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## IN DEFENSE OF THE AMERICAN SURVEILLANCE STATE

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### ABSTRACT

*The term “American surveillance state” is something that has come into use by fierce critics of U.S. government counterterrorism efforts, efforts that necessarily contain surveillance as a critical element. A body of opinion has emerged arguing that thanks to the ubiquitous eyes of the National Security Agency, the Central Intelligence Agency, the Federal Bureau of Investigation, the Department of Homeland Security, and thanks also to the widespread distribution of myriad new forms of surveillance technology, privacy in America is being destroyed and George Orwell’s dark vision of Big Brother is on its way to realization. This Article rejects this characterization, and asserts that current counterterrorism efforts are an effective and appropriate response to ongoing threats. While history teaches us the government may at times overstep its bounds, even in today’s current national security climate the U.S. government’s approach is less intrusive than it has been in the past and is critical for protecting the safety of the American people.*

### ARTICLE

The term “American surveillance state” is something that has come into use by fierce critics of U.S. government counterterrorism efforts, efforts that necessarily contain surveillance as a critical element.<sup>1</sup> A body of opinion has emerged arguing that thanks to the ubiquitous eyes of the National Security Agency, the Central Intelligence Agency, the Federal Bureau of Investigation, the Department of Homeland Security, and thanks also to the widespread distribution of myriad new forms of surveillance technology, privacy in America is being destroyed and George Orwell’s dark vision of Big Brother is on its way to realization.<sup>2</sup>

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1. See, e.g., James Eli Shiffer, *NSA Whistleblower Warns of Surveillance State*, STAR TRIBUNE (June 6, 2015), <http://www.startribune.com/nsa-whistleblower-warns-of-surveillance-state/306381431/>.

2. See, e.g., Julian Assange, Op-Ed., *Who Should Own the Internet?*, N.Y. TIMES (Dec. 4, 2014), <http://www.nytimes.com/2014/12/04/opinion/julian-assange-on-living-in-a-surveillance-society.html>; Bill Keller, Op-Ed., *Living with the Surveillance State*, N.Y. TIMES (June 16, 2013), <http://www.nytimes.com/2013/06/17/opinion/keller-living-with-the-surveillance-state.html> (“On many fronts, we are adjusting to life in a surveillance

A new genre of books appeared after 9/11 proffering variations on this argument. For example, 2003's *The Soft Cage*, by Christian Parenti, argues that government and private surveillance today is a continuation of the system in place during slavery, only much more advanced.<sup>3</sup> The 9/11 hijackings, argues Parenti, have themselves been "hijacked by the worst elements of the political class," who are using surveillance "to steer fear and anger toward the destruction of traditional American liberties."<sup>4</sup> In the wake of the Snowden revelations, others have developed similar arguments, only with greater passion and sometimes more exaggerated claims. Thus we have volumes like *Dragnet Nation: A Quest for Privacy, Security, and Freedom in a World of Relentless Surveillance* by Julia Angwin;<sup>5</sup> *The Watchers: The Rise of America's Surveillance State* by Shane Harris;<sup>6</sup> and *Surveillance Nation*, a collection of essays on the subject drawn from *The Nation* magazine, collated by Richard Kreitner.<sup>7</sup> Glenn Greenwald, a journalist and Snowden collaborator, has probably been the most prolific purveyor of this strand of thought, authoring numerous articles and books, including most recently, *No Place to Hide: Edward Snowden, the NSA, and the U.S. Surveillance State*.<sup>8</sup>

With these works in circulation, this line of thought has become widely accepted in some portions of American elite thinking. Among many liberals and on the left it is taken as a given that, as the *New York Times* editorial page contends, we are suffering from the abuses of a "runaway intelligence

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state, relinquishing bits of privacy in exchange for the promise of other rewards."); Bill Mears & Evan Perez, *Judge: NSA Domestic Phone Data-Mining Unconstitutional*, CNN (Dec. 16, 2013), <http://www.cnn.com/2013/12/16/justice/nsa-surveillance-court-ruling/>; Dominic Rushe, *NSA Surveillance Goes Beyond Orwell's Imagination—Alan Rusbridger*, THE GUARDIAN (Sept. 23, 2013), <http://www.theguardian.com/world/2013/sep/23/orwell-nsa-surveillance-alan-rusbridger>.

3. CHRISTIAN PARENTI, *THE SOFT CAGE: SURVEILLANCE IN AMERICA FROM SLAVERY TO THE WAR ON TERROR* 3 (2003).

4. *Id.* at 3.

5. JULIA ANGWIN, *DRAGNET NATION: A QUEST FOR PRIVACY, SECURITY, AND FREEDOM IN A WORLD OF RELENTLESS SURVEILLANCE* (2014).

6. SHANE HARRIS, *THE WATCHERS: THE RISE OF AMERICA'S SURVEILLANCE STATE* (2014).

7. *SURVEILLANCE NATION: CRITICAL REFLECTIONS ON PRIVACY AND ITS THREATS* (Richard Kreitner, ed., 2014).

8. GLENN GREENWALD, *NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA, AND THE U.S. SURVEILLANCE STATE* (2014).

community.”<sup>9</sup> The “mass warehousing of everyone’s data,”<sup>10</sup> undertaken by what the *Times* calls the “surveillance state,” is a danger to our civil liberties and the Constitution itself.<sup>11</sup>

Such views are not confined to the left. On the right, Senator Rand Paul, who is running for President, has denounced government surveillance programs that he said have put our right to privacy under assault.<sup>12</sup> “I believe what you do on your cellphone is none of [the government’s] damn business,” he told an audience at Berkeley to enthusiastic applause.<sup>13</sup> Senator Ted Cruz, also running for President, has joined in this chorus, explaining that the U.S. government is “implementing what appears to be an unprecedented and intrusive surveillance system on private American citizens.”<sup>14</sup>

Advocates of this line of thought advance four core arguments. First, surveillance in the United States is dramatically expanding.<sup>15</sup> Second, the level of surveillance is disproportionate to the threat faced.<sup>16</sup> Third, the

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9. Editorial, *Edward Snowden, Whistle-Blower*, N.Y. TIMES (Jan. 1, 2010), <http://www.nytimes.com/2014/01/02/opinion/edward-snowden-whistle-blower.html> [hereinafter *Edward Snowden, Whistle-Blower*].

10. Editorial, *Congress Can Stop Privacy Abuse*, N.Y. TIMES (June 7, 2013), [http://www.nytimes.com/2013/06/08/opinion/congress-can-stop-privacy-abuse.html?\\_r=0](http://www.nytimes.com/2013/06/08/opinion/congress-can-stop-privacy-abuse.html?_r=0).

11. Shane Harris, Op-Ed., *Giving In to the Surveillance State*, N.Y. TIMES (Aug. 22, 2012), <http://www.nytimes.com/2012/08/23/opinion/whos-watching-the-nsa-watchers.html>; Keller, *supra* note 2.

12. See Nick Gass, *Rand Paul: I’m Not Being Unreasonable*, POLITICO (May 26, 2015), <http://www.politico.com/story/2015/05/rand-paul-nsa-bulk-data-collection-objects-118278.html>.

13. Jeremy W. Peters, *Rand Paul, Warning About Spying, Faults Obama*, N.Y. TIMES (Mar. 19, 2014), <http://www.nytimes.com/2014/03/20/us/politics/rand-paul-speaks-at-berkeley.html>.

14. Dan Roberts & Spencer Ackerman, *US Lawmakers Call for Review of Patriot Act After NSA Surveillance Revelations*, THE GUARDIAN (June 10, 2013), <http://www.theguardian.com/world/2013/jun/10/patriot-act-nsa-surveillance-review>.

15. See Bruce Schneier, *NSA Intimidation Expanding Surveillance State*, USA TODAY (Aug. 27, 2013), <http://www.usatoday.com/story/opinion/2013/08/27/nsa-snowden-russia-obama-column/2702461/>; *Surveillance Under the USA Patriot Act*, ACLU, <https://www.aclu.org/surveillance-under-usa-patriot-act> (last visited Sept. 15, 2015).

16. See Editorial, *Surveillance: A Threat to Democracy*, N.Y. TIMES (June 11, 2013), <http://www.nytimes.com/2013/06/12/opinion/surveillance-a-threat-to-democracy.html> (“The issue is not whether the government should vigorously pursue terrorists. The question is whether the security goals can be achieved by less-intrusive or sweeping

surveillance operates without sufficient controls and outside the bounds of law.<sup>17</sup> And fourth, the surveillance is ineffective.<sup>18</sup> In sum, opponents of the government's surveillance efforts argue the efforts are ubiquitous, lawless, reckless, and unnecessary.

What is one to make of these arguments? Without question, distrust and suspicion of government snooping is a healthy impulse in democracy and very much in line with America's best traditions.<sup>19</sup> The U.S. has seen abuses of surveillance in the past: from J. Edgar Hoover's depredations at the FBI;<sup>20</sup> to Richard Nixon's antics during Watergate;<sup>21</sup> to the abuses uncovered by the Church and Pike Committees in the 1970s.<sup>22</sup> But in the case of current counterterrorism methods, the suspicion of government surveillance is wrongheaded and potentially—if acted upon—dangerous.

The primary source of that danger, of course, is the bleak security

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means, without trampling on democratic freedoms and basic rights.”).

17. See *ACLU v. Clapper*, 785 F.3d 787, 812 (2d Cir. 2015) (finding that the government's collection of bulk telephone metadata was not allowed under the Patriot Act); Harry J. Enten & Ed Pilkington, *NSA Surveillance: Guardian Poll Finds Majority in US Want Greater Oversight*, THE GUARDIAN (June 13, 2013), <http://www.theguardian.com/world/2013/jun/13/nsa-surveillance-guardian-poll-oversight>.

18. Ellen Nakashima, *NSA Phone Record Collection Does Little to Prevent Terrorist Attacks, Group Says*, WASH. POST (Jan. 12, 2014), [https://www.washingtonpost.com/world/national-security/nsa-phone-record-collection-does-little-to-prevent-terrorist-attacks-group-says/2014/01/12/8aa860aa-77dd-11e3-8963-b4b654bcc9b2\\_story.html](https://www.washingtonpost.com/world/national-security/nsa-phone-record-collection-does-little-to-prevent-terrorist-attacks-group-says/2014/01/12/8aa860aa-77dd-11e3-8963-b4b654bcc9b2_story.html).

19. See Conor Friedersdorf, *Why are People so Distrustful of Big Government?*, THE ATLANTIC (June 18, 2013), <http://www.theatlantic.com/politics/archive/2013/06/why-are-people-so-distrustful-of-big-government/276963/>; Ari Shapiro, *Distrusting Government: As American as Apple Pie*, NPR (Apr. 19, 2010), <http://www.npr.org/templates/story/story.php?storyId=126028106>.

20. John Hockenberry, *The Secrets of J. Edgar Hoover*, DATELINE NBC (Apr. 12, 2004), [http://www.nbcnews.com/id/4638275/ns/dateline\\_nbc/t/secrets-j-edgar-hoover/#.VcLAHICMo6bg](http://www.nbcnews.com/id/4638275/ns/dateline_nbc/t/secrets-j-edgar-hoover/#.VcLAHICMo6bg).

21. See Carl Bernstein & Bob Woodward, Op-Ed., *Woodward and Bernstein: 40 Years After Watergate, Nixon was far Worse than We Thought*, WASH. POST (June 8, 2012), [https://www.washingtonpost.com/opinions/woodward-and-bernstein-40-years-after-watergate-nixon-was-far-worse-than-we-thought/2012/06/08/gJQAIsi0NV\\_story.html](https://www.washingtonpost.com/opinions/woodward-and-bernstein-40-years-after-watergate-nixon-was-far-worse-than-we-thought/2012/06/08/gJQAIsi0NV_story.html).

22. Gerald K. Haines, *The Pike Committee Investigations and the CIA*, CIA (June 27, 2008), [https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter98\\_99/art07.html](https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter98_99/art07.html); NCC Staff, *Forty Years Later: Looking Back at the Church Committee*, NAT'L CONSTITUTION CTR. (Jan. 27, 2015), <http://blog.constitutioncenter.org/2015/01/looking-back-at-the-church-committee/>.

situation the United States currently faces. A decade and a half after the attacks of September 11, 2001, the U.S. is still at war in a number of locations, including Afghanistan and Iraq.<sup>23</sup> Conflagrations in which the U.S. has significant interests are raging in the Middle East and Africa: in Yemen, Syria, Libya, Somalia, and Nigeria; as well as in Europe, on the Russian frontier with Ukraine.<sup>24</sup> International terrorism continues to be a significant threat.<sup>25</sup> Indeed, the U.S. is seeing carnage around the world on a terrifying scale, with massacres in far-flung locations arcing from Kenya<sup>26</sup> to Pakistan.<sup>27</sup> Terrorist outrages have also occurred in the heart of Europe: in Norway<sup>28</sup> and in Paris.<sup>29</sup> In the U.S., the FBI has rolled up a long string of lone-wolf aspiring terrorists.<sup>30</sup> Some they have not stopped in time. In 2009, Nidal Malik Hasan opened fire on troops at Fort Hood, Texas, killing 13 and maiming 32 others.<sup>31</sup> Two more terrorists whom the FBI did not succeed in apprehending in time, Tamerlan and Dzhokar Tsarnaev, were able to

23. Jack A. Smith, *U.S. Wars Continue in New Year*, FOREIGN POL'Y J. (Jan. 3, 2015), <http://www.foreignpolicyjournal.com/2015/01/03/u-s-wars-continue-in-new-year/>.

24. *Id.*; Jean-Marie Guéhenno, *10 Wars to Watch in 2015*, FOREIGN POL'Y (Jan. 2, 2015), <http://foreignpolicy.com/2015/01/02/10-wars-to-watch-in-2015>.

25. *Worldwide Caution*, U.S. PASSPORTS & INTERNATIONAL TRAVEL, <http://travel.state.gov/content/passports/english/alertswarnings/worldwide-caution.html> (last updated July 29, 2015).

26. *See, e.g.*, Josh Levs & Holly Yan, *147 Dead, Islamist Gunmen Killed After Attack at Kenya College*, CNN (Apr. 2, 2015), <http://www.cnn.com/2015/04/02/africa/kenya-university-attack/>.

27. *See, e.g.*, *Pakistan Shia Mosque Blast in Shikarpur Kills Dozens*, BBC (Jan. 30, 2015), <http://www.bbc.com/news/world-asia-31056086>.

28. *See Timeline: How Norway's Terror Attacks Unfolded*, BBC (Apr. 17, 2012), <http://www.bbc.com/news/world-europe-14260297>.

29. *See* Dan Bilefsky & Maïa de la Baume, *Terrorists Strike Charlie Hebdo Newspaper in Paris, Leaving 12 Dead*, N.Y. TIMES (Jan. 7, 2015), <http://www.nytimes.com/2015/01/08/world/europe/charlie-hebdo-paris-shooting.html>.

30. Josh Rogin & Eli Lake, *FBI Rounding up Islamic State Suspects*, BLOOMBERG VIEW (June 25, 2015), <http://www.bloombergview.com/articles/2015-06-25/fbi-rounding-up-islamic-state-suspects>; Aaron Short, *Lone-wolf Terror Attacks Could Come at Any Time: Homeland Security Secretary*, N.Y. POST (May 11, 2015), <http://nypost.com/2015/05/11/lone-wolf-terror-attack-could-come-at-any-time-homeland-security-secretary/> (“[Homeland Security Secretary Jeh] Johnson praised the FBI for stopping more than 50 Americans who tried to join the Islamic State terror group in the past two years and alerting law enforcement agencies about ISIS’s reach.”).

31. Billy Kenber, *Nidal Hasan Sentenced to Death for Fort Hood Shooting Rampage*, WASH. POST (Aug. 28, 2013), [https://www.washingtonpost.com/world/national-security/nidal-hasan-sentenced-to-death-for-fort-hood-shooting-rampage/2013/08/28/aad28de2-0ffa-11e3-bdf6-e4fc677d94a1\\_story.html](https://www.washingtonpost.com/world/national-security/nidal-hasan-sentenced-to-death-for-fort-hood-shooting-rampage/2013/08/28/aad28de2-0ffa-11e3-bdf6-e4fc677d94a1_story.html).

explode a bomb at the Boston Marathon in 2013, killing four and injuring scores more.<sup>32</sup>

Far from being decimated, as President Obama asserted in 2012, al Qaeda remains an active force.<sup>33</sup> Not only does al Qaeda continue to enjoy a number of different sanctuaries where it can plot,<sup>34</sup> the world faces the fanatics of the Islamic State, who are spreading death and destruction indiscriminately in the areas of Syria and Iraq where they rule, while also making inroads in, among other locations, Libya, Yemen, Afghanistan, the Sinai peninsula, and the Gaza strip.<sup>35</sup> Given the record of these groups and their affiliates, there can be little doubt that if they were to obtain weapons of mass destruction, they would not hesitate to use them to strike America if the opportunity arose.

During the 1990s, as terrorist attacks took place all over the world—including against American targets abroad—a kind of complacency developed that such outrages could not happen here.<sup>36</sup> Of course, one did happen here and nearly 3,000 people died.<sup>37</sup> The surveillance programs that we have in place are designed to prevent a recurrence of what we experienced on 9/11.

It is axiomatic that peacetime is different from wartime, and equally axiomatic that the balance between security and liberty shifts when the

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32. Ann O'Neill, Aaron Cooper & Ray Sanchez, *Boston Marathon Bomber Dzhokhar Tsarnaev Sentenced to Death*, CNN (May 17, 2015), <http://www.cnn.com/2015/05/15/us/boston-bombing-tsarnaev-sentence/>.

33. Pam Benson, *CNN Fact Check: Is al Qaeda's Core Decimated or is Group Growing?*, CNN (Oct. 23, 2012), <http://www.cnn.com/2012/10/22/politics/fact-check-al-qaeda/>.

34. *Al-Qaeda Around the World*, BBC (Aug. 5, 2013), <http://www.bbc.com/news/world-13296443>.

35. *What is 'Islamic State'?*, BBC (June 29, 2015), <http://www.bbc.com/news/world-middle-east-29052144>.

36. See U.S. GOV'T PUBLISHING OFFICE, THE INTERNATIONAL TERRORISM THREAT IS CHANGING, IN COUNTERING THE CHANGING THREAT OF INTERNATIONAL TERRORISM 1 (2000), available at <http://www.gpo.gov/fdsys/pkg/GPO-COUNTERINGTERRORISM/pdf/GPO-COUNTERINGTERRORISM-1-3.pdf> ("International terrorism once threatened Americans only when they were outside the country. Today international terrorists attack us on our own soil.").

37. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES: EXECUTIVE SUMMARY (2004), available at [http://www.9-11commission.gov/report/911Report\\_Exec.htm](http://www.9-11commission.gov/report/911Report_Exec.htm).

country is under threat.<sup>38</sup> Sometimes it shifts very far. During the Civil War, President Lincoln embraced a view of executive power that allowed him, under the rubric of “public necessity,” to negate rights we take to be fundamental, including jury trial, free speech, and private property.<sup>39</sup> He usurped Congress’s power to raise an army and borrow money on the credit of the U.S. government.<sup>40</sup> He suspended the writ of habeas corpus.<sup>41</sup> In the case of *Ex parte Merryman*, he brazenly defied an order from the Chief Justice of the Supreme Court to release a prisoner.<sup>42</sup> Yet, he is remembered as one of America’s greatest presidents.

During World War I, the government infringed on free speech and free assembly in ways that are shocking now. The Sedition Act of 1918 (technically not an act but amendments to the Espionage Act of 1917) made it a crime when the United States is at war to, among other things, “willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States.”<sup>43</sup> For violating speech provisions of the act, the trade union leader Eugene Debs was sentenced to ten years in prison and disenfranchised for life.<sup>44</sup> When he appealed to the Supreme Court, it upheld his conviction.<sup>45</sup> His case was but one of many that sent Americans to jail for what the government regards today as mere political advocacy.

During World War II, President Roosevelt signed the notorious Executive Order 9066 authorizing the internment of Japanese-Americans.<sup>46</sup> He explained that it was required for “the successful prosecution of the war,” which demands “every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and

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38. See, e.g., Richard A. Posner, *Security Versus Civil Liberties*, THE ATLANTIC (Dec. 2001), <http://www.theatlantic.com/magazine/archive/2001/12/security-versus-civil-liberties/302363/>; *In Wartime, Freedoms Americans Fight for are Often Restricted*, ASSOCIATED PRESS (Apr. 14, 2003), available at <http://www.firstamendmentcenter.org/in-wartime-freedoms-americans-fight-for-are-often-restricted>.

39. DANIEL FARBER, LINCOLN’S CONSTITUTION 115 (2003).

40. *Id.* at 143.

41. *Id.* at 115.

42. See *id.* at 157–59; *Ex parte Merryman*, 17 F. Cas. 144, 149–50 (C.C.D. Md. 1861).

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

44. See *Debs v. United States*, 249 U.S. 211, 212 (1919).

45. *Id.* at 217.

46. Exec. Order No. 9066, 3 C.F.R. § 1944 (Feb. 19, 1942).

national-defense utilities.”<sup>47</sup> President Roosevelt also engaged in domestic wiretapping for foreign intelligence purposes—in direct violation of statutory bans on the practice, which the Supreme Court has upheld.<sup>48</sup> Roosevelt wrote in a secret memo to Attorney General Robert Jackson that he “‘agreed with the broad purpose of the Supreme Court decision relating to wiretapping in investigations’ but he was ‘convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation.’”<sup>49</sup> Yet there was no legal foundation for the exception Roosevelt invoked here.<sup>50</sup> He violated the statute.<sup>51</sup> Roosevelt, too, is remembered as one of the great presidents.

During the early Cold War, America experienced the excesses of McCarthyism, wherein thousands of people were accused of being Communists or Communist sympathizers, and some were hauled before the House Committee on Un-American Activities and accused of disloyalty and subversion.<sup>52</sup> Although Communist infiltration of the U.S. government was a genuine concern, as the cases of Alger Hiss and the Rosenbergs illustrate, innocent people were also dragged into the net and suffered the destruction of their careers and, in some cases, imprisonment.<sup>53</sup> During the Vietnam era, there were extensive abuses by the CIA and FBI that included the unauthorized opening of mail, warrantless interception of telegrams, harassment of civil rights activists, and other offenses that were brought to daylight by the Church and Pike Committees in the 1970s.<sup>54</sup>

This history is presented not to justify any of the egregious things that have occurred in the past, but to provide a kind of benchmark. What is significant about the current state of affairs is that, in the aftermath of the deadliest and most destructive attack ever on America, the government has not engaged a periodic wartime descent into extra-constitutional behavior.

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47. *Id.*

48. Neal Katyal & Richard Caplan, *The Surprisingly Strong Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023, 1049–52 (2008).

49. *Id.* at 1050 (quoting Memorandum from President Franklin Delano Roosevelt to Robert H. Jackson, Att’y Gen. (May 21, 1940)).

50. *Id.* at 1050–52.

51. *See id.*

52. *See McCarthyism*, PBS (Aug. 23, 2006), <http://www.pbs.org/wnet/americanmasters/episodes/arthur-miller/mccarthyism/484/>.

53. *See id.*

54. *See Haines, supra* note 22; NCC Staff, *supra* note 22.



If the Constitution has been infringed in the post-9/11 era, it has been on the margin where reasonable people can disagree, and where one can find good lawyers and good federal judges on both sides of the dispute. America has learned a great deal from the dark spots of the past. If anything, what is salient is how restrained, and careful to adhere to constitutional norms, the U.S. government has been in the face of genuine danger.

The critics of surveillance today charge lawlessness, but even if one were to accept their view, today's alleged transgressions cannot be compared to any of the darker episodes of the past. To begin with, in responding to 9/11, Congress was at pains to avoid measures that would infringe on Americans' basic rights.<sup>55</sup> The act establishing the Department of Homeland Security came complete with a statutorily mandated privacy officer and a civil liberties officer, both responsible for insuring that privacy and civil liberties are lawfully protected.<sup>56</sup> The intelligence community statutorily established a privacy officer with similar responsibilities.<sup>57</sup> U.S. surveillance programs have been authorized by Congress;<sup>58</sup> subjected to Congressional oversight;<sup>59</sup> repeatedly reauthorized by Congress;<sup>60</sup> and subjected to approval and oversight by independent Article III judges.<sup>61</sup>

To be sure, the Patriot Act has been subjected to numerous administrative and legal challenges.<sup>62</sup> And it is true that the Bush administration's Terrorist Surveillance Program, at least in its initial

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55. See, e.g., 6 U.S.C. § 141(3) (2012) (establishing procedures for the Department of Homeland Security meant to "protect the constitutional and statutory rights of any individuals who are subjects" of information held and shared by the department).

56. *Id.* §§ 142(a), 345(a).

57. *Civil Liberties and Privacy Office*, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, <http://www.dni.gov/index.php/about/organization/civil-liberties-privacy-office-who-we-are> (last visited Aug. 11, 2015).

58. PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 20–24 (2014), available at <https://www.pclob.gov/library/702-Report.pdf>.

59. See *id.* at 20.

60. See *id.* at 16.

61. *Id.* at 8; see also James E. Pfander & Daniel D. Birk, *Article III Judicial Power, The Adverse-Party Requirement, and Non-Contentions Jurisdiction*, 124 YALE L.J. 1346, 1378 (2015) (noting that FISC and FISA judges come from the Article III judiciary).

62. See generally *Doe v. Holder*, 703 F. Supp. 2d 313 (S.D.N.Y. 2010); Brett Max Kaufman, *ACLU Files Lawsuit Challenging NSA's Patriot Act Phone Surveillance*, ACLU (June 11, 2013), <https://www.aclu.org/blog/aclu-files-lawsuit-challenging-nsas-patriot-act-phone-surveillance>.

configuration, appears to have been in violation of the Foreign Intelligence Surveillance Act. In March 2004, this led to dramatic hospital bedside confrontation between acting Attorney General James Comey and White House Counsel Alberto Gonzales in the intensive care ward where Attorney General John Ashcroft was recovering from serious illness.<sup>63</sup> Comey and other high-ranking Justice Department officials threatened to resign en masse unless the violation was cured.<sup>64</sup> They prevailed.<sup>65</sup> What is significant here is that the system righted itself and the program was brought under the rule of law.

It is also true, of course, that in May 2015, the United States Court of Appeals for the Second Circuit ruled in *ACLU v. Clapper* that the National Security Agency's bulk collection of telephony metadata, one of the surveillance programs exposed by renegade NSA contractor Edward Snowden, went beyond what Congress intended when it enacted Section 215 of the Patriot Act.<sup>66</sup> But the court was careful to skirt any arguments that the program itself was unconstitutional.<sup>67</sup> It is also important to note that, in contradistinction to, say, the imprisonment of Debs and others under the Sedition Act of 1918 or the internment of Japanese Americans, Section 215 did not generate a class of victims, and it did not establish the dragnet nationwide surveillance of Americans the critics described.<sup>68</sup> The NSA established "minimization" procedures to ensure that a human being only ever examined a minuscule fraction of what the government collected for counterterrorism purposes, and only in those cases where there existed reasonable and articulable suspicion that the telephone numbers in question were connected to terrorist plotters.<sup>69</sup> Out of the millions upon millions of calls made in a recent year, the NSA only looked at some 300 telephone subscribers, and only because evidence suggested that a terrorist plot was afoot.<sup>70</sup> This is hardly a number that justifies calling America a "surveillance

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63. Dan Eggen & Paul Kane, *Gonzales Hospital Episode Detailed*, WASH. POST (May 16, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/15/AR2007051500864.html>.

64. *Id.*

65. *Id.*

66. *See ACLU v. Clapper*, 785 F.3d 787, 812 (2d Cir. 2015).

67. *See id.* at 824 (stating that because it had found the government's actions were not authorized by statute, the Court did not reach a decision on the "weighty constitutional issues" tied to the metadata program).

68. *See* 50 U.S.C. § 1861 (2012).

69. *Id.* § 1861(g).

70. Mark Hosenball, *U.S. Spy Agency Paper Says Fewer Than 300 Phone Numbers*

state.”

It is not without significance that the world’s leading critic of the “American surveillance state,” Edward Snowden, has chosen to accept political asylum in Russia and appears to be settling in for a prolonged stay.<sup>71</sup> Russia may no longer be the totalitarian communist state it once was, but over the past decade, under the tutelage of Vladimir Putin—a former KGB officer—it has been sliding ever deeper back into authoritarianism.<sup>72</sup> That authoritarianism is maintained in part by a domestic surveillance system that, in terms of scope and effectiveness, puts ours to shame.<sup>73</sup> The FSB, the successor organization to the KGB, has invested in technology that allows it to collect and to store not just metadata but also the content of communications.<sup>74</sup> The FSB uses that technology to engage in essentially unchecked surveillance of telephone calls, e-mail traffic, blogs, online bulletin boards, and websites.<sup>75</sup> Andrei Soldatov and Irina Borogan, two Russian journalists who put their lives at risk to write about this subject, conclude that over the past two years, thanks to technology, “the Kremlin has transformed Russia into a surveillance state—at a level that would have made the Soviet KGB . . . envious.”<sup>76</sup>

Of course, Russia is not a liberal democracy, and it certainly should not set any sort of benchmark for America. But even when we compare the United States to other democracies, it becomes apparent how restricted and controlled the surveillance practices of the U.S. government are. As Stuart Baker pointed out in a prepared statement before the U.S. Senate

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*Closely Scrutinized*, REUTERS (June 15, 2013), <http://www.reuters.com/article/2013/06/16/usa-security-idUSL2N0ER0AI20130616>.

71. Isabel Gorst, *Russia Gives Edward Snowden Asylum for Three More Years*, LA TIMES (Aug. 7, 2014), <http://www.latimes.com/world/europe/la-fg-russia-snowden-asylum-20140807-story.html>.

72. Luke Harding, *Spies, Sleepers and Hitmen: How the Soviet Union’s KGB Never Went Away*, THE GUARDIAN (Nov. 19, 2014), <http://www.theguardian.com/world/2014/nov/19/spies-sleepers-hitmen-kgb-never-went-away-russia-putin>.

73. Walter Pincus, *In Questioning Russia’s Putin About Surveillance, Snowden Misses the Point*, WASH. POST (Apr. 21, 2014), [https://www.washingtonpost.com/world/national-security/in-questioning-russias-putin-about-surveillance-snowden-misses-the-point/2014/04/21/c3e09352-c732-11e3-bf7a-be01a9b69cf1\\_story.html](https://www.washingtonpost.com/world/national-security/in-questioning-russias-putin-about-surveillance-snowden-misses-the-point/2014/04/21/c3e09352-c732-11e3-bf7a-be01a9b69cf1_story.html) (describing Russia’s system of operative and investigative surveillance powers of the FSB).

74. *Id.*

75. *Id.*

76. Andrei Soldatov & Irina Borogan, *Russia’s Surveillance State*, WORLD POL’Y INST. (2013), <http://www.worldpolicy.org/journal/fall2013/Russia-surveillance>.

Committee on the Judiciary, the Max Planck Institute conducted a study that estimated the number of surveillance orders per 100,000 people in a number of Western countries.<sup>77</sup> While the figures are not directly comparable given different definitions and methods of counting, the trend lines are starkly revealing.<sup>78</sup> “[A]n Italian or Dutch citizen is over a hundred times more likely to be wiretapped by his government than an American.”<sup>79</sup> France, Germany, and Great Britain also conduct domestic surveillance in numbers that dwarf American practices.<sup>80</sup>

There is thus a great deal of hypocrisy in the criticism emanating from Europe about American surveillance practices. As Baker indicated, some of this is the result of the fact that, thanks to leaks and the fact that the U.S. reveals much of what it is doing in laws that govern intelligence collection, Europeans know a great deal more about American surveillance than they do about their own practices.<sup>81</sup> The Europeans engage in those practices for precisely the same reason the United States does: not to establish an Orwellian surveillance state, but to gain intelligence about a real and present danger that threatens them even more than it threatens us.<sup>82</sup>

The critics say the surveillance is not only illegal but also unnecessary.<sup>83</sup> Yet, actual experience says something else. Admittedly, the public record is somewhat sparse when it comes to linking communications intelligence to actual successful interdiction of terrorist plots.<sup>84</sup> That sparseness follows in large part from the reluctance of U.S. intelligence agencies to disclose their

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77. *Strengthening Privacy Rights and National Security: Oversight Hearing on FISA Surveillance Programs: Hearing Before the S. Comm. On the Judiciary*, 113th Cong. 93 (2013) (prepared statement of Stuart A. Baker).

78. *See id.*

79. *See id.* (citing HANS-JÖRG ALBRECHT ET AL., MAX PLANK INSTITUTE, LEGAL REALITY AND EFFICIENCY OF THE SURVEILLANCE OF TELECOMMUNICATIONS 104 (2003)).

80. *See id.* at 94.

81. *See id.* at 96.

82. *See id.*

83. *See* Emily Swanson, *Most Americans Think NSA Surveillance Goes Too Far*, HUFFINGTON POST (July 10, 2014), [http://www.huffingtonpost.com/2014/07/10/nsa-poll\\_n\\_5572153.html](http://www.huffingtonpost.com/2014/07/10/nsa-poll_n_5572153.html) (discussing the results of a poll where 5 percent of poll takers found the surveillance programs to be an “unnecessary intrusion” into people’s lives).

84. *See* RICHARD A. CLARKE, ET AL., THE NSA REPORT: LIBERTY AND SECURITY IN A CHANGING WORLD 57 (2014) (finding that very few “tips” resulted from the metadata program and that none of these tips were essential in helping the NSA in thwarting terrorist plots).

sources and methods.<sup>85</sup>

The Privacy and Civil Liberties Oversight Board, in its critical 2014 report about bulk collection of data, made a point of stressing that the program was responsible for interdicting only a single case.<sup>86</sup> And the subject arrested in that case, the report stresses, was not a violent terrorist but someone who was merely transmitting funds to a terrorist group.<sup>87</sup> But downplaying the significance of this case seems inappropriate. It involved providing material support for the Somalia-based Harakat al-Shabaab al-Mujahideen, an Islamic terrorist organization responsible for repeated incidents of mass slaughter in Kenya—this is not an insignificant arrest.<sup>88</sup>

In any event, the Privacy and Civil Liberties Oversight Board is not the last word on the subject of effectiveness. The National Research Council, responding to a directive from President Obama, issued a study entitled *Bulk Collection of Signals Intelligence Technical Options*.<sup>89</sup> It points to not one, but four cases in which the interception of signals intelligence was critical to apprehending terrorists or intercepting plots.<sup>90</sup>

Those include, in addition to the al Shabaab case: (1) the case of David Coleman Headley, who was one of the planners of the 2005 Mumbai attack;<sup>91</sup> (2) the case of Khaliz Quazzanni, who was arrested in 2010 for providing material support to al Qaeda and was also suspected of plotting to bomb the New York Stock Exchange;<sup>92</sup> and (3) the case of Najibullah Zazi, who was arrested in 2009 for planning a suicide bomb attack on the New York City

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85. Spencer Ackerman & Dan Roberts, *NSA Surveillance: Lawmakers Urge Disclosures as Obama 'Welcomes' Debate*, THE GUARDIAN (June 9, 2013), <http://www.theguardian.com/world/2013/jun/09/nsa-surveillance-lawmakers-disclosure-debate>.

86. See PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATION OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 11, 152–53 (2014).

87. *Id.*

88. See Ellen Nakashima, *NSA Cites Case as Success of Phone Data-Collection Program*, WASH. POST (Aug. 8, 2013), [https://www.washingtonpost.com/world/national-security/nsa-cites-case-as-success-of-phone-data-collection-program/2013/08/08/fc915e5a-feda-11e2-96a8-d3b921c0924a\\_story.html](https://www.washingtonpost.com/world/national-security/nsa-cites-case-as-success-of-phone-data-collection-program/2013/08/08/fc915e5a-feda-11e2-96a8-d3b921c0924a_story.html).

89. See generally NATIONAL RESEARCH COUNCIL, BULK COLLECTION OF SIGNALS INTELLIGENCE: TECHNICAL OPTIONS (2014).

90. *Id.* at 44.

91. *Id.*

92. *Id.*

subway system.<sup>93</sup>

There are almost certainly more cases that the world does not know about. Yet, foiling just one terrorist attack holds the potential to save large numbers of lives. The measures taken to interdict terrorist communication deserve applause, not condemnation. The American surveillance state is working pretty well. It is strictly limited in scope and has been effective thus far by the best indicator we have: There has not been a reprise of 9/11.

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93. *Id.*