

WHO’S CHECKING?: TAKING A LOOK AT RECENTLY ENACTED  
FOREIGN INTELLIGENCE SURVEILLANCE LAWS IN THE UNITED STATES  
AND ZIMBABWE AND THEIR IMPACT ON THE SEPARATION OF POWERS

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## I. INTRODUCTION

The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.<sup>1</sup>

A lot more information is going to pass through government hands, and most of that is going to be about people who turn out to be innocent or irrelevant.<sup>2</sup>

The terrorist attacks of September 11, 2001 prompted swift responses from the Executive and Legislative branches of the United States government. On September 18, 2001, President George W. Bush signed the Authorization for Use of Military Force (AUMF), which gives the President the authority "to use all necessary and appropriate force" against any country or person who was involved in the terrorist attacks.<sup>3</sup> Two days later in a speech before a joint session of Congress, the President declared that the United States was engaged in a struggle against international terrorism and informed the country of his intention to confront Al-Qaeda in Afghanistan.<sup>4</sup> In October 2002, Congress further authorized the President to "defend the national security of the United States against the continuing threat posed by Iraq,"<sup>5</sup> which led to the invasion of Iraq in March 2003.<sup>6</sup>

The resolutions authorizing the use of force in Afghanistan and Iraq were not the only resources the Executive Branch was given by the Legislative Branch to engage in the new War on Terror. On October 26, 2001, just forty-three days after the attacks, the USA PATRIOT Act (PATRIOT Act) was signed into law by President Bush.<sup>7</sup> The PATRIOT Act expanded the

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<sup>1</sup> THE FEDERALIST NO. 47, at 261 (James Madison) (J.R. Pole ed., 2005).

<sup>2</sup> Richard B. Schmitt, *Spying Up, but Terror Cases Drop*, L.A. TIMES, May 12, 2008, at 1 (quoting Michael Woods, former head of the Federal Bureau of Investigation security law unit).

<sup>3</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

<sup>4</sup> 147 CONG. REC. S9553-04 (Sept. 20, 2001) (statement of President Bush).

<sup>5</sup> Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(a)(1), 116 Stat. 1498 (2002).

<sup>6</sup> David E. Sanger & John F. Burns, *Bush Orders Start of War on Iraq; Missiles Apparently Miss Hussein*, N.Y. TIMES, Mar. 20, 2003, at A1.

<sup>7</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

Executive's authority to collect material relating to foreign intelligence information and expanded the scope of the Foreign Intelligence Surveillance Act of 1978 (FISA) to include suspected terrorists.<sup>8</sup>

In the summer of 2007, Congress granted the Executive Branch additional authority to engage in the War on Terror by its passage of the Protect America Act of 2007 (PAA).<sup>9</sup> After some controversy over the renewal of the PAA and its temporary lapse, Congress enacted and President Bush signed into law the FISA Amendments Act of 2008 (FAA), which broadened the Executive Branch's wiretapping capabilities.<sup>10</sup> The expansion of Executive power in the field of national security surveillance in the United States can be analyzed in conjunction with the recent history of Zimbabwe, where a similar chain of events has been unfolding.

On August 3, 2007, President Robert Mugabe of Zimbabwe signed the Interception of Communications Act (ICA) into law.<sup>11</sup> The new law empowers the Executive Branch of Zimbabwe to intercept communications "concerning an actual threat to the national security" of Zimbabwe.<sup>12</sup> Its passage continues a long series of oppressive measures initiated by the Executive Branch of Zimbabwe and acceded to by Parliament since 2000.<sup>13</sup> However, the impetus for Zimbabwe's changes in its foreign intelligence surveillance laws was not the threat of international terrorism but growing economic insecurity, which many critics believe is the result of extreme land ownership reforms initiated by the Executive Branch of Zimbabwe's government.<sup>14</sup> In 2000, President

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<sup>8</sup> *Id.* §§ 207, 214, 225, 412.

<sup>9</sup> Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007) (to be codified at 50 U.S.C. § 1805).

<sup>10</sup> Eric Lichtblau, *Senate Approves Bill to Broaden Wiretap Powers*, N.Y. TIMES, July 10, 2008, at A1. The PATRIOT Act was renewed in March 2006. Sheryl Gay Stolberg, *Senate Passes Legislation to Renew Patriot Act*, N.Y. TIMES, Mar. 3, 2006, at A14.

<sup>11</sup> *Terrorism, Communications Bills Now Law*, HERALD (Harare, Zimbabwe), Aug. 4, 2007, available at <http://allafrica.com/stories/200708040075.html>. AllAfrica.com requires a subscription. Copies of material cited to in the Note from this source are also on file with the author.

<sup>12</sup> Interception of Communications Act, pt. III, § 6(1)(b) (2007) (Zimb.), available at [http://kubatana.net/docs/legisl/ica\\_070803.pdf](http://kubatana.net/docs/legisl/ica_070803.pdf).

<sup>13</sup> See Michael Wines, *Allies Not Likely to Push Mugabe to Change*, N.Y. TIMES, Aug. 17, 2007, at A12 (noting comments from other African leaders comparing Zimbabwe to a "sinking Titanic" and demanding Mugabe "to restore political and economic freedoms . . ."); see also CRAIG RICHARDSON, *THE COLLAPSE OF ZIMBABWE IN THE WAKE OF THE 2000-2003 LAND REFORMS* 3-4 (2004) (arguing that Zimbabwe's economic woes can be traced to land reform and government interference in the economy).

<sup>14</sup> See, e.g., Craig Richardson, *How the Loss of Property Rights Caused Zimbabwe's Collapse*, CATO INST. ECON. DEV. BULL., Nov. 14, 2005, at 1 [hereinafter CATO], <http://www.cato.org/policy/econ/dev/bull/114>.

Mugabe authorized the seizure of almost all of the 4,500 commercial farms privately owned by whites with the intent of redistributing the land to black farmers who primarily farmed on small, communal lots that had existed prior to Zimbabwe's independence in 1980.<sup>15</sup> Since Mugabe's controversial decision in 2000,<sup>16</sup> which coincided with—and many critics argue has caused—rapid and unprecedented economic decline,<sup>17</sup> the Zimbabwean Parliament has reacted to the economic crisis by giving greater power to the Executive Branch to engage in electronic surveillance.

On its face, a comparison of the United States and Zimbabwe may seem attenuated, given their disparate political histories and relative statures in the world.<sup>18</sup> However, the Legislative Branches in both nations have reacted to recent crises in strikingly similar ways by enacting surveillance laws that increase executive power with limited judicial and legislative checks on that power.<sup>19</sup> Part II of this Note discusses the events in the United States and Zimbabwe that led to the enactment of the FAA and the ICA, focusing on recent developments in the two nations that have given rise to the new Executive Branch claims for more power. It also compares and contrasts the constitutional structures of the countries to show how their respective constitutions attempt to protect the rule of law through the principle of the separation of powers. Part III analyzes the two newest surveillance laws, the FAA and the ICA, by looking at the different mechanisms that they have included, or failed to include, in an attempt to maintain balance through the separation of powers among the branches of government. While both the FAA and ICA have common shortcomings, the FAA is preferable to the ICA through its placement of limited judicial and legislative checks on the Executive. Part IV looks at possibilities for the future of each country and offers suggestions for a way forward that will protect the separation of powers and civil liberties.

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cato.org/pubs/edb/edb4.pdf (discussing Mugabe's land reforms and Zimbabwe's economic collapse).

<sup>15</sup> *Id.* at 1–2.

<sup>16</sup> *Id.* at 1.

<sup>17</sup> See, e.g., *id.* at 2–3 (scholar Craig Richardson analyzing Zimbabwe's land reforms and economic downturn).

<sup>18</sup> See *infra* Parts II.C, II.D (discussing the constitutional histories and political structures of the United States and Zimbabwe).

<sup>19</sup> See *infra* Part III (discussing and analyzing these government surveillance laws).

## II. BACKGROUND: EVENTS LEADING TO THE FISA AMENDMENTS ACT OF 2008 (FAA) AND THE INTERCEPTION OF COMMUNICATIONS ACT (ICA)

### A. *The United States*

On September 18, 2001, one week after the attacks on the World Trade Center and the Pentagon, President Bush signed the AUMF into law.<sup>20</sup> The AUMF gives the Executive Branch broad powers to prosecute the War on Terror: "The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."<sup>21</sup> Despite the broad authorization in the AUMF, the Justice Department pressed for greater legal authority to conduct clandestine international surveillance activities, which resulted in the passage of the PATRIOT Act less than two months after September 11.<sup>22</sup> The limited congressional debate regarding the expansive new eavesdropping powers that Congress was conferring upon the Executive Branch was startling.<sup>23</sup> Congress' lack of interest in legislative vetting and its surrender to the exigency of the moment was showcased by the comments of the then-Chairman of the House Judiciary Committee, Representative F. James Sensenbrenner (R-WI), who said, "The attorney general has been quite plain that as soon as the president

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<sup>20</sup> See *supra* note 3 and accompanying text.

<sup>21</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

<sup>22</sup> See Robin Toner & Neil A. Lewis, *House Passes Terrorism Bill Much Like Senate's, But With Five-Year Limit*, N.Y. TIMES, Oct. 13, 2001, at B6 (stating in reference to the PATRIOT Act: "The Legislation, produced in response to Attorney General John Ashcroft's demand for immediate action, would give the government new powers to monitor e-mail among terrorism suspects and, with a single warrant, wiretap any phones a suspect might use."). Three hundred fifty-seven members of the House voted in favor of the PATRIOT Act, sixty-six voted against it, and nine missed the vote. U.S. House of Representatives, Office of the Clerk, Final Vote Results for Roll Call 398, <http://clerk.house.gov/evs/2001/roll398.xml> (last visited May 29, 2009) (showing that a majority of Democrats in the House, 145 out of 211, voted for the bill). In the Senate, only one out of ninety-nine voting Senators opposed the bill. United States Senate, Legislation and Records, Roll Call Vote 313, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=107&session=1&vote=00313](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00313) (last visited May 29, 2009) (showing the lone dissenter to be Democratic Senator Russ Feingold from Wisconsin).

<sup>23</sup> See Toner & Lewis, *supra* note 22, at B6 (referring to "little debate" in the House and Senate prior to the bill's passage).

signs the bill, law enforcement will begin using these new powers.”<sup>24</sup> He continued, “Time is of the essence in light of the increased threat the F.B.I. has announced against the United States and its citizens.”<sup>25</sup> The new powers given to the Executive Branch in the PATRIOT Act have been discussed by many commentators,<sup>26</sup> but for the purposes of this Note, it is important to look at the PATRIOT Act in the context of the law that it expanded and significantly altered, FISA.

FISA was passed in response to the Watergate scandal and the investigations of the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities (the Church Committee), which revealed the pervasiveness of government-conducted electronic eavesdropping on domestic targets that had occurred in the United States since World War II.<sup>27</sup> In 1968 Congress passed a law, Title III of the Omnibus Crime Control and Safe Streets Act (Title III), which regulated domestic electronic eavesdropping.<sup>28</sup> However, many of the surveillance activities uncovered by the Church Committee had been aimed at domestic targets and conducted in the name of “national security” to avoid the strictures of Title III.<sup>29</sup>

In addition to the statutory framework of Title III for domestic eavesdropping, FISA was enacted against the constitutional backdrop of the Fourth Amendment of the United States Constitution, which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See, e.g., Heather Hillary & Nancy Kubasek, *The Remaining Perils of the PATRIOT Act: A Primer*, 8 J.L. SOC'Y 1 (2007) (discussing problematic aspects of the PATRIOT Act with citation to many other journalistic pieces and scholarly works on the subject).

<sup>27</sup> William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209, 1225–28. The author cites extensive Congressional findings to illustrate the extent of government surveillance of domestic targets, including the fact that approximately 300,000 individuals were indexed in a CIA computer system during a six year clandestine operation in the late 1960s and early 1970s. *Id.* at 1226.

<sup>28</sup> Caitlin Thistle, Comment, *A First Amendment Breach: The National Security Agency's Electronic Surveillance Program*, 38 SETON HALL L. REV. 1197, 1200 (2008).

<sup>29</sup> *Id.* at 1200–01.

particularly describing the place to be searched, and the persons or things to be seized.<sup>30</sup>

Prior to the PATRIOT Act, FISA required the collection of foreign intelligence information to be the “primary purpose” of any surveillance undertaken by the Executive in the name of national security.<sup>31</sup> FISA created a top secret court, the FISA court, composed of federal judges, to review warrant applications submitted by the government under the “primary purpose” standard of the statute.<sup>32</sup> The PATRIOT Act, in an effort to encourage information sharing among law enforcement and intelligence organizations in the federal government, lowered the standard to a “significant” purpose.<sup>33</sup> A subsequent FISA appellate court decision interpreting the new language “practically eliminate[d] any requirement that the government show a foreign intelligence purpose in its FISA applications,”<sup>34</sup> opening the door for increased surveillance.

FISA defines “foreign intelligence information” as:

- (1) [I]nformation that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—
  - (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
  - (B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or
  - (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or
- (2) [I]nformation with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to—

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<sup>30</sup> U.S. CONST. amend. IV.

<sup>31</sup> Banks, *supra* note 27, at 1241.

<sup>32</sup> 50 U.S.C. § 1803 (2008); *see also* Banks, *supra* note 27, at 1231–32 (stating that “FISA authorizes a special court . . . that meets in secret, ex parte” and explaining certain aspects of the FISA court).

<sup>33</sup> Banks, *supra* note 27, at 1243–45.

<sup>34</sup> *Id.* at 1246; *In re Sealed Case*, 310 F.3d 717, 732–35 (FISA Ct. Rev. 2002).

- (A) the national defense or the security of the United States; or
- (B) the conduct of the foreign affairs of the United States.<sup>35</sup>

The original FISA statute also contained a fairly expansive definition of the kinds of "electronic surveillance" that would be regulated by the law and included: (1) communications "sent by or intended to be received by" an ascertainable United States person who is located within the United States; (2) communications "to or from a person in the United States . . . if such acquisition occurs in the United States"; (3) communications between any people located within the United States "under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes"; (4) the use of a surveillance device within the United States "under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes."<sup>36</sup> To conduct surveillance of any of these communications, the government must apply for and receive a warrant from the FISA court.<sup>37</sup>

In spite of the powers granted by FISA, the Bush Administration engaged in an extensive Terrorist Surveillance Program (TSP), in which the National Security Agency (NSA) eavesdropped on the communications of Americans without judicial oversight and wholly without legislative approval.<sup>38</sup> The program monitored communications made by persons inside the United States to persons outside the United States.<sup>39</sup> Instead of revising FISA, or having this change included in the PATRIOT Act, the administration chose to act outside the law. The Bush Administration has argued that the AUMF gave it the authority to engage in the TSP because FISA only criminally punishes anyone who engages in surveillance "not authorized by statute," a claim which is not supported by the plain language of FISA itself.<sup>40</sup>

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<sup>35</sup> 50 U.S.C. § 1801(e) (2006).

<sup>36</sup> *Id.* § 1801(f)(1)–(4).

<sup>37</sup> *Id.* § 1805; *see also* Banks, *supra* note 27, at 1231–32 (describing this process).

<sup>38</sup> *See* Banks, *supra* note 27, at 1254 (noting President Bush's secret authorization of these activities and the lack of judicial approval).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1255. The text and legislative history of the statute reveals that the "statute" referred to in FISA is FISA itself, however, not another federal statute like the AUMF. *Id.*



After the *New York Times* broke the story of the TSP in December 2005,<sup>41</sup> the Bush Administration was faced with the threat of litigation over the TSP and the possibility of a court shutting the program down. The American Civil Liberties Union (ACLU) sued the NSA in federal district court in Michigan and won, with the court finding that the TSP violated the constitutional rights of the plaintiffs.<sup>42</sup> In a ruling that did not reach the merits of the constitutionality or legality of the TSP, the Sixth Circuit Court of Appeals remanded with instructions to dismiss the case for a lack of jurisdiction.<sup>43</sup>

In January 2007, the FISA court issued a ruling that allowed the Bush Administration to continue the NSA wiretapping program under the FISA guidelines.<sup>44</sup> However, a May 2007 ruling by the FISA court held that some purely international communications (electronic communications between two persons located in countries other than the United States) that were transmitted through communications facilities located within the United States required FISA warrants.<sup>45</sup>

Faced with these judicial challenges to the allegedly illegal program, the Bush Administration went to Congress to get a new law that would make the TSP legal.<sup>46</sup> The bill, the Protect America Act of 2007 (PAA),<sup>47</sup> was proposed by Director of National Intelligence Michael McConnell on July 27, 2007, and the Bush Administration pressured Congress to pass the law.<sup>48</sup> The Administration used the impending congressional summer recess to heighten the sense of urgency surrounding the passage of the law.<sup>49</sup> In his weekly radio

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<sup>41</sup> See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1 (reporting that “[m]onths after the Sept. 11 attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States”).

<sup>42</sup> *ACLU v. NSA*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006).

<sup>43</sup> *ACLU v. NSA*, 493 F.3d 644, 644, 720 (6th Cir. 2007).

<sup>44</sup> Eric Lichtblau, James Risen & Mark Mazzetti, *Reported Drop in Surveillance Spurred a Law*, N.Y. TIMES, Aug. 11, 2007, at A1; see also Charlie Savage, *New Law Expands Power to Wiretap—Diminishes Oversight of NSA Spy Program*, BOSTON GLOBE, Aug. 6, 2007, at 1A (reporting that “[i]n January 2007, [Attorney General] Gonzales announced that the program had been brought under the oversight of the national security court”).

<sup>45</sup> Lichtblau, Risen & Mazzetti, *supra* note 44; see also James Risen, *Surveillance Court Declines to Release Secret Opinions*, N.Y. TIMES, Dec. 12, 2007, at A32 (reporting that the subsequent FISA Court decision was handed down in May).

<sup>46</sup> Ellen Nakashima, *A Push to Rewrite Wiretap Law*, WASH. POST, Aug. 1, 2007, at A04.

<sup>47</sup> See Juan P. Valdivieso, *Recent Developments, Protect America Act of 2007*, 45 HARV. J. ON LEGIS. 581, 587 (2008) (discussing the legislative history of the PAA).

<sup>48</sup> *Id.*

<sup>49</sup> See Nakashima, *supra* note 46 (reporting that “The [Bush] [A]dministration . . . ha[s]”).

address, the President invoked the specter of the 9/11 attacks, cautioning Americans that the same terrorists who attacked on that day still wanted to strike the United States.<sup>50</sup> The tactics worked, as the Democratic-controlled House and Senate passed the bill before the August recess, fearing that if they did not, the President and other Republicans would depict the Democrats as "weak on terrorism."<sup>51</sup>

The PAA became an immediate lightning rod of controversy, both because of its grant of expansive new eavesdropping power to the Executive Branch<sup>52</sup> and Congress's quick submission to the demands of the Executive.<sup>53</sup> In a rare show of defiance to the White House, Congress refused to extend the PAA when it expired in early 2008.<sup>54</sup> However, as the first batch of surveillance orders issued under the PAA neared expiration in August 2008, and fearing once again that they would be considered soft on terrorism, this time in an election year, the Democratic-controlled Congress passed the FAA in early July 2008.<sup>55</sup> At the same time this chain of events was unfolding in the United States, Zimbabwe was also making similar changes to its foreign intelligence-gathering laws.

### *B. Zimbabwe*

The Republic of Zimbabwe became an independent country on April 18, 1980,<sup>56</sup> after almost one hundred years of colonial rule by the British.<sup>57</sup> Colonial Zimbabwe was governed by several different constitutional

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mounted a full-court press to get the Democratic-controlled Congress to pass the measure before lawmakers leave town . . . for the August recess, trying to portray reluctant Democrats as weak on terrorism").

<sup>50</sup> *Id.*

<sup>51</sup> James Risen, *Democrats Scrambling to Expand Eavesdropping*, N.Y. TIMES, Aug. 1 2007, at A12; see also Nakashima, *supra* note 46 (referring to pressure from the Bush administration on the Democratic-controlled Congress).

<sup>52</sup> See Valdivieso, *supra* note 47, at 581 (reporting that "[c]ivil liberties groups . . . were quick to criticize the PAA").

<sup>53</sup> See, e.g., James Risen & Eric Lichtblau, *Concerns Raised on Wider Spying Under New Law*, N.Y. TIMES, Aug. 19, 2007, at A1 (discussing how the bill was passed "in a frenetic, end of session scramble").

<sup>54</sup> Carl Hulse, *House Leaves Surveillance Law to Expire*, N.Y. TIMES, Feb. 15, 2008, at A17.

<sup>55</sup> Lichtblau, *supra* note 10, at A1 (stating "many Democrats were wary of handing the Republicans a potent political weapon").

<sup>56</sup> JACOB CHIKUWA, A CRISIS OF GOVERNANCE: ZIMBABWE 1, 33 (2004).

<sup>57</sup> See generally *id.* at 1-33 (discussing the pre-colonial and colonial history of the Shona kingdom and British control of Southern Rhodesia (Zimbabwe) beginning in 1890).

schemes, and in 1965, political unrest caused a nationalist group to unilaterally declare independence from the United Kingdom, touching off four years of fighting and political negotiations.<sup>58</sup> The current Lancaster House Constitution was modeled on the British parliamentary system, with a bicameral legislature consisting of a House of Assembly and a Senate, and an executive branch headed by a ceremonial President,<sup>59</sup> who appointed the majority leader of Parliament as his Prime Minister.<sup>60</sup>

The one hundred-member House of Assembly initially had twenty seats reserved to be specially elected in a white-only vote, while the other eighty seats were popularly elected by the rest of the population.<sup>61</sup> The Senate was composed of forty members, fourteen of whom were elected by the eighty popularly elected members of the House of Assembly, ten of whom were elected by the twenty white-only-elected members of the House of Assembly, ten of whom were elected by the Council of Chiefs, and six of whom were appointed by the President.<sup>62</sup> The Council of Chiefs, or some variation of it, had existed since the 1920s, and consisted of the indigenous tribal chiefs who continued to exercise some traditional authority in the settlement of disputes and to act as a channel for native Zimbabweans to express themselves to the white colonial government.<sup>63</sup>

In addition to the descendants of white settlers, who constituted a small minority but held political and economic power disparate to their numbers,<sup>64</sup> two competing native African factions battled for control of the young republic: the Zimbabwe African National Union (Patriotic Front) (ZANU-PF)

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<sup>58</sup> See *id.* at 16–25 (discussing the 1923, 1961, 1965, and 1969 Constitutions; Unilateral Declaration of Independence by the Rhodesian Front Government in November 1965; the subsequent “war between the Rhodesia Front Government and the nationalist forces (freedom fighters)”; approval of Rhodesian constitutional proposals in 1969; and, finally, the declaration of a republic in 1970).

<sup>59</sup> *Id.* at 32–35.

<sup>60</sup> See *id.* at 35 (stating “[t]he President appointed as Prime Minister the person who, in his opinion, was best able to command the support of the majority of members of the House of Assembly”).

<sup>61</sup> PIERRE DU TOIT, *STATE BUILDING AND DEMOCRACY IN SOUTHERN AFRICA: BOTSWANA, ZIMBABWE, AND SOUTHERN AFRICA* 120 (1995).

<sup>62</sup> *Id.*

<sup>63</sup> See *id.* at 87–88 (discussing the “legal incorporation of the chiefs” as well as “their traditional authority” and efforts to convey the sentiments of “their people” to the state).

<sup>64</sup> See CHIKUHLA, *supra* note 56, at 36 (referring to the “Zimbabwe-Rhodesia government . . . representing white interests” and the “20 [out of one hundred] seats . . . reserved for the white minority . . .”).

and the Zimbabwe African People's Union (ZAPU).<sup>65</sup> The first election in 1980 produced a large majority for the ZANU-PF, as it won fifty-seven of the eighty seats in the House of Assembly.<sup>66</sup> In subsequent elections, the ZANU-PF increased its majority, culminating with the merger of ZANU-PF and ZAPU in 1990 to control 116 of the 120 seats.<sup>67</sup>

The leader of ZANU-PF, Robert Mugabe, had succeeded in his goal of making Zimbabwe a one-party state.<sup>68</sup> In 1987, Mugabe pushed through constitutional amendments that made the ceremonial president into a true executive<sup>69</sup> elected to five-year terms.<sup>70</sup>

Land reform was always a central feature of Mugabe's political platform.<sup>71</sup> Zimbabwe benefited from a thriving economic farming base due to an extensive number of dams and rich soil.<sup>72</sup> But there was a sharp racial disparity in land ownership, as the most profitable, large-scale commercial farms were concentrated in the hands of fewer than 5,000 white families, while more than 800,000 black farmers continued to till communal lands that were a vestige of colonialism.<sup>73</sup> After his party received ninety-six percent of the vote in 1996, an election in which only thirty-two percent of eligible voters participated<sup>74</sup> due to growing cynicism about the legitimacy of the government, Mugabe proceeded to initiate some land reforms policies to benefit himself and other powerful individuals; for instance, one large tract was split it into twenty-seven smaller parcels, which were then doled out to political allies.<sup>75</sup>

By 2000, the policies of Mugabe had created a widespread desire for change and fomented political opposition, embodied in the Movement for Democratic Change (MDC), led by Morgan Tsvangirai, which opposed the

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<sup>65</sup> *Id.*

<sup>66</sup> DU TOIT, *supra* note 61, at 137.

<sup>67</sup> *Id.*; see also CHIKUWA, *supra* note 56, at 40 (discussing legislation that abolished the Senate and increased the size of the House of Assembly to 150 members).

<sup>68</sup> See RICHARDSON, *supra* note 13, at 33–34 (discussing ZANU-PF's achievement of its goal of consolidating state power by becoming "the dominant and usually unchallenged party").

<sup>69</sup> *Id.* at 35–36.

<sup>70</sup> *Id.* at 44.

<sup>71</sup> See generally *id.* at 35–42 (discussing Mugabe's focus on land reform).

<sup>72</sup> See CATO, *supra* note 14, at 1–2 (detailing that although Zimbabwe only occupies seven percent of the land in Southern Africa, 10,747 of the 12,430 dams in the region are located within its borders).

<sup>73</sup> *Id.* at 1.

<sup>74</sup> African Elections Database, Elections in Zimbabwe, <http://africanelections.tripod.com/zw.html> (last visited May 29, 2009) (scroll down and follow "1996" hyperlink).

<sup>75</sup> RICHARDSON, *supra* note 13, at 38–39.

ZANU-PF and Mugabe in the April 2000 presidential election.<sup>76</sup> The MDC garnered forty-seven percent of the vote to ZANU-PF's forty-eight percent, in spite of alleged widespread fraud at the polls.<sup>77</sup> This close call may have come as a surprise to Mugabe, as he had hoped to consolidate his power before the elections by instituting a dramatic set of land reforms that seized white-owned farmers and gave them to black farmers and passively permitted occupation of white farms by blacks.<sup>78</sup> The forced transfer of property has had a disastrous effect on the national economy, as agricultural production has plummeted due to drought and extremely productive commercial farms are transformed into small-scale communally farmed plots that are overworked and less able to withstand the devastating effects of the drought.<sup>79</sup>

The economic downturn and Mugabe's increasing age and political isolation have coincided with the enactment of draconian government programs. In 2000, the government enacted the Post and Telecommunications Act, which allowed the Executive Branch to monitor and collect Internet and phone communications made within Zimbabwe.<sup>80</sup> The law allowed the government to monitor communications if it determined that the surveillance was "reasonably justified."<sup>81</sup> However, in a landmark ruling in 2004, the Zimbabwe Supreme Court declared that the law's standard of reasonable justification violated the Zimbabwe Constitution's guarantees of individual freedom.<sup>82</sup> Section 20 of the Constitution guarantees freedom of expression subject to restrictions enacted in the interest of "defen[s]e, public safety, public order [and] the economic interests of the [s]tate."<sup>83</sup>

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<sup>76</sup> *Id.* at 39.

<sup>77</sup> Elections in Zimbabwe, *supra* note 74; *see also* RICHARDSON, *supra* note 13, at 39 (discussing perceived fraud surrounding democratic processes).

<sup>78</sup> CHIKUHLWA, *supra* note 56, at 249–50.

<sup>79</sup> RICHARDSON, *supra* note 13, at 75–84; *see also id.* at 76, tbl.4.3 (comparing differences in the yield and production on communal and commercial farms).

<sup>80</sup> UNHCR, Refworld, Internet Under Surveillance 2004 - Zimbabwe, <http://www.unhcr.org/refworld/docid/46e6919c.html> (last visited May 29, 2009).

<sup>81</sup> *Id.*

<sup>82</sup> *See id.* (discussing the court's ruling that certain sections of the PTA were unconstitutional and that the "reasonably justified" standard "was too vague to guarantee individual freedoms").

<sup>83</sup> CONSTITUTION OF ZIMBABWE ch. III, § 20(2)(a) [hereinafter ZIMB. CONST.]. The Constitution of Zimbabwe changes almost yearly, and at the time of publication of this Note, the version referred to is available at [http://www.kubatana.net/docs/legisl/constitution\\_zim\\_070201.pdf](http://www.kubatana.net/docs/legisl/constitution_zim_070201.pdf).

After another close call in the presidential election of 2002,<sup>84</sup> Mugabe and the ZANU-PF Parliament enacted laws that sharply curbed the freedom of the press and threatened dissident groups with jail if they continued to oppose his regime.<sup>85</sup> In 2004, the government began monitoring internet activity and prohibiting cell phone operators from transmitting international calls.<sup>86</sup>

Thus, the press and the MDC had been aware of the Mugabe regime's intention to chill speech for quite some time prior to the introduction and passage of the ICA. After knowledge of the proposed bill first became public in March 2006, the business sector that would be most affected by the bill, internet service providers, promptly came out against it, detailing the damage that it would do to their businesses in Zimbabwe.<sup>87</sup> By May, the bill was being condemned by civil rights groups for giving the government the potential to place an "iron grip" on communications in the country.<sup>88</sup>

The proposed measure also met a roadblock in Parliament. Before any bill can go before the full Parliament, it has to pass through the Parliamentary Legal Committee (PLC).<sup>89</sup> The PLC is a committee in Parliament established by the constitution to review the constitutionality of most bills that are submitted to Parliament.<sup>90</sup> The constitution further requires that the PLC be composed of members of Parliament, the majority of whom must have judicial experience or legal training.<sup>91</sup>

In August, a consortium of media groups organized to submit their objections to the PLC, detailing the potential unconstitutionality of the bill and objecting to the lack of judicial oversight.<sup>92</sup> In November, faced with

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<sup>84</sup> See African Elections Database, *supra* note 74 (scroll down and follow "2002" hyperlink) (showing that Mugabe received fifty-six percent of the vote to Tsvangirai's forty-two percent).

<sup>85</sup> See Michael Wines, *Zimbabwe Extends Crackdown on Dissent as Election Nears*, N.Y. TIMES, Dec. 24, 2004, at A1 (describing several new laws restricting freedoms of speech and assembly that are enforced upon threat of imprisonment).

<sup>86</sup> *Id.*

<sup>87</sup> See, e.g., Jim Holland, *Interception of Communications Bill 2006: An ISP's Perspective*, KUBATANA, Apr. 13, 2006, [http://www.kubatana.net/html/archive/opin/060413jh.asp?spec\\_code](http://www.kubatana.net/html/archive/opin/060413jh.asp?spec_code) ("Service providers are going to have to bear the potentially extremely high capital and . . . costs of the necessary hardware and software," along with "undertak[ing] the massive and expensive task of obtaining detailed identification details for all their current and future clients").

<sup>88</sup> *Mugabe Proposes Eavesdropping Law*, MAIL & GUARDIAN (S. Afr.), May 27, 2006, <http://www.mg.co.za/article/2006-05-27-mugabe-proposes-eavesdropping-law>.

<sup>89</sup> ZIMB. CONST. ch. V, pt. 3, § 40B.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* ch. V, pt. 3, § 40A(3).

<sup>92</sup> Ray Matikinye, *Media Groups Slam Communications Bill*, ZIMB. INDEP., Aug. 25, 2006, available at [http://www.kubatana.net/html/archive/media/060825zimind2.asp?spec\\_code=0604](http://www.kubatana.net/html/archive/media/060825zimind2.asp?spec_code=0604)

opposition from interest groups outside the government and the PLC, the government withdrew the bill.<sup>93</sup> Thus, for almost seven months, the government allowed the bill to be reviewed by the public and allowed a committee of Parliament to review and ultimately reject the bill.

The government, however, quickly submitted a new bill that was essentially the same as the old one.<sup>94</sup> The Zimbabwe Chapter of the Media Institute of Southern Africa, a government watchdog group,<sup>95</sup> condemned the redrafted bill for being almost identical to the old bill,<sup>96</sup> and noted that according to the Chairman of the PLC, the government had already undertaken to make further amendments to the new legislation.<sup>97</sup>

However, in spite of the opposition, the bill was passed by the House of Assembly on May 13, 2007.<sup>98</sup> An MDC politician mounted a final spirited attack on the unconstitutionality of the bill during the floor debate, arguing that the judiciary and not the Attorney General should be issuing warrants for the surveillance of Zimbabwean citizens.<sup>99</sup>

A comparison of the FAA and the ICA illuminates concrete similarities, disturbing common shortcomings, and real differences that make the FAA more palatable than the ICA. But before reviewing the laws, it is necessary to discuss the constitutional history and framework of each country to understand the competing institutional and political factors that gave rise to the FAA and ICA.

26commdex&sector=INFTEC&year=2006&range\_start=1&intMainYear%20=%202006&intTodayYear%20=%202007.

<sup>93</sup> Clemence Manyukwe, *Government Withdraws Snooping Bill*, ZIMB. INDEP., Nov. 3, 2006, available at [http://www.kubatana.net/html/archive/inftec/061103zimind1.asp?spec\\_code=060426commdex&sector=INFTEC&year=2006&range\\_start=1&intMainYear%20=%202006&intTodayYear%20=%202007](http://www.kubatana.net/html/archive/inftec/061103zimind1.asp?spec_code=060426commdex&sector=INFTEC&year=2006&range_start=1&intMainYear%20=%202006&intTodayYear%20=%202007).

<sup>94</sup> See *State Resubmits Interception Bill*, HERALD (Hararer, Zimb.), Nov. 8, 2006, available at [http://www.kubatana.net/html/archive/inftec/061108herald1.asp?sector=legisl&year=2006&range\\_start=1](http://www.kubatana.net/html/archive/inftec/061108herald1.asp?sector=legisl&year=2006&range_start=1) (describing the new bill as a consolidation of the first).

<sup>95</sup> Media Institute of Southern Africa—Zimbabwe Chapter, [http://www.kubatana.net/html/sectors/med002.asp?sector=MEDIA&year=0&range\\_start=1](http://www.kubatana.net/html/sectors/med002.asp?sector=MEDIA&year=0&range_start=1) (last visited May 29, 2009).

<sup>96</sup> Cf. Media Institute of Southern Africa, *Revised Spying Bill Fails Test*, KUBATANA, Apr. 27, 2007, [http://www.kubatana.net/html/archive/media/070427misaz.asp?spec\\_c](http://www.kubatana.net/html/archive/media/070427misaz.asp?spec_c) (stating “the revised version remains a retrogressive and repressive piece of legislation”).

<sup>97</sup> *Id.*

<sup>98</sup> Media Institute of Southern Africa, *Parliament Passes Spying Bill*, KUBATANA, available at [http://www.kubatana.net/html/archive/media/070614misaz.asp?spec\\_c](http://www.kubatana.net/html/archive/media/070614misaz.asp?spec_c).

<sup>99</sup> *Id.*

*C. Constitutional History and Structure of the United States*

The central feature of U.S. government structure is the concept of the separation of powers, which is supposed to facilitate the checking and balancing of power among the branches.<sup>100</sup> Power is dispersed among three equal branches of government: the Legislature, the Executive and the Judiciary.<sup>101</sup> Each branch has certain powers that are intended to be used as a check on the possible over-exercise of powers by a coordinate branch in order to maintain balance among the branches and prevent any one branch from accruing power at the expense of the other two.<sup>102</sup>

The Legislative Branch consists of a bicameral legislature composed of the House of Representatives, chosen by voters in proportion to their state's population, and the Senate composed of two members from each state.<sup>103</sup> Congress is given the power to declare war, create and maintain armies and a navy, and to organize militias to maintain order.<sup>104</sup> It has the sole authority to make laws.<sup>105</sup>

The Executive Branch consists of a singular President who is nationally elected.<sup>106</sup> Like Congress, the President is endowed with some authority in the conduct of foreign affairs: the President is the Commander in Chief of the Army and Navy, has the power to make treaties (with the advice and consent of the Senate), and is given the authority to appoint ambassadors.<sup>107</sup>

The third branch of the federal government, the Judiciary, consists of one constitutionally required court, the Supreme Court, and "such inferior courts as the Congress may from time to time ordain and establish."<sup>108</sup> The most significant power of the Supreme Court is the power of judicial review, which gives the Court the final authority to review the constitutionality of presidential actions and laws passed by Congress.<sup>109</sup>

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<sup>100</sup> THE FEDERALIST NO. 47, annot. lines 4–11 (James Madison) (J.R. Pole ed., 2005).

<sup>101</sup> See U.S. CONST. arts. I–III (outlining the powers of each branch of U.S. government).

<sup>102</sup> For instance, the power to create law is given exclusively to Congress. *Id.* art. I, § 8, cl. 18 (stating that Congress can "make all laws which shall be necessary and proper"). Yet the President has sole authority to execute those laws and the Judiciary interprets the laws. *Id.* art. II, § 1; *id.* art. III, § 1.

<sup>103</sup> *Id.* art. I, §§ 2–3.

<sup>104</sup> *Id.* art. I, § 8, cls. 11–16.

<sup>105</sup> *Id.* art. I, § 8, cl. 18.

<sup>106</sup> *Id.* art. II, § 1.

<sup>107</sup> *Id.* art. II, § 2, cls. 1–2.

<sup>108</sup> *Id.* art. III, § 1.

<sup>109</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the



The flexibility of the language in the Constitution and the overlapping spheres of authority given to Congress and the President have sometimes made the conduct of foreign affairs a battle between the two political branches.<sup>110</sup> In the landmark case of *United States v. U.S. District Court for the Eastern District of Michigan, Southern Division*, the Court held that the President was required by the Fourth Amendment and Title III to obtain a warrant from the judicial branch before he could eavesdrop on domestic targets.<sup>111</sup> The Court was careful, however, to make clear that its decision did not encompass executive surveillance of "foreign powers or their agents."<sup>112</sup>

The Supreme Court has also ruled on the limits of executive power, most notably in the *Steel Seizure Case*.<sup>113</sup> In that case, President Truman seized control of private steel mills for national security reasons, as the continued production of steel was essential to weaponry production.<sup>114</sup> The Court struck down the executive action, finding that no statute passed by Congress and no language in the Constitution could be construed to give the Executive the power to seize control of domestic steel mills.<sup>115</sup>

Thus, each of the three branches of the United States government is intended to check the exercise of power of the other branches. Like the United States, Zimbabwe has a constitutional system based upon the fundamental principle of the separation of powers.

#### *D. Constitutional History and Structure of Zimbabwe*

Zimbabwe's constitution embraces the principles of the separation of powers and checks and balances, dividing power among Executive, Legislative, and Judicial Branches.<sup>116</sup> The Executive Branch includes several

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province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

<sup>110</sup> See *infra* notes 111–15 and accompanying text (discussing examples of conflicts between these two branches).

<sup>111</sup> *United States v. U.S. Dist. Ct. for Eastern Dist. of Mich., Southern Div.*, 407 U.S. 297, 321–22 (1972).

<sup>112</sup> *Id.*

<sup>113</sup> See *infra* notes 114–15 and accompanying text (discussing the *Steel Seizure Case* and its holding with respect to executive power).

<sup>114</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582–83 (1952).

<sup>115</sup> *Id.* at 585–90.

<sup>116</sup> See generally ZIMB. CONST. chs. IV, V, VIII (establishing the powers and duties of the Executive, Parliament, and the Judiciary).

lower constitutional officers whose function is to carry out official executive acts; however, the President is designated as the Commander in Chief<sup>117</sup> and has the sole authority under the constitution to declare war and make peace.<sup>118</sup>

The constitution immunizes a range of presidential actions from prosecution by declaring them to be nonjusticiable, including a blanket protection of executive privilege, extending to the point that no court can inquire into the nature of any consultations that the President undertakes or whether the manner in which he has exercised any of his discretionary powers under the constitution is in accordance with the law.<sup>119</sup>

The Legislative Branch is composed of a bicameral Parliament consisting of a Senate and House of Assembly.<sup>120</sup> The constitution gives Parliament a broad grant of legislative power, giving it the authority to "make laws for the peace, order and good government of Zimbabwe."<sup>121</sup>

Despite this seemingly broad grant of authority, Parliament has not been able to act as an important check on the Executive because its powers have frequently been altered by constitutional amendments.<sup>122</sup> In a study of the constitutions of Africa, one commentator divided constitutions into three categories based on the ease with which they could be amended: flexible, semi-flexible, and semi-rigid.<sup>123</sup> The Zimbabwe constitution is a "flexible" constitution that allows for changes to be made to it with a simple two-thirds majority in both the House of Assembly and the Senate.<sup>124</sup> The constitution's flexibility, combined with the electoral dominance of the ZANU-PF and Mugabe, has allowed Mugabe to rollback democratic elements of the constitution to consolidate and extend his power.<sup>125</sup>

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<sup>117</sup> *Id.* ch. IV, pt. 1, § 27(1).

<sup>118</sup> *Id.* ch. IV, pt. 3, § 31H(4)(d).

<sup>119</sup> *Id.* ch. IV, pt. 3, § 31K(1)(a)-(d); see also Charles M. Fombad, *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa*, 55 AM. J. COMP. L. 1, 14 (2007) (comparing the powers of the Zimbabwean executive to that of a king).

<sup>120</sup> ZIMB. CONST. ch. V, pt. 1, § 33.

<sup>121</sup> *Id.* ch. V, pt. 5, § 50.

<sup>122</sup> See CHIKUHLWA, *supra* note 56, at 36-49 (describing various amendments to the Constitution of Zimbabwe and their effect on the three branches of government).

<sup>123</sup> Fombad, *supra* note 119, at 21.

<sup>124</sup> ZIMB. CONST. ch. V, pt. 5, § 52(3). But see U.S. CONST. art. V (laying out two methods for constitutional amendment, one of which requires two-thirds majority in the House and Senate and three-fourths approval by the state governments).

<sup>125</sup> See CHIKUHLWA, *supra* note 56, at 160-63 (discussing the dominance of the ZANU-PF and President Mugabe's expansion of the presidential cabinet).

The third constitutional branch of the Zimbabwean government is the Judiciary. The constitution establishes a Supreme Court, which is the court of final appeal,<sup>126</sup> and a High Court, whose jurisdiction is determined by Act of Parliament.<sup>127</sup> The constitution gives Parliament the power to create inferior courts.<sup>128</sup>

In their basic theoretical structures, the constitutions of the United States and Zimbabwe have very similar foundations: tripartite forms of government designed to limit the power of government through the separation of powers and the theory of checks and balances. The two nations not only share similar theories of government but have also seen similarities in practice arise in the enactment of the FAA and ISA.

### III. THE FAA AND THE ICA

The FAA and the ICA were enacted in order to give the Executive Branch increased legal authority to engage in electronic surveillance for national security purposes.<sup>129</sup> The two laws differ in some fundamental regards, share both positive and negative aspects, and, although they both give the Executive Branch increased power with minimal checks from the Legislative and Judicial Branches, the FAA does a better job of restraining the exercise of executive power.

#### *A. The Basics of the FAA and the ICA*

The FAA and ICA, while sharing the common goal of increasing the Executive Branch's ability to electronically eavesdrop for national security purposes, have several basic differences in terms of their scope and the degree of particularity used in describing that scope. In the United States, the FAA sets new requirements for surveillance of three broad categories of targets: (1) "persons reasonably believed to be located outside the United States" who are not United States persons;<sup>130</sup> (2) "persons reasonably believed to be located outside the United States" whose communications pass through the United

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<sup>126</sup> ZIMB. CONST. ch. VIII, § 80(1).

<sup>127</sup> *Id.* ch. VIII, § 81(1).

<sup>128</sup> *Id.* ch. VIII, § 79(1)(c).

<sup>129</sup> See *supra* Parts II.A, II.B (discussing the events leading to the enactment of these laws and their respective purposes).

<sup>130</sup> 50 U.S.C.A. § 1881a(d)(1)(A) (2008). "United States person" is defined at 50 U.S.C.A. § 1801(i).

States;<sup>131</sup> and (3) United States "persons reasonably believed to be located outside the United States."<sup>132</sup> The FAA gives the Director of National Intelligence (DNI) and the Attorney General (AG), two members of the Executive Branch, the authority to acquire foreign intelligence information relating to people reasonably believed to be located outside the United States for up to one year if the FISA court authorizes it.<sup>133</sup> "Foreign intelligence information" broadly includes, among other things, information that relates to the ability of the United States to protect against "potential attack or other grave hostile acts of a foreign power or an agent of a foreign power"<sup>134</sup> and 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>135</sup>

In order to receive authorization to engage in electronic surveillance, the DNI or AG has to issue a certification (an application for surveillance) to the FISA court which attests that (1) the targeted person is reasonably believed to be outside the United States; (2) minimization procedures<sup>136</sup> have been adopted that will prevent the retention of information relating to non-targeted persons or United States persons; (3) guidelines have been put in place to prevent the intentional targeting of a United States person; (4) these targeting, minimization, and guidelines are consistent with the Fourth Amendment; and (5) a significant purpose of the surveillance is to acquire foreign intelligence information.<sup>137</sup> The FISA court reviews the certification to make sure that the above standards have been complied with, the surveillance is targeted at non-United States persons reasonably believed to be outside the United States, and appropriate minimization procedures have been adopted and applied.<sup>138</sup>

The ICA seemingly gives the Executive Branch of Zimbabwe the expansive power to eavesdrop on the electronic communications of all persons within the country if the government has a warrant.<sup>139</sup> The official charged with

<sup>131</sup> See *id.* § 1881b(a)(1) (emphasizing that the acquisition of the communication must be within the United States).

<sup>132</sup> *Id.* § 1881c(a)(2). For all other foreign intelligence surveillance, such as surveillance of persons within the United States, the pre-FAA FISA requirements codified at 50 U.S.C.A. § 1801 et seq. still apply.

<sup>133</sup> *Id.* § 1881a(a).

<sup>134</sup> *Id.* § 1801(e)(1)(A).

<sup>135</sup> *Id.* § 1801(e)(2)(A)-(B).

<sup>136</sup> *Id.* § 1801(h).

<sup>137</sup> *Id.* § 1881a(g)(2)(A)(i)-(vi).

<sup>138</sup> *Id.* § 1881a(i)(2)(A)-(C).

<sup>139</sup> Interception of Communications Act, pt. II, § 3(1)(a)(iii) (2007) (Zimb.), available at

enforcing the law is the Minister of Transport and Communication,<sup>140</sup> an Executive Branch official. Four law enforcement officials, the Chief of Defense Intelligence, the Director-General of the President's department responsible for national security, the Commissioner of the Zimbabwe Republic Police, and the Commissioner-General of the Zimbabwe Revenue Authority, have the authority to apply for a surveillance warrant.<sup>141</sup> The application for a surveillance warrant must specify the person targeted, the telecommunications service provider that will assist with the surveillance, the location of the telecommunications facilities that will be utilized to conduct the surveillance, and all the facts that support the need for surveillance.<sup>142</sup>

The warrant will be issued if the Minister determines that there are "reasonable grounds" to believe that, among other things, the surveillance is necessary to gather information relating to either "an actual threat to the national security or to any compelling national economic interest" or "a potential threat to public safety or national security."<sup>143</sup> The warrant is required to specify the name and address of the targeted person, the manner by which the government will conduct the surveillance, and the method by which the government will identify the communications that need to be targeted.<sup>144</sup>

The FAA and ICA share the same basic framework and purpose, giving the Executive Branch increased surveillance powers, although it should be noted

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[http://kubatana.net/docs/legisl/ica\\_070803.pdf](http://kubatana.net/docs/legisl/ica_070803.pdf). The Act also requires telecommunication service providers to obtain sufficient information about its customers before entering a contract so that it can comply with the Act, if needed to. *Id.* pt. III, § 10(1). A customer is "any person, body or organisation which has entered into a contract with the service provider for the provision of a telecommunication service." *Id.* pt. I, § (2)(1) (emphasis added). Thus, it seems that telecommunication service providers must keep track of each of its customers and be able to provide the Executive, if the government has a warrant, the information and identity of the customer. Moreover, it is lawful for a party to a communication to intercept the communication. *Id.* pt. II, § 3(1)(a)(i). A party, "in relation to a telecommunication, means a person whose access to the communication is or might reasonably be known by all other parties." *Id.* pt. I, § (2)(1) (emphasis added). Here too, it seems that parties to a communication have a carte blanche to intercept the private communication between them and other parties.

<sup>140</sup> See *id.* pt. I, § 2(2) (defining "Minister" as "the Minister of Transport and Communication or any other Minister to whom the President may from time to time assign the administration of this Act"); see also *id.* pt. III, § 5(2) (providing that a warrant application must be made to the Minister).

<sup>141</sup> *Id.* pt. III, § 5(1).

<sup>142</sup> *Id.* pt. III, § 5(3)(a)–(h).

<sup>143</sup> *Id.* pt. III, § 6(1)(b)–(c). National security of Zimbabwe is defined as "matters relating to the existence, independence and safety of the State." *Id.* pt. I, § 2(1).

<sup>144</sup> *Id.* pt. III, § 7(1)(b), (d).

that the ICA goes much further than the FAA in targeting the communications of all persons within Zimbabwe, regardless of with whom the in-country target is speaking. But both laws attempt to put meaningful limits on the exercise of surveillance power by including provisions that provide for penalties for failing to follow the law.

*B. Common Characteristics of the FAA and ICA that Limit the Surveillance Power*

The FAA and ICA limit the exercise of the surveillance power by including provisions that make the laws the exclusive means through which surveillance may be conducted, provide criminal punishment for breaking the law, and put a time limit on any surveillance authorizations.

The FAA and ICA both provide that they are the exclusive means by which electronic surveillance may be conducted and they both criminally punish violators. The FAA includes an unequivocal provision stating "this [Act] shall be the exclusive means by which electronic surveillance and the interception of domestic wire, oral, or electronic communications may be conducted."<sup>145</sup> Any violation of the FAA, i.e., surveillance conducted outside the limits set up by FISA and FAA,<sup>146</sup> is punishable by a fine of up to \$10,000, up to a five year imprisonment, or both.<sup>147</sup> The ICA has a similar exclusivity provision<sup>148</sup> and provides for monetary punishments and imprisonment for any violations.<sup>149</sup>

The ICA also limits any warrant issued to a period of three months, after which the government official who requested it may seek a three month extension for "good cause."<sup>150</sup> The FAA allows for surveillance for up to one full year before the AG or DNI must return to the FISA court to get a renewed

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<sup>145</sup> 50 U.S.C. § 1812(a) (2008).

<sup>146</sup> See *id.* § 1809(a)(1) (stating "A person is guilty if an offense of he intentionally engages in electronic surveillance under color of law except as authorized by [statute]").

<sup>147</sup> *Id.* § 1809(c).

<sup>148</sup> See Interception of Communications Act, pt. II, § 3(1)(a)(iii) (stating "no person shall intercept any communication in the course of its transmission by means of a telecommunication system or radiocommunication system unless he or she is authorized by warrant"). Interceptions may also be made if he is a party to the communication or has the consent "of the person to whom, or the person by whom, the communication is sent. . . ." *Id.* pt. II, § 3(1)(a)(i)-(ii).

<sup>149</sup> See *id.* pt. II, § 3(3) (stating that any surveillance conducted outside the law is "liable to a fine . . . or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment").

<sup>150</sup> *Id.* pt. III, § 7(1)(a)(i)-(ii).

authorization.<sup>151</sup> Limiting the amount of time that surveillance can occur before new authorization is required is important because it forces frequent evaluations of the targets of the surveillance and prevents excessive surveillance. The ICA's shorter authorization is preferable because it increases accountability by forcing more frequent reevaluations and applications. Despite these shared strengths, however, the FAA and ICA share several common shortcomings.

### *C. Common Shortcomings of the FAA and ICA*

The FAA and the ICA both rely to a disturbing degree on the cooperation of private telecommunications companies for enforcement. The FAA permits the AG or DNI, after securing authorization from the FISA Court, to direct an electronic communication service provider (ECSP) to "immediately provide the Government with all information, facilities, or assistance necessary to accomplish" the eavesdropping.<sup>152</sup> ECSPs are compensated by the government for their assistance and are released from any civil or criminal liability for assisting the government pursuant to a government directive.<sup>153</sup>

The ICA goes even further in enmeshing private telecommunications companies in government surveillance by requiring them to "install[ ] hardware and software facilities and devices to enable interception of communications at all times or when so required" and make sure that the surveillance equipment is capable of providing real-time monitoring, as well as other technological requirements.<sup>154</sup> Furthermore, although ECSPs are to be paid by the government for the use of personnel and administrative costs for the surveillance,<sup>155</sup> the ECSPs are expected to provide and install the surveillance equipment at their own cost.<sup>156</sup> Both of these laws create systems whereby private corporations and public governmental entities (the intelligence agencies) engage in consortium-like behavior, blurring the line between

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<sup>151</sup> 50 U.S.C.A. § 1881a(a) (2008).

<sup>152</sup> *Id.* § 1881a(h)(1)(A).

<sup>153</sup> *Id.* § 1881a(h)(2)–(3).

<sup>154</sup> Interception of Communications Act, pt. III, § 9(1)(a)–(h).

<sup>155</sup> *Id.* pt. III, § 13(4).

<sup>156</sup> *Id.* pt. III, § 12(4)–(5); see also Lance Guma, *Too Much to Monitor for Snooping Squads*, ALLAFRICA.COM, Aug. 7, 2007, <http://allafrica.com/stories/200708071061.html> (noting that this could be financially devastating for some internet service providers).

government coercion and free enterprise, and make dispassionate governmental oversight of the surveillance activities very difficult.<sup>157</sup>

An equally alarming aspect of both laws is the wide amount of discretion given to each government in choosing the targets of surveillance. The ICA seems to allow any person within Zimbabwe, regardless of citizenship, to be the target of surveillance.<sup>158</sup> It draws no distinctions between citizens of Zimbabwe and non-citizens. Unlike FISA and the FAA, the ICA draws no distinctions between international communications routed through Zimbabwe, foreign-to-foreign calls routed through Zimbabwe, and purely domestic communications, giving the government blanket authority to eavesdrop on all communications.

Similar concerns, although not as blatant as the ICA, can be raised about the targeting guidelines of the FAA. Under the pre-FAA FISA requirements, which still apply to all communications other than the three broad types targeted by the FAA,<sup>159</sup> the executive had to specify "the identity, if known, or a description of the specific target of the electronic surveillance."<sup>160</sup> The new standards, however, do not focus on the specific communications to be targeted, like an e-mail account or phone number, but only the physical location of the person being targeted.<sup>161</sup> Conceivably it would allow for the monitoring of all electronic communications a person makes (phone, e-mail, or fax) so long as the government has a reasonable belief that the person is outside the United States. Recognizing the difficulties inherent in conducting such open-ended surveillance in close concert with private companies, both the United States and Zimbabwe have attempted to limit the use of the executive surveillance power by placing judicial and legislative checks on its exercise.

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<sup>157</sup> See Glenn Greenwald, *Telecom Amnesty Would Forever Foreclose Investigation of Vital Issues*, SALON, Oct. 15, 2007, <http://www.salon.com/opinion/greenwald/2007/10/15/amnesty/> (describing these corporations and government agencies as forming a consortium with "no governmental oversight or regulation").

<sup>158</sup> See *supra* note 139 (explaining definitions of "customer" and "party" in ICA).

<sup>159</sup> See *supra* notes 130–32 and accompanying text (discussing the surveillance subjects).

<sup>160</sup> 50 U.S.C.A. § 1804(a)(2) (2008).

<sup>161</sup> See *id.* § 1881a(d)(1)(A) ("The Attorney General, in consultation with the Director of National Intelligence, shall adopt targeting procedures that are reasonably designed to ensure that any acquisition . . . is limited to targeting persons reasonably believed to be located outside the United States."). See also *id.* § 1881b(b)(1)(C)(i), c(b)(3)(A) (stating the same targeting requirements).



*D. Limits Placed on the Surveillance Power Through Judicial and Legislative Checks and Balances*

The United States and Zimbabwe have both attempted to place limits on executive surveillance through judicial and legislative checks. Although it is lacking in some respects, the United States has done a far better job than Zimbabwe by placing a more effective judicial review check and a legislative oversight check on the exercise of the surveillance power by the Executive.

*1. Judicial Checks in the FAA and ICA*

The judicial check provided by the FAA, although weakened by certain provisions of the FAA, is stronger than the judicial check included in the ICA. The scope of the judicial review conducted by the FISA court has been changed by the FAA. In the original FISA statute, before any surveillance could begin, the FISA court had to find that there was probable cause that the target was a foreign agent or a foreign power; the facilities or locations to be surveilled were being used, or about to be used, by a foreign agent or foreign power; the minimization procedures passed the statutory requirements; and the certification met the requirements of 50 U.S.C.A. § 1804.<sup>162</sup> Under the new FAA guidelines, the FISA court continues to evaluate the minimization procedures but makes no probable cause determinations; instead, it merely reviews the authorization to ensure that the targeted persons are reasonably believed to be outside the United States,<sup>163</sup> a standard far below probable cause, thus diminishing the effectiveness of judicial oversight.

Furthermore, the original FISA guidelines provided persons who had been improperly surveilled by the government with a civil cause of action, entitling them to recover damages and attorney's fees.<sup>164</sup> However, a controversial new provision in the FAA greatly reduced the effectiveness of judicial review of executive surveillance by providing retroactive immunity from lawsuit for ECSPs that provided assistance with the TSP.<sup>165</sup>

Although the judicial oversight provided by the FAA is minimal, the ICA provides even less judicial oversight. There is no judicial review of the application for surveillance submitted to the Minister of Transportation and

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<sup>162</sup> *Id.* § 1805(a).

<sup>163</sup> *Id.* § 1881a(i)(2)(A)–(C).

<sup>164</sup> *Id.* § 1810.

<sup>165</sup> *Id.* § 1885a(a)(4)(A)(i).

Communication prior to the commencement of surveillance. The ICA does, however, give "aggrieved" persons a cause of action to challenge the surveillance order and win "costs" if the court finds them appropriate.<sup>166</sup> The lack of mandatory judicial review on the front end and the ambiguous grant of a cause of action to challenge a surveillance order on the back end fail to supply any meaningful judicial check or balance to the administration of the ICA.

In keeping with the need for checks and balances, both the FAA and ICA provide a legislative check on the exercise of executive wiretapping power. The FAA provides a much stronger legislative check than the ICA.

## *2. Legislative Checks in the FAA and ICA*

The FAA provides for a much stronger legislative check than the ICA because of its extensive reporting requirements. Once every six months, the AG and DNI are required to assess their compliance with targeting and minimization procedures and submit a report to Congress.<sup>167</sup> The Inspectors General of the Department of Justice and the intelligence community<sup>168</sup> are also required to submit a bi-annual report to Congress that identifies the number of "disseminated intelligence reports"<sup>169</sup> that contain references to United States persons.<sup>170</sup> None of these reporting requirements require that the intelligence gatherers reveal the identity or name of the United States persons who were actually surveilled.

An entire new code section, 50 U.S.C.A. § 1881, entitled "Congressional Oversight," allows Congress to see the certifications submitted by the intelligence agencies<sup>171</sup>—the certifications only have to show that the target of the surveillance is reasonably believed to be outside of the United States.<sup>172</sup> But that does not provide disclosure of potentially targeted United States

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<sup>166</sup> Interception of Communications Act, pt. V, § 18(1)–(2) (2007) (Zimb.).

<sup>167</sup> 50 U.S.C.A. § 1881a(l)(1).

<sup>168</sup> See *id.* § 401a(4) (defining the term "intelligence community").

<sup>169</sup> *Id.* § 1881a(l)(2)(B). "Disseminated intelligence reports" is not defined in the statute but it can be assumed to mean intelligence reports that are actually distributed to intelligence agents, which would seem to mean that a lot of intelligence gathered under the law may not be reported to Congress.

<sup>170</sup> *Id.* § 1881a(l)(3)(A)(i)–(ii).

<sup>171</sup> *Id.* § 1881f(b)(1)(A).

<sup>172</sup> *Id.* § 1881a(g)(2)(A)(i)(I).

persons who are in the United States and on the other end of a communication with a targeted person.

Lastly, the AG is required to disclose any decisions, orders, or opinions of the FISA Court or FISA Court of Review that contain significant interpretations of FISA,<sup>173</sup> including decisions made from 2003 onwards.<sup>174</sup> The disclosure of these opinions is neutered, however, by giving the AG the power to redact material “necessary to protect the security of the United States,”<sup>175</sup> which gives the AG the unilateral power to control the information given to Congress.

Strikingly, the ICA provides for virtually no oversight by the Legislative Branch of the Zimbabwean government. The administering Minister is required to submit an annual report to the Attorney General that includes “a written summary of the particulars of every warrant” issued by the Minister during that calendar year.<sup>176</sup> No specific information is required to be included in the report, leaving the Attorney General with broad discretion. Furthermore, the Attorney General is the “principal legal adviser to the Government” and is appointed by the President.<sup>177</sup> The Attorney General has no constitutional responsibility to act as a check on the exercise of executive power. The law, by giving the Attorney General the sole ability to review acts of surveillance committed pursuant to this law, has given the Executive the power to intercept any communications it thinks may endanger national security with no legislative oversight.

The foregoing analysis of the FAA and ICA has discussed the controversial and potentially far-reaching surveillance powers included in both laws and efforts to curb the increase in executive power by inserting judicial and legislative checks and balances.

Both Zimbabwe and the United States are at critical junctures politically and institutionally. Political developments in both countries offer the opportunity to correct current imbalances in power but the prospect of real change depends not just on partisan politics but a reinvigoration of the institutions of government and their commitment to the separation of powers.

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<sup>173</sup> *Id.* § 1871(c)(1)–(2).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* § 1871(d).

<sup>176</sup> Interception of Communications Act, pt. V, § 19(1) (2007) (Zimb.).

<sup>177</sup> ZIMB. CONST., ch. VII, § 76(1)–(2).

## IV. POSSIBILITIES FOR THE FUTURE

Zimbabwe and the United States have both held recent executive and legislative elections that resulted in victories for political parties that have challenged many of the current imbalances in power. In the United States, the November 2008 election of Democrat Barack Obama, a harsh critic of the Bush Administration and former member of the Legislative Branch as a United States Senator,<sup>178</sup> would seem to portend a change in the executive's push for ever-greater power. In Zimbabwe, the March 2008 presidential election was marred by a delayed release of vote totals and a prolonged power-sharing dispute between the two highest vote-getters, Tsvangirai and Mugabe.<sup>179</sup> Although these developments are promising, the best opportunity for change in both countries lies not with the ideological differences between the old and new political leaders but with an institutional reinvigoration of the power of each branch of government to check the others.

*A. Zimbabwe*

The power to undo the damage done by the passage of the ICA lies with any of the three branches of the Zimbabwean government. Change is most likely to come from either the Legislative or Judicial Branch.

Nonetheless, recent developments in Zimbabwe have increased the opportunity for the Executive Branch to lead the way in repealing the ICA and other repressive laws. The March 29, 2008 presidential election in Zimbabwe seemed to indicate a dramatic changing of the guard, as early, non-official returns showed a victory for Tsvangirai over Mugabe.<sup>180</sup> But the Electoral Commission delayed the release of the official results for over a month before finally revealing that Tsvangirai had captured 47.9%, Mugabe 43.2%, and a third-party challenger, a breakaway group of ZANU-PF dissidents, 8.3%, necessitating a runoff between Tsvangirai and Mugabe.<sup>181</sup> However, after months of intimidation and brutal beatings of his supporters, Tsvangirai

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<sup>178</sup> See *infra* note 191 and accompanying text.

<sup>179</sup> See *infra* notes 180–84 and accompanying text.

<sup>180</sup> See *Zimbabwe Opposition Says It Has Beaten Mugabe*, N.Y. TIMES, Mar. 31, 2008, at A6 (“Zimbabwe’s main opposition party said Sunday that it had won a landslide victory, insisting that unofficial election results showed that the [MDC] had unseated President Robert G. Mugabe, the man who has led this nation for 28 years.”).

<sup>181</sup> Celia W. Dugger, *Zimbabwe Calls for Runoff, but Opposition Challenges Vote Count*, N.Y. TIMES, May 3, 2008, at A10.

withdrew from the runoff just before it was to occur due to doubts about its integrity caused by the intimidation and persecution meted out by supporters of Mugabe.<sup>182</sup> Even though Mugabe won the one-candidate runoff, international pressure and mediation efforts by the President of South Africa, Thabo Mbeki, resulted in a groundbreaking power-sharing agreement among Mugabe, Tsvangirai, and the ZANU-PF breakaway group that called for a coalition government of all three groups and, more importantly, a new constitution.<sup>183</sup> In late January 2009, Tsvangirai finally agreed to join Mugabe's government as prime minister in the hope of forming a government that would end the repressive policies of Mugabe and open up Zimbabwe to international humanitarian aid.<sup>184</sup> More important than the struggling for the presidency, however, are the results of the March parliamentary elections and the possibilities for reform that may come as a result.

While the focus of the international community and most of Zimbabwe has been on the battle for the presidency, control of Parliament has unquestionably changed hands and could be the key to restoring the institutional balance of power. The MDC captured a narrow victory in the March elections, winning one hundred seats to the ZANU-PF's ninety-nine, with the ZANU-PF breakaway faction holding ten.<sup>185</sup> After winning the uncontested runoff, Mugabe convened Parliament and forced them to elect a Speaker in the hopes of pressuring its members to elect a Speaker supportive of Mugabe.<sup>186</sup> The plan backfired when the MDC and the ZANU-PF breakaway group combined to elect Lovemore Moyo, the candidate of the MDC caucus, as Speaker.<sup>187</sup> In his acceptance speech, Moyo declared " 'Parliament will cease to be a rubber-stamping house. . . . It'll ensure that progressive laws are passed.' " <sup>188</sup>

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<sup>182</sup> Celia W. Dugger & Barry Bearak, *Mugabe Rival Quits Runoff, Citing Attacks*, N.Y. TIMES, June 23, 2008, at A1.

<sup>183</sup> See Graham Bowley & Alan Cowell, *In Sharp Departure, Zimbabwe Rivals Meet in Bid to End Political Crisis*, N.Y. TIMES, July 22, 2008, at A6 (reporting "[i]n the agreement, which was also signed by a separate opposition faction, the sides pledged to seek a new government of national unity and a new constitution").

<sup>184</sup> Celia W. Dugger, *Zimbabwe Opposition to Join Government After Months of Pressure*, N.Y. TIMES, Jan. 31, 2009, at A8.

<sup>185</sup> See Celia W. Dugger, *Zimbabwe Opposition, Now a Power in Parliament, Wins a Top Job*, N.Y. TIMES, Aug. 29, 2008, at A6 (reporting on the MDC's victory and stating "[i]f united with its splinter faction, which has 10 seats in Parliament, the [MDC] controls 110 votes to 99 for Mr. Mugabe's governing party, ZANU-PF").

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

The selection of a leader in Parliament who is opposed to Mugabe's repressive policies is an important victory in the struggle to establish limits on the abuse of executive power. However, as the United States has shown, divided control of the Legislative and Executive Branches does not necessarily signal the imposition of meaningful limits on executive surveillance powers. It requires support from a free press, principled political leadership, and support from the third branch of government, the Judiciary.

The Zimbabwean courts also seem capable of reversing the damage done by the ICA. The Zimbabwe Supreme Court has already struck down a similarly repressive measure enacted by Parliament and signed by Mugabe into law.<sup>189</sup> The judges of Zimbabwe, particularly those on the Supreme Court, have maintained a high degree of professionalism and independence.<sup>190</sup> If the newly elected Speaker of Parliament and his MDC majority are unable to curtail executive surveillance, the courts of Zimbabwe have the power to restore order through adherence to separation of powers principles.

### *B. The United States*

Like Zimbabwe, the United States is at an important crossroads. While any of the three branches of government could correct the problems created by the FAA, the best opportunity for reform are more assertive Legislative and Judicial Branches.

The election of Barack Obama as President of the United States was hailed as a repudiation of the Bush Administration and its policies.<sup>191</sup> But President Obama has not held a consistent position on the issue of executive surveillance for national security purposes.<sup>192</sup> After initially opposing the PAA and vowing to try and stop the passage of any legislation that gave ESCPs immunity while running for the Democratic nomination for president, Obama changed his

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<sup>189</sup> See *supra* note 82 and accompanying text.

<sup>190</sup> Fombad, *supra* note 119, at 17 ("[D]espite immense pressure and severe resource constraints, an underlying professionalism remains noticeable in many judgments, especially from the High Court." (quoting LINDA VAN DE VIVJE, *THE DEMOCRATIC GOVERNANCE AND RIGHTS UNIT, UCT STUDY; THE JUDICIAL INSTITUTION IN SOUTHERN AFRICA: A COMPARATIVE STUDY OF COMMON LAW JURISDICTIONS* 160–86 (2006))).

<sup>191</sup> Adam Nagourney, *Obama Elected President as Racial Barrier Falls*, N.Y. TIMES, Nov. 4, 2008, at A1.

<sup>192</sup> James Risen, *Obama Voters Protest His Switch on Telecom Immunity*, N.Y. TIMES, July 2, 2008, at A14.

position and supported the FAA, including its immunity provision.<sup>193</sup> While it remains to be seen how Obama will govern as president, it is very unlikely that he will voluntarily abdicate the presidential powers that have accrued during the Bush years unless either the Legislative or Judicial Branches force their surrender. Indeed, as of the final editing of this Note, the Obama Administration has not rolled back all of the most controversial policies of the Bush Administration.<sup>194</sup>

The Democratic Party emerged from the November 4, 2008 national elections with large majorities in both the House and the Senate.<sup>195</sup> However, the same leadership that passed the FAA remains in place, and it seems very unlikely that they would strip a Democratic president of wiretapping powers out of a fear of appearing soft on terrorism. If the Democrats in Congress, however, were to decide to act, they should pass legislation that requires the FISA Court to review surveillance prior to its commencement, necessitates a showing of probable cause, and requires that the target of the surveillance is an agent of a foreign power. Furthermore, any future legislation should provide for even greater oversight by Congress, including full disclosure of all Americans who are intentionally or unintentionally surveilled. Since it is unlikely that a Democratic president and Congress will willingly surrender the powers contained in the FAA, the federal judiciary is the best hope for restoring checks and balances.

The passage of the FAA was met with immediate court challenges by private litigants and civil liberties groups. The ACLU sued in federal court, alleging that the FAA is an unconstitutional abridgement of the First and Fourth Amendments and a violation of the separation of powers.<sup>196</sup> Also, after its lawsuits against the ESCPs were effectively terminated by the FAA,<sup>197</sup> the Electronic Frontier Foundation sued President Bush and the NSA for allegedly

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<sup>193</sup> *Id.*

<sup>194</sup> Charlie Savage, *Obama's War on Terror May Resemble Bush's in Some Areas*, N.Y. TIMES, Feb. 18, 2009, at A20 (noting that while President Obama signed orders that will eventually close CIA secret prisons, the prison at Guantanamo Bay, Cuba, and ended military commission trials, he endorsed the Bush Administration's expansive use of the state secrets doctrine and the continued use of extraordinary rendition).

<sup>195</sup> David M. Herszenhorn & Carl Hulse, *Democrats in Congress Vowing to Pursue An Aggressive Agenda*, N.Y. TIMES, Nov. 6, 2008, at A1.

<sup>196</sup> Complaint at 3, *Amnesty International v. McConnell*, No. 08 CIV 6259 (S.D.N.Y. 2008), 2008 WL 2773811.

<sup>197</sup> 50 U.S.C. § 1885a(a)(4) (2008) (All civil actions pending against the government "shall be promptly dismissed" if the AG certifies the wiretapping was an intelligence activity authorized by the President).

engaging in illegal, warrantless wiretapping.<sup>198</sup> The Supreme Court has intervened in the past to correct prior imbalances in the separation of powers,<sup>199</sup> and it once again may have the final say as to the constitutionality of executive action and the separation of powers.

## V. CONCLUSION

This Note has explored the recent developments surrounding the passage of new intelligence-gathering laws in Zimbabwe and the United States. It has looked at events in both countries that led to the perceived need for enhanced surveillance laws and the background constitutional structures and histories upon which these new laws have been grafted. Lastly, it evaluated the checks and balances placed in each law and possibilities for the future.

The animating feature behind this comparison has been to consider whether the United States, in this limited area of law, can be compared to a country in a state of severe economic and political distress. The comparison, as noted at the outset, was attenuated by the very real differences in history, political culture, and international setting between the two countries. But these basic differences namely, Zimbabwe's standing as a third-world, sub-Saharan country only recently liberated from British colonialism and the United States' standing as the most powerful and influential democracy in the world, make the few similarities between what has occurred in recent years all the more striking.

Cataclysmic events caused both countries to enact far-reaching surveillance laws that seriously erode civil liberties. In the United States, the attacks of September 11, 2001 have been the impetus for an increase in the power of the executive to surveil citizens and non-citizens alike. In Zimbabwe, the perceived unfairness of the racial disparities in land ownership caused an ill-conceived and poorly implemented land redistribution scheme, which plunged Zimbabwe into a severe state of distress. This crisis became the reason for the government's increased surveillance of its citizenry, to save its citizens from themselves and outside threats.

But the most striking similarity that arises from this comparison is the acquiescence of the Legislative Branches to these executive demands for more

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<sup>198</sup> Scott Shane, *Agency and Bush Are Sued over Domestic Surveillance*, N.Y. TIMES, Sept. 19, 2008, at A13.

<sup>199</sup> See discussion, *supra* notes 111–15 and accompanying text (discussing *U.S. District Court v. Eastern Michigan* and the *Steel Seizure Case*).



power. Instead of checking the power of the Executive by conducting oversight, demanding access to information, and informing the public of the actions of its government, the national legislatures in Zimbabwe and the United States acted like a rubber stamp for the Executive. The Judicial Branches in both countries are limited by the fact that they must wait for litigants to present a case for them to decide before they can pass on the constitutionality of a law and have not had the opportunity to do so.

The necessary change that needs to take place in both countries is a reinvigoration of the Legislative Branch. James Madison wrote that “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others.”<sup>200</sup> Legislators in the United States and Zimbabwe have the constitutional means to limit executive power. More of them need the personal courage to do so.

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<sup>200</sup> FEDERALIST NO. 51, at 281 (James Madison) (J.R. Pole, ed., 2005).

