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# Cybersurveillance in a Free Society

Russell L. Weaver\*

When Edward Snowden stole and released thousands of National Security Agency (NSA) documents,<sup>1</sup> he exposed a massive secret governmental cybersurveillance operation.<sup>2</sup> Although U.S. citizens might have anticipated that the U.S. government was collecting information about terrorists and criminals, few could have imagined the all-encompassing nature of the NSA surveillance program.<sup>3</sup> With a budget of \$10.8 billion per year<sup>4</sup> and 35,000 employees,<sup>5</sup> the NSA was systematically collecting data about virtually everyone and everything, amassing millions of cell phone call records, e-mails, text messages, credit-card-purchase records, and information from social media networks.<sup>6</sup> In addition,

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1. See Scott Shane, *No Morsel Too Minuscule for All-Consuming N.S.A.: From Spying on Leader of U.N. to Tracking Drug Deals, an Ethos of 'Why Not?'*, N.Y. TIMES, Nov. 3, 2013, at A1, A10 (“Since Edward J. Snowden began releasing the agency’s documents in June, the unrelenting stream of disclosures has opened the most extended debate on the agency’s mission since its creation in 1952.”); Doug Stanglin, *Snowden Says NSA Can Tap Email Chats*, COURIER-J., Aug. 1, 2013, at A3 (“Documents provided by National Security Agency leaker Edward Snowden detail a top-secret program that purportedly allows analysts to search without prior authorization, large databases of emails, online chats and people’s individual browsing histories, The Guardian reports.”).

2. See Shane, *supra* note 1, at A10 (“A review of classified agency documents obtained by Mr. Snowden and shared with The New York Times by The Guardian, offers a rich sampling of the agency’s global operations and culture.”).

3. See *id.* at A10 (describing the shock and outrage of the American public at the sheer magnitude of bulk data collection).

4. *Id.* at A1.

5. *Id.*

6. See *id.* at A1, A10 (describing the NSA’s bulk data collection); see also Peter Maass, *How Laura Poitras Helped Snowden Spill His Secrets*, N.Y. TIMES MAG., Aug. 13, 2013, at MM22 (describing Snowden’s disclosures to documentarian Laura Poitras); Charlie Savage, *C.I.A. Ties to AT&T Add Another Side to Spy Debate*, INT’L HERALD TRIB., Nov. 8, 2013, at A5 (“The C.I.A. is paying AT&T more than \$10 million a year to assist with overseas counterterrorism investigations by exploiting the company’s vast database of phone records, which

the NSA created a system that enabled it to easily access Yahoo and Google accounts.<sup>7</sup> The end result was that the NSA intercepted some 182 million communication records, including “to” and “from” e-mail information, as well as text, audio, and video information.<sup>8</sup>

The cybersurveillance program was shrouded in secrecy in that U.S. governmental officials were neither open nor truthful regarding the size and scope of the NSA program. For example, President Obama assured the U.S. public that the NSA was not targeting ordinary U.S. citizens, but rather was focused only on communications from individuals who posed a terrorist threat to the United States (for example, communications of “foreign intelligence value”<sup>9</sup> and foreign intelligence targets).<sup>10</sup> The President also boldly proclaimed, “Nobody is listening to your telephone calls.”<sup>11</sup> Likewise, the NSA declared that it was not storing private online or phone information except under limited circumstances: when it believed that the recording or transcript contained “foreign intelligence information,” evidence of a possible crime, a “threat of serious harm to life or property,” or could shed “light on technical issues like encryption or vulnerability to cyber attacks.”<sup>12</sup> However, it soon became clear that the NSA had established a huge data storage center (taking advantage of the

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includes Americans' international calls.”).

7. See Barton Gellman & Ashkan Soltani, *NSA Hacks Yahoo, Google: Global Data Links Expose Untold Millions of Accounts*, CURIER-J., Oct. 31, 2013, at A1 (describing a project called MUSCULAR that the NSA used to secretly break into Yahoo and Google data centers around the world).

8. See Martha Mendoza, *Reagan's Order Led to NSA's Broader Spying*, CURIER-JOURNAL, Nov. 24, 2013, at A19, c.1–6 (“With the cooperation of foreign allies, the NSA is potentially gaining access to every email sent or received abroad from Google and Yahoo’s email services, as well as anything in GoogleDocs, Maps or Voice, according to a series of articles in the Washington Post.”).

9. See Scott Shane, *Documents Detail Surveillance*, N.Y. TIMES, June 21, 2014, at A9 (“N.S.A. officers who intercept an American online or on the phone—say, while monitoring the phone or e-mail of a foreign diplomat or a suspected terrorist—can preserve the recording or transcript if they believe the contents include ‘foreign intelligence information’ or evidence of a possible crime.”); see also Mendoza, *supra* note 8, at A19, c.1 (“What NSA does is collect the communications of targets of feign intelligence value, irrespective of the provider that carries them,’ the agency said, likening the data channels at private firms to superhighways.”).

10. See generally Shane, *supra* note 9.

11. *Id.* (internal quotation marks omitted).

12. *Id.* (internal quotation marks omitted).

declining cost of data storage and advances in search software)<sup>13</sup> and was routinely collecting extraordinarily large amounts of information regarding virtually everyone.<sup>14</sup> As a result, even if Americans were not the intended targets of NSA eavesdropping, they routinely fell “into the agency’s global net.”<sup>15</sup>

The NSA surveillance program raises fundamental questions regarding the relationship between the U.S. government and the U.S. citizenry. Undoubtedly, government has a legitimate interest in investigating and collecting information regarding suspected terrorists. Government also has a legitimate interest in shielding certain types of information (for example, state secrets or vital information that is potentially damaging to national security or foreign relations) from public disclosure.<sup>16</sup> However, the question is one of balance. In a democratic society, legitimate questions might be raised regarding whether the government should be involved in such broad-based surveillance, and whether it should be conducting such operations in secret without democratic accountability.

*I. The Founding Generation’s Skepticism of Government:  
“Separation of Powers” and “Checks and Balances”*

The NSA cybersurveillance program raises a host of troubling issues for U.S. citizens. Although the Framers of the U.S. Constitution embraced (to a greater or lesser extent) democratic principles, they remained highly distrustful of a powerful government—even a democratically elected one.<sup>17</sup> Illustrative

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13. See Scott Shane & David E. Sanger, *Job Title Key to Inner Access Held by Leaker*, N.Y. TIMES, July 1, 2013, at A1 (“That is evidently what gave birth to a vast data storage center that the N.S.A. is building in Utah, exploiting the declining cost of storage and the advance of sophisticated search software.”).

14. See generally Shane, *supra* note 9.

15. *Id.*

16. See *United States v. Nixon*, 418 U.S. 683, 708 (1974) (ordering President Nixon to release information, but noting that confidentiality regarding the President’s conversations and correspondence is generally privileged, and further noting that this privilege is “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution”).

17. See RALPH KETCHAM, *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES: THE CLASHES AND THE COMPROMISES THAT GAVE BIRTH TO OUR FORM OF GOVERNMENT* at xv (Ralph Ketcham ed., 1986)

were the views of Thomas Paine, who argued, “Society in every state is a blessing, but government even in its best state is but a necessary evil; in its worst state an intolerable one.”<sup>18</sup>

This distrust was probably rooted in a variety of considerations. First, the American Revolution was precipitated by grievances against the British government, and in particular alleged abuses by the British monarch.<sup>19</sup> Indeed, the U.S. Declaration of Independence details a long list of purported grievances against, and alleged abuses by, the British King.<sup>20</sup> Not only had British officials imposed restrictions on freedom of expression,<sup>21</sup> but they had also conducted aggressive searches and

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(“Uncertain that any government over so vast a domain as the United States could be controlled by the people, the anti-federalists saw in the enlarged powers of the central government only the familiar threats to the rights and liberties of the people.”).

18. THOMAS PAINE, COMMON SENSE 3 (Dover Publ’ns 1997) (1776). In full, the quotation reads as follows:

Society in every state is a blessing, but government even in its best state is but a necessary evil; in its worst state an intolerable one; for when we suffer, or are exposed to the same miseries by a *government*, which we might expect in a country *without government*, our calamity is heightened by reflecting that we furnish the means by which we suffer.

*Id.*

19. See, e.g., THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776) (listing grievances against the English King). In fact, the British Parliament, rather than the King, committed some of the alleged offenses.

20. See *id.* para. 2 (asserting that the King of Great Britain had engaged in “a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States”). The Declaration contains a long list of grievances, including the following:

He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass [sic] our people, and eat out their substance. He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures. . . . He has abdicated Government here, by declaring us out of his Protection and waging War against us. . . . He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

*Id.*

21. See RUSSELL L. WEAVER, FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY, AND THE IMPLICATIONS FOR DEMOCRACY 190–91 (2013) (“Previously, in 1606, England had created the crime of seditious libel in the Star Chamber’s decision in *de Libellis Famosis*. That decision replaced, in part, the criminal offense of constructive treason, and made it a crime to criticize the government or government officials . . .”).

seizures.<sup>22</sup> However, there was perhaps a second reason for the new Americans to be fearful of governmental power: many in the founding generation, or their ancestors, had emigrated from Europe to the American colonies in an effort to escape religious persecution.<sup>23</sup> Some European nations had created “established” religions, required everyone to support those religions, and aggressively persecuted those who tried to practice other religions.<sup>24</sup>

Even though the Declaration of Independence made clear that the power to govern flows from the “consent of the governed,” the early Americans did not embrace democracy unequivocally. They instead sought to impose limits on governmental power. Relying on principles from the Enlightenment,<sup>25</sup> including the writings of

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22. See Russell L. Weaver, *The Fourth Amendment, Privacy and Advancing Technology*, 80 MISS. L.J. 1131, 1132 (2011) (“Colonial officials had also used ‘general warrants’ that required them only to specify an offense, and then left it to the discretion of executing officials to decide which persons should be arrested and which places should be searched.”).

23. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–9 (1947)

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, nonattendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.

24. See *id.* at 10 (“And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.”).

25. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 16–17 (1967)

Despite the efforts that have been made to discount the ‘glittering generalities’ of the European Enlightenment on eighteenth-century Americans, their influence remains, and is profoundly illustrated in the political literature. It is not simply that the great *virtuosi* of the American Enlightenment—Franklin, Adams, Jefferson—cited the classic Enlightenment texts and fought for the legal recognition of

individuals such as John Locke,<sup>26</sup> Thomas Paine,<sup>27</sup> and Baron de Montesquieu,<sup>28</sup> the Framers of the U.S. Constitution sought to create a system where governmental power was limited and constrained. Perhaps the most significant restraint was the doctrine of “separation of powers.” The French philosopher Baron de Montesquieu is credited with articulating the doctrine in his landmark essay, *The Spirit of the Laws*:

[There] is no liberty [if] the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator.

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natural rights and for the elimination of institutions and practices associated with the ancient régime. . . . The ideas and writings of the leading secular thinkers of the European Enlightenment—reformers and social critics like Voltaire, Rousseau, and Beccaria as well as conservative analysts like Montesquieu – were quoted everywhere in the colonies, by everyone who claimed a broad awareness. In pamphlet after pamphlet the American writers cited Locke on natural rights and on the social and governmental contract, Montesquieu and later Delolme on the character of British liberty and on the institutional requirements for its attainment, Voltaire on the evils of clerical oppression, Beccaria on the reform of criminal law, Grotius, Pufendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of civil government.

26. See Donald L. Doernberg, “*We the People*”: *John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52, 57, 64–65 (1985) (concluding that it “would be difficult to overstate John Locke’s influence on the American Revolution and the people who created the government that followed it” and outlining the influence of Locke on American political thought); David Thomas Konig, *Thomas Jefferson’s Armed Citizenry and the Republican Militia*, 1 ALB. GOV’T. L. REV. 250, 262 (2008) (noting that “Jefferson followed Locke in justifying for the American colonies of 1776 the right of armed resistance”).

27. See Allen Edward Shoenberger, *Connecticut Yankee Speech in Europe’s Court: An Alternative Vision of Constitutional Defamation Law to New York Times Co. v. Sullivan?*, 28 QUINNIPIAC L. REV. 431, 432 (2010) (“Free speech, such as that exemplified by the speeches and pamphlets of the revolutionary firebrand Thomas Paine, has been at the center of American civil rights.” (citing HARVEY J. KAYE, *THOMAS PAINE: FIREBRAND OF THE REVOLUTION* (2000))).

28. See Douglass Adair, “*That Politics May Be Reduced to a Science*”: *David Hume, James Madison, and the Tenth Federalist, reprinted in DOUGLASS ADAIR, FAME AND THE FOUNDING FATHERS* 93, 95 (1974) (“By the middle of the [eighteenth] century the French judge and philosophe Montesquieu had produced a compendium of the behavioral sciences, cutting across all these fields in his famous study of *The Spirit of the Laws*.”).

Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.<sup>29</sup>

The Framers interspersed both “separation of powers” and “checks and balances” principles throughout the U.S. Constitution.<sup>30</sup> Even though Congress was given the power to enact legislation, the Constitution required the President’s signature as a prerequisite to enactment (unless Congress overrides the President’s veto or the President allows the act to become law without his signature).<sup>31</sup> The President has the power to appoint “Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States,” but he can do so only “with the Advice and Consent of the Senate.”<sup>32</sup> There are many other examples of shared powers: although Congress and the President jointly enact legislation, the judiciary is frequently charged with interpreting that legislation and sometimes with striking it down.<sup>33</sup> Moreover, many powers, such as the foreign affairs power, are shared between the President and Congress.<sup>34</sup> For example, the Senate is charged with ratifying

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29. BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 151 (Cosimo Classics 2011) (1750).

30. See KETCHAM, *supra* note 17, at xv (“Also, mindful of colonial experience and following the arguments of Montesquieu, the idea that the legislative, executive, and judicial powers had to be ‘separated,’ made to ‘check and balance’ each other in order to prevent tyranny, gained wide acceptance.”).

31. See U.S. CONST. art. I, § 7, cl. 3

Every Order, Resolution, or Vote to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

32. *Id.* art. II, § 2, cl. 2.

33. See *generally* *Marbury v. Madison*, 5 U.S. 137 (1803) (establishing the Court’s power of judicial review of legislative actions).

34. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (finding that because “the President alone has the power to speak or listen as a representative of the nation,” Congress may provide the President with greater

treaties, which the Constitution charges the President to negotiate and make,<sup>35</sup> but only the entire Congress can declare war.<sup>36</sup> The President is integrally involved in other foreign affairs issues as well.<sup>37</sup> In addition, the Framers created different terms of office for different officials so that a single election could not dramatically shift the course and direction of government.<sup>38</sup> Citations to Montesquieu's arguments regarding separation of powers appear in the Federalist Papers<sup>39</sup> and the debates at the constitutional convention.<sup>40</sup> Moreover, the doctrines of "separation of powers" and "checks and balances" are frequently cited and discussed in early documents.<sup>41</sup>

The NSA cybersurveillance program raises fundamental issues regarding separation of powers. Unquestionably, every branch of government is involved with the program to some extent. Congress passed legislation authorizing the program, and the

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discretion in external matters than would be afforded domestically).

35. See U.S. CONST. art. II, § 2, cl. 2 ("He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.").

36. See *id.* art. I, § 8, cl. 11 ("The Congress shall have Power . . . to declare War.").

37. See *Curtiss-Wright Exp. Corp.*, 299 U.S. at 319 ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.") (internal quotation marks omitted).

38. See U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . ."); *id.* art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years. . ."); *id.* art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years. . ."); see also KETCHAM, *supra* note 17, at xvii ("Thus, for example, even though an upper and a lower house might each eventually derive from the people, different districts, different terms of office, different modes of election, and different definitions of authority would create balances of power.").

39. See THE FEDERALIST NO. 47 (James Madison), reprinted in ALEXANDER HAMILTON, JOHN JAY & JAMES MADISON, THE FEDERALIST PAPERS 139 (Emereo Publ'g 2012) ("One of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct.").

40. See KETCHAM, *supra* note 17, at 85, 237, 249, 253, 260, 288, 339, 360 (referencing various arguments of Montesquieu regarding separation of powers).

41. See *id.* at 159–60, 163, 166–67, 240, 247, 259–60, 357 (discussing the doctrines of "separation of powers" and "checks and balances").

President and his subordinates were charged with carrying it out. In addition, the judiciary, albeit secret courts, were charged with issuing warrants allowing the NSA to take various types of action. Secrecy was enhanced by the fact that the Foreign Intelligence Surveillance Act (FISA) of 1978<sup>42</sup> provided that applications for search warrants would be governed by two courts whose orders were classified as “secret.”<sup>43</sup> However, there is evidence suggesting that the NSA actively sought to evade the checks and balances built into the U.S. system. Not only was the NSA not forthcoming with information, but NSA Director, James Clapper, even lied to Congress about the program.<sup>44</sup> When he was asked whether the NSA was collecting “any type of data at all on millions or hundreds of millions of Americans,” he flatly stated, “No, sir. Not wittingly.”<sup>45</sup> Clapper later sought to explain the lie by suggesting that it was the “most truthful” or “least untruthful” thing that he could say at the time.<sup>46</sup>

## II. *The NSA and Democratic Accountability*

The NSA cybersurveillance also raises democratic accountability concerns. Of course, democratic principles have not always been in vogue. When the U.S. Constitution was created,

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42. 50 U.S.C. § 1801 (2012).

43. See *id.* § 1805(a)(3), (b) (outlining the requirements for a judge to issue an electronic surveillance search warrant).

44. See Editorial Board, *Edward Snowden, Whistle Blower*, N.Y. TIMES, Jan. 2, 2014, at A18 (“[Snowden’s] leaks revealed that James Clapper Jr., the director of national intelligence, lied to Congress when testifying in March that the N.S.A. was not collecting data on millions of Americans. (There has been no discussion of punishment for that lie.)”); Charlie Savage & Scott Shane, *N.S.A. Leaker Denies Giving Secrets to China*, N.Y. TIMES, June 18, 2013, at A5 (suggesting that Snowden decided to go public because Director Clapper had lied to the American public regarding the NSA data collection program); Andrew Rosenthal, *Clapper and Carney Get Slippery on Surveillance*, N.Y. TIMES THE OPINION PAGES, (Oct. 24, 2013), [http://takingnote.blogs.nytimes.com/2013/10/24/clapper-and-carney-get-slippery-on-surveillance/?\\_r=0](http://takingnote.blogs.nytimes.com/2013/10/24/clapper-and-carney-get-slippery-on-surveillance/?_r=0) (last visited Oct. 20, 2015) (“James Clapper, the director of national intelligence who once excused a lie to Congress by explaining that it was ‘the most truthful or least untruthful’ thing he could say, issued another burst of fog . . . .”) (on file with the Washington and Lee Law Review).

45. Savage & Shane, *supra* note 44.

46. Rosenthal, *supra* note 44.

monarchy was the dominant form of government in Europe. At one point, some monarchies tried to justify their existence through the concept of “Divine Right,”<sup>47</sup> the idea that monarchs have been placed on their thrones by God; are divinely inspired and guided; and are carrying out God’s will through their actions.<sup>48</sup> Of course, if a King is carrying out God’s will, there is no legitimate place for democratic accountability. After all, why would society allow common people to criticize what God has done or allow them to hold the monarch accountable for God’s actions?

Because of these views, many monarchies imposed speech restrictions. Indeed, following Johannes Gutenberg’s development of the printing press in the fifteenth century,<sup>49</sup> some governments actively restricted the ability of ordinary people to use the printing press to communicate ideas.<sup>50</sup> In addition to placing limits on the total number of presses that could exist,<sup>51</sup> governments also imposed licensing restrictions on the content of publications.<sup>52</sup>

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47. However, many in the founding generation rejected the notion of Divine Right altogether. See PAINE, *supra* note 18, at 6 (“There is something exceedingly ridiculous in the composition of monarchy; it first excludes a man from the means of information, yet empowers him to act in cases where the highest judgment is required.”). Thomas Paine, who was British born, but who was in the American colonies during the Revolutionary period and who wrote extensively, expressed serious reservations regarding the British monarchy’s claim to rule by Divine Right:

[N]o man in his senses can say that [the British monarchs’ claim to the throne] under William the Conqueror is a very honorable one. A French bastard landing with an armed banditti, and establishing himself king of England against the consent of the natives, is in plain terms a very paltry rascally original.—It certainly hath no divinity in it.

*Id.* at 13–14.

48. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 96 (1996) (noting that “centuries ago” there was a “belief that the monarch served by divine right”).

49. See DAVID CROWLEY & PAUL HEYER, *COMMUNICATION IN HISTORY: TECHNOLOGY, CULTURE, SOCIETY* 82 (5th ed. 2007) (discussing the printing press revolution in the mid-fifteenth century).

50. See *generally id.*

51. See RUSSELL L. WEAVER, CATHERINE HANCOCK, & JOHN C. KNECHTLE, *THE FIRST AMENDMENT: CASES, PROBLEMS AND MATERIALS* 5 (4th ed. 2014) (“Even after the English licensing laws were abandoned, government retained the power to prosecute for seditious libel . . .”).

52. See *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 320 (2002) (“The English licensing system expired at the end of the 17th century, but the memory of its abuses was still vivid enough in colonial times that Blackstone warned against

They also sometimes criminalized speech.<sup>53</sup> For example, in 1606, England's Star Chambers created the crime of seditious libel in *de Libellis Famosis*,<sup>54</sup> thereby making it a crime to criticize the King and other governmental officials (and, at one point, the clergy as well).<sup>55</sup> The crime was enforced by "threats of punishment, litigation costs, and stigma"<sup>56</sup> and was justified by the notion that criticism of the government "inculcated a disrespect for public authority."<sup>57</sup> "Since maintaining a proper regard for government was the goal of the offense, it followed that truth was just as reprehensible as falsehood[,] and therefore, truth was not a defense."<sup>58</sup> Indeed, truthful criticisms were punished more severely than false criticisms on the assumption that truthful criticisms were potentially more damaging to the government.<sup>59</sup> To those who

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the 'restrictive power' of such . . . an administrative official who enjoyed unconfined authority to pass judgment on the content of speech.").

53. See generally *de Libellis Famosis*, (1606) 77 Eng. Rep. 250 (defining and establishing the crime of seditious libel in England).

54. See generally *id.* (establishing seditious libel as a crime in England).

55. See William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 248 (1982) ("These Acts, unfortunately, did not adequately circumscribe the authority of these bureaucratic licensors. They enjoyed broad and vague powers to suppress the many false . . . scandalous, seditious and libelous works . . . published to the great defamation of Religion and government." (internal quotation marks omitted)). Indeed, in *de Libellis Famosis*, the defendants had ridiculed high clergy. See *de Libellis Famosis*, (1606) 77 Eng.Rep. 250, at 251

In the case of L. P. in the Star-Chamber this term, against whom the Attorney-General proceeded *ore tenus* on his own confession, for composing and publishing an infamous libel in verse, by which John Archbishop of Canterbury (who was a prelate of singular piety, gravity, and learning, now dead) by descriptions and circumlocutions, and not in express terms; and Richard Bishop of Canterbury who now is, were traduced and scandalized . . .

56. William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984).

57. *Id.* at 103; see also Matt J. O'Laughlin, *Exigent Circumstances: Circumscribing the Exclusionary Rule in Response to 9/11*, 70 UMKCL. REV. 707, 720–21 (2002) (describing the arrest and imprisonment of John Wilkes for criticizing King George III).

58. Mayton, *supra* note 56, at 103.

59. See Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 184 n.290 (1999) ("In fact, the English rule was that the greater the truth, the greater the libel.").

regarded the concept of Divine Right as legitimate, such restrictions might have made sense.

By the eighteenth century, when the United States was established, many European philosophers had become highly skeptical of monarchy, Divine Right, and hereditary succession,<sup>60</sup> and were openly questioning the legitimacy of monarchically based governmental systems.<sup>61</sup> Thomas Paine, who was of British birth but who was living in the American colonies at the time of the Revolution, argued that monarchs become “poisoned by importance” and ultimately are “the most ignorant and unfit of any throughout the dominions.”<sup>62</sup> He went on to note:

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60. See, e.g., PAINE, *supra* note 18, at 12–13 (calling hereditary succession “an insult and an imposition on posterity”). Paine elaborated:

For all men being originally equals, no *one* by *birth* could have a right to set up his own family in perpetual preference to all others for ever. . . . Most wise men, in their private sentiments, have ever treated hereditary right with contempt; yet it is one of those evils, when once established is not easily removed.

*Id.* (emphasis in original).

61. See *id.* at 8

But there is another and greater distinction for which no truly natural or religious reason can be assigned, and that is, the distinction of men into **KINGS** and **SUBJECTS**. Male and female are the distinctions of nature, good and bad the distinctions of heaven, but how a race of men came into the world so exalted above the rest, and distinguished like some new species, is worth enquiring into, and whether they are the means of happiness or misery to mankind.

Paine continued:

As the exalting [of] one man so greatly above the rest cannot be justified on the equal rights of nature, so neither can it be defended on the authority of scripture; for the will of the Almighty, as declared by Gideon and the prophet Samuel, expressly disapproves of government by kings.

*Id.* at 9.

62. *Id.* at 15. In full, the quotation reads as follows:

Men who look upon themselves born to reign, and others to obey, some grow insolent; selected from the rest of mankind their minds are early poisoned by importance; and the world they act in differs so materially from the world at large, that they have but little opportunity of knowing its true interests, and when they succeed to the government are frequently the most ignorant and unfit of any throughout the dominions.

*Id.*

*How came the king by a power which the people are afraid to trust, and always obliged to check? Such a power could not be the gift of a wise people, neither can any power, which needs checking, be from God; yet the provision, which the [British] constitution makes, supposes such a power to exist.*<sup>63</sup>

In establishing the United States, the founding generation rejected monarchy and Divine Right as justifiable bases for governmental authority.<sup>64</sup> Inspired by such documents as *Cato's Letters*,<sup>65</sup> and the thoughts of European philosophers such as Locke,<sup>66</sup>

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63. *Id.* at 7 (emphasis in original).

64. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“Governments are instituted among Men, deriving their just powers from the consent of the governed.”).

65. See Michael Kent Curtis, *St. George Tucker and the Legacy of Slavery*, 47 WM. & MARY L. REV. 1157, 1206 (2006) (“*Cato's Letters* were a series of essays on liberty that were widely circulated in the colonies and the United States both before and after the Revolution.”); Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 RUTGERS L.J. 929, 970 (2002) (“The description of the freedom of the press as a ‘bulwark of liberty’ apparently originates with *Cato's Letters*, a series of essays by two English pamphleteers, widely reprinted and quoted in the American colonies.”); Paige Gold, *Fair Use and the First Amendment: Corporate Control of Copyright is Stifling Documentary-Making and Thwarting the Aims of the First Amendment*, 15 U. BAL. INTELL. PROP. L.J. 1, 12 (2006) (“John Trenchard and Thomas Gordon, two widely-read British political thinkers whose essays were published in the colonies as *Cato's Letters*, identified three central values that the right of free speech is designed to advance . . .”).

66. See Doernberg, *supra* note 26, at 64–65 (concluding that it “would be difficult to overstate John Locke’s influence on the American Revolution and the people who created the government that followed it”); Konig, *supra* note 26, at 262 (noting that “Jefferson followed Locke in justifying for the American colonies of 1776 the right of armed resistance”).

Paine,<sup>67</sup> and Baron de Montesquieu,<sup>68</sup> they implicitly rejected the notion of Divine Right in the Declaration of Independence and opted for an entirely new basis for the exercise of governmental authority: “Governments are instituted among Men, deriving their just powers from the consent of the governed.”<sup>69</sup> In addition, they embraced the idea of self-determination: “If an existing government becomes repressive, the people have the right to throw it off and replace it with another form of government that seems most likely to effect their Safety and Happiness.”<sup>70</sup> In other words, power flows from the people to the government, rather than the other way around.<sup>71</sup>

Granted, the Framers of the U.S. Constitution did not fully and unequivocally embrace democracy. Under the Constitution, U.S. Senators were not directly elected by the people of the United States.<sup>72</sup> Rather, they were chosen by the state legislatures.<sup>73</sup> Even

67. See Shoenberger, *supra* note 27, at 432 (“Free speech, such as that exemplified by the speeches and pamphlets of the revolutionary firebrand Thomas Paine, has been at the center of American civil rights.” (citing HARVEY J. KAYE, THOMAS PAINE: FIREBRAND OF THE REVOLUTION (2000))); see also IRVING FANG, A HISTORY OF MASS COMMUNICATION: SIX INFORMATION REVOLUTIONS 49 (1997)

Over the course of a century that began with the Industrial Revolution, the American Revolution and the French Revolution, the Western World underwent a tremendous alteration. Printing played a significant role in all three revolutions . . . Pamphlets such as Tom Paine’s *Common Sense* spread the revolt to the American Revolution. And printing awakened France and shook all of Europe with its *Declaration of the Rights of Man*.

68. See Adair, *supra* note 28, at 95 (“By the middle of the [eighteenth] century the French judge and philosophe Montesquieu had produced a compendium of the behavioral sciences, cutting across all these fields in his famous study of *The Spirit of the Laws*.”).

69. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see also *Emps. of the Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279, 323 (1973) (“Our discomfort with sovereign immunity, born of systems of divine right that the Framers abhorred, is thus entirely natural.”).

70. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

71. See *Dep’t of Pub. Health & Welfare*, 411 U.S. at 322–23 (“We the People’ formed the governments of the several States. Under our constitutional system, therefore, a State is not the sovereign of its people. Rather, its people are sovereign.”).

72. See U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . .”).

73. See *id.* (declaring that the Senate shall be chosen by the legislature of each state).

today, the President is not directly elected but is chosen through the Electoral College.<sup>74</sup> Moreover, through the concepts of separation of powers and checks and balances, the Framers sought to restrain and control the exercise of governmental authority. Finally, the people of the United States demanded inclusion of a Bill of Rights as part of the constitutional structure.<sup>75</sup>

Despite the distrust of government, over time the concept of democracy took root in the United States, and the Declaration of Independence's focus on the "consent of the governed" has gained ascendance. In addition, the notion that individuals have the right to freely debate the wisdom of governmental actions, as well as the merits (or demerits) of candidates for political office, is well accepted. As democratic principles began to take root, and monarchy was supplanted or limited by democracy, speech restrictions became anathema to the nature of government. In a democracy, the ultimate check on governmental authority comes from the electorate's ability to choose their representatives.<sup>76</sup> Criticism of governmental officials and governmental actions and the concept of democratic accountability lie at the heart of the U.S. governmental system and require a degree of governmental transparency and openness.

Of course, the fundamental dilemma presented by the NSA data collection program is that it was (before the Snowden disclosures) conducted almost entirely in secret. Governmental officials deceived the American public regarding the nature and

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74. See *id.* art. II, § 1, cl. 1–3 (declaring that each state shall appoint electors who vote for the president).

75. See *McDonald v. City of Chicago*, 561 U.S. 742, 769 (2010) ("But those who were fearful that the new Federal Government would infringe traditional rights such as the right to keep and bear arms insisted on the adoption of the Bill of Rights as a condition for ratification of the Constitution.").

76. See generally C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978) (discussing the importance of the people's ability to vote for representatives to checking the power of the government); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (same); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963) (same); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (same); RUSSELL L. WEAVER, UNDERSTANDING THE FIRST AMENDMENT 10–13 (5th ed. 2014) (same).

scope of that program.<sup>77</sup> They even lied to Congress.<sup>78</sup> Secrecy was paramount. The government issued National Security Letters to large telecommunications companies, requiring them to turn over data to the NSA and ordering the companies not to publicly acknowledge the letters or the disclosures, or even alert their customers regarding the nature and scope of NSA inquiries.<sup>79</sup> NSA search warrants were (and are) issued by secret courts, and the warrants and the court orders were (and are) classified as “secret” and withheld from the public.<sup>80</sup> To the extent that individuals attempted to challenge the NSA program in court, they were met with more secrecy.<sup>81</sup>

In other words, it was extremely difficult for the public to ascertain the nature or scope of the operation, much less to hold governmental officials accountable. Of course, government may have a legitimate basis for classifying certain types of documents as “secret” and for shielding them from public view. Even in a democracy, not everything should be publicly available. However, the extent of NSA’s secrecy went beyond permissible bounds. In a democratic society, premised on the consent of the governed, society must have some opportunity to debate and evaluate the legitimacy of the NSA surveillance program, as well as to establish appropriate limitations on governmental power. Even though some aspects of the program might justifiably be shielded from public disclosure to protect national security, the extraordinary level of secrecy associated with the NSA’s cybersurveillance program is fundamentally inconsistent with the demands and expectations of

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77. See generally Shane, *supra* note 9 (describing President Obama’s reassurance that the NSA was not listening to the American people’s phone calls).

78. See Editorial Board, *supra* note 44, at A18 (describing director of national security James Clapper’s lie to Congress that the NSA was not knowingly collecting data on millions of Americans); see generally Rosenthal, *supra* note 44.

79. See Shane, *supra* note 1, at A10 (“The agency, using a combination of jawboning, stealth and legal force, has turned the nation’s Internet and telecommunications companies into collection partners, installing filters in their facilities, serving them with court orders, building back doors into their software and acquiring keys to break their encryption.”); Stanglin, *supra* note 1 (discussing how the NSA forced companies to maintain the secrecy of its spying program).

80. See 50 U.S.C. § 1805(a)(3), (b) (2012) (outlining the requirements for a judge to issue an electronic surveillance search warrant).

81. See generally *Clapper v. Amnesty Int’l, Inc.*, 133 S. Ct. 1138 (2013) (holding that Amnesty International lacked standing to challenge FISA).

a free society. The question is one of balance, and there was no balance with the NSA program. Secrecy pervaded the program, ignoring and trampling the concept of democratic accountability. Absent the Snowden disclosures, the public might still be unaware of the nature or extent of the program. At least now, in light of those disclosures, the nation is able to debate the propriety and scope of the surveillance program.

### *III. The Fourth Amendment as a Limitation on the NSA Surveillance Program*

The Fourth Amendment to the U.S. Constitution<sup>82</sup> provides a potential check on the NSA surveillance program. Interestingly, even though the Framers of the U.S. Constitution viewed the concepts of “separation of powers” and “checks and balances” as sufficient, in and of themselves, to protect the people against governmental abuse, many of the people did not. As a result, when the Framers of the U.S. Constitution decided not to include a bill of rights on the theory that they had created a government of limited and enumerated powers and one whose power would be sufficiently checked by the doctrines of separation of powers and checks and balances, the people balked.<sup>83</sup> It rapidly became clear that the Constitution might not have enough support to gain ratification without the addition of a bill of rights. In an effort to salvage the process, proponents urged ratification of the Constitution “as is,” but promised that the first Congress would create what became the Bill of Rights.<sup>84</sup> Only then was ratification possible.<sup>85</sup> As a result, the Bill of Rights entered the Constitution

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82. U.S. CONST. amend. IV.

83. See *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (White, J., dissenting) (“During the debates in the Thirteen Colonies over ratification of the Constitution, one of the arguments frequently used by opponents of ratification was that without a Bill of Rights guaranteeing individual liberty the new general Government carried with it a potential for tyranny.”).

84. See *McDonald v. City of Chicago*, 561 U.S. 742, 769 (2010) (“But those who were fearful that the new Federal Government would infringe traditional rights such as the right to keep and bear arms insisted on the adoption of the Bill of Rights as a condition for ratification of the Constitution.”).

85. See *id.* (discussing the states’ insistence on the adoption of a bill of rights as a condition for the Constitution’s ratification); *Marsh v. Chambers*, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting) (“The first 10 Amendments were not

as a series of amendments rather than as a part of the Constitution itself.<sup>86</sup>

An essential component of the Bill of Rights was the Fourth Amendment, which limited the government's authority to conduct searches and seizures.<sup>87</sup> Abuses during the British colonial period motivated the founding generation's push for Fourth Amendment protections.<sup>88</sup> British colonial officials had used Writs of Assistance that required them to do no more than specify the object of a search to obtain a warrant that allowed them to search any place where the evidence might be found.<sup>89</sup> There was no limit as to place or duration.<sup>90</sup> Colonial officials had also used "general warrants" that required them only to specify an offense and then left it to the discretion of those officials to decide which persons should be arrested and which places should be searched.<sup>91</sup>

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enacted because the members of the First Congress came up with a bright idea one morning; rather, their enactment was forced upon Congress by a number of the States as a condition for their ratification of the original Constitution.”).

86. See *McDonald*, 561 U.S. at 769 (discussing how the Bill of Rights only entered the Constitution because states insisted upon it as a condition for ratification).

87. See U.S. CONST. amend. IV (“The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

88. See RUSSELL L. WEAVER ET AL., *PRINCIPLES OF CRIMINAL PROCEDURE* 64–65 (3d ed. 2008) (“The debate (and the anger) in the American colonies about the arbitrary use of these writs of assistance by the English ‘was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.’” (quoting *Boyd v. United States*, 116 U.S. 616, 625 (1886))); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990) (“[T]he driving force behind the adoption of the [Fourth] Amendment . . . was widespread hostility among the former Colonists to the issuance of writs of assistance. . . . [T]he purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government.”).

89. See *Weaver*, *supra* note 22, at 1131–227 (describing the use of Writs of Assistance to search people and property with wide discretion).

90. See *id.* (noting the lack of limitations or restrictions on the Writs of Assistance).

91. See *id.* at 1132 (“Colonial officials had also used ‘general warrants’ that required them only to specify an offense, and then left it to the discretion of executing officials to decide which persons should be arrested and which places should be searched.”).

In the Fourth Amendment, the founding generation sought to cabin the new government's authority to engage in searches and seizures and limit the possibilities for abuse. In general, the Fourth Amendment prohibits "unreasonable" searches and seizures.<sup>92</sup> Although that Amendment does not mandate the issuance of a search warrant as a precondition to a search, it does provide that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."<sup>93</sup> Although the Fourth Amendment does not explicitly protect individual privacy, it did seek to protect people, as well as their houses, papers, and effects.<sup>94</sup>

Although the Fourth Amendment has generally provided the citizenry with substantial protections against "unreasonable searches and seizures,"<sup>95</sup> the U.S. Supreme Court has struggled to deal with the problem of advancing technology like that being used by the NSA.<sup>96</sup> Part of the problem is that the state of technology was far less advanced in the eighteenth century so that the authors of the Fourth Amendment were not concerned with cyber-searches, but instead were worried about actual physical searches of persons and places.<sup>97</sup> As a result, Supreme Court precedent had historically

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92. U.S. CONST. amend. IV.

93. *Id.*

94. *See id.* ("The right of the people to be secure in their persons, houses, papers, and effects . . . shall not be violated . . .").

95. *See, e.g.,* Arizona v. Gant, 556 U.S. 332, 335 (2009) (holding that the search of the defendant's vehicle while he was handcuffed in a patrol car was unreasonable); Kyllo v. United States, 533 U.S. 27, 40 (2001) (holding that the warrantless use of thermal imaging technology to "see" what was going on inside a home was unreasonable); Florida v. Royer, 460 U.S. 491, 506 (1983) (holding that police exceeded the limits of an investigative stop when they asked defendant to accompany them to a small police room, retained his ticket and driver's license, and in no way indicated that he was free to depart); Mapp v. Ohio, 367 U.S. 643, 654 (1961) (holding that evidence obtained by unconstitutional search was inadmissible).

96. *See Weaver, supra* note 22, at 1137 ("[E]arly United States Supreme Court decisions dealing with technology and the Fourth Amendment . . . were virtually unresponsive (except in the dissents) to the problems presented by new technologies.").

97. *See Draper v. United States*, 358 U.S. 307, 308 n.1 (1959) ("The Fourth Amendment of the Constitution of the United States provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .').

tended to limit the Fourth Amendment's application to situations in which the police actually searched a person<sup>98</sup> or trespassed onto a "constitutionally protected area."<sup>99</sup> The Court's approach became problematic as technology advanced to the point that the police could infringe privacy interests without actually trespassing or intruding into a constitutionally protected area.<sup>100</sup>

By the beginning of the twentieth century, as electricity came into widespread use and new technologies were invented, the Court began to confront situations in which the police or governmental officials would aggressively use technology in police investigations.<sup>101</sup> In these early cases, the Court was dealing with relatively crude technologies such as "detectaphones,"<sup>102</sup> "spike mikes,"<sup>103</sup> and wiretaps.<sup>104</sup> Except when the technology actually penetrated into a "constitutionally protected area," such as a home (for example, in the case of the spike mike which was inserted into someone's home to overhear conversations inside the home),<sup>105</sup> the Court refused to hold that the use of such technologies to spy on

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98. *See id.* at 314 (holding that an agent had probable cause and reasonable grounds for believing that the defendant was violating federal laws on narcotic drugs, and therefore heroin discovered in search incident to lawful arrest was competent evidence).

99. *See Goldman v. United States*, 316 U.S. 129, 135 (1942) (holding "that the use of the detectaphone by Government agents was not a violation of the Fourth Amendment"); *Olmstead v. United States*, 277 U.S. 438, 466 (1928) ("We think, therefore, that the wire tapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.").

100. *See Weaver*, *supra* note 22, at 1137 ("[E]arly United States Supreme Court decisions dealing with technology and the Fourth Amendment . . . were virtually unresponsive (except in the dissents) to the problems presented by new technologies.").

101. *See id.* (describing the Court's early struggles with application of the Fourth Amendment to emerging police technologies such as wiretapping).

102. *See Goldman*, 316 U.S. at 134 ("We hold that what was heard by the use of the detectaphone was not made illegal by trespass or unlawful entry.").

103. *See Silverman v. United States*, 365 U.S. 505, 506 (1961) (noting "the officers employed a so-called 'spike mike' to listen to what was going on within the four walls of the house next door").

104. *See Olmstead*, 277 U.S. at 466 (holding "that the wire tapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment").

105. *See Silverman*, 365 U.S. at 512 (holding that the use of spike mikes violated the Fourth Amendment).

citizens constituted a “search” within the meaning of the Fourth Amendment.<sup>106</sup>

However, by the early part of the twentieth century, individual justices were beginning to raise concerns regarding the potentially adverse impact of intrusive technologies on individual privacy. In *Olmstead v. United States*,<sup>107</sup> with a degree of prescience, a dissenting Justice Brandeis argued that the “progress of science . . . is not likely to stop with wire tapping,” and may some day allow the government “without removing papers from secret drawers” to “expose to a jury the most intimate occurrences of the home.”<sup>108</sup> Justice Brandeis argued that, rather than inquiring whether the government has intruded into a “constitutionally protected area,” the courts should focus on whether government had trampled on the “indefeasible right of personal security, personal liberty and private property.”<sup>109</sup> In *Goldman v. United States*,<sup>110</sup> a dissenting Justice Murphy relied on Justice Brandeis and Samuel Warren’s seminal article on privacy<sup>111</sup> to argue that the Fourth Amendment should be broadly interpreted to protect “the individual against unwarranted intrusions by others into his private affairs,”<sup>112</sup> and that the Court should provide greater protection for individual privacy.<sup>113</sup> Despite these dissents, the Court continued to focus on whether government had intruded into a “constitutionally protected area.”

By the second half of the twentieth century, the Court itself was becoming more sensitive to the intrusive possibilities of newer

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106. See *Goldman v. United States*, 316 U.S. 129, 135 (1942) (holding that the use of a detectaphone did not violate the Fourth Amendment); *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (holding that the use of wire tapping did not violate the Fourth Amendment).

107. 277 U.S. 438 (1928).

108. *Id.* at 474 (Brandeis, J., dissenting).

109. *Id.* at 474–75.

110. 316 U.S. 129 (1942).

111. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

112. *Goldman v. United States*, 316 U.S. 129, 136 (1942) (Murphy, J., dissenting).

113. See *id.* at 139 (“Whether the search of private quarters is accomplished by . . . detectaphone . . . , or by new methods of photography . . . , the privacy of the citizen is equally invaded by agents of the Government and intimate personal matters are laid bare to view.”).

technologies. In *Silverman v. United States*<sup>114</sup> the Court expressed concern in dicta regarding “the Fourth Amendment implications of these and other frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society.”<sup>115</sup> A mere six years later, the Court rendered its landmark decision in *Katz v. United States*<sup>116</sup> and mapped out a completely new approach for handling advancing technologies under the Fourth Amendment. Instead of asking whether the police had intruded into a “constitutionally protected area” (which, of course, would still constitute a search within the meaning of the Fourth Amendment), the Court inquired whether the government had violated an individual’s “expectation of privacy.”<sup>117</sup> A concurring Justice Harlan essentially agreed with the Court but argued that the expectation of privacy must be one that society recognizes as “reasonable.”<sup>118</sup> The Harlan formulation was the one that the Court ultimately adopted.

The *Katz* test seemingly expanded the Fourth Amendment’s application to advancing technologies. In that case, Katz made a phone call from a telephone booth, and the police overheard the conversation because of a listening device attached to the outside of the booth.<sup>119</sup> Based on prior precedent, the prosecution argued that there had been no intrusion into a “constitutionally protected area” because a phone booth was not a protected area (like a home).<sup>120</sup> Moreover, the government had not “trespassed” into the

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114. 365 U.S. 505 (1961).

115. *Id.* at 509.

116. 389 U.S. 347 (1967).

117. *See id.* at 351 (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”).

118. *See id.* at 361 (Harlan, J., concurring) (“My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as reasonable.”).

119. *See id.* at 348 (majority opinion) (discussing “evidence of the petitioner’s end of telephone conversation, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls”).

120. *See id.* at 351 (“The petitioner has strenuously argued that the booth was a ‘constitutionally protected area.’ The Government has maintained with equal

phone booth because it had simply attached a listening device to the outside to capture sound waves emanating from the booth.<sup>121</sup> Despite the absence of a trespass, the Court found that the government's use of the listening device constituted a search because the government had violated Katz's reasonable expectation of privacy (REOP): "One who occupies [a phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."<sup>122</sup>

After *Katz*, one might have assumed that the Court had sufficiently restricted the government's ability to use new technologies to intrude on personal privacy. However, as the Court struggled to apply the *Katz* formulation in subsequent cases, it rapidly became clear that the REOP test did not provide much protection against the onslaught of technology.<sup>123</sup> Although the Court has rendered some post-*Katz* technology decisions that are privacy-protective,<sup>124</sup> the general thrust of the Court's jurisprudence has been largely search-permissive.<sup>125</sup> The problem is that the Court has narrowly construed the REOP test in a way that provides little protection against electronic intrusions.<sup>126</sup> Indeed, in a number of cases, the Court has found that individuals do not have an REOP even though a reasonable person might very

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vigor that it was not.").

121. *See id.* at 352 ("The Government contends, however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls.").

122. *Id.*

123. *See Weaver, supra* note 22, at 1138 ("[T]he *Katz* test has been narrowly construed and has not easily adapted to new technologies.").

124. *See Riley v. California*, 134 S. Ct. 2473, 2485 (2014) (determining that the police may not search the electronic contents of an individual's cell phone, incident to arrest, despite precedent suggesting that the police can search "closed containers" as part of such a search); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (finding that the use of Forward Looking Infrared Technology to determine the amount of heat emanating from a home (to determine whether the owner might be using lights to grow marijuana in his attic) constituted a "search" within the meaning of the Fourth Amendment).

125. *See Weaver, supra* note 22, at 1138 ("*Katz* offered substantial hope to those who were concerned about the advance of technology and the potential implications for privacy. However, *Katz* has not lived up to that promise . . .").

126. *See id.* (discussing how the *Katz* test has been narrowly construed).

well have concluded otherwise. For example, the Court has held that individuals do not have an REOP in so-called “open fields” even if they are fenced and posted with “no trespassing” signs,<sup>127</sup> against helicopters hovering at low altitudes over their homes,<sup>128</sup> against surreptitious examination of garbage that they leave on the street for the garbage collector,<sup>129</sup> against canine sniffs designed to uncover whether a passenger is carrying illegal drugs in a suitcase,<sup>130</sup> or against the use of ground-tracking devices that are used to follow the movements of their automobiles<sup>131</sup> (except when the device is used to uncover information about the inside of a home,<sup>132</sup> or the police commit a trespass in installing the device on a vehicle<sup>133</sup>).

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127. See, e.g., *Oliver v. United States*, 466 U.S. 170, 179 (1984) (“[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance.”).

128. See, e.g., *Florida v. Riley*, 488 U.S. 445, 455 (1989) (finding that an officer’s observation, with his naked eye, of the interior of a partially covered greenhouse in residential backyard from vantage point of helicopter circling 400 feet above did not constitute a “search” for which a warrant was required); *California v. Ciraolo*, 476 U.S. 207, 215 (1986) (holding that warrantless aerial observation of fenced-in backyard within curtilage of home was not unreasonable under the Fourth Amendment); *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986) (announcing that aerial photography of chemical company’s industrial complex was not a “search” for Fourth Amendment purposes.).

129. See, e.g., *California v. Greenwood*, 486 U.S. 35, 45 (1988) (determining that defendants did not have reasonable expectation of privacy protected by the Fourth Amendment in garbage which they placed in opaque bags outside their house for collection by trash collector).

130. See, e.g., *United States v. Place*, 462 U.S. 696, 707 (1983) (deciding that exposure of luggage to a trained narcotics detection dog is not a search for Fourth Amendment purposes).

131. See, e.g., *United States v. Knotts*, 460 U.S. 276, 285 (1983) (finding that monitoring the signal of a beeper placed in a container of chemicals that were being transported to the owner’s cabin did not invade any legitimate expectation of privacy on the cabin owner’s part and, therefore, there was neither a “search” nor a “seizure” under the Fourth Amendment).

132. See, e.g., *United States v. Karo*, 468 U.S. 705, 721 (1984) (explaining that the Government is not completely free to determine by means of electric device, without warrant and without probable cause or reasonable suspicion, whether a particular article or person is in an individual’s home at particular time).

133. See, e.g., *United States v. Jones*, 132 S. Ct. 945, 954 (2012) (announcing that attachment of Global-Positioning-System (GPS) tracking device to vehicle, and subsequent use of that device to monitor vehicle’s movements on public streets, was a search within meaning of Fourth Amendment).

Perhaps the most restrictive limitation on the *Katz* test comes from the notion that there is no REOP for information that is “voluntarily conveyed to a third party.”<sup>134</sup> In *Smith v. Maryland*,<sup>135</sup> the Court held that the police did not violate an individual’s REOP when it installed a pen register that allowed them to mechanically record all of the phone numbers dialed by the individual.<sup>136</sup> The recording was done at the phone company, rather than through an intrusion into the individual’s home, and the Court held that an individual has no “legitimate expectation of privacy” in things that he “voluntarily turns over to third parties,” including to the phone company’s mechanical equipment.<sup>137</sup> Likewise, in *United States v. Miller*,<sup>138</sup> the Court held that an individual did not retain an REOP in his bank records that were being held by his bank because they had been voluntarily turned over to a third party.<sup>139</sup> Finally, in *Couch v. United States*,<sup>140</sup> the Court held that a client could not claim an REOP in his own documents that were in the possession of a third party (his accountant).<sup>141</sup>

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134. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 745–46 (1979) (holding that installation and use of a pen register by a telephone company does not constitute a “search” within the meaning of the Fourth Amendment); *United States v. Miller*, 425 U.S. 435, 446 (1976) (determining that a bank depositor had no protectable Fourth Amendment interest in bank records, consisting of microfilms or checks, deposit slips, and other records relating to his accounts at two banks, maintained pursuant to Bank Secrecy Act and obtained by allegedly defective subpoenas); *Couch v. United States*, 409 U.S. 322, 336 (1973) (holding that, where taxpayer hired an independent accountant to whom she had delivered regularly over a period of years various business and tax records which remained in his continuous possession, taxpayer’s divestment of possession of such records disqualified her entirely as object of any impermissible Fifth Amendment compulsion).

135. 442 U.S. 735 (1979).

136. See *id.* at 745–46 (“The installation and use of a pen register, consequently, was not a ‘search,’ and no warrant was required.”).

137. See *id.* at 774–75 (“When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and ‘exposed’ that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed.”).

138. 425 U.S. 435 (1976).

139. See *id.* at 440 (noting that Miller could not assert either ownership or possession over the records because the bank was required to keep them pursuant to its statutory obligations).

140. 409 U.S. 322 (1973).

141. See *id.* at 335 (“[T]here can be little expectation of privacy where records

If literally applied, the “voluntarily turned over to a third party” doctrine creates a gaping hole in the Fourth Amendment and suggests that the Fourth Amendment provides almost no protection against the NSA’s massive surveillance operation. In a modern, technologically driven society, most people convey a large amount of information through third parties. Emails are routinely sent through Internet service providers (ISPs), and text messages are routinely sent through service providers like Verizon, AT&T, and T-Mobile. Even phone calls are made through phone companies. Of course, *Katz* itself involved a phone call placed through the phone company, and the Court concluded that *Katz* was protected by an REOP.<sup>142</sup> However, in light of decisions like *Smith*, *Miller*, and *Couch*, it is not clear that emails, phone calls, and text messages are accompanied by an REOP today.

All is not lost. In recent years, the Court has shown somewhat greater sensitivity towards privacy issues. Indeed, in a couple of recent decisions, the Court has protected individuals against police attempts to use technology to obtain information regarding the interior of their homes. For example, in *Kyllo v. United States*,<sup>143</sup> the Court held that the police had violated a homeowner’s REOP when they used forward-looking infrared technology (FLIR) to determine the amount of heat emanating from his home.<sup>144</sup> The police suspected, correctly as it turned out, that the occupants were using special lights to grow marijuana in their attic.<sup>145</sup> The Court stated that “obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area’ constitutes a search—at least where (as here) the technology in question is not in general public

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are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return.”).

142. *Katz v. United States*, 389 U.S. 347, 354 (1967) (finding that the search and seizure would have been constitutional if it had been carried out with prior authorization from a magistrate that narrowly limited its scope).

143. 533 U.S. 27 (2001).

144. *See id.* at 40 (“Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.”).

145. *See id.* at 30 (“Agent Elliott concluded that petitioner was using halide lights to grow marijuana in his house, which indeed he was.”).

use.”<sup>146</sup> Likewise, in *Florida v. Jardines*,<sup>147</sup> the Court held that the police committed a search when they entered the curtilage of Jardines’ home to have a narcotics-detection dog sniff at an individual’s front door.<sup>148</sup> However, in that case, the Court did not apply the REOP test but instead focused on the fact that the officers and the dog had committed a physical intrusion into the constitutionally protected area of the curtilage of defendant’s home.<sup>149</sup> The difficulty is that, despite the Court’s protectiveness towards the home, it has provided little protection against governmental surveillance of communications sent from a person’s home.

There are indications that some individual U.S. Supreme Court justices are becoming concerned regarding the intrusiveness of modern technologies. For example, in *City of Ontario v. Quon*,<sup>150</sup> the Court suggested that it was uncomfortable with the results that the REOP test produced.<sup>151</sup> *Quon* involved the question of whether a member of a police SWAT team possessed an REOP in text messages that he sent and received on a wireless pager that the City issued for his use for work-related purposes.<sup>152</sup> The police department investigated the officer and others after they repeatedly exceeded their monthly limits on messages, seeking to determine whether the limits were too low or whether departmental rules related to non-work-related messages had been violated.<sup>153</sup> The audit revealed that most of one officer’s messages were not work-related, and he was disciplined.<sup>154</sup> He filed suit, arguing that the audit violated his Fourth Amendment

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146. *Id.* at 34 (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)).

147. 133 S. Ct. 1409 (2013).

148. *See id.* at 1417–18 (focusing on a Fourth Amendment property rights baseline).

149. *See id.* at 1414–15 (describing curtilage as “an area adjacent to the home and to which the activity of home life extends”).

150. 560 U.S. 746, 762 (2010).

151. *See id.* at 757 (discussing the test found in *O’Connor v. Ortega*, 480 U.S. 709 (1987) as an alternative to the one found in *Katz*).

152. *See id.* at 750–51 (explaining the purpose of the SWAT pagers was to assist the SWAT team in mobilization).

153. *See id.* at 752 (describing the text messages as public information that was available for auditing).

154. *See id.* (mentioning that some of the text messages were explicit in nature).

rights.<sup>155</sup> In deciding the case, the Court assumed that Quon had a reasonable expectation of privacy in his messages but expressed hesitance to establish fixed rules regarding the application of Fourth Amendment rules to emerging technologies: “The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.”<sup>156</sup> In some respects, this hesitance was staggering. After all, the Court had been struggling with the implications of technology for nearly a century.<sup>157</sup> Of course, there was some sense in the *Quon* Court’s observations. As the Court noted, the “dynamics of communication and information transmission” are changing rapidly, as are societal expectations regarding what should be regarded as proper and improper behavior, and the Court worried about its ability to predict “how employees’ privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable.”<sup>158</sup>

Another hopeful decision was rendered in *Riley v. California*,<sup>159</sup> in which the Court held that the police could not routinely search digital information on a cell phone as part of a search incident to legal arrest.<sup>160</sup> In one of the fact scenarios presented in that case, after an individual was stopped for driving with expired license plates and arrested, the police suspected that the arrestee was associated with gang activity and decided to search his smart phone.<sup>161</sup> Although the Court reaffirmed the search-incident-to-arrest exception, the Court invalidated the

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155. *See id.* at 753 (claiming, in addition to Fourth Amendment violations, the audit violated the Stored Communications Act).

156. *Id.* at 759.

157. *See* Lawrence Hurley, *In U.S., When High-Tech Meets High Court, High Jinks Ensnare*, REUTERS (May 9, 2014, 1:12 PM), <http://www.reuters.com/article/2014/05/09/us-usa-court-tech-idUSBREA480N420140509> (last visited June 5, 2015) (describing recent mishaps of Justices’ use of technological terms) (on file with the Washington and Lee Law Review).

158. *City of Ontario v. Quon*, 560 U.S. 746, 759–60 (2010).

159. 134 S. Ct. 2473 (2014).

160. *See id.* at 2485 (holding that officers must obtain warrants before conducting searches of cell phones).

161. *See id.* at 2480 (highlighting that the police found incriminating information regarding two gangs, the Crips and the Bloods).

search.<sup>162</sup> In doing so, the Court emphasized that individuals are entitled to privacy against governmental intrusion into their private affairs and described smart phones as “minicomputers” that have the potential to function as telephones as well as “cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, and newspapers,” and can contain “millions of pages of text, thousands of pictures, or hundreds of videos.”<sup>163</sup> As a result, using a smart phone, the “sum of an individual’s private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions,” can reveal a user’s Internet searches, browsing history, and personal movements.<sup>164</sup> Consequently, the Court regarded a search of a smart phone as quite different than the use of the pen register in *Smith v. Maryland*.<sup>165</sup>

In *Riley*, in evaluating the validity of the government’s action, the Court balanced “the degree [to which a search] intrudes upon an individual’s privacy” against “the degree to which it is needed for the promotion of legitimate governmental interests.”<sup>166</sup> Because the digital data “stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee’s escape,” the Court concluded that the police could not search it except to determine whether it is being used to conceal a weapon (for example, a razor blade).<sup>167</sup> Even though the Court was aware of the fact that a smart phone might be vulnerable to two different types of evidence destruction—remote wiping and data encryption—the Court viewed these concerns as remote given that the government had offered nothing more than a couple “of anecdotal examples of remote wiping triggered by an arrest.”<sup>168</sup> Regarding encryption, the Court noted that the police would have limited opportunities to search a password-protected phone

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162. See *id.* at 2483 (explaining that cell phones found on arrestees do not pose a risk to officers and generally do not invoke exigency issues).

163. *Id.* at 2489.

164. *Id.*

165. See *id.* at 2492 (stating explicitly that *Smith v. Maryland* does not apply).

166. *Id.* at 2484.

167. See *id.* at 2485 (“Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one.”).

168. See *id.* at 2486–87 (explaining that most phone screens would lock a few minutes after an arrest).

because smart phones “lock at the touch of a button or, as a default, after some very short period of inactivity.”<sup>169</sup> In any event, the police can prevent remote wiping by disconnecting a phone from the network, which can happen by removing the battery or placing the phone in a bag that isolates it from receiving radio waves.<sup>170</sup> If there is evidence suggesting that a remote wipe is imminent, the police may be able to establish “exigent circumstances” that would justify an immediate warrantless search.<sup>171</sup>

*Riley’s* pro-privacy holding and statements offer U.S. citizens some hope that the Court will eventually provide individuals with protection against NSA surveillance of e-mail, text, and phone communications.<sup>172</sup> However, the decision does not inevitably lead to that result.<sup>173</sup> Even if the Court precludes the police from reviewing the contents of an individual’s smart phone, it might not go so far as to prohibit the NSA from accessing communications sent by an individual through an ISP or cell phone provider that is

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169. *See id.* at 2486

Moreover, in situations in which an arrest might trigger a remote-wipe attempt or an officer discovers an unlocked phone, it is not clear that the ability to conduct a warrantless search would make much of a difference. The need to effect the arrest, secure the scene, and tend to other pressing matters means that law enforcement officers may well not be able to turn their attention to a cell phone right away. . . . Cell phone data would be vulnerable to remote wiping from the time an individual anticipates arrest to the time any eventual search of the phone is completed, which might be at the station house hours later. Likewise, an officer who seizes a phone in an unlocked state might not be able to begin his search in the short time remaining before the phone locks and data becomes encrypted.

(citations omitted).

170. *See id.* at 2487 (describing new technology to prevent encryption, such as “Faraday bags”).

171. *See id.* at 2487–88 (outlining that a potential test regarding exigent circumstances in situations with imminent threats of data wipes is the reasonableness of the officer’s actions).

172. *See* Marc Rotenberg & Alan Butler, *Symposium: In Riley v. California, a Unanimous Supreme Court Sets Out Fourth Amendment for Digital Age*, SCOTUSBLOG (June 26, 2014, 6:07 PM), <http://www.scotusblog.com/2014/06/symposium-in-riley-v-california-a-unanimous-supreme-court-sets-out-fourth-amendment-for-digital-age/> (last visited June 12, 2015) (“The Court’s opinion in *Riley v. California* signals a Court more prepared to engage in the challenges of the digital age ahead.”) (on file with the Washington and Lee Law Review).

173. *See id.* (explaining that the Court has not addressed this issue specifically).

remotely situated from the individual's smart phone. As a result, *Riley* does not definitively resolve the Fourth Amendment issues raised by the NSA surveillance program and does not come to grips with the Court's prior precedent, which suggests that there is no REOP in information that an individual voluntarily turns over to a third party, and it is unclear whether and how the Court will apply its precedent to smart phones and computers or to communications made through such devices.<sup>174</sup>

Of course, even if the Court's Fourth Amendment jurisprudence were construed broadly enough to allow an individual to challenge the government's seizure of phone call information, texts, or emails, a potentially aggrieved individual might not be able to bring suit.<sup>175</sup> For one thing, the individual may not be able to prove that he is under surveillance.<sup>176</sup> As noted, when the NSA sends a National Security Letter to a telecommunications company, it usually includes an order precluding the company from publicly acknowledging the letters or the disclosures or even from alerting their customers.<sup>177</sup> Moreover, to bring suit, individuals must be able to establish standing in the sense of establishing sufficient injury to satisfy the Article III case or controversy requirements.<sup>178</sup> In *Clapper v. Amnesty International*,<sup>179</sup> individuals who were the likely targets of NSA surveillance (they were providing legal representation to alleged terrorists who had been detained at Guantanamo Bay) sought to challenge the cybersurveillance program.<sup>180</sup> However, because of

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174. See Jay Stanley, *How the Supreme Court Could Have Ruled in Riley*, ACLU (Jun. 26, 2014, 11:17 AM), <https://www.aclu.org/blog/how-supreme-court-could-have-ruled-riley> (last visited July 10, 2015) (explaining that the Court could easily limit this decision in later cases) (on file with the Washington and Lee Law Review).

175. See Stephen I. Vladeck, *Standing and Secret Surveillance*, 10 ISJLP 551, 556 (2014) (describing one possible issue barring a Fourth Amendment claim: standing).

176. See *id.* at 567 (explaining that proving data surveillance is difficult in the absence of Snowden-like disclosures).

177. See generally Shane, *supra* note 1; Stanglin, *supra* note 1.

178. See generally Vladeck, *supra* note 175.

179. 133 S. Ct. 1138 (2013).

180. See *id.* at 1143 (highlighting the respondents' argument that there was an objectively reasonable likelihood that their communications would be acquired in the future).

the secrecy that pervaded the NSA program, plaintiffs were unable to prove that they were actual targets of the NSA program, and the Court concluded that they could not establish injury or standing to sue.<sup>181</sup> Of course, the Court's holding placed plaintiffs in an impossible situation.<sup>182</sup> To have standing to sue, plaintiffs must be able to prove that the NSA is subjecting them to surveillance.<sup>183</sup> However, the government goes to great lengths to maintain secrecy and to preclude plaintiffs for knowing whether they are subject to surveillance.<sup>184</sup> In *Clapper*, the plaintiffs asked that the Government be forced to reveal, through *in camera* proceedings, whether it was intercepting respondents' communications and what targeting procedures it was using.<sup>185</sup> The Court refused to require the Government to make this revelation, noting that the plaintiffs were required to establish standing by "pointing to specific facts" and that the Government was not required to "disprove standing by revealing details of its surveillance priorities."<sup>186</sup> The net effect was that, because the government's surveillance program was super-secret, plaintiffs could not prove that they were under surveillance, and therefore they could not

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181. See *id.* at 1147 ("[I]njury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010))).

182. See Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in Clapper v. Amnesty International USA and City of Los Angeles v. Lyons*, 23 WM. & MARY BILL RTS. J. 127, 130 (2014) (critiquing the *Clapper* decision because the Court used it to shelter large swathes of governmental conduct from the most effective forms of judicial review).

183. See *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1155 (2013) (deciding that the respondents lacked standing because they "cannot demonstrate that the future injury they purportedly fear is certainly impending and because they cannot manufacture standing by incurring costs in anticipation of non-imminent harm").

184. See Jackson, *supra* note 182, at 142 (arguing "[w]hen a government in a democracy seeks to act in secret, the need for judicial review of the legality of statutes authorizing the secrecy should be deemed specially pressing").

185. See *Clapper*, 133 S. Ct. at 1149 n.4 (questioning the practical implications of allowing a terrorist suspect to determine whether he or she was under government surveillance by filing a law suit).

186. See *id.* (focusing on which party must prove standing in government surveillance cases).

meet the case or controversy necessary to proceed with the litigation.<sup>187</sup>

### Conclusion

Life, and rights, inevitably involve tradeoffs. Even skeptics of governmental power recognize the need to balance governmental interests and individual interests.<sup>188</sup> Unquestionably, the individual interest in privacy, which Justice Louis D. Brandeis described as “the right most valued by civilized men,” and the interest in preventing governmental overreach and abuse are fundamental to life in a free society. However, they are not regarded as absolute.<sup>189</sup> Moreover, the government has a compelling interest in gathering the information necessary to prevent future terrorist attacks.<sup>190</sup> The question is whether the NSA surveillance program strikes the right balance between the governmental interest in protecting society and the individual interest in privacy.<sup>191</sup>

Nevertheless, when viewed from a historical perspective, the NSA surveillance program can only be regarded as extraordinary.<sup>192</sup> Although the Framers of the U.S. Constitution

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187. See Jackson, *supra* note 182, at 187 (concluding that the *Clapper* decision protecting secret government spying programs through standing hurts alleged victims, society, and even the Court).

188. See *Riley v. California*, 134 S. Ct. 2473, 2492 (2014) (analyzing the interests of both the government and individuals).

189. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (defining the most valued right as the right to be left alone by the government).

190. See Matthew Silverman, *National Security and the First Amendment: A Judicial Role in Maximizing Public Access to Information*, 78 IND. L.J. 1101, 1111 (2003) (“Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.” (quoting *Snepp v. United States*, 444 U.S. 507, 509 n.3. (1980))).

191. See *id.* at 1124 (“The challenge to the judicial branch is to adapt in a way that preserves barriers to access where, in the interests of national security, access should not be granted, while taking steps to prevent the abuse of privileges where information should be released.”).

192. See Jenny Hendrix, *NSA Surveillance Puts George Orwell’s ‘1984’ on Bestseller Lists*, L.A. TIMES (June 11, 2013), <http://articles.latimes.com/2013/jun/11/entertainment/la-et-jc-nsa-surveillance-puts-george-orwells-1984-on-bestseller-lists-20130611> (last visited June 6, 2015) (quoting President Obama’s defense of the N.S.A. surveillance program: “In the abstract, you can

embraced a movement away from monarchy towards democracy, they exhibited distrust towards government and feared potential abuses of governmental power. This distrust is evident in the fact that the Framers embraced Montesquieu's notion of separation of powers and created a system that involved checks and balances.<sup>193</sup> In addition, the founding generation was worried that the doctrine of separation of powers did not provide sufficient protection against governmental abuse and demanded what became the Bill of Rights.<sup>194</sup>

While it is difficult to know for sure how other generations would have reacted, one can relatively easily surmise that the founding generation would have been dumbfounded to learn of the NSA's surveillance and data collection program. Unquestionably, the technology that the NSA has employed to implement its program is beyond anything that they could possibly have been imagined at that time. Beyond that, the founding generation was concerned about governmental abuses of power, and such a broad-based surveillance program presents a huge potential for abuse. Despite governmental claims that such spying is needed to protect Americans against terrorists, the founding generation might have feared that governmental officials would use its data collection against Americans.

Of course, the fundamental problem with the NSA surveillance relates to the secrecy with which it was conducted. In a democratic society, in which the power to govern flows from the consent of the governed, one can legitimately question whether the government should be operating such a massive surveillance program shrouded in secrecy. It is important that the people be allowed to debate the competing values and to weigh in on the size and scope of the program. Perhaps the American public will decide that the global war against terrorism justifies the potential risks presented by such a program. Perhaps not.

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complain about Big Brother and how this is a potential program run amok, but when you actually look at the details, then I think we've struck the right balance.") (on file with the Washington and Lee Law Review).

193. See THE FEDERALIST NO. 47 (James Madison) (focusing on Montesquieu's separation of powers doctrine to reduce tyranny in the Federal Government).

194. See *supra* note 85 and accompanying text (discussing the states' condition of adoption of a bill of rights to ratify the Constitution).

Regardless, society should be given a full and fair opportunity to have this debate.