

THESIS

SYSTEMS OF POWER AND CITIZENSHIP  
IN THE U.S. 2010 FOREIGN INTELLIGENCE SURVEILLANCE ACT

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## ABSTRACT

### SYSTEMS OF POWER AND CITIZENSHIP IN THE U.S. 2010 FOREIGN INTELLIGENCE SURVEILLANCE ACT

In 1978, the United States government developed the Foreign Intelligence Surveillance Act (FISA) to guide how the U.S. government conducts intelligence-gathering operations on individuals located outside of the United States—a piece of legislation that has been amended throughout the years, yet its 2010 version remains in effect today. Using Foucault’s concept of power/knowledge and literature on citizenship, this study explores the power relationships and subjectivities that are produced within the rhetoric of FISA. Ultimately, I argue that the rhetoric of FISA creates the subject of person as citizen, and citizens as inscribed within a broader structure of national power. Citizens of the United States are granted unmatched privacy rights and legal protections, and non-U.S. individuals are bound as quasi-citizens: possessing duties to the U.S. while receiving diminished rights in return. Implications for surveillance, personhood, and foreign policy are discussed.

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## CHAPTER 1: THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

In 1978, the United States government developed the Foreign Intelligence Surveillance Act (FISA) to guide how the U.S. government conducts intelligence-gathering operations on individuals located outside of the United States. FISA has been modified in numerous ways since its creation. However, the amended Foreign Intelligence Surveillance Act released on October 7, 2010, stands as the U.S. legal authority regarding the surveillance of individuals outside of the country. The bill is available online for free public access from the U.S. House of Representatives office of the Legislative Counsel.<sup>1</sup>

When debating the government's ability to engage in surveillance operations, issues of privacy and personal rights are inescapable. This study investigates some of the many power relationships that are created through the rhetoric of the 2010 version of the Foreign Intelligence Surveillance Act, and their subsequent implications for personal agency and the distribution of rights. Most broadly, this study will explore:

RQ1: What power relationships does FISA rhetorically produce?

In order to address this question, I will consider:

RQ2: How does the language of the document frame the agency of different groups?

RQ3: How does the document rhetorically construct citizenship?

Throughout this thesis, I will argue that FISA produces the subjects of person and citizen through discourse, providing broad possibilities for the role of person, and assigning all persons responsibilities to the United States government. The document simultaneously constructs the role of citizen by providing United States individuals with privacy rights and protections that are

not provided to foreign persons. The following analysis will consider the ongoing power relationships within the rhetoric of the 2010 Foreign Intelligence Surveillance Act in five chapters. First, it will discuss FISA's emergence as a political response to a number of domestic and global threats, and the relevance of the document today. The second chapter will theorize a Foucauldian approach to the Foreign Intelligence Surveillance Act, as a discourse with power/knowledge implications. The third chapter will consider how FISA rhetorically builds person and citizen—assigning all persons responsibilities to the United States government, while providing different groups with unequal fields of power through their access to privacy. The fourth chapter describes how the subjects of person and citizen are embedded within a hierarchical structure of national power through the United States and foreign powers, and the fifth chapter will describe implications for citizenship and subjects in political discourse.

### *The Foreign Intelligence Surveillance Act*

The U.S. Foreign Intelligence Surveillance Act that was first produced in 1978 developed out of a cultural context filled with domestic and international threats to the U.S. government. The United States' economy was strained as deficits and oil prices grew. All the while, the country had been involved in a variety of long and hostile political and military conflicts. Public distrust and opposition to the government grew, and human rights developed into a political concern. The 1978 version of FISA responded to the U.S. government's political need for security and its growing interest in international oversight, as it slipped past the skeptical eye of the public.

The United States' economy of the 1970's was marked by postindustrialism and globalization. During the decade, the majority of the labor-force moved from positions in

agriculture and manufacturing to information based tasks—a transition known as the postindustrial shift. U.S. “industrial society focused on the coordination of humans and machines”; the new “postindustrial society” was “organized around communications and the dissemination of knowledge.”<sup>2</sup> As the face of the American work force shifted in the 1970’s to information-based tasks, U.S. companies expanded their businesses across the globe at unprecedented rates. Between the years 1950 and 1970, U.S. “foreign direct investments (FDIs) skyrocketed by over 540 per cent.”<sup>3</sup> Internationally, “the 1960s marked the heyday of trade expansion... world trade grew at an average of over 8 per cent yearly, well above the remarkable GDP growth rate.”<sup>4</sup> Both the growing presence of international trade and the information-based shift in the U.S. workforce posed new challenges to the United States government. In addition, the globalized economy created more competition for U.S. industries to stay in business. Giuseppe Barca suggests that “what marked the 1970s was the growth in number and sophistication of measures directed at sheltering domestic industry from foreign competition.”<sup>5</sup> At the time of the 1978 Foreign Intelligence Surveillance Act, the U.S. economy was more globalized than ever before, which provided the United States government and industries with challenges they had never before experienced.

In addition to the global arena for trade that was building in the 1970’s, the decade is known for financial strain on the U.S. government and citizens. Starting in the 1960’s and continuing into the 70’s, the U.S. felt “pressures on the dollar,” had a “negative balance with Japan,” and “deficit marked many sectors of the US merchandise trade balance, from consumer goods to motor vehicles.”<sup>6</sup> Barbara Keys argues that even though the 1970’s marked the take-off of globalization—a framework that provided the benefits of “growing world markets, tighter international monetary links, and rapid cultural exchange”—it was economic struggles such as



“the breakdown of the Bretton Woods international monetary system, the oil shock of 1973, and Third World demands for a new international economic order,” that “portended a new economic landscape” in the 70’s.<sup>7</sup> Not only was the United States government experiencing financial pressures in the 1970’s, but also many U.S. citizens were encountering economic struggles. Thomas Borstelmann argues that the U.S. economy of the 70’s brought “inflation, unemployment, and declining real wages,” and “the gap between the rich and the poor began to grow quickly.”<sup>8</sup> In the new age of information and globalization, financial difficulties plagued both the U.S. government and many United States citizens.

Money problems were not the only challenge facing U.S. people overall during the 1970’s, but other ongoing social struggles also posed internal pressures. During the decade, U.S. crime rates, murders, and illegal drug use increased, causing social rehabilitation to become a new focus for the use of American tax dollars.<sup>9</sup> According to the U.S. Department of Justice crime reporting statistics, crime rates grew significantly leading up to the creation of FISA in 1978. While the United States population grew a mere nine percent between the years 1968 and 1978 (from 199,399,000 to 218,059,000 citizens), within the same decade, statistics for murder and non-negligent manslaughter grew forty percent (from 13,800 to 19,560), the number of reported rapes more than doubled (from 31,670 to 67,610), aggravated assaults nearly doubled (from 286,700 to 571,460), and burglaries increased by nearly seventy percent (from 1,858,900 to 3,128,300).<sup>10</sup> As Americans in the 1970’s struggled with the deteriorating economy, the nation faced a number of growing social issues that threatened individuals’ daily lives.

Alongside the changing industrial and economic landscape, the United States had been involved in multiple long and trying political conflicts leading up to the Foreign Intelligence Surveillance Act’s adoption in 1978. In the 1970’s, the U.S. was deep into the Cold War (a

conflict that began under Truman's presidency in September of 1945, and continued until the Soviet Union fell in 1991<sup>11</sup>). During the 1950's-60's, both the United States and Soviet Union created enormous stock-piles of nuclear weapons. Both countries cooperatively engaged in "efforts to control the spread of those weapons" in the 1970's.<sup>12</sup> Additionally, U.S. involvement with Vietnam had been a long-standing presence. Motion towards the Vietnam War began with Harry Truman's international diplomacy in 1947 and the conflict continued to grow, spanning the presidencies of Dwight Eisenhower, John Kennedy, Lyndon Johnson, and Richard Nixon, finally concluding when Gerald Ford pulled American troops out of Vietnam in 1975.<sup>13</sup> Both the Cold War and the Vietnam War had lasting implications for both the U.S. government and its people at the time FISA was created.

In addition to the international political conflicts that the United States' struggled with during the 1970's, the government's public image took a piercing hit with the Watergate scandal. Despite Nixon's attempts "to distance himself from the lies of the outgoing president, Lyndon Johnson" during the race for the presidency in 1968,<sup>14</sup> the events of Watergate in 1972 ultimately ended with Nixon's impeachment from the presidency in 1974.<sup>15</sup> Even after Nixon left the White House, there was a lasting imprint on the public. Neil Hamilton argued that Watergate "weakened trust in the country's political system and leaders" in the 1970's, "a weakening that had been underway since the mid-1960s.... That distrust and, with it, Americans turning their backs on politics characterized the politics of the decade."<sup>16</sup> During this time period, the United States people began to perceive the government as a potential threat, and in response, the U.S. government seemed to perceive its public as a threat. In response to the U.S. government's faltering image of the 70's, the country developed new policies to manage the crisis. The combination of the "abuses of power" with Watergate and the public's "growing concern with

privacy rights,” “illegal FBI counterintelligence activities, and excesses of the CIA,” motivated the U.S. government to develop “increased restrictions on the collection, retention, dissemination, and use of intelligence information at all levels of government” during the 1970’s.<sup>17</sup> The public’s growing distrust in the U.S. government was evident during the development of the Foreign Intelligence Surveillance Act, influencing how the bill was formed and received.

Alongside the United States’ economic and political strains of the time, social activism and human rights became key concerns of the American public. The 1960’s had been a decade filled with civil rights battles<sup>18</sup> and characterized by a thriving counterculture,<sup>19</sup> as violent and peaceful protests “captured nationwide attention.”<sup>20</sup> In the 1970’s, protests were “kept alive” by Native American groups and women fighting for equality.<sup>21</sup> Barbara Keys argues that the United States’ heightened interest in human rights resulted as an after-effect of the Vietnam War. Keys suggests that as long as the Vietnam War continued, the United States was “branded” as “a major source of oppression and violence in the world,” making it impossible for the country to “champion” a human rights “crusade against those evils elsewhere.”<sup>22</sup> However, once the Vietnam War concluded, human rights issues were expanded from being merely a social concern to serving as a significant political concern as well. When President Carter took office in 1977, he “became the first leader of a major country to elevate the international promotion of human rights to a central role in foreign policy” when he “proclaimed a profound moral commitment to human rights.”<sup>23</sup> Keys asserts that the adoption of human rights agendas by the U.S. government in the 70’s became a practical political tool because of its “capacity to shift attention and blame away from the trauma of the Vietnam War and the embarrassments and self-criticism of the civil rights movement and Watergate.”<sup>24</sup> At the time FISA was produced, the United States was

adjusting in the wake of the Vietnam War, and the U.S. government picked up human rights advocacy as a political motive in response to the public's increasing skepticism for the government.

The 1970's was a dynamic decade filled with economic, social, and political threats to the United States government and its citizens. During the 70's, the United States government managed conflicts with Vietnam and the Soviet Union. The U.S. saw the growth of a more global economy, in addition to rising national deficits. The work force became information-dominant, and human rights became a political campaign. As the public faced social struggles, the U.S. government tried to maintain its credibility and public image in the wake of a reputation crisis. These notable features of the time period contributed to the development of the Foreign Intelligence Surveillance Act. The U.S. government's mission for its own security in this turbulent time is apparent in Richard Nixon's report to congress (1970):

We aim for a world in which the importance of power is reduced; where peace is secure because the principal countries wish to maintain it. But this era is not yet here. We cannot entrust our future entirely to the self-restraint of countries that have not hesitated to use their power even against their allies. With respect to national defense, any President has two principle obligations: to be certain that our military preparations do not provide an incentive for aggression, but in such a way that they do not provoke an arms race which might threaten the very security we seek to protect.<sup>25</sup>

The many economic, social, and political challenges that the United States faced leading up to 1978 helped to inspire the creation of the Foreign Intelligence Surveillance Act as a response to these pressing threats.

United States approaches to surveillance have changed over time in order to account for the global political and technological context of the moment. Douglas Charles suggested that the “domestic unrest” that the U.S. felt during “the First World War, Red Scare, Great Depression, Second World War, Cold War,” and “War on Terrorism” caused increases in “the FBI’s power and authority... for different reasons, to deal with a perceived domestic threat.”<sup>26</sup> At the time of the First World War, maintaining national security became the U.S. Federal Bureau of Investigation’s top priority, and the potential for “foreign influences” to have an effect “upon American society” developed into a primary concern.<sup>27</sup> With the onset of the Second World War, many of the U.S. intelligence services (as we think of them today) were created to respond to the threat of the Axis powers.<sup>28</sup> Following WWII, U.S. intelligence agencies transformed once again to accommodate to the new global climate. In response to the pressing threats of Communism and the Soviet Union, U.S. intelligence agencies changed “both in structure and practice... into cold war agencies.”<sup>29</sup> During this time, the primary focus of intelligence operations became “gaug[ing] the capabilities and intentions of the Soviet Union and the People’s Republic of China.”<sup>30</sup> After the dismantling of the Berlin wall, United States intelligence interests strayed in the 1990’s from the fallen Soviet Union, to emerging threats posed by countries such as North Korea, Pakistan, India, some African countries (including Rwanda), and some new European interests (such as Yugoslavia).<sup>31</sup> As international relations change their tenor over time, U. S. intelligence agencies have adjusted to account for the changing political contexts.

The Foreign Intelligence Surveillance Act of 1978 was a significant piece of legislation due to its impact on United States government procedures. FISA created a Foreign Intelligence Surveillance court that was meant to oversee all U.S. government surveillance practices and

determine their legality. By requiring that “that all U.S. intelligence agencies... obtain permission to spy on anyone,”<sup>32</sup> FISA appears to instill legal safeguards that help protect individuals from being surveilled upon by the government. However, the document also allows for the government to participate in intelligence-gathering operations in a number of situations. As a whole, “FISA regulations are... broad and sufficiently vague to allow the NSA or the CIA virtually all the freedom they need to make electronic interceptions of all kinds.”<sup>33</sup> The broad rhetoric of the Foreign Intelligence Surveillance Act allows the statutes of the policy to apply to arguably everyone (as I will argue in chapter three’s discussion of personhood). Additionally, FISA became “the first surveillance law to permit *warrantless* surveillance”<sup>34</sup> during emergency scenarios and with proper authority. The introduction of the Foreign Intelligence Surveillance Act into the political landscape in 1978 has changed the United States government procedures and authorization for surveillance practices ever since.

Along with changes in technology and international relations, the Foreign Intelligence Surveillance Act has morphed through amendments since 1978, and the updated 2010 version of FISA stands as the document currently enforced today. FISA first underwent significant changes alongside the creation of The USA PATRIOT Act (The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act) of 2001. The PATRIOT Act moved to explicitly include electronic, wire, and oral communications in clauses regarding the disclosure and seizure of information,<sup>35</sup> and implemented the limitation that the investigation of a U.S. citizen must not be “conducted solely upon the basis of activities protected by the first amendment to the Constitution.”<sup>36</sup> Additionally, the PATRIOT Act implemented legal “immunity”<sup>37</sup> for parties who comply “with a court order or request for emergency assistance” under FISA, as well as provides protection for “any provider of a wire or

electronic communication service, landlord, custodian, or other person (including any officer, employee, agent, or other specified person thereof) that furnishes any information, facilities, or technical assistance”<sup>38</sup> during an intelligence-gathering operation. The 2001 U.S. PATRIOT Act modernized U.S. surveillance policies in the Foreign Intelligence Surveillance Act to, among other changes, explicitly account for a wider range of communicative events, such as those through electronic means.

Six years after the PATRIOT Act amended FISA, the Protect America Act of 2007 was introduced. The Protect America Act is a short document that updated FISA by allowing for additional procedures by which to authorize intelligence-gathering operations. With the passing of the Protect America Act, the Director of National Intelligence and the Attorney General were granted new authority when authorizing the obtaining of information regarding individuals that are “reasonably believed to be outside the United States”<sup>39</sup> for up to one year. The five-page document allows the Director of National Intelligence and Attorney General to authorize a surveillance-gathering operation orally (“if time does not permit the preparation of a certification”<sup>40</sup>), and permits them to “direct a person to—

- (1) immediately provide the Government with all information, facilities, and assistance necessary to accomplish the acquisition in such a manner as will protect the secrecy of the acquisition and produce a minimum of interference with the services that such person is providing to the target; and
- (2) maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the acquisition or the aid furnished that such person wishes to maintain.”<sup>41</sup>

The Protect America Act does require the Government to compensate a person for any aid that person provided to an intelligence-gathering operation that falls under this sub-section. If a person fails to comply with such a directive for intelligence, the Attorney General may obtain a court order for compliance—refusal to follow such an order qualifies as contempt of the court. Individuals can petition the court to revoke or modify a directive. Much of the Protect America Act ceased to have effect 180 days after implementation. However, the procedural changes that the Protect America Act applied to FISA regarding the authorization of information-gathering operations and one's ability to order directives related to such operations are to remain in effect until an unidentified expiration date.

In 2008, the Foreign Intelligence Surveillance Act changed again with the passing of the FISA Amendment Act, a piece of legislation that addresses the procedure for authorizing the acquisition of foreign intelligence. The act first established additional definitions for vocabulary, and then outlined the process for authorizing the targeting of a person outside the United States (including some additional limitations for conducting international surveillance operations). The FISA Amendment Act also addressed when and how the Attorney General and Director of National Intelligence may determine it appropriate to target an individual for surveillance. These numerous adaptations of the Foreign Intelligence Surveillance Act of 1978 display the document's continued political significance, especially in recent years. The PATRIOT Act, the Protect America Act, and the FISA Amendment Act can be seen as U.S. government responses to the changing political and technological climate, each of which helping to morph the Foreign Intelligence Surveillance Act of 1978 into the 2010 version of FISA that I still in use today.

In recent years, issues of surveillance and intelligence, and even the Foreign Intelligence Surveillance Act specifically, have remained conversation points in U.S. government discourse.



A myriad of publicly available government documents concerning FISA are accessible from the White House website, [whitehouse.gov](http://whitehouse.gov). The website contains six statements of “administration policy” that address FISA between the years 2004-2014, or short letters presented by the House or Senate. The statements express support for the passing of different pieces of legislation that would supplement, amend, or extend FISA, such as the PATRIOT Sunsets Extension Act of 2011<sup>42</sup> and the USA FREEDOM Act of 2014.<sup>43</sup> These public documents display FISA’s ongoing significance in the United States political sphere, and how the original Foreign Intelligence Surveillance Act continues to develop as time passes and the cultural climate shifts.

FISA has taken the stage not only in political conversations, but also in media discourses. By searching “Foreign Intelligence Surveillance Act” on *The New York Times* webpage, one can find articles that mention The Foreign Intelligence Surveillance Act as early as 1976. While FISA has been brought up in *New York Times* articles almost every year since then, the number of articles that discussed the Foreign Intelligence Surveillance Act boomed in the past decade (there were 12 articles about FISA before 1980, 30 between 1980 and 2000, 43 between 2000 and 2005, 270 between 2005 and 2010, and [currently] 210 between 2010-April 2015). *New York Times* articles often present a sense of skepticism or criticism regarding decisions of the FISA law or court, and debate the ethics or efficacy of FISA. Articles on *The Washington Post* website generally discuss the NSA more broadly, and present testimony that both critiques and defends U.S. surveillance practices. The safety and security of United States’ citizens information is a frequent concern of the articles, which include discussions of the NSA’s access to Google and Yahoo cloud,<sup>44</sup> the “bulk collection of Americans’ phone records”<sup>45</sup> and e-mails.<sup>46</sup>

The Foreign Intelligence Surveillance Act received elevated media attention following Edward Snowden’s public release of classified National Security Agency documents in 2013.

Primarily, the secrecy that surrounds FISA court practices was called into question. Some of the documents leaked by Snowden showed that the FISA Court authorized the U.S. government to access every call in Verizon's network including those located within the United States<sup>47</sup>—a type of surveillance outside of FISA's legal authority. In response, in 2013 both Google and Microsoft sought the FISA Court's permission to release compounded data about the total number of data requests they receive from the FISA Court and the total number of accounts or users that are included within each request.<sup>48</sup> Snowden's whistle-blowing scandal in 2013 brought U.S. intelligence-gathering procedures into the public sphere by raising the question of United States government surveillance on its own citizens.

Distinct from media discourses, public opinion polls given to the United States public have displayed a good deal of support for U.S. surveillance practices. Clem Brooks and Jeff Manza analyzed Surveys of American Policy Attitudes (SAPA)—a telephone survey that called 17,602 people in 2009 and 19,871 in 2010, interviewing 1,559 people in 2009 and 1,225 individuals in 2010, with the rest of the calls being no answers, refusals, etc.<sup>49</sup> Brooks and Manza found that policy changes enacted by the United States government serve “primarily to enhance or leave intact, but not reduce” public “support for counterterrorism practices.”<sup>50</sup> The phone surveys showed that of the ten issues “at hand, it is NSA surveillance of American citizens and suspected terrorists that elicits the highest level of support” (the amount of support for NSA surveillance was 0.76—well above the following three counterterrorism measures of airport security [0.67], the Patriot Act [0.66], and the Military Commissions Act [0.65]).<sup>51</sup> The SAPA surveys illustrate a large amount of public support for the United States' surveillance practices, exceeding the level of support for other government operations. In similar fashion, Brooks and

Manza consider survey responses to a 2006-2010 ABS News/Washington Post questionnaire, which asked:

What do you think is more important right now: for the federal government to investigate possible terrorist threats, even if that intrudes on personal privacy; or for the federal government not to intrude on personal privacy, even if that limits its ability to investigate possible terrorist threats?<sup>52</sup>

At the beginning, 65% of participants chose to investigate the possible threat rather than to protect personal privacy, growing to a 68% ‘investigate threat’ vote in 2010.<sup>53</sup> These polls show majority support of the United States public regarding government intelligence-gathering operations, even though personal privacy rights may be affected. Brooks and Manza do note that Americans’ perspectives on policies will be impacted by a variety of personal attitudes and reasoning. However, they did find that “when the activity at hand involves a specific government agency or piece of legislation, public attitudes are a good deal more supportive.”<sup>54</sup> In the end, Brooks and Manza describe “threat priming”<sup>55</sup> as an important function of how the American public perceives counterterrorism policies, and suggest that individuals may base their reasoning regarding counterterrorism policies off of a perceived threat derived from the “national identity of target groups.”<sup>56</sup> As displayed through the work of Brooks and Manza, the United States public has a generally positive opinion regarding U.S. surveillance practices, including those outlined by the Foreign Intelligence Surveillance Act.

Even more recently, the government has conducted research studies on the United States public that address issues of electronic surveillance and intelligence gathering. In December of 2013, The President’s Review Group on Intelligence and Communications Technologies released a 303-page report to the president regarding “Liberty and Security in A Changing

World” of firewalls, classified networks, intellectual property, and more.<sup>57</sup> The Review Group first presented a history and set of principles they hold, followed by a set of 46 recommendations that are addressed “to you [the president], to Congress, to the American people, and to leaders and citizens of diverse nations during continuing explorations of these important questions.”<sup>58</sup> Among other appeals to readers, the document asserts that the FISA Court and the policies that dictate the surveillance of non-U.S. persons should be reformed. In May 2014, President Obama requested that a 90-day study be conducted to examine what kinds of changes the boom in “big data technologies” might bring to the American populace.<sup>59</sup> The document describes “big data” as “the growing technological ability to capture, aggregate, and process an ever-greater volume, velocity, and variety of data,”<sup>60</sup> with the potential to be used in many ways and by various audiences. In the end, the study found that significant portions of the American public are skeptical of how their personal information is collected and used as “big data” by agencies. Out of 24,092 respondents, 85% reported being “very much” concerned with “legal standards and oversight” of data gathering practices, 84% were “very much” concerned with “transparency about data use,” 53% surveyed “did not trust” law enforcement “at all,” and 67% of respondents “did not trust” intelligence agencies “at all.”<sup>61</sup> These documents indicate that how electronic data is used and collected remains a key concern of both the United States government and its people. The public’s interest in big data collection is relevant to the Foreign Intelligence Surveillance Act, because FISA regulates the U.S. government’s legal ability to review and collect domestic and international electronic communications.

Despite the Foreign Intelligence Surveillance Act’s minimal presence within the field of communication, some scholars have conducted relevant research. Marouf Hasian gathered an assortment of texts from between late 2005 and summer 2006 to illuminate a variety of rhetorical

histories regarding the Foreign Intelligence Surveillance Act of 1978. Hasian explores some ways in which strategic ambiguity is produced within these histories, and argues that ultimately these interpretations influence “the ways we think about the ‘domestic’ or ‘foreign’ nature of warrantless surveillance.”<sup>62</sup> Similarly, Eric Connelly examined word clusters in the Foreign Intelligence Surveillance court document, *In Re Directives*, which addresses issues of surveillance. Connelly found an ongoing tension between the ideographs of privacy and national security in the document, and argued that the language serves to rhetorically silence various voices.<sup>63</sup> These studies display some of the ways that surveillance operations have been rhetorically constituted through the language of the Foreign Intelligence Surveillance Act.

In a world saturated by legislation, the Foreign Intelligence Surveillance Act might not seem to be of great significance. However, FISA is significant due to the legal and social consequences of the text. From a political standpoint, the bill not only specifies the “the exclusive means by which electronic surveillance... and the interception of domestic wire and oral communications may be conducted” by the United States government,<sup>64</sup> but also established the Federal Intelligence Surveillance Court. In addition to the legal consequences of FISA, the act serves a number of rhetorical functions. FISA shapes the U.S. government’s ability to monitor international communications, thus constructing specific discourses and results for U.S. international diplomacy. Due to the impact FISA has on shaping our government’s intelligence-gathering duties and how they are to be conducted (both physically and electronically), the Foreign Intelligence Surveillance Act is worthy of a close rhetorical inspection.

## ENDNOTES

<sup>1</sup> Foreign Intelligence Surveillance Act of 1978, P.L. 95-511, as amended through P.L. 111-259 (2010),  
<http://legcounsel.house.gov/Comps/Foreign%20Intelligence%20Surveillance%20Act%20Of%201978.pdf>.

<sup>2</sup> J. David Hoeveler, *The Postmodernist Turn: American Thought and Culture in the 1970s* (New York: Twayne Publishers, 1996), 2.

<sup>3</sup> Giuseppe Barca, *International Trade in the 1970s: The US, the EC and the Growing Pressure of Protectionism* (London: Bloomsbury, 2013), 21.

<sup>4</sup> Barca, *International Trade in the 1970s*, 13.

<sup>5</sup> Barca, *International Trade in the 1970s*, 177.

<sup>6</sup> Barca, *International Trade in the 1970s*, xi-xii.

<sup>7</sup> Barbara Keys, *Reclaiming American Virtue: The Human Rights Revolution of the 1970s* (Cambridge: Harvard University Press, 2014), 10.

<sup>8</sup> Thomas Borstelmann, *The 1970s: A New Global History From Civil Rights to Economic Inequality* (Princeton: Princeton University Press, 2012), 53.

<sup>9</sup> Kelly Sagert, *The 1970s: American Popular Culture Throughout History* (Westport: Greenwood Press, 2007), 4.

<sup>10</sup> “Estimated Crime in United States—total,” *Uniform Crime Reporting Statistics*, U.S. Department of Justice Federal Bureau of Investigation, accessed November 14, 2014,  
<http://www.bjs.gov/ucrdata/Search/Crime/State/RunCrimeStatebyState.cfm>.

- <sup>11</sup> Kenneth Hill, *Cold War Chronology: Soviet-American Relations 1945-1991* (Washington D.C.: Congressional Quarterly, Inc., 1993).
- <sup>12</sup> Neil Hamilton, *The 1970s* (New York: Infobase Publishing, 2006), x.
- <sup>13</sup> Glenn Hastedt, *Encyclopedia of American Foreign Policy* (New York: Facts on File, 2004), 507-509.
- <sup>14</sup> Hamilton, *The 1970s*, ix.
- <sup>15</sup> Louis Liebovich, *Richard Nixon, Watergate, and the Press: A Historical Retrospective* (Westport: Praeger Publishers, 2003).
- <sup>16</sup> Hamilton, *The 1970s*, ix.
- <sup>17</sup> Sorrel Wildhorn, Brian Jenkins, and Marvin Lavin, "Intelligence Constraints of the 1970s and Domestic Terrorism: Vol. I, Effects on the Incidence, Investigation, and Prosecution of Terrorist Activity," *The U.S. Department of Justice* (1982), v.
- <sup>18</sup> Sharon Harley, *The Timetables of African-American History* (New York: Simon & Schuster).
- <sup>19</sup> Peter Braunstein and Michael Doyle, eds., *Imagine Nation: the American counterculture of the 1960s and '70s* (New York: Routledge, 2002).
- <sup>20</sup> Hamilton, *The 1970s*, viii.
- <sup>21</sup> Hamilton, *The 1970s*, viii.
- <sup>22</sup> Keys, *Reclaiming American Virtue*, 49.
- <sup>23</sup> Keys, *Reclaiming American Virtue*, 2.
- <sup>24</sup> Keys, *Reclaiming American Virtue*, 3.
- <sup>25</sup> Richard Nixon, *U.S. Foreign Policy for the 1970's: A New Strategy for Peace* (1970),

<sup>26</sup> Douglas Charles, *J. Edgar Hoover and the Anti-Interventionists: FBI Political Surveillance and the Rise of the Domestic Security State, 1939-1945* (Columbus: Ohio State University Press, 2007), 4.

<sup>27</sup> Charles, *J. Edgar Hoover and the Anti-Interventionists*, 19.

<sup>28</sup> Ernest May, “The Twenty-first Century Challenge for U.S. Intelligence,” *Transforming U.S. Intelligence* (Washington D.C.: Georgetown University Press, 2005), 12.

<sup>29</sup> May, “The Twenty-first Century Challenge for U.S. Intelligence,” 12.

<sup>30</sup> May, “The Twenty-first Century Challenge for U.S. Intelligence,” 3.

<sup>31</sup> May, “The Twenty-first Century Challenge for U.S. Intelligence,” 4.

<sup>32</sup> Clem Brooks and Jeff Manza, *Whose Rights? Counterterrorism and the Dark Side of American Public Opinion* (New York: Russel Sage Foundation, 2013), 25.

<sup>33</sup> Mick Farren and John Gibb, *Who’s Watching You? The Chilling Truth About the State, Surveillance, and Personal Freedom* (St Paul: Conspiracy Books, 2007), 111.

<sup>34</sup> Elliot Cohen, *Technology of Oppression: Preserving Freedom and Dignity in an Age of Mass, Warrantless Surveillance* (New York: Palgrave Macmillan, 2014), 33.

<sup>35</sup> The Patriot Act of 2001, P.L. 107-56, 107<sup>th</sup> Cong. (2001).

<sup>36</sup> P.L. 107-56, sec. 214 (a).

<sup>37</sup> P.L. 107-56, sec. 225.

<sup>38</sup> P.L. 107-56, sec. 225 (h).

<sup>39</sup> The Protect America Act of 2007, P. L. 110—55, 110<sup>th</sup> Cong. (2007).

<sup>40</sup> P. L. 110—55.

<sup>41</sup> P. L. 110—55.

<sup>42</sup> PATRIOT Sunsets Extension Act of 2011, S. 990, 112<sup>th</sup> Cong. (2011).



<sup>43</sup> “Statement of Administration Policy: H. R. 3361—USA FREEDOM Act,” Executive Office of the President (2014).

<sup>44</sup> Barton Gellman, Ashkan Soltani, and Andrea Peterson, “How We Know the NSA Has Access to Internal Google and Yahoo Cloud Data,” *The Washington Post*, November 4, 2013, <http://www.washingtonpost.com/blogs/the-switch/wp/2013/11/04/how-we-know-the-nsa-had-access-to-internal-google-and-yahoo-cloud-data/>.

<sup>45</sup> Mark Udall and Ron Wyden, “The White House Should End the Bulk Collection of Americans’ Phone Records,” *The Washington Post*, July 26, 2013, [http://www.washingtonpost.com/opinions/the-white-house-should-end-the-bulk-collection-of-americans-phone-records/2013/07/26/c3c0103e-f553-11e2-9434-60440856fadf\\_story.html](http://www.washingtonpost.com/opinions/the-white-house-should-end-the-bulk-collection-of-americans-phone-records/2013/07/26/c3c0103e-f553-11e2-9434-60440856fadf_story.html).

<sup>46</sup> Ellen Nakashima, “4 Senators Raise Alarm About NSA Collection of Americans’ e-mails, phone calls,” *The Washington Post*, July 25, 2014, [http://www.washingtonpost.com/world/national-security/4-senators-worry-about-nsa-collection-of-americans-e-mails-phone-calls/2014/07/25/2ead676e-1422-11e4-8936-26932bcfd6ed\\_story.html](http://www.washingtonpost.com/world/national-security/4-senators-worry-about-nsa-collection-of-americans-e-mails-phone-calls/2014/07/25/2ead676e-1422-11e4-8936-26932bcfd6ed_story.html).

<sup>47</sup> Rob Tricchinelli, “FISA Court Faces Legal Challenges to Secrecy: Civil Liberties Groups, Technology Companies File Briefs Asking for Limited Transparency From Secretive Court” *The News Media & The Law* 37, no.3 (2013): 23.

<sup>48</sup> Tricchinelli, “FISA Court Faces Legal Challenges to Secrecy,” 23.

<sup>49</sup> Brooks and Manza, *Whose Rights?*, 83.

<sup>50</sup> Clem Brooks and Jeff Manza, *Whose Rights? Counterterrorism and the Dark Side of American Public Opinion* (New York: Russel Sage Foundation, 2013), 13.

<sup>51</sup> Brooks and Manza, *Whose Rights?*, 69.

<sup>52</sup> Brooks and Manza, *Whose Rights?*, 65.

<sup>53</sup> Brooks and Manza, *Whose Rights?*, 65.

<sup>54</sup> Brooks and Manza, *Whose Rights?*, 71.

<sup>55</sup> Brooks and Manza, *Whose Rights?*, 85.

<sup>56</sup> Brooks and Manza, *Whose Rights?*, 86.

<sup>57</sup> Richard Clarke, Michael Morell, Geoffrey Stone, Cass Sunstein, and Peter Swire, “Liberty and Security in a Changing World,” The President’s Review Group on Intelligence and Communications Technologies, (2013), [http://www.whitehouse.gov/sites/default/files/docs/2013-12-12\\_rg\\_final\\_report.pdf](http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf).

<sup>58</sup> Clarke et al., “Liberty and Security in a Changing World.”

<sup>59</sup> “Big Data: Seizing Opportunities, Preserving Values,” Executive Office of the President (2014), [http://www.whitehouse.gov/sites/default/files/docs/big\\_data\\_privacy\\_report\\_5.1.14\\_final\\_print.pdf](http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_5.1.14_final_print.pdf).

<sup>60</sup> “Big Data: Seizing Opportunities, Preserving Values,” 2.

<sup>61</sup> “Big Data: Seizing Opportunities, Preserving Values,” 79.

<sup>62</sup> Marouf Hasian, “Unitary Executives, Rhetorical Histories, and the National Security Agency’s Strategic Remembrances of the Foreign Intelligence Surveillance Act (FISA),” *Free Speech Yearbook* 43 (2009).

<sup>63</sup> Eric Connelly, “State Secrets and Redaction: The Interaction Between Silence and Ideographs,” *Western Journal of Communication*, 76, no. 3 (2012), doi: 10.1080/10570314.2011.653470.

<sup>64</sup> The Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, H. R. 6304—5.

## CHAPTER 2: POWER AND DISCOURSE

In the previous chapter, I explored the development of the United States Foreign Intelligence Surveillance Act, and its political and social significance over the last half-century. In this chapter, I consider Michel Foucault's construction of power/knowledge to expand how concepts like government and legislation work to influence the public. Both the language of the law and public conversations about FISA serve as discourses which rhetorically position all people into various subjectivities and power relationships. This chapter will utilize a Foucauldian approach to power to explore how the 2010 Foreign Intelligence Surveillance Act operates as a discourse that propagates particular power/knowledge relationships, rhetorically producing subjectivities that individuals are arranged within.

One fundamental Foucauldian concept that complexifies any conversation about power, including the power structures that are produced through the rhetoric of FISA, is Foucault's framework for power/knowledge. Foucault defines the terms power and knowledge in a uniquely dynamic way by suggesting that the two concepts are fundamentally connected. To begin, Foucault broadens traditional notions of power that frame it as simply a force that can be "possessed" or administered onto others.<sup>1</sup> Rather, Foucault asserts that power becomes constructed through networks of relationships that develop over time. Thus, power can "never be simply present" within a social system, but instead, develops through the unfolding of human interactions.<sup>2</sup> Foucault widens the concept of power from the process of "one action forcibly constraining or modifying another,"<sup>3</sup> to an assortment of structures that become formed by the "reenactment or reproduction of social alignments"<sup>4</sup> which are "co-constituted" both "by those

who support and resist” it.<sup>5</sup> This definition of power shifts agency from one dominant agent, to a compilation of actors. Foucault explains: “individuals are the vehicles of power, not its points of application.”<sup>6</sup> Additionally, Foucault presents power as a dynamic construction without defined boundaries. Gary Gutting explains, power is a presence that “is not something present at specific locations within those networks, but is instead always at issue in ongoing attempts to (re)produce effective social alignment, and conversely to avoid or erode their effects.”<sup>7</sup> As a result, Gutting describes power as “dispersed across complicated and heterogeneous social networks marked by ongoing struggle.”<sup>8</sup> Foucault transformed the definition of power from a sense of authority that can be wielded, to a dynamic social system that becomes mutually constructed between people. Following this perspective, Sonja Foss, Karen Foss, and Robert Trapp describe power as an “omnipresent”<sup>9</sup> structure that develops within all relationships, as well as a “creative force”<sup>10</sup> that serves to facilitate the production of particular social dynamics and material positions. Thus, Foucault’s construction of power allows one to consider social structures in a uniquely complex way by expanding our understanding of how power dynamics manifest and propagate.

Central to Foucault’s notion of power is his concept of knowledge. According to Foucault, systems of power both create, and are created by, ways of thinking. Power relationships both play a role in the invention of the cultural beliefs and artifacts that constitute social knowledge, and will also develop as a result of the knowledge that is produced. Raymie McKerrow explains, “subjects do not ‘call the world into being.’ Rather, the world pre-exists their participation, and the social practices to which they become conditioned or socialized are not initially of their own making.”<sup>11</sup> In other words, individuals are placed within a social context of power relationships that shape how they perceive the world. As a result, Foucault

combines the terms power and knowledge into power/knowledge to describe how “the exercise of power perpetually creates knowledge and, conversely, knowledge constantly induces effects of power.”<sup>12</sup> By considering power as a practice that becomes mutually constructed between parties over time and through the creation of knowledge through discourse, the ways that legislation (such as FISA) works to establish power relationships between individuals, governments, and policies can be understood in a more dynamic way.

Similar to the significance of knowledge within Foucault’s definition of power, Foucault viewed discourse as an important factor in the social production of power/knowledge. Discourses are methods of speaking about, and therefore knowing, the world. Consequently, “knowledge and... discursive practices are inseparable”<sup>13</sup>—knowledge is built and shared using discourse, because knowledge determines “the form” that discourses can and will assume.<sup>14</sup> Discourse is thus significant in building power structures, because “only a particular kind of knowledge is allowed by particular discursive formations, and nothing else receives support.”<sup>15</sup> This analysis considers the Foreign Intelligence Surveillance Act and communication about it to be cultural discourses that influence domestic and global power/knowledge relationships about surveillance, citizenship, and the United States as the leading national power.

Using Foucault’s framework, the history leading up to the development of FISA in 1978, as well as the time prior to each subsequent revision of the document, served as discursive formations, or epistemes,<sup>16</sup> that determined the discourses within the texts themselves. Essentially, an episteme is the context or worldview that spurs certain instances of knowledge to be produced, rather than others. Foss, Foss, and Trapp describe an episteme as “a characteristic system, structure, or network that defines the conditions for the possibility of knowledge or for the world view of an age... a kind of period style for the organization of knowledge that

functions automatically in a culture.”<sup>17</sup> Alan Hunt and Gary Wickham explain epistemes as providing “‘grids’ for perception,” thereby “imposing a framework of categories and classifications *within which* thought, communication, and action can occur.”<sup>18</sup> As examined in the first chapter, the social, economic, and political struggles that the United States felt during the 1970’s, in addition to the growing globalization and information-dominance of the time, were a contextual episteme that instigated the United States government’s creation (and later renovations) of the Foreign Intelligence Surveillance Act.

Foucault’s construction of power/knowledge is further expanded through the concept of the discursive subject. As stated in the previous quote from McKerrow, individuals are subjected to power/knowledge structures that shape how they can and do participate within the world. This conditioning of human behavior can be described as the process of discipline. To discipline individuals is to equip them “with particular skills and attributes to develop their capacity for self-control, to promote their ability to act in concert, to render them amenable to instruction, or to mould their characters in other ways.”<sup>19</sup> Foss, Foss, and Trapp expand upon the discussion of power’s influence on knowledge by suggesting that power structures act by validating or discounting particular subjects and subjectivities. They assert that structures of power “determine what kinds of discourses will be viewed as true or... valid,” ultimately dictating “which subjects are diminished and which... have their discourse valued.”<sup>20</sup> So, not only are power/knowledge relationships inescapable and mutually constitutive, but they also establish which voices will be accepted as true and significant, and which voices will be discredited and squelched. By describing people as subjects that are both subjected to and helping to construct power/knowledge relationships, Foucault develops a more complex framework for agency and influence than ever before. In chapter three of this analysis, I will explore how the 2010 Foreign

Intelligence Surveillance Act rhetorically produces the subjects of person and citizen and divides these subjectivities into sub-categories; in chapter four, I will discuss how FISA provides these various subjectivities varying rights and protections.

An important clarification can be made between traditional notions of government and legislation, and a Foucauldian perspective on government and discipline. Foucault re-frames these concepts as large-scale practices of power/knowledge that regulate human behavior. According to Foucault, forms of government exercise power by directing citizens to monitor their own actions.<sup>21</sup> A government “aims to regulate the *conduct* of others or of oneself,” both by “acting directly on individual behaviour,” as well as by leading individuals to “regulate their own behaviour.”<sup>22</sup> As such, the goal of government can be viewed as the ability to produce successful power/knowledge relationships within the populace. MacDonald and Hunter describe Foucault’s “governmentality” as a form “of exercising... power upon populations” that is “informed by a principle form of knowledge, political economy.”<sup>23</sup> A successful government operates by disciplining, or training, its subjects to perform in particular ways. As individuals enact activities of citizenship, they serve to (re)produce the original power structure of governmentality. Barry Hindess describes Foucault’s frames of “domination and government” as “power relationships that are relatively stable and hierarchical.”<sup>24</sup> Hindess defines the act of domination as “conditions under which the subordinated have relatively little room for manoeuvre,” and asserts that the role of government “lies between domination and those relationships of power which are reversible... aiming to affect the actions of individuals by working on their conduct.”<sup>25</sup> From this perspective, governments attempt to discipline their people into desired social systems that ultimately serve to reinforce structures of governmentality. Foucault’s discussion of governance expands upon how we understand



individuals to be disciplined into various power relationships by stressing the socially constituted, evolving, and resistive functions that power/knowledge structures display. This perspective on the role of governments and how they influence publics re-frames the Foreign Intelligence Surveillance Act from a piece of legislation, to a form of discipline created by the United States government in an attempt to discipline the public and other nations to operate in particular ways.

The process of discipline is a fundamental feature of Foucault's governmentality. According to Foucault, power strategies that operate as disciplining practices can function in many different ways. The different ways that power dynamics are developed and maintained are referred to as strategies: "the multiple ways in which heterogeneous elements align or conflict with one another to constitute power relations."<sup>26</sup> Possible power relationships and the strategies that produce them can manifest in a wide variety of forms. For example, practices of "normalization" and "normalizing judgment" have been described "as a technique of power."<sup>27</sup> Lee Quinby describes normalization as a process whereby "modes of power and their corresponding techniques and practices" work to "discipline and regulate the body or soul... producing docility and conformity."<sup>28</sup> Strategies function to discipline individuals over time into particular power relationships by influencing their daily behaviors.

In addition to normalization, society follows a number of customs that function as disciplining practices. Everyday practices of "surveillance, elicitation," "documentation," and more, can be regarded as powerful forces due to the ways they create constraints that shape individual behavior, consequently constructing "new forms of knowledge" as well as "new kinds of constraint."<sup>29</sup> One of Foucault's most famous contributions to the conversation is his exploration of strategies and power relationships in the Panopticon. The Panopticon was a

prison system designed to condition criminals to monitor their own behavior (Foucault described the Panopticon as a “technological invention in the order of power, comparable with the steam engine in the order of production”<sup>30</sup>). A Panopticon is illuminated from a central security post, with floors of prison cells that encircle the guard stand. The layout arranges individuals so that all prisoners are easily visible to guards, but prisoners are unable to see the guards due to the central lighting. As result, prisoners are unable to determine when the guards are watching them. This phenomenon led Foucault to create “the term ‘Panoptism’” to refer to “an ensemble of mechanisms brought into play in all the clusters of procedures used by power.”<sup>31</sup> Foucault’s Panopticon is a useful frame for considering how a government might discipline its “subjects through discourse,”<sup>32</sup> rather than by way of physical punishment. Foucault revolutionized our understanding of how governments and the social systems that they govern function, by exploring how strategies—such as normalization, surveillance, and panoptisms—can be seen structures that discipline subjects into various power/knowledge constructions. I will explore implications for discipline and panoptism as a result of the rhetoric within the Foreign Intelligence Surveillance Act in the concluding chapter.

Foucault’s example of the Panopticon is a system where government and discipline are so fundamentally interwoven into a social structure that individuals, or subjects, eventually begin to self-govern. In this way, Foucault’s framework of power/knowledge places a new importance on the subjects within power relationships, and their ability to foster or resist power structures by either adopting or working against a governing force’s disciplining behaviors. Foucault asserts, “we must attempt to study the myriad of bodies which are constituted as peripheral *subjects* as a result of the effects of power.”<sup>33</sup> In response, McKerrow reframes the position of a rhetorical critic to ask the central question: “what, precisely, is the role, within a particular discourse, that is

given to the speaking subject: what authority does the subject have in a specific context to speak, and to what effect?"<sup>34</sup> It is imperative to ask these questions, because disciplining practices become so tightly woven into social systems that they can be difficult to notice. McKerrow explains, "we are comfortable with those social practices that define us, even as they limit our spirit and constrain our freedom to be other than what we are."<sup>35</sup> By extending how we perceive governments as disciplining subjects to be an increasingly dynamic and mutually constitutive process, subjects themselves gain increased significance through the possibility for self-monitoring social systems to develop. The subjects produced within the Foreign Intelligence Surveillance Act are worthy of rhetorical study due to the implications these subjectivities may have for individuals' privacy rights, legal protections, and the U.S. government's ability to surveil on others.

While rhetorical scholarship has yet to explore power/knowledge directly within the context of FISA, some research has considered Foucault's framework within the context of electronic communication—a discourse central to the operation of the 2010 Foreign Intelligence Surveillance Act. In their research, Campbell and Carlson explored how internet use relates to Foucault's sense of discipline, and assert that "the panoptic model produces the self-monitoring subject as much on some threat of coercion as on the omnipresent possibility of surveillance."<sup>36</sup> Sami Coll explored the role of online privacy as a governing mechanism. Coll explained that privacy can act as both "a countermeasure against surveillance," and "a part of the whole mechanism of surveillance."<sup>37</sup> In the context of the internet, privacy is generally regarded as "informational privacy," or an individual's control over their own "private data."<sup>38</sup> Coll studied circumstances when individuals felt an invasion of privacy on the internet, and discovered that often these perceptions did not match up with "what is considered a risk by data and privacy

protection laws. Ironically, measures meant to protect customers' privacy are the very ones that produce this feeling" of a breach of privacy.<sup>39</sup> Coll ultimately argues that privacy policies should not be "reduced to the self-determination principle," but rather, "privacy and its definition must urgently be understood as a struggle of power" involving the "surveillance of citizens and consumers," while some individuals "would prefer to promote privacy as a common good that could lead society to more democracy and freedom."<sup>40</sup> As the presence of internet communication becomes increasingly pervasive over time and big data collection develops as a social concern, some scholars have considered how the Foucauldian roles of discipline and governance play out in a computer-mediated online environment.

This study considers issues of privacy—whether over the internet, phone, or through another medium—by analyzing how the United States gathers non-U.S. information, as directed by the 2010 Foreign Intelligence Surveillance Act. The document, FISA, can be considered a rhetorical strategy (following Foucault's framework), because the purpose of a piece of legislation is to maintain old ethical frameworks while applying them to new time periods and contexts. Additionally, the language in FISA is composed of various rhetorical "strategies" due to the many ways the rhetoric of the text itself constitutes power structures. These strategies rhetorically position individuals into different groups with varying access to rights, producing subjectivities with a pre-constructed power hierarchy. The following analysis explores the subjects of person and citizen in FISA, and describes how these subjectivities are rhetorically constituted within a structure of national power.

## ENDNOTES

<sup>1</sup> Joseph Rouse, "Power/Knowledge," Gary Gutting, ed., *The Cambridge Companion to Foucault* (New York: Cambridge University Press, 1994), 106.

<sup>2</sup> Rouse, "Power/Knowledge," 110.

<sup>3</sup> Rouse, "Power/Knowledge," 110.

<sup>4</sup> Rouse, "Power/Knowledge," 107.

<sup>5</sup> Rouse, "Power/Knowledge," 109.

<sup>6</sup> Michel Foucault, *Power/Knowledge: Selected Interviews & Other Writings 1972-1977*, ed. Colin Gordon (New York: Vintage Books, 1980), 98.

<sup>7</sup> Gary Gutting, ed., *The Cambridge Companion to Foucault* (New York: Cambridge University Press, 1994), 109.

<sup>8</sup> Gutting, *The Cambridge Companion to Foucault*, 109.

<sup>9</sup> Sonja Foss, Karen Foss, and Robert Trapp, *Contemporary Perspectives on Rhetoric* (Prospect Heights: Waveland Press, Inc., 1985), 205-206.

<sup>10</sup> Foss, Foss, and Trapp, *Contemporary Perspectives on Rhetoric*, 207.

<sup>11</sup> Raymie McKerrow, "Foucault's Relationship to Rhetoric," *The Review of Communication* 11, no. 4 (2011): 257, doi: 10.1080/15358593.2011.602103.

<sup>12</sup> Foucault, *Power/Knowledge*, 52.

<sup>13</sup> Foss, Foss, and Trapp, *Contemporary Perspectives on Rhetoric*, 195.

<sup>14</sup> Foss, Foss, and Trapp, *Contemporary Perspectives on Rhetoric*, 195.

<sup>15</sup> Foss, Foss, and Trapp, *Contemporary Perspectives on Rhetoric*, 195.

<sup>16</sup> Foss, Foss, and Trapp, *Contemporary Perspectives on Rhetoric*, 202.

<sup>17</sup> Foss, Foss, and Trapp, *Contemporary Perspectives on Rhetoric* (Prospect Heights: Waveland Press, Inc., 1985), 194.

<sup>18</sup> Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994), 9.

<sup>19</sup> Hindess, *Discourses of Power*, 113.

<sup>20</sup> Foss, Foss, and Trapp, *Contemporary Perspectives on Rhetoric*, 205.

<sup>21</sup> Barry Hindess, *Discourses of Power: From Hobbes to Foucault* (Oxford: ...” 1996), 106.

<sup>22</sup> Hindess, *Discourses of Power*, 106.

<sup>23</sup> Malcolm MacDonald and Duncan Hunter, “Security, Population, and Governmentality: UK Counter-terrorism discourse,” *Critical Approaches to Discourse Analysis across Disciplines* 7, no. 1 (2013): 124.

<sup>24</sup> Hindess, *Discourses of Power*, 97.

<sup>25</sup> Hindess, *Discourses of Power*, 97.

<sup>26</sup> Rouse, “Power/Knowledge,” 111.

<sup>27</sup> Gutting, *The Cambridge Companion to Foucault*, 109.

<sup>28</sup> Lee Quinby, *Freedom, Foucault, and the Subject of America* (Boston: Northeastern University Press, 1991), 4.

<sup>29</sup> Rouse, “Power/Knowledge,” 96.

<sup>30</sup> Foucault, *Power/Knowledge*, 71.

<sup>31</sup> Foucault, *Power/Knowledge*, 71.

<sup>32</sup> John Campbell and Matt Carlson, “Panopticon.com: Online Surveillance and the Commodification of Privacy,” *Journal of Broadcasting and Electronic Media* 46, no. 4 (2002): 589.

<sup>33</sup> Foucault, *Power/Knowledge*, 98.

<sup>34</sup> McKerrow, “Foucault’s Relationship to Rhetoric,” 267.

<sup>35</sup> *Ibid.*, 255.

<sup>36</sup> Campbell and Carlson, “Panopticon.com,” 590.

<sup>37</sup> Sami Coll, “Power, knowledge, and the subjects of privacy: understanding privacy as the ally of surveillance,” *Information, Communication & Society* 17, no. 10 (2014): 1251, doi: 10.1080/1369118X.2014.918636.

<sup>38</sup> Coll, “Power, knowledge, and the subjects of privacy,” 1252.

<sup>39</sup> Coll, “Power, knowledge, and the subjects of privacy,” 1257.

<sup>40</sup> Coll, “Power, knowledge, and the subjects of privacy,” 1261.

## CHAPTER 3: PERSONHOOD AND CITIZENSHIP

As a discourse, the Foreign Intelligence Surveillance Act produces two significant types of subjects: those of person and citizen. This chapter will explore how the rhetoric within FISA constructs a knowledge of personhood as an inclusive and factionalized group that is bound by responsibilities to the United States government. The document constructs a broad definition of person, factionalizing it into multiple sub-groups. Additionally, FISA assigns civic responsibilities to each person, such as their compliance with government operations and confidentiality about intelligence-gathering procedures. These qualities of personhood within the language of FISA build complex implications for personal responsibility to the United States government, and to other persons.

In general, communication research on how discourse can produce persons and personhood is non-specific and decentralized, although many intercultural communication studies have explored the relationship between language and identity. In relation to discourse, Michael Tissaw stresses that “human beings do not come into the world as persons. They *become* persons and maintain their personhood via acquisition and exercise of a range of abilities” that are associated with “the concepts ‘person’ and ‘personhood.’”<sup>1</sup> From a rhetorical perspective, Sabine Krolak-Schwerdt et al. suggest that “person descriptive texts” can be identified as a “specific type of texts”<sup>2</sup> in and of themselves. As a genre, person descriptive texts describe a person, or persons, and present a number of characteristics that are significant to or representative of that person/s. Sabine Krolak-Schwerdt et al. argue that these “person descriptions” can have a significant impact on one’s identity and behaviors, and “frequently



provide the basis of such important things as impression formation, attribution, and social judgments.”<sup>3</sup> The classifying of person descriptive texts as a unique type of rhetoric with the potential to impact individuals’ beliefs and actions displays the need for communication research to further explore how texts describe and rhetorically produce various persons.

Literature on citizenship is diverse, but seems to frame citizenship as a social and/or political construction that establishes a relationship of rights and responsibilities between a person and a structured group. Typically, citizenship is conceptualized as a relationship between a person and a state that involves both the assignment of personal responsibility to a country, and the national attribution of rights to an individual. Traditional notions of citizenship appear to be political and legal, involving an “individual’s full political membership in the nation-state and permanent allegiance to it.”<sup>4</sup> Connie McNeely describes the relationship of “citizenship” between a person and their country as “a legal status” that creates “rights and duties, liberties and constraints,” as well as “powers and responsibilities.”<sup>5</sup> The status of citizen provides an individual with “general protections”<sup>6</sup> from the state, in addition to allotting them “a certain reciprocity of rights against, and duties towards, the community” in which they live.<sup>7</sup> Because individuals are given responsibilities towards their community as citizens, citizenship requires various “degrees of participation”<sup>8</sup> from participants. Foucault’s concept of power/knowledge works well with theories that construct citizenship as a give-and-take of rights and responsibilities between a government and its citizens, because the government produces disciplining practices and strategies that help construct citizenship, and as a result, citizens participate in the production of national power.

It is important to note that citizenship can expand beyond the confines of a nation-state. Catherine Holland describes how possible variations of “political identification” can be vast, and

can connect to “the particular identities of citizens.”<sup>9</sup> Citizenship can be understood with many layers and appropriations, but generally, the defining feature of a citizen is a “status that provides access to special rights and powers.”<sup>10</sup> While the attributing of rights and responsibilities are key functions of citizenship, citizenship expands beyond a simple give-and-take relationship. Over time, individuals can adopt and embody the qualities of citizen. Carlos Mendoza explains,

full citizenship... includes both the institutional (legal) and attitudinal aspects. We are citizens to the extent that we know the legal and formal environment in which we live, but also to the extent to which we know how to live and commit ourselves to the transformation of our society.<sup>11</sup>

Mendoza illustrates how relationships of citizenship can transform one’s self (in both behavior and attitude), as well as societal processes overall. Connie McNeely stresses the identity function of citizenship, and considers the power dynamics that can manifest as a result.

McNeely argues that nations construct “social boundaries” which “serve to designate societal membership for some groups as opposed to ‘others,’”—a “designation... primary and fundamental to social identity itself.”<sup>12</sup> According to this perspective, citizenship is a significant piece of one’s identity, and becomes a way for individuals to associate with an in-group and exclude others as an out-group. McNeely extends her discussion of power by asserting that “fundamental to” citizenship “is the question of who should or may participate and at what level,” as institutions of citizenship systematically distinguish “between those who are members and those who are ‘others.’”<sup>13</sup> Mendoza and McNeely expand the construction of citizenship by describing attitudinal aspects and identity functions as essential pieces of citizenship. While citizenship is often thought of as relationship between a nation and its people, the term may also

be useful for understanding other social affiliations beyond nationality, and should be considered for the numerous ways it may affect individuals' identities, behaviors, and worldviews.

Within the rhetoric of the Foreign Intelligence Surveillance Act, the subjects of person and citizen are entwined in a complex relationship: the status of personhood ties individuals with citizen-type responsibilities to the United States government, yet full personhood is not provided to individuals unless they receive the status of full-citizen. As such, the subjects of person and citizen that are produced by FISA have a complex and co-constituted relationship; different subjectivities are given varying access to legal rights and protections, and thus, they are rhetorically produced as different types of persons and citizens.

The Foreign Intelligence Surveillance Act presents "person" as a varied and inclusive term that can be separated into distinct categories. In general, FISA provides a broad definition of personhood. FISA defines "person" as "any individual, including an any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power."<sup>14</sup> Under this definition of person, groups, businesses, and governments, all qualify as a people. In addition, the document explicitly emphasizes the presence of working individuals and a wide spectrum of corporations, and repeats the phrase, "landlord, custodian, or other person." By granting groups of people and companies personhood, FISA provides "person" a relatively broad scope. However, FISA's construct of personhood is not united, but divided into individuals, groups, companies, and more, and is primarily reserved for members of the United States.

Within FISA's framework of "person," United States persons are provided their own distinct category of personhood that receives special privileges. The document defines a "United States person" as:

a citizen of the United States, an alien lawfully admitted for permanent residence... an unincorporated association [of] a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States.<sup>15</sup>

While the Foreign Intelligence Surveillance Act's definition of "person" is given a wide scope, the document provides a more limited definition of United States persons. In order to qualify as a U.S. person, one must be a U.S. citizen, a permanent resident of the U.S., a group composed of citizens/permanent residents, or a U.S. corporation that primarily resides in the United States. FISA's definition of United States person is still relatively inclusive, because groups of people and companies are granted personhood. However, only the individuals, groups, and companies that are granted permanent legal residency in the United States also receive the status of "U.S. person."

While the Foreign Intelligence Surveillance Act has a clear definition of United States person that provides specific boundaries, the document lacks any consideration of a "foreign person." FISA uses the phrase "United States person[s]" 89 times; the terms "foreign person" and "non-U.S. person" do not appear in the document once. Instead, non-U.S. persons in FISA are presented as foreign powers, agents of a foreign power, or other persons. By failing to acknowledge that non-U.S. citizens are also persons, the document limits which groups are provided the title and privileges of full personhood. This distinction in FISA's attribution of personhood becomes increasingly important in the "National Power" chapter of this analysis, where I discusses how FISA's rhetorical moves provide United States persons with more privacy rights and protections than non-U.S. persons.

Another significant sub-group of person within the Foreign Intelligence Surveillance Act is an aggrieved person. Aggrieved persons in FISA are targets of United States government operations, and have had their information surveilled upon. In order to qualify as an aggrieved person, one must have their “premises, property, information or material” targeted by a “physical search.”<sup>16</sup> In general, the document positions U.S. groups against aggrieved persons, and presents aggrieved persons as individuals that are in need of government surveillance. FISA does provide aggrieved persons some basic rights. First, FISA dictates that aggrieved persons must be informed whenever a government body intends to “use” or “disclose”<sup>17</sup> information collected from that person during a surveillance-operation, or enter it into evidence for court or state purposes. Second, after a person has been notified that the United States government intends to use their information, “any aggrieved person against whom evidence” has or will be “obtained or derived”<sup>18</sup> has the right to appeal the use of their information to the court. A “move to suppress the evidence obtained or derived” may be considered “on the grounds that—”

(A) the information was unlawfully acquired; or

(B) the use of the pen register or trap and trace device, as the case may be, was not made in conformity with an order of authorization or approval under this title.<sup>19</sup>

This passage of the Foreign Intelligence Surveillance Act provides aggrieved persons the right to know when their information is being used by the government, and allows them to contest the use of their information if it was acquired illegally. However, the passage also assumes that aggrieved persons are a guilty party who rightfully had their information obtained by the United States government in the first place, and requires that these individuals fight in court if they desire to prove otherwise. FISA’s construction of aggrieved persons suggests that peoples’ information belongs to the United States government on demand, and produces difficult legal

hurdles for targets of surveillance to overcome if they choose to defend the privacy of their information.

Despite the Foreign Intelligence Surveillance Act's factionalizing of personhood into United States persons and aggrieved persons and its failure to recognize non-U.S. individuals as persons, the document allows for arguably anyone to qualify as a "person." FISA repeatedly references an "other person" and an "other specified person." Not only is personhood granted broad applicability within FISA due to its explicit inclusion of groups and companies, but also, the document's use of non-specific phrases, such as "other specified person," implies that absolutely anyone can be deemed a "person" (even if members of the United States are the only ones explicitly referred to as persons). The non-specific inclusivity of FISA's term, "person," becomes increasingly important as the role of citizenship is created through the document's duties for such "persons" during intelligence-gathering procedures, and the rights that persons are provided in return.

Alongside the Foreign Intelligence Surveillance Act's broad and fragmented construction of personhood, FISA strategically produces relationships of citizenship by framing all people as having responsibilities to the United States government. In the next few paragraphs, I will describe how FISA uses variations of the term "person" to present extensive duties for individuals and organizations in disclosing information to the U.S. government, maintaining any records requested by the U.S. government, and remaining confidential about the operations all the while. Ultimately, the rhetoric of the Foreign Intelligence Surveillance Act produces person as citizen by presenting persons as a diverse group with duties to the United States government.

Citizenship is built into FISA with the document's explicit assertion that all persons are required to disclose information to and maintain records for the United States government as

requested. For example, FISA dictates that the Attorney General may “direct” a person to: “(i) furnish all information, facilities, and assistance necessary to accomplish” a surveillance operation “in such a manner as will protect the secrecy of the acquisition and produce a minimum of interference,” as well as “(2) maintain... any records concerning the search or the aid furnished that such person wishes to maintain.”<sup>20</sup> According to this section of FISA, the Attorney General has the authority to access any foreign person, group, or company’s records and information in pursuit of a related operation, as well as receive assistance and record-keeping duties from any person so asked. This statute acts as a strategy that produces “person” with responsibilities to the U.S. government inherently and at request, whether or not individuals have been made aware of these civic duties, consent to them, or are United States citizens. At the same time, FISA demands persons provide a “minimum of interference” when complying with U.S. surveillance operations, so they are required to cooperate without question or delay. By demanding that any individual, company, or other group must cooperate with United States intelligence-gathering operations at any point, FISA strategically produces persons that are bound by responsibility to the U.S. government, regardless of whether or not they receive the rights and privileges of United States persons.

One group that the Foreign Intelligence Surveillance Act explicitly identifies when attributing persons responsibilities to U.S. government intelligence-gathering operations are individual laborers. For example, the document states that a:

landlord, custodian, or other person shall furnish any information, facilities, or technical assistance necessary to accomplish the installation and operation of the pen register or trap and trace device in such manner as will protect its secrecy and produce a minimum amount of interference....<sup>21</sup>

This excerpt positions common working individuals as informants for the United States government, while reinforcing the need for these persons to silently comply with U.S. surveillance practices. FISA also identifies large companies as possessing duties to the United States government during surveillance operations. The document states that the government officials conducting intelligence-gathering may request information from “the provider of a wire or electronic communication service,”<sup>22</sup> any “public accommodation facility, physical storage facility,” “vehicle rental facility,” or “common carrier” (any person or entity transporting people or property by land, rail, water, or air for compensation<sup>23</sup>)... “shall comply with an order” for information.<sup>24</sup> This excerpt seems to emphasize transportation records and information, suggesting that the transportation of foreign individuals is of particular concern to the U.S. government. By explicitly identifying working individuals and companies as persons with duties in intelligence-gathering operations, FISA positions everyday workers, establishments, and companies simultaneously as potential informants for the United States government, who are legally responsible for maintaining records for the U.S. government upon request. Additionally, FISA dictates that records persons compile or maintain for the United States government “shall be furnished at reasonable intervals during regular business hours for the duration of the order to the authorized Government official or officials.”<sup>25</sup> Through its rhetoric, the Foreign Intelligence Surveillance Act provides potentially anyone with the legal obligation to assist with United States surveillance operations at any time. All the while, the document explicitly highlights working individuals and companies as groups with duties during U.S. intelligence-gathering operations, positioning them as potential government informants or spies.

One significant duty that FISA assigns to persons involved in surveillance operations is confidentiality. Even though the document provides legal authority for government officials to



demand a private person or company's compliance with a surveillance operation, the individuals providing their services to the government are required to maintain secrecy about the operations that are taking place. One excerpt from FISA explains: a "provider, landlord, custodian, or other person" that assists in a surveillance operation "shall not disclose the existence of the investigation or of the pen register or trap and trace device to any person unless or until ordered by the court," at the same time as the individual "shall maintain... any records concerning the pen register or trap and trace device or the aid furnished."<sup>26</sup> All the while, FISA demands that the U.S. government officials who engage in surveillance operations must keep the intentions behind an investigation private to others. In one section of the document, FISA states, "an order under this subsection shall not disclose that it is issued for purposes of an investigation."<sup>27</sup> This statute requires that persons must still comply with U.S. intelligence-gathering procedures, whether or not they are informed about the operation they are taking part in. So, not only does the Foreign Intelligence Surveillance Act demand that any person asked cooperates with intelligence-gathering operations, but it also insists that all persons keep these investigations confidential. FISA develops a strategy of secrecy regarding intelligence-gathering operations, where citizens are not allowed to communicate about ongoing operations, and may not be provided information about operations they are actively participating in. This dynamic could be seen as fostering a sense of mistrust among people, because any individual or group could potentially be a quiet accomplice helping the U.S. government surveil on others. By requiring confidentiality about intelligence-gathering operations, FISA strategically inhibits individuals' ability to discuss United States government practices with others, further factionalizing the document's construction of person.

The Foreign Intelligence Surveillance Act portrays personal compliance with U.S. government requests and responsibilities as an expected and legally required behavior for any person so asked. For example, the rhetoric of the document presents compliance as a stated fact, without allowing individuals the ability to choose whether or not they assist in intelligence operations. Orders for physical searches under FISA “direct” that:

(B) ... a specified landlord, custodian, or other specified person furnish the applicant forthwith all information, facilities, or assistance necessary to accomplish the physical search in such a manner as will protect its secrecy and produce a minimum of interference with the services that such landlord, custodian, or other person is providing the target of the physical search;

(C) that such landlord, custodian, or other person maintain under security procedures... any records concerning the search or the aid furnished that such person wishes to retain.<sup>28</sup>

FISA enforces the authority of U.S. officials to order persons to assist with surveillance operations through legal punishments. As stated by the Foreign Intelligence Surveillance Act, “failure to obey an order issued under this paragraph may be punished by the Court as contempt of court.”<sup>29</sup> These excerpts display how FISA not only assumes people will comply with intelligence-gathering procedures, but also reinforces this behavior through its enforcement of legal obligations.

Alongside the responsibilities that the Foreign Intelligence Surveillance Act assigns to persons, the document does provide individuals with some privileges and incentives for complying with U.S. government operations. Due to the time and effort FISA requires from persons who assist with intelligence-gathering operations, the document includes a discussion of compensation. FISA requires that the government “compensate” individuals for “reasonable

expenses incurred by such provider, landlord, custodian, or other person in providing such information, facilities, or technical assistance.”<sup>30</sup> Not only are individuals who assist in surveillance operations legally provided compensation for their contribution, but also, these persons are protected from legal action. In one section, FISA establishes that,

no cause of action shall lie in any court against any provider of a wire or electronic communication service, landlord, custodian, or other person (including any officer, employee, agent, or other specified person thereof) that furnishes any information, facilities, or technical assistance<sup>31</sup>

to a surveillance operation. The Foreign Intelligence Surveillance Act’s discussion of personal immunity and compensation for persons who participate in intelligence-gathering operations provides those individuals with incentives and privileges for complying with U.S. government operations.

In addition to the privileges FISA furnishes to the persons who assist with surveillance procedures, the document provides individuals varying levels of privacy rights and safeguards. FISA does supply all persons with some basic legal protections. For example, the document sets time limits on surveillance procedures (one sections authorizes operations for “a period not to exceed 90 days,” though extensions of up to 90 days may be granted)<sup>32</sup> and outlines an appeal process for aggrieved persons to contest the U.S. government’s use of their information. While all individuals receive some rights according to FISA, United States persons are granted more privacy rights than others simply because of their association with the United States. The Foreign Intelligence Surveillance Act is designed to only allow for the targeting of information shared “exclusively between or among foreign powers.”<sup>33</sup> As a result, U.S. persons are relatively protected from becoming a target of surveillance-gathering procedures under FISA because of

their domestic status. In conjunction with the duties that FISA assigns to all people, the document provides people varying access to legal rights and protections.

Using a Foucauldian perspective, the subject of person in the Foreign Intelligence Surveillance Act is created through the document's construction of knowledge. FISA uses definitions for various persons alongside the construction of duties and privileges, forming a complex network of citizenship that impacts the agency of individuals involved. A number of rhetorical strategies contribute to the image of persons that is produced through FISA's presentation of knowledge. First, FISA's wide definition of "person" can be seen as a strategy with notable rhetorical implications in and of itself. The document creates a wide range of possibilities for personhood, such as groups and companies. As a result, the duties that FISA requires from individuals can also be asked of businesses, organizations, and more. The Foreign Intelligence Surveillance Act uses its definitions to include an extensively varied and inclusive range of subjects as persons. Due to FISA's portrayal of persons as a diverse, inclusive group, there may be subsequent implications for individuals to feel a lack of unity with or similarities to other persons. The all-inclusive definition of personhood can be seen as a strategy that encourages each person acting for him/herself, because the group of "person" is so vast and divided that it lacks cohesion across sub-groups. FISA's rhetoric can be seen as producing knowledge that binds many types of subjects into the role of person, with various potential implications for what it means to be a "person."

Another key strategy within the Foreign Intelligence Surveillance Act that contributes to the knowledge that constructs personhood is through the document's production of responsibilities of citizenship. The Foreign Intelligence Surveillance Act ascribes duties to all persons by requiring that everyone must comply with U.S. conducted surveillance operations and

maintain confidentiality, producing the knowledge of persons by entwining responsibilities to the government as fundamental features of the concept of personhood. All the while, FISA rhetorically produces person as citizen and person as anyone/everyone, positioning all people as bound to orders from the United States government regardless of their location or identity. As a result, under FISA, the United States government can require particular duties in surveillance operations from arguably anyone. The duties of personhood legally become accepted characteristics of persons, impacting how the Court and individuals themselves may view their relationship to the United States government.

Not only does the Foreign Intelligence Surveillance Act provide detailed responsibilities for persons to maintain records and disclose information to the U.S. government, but the act also hails out specific types of professions and corporations as potential government informants. FISA also offers these individuals financial compensation and legal security for their compliance and timely cooperation with surveillance procedures. As a result, the document positions people against one another, encouraging individuals to silently and efficiently cooperate with United States surveillance procedures in order to receive the most gain and endure the least trouble. By producing the knowledge that all persons may be potential U.S. government informants, this strategy has the potential to exacerbate the potential lack of unity amongst persons. Because FISA positions everyday, working individuals and companies as legal informants to the United States government, persons may view their relationship to other persons with less trust than otherwise, and be more reserved from sharing information with others or participating in structured events. The rhetorical positioning of person within FISA serves as knowledge that creates the subjects of person as citizen, and persons as a factionalized group.

The Foreign Intelligence Surveillance Act rhetorically creates the subjects of person and citizen through the language of the law, and includes all individuals, companies, and groups within these roles. However, United States persons and non-U.S. persons are provided non-equal demands and opportunities by the document, complicating the subjectivities that are available to person/citizens within FISA—a relationship that will be further explored in Chapter 4 regarding National Power. The language of the Foreign Intelligence Surveillance Act serves as knowledge that produces persons as an inclusive and factionalized group, bound by responsibilities to the United States government.

## ENDNOTES

<sup>1</sup> Michael Tisaw, “The Person Concept and the Ontology of Persons,” in *The Psychology of Personhood: Philosophical, Historical, Social-Developmental, and Narrative Perspectives*, ed. Jack Martin and Mark Bickhard (New York: Cambridge University Press, 2013), 32.

<sup>2</sup> Sabine Krolak-Schwerdt, Nadine Junker Rainer Roth, and Margret Wintermantel, “Processing Person Descriptions: How Does Text Coherence Influence Encoding and Retrieval of Person Information?” *Journal of Language and Social Psychology* 27, no. 3 (2008), 236.

<sup>3</sup> Krolak-Schwerdt, Roth, and Wintermantel, “Processing Person Descriptions,” 236.

<sup>4</sup> *Public Rights, Public Rules: Constituting Citizens in the World Polity and National Policy*, ed. Connie McNeely (New York: Garland Publishing, 1998), 5.

<sup>5</sup> *Public Rights, Public Rules*, ed. Connie McNeely, 5.

<sup>6</sup> Catherine Holland, *The Body Politic: Foundings, Citizenship, and Difference in the American Political Imagination* (New York: Routledge, 2001), vii.

<sup>7</sup> *Public Rights, Public Rules*, ed. Connie McNeely, 6.

<sup>8</sup> *Public Rights, Public Rules*, ed. Connie McNeely, 6.

<sup>9</sup> Holland, *The Body Politic*, vii.

<sup>10</sup> *Public Rights, Public Rules*, ed. Connie McNeely, 10.

<sup>11</sup> Carlos Mendoza, “Globalization and Citizenship: Is There Room For Pedagogy?” in *Educating for Participatory Democracy: Paradoxes in Global Logistics*, ed. Roy Elveton (Cresskill: Hampton Press, 2006), 173.

<sup>12</sup> *Public Rights, Public Rules*, ed. Connie McNeely, 7.

<sup>13</sup> *Public Rights, Public Rules*, ed. Connie McNeely, 6.

<sup>14</sup> Foreign Intelligence Surveillance Act of 1978, P.L. 95-511, as amended through P.L. 111-259 (2010), sec. 101 p. 6.

<sup>15</sup> P.L. 111-259, sec. 101 p. 6.

<sup>16</sup> P.L. 111-259, sec. 301 p. 23.

<sup>17</sup> P.L. 111-259, sec. 405 p. 40.

<sup>18</sup> P.L. 111-259, sec. 405 p. 40.

<sup>19</sup> P.L. 111-259, sec. 405 p. 40.

<sup>20</sup> P.L. 111-259, sec. 302, 25.

<sup>21</sup> P.L. 111-259, sec. 403 p. 37.

<sup>22</sup> P.L. 111-259, sec. 403 p. 37.

<sup>23</sup> P.L. 111-259, sec. 502 p. 48.

<sup>24</sup> P.L. 111-259, sec. 601 p. 48.

<sup>25</sup> P.L. 111-259, sec. 403 p. 38.

<sup>26</sup> P.L. 111-259, sec. 403 p. 37-38.

<sup>27</sup> P.L. 111-259, sec. 601 p. 48.

<sup>28</sup> P.L. 111-259, sec. 304 p. 29.

<sup>29</sup> P.L. 111-259, sec. 702 p. 57.

<sup>30</sup> P.L. 111-259, sec. 403 p. 37-38.

<sup>31</sup> P.L. 111-259, sec. 403 p. 38.

<sup>32</sup> P.L. 111-259, sec. 403 p. 38.

<sup>33</sup> P.L. 111-259, sec. 102 p. 7.



## CHAPTER 4: NATIONAL POWER

Persons and citizens within the Foreign Intelligence Surveillance Act are not all on an equal platform when it comes to individual rights. The document embeds persons within various and unequal fields of power, primarily defined by their association with either the United States or foreign powers. This chapter will first explore how the United States is rhetorically constructed within FISA, exploring the various levels of power the document assigns to different members of the United States, and suggesting that the U.S. displays a heightened consideration for its own interests at the expense of non-U.S. groups. Next, the chapter will consider how FISA others non-U.S. people, characterizing them as risky and in need of surveillance, and ultimately limiting the rights and privileges provided to them. The rhetoric of FISA constructs various levels of national power, attributing different groups unequal access to legal rights and protections.

### *The United States*

The Foreign Intelligence Surveillance Act positions the United States and foreign groups as separate and disparate entities. As constructed in FISA, the United States is a sub-divided and diverse group that sets relatively strict guidelines for membership. The document also makes explicit attempts to protect United States interests, while failing to provide other persons with equal consideration. As a result, FISA's production of United States person is factionalized, yet still granted wider access to rights than non-U.S. persons.

Similarly to FISA's division of person into separate sub-groups, members of the United States are separated into many sub-categories with varying amounts of rights and privileges. However, unlike the term "persons," FISA provides defined boundaries for United States persons and territory. FISA's definitions for the "United States" and "state" are both relatively short, yet specific about who is included. The United States is defined as "all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands,"<sup>1</sup> and state is defined as "any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and any territory or possession of the United States."<sup>2</sup> Both of these terms are defined with a few specific locations, thereby expressing explicit boundaries for who is and is not a "state" and a member of the "United States." FISA's definition of United States person (cited in chapter three of this analysis) also presents specific guidelines for qualification. U.S. persons are individuals and groups that are legal citizens or permanent residents of the United States, or companies that are incorporated in the U.S.<sup>3</sup> Despite the many types of subject that can qualify as a person under this definition, FISA limits the parameters of "United States persons" within a relatively explicit and concise scope, by requiring that persons are citizens or legal residents of the United States to acquire the position and rights of full citizenship. The Foreign Intelligence Surveillance Act's definitions for the "United States," a "state," and a "United States person" all convey relatively clear and specific boundaries for who makes up the United States, excluding a large majority of individuals from receiving full citizenship from the rhetoric of FISA.

As members of the United States, FISA grants "U.S. persons" significant and unique rights. For example, FISA requires that law enforcement officials obtain a warrant before collecting information from a United States person,<sup>4</sup> while there are cases regarding foreign

persons when warrants are not needed, or applications can be approved after surveillance operations have already begun. Also, the Foreign Intelligence Surveillance Act requires that law enforcement follows “minimization procedures” which ensure that, among other things, U.S. persons must consent before law enforcement can release any information that will identify a United States person (thereby prohibiting “the dissemination of non-publicly available information” about U.S. persons, “unless such person’s identity is necessary to understand foreign intelligence information or assess its importance”).<sup>5</sup> By specifying that United States persons must consent before their identifying information is disseminated without requiring the same consent from non-U.S. persons, FISA privileges United States persons by allotting them additional agency and voice in how their personal information can be used by the government. Even more substantially, if law enforcement unintentionally collects information “where all intended recipients are located within the United States,” and “under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes,” then this information “shall be destroyed upon recognition.”<sup>6</sup> So, communications on U.S. land are granted the most privacy, because they cannot be collected without a warrant and “reasonable expectations of privacy” must be respected. The Foreign Intelligence Surveillance Act gives these privileges only to U.S. persons and information collected on United States territory, allowing members of the United States more access to privacy than others, as well as an initial expectation of innocence.

U.S. persons are not the only members of the United States addressed within the Foreign Intelligence Surveillance Act, but the U.S. is also divided into various sub-groups, including the President and Attorney General, a judge/the FISA court, and the United States government and employees in general. To begin, the United States President and Attorney General are given

significant power over other persons and members of the United States. For example, in general, the Foreign Intelligence Surveillance Act allows the President to authorize foreign information-gathering operations without a court order. FISA states: “Notwithstanding any other provision of law, the President, acting through the Attorney General, may authorize physical searches without a court order under this title to acquire foreign intelligence information for periods of up to one year if” the Attorney General provides the proper certification in writing, and the proper minimization procedures are followed.<sup>7</sup> The President and Attorney General may also authorize electronic surveillance (including United States communications) without a court order for up to “fifteen calendar days following a declaration of war by the Congress.”<sup>8</sup> Throughout the Foreign Intelligence Surveillance Act, the President, using the Attorney General, is given the ability to authorize electronic surveillance with greater ease than other government officials. Even though the document primarily allows for the authorization of foreign intelligence surveillance, the President and Attorney General retain the ability to surveil on United States people and communications taking place on U.S. land for a short period of time after the U.S. declares war.

Along with the United States President and Attorney General, FISA positions the Foreign Intelligence Surveillance Court as a powerful entity. Near the beginning of the act, FISA states:

“Nothing in this Act shall be constructed to reduce or contravene the inherent authority of the court established under subsection (a) to determine or enforce compliance with an order or a rule of such court or with a procedure approved by such court.”<sup>9</sup>

Here, the Foreign Intelligence Surveillance Act frames the FISA court as an all-powerful entity, whose decisions cannot be undermined by the language of FISA, or anything else. Judges themselves are also framed as powerful, and have the ability to use their own judgment in making important and binding decisions. FISA specifies that FISA court orders “shall be final

orders and binding upon all courts of the United States and the several States except a United States court of appeals and the Supreme Court.”<sup>10</sup> At times, these final court orders will involve the individual discretion of an appointed judge. Twice, FISA states that “the judge may determine in his [sic] discretion it is in the interest of justice to serve, notice of...”<sup>11,12</sup> This phrase allows judges flexibility when determining a proper and just course of action for intelligence procedures. FISA also allows judges the authority to determine which appeals and applications are discounted as illegitimate. The document provides judges the ability to determine “a petition is frivolous,” and “immediately deny the petition and affirm the production order or nondisclosure order,” or determine a “petition is not frivolous,” and “promptly consider the petition”<sup>13</sup> according to the proper procedures. By allowing judges to accept or deny documents as “frivolous,” FISA allows the court system to determine which discourses it validates as true or false. Additionally, FISA permits judges to determine whether or not they assess intelligence-gathering operations for their compliance with minimization procedures.<sup>14</sup> The Foreign Intelligence Surveillance Act positions judges and courts as powerful members of the United States, alongside the U.S. President and Attorney General.

In the global arena, FISA presents the United States government with the most access to information. Federal officers engaging in intelligence-gathering procedures manage different levels of “privileged communication”<sup>15</sup> that are not available to the general public. The United States government and the court also review surveillance documentation that “may include classified information.”<sup>16</sup> Because FISA gives some members of the United States access to privileged communication and classified information while restricting the knowledge that is available to others, the U.S. government can legally access information that no other individuals can. Not only does FISA position the United States government with greater access to

information than others, but the document also presents this information as a basis for action. As I will describe in the following section on foreign powers, the Foreign Intelligence Surveillance Act describes “potential” attacks and offenses committed by hostile powers as a motive for action, suggesting that the United States government has the foresight to determine which actions other powers will take in the future. By presenting the United States government as a group with privileged access to information and insight into the actions of foreign powers, the Foreign Intelligence Surveillance Act positions the United States government as an extraordinary global power.

As a result of FISA’s dominating presentation of the United States government and courts, employees of the United States also receive an elevated power status. Under some circumstances, members of the United States government are able to conduct surveillance operations. The policy asserts that “officers, employees, or agents of the United States are authorized in the normal course of their official duties to conduct electronic surveillance not targeted against the communications of any particular person or persons,”<sup>17</sup> and states that it is legal to “train intelligence personnel in the use of electronic surveillance equipment.”<sup>18</sup> While the Foreign Intelligence Surveillance Act establishes the legality of particular United States employees surveiling on others, these actions are otherwise illegal for all other groups of people. The document articulates that “a person is guilty of an offense if he [sic] intentionally— (1) engages in electronic surveillance under color of law...” or discloses or uses information that they knew or had reason to know “was obtained through electronic surveillance” which had not been authorized.<sup>19</sup> So, actions that are illegal for most persons can be legal for members of the United States government. In this way, FISA suggests that only United States agents are capable of approving operations, conducting surveillance, and receiving training on how to engage in

information-gathering procedures. The Foreign Intelligence Surveillance Act allows for different members of the U.S. government to assist in surveillance operations depending on the situation, and “federal officers... may consult with Federal law enforcement officers or law enforcement personnel of a state or political subdivision of a State.”<sup>20</sup> Following this provision, United States government employees of many levels may be invited to participate in intelligence-gathering procedures. Even though FISA does present the possibility for information to be “unlawfully acquired”<sup>21</sup> by the United States government, the document has no discussion of legal ramifications or punishments for the officials who engage in an unlawful surveillance operation.

The Foreign Intelligence Surveillance Act formulates the United States as an entity divided into many sub-groups with varying fields of agency and access to information. All United States persons are granted some basic privacy rights, and individuals including the President, Attorney General, and other government employees are provided an unmatched ability to access the information of others. Despite FISA’s factionalization of members of the United States into sub-categories with various access to power and information, the Foreign Intelligence Surveillance Act presents a concern for protecting United States privacy rights in general.

Throughout the document, United States interests are given top priority. FISA demands that individuals protect the “secrecy” of intelligence operations, and provide a “minimization of interference”<sup>22</sup> with U.S. conducted electronic surveillance. Additionally, the “minimization procedures” that the Foreign Intelligence Surveillance Act creates to protect individuals during intelligence operations are focused primarily on United States persons. Among other responsibilities, minimization procedures must (A) “minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United

States persons...” and (B) “require that nonpublicly available information... shall not be disseminated in a manner that identifies any United States person...”<sup>23</sup> FISA establishes specific procedures to protect the information of U.S. persons, while other peoples are not granted the right to the same privacy protections.

While United States interests are of significant concern in the Foreign Intelligence Surveillance Act, the act presents a relatively rushed attitude for assessing information. For example, the U.S. government is given limited time to process information and make binding decisions. One excerpt insists that “no information, material, or property of a United States person shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order... is obtained...”<sup>24</sup> Because 72 hours is not a very long amount of time, government officials may make decisions that are less thought out and reasonable about personal information than if they were given more time to consider another course of action. Also, in some cases the government may begin surveillance operations before they are fully approved by a court. In cases of emergency, the Attorney General has the power to “authorize” the “acquisition” of information before receiving “an order authorizing such acquisition.”<sup>25</sup> If government officials begin a surveillance operation and then it is discovered that the application for the operation didn’t contain all of the necessary components, or that the suggested procedures “are not consistent” with the United States Constitution, the court can order individuals “cease, or not begin, the implementation of the”<sup>26</sup> surveillance procedures. So, FISA suggests that individuals may begin intelligence-gathering practices before they are approved, while failing to discuss repercussions for this behavior. Other government groups, including the Congress and Senate, are also rushed when it comes reviewing surveillance operations. Even though different committees of the Congress, Senate, and other government organizations are required to oversee



various aspects of intelligence-gathering procedures, they are only supplied reports with consolidated statistics, rather than reasoning or case-specific information. These reports are referred to in the document as “congressional oversight.”<sup>27,28,29</sup> In each case, committees are provided numerical information such as “the total number of applications for orders” and “the total number of such orders either granted, modified, or denied,”<sup>30</sup> yet no details regarding each specific intelligence-gathering procedure. Finally, the ability for the President and Attorney general to have special abilities to authorize surveillance during times of war for a limited number of days reinforces the rushed nature of the document. If these individuals are considering surveillance operations as a possible course of action, the short window of time allotted to officials when making a decision may help pressure them to make quick, less-supported decisions. In addition to encouraging hurried action, the Foreign Intelligence Surveillance Act does not discuss consequences for U.S. government officials who engage in surveillance operations that are later found to be illegal. Similarly, the document allows for the law to be amended and “new provisions”<sup>31</sup> to be added, without considering intelligence operations of the past that have become illegal as a result. At times, the rhetoric of FISA places individuals into contexts that encourage rushed behaviors, such as short timelines or minimal information. Yet, government officials in the Foreign Intelligence Surveillance Act never appear to receive punishment for their unlawful behavior.

FISA rhetorically positions all persons as subjects that operate within a framework of United States power. The Foreign Intelligence Surveillance Act presents the United States as a people disparate from foreign powers and allots members of the U.S. rights and protections that are not provided to others, yet factionalizing members into different sub-levels of power. Throughout the document, the rhetoric focuses on the advancement of U.S. interests as the

primary goal while encouraging quick, and potentially thought-less, actions during intelligence operations. However, FISA mentions no explicit repercussions for government officials who engage in illegal intelligence operations, suggesting that the United States government may proceed with surveillance operations without consequences or fear of punishment—regardless of the ultimate legality of their intelligence-gathering procedures.

### *Foreign Powers*

As the rhetoric in the Foreign Intelligence Surveillance Act constructs the power of the United States, the document simultaneously produces non-U.S. persons. Unlike FISA's discussion of United States persons, non-U.S. individuals are described as the targets of surveillance operations, and thus, presented as the cause for national security concerns and the reason that detailed records about individuals should be kept. The Foreign Intelligence Surveillance Act others non-U.S. persons by both strategically vilifying their identity, and diminishing their rights.

Throughout FISA, foreign groups are othered and targeted, resulting in their characterization as distrustful and dangerous. Rhetorical scholars have explored the communicative process of othering in countless types of relationships. Othering can manifest in many ways, but typically involves the creation of a dichotomy between an us group, and a contrasting them or other group. This ostracized group is typically presented as “alien” or “deviant,” though can also be framed positively as “exotic” and “beautiful.”<sup>32</sup> The Foreign Intelligence Surveillance Act others foreign individuals and groups by identifying them as different than those within the bounds of the United States through the rights awarded to them. Gregory Treverton asserted that by simply developing the Foreign Intelligence Surveillance

Court with the original version of FISA in 1978, thus “creating a peacetime intelligence community, the United States enshrined twin distinctions—between ‘foreign’ and ‘domestic’ and between foreign intelligence and law enforcement.”<sup>33</sup> Under FISA, American individuals, companies, etc. are generally protected from surveillance operations. However, “foreign” individuals and groups seem to be provided fewer and less stringent rights when it comes to questions of privacy and information-security. This dynamic results in an unequal framing of power that favors United States groups over others.

One significant way that the Foreign Intelligence Surveillance Act positions non-U.S. persons as suspect is within the document’s definitions for foreign power and agent of a foreign power. FISA’s definitions classifying “foreign” groups appear much more lengthy and dynamic than its definitions for domestic groups. FISA lists seven definitions of “foreign power” which range from any non-U.S. government, to terrorist organizations. The document’s first two definitions for foreign power are: “a foreign government or any component, thereof, whether or not recognized by the United States,” and “a faction of a foreign nation or nations, not substantially composed of United States persons.”<sup>34</sup> Following definitions for “foreign power” include “a group engaged in international terrorism or activities in preparation therefore,” and “an entity not substantially composed of United States persons that is engaged in the international proliferation of weapons of mass destruction.”<sup>35</sup> FISA’s discussion of foreign powers represents all non-U.S. groups as a single, indistinguishable entity, and thus, at the same level of the power hierarchy. The definitions also separate foreign groups into sub-categories that contribute to the document’s devaluation of non-United States persons through their overwhelmingly negative characterization. In FISA’s first definition of foreign power, the document states that a “foreign power” is a “government... whether or not recognized by the

United States.”<sup>36</sup> This definition suggests that the United States has the authority to either recognize or de-legitimate non-U.S. governments, contributing to the document’s portrayal of the U.S. an elitist, dominant power. A later definition of foreign power describes them as groups “engaged in international terrorism or activities in preparation therefore.” This definition not only implies that foreign powers are associated with terrorist activities, but it also positions the United States to expect non-U.S. groups to pose terrorist threats in the future. Yet another definition suggested that foreign powers can be entities “engaged in the . . . proliferation of weapons of mass destruction.”<sup>37</sup> This definition both conveys the criminal and immoral connotations brought forward by the word “terrorist,” and contributes a heightened sense of danger and cause for fear to the document by describing foreign powers as gravely dangerous. All the while, FISA’s second definition of foreign power included groups as small as “a faction of a foreign nation or nations.”<sup>38</sup> These definitions combined imply that even the smallest foreign entity can post a dramatic threat to United States interests. As a whole, the Foreign Intelligence Surveillance Act’s definitions of foreign power positions non-U.S. groups, of any size, as organizations whose legitimacy can only be validated by the United States, and which are possible criminals capable of excessive danger. With FISA’s use of the same term, “foreign power,” to describe a variety of groups—including any non-United States’ government and terrorist organizations—the document makes no effort to distinguish between the two. As a result, the Foreign Intelligence Surveillance Act constructs a two-tier national power structure: the United States becomes the global authority on information-gathering operations while safeguarding the privacy rights of its own citizens, while foreign groups are constructed as potentially dangerous enemies who are entitled to limited privacy rights from the United States government.

Another important definition that contributes to the Foreign Intelligence Surveillance Act's othering of foreign powers is that for the phrase, "agent of a foreign power." The document's definition of an "agent of a foreign power" is long and varied in a similar fashion to the term, "foreign power." FISA's definition for "agent of a foreign power" is lengthy—347 words, split in to sections (1) A-E and (2) A-E. At its simplest, the definition of "agent of a foreign power" can be found at the beginning of (1)(A): "any person other than a United States person, who... acts in the United States as an officer or employee of a foreign power."<sup>39</sup> Subsequent definitions for "agent of a foreign power" appear much less neutral in tone, and include engagement "in clandestine intelligence activities in the United States contrary to the interests of the United States," engaging "in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States," participation "in international terrorism or activities in preparation therefore," involvement "in the international proliferation of weapons of mass destruction, or activities in preparation therefore," knowing engagement "in sabotage or international terrorism," and more.<sup>40</sup> This definition for "agent of a foreign power" is similar to FISA's definition of a "foreign power" in that it ranges from seemingly any person who acts on behalf of a non-U.S. group, to terrorists. Due to FISA's extent and specificity when detailing agents of a foreign power as lawbreakers, terrorists, and producers of weapons of mass destruction, the document others "foreign powers" (which includes any government that is not the United States government in its broadest definition) by portraying anyone working on their behalf as a potentially dangerous threat. FISA's definition for "agent of a foreign power" presents similar strategies as the document's definition of a "foreign power" in many ways: the definition frames non-U.S. persons as potential criminals and terrorists, enhanced with a newfound potential for

“sabotage;” the definition includes the same predictive and anticipatory tone as above through its expectation for “terrorism or activities in preparation therefore,” and the definition suggests the same drastic threat as before through its threat of “weapons of mass destruction.” However, FISA’s definition of agent of a foreign power presents a new focus on the “clandestine” behaviors of “foreign powers,” which the document posits may both be “contrary to the interests of the United States,” and “involve a violation of the criminal statutes of the United States.”<sup>41</sup>

These statements have two implications. First, the definition of agent of a foreign power presents foreign communication as a potential threat to, or as against the interests of, the United States. By framing the private actions of foreign persons as against the interests of the United States, the elitist construction of the U.S. is fortified by suggesting that non-U.S. communications will be relevant to and concerned with United States interests. Second, this definition directs that while non-U.S. persons are not granted the same privacy rights as U.S. citizens, these people are still held accountable for adhering to the “criminal statutes of the United States.” Because FISA’s definitions for “foreign power” and “agent of a foreign power” explicitly use the same phrases to refer to every non-U.S. agent as well as to many forms of illegal groups, failing to distinguish between terrorists and law abiding foreign agents while placing an emphasis on the potential criminal qualities of foreign persons, the Foreign Intelligence Surveillance Act not only others foreign individuals by framing them as a unified group of potential enemy others, but also strategically positions non-U.S. groups into subordinate subjectivities within FISA’s global power structure.

The rhetoric of the Foreign Intelligence Surveillance Act presents foreign powers as suspected of engaging in, but not limited to, clandestine intelligence activities, terrorism, the proliferation of weapons of mass destruction, violating the criminal statues of the U.S., sabotage,

falsifying their identity, coercing the populace, and intimidating a government. FISA portrays non-U.S. citizens and their information as risky to the United States, and requires that foreign intelligence information is the primary target of surveillance operations approved by this act.<sup>42</sup> These rhetorical strategies other foreign people as criminals, targets, and hazards to the United States government.

Not only does the 2010 Foreign Intelligence Surveillance Act rhetorically other foreign entities as non-U.S. persons, but it also uses this defining feature of “foreignness” to determine what legal precautions must be taken when conducting surveillance operations. For example, FISA dictates that as long as the United States’ President follows the proper procedure (which requires assistance from the Attorney General), s/he “may authorize electronic surveillance without a court order” as long as the information-gathering procedures are conducted solely on information “used exclusively between or among foreign powers,” technical information “from property or premises under the open and exclusive control of a foreign power,” and assuming that “there is no substantial likelihood that the surveillance will acquire the contents of any communications to which a United States person is a party.”<sup>43</sup> This statute dictates that while the President typically must retrieve a court order to conduct intelligence-gathering operations on U.S. citizens, they need not receive a court order before conducting surveillance on foreign individuals. Because FISA uses the characteristic of “foreignness”—anyone who is not included under the United States’ clear guidelines—to determine whether or not a court is needed to review the legality of a surveillance operation, it requires fewer individuals to authorize intelligence-gathering operations on any individual that may fit under the blanket definition of “foreign.” As a result, U.S. citizens and non-U.S. citizens are granted differing rights to privacy and legal review before surveillance operations can occur. By strategically reducing the privacy

rights of non-U.S. persons, FISA reinforces its framing of foreign powers as a dangerous other group that requires more surveillance and fewer protections than United States persons.

Other instances when the othering of foreign individuals appears to influence their legal rights within FISA manifest from the document's vague and various definitions of key phrases including "foreign power" and "foreign intelligence information." As previously described, FISA defines foreign powers as any non-U.S. government, whether or not recognized by the United States (among other definitions). Implications arise when the document applies this loose definition to U.S. government requests for conducting surveillance operations. In one statute, FISA dictates that applications for orders "requiring the production of library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, or medical records containing information that would identify a person" must include reasonable evidence that the tangible information sought is "relevant to an authorized investigation (other than a threat assessment)... to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities."<sup>44</sup> Among other responsibilities, an application must show that the operation pertains to "a foreign power or an agent of a foreign power," "the activities of a suspected agent of a foreign power who is the subject of such authorized investigation" or "an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation."<sup>45</sup> This section of FISA reinforces the concepts of "terrorism" and "clandestine" behaviors, while also using non-specific terms that may allow for a wide variety of intelligence-operations to be approved under this legislation. For example, an application may aim to "protect against... clandestine intelligence activities," as long as they are conducted by foreign powers. Because the term, "foreign powers," describes any non-U.S.



group, and behaviors such as “clandestine intelligence activities” are similarly non-specific and able to be applied to numerous situations, the language in the bill appears to allow for surveillance operations in almost any “foreign” context and location. FISA’s definition of “foreign intelligence information” displays the same phenomenon of vague, widely applicable language as government applications for surveillance. For example, while FISA defines “foreign intelligence information” as “information that relates to... actual or potential attack... sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power,” the document also defines “foreign intelligence information” as “clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power,” or “information with respect to a foreign power or foreign territory that relates to... the national defense or the security of the United States; or the conduct of the foreign affairs of the United States.”<sup>46</sup> As a result of FISA’s vague definition of “foreign intelligence information,” it appears that any foreign communication that may impact “the foreign affairs of the United States” is available for surveillance. By providing hazy boundaries for the definitions of important terms such as “foreign power,” “clandestine intelligence activities,” and “foreign intelligence information,” the 2010 Foreign Intelligence Surveillance Act seems to allow for fairly widespread and non-restrictive surveillance operations, as long as they are conducted on foreign groups. The document’s vague and widely applicable key terms act as strategies that help to construct an imbalanced power relationship between the U.S. and foreign entities, allowing the United States government relatively easy and widespread access to foreign information.

The distinction between the privacy rights of United States citizens and non-U.S. persons in FISA serves as a strategy that reinforces the power structure of a dominant United States

watching over a subordinate other, and also carries serious implications for the human rights of non-U.S. citizens. In FISA's discussion of the application process to conduct surveillance operations, the document listed different types of information that authorized U.S. personnel can apply to receive from foreign persons (as long as it is "relevant to an authorized investigation"<sup>47</sup>) that would require a court order if demanded from a United States citizen—including "library circulation records, library patron lists, book sales records, book customer lists... tax return records, educational records," and "medical records."<sup>48</sup> This list first positions the object of U.S. surveillance as foreign citizens and community members rather than foreign governments or corporations. Because FISA directs that U.S. officials may access information from and about foreign civilians with less effort than they would need to obtain information pertaining to a domestic individual, the document dictates that non-U.S. persons are provided fewer privacy rights and lesser legal protections than United States persons receive. As a result, the rhetoric of FISA suggests that the United States government must provide its citizens basic human rights that it need not follow in the process of gathering intelligence on non-U.S. peoples. FISA's emphasis on every-day documentation such as taxes and medical records leads to a heightened sense of skepticism and othering regarding every non-U.S. person. Also, the document's specific targeting of books and library records appears to frame foreign education as a U.S. concern and a potential threat. The rhetoric of the 2010 Foreign Intelligence Information Act not only carries implications for the extent to which foreign and domestic groups do or do not hold power, but the language also provides non-U.S. citizens with fewer rights than United States persons, thereby framing foreign individuals as a different group of human that is granted separate rights to privacy and fewer legal protections.

The rhetoric in the Foreign Intelligence Surveillance Act produces non-U.S. person as others and potential terrorists, while presenting the United States as a group with clearly defined and limiting boundaries. FISA not only positions non-U.S. people as criminal others, but also provides these individuals fewer privacy rights and privileges than United States persons. These strategies place subjects within a power/knowledge network of national power that places the interests of the United States as top priority, and foreign information as an available commodity. The Foreign Intelligence Surveillance Act's loose terminology and unequal distribution of privacy rights between peoples significantly impacts the agency that United States and non-U.S. subjectivities are allotted by the document. In the pursuit of safeguarding U.S. interests, FISA diminishes foreign individuals' rights to privacy and protections from the U.S. government and outlines a wide variety of information about foreign persons that the U.S. government may be interested in collecting—ranging from education and tax records to transportation information—framing average foreign citizens as potential enemies of the state, and suggesting that these individuals are entitled to a different standard of living than U.S. persons. In the end, the Foreign Intelligence Surveillance Act's rhetoric places all persons within various subjectivities that have different rights privacy and protection from surveillance, fostering un-equal power relationships between United States and foreign persons.

## ENDNOTES

- <sup>1</sup> Foreign Intelligence Surveillance Act of 1978, P.L. 95-511, as amended through P.L. 111-259 (2010), sec. 101 p.6.
- <sup>2</sup> P.L. 111-259, sec. 101 p.6.
- <sup>3</sup> P.L. 111-259, sec. 101 p.6.
- <sup>4</sup> P.L. 111-259, sec. 102 p.5.
- <sup>5</sup> P.L. 111-259, sec. 102 p.5.
- <sup>6</sup> P.L. 111-259, sec. 107 p.19.
- <sup>7</sup> P.L. 111-259, sec. 302 p. 24-25.
- <sup>8</sup> P.L. 111-259, sec. 112 p.21.
- <sup>9</sup> P.L. 111-259, sec. 104 p. 10.
- <sup>10</sup> P.L. 111-259, sec. 106 p. 18.
- <sup>11</sup> P.L. 111-259, sec. 107 p.19.
- <sup>12</sup> P.L. 111-259, sec. 306 p. 33.
- <sup>13</sup> P.L. 111-259, sec. 501 p.45.
- <sup>14</sup> P.L. 111-259, sec. 304 p.30.
- <sup>15</sup> P.L. 111-259, sec. 106 p. 17.
- <sup>16</sup> P.L. 111-259, sec. 501 p. 46.
- <sup>17</sup> P.L. 111-259, sec. 105 p. 15-16.
- <sup>18</sup> P.L. 111-259, sec. 105 p. 16.
- <sup>19</sup> P.L. 111-259, sec. 108 p. 20.
- <sup>20</sup> P.L. 111-259, sec. 107 p. 19.

<sup>21</sup> P.L. 111-259, sec. 106 p. 18.

<sup>22</sup> P.L. 111-259, sec. 103 p. 8.

<sup>23</sup> P.L. 111-259, sec. 302 p. 24.

<sup>24</sup> P.L. 111-259, sec. 302 p. 24.

<sup>25</sup> P.L. 111-259, sec. 703 p. 66.

<sup>26</sup> P.L. 111-259, sec. 702 p. 59.

<sup>27</sup> P.L. 111-259, sec. 406 p. 42.

<sup>28</sup> P.L. 111-259, sec. 501 p. 47.

<sup>29</sup> P.L. 111-259, sec. 609 p. 49.

<sup>30</sup> P.L. 111-259, sec. 406 p. 42.

<sup>31</sup> P.L. 111-259, sec. 201 p. 22.

<sup>32</sup> Roberta Marzorati, “Imagined communities and othering processes: The discursive strategies of established Italian residents in a Milan city neighborhood,” *Journal of Language and Politics* 12 no. 2 (2013): 251, doi: 10.1075/jlp.12.2.05mar.

<sup>33</sup> Gregory Treverton, *Reshaping National Intelligence in an Age of Information* (Cambridge: Rand, 2001), 224.

<sup>34</sup> P.L. 111-259, sec. 101 p. 2.

<sup>35</sup> P.L. 111-259, sec. 101 p. 2.

<sup>36</sup> P.L. 111-259, sec. 101 p. 2.

<sup>37</sup> P.L. 111-259, sec. 101 p. 2.

<sup>38</sup> P.L. 111-259, sec. 101 p. 2.

<sup>39</sup> P.L. 111-259, sec. 101 p. 2-4.

<sup>40</sup> P.L. 111-259 sec. 101 p. 2-4.

<sup>41</sup> P.L. 111-259 sec. 101 p. 2-4.

<sup>42</sup> P.L. 111-259 sec. 104 p. 11.

<sup>43</sup> P.L. 111-259, sec. 102 p.7.

<sup>44</sup> P.L. 111-259, sec. 501 p, 43.

<sup>45</sup> P.L. 111-259, sec. 501 p, 43.

<sup>46</sup> P.L. 111-259, sec. 101 p.4.

<sup>47</sup> P.L. 111-259, sec. 501 p, 43.

<sup>48</sup> P.L. 111-259, sec. 501 p, 43.

## CHAPTER 5: CITIZENSHIP/IMPLICATIONS

In this paper, I have made the case that the Foreign Intelligence Surveillance Act produces the subjects of person and citizen, dividing these groups into various sub-categories with differing access to rights and privileges. FISA serves as a discourse, and subsequently produces discourses, that arrange subjects into complex power relationships based on national power. The document produces the institution, foreign power, as a risky and targeted group, while simultaneously producing the United States as a privileged and protected entity. The discourse of FISA creates a narrative with characters, or subjectivities, that it positions individuals, groups, companies, the court, and more within. The Foreign Intelligence Surveillance Act rhetorically places persons within complex power relationships, influenced by the factionalization of person, the othering of foreign people, and the positioning of everyday laborers as potential informants for the United States government. As a result, the rhetoric of FISA can be seen as fostering secrecy, surveillance, and mistrust among people, resulting in a sense of threat that encourages persons to surveil upon the behaviors of themselves and others in order to comply with U.S. government orders and expectations. Not only do these strategies contribute to a lack of comradery and identification between people by positioning individuals as informants, secretive, and without similarities to one another, but these attitudes could help to create a panoptism that both encourages a person to follow self-surveillance practices and surveil upon other individuals—outside and within the United States’ borders. If persons are aware of their potential obligations to the United States government and feel threatened that their information may be surveilled upon by the government at any time, they may feel inclined to

monitor their own behavior, or keep records on file in case their information may become of use. Even if individuals are not concerned about the legal implications of their behaviors themselves, people may be concerned about the monitoring and recording of seemingly personal or private actions. The monitoring of social media, phone lines, medial records, library records, and more by the U.S. government may cause everyday individuals to feel monitored, or surveilled upon. Even more prominently, the Foreign Intelligence Surveillance Act creates relationships of citizenship and quasi-citizenship through its attribution of rights and duties. FISA assigns all persons basic duties during surveillance operations, while denying non-United States persons the same privacy rights and protections that U.S. persons receive. The quasi-citizenship of foreign persons within FISA creates serious implications for the levels of power and personhood that are allotted to the different groups within the document. As a discourse, FISA produces all persons as always, already citizens, and citizens as fundamentally established within structures of nation and national power. Consequently, the Foreign Intelligence Surveillance Act can be seen as a Foucauldian method of governance, whereby the United States government attempts to discipline U.S. and foreign individuals into various and unequal social positions.

When considering the inequalities present within the Foreign Intelligence Surveillance Act's subjectivities of U.S. and non-U.S. persons, I assert the rhetorical positioning of these subjects deserves critique. If subjects themselves participate in power/knowledge relationships and are impacted by them, then their agency within these relationships deserves consideration. Sonja Foss, Karen Foss, and Robert Trapp, assess the importance of subjects within discourse. They explain that according to Foucault's theories of power, subjects are not "given" but are "produced," or created through "practices and techniques" that are imposed upon them.<sup>1</sup> When considering the role of subject, it is important that knowledge and discursive practices work



together to produce each other. Discursive formations allow for the production of only specific kinds of knowledge, because “nothing else receives support in the discourse,”<sup>2</sup> impacting the subjects’ worldview and their possibilities for action. Foss, Foss, and Trapp expound on discursive formation by describing rules that govern which types of discourses may form in any context, including dynamics like “prohibitions against talking about certain things,” who is granted the authority to produce discourse and deem it legitimate, and what expectations are in place for discourses to appear in particular forms.<sup>3</sup> As a result of the rules that govern discursive formation, Foss, Foss, and Trapp assert that “only certain individuals” are allowed “to be involved in the formulation of” knowledge.<sup>4</sup> The Foreign Intelligence Surveillance Act’s rhetorical strategies become important due to the ways they operate as a catalyst for discursive formation or knowledge formation, allowing for and inhibiting the production of specific subjectivities into particular power relationships. The language of the legislation itself constructs a power/knowledge scaffold that it produces person/citizens within, impacting their agency and personhood. Foss, Foss, and Trapp argue that the rules of discursive formation ultimately serve to “silence certain dimensions of experience simply by not recognizing them as objects of discourse,”<sup>5</sup> as they dictate “which subjects are diminished and which are accorded the status necessary to have their discourse valued.”<sup>6</sup> FISA’s rhetoric is consequential not only due to its positioning of persons into various subjectivities, but also because of the power imbalance that it provides to its subjects, rhetorically constructing the roles, responsibilities, and rights of citizenship and quasi-citizenship.

The rhetoric of the Foreign Intelligence Surveillance Act presents additional implications for the ethical and common use of surveillance practices by the United States government. To begin, the extent to which the U.S. government should be allowed to surveil on foreign groups

can be called into question. Elliot Cohen describes examples where the National Security Agency targeted U.S. business opponents, including French Oil and owner of Total, “the fifth largest oil and gas company in the world; the Brazilian oil giant, Petrobras, which also produces biofuels and other forms of alternative energy; and Thales, a French-based conglomerate with aerospace, space, defense, transportation, and security divisions.”<sup>7</sup> The ethical implications of U.S. surveillance into these companies can be called into question, because corporate knowledge and other “confidential information” may provide a “competitive edge” for these companies, and by the United State government gathering this intelligence, United States competitors may gain “unfair advantage”<sup>8</sup> in the marketplace. Additionally, the scope of surveillance practices that can be enacted seems worthy of consideration. Surveillance practices on persons can manifest in a potentially very wide variety of ways. While some practices are more “soft” and less intrusive, like “seemingly benign and relatively inconspicuous forms of monitoring and assessment” such as security cameras in stores, other surveillances are more “hard,”<sup>9</sup> including listening to phone calls and reading e-mails. Because there is a spectrum for possible surveillance practices, it is important to consider which types of practices might be more acceptable (such as the placing of security cameras), and which might deserve legal oversight and protections (such as the reading of text messages). William Staples describes how surveillance practices can even be conducted using the body—using examples including drug testing and programs that try to control women’s reproduction (for example Project Prevention—a private group that pays drug and alcohol abusers to “to go on long-term birth control or... to be permanently sterilized”).<sup>10</sup> Staples describes these body-based surveillance practices, including video recordings, as allowing “organizations to monitor, judge, or even regulate our actions and behaviors *through* our bodies,”<sup>11</sup> positioning the body as “an ‘object’ that holds proof of identity or evidence of possible

deviance.”<sup>12</sup> Even regarding the most seemingly insignificant of surveillance practices, it is possible that there are important implications for those who are subjected to surveillance. Staples asserts that even “‘small,’ monotonous, and even seemingly trivial” methods of surveillance “are not without effect,” and that these may serve as “meticulous rituals” and “specific, concrete mechanisms that help maintain unbalanced and unequal relationships between clusters of individuals.”<sup>13</sup> Staples expands that “some surveillance practices should be considered not only as potential threats to individual privacy and liberties,” but may also “operate as a powerful means of creating and reinforcing social differences and enhancing the life chances of some while diminishing those of others.”<sup>14</sup> The rhetoric of the Foreign Intelligence Surveillance Act monitors how the United States government may legally subject persons to surveillance, allowing persons different access to privacy and expectations for oversight and disclosure, thereby providing different legal opportunities and restrictions to the various subjectivities of the document.

FISA’s rhetoric may provide additional implications for United States citizenship and democracy that are worthy of consideration. Because the act requires individuals’ participation in surveillance operations while simultaneously demanding confidentiality—allowing government officials to refrain from informing persons about the nature of the intelligence-gathering procedures that they are contributing to—FISA does not allow for individuals to critically assess the duties that they are required to embody. Persons are required to act for the United States government without being provided the opportunity, or enough background information, to consent to their actions. Individuals, companies, and other persons, are given legal duties to the government that they cannot opt out of, while they are legally denied details about the operation at hand. As a result, the rhetoric of the Foreign Intelligence Surveillance Act

is not that of a democracy with considers the voice of the people, but rather, stands as a binding production of knowledge that requires individuals to act in particular ways, regardless of whether or such persons agree with or are aware of the situation at hand.

There are many individuals who disagree with the significance of the power inequalities provided to the various subjects within FISA, as I have presented above. For example, in their book, Philip Heymann (professor of law at Harvard; previous positions in the State and Justice departments) and Juliette Kayyem (lecturer of Public Policy at Harvard; experience in homeland security efforts) provided recommended actions for the United States government in their 2005 book, *Protecting Liberty in an Age of Terror*. They provide the following statement regarding individuals' personal rights as one of the "important choices" that defines the scope of their recommendations:

Throughout U.S. national security law, as well as rules with regard to law enforcement powers, the coverage of any set of protections has depended principally on two factors: whether the targeted individual is a U.S. person (a citizen or resident alien) and whether the governmental activity occurs within the United States....

In a number of recommendations, we have permitted broader governmental authority if it is directed at non-U.S. persons who are not within the United States. These limitations will fully protect political liberties within the United States. We recognize that this approach is not without costs. It may raise a serious likelihood that the United States would permit doing to other nationals what the American public would not tolerate if applied to citizens.<sup>15</sup>

Despite the authors' claim to consider the "likely effect" of their recommendations "on both U.S. allies and foes,"<sup>16</sup> they do not describe any practices by which they ensure this, or expound upon

the ethical implications previously presented. I assert that by failing to provide persons with equal privacy rights while requiring universal compliance with U.S. law and government operations, the Foreign Intelligence Surveillance Act produces relationships of quasi-citizenship, which are worthy of ethical consideration.

Finally, there are a few additional rhetorical moves within FISA that are noteworthy aspects of the power/knowledge relationships at play. To begin, the Foreign Intelligence Surveillance Act is not without errors and typos (e.g. “knowing or having reason to know that the information was obtained...”<sup>17</sup>). The chapter on national power described how the United States appears both self-concerned and rushed when it comes to decision-making. The presence of typos within a document that dictates such significant United States government operations on a global scale reinforces both the hasty disposition of the United States government, and the perceived lack of importance of non-U.S. people. Additionally, the length of the document has rhetorical consequences to its readers. FISA is long, at 81 pages. In fact, the act is so long, it seems increasingly easy for a reader to assume the narrative of the law as the truth or a given, without having to know, or even read, the whole thing. Also, FISA’s length may restrict non-English speaking persons from accessing the information in the document. Both the Foreign Intelligence Surveillance Act’s overwhelming length and overlooked typos are significant features of the document’s rhetoric.

Yet another consideration regarding FISA should be double-standards when it comes to one’s access to knowledge and privacy. Under the rhetoric of FISA, the United States is provided rights and abilities that no other individuals or governments receive, creating a gross power imbalance in the document. All the while, U.S. government surveillance practices receive public support, and issues of foreign rights are overlooked. Yet, the surveillance of U.S. citizens

continues to be at the forefront of media attention on the subject, as seen by the public's reaction to Snowden in 2013, and legislation such as FISA that works to protect only United States persons. The question becomes: is it acceptable to provide non-U.S. persons with fewer privacy rights and safeguards from surveillance than United States persons receive?

By applying Foucault's framework of power/knowledge to the Foreign Intelligence Surveillance Act, this analysis expands upon discourses on surveillance, public policy, and privacy rights. This analysis presents a number of implications for political and global discourses. First, the discussion of subjects as produced through legal and political documents extends discussions of how different groups of people are framed, and why this dynamic is important. By incorporating Foucault's understanding of power/knowledge into a conversation about legislation, how policies work to influence a population appears differently—as a disciplining process that becomes mutually constituted between people. Second, citizenship in the Foreign Intelligence Surveillance Act becomes an interesting privilege and obligation that influences personhood and citizenship in a variety of ways. Among other things, the production of person within FISA calls into question images of comradeship while supporting constructions of individuality and silence. Even if United States interests are to take primary concern in the development of legislation like FISA, the changing cultural climate may make this goal increasingly difficult and convoluted. Gregory Treverton claims that intelligence has changed over time to the extent “that *foreign* and *domestic* are losing their traditional meanings,” causing it to be even more difficult to distinguish between foreign and domestic information, or to distinguish “home from abroad.”<sup>18</sup> As a result, Treverton suggests that the line between foreign and domestic has blurred to the extent that intelligence operations will “confront a more and more tangled web of the foreign and the domestic,”<sup>19</sup> and begin to focus on “the ‘domestic’ side

of foreign policy issues”<sup>20</sup> by surveiling upon U.S. citizens. The subjective positions created by the Foreign Intelligence Surveillance Act have implications for which voices are respected and which are monitored, and may serve to encourage more and more surveillance on United States persons over time.

This study does present a number of limitations. To begin, a single document cannot stand as representative for the positioning of groups on a global scale—rhetorical works must be understood within a larger context that helps to provide individuals with more or less agency in any given situation. As a result, while FISA may construct power/knowledge in particular ways, the subjective experiences that result can only be created due to the existence of various environmental and political backdrops. At the same time, Foucault’s particular method of criticism has been debated. Some scholars have accused Foucault’s concepts as “anti-humanist and as an abandonment of the human subject.”<sup>21</sup> Others have accused Foucault of inescapable relativism, which can be “summarized in the phrase: ‘Where can Foucault stand?’ This is, if everything is constructed in accordance with the working of power... then what is the independent basis for arguing that any particular social arrangement is better than any other?”<sup>22</sup> However, these methodological limitations may be moot. Foss, Foss, and Trapp explain that Foucault’s primary focus “is not on individual rhetors but rather on the roles human beings in general assume in speaking and writing and how these are created and constrained by the norms or rules of the discursive formation.”<sup>23</sup> They describe Foucault’s primary focus as “not... on the discursive acts of our daily lives but rather on discourse that, because it follows particular rules or has passed appropriate tests, is understood to be true in a culture.”<sup>24</sup> Therefore, everyday practices may serve as the foundation for defining and influencing social arrangements. By failing to acknowledge an assortment of everyday constructions regarding citizenship and

foreign-ness, thus ignoring the external forces that contribute to these subjectivities, a Foucauldian critique of FISA does present a number of limitations.

As such, this analysis encourages further research in multiple of areas. To begin, the rhetorical construction of “domestic” and “foreign” affairs within American political discourse and legislation deserves additional consideration, as well as re-formulation to avoid harmful, unequal constructions of persons and groups. In addition, relationships of quasi-citizenship may be more widespread than previously recognized. For example, some United States “persons” don’t live within the 50 states. So, while they receive privacy rights under FISA, they may not be adequately represented in United States government practices overall. Scholarship should continue to consider how we these harmful power relationships might be replaced them with better rhetorical practices. Foss, Foss, and Trapp present Foucault’s “genealogical method”<sup>25</sup> as one potential solution for mitigating harmful power constructs. They describe the genealogical method as one that gives primary importance to the “discourse and knowledge” that is typically “seen as illegitimate,” giving “voice to the ‘victims’” by describing the ongoing “techniques and operations of power.”<sup>26</sup> Future research could explore the subjects that result from public, private, or political discourses, and explore those groups who are denied agency and voice. Regardless, future research should not only consider how and why subjectivities, like those of non-U.S. citizens, become rhetorically constructed through political discourse, but also discuss the ways in which future discourse and legislation may work to avoid the potentially harmful constructions presented within documents such as FISA.

The 2010 Foreign Intelligence Surveillance Act is of great legal consequent, yet, it is only one of a vast sea of legislation and political discourses regarding surveillance, privacy rights, and personhood. As time passes, it seems the role of surveillance on a global scale will only



continue to increase in significance. For instance, a *New York Times* article from February 2015 describes how government requests for information from Twitter have increased. In the six-month time period since July 2014, government requests in general (not solely from the United States) for “data on specific users... rose by 40 percent, to about 2,871.”<sup>27</sup> With more technology, communication, and globalization than ever before, the future may continue to present challenging questions for everyday and governmental surveillance, and its resulting implications for persons and subjects.

## ENDNOTES

<sup>1</sup> Jenny Edkins, *Poststructuralism and International Relations: Bringing the Political Back In* (Boulder: Lynne Rienner Publishers, 1999), 58.

<sup>2</sup> Sonja Foss, Karen Foss, and Robert Trapp, *Contemporary Perspectives on Rhetoric* (Prospect Heights: Waveland Press, Inc., 1985), 195.

<sup>3</sup> Foss, Foss, and Trapp, *Contemporary Perspectives on Rhetoric*, 196-197.

<sup>4</sup> Foss, Foss, and Trapp, *Contemporary Perspectives on Rhetoric*, 198.

<sup>5</sup> Foss, Foss, and Trapp, *Contemporary Perspectives on Rhetoric*, 196.

<sup>6</sup> Foss, Foss, and Trapp, *Contemporary Perspectives on Rhetoric*, 205.

<sup>7</sup> Elliot Cohen, *Technology of Oppression: Preserving Freedom and Dignity in an Age of Mass, Warrantless Surveillance* (New York: Palgrave Macmillan, 2014), 71-72.

<sup>8</sup> Elliot Cohen, *Technology of Oppression*, 71-72.

<sup>9</sup> William Staples, *Everyday Surveillance* (Lanham: Rowman & Littlefield, 2014), 2.

<sup>10</sup> Staples, *Everyday Surveillance*, 159.

<sup>11</sup> Staples, *Everyday Surveillance*, 6.

<sup>12</sup> Staples, *Everyday Surveillance*, 6.

<sup>13</sup> Staples, *Everyday Surveillance*, 3.

<sup>14</sup> Staples, *Everyday Surveillance*, 13

<sup>15</sup> Philip Heymann and Juliette Kayyem, *Protection Liberty in an Age of Terror* (Cambridge: The MIT Press, 2005), 8.

<sup>16</sup> Philip Heymann and Juliette Kayyem, *Protection Liberty in an Age of Terror* (Cambridge: The MIT Press, 2005), 8.

<sup>17</sup> Foreign Intelligence Surveillance Act of 1978, P.L. 95-511, as amended through P.L. 111-259 (2010), sec. 108 p. 20.

<sup>18</sup> Gregory Treverton, *Reshaping National Intelligence in an Age of Information* (Cambridge: Rand, 2001), 231.

<sup>19</sup> Treverton, *Reshaping National Intelligence in an Age of Information*, 232.

<sup>20</sup> Treverton, *Reshaping National Intelligence in an Age of Information*, 231.

<sup>21</sup> Foss, Foss, and Trapp, *Contemporary Perspectives on Rhetoric*, 200.

<sup>22</sup> Jerome Wakefield, "Fixing a Foucault Sandwich," in *Culture in Mind: Toward a Sociology of Culture and Cognition*, ed. Karen Cerulo (New York: Routledge, 2002), 263-264.

<sup>23</sup> Foss, Foss, and Trapp, *Contemporary Perspectives on Rhetoric*, 200.

<sup>24</sup> Foss, Foss, and Trapp, *Contemporary Perspectives on Rhetoric*, 243.

<sup>25</sup> Foss, Foss, and Trapp, *Contemporary Perspectives on Rhetoric*, 207.

<sup>26</sup> Foss, Foss, and Trapp, *Contemporary Perspectives on Rhetoric*, 207.

<sup>27</sup> Mike Issac, "Twitter Reports a Surge in Government Data Requests," *The New York Times*, February 9, 2015, [http://bits.blogs.nytimes.com/2015/02/09/twitter-reports-surge-in-government-data-requests/?\\_r=0](http://bits.blogs.nytimes.com/2015/02/09/twitter-reports-surge-in-government-data-requests/?_r=0).