SURVEILLANCE AND LAW ENFORCEMENT:
TOOLS IN THE FIGHT AGAINST TERROR IN A
COMPARATIVE STUDY OF THE UNITED STATES
AND PAKISTAN

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I. INTRODUCTION

In the aftermath of September 11, 2001 (9/11), nations around the world began adopting emergency measures that emphasized national security but infringed on the rights guaranteed to citizens through their respective domestic constitutions and international law.1 Pakistan and the United States were amongst the most active of those nations, as tenuous partners in the War on Terror.2 Since then, both countries have adopted methods that have not only violated the rights of their citizens, but have disrupted the delicate balance of power between their three branches of government. There are glaring lessons to be learned from the experience of both sides, evident in the manner Pakistan has dealt with homegrown and foreign terrorism for decades3 and the United States’ well-established judicial institutions that preserve civil liberties, that have been largely suspended during the War on Terror.4

Both nations must develop methods for investigating and punishing terrorists that accord with the traditional national and international laws concerning admissibility of evidence, judicial review over determinations of the executive branch, fair trial, and privacy.5 The importance of these

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3 Ahmed Rashid, Pakistan in the Grip of Chaos, BBC NEWS (Jan. 24, 2014), available at http://www.bbc.com/news/world-asia-25870662 (last visited Sep 27, 2014). Pakistani Taliban attacks on military personnel and civilians now include mass bombings of mosques, churches and bazaars. And in recent months the Taliban have become adept at targeted killings of politicians, bureaucrats and senior officials in the army and police, too, using suicide bombers, gunmen on motorbikes or mines laid in the road.

4 Kendall W. Harrison, The Evolving Judicial Response to the War on Terrorism, 75-DEC WIS. LAW. 14, (2002).

September 11, 2001, changed the face of America. The horrific events of that tragic day have challenged the country’s sense of security, its trust of those unlike us, and its faith in the future. But the long shadows of Sept. 11 stretch beyond any individual’s sense of personal well-being. They have placed America’s constitutional legacy under great strain as well.

5 Human Rights, Terrorism and Counter-Terrorism: FACT SHEET 32, OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS (July 7, 2008), available at http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf [hereinafter Fact Sheet 32]. Respect for human rights and the rule of law must be the bedrock of the global fight against terrorism. This requires the development of national counter-terrorism strategies that seek to prevent acts of terrorism, prosecute those responsible for such criminal acts, and promote and protect human rights and the
principles has been lost in the post-9/11 era, which is why this study will assert the need for governments to respect civil rights in their pursuit of security by using the criminal law enforcement model to deal with modern terrorism.

Specifically, this article will look to the various issues surrounding surveillance by critically examining and comparing Pakistan’s Investigation For Fair Trial Act of 2013 and the United States’ PATRIOT Act and Foreign Intelligence Surveillance Act (FISA). While FISA gave the U.S. judiciary its powers to grant warrants for wiretaps conducted by intelligence agencies, the PATRIOT Act altered wiretapping requirements and essentially limited the court’s ability to supervise surveillance conducted by government entities. Pakistan’s Fair Trial Act is modeled after these laws and has been subject to the same criticisms; namely that these expansive surveillance laws disregard the right of citizens through encroachment, allowing the judiciary to be involved in the surveillance process. This note will examine the history of wiretapping in the United States and Pakistan, and critically evaluate its recent changes to accommodate for the War on Terror.

rule of law. It implies measures to address the conditions conducive to the spread of terrorism, including the lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, and socio-economic marginalization; to foster the active participation and leadership of civil society; to condemn human rights violations, prohibit them in national law, promptly investigate and prosecute them, and prevent them . . .


10. Rebecca A. Copeland, War on Terrorism or War on Constitutional Rights? Blurring the Lines of Intelligence Gathering in Post-September 11 America, 35 Tex. Tech. L. Rev. 1, 3 (2004) (“Passage of the USA PATRIOT Act has amplified long-standing challenges by scholars to the constitutionality of the FISA.”).

II. AGE OF TERRORISM: WAR, CRIME, AND EMERGENCY RULES

A. Large Crime, Not Small War

For countries that have had a long history of dealing with terrorist groups, there are two traditional modes by which they deal with terrorism, "[a]s pre-9/11 books on terrorism customarily noted, nations have a choice between thinking of terrorist attacks as large crimes (on the model of organized crime or other criminal conspiracies) or as small wars (on the model of insurgent attacks)."\textsuperscript{12}

The designation of terrorism controls the level of rights suspects are afforded either under international humanitarian law on one track\textsuperscript{13} or the U.S. Constitution\textsuperscript{14} and international human rights conventions on another.\textsuperscript{15} There are many differences between these two sets of laws. For example, while humanitarian law allows military officials to kill enemy combatants,\textsuperscript{16} the constitutional and humanitarian rights laws emphasizes the "right to life" limiting the government's right to use lethal force.\textsuperscript{17}

\begin{thebibliography}{99}
\bibitem{15} \textit{See generally} Fact Sheet 32, \textit{supra} note 5.

\begin{quote}
If we can put a soldier out of action by capturing him, we should not wound him.
If we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil. The law of war permits armed forces to defeat the enemy but does not provide an unlimited license to kill.
\end{quote}

\end{thebibliography}
Further, human rights law requires criminals to be afforded certain protections in court,\textsuperscript{18} enemy combatants suspected of war crimes can be prosecuted by military commissions which "lack the protection afforded in the federal courts."\textsuperscript{19} As such, while there are rules that nations must follow in the midst of an armed conflict, they are quite distinct from the rules requisite during times of peace when criminal activity is occurring. This is especially true when one considers the applicability of domestic constitutional law as applied to the surveillance of terrorism suspects.

In the aftermath of the PATRIOT Act, the Bush administration attempted to argue that neither the Constitution nor humanitarian law applied to terrorism suspects.\textsuperscript{20} This was followed with arguments that the domestic U.S. courts were ill-equipped to handle sensitive terrorism cases, often involving suspects apprehended overseas.\textsuperscript{21} However, both the United States and Pakistan have developed an extensive history of common law jurisprudence protecting constitutional civil liberties during peacetimes to deal with criminal behavior.\textsuperscript{22}

This was true for the United States with acts of terrorism prior to 9/11. The Clinton administration saw several terrorist attacks on American interests, including the bombing of two U.S. Embassies in Africa and the Oklahoma City bombing on a federal building which left nearly 200 dead, including children.\textsuperscript{23} However, "under the Clinton administration, terrorist attacks were seen primarily as big crimes with a small war component. They were handled as a first matter by the Department of Justice (DOJ) and

\begin{itemize}
  \item \textsuperscript{18} \textit{Id.} at art. 9(1) ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."); see also \textit{id.} at art. 9(3) (Anyone suspected of a crime, "shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.").
  \item \textsuperscript{20} David Turns, \textit{The "War on Terror" Through British and International Humanitarian Law Eyes: Comparative Perspectives on Selected Legal Issues}, 10 N.Y. CITY L. REV. 435, 437 (2007) (citing 151 CONG. REC. S12657-58 (daily ed. Nov. 10, 2005)). (Senator Bingaman stated: The administration has gone to great lengths to avoid the legal restraints that normally would apply under our legal system. They have argued that the laws of war are not applicable because we are fighting a new type of enemy. They have argued the criminal laws are not applicable because we are fighting a war.)
  \item \textsuperscript{21} See \textit{id.} at 439.
  \item \textsuperscript{22} Scheppele, \textit{supra} note 12; see generally Mehran v. Federation of Pakistan, (1998) PLD (SC) 1445 (Pak.).
\end{itemize}
ordinary criminal courts, even when they pertained to attacks on U.S. interests overseas."24 After Al-Qaeda claimed responsibility for the attacks on the U.S. embassies, Clinton engaged in a war-like act by ordering the aerial bombing of several Al-Qaeda training facilities in 1998.25

However, the more substantive reaction from the President came through criminal prosecutions of suspects in civilian courts, where “four defendants—including one American citizen—were tried in the federal District Court for the Southern District of New York in the spring of 2001 for plotting and participating in the attacks.”26 In that case, “several months of evidence—including reports from FBI field officers, results of electronic monitoring, physical evidence obtained through searches in multiple countries, and confessions gathered in extensive interrogations abroad—resulted in convictions of all four defendants on all counts.”27

Rather than approaching terrorist acts as acts of war requiring military tribunals,

[It] appeared from the Clinton administration’s antiterrorism efforts that it believed the ordinary criminal justice system was an effective tool for ensuring that those who plotted against the United States and attempted to kill its citizens could be brought to justice on the basis of public evidence in normal criminal proceedings. And the results—guilty verdicts in all cases—seemed to bear that belief out.28

Further, despite deriding the judiciary’s ability to handle terrorism cases, the Bush administration successfully prosecuted 190 suspects in U.S. courts, according to President Obama.29

Pakistan has also successfully prosecuted terrorism cases in the past without the reliance of military commissions.30 The Anti-Terrorism Act was originally passed in 1997 as a means to set up a “parallel system of justice” that would be “unencumbered by the procedural niceties of the

27. Id.
28. Id.
regular court system.\textsuperscript{31} The Act criminalized a litany of acts, including, "murder, the malicious insult of the religious beliefs of any class, the use of derogatory remarks in respect of the holy personages, kidnapping and forms of robbery."\textsuperscript{32} However, the act allowed the Anti-Terrorism Court (ATC) to overlook constitutional protections for the accused with regards to evidentiary and procedural rules that would otherwise apply in civilian courts.\textsuperscript{33} The Supreme Court of Pakistan resoundingly overturned this part of the law in \textit{Mehmal v. Federation of Pakistan}, which concerned the terrorist bombing of a federal court building.\textsuperscript{34} Despite being the targets of terrorist groups, the judges on the Supreme Court held that the Anti-Terrorism Act could not weaken the rights of the accused in the ATCs, and that the rules of evidence established by civilian courts would have to be followed.\textsuperscript{35} There are considerably transparent problems with the ATCs, as is evidenced by their four percent conviction rate for terror suspects, which will be discussed in Part II of this study.\textsuperscript{36} Also, one cannot forget that the Pakistani military has led operations within the country that confront terrorists as combatants engaged in a civil war against the state.\textsuperscript{37} In a recent operation, the military reported killing 910 terrorists while losing eighty-two soldiers.\textsuperscript{38} Further, the Army Act was amended in 2007\textsuperscript{39} to allow military tribunals to have jurisdiction over civilians for prosecuting

\begin{itemize}
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Id. at 390 n.3.
\item \textsuperscript{33} See id. at 387–417.
\item \textsuperscript{35} Kennedy, \textit{supra} note 30.
\item \textsuperscript{37} See generally Qudssia Akhlaque, \textit{It’s ‘Operation Sunrise’ not ‘Silence’}, DAWN INInternet Edition (July 12, 2007), http://web.archive.org/web/20080304014535 (last visited Oct. 19, 2014) (one such operation ordered by General Pervez Musharraf in 2007 targeted a mosque housing extremists in one of Pakistan’s major cities, Lahore).
\end{itemize}
crimes including murder and libel, though its use has been limited in recent years. However, outside these limited cases the bulk of terrorist suspects are brought before the ATCs, which evidences Pakistan’s early response to terrorism as a criminal issue that must be handled with the same form used by civilian courts and the rules applied to any other crime.

B. Emergency Times: The Open Door to Imperial Presidency

In the aftermath of 9/11, “[u]nder the Bush administration, terrorist attacks have been seen within the framework of not just a small war, but of a world war.” As such, the rich jurisprudence established by civilian courts prosecuting terrorists was all but rejected, vesting power mainly in the executive branch. The Bush administration invoked Paul Schmitt’s ideal that a “state suspends the law in the exception on the basis of its right of self-preservation,” or rather, the leader of a country has the power to suspend its laws in order to save the country from ruin.

This invocation of emergency is what Kim Lane Scheppelle points to that allows executives to “gain great powers, ‘powers that were used to justify both the use of force abroad and restrictions on rights at home.’” She went on to explain that “each new threat, however slight, justified changing what had been the normal rules of procedure to cope with the new form of danger.” The same can be said for “national security” concerns, which Daniel Yergin wrote:

[W]hat characterizes the concept of national security . . . [is] [v]irtually every development in the world is perceived to be


41. Kennedy, supra note 30.

42. Scheppelle, supra note 12, at 1023.


45. Scheppelle, supra note 12, at 1024.

46. Id.
potentially crucial. An adverse turn of events anywhere endangers the United States. Problems in foreign relations are viewed as urgent and immediate threats. Thus, desirable foreign policy goals are translated into issues of national survival, and the range of threats becomes limitless. The doctrine is characterized by expansiveness, a tendency to push the subjective boundaries of security outward to more and more areas, to encompass more and more geography and more and more problems. It demands that the country assume a posture of military preparedness; the nation must be on permanent alert.  

As such, declarations of emergency or laws born out of an emergency situation allow for the executive branch to expand its powers citing to the amorphous “national security” without the traditional check from other branches of government. This has continued since the Cold War such that:

The “imperial presidency” has taken shape throughout the history of the United States, as Arthur M. Schlesinger, Jr. argued in his seminal work; however, the president’s invocation of national security after 9/11 “has meant that he has not needed to otherwise justify or explain his course of action,” which has certainly concentrated power to the president unlike before. As such, President Bush began the trend, which President Obama has carried forth, of avoiding judicial and congressional checks by “trying to bring the war on terrorism entirely within the executive branch and minimizing the influence of both Congress and the courts . . . .”

Authoritarianism has a far more developed history in Pakistan, where “in the 59 years since Pakistan became an independent state, the military has overthrown democratic governments three times . . . on each occasion (military leadership) chose to dismiss the government and hold fresh

48. Id.
49. Schepple, supra note 12, at 1022.
50. Id.
51. Id.
elections, instead of replacing the democratic system.”52 One of the first examples dates back to General Zia Ul Haq’s dictatorial regime, which passed the Eighth Amendment in 1985 that “vested sweeping authority in the presidency—which remained closely associated with the military—at the expense of the Prime Minister and Parliament,”53 creating a civilian martial law system of government.54

The most recent emergency was declared by General Pervez Musharraf, who dissolved Parliament and attempted to disband the judiciary by placing judges and their families under house arrest.55 Earlier in his rule, Musharraf politicized the use of the ATC in order to consolidate his power in the executive branch.56 The most glaring example was the ATC case against Nawaz Sharif, a politician who Musharraf removed from power through a coup.57 Sharif was sentenced to life in jail but his punishment was commuted to exile, which many perceived as a political move by the Musharraf administration to remove any challenge to their executive authority.58

After 9/11, Musharraf became a close ally with the Bush administration in the War on Terror, but often used his position as an ally to tighten his grip of control over the country.59 It is alleged that after forming the alliance with the United States, “the Musharraf regime had started the practice of secretly detaining people . . . . [some allege that] the missing persons were mostly political adversaries from Baluchistan,” rather than

52. See Aditya Bhave & Christopher Kingston, Military Coups and the Consequences of Durable De Facto Power: the Case of Pakistan, DEP’T ECON. U. CHI. & DEP’T ECON. AMHERST C. 2, 27 (2009).


55. See Ghias, supra note 53, at 985.

56. We Can Torture, Kill or Keep you for Years, HUMAN RIGHTS WATCH, 39 (July 2011), available at http://www.hrw.org/sites/default/files/reports/pakistan0711Weblnside.pdf (last visited Oct. 19, 2014) (“Scores of government opponents including lawyers remain in prison across the country today . . . . thousands have been released, but the fear of being re-arrested hangs over them as charges against them under the Anti-Terrorism Act remain on file.”).

57. Id.

58. See Kennedy, supra note 30, at 399–401 (the government’s case against the former prime minister was designed to bring criminal charges against Nawaz Sharif, which if successful would effectively end his political career, and to absolve Chief Executive Musharraf from any liability associated with staging the military coup of October 12).

59. See Kennedy, supra note 30, at 407–08.
Taliban or Al-Qaeda members. These Baloch adversaries were nationalists that threatened the unitary rule of Musharraf by declaring their desire for separation from the country. These demands were met with disappearances, extrajudicial murders, and torture, none of which were prosecuted due to the invocation of “national security” in the War on Terror. Asma Jahangir, a leading human rights attorney in Pakistan, stated that “General Musharraf wanted absolute power and that he would not tolerate any dissent and would continue to use the ‘terrorist card’ to keep the international community at bay.” The ability to disappear citizens and deny knowledge of their whereabouts is perhaps the clearest mark of an imperial executive branch that is not subject to constitutional limitations based largely by the “time of emergency” justification.

C. Emergency Times: Court-Cutting

The invocation of emergency situation doctrine allows for the executive branch to expand its power base beyond constitutional limits. This is especially detrimental to nations that champion civil liberties like the United States and Pakistan, which require separation of powers and an independent judicial branch. Post 9/11 national security laws have disregarded this practice, as the ACLU explained regarding the PATRIOT Act, it “continues an alarming trend known as court-stripping—removing authority from the judiciary—in time of crisis . . . . As it has done in times of past tragedy, the government responded by passing legislation that reduces or eliminates the process of judicial review and erodes our civil liberties.”

Schepple explains that “the avoidance of separation of powers constraints in the domestic war on terrorism has reached its height with the

60. See Ghias, supra note 53, at 985.
62. We Can Torture, Kill or Keep you for Years, supra note 56.
63. Amended Army Act Proves Pakistan is Under Martial Law, supra note 40.
64. See John T. Philipsborn, Unsteadily To Center Stage: An Overview of Pakistan’s Justice System, 85 JUDICATURE 228, 230 (2002) (much like the United States, “Pakistan has stayed with a constitutional basis for government, providing for executive, legislative, and judicial branches; the separation of powers; and the protection of personal rights under the law.”).
claimed presidential power to label suspect individuals as enemy combatants who are immune from legal process altogether. The purely executive designation process was deemed incomplete and overly abusive by the Supreme Court in *Hamdan* and other Guantanamo Bay cases. While cases such as *Hamdan* demonstrate that the Court has voiced its dissent to the stripping of their power post 9/11, judges

> [H]ave since become quite deferential to the Bush administration's rationales for the declarations of exception to states of normal legality. At times of crisis, the system of separation of powers and the system for protection of human rights seem to collapse into the one constitutional clause that gives the commander in chief his powers.

Despite their deference, Richard Weich argues that post-9/11 programs, created through the PATRIOT Act, effectively silence judicial overview and "reflect a distrust of the judiciary as an independent safeguard against abuse of executive authority." The two phenomena described above, the ever-expanding imperial presidency and the never-ending justification of national security, were achieved through the passage of the PATRIOT Act, which "significantly alters the court system's supervision of the executive in its investigation of routine criminal matters unconnected to terrorism." As more and more issues are categorized under national security, the president's power has grown significantly under the Bush and Obama administrations, at the cost of the court's power. Emmanuel Gross rejects such notions of over-empowerment by arguing that there is a heightened need for judicial review when the government's actions concern national security, "if only because of the fear that such actions might infringe on an individual's right to privacy based merely on an assertion of national security."

While U.S. judges have remained silent on certain issues categorized as national security, they did not create a "Doctrine of Necessity" as the

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70. See generally USA PATRIOT Act, *supra* note 7.
Pakistan Supreme Court did in order to legitimize illegal actions by the executive branch. In three landmark cases, the Pakistan Court applied the Doctrine of Necessity, which resembles the “emergency” arguments made by the Bush and Obama administrations to expand the imperial or unitary presidency. This principle simply asserts, “that which is illegal, necessity can make legal” and has been used to justify unconstitutional coups by military dictators who either manipulated or silenced members of the judiciary. However, this doctrine has been all but abandoned by the current Supreme Court bench, which is inhabited by individuals that were part of the 2008 Lawyers Movement. This Movement started after Musharraf declared emergency in 2007 and attempted to have all judges sworn in with a new oath that would recognize the legality of his illegal dictatorship. This act was far more of an offensive attack by the executive against the judiciary than the court-stripping provisions of the PATRIOT Act. Yet, the Chief Justice stood firm and refused to take the oath, which instigated Musharraf to remove him and place him on house arrest. This triggered the Lawyers Revolution to mobilize and eventually bring down the dictatorial regime through non-violent legal means. Since then, the Supreme Court has pressed hard against the executive branch and the military on issues including disappearances of persons during the War on Terror. Unfortunately, despite the Court taking notice on disappearances and torture cases, little progress has been made to make Army officials legally accountable for their actions, as they have long-enjoyed immunity. Even still, no one can deny that the institution has attempted to carve out a

73. Id.
74. Id.
75. Id.
76. See Ghias, supra note 53, at 985.
78. See Ghias, supra note 53, at 985.
space for its active participation even in the era of terrorism, where judicial bodies have been less respected and relied upon.

One of the leaders of the Lawyer’s Revolution, Aitizaz Ahsan, rightly stated that it is in times of crisis that the judiciary should be relied upon more frequently:

[T]he existence of an independent and functioning judiciary is quite crucial to the prosecution of this form of war, which President Bush dubbed as a ‘War on Terror’. The implication is evident. Without an independent judiciary, a contestant cannot win this form of war. I praise the judicial system in the USA. It is fiercely independent, and its Judiciary has challenged its Executive over Guantanamo Bay and over detention without trial. It is simple. An independent judicial system has to be provided in this theater of war. It is the people in that area that matter. 81

D. Individual Rights Under Attack

The court should act during times of crisis to maintain the constitutionally mandated balance of powers between branches, as it serves to protect civilians from illegal acts by the government in pursuit of security. 82 The revocation of civil rights in response to a security crisis is not a new phenomenon for the United States as the ACLU explains, “[t]hroughout U.S. history ‘national security’ has often been used as a pretext for massive violations of individual right[s].”83 The ACLU went on to explain that while the nation geared up for the fight against terrorism after 9/11, the government launched “a serious civil liberties crisis.”84 Similarly another national government organization has stated that the war on terror “could become a war on all American citizens” due to


82. See Jacob R. Lilly, National Security at What Price?: A Look Into Civil Liberty Concerns in the Information Age Under the USA PATRIOT Act of 2001 and a Proposed Constitutional Test for Future Legislation, 12 CORNELL J.L. & PUB. POL’Y 447, 465 (2003) (“[T]he judicial branch cannot abandon its oversight duties in the midst of ever-changing technology and threats to national security but must develop constitutional tests that can effectively balance the competing interests of national security and individual rights.”).


84. Id.
overpowered presidents that disregard "meaningful judicial review and respect due individual rights and liberties."\textsuperscript{85}

While specific rights regarding citizens' right to privacy and the prohibition on unwarranted or unreasonable searches and seizures will be discussed in the following section, it is worthwhile to examine the practical need for preserving rights in response to terrorism. As the United States has increasingly retracted many civil liberties in an effort to deal with terrorism, "many of America’s allies have seen 9/11 not as a moment when the rule of law should be suspended, but precisely a moment when the rule of law needs to be strengthened."\textsuperscript{86} This coincides with the Chief Justice of the Supreme Court of Pakistan, who argued that "in any war, the most effective weapon is a population with enforceable rights."\textsuperscript{87} By providing fair trials and checking the excesses of executive power, the judiciary serves an invaluable function as nations develop methods to deal with terrorism.

Disappearing, kidnapping, torturing, rendering, and killing individuals are all activities which terrorists have engaged in, but nations have increasingly used the same illegal methods to battle terrorism. As such, if legal rights are disregarded, what ideological difference or advantage could the American or Pakistani government offer over terrorist groups?

Maria Vogel Short explains that laws like the PATRIOT Act "tip the scales against civil liberties, effectively playing into the hands of terrorists bent on derailing democratic systems."\textsuperscript{88} She went on to quote Lawrence Lustberg, President of the Association of Criminal Defense Lawyers of New Jersey, who aptly stated, "there are general tests of reasonableness or balancing tests for wiretaps. When that balancing act is changed, terrorism has won."\textsuperscript{89} Gross goes further to state that laws like the PATRIOT Act which pose dangers to democracy also limit the ability of the public to be unified in its fight against terror, leading to "fear and anxiety being voiced."\textsuperscript{90} He states that, "[t]he terrorist attack against the United States on September 11, 2001 threatened the freedoms of the nation in a concrete manner. The United States must be careful to ensure that its anti-terrorist legislation will not threaten these freedoms even more."\textsuperscript{91} As such, a commitment to the civil liberties of citizens and respect for the active

\begin{thebibliography}{9}
\bibitem{85} See Schultz, \textit{supra} note 1, at 206 n.77.
\bibitem{86} Scheppele, \textit{supra} note 12, at 1004.
\bibitem{87} Ahsan, \textit{supra} note 81.
\bibitem{88} Gross, \textit{supra} at note 19, n.155.
\bibitem{89} \textit{Id.} at 14.
\bibitem{90} \textit{Id.} at 3.
\bibitem{91} \textit{Id.} at 14.
\end{thebibliography}
involvement of the judiciary in protecting those liberties are key changes that need to take place if Pakistan and the United States wish to confront and eradicate the spread of terrorism.  

III. USA SURVEILLANCE

A. Individual Rights Regarding Surveillance

Surveillance by executive agencies has been limited traditionally by the Supreme Court in its analysis of the Fourth Amendment, which prohibits "unreasonable searches and seizures." In various decisions, the Supreme Court determined that even though the Constitution did not explicitly guarantee a citizen the right of privacy, the conjunctive effect of many of the amendments in the Bill of Rights creates a zone of privacy free from government intrusion. While wiretap surveillance was not covered under the Fourth Amendment analysis at first, the Court in Katz v. United States held that when the privacy a person justifiably relies upon was invaded when wiretapped, wiretapping constitutes a search and seizure within the meaning of the Fourth Amendment. In United States v. United States District Court (Keith), "the Court concluded that the warrant clause of the Fourth Amendment applied to investigations of domestic security threats."

B. Judicial Supervision of Surveillance: Checks and Balances

While the Fourth Amendment protects individual citizens, it also plays into the system of checks and balances by empowering the judiciary to

92. See generally Fact Sheet 32, supra note 5.

93. See U.S. CONST. amend. IV.

94. Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (The Court stated: Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment . . . ).


supervise searches proposed by the executive branch as explained by the Court in *Katz*:

Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks.97

However, in all the cases described above, “the court explicitly declined to address whether electronic surveillance of foreign governments or their agents also required a prior warrant.”98 In fact, Justice Byron wrote in his concurrence for *Katz* that, “[w]e should not require the warrant procedure and the magistrate’s judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.”99

C. *FISA Creation*

In the absence of rules governing wiretapping of foreign nationals by national security agencies and the Church Committee discoveries,100 Congress passed the Foreign Intelligence Surveillance Act (FISA), which regulated the CIA and FBI’s surveillance activity domestically.101 The Act formally granted powers to these intelligence organizations and created a “secure framework by which the Executive Branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this Nation’s commitment to privacy and individual rights.”102 Several powers were granted to the executive branch including the right to conduct secret electronic surveillance “under a standard less strict than [the]
probable cause standard of criminal investigation . . . without providing the notice required in a criminal investigation."\textsuperscript{103}

These executive powers were checked and balanced with a judicial role in the wiretap process through the creation of the Foreign Intelligence Surveillance Court (FISC).\textsuperscript{104} This Court is composed of eleven federal judges, who can grant warrants for wiretap surveillance on "agents of a foreign power."\textsuperscript{105} Daniel Saperstein explains:

"[U]nder the specified classifications of FISA . . . agents of a foreign power, are subject to wiretapping probes if the guidelines for the issuance of an order are properly followed. FISA established that the evidentiary standard of probable cause is necessary to warrant labeling a target of electronic surveillance a foreign power or agent of a foreign power, and to determine if the facilities or places kept under surveillance are being or are about to be used by a foreign power or agent of a foreign power."\textsuperscript{106}

\section*{D. PATRIOT Act Effects on Wiretapping}

Before 9/11, FISC established a wall between the FBI and the Criminal Division of the U.S. Department of Justice (DOJ), inhibiting the FBI and other intelligence agencies such as the CIA and the National Security Agency (NSA) from sharing intelligence information with criminal investigators.\textsuperscript{107} This wall was constructed based on the distinction between intelligence gathering and law enforcement, because "[d]omestic law enforcement is a policy area that must respect the constitutional protections and due process rights of those suspected of committing crimes . . . . However, foreign intelligence gathering is generally exempt from a rigid application of these protections."\textsuperscript{108} Therefore, the wall was in place to ensure that evidence obtained through surveillance granted by the FISC

\begin{thebibliography}{9}
\item Cusick, supra note 98, at 58.
\item William Michael, A Window on Terrorism: The Foreign Intelligence Surveillance Act, 58 NOV BENCH & B. MINN. 23, 24 (2011).
\item Id. (emphasis added).
\item Id. at 1960.
\item Schultz, supra note 1, at 209–10.
\end{thebibliography}
would be used purely for intelligence and not for criminal investigatory purposes.  

Yet, in the aftermath of 9/11, "[t]he war on terrorism breached a wall traditionally distinguishing foreign policy, national security, and intelligence gathering from domestic law enforcement." The PATRIOT Act removes the distinction between monitoring for investigative purposes and monitoring for the purpose of gathering foreign intelligence. This expands the power of intelligence agencies to share information for the dual purpose of intelligence collection and criminal investigation, and allows the CIA to violate the Fourth Amendment rights of U.S. citizens. 

Further, the Act changed the standard for validating a search. 

Previously, in order to receive a warrant from the FISC, the government had to prove that its only purpose for wiretapping was for intelligence-gathering. The PATRIOT Act changed this from an "only purpose" to a "significant purpose" standard, thus greatly expanding the scope of situations for which intelligence agencies could be granted a warrant, even if their intention was a criminal investigation rather than intelligence gathering. As the Daily Record explains,

[T]he result is that: Under the new law only a 'significant purpose,' as opposed to 'the purpose' of the investigation is needed to sidestep the warrant requirement . . . . This fundamental shift poses a serious threat to our constitutionally

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110. Schultz, supra note 1, at 210.
112. USA PATRIOT Act, supra note 7, at § 504 (creating 50 U.S.C. §§ 1806(k)(1), 1825(k)(1)) (the USA PATRIOT Act provided that, with respect to both physical searches and electronic surveillance, federal officers executing a FISA warrant "may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against"); see also Logana, supra note 109.
114. USA PATRIOT Act, supra note 7.
116. Id. at 63–64.
protected privacy rights and alters the checks and balances critical to our governmental structure.\textsuperscript{117}

E. Attacks on Wiretap Standards for Terrorism Suspects

As the executive branch has expanded its list of exclusive powers under the justification that greater powers are needed to deal with the War on Terror, many have attempted to attack the FISA courts and the warrant requirements all together.\textsuperscript{118} John Yoo, former Bush administration legal counsel, argued that intelligence agencies need to move quickly to stop terrorist plots,\textsuperscript{119} and "bemoaned the government’s high burden to establish the rough equivalent of probable cause for the criminal justice system."\textsuperscript{120}

Other members of the intelligence community, including the Director of National Intelligence, Michael McConnell, have also attacked the need for probable cause under FISA. He has stated in a House Judiciary Committee testimony that proving probable cause for warrants costs "substantial expert resources toward preparing applications ... [diverting them] from the job of analyzing collection results and finding new leads, to writing justifications that would demonstrate their targeting selections would satisfy the statute, creating an 'intolerable situation.'"\textsuperscript{121} This view is echoed by Professor Emanuel Gross who stated that the nature of international terrorism is such that it makes it "difficult to obtain the information necessary to meet the strict standard of probable cause,"\textsuperscript{122} and that "[t]errorism involves a network that covers the world, and it is not always possible to point to the specific person who intends to commit a specific act."\textsuperscript{123} While Gross suggests that this standard should be abandoned to deal with terrorism, perhaps allowing for warrantless surveillance of terrorism suspects, Kelly Cusick comes to a different conclusion based on the same facts. She asserts that "terrorist group[s]
cautious, close-knit, and never purchase large amounts of illegal material," which renders "wiretapping and other law enforcement techniques" ineffective as preventative mechanisms.124

F. Warrantless Surveillance

Rather than accepting critiques about the constitutionality of expanded surveillance, the Bush administration sought greater unfettered secrecy in its surveillance capabilities. In 2005, the New York Times discovered that the Bush administration had authorized the NSA to conduct warrantless wiretaps of American citizens, sidestepping the FISA courts all together.125 Alberto Gonzalez explained that warrantless wiretaps were permitted under the Authorization for the Use of Military Force Act (AUMF) whenever intelligence agencies determined that one party to a communication was outside the United States and there was "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda."126

The program was criticized because it circumvented the FISC and was seen as an attack on the power of the judiciary in supervising the searches conducted by intelligence agencies.127 Civil liberties advocates also rebuked the "reasonable basis" standard because it offered far less protection from illegal government intrusion than the previously established "probable cause" standard.128

Though Congressional members from across the political spectrum raised all of these critiques,129 the NSA program was officially made permanent through the passage of the Protect America Act of 2007

124. Cusick, supra note 98, at 83.


127. Risen and Lichtblau, supra note 125.


This Act allowed the NSA to conduct electronic surveillance without first seeking permission from the FISC. The PAA did, however, create a system of internal checks for the NSA to follow before engaging in warrantless surveillance, and further required the Agency to report any warrantless surveillance seventy-two hours after conducting it.

G. FISC Rubber Stamp

Prior to the passage of the PAA, the FISA court itself gave permission to the NSA to conduct its program of surveillance, so long as they maintained the probable cause standard, proving that the target of surveillance is communicating with an agent of Al Qaeda or "affiliated groups." While the court took limited steps in reigning in the NSA, FISC has been critiqued in the past for failing to hold intelligence agencies, and thereby the president, to a high standard when reviewing warrant applications. Ronald Weich explains that "[m]any provisions of the USA-PATRIOT Act limit judicial review of law enforcement activities altogether, or create the illusion of judicial review while transforming judges into mere rubber stamps." According to the Electronic Privacy Information Center, since its establishment in 1979, the FISC has only rejected eleven warrant applications, while granting 32,000 warrants. Some have "cited the lopsided statistics of wiretapping approvals by the FISC as proof that FISA did not hinder intelligence gathering efforts."


131. Risen and Lichtblau, supra note 125.


134. See generally id.

135. See Weich, supra note 69, at 5.


137. Saperstein, supra note 105.
H. Surveillance and Privacy in the Digital Age

For the most part, American jurisprudence and legislation concerning privacy relates to historical concerns about the sanctity of the home, however, in the age of information, “the government can enter homes and businesses through a fiber optic cable and gain access to more persons, houses, papers and effects than George III could have ever imagined, even in his wildest dreams.”\(^{138}\) As legal civil protections have failed to keep pace with the proliferation of technology,\(^{139}\) it was disclosed by Edward Snowden and Glenn Greenwald that U.S. executive agencies have engaged in massive surveillance on millions of people around the world.\(^{140}\) This included both telephone and internet communications.\(^{141}\) Along with thirty-five world leaders,\(^{142}\) the NSA has monitored communications from 193 countries including, and especially, Pakistan.\(^{143}\)

The legal groundwork for one of the surveillance programs called PRISM, was laid with the passage of the aforementioned PAA.\(^{144}\) The Obama administration further qualified the PRISM program under Article 215 of the PATRIOT Act, which allows for the collection of any information “relevant to an authorized investigation.”\(^{145}\) However, the program has been criticized “that billions of records cannot possibly be

\(^{138}\) David F. Kelley, *Taking Terabytes Out of the Constitution: Can We Fight Terrorism without Big Brother?*, 40 SPG VT. B.J. 16 (Spring 2014).

\(^{139}\) Chris J. Chasind, *The Revolution will be Tweeted, but the Tweets will be Subpoenaed: Reimagining Fourth Amendment Privacy to Protect Associational Anonymity*, 2014 U. ILL. J.L. TECH. & POL’Y 1, 4 (Spring 2014) (“Traditional constitutional and statutory protections for electronic information have not kept pace with the ever-increasing role of technology in modern life.”).


\(^{144}\) See Lee, supra note 130.

\(^{145}\) Id.
relevant when a negligible portion of those records are actually linked to terrorist activity.”

It was not just executive agencies engaged in this type of bulk surveillance, but the FISC also played a role by ordering Internet and telephone providers to supply the government with requested information. These revelations should provide a cautionary tale for the creation of legislation like the PATRIOT Act, which renders useless the longstanding and institutional limits previously placed upon governmental intrusion of private information.

IV. PAKISTAN SURVEILLANCE

A. Individual Rights

Pakistan has experienced several periods of extrajudicial rule by the military, but its Constitution has set out several civil liberties that have been upheld by the judiciary and should be fully understood when discussing the issue of surveillance. Most importantly, Article 14 of the Constitution protects the inviolability of dignity of man, stating “the dignity of man and, subject to law, the privacy of home shall be inviolable.” Elaborating on these rights, Article 10A guarantees the right to a fair trial, which balances the right to privacy with the state’s duty to investigate criminal matters. Additionally, Article 19 guarantees the right to information: “[e]very citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law.”

The right to privacy was supported by the Pakistani Supreme Court in its decision on the Hasba Bill, which was a provincial law that created an office “with special powers to implement Islamic laws” in one of the nation’s provinces. The Court unanimously rejected the bill, stating that

148. PAKISTAN CONST. art. 2, ch. 1. IX.
149. See generally id.
150. Id. at art. 10(a).
151. Id. at art. 19.
“it is observed that private life, personal thoughts, and the individual beliefs of citizens cannot be allowed to be interfered with.”

B. Evidentiary Rules

More specifically, the nation’s evidentiary rules and rules for criminal procedure eschew limitations on the government when it is conducting searches or surveillance of a private citizen. Under the Qanun-E-Shahadat (Rules of Evidence) Order of 1984, the question of relevance is a legal one rather than a logical one, unlike the United States’ Rules of Evidence. As such, material that would be deemed “inadmissible” in the United States could be deemed altogether irrelevant in Pakistan for the same underlying reason, being illegally obtained. The Pakistani Rules of Evidence grant expansive protections to the citizen including Sections 38 and 39, which state that a confession made to a police officer or in police custody “cannot be proven” or rather is irrelevant. Further, a confession made under a promise of secrecy or “in consequence of a deception practiced on the accused purpose for obtaining it” will be rendered irrelevant. The evidence illegally obtained by police in the aforementioned situations will be set aside, however, “rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court . . . [that] if the rejected evidence had been received, it ought not to have varied the decision.” This is similar to the provisions of the fruit of the poisonous tree doctrine in the United States, which prohibits the government from using evidence procured illegally in a criminal case against the individual, but will allow other evidence not tainted by the illegality of the search or seizure to be submitted in the same case.

153. Id.
154. See generally PAK. CODE CRIM. PRO. § 47.
156. Id.
158. Id. at § 42.
159. Id. at § 162.
The Rules of Criminal Procedure also set out rules for searches conducted by police, when done so with a warrant.\textsuperscript{161} While the warrant requirement is not enumerated in Pakistan’s Constitution, as it is in the U.S. Constitution, the Code of Criminal Procedure dates back to 1898 and provides detailed procedures for arrest and search warrants.\textsuperscript{162} Article 94 permits the Court or any officer in charge of a police station to produce a summons or written order to a citizen who is in possession of any document “necessary or desirable for the purposes of any investigation, inquiry or trial.”\textsuperscript{163} This is a strikingly different standard from the U.S. system where only the Court has the permission to allow a search. However, the summons or written order described in Article 94 has less authority than a search warrant, which is covered separately under Article 96.\textsuperscript{164} Article 96 states that if the Court “has reason to believe that the person to whom a summons or order has been or might be addressed will not or would not produce the document or thing as required” they may issue a search warrant.\textsuperscript{165} This power is vested purely in the courts, and they can issue warrants that have temporal and geographical limitations which police must respect so as to ensure a minimum intrusion into the privacy of citizens.\textsuperscript{166} There is a further check placed on police which limits them to the four corners of the warrant because the searches under Article 96 must be made in the presence of “two or more respectable inhabitants of the locality in which the place to be searched is situated.”\textsuperscript{167} The use of witnesses is a method to safeguard individual liberties and hold the police accountable, mirroring the justification for the transparency requirements for arrest warrants in the United States.\textsuperscript{168}

\textsuperscript{161} See Generally FED. R. CRIM. P. 41.

\textsuperscript{162} See PAK. CODE CRIM. PROC., 1898 amended by The Political Parties (Amendment) Act, No. 2 of 1997 PLD (Statutes) 94.

\textsuperscript{163} Id.

\textsuperscript{164} Id. at art. 96.

\textsuperscript{165} Id.

\textsuperscript{166} See PAK. CODE CRIM. PROC. § 94.

\textsuperscript{167} Id. Search to be made in presence of witness. (1) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do.

\textsuperscript{168} See generally PAK. CODE CRIM. PROC.
C. Extrajudicial Surveillance by Intelligence Agencies

These rules have traditionally applied to police but are not operable on the intelligence agencies, which have a far greater involvement in terrorist investigations. It is suspected that intelligence agencies like the Inter-Services Intelligence (ISI) have conducted wire-tapping and other forms of modern surveillance without any rules, guidelines, or limitations by the judiciary for decades. As Zahid Hussain explains, “security agencies are tempted to resort to extrajudicial measures in the absence of the rule of law and judicial oversight.” As such, not only have citizens been monitored, but “thousands of people have been disappeared in the past years, presumably taken away by intelligence and security agencies.” This was the case with the Adiala 11, where intelligence agents disappeared eleven terror suspects after they had been acquitted by the Anti-Terrorism Courts for their involvement of a bombing on an ISI bus. The suspects were released due to a lack of admissible evidence. Along with allegations of disappearing individuals, the ISI and Intelligence Bureau, (IB), have been accused of wiretapping high-ranking politicians, judges, and civil servants in order to blackmail them or attempt to ruin their careers. As long as security agencies can engage in such illegal operations without judicial check, the rights of information, dignity, and privacy cannot be considered to be functioning parts of the Pakistani Constitution.

D. Requirement for New Surveillance Legislation

Along with the problem of illegal activities by security agencies, there is a recognizable problem with the acquittal rate of terrorist suspects. Some estimate that as low as four percent of terrorism cases tried by

170. Id. at ¶ 7.
171. Id. at ¶ 8.
172. Id.
civilian courts result in guilty verdicts. The reasons for the lack of convictions vary from the lack of witness protection to judges’ fears of retaliation by the terror groups if they attempt to enforce the law against their members. However, one of the causes of the acquittal rates deals with the admissibility and collection of electronic evidence through surveillance, which was the impetus of the creation of the Fair Trial Act of 2012.

While the Rules of Evidence provide for the Court to allow admission of evidence procured through “modern devices or techniques,” there were no laws regulating modern surveillance. The Fair Trial Act’s preamble explains that

[E]xisting laws neither comprehensively provide for nor specifically regulate advance[d] and modern investigative techniques such as to cover surveillance and human intelligence, property interference, wire-tapping and communication interception are used extensively in other jurisdictions to prevent the offences and as an indispensable aid to the law enforcement and administration of justice.

As such, some have claimed that the “Fair Trial bill is not only important for prosecuting terrorists, but also for stopping extrajudicial practices. The proposed legislation seeks to make investigation more transparent and security and intelligence agencies accountable to the courts.”

Abdul Ramoof, a prosecutor in Karachi’s ATC, asserted that data from electronic surveillance of terrorist suspects was “essential in prosecution and curbing the menace of terrorism.”

E. Fair Trial Act 2013

The positive developments brought forth by the Act include security agents and police referring their request to conduct surveillance to a leading officer in their agency, who must then seek permission from the Interior

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177. Id.
178. See id.
179. See generally Fair Trial Act, supra note 6, at Preamble.
180. Qanun-E-Shahdat Order, supra note 157, at 69 (“In such cases as the Court may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques.”).
181. Fair Trial Act, supra note 6, at Preamble.
182. Hussain, supra note 170.
183. Imtiaz, supra note 11.
Ministry, and the Court. Further, the application to the Court by the intelligence officer must be accompanied by:

[A] signed statement of authorized officer that the warrant shall be used only and exclusively for preventing or lawfully investigating a scheduled offense . . . and the same shall not be misused in any manner, nor the approval of the warrant shall be abused to interfere or intervene in the privacy of any person.

If the judge finds there is reason to believe that the intelligence agent is misusing the warrant, they can order direct departmental proceedings for wrongful warrant applications by its officers.

When granting a warrant, the judge must ensure that “the issuance of warrant shall not unduly interfere in the privacy of any person or property.” The judge can refuse to grant a warrant if “he has reasons to believe that the warrant is being procured with mala fide intention,” or if the warrant request is “based on insufficient evidence or has resulted in an undue and inappropriate interference in the privacy of any person.” The warrant can be issued for no longer than sixty days, however, the intelligence agent can request a reissuance of another six months if they can show good cause. Once the intelligence agent has been granted the warrant, they are permitted to contact any service provider of internet or telephone services, who must permit the agent to tap certain lines. If the service provider does not comply, they can be charged up to ten million rupees in fines, but if they do comply, they are still immune from any form of criminal prosecution.

If incriminating information is found through the surveillance, the Fair Trial Act allows for the admission of electronic


185. Fair Trial Act, supra note 6, at Ch.2(8)(c)(i).
186. Id. at Ch.3(15).
187. Id. at Ch.3(10)(2)(b).
188. Id. at Ch.3(11)(e).
189. Id. at Ch.3(14).
190. Fair Trial Act, supra note 6, at Ch.4(17)(1).
191. Id. at Ch.4(20).
data, audio, and video collected as proper evidence in the criminal case against the accused.192

Along with formalizing and institutionalizing the use of electronic surveillance for terrorism cases, the Fair Trial Act also empowers the police to collect said information on their own.193 Previously, the police would have had to request intelligence agencies like the ISI for electronic surveillance information,194 but the current Act allows them to conduct electronic monitoring on their own.195 Unlike their counterparts in the United States, where police have traditionally conducted domestic surveillance at the exclusion of agencies like the CIA, Pakistan's police have lacked experience in electronic surveillance and evidence collection, as is demonstrated by their intelligence agents inability to provide admissible evidence to the courts for prosecution.196 While the Fair Trial Act allows intelligence agencies to monitor citizens inside and outside the nation,197 which is something the U.S. FISA courts tried to prohibit by erecting the wall between criminal investigation and intelligence gathering, the law empowers police to properly investigate terrorism with evidence that can be admissible to the Court.198

F. Critiques of Fair Trial Act

While the law aims "to prevent the law enforcement and intelligence agencies from using their powers arbitrarily . . . to regulate the said powers and provide for their permissible and fair uses in accordance with law and under proper executive and judicial oversight,"199 critics argue that several provisions of the bill are unacceptable. First, under an early version of the bill, a high-ranking intelligence officer could bypass a judge and permit surveillance under complete secrecy for up to seven days in certain

192. See id. at Ch.5(23).
193. See Imtiaz, supra note 11.
194. Id. at 1.
195. Fair Trial Act, supra note 6, at Ch.1(3)(a) (applicant means "any law enforcement agency including the Police, Federal Investigation Agency, Anti Narcotis Task Force, Pakistan Customs, Pakistan Maritime Security Agency, Fronties Constabulary").
196. See id. at Ch.5(23).
197. Id. at Preamble (2)(1)(c) ("The provisions of this Act shall apply to all citizens of Pakistan within or outside Pakistan . . . . It shall also apply to all transactions or communications originated or concluding within Pakistan or originated or concluded outside Pakistan by any person.").
198. Id. at Ch. 3(22)(1).
199. Fair Trial Act, supra note 6, at Preamble.
circumstances. The provision was reserved for the "ticking time bomb" situations where security agents would need to act immediately, however, Barrister Khan argued that the interim warrant would be too easy to misuse. Critiques of this provision were voiced by the political opposition parties during the Senate's debate, and it was eventually removed from the final text of the law. However, the potential inclusion of this provision demonstrates the willingness of the ruling administration to expand surveillance powers, in the process of setting rules for them.

Others have complained about the lax standard to be applied by the judges in granting such warrants. In the warrant request, the Act only requires the government to:

[H]ave reasons to believe that the person is *likely* to be associated with or is *beginning to get* associated with any prohibited act or is in the process of beginning to plan such an act or is indulging in such conduct or activity that arises *suspicion* that he is likely to plan or attempt to commit offense.

This standard is far different than the FISA court's standard of "probable cause" in the United States, as there merely needs to be a reasonable suspicion on behalf of the agent and judge in Pakistan. Further, there are issues with the balance of privacy rights when the law permits surveillance of those "likely to be associated with or beginning to get associated with," which is more expansive than being able to monitor only those who are planning or committing crimes. Moreover, the list of crimes covered by the Act includes many non-terrorism related offenses such as the State Secrets Act. Some have complained this opens the door for the Army to

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201. Javaid, supra note 184.
203. Fair Trial Act, supra note 6, at Ch.2(5).
204. *Id.*
205. *Id.*
206. See *id.* at Ch.9, Schedule 1; *see also* Official Secrets Act, No. 19 of 1923 (PAK.).
“endanger the fundamental rights of citizens,” 207 by targeting activists and dissidents. 208

The Act also does away with many of the requirements for police conducting physical searches that exist in the Rules of Criminal Procedure. While during a physical search, there are two witnesses required to be present in order to hold the police accountable, the Fair Trial Act allows for far greater secrecy and non-accountability. 209 Under Article 5.27, any official performing any function under this act shall ensure complete secrecy of the process and shall refrain from any disclosures that may compromise the future capabilities of intelligence gathering. 210 Therefore, in most situations the intelligence agent will only be required to disclose the requested surveillance with the Interior Ministry and the warrant-reviewing judge, limiting review of such surveillance. 211

V. CONCLUSION AND ALTERNATIVES

A. Conclusion

The continued proliferation of terrorism and the growing trend of governments overriding their citizens’ protections for a fair trial and privacy require new methods that both ensure a nation’s safety and uphold its humanitarian, constitutional, and international values. The General Assembly of United Nations affirmed that,

[R]espect for human rights and the rule of law [is] the fundamental basis for the fight against terrorism . . . . [Member States] reaffirm[ed] that the promotion and protection of human rights for all and respect for the rule of law are essential to all components of the Strategy, and recognized that effective counterterrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing. 212

207. Javaid, supra note 184 (quoting Sana Saleem, “[t]he law should only be restricted to terror suspects,” she says, otherwise, “the phone tapping and electronic eavesdropping mandated by law could endanger the fundamental rights of all citizens.”).
208. See id.; see also Fair Trial Act, supra note 6.
209. See generally Fair Trial Act, supra note 6.
210. Fair Trial Act, supra note 6, at Ch.5(23).
211. Id. at Ch.2(6).
Therefore, it is incumbent upon nations to deal with terrorism in a similar manner as other long running domestic criminal problems. Nations like the United States and Pakistan must try to strike the fine balance between security and freedom. In the alternative, if one is to concede the invocations of the emergency rule that legitimize wholesale abrogation of fundamental civil rights under certain circumstances, three phenomena will occur concurrently, as they have been in the United States and Pakistan recently. The executive branch will expand categorizations of "national security" to be able to exclusively, secretly, and unilaterally control more parts of the government, thereby disturbing the system of checks and balances. The judicial branch will continue to both compromise its own power by deferring to the executive branch, and lose institutional power through the passage of anti-judiciary and anti-terrorism legislation like the PATRIOT Act. Lastly, if current trend concerning the suspension of constitutional protections for terrorism continues, it will challenge the jurisprudence developed for over 200 years concerning the right of citizens to privacy, dignity, information, and a fair trial.

These phenomena have led to a breakdown of limitations for government officials wishing to monitor their citizens. In the United States, the warrant requirement was required for electronic surveillance but this prerequisite approval from a judge vanished for certain citizens with the passage of laws like the PATRIOT Act and the PAA. Additionally, anti-terrorism legislation has led to an increased scope of monitoring by intelligence gathering institutions such as the CIA, even though the Church Committee found that these institutions could not be entrusted with the power to intrude on citizens' right to privacy. In Pakistan, while there have been warrant requirements for physical searches, there was an absence of legislation concerning modern electronic surveillance. The Fair Trial Act attempts to pull surveillance from the shadows into the rule of law by requiring intelligence officials and police to seek judicial approval before wiretapping of any suspect. However, critics argue that the Act goes too far in granting intelligence agencies, known for their political manipulation and brutal activities, the right to impede the right to privacy for invalid reasons.

Critics of the criminal enforcement model argue that civilian courts are ineffective at battling terrorism because they have standards of proof that cannot be met due to the nature of terrorism. However, the illegal practices of intelligence agencies in Pakistan and the United States are a primary cause for the inability of courts to prosecute individuals. These suspects might in fact be terrorists, but have been subject to illegal treatment by the government, requiring most of the evidence collected against them to be set aside by the Court in accordance with constitutional protections. Therefore, when considering modern methods of electronic surveillance, one must
keep in the mind the end goal of prosecuting suspects with admissible and legally obtained evidence.

B. Recommendations

The general recommendation to both the United States and Pakistan regarding surveillance laws is to reevaluate the way in which the government and its intelligence agencies interpret the balance between security and privacy. There should be an increased reliance on the historical protections afforded to citizens through physical searches by analogizing them to modern surveillance practices. Both Pakistan and the United States have developed laws and common law practices that require the state to respect the privacy of its citizens by limiting the scope of its searches, which should be respected by intelligence agencies in battling terrorism. Along with respecting the rights of the citizen, the investigating authorities must also respect the right of the judicial branch to be involved throughout the surveillance process in order to hold the authorities accountable for their duty to uphold the security-privacy balance. The warrant requirement is an embodiment of this right, and should continue to be applied for terrorism cases in both Pakistan, through the Fair Trial Act, and the United States, through the FISA courts.

For the United States, the executive branch and FISA courts themselves should reconsider easing the burden of proof for investigating authorities dealing with terrorism, and should maintain the “probable cause” standard or something near it in order to allow the government to investigate properly without intruding on the rights of citizens. In Pakistan, the Fair Trial Act should either be amended or interpreted by the Supreme Court as requiring proof of probable cause for warrant requesting agencies, rather than the “reasonable suspicion” standard currently in place.

The wall between criminal investigation and intelligence gathering should be reconstructed in order to limit the scope of surveillance that international intelligence agencies can engage in domestically. For the United States, there needs to be a restructuring of the surveillance process to prohibit the CIA from being able to either receive warrants from the FISA courts to monitor citizens, or worse, to do so without a warrant. The FBI and local police authorities should continue to share information and conduct surveillance in pursuit of criminal prosecutions. In Pakistan, the Fair Trial Act should be reexamined to place a greater emphasis on the power of local police in investigating terrorist plots through electronic surveillance, shifting this power out of the hands of the nation’s intelligence agencies like the ISI.

Further, while the target of warrant should likely not be informed of the government’s monitoring as is required in physical searches, there must
be something that holds intelligence agencies and police accountable for their actions. These officials often rely on governmental immunity to avoid punishment for carrying out abuses of the surveillance process. Therefore, a personal enforcement mechanism is the only way to hold these individuals accountable. Both countries should consider allowing the same judicial body that grants warrants the power to hold intelligence officers in contempt of court if they are attempting to abuse the warrant process, either by bringing frivolous requests or failing to abide by the limitations required by the warrant.

Lastly, maintaining a proper balance between constitutional rights and the duty of the state to investigate and prosecute terrorism will require a vigilant judicial body and a more respectful executive branch. Judges have been silenced in many ways in the age of terrorism either fearing for their personal safety as in Pakistan, or the risk of allowing another terrorist attack to occur due to inadequacies in the judicial process, as in the United States. However, just as in all other criminal cases, the job of the judiciary is to hold the state accountable for when it wishes to invade the privacy or freedom guaranteed to its citizens. Holding the state accountable for its duties does not equate to co-opting or assisting terrorism, but rather, is an ideological assault against the lawless nature of terrorist methodologies. As guardians of the Constitution, the judicial branch must be reinvigorated regarding issues of privacy and modern surveillance, rather than conceding to fear-mongering and anti-judicial principles advocated by anti-terrorism hawks.