings.⁶⁵ The ex parte sealed proceedings, held in secret, require a judicial ruling by the FISC on whether the surveillance requests followed statutory protocols.⁶⁶

Today, Japanese Americans, communists, civil rights groups, and radical Christian organizations do not receive the same level of government attention or monitoring as they once did. In part, this is because federal authorities perceive another group to be the more immediate threat to national security. The threat they once presented has been replaced by the newest perceived threat, acts of terrorism committed by Muslim extremists.

⁶² *Id.*

⁶³ *Id.* at 234.

⁶⁴ *Id.* at 235.

⁶⁵ Lance Davis, Note: *The Foreign Intelligence Surveillance Court's May 17 Opinion: Maintaining a Reasonable Balance Between National Security and Privacy Interests*, 34 MCGEORGE L. REV. 713, 716 (2003).

⁶⁶ *Id.*

The extreme acts of violence in the early nineties and on 9/11 have changed many things, including surveillance under FISA.⁶⁷ Judging by the actions of the United States government, attacks on American soil are treated very differently than American conflicts abroad. Americans before 9/11 felt largely invincible and separated from modern style terrorism occurring abroad. The Muslim terrorist attacks in the past twenty years are the only massive assaults on American soil since the Japanese attacked Pearl Harbor in the 1940's.⁶⁸ The profiling occurring today because of the attacks on 9/11 is similar in nature as to the profiling that occurred after Pearl Harbor over sixty five years ago.⁶⁹

Shortly after the 9/11 tragedies, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act).⁷⁰ The PATRIOT Act's passage included as a purpose its ability to circumvent an abundance of previously present red tape in the attainment of warrants and government monitoring of citizens.⁷¹ The PATRIOT Act significantly

⁶⁷ See generally Steven W. Becker, *"Mirror, Mirror on the Wall . . .": Assessing the Aftermath of September 11th*, 37 VAL. U. L. REV. 563 (2003).

⁶⁸ Victoria S. Shabo, *The 9/11 Commission and Implications for Legislative-Executive Information Sharing*, 83 N.C. L. REV. 1037, 1038 (2005).

⁶⁹ Lininger, *supra* note 1 at 1210-27.

⁷⁰ Christina C. Logan, *Liberty or Safety: Implications of the USA Patriot Act and the U.K.'s Anti-Terror Lawson Freedom of Expression and Free Exercise of Religion*, 37 SETON HALL L. REV. 863, 867 (2007).

⁷¹ Robert C. Power, *"Intelligence" Searches and Purpose: A Significant Mismatch between Constitutional Criminal Procedure and the Law of Intelligence-Gathering*, 30 PACE L. REV. 620, 634 (2010).

changed the scope of FISA surveillance.⁷² The actual purpose of a FISA request for surveillance before the PATRIOT act had to be for gathering foreign intelligence.⁷³ Now with the PATRIOT Act, gathering foreign intelligence only has to be a significant purpose in order for FISC approval.⁷⁴ This allows for what some believe political incentives for surveillance on individuals and organizations.⁷⁵ One significant change to FISA because of the PATRIOT Act is the approval time for searches.⁷⁶ The time frame for physical searches now is ninety days.⁷⁷ This should be compared to the four or five days allowed for the searches before the PATRIOT Act.⁷⁸

The PATRIOT Act significantly affected the way federal authorities implement FISA. Previously, the FISC conducted a full review of a FISA order, including whether the individual or group posed a “purpose” for surveillance as to foreign intelligence.⁷⁹ Following 9/11, FISC’s responsibility, in reality, is limited to deciding whether the order

⁷² Patricia L. Bellia, *Brave New World: U.S. Responses to the Rise in International Crime: The “Lone Wolf” Amendment and the Future of Foreign Intelligence Surveillance Law*, 50 VILL. L. REV. 425, 448 (2005).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 443

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ John E. Branch III, *Statutory Misinterpretation: The Foreign Intelligence Court of Review's Interpretation of the “Significant Purpose” Requirement of the Foreign Intelligence Surveillance Act*, 81 N.C. L. REV. 2075, 2076 (2003).

follows a general procedural test.⁸⁰ The FISC no longer has any say in the target of surveillance.⁸¹ The reasoning behind this is due to the Executive Branch's interest in wanting to protect possible intelligence information and limit the amount of people who actually would have access to information on national security threats.⁸² The Judicial Branch gives deference to the Executive Branch's experience in matters of national security, but there is not yet confirmation that this deference is the best course.⁸³

In 2002, Congress replaced the reasonable suspicion requirement of FISA for investigations of religious groups in favor of a less stringent standard, making it easier for the government to obtain FISA orders.⁸⁴ The only justification for a FISA order now is that the information sought is related to the professed law enforcement purpose.⁸⁵ A possible justification for this change is the increased concern that Islamic groups continue to plot and plan further aggressions against the United States. By removing FISA's reasonable suspicion requirement, the federal authorities suggest they are better able to protect Muslim Americans, particularly from hate crimes in the post 9/11 era.⁸⁶

⁸⁰ Forgang, *supra* note 3, at 238.

⁸¹ Richard H. Seamon & William D. Gardner, *The Patriot Act and the Wall between Foreign Intelligence and Law Enforcement*, 28 HARV. J.L. & PUB. POL'Y 319, 325 (2005).

⁸² Forgang, *supra* note 3, at 250.

⁸³ *Id.*

⁸⁴ John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U.L. REV. 1081, 1106 (2002).

⁸⁵ *Id.* at 1116.

⁸⁶ Lininger, *supra* note 1, at 1205.

The government's ability to better protect Muslims from hate crimes may be true, but it is not justifiable for the mass amount of people whose privacy rights were impeded on.⁸⁷

FISC's reduced discretion coupled with the high approval rate of FISA orders leads to a conclusion that Muslims have become primary targets of abuse under FISA.⁸⁸ Islamic terrorism is a formidable adversary of the United States, but FISA's current guidelines may allow for mistakes and unjust investigation.⁸⁹ Brandon Mayfield, an American who converted to the Muslim faith, provides at least one example of an innocent target harmed by broadening FISA's application.

On March 11, 2004, a coordinated series of bombs erupted in Madrid on several commuter trains.⁹⁰ After the dust settled, 200 passengers had been killed and more than 1,800 people were injured by the Spanish attacks that morning.⁹¹ Oregon attorney Brandon Mayfield became a suspect of those terrorist bombings in Spain.⁹² In *Mayfield v. United States*,⁹³ the Department of Justice used FISA to gain intelligence and surveillance privileges on Mayfield, who had strong ties to the Muslim community,

⁸⁷ *Id.*

⁸⁸ See generally Wilson R. Huhn, *Congress has the Power to Enforce the Bill of Rights Against the Federal Government; Therefore FISA is Constitutional and the President's Terrorist Surveillance Program is Illegal*, 16 WM. & MARY BILL OF RTS. J. 537 (2007).

⁸⁹ See generally Ronald Sievert, *A New Historical Perspective on National Security Law Policies during the Bush Administration and their Implications for the Future; Constitutional in Conception, Problematic in Implementation*, 7 RUTGERS J.L. & PUB. POL'Y 35 (2009).

⁹⁰ Gerald E. Rosen, *Secret Evidence and the Courts in the Age of National Security: The War on Terrorism in the Courts*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 101, 110 (2006).

⁹¹ *Id.* at 111.

⁹² *Mayfield v. United States*, 599 F.3d 964 (9th Cir. 2010).

⁹³ *Id.* at 966.

through his faith, his family and his pro bono legal work.⁹⁴ The government accused him of being involved in the Spanish bombings because of fingerprint information.⁹⁵ The preliminary fingerprint analysis of a print found at the bomb site conducted by FBI agents at Langley initially found no confirmed matches.⁹⁶ Unsatisfied with the results, the agents received orders to prepare a list of individuals who matched any points on the fingerprint analyses.⁹⁷ Once the list was compiled, the agents further narrowed the list to the twenty most probable matches.⁹⁸ Mr. Mayfield was number seventeen on the list.⁹⁹ The Spanish government received the FBI report results confirming that Brandon Mayfield was the perpetrator, but the Spanish authorities discredited the FBI's results because they believed the two prints were too dissimilar.¹⁰⁰ The United States government continued to pursue Mayfield as the primary subject even after the Spanish government had identified and arrested the actual terrorists.¹⁰¹ The manner in which the United States government continued Mayfield's prosecution suggests to the researcher that the government's interest may have been something other than finding true justice.

⁹⁴ *Id.*

⁹⁵ *Id.* at 965.

⁹⁶ *Id.* at 967.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

In the case against Brandon Mayfield, the government obtained a FISA order for physical searches and electronic surveillance. The FBI's reasoning to the FISC for the FISA surveillance order was to "collect foreign intelligence information."¹⁰² The FBI followed Brandon and his family members when they traveled to and from a mosque, Mr. Mayfield's law office, the children's schools and during other family activities. After it finally became clear that Mr. Mayfield was not the culprit behind the Spanish terrorist attacks, Mr. Mayfield filed suit against the government.¹⁰³ Brandon Mayfield and the government settled on the terms "that the government would pay compensatory damages of \$ 2 million to Mayfield and his family; destroy documents relating to the electronic surveillance conducted pursuant to FISA; return seized materials to Mayfield; and apologize to Mayfield and his family."¹⁰⁴ Mr. Mayfield also agreed not to seek any further litigation with one exception being the constitutionality of FISA.¹⁰⁵ Brandon Mayfield then filed "suit seeking declaratory judgment that 50 U.S.C.S. §§ 1804 and 1823, provisions of FISA as amended by the PATRIOT Act, were unconstitutional under the Fourth Amendment."¹⁰⁶ The United States District Court for the District of Oregon agreed and granted the plaintiff's relief making this one of the first times the

¹⁰² *Id.* at 968.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 964.

constitutionality of FISA had been successfully challenged.¹⁰⁷ The victory did not last long though. The United States quickly appealed and the decision was vacated and remanded with directions to dismiss the plaintiff's claim.¹⁰⁸

The first instances of profiling on the Islamic community appear shortly after the first attack on the World Trade Center (WTC) in the early nineties.¹⁰⁹ The government told local FBI stations to start "mosque counting."¹¹⁰ This process required agents to literally count in their districts the number of mosques hosting regular congregations.¹¹¹ Surveillance escalated to the government recording Muslim religious services and the private discussions of Muslim worshipers attending the services.¹¹² The FBI even infiltrated some of the mosques with the use of undercover agents, surveillance cameras, flyovers, and subpoenas for telephone calls of congregation members.¹¹³

The surveillance and "mosque counting" process enjoyed some success. While recording conversations of members at a New York mosque, the FBI intercepted information about future targets for terrorist attacks.¹¹⁴ Those recorded also discussed

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 971.

¹⁰⁹ Sahar Aziz, Note: *The Laws on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Preventing Terrorism?*, 9 TEX. J. ON C.L. & C.R. 45, 68 (2003).

¹¹⁰ Lininger, *supra* note 1, at 1225.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 1226.

¹¹⁴ *Id.* at 1225.

the success of their last attack, which was the World Trade Center.¹¹⁵ The surveillance techniques led to successful acquisition and prosecution of the original WTC terrorists.¹¹⁶ The prosecution of the WTC attackers is one example of the type of government intrusion that gives credence to the great debate- whether the government's ignoring Fourth Amendment privacy rights is necessary to prevent further attacks on American Citizens.¹¹⁷

The standards for obtaining permission to conduct surveillance under FISA are lower than surveillance requests for ordinary, non-terror suspects.¹¹⁸ The FBI, however, may be operating with more restrictive internal controls than statutorily required to ensure better justification and more conscionable FISA privacy invasions. If some FBI agencies feel the statutory regulations are not strict enough and impose a higher internal standard then the legislation should keep up with those in the field and make those standards mandatory across the board. Amendments to FISA and the limiting of the FISC's review process to a less strict general procedural check leaves ample room for an order with insufficient basis to be approved and infringement on an innocent citizen's rights to be guaranteed.¹¹⁹

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1226.

¹¹⁷ Forgang, *supra* note 3, at 266.

¹¹⁸ Logan, *supra* note 71, at 869.

¹¹⁹ Forgang, *supra* note 3, at 238.

The United States Treasury Department keeps a list of persons who have their assets frozen.¹²⁰ The Treasury Department's list for suspected terrorists who have had their assets frozen is known as the Specially Designated Global Terrorists list (SDGT).¹²¹ By April 2005, the SDGT list had grown to 743 people and 947 organizations under allegations of material support to terrorism involving the use of secret evidence.¹²² Ninety percent of the individuals and ninety six percent of the organizations on the SDGT list were Arabic or Islamic.¹²³

The threat for further terrorist attacks is of serious concern in the United States, but the stigma that the Muslim community will be the ones responsible has been overstated.¹²⁴ The government's investigations and stereotyping of the Islamic community has a larger effect than just the persons under investigation.¹²⁵ Common profiling and stereotyping by Americans has increased out of response to the governmental investigations targeting only potential threats from the Muslim community.¹²⁶ The common profiling of the Islamic community by every day citizens is a child-like reaction to what the greater power (the United States government) is most

¹²⁰ Laura K. Donohue, *Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime*, 43 Wake Forest L. Rev. 643, 672 (2008).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 673.

¹²⁴ *Id.* at 643.

¹²⁵ *Id.*

¹²⁶ *Id.*

concerned with. This is in a sense how a child mimics their parents because the child instinctively trusts and believes their parents to have better judgment on the matter.

Chapter 3. Methodology

The researcher examined whether Muslim organizations and individuals are targets of federal secret surveillance under FISA. In determining this, the researcher employed both quantitative and qualitative research methods.

The quantitative component of the project consisted of a content analysis of federal case law involving evidence gained through FISA surveillance. The researcher was particularly interested in assessing the role FISA played in the cases, with special interest in federal prosecutions and the influence FISA evidence may have had on defendants. The researcher collected data and analyzed the information to examine correlations of Islamic ties and the use of FISA as a means of gathering intelligence. Statistical software allowed the researcher to gain empirical insight into the prosecutions involving members of the American-Islamic community. The researcher's target population includes all of the reported cases of federal prosecutions involving FISA and issued from 1978 to 2010.

The idea for the thesis topic is the result of researcher's experiences gained while working with a professor during a directed study project. The directed study project encompassed conducting legal research involving FISA. Throughout the study, the researcher began to notice the majority of the prosecutions involved persons of the Islamic faith. After further research, it seemed apparent that a strong connection existed between the use of FISA evidence in federal prosecutions after 9/11 and the indictments of Muslim defendants, Islamic organizations, and businesses associated with or having ties to individuals of the Muslim faith. The strongest evidence of this

connection has arisen in the past decade. Initially, injustices were not readily apparent, in part because of the blinding influence of the 9/11 attacks by Muslim extremists. As the subject was considered further, potential injustices became more difficult to rationalize.

To begin, the researcher conducted a content analysis of all the federal trial court and appellate court cases involving FISA to collect information since its enactment. Upon initial review of the literature, a concern surfaced. After 9/11, many cases relying on FISA evidence had connections to the Muslim community. The researcher became interested in the possibility that profiling by government authorities continues in the United States today. This led to an interest in determining whether the connection between the Islamic community and FISA persisted throughout the case law. The researcher then identified all of the federal trial court and appellate court cases involving FISA by using key search terms through Westlaw. The electronic data base allows searches to be conducted using key words. The most complete list of cases resulted from the search terms "FISA & Surveillance." The resulting list of federal trial court and appellate court cases identified 180 opinions relevant to this study. Using the issuing court and the date, the researcher created a master list dividing the cases by date and by issuing court.

The researcher began the content analysis by determining a list of variables that would be identified in each of the opinions. A spreadsheet was then created in Microsoft Excel to allow the researcher to input information from each of the cases related to the variables. Additionally, the list of 180 opinions was reduced to 112 that

met the study parameters – opinions in which FISA evidence was relevant to the case outcome.

The first variable for the table was the case name and citation so the opinion could be easily identified and located. After entering each opinion's case name and reference citation, the researcher began inputting data relevant to the next variables, beginning with the court ("Court") that issued the opinion. The variable was selected because it would allow the user to be able to identify the jurisdiction and the geographical area the opinions relying on FISA were issued. The opinions are ordered from the most recent to the oldest. Further, the opinions are listed beginning with the appellate decision, issuing from the United States Circuit Courts of Appeal, and then the trial court decisions, the United States District Courts. The third variable selected for study, delineated as "Issue before the Court," was chosen to examine whether FISA impacts the outcome of the federal prosecutions.

The next the variable is "Muslim Ties." This variable includes whether a defendant or plaintiff is of the Muslim faith and whether the parties had dealings with Muslim organizations or businesses. The researcher includes two separate variables referencing the dates of the opinions. The first of the two is simply the date the published opinion issued from the court. The second date variable records information about whether the issued date of the opinion fell before or after 9/11/01. This variable was initially believed to be significant because of the amendments to FISA that resulted from the enactment of the PATRIOT Act. This construct is included to determine what impact, if any, 9/11 had on the government's use of FISA in relevant cases. Equally

important is determining whether the cases whose opinions issued after 9/11 had a higher frequency of non-government parties with, "Muslim Ties." The cursory review of the FISA opinions allowed the researcher to readily identify, without the aid of data entry or statistical analysis, that there had been a substantial increase in the number of Muslims connected to cases involving FISA after 9/11.

It was necessary to discern the type of case, criminal or civil; therefore, type of case was included for analysis. Variables eight (criminal charges) and nine (convictions) were identified by the researcher after reading and analyzing law review articles written about FISA. The articles raised an interesting point that though FISA is used to gather intelligence on individuals thought to be agents aiding foreign powers in enterprises related to terror, most of the criminal prosecutions involve charges for common crimes not related to terrorism. This data offers assistance in determining what types of charging crimes were brought by federal prosecutors using FISA evidence and what convictions, if any, resulted from the prosecution. The researcher theorized data associated with this variable would be instructive concerning the pervasiveness, or lack thereof, of the prosecution of terror-related crimes. Conversely then, the next two variables addressed civil claims and civil verdicts. These two variables would allow the researcher to analyze the types of damages plaintiffs were seeking in civil suits. The researcher hypothesized that analysis of the civil variables would demonstrate a majority of the claims are to recover after criminal prosecutions in which FISA was used. These cases seemed to involve the return of documents, materials and effects taken during secret FISA sneak-and-peaks or the request for damages related to the

government's surveillance. Variable eleven, civil verdicts, presents an opportunity to discover empirically how the courts interpreted these claims and the level of success citizens would had be targets of surveillance had recovering monetary damages for surveillance.

There is also a variable that addresses whether the named party or parties of interest are an individual, more than one individual or a formal group/entity (business or organization). During the researcher's directed study and reading through FISA law reviews, a potential pattern arose involving defendants who were of the Muslim faith or being or had dealings with Muslim-based organizations. Curious about this relationship, the researcher included a variable that would allow further investigation.

The final variable to be considered in the content analysis is whether there is an Al Qaeda connection. Al Qaeda admitted to its role as the mastermind behind the terror attacks of 9/11, and the researcher was interested in examining what relationship the Muslims identified in the study have with this terrorist organization.

After entering data from the cases, the researcher needed to conduct statistical analysis of the data contained in the spreadsheet, but before the information could be analyzed, the data needed to be numerically coded. To accomplish this, the researcher assigned each variable item a numerical value. These values were coded consistent with the codebook or key that was prepared in association with the spreadsheet and the data it contained. Each numeral correlates to information related to the variable. For example; Variable D is "Muslim Connection" so if there is a Muslim connection the information gets the assigned value of (1), if there is no connection then the value is

assigned (0). Most of the variables are far more complicated than a simple dichotomous variable (yes or no) and have many different values beyond zero and one. The values for each variable are saved in what is known as the “Codebook”. The codebook is included as an attachment in (Appendix A) for a complete breakdown of each piece of information within each variable.

Once the codesheet and codebook were completed, the researcher was able to run central tendencies (frequencies and averages) on the data to determine basic descriptive information about the data. The results from each variable were compared between the constraints looking for information relevant to the study’s research questions. This concluded the quantitative research aspect of the empirical legal studies approach.

The qualitative review included a study of current federal criminal prosecutions involving FISA surveillance. The review started with attempting to learn more about FISA and investigate whether anyone else found profiling to be a continuing issue in the post 9/11 era. While ample literature is available about the profiling of Muslims and the use of FISA, little has been written on FISA surveillance of Muslim Americans as a tool in the government’s arsenal and a vehicle for the profiling of these citizens. Examining the changes to surveillance law and amendments was a justifiable alternative for information about current profiling occurring in the United States today. The thesis research required a survey of the existing literature addressing profiling and the history of surveillance law in the United States. The qualitative research includes an additional examination of the published opinions in federal prosecutions from 1978 to 2010. It also

includes a review of the published opinions in civil cases for the same period. Additionally, the researcher conducted more traditional legal research using Westlaw and Lexis-Nexis Academic to further identify any possible impact the use of FISA has had on the Islamic community. The researcher utilized Lexis-Nexis Academic to originally educate himself about FISA and the changes to it since its creation. Using Lexis-Nexis, the researcher was able to narrow his searches to results of less than 100 to get the most relevant law review articles. As previously noted, the searches started in an attempt to understand the basic concepts of FISA, but quickly one idea began to build on another.

The researcher decided to explore the history of profiling and stereotyping not related to surveillance to better understand the capabilities of the United States government and its citizens. A review of law review articles on FISA and the implications to the Islamic community since 9/11 presented some common themes in the research literature. These themes focused on the changes to FISA and the implications those changes have had on the way surveillance is conducted in the United States. Another common idea in the qualitative research emerged from the theoretical reviews. The reviews demonstrated how the government has made the same mistakes of privacy invasion in the past, but somehow gets caught up in itself and occurs again and again. These theoretical articles also contained another avenue of study for the researcher. Specifically a third theme focused on how the United States reacts to attacks on American soil as compared to conflict abroad.

The researcher was able to use empirical legal studies to employ a mixed methods approach that consisted of a quantitative and a qualitative component. Utilizing both types of research approaches throughout the directed readings and thesis semesters allowed the student to differentiate the research and allow concepts and ideas to build and fuel each other into what you see as the complete research product.

Chapter 4. Results

This study employs a mixed methods approach combining quantitative analysis with a qualitative component reached through a form of legal research. Below the results are reported for each approach.

Quantitative Results

The results of the quantitative research were reached by utilizing the statistical software package, Stata, to determine descriptive information for the relevant variables. The following summarizes the results of statistical analysis based on the research questions formed.

The FISA decisions reported since 1978 include both criminal and civil cases. Though the study focuses solely on criminal cases, it is instructive to provide the reader with a foundation of overall frequency of outcomes comparing civil to criminal cases. The researcher theorized a majority of the published opinions would be criminal. The results indicate that approximately 63 percent or seventy cases involving FISA were criminal prosecutions. Conversely, the remaining 37 percent reported on civil disputes.

The researcher then analyzed the criminal charges of the seventy criminal cases and a significant majority resulted. Originally the researcher thought a majority of the criminal charges would be terror related. The most common crime charged in the published federal prosecutions is conspiracy and conspiracy-related crimes, both of which appeared twenty four times, and is significantly more than the next most commonly charged crime of terrorism and terror-related crimes. Terror-related crimes

appeared five times in the results. The frequency of conspiracy-related crimes is more than four times that of terror-related crimes, the next most popular crime charged. Conspiracy crimes make up 21.43 percent of the total number of opinions and 34.29 percent of the total criminal decisions.

The researcher then examined the outcome of the cases and theorized that a majority would be affirmed convictions. The most frequent result of the variable is that the appellate court affirmed the trial court convictions. Affirmed convictions have a frequency of thirty-four or 30.36 percent of all the published opinions in the study. Comparing the total amount of affirmed convictions to the seventy criminal prosecutions, the percentage increases to 48.57. This data can then be contrasted to the number of cases with reversed judgments and vacated judgments. Variables, reversed judgments and vacated judgments, each appeared once in the study and each had a corresponding percentage of 0.89 in the total opinions.

The next variable examined is whether the federal opinion was published before 9/11. The total number of published federal opinions studied is 112 and the researcher predicted that the majority of the opinions would appear after 9/11. The resulting frequency of published opinions before 9/11 is forty. Thus, the frequency of opinions published after 9/11 is seventy two. The variable was designed to allow the researcher to measure the impact of 9/11 on court opinions in which FISA evidence played a role. The results indicate that the first twenty three years of FISA's existence accounts for only 35.40 percent of the published federal opinions involving FISA. Interestingly, the remaining published opinions involving FISA were issued in the last nine years of

FISA's existence. In the years following 9/11, a period of time that accounts for 28 percent of FISA's lifespan, 72 percent of published opinions involving FISA appeared. The vast majority of FISA opinions, therefore, arose after 9/11.

Another point of interest involves which jurisdiction and which courts hosted FISA cases. The "courts" variable was included to determine the frequency of FISA cases within the reporting jurisdictions or courts. The researcher hypothesized there would be no significant majority in this variable. The results indicate; however, that a few jurisdictions have reported more FISA opinions than their sister courts. Of the published federal opinions since FISA's enactment in 1978, a few courts resulted in a higher frequency than others in respect to the "courts" variable. The U.S. Circuit Court of Appeals for the Ninth Circuit Court appears most frequently amongst the 112 cases, with thirteen opinions or 11.61 percent of all of the federal decisions. Of the trial courts that heard FISA cases, the U.S. District Court for the Southern District of New York appears most frequently with twelve opinions or nearly 11 percent of the total number of published FISA decisions. It is, perhaps, noteworthy to mention that the U.S. District Court for the District of Columbia also appeared frequently with nine decisions emanating from it, a total that represents 8 percent of the total decisions. The findings reveal that out of the total 112 opinions examined, 30.36 percent were heard by only three jurisdictions.

Further review of the FISA opinions indicate that twenty-two different FISA-related procedural benchmarks were presented to the courts for determination. Of the twenty-two processes, three stood out in frequency over the others. As might be

expected, appeals appeared most frequently. In fact, appeals represented nearly 35 percent of the procedural actions recorded. The next highest result is held by dispositive motions in the district courts, otherwise known as motions to dismiss. Motions to dismiss appeared seventeen times across all opinions in the study and resulted in 15.18 percent of all procedural benchmarks filed. Lastly, motions to suppress appeared fifteen times or 13.39 percent of the published opinions. The frequency of the top three issues heard before the court comprises 63.39 percent of all procedural processes in the published federal opinions since the enactment of FISA.

The results of the next variable inform the researcher what type of defendant was named in the government's prosecutions. The researcher theorized that there would be fewer individuals and more groups involved in the opinions. Individuals, indicated alone, comprised 55.36 percent or sixty-two of the published opinions. Entities (organizations, religious groups, corporations, and businesses) appeared twenty seven times or 24.11 percent of the opinions studied. Multiple individuals or groups of individuals, indicated together, reported a frequency of twenty-three or 20.54 percent of the opinions. Thus, individuals indicted alone occupy the most frequently appearing classification of defendants named in federal prosecutions in which FISA evidence is used.

Muslim Connection Results

The first variable to be analyzed that relates to the Islamic community is whether the parties had a Muslim connection. The dichotomous constraint identifies whether

there is a connection to the Islamic community. The researcher hypothesized a majority of the opinions would contain a connection to the Muslim community. The results indicated that forty-six of the 112 cases had a Muslim connection in the opinion and sixty-three cases did not. Three cases had a religious affiliation other than Muslim. Overall, the results indicated that since the enactment of FISA, 41.07 percent of the published federal opinions contained an Islamic connection. As expected, when the variables are combined the results indicate a majority of the cases involving Muslim connections were published after 9/11. More particularly, the results show that forty-one of the forty-six opinions with an Islamic tie occurred after 9/11. As previously demonstrated, seventy two of the 112 cases appear after the terrorist attacks on 9/11. Thus, 56.94 percent of the published federal opinions after 9/11 relate to the Islamic community. The number of opinions with a Muslim connection before 9/11 is five or 12.50 percent. The last result acquired from this cross tabulation of the two variables is the "other religious affiliations." All three of the opinions with a religious tie other than Islamic appear before 9/11 and none other than Islamic appear after 9/11. The researcher then ran frequency analyses on the number of instances Al Qaeda appeared in the opinions. Of the opinions reported, eighteen had a connection to Al Qaeda, or 16.07 percent of all FISA related published opinions. To fully understand this result, the researcher then conducted cross tabulations for the number of Muslim connections and Al Qaeda appearances. Of the forty-six total Muslim connections, seventeen of them also were related to Al Qaeda. In addition to this result, all of the seventeen Al Qaeda/Muslim connections appeared after 9/11.

To further determine the types of Muslim connections in the published opinions, the researcher tabulated the frequency of the types of Muslim defendants. The researcher originally hypothesized that lone individuals would make up the majority of Islamic connections. The results concluded that out of the forty-six Muslim connections, twenty-two were lone individuals or 47.83 percent. Entities such as businesses, religious organizations, or other groups appeared fifteen times in the results or 32.61 percent of the defendants with Muslim ties and the other nine Islamic connections were groups of individuals for 19.57 percent of the published opinions. In addition to the types of defendants with a Muslim connection, the researcher also gathered results of another cross tabulation of two variables, "Muslim connections" and "civil v. criminal." The results indicated that of the opinions with an Islamic connection, twenty-six of them were criminal and nineteen were civil. Thus, the results demonstrate a higher chance, 56.52 percent, for a Muslim connection to appear in a criminal prosecution rather than in civil litigation.

The final question considered the frequency of terror-related criminal charges associated with prosecutions involving a Muslim connection. The researcher theorized a majority of the criminal charges in opinions containing a Islamic connection would be terror-related. Of the forty-six published opinions with a Muslim connection, twenty-six were criminal prosecutions. Terror-related crimes evidenced a frequency of five or 4.46 percent of the total charges. The researcher then had to determine how many of the five terror-related crimes charged had a Muslim connection. Of the five, four had an Islamic connection and one was connected to the IRA. Thus, four terror related crimes

were charged in twenty -six criminal prosecutions containing a Muslim tie or 15.38 percent of the published opinions studied.

According to the results of the study, an individual charged in a case in which FISA was used has a 63.72 percent chance of being involved in a case after 9/11. Next, the party has a sixty three percent chance of being a defendant in a criminal prosecution in which FISA evidence was utilized. After 9/11, the defendant would have a 56.94 percent chance of being Muslim or being in association with the Islamic community. The defendant would most probably be a lone individual charged, 55.36 percent of the time, and the most probable type of crime the defendant would be charged with would be conspiracy related. Lastly, the defendant would most likely be appealing the conviction in the United States Court of Appeals in the Ninth Circuit and more likely than not the defendant's conviction of a conspiracy related crime would be affirmed.

Chapter 5. Conclusion

This thesis project began a journey for the researcher during which he hoped to determine whether after September 11, 2001, the Islamic community provides a target for government profiling aided in its profiling by the use of the Foreign Intelligence Surveillance Act (FISA). The original hypothesis theorized that the terrorist attacks of 9/11 resulted in amendments to FISA that now serve as a medium for the profiling of the Islamic community. A mixed-methods research approach consisting of quantitative and qualitative research confirmed the researcher's hypothesis that the Islamic community is being profiled by the use of FISA after 9/11. The researcher arrived at this conclusion by conducting quantitative research involving a content analysis of federal case law involving evidence gained through FISA surveillance. The researcher also employed qualitative research using a form of legal research that required him to identify and analyze law reviews pertaining to profiling, statutory enactments, including FISA and the USA PATRIOT Act, and case law reported court decisions that involved FISA. The combination of research methods resulted in the confirmation of the theory that the government's use of FISA has enabled its profiling of the Islamic community.

Al Qaeda admitted its responsibility for the terrorist attacks on 9/11 and the study shows that the use of FISA is significantly increased after the attacks. The radical and violent group is a Muslim based organization and the research shows the implications of the group attacking on 9/11 has given rise to profiling of the Muslim community as a whole by the use of FISA after the attacks. Nearly two-thirds of the FISA opinions have been issued in the decade since 9/11, as opposed to the remaining one-third delivered

between 1978 and 2001. This is largely due to a significant increase in the use of FISA surveillance since 9/11 resulting from the amendments to FISA in the PATRIOT Act.

To initially determine whether the United States government was profiling the Muslim society today, the researcher examined the history of profiling and stereotyping throughout the history of surveillance law. The process revealed a consistent pattern of government profiling aided by the use of surveillance techniques. Beginning as early as the bootleggers in the 1920's, the government evidenced a propensity for both profiling and using surveillance to monitor targeted members of the profiled segment of the population. The landmark case of *Olmstead v. United States* was the first time the United States Supreme Court sanctioned the use of electronic surveillance and authorized government monitoring of a particular group that was then the subject of profiling. Profiling by the government has continued since. Including the previously mentioned bootleggers from the 1920's, six major groups have served as known government profiling targets (as well as targets for government surveillance): the Japanese in the 1940's, alleged communists Americans in the 1950's and 1960's, civil rights movement members in the 1960's and 1970's, radical Christian groups in the 1980's, and Muslims since the first World Trade Center attacks in the 1990's. Common to each is the observation that after an attack or large scale change occurring on American soil, the government's interest in these groups is intensified resulting in heightened surveillance.

After 9/11, the government argued that the restrictions of many regulations, including FISA, were too stringent and curtailed its ability to provide adequate national

security. The government assured the American people the PATRIOT Act would increase the government's effectiveness, and, at least as the legislation concerned FISA, allow the necessary surveillance to protect the American people. As this study reveals, the use of FISA surveillance and evidence collection increased significantly and became a favored "weapon" in the government's arsenal against the Muslim enemy of the United States.

To fully understand the extent of the profiling occurring against the Islamic community much further research is needed. Using the researcher's content analysis as a starting point, research could be continued to include the civil litigation in which FISA surveillance and evidence was utilized. Examining the civil aspects of FISA would allow a researcher to determine whether the government's surveillance and evidence collection through FISA has been sanctioned in the civil system. The study revealed that defendants in criminal prosecutions enjoyed very little success against in criminal court, and it would be interesting to see how courts decide civil matters for return of documents and retributions for improper surveillance.

The American people should be aware of the profiling occurring against Muslim Americans today. The study depicts that throughout the history of United States surveillance, a significant number of groups and religions have been impacted. The problem goes far beyond that of one particular group. The government has proven itself incapable of ethically conducting surveillance on its own people without proper regulation or restrictions in place. There is a reason to look beyond the attacks of 9/11

and examine government profiling, not only of the Islamic community, but beyond these groups because there are considerable implications for other groups of citizens.

The researcher concludes that the only way to prevent further profiling of Muslims enabled by the use of FISA is to restore the statute to its original language as enacted in 1978. Giving the FISC the power to once again conduct a full review of FISA orders and determine the potential of a threat to national security is the only way to keep the government's use of FISA in check. In every other aspect of the law, a citizen has the right for a judge to fully review the evidence and determine if the government has shown adequate cause before action is taken against them. The researcher suggests to prevent further profiling the language of FISA be amended to its original mandate. As it is written, due to the PATRIOT Act, only a "significant purpose" of a FISA order must be for gathering foreign intelligence information. In the researcher's opinion, if there are reasons for a FISA order other than for gathering intelligence information, then there are alternative avenues for surveillance and investigations beyond FISA.

The researcher anticipates continuing his research on both FISA and its use as a tool to facilitate targeting Muslims, particularly American Muslims. It is important to increase awareness of the prevalence of Muslim profiling by American authorities. One avenue available to the researcher is to more broadly distribute his research findings. This can be accomplished in a number of ways, including the publication of his research and the presentation of his study's results in both academic and lay settings. Additionally, further research is warranted and might include conducting broader

qualitative studies that will consist of interviews with Muslims in general, but more particularly with American Muslims directly affected by FISA surveillance and profiling. Acquiring direct experiences from FISA and profiling victims would enhance the preliminary research accomplished through this thesis project. Further research inquiries should also include interviews of federal authorities, such as FBI agents, former FBI agents, Department of Justice employees, congressional representatives, congressional staff personnel, and other to learn more about the use of FISA, agencies' internal controls, circumvention of surveillance restrictions, and other research interests that may arise.

The research could also be furthered to better understand why the Islamic community became a profiling target. The researcher would like to examine the extent of radical Muslim sects. Studying the United States reaction to modern terrorism from Islamic groups like Al Qaeda and the Taliban may hold clues to how the profiling of all Muslims came to be. The researcher would like to compare and contrast American gangs to violent Muslim sects to try to understand how the government gauges foreign threats differently than domestic ones.

Due to the narrow scope and time frame of the undergraduate thesis process, the research had some limitations. The researcher was unable to interview anyone impacted or profiled by FISA. Similarly, law enforcement authorities who work with FISA on a routine basis were unwilling to provide inclusion in the project. In addition, for this project the researcher limited the scope of research to include only criminal

prosecutions. Further analyses that consider the civil implications of FISA are also needed.

The nation's founding fathers established a federal government whose purpose is largely to provide protection to its citizens and to protect the rights of those citizens as outlined in the Constitution, but it seems the two tasks conflict with each other and collide within the context of governmental surveillance. Citizens of the United States have an inherent trust in their leaders, and if the government demonstrates a pattern of profiling the Islamic community through surveillance laws, citizens will follow suit. This thought process has implications beyond the profiling and stereotyping of the Islamic people by the government as society has seen other instances in airports and local businesses of non-Muslim citizens profiling Muslims in the wake of 9/11. Some Americans feel as if members of the Muslim community are more likely to attempt to hurt them and their families and Muslim Americans are aware of these connotations. If a change is not made at the executive and legislative levels, perhaps beginning with revisiting more stringent FISA restrictions, then the tensions between the United States and the national Islamic community will only escalate. "Privacy is a basic right, protected by the laws and Constitution of the United States. While national security is an immensely important interest, the government should not sacrifice all else while trying to protect it."¹²⁷

¹²⁷ Forgang, *supra* note 3, at 266.

APPENDIX A: Code Book

CODE BOOK

A) Case ID

- Numbers 1-112 correspond to individual cases involving FISA. The cases are listed in reverse chronological order by court starting with the U.S.C.A. Each case has exactly one entry ID #. Thus, there are 112 cases in the study.

B) Courts

- U.S.C.A.:
 - 1st Cir. = (1)
 - 2nd Cir. = (2)
 - 4th Cir. = (4)
 - 6th Cir. = (6)
 - 7th Cir. = (7)
 - 8th Cir. = (8)
 - 9th Cir. = (9)
 - 10th Cir. = (10)
 - 11th Cir. = (11)
 - Fed. Cir. = (13)
 - District of Columbia = (15)
- U.S.D.C.:
 - IDs are a group of 3 numbers:
 - First number will be the US district Court number 1-11
 - Second number will be the section in each state
 - District = (0)
 - North = (1)
 - Central = (2)
 - Middle= (3)
 - South = (4)
 - East = (5)
 - West = (6)
 - The last number will be the assigned State number listed below
 - Example: U.S.D.C. D. Massachusetts: District 1, District section 0, State ID 1 (101)
 - Districts and States
 - 1st District
 - MA (1)

- 2nd District
 - NY (1)
 - CT (2)
- 3rd District
 - PA (1)
- 4th District
 - MD (1)
 - VA (2)
 - NC (3)
- 5th District
 - TX (1)
- 6th District
 - OH (1)
 - MI (2)
- 7th District
 - WI (1)
 - IL (2)
- 8th District
 - MN (1)
 - MO (2)
- 9th District
 - CA (1)
 - OR (2)
 - HI (3)
- 10th District
 - KS (1)
- 11th District
 - GA (1)
 - FL (2)
- The court section within each state is labeled as following:
 - District = (0)
 - North = (1)
 - Central = (2)
 - Middle= (3)
 - South = (4)
 - East = (5)
 - West = (6)

- District of Columbia = (16)
 - U.S. Court of Fed. Claims = (12)
 - U.S. Navy-Marine Corps Court = (14)
- C) Issue Before Court
 - (1) Declaratory Judgment
 - (2) Subpoena Appeal
 - (3) Appeal of the Trial Court's decision
 - (4) Motion to Dismiss
 - (5) Change of Venue
 - (6) Motion to Suppress
 - (7) Trial
 - (8) Motion for Summary Judgment and Motion to Dismiss
 - (9) Motion for Summary Judgment
 - (10) Discovery and Evidentiary Rulings
 - (11) M/PO
 - (12) M/D, M/S
 - (13) Motion for New Trial
 - (14) Motion for Declaratory Judgment
 - (15) Evidentiary Hearing
 - (16) Preliminary Injunction for return of Seized Property
 - (17) Motion to Amend
 - (18) Motion for Disclosure
 - (19) Motion for Pretrial Discovery
 - (20) Request for Information
 - (21) Motion to Disclose
 - (22) Motion to Compel
- D) Muslim Con.
 - (0) No Connection
 - (1) Muslim Connection
 - (2) IRA Connection
 - (3) Mormon Connection
- E) Date
 - a. The opinion date for each of the 112 cases.
- F) < or > 9/11/01
 - a. The following demonstrates whether or not the opinion issued was before or after 9/11/01
 - (0) Opinion issued before 9/11/01
 - (1) Opinion issued after 9/11/01

G) Civ or Crim

(1) Criminal Case

(2) Civil Case

H) Crim Charges (Criminal Charges)

(0) N/A

(1) Unknown

(2) Unauthorized Contact with Fed. Prisoner

(3) Evidence obtained should be suppressed

(4) Terrorism

(5) Conspiracy

(6) Export-control laws

(7) Acting as an agent to a foreign power

(8) Unlawfully obtaining citizenship

(9) Drugs

(10) M/S evidence from the ECPA

(11) M/Vacate

(12) Counterfeiting

(13) Loan sharking

(14) Incidental surveillance evidence

(15) Assault and battery

(16) Tax matters

(17) 5th and 6th amendments

(18) Discovery violations

(19) Perjury

(20) Legality of detention

(21) Espionage

(22) Directing structured bank transaction

(23) Intercepted material by FISA

(24) Contempt under FISA

(25) Failure to report contacts with a citizen of communist
nation

(26) Donations to organization in connection to terrorism

I) Crim Conv.

a. Criminal Convictions

(0) N/A

(1) Affirmed Convictions

(2) M/D and M/S denied

(3) Vacated and Remanded

- (4) Vacated and Granted M/S
- (5) Dismissed
- (6) Unknown
- (7) Reversed

J) Civ Claims (Civil Claim)

- (0) N/A
- (1) Unknown
- (2) FISA and Unconstitutional
- (3) Appeal
- (4) FOIA
- (5) Damages from being victimized
- (6) Torture Victim Protection Act
- (7) Failure to state a claim
- (8) Subject Matter Jurisdiction
- (9) FISA compliance
- (10) M/SJ warrantless wiretapping
- (11) Wrongful death
- (12)
- (13) Block pending investigation
- (14) Water rights
- (15) Conspiracy
- (16) Discrimination
- (17) Evidentiary motions
- (18) NSA letters
- (19) Unlawful arrest and imprisonment
- (20) Torts related to international and domestic law
- (21) Return of seized items

K) Civ. Verd. (Civil Verdict)

- (0) N/A
- (1) Unknown
- (2) Dismissed
- (3) Affirmed Judgment
- (4) Reversed
- (5) Vacated
- (6) Remanded
- (7) M/D granted
- (8) M/SJ granted
- (9) Inadmissible

- (10) Enjoined from issuing NSA letters
- (11) Court Stayed

L) Def.

a. Type of Defendants

- (1) Individual
- (2) Group (organization, religious group, corporation, business)
- (3) Individuals (Multiple individuals but not from a common group)

M) Al Qaeda

a. Al Qaeda Connection

- (1) None
- (2) Yes Al Qaeda Connection

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