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Five Eyes: Unblinking, Unmoving, and Out of Control

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Five Eyes: Unblinking, Unmoving, and Out of Control

By: Braden Couch[†]

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I. Introduction

You have probably seen the meme, or a variation of it: federal agents are watching you through the camera on your computer or your phone.¹ One need not look further than around a classroom or workplace: sticky notes and pieces of tape cover the cameras of many electronic devices. While it is unknown to what extent the federal government is spying on American citizens through their computer webcams,² it may surprise many to know that the United States government is not the only sovereign power that may be

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¹ Kathryn Watson, *The 'FBI Agent Watching Me' Meme is About Accepting Mass Surveillance*, THE DAILY DOT (Apr. 26, 2018), <https://www.dailydot.com/unclick/fbi-agent-watching-me-meme/> [https://perma.cc/V4X8-ZXGR].

² See Kim Zetter, *Everything We Know About How the FBI Hacks People*, WIRED (May 15, 2016), <https://www.wired.com/2016/05/history-fbis-hacking/> [https://perma.cc/R4LP-L3KS] (explaining that it is not currently publicly known what information the FBI or other federal agencies gather through other electronic surveillance, although previous cases indicate some changes over time in the information gathered).

snooping around in the personal data of American citizens.³ The charter of the Central Intelligence Agency (“CIA”) does not permit the organization to conduct intelligence operations on the domestic activities of United States citizens,⁴ and the National Security Agency (“NSA”) is barred by law from carrying out certain types of spying on American citizens.⁵ Nations such as the United Kingdom, Canada, Australia, and New Zealand, however, each have different surveillance laws that at times make it easier for those nations to legally spy on American citizens.⁶ These differing laws provide an “incentive” for each nation’s intelligence agencies to be complicit with foreign governments spying on their own citizens.⁷ This seemingly innocuous truism provides the backdrop for the amorphous intelligence collective known as “Five Eyes,” formed by the UKUSA Agreement (“the Agreement”).⁸ Each of the respective nations included within the Agreement have their own anti-

³ See Joe Carter, *What You Should Know About the “Five Eyes” Intelligence Community*, PROVIDENCE (May 19, 2017), <https://providencemag.com/2017/05/know-five-eyes-intelligence-community/>

[<https://perma.cc/X6FT-DT3Z>] (stating that the original UKUSA Agreement developed the understanding that respective governments would not spy on each other’s citizens without permission, although a 2005 NSA directive indicates that the partners “reserve the right to conduct intelligence operations against each other’s citizens when it is in the best interest of each nation.”).

⁴ See Adam Janos, *Nixon and Johnson Pushed the CIA to Spy on U.S. Citizens, Declassified Documents Show*, HISTORY (July 10, 2018), <https://www.history.com/news/cia-surveillance-operation-chaos-60s-protest>

[<https://perma.cc/V3C3-HJR3>] (stating that the Agency’s charter, drafted when the agency was created in 1947, mandated that “the CIA focus its counterintelligence on overseas targets only,” reflecting the “Constitutional principle that American citizens are entitled to a high degree of personal privacy.”).

⁵ Conor Friedersdorf, *Is ‘The Five Eyes Alliance’ Conspiring to Spy on You?*, THE ATLANTIC (June 25, 2013), <https://www.theatlantic.com/politics/archive/2013/06/is-the-five-eyes-alliance-conspiring-to-spy-on-you/277190/> [<https://perma.cc/44GQ-DF9L>].

⁶ *Id.*

⁷ *Id.*

⁸ Scarlet Kim, *Newly Disclosed NSA Documents Shed Further Light on Five Eyes Alliance*, LAWFARE (Mar. 25, 2019), <https://www.lawfareblog.com/newly-disclosed-nsa-documents-shed-further-light-five-eyes-alliance> [<https://perma.cc/4M89-A57H>] (stating that a 1985 declassified document notes that the nature and scope of the UKUSA Agreement extends to third parties as well, with “special consideration . . . given to Canada, Australia, and New Zealand and to not consider them as third parties. This special consideration is documented in Appendix J of the 1955 version of the agreement and gives rise to what we now know as the Five Eyes Alliance.”).

domestic surveillance laws.⁹ It is alleged that each party to the Agreement spies on other parties' citizens and the intelligence gleaned therein is shared amongst at least the collective.¹⁰ Five Eyes is a multilateral, intelligence sharing, secret-treaty that was originally formed in 1946 by the United States and the United Kingdom.¹¹ The current five respective "eyes" include the United States, the United Kingdom, Australia, New Zealand, and Canada.¹² Additional nations have also had access to respective programs within the Five Eyes network, and there is talk of greater expansion.¹³

The United States' national security apparatus is becoming increasingly interconnected with the national security apparatuses of the broader global community.¹⁴ Nearly all of the information available on Five Eyes was intended to be classified, but many documents were made public through a series of legal fights and massive whistleblowing.¹⁵ Most Americans have undoubtedly seen or read the pervasive, ongoing hand-wringing over the broad scope of the almost two decade old "Patriot Act,"¹⁶ but Five Eyes has largely stayed out of the public consciousness.¹⁷ With the continued rollback of civil liberties across the board by the current

⁹ See Friedersdorf, *supra* note 5 (stating "Allied countries have different laws and surveillance rules.").

¹⁰ *See id.*

¹¹ J. Vitor Tossini, *The Five Eyes – The Intelligence Alliance of the Anglosphere*, UK DEFENCE JOURNAL (Nov. 14, 2017), <https://ukdefencejournal.org.uk/the-five-eyes-the-intelligence-alliance-of-the-anglosphere/> [<https://perma.cc/52Q7-9RJF>].

¹² *Id.*

¹³ Noah Barkin, *Exclusive: Five Eyes Intelligence Alliance Builds Coalition to Counter China*, REUTERS (Oct. 12, 2018), <https://www.reuters.com/article/us-china-fiveeyes/exclusive-five-eyes-intelligence-alliance-builds-coalition-to-counter-china-idUSKCN1MM0GH> [<https://perma.cc/EDW2-DM6E>].

¹⁴ *See id.*

¹⁵ Richard Norton-Taylor, *Not So Secret: Deal at the Heart of UK-US Intelligence*, THE GUARDIAN (June 24, 2010), <https://www.theguardian.com/world/2010/jun/25/intelligence-deal-uk-us-released> [<https://perma.cc/8EQJ-G4ZE>].

¹⁶ 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, 272 (stating that the goal of the act was to "deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes").

¹⁷ See Friedersdorf, *supra* note 5.

administration,¹⁸ the growth of Five Eyes represents a potential existential threat to the health and wellbeing of the United States. In essence, to roughly translate the famed Roman satirist Juvenal, “Who watches the Watchmen?”¹⁹ The incredibly broad swath of data collection²⁰ ensures the proverbial Watchmen will be aware of you, but who is there to keep them reined in?

Analysis proceeds in six parts. Part I summarizes the history and background of Five Eyes, considering the original need for and contributions the intelligence treaty offered to the broader global community. Part II discusses the history of the Agreement. Part III traces the evolution of the respective parties’ intelligence gathering over time. Part IV centers on the legality of the Agreement within the United States’ statutory and constitutional law. Part V examines potential hurdles to reform, and considers several different methods by which the Agreement could be eliminated or at least partially modified and reined in. Part VI concludes the piece by looking into the future and determining the most probable policy outcome.

II. Background

One of the greatest intelligence failures in American history came to a head on the morning of December 7, 1941, when Imperial Japan bombed the majority of the U.S. Pacific Fleet stationed at Pearl Harbor.²¹ The casualty numbers on their own are astounding – over 3,500 American soldiers were killed, wounded, or reported missing in action – not to mention the hundreds of fighter planes destroyed on the ground, and the damage to and destruction of at least 17 ships.²² Despite the widespread shock amongst the

¹⁸ See generally *Trump Administration Civil and Human Rights Rollbacks*, THE LEADERSHIP CONFERENCE ON CIVIL & HUMAN RIGHTS (Aug. 2019), <https://civilrights.org/trump-rollbacks/> [<https://perma.cc/UM5L-HSPZ>] (listing the constraint of civil liberties during the Trump administration).

¹⁹ JUVENAL, SATIRE VI, 268 (Susanna Morton Braund ed., Harvard Univ. Press 2014).

²⁰ See Kim, *supra* note 8 (stating that declassified documents “confirms our understanding of the broad scope of the UKUSA Agreement.”).

²¹ *Pearl Harbor: An Intelligence Failure That Lives in Infamy*, STRATFOR (Dec. 7, 2016), <https://worldview.stratfor.com/article/pearl-harbor-intelligence-failure-lives-in-famy> [<https://perma.cc/2GL9-VHKK>] [hereinafter STRATFOR].

²² *Overview of the Pearl Harbor Attack, 7 December 1941*, NAVAL HISTORY & HERITAGE COMMAND (Dec. 1991), <https://www.history.navy.mil/browse-by-topic/wars-conflicts-and-operations/world-war-ii/1941/pearl-harbor.html> [<https://perma.cc/3FZU-DMRA>].

American public at the time, a sizeable amount of intelligence existed that indicated an imminent attack at Pearl Harbor and across the broader Pacific.²³ The Empire of Japan was in the midst of war with China and was engaged in long-standing negotiations with the United States “to stabilize the situation in Southeast Asia.”²⁴ After the negotiations broke down, U.S. intelligence intercepted communications indicating that Tokyo did not see a future for its diplomatic relations with the United States.²⁵ American communications specialists cracked the codes Japan was using for diplomatic missives and could read the messages Tokyo sent to its various embassies, including instructions sent just ahead of the attack for diplomatic posts to destroy all sensitive materials.²⁶ Yet when the Imperial Japanese Navy struck Pearl Harbor, the U.S. Pacific Fleet was sitting unaware and vulnerable in port.²⁷ The United States knew of Japan’s preparations for hostilities, but it came up short in understanding Tokyo’s thinking and anticipating its strategy.²⁸

That said, “[c]ompared with the elaborate infrastructure that the United States boasts today, the country’s intelligence apparatus was inchoate in the early 1940s.”²⁹ Instead, the intelligence capabilities of the United States “did not begin to develop in earnest until after World War II concluded.”³⁰ During the war, the United States and the United Kingdom informally shared intelligence regarding their Axis enemies, but after the conclusion of the War, neither country thought it wise to cease strategic intelligence sharing,³¹ as the Nazi threat had been replaced by the Soviet threat.³² This agreement was

²³ STRATFOR, *supra* note 21.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ STRATFOR, *supra* note 21.

³⁰ *Id.*

³¹ Paul Farrell, *History of 5-Eyes–Explainer*, THE GUARDIAN (Dec. 2, 2013), <https://www.theguardian.com/world/2013/dec/02/history-of-5-eyes-explainer> [https://perma.cc/JCZ6-RBL8].

³² See Vladimir Dubinsky, *How Communism Took Over Eastern Europe After World War II*, THE ATLANTIC (Oct. 22, 2012), <https://www.theatlantic.com/international/archive/2012/10/how-communism-took-over-eastern-europe-after-world-war-ii/263938/> [https://perma.cc/N93S-UR74] (explaining

formalized as the UKUSA Agreement on March 5, 1946.³³ As dominion nations of the British Commonwealth at the time, New Zealand, Australia, and Canada were given elevated status over other third-party members to the alliance.³⁴ This initial Agreement specifically related to “foreign intelligence,” which was defined as:

[A]ll communications of the government or of any military, air, or naval force, faction, party, department, agency, or bureau of a foreign country, or of any person or persons acting or purporting to act therefor, and shall include communications of a foreign country which may contain information of military, political or economic value.³⁵

Surprisingly, the Agreement was not signed by President Truman, who was in office at the time of its conception, but was signed solely by senior military officials from the United States.³⁶ Discussion of the legality of this novelty is addressed in Part III of the piece.

In its infancy, the Agreement “specifically exclude[d] the U.S., the British Commonwealth and nations, and the British Empire from the scope of this sort of information.”³⁷ “By 1955, the role of the other Five Eyes nations was formalized when the Agreement was updated: ‘At this time only Canada, Australia and New Zealand will be regarded as UKUSA-collaborating Commonwealth countries,’” pursuant to an annexure in the 1955 Agreement.³⁸ The Commonwealth countries were required to “collaborate directly with tasks as determined by the [NSA], and . . . exchange raw material, technical material, and end product of these tasks.”³⁹ At present, most of the relevant documents for the post-1955 Agreement are still classified,⁴⁰ so it is unclear how much the terms

how after the Nazis withdrew from Eastern Europe, their domination was replaced by that of the Soviet Union).

³³ Farrell, *supra* note 31.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Farrell, *supra* note 31.

⁴⁰ *Id.*

and scope of the Agreement may have changed over the last 70 years.⁴¹ In fact, the existence and legitimacy of the original 1946 Agreement was only officially acknowledged by the U.S. government in 2010.⁴²

Regardless of the ambiguities surrounding the exact language of the current Agreement, due to a combination of leaks and investigative journalism, the Agreement became public knowledge long before 2010.⁴³ As one may expect, the parties to the Agreement do not always get along – backbiting and threats to stop the flow of intelligence between the member states are commonplace.⁴⁴

The occasional setback aside,⁴⁵ the intelligence gathering arms of the parties had multiple “successes” during the Cold War.⁴⁶ The United Kingdom’s General Communications Headquarters (“GCHQ”) and the NSA continually shared intelligence on the Soviet Union and China, while also working together on the “Exotics,” the term British and American intelligence used to refer to Eastern European nations.⁴⁷ During the 1950s, MI6 and the CIA jointly planned the overthrow of the democratically elected government of Iran, placing the Shah in power.⁴⁸ The following decade, British and American intelligence were once again involved in the overthrow of a democratically elected government – this time resulting in the assassination of the Former Congolese Prime

⁴¹ *Id.*

⁴² Norton-Taylor, *supra* note 15.

⁴³ *See id.*

⁴⁴ *See* Richard Aldrich, *Allied Code-Breakers Cooperate - But Not Always*, THE GUARDIAN (June 24, 2010), <https://www.theguardian.com/world/2010/jun/24/intelligence-sharing-codebreakers-agreement-ukusa> [<https://perma.cc/X4E5-2EDJ>] (recounting President Nixon’s cutting off of intelligence to the British for being too pro-Europe, with retaliations back and forth until Watergate forced Nixon from office).

⁴⁵ *See id.* (discussing the cut-off of Canada from intelligence sharing for three days in 1990, until the Canadian government agreed to send warships to participate in the first Gulf War).

⁴⁶ *See id.* (stating that the agreement was a unique alliance that operates to this day).

⁴⁷ *Id.*

⁴⁸ *See* Raf Sanchez, *British Diplomats Tried to Suppress Details of MI6 Role in Iran Coup*, THE TELEGRAPH (Aug. 19, 2013), <https://www.telegraph.co.uk/news/worldnews/northamerica/usa/10253384/British-diplomats-tried-to-suppress-details-of-MI6-role-in-Iran-coup.html> [<https://perma.cc/XC57-UFXB>].

Minister Patrice Lumumba.⁴⁹ In the early 1970s, the Australian Secret Intelligence Service (“ASIS”) and the CIA jointly worked to overthrow Chile’s democratically elected government and installed the brutal Pinchot regime.⁵⁰ Concurrently, as the Vietnam War waged on in Indochina, GCHQ technicians, based out of the listening station in British Hong Kong, provided significant assistance to American intelligence in monitoring North Vietnamese air defenses.⁵¹

The intelligence sharing network was unable to discern either the health of the Soviet Union or its respective military capabilities.⁵² The speed at which South Vietnam fell shocked the parties to the Agreement,⁵³ as did the fall of the Soviet Union and the breakup of Yugoslavia.⁵⁴ More recently, the parties to the Agreement have come under fire for not being aware of or alerting New Zealand of the massive online presence of the Christchurch terrorist, which included “pictures of his weapons posted online before the shooting and an apparent manifesto describing the contours of his white supremacist and right-wing ideology shared on social media.”⁵⁵ Intelligence experts have argued that these types of domestic terrorism are “very difficult to detect and disrupt,” and posited that “Five Eyes countries, including New Zealand [should] seek ways to access encrypted personal data legally in an effort to thwart terrorist attacks.”⁵⁶

These recent terror attacks⁵⁷ have only added to the call for

⁴⁹ Gordon Corera, *MI6 and the Death of Patrice Lumumba*, BBC (Apr. 2, 2013), <https://www.bbc.com/news/world-africa-22006446> [<https://perma.cc/3C6X-AB43>].

⁵⁰ Max Suich, *Spymaster Stirs Spectre of Covert Foreign Activities*, THE AUSTRALIAN (Mar. 20, 2010), <https://www.theaustralian.com.au/news/inquirer/spymaster-stirs-spectre-of-covert-foreign-activities/news-story/81531449790cf1321578d684e368905c> [<https://perma.cc/6HPW-EHM6>].

⁵¹ Richard J. Aldrich, *GCHQ: The Uncensored Story of Britain’s Most Secret Intelligence Agency* 277 (2010).

⁵² See Tim Weiner, *Legacy of Ashes: The History of CIA* 329–30 (2006).

⁵³ *Id.* at 341.

⁵⁴ See *id.* at 329.

⁵⁵ Cristina Maza, *New Zealand Mosque Attack Difficult to Prevent Despite Five Eyes Intelligence Sharing, Experts Say*, NEWSWEEK (Mar. 15, 2019), <https://www.newsweek.com/new-zealand-mosque-attack-five-eyes-security-1365155> [<https://perma.cc/NVZ3-6B9J>].

⁵⁶ *Id.*

⁵⁷ See *id.*

expanding the intelligence-sharing network, which has already seen a soft expansion in recent years with the cooperation of countries such as Germany and Japan in the Agreement, as a way to combat “Chinese influence[,] operations[,] and investments.”⁵⁸ Although the governments of each respective nation have no comment on the matter, a high-ranking U.S. official stated that “[c]onsultations with our allies, with like-minded partners, on how to resolve China’s assertive international strategy have been frequent and are gathering momentum.”⁵⁹ Combating increased Russian influence on global issues has also been discussed.⁶⁰ Further, a number of nations have been granted “observer” status within the Agreement, giving said nations limited access to shared intelligence.⁶¹ The exact number of “observer” status nations is, however, unknown and estimations are based on covert leaks.⁶² Overall, it appears highly likely that the number of nations included within the Five Eyes Agreement is only set to increase.

III. Intelligence Gathering Mechanisms: Evolution Over Time

The Agreement was signed initially in 1946 and remains in force today.⁶³ What started as largely “signal intelligence” gathering transitioned into the massive “Echelon” data collection system – the scope of which was most recently detailed by the disclosures of various leakers, including Edward Snowden.⁶⁴ This section will analyze the changes over time in mechanisms used by parties to the Agreement, highlighting the increasing amount of intelligence that is being collected, while also noting when certain individual aspects of the program became public.

Following the outline set forth in the updated 1955 Agreement, the three new parties to the Agreement – Australia, Canada, and New Zealand – were to “‘collaborate directly,’ with tasks as

⁵⁸ Barkin, *supra* note 13.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See Phillip Dorling, *Singapore, South Korea Revealed as Five Eyes Spying Partners*, THE SYDNEY MORNING HERALD (Sep. 25, 2013), <https://www.smh.com.au/technology/singapore-south-korea-revealed-as-five-eyes-spying-partners-20131124-2y433.html> [<https://perma.cc/ZJ7N-HW59>].

⁶² *See id.*

⁶³ Aldrich, *supra* note 44.

⁶⁴ See Farrell, *supra* note 31 (defining signals as “high-frequency radio that could be transmitted around the world”).

determined by the NSA and ‘exchange raw material, technical material and end product of these tasks.’”⁶⁵ In the 1940’s and 1950’s, these end products were largely high-frequency radio signals that delivered messages around the world, necessitating “a whole network of stations to monitor HF radio” and “[m]any of those stations are still here.”⁶⁶ By the 1960’s, “these radio signals were left behind; in their place came satellite or microwave relay communications, and each of the parties began developing interception methods for these. With each leap in technology came new capabilities.”⁶⁷ More specifically, as explained by Des Ball, an Australian intelligence expert, these changes in medium meant that data collection “moved into facilities that could intercept those much shorter-range signals.”⁶⁸

As the technological capabilities advanced, so too did the nature of the surveillance.⁶⁹ As stated above, the initial Agreement was written with the intent “to share information about intelligence gathered on foreign countries, not domestic surveillance.”⁷⁰ The Agreement specifically “exclude[d] the US, the British Commonwealth and nations, and the British Empire from the scope of this type of information.”⁷¹ This has since shifted to a policy that “enable[d] spying on [Five Eyes] partners, even without the permission of the other country.”⁷² A leaked 2005 NSA draft directive stated that the Agreement “has evolved to include a common understanding that both governments will not target each other’s citizens/persons. However, when it is in the best interest of each nation, each reserves the right to conduct unilateral Comint [(communications intelligence)] action against each other’s citizens/persons.”⁷³ The same draft directive went on to further say that “[u]nder certain circumstances, it may be advisable and allowable to target second-party persons and second-party communications unilaterally when it is in the best interest of the

⁶⁵ *See id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *See id.*

⁷⁰ Farrell, *supra* note 31.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

US.”⁷⁴ This change in policy is considered a major risk to the privacy interests and constitutional rights of citizens of all nations party to the Agreement.⁷⁵ Where once there was at least something of a “clear distinction between intelligence gathering on non-nationals and domestic citizens, [this] appears to have changed.”⁷⁶ Executive Director of the Cyberspace Law and Policy Centre David Vaile argues:

If you actually did want to spy more on the local people then it appears that with the cooperation of the other partners this is easier, because they would have the legal right in their own domestic law to treat citizens of other countries as foreigners, and that appears to be where the rot has set in.⁷⁷

Although defeating terrorism and preventing death are both noble objectives, normatively speaking, the Echelon surveillance system “is now used to monitor billions of private communications worldwide,” begging the question what percentage of those private communications are even tangentially related to terrorism.⁷⁸ Whistleblowers and investigative journalists have found a substantial amount of evidence that reaffirms the argument that parties to the Agreement use it to spy on their own citizens.⁷⁹ It has been reported that “phone, internet and email records of UK citizens not suspected of any wrongdoing have been analyzed and stored by the NSA under a secret deal that was approved by British intelligence officials, according to documents from the intelligence leaker Edward Snowden.”⁸⁰ In 2007, the rules were changed to allow the NSA to analyze and retain any British citizen’s mobile phone and fax numbers, emails, and IP addresses swept up by its

⁷⁴ *Id.*

⁷⁵ *See id.*

⁷⁶ Farrell, *supra* note 31.

⁷⁷ *Id.*

⁷⁸ See James Ball, *US and UK Struck Secret Deal to Allow NSA to ‘Unmask’ Britons’ Personal Data*, THE GUARDIAN (Nov. 20, 2013), <https://www.theguardian.com/world/2013/nov/20/us-uk-secret-deal-surveillance-personal-data> [<https://perma.cc/RW8D-89GM>].

⁷⁹ *Id.*

⁸⁰ *Id.*

dragnet.⁸¹ “Previously, this data had been stripped out of NSA databases – ‘minimized’ in intelligence agency parlance – under rules agreed between the two countries.”⁸² These communications were “incidentally collected”⁸³ by the NSA, meaning the individuals were not the initial targets of surveillance operations and, therefore, were not suspected of wrongdoing.⁸⁴

The NSA in turn used the data collected to conduct “so-called ‘pattern of life’ . . . analyses, under which the agency can look up to three ‘hops’ away from a target of interest . . . [analysis] suggests three hops for a typical Facebook user could pull the data of more than 5 million people into the dragnet.”⁸⁵ The same document went on to extoll the intelligence sharing, “there are circumstances when targeting of second party persons and communication systems, with the full knowledge and operation of one or more parties, is allowed when it is in the best interests of each nation.”⁸⁶ The document further laid out potential examples of such sharing, which included “targeting a UK citizen located in London using a British telephone system.”⁸⁷ The governments of the United States and the United Kingdom declined to comment when this batch of documents was released, not answering whether they knew or sanctioned the change in intelligence gathering mechanisms.⁸⁸ The release of these details may spark a general question: How is this legal?

IV. Is this Legal?

For the purposes of this section, the legality of the Five Eyes intelligence sharing network will be analyzed solely through the lens of the U.S. legal framework. This is not to say that there are not legal concerns present in the other nation’s systems, but given the United States’ leading role in the alliance, it is best to consider the legal background of the Agreement within the United States. As

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* (defining incidental collection as collection of personal information from individuals that “were not the initial targets of surveillance operations and therefore were not suspected of wrongdoing.”).

⁸⁴ Ball, *supra* note 78.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

mentioned above, the Agreement was not signed by President Truman, but by top military leaders of both the United Kingdom and the United States.⁸⁹ Passing reference is given to Presidential authorization, specifically in an appendix signed in 1946, that granted the Federal Bureau of Investigation (FBI) permission to participate in the program.⁹⁰ There, the Director of the FBI's briefing with the military leaders that signed the original agreement is detailed, but Fleet Admiral William D. Leahy, the senior-most naval officer who served in WWII, did not directly inform President Truman or seek authorization from him.⁹¹ Instead, Admiral Leahy felt that:

[the] STANCIB (United States Communications Intelligence Board) should make proper arrangements with the FBI, and work out satisfactory arrangements with the British. Admiral Leahy does not wish to commit the President in this whole matter . . . because of the excellent ammunition all such dealings would furnish the opposition were the facts to be made public at some later point during his tenure of office.⁹²

It is unknown whether or not President Truman was briefed on the matter and decided to let it proceed without his authorization, but it is unquestioned that no direct presidential authorization was given for the creation of the Agreement in 1946.⁹³

The updated Agreement, which brought Australia, Canada, and New Zealand into the fold as full members on May 10, 1955, also made no mention of direct presidential authorization.⁹⁴ Instead, the Agreement stated, “[N]o attempt should be made to over-formalize and that the present direct exchanges of signals and letters should

⁸⁹ Memorandum from W.R. Smedberg III on U.S. - British to Admiral Stone, Admiral Inglis, General Vandenberg, General Corderman, Captain Wenger, (Feb. 19, 1946) (on file with National Security Agency), https://www.nsa.gov/Portals/70/documents/news-features/declassified-documents/ukusa/fbi_stancib_19feb46.pdf [<https://perma.cc/F5GS-PC9H>].

⁹⁰ *Id.*

⁹¹ *See id.*

⁹² *Id.*

⁹³ *See id.*

⁹⁴ *Amendment No. 4 to the Appendices to the UKUSA Agreement (Third Edition)*, NATIONAL SECURITY AGENCY (May 10, 1955) [hereinafter *Amendment No. 4*].

continue.”⁹⁵ It went on to state that “[i]t will be contrary to this Agreement to reveal its existence to any third party unless otherwise agreed by the two parties.”⁹⁶

In order to be constitutional as an executive action, the Agreement must either be an international treaty or executive agreement, and must also pass Article VI muster.⁹⁷ Analysis within this section is broken into two parts: the first concerning whether the Agreement is a valid international treaty or executive agreement, and the second discussing whether Article VI of the Constitution is violated.

A. International Treaty, Executive Agreement, or Illegal Executive Action?

Article II, Section 2 of the Constitution gives the President of the United States the authority to “make Treaties, provided two-thirds of the Senators present concur.”⁹⁸ These treaties are treated as the “supreme law of the land,” courtesy of the Supremacy Clause.⁹⁹ Alternatively, the President may enter into executive agreements, which are not considered treaties for the purpose of the Constitution, though they are considered by some to be politically rather than legally binding.¹⁰⁰ Executive agreements have been conferred the same legal status as treaties, despite not requiring the advice and consent of the U.S. Senate.¹⁰¹ However, the broader permissibility of executive agreements was narrowed somewhat by the passage of the Case-Zablocki Act in 1972,¹⁰² which states that “[t]he Secretary of State shall transmit to the Congress the text of any international agreement . . . other than a treaty, to which the United States is a party as soon as practicable . . . but in no event later than sixty days thereafter.”¹⁰³

⁹⁵ *Id.* at 4.

⁹⁶ *Id.* at 6.

⁹⁷ *Id.*

⁹⁸ U.S. CONST. art. II, cl. 2.

⁹⁹ U.S. CONST. art. VI, cl. 2.

¹⁰⁰ William Green, *The Encyclopedia of Civil Liberties in America*, 345–48 (2004).

¹⁰¹ *See* *United States v. Pink*, 315 U.S. 203, 223 (1942).

¹⁰² *See* 1 U.S.C § 112b(a) (2016).

¹⁰³ 1 U.S.C § 112b(a) (2016). *But see* 1. U.S.C. § 112b(e)(1) (stating the Secretary of State shall determine for the executive branch “whether an arrangement constitutes an international agreement within the meaning of this section.”).

Given the Treaty Clause's requirements noted above, it is clear that the Agreement was never given to the U.S. Senate for the required advice and consent. It is arguable that President Truman did not know the full extent of the authority granted to intelligence agencies in the Agreement,¹⁰⁴ suggesting that this was a treaty for the purposes of the Treaty Clause.

On the other hand, assuming that President Truman was in fact aware of the existence of the Agreement, the Agreement could have still legally passed muster as an executive agreement (notwithstanding the Article VI concerns discussed below), up until the passage of the Case-Zablocki Act in 1972. Although case law on this issue is lacking, it stands to reason that previous Executive Agreements would be subject to reporting requirements. Therefore, it appears that the Agreement was not a valid executive agreement, particularly after the passage of the Case-Zablocki Act, an act intended to curb the very type of secret executive agreements resembling the Agreement.¹⁰⁵ There has been no subsequent Case-Zablocki Act activity regarding the United States' position on the Agreement.¹⁰⁶ Overall, even construing the constitutionality of the Agreement as liberally as possible, it is outside reason to suggest that the Agreement was adopted via legal executive action.

B. Does the Agreement Violate Article VI?

As noted by Senator Ted Cruz in a recent Harvard Law Review piece, "treaties are the supreme law of the land, . . . potentially becoming a vehicle for the federal government to either give away power to international actors or to accumulate power otherwise reserved to the states or individuals."¹⁰⁷ Although considered a specious claim by some, others have "chomp[ed] at the bit for the federal government to make or implement treaties as a way of

¹⁰⁴ See Amendment No. 4, *supra* note 94.

¹⁰⁵ See Stephen Bryen & Shoshana Bryen, *The Case Act: A Lesson From History*, PJ MEDIA (Jan. 18, 2015), <https://pjmedia.com/blog/the-case-act-a-lesson-from-history/> [<https://perma.cc/JY8X-UCZB>] (explaining the legislative history of the Case Act, the passage of which arose when the Democratic Congress discovered "significant covert agreements had been arranged between the U.S. government and South Korea, Laos, Thailand, Ethiopia, Spain, and more").

¹⁰⁶ See *id.* (explaining that the "Case Act has been honored more in breach than in compliance . . . Presidents have been accused of withholding relevant documents from Congress . . .").

¹⁰⁷ Ted Cruz, *Limits on the Treaty Power*, 127 HARV. L. REV. F. 93, 93 (2019).

enacting laws that the Supreme Court has otherwise held as exceeding the federal government's powers."¹⁰⁸ One of the most prominent cases in Article VI jurisprudence is that of *Reid v. Covert*,¹⁰⁹ in which a plurality held that

[t]here is nothing in [Article VI], which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution It would be manifestly contrary to the objectives of those who created the Constitution . . . to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive[.]¹¹⁰

Further, in *Medellin v. Texas*, a majority of the court held that the "state procedural default rules could not be displaced by a [non-self-executing treaty], an ICJ ruling, or Presidential memorand[a]"¹¹¹ *Medellin* therefore prevented the President from using a treaty to run roughshod over the courts."¹¹²

Assuming *arguendo* that the Agreement is in fact a valid treaty or executive agreement, it is difficult to see how the Agreement can be reconciled with the 'constitutional prohibitions' discussed in *Reid* and *Medellin*. Chief amongst these prohibitions is the Fourth Amendment to the U.S. Constitution, which states in pertinent part: "The rights of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated[.]"¹¹³ Case law on the Fourth Amendment suggests that the Amendment requires "a neutral and detached authority between the [government] and the public . . . [and is violated by laws that permit searches to happen] indiscriminately and without regard to their connection to a crime under investigation."¹¹⁴ The

¹⁰⁸ *Id.*

¹⁰⁹ *Reid v. Covert*, 354 U.S. 1, 15–19 (1957) (plurality opinion).

¹¹⁰ *Id.*

¹¹¹ *Medellin v. Texas*, 552 U.S. 491, 532 (2008).

¹¹² *See Cruz, supra* note 107 and accompanying text; *see also* 552 U.S. at 499.

¹¹³ U.S. CONST. amend. IV.

¹¹⁴ *Berger v. New York*, 388 U.S. 41, 54, 59 (1967).

text of the Agreement makes no reference to an ongoing crime, much less requisite warrant requirements. Echelon and PRISM¹¹⁵ metadata collection occurs far outside the scope of procedures permitted by the Fourth Amendment.¹¹⁶ In its 2018 opinion of *Berger v. New York*, the Supreme Court held that the government violated the Fourth Amendment by accessing the historical records of a cellphone's geographic locations without a search warrant.¹¹⁷ Therefore, unless the Fourth Amendment has become a truism, like the Tenth Amendment,¹¹⁸ the Agreement must necessarily violate the prohibition against “unreasonable searches and seizures.” To suggest that the Fourth Amendment protects against unreasonable searches and seizures by the United States government, but that the searches and seizures in question here are permissible simply because they were conducted on behalf of the United States government by other nations is unfathomable. To hold otherwise would not only undermine the holding in *Reid*, but also allow for the inappropriate use of the treaty power warned against by Senator Cruz.

V. A Path Forward

It is fair to say that the existence of the Five Eyes intelligence network is far from the center of the national consciousness, much less the potential expansion of the intelligence network. Nevertheless, there is a path forward for those opposed to such potentially illegal domestic intelligence gathering. Given both the dearth of legal challenges to the Agreement, and the lack of success of tangentially related legal challenges,¹¹⁹ the best mechanism for

¹¹⁵ See Laura Hautala, *NSA Surveillance Programs Live On, In Case You Hadn't Noticed*, CNET (Jan. 19, 2018), <https://www.cnet.com/news/nsa-surveillance-programs-prism-upstream-live-on-snowden/> [<https://perma.cc/EC5E-8YQ8>] (explaining that PRISM is an internet data collection system that “takes the communications directly from internet services like email providers and video chat programs.”).

¹¹⁶ See *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018) (“Given the unique nature of cell phone location information, the fact that the Government obtained the information from a third party does not overcome Carpenter’s claim to Fourth Amendment protection.”).

¹¹⁷ *Id.*

¹¹⁸ *United States v. Darby*, 312 U.S. 100, 124 (1941) (“The [Tenth] [A]mendment states but a truism that all is retained which has not been surrendered.”)

¹¹⁹ See generally *United States v. Richardson*, 418 U.S. 166 (1974) (discussing the broader standing requirement hurdles that occur in lawsuits of this kind). *But see* *Flast v. Cohen*, 392 U.S. 83, 106 (1968) (holding that taxpayers have standing to sue to prevent

modifying, rolling back, or halting the expansion of the intelligence gathering network is through the political branches of the United States.

The most integral aspect of any public policy campaign is broader public knowledge of the issue at hand.¹²⁰ In this instance, public knowledge of the Agreement is incredibly low, arguably due to the complexity of the issue and the U.S. government's desire for the Agreement to remain relatively anonymous. However, the likelihood of public awareness seems somewhat higher now than when information about Echelon and PRISM was leaked by Edward Snowden in 2013.¹²¹ A good start would involve the respective Congressional Intelligence Committees, Committees on Foreign Affairs, or any standing Committee with appropriate jurisdiction holding public hearings on this virtually unknown Agreement. This would necessitate the national security apparatus to explain to the American public why the Agreement has been allowed to chip away at the very freedoms members of the national security apparatus are sworn to defend.

Historically speaking, the United States' national security apparatus has been littered with obfuscations and cover-ups, mainly designed to maintain said apparatus' global power and prestige.¹²² Attempts at quiet reform – such as President Kennedy's private desire to “splinter the CIA into a thousand pieces and scatter it into the winds”¹²³ – have often resulted in harm to those attempting to

the disbursement of federal funds in contravention of the specific constitutional prohibition against government support of religion).

¹²⁰ See Stephen Lurie, *Highly Educated Countries Have Better Governments*, THE ATLANTIC (Mar. 6, 2014), <https://www.theatlantic.com/education/archive/2014/03/highly-educated-countries-have-better-governments/284273/> [<https://perma.cc/7XTL-XFTG>] (discussing the results of a research paper that indicated citizens complain more about issues if they are knowledgeable and know about the issues themselves).

¹²¹ See A.W. Geiger, *How Americans have viewed government surveillance and privacy since Snowden leaks*, PEW RESEARCH CENTER (June 4, 2018), <https://www.pewresearch.org/fact-tank/2018/06/04/how-americans-have-viewed-government-surveillance-and-privacy-since-snowden-leaks/> [<https://perma.cc/WCP7-373X>] (showing that roughly half of Americans feel that their personal data is less secure as of 2018 than it was five years previously which, taken with the rest of the poll's findings, indicates American apprehension about government surveillance).

¹²² See Weiner, *supra* note 52.

¹²³ Jon Schwarz, *In 1974 Call to Abolish CIA, Sanders Followed in Footsteps of JFK, Truman*, THE INTERCEPT (Feb. 22, 2016), <https://theintercept.com/2016/02/22/in-1974-call-to-abolish-cia-sanders-followed-in-footsteps-of-jfk-truman/> [<https://perma.cc/5KDY->

implement said reform.¹²⁴

The potential efficacy of a public opinion based strategy is exemplified by observing President Trump's many lamentations at what he dubs the "Deep State."¹²⁵ While the term "Deep State" can be amorphous, the broader strategy employed by the President and his allies against the United States' intelligence agencies provides a useful blueprint.¹²⁶ A number of recent public opinion surveys indicate that the American public's faith in the FBI declined from the time Trump announced his candidacy to the present, from 64% confidence to a bare majority of 51%.¹²⁷ Among Republicans, the drop is more substantial, falling 22 percentage points to 38%, while Independents' confidence fell by 15 percentage points during the same time.¹²⁸

The resounding success of message discipline – the repeated mantra of "fake news" – has eroded confidence in the FBI in what was once their most ardent group of defenders.¹²⁹ This shift in the views of rank-and-file voters has translated to elected officials within the Republican Party as well.¹³⁰ Just as the party of "law and order" can turn on the law, it is reasonable to assume similar tactics could be employed on the Democratic Party. From there, the Agreement could be stemmed or even rolled back.

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¹²⁴ See Phillip Shenon, *Yes, the CIA Director was Part of the JFK Assassination Cover-Up*, POLITICO (Oct. 6, 2015), <https://www.politico.com/magazine/story/2015/10/jfk-assassination-john-mccone-warren-commission-cia-213197> [<https://perma.cc/X6DJ-5LQF>].

¹²⁵ See Alana Abramson, *President Trump's Allies Keep Talking About the 'Deep State.' What's That?*, TIME (Mar. 8, 2017), <https://time.com/4692178/donald-trump-deep-state-breitbart-barack-obama/> [<https://perma.cc/E2UX-A3QB>].

¹²⁶ See John Sipher & Benjamin Haas, *Trump's Moves Against the Intelligence Community Are Hurting U.S. National Security*, JUST SECURITY (Jan. 31, 2019), <https://www.justsecurity.org/62439/trumps-moves-intelligence-community-crippling-u-s-national-security/> [<https://perma.cc/C2LT-F9DZ>].

¹²⁷ See Emily Stewart, *Republican Confidence in the FBI has Declined in the Age of Trump*, VOX (Feb. 3, 2018), <https://www.vox.com/latest-news/2018/2/3/16968372/trump-fbi-republican-poll-confidence> [<https://perma.cc/NK4N-V56Y>].

¹²⁸ *Id.*

¹²⁹ *See id.*

¹³⁰ See Zachary Basu, *Republican Blocks Bill Requiring Campaigns to Alert FBI to Foreign Assistance*, AXIOS (June 13, 2019), <https://www.axios.com/marsha-blackburn-foreign-offers-assistance-campaigns-fab324f4-a630-41aa-9b90-a6fc4ca5c5d0.html> [<https://perma.cc/8B36-UXDF>].

Ironically, one of the few international agreements that President Trump has not withdrawn the United States from is the Agreement.¹³¹ Yet, there are signs that the Agreement is within the sights of the President.¹³² The British government is currently in talks with Chinese media conglomerate Huawei to build a portion of the United Kingdom's new 5G high-speed mobile network.¹³³ "Huawei has faced tremendous pressure from the Trump administration as the U.S. claims the company's equipment could be used for espionage by the Chinese government."¹³⁴ Huawei already faces "criminal charges from the Justice Department after being accused of stealing trade secrets and skirting U.S. sanctions on Iran," and U.S. government agencies are banned from buying Huawei-manufactured equipment – which is being challenged in federal court by Huawei.¹³⁵ Huawei argues that "banning Huawei products from the United States would not make the nation's networks more secure and in fact could distract from larger and more pressing security threats."¹³⁶ There is a motion pending for summary judgment on behalf of Huawei.¹³⁷

The United States has successfully convinced Australia, a party to the Agreement, to block the company's equipment from being used.¹³⁸ The United Kingdom is said to have "let Huawei provide 'non-core' technology, like antennas, to the country's mobile

¹³¹ See Martin Finucane & Jeremiah Manion, *Trump Has Pulled out of International Agreements Before. Here's a List*, THE BOSTON GLOBE (Feb. 1, 2019), <https://www.bostonglobe.com/metro/2019/02/01/trump-has-pulled-out-international-agreements-before-here-list/H9zTo2ctVEQ0b8xkUQ2t9J/story.html> [https://perma.cc/SU9X-TDCY] (describing several international agreements from which President Trump has withdrawn or threatened to withdraw the United States, including the Iran nuclear deal, the Paris Agreement, and the Trans-Pacific Partnership).

¹³² See Saheli Roy Choudhury, *Trump Reportedly Will Threaten to Curb Intelligence Sharing with the UK Over Huawei* (May 30, 2019), <https://www.cnn.com/2019/05/31/trump-to-threaten-to-curb-intelligence-sharing-with-uk-over-huawei-ft.html> [https://perma.cc/RTF5-KPF4].

¹³³ See *id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Paul Mozur, *Huawei Revs Up Its U.S. Lawsuit, With the Media in Mind*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/2019/05/29/business/huawei-us-lawsuit.html> [https://perma.cc/VB3N-NQRT].

¹³⁷ *Id.*

¹³⁸ See Choudhury, *supra* note 132.

operators for the next generation networks.”¹³⁹ The U.K., however, will not allow the Chinese firm to provide so-called ‘core’ technology that includes software and other equipment linking primary internet connections,” which is still short of the demands from the Trump administration.¹⁴⁰ As noted above, the volume of ongoing data-sharing between parties to the Agreement¹⁴¹ means that if the Chinese government were to gain access to British intelligence, they would have access to the entire Agreement network. Yet, the existence of such an Agreement means that at all times the entire network is one unsecured vendor away from a massive security breach that would undermine the very security the Agreement purports to defend.

VI. Conclusion

“Five Eyes,” as described above, is already something of a misnomer. There are formal and informal side-agreements – as third parties have described in the Agreement’s original text¹⁴² -- with a host of other states,¹⁴³ ranging from South Korea to Germany.¹⁴⁴ As the world seemingly steps back from the themes of liberal democracy that characterized the post-war world,¹⁴⁵ the existence of the Agreement is justified differently – ranging from protecting the remaining liberal democracies to the protection of “economic well-being” – but justified nonetheless.¹⁴⁶ As the Agreement’s scope and size expands, the chances of culling this likely unconstitutional arrangement lessen by the day. Technology is constantly updating and moving forward, and as it does, so does

¹³⁹ Elizabeth Schulze, *UK Will Reportedly Allow Huawei to Build Out Part of its 5G Network*, CNBC, (April 24, 2019), <https://www.cnbc.com/2019/04/24/uk-to-allow-huawei-to-build-out-parts-of-its-5g-networks-reports.html> [https://perma.cc/PW7M-X9MX].

¹⁴⁰ *Id.*

¹⁴¹ See Ball, *supra* note 78.

¹⁴² See Kim, *supra* note 8.

¹⁴³ See Farrell, *supra* note 31.

¹⁴⁴ See Dorling, *supra* note 61.

¹⁴⁵ See *Democracy in Retreat: Freedom in the World 2019*, FREEDOM HOUSE, (2019), https://freedomhouse.org/sites/default/files/Feb2019_FH_FITW_2019_Report_ForWeb-compressed.pdf (demonstrating that the Freedom World study has shown a decrease in global freedom for the past thirteen years running).

¹⁴⁶ See Stilgherian, *Australia Signals Indo-Pacific Focus for Five Eyes*, ZDNET (June 13, 2019), <https://www.zdnet.com/article/australia-signals-indo-pacific-focus-for-five-eyes/> [https://perma.cc/KP3X-L2L7].

the power of the Agreement's parties to spy on their own citizens. Regardless of one's agreement or disagreement with the proffered solution, the facts remain the same. As the national security apparatus continues to blunder its way forward, inadvertently allowing or creating national security emergencies, an argument for more intelligence-gathering tools will always exist. From the flaming oil-filled waters of Pearl Harbor to smoke-filled skies of Manhattan, there is no denying the dangers that the broader world presents. However, as once famously stated by Benjamin Franklin, "[t]hose who would give up essential [l]iberty, to purchase a little temporary safety, deserve neither[.]"¹⁴⁷ One would be wise to remember those words, regardless of the year.

¹⁴⁷ Benjamin Franklin, *Pennsylvania Assembly: Reply to the Governor 11 November 1755*, NATIONAL ARCHIVES, (Jan. 2019), <https://founders.archives.gov/documents/Franklin/01-06-02-0107> [<https://perma.cc/9V8U-MP8J>].