FOREWORD:
A DELICATE BALANCE: LIBERTY AND SECURITY IN THE AGE OF TERRORISM

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I. INTRODUCTION

On April 11, 2015, the Constitutional Law Center at Drake Law School held a symposium titled “Eyes and Ears Everywhere? Privacy in an Age of Government and Technological Intrusion.”1 The symposium featured presentations by four leading experts on national security law and constitutional law: Professor Geoffrey R. Stone of the University of Chicago Law School;2 Laura K. Donohue of the Georgetown University Law Center;3 Dr. Gabriel Schoenfeld of the Hudson Institute;4 and Professor Nadine Strossen of New York Law School.5

This issue of the Drake Law Review includes articles by each of the

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symposium presenters. These articles offer a wide range of perspectives on the constitutional and national security issues raised by the government’s counterterrorism surveillance measures. Professor Stone discusses lessons he learned during his service on the President’s Review Group on Intelligence and Communications Technologies. His paper provides a fascinating window into the operations of the National Security Agency (NSA) and the intelligence community more broadly. Professor Donohue analyzes the chilling constitutional ramifications of the government’s surveillance powers. She warns that the government’s electronic eavesdropping techniques amount to a general warrant that violates cornerstone principles enshrined in the Bill of Rights. Dr. Schoenfeld, in contrast, defends the government’s surveillance techniques. He points out the severe threats the nation faces and asserts that the government has taken appropriate measures to protect Americans from terrorism. Finally, Professor Strossen addresses the broader impact of mass surveillance on our constitutional freedoms. She contends that the Fourth Amendment is not the only constitutional right threatened by modern counterterrorism surveillance techniques.

Each of the articles is thoughtful, interesting, and deeply informative. They significantly enrich our understanding of the complex issues faced by government and society in the Age of Terrorism.6

By way of an introduction to the excellent papers that follow, this Foreword places the debate over mass surveillance in a global and historical context. Although the devastating terrorist attacks of September 11, 2001, ushered in a new chapter in American national security law, the fundamental constitutional questions raised by modern security measures are as old as the nation itself.

II. THE AGE OF TERRORISM

The current debate over national security began on September 11, 2001, when 19 hijackers took control of four commercial airplanes and used them to launch suicide attacks on prominent symbols of the United States.7

In a span of two hours, the attacks killed 2,973 people, destroyed the Twin Towers in New York City, and demolished part of the Pentagon. The September 11 attacks represented the most severe threat to the American homeland since World War II. On September 14, President Bush declared a state of national emergency.

The crisis atmosphere that prevailed after September 11 coincided with major technological advances in the government’s surveillance capabilities. Since the 1990s, the speed, ease, and volume of communication technologies have increased dramatically through the wide-spread use of email, cellphones, and text messaging. But modern communications leave electronic fingerprints for government investigators to pore over. The result is more information about the lives of private citizens is available to the government than ever before.

In the aftermath of the September 11 terrorist attacks, the temptation to access private electronic communications through bulk collection methods proved irresistible to the government. In 2001 President George W. Bush directed the NSA to conduct a secret and massive campaign of warrantless wiretapping. The full extent of the government’s domestic spying did not become apparent until June 2013, when former government

8. Id. at 1–14, 311.
9. Id. at 311.
contractor Edward Snowden publicly disclosed the details of the NSA’s mass surveillance of domestic communications.\textsuperscript{15} Snowden’s leaks gave rise to an intense national debate: Some praised Snowden as a patriotic whistleblower, whereas others condemned him as a traitor.\textsuperscript{16} In June 2015, Congress amended the USA Patriot Act to prevent the government from storing metadata on Americans’ cell phone calls.\textsuperscript{17}

The September 11 attacks and the NSA revelations powerfully demonstrated the dual threats posed to our security and our liberty in the Age of Terrorism. As the United States Supreme Court observed more than four decades ago, the nation must strike a balance between “the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression.”\textsuperscript{18}

But the question of where to draw the line between security and liberty remains hotly contested.\textsuperscript{19} As we debate where the proper balance lies between security and liberty, two points must be emphasized. First, the government has repeatedly violated civil liberties in the name of national security in the past and modern technological capabilities give the government uniquely powerful tools to do so again in the future.\textsuperscript{20} Second, terrorism poses a grave threat to the nation that will likely grow only more dangerous in the years ahead.\textsuperscript{21} Any effort to balance liberty and security must therefore take into account the full range of threats faced by the

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20. \textit{See infra} Part III.
21. \textit{See infra} Part IV.
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nation.22

III. THE GOVERNMENT’S LONG HISTORY OF CIVIL LIBERTIES VIOLATIONS

Critics of the government’s surveillance programs have good reason to fear that authorities may abuse their power: The government has a long history of sacrificing civil liberties in the name of security.

For example, as Professor Stone and Dr. Schoenfeld note in their articles, the Wilson Administration ferociously suppressed domestic criticism during the First World War. The Wilson Administration’s practices merit close attention as a timely warning from the past. In his war message to Congress in April 1917, President Woodrow Wilson announced that he would impose “a firm hand of stern repression” on “disloyal” Americans.23 Likewise, Attorney General Thomas Gregory declared that domestic opponents of the war would receive no mercy from “an avenging government.”24 In 1917 and 1918 Congress enacted several laws designed to criminalize domestic dissent, including the Sedition Act, which prohibited “uttering, printing, writing, or publishing any disloyal, profane, scurrilous, or abusive language” about the U.S. government or the war effort.25

The Wilson Administration used those laws to prosecute 3,000 “disloyal” people, including, as Dr. Schoenfeld notes, Eugene Debs,26 the Socialist candidate for president in 1912.27 In response to the government’s repressive techniques, the poet and war critic Max Eastman observed, “If you stopped to collect your thoughts . . . you could be arrested for illegal assembly.”28

The Wilson Administration also targeted the press. Postmaster
General Albert Burleson denied postal service access to any publication deemed “disloyal.” Burleson blocked the circulation of a wide-range of pacifist, socialist, and anti-war newspapers and magazines, including The Masses, the New York Call, and the Milwaukee Leader. The government also prosecuted dissenting journalists, such as Victor Berger, editor of the Leader, who received a 20-year prison sentence for disloyalty. The journalist Oswald Garrison Villard observed that the President “was deliberately silent when freedom of speech and the right of conscience were struck down in America.” The Wilson Administration’s repression was so severe it prompted the creation of the National Civil Liberties Union, known today as the American Civil Liberties Union.

Even more draconian acts of repression occurred during the Second World War when the Roosevelt Administration forcibly removed over 100,000 Japanese-Americans and permanent residents of Japanese descent from the West Coast. The Japanese-American internment resulted from a racist panic that swept through the nation in the weeks following the Japanese navy’s attack on Pearl Harbor. Confidential investigations by both the military and the Federal Bureau of Investigation concluded that national security did not require mass evacuation of Japanese-Americans from the West Coast. In fact, FBI Director J. Edgar Hoover privately characterized rumors of Japanese-American disloyalty as a product of “hysteria and lack of judgment.”

Nevertheless, the virulent and widespread nature of anti-Japanese racism created intense political pressure on the Roosevelt Administration to

30. COOPER, JR., supra note 26, at 298; FERRELL, supra note 25.
31. FERRELL, supra note 25.
33. CLEMENTS, supra note 29, at 155; COOPER, JR., supra note 26, at 300.
35. JOHN MORTON BLUM, V WAS FOR VICTORY 157–61 (1976); ROGER DANIELS, PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR II, at 22–47 (1993); KENNEDY, FREEDOM FROM FEAR, supra note 34, at 750–53.
37. Id. at 387 (quotation marks omitted).
take action. In February 1942, President Franklin Roosevelt ordered the evacuation and internment of Japanese-Americans on the West Coast, overriding the objections of Attorney General Francis Biddle, who deemed the order “ill-advised, unnecessary, and unnecessarily cruel.” The grim reality, Hoover privately noted, was that the call for mass evacuation was based “primarily upon public and political pressure rather than on factual data.” But even Roosevelt’s internment order failed to satisfy some members of Congress. The racist hysteria reached such a fevered pitch that the House of Representatives considered a bill to revoke the citizenship of Japanese-Americans. Although Congress never approved the bill, the fact that it could even be proposed showed the depth of the racism that informed the government’s decision-making.

Roosevelt’s internment order went into effect in March 1942, with devastating financial and personal consequences for Japanese-Americans. Those who lived in California, Oregon, and Washington found themselves forced to sell their homes, small businesses, and personal belongings at rock bottom prices. By the fall of 1942, the government had interned 100,000 Japanese-Americans in 10 camps located in barren, isolated parts of the West. The government’s camps provided Spartan living conditions, inadequate housing, poor food, and no privacy. The government treated the Japanese-Americans as enemy prisoners, surrounding them with machine gun posts, barbed wire, and guard towers. Ted Nakashima, a young Japanese-American internee, asked, “Can this be the same America we left a few weeks ago?”

The allegations of disloyalty against Japanese-Americans proved

38. Id. at 387–90.
39. KENNEDY, FREEDOM FROM FEAR, supra note 34, at 753 (quotation marks omitted).
40. TAKAKI, supra note 36, at 387 (quotation marks omitted).
41. Id.
42. Id. at 160; DANIELS, supra note 35, at 51–55.
43. Id. at 160; DANIELS, supra note 35, at 51–55.
44. BLUM, supra note 35, at 160; DANIELS, supra note 35, at 51–55.
45. BLUM, supra note 35, at 161; DANIELS, supra note 35, at 66.
47. KENNEDY, FREEDOM FROM FEAR, supra note 34, at 754.
48. GOODWIN, supra note 46, at 323 (quotation marks omitted).
completely unfounded. No case of espionage or sabotage during the war was ever proven against a Japanese-American citizen. Moreover, Japanese-American troops in the U.S. Army earned a well-deserved reputation for extraordinary courage in battle, winning thousands of awards and commendations for battlefield valor. A total of over 9,000 Japanese-American soldiers died or were wounded while serving in the U.S. Army in Europe.

After the war, Congress belatedly recognized the wartime loyalty and courage of Japanese-Americans. In the late 1940s and again in the 1980s, Congress compensated Japanese-Americans for their wrongful detention. But the government’s compensation amounted to only $20,000 per person, an amount woefully inadequate to redress the massive scale of the civil liberties violations committed by the government during the war. As the government’s own investigatory commission concluded in 1983, “A grave injustice was done to Americans and resident aliens of Japanese ancestry who, without any individual review or probative evidence against them, were excluded, removed, and detained by the United States during World War II.”

The government once again committed major civil liberties violations during the Cold War. In the late 1940s and early 1950s, the Truman Administration prosecuted over 100 leaders of the American Communist Party on the basis of their political beliefs. The prosecutions essentially

49. BLUM, supra note 35, at 158 (finding that “no case was ever authenticated”); KENNEDY, FREEDOM FROM FEAR, supra note 34, at 757–58.
50. BLUM, supra note 35, at 165; DANIELS, supra note 35, at 64; KENNEDY, FREEDOM FROM FEAR, supra note 34, at 755; TAKAKI, supra note 36, at 400–02.
51. TAKAKI, supra note 36, at 401–02.
53. KENNEDY, FREEDOM FROM FEAR, supra note 34, at 759.
criminalized certain types of political speech by making it a crime to belong to the Communist Party.\(^56\) At the same time, the House Committee on Un-American Activities (HUAC) investigated and harassed political dissenters by accusing them of disloyalty.\(^57\) Southern segregationists, like Mississippi Senator John Rankin, played a key role on HUAC, using the committee as a platform to attack the Civil Rights Movement, which segregationists falsely depicted as a tool of the Soviet Union.\(^58\) Meanwhile, the FBI amassed vast files on the private lives of public figures.\(^59\) Although President Truman privately feared that the FBI was becoming a “Gestapo or Secret Police,” he supported the FBI’s violation of civil liberties throughout his presidency.\(^60\)

The government’s persecution of political dissenters intensified in the 1950s. Wisconsin Senator Joe McCarthy became a national figure by making baseless accusations that communist spies controlled many American institutions, a demagogic campaign known today as the Red Scare.\(^61\) Thousands of Americans lost their jobs and hundreds went to jail as a result of groundless accusations of disloyalty.\(^62\) Although the Red Scare subsided by the mid-1950s,\(^63\) the government continued to pursue dissenters and left-wing activists. To that end, the FBI in 1956 established COINTELPRO, a secret surveillance program to monitor the American Communist Party and other politically unpopular groups.\(^64\)

The government’s domestic spying campaign reached a climax in the 1960s and early 1970s. In 1963, Attorney General Robert F. Kennedy authorized the FBI to install wiretaps on telephones used by the civil rights leader Dr. Martin Luther King, Jr.\(^65\) Later in the decade, President Lyndon

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56.  Patterson, supra note 55, at 192.
58.  Patterson, supra note 55, at 188–89.
60.  Patterson, supra note 55, at 188 (quotation marks omitted).
61.  Id. at 196–205.
62.  Id. at 185–87, 196–204.
63.  Id. at 201–05; Powers, Secrecy and Power, supra note 59, at 321–23.
64.  Patterson, supra note 55, at 264; Powers, Secrecy and Power, supra note 59, at 339–43.
Johnson directed the CIA and FBI to spy on opponents of the Vietnam War.\textsuperscript{66} Although the CIA’s charter expressly prohibited it from engaging in domestic espionage, the CIA amassed files on more than 7,000 Americans.\textsuperscript{67} The Nixon Administration took domestic spying to a new level of intensity, compiling a secret “enemies list” of administration opponents.\textsuperscript{68} A lawless spirit corrupted the Nixon White House, and in June 1972, Washington D.C. police arrested members of the President’s reelection campaign for participating in a bungled break-in at the Democratic National Committee headquarters.\textsuperscript{69} The ensuing scandal ultimately led to Nixon’s resignation in August 1974.\textsuperscript{70}

The government’s history of civil liberties violations is particularly relevant today because modern technology makes the government’s surveillance capabilities more intrusive than ever before. As Professor Donohue observes, the massive proliferation of private information on electronic databases is unprecedented in its scale and sweep.\textsuperscript{71} She warns that the government’s collection of personal data “can be used for not just ascertaining threats to the United States, but also for heading off political opposition.” Similarly, Professor Strossen rightfully emphasizes that “the ongoing dragnet communications surveillance programs raise multiple statutory and constitutional problems.” Ironically, FBI Director James Comey himself has acknowledged as much. In a recent interview he warned, “I believe that Americans should be deeply skeptical of government power. You cannot trust people in power. The founders knew that. That’s why they divided power among three branches, to set interest against interest.”\textsuperscript{72}

Such warnings are well-grounded in history and technology. The government’s history of abuse of power, combined with its technological capabilities, makes the threat posed to civil liberties by domestic surveillance

\textsuperscript{66} Patterson, supra note 55, at 632–33; Powers, Secrecy and Power, supra note 59, at 427–33.

\textsuperscript{67} Patterson, supra note 55, at 632.


\textsuperscript{69} Patterson, supra note 55, at 771–78.

\textsuperscript{70} Id. at 778.

\textsuperscript{71} “Social network construction and analysis can reveal our intimate details . . . in many ways such data is more devastating than pure content.”

programs very real indeed.

IV. A LONG HISTORY OF SURPRISE ATTACKS

Concerns over government surveillance techniques, however, must also be assessed within the context of the very real security threats faced by the United States.\(^{73}\) Just as the government has a long record of violating civil liberties, it also has a long history of failing to guard against threats to national security.

One of the worst security breakdowns in American history came during the War of 1812. In August 1814, the British army captured Washington, D.C. and burned the White House, the Capitol Building, and several other government buildings and facilities.\(^{74}\) Fires also consumed the Library of Congress and the Supreme Court’s chambers.\(^{75}\) The fires in the city became so large they could be seen from 40 miles away.\(^{76}\)

The disaster resulted from the Madison Administration’s failure to take reasonable and appropriate security measures.\(^{77}\) Although the war began in June 1812,\(^{78}\) President Madison did not establish a special military district to protect Washington until July 1814.\(^{79}\) Even then, the Administration failed to defend all the routes to Washington and did not muster sufficient numbers of trained, experienced soldiers.\(^{80}\) Accordingly, when the British army drove across Maryland in late August, only about 6,000 poorly-trained American troops stood between the British and Washington.\(^{81}\) At the Battle of Bladensburg, American forces quickly collapsed and ran from the battlefield, clearing the way for the British to


\(^{75}\) Pitch, supra note 74, at 109–110.

\(^{76}\) Hickey, supra note 74, at 208.

\(^{77}\) Stephen Budiansky, Perilous Fight: America’s Intrepid War With Britain on the High Seas, 1812–1815, at 333 (2010) (“Despite weeks of warning, the defense of the capital city was in utter disarray.”); Hickey, supra note 74, at 204–05.

\(^{78}\) Hickey, supra note 74, at 43; Pitch, supra note 74, at 16.

\(^{79}\) Hickey, supra note 74, at 204; J.C.A. Stagg, Mr. Madison’s War: Politics, Diplomacy, and Warfare in the Early American Republic, 1783–1830, at 408 (1983).

\(^{80}\) Budiansky, supra note 77, at 334; Stagg, supra note 79, at 414–16.

\(^{81}\) Hickey, supra note 74, at 205–06.
capture the nation’s capital.82

The Madison Administration’s fundamental mistake was underestimating the extent of the danger. Despite the state of war, Secretary of War John Armstrong belittled the idea that the British would attack Washington.83 During the critical weeks before the British attack, Armstrong failed to coordinate defense plans with the military authorities responsible for protecting the city.84 As the historian J.C.A. Stagg has observed, “Washington was far less prepared, both psychologically and militarily, for an attack than it might have been.”85 He concludes that “the root of the problem was the widespread disinclination to believe that the capital really would be attacked.”86

The government’s failure to take sensible security measures also resulted in disaster in the Second World War. On December 7, 1941, the Japanese navy launched a surprise air assault on the U.S. naval base at Pearl Harbor, Hawai‘i.87 Japanese warplanes sank six American battleships and damaged a dozen others.88 In the process, the attack killed over 2,300 sailors, soldiers, and Marines as well as 68 civilians.89 As the historian John Keegan has observed, “It was a humiliation without precedent in American history.”90

Ironically, the Roosevelt Administration anticipated a Japanese attack in December 1941.91 American relations with Japan had reached the breaking point by November 1941, and President Roosevelt himself concluded that war was inevitable.92 But the Administration assumed the attack would come in the Philippines or Southeast Asia, not on American

82. Id. at 206; PITCH, supra note 74, at 71–85; STAGG, supra note 79, at 417.
83. PITCH, supra note 74, at 18–19; STAGG, supra note 79, at 408–09; STEVE VOGEL, THROUGH THE PERILOUS FIGHT: SIX WEEKS THAT SAVED THE NATION 52–54 (2013).
84. PITCH, supra note 74, at 18–19; STAGG, supra note 79, at 409–13; VOGEL, supra note 83.
85. STAGG, supra note 79, at 415.
86. Id.
87. KENNEDY, FREEDOM FROM FEAR, supra note 34, at 519–22.
89. DONALD L. MILLER, D-DAYS IN THE PACIFIC 15 (2005); PRANGE, supra note 88.
91. GOODWIN, supra note 46, at 293.
92. Id.; KENNEDY, FREEDOM FROM FEAR, supra note 34, at 514–15.
Consequently, as the historian Doris Kearns Goodwin points out, “U.S. forces at Pearl Harbor were fatally unprepared for war on the morning of December 7.” Indeed, post-war studies concluded that the military’s failure to conduct rigorous and sustained surveillance operations in the Hawaiian Islands made it possible for the Japanese to launch a successful surprise attack.

The September 11 terrorist attacks, of course, present the most recent example of a devastating assault on America. After the attacks, Congress established a national commission to examine why Al Qaeda terrorists caught the U.S. government by surprise on September 11. The commission reported that in the years before 2001, “the large, unwieldy U.S. government tended to underestimate” the terrorist threat even as it “grew ever greater.” In particular, the commission faulted the government’s intelligence agencies for failing to share information with each other and for failing to coordinate surveillance strategies and techniques. For example, the commission found that “no agency of the U.S. government systematically analyzed terrorists’ travel strategies,” a blind spot that enabled the hijackers to enter the United States unimpeded and carry out their devastating mission of mass murder.

Without question, terrorism remains a grave threat to the United States. The most recent example is the rise of the Islamic State of Iraq and Syria (ISIS), which has declared as one of its central goals the mass murder of Americans. In addition, lone wolf attacks present a major threat to national security, as tragically demonstrated in the Boston Marathon

94. Goodwin, supra note 46, at 293.
95. Prange, supra note 88, at 732–34.
96. 9/11 Commission Report, supra note 7, at xv.
97. Id. at 348.
98. Id. at 347–60, 416–19.
99. Id. at 384.
bombing\textsuperscript{101} and the Chattanooga Naval Reserve Center shootings.\textsuperscript{102} The gravity of the threat is magnified by the fact that terrorists possess not only bombs and guns, but also have the potential for using chemical weapons\textsuperscript{103} as well as cyberattacks on electricity and infrastructure.\textsuperscript{104} It is thus with good reason that Dr. Schoenfeld concludes that “foiling just one terrorist attack holds the potential to save large numbers of lives.”

In short, counter-terrorism requires constant vigilance on the part of the intelligence community. As Geoffrey Stone notes, “the only realistic way to keep ourselves safe is advanced detection so we can prevent terrorist attacks from occurring.” In preserving our constitutional freedoms, therefore, we must take care not to let our guard down. Terrorism poses a clear and present danger and will continue to do so for years to come.


V. CONCLUSION

Two final points are in order. First, domestic surveillance is a global issue. For example, in recent months, European governments have dramatically expanded their domestic surveillance powers. In May 2015, the lower house of the French Parliament adopted a sweeping domestic surveillance bill that allows the government to intercept private citizens’ cell phone calls and read emails with essentially no judicial oversight.105 And in December 2014, the British court that oversees the nation’s intelligence services ruled that electronic mass surveillance of private citizens’ communications is permissible under British law.106 Both the French and British security measures reflect the fact that terrorism is not a uniquely American problem. From Paris107 to Baghdad108 to Bangkok,109 terrorists inflict a devastating toll all over the world. The grim reality, therefore, is terrorism is a global problem faced by governments virtually everywhere.110

Second, surveillance by the U.S. government is not the only privacy issue that should concern civil libertarians. The evidence is building that foreign governments have mounted a sustained campaign to invade the privacy of Americans.111 For example, the Washington Post recently

reported that China is building an enormous database on American citizens.\textsuperscript{112} As part of that database, Chinese hackers allegedly breached data files at the Office of Personnel and Management, gaining access to the private information of over 22 million Americans.\textsuperscript{113} The hackers gained access to Social Security numbers, fingerprints, health records, credit reports, and even the sexual histories of current and former government employees and their family members.\textsuperscript{114} Hacking by foreign governments has even extended to the records of private corporations and insurance companies.\textsuperscript{115} For example, in June 2015 Chinese hackers reportedly accessed the health-care records of 91 million Americans whose information was stored on the computers of Anthem Inc. and Premera Blue Cross, two major insurance companies.\textsuperscript{116} Experts warn that the sensitive nature of the

\textsuperscript{112} Ellen Nakashima, \textit{With a Series of Major Hacks, China Builds a Database on Americans}, WASH. POST (June 5, 2015), http://www.washingtonpost.com/world/national-security/in-a-series-of-hacks-china-appears-to-building-a-database-on-americans/2015/06/05/d2af5f1fa-0ba3-11e5-95fd-d580f1e5d44e_story.html.


medical information could be used for blackmail as well as identity theft. Even travel records may have fallen into the hands of foreign governments. In July 2015, Chinese hackers reportedly gained access to passenger and hotel records of one billion travelers around the globe, including patrons of American and United Airlines.

By any measure, therefore, we live in a dangerous world with complex and growing challenges. In order to achieve the twin goals of protecting the nation while preserving the Constitution, we must continually strive to find the right balance between liberty and security. Accordingly, America’s commitment to the rule of law is more important than ever. As Justice Kennedy has eloquently observed, “The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.”