

SURVEILLANCE AND SCAPEGOATS: EVANSVILLE’S GERMAN AMERICANS, WORLD WAR ONE, AND WHAT IT TEACHES ABOUT FISA SECTION 702

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INTRODUCTION

America’s history of wartime hysteria often threatens civil liberties. In wartime, ‘by any means necessary’ often becomes the battle cry, and individual rights are sacrificed for national security.¹ As Congress debates the reauthorization of Foreign Intelligence Surveillance Act (FISA) Section 702—a law granting the Attorney General and the Director of National Intelligence broad authority to conduct warrantless surveillance of foreign targets, often capturing U.S. persons’ communications²—this pattern deserves renewed scrutiny.

Robert Prager’s 1918 lynching proves this pattern’s lethal power. In 1905, Prager left Dresden, Germany, for America’s promise of opportunity.³ By 1917, he had settled in Collinsville, Illinois, as the United States entered World War I.⁴ He took steps to prove his loyalty to America. He applied for citizenship, registered as an “enemy alien” as required by law, and attempted to enlist in the military.⁵ These efforts proved futile.

In early 1918, after dynamite purportedly disappeared from a local mine, workers branded Prager as a prime suspect.⁶ On April 3, a mob of miners dragged him from his home.⁷ They forced him to kiss the American flag and paraded him through the town streets wrapped in it.⁸ The police intervened, but the mob stormed the police station and reclaimed their prey.⁹

Eventually, the mob marched Prager to the outskirts of town.¹⁰ One man grabbed a rope, and others shined their cars’ headlights on a nearby tree.¹¹ They strung the rope over a branch and tied it around Prager’s neck, but the mob’s first attempt failed.¹² With his hands free, Prager grabbed the rope, which

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1. *See infra* Parts I and II.

2. 50 U.S.C. § 1881(a) (2024).

3. *See* FREDERICK C. LUEBKE, BONDS OF LOYALTY: GERMAN-AMERICANS AND WORLD WAR I 3 (1974).

4. *Id.* at 4.

5. *Id.*

6. *Id.*

7. *Id.*; ERIK KIRSCHBAUM, BURNING BEETHOVEN: THE ERADICATION OF GERMAN CULTURE IN THE UNITED STATES DURING WORLD WAR I, at 16 (2015).

8. LUEBKE, *supra* note 3, at 6.

9. *Id.* at 6, 8.

10. *Id.* at 8.

11. *Id.* at 9.

12. *Id.*

prevented strangulation.¹³ He pleaded for his life.¹⁴ The man holding the rope released the tension, and Prager dropped.¹⁵ Prager begged to write a letter to his family before dying.¹⁶ Prager wrote, “Dear parents . . . I must on this fourth day of April, 1918, die. Please pray for me, my dear parents. This is my last letter and testament. Your dear son and brother, Robert Paul Prager.”¹⁷ Then, just after midnight, the mob resituated Prager and the rope, secured his hands, and lynched him.¹⁸ The citizens and mine workers likely felt they had done their duty, protected their land from German imperialism, and served ‘justice’ to a German American they suspected of disloyalty.

For German Americans in Evansville, Indiana, just 200 miles from Collinsville, Prager’s lynching served as a stark warning: abandon your heritage or face the consequences. Communities that once openly celebrated German culture quickly erased their identities under the pressure to prove their patriotism.¹⁹ This climate of suspicion and forced assimilation reveals a larger historical trend: during wartime, marginalized groups often become scapegoats, leading to government and public overreach. Evansville exemplifies this pattern.

Unfortunately, these experiences extend beyond World War I. Justice Antonin Scalia warned of this recurring danger when he remarked on Japanese internment: “[Y]ou are kidding yourself if you think the same thing will not happen again.”²⁰ His words remain relevant as lawmakers debate reauthorizing FISA Section 702, a surveillance statute that raises pressing concerns about privacy, disproportionate impact, and national security overreach.²¹

This note argues that the treatment of German Americans during World War I highlights the risks of an unchecked government. Part I explores how wartime crises grow federal power. It outlines the legal basis for government overreach, tracing it from the Espionage and Sedition Acts to the Foreign Intelligence Surveillance Act (FISA) and Section 702. Part II examines the rise and fall of Evansville’s German American community. It illustrates how federal policies and public hysteria forced assimilation and erased cultural identity. Part III draws parallels between these historical events and modern surveillance under Section 702. It demonstrates how fears about national security can lead to policies that often target specific communities. This historical context is crucial as Congress considers whether to reauthorize Section 702. Lawmakers must understand that fear can undermine constitutional rights and must introduce

13. *Id.* at 9–10.

14. LUEBKE, *supra* note 3, at 10.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. KIRSCHBAUM, *supra* note 7, at 119.

20. Debra Cassens Weiss, *Scalia: Korematsu Was Wrong, But ‘You Are Kidding Yourself’ If You Think It Won’t Happen Again*, A.B.A. J. (Feb. 4, 2014, at 13:05 CST), https://www.abajournal.com/news/article/scalia_korematsu_was_wrong_but_you_are_kidding_yourself_if_you_think_it_won [<https://perma.cc/KS47-GWD4>].

21. *See infra* Part I.

reforms that balance national security needs with civil liberties.

The history of German Americans during World War I provides a salient example of how fear can distort legal protections. Then, as now, national security concerns created an environment where fear overpowers reason, subjecting entire communities to suspicion, coercion, and forced assimilation. The loss of German American culture in Evansville, Indiana, serves as both a warning and a reflection of the risk posed by Section 702 today. Broad surveillance powers may again enable the government to target specific groups under the guise of security. History shows that emergency measures rarely remain temporary.²² Without meaningful safeguards, today's surveillance programs could replicate past injustices and trade constitutional protections for the hope of national security.

I. LEGAL FRAMEWORK

Throughout United States history, national crises have led the federal government to increase its powers in the name of security. During World War I, the Espionage and Sedition Acts limited free speech and targeted German Americans, anti-war activists, and socialist groups.²³ After 9/11, this pattern repeated itself in a major way when the government increased digital surveillance with the USA PATRIOT Act and FISA Section 702.²⁴ The government justified these actions as crucial for combating the threat of terrorism.²⁵ Yet many of the provisions persist. This government expansion has forever shifted the balance between national security and civil liberties.

A. World War I Repression: Federal Statutes and Judicial Endorsement

1. *The Espionage Act of 1917 and the Sedition Act of 1918.*—On the campaign trail, President Wilson, in an address to the New York Press Club presented himself as a supporter of limited government and argued that “The history of liberty is a history of the limitation of governmental power, not the increase of it.”²⁶ Yet in early April 1917, when the United States joined the conflict, he warned Congress that “[i]f there should be disloyalty, it will be dealt

22. See *infra* Part I.

23. LUEBKE, *supra* note 3, at 241.

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

25. See, e.g., *Homeland Defense: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 8–20 (2001) (statement of John Ashcroft, Att’y Gen. of the U.S.) (“threat” is mentioned 35 times in the hearing transcript).

26. WOODROW WILSON, A CROSSROADS OF FREEDOM THE 1912 SPEECHES OF WOODROW WILSON 130 (1956).

with a firm hand of stern repression.”²⁷ Wilson’s shift stemmed from his concerns about sabotage and espionage as the nation prepared for war.²⁸ Shortly after the United States joined the war, Congress enacted the Espionage Act of 1917, which granted federal authorities extensive powers to suppress speech and actions considered disloyal.²⁹ Although framed as a neutral law, its enforcement disproportionately targeted German Americans, anti-war activists, and socialists.³⁰ The Act criminalized interference with military operations and espionage while enabling the government to prosecute those opposing the war.³¹ It restricted publications, social gatherings, and any public expression against the war.³²

The Sedition Act of 1918 extended these restrictions, making it a crime to criticize the government, military, or war efforts.³³ Under this expansion, nearly 2,000 people faced prosecution, with many charged for simply questioning the war.³⁴ Together, these laws stifled public debate and justified extensive surveillance of German Americans, leading local officials and private citizens to monitor their neighbors.³⁵ The ultimate effect ended with essentially a legal muzzle on the German American community.³⁶

2. *The Judiciary’s Influence.*—Rather than serving as a check on the executive power and responding to the extraordinary measures, the Supreme Court affirmed the government’s authority to limit speech.³⁷ In *Schenck v. United States*, the Court introduced the “clear and present danger” test, which allowed for the restriction of speech when it presented an immediate threat to national security.³⁸ Justice Oliver Wendell Holmes, in his opinion for the Court, likened speech to a falsely yelled “fire” in a packed theater, reasoning that some

27. HARRY N. SCHEIBER, *THE WILSON ADMINISTRATION AND CIVIL LIBERTIES, 1917–1921* 21 (Quid Pro Books 2013) (1960) (quoting WOODROW WILSON, ADDRESS TO JOINT SESSION OF CONGRESS (April 2, 1917)).

28. *Id.* at 5–6.

29. Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (1917) (codified at 18 U.S.C. § 792).

30. See Andrew P. Napolitano, *A Legal History of National Security Law and Individual Rights in the United States*, 8 N. Y. U. J. L. & LIBERTY 46, 474–75 (2024) (describing the Justice Department-backed vigilantes who “ransacked the homes of German Americans”); Christopher P. Graham, *Free Speech and the Sedition Act of 1918*, 61 ADVOCATE 27, 27–28 (2018) (recounting prosecution and ten-year sentence of socialist Eugene V. Debs for an anti-war speech); *id.* at 28–29 (describing conviction of socialist Dr. Marie Equi for anti-war activism); Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from History*, 87 MASS. L. REV. 72, 73 (2002) (noting that World War I prisons “filled up with anti-war protestors, striking workers, and immigrants believed to be dangerously radical”).

31. 40 Stat. 217 (1917) (codified at 18 U.S.C. § 792).

32. See, e.g., LUEBKE, *supra* note 3, at 241.

33. Sedition Act of 1918, Pub. L. No. 65-150, 40 Stat. 553 (1918).

34. Murray & Wunsch, *supra* note 30, at 76.

35. See, e.g., LUEBKE, *supra* note 3, at 228, 277.

36. *Id.* at xiii–xiv.

37. See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919); *Schaefer v. United States*, 251 U.S. 466 (1920).

38. 249 U.S. at 52.

expressions might be restricted if they posed an immediate danger.³⁹ However, some scholars argue that Holmes's standard failed to effectively safeguard speech rights.⁴⁰ Instead of moving away from prior restrictive doctrines, the clear and present danger test simply rebranded the existing bad tendency test.⁴¹ Thus, the ruling gave the federal government broad authority to classify disloyal speech as criminal, regardless of any actual harm.⁴² In his famous dissent in *Abrams v. United States*, Holmes later separated himself from this reasoning, condemning the government's overreach and politically driven speech restrictions.⁴³ But by then, *Schenck* had already established a precedent that curtailed civil liberties during wartime.⁴⁴ The damage was already done.

Subsequent cases extended the logic in *Schenck*. In *Schaefer v. United States*, the Supreme Court upheld the convictions of editors of the Philadelphia Tageblatt, a German-language newspaper, for publishing articles expressing alleged pro-German sentiments.⁴⁵ The prosecution's case depended largely on the claim that their reporting, although sourced from English-language outlets, was framed to display a pro-German bias.⁴⁶ Justice Joseph McKenna's majority opinion condemned efforts to undermine public morale.⁴⁷ He reasoned that the crucial question was whether speech could weaken national resolve.⁴⁸ This decision significantly impaired press freedoms and had a profound impact on non-English publications.⁴⁹

Justices Louis Brandeis and Holmes dissented together.⁵⁰ The dissent cautioned that these restrictions would place the press under the control of a fearful, "intolerant majority".⁵¹ Brandeis criticized the vague definition of disloyalty, warning that such ambiguity could lead to dangerous outcomes.⁵² The majority ruling increased the chilling effect on the opposition.⁵³ It made it risky for German-language publications to voice any opinions that differed from

39. *Id.*

40. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 194 (2004).

41. *Id.* at 195.

42. *Id.* Two cases later solidified that the clear and present danger test did not offer any further protections for those who needed it. See *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

43. See 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); STONE, *supra* note 40, at 206–07.

44. *Abrams*, 250 U.S. at 619 (citing *Schenck v. United States*, 249 U.S. 47 (1919)).

45. 251 U.S. 466, 468, 482 (1920).

46. See *id.* at 473–74.

47. *Id.* at 477.

48. *Id.* at 474.

49. Napolitano, *supra* note 30, at 479–80.

50. *Schaefer v. United States*, 251 U.S. 466, 482–95 (1920) (Brandeis, J., dissenting).

51. *Id.* at 495.

52. *Id.* at 494–95.

53. *Id.* at 494.

the government's stance.⁵⁴

3. *Government-Sanctioned Vigilantism*.—As legislative and judicial support for suppressing dissent grew, the Wilson administration authorized the creation of the American Protective League (APL), a volunteer corps under the Department of Justice.⁵⁵ With over 200,000 civilian members, the APL operated as a quasi-law enforcement agency, conducting surveillance and reporting suspected “enemy aliens” and other so-called disloyal persons.⁵⁶ The APL wiretapped phones, intercepted mail, and conducted warrantless searches of homes and businesses.⁵⁷ They targeted German Americans and other perceived subversives.⁵⁸ Members and supporters pressured individuals to buy Liberty Bonds and viewed refusals as acts of disloyalty.⁵⁹ Those who did not buy bonds faced social ostracism, public shaming, and even violence.⁶⁰

The APL's unchecked authority blurred the lines between federal law enforcement and civilian vigilantism.⁶¹ Although the government sanctioned its actions, APL often surpassed legal boundaries, resulting in widespread abuses.⁶² Federal officials later voiced concerns about the APL's excesses, yet the

54. *See id.* Congress initially resisted giving the President unrestricted powers to silence the press, rejecting a “press censorship” provision in the Espionage Act. *See also* Thomas F. Carroll, *Freedom of Speech and of the Press in War Time: The Espionage Act*, 17 MICH. L. REV. 621, 624 (1919) (explaining Congress initially resisted giving the President unrestricted powers to silence the press, rejecting a “press censorship” provision in the Espionage Act); 65th Cong., 1st Sess., in 55 CONG. REC. H1595–1607 (April 30, 1917) (noting the House's defeat of the press-censorship clause). Federal prosecutors and some lower courts expanded the Act's language to punish criticism. However, judges George Bourquin and Charles Fremont Amidon stood out by insisting on solid evidence of intent to disrupt military recruiting or operations. They emphasized that mere talk does not constitute a crime. *See* *United States v. Hall*, 248 F. 150, 153 (D. Mont. 1918) (Bourquin, J.); *United States v. Schutte*, 252 F. 212, 214 (D.N.D. 1918) (Amidon, J.). Meanwhile, Judge Learned Hand, in *Masses Pub. Co. v. Patten*, 244 F. 535, 541 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917), insisted that only direct incitement to unlawful acts constituted a punishable offense under the First Amendment. *See also* GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 153–55 (2d ed. 2011).

55. JOAN M. JENSEN, *THE PRICE OF VIGILANCE* 17–25 (1968). Other vigilante groups emerged, including the Knights of Liberty, Boy Spies of America, and Sedition Slammers. *Id.* at 274; Christopher Capozzola, *The Only Badge Needed Is Your Patriotic Fervor: Vigilance, Coercion, and the Law in World War I America*, 88 J. AM. HIST. 1354, 1361 (2002). These organizations often exceeded legal limits, using forced loyalty tests and public humiliation violence. *See, e.g.*, PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 94–95 (1st ed. 1979). In Texas, six farmers were whipped for refusing to donate to the Red Cross; elsewhere, people were tarred and feathered for opposing the war sentiments. *Id.* at 131. Authorities often ignored these acts, blurring the line between patriotism and loyalty vigilantism. *See, e.g.*, LUEBKE, *supra* note 3, at 12.

56. JENSEN, *supra* note 55, at 213.

57. *Id.* at 58, 148–49.

58. *Id.* at 33, 173; Murray & Wunsch, *supra* note 30, at 76.

59. JENSEN, *supra* note 55, at 110, 153.

60. *Id.* at 110.

61. Murray & Wunsch, *supra* note 30, at 76.

62. JENSEN, *supra* note 55, at 33, 95.

organization continued its operations largely unhindered.⁶³ This set a dangerous precedent for using public hysteria to target perceived internal threats.⁶⁴

The laws enacted by Congress, along with the favorable legal infrastructure empowered by deferential Supreme Court opinions, became a powerful tool. This landscape fundamentally changed civic life for German Americans. It demonstrates how quickly security concerns can bypass constitutional rights. Soon, individual states hopped on the wagon to “protect” themselves and support the overall effort and began to enact their own laws.

B. Anti-German Laws at the State Level

While federal statutes and Supreme Court rulings laid the groundwork for suppressing dissent nationwide, many states went further. Seeking to demonstrate their patriotism—and, in many cases, to exploit anti-German hysteria—states passed laws that directly targeted the German language, newspapers, schools, and religious observances. These laws swiftly weakened German Americans’ ability to preserve their cultural identity.

Several states, including Indiana, Nebraska, and Iowa, passed laws banning the German language in schools.⁶⁵ In 1919, Indiana passed the McCray Act, which aimed to eliminate German-language instruction and reflected the national movement to suppress German culture.⁶⁶ State Senator Franklin McCray and Lieutenant Governor Edgar D. Bush introduced the bill.⁶⁷ It banned teaching German in all public, private, and parochial elementary schools, required that schools use only English for instruction, and imposed fines and imprisonment on violators.⁶⁸

The Indiana legislature expedited the bill.⁶⁹ The Indiana Senate approved it with just one dissenting vote.⁷⁰ The House followed with unanimous support, suspending procedural rules to speed up the process.⁷¹ Governor James P. Goodrich signed the act into law, which declared an emergency need for its immediate enactment.⁷² While framed as a patriotic measure to promote national unity, the law dismantled established German language education.⁷³ The law remained in effect until the Supreme Court’s decision in *Meyer v. Nebraska*, which held that state laws prohibiting foreign language instruction

63. *Id.* at 95.

64. *See, e.g., id.* at 30.

65. KIRSCHBAUM, *supra* note 7, at 103, 109, 125; Paul J. Ramsey, *The War Against German-American Culture: The Removal of German-Language Instruction from the Indianapolis Schools, 1917–1919*, 98 IND. MAG. HIST. 285, 298–301 (2002).

66. Ramsey, *supra* note 65, at 288.

67. *Id.* at 299.

68. *Id.*

69. *Id.* at 299–300.

70. *Id.* at 299.

71. *Id.* at 299–300.

72. *Id.* at 300.

73. *Id.* at 288, 293.

violated the Due Process Clause of the Fourteenth Amendment by infringing on the rights of parents and teachers to direct a child's education.⁷⁴ This differed from earlier cases like *Schenck*⁷⁵ and *Abrams*,⁷⁶ both of which supported wartime restrictions on expression. In *Meyer*, the Court struck down a Nebraska law that prohibited the teaching of select foreign languages, one of which was German.⁷⁷ The Court acknowledged that the state's purported purpose of the law was to foster national unity but ultimately held that the banning of German language instruction was not legitimate.⁷⁸

Other State's laws went even further, restricting German church services and even banning German-language telephone conversations.⁷⁹ Federal war hysteria often supported this effort.⁸⁰ They enabled local officials to target and penalize individuals for maintaining their German heritage.⁸¹

By the end of the war, federal and state governments had effectively criminalized German American culture. City halls and courtrooms sent a clear message: any public display of German identity invited suspicion and retaliation. This historical episode teaches us vital lessons. Public sentiment can quickly lead to legal constraints, particularly when national security is emphasized. Today, advancing surveillance technologies grant the federal government new tools to monitor communities, raising concerns about history repeating itself in a digital age.

C. Modern Surveillance Framework: PATRIOT Act and FISA Section 702

1. *The PATRIOT Act.*—In response to the September 11, 2001, terrorist attacks, the Bush Administration pushed for the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act or PATRIOT Act).⁸² The 9/11 attacks created intense public pressure.⁸³ Congress quickly passed the law within 45 days of the tragedy, expanding intelligence sharing, authorizing roving wiretaps,

74. 262 U.S. 390, 403 (1923). The ruling also highlighted the importance of individual choice. *See id.* at 399, 401; *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (recognizing *Meyer* as a foundational parental rights case). Today, scholars argue that *Meyer* prioritizes parental rights over speech freedoms and that this focus generally limits its effectiveness as a precedent for the First Amendment. *See* Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 22 (2009).

75. *Schenck v. United States*, 249 U.S. 47 (1919).

76. *Abrams v. United States*, 250 U.S. 616 (1919).

77. *Meyer*, 262 U.S. at 403.

78. *Id.*

79. KIRSCHBAUM, *supra* note 7, at 125.

80. *Id.*

81. *Id.* at 128–29.

82. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001); John T. Soma et al., *Balance of Privacy vs. Security: A Historical Perspective of the USA PATRIOT Act*, 31 RUTGERS COMPUT. & TECH. L.J. 285, 287–88 (2005).

83. *Id.* at 307–12.

and broadening electronic surveillance.⁸⁴ The Act amended more than fifteen existing laws, including the Foreign Intelligence Surveillance Act (FISA) and the Electronic Communications Privacy Act (ECPA).⁸⁵ When threats decreased, or courts intervened, policies usually shifted back to a balanced approach.⁸⁶

One of the Act's most controversial provisions, Section 215, allowed the FBI to seize any items linked to national security investigations.⁸⁷ Critics argued this provision facilitated government overreach.⁸⁸ The Act also lowered FISA's surveillance threshold, permitting orders when foreign surveillance was merely a "significant purpose", even if law enforcement played a primary role.⁸⁹ Additionally, the Act expanded the legal definition of terrorism to include cyberterrorism and attacks on mass transportation.⁹⁰

The Act ignited constitutional debates, particularly regarding the Fourth Amendment protections.⁹¹ Opponents warned that it enabled the incidental collection of Americans' communications while limiting judicial oversight.⁹² FISA court proceedings remained secret, with minimal adversarial checks, which has also raised concerns.⁹³ While courts have upheld many provisions, some, including indefinite gag orders that restricted free speech, have been struck down.⁹⁴

Because the PATRIOT Act significantly expanded government surveillance powers, Congress included sunset clauses for several key provisions to ensure periodic review and reauthorization.⁹⁵ Advancements in technology heighten the clash between privacy and security, driving continuous changes in legislation and court rulings.⁹⁶

2. *The Evolution and Impact of FISA Section 702.*—Congress enacted FISA in 1978 in response to revelations of widespread domestic spying, particularly

84. Soma et al., *supra* note 82, at 338, 308–312.

85. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001); Soma et al., *supra* note 82, at 307–12.

86. Soma et al., *supra* note 82, at 287.

87. *Id.* at 304.

88. *Id.* at 327.

89. *In re Sealed Case*, 310 F.3d 717, 734 (F.I.S.C.R. 2002) (“[T]he Patriot Act amendments clearly disapprove the primary purpose test.”); Soma et al., *supra* note 82, at 318–19.

90. Soma et al., *supra* note 82, at 318, 326.

91. *See generally*, A.B.A., PATRIOT DEBATES: EXPERTS DEBATE THE USA PATRIOT ACT (Stewart A. Baker & John Kavanagh eds., 2005); Soma et al., *supra* note 82, at 327.

92. *In re Sealed Case*, 310 F.3d at 733 (citing concerns of some Senate Judiciary Committee members on the harms posed by the amendments).

93. Soma et al., *supra* note 82, at 310.

94. *See, e.g.*, *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), *as modified* (Mar. 26, 2009); *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013), *vacated*, 800 F.3d 559 (D.C. Cir. 2015), *remanded to*, 142 F. Supp. 3d 172 (D.D.C. 2015); *Smith v. Obama*, 816 F.3d 1239 (9th Cir. 2016).

95. *See, e.g.*, PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112–14, 125 Stat. 216 (2011) (extending the PATRIOT Act to June 1, 2015).

96. Soma et al., *supra* note 82, at 340.

those uncovered by the Church Committee in 1975–76.⁹⁷ FISA aimed to regulate electronic surveillance of foreign intelligence within the United States and established the Foreign Intelligence Surveillance Court (FISC) to oversee requests for targeting foreign powers and their agents within U.S. territory.⁹⁸ While the framework imposed some safeguards, including a probable cause requirement, it granted broad surveillance authority that would later expand significantly.⁹⁹

After the 9/11 attacks, officials feared that FISA’s warrant requirements slowed counterterrorism efforts.¹⁰⁰ In response, President Bush authorized Stellar Wind, a secret warrantless surveillance program that bypassed the FISA’s 1978 warrant requirements.¹⁰¹ The Bush administration justified this step by arguing that modern communications often passed through U.S.-based networks, which made the old geographic limitations useless.¹⁰² Congress later codified this framework by passing the PATRIOT Act, which removed barriers between intelligence and law enforcement and expanded government surveillance powers.¹⁰³ Stellar Wind sparked controversy for lacking judicial oversight.¹⁰⁴ In 2008, Congress responded by enacting the FISA Amendments Act, which introduced Section 702.¹⁰⁵ This provision changed United States intelligence collection.¹⁰⁶ Section 702 permits warrantless surveillance of non-U.S. persons abroad, even when their communications pass through U.S.-based networks.¹⁰⁷

Section 702 grants the Attorney General (AG) and Director of National

97. Kevin Burns, Note, *Foreign Intelligence Surveillance Act Section 702: The Good, the Bad, and a Proposal to Make It Less Ugly*, 34 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 689, 691–92 (2024).

98. *Id.* at 693.

99. *Id.* at 693–94.

100. *Id.* at 694–95 (explaining that the PATRIOT Act loosened FISA’s warrant requirements to give officials greater flexibility after 9/11).

101. OFF. OF THE INSPECTOR GEN., DEP’T OF JUST., *A REVIEW OF THE DEPARTMENT OF JUSTICE’S INVOLVEMENT WITH THE PRESIDENT’S SURVEILLANCE PROGRAM* 3 (2009).

102. *See, e.g., id.* at 28–29. The Bush Administration had to justify the vast expansion of surveillance powers. It claimed that the existing FISA protocols impeded prompt action against national security threats. In its justification, the Administration noted that many modern communications passed through U.S.-based networks, thus heightening their urgency. The critics, on the other hand, argued that the program did not provide enough judicial oversight and lacked any meaningful checks. This permitted the extensive collection of American data. *See* Napolitano, *supra* note 30, at 523 (discussing Attorney General John Ashcroft’s approval of the program without assessing its constitutionality).

103. Burns, *supra* note 97, at 694.

104. OFF. OF THE INSPECTOR GEN., *supra* note 101, at 238.

105. Charlie Savage, *What Is the Powerful Surveillance Law That Divided Lawmakers?*, *N.Y. TIMES* (Apr. 12, 2024), <https://www.nytimes.com/2024/04/12/us/politics/surveillance-law-section-702-fisa.html> [<https://perma.cc/5A39-W522>]; *See also* FISA Amendments Act of 2008, Pub. L. No. 110–261, 122 Stat. 2436, 2438.

106. *In re Sealed Case*, 310 F.3d 717, 732 (“This bill . . . break[s] down tradition barriers between law enforcement and foreign intelligence.”) (internal quotations omitted).

107. 122 Stat. at 2438.

Intelligence (DNI) authority to approve surveillance of non-U.S. persons abroad without individual court orders.¹⁰⁸ The statute prohibits the government from targeting U.S. persons or individuals inside the United States; if such surveillance is necessary, traditional FISA procedures requiring probable cause and individualized warrants must be followed.¹⁰⁹ The AG and DNI must submit annual certifications to FISC.¹¹⁰ These certifications outline targeting procedures and safeguards designed to prevent the collection of U.S. persons' data.¹¹¹ These safeguards include: (1) targeting procedures that ensure surveillance applies only to foreign individuals abroad;¹¹² (2) minimization procedures that dictate how collected intelligence is stored and shared;¹¹³ and (3) querying procedures that regulate how analysts search the database U.S. persons' data.¹¹⁴

Section 702 collects data in two ways.¹¹⁵ The first is upstream collection, which occurs when the National Security Agency (NSA) collaborates with telecommunications providers where it will tap into key internet infrastructure.¹¹⁶ This allows the NSA to look at communications prior an intelligence target's arrival in the United States.¹¹⁷ The other is downstream collection, sometimes referred to as the PRISM program.¹¹⁸ PRISM collects data from technology companies like Google, Microsoft, and AT&T.¹¹⁹ It requires these companies to hand over stored or real-time communications of targeted individuals.¹²⁰

D. The Evolution and Impact of Section 702

The scope of Section 702 has steadily expanded. In 2022, the program targeted 246,073 people or accounts, up from 232,433 in 2021.¹²¹ While foreign intelligence remains FISA's primary goal, surveillance of foreign targets

108. *Id.*

109. Burns, *supra* note 97, at 695.

110. *Id.* at 696.

111. *Id.*

112. *Id.* at 695.

113. See, e.g., PRIV. & CIV. LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 50 (2014).

114. *Id.* at 12.

115. *Id.* at 7.

116. *Id.*

117. *Id.* at 36.

118. *Id.* at 7; Associated Press, *The secret to NSA's PRISM program: Bigger, bolder data seizures than the Bush era*, WASH. TIMES (June 15, 2013), <https://www.washingtontimes.com/news/2013/jun/15/secret-nsas-prism-program-bigger-bolder-data-seizu/> [https://perma.cc/7HFN-VBHT].

119. *Id.*

120. *Id.*

121. Burns, *supra* note 97, at 699.

inevitably sweeps in communications involving U.S. persons.¹²² This has resulted in vast amounts of incidentally collected U.S. person data and has raised ongoing legal and constitutional concerns.¹²³

However, the program has demonstrated counterterrorism successes. In 2009, Section 702 helped thwart Najibullah Zazi's 2009 plan to bomb the New York City subway.¹²⁴ It also played a role in dismantling ISIS propaganda networks aimed at American radicalization.¹²⁵ In 2021, the program prevented an Iranian-sponsored cyberattack on Boston Children's Hospital.¹²⁶ More recently, the government has used the program to share intelligence on Russian military actions to assist Ukraine.¹²⁷

On the other hand, Section 702 has been subject to abuse. From December 2021 to November 2022, FBI agents conducted 119,383 searches in Section 702's database for Americans' information.¹²⁸ Many of these were entirely unauthorized.¹²⁹ These searches included queries on January 6th protesters, Black Lives Matter activists, a United States Senator, and 19,000 donors to a congressional candidate.¹³⁰

Beyond unauthorized searches, victims of improper surveillance face major legal hurdles in challenging the program.¹³¹ The government frequently invokes the "state secrets" privilege, blocking access to surveillance records and hindering lawsuits.¹³² Additionally, when prosecutors rely on Section 702-derived evidence, they often fail to notify defendants.¹³³ From 2013 to 2018, prosecutors notified only eleven defendants that evidence against them came from Section 702 surveillance.¹³⁴ Litigants also struggle to prove standing due

122. See OFF. OF THE DIR. OF NAT'L INTEL., ANNUAL STATISTICAL TRANSPARENCY REPORT REGARDING THE INTELLIGENCE COMMUNITY'S USE OF NATIONAL SECURITY SURVEILLANCE AUTHORITIES 7 (2024).

123. *Id.* at 9.

124. MAJORITY FISA WORKING GRP. OF THE H. PERMANENT SELECT COMM. ON INTEL., FISA REAUTHORIZATION: HOW AMERICA'S MOST CRITICAL NATIONAL SECURITY TOOL MUST BE REFORMED TO CONTINUE TO SAVE AMERICAN LIVES AND LIBERTY 34, 118th Cong. (2023).

125. *Id.* at 35.

126. *FBI Director Cites Mysterious Iran-Linked Attack in Arguing for Section 702*, WASH. POST (Dec. 7, 2023), <https://www.washingtonpost.com/politics/2023/12/07/fbi-director-cites-mysterious-iran-linked-attack-arguing-section-702/> [<https://perma.cc/QH6S-WYTD>].

127. MAJORITY FISA WORKING GRP., *supra* note 124, at 3.

128. OFF. OF THE DIR. OF NAT'L INTEL., *supra* note 122, at 25.

129. See Burns, *supra* note 97, at 713–17 (noting several instances of documented misuse of Section 702 data against U.S. citizens).

130. Savage, *supra* note 105; Patrick Toomey & Sara Robinson, *Mass Surveillance Is Dangerous for American Communities: Reforming the Section 702 Spying Regime*, A.B.A. (June 3, 2024), <https://www.americanbar.org/groups/crsj/resources/human-rights/2024-june/mass-surveillance-dangerous-american-communities-reforming-section-702/> [<https://perma.cc/QW3S-89P6>].

131. Burns, *supra* note 97, at 709–12.

132. *Id.* at 710–11.

133. *Id.* at 711.

134. Sarah Beller, *401-Forbidden: An Empirical Study of Foreign Intelligence Surveillance Act Notices, 1990-2020*, 13 HARV. NAT'L SEC. J. 158, 174 (2022).

to limited access to surveillance records and consistent government obstruction.¹³⁵

In response to public outcry and congressional scrutiny, the FBI implemented internal reforms to curb abuses.¹³⁶ The FBI now must document justification before searching the database.¹³⁷ The agency also created an internal audit office and mandated new training,¹³⁸ requires agents to receive attorney approval for large-scale queries,¹³⁹ and now segregates Section 702 data from other databases.¹⁴⁰ But these administrative changes have not satisfied some privacy advocates who demand more—particularly a warrant requirement for searching Americans’ communications.¹⁴¹

In January 2025, a district judge in the Eastern District of New York ruled that officials must obtain a warrant before searching U.S. person data collected under Section 702.¹⁴² The court rejected the government’s long-held position that once foreign intelligence data is legally obtained, it remains open for review without constitutional safeguards.¹⁴³ Citing Second Circuit precedent, the court stressed that national security concerns do not override the warrant requirement.¹⁴⁴ The defendant appealed this ruling, but the decision’s unresolved reasoning leaves its long-term impact uncertain, particularly for the defendant and other Section 702 challengers.¹⁴⁵ If reversed, the decision could reaffirm the government’s position and maintain surveillance authority. Until the appellate process concludes, litigants face a fluid legal landscape where significant legal shifts remain possible.

Legislation like the Espionage Act, the Sedition Act, state-level bans on the German language, the PATRIOT Act, and FISA Section 702 emerged in response to perceived crises. Each reflected urgent national concerns, yet each left a lasting mark on free expression and individual privacy. These laws demonstrate how emergency powers can quickly erode constitutional protections and often harm minority and immigrant communities.

135. Burns, *supra* note 97, at 709–10.

136. *Id.* at 725–26.

137. MAJORITY FISA WORKING GRP., *supra* note 124, at 30.

138. *Id.* at 28.

139. *Id.* at 29.

140. *Id.*

141. Wes Davis, *U.S. Congress pushes warrantless wiretapping decision off until April next year*, THE VERGE (Dec. 6, 2023, at 19:16 ET), <https://www.theverge.com/2023/12/16/24004356/section-207-reauthorized-until-april-fisa-national-defence-cyber-surveillance> [<https://perma.cc/4PER-SZBW>].

142. *United States v. Hasbajrami*, No. 1:11-cr-623, 2025 WL 258090, at *20 (E.D.N.Y. Jan. 21, 2025), *superseded by*, 2025 WL 447498 (E.D.N.Y. Feb. 10, 2025), *appeal docketed*, No. 25-542 (2d Cir. Mar. 7, 2025).

143. *Id.* at *9.

144. *Id.* at *7–8.

145. Notice of Criminal Appeal, *United States v. Hasbajrami*, No. 25-542, at 1 (2d Cir. Mar. 7, 2025).

II. BACKGROUND

During World War I, the government restricted speech, assembly, and cultural expression. The government justified these restrictions as necessary to protect national security.¹⁴⁶ The fear of espionage led to laws that impacted German Americans.¹⁴⁷ This section looks at the historical background of such laws, using Evansville, Indiana, as a case study. Evansville: a city where federal and state legal systems—alongside a climate of fear and hysteria—dismantled the German American community identity. This history provides a lens into how federal power can reshape entire communities.

A. The Road to War and American Nativism

1. *Historical Roots of Nativism and Nativist Legislation.*—Nativism had long influenced U.S. politics, often depicting non-Anglo immigrants as threats to American values.¹⁴⁸ Drawing on Louis Hartz’s “Fragment Theory,”¹⁴⁹ scholars note how early America’s English Protestant and republican ideals fostered suspicion toward groups that resisted rapid assimilation.¹⁵⁰ By the early 20th century, German immigrants became a primary target for those fearing foreign influence.¹⁵¹ The Dillingham Commission, a congressional body established to investigate immigration’s effects, exemplified this nativist thinking.¹⁵² Though initially concerned with Southern and Eastern Europeans, the Commission recommended restrictions on “undesirable[]” groups.¹⁵³ The findings laid a legal and rhetorical foundation for future anti-German measures.¹⁵⁴

2. *The Path to War and Escalation of Anti-German Sentiment.*—The Lusitania sinking in 1915,¹⁵⁵ The Black Tom explosion in 1916,¹⁵⁶ and the

146. See *supra* Part I.

147. *Id.*

148. See, e.g., Duncan Moench, *Anti-German Hysteria and the Making of the Liberal Society*, 7 AM. POL. THOUGHT 86, 87 (2018).

149. LOUIS HARTZ, *THE FOUNDING OF NEW SOCIETIES: STUDIES IN THE HISTORY OF THE UNITED STATES, LATIN AMERICA, SOUTH AFRICA, CANADA, AND AUSTRALIA* 3–6 (1964).

150. Moench, *supra* note 148, at 90.

151. *Id.* at 103.

152. KATHERINE BENTON-COHEN, *INVENTING THE IMMIGRATION PROBLEM: THE DILLINGHAM COMMISSION AND ITS LEGACY* 21–42 (2018).

153. *Id.* at 118.

154. See, e.g., *id.*

155. *The Lusitania Disaster*, LIBRARY OF CONG., <https://www.loc.gov/collections/world-war-i-rotogravures/articles-and-essays/the-lusitania-disaster/> [https://perma.cc/G3NX-64QN] (last visited Dec. 2, 2024).

156. Elke Weesjes & Phil Nerges, *100 Years of Terror*, NAT. HAZARDS CTR. (Oct. 31, 2016), <https://hazards.colorado.edu/article/100-years-of-terror-the-black-tom-explosion-and-the-birth-of-u-s-intelligence-services-1> [https://perma.cc/C68B-YR85].

Zimmermann Telegram in 1917¹⁵⁷ increased anti-German sentiment. President Woodrow Wilson also began to warn of potential threats on home soil.¹⁵⁸ In his addresses to Congress, Wilson charged that “There are citizens of the United States . . . who have poured the poison of disloyalty into the very arteries of our national life,” invoking the direct threat of disloyalty.¹⁵⁹ This rhetoric paved the way for superpatriotism.¹⁶⁰ By April 1917, when the United States declared war on Germany, patriotic fervor exploded.¹⁶¹ This intense nationalism transformed into a widespread eagerness to snuff out dissenters.¹⁶² Wilson’s Democratic Party suggested that a German identity was problematic.¹⁶³

3. *Popular Culture and the Policing of “German” Influences.*—The broader climate of hysteria spurred Americans to rebrand or eradicate visible signs of German heritage.¹⁶⁴ Foods like sauerkraut or hamburgers were renamed “liberty cabbage” and “liberty sandwiches,” while dachshunds were denounced in Ohio for their German origin.¹⁶⁵ The anti-German sentiment also came from Theodore Roosevelt, who vilified German Americans who insisted on preserving cultural traditions, labeling them “traitors.”¹⁶⁶

4. *Forced Assimilation and the Erosion of German Identity.*—Consequently, German Americans were forced to give up visible expressions of their heritage—stopping German-language services in churches, eliminating German classes in schools, and anglicizing their names to evade harassment.¹⁶⁷ This environment of enforced uniformity, based on the legal framework outlined in Part A, combined national hysteria and federal power into a commanding force that allowed the government and the nation as a whole to achieve the goal

157. Zimmermann Telegram (1917), NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/zimmermann-telegram> [<https://perma.cc/R6JG-W259>] (last visited Aug. 31, 2025).

158. See Woodrow Wilson, *Address at the Fiftieth Anniversary of the Manhattan Club in New York City* (Nov. 4, 1915), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/node/317075> [<https://perma.cc/5VJ2-AZEW>] (last visited Sep. 9, 2025) (warning that “very loud and very clamorous” voices spoke “alien sympathies” and were “partisans of other causes than that of America”); Woodrow Wilson, *Address on Flag Day* (June 14, 1917), AM. PRESIDENCY PROJECT, www.presidency.ucsb.edu/node/206616 [<https://perma.cc/V6WA-BS5B>] (last visited Sep. 9, 2025) (declaring that “there should be no tolerance for those who inject the poison of disloyalty into our most critical affairs”).

159. Wilson’s Third Annual Message, 1 in MESSAGES AND PAPERS OF WOODROW WILSON 133 (1924) (denouncing “infinitely malignant” hyphenates who “preach and practice disloyalty”).

160. See STONE, *supra* note 40, at 146 (explaining how Wilson’s rhetoric about disloyalty legitimized repression and encouraged the rise of superpatriotism).

161. See, e.g., MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* 78–79 (1995).

162. Moench, *supra* note 148, at 111.

163. Woodrow Wilson, *Final Address in Support of League of Nations* (speech delivered in Pueblo, Colo., Sep. 25, 1919).

164. Natasha Karunaratne, *The Anti-German Sentiment of World War I*, RE-IMAGINING MIGRATION, <https://reimaginingmigration.org/the-anti-german-sentiment-of-world-war-i/> [<https://perma.cc/L7CC-5XYX>] (last visited Aug. 31, 2025).

165. *Id.*; *Exit the German Dachshund*, JASPER WKLY. COURIER, Aug. 30, 1918.

166. Moench, *supra* note 148, at 111–12.

167. *Id.* at 112.

of protecting themselves.

B. German Americans in Evansville Before World War I

1. *Early German Settlement in Evansville (1836–1865).*—Between 1836 and 1837, German farmers from Ingelheim, Germany, arrived in Evansville, acquiring thousands of acres.¹⁶⁸ This marked the first major wave of German immigration to Evansville.¹⁶⁹ Lutheran churches anchored these farming communities, while additional immigrants from Hesse, Swabia, and Bavaria settled in the Lamasco District on the city’s west side.¹⁷⁰ Seeking religious freedoms and economic opportunity, these newcomers leveraged Evansville’s fertile soil for agriculture and built a thriving cultural enclave with German language schools, churches, and businesses.¹⁷¹

2. *The Second Wave of German Immigration (1865–1882).*—A second wave of Germans arrived between 1865 and 1882, primarily Roman Catholic blue-collar workers fleeing Bismarck’s “Kulturkampf.”¹⁷² Many settled in German Township, while others moved into Evansville’s city limits.¹⁷³ By 1900, German-born residents and their children comprised nearly forty percent of Vanderburgh County’s population, reinforcing Evansville’s identity as a center of German American life.¹⁷⁴ German newspapers, cultural festivals, and religious organizations flourished and strengthened community ties.¹⁷⁵

3. *Cultural Integration and Preservation (Early 20th Century).*—By the early 1900s, German immigrants began to enter Evansville’s education, business, and politics spheres, yet many maintained distinct identities in church-centered communities.¹⁷⁶ Lutheran, Roman Catholic, and Evangelical churches remained central to social life, offering services in German.¹⁷⁷ Families spoke German at home, believing language was essential to preserving their faith and heritage.¹⁷⁸ Parochial schools made German central to their curriculum, and public schools later recognized this by offering advanced placement and credit

168. DARREL E. BIGHAM, REFLECTIONS ON A HERITAGE: THE GERMAN AMERICANS IN SOUTHWESTERN INDIANA 3 (1980).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* Kulturkampf was the cultural and political battle of conflicting values between Otto von Bismarck and the Roman Catholic Church about secular power. See, e.g., Gul Farrukh, *Divided Devotion: A Historical Exploration of Bismarck’s Kulturkampf and its Impact on German Society*, 3 J. SOC. SCI. REV. 21 (2023) (providing an in-depth analysis and explanation of Kulturkampf).

173. BIGHAM, *supra* note 168, at 3.

174. *Id.*

175. *Id.* at 4–7.

176. *Id.* at 4.

177. *Id.* at 7, 12.

178. *Id.*

in German to students who came from those parochial schools.¹⁷⁹ The slow assimilation of Evansville's German Americans stemmed from their dedication to language and the strength of their enclaves.

4. *Social and Cultural Organizations as Cultural Preservers.*—Beyond language and religion, German Americans preserved their heritage through social organizations. They established German-language Masonic lodges, two Männerchors (men's choirs), and a Turnverein (gymnastics club).¹⁸⁰ The Germania Männerchor became the city's largest German cultural organization, attracting 700 members.¹⁸¹ The Turnverein offered sports, exercise, and social events, influencing citywide traditions like school "Field Day" celebrations.¹⁸² Meanwhile, German culture thrived at Saturday markets at Fourth Street and First Avenue (Little Market), which served as gathering a space where families reinforced their cultural identity through German food, clothing, and traditions.¹⁸³

5. *Celebrations and Traditions as Expressions of German Heritage.*—German culture remained highly visible through annual "German Day" celebrations in June, featuring German music, food, and festivities.¹⁸⁴ Churches hosted summer socials, strengthening communal bonds.¹⁸⁵ Christmas was a major holiday for many German Americans and has always been an important holiday in German culture.¹⁸⁶ German culture influence in Evansville was so prominent that in 1915, the Evansville Businessman's Association included the German anthem "Die Wacht am Rhein" as one of the three songs at its annual meeting.¹⁸⁷ Only a few years later, playing this song became a crime.

C. Wartime Hysteria and the Turning Tide in Evansville

1. *Mayor Benjamin Bosse's Political Balancing Act.*—Anti-German hysteria was not unique to any particular area. In fact, we must not look any further than our own state to find a poignant historical example. Benjamin Bosse, a prominent Democrat and successful businessman, was first elected mayor of Evansville in 1913 and subsequently re-elected in 1917, just as the United States entered World War I.¹⁸⁸ Although Bosse himself was of German

179. *Id.* at 12.

180. *Id.* at 25.

181. *Id.* at 15–16.

182. *Id.*; Claire Nolte, *The German Turnverein*, ENCYC. OF 1848 REVOLUTIONS, <https://sites.ohio.edu/chastain/rz/turnvere.htm> [<https://perma.cc/LCW5-PPPL>] (last visited Nov. 5, 2024).

183. BIGHAM, *supra* note 168, at 4, 9–10.

184. *Id.* at 16.

185. *Id.*

186. *Id.* at 16–17.

187. *Id.* at 5.

188. *Regional Voices: Jeffrey Bosse, The Story of Benjamin Bosse*, PBS, <https://www.pbs.org/video/evansville-rotary-club-regional-voices-jeff-bosse-story-benjamin-bosse/> (last visited Sep. 5, 2025).

heritage, he found himself navigating a delicate political landscape.¹⁸⁹ His administration sought to balance Evansville's economic ties to its German American population while demonstrating unwavering support for the war effort.¹⁹⁰ To maintain political favor, Bosse aligned himself with national superpatriotic campaigns, encouraging aggressive loyalty enforcement while avoiding direct condemnation of German Americans.¹⁹¹

The Bosse administration's passive approach was met with more direct attacks on German Americans by other local authorities. Local authorities, including Police Chief Edgar Schmitt and Liberty Loan Postmaster John Nolan, took the lead in targeting German Americans.¹⁹² Schmitt spearheaded local surveillance efforts and arrested individuals suspected of disloyalty, while Nolan leveraged his position to pressure German Americans into purchasing Liberty Bonds—a practice that became a *de facto* loyalty test.¹⁹³ Those who refused risked being labeled as enemy sympathizers, subjecting them to arrest, public shaming, and professional ruin.¹⁹⁴

Evansville likely reflected the broader national wave of hysteria, fear, and hostility toward German Americans during World War I.¹⁹⁵ Bosse perhaps sought to ensure Evansville supported the national war effort.¹⁹⁶ To that end, his administration, like those across the nation, likely promoted and encouraged Evansville citizens to participate in patriotic campaigns that mirrored

189. FRANK M. GILBERT, *HISTORY OF THE CITY OF EVANSVILLE AND VANDERBURG COUNTY, INDIANA* 392 (1910).

190. BIGHAM, *supra* note 168, at 18 (noting the prominence of German Lutherans and Catholics in Evansville's Democratic politics, the rise of figures such as Mayor Bosse, and the shifting loyalties during World War I).

191. *See id.* (explaining that both parties in Evansville "regularly placed a predominately German American slate before the electorate and could not hope to win without ritual appearances at the German Day Volksfest of the Maennerchor or having a number of party workers who could speak German," reflecting outward displays of loyalty to national causes while maintaining German American support).

192. *Less Than Half Register*, THE EVANSVILLE COURIER, Feb. 14, 1918; *see* Telegram to D.C. (April 15, 1918) (on file with Fold3 database) (listing Nolan as an active correspondent regarding German American activities); *see also* Report on Sieveking (Apr. 16, 1918) (on file with Fold3 database) (describing Nolan's role in initiating investigations into suspected disloyalty).

193. *Id.*

194. *See* LUEBKE, *supra* note 3, at 225–27 (detailing how German Americans faced loyalty tests and risked professional and social ruin if they resisted patriotic demands).

195. *See id.* at 225–30 (describing national "superpatriotism" and hostility toward German Americans); *see also* KIRSCHBAUM, *supra* note 7, at 110–18 (detailing mob hostility and repression of German culture).

196. *See* BIGHAM, *supra* note 168, at 18 (explaining the dominance of German Lutherans and Catholics in Evansville's Democratic politics, the prominence of German cultural and patriotic societies, and the civic leadership provided by figures such as Mayor Bosse, all of which came under heightened scrutiny as World War I placed new pressures on public displays of loyalty).

nationwide movements for “100 percent Americanism.”¹⁹⁷ This atmosphere of heightened patriotism seemed to have spurred superpatriotism throughout the city.¹⁹⁸ That surge of patriotic fervor, in turn, likely exacerbated the social and political pressures faced by Evansville’s German American population.¹⁹⁹

Prior to being elected mayor in 1916, Bosse served as the Indiana delegate to the Democratic National Convention.²⁰⁰ This convention would ultimately nominate Woodrow Wilson as the Democratic candidate for president.²⁰¹ The convention and his involvement with the Democratic Party likely guided Bosse’s policies and stance during wartime. In that light, it seems that Bosse sought to present himself as the mayor who promoted war production, expanded services, and fostered a patriotic community. He may also have felt pressure to ensure that Evansville’s large German American community did not cause any problems and diminish his political status within the party.

Early on, Bosse probably took a staunch patriotic stance.²⁰² To play the political game, however, he would never explicitly speak against the German Americans, as he knew they were a large factor in the economic success of Evansville.²⁰³ Nevertheless, the patriotism he exuded, coupled with the anti-German hysteria that swept the nation, fueled fervor into the hearts of many Evansville citizens. Moreover, Bosse left the question of German Americans up to the local and federal authorities, such as the Evansville police chief, Edgar Schmitt, and the Liberty Loan Postmaster, John Nolan.²⁰⁴ They helped lead campaigns and investigations to search for “disloyal” or anti-war citizens, specifically targeting the German Americans.²⁰⁵

197. For an example of other German communities facing similar pressures, see, e.g., Tina Stewart Brakebill, *From “German Days” to “100 Percent Americanism”*: McLean County, Illinois 1913-1918: German Americans, World War One, and One Community’s Reaction, 95 J. OF THE ILL. ST. HIST. SOC’Y (1998-) 148, 148–55 (2002); Moench, *supra* note 148, at 86–95 (discussing “100 percent Americanism” as a nationwide movement).

198. See LUEBKE, *supra* note 3, at 225–30 (describing “superpatriotism in action” during the war); see also STONE, *supra* note 40, at 153–60 (analyzing how patriotic fervor suppressed dissent).

199. See PETRA DEWITT, DEGREES OF ALLEGIANCE: HARASSMENT AND LOYALTY IN MISSOURI’S GERMAN-AMERICAN COMMUNITY DURING WORLD WAR I 120–27 (2012) (explaining harassment of German Americans under heightened patriotic pressure); see also KIRSCHBAUM, *supra* note 7, at 120–27 (describing the eradication of German cultural institutions).

200. LOUIS GRANAT & J. BRUCE KREMER, OFFICIAL REPORT OF THE PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION, HELD AT SAINT LOUIS, MISSOURI, JUNE 14, 15 AND 16TH, 1916, at 59 (1916).

201. *Id.*

202. *Id.*

203. *Id.* German Americans played a central role in Evansville’s economy, including major industries such as the Globe-Bosse-World Furniture Company. BIGHAM, *supra* note 168, at 13. Additionally, both political parties regularly placed German American slates before voters and sought their support through cultural events making German Americans an indispensable civic and political force. *Id.* at 18. To be politically successful, no candidate could completely lose the German American vote. *Id.*

204. Less Than Half Register, *supra* note 192; Report on Sieveking, *supra* note 192.

205. Less Than Half Register, *supra* note 192; Report on Sieveking, *supra* note 192.

2. *Implementation of Enemy Alien Registration.*—As anti-German sentiment grew across the nation, the federal government mandated that all non-naturalized German Americans register as “enemy aliens.”²⁰⁶ By February 1918, only 400 individuals in Evansville had complied with the requirements.²⁰⁷ In response, local authorities grew more determined as the residents stood firm against them.²⁰⁸

Police Chief Schmitt ordered a clear directive: anyone who does not register will face arrest.²⁰⁹ In the weeks to follow, local authorities would arrest German Americans, force them to register, and then let them go.²¹⁰ This process aimed to intimidate and label them as potential threats in the public eye.²¹¹ Individuals feared they would be ousted as the federal government began rounding up suspected “enemy aliens.”²¹²

3. *The Sieveking Investigation.*—The case of George Sieveking, an evangelical minister, is a powerful example. Sieveking, a German immigrant who had lived in the United States since 1889, had spent years ministering in various Midwestern churches before settling in Evansville in 1914.²¹³ By all accounts, he was a respected figure within the German American community—until he became the subject of a loyalty investigation.²¹⁴

In 1917, an Evansville resident reported to the police that Sieveking had preached against the draft and war and was allegedly planning a violent antiwar protest.²¹⁵ Concerned that such activities might bring federal scrutiny to Evansville, the local police sought guidance from federal authorities in Indianapolis.²¹⁶ Federal agents advised them to send an informant to Sieveking’s congregation and verify the claims.²¹⁷ After weeks of surveillance, the informants found no evidence, and the case went dormant.²¹⁸

Yet, in 1918, the investigation resurfaced when Sieveking exclaimed, “Don’t want your bonds. You made me register as enemy and now I am an

206. *World War I Enemy Alien Records*, NAT’L ARCHIVES, <https://www.archives.gov/research/immigration/enemy-aliens/ww1> [<https://perma.cc/8VQW-PG3V>] (last visited Nov. 6, 2024).

207. *Less Than Half Register*, *supra* note 192.

208. *Mayor and Chief to Act on Aliens*, THE EVANSVILLE COURIER, Feb. 21, 1918.

209. *Less Than Half Register*, *supra* note 192.

210. *See Mayor and Chief to Act on Aliens*, *supra* note 208 (describing the enforcement regime).

211. *Id.*

212. *Id.*

213. Interview by Federal Agents with George Sieveking, in Evansville, Ind. (Apr. 30, 1918) (on file with Fold3 database).

214. *Id.*

215. Report on Sieveking, *supra* note 192.

216. Letter from C. F. Werner to Murdock (Aug. 2, 1917) (on file with Fold3 database).

217. *Id.*

218. There was correspondence with federal authorities in August of 1917. Report From C.F. Werner on Sieveking Investigation (Aug. 17, 1917) (on file with Fold3 database). But no correspondence surfaces again until April 1918.

enemy to this country.”²¹⁹ It is not clear why Sieveking refused to buy bonds or make that statement. Nolan reported him to federal authorities, claiming that Sieveking was “inflaming neighbors to a degree which threatened violence” and that he had to “beg a meeting not to lynch him.”²²⁰ Alarmed, federal officials ordered Sieveking’s arrest.²²¹

Sieveking was transported to Indianapolis and questioned.²²² There, the Assistant United States Attorney recommended his internment because of his alleged “pro-German” talk.²²³ With no trial, no due process, and no opportunity to defend himself, Sieveking was sent to Fort Oglethorpe, Georgia, an internment camp for suspected enemy aliens.²²⁴

4. *The Rottmayer Investigation.*—Joseph Rottmayer, a stove worker in Evansville, faced scrutiny for allegedly sympathizing with the Germans.²²⁵ This case is another example the city’s crackdown. Witnesses reported that Rottmayer publicly supported Germany and refused to purchase a Liberty Bond.²²⁶

The Davis-Houghland detective agency investigated and took Rottmayer in after reviewing the reports.²²⁷ They then subjected him to intense interrogation.²²⁸ Rottmayer, fearing the consequences, insisted that he made his statements as a joke and lacked any loyalty to Germany.²²⁹ To demonstrate his allegiance to the United States, he had to write a formal apology to the federal government, fly an American flag outside his home, and purchase a Liberty Bond to show his patriotism.²³⁰

John Nolan, who played a role in persecuting Sieveking, would later investigate Rottmayer.²³¹ However, the damage was done. Rottmayer faced public humiliation and coercion.²³² His experience highlights the intense pressure German Americans felt to shed their cultural identity and prove their loyalty to the United States.

5. *Impact on Evansville’s German American Community.*—The cases of Sieveking and Rottmayer were not isolated incidents. The profound impact on Evansville’s German community included the shutdown of German-language newspapers, closure of German schools and ban on German-language

219. Letter from Federal Authorities (Apr. 13, 1918) (on file with Fold3 database)

220. *Id.*

221. Order to Arrest Sieveking (Apr. 15, 1918) (on file with Fold3 database).

222. Report on Sieveking, *supra* note 192.

223. Telegram from Indianapolis U.S. Att’y to Dep’t of Justice (Apr. 16, 1918) (on file with Fold3 database).

224. Progress Report (July 2, 1919) (on file with Fold3 database).

225. *Doff’s Hat to American Flag*, THE EVANSVILLE COURIER, Nov. 23, 1917.

226. *Apologizes to United States*, THE EVANSVILLE COURIER, Nov. 22, 1917.

227. *Id.*

228. *Id.*

229. *Doff’s Hat to American Flag*, *supra* note 225.

230. *Id.*

231. *Apologizes to United States*, *supra* note 226.

232. *Id.*

education, abandonment of German services in churches, and boycotting or forced renaming of German businesses.²³³

Even those who had previously been well-integrated and respected members of the community found themselves treated as foreign threats.²³⁴ Fear of persecution led many German Americans to anglicize their names, stop speaking German, and publicly distance themselves from their heritage.²³⁵ The forced assimilation of Evansville's German Americans permanently altered the city's cultural landscape.

D. German Americans After World War I in Evansville

World War I devastated Evansville's German American community.²³⁶ Societal pressure compelled them to abandon their cultural identity, and their vibrant, diverse character vanished.²³⁷

1. Systematic Dismantling of German Institutions.—By 1918, German culture had virtually disappeared from public life.²³⁸ The German language was outlawed in many states, including instruction in schools.²³⁹ Churches abandoned German services.²⁴⁰ The German-language press collapsed.²⁴¹ The Germania Männerchor membership dropped by fifty percent and traditional celebrations like German Day ceased entirely.²⁴²

Some made deliberate choices to “Americanize” their family.²⁴³ By 1919, Central High School had replaced German language instruction with French.²⁴⁴ Economic changes accelerated this transformation, too. As Evansville transitioned from agriculture to manufacturing, German Americans began working in factories and needed to learn English.²⁴⁵ The transition dismantled the close-knit German communities that once upheld their culture. The lively “Little Germany” that once characterized Evansville now exists only in fragments.²⁴⁶

233. BIGHAM, *supra* note 168, at 21–23.

234. *Id.*

235. *Id.* at 22.

236. *Id.*

237. *Id.*

238. *Id.*

239. *See, e.g.,* Ramsey, *supra* note 65, at 299 (discussing Indiana's McCray Act).

240. BIGHAM, *supra* note 168, at 23.

241. *Id.* at 300.

242. *Id.* at 22, 25.

243. BIGHAM, *supra* note 168, at 22.

244. *Id.*

245. *Id.* at 20.

246. *Id.* at 24–27.

E. Recent FISA Section 702 Debates

1. Recent Congressional Reauthorization Efforts.—The debate over FISA Section 702’s reauthorization shows congressional divisions on surveillance and civil liberties. In April 2024, the House passed a two-year reauthorization after initial failure.²⁴⁷ At the time, soon-to-be and then-former President Donald Trump pressured Congress to “kill” the program, which led to a shortened timeframe as a compromise.²⁴⁸ Debates over surveillance authorities have grown increasingly contentious as shifting political coalitions redefine the balance between national security and privacy.²⁴⁹

Congress’s debate about whether to reauthorize Section 702 focused on warrants for searching Americans’ communications discovered in Section 702 searches.²⁵⁰ Advocates for more privacy who oppose Section 702’s use consistently advocate for warrants.²⁵¹ They claim that Section 702 “violate Americans’ fundamental civil liberties and civil rights.”²⁵² Ultimately, the warrant requirement amendment failed by a 212-212 tie vote in the House.²⁵³ Many intelligence officials disagreed and were opposed to the warrant requirement, claiming that it would limit the capability to investigate potential threats.²⁵⁴ Then-FBI Director Christopher Wray warned that Section 702’s expiration would harm public safety, emphasizing its importance in preventing terrorist attacks and disrupting cyber threats.²⁵⁵

The reauthorization bill introduced several significant reforms. First, it codified new restrictions on database searches.²⁵⁶ Second, it also limited who could access the raw intelligence to reduce the potential for abuse.²⁵⁷ Finally, it

247. See CONG. RSCH. SERV., R48592, REAUTHORIZATION OF FISA SECTION 702, at 1–2 (2024), <https://www.congress.gov/crs-product/R48592>; Savage, *supra* note 105.

248. *Id.*

249. *Id.*

250. *Id.*; see, e.g., 170 Cong. Rec. H2323 (daily ed. Apr. 12, 2024) (statement of Rep. Lofgren) (urging adoption of warrant requirement for U.S.-person queries).

251. See, e.g., Savage, *supra* note 105.

252. *Id.*; Letter from Access Now et al. to the Hon. Charles Schumer, Majority Leader, U.S. Senate (Nov. 13, 2023).

253. Savage, *supra* note 105. The 212-212 vote in the House on the amendment concerning warrants for searching Americans’ communications discovered in Section 702 searches revealed an unusual bipartisan split. The amendment received support from 86 Republicans and 200 Democrats. Conversely, the opposition comprised 130 Republicans and 82 Democrats. This distribution indicates a significant bipartisan divide on privacy concerns and governmental surveillance authorities. See H.R., Roll Call Vote No. 114, 118th Cong., 2d Sess., Congressional Record (Apr. 12, 2024).

254. Savage, *supra* note 105 (“National security officials from the Biden administration had lobbied Congress heavily not to pass the amendment.”).

255. *Warrant Requirement for FBI’s Section 702 Queries Would Impede Investigations, Endanger National Security, Director Says*, FBI (Apr. 9, 2024), <https://www.fbi.gov/news/stories/warrant-requirement-for-fbi-s-section-702-queries-would-impede-investigations-endanger-national-security-director-says> [<https://perma.cc/LPF6-P7FB>].

256. *Reforming Intelligence and Securing America Act*, H.R. 7888, 118th Cong. § 2 (2024).

257. *Id.*

created new requirements for reporting to improve transparency.²⁵⁸

Privacy advocates argue they will push for stronger civil liberties as the bill advances.²⁵⁹ The debate strikes directly at the core of the balance between national security and constitutional rights, which has always challenged the nation. The outcome will impact future foreign intelligence collection and the balance between government power and individual privacy.

As Congress debates Section 702 today, Evansville's history reminds us that unchecked government surveillance poses long-term risks. These risks often exceed the original goals of such powers. By learning from history, modern society can protect the rights of vulnerable communities, ensuring that national security does not infringe on civil liberties and cultural identity.

III. ANALYSIS

Throughout American history, times of perceived crisis have often led to increased government overreach, frequently infringing on civil liberties. The way German Americans were treated during World War I serves as a relevant comparison to today's digital surveillance practices under Section 702 FISA. This section identifies three key parallels: (1) the enforcement actions undertaken by citizens and the private sector; (2) the stifling of cultural and political expression; and (3) the lack of effective oversight. The analysis concludes by examining how these lessons can inform the forthcoming debate on the reauthorization of Section 702.

A. Historical Parallels: Wartime Hysteria, Targeted Communities

1. Civilian (and Corporate) Enforcement as a Tool of Fear.—During World War I, the dialogue surrounding the war and national security caused communities to feel an impending threat and took surveillance into their own hands. The APL enlisted everyday citizens to expose disloyalty.²⁶⁰ This turned neighbors into watchdogs against each other.²⁶¹ In Evansville, Liberty Bond sales were used as a means of testing loyalty, highlighting how espionage fears led to social pressure for compliance.²⁶² Those who declined to buy bonds were labeled disloyal and frequently faced severe repercussions,²⁶³ similar to what Joseph Rottmayer and George Sieveking experienced.

Today's surveillance systems function like a modern citizen-enforcement model. Private companies now often take on the roles once filled by civilians.²⁶⁴ Under Section 702, technology firms and internet service providers must assist

258. *Id.*

259. Letter from Access Now, *supra* note 252.

260. LUEBKE, *supra* note 3, at 211–12.

261. *See, e.g.,* Capozzola, *supra* note 55, at 1361.

262. *See supra* Part II.

263. *Id.*

264. Burns, *supra* note 97, at 698.

government requests, allowing the government to gather data on a large scale.²⁶⁵ Though the legal mechanisms differ from World War I's civilian deputization, both contexts create a climate of fear.²⁶⁶ Where the APL might have dug through trash, wiretapped phones, and followed individuals around to coerce compliance, today's government reliance on technology companies can sidestep traditional warrant requirements through "incidental collection" or so-called "back-door search[es]" of Americans' data.²⁶⁷ In both periods, inadequate oversight increases the likelihood of these tools being misused against minorities or marginalized groups.

2. *Erosion of Cultural and Political Expression.*—In Evansville, German Americans abandoned their language, closed their businesses, and set aside their culture to avoid suspicion.²⁶⁸ German newspapers closed, churches ceased holding services in German, and social organizations like the Germania Männerchor went underground.²⁶⁹ The pressure to assimilate was not only social but also legally reinforced through bans on German language instruction in schools and surveillance of their communities.²⁷⁰

Today, Section 702 has a similarly chilling effect, particularly within Muslim and other immigrant communities.²⁷¹ Because the statute allows the targeting of foreign individuals (with minimal regard for the incidental collection of U.S. persons' data), many people self-censor their communications—especially those with international ties—to avoid becoming subjects of government scrutiny.²⁷² The FBI has illustrated the abuse of Section 702 by targeting specific groups, including protesters and ethnic communities.²⁷³ This misuse mirrors how the APL targeted German cultural organizations.²⁷⁴

3. *Minimal Judicial Oversight and Unchecked Executive Power.*—The Espionage and Sedition Acts operated with scant judicial checks, leaving local authorities and postmasters to interpret and enforce vague definitions of "disloyalty."²⁷⁵ Similarly, the Foreign Intelligence Surveillance Court provides

265. *Id.*

266. Capozzola, *supra* note 55, at 1361.

267. Burns, *supra* note 97, at 698, 703.

268. BIGHAM, *supra* note 168, at 22.

269. *Id.*

270. *Id.*

271. Toomey & Robinson, *supra* note 130.

272. See BRENNAN CTR. FOR JUST. AT N.Y.U. SCH. OF LAW, *Comments to the Privacy and Civil Liberties Oversight Bd. re: Section 702 of the Foreign Intelligence Surveillance Act* 15–16 (Nov. 4, 2022), <https://www.brennancenter.org/our-work/research-reports/brennan-center-submits-comments-pclob-oversight-project-section-702> [<https://perma.cc/QS93-NARW>]; Lee Rainie & Mary Madden, *Americans' Privacy Strategies Post-Snowden*, PEW RSCH. CTR. (Mar. 16, 2015), <https://www.pewresearch.org/internet/2015/03/16/americans-privacy-strategies-post-snowden/> [<https://perma.cc/PE5W-8PXS>].

273. Toomey & Robinson, *supra* note 130.

274. LUEBKE, *supra* note 3 at 211–12.

275. STONE, *supra* note 40 at 178–79.

only a broad, programmatic review of Section 702 surveillance rather than scrutinizing individualized warrants.²⁷⁶ Intelligence agencies possess significant discretion in targeting foreign communications, often resulting in the incidental collection of vast amounts of data belonging to U.S. persons.²⁷⁷

Any litigant who tries to challenge these issues faces nearly impossible odds due to problems in proving standing. In *Clapper v. Amnesty International USA*, the Supreme Court protected Section 702 surveillance, holding that plaintiffs must show a “certainly impending” harm to demonstrate standing.²⁷⁸ The Court dismissed the Second Circuit’s standard for standing, stating that a mere chance of future events involving multiple separate government actions cannot meet the constitutional requirement for an actual or imminent threat.²⁷⁹ Furthermore, the Court ruled that plaintiffs could not manufacture standing by voluntarily incurring costs to mitigate a hypothetical risk of surveillance.²⁸⁰ Article III standing requirements prevent litigants from challenging Section 702 surveillance because it can be difficult to prove incidental collection with a lack of clear proof of captured communications.²⁸¹

Many Americans, particularly in Muslim and immigrant communities, pull back on their international communications and think about their cultural connections in fear of surveillance.²⁸² Government officials have historically justified increased government power through inflaming rhetoric and aggressive threats of imminent fear. Wilson emphasized and warned of sabotaging German spies “filling . . . unsuspecting communities,” while modern officials cite the prevented attacks to defend Section 702’s utility.²⁸³ Both risk minimizing surveillance’s broader costs to society’s fabric and the erosion of civil liberties it may cause.

Defenders of Section 702 argue for its necessity based on post-9/11 security needs, echoing World War I-era justifications.²⁸⁴ However, the German American experience reveals that emergency measures often persist beyond their valid reasons.²⁸⁵ Like the World War I-era laws, Section 702 has extended itself and now covers drug trafficking, cyber threats, and foreign visitor screening.²⁸⁶

Surveillance lessons are crucial for the reauthorization of Section 702. Congress should consider that granting extensive surveillance powers to the

276. Burns, *supra* note 97, at 708.

277. *Id.*

278. 568 U.S. 398, 409 (2013).

279. *Id.* at 410–14.

280. *Id.* at 416–17.

281. Burns, *supra* note 97, at 709.

282. Toomey & Robinson, *supra* note 130.

283. Moench, *supra* note 148, at 112.

284. See *Joint Statement for the Record on Section 702 of the Foreign Intelligence Surveillance Act Before the S. Comm. on the Judiciary*, 118th Cong. 5 (2023) (statement of Chris Fonzone, Gen. Couns., Off. of the Dir. of Nat’l Intel., et al.).

285. DON HEINRICH TOLZMANN, *THE GERMAN-AMERICAN EXPERIENCE* 298 (2000).

286. Burns, *supra* note 97, at 712.

Executive Branch might go beyond the intended use and cause harmful consequences. The attack on German Americans in Evansville, Indiana, demonstrates how unchecked executive authority can weaken American pluralism. Today's surveillance practices could be misused, potentially resulting in outcomes like those seen during World War I. This historical context highlights the importance of revisiting these issues.

B. Critiquing Section 702: Oversight Gaps and Domestic Implications

1. *Incidental Collection of U.S. Persons' Data.*—Although Section 702 targets “non-U.S. persons located outside the United States,”²⁸⁷ those searches tend to turn up a large volume of “incidental” U.S. communications.²⁸⁸ The FBI conducts an alarming amount of warrantless “queries” on U.S. citizens.²⁸⁹ As with the muddy lines between foreign agents and innocent civilians during World War I, the broad contours of “foreign intelligence” under Section 702 pave the way for routine domestic surveillance.²⁹⁰ This situation is especially intense for individuals with strong connections overseas—reflecting how simply speaking German a century ago could provoke suspicion.

2. *Judicial Oversight Deficiencies.*—The FISC provides only a limited review of Section 702 surveillance.²⁹¹ Section 702's approval relies on generalized certifications by the FISC rather than individual warrants.²⁹² This structural design permits extensive executive branch latitude in deciding who and what to monitor. During World War I, federal authorities similarly turned to local infrastructures, such as vigilantes and postmasters. This risked problems as much of the work done was unchecked.²⁹³ Congress has held hearings on Section 702 compliance,²⁹⁴ but the current system lacks the proper checks and balances to curb overreach. The secretive nature of FISC proceedings and broad government interpretations of “foreign intelligence” shield the program from much outside scrutiny.²⁹⁵

3. *Societal Chilling Effect.*—When people are aware that they could be surveilled, they might alter their behavior.²⁹⁶ Studies indicate that some Muslim Americans and immigrant groups limit their religious gatherings, avoid political

287. MAJORITY FISA WORKING GRP., *supra* note 124, at 21.

288. Burns, *supra* note 97, at 698.

289. *Id.* at 700.

290. *Id.* at 694.

291. Beller, *supra* note 134, at 201.

292. Burns, *supra* note 134, at 695–96.

293. *See, e.g.*, CHRISTOPHER CAPOZZOLA, *UNCLE SAM WANTS YOU: WORLD WAR I AND THE MAKING OF THE MODERN AMERICAN CITIZEN* 152 (2008); *see also* Capozzola, *supra* note 55, at 1361.

294. Joint Statement for the Record, Hearing on Oversight of Section 702 of the Foreign Intelligence Surveillance Act Before the S. Comm. on the Judiciary, 118th Cong. (June 13, 2023).

295. Beller, *supra* note 134, at 163; Burns, *supra* note 97, at 694.

296. BRENNAN CTR. FOR JUST., *supra* note 272.

discussions online, and refrain from making international calls families.²⁹⁷ Similarly, German Americans in Evansville avoided speaking German publicly and changed their names to appear more American.

C. What Should We Do? Lessons from the Treatment of German Americans

Congress should heed the historical lessons from the treatment of German Americans when deciding whether—or how—to reauthorize FISA Section 702. At least three crucial themes emerge: (1) the recurrent pattern of wartime civil liberties curtailments, (2) the erosion of constitutional protections through unchecked surveillance powers, and (3) the disproportionate harm to communities.

1. *Patterns of Wartime Civil Liberties Curtailments.*—Emergencies have consistently prompted rapid expansions of executive power, from the World War I crackdown on dissent to the post-9/11 surveillance apparatus.²⁹⁸ Congress has been, and will likely continue to be, willing to give extensive power to the executive that risks impacting the protections and fundamental rights that the Constitution guarantees in times of perceived threat.²⁹⁹ Initially designed to combat “disloyalty,” the Espionage Act became a mechanism targeting labor organizers and peace activists.³⁰⁰ Section 702 illustrates a comparable mission creep: initially defended for counterterrorism, it now encompasses inquiries into cybercrime, narcotics, and other areas.³⁰¹ This shift resembles the uncontrolled expansion of anti-German actions into daily life’s cultural, social, and linguistic aspects.

2. *Erosion of Constitutional Principles.*—Section 702’s design can abridge the Fourth Amendment through “incidental” and “about” collection practices, which allow the government to capture and query Americans’ communications without a traditional warrant.³⁰² Many scholars have noted and opined that the Constitution has some flexibility in times of crisis.³⁰³ But this theory and

297. *Id.* Beyond other historical events, both *Trump v. Hawaii*, 585 U.S. 667 (2018) and surveillance policies under FISA Section 702 have created a belief that Muslim Americans are inherent security threats. This has affected their free expression and undermined civic participation, like the experiences of German Americans during World War I. As the executive branch expands its reach, concerns about how Section 702 could be used to target groups continue. Given the extensive powers conferred by existing surveillance laws, upcoming administrations may exploit these authorities in ways that could disproportionately affect vulnerable populations. *See, e.g.,* Jennifer Lee Koh, *Executive Discretion and First Amendment Constraints on the Deportation State*, 56 GA. L. REV. 1473, 1480 (2022).

298. *See* Napolitano, *supra* note 30, at 468–72; Sedition Act of 1918, Pub. L. No. 65-150, 40 Stat. 553 (1918).

299. *See, e.g.,* STONE, *supra* note 40.

300. Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (1917).

301. Burns, *supra* note 97, at 712.

302. PRIV. & CIV. LIBERTIES OVERSIGHT BD., *supra* note 113, at 7.

303. *See, e.g.,* Charles Hughes, *War Powers Under the Constitution*, 2 MARQ. L. REV. 3, 17 (1917).

principle should not justify the wholesale abandonment of constitutional protection. The program's structure creates a legal fiction that surveillance targeting foreigners does not implicate Americans' constitutional rights, even when it routinely captures American communications.³⁰⁴

The debate over Section 702 reveals the tension between what scholars Eric Posner and Adrian Vermeule term the "accommodation view" and the "strict view" of civil liberties during emergencies.³⁰⁵ Section 702 embodies the accommodation view taken to its extreme. It prioritizes governmental discretion to a degree that it risks completely forgoing the Fourth Amendment protections for some Americans. However, as Geoffrey Stone's analysis of historical overreach demonstrates, such wartime restrictions on civil liberties have often proved excessive and, in hindsight, often unwarranted to the degree in which they are taken.³⁰⁶

The program's oversight mechanisms have proven that they can fail. Samuel Issacharoff and Richard Pildes hypothesize an "institutional process" model for effective oversight.³⁰⁷ The FISA Court's limited review of general procedures, rather than individual surveillance decisions, can lead to meaningless and ineffective checks on executive power. Issacharoff and Pildes would advocate for a more meaningful check on this type of power.³⁰⁸ Similarly, Amanda Tyler advocates for maintaining a "business as usual" judicial review during emergencies, where courts consider and decide cases as if circumstances were normal.³⁰⁹ However, as it currently stands, Section 702's structure systematically prevents meaningful review.

3. *Disproportionate Effects.*—Modern surveillance programs, like the restrictions on German Americans during World War I, can disproportionately affect specific communities within the United States.³¹⁰ Evidence suggests that Muslim Americans, Arab Americans, and those similarly situated face heightened scrutiny under Section 702.³¹¹ This awareness creates a chilling effect on cultural practices and life.³¹²

Mark Tushnet argues that to effectively address contemporary issues that balance the interests of national security and civil liberties, we must utilize and

304. See, e.g., PRIV. & CIV. LIBERTIES OVERSIGHT BD., *supra* note 113, at 6.

305. Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* 55 (Mark Tushnet ed., 2005).

306. STONE, *supra* note 40, at 539.

307. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 *THEORETICAL INQUIRIES L.* 1, 2, 6 (2003).

308. *Id.* at 5–6.

309. Amanda L. Tyler, *Judicial Review in Times of Emergency: From the Founding Through the Covid-19 Pandemic*, 109 *VA. L. REV.* 489, 561–62 (2023).

310. Toomey & Robinson, *supra* note 130.

311. *Id.*

312. BRENNAN CTR. FOR JUST., *supra* note 272.

learn from past examples of overreach.³¹³ Thus, the insights we glean from German Americans during World War I and other historical instances, where civil liberties were sacrificed for national security, should shape our responses to today's problems. Eugene Rostow condemned the internment of Japanese Americans, highlighting the dangers of unrestrained executive authority.³¹⁴ Likewise, the extensive surveillance powers under Section 702 illustrate how, once granted, emergency powers can have lasting effects on civil liberties.

D. Recommendations: Concrete Steps for Reform

1. *Enhance Statutory Guardrails and Sunset Provisions.*—Congress should consider and refine Section 702 to prevent overreach. One step could be to narrow the definition of “foreign intelligence.”³¹⁵ It could also restrict or outright prohibit “about” collection practices. Another step is to enact meaningful sunset clauses to require comprehensive review. This approach would require lawmakers to consistently reassess the necessity and scope of surveillance instead of mere automatic reauthorization.

2. *Strengthen Judicial Review.*—Adopting individualized review processes for U.S. person queries would curb some of Section 702's most controversial backdoor searches. The FISA Court should have the authority to review, in real-time, significant executive branch decisions that affect Americans, drawing on the principle of “business as usual” judicial oversight advocated by scholars like Amanda Tyler.³¹⁶

3. *Lower Barriers to Standing and Litigation.*—*Clapper's* “certainly impending” standard³¹⁷ makes any type of meaningful judicial scrutiny of mass surveillance nearly impossible. One possible change could be to adopt the more flexible standard taken by the Second Circuit—the “objectively reasonable likelihood” test—which would allow more challenges of unconstitutional surveillance to proceed through the courts without having to present near-impossible proof that they were personally monitored.³¹⁸

4. *Promote Transparency and Independent Oversight.*—All things Section 702 are generally shrouded in secrecy. Producing regular, declassified reports to Congress—and sometimes to the public—would help reduce the secrecy surrounding surveillance measures. Another method may be to add structured audits to ensure that executive agencies cannot stretch their authority in the

313. Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 295–96 (2003).

314. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 491 (1945).

315. 50 U.S.C. § 1801(e).

316. Tyler, *supra* note 309, at 561–62.

317. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013).

318. *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 134 (2d Cir. 2011), *rev'd*, 568 U.S. 398 (2013); *see also Clapper*, 568 U.S. at 432–33, 441 (Breyer, J., dissenting) (arguing Article III standing is satisfied by a “reasonable probability” or “substantial risk” of surveillance).

interest of national security.

The story of German Americans in World War I offers a historical backdrop that sheds light on today's discussions around FISA Section 702. Both instances illustrate how unrestrained government power can foster a culture of fear and self-censorship, leading to community alienation, hindering free expression, and diminishing public trust.

As Congress considers reauthorizing Section 702, it is vital to reflect on historical lessons during these discussions. The absence of safeguards, limited oversight, and lack of judicial recourse poses a considerable threat to civil liberties and social cohesion. By examining the experiences of German Americans, lawmakers can recognize the long-lasting consequences of wartime surveillance and devise a more balanced, constitutionally sound approach forward.

CONCLUSION

The issues surrounding FISA Section 702 are eerily reminiscent of past government overreach. Today, many recognize that current surveillance laws also lack vital safeguards, yet Congress has failed to pass any amendments to Section 702 to formalize these concerns.

As Congress debates reauthorization, it must remember the history of German Americans during World War I. National security will always remain a vital concern, but it should be carefully balanced with constitutional rights. When fear takes over and begins to shape policy, people often suffer, as some groups still do today. And when these freedoms are encroached upon, it can become difficult, if not impossible, to reverse without hard-fought efforts. To prevent past mistakes from repeating themselves, lawmakers must enforce strong oversight, transparency, and limits on government surveillance. By learning from history, Congress can help ensure that national security does not justify the erosion of civil liberties.