

An Illusion of Safety:

Why Congress Should Let FISA's Lone Wolf Amendment Expire

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Introduction

As over 300,000 people prepared to descend upon Las Vegas for New Year's Eve 2016-2017, and hundreds of hotels, casinos, restaurants, and businesses prepared to receive them, the FBI and DHS were concerned with something more somber and far more significant. With large crowds in a small area and massive media coverage, the Las Vegas Strip would be a prime target for terrorists, especially "unaffiliated lone offenders."¹ New Year's Eve fortunately came and went without incident. The dream never materialized—not yet, at least.

Eight months later, on October 1, 2017, an automatic weapon opened fire from a 32nd-story Las Vegas hotel room upon a crowded country music concert. By the end of the attack, 58 lay dead and over 800 injured.² It was the deadliest shooting in U.S. history, and it was planned and executed not by a well-resourced terrorist or criminal organization, but by a single individual, unconnected with any nefarious organization (as far as intelligence and law enforcement have been able to determine). The lone wolf attack that the FBI and DHS specifically addressed in their December 2016 joint threat assessment had arrived.

The Las Vegas attack was another reminder of the lone wolf threat.³ Lone wolf terrorists are individuals unconnected to any organization and who plan and execute all aspects of an operation alone.⁴ They are not new. While intelligence and law enforcement authorities have consistently strained to utilize available tools to identify and stop lone

¹ FBI & DHS, JOINT SPECIAL EVENT THREAT ASSESSMENT: AMERICA'S PARTY: NEW YEAR'S EVEN 2016-2017 LAS VEGAS STRIP AND DOWNTOWN LAS VEGAS, NEVADA (Dec. 19, 2016).

² See generally Kieran Cororan, Sinéad Baker, & David Choi, *The FBI has closed its investigation of the Las Vegas mass shooting that killed 58 people and injured hundreds more. Here's exactly how the nation's worst modern gun massacre unfolded*, BUS. INSIDER (Jan. 29, 2019), <https://www.businessinsider.com/timeline-shows-exactly-how-the-las-vegas-massacre-unfolded-2018-9>.

³ Whether the Las Vegas shooting was an act of terrorism is debated, since motive has not been discovered. See Mark Berman, *Las Vegas police end investigation into massacre without 'definitively' determining what motivated the gunman*, WASH. POST (Aug. 3, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/08/03/las-vegas-police-end-investigation-into-massacre-without-definitively-determining-motive/> (noting that law enforcement "found 'no evidence of radicalization or ideology to support any theory'" of terrorism). See also Matthew J. Dolliver & Erin M. Kearns, *Is It Terrorism?: Public Perceptions, Media, and Labeling the Las Vegas Shooting*, STUDIES IN CONFLICT & TERRORISM (Aug. 8, 2019), available at https://www.erinmkearns.com/uploads/2/4/5/5/24559611/11._dolliver___kearns.2019.sct.pdf (discussing the For different public perceptions of terrorism, especially as influenced by the media).

⁴ See *infra* Section I.C for a discussion on the lone wolf.

volves before attacks, Congress did create a new tool after the attacks of 9/11. The “lone wolf amendment,” as Section 6001 of the Intelligence Reform and Terrorism Prevention Act (IRTPA) is commonly known, expanded the powers of the Foreign Intelligence Surveillance Act (FISA), the legal authority for conducting electronic surveillance on foreign spies and agents of foreign powers engaged in espionage or international terrorism. The amendment now allows the government to surveil suspected terrorists unconnected to any organization (i.e., lone wolves).

FISA authorizes the government to obtain a warrant to conduct electronic surveillance on an individual whom the government has probable cause to believe is an agent of a foreign power.⁵ FISA was established in the midst of the Cold War, when the primary threats were foreign states, like the Soviet Union (and its spies), and traditionally-structured international terrorist organizations.⁶ Surveillance at that time focused on targets associated with some foreign state or organization.⁷ The lone wolf amendment recognized the evolving national security threats and added another definition of an agent of a foreign power: “any person other than a United States person who engages in international terrorism or activities in preparation therefore [sic].”⁸

This change was not trivial. No longer would the government need to show probable cause that a suspect was connected to a foreign power or organization in order to obtain a FISA surveillance warrant. It would need only demonstrate probable cause that the individual is (1) a non-U.S. person⁹ and (2) engaging or preparing to engage in international terrorism. In some ways this lowered the evidentiary bar to obtain a FISA warrant. But such a tool might be essential to ensuring national security in an era of decentralized, leaderless terrorist networks, where organizational structures and hierarchies are less clear, and individuals can be inspired to engage in terrorism without any direct engagement with a terrorist organization.¹⁰

⁵ 50 U.S.C. § 1805.

⁶ The legislative history of FISA specifically references international terrorist groups, such as Black September and the Red Brigades. It also excludes wholly domestic terrorist groups. H.R. REP. NO. 95-1283, pt. 1, at 30 (1978), <https://fas.org/irp/agency/doj/fisa/hspci1978.pdf>.

⁷ Some original definitions of “agent of foreign power” under 50 U.S.C. § 1801 did not require association with a foreign organization, but they addressed extremely significant national security threats. For example, 50 U.S.C. § 1801(b)(1)(D) addressed non-U.S. persons who “engage[] in the international proliferation of *weapons of mass destruction*, or activities in preparation therefor” (emphasis added).

⁸ See 50 U.S.C. § 1801(b)(1)(C).

⁹ 50 U.S.C. § 1801(i) defines a “United States person” as “a citizen of the United States, an alien lawfully admitted for permanent residence . . . , an unincorporated association 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, but does not include a corporation or an association which is a foreign power”

¹⁰ See, e.g., U.S. DEP’T OF ST., COUNTRY REPORTS ON TERRORISM 2015 (2016), <https://www.state.gov/documents/organization/258249.pdf> (“The global terrorist threat . . . [is] becoming increasingly

The lone wolf amendment is set to expire on December 15, 2019, and the decision to renew might appear to be an easy one. Yet three factors should cause Congress to take pause. First, in the fifteen years since its implementation, the lone wolf amendment has apparently never been used in the course of an investigation. Considering the stated need after 9/11, and the fact that there have been plenty of terrorist, including lone wolf, attacks since then, one would think that this provision would have been used at least once.

Second, the lone wolf amendment is specifically restricted to non-U.S. persons; yet many recent lone wolves have been and will likely continue to be U.S. persons. Radical Islamist lone wolves, for instance, operating on behalf of groups that have explicitly called for citizens abroad to conduct lone wolf attacks,¹¹ would satisfy the legal conditions for the government to gain a lone wolf surveillance warrant only if that person is a non-U.S. person; U.S. persons who are radical Islamists are exempt.¹² The equally significant threat of white nationalist and other domestic groups within the United States are similarly not covered by the lone wolf amendment, despite their rise in recent years.¹³

Third, electronic surveillance is not necessarily the appropriate tool to fight lone wolves. One of the greatest challenges about lone wolves is that they are extremely difficult to identify before they attack; the government cannot conduct electronic surveillance on a lone wolf that it does not even know exists. But assuming that a lone wolf is properly identified before an attack, the electronic surveillance would likely produce little information of any foreign intelligence value. Because lone wolves are isolated from any terrorist network, there would be no information available on a terrorist organization or network. Rather, the information collected would be primarily, if not only, of a criminal nature; the foreign intelligence purpose would be minimal. But FISA requires that surveillance must have at least a “significant purpose” of foreign intelligence collection, so surveillance lacking that purpose would push the bounds of legality.¹⁴ The FISA deficiencies are all the more apparent when compared to the Title III surveillance warrant authorities that are already available.

decentralized and diffuse.”); Antonia Ward, *Do Terrorist Groups Really Die? A Warning*, RAND BLOG (Apr. 9, 2018), <https://www.rand.org/blog/2018/04/do-terrorist-groups-really-die-a-warning.html> (“Shifting toward this decentralized model helped insulate [al-Qaeda] from the loss of members of core al-Qaeda.”).

¹¹ See, e.g., *Vehicles as Weapons of Terror*, COUNTER EXTREMISM PROJECT (Mar. 2019), <https://www.counterextremism.com/vehicles-as-weapons-of-terror> (citing terrorist groups’ practice of calling for individuals to conduct vehicular attacks).

¹² See 50 U.S.C. § 1801(b). U.S. persons preparing for terrorism on behalf of a foreign power can qualify for FISA surveillance, 50 U.S.C. § 1801(b)(2)(C), but they require a demonstration of agency that is not required under the lone wolf amendment.

¹³ See *infra* Section I.C and II.B.

¹⁴ See *infra* note 29 and accompanying text.

So, is the lone wolf amendment the much needed “fix” that Congress thought it would be? Is it a useful and effective tool to maintain as law? Is it worth maintaining “just in case” it is someday needed? Or might its continued presence, for the ostensible and legitimate purpose of national security, pose risks to civil liberties? This Note aims to address the utility and efficacy of the lone wolf amendment as Congress is set to debate its renewal this year, and will show that it has not proven to be successful, in theory or practice, and should be permitted to expire.

Part I of this Note will examine the underpinnings of the lone wolf amendment. Section I.A will examine the history and goals of FISA and the surveillance authorities it grants to the government. Section I.B will explore the lone wolf amendment specifically. Section I.C will survey the current scholarship and understanding, within academia and law enforcement, of lone wolves: who they are, how they develop, and the tools available to fight them. It will include an examination of the recent trends in the increasing democratization of violence, and the increased capability of international terrorist organizations and propagandists to disseminate messages to individuals across the world, thereby leading to radicalization and terrorism in unpredictable ways.

Part II will examine the shortcomings of the lone wolf amendment. In Section II.A, I will examine the lack of use of the provision and the associated problems with continued maintenance of an unused law. In particular, I will address, and hopefully refute, arguments by the DOJ that such a tool is needed “just in case.” In Section II.B, I will examine the ineffectiveness of the lone wolf amendment as a tool to fully address the lone wolf threat. Its failure to cover U.S. persons leaves a noticeable security gap not commensurate with the significance of the lone wolf threat. And because lone wolves are not only non-U.S. persons, the lone wolf amendment risks infecting the FISA process with racial, ethnic, religious, or other discriminatory biases unrelated to the security threats. Section II.C will examine the fundamental futility of foreign intelligence surveillance of lone wolves, since they are likely to produce little information, and any such information would lack foreign intelligence value.

Part III will present and examine three options for Congress in light of the lone wolf amendment’s sunset. The first option is to expand the statutory language to incorporate lone wolves who are U.S. persons. The second option is to modify the language of the lone wolf amendment to require a showing of an expected connection between the target and a foreign organization. The third option is to let the provision expire, and rely on the remaining FISA provisions and other criminal surveillance and prosecution tools to counter the lone wolf threat.

Current literature has to date not comprehensively analyzed the lone wolf amendment in the context of the nature of the lone wolf threat, nor has it thoroughly addressed the legal and practical shortcomings of the amendment. Moreover, an updated analysis is due in light of the upcoming expiration of the lone wolf amendment. Though Congress

has been willing to relinquish power to the executive in matters of national security, this may be an opportunity for it to assert its constitutional role of oversight and seriously scrutinize a legislatively-granted executive power.

Part I: Lone Wolves and Statutory Surveillance Authorities

This Part sets the foundation for the critical analysis of the lone wolf amendment in Part II. FISA is a unique body of law that grants significant powers to intelligence and law enforcement for legitimate national security purposes. The lone wolf amendment reflects an attempt to adapt to changing national security threats by expanding FISA’s scope to a new category of individuals: lone wolves. However, lone wolves are incredibly complex and difficult to confront.

A. FISA

FISA was enacted in 1978 following the findings of the Senate’s Church Committee, which had been constituted to “conduct an investigation and study of governmental operations with respect to intelligence activities and of the extent, if any, to which illegal, improper, or unethical activities were engaged in” by federal government agencies and individuals.¹⁵ Revelations of alleged government abuses, including assassination plots and warrantless surveillance operations of U.S. citizens, demonstrated a need for congressional oversight and inclusion.¹⁶ FISA was the product.

FISA represented a “grand bargain” between the legislative and executive branches. The drafters recognized that selection of the proper conditions and standards for foreign intelligence electronic surveillance is a “political decision . . . properly made by the political branches of Government *together*.”¹⁷ It found a balance between granting the executive branch appropriate national security-related powers, especially with regards to electronic surveillance, while protecting constitutional rights and civil liberties through clearly defined and judicially monitored procedures.¹⁸

FISA defined many aspects of foreign intelligence surveillance, including what constitutes a “foreign power,” an “agent of a foreign power,” “foreign intelligence information,” and “electronic surveillance.”¹⁹ No longer did federal

¹⁵ 121 CONG. REC. 1,432 (1975), https://www.senate.gov/artandhistory/history/common/investigations/pdf/ChurchCommittee_Vote1975.pdf.

¹⁶ Seymour M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antivar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES (Dec. 22, 1974), <https://www.nytimes.com/1974/12/22/archives/huge-cia-operation-reported-in-u-s-against-antiwar-forces-other.html>.

¹⁷ H.R. REP. NO. 95-1283, pt. 1, at 22 (1978), <https://fas.org/irp/agency/doj/fisa/hspci1978.pdf> (emphasis added).

¹⁸ See 50 U.S.C. § 1801 *et seq.*

¹⁹ “Foreign power” has seven different definitions, generally referring to foreign governments and their respective organs, foreign-based or -constituted organizations, and international terrorist organizations. 50 U.S.C. § 1801(a). “Agent of a foreign power” is divided between U.S. and non-U.S. persons, each of which has five unique definitions to qualify

agencies have sole discretion to conduct electronic surveillance on individuals: they now had to operate within legally-defined boundaries.

Perhaps even more significant was FISA's establishment of a court, the FISA Court (FISC), specifically designated to hear applications and grant orders approving electronic surveillance, as well as a court of review (FISCR).²⁰ This finally integrated judicial oversight into the foreign intelligence surveillance warrant process.²¹

The process itself is robust. In order to obtain a warrant, a federal officer must submit an application "upon oath or affirmation" and with the "approval of the Attorney General" to a FISC judge. In addition to satisfying numerous requirements,²² the application must demonstrate that there is probable cause to believe that the surveillance target is an agent of a foreign power.²³ Yet no U.S. person may be considered an agent of a foreign power "solely upon the basis of activities protected by the first amendment to the Constitution of the United States."²⁴

This probable cause standard differs from that of typical domestic criminal warrants, also known as Title III warrants.²⁵ Whereas a FISA warrant's probable cause standard assesses the suspect's identity and association with another entity, the Title III warrant's probable cause is focused on the suspect's actions. A Title III warrant is granted

them as "agents." 50 U.S.C. § 1801(b). "Foreign intelligence information" relates to information related to the United States' ability to defend against intelligence collection and attack, and generally to ensure national security. 50 U.S.C. § 1801(c). "Electronic surveillance" has four distinct definitions, generally describing the process and outcome of intelligence collection from wire, radio, and other electronic mediums. 50 U.S.C. § 1801(f). For additional definitions covered under FISA, see 50 U.S.C. § 1801.

²⁰ 50 U.S.C. § 1803.

²¹ Previously, courts had granted the government significant leeway in conducting warrantless surveillance. *See, e.g.,* *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980) (ruling that the government does not need to obtain a warrant to conduct foreign intelligence surveillance; this case began before FISA's enactment); *United States v. U.S. District Court (Keith)*, 407 U.S. 297 (1972) (holding that warrantless surveillance may not be conducted on domestic organizations, but abstaining from withholding such power for national security reasons against foreign powers).

²² *See* 50 U.S.C. § 1804(a). A FISA warrant application must include, inter alia, the identity of the Federal officer making the application, the identity of the surveillance target, the facts and circumstances justifying surveillance, "minimization procedures" to avoid the collection of information outside the scope of the surveillance, the nature of information sought, certifications by designated executive officials, and the expected time required to conduct surveillance.

²³ 50 U.S.C. § 1805(a)(2)(A). *See infra* Section II.B for more discussion on the probable cause standard.

²⁴ 50 U.S.C. § 1805(a)(2)(A). While U.S. persons are protected by a First Amendment preclusion, non-U.S. persons are not. Therefore, FISA warrants for non-U.S. persons might be predicated solely on First Amendment activities.

²⁵ *See* Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, 82 Stat. 197, H.R. 5037. Title III of this act establishes judicial procedures granting approval for electronic surveillance. It expressly refrains from infringing upon areas of national security: "Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other acts of a foreign power . . ." § 2511(3).

after a showing that “there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense” pursuant to a designated set of federal crimes.²⁶

The courts have recognized the distinction between “ordinary crimes” and issues affecting national security. The undue burden on the government to produce such evidence showing probable cause in the context of national security would hamper the executive’s constitutional duties. They have thus consistently granted the executive branch significant leeway in conducting electronic surveillance in the context of national security, both before and after the enactment of FISA, and regardless of the government’s use of a warrant.²⁷

FISA’s probable cause standard differs from Title III’s because it serves a different purpose. FISA surveillance is intended to collect foreign intelligence information, whereas Title III surveillance is intended to collect information related to criminal acts for law enforcement purposes. FISA originally required that foreign intelligence collection serve as the “primary purpose” of surveillance in order to prevent the use of such intelligence in criminal investigations and prosecutions (the purview of Title III warrants). This created a “wall” between the intelligence community and law enforcement, forbidding any cross-talk or coordination despite a common target.²⁸

The USA PATRIOT Act partially tore down this wall by changing “the purpose” to “a significant purpose.”²⁹ Now, the government’s application for a FISA warrant need only declare that a significant purpose of the surveillance is foreign intelligence collection, allowing criminal purposes to also play a role in the surveillance. The FISC confirmed this interpretation in 2002, in the first appeal from the FISC since FISA’s enactment twenty-four years earlier.³⁰ In that

²⁶ 18 U.S.C. § 2518. The difference between the FISA and Title III probable cause standards is less distinct for U.S. persons than for non-U.S. persons, because the definitions under which U.S. persons qualify for FISA surveillance include criminal acts. *See* 50 U.S.C. § 1801(b)(2). Criminal acts are not always included in the non-U.S. person definitions of “agent of a foreign power” under FISA. *See* 50 U.S.C. § 1801(b)(1).

²⁷ *See, e.g., In Re Sealed Case*, 310 F.3d 717 (2002) (rejecting the FISC’s Fourth Amendment restrictions on government surveillance as long as a “significant purpose” is the collection of foreign intelligence information); *United States v. Johnson*, 952 F.2d 565 (1st Cir. 1991) (rejecting defendants’ claims that FISA surveillance was conducted for criminal, and not foreign intelligence, purposes); *United States v. Falvey*, 540 F. Supp. 1306 (E.D.N.Y. 1982) (affirming the constitutionality of FISA and the necessity of surveillance for national security purposes); *Zweibon v. Mitchell*, 720 F.2d 162 (1983) (affirming the warrantless surveillance of a domestic religious group for purposes of national security); *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980) (*see supra* note 21). *But see Keith*, 407 U.S. 297 (1972) (holding that the government must obtain a warrant for electronic surveillance for domestic security matters, but leaving open the issue whether warrants are required for foreign individuals or threats).

²⁸ James X. Dempsey, *Electronic Surveillance and Cybersecurity*, in NATIONAL SECURITY LAW IN THE NEWS 235 (Paul Rosenzweig et al. eds., 2012).

²⁹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, 107 P.L. 56, 115 Stat. 272 (Oct. 26, 2001).

³⁰ *In Re Sealed Case*, 310 F.3d 717 (2002).

case, the FISC had imposed restrictions on the government's FISA warrant to ensure that information would not be used for criminal purposes, but the FISCR held that such a bar was unreasonable. The "significant purpose" enabled government surveillance even when there is an intent to use the intelligence for a criminal prosecution. It even went beyond the USA PATRIOT Act's permission of "significant purpose": it claimed that "it is virtually impossible to read the 1978 FISA to exclude from its purpose the prosecution of foreign intelligence crimes . . . because . . . the definition of an agent of a foreign power . . . is grounded on criminal conduct."³¹ The court argued that because the discrete division between foreign intelligence and criminal purposes is not only difficult, but unreasonable, such a strict distinction should not be made.

Though this change improved the efficiency in intelligence and law enforcement operations, it opened the door for FISA to have a greater influence in criminal prosecutions, which can be problematic for defendants' civil liberties. Title III offers greater protections than does FISA. For instance, Title III requires notice be given to an individual of the surveillance after a designated period of time; FISA does not.³² Title III also permits disclosure of collected information to the defendant during prosecution; FISA does not, since the collected information is often classified.³³ Because of these differing standards, FISA-collected information can have greater consequences on defendants in a criminal prosecution.

B. *Lone Wolf Amendment*

The origin story of FISA's lone wolf amendment begins in the days leading up to 9/11. In February 2001, Zacarias Moussaoui, a French national, came to the United States to take flight lessons in preparation for al Qaeda's attacks later that year. The FBI began to investigate him in August 2001, after red flags were raised by Moussaoui's unusual interest in the flight simulations, his unexplained possession of large sums of money, and his jihadist beliefs.³⁴ The investigating FBI agent suspected him of preparing for a terrorist attack, but was unaware of his al Qaeda

³¹ *Id.*, at 723.

³² *Comparison of Electronic Surveillance Under Title III and FISA*, ACLU, <https://www.aclu.org/other/comparison-electronic-surveillance-under-title-iii-and-fisa> (last visited May 12, 2019).

³³ *Id.*

³⁴ NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, *THE 9/11 COMMISSION REPORT* 273 (2004).

connections or ultimate terrorist intentions. The agent, seeking to prevent Moussaoui from obtaining further training, worked with INS to detain him for overstaying his visa.³⁵

The FBI case agent wanted to obtain a criminal (Title III) warrant to search Moussaoui's laptop computer, yet "[a]gents at FBI headquarters believed there was insufficient probable cause."³⁶ The case agent then sought to obtain a FISA warrant, but again FBI HQ doubted the sufficiency of the evidence to show probable cause that Moussaoui was an agent of a foreign power.³⁷ The agents scrambled to somehow connect Moussaoui with a foreign power or organization, even attempting to tie him to Chechen rebels, but failed to meet standards the FBI believed were necessary to obtain a FISA warrant.³⁸ A FISA warrant application was never submitted.

Had the FBI conducted the desired electronic surveillance, it might have discovered Moussaoui's al Qaeda connections and the plans for the imminent terrorist attacks.³⁹ Yet the probable cause standards for both criminal and FISA warrants deterred the FBI from even submitting warrant applications. As a result, a potentially crucial source of intelligence that might have prevented the 9/11 attacks was missed. Congress sought to close this supposed gap in the intelligence architecture with the "Moussaoui fix."

The FBI had believed that it was unable to obtain a FISA warrant because of a lack of demonstrable agency of Moussaoui to a foreign power. Congress, therefore, sought to empower intelligence and law enforcement to conduct surveillance "of so-called 'lone wolf' foreign terrorists."⁴⁰ Congress recognized that "[r]equiring that targets of a FISA warrant be linked to a foreign government or international terrorist organization may have made sense when FISA was enacted in 1978," when Soviet spies and "hierarchical, military-style terror groups" were the norm.⁴¹ But the different threats of today required different tools.⁴²

The new tool to counter lone wolves came via the Intelligence Reform and Terrorism Prevention Act of 2004, in which FISA was amended to include an additional definition of "agent of a foreign power." Under 50 U.S.C. §

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 274. *See also* 50 U.S.C. § 1805(a)(2)(A).

³⁸ *Id.*, 274.

³⁹ This claim is not undisputed. The Senate recognized that it was "not certain that a search of this terrorist [Moussaoui] would necessarily have led to the discovery of the September 11 conspiracy." S. REP. NO. 108-40, at 3 (2003).

⁴⁰ S. REP. NO. 108-40, at 2 (2003).

⁴¹ S. REP. NO. 108-40, at 3 (2003).

⁴² *Id.*

1801(b)(1)(C), an agent of a foreign power would include any non-U.S. person who “engages in international terrorism or activities in preparation therefore.”⁴³ This was subject to a sunset provision, originally set for December 31, 2005.⁴⁴

While this legislation removed a main element of the original FISA probable cause standard (connection to a foreign power), it was reserved solely for non-U.S. persons involved with international terrorism. U.S. persons, domestic terrorists (who are already immune from FISA), and non-U.S. persons engaging in anything other than international terrorism fall outside the scope of this provision.

This legislation seems uncontroversial, especially in the shadow of the 9/11 attacks and the changing nature of terrorism.⁴⁵ It only slightly expanded the scope of FISA to include only non-U.S. persons and maintained a requirement to show the target’s engagement in or preparation for international terrorism; “the change, by initial appearances, has limited consequences for privacy.”⁴⁶ Yet the amendment did receive pushback within the Senate Judiciary Committee from which the amendment originated.⁴⁷

Senators Leahy and Feingold expressed their reservations in the Committee report. They were “concerned that this measure [lone wolf amendment] will not ensure that the government’s FISA power is being used as effectively or appropriately as is necessary.”⁴⁸ They were frustrated with the Justice Department’s lack of cooperation in supporting the Senate’s “oversight efforts to evaluate how [the expanded government surveillance] powers are being used.”⁴⁹ And they were particularly dismayed at the changing rationales for the amendment.⁵⁰ Fundamental to their skepticism of the supposed need for the lone wolf amendment was the argument that the FBI had improperly interpreted the probable cause standard in its decision not to submit a FISA application.

⁴³ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6001, 118 Stat. 3638, 3742 (2004).

⁴⁴ Subject to the sunset provision of Section 224 of the USA Patriot Act, P.L. 107-56. An exception was provided for investigations that began before that date or for any criminal or other offenses that occurred before that date. Section 224(b).

⁴⁵ S. REP. NO. 108-40, at 3 (2003) (discussing the evolving nature of national security threats that FISA is designed to fight: in the 1970s, the threats were Soviet spies and hierarchical organizations, but now they are different); H.R. REP. NO. 95-1283, pt. 1, at 36 (1978) (emphasizing that the electronic surveillance of foreign nationals is not intended to treat them differently on the basis of nationality, but to identify their foreign governments).

⁴⁶ Patricia E. Simone & Patricia L. Bellia, *The “Lone Wolf” Amendment and the Future of Foreign Intelligence Surveillance Law*, 50 VILL. L. REV. 425, 428 (2005).

⁴⁷ S. REP. NO. 108-40, at 8 (2003). The committee nonetheless voted unanimously (19-0) to send the bill to the full Senate with a recommendation that it pass.

⁴⁸ *Id.* at 10.

⁴⁹ *Id.*

⁵⁰ *Id.* at 11.

They specifically referenced the FBI attorneys' complete lack of awareness of the legal foundation of the probable cause standard, *Illinois v. Gates*. At the time that agents sought a FISA warrant for Moussaoui, they apparently had interpreted the probable cause standard (that Moussaoui was an agent of a foreign power) as "more probable than not."⁵¹ Yet *Gates* stated that probable cause "means less than evidence which would justify condemnation."⁵² Probable cause does not require proof beyond a reasonable doubt or a preponderance of evidence.⁵³ Rather, determination of probable cause requires only a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . , there is a fair probability that contraband or evidence of a crime will be found in a particular place."⁵⁴ Thus, probable cause does not even need to meet the 51% marker—arguably a low standard, but one which the Court has nonetheless upheld. Had the FBI properly applied *Gates*, it would likely have been able to sufficiently tie Moussaoui to a foreign power for FISA purposes.⁵⁵ A 2002 internal FBI memo from the Office of the General Counsel to all FBI divisions seeking "to clarify the meaning of probable cause" suggests that it recognized and attempted to rectify this failure.⁵⁶

Nevertheless, Congress passed IRTPA and the lone wolf amendment on December 17, 2004. The original and subsequent legislation has consistently included a sunset provision, but Congress has never failed to renew it: since enactment, the amendment has been renewed six times.⁵⁷ The current sunset is December 15, 2019.

⁵¹ *Id.* at 39.

⁵² *Illinois v. Gates*, 462 U.S. 213, 216 (1983).

⁵³ *Id.* This was reiterated in a letter from the Senate Judiciary Committee to the FBI, criticizing it for its lack of awareness of the *Gates* standard. S. REP. NO. 108-40, at 63 (2003).

⁵⁴ *Gates*, 462 U.S. at 238.

⁵⁵ S. REP. NO. 108-40, at 35 (2003).

⁵⁶ *Id.* at 66.

⁵⁷ See USA PATRIOT Improvement and Reauthorization Act of 2005, P.L. 109-177, 120 Stat. 192 (March 9, 2006) (extending the sunset of Section 6001 until December 31, 2009); Department of Defense Appropriations Act, 2010, P.L. 111-118 § 1004(b) (extending until February 28, 2010); P.L. 111-141 (extending until February 28, 2011); P.L. 112-3 (extending until May 27, 2011); P.L. 112-14 (extending until June 1, 2015); USA Freedom Act, P.L. 114-23 (extending until December 15, 2019).

C. *Lone Wolves*

The concept of the lone wolf is not new,⁵⁸ but recent social, political, and technological developments have fostered a climate that provides unprecedented support for their growth and success.⁵⁹ And while government, intelligence, and law enforcement authorities have and will continue to develop tools and methods to prevent and stop them, the very nature of the lone wolf will ensure that it remains a persistent threat.⁶⁰

Lone wolves, also known as lone terrorist actors or lone actors,⁶¹ plan and execute terrorist acts independent of any organization. Various individuals and organizations define the lone wolf differently,⁶² but a defining element of lone wolves is the fact that they “operate without organizational support and are not influenced by organizational

⁵⁸ Nineteenth-century anarchists advocated for individual acts of violence for its ideological congruency with anarchism: “[o]nly unorganized individuals . . . were safe from coercion and domination and thus capable of remaining true to the ideals of anarchism.” Paul Avrich, *The Anarchists in the Russian Revolution*, 26 *RUSSIAN REV.* 341, 343 (1967). *See also*, D. Novak, *Anarchism and Individual Terrorism*, 20 *CANADIAN J. OF ECON. AND POL. SCI.* 176-184 (May 1954)). Beginning in the 1970s, white supremacists adopted “leaderless resistance,” a term popularized by Ku Klux Klansman Louis Beam in a 1992 essay, as the best viable means to defeat “state tyranny.” Jeffrey Kaplan, *Leaderless Resistance*, 9 *TERRORISM AND POL. VIOLENCE* 80-95 (1997). Numerous other groups of varying ideologies, including environmental extremists, antiabortion militants, and Islamic extremists, have also embraced the strategy of leaderless resistance. JEFFREY D. SIMON, *LONE WOLF TERRORISM: UNDERSTANDING THE GROWING THREAT* 35 (2013).

⁵⁹ New technologies, especially the internet, have enabled terrorists generally and lone wolves specifically: to access greater amounts of information, motivating individuals to react to current events as well as providing information to weapons, tactics, and sources for reconnaissance; to communicate with like-minded people; and to broadcast their manifestos and attacks to a world audience. JEFFREY D. SIMON, *LONE WOLF TERRORISM: UNDERSTANDING THE GROWING THREAT* 25-34 (2013).

⁶⁰ Lone wolves are more prevalent in countries, like the United States, that have robust counterterrorism capacity, which denies organized terrorist groups the ability to survive, let alone operate. In such conditions, lone wolves become the relatively greater and more lethal threat. *See* Brian J. Phillips, *Deadlier in the U.S.? On Lone Wolves, Terrorist Groups, and Attack Lethality*, 29 *TERRORISM AND POL. VIOLENCE* 533-459 (2015).

⁶¹ *See, e.g., Understanding Lone-actor Terrorism: A Comparative Analysis with Violent Hate Crimes and Group-based Terrorism*, START (Sept. 2013), https://www.start.umd.edu/sites/default/files/publications/local_attachments/START_IUSSD_UnderstandingLoneactorTerrorism_Sept2013.pdf.

⁶² For instance, “[t]he FBI and DHS defined a lone offender as an individual motivated by one or more violent extremist ideologies who, operating alone, supports or engages in acts of violence in furtherance of that ideology or ideologies that may involve influence from a larger terrorist organization or a foreign actor.” FBI & DHS, *JOINT SPECIAL EVENT THREAT ASSESSMENT: AMERICA’S PARTY: NEW YEAR’S EVEN 2016-2017 LAS VEGAS STRIP AND DOWNTOWN LAS VEGAS, NEVADA*, at 2 (Dec. 19, 2016). They also define a homegrown violent extremist, a functional equivalent of a lone wolf, “as a person of any citizenship who has lived or operated primarily in the United States or its territories who advocates, is engaged in, or is preparing to engage in ideologically motivated terrorist activities (including providing support to terrorism) in furtherance of political or social objectives promoted by a foreign terrorist organization *but whose actions are independent of direction by a foreign terrorist organization.*” *Id.* at 1 (emphasis added). In a comprehensive DOJ-funded study, lone wolf terrorism was defined as “political violence perpetrated by individuals who act alone; *who do not belong to an organized terrorist group or network*; who act without the direct influence of a leader or hierarchy; and *whose tactics and methods are conceived and directed by the individual without any direct outside command and direction.*” Mark Hamm & Ramon Spaaj, *Lone Wolf Terrorism in America: Using Knowledge of Radicalization Pathways to Forge Prevention Strategies*, DEP’T OF JUST. 9 (Feb. 2015) (unpublished), PDF available at <https://www.ncjrs.gov/pdffiles1/nij/grants/248691.pdf> (emphasis added).

dynamics.”⁶³ Lone wolf terrorists are distinguishable from other “solitary offenders” in that their actions constitute significant violence at the societal level and they are driven by, amongst other things, ideology.⁶⁴

This network independence (or isolation) poses significant challenges to intelligence and law enforcement in two ways. First, without an organizational connection, officials have no idea who the lone wolf terrorists are. The process of radicalization can assist in this identification, but radicalization is also complex and difficult to observe. There are several existing theoretical frameworks outlining the radicalization process,⁶⁵ but radicalization usually occurs in unique, personal ways, and few external signals may be apparent. Research does show that lone actors may “broadcast” their intentions, providing rare, time-sensitive clues of an ensuing terrorist act, but these broadcasts are often only properly appreciated after the fact.⁶⁶ Despite the ex post utility of radicalization frameworks and the prevalence and commonality of many behaviors and beliefs, it is not inevitable that a particular individual will ultimately commit an act of terrorism.⁶⁷

Second, once an individual becomes radicalized, their plans and intentions can easily remain off the radar of intelligence and law enforcement. Terrorist networks present numerous opportunities for intelligence and law enforcement officials to track individuals and their activities, thereby enabling predictive analysis and preventive action *before* an attack. Physical and electronic communications, physical meetings, and transmission of goods and services are common in networks and provide useful information. Lone wolves do not provide this same information because they do not have the same connections. They meet with no one in the course of planning and execution, and they receive no orders, guidance, financial assistance, or training. How, then, can intelligence and law enforcement even become aware of lone wolves?

Some argue that the lone wolf threat is not as significant as that of larger, well-resourced terrorist organizations,⁶⁸ such as al Qaeda or ISIS, yet such claims are not validated by actual events. As of 2015 in the United

⁶³ START, *supra* note 61, at 3.

⁶⁴ TERRY D. TURCHIE & KATHLEEN M. PUCKETT, HUNTING THE AMERICAN TERRORIST: THE FBI’S WAR ON HOMEGROWN TERROR 262 (2007).

⁶⁵ See, e.g., Allison G. Smith, *How Radicalization to Terrorism Occurs in the United States: What Research Sponsored by the National Institute of Justice Tells Us*, DEP’T OF JUST. (2018), <https://www.ncjrs.gov/pdffiles1/nij/250171.pdf> (presenting different models for the terrorist’s radicalization process).

⁶⁶ Hamm & Spaaj, *supra* note 62 at 9.

⁶⁷ Smith, *supra* note 65 at 18.

⁶⁸ See, e.g., Beau de Barnes, Note, *Confronting the One-Man Wolf Pack: Adapting Law Enforcement and Prosecution Responses to the Threat of Lone Wolf Terrorism*, 92 B.U. L. Rev. 1613, 1655-57 (2012) (dismissing the impact of lone wolves as “ultimately insignificant”).

States, lone wolves made up only 6% of all terrorists, but they executed 25% of all terrorist attacks.⁶⁹ Lone wolf attacks perpetrated on behalf of radical Islamist groups or ideologies often grab many of the headlines: for instance, the Fort Hood shooting in 2009, the San Bernardino shooting in 2015,⁷⁰ and the Orlando nightclub shooting in 2017. Lone wolf attacks conducted on behalf of other ideologies, particularly white nationalism, are just as, if not more prevalent: for instance, the shooting at an African American church in South Carolina in 2015, the shooting at a Jewish synagogue in Pittsburgh in 2018, and the El Paso Walmart shooting in 2019. Nor is the lone wolf a uniquely American problem; it has affected other countries equally in recent years: Anders Breivik's attack in Norway in 2011, the attack-by-cargo truck in Nice, France in 2016, and the Christchurch, New Zealand shootings in 2019.

It is highly doubtful that lone wolf attacks will abate in the future. Globalization and the spread of technology have particularly facilitated the continued existence of this threat. Violence has become increasingly democratized. Individuals can gain access to weapons, or the information necessary to build their own.⁷¹ They can perform their own reconnaissance of targets through Google Maps and open-source information. Individuals can become radicalized far more easily thanks to the internet. They have greater awareness of events, issues, and atrocities in distant lands, fostering the foundations for potential radicalization.⁷² Groups and individuals spread propaganda and engage in conversations that enables recruitment-through-inspiration: individuals need not become official group members in order to act on its behalf.⁷³

⁶⁹ STUDY OF TERRORISM AND RESPONSES TO TERRORISM, PATTERNS OF LONE ACTOR TERRORISM IN THE UNITED STATES (2015), https://www.start.umd.edu/pubs/START_ATS_PatternsofLoneActorTerrorismUS_ResearchBrief.pdf.

⁷⁰ Though the San Bernardino attack was performed by two people, and not a single individual, they did plan and execute the operation entirely independent of any external guidance, direction, or support. They were inspired by Anwar al-Awlaki's internet lectures and they independently declared loyalty to ISIS. Daniel Byman, *How to Hunt a Lone Wolf: Countering Terrorists Who Act on Their Own*, FOREIGN AFF. (Mar./Apr. 2017), <https://www.foreignaffairs.com/articles/2017-02-13/how-hunt-lone-wolf>.

⁷¹ See, e.g., Benjamin Bahney, *How U.S. Gun Laws Allow Mass Shooters to Slip Through*, RAND BLOG (Nov. 15, 2018), <https://www.rand.org/blog/2018/11/how-us-gun-laws-allow-mass-shooters-to-slip-through.html> (observing the overwhelming use of easily accessible semiautomatic firearms in terrorist attacks); Doug Irving, *Four Ways 3D Printing May Threaten Security*, RAND BLOG (May 8, 2018), <https://www.rand.org/blog/articles/2018/05/four-ways-3d-printing-may-threaten-security.html> (noting the potential security risks of 3D printing).

⁷² See JOHN MACKINLAY, *THE INSURGENT ARCHIPELAGO* 41 (2009). Mackinlay points out that "the distinction between terrorism and insurgency [has] becom[e] blurred," *id.* at 70, and that use of the term "terrorism," as opposed to "insurgency," serves a political purpose, *id.* at 198. Thus, many of the dynamics of the lone wolf are applicable to counterinsurgency theory.

⁷³ See, e.g., Interview by Terry Gross, N.P.R., with Scott Shane, N.Y. Times, (Sept. 14, 2015), <http://www.npr.org/2015/09/14/440215976/journalist-says-the-drone-strike-that-killed-awlaki-did-not-silence-him> (describing al Qaeda leader Anwar Al-Awlaki's ability to inspire terrorist attacks even after his death).

So how do governments counter the lone wolf threat? One of the greatest challenges in defeating the lone wolf threat is identifying lone wolves before an attack. As discussed *supra*, their complete isolation from a terrorist network (at least in theory) allows the lone wolf to remain off the radar of intelligence and law enforcement. Yet the government might be able to get them on the radar with some existing legal tools. For instance, CCTV and biometrics enable tracking of known or suspected terrorists,⁷⁴ though an individual not previously a terrorist but who self-radicalizes into a lone wolf will avoid such detection. The government can actively engage with local, often marginalized, groups that might be susceptible to terrorist radicalization. It can collect information to help identify potential lone wolves either directly, through elicitation of information from the people, or indirectly, through confidential informants.⁷⁵ “The key to recognizing lone wolves before they act is citizen awareness and involvement,” since lone wolves “are virtually invisible to law enforcement.”⁷⁶ However, because the signs are often subtle, even locals might be unaware of an individual’s lone wolf status.

Active monitoring for early warning signs is, of course, useful and necessary: terrorists who recently break away from their organizations, individuals with psychological conditions or sudden changes in behavior, and suspicious purchases of potentially dangerous materials are all valuable pieces of evidence.⁷⁷ These facts, while individually might not be dispositive of a lone wolf, can collectively enable intelligence and law enforcement to infer a potential threat.⁷⁸

Monitoring the internet activity of lone wolves can be effective; it might be “the only intelligence that the authorities have prior to an attack.”⁷⁹ Radical Islamists and white nationalists both use online forums to radicalize and plan,⁸⁰ and it is common for lone wolves generally to broadcast their intents prior to an attack.⁸¹

⁷⁴ JEFFREY D. SIMON, *LONE WOLF TERRORISM: UNDERSTANDING THE GLOBAL THREAT* 189, 194 (2013).

⁷⁵ See, e.g., Rachel Briggs, *Community Engagement for Counterterrorism: Lessons from the United Kingdom*, 86 INT’L AFF. 977-981 (2010) (noting the benefits of community engagement, as well as the risks, including discrimination, social divisiveness, and counterproductive results in counterterrorism efforts).

⁷⁶ UNNI TURRETTINI, *THE MYSTERY OF THE LONE WOLF KILLER: ANDERS BREIVIK AND THE THREAT OF TERROR IN PLAIN SIGHT* vii (2015).

⁷⁷ SIMON, *supra* note 74, at 207-10.

⁷⁸ Such was the case with Moussaoui.

⁷⁹ SIMON, *supra* note 74, at 206.

⁸⁰ See SIMON, *supra* note 74, at 203-04; *STUDY OF TERRORISM AND RESPONSES TO TERRORISM, THE USE OF SOCIAL MEDIA BY UNITED STATES EXTREMISTS* (2018), https://www.start.umd.edu/pubs/START_PIRUS_UseOfSocialMediaByUSExtremists_ResearchBrief_July2018.pdf.

⁸¹ See Hamm & Spaaj, *supra* note 62, at 9.

Effective messaging and counter-propaganda are arguably the most effective tools to prevent lone wolves, though difficult to implement and maintain over long periods of time.⁸² Such tactics aim to prevent radicalization in the first place. They also improve relations between the government and diverse populations, thereby establishing trust between the government and the people, encouraging the reporting of terrorist activity and disincentivizing and de-glamourizing lone wolf attacks.

Of course, governments can counter lone wolves by expanding the application of existing tools, including some listed above, to more individuals and in more circumstances. That is, they can grant legal authority to security officials that increases security at the expense of civil liberties. This dynamic is not new: the pendulum constantly swings back and forth between security and civil liberties, and the enactment of the lone wolf amendment reflected the post-9/11 momentum in favor of security.

Part II: Shortcomings of the Lone Wolf Amendment

This Part critiques the lone wolf amendment on three grounds: its lack of use, its failure to account for the full lone wolf threat, and its inappropriateness as a counter-lone wolf tool.

A. The Lone Wolf Amendment Has Not Been Used

The lone wolf amendment seemed necessary in light of the apparent weaknesses in the intelligence infrastructure after 9/11. It was supposed to close a gap that hampered intelligence and law enforcement's ability to identify lone wolves. Yet, in the nearly fifteen years since its implementation, it is not clear that it has ever been used. When the lone wolf amendment was set to expire in 2009, Senator Patrick Leahy requested information from the DOJ on the provision. In its response, DOJ acknowledged that the amendment had not yet been relied upon in an investigation, but maintained that it was needed in case it is "the only avenue to effective surveillance."⁸³ The DOJ has not since affirmed or rejected this position.⁸⁴ Certainly, the DOJ's silence on the use of the lone wolf amendment since

⁸²SIMON, *supra* note 74, at 210-12.

⁸³ Letter from the U.S. Dep't of Justice to Sen. Patrick J. Leahy, at 4-5 (Sept. 14, 2009), https://www.wired.com/images_blogs/threatlevel/2009/09/leahyletter.pdf.

⁸⁴ CONGRESSIONAL RESEARCH SERVICE, AMENDMENTS TO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA) EXPIRING ON DECEMBER 15, 2019 (Apr. 11, 2016) (citing the 2009 statement by the DOJ, but not indicating an updated position).

the 2009 letter does not mean that it has never been used. But if it had been used, one might have expected the DOJ to publicize the amendment's utility and effectiveness. It has not done this.

But arguably a day in which the lone wolf amendment is required may never come. Under the *Gates* interpretation of probable cause, the government would be able to obtain a FISA warrant by passing a far lower evidentiary bar than it originally, and incorrectly, believed. Even hypotheticals presented by DOJ officials would seemingly not limit the government's efforts as it claims. For example, the DOJ has claimed that a known terrorist who has "affirmatively severed his connection with his group" would not satisfy FISA requirements without the lone wolf amendment.⁸⁵ This is not readily apparent, however; under the *Gates* standard, even this prior connection, combined with additional evidence, could likely establish the requisite probable cause necessary to obtain a FISA warrant.

There has been no shortage of arrests, prosecutions, and convictions of alleged terrorists. Lone wolf attacks, themselves, have risen post-9/11.⁸⁶ The fact that intelligence and law enforcement have been so active without relying on the lone wolf amendment suggests that this provision has been unnecessary. Unused laws, especially those with attached sunset clauses, are supposed to expire. Sunset clauses in legislation that grants significant powers to the executive branch, such as those related to security or in the context of national emergencies, provide a means of legislative oversight and "an opportunity to reconsider the delegated powers."⁸⁷ Because in such contexts, fear and panic may guide initial legislative decision-making, sunset clauses provide an opportunity to reconsider the issues with more tempered minds and emotions.⁸⁸ They also provide the opportunity to restore the balance of power between the legislative and executive branches.⁸⁹

⁸⁵ Letter from the U.S. Dep't of Justice to Hon. Patrick J. Leahy 5 (Sept 14, 2009), https://www.wired.com/images_blogs/threatlevel/2009/09/leahyletter.pdf; see also *Hearing on USA PATRIOT Act Reauthorization Before the Subcomm. On Crime, Terrorism and Homeland Security of the H. Comm. On the Judiciary*, 112th Cong. 3 (2011) (statement of Todd Hinnen, Acting Assistant Att'y Gen., Dep't of Just.), <https://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/03/09/11/03-09-11-nsd-hinnen-testimony-re-usa-patriot-act-reauthorization.pdf>.

⁸⁶ Between 1940 and 2000, 38 lone wolves committed 171 attacks (averaging 2.85 attacks per year); from 2001 through 2013, 45 lone wolves committed 45 attacks (averaging 3.46 attacks per year). Mark Hamm & Ramon Spaaj, *Lone Wolf Terrorism in America: Using Knowledge of Radicalization Pathways to Forge Prevention Strategies*, DEP'T OF JUST., at 4 (Feb. 2015) (unpublished), PDF available at <https://www.ncjrs.gov/pdffiles1/nij/grants/248691.pdf>.

⁸⁷ ANTONIOS EMMANOUIL KOUROUTAKIS, *THE CONSTITUTIONAL VALUE OF SUNSET CLAUSES: AN HISTORICAL AND NORMATIVE ANALYSIS* 146 (2017).

⁸⁸ *Id.* at 149-50.

⁸⁹ *Id.* at 6.

The historical disuse of the lone wolf amendment may seem, independently, like insufficient criticism for a national security tool. Supporters may argue that even if it hasn't been used, it is conceivable that someday, some context would require it. And since there is no evidence that it has been abused—such as to conduct unjustified surveillance in violation of an individual's rights—there is no harm to renewing the amendment (the “no harm, no foul” argument). But the following two Sections will further emphasize the current amendment's inadequacies in addressing the lone wolf threat.

B. *The Lone Wolf Amendment Fails to Fully Address the Lone Wolf Threat*

The lone wolf amendment would have enabled the government to conduct electronic surveillance on Moussaoui, but it does not allow such surveillance of a massive portion of lone wolves. The provision is explicitly limited to non-U.S. persons. This completely ignores the threat of U.S. persons who pursue terrorism on behalf of both domestic and international causes, despite the fact that they—especially white supremacists—are consistently the greater threat. Investigations and arrests for domestic terrorists and lone wolves has risen in recent years,⁹⁰ and have remained higher than for international terrorism.⁹¹ Since 9/11, for instance, “more people have been killed in America by non-Islamic domestic terrorists than jihadists.”⁹²

The lone wolf amendment's sole focus on non-U.S. persons risks not only missing a huge segment of potential lone wolves, but also risks unfair discrimination and disparate treatment towards certain groups, namely non-whites and Muslims.⁹³ The U.S. government already tends to pursue radical Islamists and foreign terrorists more aggressively than

⁹⁰ *FBI investigating 1,000 suspected “lone wolf” militants, director says*, GUARDIAN (May 16, 2018), <https://www.theguardian.com/us-news/2018/may/17/fbi-investigating-1000-suspected-lone-wolf-militants-director-says> (citing FBI Director Christopher Wray in testimony to Congress).

⁹¹ See, e.g., Devlin Barrett, *Arrests in domestic terror probes outpace those inspired by Islamic extremists*, WASH. POST (Mar. 9, 2019), https://www.washingtonpost.com/world/national-security/arrests-in-domestic-terror-probes-outpace-those-inspired-by-islamic-extremists/2019/03/08/0bf329b6-392f-11e9-a2cd-307b06d0257b_story.html?utm_term=.c1300e2fddec; Devlin Barrett, *FBI investigating 1,000 white supremacist, domestic terrorism cases*, WASH. POST (Sept. 27, 2017) https://www.washingtonpost.com/world/national-security/fbi-investigating-1000-white-supremacist-domestic-terrorism-cases/2017/09/27/95abff24-a38b-11e7-ade1-76d061d56efa_story.html?utm_term=.a5340559b118. One study shows that, “strictly in terms of lethality, the data indicate that lone wolf terrorism in America is not on the rise.” Mark Hamm & Ramon Spaaj, *Lone Wolf Terrorism in America: Using Knowledge of Radicalization Pathways to Forge Prevention Strategies*, DEP'T OF JUST. 5 (Feb. 2015) (unpublished), PDF available at <https://www.ncjrs.gov/pdffiles1/nij/grants/248691.pdf> (emphasis added).

⁹² SOUTHERN POVERTY LAW CENTER, *AGE OF THE WOLF: A STUDY OF THE RISE OF LONE WOLF AND LEADERLESS RESISTANCE TERRORISM* 4 (Feb. 12, 2015), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/lone_wolf_special_report_0.pdf.

⁹³ Khaled A. Beydoun, *Lone Wolf Terrorism: Types, Stripes, and Double Standards*, 112 NW. U.L. REV. 1213 (2018).

domestic terrorists.⁹⁴ The lone wolf amendment could become a tool to reinforce this as status quo, while failing to provide equivalent tools to fight an equivalent threat (domestic and U.S. person lone wolves). Aside from the obvious security gap, this distinction risks reinforcing the unjust prevalence of racial and religious discrimination in intelligence and law enforcement targeting.⁹⁵

C. The Lone Wolf Amendment is Not the Appropriate Tool to Fight Lone Wolves

Even if the lone wolf amendment was worded in such a way as to enable the government to surveil all lone wolves (both U.S. and non-U.S. persons) without infringing on privacy rights, it is not an appropriate tool to address them. Because lone wolves are isolated from any network, it is difficult to identify them prior to an attack. As a result, intelligence and law enforcement would have to operate on very limited information, if any, to meet the probable cause standard for a FISA warrant. First Amendment activities, especially those relayed over the internet, may offer substantial evidence,⁹⁶ but First Amendment activity cannot form the sole basis of FISA warrant for U.S. persons.⁹⁷ Broadcasting of intent to conduct an attack, common among lone wolves, would likely be sufficient justification, but unless a lone wolf broadcasts far ahead of time, intelligence and law enforcement would have little time to obtain a warrant and then conduct the surveillance.

Perhaps more significantly, lone wolves would be poor sources of foreign intelligence, a fundamental requirement for FISA surveillance. Lone wolves' lack of any connection to a foreign power or organization means that the intelligence would end at and with the individual. FISA's legislative history clearly states that an individual "cannot be a foreign power," and therefore FISA surveillance must be based on a targeted individual's connection to a foreign power.⁹⁸ Once that baseline is met, the potential infringement on privacy rights is appropriate when there is "the likelihood of obtaining foreign intelligence information from electronic surveillance of [surveillance targets]. Such information by definition must directly and [sic] substantially relate to important foreign policy or national security concerns."⁹⁹ Electronic surveillance therefore fails to meet FISA's intent when it lacks the "likelihood" of such

⁹⁴ SOUTHERN POVERTY LAW CENTER, *supra* note 92, at 4-5.

⁹⁵ *See, e.g.*, Beydoun, *supra* note 93 (noting the disparate treatment of white and Muslim lone wolves).

⁹⁶ *See supra* note 79 and accompanying text.

⁹⁷ 50 U.S.C. § 1805(a)(2)(A). Non-U.S. persons are not afforded this same protection under the statute, and therefore FISA applications predicated solely on first amendment activities may be legal.

⁹⁸ H.R. REP. NO. 95-1283, pt. 1, at 74 (1978), <https://fas.org/irp/agency/doj/fisa/hspci1978.pdf>.

⁹⁹ *Id.* at 33.

intelligence collection. It also fails to meet the explicit statutory requirement that foreign intelligence be a “significant purpose” of surveillance. There is little credibility in an argument that the purpose is to collect foreign intelligence when there is no expectation to collect such intelligence.

Perhaps, however, intelligence and law enforcement believe an individual is in fact a part of some organization and is preparing to engage in terrorism, but they simply lack sufficient evidence at that time to show a connection; would this not be grounds for FISA surveillance? This is the very problem that the government encountered with Moussaoui. In this case, it might not be possible until after the electronic surveillance itself, or after an attack or arrest, that the government can establish such evidence of agency. However, the *belief* of a connection is not required in the text of the lone wolf amendment, nor has it been suggested in the legislative history or in claims by DOJ, FBI, or other government officials. This gap between what might be the intent of the law and what the law is, as written, is significant. If this was the intent of Congress, then the act has been written in an overly broad way.

Finally, it is not apparent that Title III—the legal authority that permits surveillance of individuals engaging in criminal activity, as opposed to being agents of a foreign power—cannot be an effective tool to confront lone wolves. Assuming that intelligence and law enforcement have successfully identified a lone wolf, and assuming that surveillance is expected to produce valuable information to stop an attack, Title III can be applied to *all* lone wolves, both U.S. persons and non-U.S. persons alike. It is not dependent on the suspect’s citizenship status or nationality. Law enforcement can obtain a Title III surveillance warrant for any individual who has committed, is committing, or will commit a crime.¹⁰⁰ The terrorist activities for which the lone wolves are preparing would satisfy the Title III standard that there be probable cause that the individual has or will commit a criminal act.¹⁰¹ And the notice and disclosure requirements maintain defendants’ rights, thereby limiting potential abuses through FISA. If the goal is to stop lone wolf terrorist attacks, then Title III can do the job.

Part III: Options for Congress

The discussion so far has painted a bleak picture for the necessity and effectiveness of the current lone wolf amendment. Yet the lone wolf threat is real, and there is a need to identify and prevent such attacks. The current provision may not be working, but there are two options for revision and improvement. However, because of the

¹⁰⁰ See 18 U.S.C. § 2518.

¹⁰¹ See, e.g., Mary B. McCord, *It’s Time for Congress to Make Domestic Terrorism a Federal Crime*, LAWFARE (Dec. 5, 2018), <https://www.lawfareblog.com/its-time-congress-make-domestic-terrorism-federal-crime>.

provision's faulty *raison d'être*, its to-date lack of use, its likely uselessness in the context of true lone wolves, and the potential risks to civil liberties, this Note proposes that Congress let the lone wolf amendment expire.

A. Expand the Statutory Language to Include All Lone Wolves

Congress could build upon its initial efforts to counter lone wolves by including provisions in which U.S. persons, suspected of preparing for terrorism as lone wolves, could be surveilled under FISA. This would meet Congress's intent to fight lone wolves by giving the government the actual power to do so. Since lone wolves are often U.S. persons, and domestic terrorism is on the rise, the current provision's singular focus on non-U.S. persons may be the wrong approach.

This solution of expanding the language has obvious problems. First and most obvious is the risk it poses to FISA's delicate balance between national security, privacy, constitutional rights, and civil liberties. The courts have consistently recognized that U.S. persons have greater rights than non-U.S. persons, especially with regards to privacy rights.¹⁰² The FISC itself has regularly opined on Fourth Amendment issues, typically ruling in favor of government surveillance,¹⁰³ but such an expansion as suggested here might be a bridge too far. It would be perhaps too great a challenge to privacy.

Second, this solution might be no more effective at countering the lone wolf threat than the current framework. The very nature of lone wolves makes them extremely difficult even to identify, let alone stop. Giving the government the ability to conduct electronic surveillance on U.S. persons as well would not necessarily help because the government will rarely know who the lone wolves are. Even if there was widespread internet monitoring, "it would be very difficult, if not impossible, to distinguish a [lone wolf] terrorist from a student, researcher, Internet surfer, and the like."¹⁰⁴

This solution also fails to address the fact that lone wolf electronic surveillance in general will produce little, if any, foreign intelligence information that is required for a FISA warrant.¹⁰⁵ U.S. persons conducting terrorism on behalf of a foreign organization, like ISIS, at least have *some* connection that could suggest a degree of foreign intelligence. But

¹⁰² *Cf. Keith*, 407 U.S. 297 (1972) ("Different standards [for domestic security surveillance] may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and *the protected rights of our citizens.*") (emphasis added).

¹⁰³ *See supra* note 27.

¹⁰⁴ JEFFREY D. SIMON, *LONE WOLF TERRORISM: UNDERSTANDING THE GLOBAL THREAT* 205-06 (2013).

¹⁰⁵ *See supra* Section II.C.

domestic terrorists fundamentally offer no foreign intelligence.¹⁰⁶ FISA was originally created with the primary purpose—and later significant purpose—of collecting foreign intelligence.¹⁰⁷ This solution, while at least getting closer to fully addressing the lone wolf threat, throws out the foreign intelligence purpose entirely. Moreover, the constitutional and practical obstacles this would likely face make this an unreasonable alternative.

B. Modify the Language to Reinstate a Foreign Power Nexus

If the purpose of the lone wolf amendment was to enable government surveillance of non-U.S. persons for whom ties to a foreign organization were simply not yet discovered, like for Moussaoui, and such a tool is truly crucial for intelligence and law enforcement, then the statutory language could be modified to emphasize this foreign connection. For example, Congress could rephrase 50 U.S.C. § 1801(b)(1)(c) to become: a non-U.S. person who “engages in international terrorism or activities in preparation therefore, *and who is reasonably suspected of having a connection with a foreign power.*” This would modify the statute to consider surveillance of individuals in the context of larger intelligence and counterintelligence operations. It would maintain the agency element in the probable cause standard, albeit to a lower degree. And though there has been no evidence of abuse of civil liberties through the current provision, this modification would preemptively reduce the risk of the government embarking on fishing expeditions of individuals on weak evidentiary grounds.

This solution fails to incorporate the domestic lone wolf, but under this revised language, it is not the true lone wolves whom the government is targeting, but the typical agents of foreign powers that the government has reasonable suspicion might be acting on behalf of a foreign power. If, for instance, a foreign agent has exercised exceptional operational security and tradecraft, thus presenting very limited information to U.S. intelligence and law enforcement officials of their foreign connections, this revised language would enable the government to conduct electronic surveillance of such threats.

This solution dispenses with the idea that true lone wolf terrorists are the target. Rather, it maintains focus on and intelligence collection of foreign organizations, while reserving counter-lone wolf tools and strategies for another day. It returns FISA’s focus to more traditional threats, but ignores the evolution of security threats. The burden would still return to Congress to separately create more effective, more inclusive lone wolf legislation.

¹⁰⁶ *Id.*

¹⁰⁷ *See supra* note 29 and accompanying and subsequent text.

C. *Let the Lone Wolf Amendment Expire*

The final option is simple: let the lone wolf amendment expire. This provision has not been used,¹⁰⁸ it is not evident that it was ever needed in the first place,¹⁰⁹ and it does not fully address the lone wolf threat.¹¹⁰

DOJ argues that this tool is necessary,¹¹¹ but such an argument should be viewed with skepticism. Little intelligence is likely to be obtained through surveillance of a lone wolf. Since lone wolves have no connections to any organizations, there is no possibility for network analysis and counterintelligence. Since lone wolves are isolated individuals, the intelligence collected would be relevant primarily to just that individual, with perhaps some intelligence value for broader pattern analysis for the study of lone wolves. If such is the goal of surveillance of lone wolves, then FISA may not be the appropriate tool. Title III surveillance authorities, with the more restrictive, and thus more protective, safeguards, enable intelligence and law enforcement to simultaneously collect the necessary information *and* prepare for criminal prosecution.¹¹²

Intelligence and law enforcement may not have the total awareness that the suspected individual is a true lone wolf: they may simply lack, at that moment, sufficient information to connect the person to an organization. This was a strong argument for the initial creation of the lone wolf amendment, but it has been undermined by the fact that there have been numerous investigations and arrests of alleged and convicted terrorists since the amendment's creation, none of which apparently relied upon the lone wolf amendment.¹¹³ Moreover, the many lone wolf attacks since the creation of this provision suggests that the lone wolf amendment is focused on the wrong problem. The problem is not surveillance of the lone wolf, but *ex ante* identification, a problem that the lone wolf amendment is not equipped to resolve.

Expiration of this amendment will also serve to check the power of the executive branch and preempt potential abuses. Admittedly, there has been no credible evidence of FISA abuses, and the FISC's high approval rate for FISA warrant applications¹¹⁴ suggests that the government exercises substantial due diligence in creating and vetting warrant

¹⁰⁸ See *supra* Section II.A.

¹⁰⁹ See *supra* Section I.B.

¹¹⁰ See *supra* Sections II.B and II.C.

¹¹¹ See Letter from the U.S. Dep't of Justice to Sen. Patrick J. Leahy, at 4-5 (Sept. 14, 2009), https://www.wired.com/images_blogs/threatlevel/2009/09/leahyletter.pdf.

¹¹² See *supra* text accompanying note 29.

¹¹³ See *supra* Section II.A.

¹¹⁴ From 1979-2017 (inclusive), 99% of FISA applicants were approved, and fewer than 1% were rejected. The rejection rate has slightly increased in recent years: from 2015-2017 (inclusive), 1.7% of FISA applications were rejected. ELECTRONIC PRIVACY INFORMATION CENTER, FOREIGN INTELLIGENCE SURVEILLANCE ACT COURT ORDERS 1979-2017, <https://epic.org/privacy/surveillance/fisa/stats/default.html> (last visited May 12, 2019). In 2018, 72 of 1,318

applications.¹¹⁵ Yet the courts already give extraordinary deference to the government in the face of national security issues.¹¹⁶ It is unclear if the court would rule against the government in use of the lone wolf amendment, so expiration will act as a preemptive check.

Giving powers to the executive without oversight and constraint can and has led to abuses. FISA was originally created in part because government officials had operated on the honest beliefs that surveillance was conducted for legitimate foreign intelligence and counterintelligence purposes, all while the system was becoming corrupted with abuses.¹¹⁷ Similar abuses could reasonably occur in the context of lone wolves. This provision is an expansive authority, and lone wolves offer little *ex ante* evidence of their radicalization, intent, and operational plans; taken together, the government could, in theory, more easily engage in fishing expeditions, using limited information to initiate electronic surveillance of individuals. Though this would serve the interests of national security, it would nonetheless subvert the privacy and civil liberties interests that FISA was designed to avoid. Even the perception of infringement on individual privacy can create a “chilling effect” on the public’s ability to engage in the body politic.¹¹⁸ The recent spate of lone wolf attacks might even pressure the government to more aggressively and proactively pursue lone wolves, and thereby lead to more surveillance of more people.

The potential for abuse is all the more relevant when one remembers that a tool already exists to tackle this problem: Title III. FISA changed the probable cause standard from one that was act-centric in Title III (probable cause that an individual is or will commit a criminal *act*) to one that was person-centric (probable cause that an individual is an *agent* of a foreign power).¹¹⁹ The potential consequences of FISA’s arguably lower bar are compounded with the addition of the lone wolf amendment, which effectively removes the agency element entirely. FISA’s different probable cause

FISA applications were rejected (in full or in part), reaching a 5% rejection rate. Letter from James C. Duff, Director, Administrative Office of the United States Courts, to Honorable Jerrold Nadler, Chairman, Committee on the Judiciary (Apr. 25, 2019), <https://fas.org/irp/agency/doj/fisa/2018rept-aousc.pdf>.

¹¹⁵ Critics of FISA argue, however, that the high approval and low rejection rates point to the FISC’s notable, and problematic, deference to the executive branch. Evan Perez, *Secret Court’s Oversight Gets Scrutiny*, WALL ST. J. (Jun. 9, 2013), <https://www.wsj.com/articles/SB10001424127887324904004578535670310514616>.

¹¹⁶ *See supra* note 27.

¹¹⁷ Seymour M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antivar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES (Dec. 22, 1974), <https://www.nytimes.com/1974/12/22/archives/huge-cia-operation-reported-in-u-s-against-antiwar-forces-other.html>.

¹¹⁸ S. REP. NO. 95-604(I), at 8, 1978 U.S.C.C.A.N. 3909-10. Though the Senate Judiciary Committee used “chilling effect” in reference to warrantless surveillance specifically, the concept applies generally to the idea of “direct infringements on constitutional rights . . . [and] government activities which effectively inhibit the exercise of these rights. *Id.*”

¹¹⁹ *See supra* note 26 and accompanying text.

standard and the lone wolf amendment's removal of agency are independently appropriate, but together they create risks of abuse.

Finally, it is not unusual for legislation to expire at their sunset for lack of need or use. Indeed, that is the purpose of sunset laws. The rise of administrative and regulatory programs and agencies in the second half of the twentieth century led Congress and state legislatures to begin to implement them more frequently, in an effort to increase legislative oversight and governmental accountability.¹²⁰ Sunsets require "review of past performance" to justify renewal.¹²¹ Even with regards to surveillance programs, expiration is not unique. There is currently discussion, for instance, to let a major NSA surveillance program expire with its 2019 sunset, because it "provides limited value to national security and has become a logistical headache."¹²² The political climate may be right to allow the lone wolf amendment to expire. The current administration has sought to generally reduce regulations in other sectors,¹²³ and when other surveillance powers may be abandoned, this may be a good time to drop the lone wolf amendment.

The fear that someday a case will arise where the lone wolf amendment is the only way to stop a terrorist attack is not an unreasonable one. The costs of missing a threat when a tool like the lone wolf amendment *might* have stopped it would be huge. But such a slippery-slope argument, enmeshed in national security rhetoric, is often used to give the executive greater powers. Congress should and must aggressively challenge the executive's claim for the need for such power.

Conclusion:

The initial argument for the lone wolf amendment rested on the idea that its absence denied the government a meaningful tool to prevent terrorism. Yet it seems clear that that simply was and has not been the case. There is no

¹²⁰ See Virginia McMurtry, *Sunset Laws: Establishing Systematic Oversight Procedure*, Issue Brief Number IB76049, Updated Feb. 22, 1979.

¹²¹ VIRGINIA MCMURTRY, CONG. RESEARCH SERV., IB76049, SUNSET LAWS: ESTABLISHING SYSTEMATIC OVERSIGHT PROCEDURE 2 (1979).

¹²² Dustin Volz & Warren P. Strobel, *NSA Recommends Dropping Phone-Surveillance Program*, WALL ST. J. (Apr. 24, 2019), <https://www.wsj.com/amp/articles/nsa-recommends-dropping-phone-surveillance-program-11556138247>. See also Charlie Savage, *Disputed N.S.A. Phone Program Is Shut Down, Aide Says*, N.Y. TIMES (March 4, 2019), <https://www.nytimes.com/2019/03/04/us/politics/nsa-phone-records-program-shut-down.html> (reporting early and unofficial discussions to end the program); Dustin Volz, *NSA Weighs Ending Phone Surveillance Program Exposed by Snowden*, WALL ST. J. (March 5, 2019), <https://www.wsj.com/articles/nsa-weighs-ending-phone-surveillance-program-exposed-by-snowden-11551752806> (reporting the same); Susan Landau, *Is Section 215 No Longer Worth the Effort?*, LAWFARE (March 11, 2019), <https://www.lawfareblog.com/section-215-no-longer-worth-effort> (commenting on these reports).

¹²³ Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Feb. 3, 2017).

evidence that it has ever been used in its fifteen-year existence, it cannot be applied to all lone wolves, and it is not even the right tool to prevent lone wolf attacks.

This is not to suggest that the lone wolf amendment is a meritless concept, or that the hardworking men and women in intelligence and law enforcement should be handcuffed from combatting terrorism. Rather, it is exactly because the lone wolf threat is real and unlikely to diminish that the government needs something better. When intelligence or law enforcement authorities encounter an individual suspected of preparing for or engaging in terrorism, they should have the tools to investigate, prevent, and prosecute. But the current provision is not that tool, nor is it clear that the preexisting Title III surveillance authorities are inadequate.

As one observer writes, “the lone wolf provision effectively aims a Howitzer at a gnat.”¹²⁴ The lone wolf amendment is a massive weapon, but was designed to take down a specific, precise target. It is not the most effective weapon for this threat, and its misuse or overuse risks causing collateral damage (i.e., wrongful surveillance). FISA was designed to enable the government to identify and track spies and members of international terrorist organizations, to map networks and provide insight necessary to disrupt enemy operations and organizations, and to enhance the United States’ own intelligence capabilities. The lone wolf amendment distorts that purpose, and thus should be abandoned.

The analysis here, while specific to a single provision within the U.S. Code, can be relevant in similar debates regarding legislation and congressional oversight for surveillance and national security issues. It is the nature of Congress to generally empower the executive branch in areas of national security, especially following major incidents and in times of crisis. Certain programs and laws, like the lone wolf amendment, might seem sufficiently uncontroversial to warrant renewal without serious scrutiny. This is particularly apparent in the context of political calculations of Congress: the political consequences of a potential terrorist incident are far greater than simply maintaining elements of the security state. But Congress can and should seriously scrutinize the lone wolf amendment. When Congress asserts its constitutional role of oversight and accountability, it not only reinforces the balance of power between the branches of government, but it helps to improve national security and protect the rights and liberties of the American people.

¹²⁴ Julian Sanchez, *Keeping Lone Wolves from the Door*, REASON (Oct. 5, 2009), <https://reason.com/2009/10/05/should-the-patriot-act-keep-lo>.