# Explanation/Guide

### File Description and General Tips

This file contains the Surveillance State Repeal Act affirmative. It includes three advantages and comprehensive backline evidence. When reading this affirmative, students can choose to read the Constitutional Privacy Advantage, the Tech Leadership Advantage, and/or the Investigative Journalism Advantage. The negative’s case materials are located in the Surveillance State Repeal Act negative file.

In response to negative case arguments, the affirmative can draw from the backline evidence in this file. For each case argument, the affirmative is provided with three cards in response. Due to time constraints, students should carefully choose which (if any) extension evidence to read in the 2AC. Instead of reading new cards to respond to each 1NC case argument, students are encouraged to write 2AC blocks that make analytical arguments drawing upon the relevant 1AC evidence. When necessary, these blocks should include evidence from the backline materials.

In response to negative off-case arguments, the affirmative can draw from the evidence in the relevant files. This file contains *only* case arguments.

### Explanation of the Plan

The plan prohibits federal intelligence agencies like NSA from engaging in bulk searches and/or seizures of Americans’ electronic communications without a warrant. This is the major provision of the Surveillance State Repeal Act, a broad legislative proposal that eliminates surveillance authorities derived from the USA PATRIOT Act, the FISA Amendments Act of 2008, and Executive Order 12333. This would substantially constrain the NSA’s mass surveillance programs including Upstream, PRISM, and X-KEYSCORE by requiring that collection occur only pursuant to an individualized warrant.

### Explanation of the Constitutional Privacy Advantage

The affirmative argues that bulk collection of Americans’ electronic communications is unconstitutional because it violates First and Fourth Amendment rights to privacy. They argue that privacy is the foundation of freedom and that mass surveillance is inherently repressive because it stifles dissent and freedom of thought. The affirmative contends that violations of constitutional privacy rights should never be tolerated regardless of consequences because the Constitution establishes a series of collective pre-commitments. Constitutional rights can never be “balanced away” — even in the face of security threats — or they are emptied of their value as constraints on government action.

### Explanation of the Tech Leadership Advantage

The affirmative argues that NSA surveillance is undermining the global competitiveness of the U.S. tech industry because it is undermining international trust in American companies like Google, Apple, Microsoft, and Cisco. These companies are losing billions of dollars in revenue as their global market share shrinks. America’s overall tech leadership depends on the strength of these companies because they form the industrial base that produces innovative products and services upon which our national security depends. Without tech leadership, America will be unable to maintain its hegemony. The affirmative argues that this loss of leadership will create a dangerous power vacuum that exacerbates security threats and risks conflict.

### Explanation of the Investigative Journalism Advantage

The affirmative argues that mass surveillance imperils freedom of the press by deterring and hampering investigative journalists from reporting about government wrongdoing. In an environment where all electronic communications are swept up by NSA’s dragnet, sources will not come forward and journalists won’t be able to publicize government misconduct. The ability of American journalists to act as effective watchdogs is particularly important because the global press depends on them to report on the U.S. government and because other countries use the existence of NSA domestic surveillance to justify their own surveillance of journalists. The affirmative contends that investigative journalism is vital to government accountability and movements for social justice. Without fearless investigative journalism, transformative social change is impossible.

## 1AC

### 1AC — Constitutional Privacy Advantage

#### Contention One: Constitutional Privacy

#### First, NSA’s bulk surveillance of the Internet is an unconstitutional violation of privacy.

Lee 15 — Micah Lee, Technologist focusing on operational security, source protection, privacy, and cryptography for *The Intercept*, Founder and Board Member of the Freedom of the Press Foundation, former Staff Technologist with the Electronic Frontier Foundation, 2015 (“Spying On The Internet Is Orders Of Magnitude More Invasive Than Phone Metadata,” *The Intercept*, July 9th, Available Online at <https://firstlook.org/theintercept/2015/07/09/spying-internet-orders-magnitude-invasive-phone-metadata/>, Accessed 07-20-2015)

When you pick up the phone, who you’re calling is none of the government’s business. The NSA’s domestic surveillance of phone metadata was the first program to be disclosed based on documents from whistleblower Edward Snowden, and Americans have been furious about it ever since. The courts ruled it illegal, and Congress let the section of the Patriot Act that justified it expire (though the program lives on in a different form as part of the USA Freedom Act).

Yet XKEYSCORE, the secret program that converts all the data it can see into searchable events like web pages loaded, files downloaded, forms submitted, emails and attachments sent, porn videos watched, TV shows streamed, and advertisements loaded, demonstrates how Internet traffic can be even more sensitive than phone calls. And unlike the Patriot Act’s phone metadata program, Congress has failed to limit the scope of programs like XKEYSCORE, which is presumably still operating at full speed. Maybe Verizon stopped giving phone metadata to the NSA, but if a Verizon engineer uploads a spreadsheet full of this metadata without proper encryption, the NSA may well get it anyway by spying directly on the cables that the spreadsheet travels over.

The outrage over bulk collection of our phone metadata makes sense: Metadata is private. Americans call suicide prevention hotlines, HIV testing services, phone sex services, advocacy groups for gun rights and for abortion rights, and the people they’re having affairs with. We use the phone to schedule job interviews without letting our current employer know, and to manage long-distance relationships. Most of us, at one point or another, have spent long hours on the phone discussing the most intimate details about our lives. There isn’t an American alive today who didn’t grow up with at least some access to a telephone, so Americans understand this well.

But Americans don’t understand the Internet yet. Bulk collection of phone metadata is, without a doubt, a violation of your privacy, but bulk surveillance of Internet traffic is orders of magnitude more invasive. People also use the Internet in all the ways they use phones — often inadvertently sharing even more intimate details through online searches. In fact, the phone network itself is starting to go over the Internet, without customers even noticing.

XKEYSCORE, as well as NSA’s programs that tap the Internet directly and feed data into it, have some legal problems: They violate First Amendment rights to freedom of association; they violate the Wiretap Act. But the biggest and most obvious concerns are with the Fourth Amendment.

The Fourth Amendment to the U.S. Constitution is short and concise:

The right of the people to be secure in their persons, houses, papers, and effects, 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.

It means that Americans have a right to privacy. If government agents want to search you or seize your data, they must have a warrant. The warrant can only be issued if they have probable cause, and the warrant must be specific. It can’t say, “We want to seize everyone’s Internet traffic to see what’s in it.” Instead, it must say something like, “We want to seize a specific incriminating document from a specific suspect.”

But this is exactly what’s happening:

The government is indiscriminately seizing Internet traffic to see what’s in it, without probable cause. The ostensible justification is that, while tens of millions of Americans may be swept up in this dragnet, the real targets are foreigners. In a legal document called USSID 18, the NSA sets out policies and procedures that purportedly prevent unreasonable searches of data from U.S. persons.

But it doesn’t prevent, or even claim to prevent, unreasonable seizures.

Kurt Opsahl, general counsel of the Electronic Frontier Foundation, explains: “We have a fundamental disagreement with the government about whether [data] acquisition is a problem. Acquisition is a seizure and has to be compliant with the Fourth Amendment.”

If you read USSID 18 carefully, you’ll see that it appears to limit, with many exceptions, the government’s ability to intentionally collect data concerning U.S. persons. But the Department of Defense, under which the NSA operates, defines “collection” differently than most of us do. It doesn’t consider seized data as “collected” until it’s been queried by a human.

If you email your mom, there’s a good chance the NSA will intercept the message as it travels through a fiberoptic cable, such as the ones that make up the backbone of the Internet, eventually making its way to an XKEYSCORE field site. You can thwart this with encryption: either by encrypting your email (hopefully someday all parents will know how to use encrypted email), or by using email servers that automatically encrypt with each other. In the absence of such encryption, XKEYSCORE will process the email, fingerprint it and tag it, and then it will sit in a database waiting to be queried. According to the Department of Defense, this email hasn’t been “collected” until an analyst runs a query and the email appears on the screen in front of them.

When NSA seizes, in bulk, data belonging to U.S. citizens or residents, data that inevitably includes information from innocent people that the government does not have probable cause to investigate, the agency has already committed an unconstitutional “unreasonable seizure,” even if analysts never query the data about innocent U.S. persons.

The NSA has legal justifications for all their surveillance: Section 215 of the Patriot Act, now expired, was used to justify bulk collection of phone and email metadata. Section 702 of the Foreign Intelligence Surveillance Act (FISA) is currently used to justify so-called “upstream” collection, tapping the physical infrastructure that the Internet uses to route traffic across the country and around the world in order to import into systems like XKEYSCORE. Executive Order 12333, approved by President Reagan, outlines vague rules, which are littered with exceptions and loopholes, that the executive branch made for itself to follow regarding spying on Americans, which includes USSID 18.

But these laws and regulations ignore the uncomfortable truth that the Fourth Amendment requires surveillance of Americans to be targeted; it cannot be done in bulk. Americans are fighting to end bulk surveillance in dozens of lawsuits, including Jewel v. NSA, which relies on whistleblower-obtained evidence that NSA tapped the fiber optic cables that carry Internet traffic in AT&T’s Folsom Street building in San Francisco. It’s easy for the government to stall cases like this, or get them dismissed, by insisting that talking about it at all puts our national security at risk.

And, of course, let’s not forget the 6.8 billion people on Earth who are not in the United States. Article 12 of the U.N. Declaration of Human Rights states:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

The NSA has very few restrictions on spying on non-Americans (it must be for “foreign intelligence” or “counterintelligence” purposes, and not other purposes), despite XKEYSCORE and the bulk collection programs that feed it being an “arbitrary interference” with the privacy of such persons. NSA doesn’t even have restrictions on spying on allies, such as Germany and France.

Facebook feeds everywhere are decorated with baby pictures. When those babies are grown up and getting elected to Congress, maybe then Americans will understand how the Internet works, and that bulk surveillance of phone metadata is just a tiny sliver of the enormous “collect it all” bulk surveillance pie.

#### Second, constitutional privacy protections are the foundation of freedom. Mass surveillance is inherently repressive because it exposes individuals to inescapable, oppressive scrutiny.

Greenwald 14 — Glenn Greenwald, journalist who received the 2014 Pulitzer Prize for Public Service for his work with Edward Snowden to report on NSA surveillance, Founding Editor of *The Intercept*, former Columnist for the *Guardian* and *Salon*, recipient of the Park Center I.F. Stone Award for Independent Journalism, the Online Journalism Award for investigative work on the abusive detention conditions of Chelsea Manning, the George Polk Award for National Security Reporting, the Gannett Foundation Award for investigative journalism, the Gannett Foundation Watchdog Journalism Award, the Esso Premio for Excellence in Investigative Reporting in Brazil, and the Electronic Frontier Foundation’s Pioneer Award, holds a J.D. from New York University School of Law, 2014 (“The Harm of Surveillance,” *No Place To Hide: Edward Snowden, the NSA, and the U.S. Surveillance State*, Published by Metropolitan Books, ISBN 9781627790734, p. 173-174)

Privacy is essential to human freedom and happiness for reasons that are rarely discussed but instinctively understood by most people, as evidenced by the lengths to which they go to protect their own. To begin with, people radically change their behavior when they know they are being watched. They will strive to do that which is expected of them. They want to avoid shame and condemnation. They do so by adhering tightly to accepted social practices, by staying within imposed boundaries, avoiding action that might be seen as deviant or abnormal.

The range of choices people consider when they believe that others are watching is therefore far more limited than what they might do when acting in a private realm. A denial of privacy operates to severely restrict one’s freedom of choice.

Several years ago, I attended the bat mitzvah of my best friend’s daughter. During the ceremony, the rabbi emphasized that “the central lesson” for the girl to learn was that she was “always being watched and judged.” He told her that God always knew what she was doing, every choice, every action, and even every thought, no matter how private. “You are never alone,” he said, which meant that she should always adhere to God’s will.

The rabbi’s point was clear: if you can never evade the watchful eyes of a supreme authority, there is no choice but to follow the dictates that authority imposes. You cannot even consider forging your own path beyond those rules: if you believe you are always being watched and judged, you are not really a free individual.

All oppressive authorities — political, religious, societal, parental — rely on this vital truth, using it as a principal tool to enforce orthodoxies, compel adherence, and quash dissent. It is in their interest to convey that nothing their subjects do will escape the knowledge of the authorities. Far more effectively than a police force, the deprivation of privacy will crush any temptation to deviate from rules and norms.

What is lost when the private realm is abolished are many of the [end page 173] attributes typically associated with quality of life. Most people have experienced how privacy enables liberation from constraint. And we’ve all, conversely, had the experience of engaging in private behavior when we thought we were alone — dancing, confessing, exploring sexual expression, sharing untested ideas — only to feel shame at having been seen by others.

Only when we believe that nobody else is watching us do we feel free — safe — to truly experiment, to test boundaries, to explore new ways of thinking and being, to explore what it means to be ourselves. What made the Internet so appealing was precisely that it afforded the ability to speak and act anonymously, which is so vital to individual exploration.

For that reason, it is in the realm of privacy where creativity, dissent, and challenges to orthodoxy germinate. A society in which everyone knows they can be watched by the state — where the private realm is effectively eliminated — is one in which those attributes are lost, at both the societal and the individual level.

Mass surveillance by the state is therefore inherently repressive, even in the unlikely case that it is not abused by vindictive officials to do things like gain private information about political opponents. Regardless of how surveillance is used or abused, the limits it imposes on freedom are intrinsic to its existence.

#### Third, constitutional safeguards against warrantless surveillance must be maintained *regardless of consequences*. “Weighing” privacy against security *nullifies* the Fourth Amendment.

Cole 6 — David Cole, Professor at Georgetown University Law Center, has litigated many significant constitutional cases in the Supreme Court, holds a J.D. from Yale Law School, 2007 (“How to Skip the Constitution,” *New York Review of Books*, November 16th, Available Online at <http://www.nybooks.com/articles/archives/2006/nov/16/how-to-skip-the-constitution/>, Accessed 06-28-2015)

Judge Posner is not troubled by any of these measures, at least as a constitutional matter. His theory of the Constitution is at once candid and cavalier. Rejecting popular conservative attacks on “judicial activism,” he argues that in view of the open-ended character of many of the document’s most important terms—“reasonable” searches and seizures, “due process of law,” “equal protection,” and even “liberty” itself—it is not objectionable but inevitable that constitutional law is made by judges. He dismisses the constitutional theories of textualism and originalism favored by many conservative judges and scholars as canards, arguing that neither the Constitution’s text nor the history of its framing gives much guidance in dealing with most of the hard questions of the day. Constitutional law, he maintains, “is intended to be a loose garment; if it binds too tightly, it will not be adaptable to changing circumstances.”

But Posner then goes on to treat the Constitution as essentially a license to open-ended “balancing” of interests by the political branches and the courts. His thinking is informed largely by an economist’s predilection for cost-benefit analysis and a philosophical enthusiasm for pragmatism. Posner’s reputation as a scholar rests not on his contributions to constitutional theory, but on his role as one of the founding fathers of the movement that applied economic analysis to law. His new book might just as well have been called “An Economist Looks at the Constitution.” In the end, constitutional interpretation for Posner is little more than a balancing act, and when the costs of a catastrophic terrorist attack are placed on the scale, he almost always feels they outweigh concerns about individual rights and liberties.

Consider, for example, his views on electronic surveillance. The Bush administration currently faces several dozen lawsuits challenging various aspects of its NSA spying program, which, according to the administration, involves the warrantless wiretapping of international phone calls and e-mails where one of the participants is thought to be connected with al-Qaeda or affiliated groups. That program, as I and many other constitutional scholars have argued, violates a provision in the Foreign Intelligence Surveillance Act (FISA) specifying that it is a crime for officials not to seek a warrant from the appropriate court before engaging in such wiretapping.1 The Bush administration seeks to justify this violation of law by invoking an inherent presidential power to ignore congressional legislation, echoing President Richard Nixon’s defense of his own decision to authorize warrantless wiretapping during the Vietnam War: “When the president does it, that means that it is not illegal.” Posner not only sees nothing wrong with the NSA program; he would also find constitutional a far more sweeping measure that subjected every phone call and e-mail in the nation, domestic as well as international, to initial computer screening for patterns of suspicious words, and then permitted intelligence agents to follow up on all communications that the computer treated as suspicious.

How does Posner reach the conclusion that the Constitution would permit such an Orwellian scheme, far more invasive than the Bush administration, if it is to be believed, has been willing to undertake so far? In a word, balancing. In Posner’s view, the costs to personal liberty of such a program are minimal, and are outweighed by the benefits to our security. Having a computer analyze one’s phone calls is no big deal, he claims, as long as we know it’s only looking for terrorists. He admits that there might be a danger of misuse of the information by the agents who follow up on the computer’s “suspects,” but he considers that risk minimal because he is confident that any such abuse would likely come to light and be widely criticized. (He fails to acknowledge that whistleblowing would be far less likely if he had his way and an Official Secrets Act were passed making it a crime to publish leaked government secrets.) As for the benefits of such surveillance, Posner surmises that such a program might sweep up sufficient data to permit intelligence agents to “connect the dots” and prevent a catastrophic attack. Even if it didn’t, he writes, it would at least have the salutary effect of discouraging terrorists from communicating by telephone and e-mail.

Every aspect of Posner’s analysis is open to question. He ignores that privacy is essential to political freedom: if everyone knows that their every electronic communication is subject to government monitoring, even by a computer, it would likely have a substantial chilling effect on communications that the government might conceivably find objectionable, not just terrorist planning, and not just criminal conduct. Moreover, Posner ignores the myriad ways in which the government can harass people without its ill intent ever coming to light. For example, the government can selectively prosecute minor infractions of the law, launch arbitrary tax investigations, and engage in blackmail, all methods perfected by FBI Director J. Edgar Hoover. Contrary to Posner’s claims, one cannot, as the FBI’s abuses showed, trust public scrutiny to forestall such tactics, even in the absence of an Official Secrets Act. Finally, it is far from clear that such a program would be effective—the sheer volume of “dots” generated would make connecting them virtually impossible. In any case, computer programs would be relatively easy to evade through the use of code words.

The real answer to Posner’s notion of balance, however, is not to show that a different balance can be struck, but to return to established Fourth Amendment jurisprudence, which has long required that searches must generally be justified by a showing of objective, specific suspicion approved by a judge who is willing to issue a specific warrant. The requirements that a warrant be issued and that it be based on “probable cause” are designed to protect privacy unless there are fairly strong grounds for official intrusion. The principal evil that the Fourth Amendment was drafted to avoid was the “general warrant,” which permitted government officials to search anyone’s home, without suspicion of specific individuals. Posner’s program is nothing less than a twenty-first-century version of exactly what the Fourth Amendment was designed to forbid. Through an open-ended and inevitably subjective balancing of privacy and security, he has managed to turn the Fourth Amendment on its head.

#### Fourth, *every* unconstitutional breach of privacy rights must be rejected to prevent total erosion of liberty.

Solove 11 — Daniel J. Solove, John Marshall Harlan Research Professor of Law at the George Washington University Law School, Founder of TeachPrivacy—a company that provides privacy and data security training programs to businesses, schools, healthcare institutions, and other organizations, Fellow at the Ponemon Institute and at the Yale Law School’s Information Society Project, Serves on the Advisory Boards of the Electronic Frontier Foundation, the Future of Privacy Forum, and the Law and Humanities Institute, holds a J.D. from Yale Law School, 2011 (“The Nothing-to-Hide Argument,” *Nothing to Hide: The False Tradeoff between Privacy and Security*, Published by Yale University Press, ISBN 9780300172317, p. 29-31)

Blood, Death, and Privacy

One of the difficulties with the nothing-to-hide argument is that it looks for a singular and visceral kind of injury. Ironically, this underlying [end page 29] conception of injury is sometimes shared by those advocating for greater privacy protections. For example, the law professor Ann Bartow argues that in order to have a real resonance, privacy problems must “negatively impact the lives of living, breathing human beings beyond simply provoking feelings of unease.” She urges that privacy needs more “dead bodies” and that privacy’s “lack of blood and death, or at least of broken bones and buckets of money, distances privacy harms from other [types of harm].”23

Bartow’s objection is actually consistent with the nothing-to-hide argument. Those advancing the nothing-to-hide argument have in mind a particular kind of appalling privacy harm, one where privacy is violated only when something deeply embarrassing or discrediting is revealed. Like Bartow, proponents of the nothing-to-hide argument demand a dead-bodies type of harm.

Bartow is certainly right that people respond much more strongly to blood and death than to more abstract concerns. But if this is the standard to recognize a problem, then few privacy problems will be recognized. Privacy is not a horror movie, most privacy problems don’t result in dead bodies, and demanding more palpable harms will be difficult in many cases.

In many instances, privacy is threatened not by a single egregious act but by the accretion of a slow series of relatively minor acts. In this respect, privacy problems resemble certain environmental harms which occur over time through a series of small acts by different actors. Although society is more likely to respond to a major oil spill, gradual pollution by a multitude of different actors often creates worse problems.

Privacy is rarely lost in one fell swoop. It is often eroded over time, little bits dissolving almost imperceptibly until we finally begin to notice how much is gone. When the government starts monitoring the phone numbers people call, many may shrug their shoulders and say, “Ah, it’s just numbers, that’s all.” Then the government might start monitoring some phone calls. “It’s just a few phone calls, nothing [end page 30] more,” people might declare. The government might install more video cameras in public places, to which some would respond, “So what? Some more cameras watching in a few more places. No big deal.” The increase in cameras might ultimately expand to a more elaborate network of video surveillance. Satellite surveillance might be added, as well as the tracking of people’s movements. The government might start analyzing people’s bank records. “It’s just my deposits and some of the bills I pay—no problem.” The government may then start combing through credit card records, then expand to Internet service provider (ISP) records, health records, employment records, and more. Each step may seem incremental, but after a while, the government will be watching and knowing everything about us.

“My life’s an open book,” people might say. “I’ve got nothing to hide.” But now the government has a massive dossier of everyone’s activities, interests, reading habits, finances, and health. What if the government leaks the information to the public? What if the government mistakenly determines that based on your pattern of activities, you’re likely to engage in a criminal act? What if it denies you the right to fly? What if the government thinks your financial transactions look odd—even if you’ve done nothing wrong—and freezes your accounts? What if the government doesn’t protect your information with adequate security, and an identity thief obtains it and uses it to defraud you? Even if you have nothing to hide, the government can cause you a lot of harm.

“But the government doesn’t want to hurt me,” some might argue. In many cases, this is true, but the government can also harm people inadvertently, due to errors or carelessness.

#### Finally, constitutional rights like privacy *can’t be “outweighed”* on the basis of cost-benefit analysis. This is especially important in the context of *terrorism*.

Cole 7 — David Cole, Professor at Georgetown University Law Center, has litigated many significant constitutional cases in the Supreme Court, holds a J.D. from Yale Law School, 2007 (“Book Review: The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11 (Review of Richard A. Posner’s *Not A Suicide Pact: The Constitution In A Time Of National Emergency*),” *Stanford Law Review* (59 Stan. L. Rev. 1735), April, Available Online to Subscribing Institutions via Lexis-Nexis)

II. The Disappearing Constitution

The general problem with Posner's approach is that it does away with the animating idea of the Constitution - namely, that it is a form of collective precommitment. The genius behind the Constitution is precisely the recognition that "pragmatic" cost-benefit decisions of the type Posner favors will often appear in the short term to favor actions that in the long term are contrary to our own best principles. Just as we may be tempted to smoke a cigarette tonight [\*1746] even though in the long term we are likely to suffer as a result, so we know collectively that in the short term we are likely to empower government to suppress unpopular speech, invade the privacy of "dangerous" minorities, and abuse suspected criminals, even though in the long term such actions undermine the values of free speech, equality, and privacy that are necessary to democracy and human flourishing. If we were always capable of rationally assessing the costs and benefits in such a way as to maximize our collective well-being, short-term and long-term, we might not need a Constitution. But knowing that societies, like individuals, will be tempted to act in ways that undermine their own best interests, we have precommitted to a set of constitutional constraints on pragmatic balancing. Posner's view that the Constitution must bend to the point of authorizing virtually any initiative that seems pragmatic to him reduces the Constitution to a precommitment to balance costs and benefits, and that is no precommitment at all.

Constitutional theory demands more than ad hoc balancing. n27 While the nature of competing interests means that at some level of generality, a balance must be struck, constitutional analysis is not an invitation to the freewheeling, all-things-considered balance of the economist. Instead, it requires an effort, guided by text, precedent, and history, to identify the higher principles that guide us as a society, principles so important that they trump democracy itself (not to mention efficiency). The judge's constitutional duty was perhaps best captured by Justice John Marshall Harlan, writing about the due process clause:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint. n28

Instead of looking to the Constitution and its jurisprudence as a reflection of our collective effort to determine the higher principles that should guide us, as Harlan suggests, Posner would start from scratch, assessing what is best from a pragmatic, open-ended balancing approach that he admits ultimately involves weighing imponderables.

 [\*1747] Posner insists that to declare a practice constitutional is not the same as saying that it is desirable as a policy matter: "Much that the government is permitted by the Constitution to do it should not do and can be forbidden to do by legislation or treaties" (p. 7). That is certainly true as a theoretical matter, at least where one's constitutional theory is not reducible to one's policy preferences. But Posner appears to view questions of constitutionality as simply a matter of weighing all the costs and benefits, which is surely the same utilitarian calculus the policymaker would use to determine whether a practice is desirable. Under Posner's approach, then, it is difficult to see why there would be any room between what is desirable and what is constitutional.

If constitutionalism is to have any bite, it must be distinct from mere policy preferences. In fact, our Constitution gives judges the authority to declare acts of democratically elected officials unconstitutional on the understanding that they will not simply engage in the same cost-benefit analyses that politicians and economists undertake. The very sources Judge Posner dismisses - text, precedent, tradition, and reason - as unhelpful in the face of the threat of catastrophic terrorism are absolutely essential to principled constitutional decision-making. It is true that text, precedent, tradition, and reason do not determine results in some mechanistic way. That is why we ask judges, not machines, to decide constitutional cases. But these sources are nonetheless critically important constraints on and guides to constitutional decision-making. They are what identify those principles that have been deemed fundamental - and therefore constitutional - over our collective history.

The Framers of the Constitution did not simply say "the government may engage in any practice whose benefits outweigh its costs," as Judge Posner would have it. Instead, they struggled to articulate a limited number of fundamental principles and enshrine them above the everyday pragmatic judgments of politicians. They foresaw what modern history has shown to be all too true - that while democracy is an important antidote to tyranny, it can also facilitate a particular kind of tyranny - the tyranny of the majority. Constitutional principles protect those who are likely to be the targets of such tyranny, such as terror suspects, religious and racial minorities, criminal defendants, enemy combatants, foreign nationals, and, especially in this day and age, Arabs and Muslims. Relegating such individuals to the mercy of the legislature denies the existence of that threat. The Constitution is about more than efficiency and more than democracy; it is a collective commitment to the equal worth and dignity of all human beings. To fail to see that is to miss the very point of constitutional law.

Posner's trump card is that because terrorism in the twenty-first century poses the risk of truly catastrophic harm, it renders constitutional precedent and history largely irrelevant. Everything has changed. We are in a new paradigm, in which, as Alberto Gonzales said of the Geneva Conventions, the old rules (apparently including even those enshrined in the Constitution) are now [\*1748] "quaint" or "obsolete." n29 But each new generation faces unforeseen challenges. The advent of modern weaponry changed war as we knew it. Communism backed by the Soviet Union posed a "new" threat of totalitarian takeover. The development of the nuclear bomb ushered in yet another new era. This is not to deny that there is a real threat that terrorists may get their hands on weapons of mass destruction, and that this threat must be taken very seriously. But it is to insist on what is a truly conservative point - that principles developed and applied over two centuries still have something important to say in guiding us as we address the threat of modern terrorism.

The corollary to Posner's pragmatic and utilitarian balancing approach to the Constitution is that judges should defer to the political branches on national security questions. Judges have no special expertise in national security, he argues, while the political branches do (p. 9). Decisions invalidating security measures as unconstitutional reduce our flexibility, for they are extremely difficult to change through the political process, and may cut off avenues of experimentation (p. 27). But the Constitution was meant to cut off certain avenues. Trying suspected terrorists without a jury, locking them up without access to a judge, convicting them without proving guilt beyond a reasonable doubt, searching them without probable cause or a warrant, and subjecting them to torture all might make terrorists' tasks more difficult (although, as I have argued elsewhere, many of these shortcuts actually help the terrorists and make us more vulnerable, because of the backlash they provoke). n30 But while the Constitution may not be a "suicide pact," neither is it a license to do anything our leaders think might improve our safety.

### 1AC — Tech Leadership Advantage

#### Contention Two: Tech Leadership

#### First, NSA surveillance is decimating the U.S. tech industry. The fallout will be large and long-term unless confidence in U.S. companies is restored.

Donohue 15 — Laura K. Donohue, Associate Professor of Law, Director of the Center on National Security and the Law, and Director of the Center on Privacy and Technology at Georgetown University, has held fellowships at Stanford Law School’s Center for Constitutional Law, Stanford University’s Center for International Security and Cooperation, and Harvard University’s John F. Kennedy School of Government, holds a Ph.D. in History from the University of Cambridge and a J.D. from Harvard Law School, 2015 (“High Technology, Consumer Privacy, and U.S. National Security,” Forthcoming Article in the *Business Law Review*, Available Online via SSRN at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2563573>, Accessed 08-08-2015, p. 3-6)

II. Economic Impact of NSA Programs

The NSA programs, and public awareness of them, have had an immediate and detrimental impact on the U.S. economy. They have cost U.S. companies billions of dollars in lost sales, even as companies have seen their market shares decline. American multinational corporations have had to develop new products and programs to offset the revelations and to build consumer confidence. At the same time, foreign entities have seen revenues increase. Beyond the immediate impact, the revelation of the programs, and the extent to which the NSA has penetrated foreign data flows, has undermined U.S. trade agreement negotiations. It has spurred data localization efforts around the world, and it has raised the spectre of the future role of the United States in Internet governance. Even if opportunistic, these shifts signal an immediate and long-term impact of the NSA programs, and public knowledge about them, on the U.S. economy.

A. Lost Revenues and Declining Market Share

Billions of dollars are on the line because of worldwide concern that the services provided by U.S. information technology companies are neither secure nor private.13 Perhaps nowhere is this more apparent than in cloud computing. [end page 3]

Previously, approximately 50% of the worldwide cloud computing revenues derived from the United States.14 The domestic market thrived: between 2008 and 2014, it more than tripled in value. 15 But within weeks of the Snowden leaks, reports had emerged that U.S. companies such as Dropbox, Amazon Web Services, and Microsoft’s Azure were losing business. 16 By December 2013, ten percent of the Cloud Security Alliance had cancelled U.S. cloud services projects as a result of the Snowden information.17 In January 2014 a survey of Canadian and British businesses found that one quarter of the respondents were moving their data outside the United States.18

The Information Technology and Innovation Foundation estimates that declining revenues of corporations that focus on cloud computing and data storage alone could reach $35 billion over the next three years.19 Other commentators, such as Forrester Research analyst James Staten, have put actual losses as high as $180 billion by 2016, unless something is done to restore confidence in data held by U.S. companies.20

The monetary impact of the NSA programs extends beyond cloud computing to the high technology industry. Cisco, Qualcomm, IBM, Microsoft, and Hewlett-Packard have all reported declining sales as a direct result of the NSA programs.21 Servint, a webhosting company based in Virginia, reported in June 2014 that its international clients had dropped by 50% since the leaks began.22 Also in June, the German government announced that because of Verizon’s complicity in the NSA program, it would end its contract with the company, which had previously [end page 4] provided services to a number of government departments.23 As a senior analyst at the Information Technology and Innovation Foundation explained, “It’s clear to every single tech company that this is affecting their bottom line.”24 The European commissioner for digital affairs, Neelie Kroes, predicts that the fallout for U.S. businesses in the EU alone will amount to billions of Euros.25

Not only are U.S. companies losing customers, but they have been forced to spend billions to add encryption features to their services. IBM has invested more than a billion dollars to build data centers in London, Hong Kong, Sydney, and elsewhere, in an effort to reassure consumers outside the United States that their information is protected from U.S. government surveillance. 26 Salesforce.com made a similar announcement in March 2014.27 Google moved to encrypt terms entered into its browser. 28 In June 2014 it took the additional step of releasing the source code for End-to-End, its newly-developed browser plugin that allows users to encrypt email prior to it being sent across the Internet.29 The following month Microsoft announced Transport Layer Security for inbound and outbound email, and Perfect Forward Secrecy encryption for access to OneDrive.30 Together with the establishment of a Transparency Center, where foreign governments could review source code to assure themselves of the integrity of Microsoft software, the company sought to put an end to both NSA back door surveillance and doubt about the integrity of Microsoft products. 31

Foreign technology companies, in turn, are seeing revenues increase. Runbox, for instance, an email service based in Norway and a direct competitor to Gmail and Yahoo, almost immediately made it publicly clear that it does not comply with foreign court requests for its customers’ personal information. 32 Its customer base increased 34% in the aftermath of the Snowden leaks. 33 Mateo Meier, CEO of Artmotion, Switzerland’s biggest offshore data hosting company, reported that within the first month of the leaks, the company saw a 45% rise in revenue.34 Because Switzerland is not a member of the EU, the only way to access data in a Swiss data center is through an official court order demonstrating guilt or liability; there are no exceptions for the United States.35 In April 2014, Brazil and the EU, which previously used U.S. firms to supply undersea cables for transoceanic [end page 5] communications, decided to build their own cables between Brazil and Portugal, using Spanish and Brazilian companies in the process. 36 OpenText, Canada’s largest software company, now guarantees customers that their data remains outside the United States. Deutsche Telekom, a cloud computing provider, is similarly gaining more customers.37 Numerous foreign companies are marketing their products as “NSA proof” or “safer alternatives” to those offered by U.S. firms, gaining market share in the process. 38

#### Second, this decline in the U.S. tech sector is crushing U.S. global tech leadership.

Castro and McQuinn 15 — Daniel Castro, Vice President of the Information Technology and Innovation Foundation—a nonprofit, non-partisan technology think tank, former IT Analyst at the Government Accountability Office, holds an M.S. in Information Security Technology and Management from Carnegie Mellon University and a B.S. in Foreign Service from Georgetown University, and Alan McQuinn, Research Assistant with the Information Technology and Innovation Foundation, holds a B.S. in Political Communications and Public Relations from the University of Texas-Austin, 2015 (“Beyond the USA Freedom Act: How U.S. Surveillance Still Subverts U.S. Competitiveness,” Report by the Information Technology & Innovation Foundation, June, Available Online at <http://www2.itif.org/2015-beyond-usa-freedom-act.pdf?_ga=1.61741228.1234666382.1434075923>, Accessed 07-05-2015, p. 7)

Conclusion

When historians write about this period in U.S. history it could very well be that one of the themes will be how the United States lost its global technology leadership to other nations. And clearly one of the factors they would point to is the long-standing privileging of U.S. national security interests over U.S. industrial and commercial interests when it comes to U.S. foreign policy.

This has occurred over the last few years as the U.S. government has done relatively little to address the rising commercial challenge to U.S. technology companies, all the while putting intelligence gathering first and foremost. Indeed, policy decisions by the U.S. intelligence community have reverberated throughout the global economy. If the U.S. tech industry is to remain the leader in the global marketplace, then the U.S. government will need to set a new course that balances economic interests with national security interests. The cost of inaction is not only short-term economic losses for U.S. companies, but a wave of protectionist policies that will systematically weaken U.S. technology competiveness in years to come, with impacts on economic growth, jobs, trade balance, and national security through a weakened industrial base. Only by taking decisive steps to reform its digital surveillance activities will the U.S. government enable its tech industry to effectively compete in the global market.

#### Third, this jeopardizes national security. A strong U.S. tech sector is the lynchpin of U.S. global power.

Donohue 15 — Laura K. Donohue, Associate Professor of Law, Director of the Center on National Security and the Law, and Director of the Center on Privacy and Technology at Georgetown University, has held fellowships at Stanford Law School’s Center for Constitutional Law, Stanford University’s Center for International Security and Cooperation, and Harvard University’s John F. Kennedy School of Government, holds a Ph.D. in History from the University of Cambridge and a J.D. from Harvard Law School, 2015 (“High Technology, Consumer Privacy, and U.S. National Security,” Forthcoming Article in the *Business Law Review*, Available Online via SSRN at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2563573>, Accessed 08-08-2015, p. 14-15)

To the extent that the NSA programs, and public knowledge of them, has harmed the U.S. economy, they have harmed U.S. national security. The country’s economic strength is part of what enables the United States to respond to external and internal threats. The ability to defend the country against would-be aggressors requires resources—e.g., to build and equip a military force, to move troops, to [end page 14] respond to attacks in whatever form they may materialize. Many of the supplies needed to fend off overreaching by either states or non-state actors derive not from government production, but from the private sector. To the extent that a weak private sector emerges, the government’s ability to respond is harmed.

Beyond this, economic security allows the country the freedom to determine its international and domestic policies on the merits, not on need. Where the United States is in a strong economic position, it is less vulnerable in international negotiations, such as those related to trade. It is also in a politically superior position, where it can use its wealth to accomplish the desired ends.

A strong economy also ensures that citizens have their needs met, with sufficient income levels for housing, food, clothing, and education. This, in turn, generates social and political stability, which allows for the development of communities, which creates greater cohesion among citizens. It also contributes to the evolution of democratic deliberations, reinforcing the rule of law.

Economic security allows for growth and innovation, which is fed by education and opportunity. Innovation, in turn, allows the country to continue to adapt to the evolving environment and international context. There are further considerations. But these suffice to illustrate the importance of economic strength to U.S. national security writ large.

#### Fourth, U.S. leadership is vital to global stability. Relative decline opens a power vacuum that spurs conflict.

Goure 13 — Daniel Goure, President of The Lexington Institute—a nonprofit public-policy research organization, Adjunct Professor in Graduate Programs at the Center for Peace and Security Studies at Georgetown University, Adjunct Professor at the National Defense University, former Deputy Director of the International Security Program at the Center for Strategic and International Studies, has consulted for the Departments of State, Defense and Energy, has taught or lectured at the Johns Hopkins University, the Foreign Service Institute, the National War College, the Naval War College, the Air War College, and the Inter-American Defense College, holds Masters and Ph.D. degrees in International Relations and Russian Studies from Johns Hopkins University, 2013 (“How U.S. Military Power Holds the World Together,” *inFocus Quarterly*—the Jewish Policy Center's journal, Volume VII, Number 2, Summer, Available Online at http://www.jewishpolicycenter.org/4397/us-military-power, Accessed 08-17-2013)

The Centrality of U.S. Power

There are three fundamental problems with the argument in favor of abandoning America's security role in the world. The first problem is that the United States cannot withdraw without sucking the air out of the system. U.S. power and presence have been the central structural feature that holds the present international order together. It flavors the very air that fills the sphere that is the international system. Whether it is the size of the U.S. economy, its capacity for innovation, the role of the dollar as the world's reserve currency or the contribution of U.S. military power to the stability and peace of the global commons, the present world order has "Made in the USA" written all over it.

The international system is not a game of Jenga where the worst thing that can happen is that one's tower collapses. Start taking away the fundamental building blocks of the international order, particularly American military power, and the results are all but certain to be major instability, increased conflict rates, rapid proliferation of nuclear weapons, economic dislocation and, ultimately, serious and growing threats to security at home.

#### Finally, U.S. leadership resolves a myriad of catastrophic global impacts. The right policies will prevent decline.

Lieber 13 — Robert J. Lieber, Professor of Government and International Affairs at Georgetown University, has held fellowships from the Guggenheim, Rockefeller and Ford Foundations, the Council on Foreign Relations, and the Woodrow Wilson International Center for Scholars, holds a Ph.D. from the Department of Government at Harvard University, 2013 (“Against the Idea of American Decline,” *inFocus Quarterly*—the Jewish Policy Center's journal, Volume VII, Number 2, Summer, Available Online at http://www.jewishpolicycenter.org/4398/american-decline, Accessed 08-17-2013)

The stakes are immense, and not only for America itself. Since World War II, the United States has been the world's principal provider of collective goods. The leading international institutions of today and much of the existing international order have been a product of American leadership. Evidence from recent decades suggests that the alternative is not that some other institution or major power (the UN, the EU, China, India, Russia, or Japan) will take its place, but that none will. Some have argued that the effects of globalization are leading the world toward greater cooperation and even collective security. This may be a comforting view about the implications or even desirability of American disengagement, but practical experience suggests otherwise. In dealing with failed states, ethnic cleansing, human rights, the environment, trade liberalization, regional conflict, and nuclear proliferation, emerging powers such as the BRICS (Brazil, Russia, India, China, and South Africa) have been largely unhelpful, and others in Europe, Asia, Africa, or Latin America have more often than not lacked the will or capacity to act collectively on common tasks.

For the United States, the maintenance of its leading role matters greatly. The alternative would not only be a more disorderly and dangerous world in which its own economic and national security would be adversely affected, but also regional conflicts and the spread of nuclear weapons would be more likely. In addition, allies and those sharing common values, especially liberal democracy and the market economy, would increasingly be at risk. Ultimately, America's ability to avoid long-term decline—and the significant international retrenchment that would be a result of severely reduced resources—becomes a matter of policy and political will. There is nothing inevitable or fated about decline. Both past experience and national attributes matter greatly. Flexibility, adaptability, and the capacity for course correction provide the United States with a resilience that has proved invaluable in the past and is likely to do so in the future.

### 1AC — Investigative Journalism Advantage

#### Contention Three: Investigative Journalism

#### First, NSA surveillance undermines freedom of the press by deterring investigative journalism. Workarounds are futile.

Froomkin 14 — Dan Froomkin, Senior Writer for *The Intercept*, former Columnist for the *Washington Post* where he wrote the “White House Watch” column, former Senior Washington Correspondent and Bureau Chief for *The Huffington Post*, 2014 (“Top Journalists and Lawyers: NSA Surveillance Threatens Press Freedom and Right To Counsel,” *The Intercept*, July 28th, Available Online at <https://firstlook.org/theintercept/2014/07/28/nsa-surveillance-threatens-press-freedom-right-counsel-survey-finds/>, Accessed 08-08-2015)

To do their jobs properly, journalists and lawyers sometimes need to be able to keep information private from the government.

And because what journalists and lawyers do is so integral to safeguarding democracy and basic rights, the United States has traditionally recognized their need for privileged communications.

But the virtually inescapable government surveillance exposed by NSA whistleblower Edward Snowden has impaired if not eliminated the ability of news-gatherers and attorneys to communicate confidentially with their sources and their clients, according to a new report by two rights advocacy groups.

The report by Human Rights Watch and the American Civil Liberties Union is based on an exhaustive new survey of journalists and lawyers working in the areas of national security and intelligence. Both groups of professionals describe a substantial erosion in their ability to do their constitutionally-protected jobs.

Not even the strongest versions of NSA reform being considered in Congress come anywhere close to addressing the chilling effects on basic freedoms that the new survey describes.

“If the US fails to address these concerns promptly and effectively,” report author G. Alex Sinha writes, “it could do serious, long-term damage to the fabric of democracy in the country.”

Even before the Snowden revelations, reporters trying to cover important defense, intelligence and counter-terrorism issues were reeling from the effects of unprecedented secrecy and attacks on whistleblowers.

But newfound awareness of the numerous ways the government can follow electronic trails — previously considered the stuff of paranoid fantasy — has led sources to grow considerably more fearful.

“It used to be that leak investigations didn’t get far because it was too hard to uncover the source, but with digital tools it’s just much easier, and sources know that,” said Washington Post contributor Barton Gellman, one of the 46 journalists interviewed for the survey.

Sources are “afraid of the entire weight of the federal government coming down on them,” New Yorker staff writer Jane Mayer is quoted as saying. “The added layer of fear makes it so much harder. I can’t count the number of people afraid of the legal implications [of speaking to me].”

Jonathan Landay, a McClatchy Newspapers reporter covering national security and intelligence, told Human Rights Watch that some sources have grown reluctant to talk to him about anything, “even something like, ‘Please explain the rationale for this foreign policy.’ That’s not even dealing with classified material; that’s just educating readers.”

Methods reporters use to avoid surveillance are time-consuming, difficult, off-putting to sources — and ultimately futile, the surveyed journalists reported. “If the government wants to get you, they will,” Washington Post reporter Adam Goldman said.

But when journalists can’t do their jobs, the effect is felt well beyond the profession alone. Insufficiently informed journalism can “undermine effective democratic participation and governance,” the report states.

“What makes government better is our work exposing information,” Washington Post reporter Dana Priest is quoted as saying. “It’s not just that it’s harder for me to do my job, though it is. It also makes the country less safe. Institutions work less well, and it increases the risk of corruption. Secrecy works against all of us.”

#### Second, this spills over to international press freedom. Domestic surveillance of U.S. journalists undermines investigative journalism *globally*.

Marthoz 13 — Jean-Paul Marthoz, Europe Representative with the Committee to Protect Journalists, Deputy Chair of the Advisory Committee of the Europe and Central Asia Division of Human Rights Watch, Associate Editor of *Europe’s World*, Foreign Affairs Columnist for *Le Soir* (Belgium), Visiting Professor of International Journalism at the Université Catholique de Louvain, 2013 (“The US press is our press,” Committee to Protect Journalists, October 10th, Available Online at <https://cpj.org/blog/2013/10/the-us-press-is-our-press.php>, Accessed 08-08-2015)

The international media depend on the U.S. press to cover U.S. stories—and many of these, from the subprime mortgage crisis to NSA surveillance, are global stories because of their worldwide repercussions. But international journalists also rely on the U.S. press to report and comment on most world events. Therefore any restriction on U.S. journalists' freedom to report inevitably reverberates around the globe.

Indeed, the U.S., through a multiplicity of actors—the government, the military, transnational corporations, and NGOs—plays a major role on the international scene, from the Syrian crisis to climate change negotiations and the global war on drugs. The American press is not only the first source of information on U.S. policies related to these global challenges but also an indispensable provider of facts, opinions, and images on the issues themselves.

This role is particularly crucial—and highly appreciated—when U.S. journalists live up to their legend as dogged muckrakers and vigilant watchdogs, uncovering policies and actions that the U.S. government or other national or international actors would rather keep secret.

The U.S. press' global influence is a reflection of U.S. power, but its international reputation is grounded in its audacity and its independence to report on authorities and hold them to account "without fear of favor," in the words of Adolph S. Ochs, founding father of the modern New York Times. In fact, whereas the Obama administration seems to consider the U.S. press a potential threat to national interests, this concept of journalism as a Fourth Estate strongly contributes to U.S. soft power around the world. The impact of the U.S. administration's umbrageous attitude toward the press undermines the image of a democratic model based on robust checks and balances and in particular on a press that dares speak truth to power.

The sneaky surveillance and prosecution of journalists in the search for leakers have a global cost. By disproving that U.S. journalists cannot be forced to go to court or to jail because they published something that embarrasses government officials, these actions provide easy alibis for enemies of a free press in authoritarian states and weaken the U.S. commitment to defend press freedom and embattled journalists everywhere. They also threaten to reduce the U.S. media's freedom to report on issues of global interest and therefore restrict the news flows feeding the international media.

"All the (world) press is our press," wrote Columbia University President Lee C. Bollinger in his 2010 landmark essay Uninhibited, Robust, and Wide-Open. A Free Press For a New Century (Oxford University Press, 2010). "All the U.S. press is our press," echo international journalists who know they depend on their U.S. colleagues to provide, in the famous words of the 1947 Hutchins Commission, "a truthful, comprehensive, and intelligent account of the day's events in a context which gives them meaning."

#### Third, strong investigative journalism is vital to democracy and government accountability.

Waisbord 1 — Silvio Waisbord, Associate Professor and Director of the Journalism Resources Institute in the Department of Journalism and Media Studies at Rutgers University, former Lecturer at the Annenberg School for Communication at the University of Pennsylvania, holds a Ph.D. in Sociology from the University of California-San Diego, 2001 (“Why Democracy Needs Investigative Journalism,” *Global Issues*, Volume 6, Issue 1, April, Available Online at <http://www.4uth.gov.ua/usa/english/media/ijge0401/gj03.htm>, Accessed 08-08-2015)

What Is Investigative Journalism?

Investigative reporting is distinctive in that it publicizes information about wrongdoing that affects the public interest. Denunciations result from the work of reporters rather than from information leaked to newsrooms.

While investigative journalism used to be associated with lone reporters working on their own with little, if any, support from their news organizations, recent examples attest that teamwork is fundamental. Differing kinds of expertise are needed to produce well-documented and comprehensive stories. Reporters, editors, legal specialists, statistical analysts, librarians, and news researchers are needed to collaborate on investigations. Knowledge of public information access laws is crucial to find what information is potentially available under "freedom of information" laws, and what legal problems might arise when damaging information is published. New technologies are extremely valuable to find facts and to make reporters familiar with the complexities of any given story. Thanks to the computerization of government records and the availability of extraordinary amounts of information online, computer-assisted reporting (CAR) is of great assistance.

Democracy and Investigative Journalism

Investigative journalism matters because of its many contributions to democratic governance. Its role can be understood in keeping with the Fourth Estate model of the press. According to this model, the press should make government accountable by publishing information about matters of public interest even if such information reveals abuses or crimes perpetrated by those in authority. From this perspective, investigative reporting is one of the most important contributions that the press makes to democracy. It is linked to the logic of checks and balances in democratic systems. It provides a valuable mechanism for monitoring the performance of democratic institutions as they are most broadly defined to include governmental bodies, civic organizations and publicly held corporations.

The centrality of the media in contemporary democracies makes political elites sensitive to news, particularly to "bad" news that often causes a public commotion. The publication of news about political and economic wrongdoing can trigger congressional and judicial investigations.

In cases when government institutions fail to conduct further inquiries, or investigations are plagued with problems and suspicions, journalism can contribute to accountability by monitoring the functioning of these institutions. It can examine how well these institutions actually fulfill their constitutional mandate to govern responsibly in the face of press reports that reveal dysfunction, dishonesty, or wrongdoing in government and society. At minimum, investigative reporting retains important agenda-setting powers to remind citizens and political elites about the existence of certain issues. There are no guarantees, however, that continuous press attention will result in congressional and judicial actions to investigate and prosecute those responsible for wrongdoing.

Investigative journalism also contributes to democracy by nurturing an informed citizenry. Information is a vital resource to empower a vigilant public that ultimately holds government accountable through voting and participation. With the ascent of media-centered politics in contemporary democracies, the media have eclipsed other social institutions as the main source of information about issues and processes that affect citizens' lives.

#### Fourth, robust investigative journalism is vital to challenge systems of oppression. This is an important social justice issue.

Schenwar 14 — Maya Schenwar, Editor-in-Chief and former Senior Editor and Reporter at *Truthout*—an independent social justice news website, Member of the Board of Advisors at Waging Nonviolence, recipient of a Society of Professional Journalists Sigma Chi Award and a Lannan Residency Fellowship, holds a B.A. in English Literature and Women’s Studies from Swarthmore College, 2014 (“Journalism Is Action,” *Truthout*, January 13th, Available Online at <http://www.truth-out.org/news/item/21201-journalism-is-action>, Accessed 08-08-2015)

Sometimes I wish there were another word for the “media.” No other term is exactly right to describe our work—the news, the press, journalism organizations all fall short of its meaning—but unfortunately, the “media” is often equated with “propaganda,” and rightly so. This country’s dominant media regularly function as mere service providers for the corporations and forces of power that sustain them.

The services being provided are dangerous: Media have the power to manipulate public discussions and understandings through which stories they choose to report, who they choose to report them, who they choose to interview, what words they choose to employ in their coverage, and who they choose to label “good guys” and “bad guys.” The arrangement of “debates” in the dominant media usually includes a very narrow range of opinion, but represents this spread as the range of opinion worthy of public consideration. This dialogue is controlled not only by the people and companies that hold the purse strings, but more importantly, by the unquestioned power structures in which those entities operate. Funded by corporations, driven by advertising, populated and legitimized by powerful political figures and mainstream celebrities, these media can’t function any other way.

As independent, non-corporate media, Truthout and our peer organizations know that we, too, shape conversations and impart perspectives. We know that the myth of “objective” journalism is not only false, but also unhelpful; we’ve got to own our perspectives, striving to deliver socially responsible information that helps to create a more just, humane and vibrant world.

And so, we work to cover stories that are excluded from mainstream conversations and bring transformative ideas to the fore. This work isn’t just about doing investigative reporting and uncovering individual instances of wrongdoing, though those are important tasks. As truly independent media, we consider it our obligation to step back and question the structures that perpetuate that wrongdoing: structures bound up in racism, classism, sexism, anti-queer and anti-trans violence, ableism, and other types of oppression.

As we move into the new year, we’ll plunge deeper into our exploration of the linkages between capitalism and criminalization; poverty and environmental degradation; surveillance and imprisonment; and violent foreign policy and militarism at home. We aim to do this by not only giving scholars, activists and independent journalists a place to share their courageous work, but also by providing a platform for the people most impacted by these issues to speak for themselves.

Over the next year, we hope to further the understanding that journalism doesn’t just prompt action—it is action. Stories are acts, and acts have impacts, and when we report on something, or opine on something, or analyze something, we are putting both the existence of that something and our perspective on it out into the universe. As journalists, we have to release our long-treasured fantasy of “impartial” reporting, and hold the work we publish accountable to our society and our future.

#### Finally, transformative social change *is* possible, but only if mass surveillance is curtailed. The impact is widespread suffering, death, and tyranny.

Applebaum 13 — Jacob Applebaum, independent computer security researcher and hacker, spokesperson and developer for The Tor Project, 2013 (“Afterword,” *Homeland* — by Cory Doctorow, Available Online at <http://pastebin.com/VHBx3imj>, Accessed 06-17-2015)

Everything good in the world comes from the efforts of people who came before us. Every minute that we are able to enjoy in a society that is not ruled by senseless violence is a minute given to us by the hard work of people who dedicated their lives for something better. Every person we meet is carrying his own burdens. Each person is the center of her own universe. There is so much left to be done, so many injustices to right, so much suffering to relieve, so many beautiful moments to be lived, an endless amount of knowledge to uncover. Many secrets of the universe wait to be uncovered.

The deck from which our hands are dealt need not be stacked against us; it is possible to create societal structures that are just and capable of reasoned compassion for everyone. It is possible to change the very nature of our lives. It is possible to redesign the entire deck, to change the very face and count of the cards, to rewrite the rules and to create different outcomes.

We live in the golden era of surveillance; every phone is designed to be tapped, the Internet passes through snooping equipment of agencies that are so vast and unaccountable that we hardly know their bounds. Corporations are forced (though some are willing enough!) to hand over our data and data of those whom we love. Our lives are ruled by networks and yet those networks are not ruled by our consent. These networks keep us hooked up but it is not without costs that they keep us hooked together. The businesses, the governments, and the individuals that power those networks are incentivized to spy, to betray and to do it silently. The architecture of the very systems produces these outcomes.

This is tyranny.

The architecture of our systems and of our networks is not the product of nature but rather the product of imperfect humans, some with the best of intentions. There is no one naturally fit to survive in these unnatural systems, there are some who are lucky, others who have adapted.

This letter to you, from your perhaps recent past, was written with Free Software written as a labor of love by someone who wished to help the children of Uganda while flying over an expansive ocean at difficult to understand heights, it was composed while running under a kernel written by scores of people across every national line, across every racial, sexual and gender line by a socially and politically agnostic engineer, it was sent through multiple anonymity networks built by countless volunteers acting in solidarity through mutual aid and it was received by an author who published it for a purpose.

What is the common purpose of all of these people? It is for the whole of our efforts to be more than the sum of our parts -- this creates a surplus for you - to give breathing room to others, so that they may take the torch of knowledge, of reason, of justice, of truth telling, of sunlight -- to the next step, wherever it may lead us.

There was a time when there were no drone killings, societies have existed without armed policemen, where peace is not only possible but actually a steady state, where mass surveillance was technically and socially infeasible, where fair and evenhanded trials by impartial juries were available for everyone, where fear of identification and arrest was not the norm but the exception. That time was less than a generation ago and much more has been lost in the transition from one generation to the next.

It's up to you to bring those things back to our planet. You can do this with little more than cooperation, the Internet, cryptography, and willingness. You might do this alone or you might do it in a group; you might contribute as a solitary person or as one of many. Writing Free Software empowers every person, without exception, to control the machines that fill our lives. Building free and open hardware empowers every person, without exception, to construct new machines to free us from being slaves to machines that control us. Using free and open systems allows us to construct a new basis by which we may once again understand as a whole, the systems by which we govern ourselves.

We are on the edge of regaining our autonomy, of ending total state surveillance, of uncovering and holding accountable those who commit crimes in our names without our informed consent, of resuming free travel without arbitrary or unfair restriction. We're on the verge of ensuring that every person, not one human excluded, has the right to read and the right to speak. Without exception.

It's easy to feel hopeless in the face of the difficult issues that we face everyday -- how might one person effectively resist anything so much larger than herself? Once we stop acting alone, we have a chance for positive change. To protest is to stop and say that you object, to resist is to stop others from going along without thinking and to build alternatives is to give everyone new choices. Omission and commission are the yin and yang of personal agency.

What if you could travel back through time and help Daniel Ellsberg leak the Pentagon papers? Would you take the actions required, would you risk your life to end the war? For many it is easy to answer positively and then think nothing of the actual struggles, the real risk or the uncertainty provided without historical hindsight. For others, it's easy to say no and to think of nothing beyond oneself.

But what if you didn't need to travel back through time?

There are new Pentagon Papers just waiting to be leaked; there are new wars to end, new injustices to make right, fresh uncertainty that seems daunting where success seems impossible, new alternatives need to be constructed, old values and concepts of justice need to be preserved in the face of powerful people who pervert the rule of law for their own benefit.

Be the trouble you want to see in the world, above nationalism, above so-called patriotism, above and beyond fear and make it count for the betterment of the planet. Legal and illegal are not the same as right and wrong -- do what is right and never give up the fight.

This is one idea out of many that can help you and your friends free our planet from the tyranny that surrounds us all. It's up to you now - go create something beautiful and help others to do the same. Happy hacking,

### 1AC — Plan

#### The United States federal government should prohibit federal intelligence agencies from engaging in bulk searches and/or seizures of Americans’ electronic communications without obtaining an individualized warrant based on a judicial determination of probable cause.

### 1AC — Solvency

#### Contention Four: Solvency

#### First, the plan effectively dismantles the U.S. surveillance state. Only comprehensive reform eliminates *actual* and *latent* abuse.

Holt 14 — Rush Holt, Member of the United States House of Representatives (D-NJ), former Head of the Nuclear and Scientific Division of the Office of Strategic Forces at the U.S. Department of State, former Assistant Director of the Princeton Plasma Physics Laboratory at Princeton University, holds a Ph.D. in Physics from New York University, 2014 (“Time to end the ‘surveillance state’,” MSNBC, January 17th, Available Online at <http://www.msnbc.com/msnbc/time-end-the-surveillance-state>, Accessed 06-19-2015)

On January 21, 2009, I stood on the steps of the United States Capitol and heard Barack Obama – who, minutes before, had been sworn in as the president of the United States – deliver a striking call for the protection of civil liberties. “Our Founding Fathers,” he said, “faced with perils that we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man.” As Americans, he added, we must “reject as false the choice between our safety and our ideals.”

How troubling, then, to hear that same president claim on Friday that America must strike “the balance between security and liberty” – embracing the same false choice that he himself once denounced.

The president’s remark came in a nearly hour-long speech intended to calm public fury over the National Security Agency’s abuses of its surveillance authority. His speech suggested that the intelligence community is undergoing meaningful reforms, but the truth is that the president’s reform proposals are not nearly as exhaustive, or as effective, as he implied.

We should start by remembering that the NSA’s abusive practices originated in the organizational culture of the intelligence community as a whole: collect everything, keep everything – forever. The NSA has dedicated, patriotic Americans who employ astounding, sophisticated capabilities and who are developing more every day. Naturally, in their zeal to do their job, they want to use their capabilities to the fullest, even if this tramples on the rights of Americans or is ineffective.

But rather than meaningfully reining in these capabilities, the president’s proposals continue to allow surveillance of Americans without requiring a Fourth Amendment determination of probable cause. They continue to regard Americans as suspects first and citizens second. They continue to allow the government to build backdoors into computer software and hardware. They fail to strengthen protections for whistleblowers who uncover abusive spying.

The most disturbing omission from President Obama’s reforms was any commitment to enforcing the Fourth Amendment’s warrant-based, probable-cause standard for seizing and searching the communications of any American. Instead, the president required only “reasonable suspicion” to query the NSA’s mass surveillance databases – a much lower standard that was already in place during the abuses uncovered to date.

In embracing the “reasonable suspicion” doctrine, the president overruled his own task force on surveillance reform and endorsed a practice that a U.S. District Court judge has found unconstitutional. He also misinterpreted the intent of our Founders when they wrote the Bill of Rights in the first place. In his history lesson he omitted discussion of the despised general warrants that colonists found so daunting and frightening and that have returned now in the wholesale collection of data on Americans. The Fourth Amendment does not exist to impede police or intelligence agencies. To the contrary, it exists to hold to hold government agents to a high standard – to ensure that they act on the basis of evidence and pursue real culprits, rather than wasting time and resources on wild goose chases.

The president also left unaddressed the subversion of encryption standards by the NSA, as well as its efforts to pressure companies to build “back doors” into their products to facilitate NSA access to hardware, firmware, or software. American tech companies stand to lose billions of dollars in overseas business due to the revelation that the NSA has pressured them to hamper their own products. That economic toll seems likely to mount in the months ahead.

And of course, the president’s remarks left unaddressed a deeper problem: how can we trust that the intelligence community is being honest about its own activities? Even I, as a member of Congress, have been repeatedly misled by the NSA. In December 2005, for instance, when I was a member of the House Permanent Select Committee on Intelligence, I asked NSA Director Keith Alexander whether the NSA was spying on Americans. He assured me they were not. One week later, The New York Times ran its initial story on what is now known as the “Stellar Wind” warrantless surveillance program.

How, in an atmosphere of such secrecy, can the public ever gain full confidence that the NSA is operating within legal bounds? Because the work of the NSA is so extensive and so technical, courts overseeing its programs need enhanced technical expertise. And because the NSA’s executives are so skilled at presenting only the information they chose, full oversight is possible only with inside information from whistleblowers who understand the programs. Without whistleblower protections for intelligence employees that are similar to those afforded to other government employees, Congress and the public will learn of failures or abuses too late, if ever. But the president’s proposals omitted any mention of whistleblower protections, as well.

Even the modest improvements that the president announced – for instance, requiring a cost-benefit analysis before spying on the heads of state of foreign nations, rather than simply spying on everyone – are subject to reversal at a stroke of the president’s pen. These new standards are backed only by the president’s good intentions.

But as Daniel Webster observed in an earlier age, “Good intentions will always be pleaded for every assumption of authority. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.”

Our duty is to ensure that our nation remains under the rule of law, not the whims of those in power. We must eliminate these NSA programs and their actual and latent potential for abuse. To achieve that end, Congress should pass the Surveillance State Repeal Act – legislation I’ve authored that would repeal the laws that made the NSA’s abuses possible in the first place.

#### Finally, the plan dramatically curtails domestic surveillance under all relevant legal authorities.

Williams 15 — Lauren C. Williams, Technology Reporter for *ThinkProgress* who covers consumer privacy, cybersecurity, tech culture, and the intersection of civil liberties and tech policy, holds a master’s in journalism from the University of Maryland, 2015 (“House Members Move To Repeal The Patriot Act With Strongest Anti-Surveillance Bill To Date,” *ThinkProgress*, March 24th, Available Online at <http://thinkprogress.org/election/2015/03/24/3638234/house-members-move-repeal-patriot-act-strongest-anti-surveillance-bill-date/>, Accessed 06-29-2015)

Overshadowed by congressional budget talks, Reps. Mark Pocan (D-WI) and Thomas Massie (R-KY) quietly introduced the strongest anti-surveillance bill to date that would strip the government of much of its spying power.

“This isn’t just tinkering around the edges, it’s a meaningful overhaul that makes sure the meaningless surveillance of emails and cell phones are done away with,” Pocan said in a briefing for congressional staffers Tuesday.

The Surveillance State Repeal Act, or HR 1466, aims to repeal the Patriot Act, including the controversial telephony metadata collection program, and strip many of the surveillance permissions granted under the Foreign Intelligence Surveillance Act amendments passed under President George W. Bush in 2008.

Reps. Alan Grayson (D-FL), James McGovern (D-MA), and Lloyd Doggett (D-TX) are original co-sponsors on the bill, which was ushered in March 19.

Surveillance has been a prominent in public debate since former National Security Agency contractor Edward Snowden’s massive document leak exposed several government intelligence programs, namely the NSA’s dragnet telephone metadata collection.

But despite public outrage over civil liberties violations and calls for immediate reform, little has been done since Snowden’s 2013 revelations.

The controversial phone metadata surveillance program was reauthorized for the fifth time under Section 215 of the Patriot Act extended until June. Other sections of the Patriot Act are also expected to sunset this summer.

In 2014, President Barack Obama announced a scaled-back surveillance program that would permit intelligence agencies to collect phone records without storing them, and agencies could only query the data stored by a third party after getting a warrant except in true emergencies. Those queries were limited to people who have called or been called by suspected terrorists.

Revised versions of the USA Freedom Act, a counter bill to the Patriot Act introduced after the Snowden leaks, have stalled, and only offered smaller changes.

But with continued bipartisan support, HR 1466 could rekindle hope for sweeping changes in surveillance laws.

“All mass surveillance does is violate the rights and put a chilling effect on the American people,” causing people to change their behavior because they’re afraid of government spying, said Patrick Eddington, national security and civil liberties policy analyst for the libertarian think tank CATO Institute, at Tuesday’s meeting.

The Patriot Act, as written, is heavily contingent on Executive Order 12333, signed by President Ronald Reagan more than 30 years ago. The order has been since used as the legal justification for some of the NSA’s surveillance programs including backdoor access to internet companies’ data centers.

If passed, the Surveillance State Repeal Act would ban the use of order 12333 and close those data access loopholes built in to software and devices’ encryption. It would also extend greater protections to whistleblowers, such as making it illegal to fire or retaliate against them.

“This is not about Edward Snowden. If you want to talk about Edward Snowden, we need better whistleblower protections so it doesn’t happen again,” Massie said, indicating the contractor turned whistleblower couldn’t legally have disclosed problems with the agency to him or other Congress members.”

Pocan and Massie’s bill would upend that justification by repealing the programs under FISA and the Patriot Act that allow indiscriminate collection and access to Americans’ communications. For example, HR 1466 would repeal the amendment that permits email harvesting, with few exceptions, and make it illegal to survey individuals without a warrant and probable cause. The bill also mandates domestic surveillance programs be monitored for compliance by the Government Accountability Office.

## 2AC — Constitutional Privacy Advantage

### They Say: “Not Unconstitutional”

#### Bulk Internet surveillance is unconstitutional — it violates the *First* and *Fourth* Amendments.

The Nation 15 — The Nation, the oldest continuously published weekly magazine in the United States, 2015 (“Why ‘The Nation’ Is Suing the Federal Government,” March 31st, Available Online at <http://www.thenation.com/article/why-nation-suing-federal-government/>, Accessed 08-08-2015)

One of the most disturbing revelations from whistleblower Edward Snowden is that the National Security Agency copies and searches the contents of virtually every text-based Internet communication that you send overseas or receive from abroad. This includes e-mails, instant messages, search-engine history and the websites you visit. The agency does so whether or not you or the person you’re communicating with has done anything wrong, and whether or not either party is a specific “target” of the NSA. Furthermore, if the agency believes your message contains information relating to the foreign affairs of the United States—in the NSA’s overly broad terms, “foreign intelligence information”—it may hold on to it indefinitely.

This massive, dragnet surveillance is a fundamental violation of the Fourth Amendment, which protects our right to privacy, and the First Amendment, which protects freedom of expression and association. The government is collecting these private communications without any individualized suspicion and without obtaining a warrant from a judicial authority. For these reasons, The Nation has joined the ACLU’s suit against the National Security Agency and the Department of Justice, filed this March in federal district court in Maryland, where the NSA is headquartered. Fellow plaintiffs include the Wikimedia Foundation, Human Rights Watch, PEN American Center, the Global Fund for Women and other civil society, legal and media organizations.

The NSA carries out this dragnet spying, known as “upstream” surveillance, by tapping directly into the Internet backbone—the network of high-capacity cables and switches that carry Americans’ communications with one another and with the rest of the world. Inside the United States, upstream surveillance is conducted under a 2008 law called the FISA Amendments Act (FAA), which allows the NSA to target the communications of foreigners abroad and to intercept Americans’ communications with those foreign targets without a warrant. There are few limits on whom the government may target under the FAA, and those limitations that do exist are weak and riddled with exceptions. Targets can include journalists, academics, government officials, human rights activists, political activists from all over the spectrum and other innocent people who are not connected in any way with terrorism or other criminal activity. Yet the NSA is exceeding even the FAA’s broad authority by spying on everyone, in order to determine who might be talking or reading “about” its targets.

#### Internet surveillance is unconstitutional because it searches *first*—without a warrant.

Toomey 15 — Patrick Toomey, Staff Attorney in the National Security Project at the American Civil Liberties Union, holds a J.D. from Yale Law School, 2015 (“The NSA Has Taken Over the Internet Backbone. We're Suing to Get it Back.,” American Civil Liberties Union, March 10th, Available Online at <https://www.aclu.org/blog/nsa-has-taken-over-internet-backbone-were-suing-get-it-back>, Accessed 08-08-2015)

The fact that upstream surveillance is supposedly focused on international communications is hardly a saving grace. Americans spend more and more of their lives communicating over the Internet – and more and more of those communications are global in nature, whether we realize it or not. An email from a woman in Philadelphia to her mother in Phoenix might be routed through Canada without either one knowing it. Similarly, companies like Microsoft and Google often store backup copies of their U.S. customers' emails on servers overseas, again with hardly anyone the wiser. The NSA is peeking inside virtually all of these.

Our plaintiffs have had to go out of their way to take measures, sometimes at a high cost, to protect their communications from their own government. Despite these precautions, the chilling effect is palpable. NSA surveillance makes it harder for the plaintiffs to gather information from sources who believe that by sharing information over the Internet, they are also sharing it with the U.S. government and the intelligence agencies it partners with. The work of human rights and free-knowledge organizations is profoundly undermined by this unconstitutional surveillance, and we're all worse off.

Upstream surveillance flips the Constitution on its head. It allows the government to search everything first and ask questions later, making us all less free in the process. Our suit aims to stop this kind of surveillance. Please join our effort to reform the NSA.

#### NSA Internet surveillance violates constitutional privacy rights.

Wales and Tretikov 15 — Jimmy Wales, Founder of Wikipedia, Board Member of the Wikimedia Foundation—the non-profit charitable organization that hosts and manages Wikipedia, and Lila Tretikov, Executive Director of the Wikimedia Foundation, 2015 (“Stop Spying on Wikipedia Users,” *New York Times*, March 10th, Available Online at <http://www.nytimes.com/2015/03/10/opinion/stop-spying-on-wikipedia-users.html>, Accessed 08-08-2015)

Today, we’re filing a lawsuit against the National Security Agency to protect the rights of the 500 million people who use Wikipedia every month. We’re doing so because a fundamental pillar of democracy is at stake: the free exchange of knowledge and ideas.

Our lawsuit says that the N.S.A.’s mass surveillance of Internet traffic on American soil — often called “upstream” surveillance — violates the Fourth Amendment, which protects the right to privacy, as well as the First Amendment, which protects the freedoms of expression and association. We also argue that this agency activity exceeds the authority granted by the Foreign Intelligence Surveillance Act that Congress amended in 2008.

Most people search and read Wikipedia anonymously, since you don’t need an account to view its tens of millions of articles in hundreds of languages. Every month, at least 75,000 volunteers in the United States and around the world contribute their time and passion to writing those articles and keeping the site going — and growing.

On our servers, run by the nonprofit Wikimedia Foundation, those volunteers discuss their work on everything from Tiananmen Square to gay rights in Uganda. Many of them prefer to work anonymously, especially those who work on controversial issues or who live in countries with repressive governments.

These volunteers should be able to do their work without having to worry that the United States government is monitoring what they read and write. Unfortunately, their anonymity is far from certain because, using upstream surveillance, the N.S.A. intercepts and searches virtually all of the international text-based traffic that flows across the Internet “backbone” inside the United States. This is the network of fiber-optic cables and junctions that connect Wikipedia with its global community of readers and editors.

As a result, whenever someone overseas views or edits a Wikipedia page, it’s likely that the N.S.A. is tracking that activity — including the content of what was read or typed, as well as other information that can be linked to the person’s physical location and possible identity. These activities are sensitive and private: They can reveal everything from a person’s political and religious beliefs to sexual orientation and medical conditions.

The notion that the N.S.A. is monitoring Wikipedia’s users is not, unfortunately, a stretch of the imagination. One of the documents revealed by the whistle-blower Edward J. Snowden specifically identified Wikipedia as a target for surveillance, alongside several other major websites like CNN.com, Gmail and Facebook. The leaked slide from a classified PowerPoint presentation declared that monitoring these sites could allow N.S.A. analysts to learn “nearly everything a typical user does on the Internet.”

The harm to Wikimedia and the hundreds of millions of people who visit our websites is clear: Pervasive surveillance has a chilling effect. It stifles freedom of expression and the free exchange of knowledge that Wikimedia was designed to enable.

During the 2011 Arab uprisings, Wikipedia users collaborated to create articles that helped educate the world about what was happening. Continuing cooperation between American and Egyptian intelligence services is well established; the director of Egypt’s main spy agency under President Abdel Fattah el-Sisi boasted in 2013 that he was “in constant contact” with the Central Intelligence Agency.

So imagine, now, a Wikipedia user in Egypt who wants to edit a page about government opposition or discuss it with fellow editors. If that user knows the N.S.A. is routinely combing through her contributions to Wikipedia, and possibly sharing information with her government, she will surely be less likely to add her knowledge or have that conversation, for fear of reprisal.

And then imagine this decision playing out in the minds of thousands of would-be contributors in other countries. That represents a loss for everyone who uses Wikipedia and the Internet — not just fellow editors, but hundreds of millions of readers in the United States and around the world.

In the lawsuit we’re filing with the help of the American Civil Liberties Union, we’re joining as a fellow plaintiff a broad coalition of human rights, civil society, legal, media and information organizations. Their work, like ours, requires them to engage in sensitive Internet communications with people outside the United States.

That is why we’re asking the court to order an end to the N.S.A.’s dragnet surveillance of Internet traffic.

Privacy is an essential right. It makes freedom of expression possible, and sustains freedom of inquiry and association. It empowers us to read, write and communicate in confidence, without fear of persecution. Knowledge flourishes where privacy is protected.

### They Say: “Privacy Already Dead”

#### Government surveillance is a much greater threat because people can’t *opt-out*.

Fung 13 — Brian Fung, Technology Reporter for *The Washington Post*, former Technology Correspondent for *National Journal*, former Associate Editor at the *Atlantic*, holds an MSc in International Relations from the London School of Economics and a B.A. in Political Science from Middlebury College, 2013 (“Yes, there actually is a huge difference between government and corporate surveillance,” *The Washington Post*, November 4th, Available Online at <https://www.washingtonpost.com/news/the-switch/wp/2013/11/04/yes-there-actually-is-a-huge-difference-between-government-and-corporate-surveillance/>, Accessed 08-05-2015)

When it comes to your online privacy — or what little is left of it — businesses and governments act in some pretty similar ways. They track your credit card purchases. They mine your e-mail for information about you. They may even monitor your movements in the real world. Corporate and government surveillance also diverge in important ways. Companies are looking to make money off of you, while the government aims to prevent attacks that would halt that commercial activity (along with some other things).

But the biggest difference between the two has almost no relation to who's doing the surveillance and everything to do with your options in response. Last week, we asked you whether you'd changed your online behavior as a result of this year's extended national conversation about privacy — and if so, which form of snooping annoyed you more. Looking through the responses so far, this one caught my eye:

The government because I can't \*choose\* not to be spied on by them. The government also has the power to kill or imprison me which no private company has. I am a firm believer that our founding fathers created a system that respected individual privacy and to see it eroded by the federal government concerns me deeply. I am a strong believer in the 1st, 2nd, 4th and 5th amendments.

Putting aside the government's power to capture or kill, your inability to refuse the government is what distinguishes the NSA from even the nosiest companies on Earth. In a functioning marketplace, boycotting a company that you dislike — for whatever reason — is fairly easy. Diners who object to eating fake meat can stop frequenting Taco Bell. Internet users that don't like Google collecting their search terms can try duckduckgo, an anonymous search engine.

By contrast, it's nearly impossible to simply pick up your belongings and quit the United States. For most people, that would carry some significant costs — quitting your job, for instance, or disrupting your children's education, or leaving friends and family. Those costs can be high enough to outweigh the benefits of recovering some hard-to-measure modicum of privacy. Besides, leaving the country would ironically expose you to even greater risk of surveillance, since you'd no longer be covered by the legal protections granted to people (even foreign terror suspects) that arrive to U.S. shores.

There are still some ways to shield yourself from the NSA. To the best of our knowledge, the government has yet to crack the encryption protocols behind Tor, the online traffic anonymizing service. But Tor's users are also inherently the object of greater suspicion precisely because they're making efforts to cover their tracks.

In the business world, no single company owns a monopoly over your privacy. The same can't really be said about the government.

#### The government has unique powers to violate individuals’ privacy.

Harper 12 — Jim Harper, Director of Information Policy Studies at the Cato Institute, founding member of the Department of Homeland Security’s Data Privacy and Integrity Advisory Committee, holds a J.D. from the University of California-Hastings College of Law, 2012 (“Why Government is the Greater Threat to Privacy,” The Institute for Policy Innovation—a non-profit, non-partisan public policy think tank, November 2nd, Available Online at <http://www.ipi.org/ipi_issues/detail/why-government-is-the-greater-threat-to-privacy>, Accessed 08-05-2015)

Individuals enjoy privacy when they have the power to control information about themselves and when they have exercised that power consistent with their interests and values.

But while most of the debate about privacy has been focused on privacy with regard to private companies, government poses a much greater threat to privacy. In terms of privacy, the public sector and the private sector are worlds apart.

Because of governments’ unique powers, the issue of privacy from government is of a much more critical nature than privacy from companies. Governments can invade privacy by taking and using personal information against the will of individuals. Private companies cannot get information from people who refuse to share it. Moving beyond privacy, governments can knock down doors, audit people’s finances, break up families, and throw people in jail. A bright line should separate our contemplation of privacy from government and privacy in the private sector.

#### On balance, governments are a greater threat to privacy.

Harper 12 — Jim Harper, Director of Information Policy Studies at the Cato Institute, founding member of the Department of Homeland Security’s Data Privacy and Integrity Advisory Committee, holds a J.D. from the University of California-Hastings College of Law, 2012 (“Why Government is the Greater Threat to Privacy,” The Institute for Policy Innovation—a non-profit, non-partisan public policy think tank, November 2nd, Available Online at <http://www.ipi.org/ipi_issues/detail/why-government-is-the-greater-threat-to-privacy>, Accessed 08-05-2015)

Conclusion

Between government and the private sector, government is the clearest threat to privacy. Governments have the power to take information from people and use it in ways that are objectionable or harmful. This is a power that no business has: People can always turn away from businesses that do not satisfy their demands for privacy.

Privacy advocates and concerned citizens should be far more concerned about governments as potential abusers of privacy.

### They Say: “Nothing To Hide”

#### Privacy is vital to freedom. Posner’s argument breeds conformity and passivity.

Greenwald 14 — Glenn Greenwald, journalist who received the 2014 Pulitzer Prize for Public Service for his work with Edward Snowden to report on NSA surveillance, Founding Editor of *The Intercept*, former Columnist for the *Guardian* and *Salon*, recipient of the Park Center I.F. Stone Award for Independent Journalism, the Online Journalism Award for investigative work on the abusive detention conditions of Chelsea Manning, the George Polk Award for National Security Reporting, the Gannett Foundation Award for investigative journalism, the Gannett Foundation Watchdog Journalism Award, the Esso Premio for Excellence in Investigative Reporting in Brazil, and the Electronic Frontier Foundation’s Pioneer Award, holds a J.D. from New York University School of Law, 2014 (“What Bad, Shameful, Dirty Behavior is U.S. Judge Richard Posner Hiding? Demand to Know.,” *The Intercept*, December 8th, Available Online at <https://firstlook.org/theintercept/2014/12/08/bad-shameful-dirty-secrets-u-s-judge-richard-posner-hiding-demand-know/>, Accessed 06-28-2015)

Richard Posner has been a federal appellate judge for 34 years, having been nominated by President Reagan in 1981. At a conference last week in Washington, Posner said the NSA should have the unlimited ability to collect whatever communications and other information it wants: “If the NSA wants to vacuum all the trillions of bits of information that are crawling through the electronic worldwide networks, I think that’s fine.” The NSA should have “carte blanche” to collect what it wants because “privacy interests should really have very little weight when you’re talking about national security.”

His rationale? “I think privacy is actually overvalued,” the distinguished jurist pronounced. Privacy, he explained, is something people crave in order to prevent others from learning about the shameful and filthy things they do:

Much of what passes for the name of privacy is really just trying to conceal the disreputable parts of your conduct. Privacy is mainly about trying to improve your social and business opportunities by concealing the sorts of bad activities that would cause other people not to want to deal with you.

Unlike you and your need to hide your bad and dirty acts, Judge Posner has no need for privacy – or so he claims: “If someone drained my cell phone, they would find a picture of my cat, some phone numbers, some email addresses, some email text,” he said. “What’s the big deal?” He added: “Other people must have really exciting stuff. Do they narrate their adulteries, or something like that?”

I would like to propose a campaign inspired by Judge Posner’s claims (just by the way, one of his duties as a federal judge is to uphold the Fourth Amendment). In doing so, I’ll make the following observations:

First, note the bargain Judge Posner offers, the one that is implicitly at the heart of all surveillance advocacy: as long as you make yourself extremely boring and unthreatening – don’t exercise your political liberties, but instead, just take pictures of your cat, arrange Little League games, and exchange recipes – then you have nothing to worry about from surveillance. In other words, as long as you remain what Judge Posner is – an obedient servant of political and corporate power – then you have nothing to worry about from surveillance.

The converse, of course, is equally true: if you do anything unorthodox or challenging to those in power – if, for instance, you become a civil rights leader or an antiwar activist – then you are justifiably provoking surveillance aimed at you. That is the bargain at the heart of the anti-privacy case, which is why a surveillance state, by design, breeds conformity and passivity – which in turn is why all power centers crave it. Every time surveillance is discussed, someone says something to the effect of: “I’m not worried about being surveilled because I’ve chosen to do nothing that’d be interesting to the government or anyone else.” That self-imprisoning mindset, by itself, is as harmful as any abuse of surveillance power (in September, I gave a 15-minute TED talk specifically designed to address and refute the inane “nothing to hide” anti-privacy rationale Judge Posner offers here).

#### The ends don’t justify the means: even people with “nothing to hide” are harmed by surveillance.

Snowden 15 — Edward Snowden, NSA whistleblower, Member of the Board of Directors of the Freedom of the Press Foundation, former Central Intelligence Agency officer and National Security Agency contractor, 2015 (“Just days left to kill mass surveillance under Section 215 of the Patriot Act. We are Edward Snowden and the ACLU’s Jameel Jaffer. AUA.,” Reddit Ask Me Anything with Edward Snowden, May 21st, Available Online at <https://www.reddit.com/r/IAmA/comments/36ru89/just_days_left_to_kill_mass_surveillance_under/crglgh2>, Accessed 06-16-2015)

Jameel is right, but I think the central issue is to point out that regardless of the results, the ends (preventing a crime) do not justify the means (violating the rights of the millions whose private records are unconstitutionally seized and analyzed).

Some might say "I don't care if they violate my privacy; I've got nothing to hide." Help them understand that they are misunderstanding the fundamental nature of human rights. Nobody needs to justify why they "need" a right: the burden of justification falls on the one seeking to infringe upon the right. But even if they did, you can't give away the rights of others because they're not useful to you. More simply, the majority cannot vote away the natural rights of the minority.

But even if they could, help them think for a moment about what they're saying. Arguing that you don't care about the right to privacy because you have nothing to hide is no different than saying you don't care about free speech because you have nothing to say.

A free press benefits more than just those who read the paper.

\* Jameel = Jameel Jaffer, Deputy Legal Director of the American Civil Liberties Union and Director of the ACLU's Center for Democracy

#### There is a substantial chilling effect — Wittes is wrong.

Masnick 14 — Mike Masnick, Founder and Chief Executive Officer of Floor64—a software company, Founder and Editor of *Techdirt*, 2014 (“Saying That You're Not Concerned Because The NSA Isn't Interested In You Is Obnoxious And Dangerous,” *Techdirt*, July 16th, Available Online at https://www.techdirt.com/articles/20140703/18113427778/saying-that-youre-not-concerned-because-nsa-isnt-interested-you-is-obnoxious-dangerous.shtml, Accessed 07-05-2015)

One of the more common responses we've seen to all of the revelations about all of that NSA surveillance, is the response that "Well, I don't think the NSA really cares about what I'm doing." A perfect example of that is long-time NSA defender Ben Wittes, who recently wrote about why he's not too worried that the NSA is spying on him at all, basically comparing it to the fact that he's confident that law enforcement isn't spying on him either:

As I type these words, I have to take on faith that the Washington D.C. police, the FBI, the DEA, and the Secret Service are not raiding my house. I also have to take on faith that federal and state law enforcement authorities are not tapping my various phones. I have no way of knowing they are not doing these things. They certainly have the technical capability to do them. And there’s historical reason to be concerned. Indeed, there is enough history of government abuse in the search and seizure realm that the Founders specifically regulated the area in the Bill of Rights. Yet I sit here remarkably confident that these things are not happening while my back is turned—and so do an enormous number of other Americans.

The reason is that the technical capability for a surveillance event to take place does not alone amount to the reality—or likelihood—of that event’s taking place....

For much the same reason as I am not rushing home to guard my house, I have a great deal of confidence that the National Security Agency is not spying on me. No doubt it has any number of capabilities to do so. No doubt those capabilities are awesome—in the wrong hands the tools of a police state. But there are laws and rules that protect me, and there are compliance mechanisms that ensure that the NSA follows those laws and rules. These systems are, to be sure, different from those that restrain the D.C. cops, but they are robust enough to reassure me.

Julian Sanchez has a blistering response to that, appropriately entitled Check Your Privilege, which highlights that while Wittes, a well-paid, white, DC-based policy think tank worker, may be confident of those things, plenty of other folks are not nearly so confident, and that the NSA has made it pretty clear that they shouldn't be so confident.

In a democracy, of course, the effects of surveillance are not restricted to its direct targets. Spying, like censorship, affects all of us to the extent it shapes who holds power and what ideas hold sway. Had the FBI succeeded in “neutralizing” Martin Luther King Jr. earlier in his career, it would hardly have been a matter of concern solely for King and his family—that was, after all, the whole point.

Instead of a couple wonks comfortably ensconced in D.C. institutions, let’s instead ask a peaceful Pakistani-American who protests our policy of targeted killings, perhaps in collaboration with activists abroad; we might encounter far less remarkable confidence. Or, if that seems like too much effort, we can just look to the survey of writers conducted by the PEN American Center, finding significant percentages of respondents self-censoring or altering their use of the Internet and social media in the wake of revelations about the scope of government surveillance. Or to the sworn declarations of 22 civil society groups in a lawsuit challenging bulk phone records collection, attesting to a conspicuous decline in telephonic contacts and members expressing increased anxiety about their association with controversial or unpopular organizations.

As Sanchez notes, it's not just whether or not any of us are direct targets, but the overall chilling effects of how the system is used. And, I should note, that while Wittes is confident that he's safe -- there are a growing number of folks who have good reason to believe that they are not immune from such surveillance. The recent revelation that Tor users are labeled as extremists who get extra-special scrutiny seems like a major concern. Similarly, the story from earlier this year that the NSA targeted the Pirate Bay and Wikileaks as part of some of its surveillance efforts is a major concern. In the process of doing journalism, I've communicated with folks associated with some of those and other similar organizations. In the past, I probably would have similarly noted that I doubted the NSA cared at all about what I was doing, but as each of these stories comes out, I am increasingly less sure. And, more importantly, even if the NSA is not at all concerned with what I happen to be doing, just the fact that I now have to think about what it means if they might be certainly creates a chilling effect, and makes me think twice over certain people I contact, and what I say to them.

It's easy to claim that you're not worried when you're the one out there supporting those in power. It becomes a lot trickier when you're either criticizing those in power, or communicating with those who challenge the power structure. Suddenly, it's not so easy to sit on the sidelines and say "Meh, no one's going to care about me..." And that should be a major concern. The way we keep a strong democracy is by having people who are able and willing to challenge the status quo and those in power. And yes, the US is much more forgiving than many, many other countries to such people, but there are clear biases and clear cases where they are not at all accepting of such things. And the more of a chilling effect the government creates around those things, the more dangerous it becomes to stand up for what you believe in.

### They Say: “Weigh Consequences”

#### The Constitution enshrines fundamental principles as side constraints that guide cost-benefit analysis. Posner is wrong — those principles can’t be balanced away.

Cole 7 — David Cole, Professor at Georgetown University Law Center, has litigated many significant constitutional cases in the Supreme Court, holds a J.D. from Yale Law School, 2007 (“‘How to Skip the Constitution’: An Exchange,” *New York Review of Books*, January 11th, Available Online at <http://www.nybooks.com/articles/archives/2007/jan/11/how-to-skip-the-constitution-an-exchange/>, Accessed 06-28-2015)

More generally, Judge Posner shies away from his own constitutional theory when he says that to declare a practice constitutional is not the same as saying that it is desirable as a policy matter. That is certainly true as a theoretical matter, at least where one’s constitutional theory is not reducible to one’s policy preferences. But as my review points out, Posner views questions of constitutionality as simply a matter of weighing all the costs and benefits, which is surely the same utilitarian calculus the policymaker would use to determine whether a practice is desirable. Under Posner’s approach, then, it’s hard to see why there would be any room between what is desirable and what is constitutional.

Judge Posner accuses me, in effect, of subscribing to the same constitutionalism-as-policy approach that he uses by asserting, without evidentiary support, that my constitutional views simply track my own policy preferences; “the rest is rhetoric.” But I believe that there is a critical distinction between constitutionalism and mere policy preferences. In fact, our Constitution gives judges the authority to declare acts of democratically elected officials unconstitutional on the understanding that they do not simply engage in the same cost-benefit analyses that politicians and economists undertake.

My own view is that the very sources Judge Posner dismisses—text, precedent, tradition, and reason—are absolutely essential to principled constitutional decision-making. Posner suggests that because none of these elements necessarily provides a determinate answer to difficult questions, we may as well abandon them for his seat-of-the-pants, cost-benefit approach. It is true that text, precedent, tradition, and reason do not determine results in some mechanistic way. That is why we ask judges, not machines, to decide constitutional cases. But these sources are nonetheless critically important constraints on and guides to constitutional decision-making. They are what identify those principles that have been deemed fundamental—and therefore constitutional—over our collective history. That there are differences over principle in no way excludes the need for reasoned argument about them.

There is a reason the framers of the Constitution did not simply say “the government may engage in any practice whose benefits outweigh its costs,” as Judge Posner would have it, but instead struggled to articulate a limited number of fundamental principles and enshrine them above the everyday pragmatic judgments of politicians. They foresaw what modern history has shown to be all too true—that while democracy is an important antidote to tyranny, it can also facilitate a particular kind of tyranny—the tyranny of the majority. Constitutional principles protect those who are likely to be the targets of such tyranny, such as terror suspects, religious and racial minorities, criminal defendants, enemy combatants, foreign nationals, and, especially in this day and age, Arabs and Muslims. Relegating such individuals to the mercy of the legislature—whether it be Republican or Democratic—denies that threat. The Constitution is about more than efficiency, and more than democracy; it is a collective commitment to the equal worth and dignity of all human beings. To call that mere “rhetoric” is to miss the very point of constitutional law.

#### The neg’s impact comparison relies on *juking the stats*. “Balancing” liberty and security is a rigged game that *always* subjugates rights.

Sidhu 9 — Dawinder S. Sidhu, Visiting Researcher at the Georgetown University Law Center, former Fellow at the Center for Internet and Society at Stanford University, holds a J.D. from The George Washington University Law School and an M.A. in Government from Johns Hopkins University, 2009 (“Wartime America and the Wire: A Response to Posner's Post-9/11 Constitutional Framework,” *George Mason University Civil Rights Law Journal* (20 Geo. Mason U. Civ. Rts. L.J. 37), Fall, Available Online to Subscribing Institutions via Lexis-Nexis)

IV. Rigging the Game

"Juking the stats." n101

- Roland "Prez" Pryzbylewski, The Wire

In Not a Suicide Pact, Posner not only presents an unhelpful balancing scheme between liberty and security, a contest that is attended only by civil libertarians and hawkish security folks, but then also stacks the deck against the preservation of liberty such that security will invariably be dominant and liberty must consequently give way. n102 In particular, Posner posits that in times of war, greater weight is to be placed on security measures due to the heightened interest in protecting the homeland. He writes, "In times of danger, the weight of concerns for public safety increases relative to that of liberty concerns, and civil liberties are narrowed." n103 He continues, "[A] decline in [\*55] security causes the balance to shift against liberty," n104 and "the more endangered we feel, the more weight we place on the interest in safety." n105

Moreover, according to Posner, elevating security concerns above liberty interests may be necessary to ward off future terrorist activity. He speculates that "[a] minor curtailment of present civil liberties, to the extent that it reduces the probability of a terrorist attack, reduces the likelihood of a major future curtailment of those liberties." n106 Otherwise, "rooting out" the enemy "might be fatally inhibited if we felt constrained to strict observance of civil liberties." n107 From the government's point of view, Posner simply notes, "It is better to be safe than sorry." n108

Prez and others in The Wire often expressed their disappointment with the concept of "juking the stats." n109 This refers to a situation in which the powers that be—police commanders, high-level public school officials, or politicians—would manipulate perspectives or information to ultimately achieve a predetermined, preferred outcome. n110 It refers to the rigging of the system; it is result-oriented decisionmaking by those at the top of the power structure to the detriment [\*56] of those stakeholders with little or no bargaining ability. n111 For example, in an effort to appease the city's political leadership and the public to which the politicians were accountable, the high-level police officials implemented a strategy to increase the absolute number of arrests; in essence, they manufactured the impression that they were making a dent in city crime. n112 Although the number of arrests did increase, the arrests were of minor users and offenders; as such, police resources were drawn away from infiltrating the primary sources of the city's drug and related crime problems. n113 Even when the police furnished statistics that supported the suggestion that they were successful in addressing crime, in actuality the drug camp was unfazed and the public remained vulnerable to widespread drug trafficking and associated criminal activities. n114 The campaign, though successful on its face, was in truth ineffective and counterproductive.

Just as information could be "juked" to support a self-fulfilling outcome in The Wire, legal commentators recognize that the constitutional equation suggested by Posner is not objectively calibrated, but instead will yield only one pre-determined answer: Civil liberties must defer to security programs or policies. David Cole of the Georgetown University Law Center observed that "constitutional interpretation for Posner is little more than an all-things-considered balancing act—and when the potential costs of a catastrophic terrorist attack are placed on the scale, the concerns of constitutional rights and civil liberties are almost inevitably outweighed." n115 Two others criticize Posner's law and economics approach to security issues because his "method works largely through a cost-benefit analysis where equality and antisubordination never quite measure up to the concerns against [\*57] which they are being measured." n116 Similarly, another commentator writes that Posner's "method ... tilts in the favor of security more often than not." n117

In proposing that post-9/11 constitutional questions implicating the security of the nation be reduced to a balancing of purportedly competing interests, Posner offers a mechanism that is not only faulty in design, as both security and liberty can be simultaneously managed, but also troublesome in its application, as security invariably subjugates other constitutional interests, specifically individual rights. Accordingly, Posner's recommendation is consistent with the "rigging" exhibited and discredited in The Wire—giving the impression of an objective approach to produce a pre-determined outcome, but in essence depriving the people of a legitimate debate on the proper relationship between national security and individual rights.

#### Unconstitutional policies should be rejected regardless of consequences.

Carter 87 — Steven Carter, Professor of Law at Yale University, 1987 (“From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers,” *Brigham Young University Law Review*, Issue 3, Available Online at http://lawreview.byu.edu/archives/1987/3/car.pdf, Accessed 01-12-2013)

The Constitution, which is after all a species of law, is thus quite naturally viewed as a potential impediment to policy, a barrier that must be adjusted, through interpretation or amendment, more often than preservation of government under that Constitution is viewed as a desirable policy in itself. In this the modern student of policy is like the modern moral philosopher—and like a good number of constitutional theorists as well—in denigrating the value of preserving any particular process and exalting the desirable result. But constitutionalism assigns enormous importance to process, and consequently assigns costs, albeit perhaps intangible ones, to violating the constitutional process. For the constitutionalist, as for classical liberal democratic theory, the autonomy of the people themselves, not the achievement of some well-intentioned government policy, is the ultimate end for which the government exists. As a consequence, no violation of the means the people have approved for pursuit of policy—here, the means embodied in the structural provisions of the Constitution—can be justified through reference to the policy itself as the end**.**

### They Say: “Security Outweighs Privacy”

#### Weighing privacy against security *in the abstract* commits the all-or-nothing fallacy. Privacy outweighs security *in this case*.

Solove 11 — Daniel J. Solove, John Marshall Harlan Research Professor of Law at the George Washington University Law School, Founder of TeachPrivacy—a company that provides privacy and data security training programs to businesses, schools, healthcare institutions, and other organizations, Fellow at the Ponemon Institute and at the Yale Law School’s Information Society Project, Serves on the Advisory Boards of the Electronic Frontier Foundation, the Future of Privacy Forum, and the Law and Humanities Institute, holds a J.D. from Yale Law School, 2011 (“The All-or-Nothing Fallacy,” *Nothing to Hide: The False Tradeoff between Privacy and Security*, Published by Yale University Press, ISBN 9780300172317, p. 35-37)

The all-or-nothing fallacy causes tremendous distortion in the balance between privacy and security. In fact, I believe that many courts and commentators who balance security measures against privacy rights conduct the balance wrongly because of this fallacy. They cast the balance in terms of whether a particular government security measure should be barred. On one side of the scale they weigh the benefits of the security measure. On the other side they weigh privacy rights.

At first blush, this seems like a reasonable approach—balance the security measure against privacy. Yet it is quite wrong. Placing the security measure on the scale assumes that the entire security measure, all-or-nothing, is in the balance. It’s not. Protecting privacy seldom negates the security measure altogether. Rarely does judicial oversight or the application of the Fourth Amendment prohibit a government surveillance activity. Instead, the activity is allowed subject to oversight and sometimes a degree of limitation.

Most constitutional and statutory protections work this way. The Fourth Amendment, for example, allows all sorts of very invasive searches. Under the Fourth Amendment, the government can search your home. It can search your computer. It can do a full body-cavity search. It can search nearly anything and engage in nearly any kind of surveillance. How can this be so? Because the Fourth Amendment doesn’t protect privacy by stopping the government from searching; it works by requiring judicial oversight and mandating that the government justify its measures. So under the Fourth Amendment, the government can engage in highly invasive searches if it justifies the need to do so beforehand to a judge. [end page 35]

Like the Fourth Amendment, electronic-surveillance law allows for wiretapping, but limits the practice by mandating judicial supervision, minimizing the breadth of the wiretapping, and requiring law-enforcement officials to report back to the court to prevent abuses. Thus the protection of privacy might demand the imposition of oversight and regulation but need not entail scrapping an entire security measure.

When security is balanced against privacy, the entire security measure shouldn’t be weighed against the privacy harms it creates. Since protecting privacy involves imposing oversight and regulation on the initiative, the security side of the scale should gauge only the extent to which such oversight and regulation reduce the effectiveness of the security measure. If, say, judicial oversight and regulation designed to protect privacy result in delays and paperwork and limitations that make a security measure 10 percent less effective, it makes no sense to balance the entire security measure against privacy. Instead, the balance should be between privacy and the 10 percent decrease in the measure’s effectiveness.

Far too often, however, discussions of security and liberty fail to assess the balance this way. Polls frequently pose the question as an all-or-nothing tradeoff. A 2002 Pew Research poll asked American citizens:

Should the government be allowed to read e-mails and listen to phone calls to fight terrorism?3

A 2005 poll from Rasmussen Reports posed the question:

Should the National Security Agency be allowed to intercept telephone conversations between terrorism suspects in other countries and people living in the United States?4

Both these questions, however, neglect to account for warrants and court orders. Few would contend that the government shouldn’t be [end page 36] allowed to conduct a wide range of searches when it has a search warrant or court order. So the questions that should be posed are:

Should the government be allowed to read emails and listen to phone calls without a search warrant or the appropriate court order required by law to fight terrorism?

Should the National Security Agency be allowed to intercept telephone conversations between terrorism suspects in other countries and people living in the United States without a court order or judicial oversight?

The choice is not between a security measure and nothing, but between a security measure with oversight and regulation and a security measure at the sole discretion of executive officials. In many cases, oversight and regulation do not diminish a security measure substantially, so the cost of protecting privacy can be quite low. Unfortunately, the balance is rarely assessed properly. When the balance is measured under the all-or-nothing fallacy, the scale dips dramatically toward the security side. The costs of protecting privacy are falsely inflated, and the security measure is accorded too much weight.

#### Sacrificing privacy for the sake of security negates the Constitution. In this context, giving up privacy means giving up *the rule of law*.

Rotenberg 7 — Marc Rotenberg, Executive Director of the Electronic Privacy Information Center, Adjunct Professor at the Georgetown University Law Center, Fellow of the American Bar Foundation, has testified before Congress more than 60 times including for the 9/11 Commission, holds a J.D. from Stanford Law School, 2007 (“Privacy vs. Security? Privacy.,” *The Huffington Post* — from a public debate hosted by The Miller Center for Public Affairs at the University of Virginia, November 13th, Available Online at <http://www.huffingtonpost.com/marc-rotenberg/privacy-vs-security-priva_b_71806.html>, Accessed 08-07-2015)

But Benjamin Franklin warned long ago that such a strategy would fail. The correct balance is not a metaphysical tradeoff between security and privacy. The correct balance -- really a counter-balance - is between the powers of government and the means of oversight that are established.

This is the point made clear by the 9-11 Commission. It is the oversight of government and the rights of the individuals that we are being asked to sacrifice, and no where is the cost more clear than with privacy.

In the modern era, the right of privacy represents a vast array of rights that include clear legal standards, government accountability, judicial oversight, the design of techniques that are minimally intrusive and the respect for the dignity and autonomy of individuals.

The choice that we are being asked to make is not simply whether to reduce our expectation of privacy, but whether to reduce the rule of law, whether to diminish the role of the judiciary, whether to cast a shroud of secrecy over the decisions made by government.

In other words, we are being asked to become something other than the strong America that could promote innovation and safeguard privacy that could protect the country and its Constitutional traditions. We are being asked to become a weak nation that accepts surveillance without accountability that cannot defend both security and freedom.

That is a position we must reject. If we agree to reduce our expectation of privacy, we will erode our Constitutional democracy.

#### Privacy *is* a security interest. Without it, society is unbearably oppressive.

Solove 11 — Daniel J. Solove, John Marshall Harlan Research Professor of Law at the George Washington University Law School, Founder of TeachPrivacy—a company that provides privacy and data security training programs to businesses, schools, healthcare institutions, and other organizations, Fellow at the Ponemon Institute and at the Yale Law School’s Information Society Project, Serves on the Advisory Boards of the Electronic Frontier Foundation, the Future of Privacy Forum, and the Law and Humanities Institute, holds a J.D. from Yale Law School, 2011 (“Why Privacy Isn’t Merely an Individual Right,” *Nothing to Hide: The False Tradeoff between Privacy and Security*, Published by Yale University Press, ISBN 9780300172317, p. 49-50)

In contrast, the philosopher John Dewey proposed an alternative theory about the relationship between individual and society. For Dewey, the good of individual and the good of society are often interrelated rather than antagonistic: “We cannot think of ourselves save as to some extent social beings. Hence we cannot separate the idea of ourselves and our own good from our idea of others and of their good.”7 Dewey contended that the value of protecting individual rights emerges from their contribution to society. In other words, individual [end page 49] rights are not trumps but are protections by society from its intrusiveness. Society makes space for the individual because of the social benefits this space provides. Therefore, Dewey argues, rights should be valued based on “the contribution they make to the welfare of the community.” Otherwise, in any kind of utilitarian calculus, individual rights wouldn’t be valuable enough to outweigh most social interests, and it would be impossible to justify individual rights. Dewey argued that we must insist upon a “social basis and social justification” for civil liberties.8

Like Dewey, I contend the value of protecting the individual is a social one. Society involves a great deal of friction, and we are constantly clashing with one another. Part of what makes a society a good place in which to live is the extent to which it allows people freedom from the intrusiveness of others. A society without privacy protection would be oppressive. When protecting individual rights, we as a society decide to hold back in order to receive the benefits of creating free zones for individuals to flourish.

As the legal theorist Robert Post has argued, privacy is not merely a set of restraints on society’s rules and norms. Instead, privacy constitutes a society’s attempt to promote civility.9 Society protects privacy as a means of enforcing order in the community. Privacy isn’t the trumpeting of the individual against society’s interests but the protection of the individual based on society’s own norms and values. Privacy isn’t simply a way to extricate individuals from social control; it is itself a form of social control that emerges from a society’s norms. It is not an external restraint on society but an internal dimension of society. Therefore, privacy has a social value. When the law protects the individual, it does so not just for the individual’s sake but for the sake of society. Privacy thus shouldn’t be weighed as an individual right against the greater social good. Privacy issues involve balancing societal interests on both sides of the scale.10

## 2AC — Tech Leadership Advantage

### They Say: “Alternate Causality – STEM”

#### There is no STEM shortage — consensus of studies.

Camarota 14 — Steven Camarota, Director of Research for the Center for Immigration Studies, holds a Ph.D. in Public Policy Analysis from the University of Virginia, 2014 (“What STEM Shortage?,” *National Review*, May 20th, Available Online at <http://www.nationalreview.com/article/378334/what-stem-shortage-steven-camarota>, Accessed 08-09-2015)

The idea that we need to allow in more workers with science, technology, engineering, and math (“STEM”) background is an article of faith among American business and political elite.

But in a new report, my Center for Immigration Studies colleague Karen Zeigler and I analyze the latest government data and find what other researchers have found: The country has well more than twice as many workers with STEM degrees as there are STEM jobs. Also consistent with other research, we find only modest levels of wage growth for such workers for more than a decade. Both employment and wage data indicate that such workers are not in short supply.

Reports by the Economic Policy Institute (EPI), the RAND Corporation, the Urban Institute, and the National Research Council have all found no evidence that STEM workers are in short supply. PBS even published an opinion piece based on the EPI study entitled, “The Bogus High-Tech Worker Shortage: How Guest Workers Lower U.S. Wages.” This is PBS, mind you, which is as likely to publish something skeptical of immigration as it is to publish something skeptical of taxpayer subsidies for the Corporation for Public Broadcasting.

RAND’s analysis looked backward in time and found, “Despite recurring concerns about potential shortages of STEM personnel . . . we did not find evidence that such shortages have existed at least since 1990, nor that they are on the horizon.”

#### The scholarly evidence is overwhelmingly on our side.

Teitelbaum 14 — Michael S. Teitelbaum, Senior Research Associate with the Labor and Worklife Program at Harvard Law School, former Vice President and Program Director at the Alfred P. Sloan Foundation, former faculty member at Princeton University and Oxford University, former Vice Chair and Acting Chair of the U.S. Commission on International Migration, holds a D.Phil. in Demography from Oxford University, 2014 (“The Myth of the Science and Engineering Shortage,” *The Atlantic*, March 19th, Available Online at <http://www.theatlantic.com/education/archive/2014/03/the-myth-of-the-science-and-engineering-shortage/284359/>, Accessed 08-09-2015)

A compelling body of research is now available, from many leading academic researchers and from respected research organizations such as the National Bureau of Economic Research, the RAND Corporation, and the Urban Institute. No one has been able to find any evidence indicating current widespread labor market shortages or hiring difficulties in science and engineering occupations that require bachelors degrees or higher, although some are forecasting high growth in occupations that require post-high school training but not a bachelors degree. All have concluded that U.S. higher education produces far more science and engineering graduates annually than there are S&E job openings—the only disagreement is whether it is 100 percent or 200 percent more. Were there to be a genuine shortage at present, there would be evidence of employers raising wage offers to attract the scientists and engineers they want. But the evidence points in the other direction: Most studies report that real wages in many—but not all—science and engineering occupations have been flat or slow-growing, and unemployment as high or higher than in many comparably-skilled occupations.

#### The U.S. has a STEM worker surplus, not a shortage.

Bruenig 13 — Matt Bruenig, Economics and Politics Writer for *PolicyShop*—the Demos blog, 2013 (“The STEM-Shortage Myth,” *The American Prospect*, April 25th, Available Online at <http://prospect.org/article/stem-shortage-myth>, Accessed 08-09-2015)

The Economic Policy Institute published a report yesterday on the supposed shortage of professionals in science, technology, engineering, and math (STEM). You've probably heard of the crisis by now. America is not producing enough STEM degrees. This will be the death of innovation and global competitiveness. We must reorient higher education to convert more liberal arts students into STEM students. And so on.

The problem with this alleged crisis is that it is not real. As the EPI report lays bare, the common wisdom about our STEM problem is mistaken: We are not facing a shortage of STEM-qualified workers. In fact, we appear to have a considerable STEM surplus. Only half of students graduating with a STEM degree are able to find STEM jobs. Beyond that, if there was an actual shortage of STEM workers, basic supply and demand would predict that the wages of STEM workers would be on the rise. Instead, wages in STEM fields have not budged in over a decade. Stagnant wages and low rates of STEM job placement strongly suggest we actually have an abundance of STEM-qualified workers.

### They Say: “Alternate Causality – Taxes”

#### Tech companies move cash overseas to avoid U.S. taxes.

Sullivan 13 — Mark Sullivan, Senior Editor of *TechHive*, 2013 (“How much tax do big tech companies pay?,” *TechHive*, April 13th, Available Online at <http://www.techhive.com/article/2034137/how-much-tax-do-big-tech-companies-pay-.html>, Accessed 08-10-2015)

Large U.S. tech companies should pay income taxes of about 35 percent on the profits they make (above $18.3 million) from business done in the United States. So says the tax code.

It rarely works out that way. Instead, many U.S. companies routinely park large chunks of their income overseas to avoid paying federal income taxes on it. And the SEC apparently looks the other way when companies obscure the true mix of their domestic-versus-overseas profit in their regulatory filings.

Ultimately, only the IRS knows how much these companies actually pay, and it’s not sharing the information with people like you and me.

Tech-sector companies have been especially adept at moving cash assets around the globe, and at muddying the waters as to precisely where their profits came from.

Under federal law, U.S. companies may permanently “defer” paying taxes on income transferred to foreign subsidiaries. Those monies may be subject to taxation by the country where they’ve been parked, but tax rates in popular tax haven countries like Bermuda are extremely low or even nonexistent.

Bloomberg reported in December that Google avoided paying $2 billion in global income taxes by moving $10 billion in revenue to Bermuda, which has no corporate income tax.

The fact that the tax rate on tech companies’ global income is less than the statutory rate of 35 percent in the United States suggests that shifting income overseas can reduce companies’ overall tax burden considerably, and often dramatically.

#### All the major tech companies do it — high tax rates are circumvented.

Bort 13 — Julie Bort, Editor of Enterprise Computing at *Business Insider*, 2013 (“Look At The Humongous Amounts Of Money US Tech Companies Stash Overseas To Avoid Taxes,” *Business Insider*, August 13th, Available Online at <http://www.businessinsider.com/tech-companies-hoard-cash-overseas-to-avoid-taxes-2013-8?op=1>, Accessed 08-10-2015)

U.S. companies are stockpiling really huge amounts of cash in offshore accounts.

But, it turns out, the two most vocal proponents concerning the tax rules that incentivize companies to avoid moving cash into the U.S., Cisco and Apple, aren't even the ones with the biggest stashes.

Microsoft's pile of foreign cash is way bigger.

A lot of the money sitting overseas was earned overseas, but some of it is put there through accounting methods to avoid U.S. taxes, a situation that Congress has recently been investigating. If these companies want to spend that money in the U.S. to make an acquisition or hire a bunch of new employees, Uncle Sam wants to take a 35% cut.

Cisco's CEO John Chambers and Apple's CEO Tim Cook have been trying to get Congress to change the rules, asking for a lower tax rate or even no taxes at all.

Chambers even went so far as to threaten not to make any more U.S. acquisitions or hire any more U.S. employees unless the rule is changed. He didn't make good on that. Last month, Cisco bought Maryland-based Sourcefire for $2.7 billion.

But Cisco and Apple clearly aren't the only ones with a lot at stake. Bloomberg on Tuesday published a list of the 25 companies with the biggest overseas tax hoards.

All of the top 10 are tech companies:

1. Microsoft, $76.4 billion

2. IBM, $44.4 billion

3. Cisco Systems, $41.3 billion

4. Apple, $40.4 billion

5. Hewlett-Packard, $33.4 billion

6. Google, $33.3 billion

7. Oracle, $26.2 billion

8. Dell, $19.0 billion

9. Intel, $17.5 billion

10. Qualcomm, $16.4 billion

#### Effective tax rates on tech companies are already very low.

Pyke 15 — Alan Pyke, Deputy Economic Policy Editor for *Think Progress*, former blogger and researcher with a focus on economic policy and political advertising at Media Matters for America, American Bridge 21st Century Foundation, and PoliticalCorrection.org, 2015 (“Corporate Tax Rates Aren’t The Reason American Companies Flee To Tax Havens,” *Think Progress*, February 9th, Available Online at <http://thinkprogress.org/economy/2015/02/09/3620741/inversion-mergers-not-about-tax-rate/>, Accessed 08-10-2015)

Cutting the corporate tax rate in the U.S. would do little to discourage companies from moving overseas to dodge American taxes, according to a new Reuters analysis of the half-dozen largest companies to launch so-called inversion mergers last year.

The list of six companies includes both Medtronic and Burger King, household names whose inversion plans drew significant press attention to the growth of the business practice in recent years. An inversion allows an American company to merge with a foreign entity then set the corporate headquarters of the merged firm in that other company’s home country, shifting the U.S. firm’s tax residence overseas without requiring any actual realignment of where and how the company does business. The maneuver is entirely legal and “mainly driven by efforts to shift profits out of the U.S. and to access overseas earnings at little or not cost in U.S. tax,” Reuters explains.

While proponents of a corporate tax cut or repatriation tax holiday often argue that companies undertake these elaborate schemes specifically because of the 35 percent statutory income tax rate that corporations face in the U.S. But that argument ignores the often huge gap between that on-paper tax rate and the effective rate that companies actually pay. Reuters reports that Medtronic, Burger King, and four other large companies plotting inversions actually paid an average federal tax rate of 20.3 percent from 2011 to 2013. That finding corresponds with other research on effective corporate tax rates, such as a 2014 report from Citizens for Tax Justice that found an effective tax rate of just below 20 percent for the 288 largest profitable companies in America.

Some analyses have found that a significant number of profitable companies even pay zero percent income tax rates in the U.S. thanks to creative accounting. Complex international corporate structures have let giant tech companies like Apple and Google protect hundreds of billions of dollars in revenue from taxation, and there is so much money to be made from gaming the rules of the international business tax system that even an old-guard manufacturer like Caterpillar decided to spend $50 million setting up a scheme to route profits through Switzerland and away from Internal Revenue Service hands. About $2 trillion in U.S. corporate profits is currently stashed offshore under one or another such scheme, and the Wall Street firms that help set up inversion mergers made about a billion dollars facilitating the deals in recent years.

If American companies are expatriating even though they already manage to avoid roughly half of the statutory tax burden they face, that suggests that cutting statutory rates would not produce a surge of patriotism from these firms. Burger King took significant heat from customers over its tax inversion merger with Canadian brand Tim Horton’s, but is pressing ahead anyway because the financial returns from the deal are too good to pass up.

### They Say: “Status Quo Solves”

#### The Freedom Act wasn’t enough — the plan is needed.

Castro and McQuinn 15 — Daniel Castro, Vice President of the Information Technology and Innovation Foundation—a nonprofit, non-partisan technology think tank, former IT Analyst at the Government Accountability Office, holds an M.S. in Information Security Technology and Management from Carnegie Mellon University and a B.S. in Foreign Service from Georgetown University, and Alan McQuinn, Research Assistant with the Information Technology and Innovation Foundation, holds a B.S. in Political Communications and Public Relations from the University of Texas-Austin, 2015 (“Beyond the USA Freedom Act: How U.S. Surveillance Still Subverts U.S. Competitiveness,” Report by the Information Technology & Innovation Foundation, June, Available Online at <http://www2.itif.org/2015-beyond-usa-freedom-act.pdf?_ga=1.61741228.1234666382.1434075923>, Accessed 07-05-2015, p. 1)

Almost two years ago, ITIF described how revelations about pervasive digital surveillance by the U.S. intelligence community could severely harm the competitiveness of the United States if foreign customers turned away from U.S.-made technology and services.1 Since then, U.S. policymakers have failed to take sufficient action to address these surveillance concerns; in some cases, they have even fanned the flames of discontent by championing weak information security practices.2 In addition, other countries have used anger over U.S. government surveillance as a cover for implementing a new wave of protectionist policies specifically targeting information technology. The combined result is a set of policies both at home and abroad that sacrifices robust competitiveness of the U.S. tech sector for vague and unconvincing promises of improved national security.

ITIF estimated in 2013 that even a modest drop in the expected foreign market share for cloud computing stemming from concerns about U.S. surveillance could cost the United States between $21.5 billion and $35 billion by 2016.3 Since then, it has become clear that the U.S. tech industry as a whole, not just the cloud computing sector, has underperformed as a result of the Snowden revelations. Therefore, the economic impact of U.S. surveillance practices will likely far exceed ITIF’s initial $35 billion estimate. This report catalogues a wide range of specific examples of the economic harm that has been done to U.S. businesses. In short, foreign customers are shunning U.S. companies. The policy implication of this is clear: Now that Congress has reformed how the National Security Agency (NSA) collects bulk domestic phone records and allowed private firms—rather than the government—to collect and store approved data, it is time to address other controversial digital surveillance activities by the U.S. intelligence community.4

#### The Freedom Act didn’t go far enough — our evidence cites tech companies.

Volz 14 — Dustin Volz, Staff Correspondent covering tech policy for *National Journal*, holds a Master of Mass Communication, a B.A. in Journalism, and a B.A. in History from Arizona State University, 2014 (“Google, Facebook Warn NSA Bill Wouldn't Stop Mass Surveillance,” *National Journal*, May 21st, Available Online at <http://www.nationaljournal.com/tech/google-facebook-warn-nsa-bill-wouldn-t-stop-mass-surveillance-20140521>, Accessed 08-10-2015)

A day before the House will vote on a major bill designed to rein in government surveillance, a group of blue-chip tech firms are warning that the measure falls far short of what is advertised.

The Reform Government Surveillance coalition—whose members include Google, Facebook, Microsoft, AOL, Apple, Twitter, LinkedIn, DropBox, and Yahoo—issued a statement Wednesday announcing it was pulling its support of the USA Freedom Act. The legislation would take the storage of phone records out of government hands and keep them with phone companies.

But newly amended language in the bill has "moved in the wrong direction" of true surveillance reforms, the tech companies said.

"The latest draft opens up an unacceptable loophole that could enable the bulk collection of Internet users' data," the coalition said. "While it makes important progress, we cannot support this bill as currently drafted and urge Congress to close this loophole to ensure meaningful reform."

The loophole referred to is the Freedom Act's definition of a "specific selection term," which underwent changes in the newest version of the bill released this week. Earlier drafts, including the one passed two weeks ago by the House Judiciary and Intelligence committees, defined selectors as "a person, account or entity." But the new language—which adds words like "address and "device" and the non-limiting term "such as"—is seen as more broad.

Also on Wednesday, the Computer & Communications Industry Association, whose members additionally include Pandora, Samsung, Sprint and others, said it would "not support consideration or passage of the USA Freedom Act in its current form."

Several privacy groups have already revolted against the bill, citing similar concerns with the new language. Harley Geiger, senior counsel with the Center for Democracy & Technology, said the bill would allow for "an unacceptable level of surveillance." While the language could impose some limits on infinitely vast bulk collection of phone records, Geiger said, it could still potentially allow collection on areas as large as area codes or cities.

#### The Freedom Act was a net-negative because it extended unconstitutional programs.

Marthews 14 —Alex Marthews, National Chair at Restore The Fourth—a 501(c)(4) nonprofit that seeks to strengthen the Fourth Amendment to the United States Constitution and end programs that violate it, holds a Masters in Public Policy from the University of California-Berkeley and a B.A. in English from the University of Cambridge, 2014 (“We Need Real Surveillance Reform, Not The House's ‘USA Freedom Act’,” *Restore The Fourth*, May 27th, Available Online at http://restorethe4th.com/blog/we-need-real-surveillance-reform-not-the-houses-usa-freedom-act/, Accessed 06-19-2015)

Last week, the House of Representatives passed the bill called The USA Freedom Act, 303 votes to 121. Following a series of amendments, the bill as it passed in the end contained much weaker reforms than even the very modest ones it originally proposed. The Chair of the Judiciary Committee's manager's amendment removed two-thirds of its substantive reforms; the Chair of the Intelligence Committee and the White House worked hard to remove as much as possible of what remained, leaving a shell that will still permit mass surveillance.

The Fourth Amendment is clear: Mass surveillance is unconstitutional. A government search is unreasonable, and therefore unconstitutional, if it is not authorized beforehand by a warrant issued by a judge, on the basis of "probable cause" of involvement in an actual crime, supported by an "oath or affirmation, and particularly describing" the "persons or things to be seized."

That's what ought to happen. This bill, on the other hand, would allow government searches of millions of innocent people's data and movements, not based on probable cause or even reasonable suspicion of their personal involvement in a crime, but simply on any "selection term" vaguely associated with a target of surveillance.

The "selection term" could be as broad as the government likes, covering, for example, everyone born in Hawaii, or everyone with the middle name Hussein. The argument for this “reform” that supporters are touting is that this is better than the current government practice of collecting everything with no selection term at all. While that's true, it misses the larger point. The standard is individualized probable cause warrants, not “whatever is most convenient for the NSA.” A standard that can be redefined at will is marginally – if at all – better than having none.

As a terrible coda, the bill's last section extends out the sunset of crucial parts of the abusive PATRIOT Act from 2015 all the way through till 2017. Apparently, fourteen years of "emergency" privacy-violating legislation is still not enough to defeat the people who attacked us on 9/11, and we need sixteen. Given this extension, were this bill as it currently exists to be signed into law, it would be a net negative for the Fourth Amendment.

The only merit in the bill having passed is that it provides something with which the Senate's superior version of the USA Freedom Act can be reconciled in conference. We urge the Senate, and especially the Judiciary Committee, to fight hard for the Fourth Amendment in the next few months by advancing as strong a bill as possible – much stronger than this one. The USA Freedom Act, in its original form, was popular enough in the House to have passed unamended, had it been allowed to come to the floor. In the Senate, the same may well be true, and our next steps on Capitol Hill will be to work to make that happen.

When we look back in a generation at the era of our out-of-control surveillance state, we will wonder why we didn't take the Fourth Amendment as seriously as our Founders took it. We will feel shame that we were willing to sell our Bill of Rights in an attempt to thwart the same terrorists said to be attacking it. The sooner we replace this act with actual reform, the sooner our out-of-control surveillance state will finally be a thing to look back on.

### They Say: “No Competitiveness Impact”

#### Competitiveness is real and necessary for economic growth — Krugman is wrong.

Ezell 11 — Stephen Ezell, Senior Analyst with the Information Technology and Innovation Foundation—a non-partisan research and educational institute and think tank whose mission is to formulate and promote public policies to advance technological innovation and productivity, former head of the Global Service Innovation Consortium at Peer Insight—an innovation research and consulting firm, holds a B.S. from the School of Foreign Service at Georgetown University with an Honors Certificate from Georgetown’s Landegger International Business Diplomacy program, 2011 (“Krugman Flat Wrong that Competitiveness is a Myth,” *The Innovation Files*, January 25th, Available Online at http://www.innovationfiles.org/krugman-flat-wrong-that-competitiveness-is-a-myth/, Accessed 08-11-2013)

In a Sunday op-ed in the New York Times, “The Competition Myth,” Paul Krugman argues that “competitiveness” is a myth, a bad metaphor, a fundamentally misleading goal, and that it doesn’t make “any sense to view our current woes as stemming from a lack of competitiveness.” About this, Krugman is absolutely, dead-on, 100 percent wrong. For the reality is that the perilous state of the American economy has everything to do with faltering U.S. competitiveness—and more than that—much to do with the abject refusal of neoclassical economists like Krugman himself to recognize that competitiveness is an issue, that countries compete, and that U.S. economic policy should be directly designed to bolster the competitiveness of U.S. organizations and industries.

Krugman’s like the young boy who finds himself losing a race with his buddies and who stops and yells, “I’m not racing!” Better to simply pretend that you aren’t racing than to lose. For if you can convince yourself that you aren’t in a race, you sure sleep better at night than if you admitted you were in a competition and were losing…That is, until you wake up one morning having lost ten million manufacturing jobs, have 10% unemployment, and have a horrifically bad trade balance. Moreover, when you refuse to even believe that you’re in a race, it’s a sure sign that you’re going to lose, as evidenced by the fact that the United States ranks 40th of out of 40 countries and regions in improving its innovation competitiveness over the past decade, as ITIF’s Atlantic Century report found.

#### Government policies are needed to support innovation and global competitiveness — Krugman is wrong.

Ezell 11 — Stephen Ezell, Senior Analyst with the Information Technology and Innovation Foundation—a non-partisan research and educational institute and think tank whose mission is to formulate and promote public policies to advance technological innovation and productivity, former head of the Global Service Innovation Consortium at Peer Insight—an innovation research and consulting firm, holds a B.S. from the School of Foreign Service at Georgetown University with an Honors Certificate from Georgetown’s Landegger International Business Diplomacy program, 2011 (“Krugman Flat Wrong that Competitiveness is a Myth,” *The Innovation Files*, January 25th, Available Online at http://www.innovationfiles.org/krugman-flat-wrong-that-competitiveness-is-a-myth/, Accessed 08-11-2013)

Krugman’s misguided perspective on competitiveness dates back to a 1994 Foreign Affairs article he wrote, “Competitiveness, A Dangerous Obsession,” in which he made the utterly astounding contention that, “The notion that nations compete is incorrect…countries are not to any important degree in competition with each other.” Like many U.S. elites, Krugman simply refuses to recognize that the U.S. is in global economic—and innovation—competition with other nations. This view remains readily apparent in the NYT article, where Krugman contends that “we’re in a mess because we had a financial crisis, not because American companies have lost their ability to compete with foreign rivals.” Krugman goes on, “But isn’t it at least somewhat useful to think of our nation as if it were America Inc., competing in the global marketplace? No.” So again, only companies compete with one another; and it’s not helpful to think of the U.S. as competing. Moreover, our companies are competing fine…so the problem must be a financial crisis (caused by a few malfeasant firms in the financial sector).

But the reality is that countries do compete and seek to win in the highest-value-added sectors of economic activity. In fact, Krugman dramatically underestimates the impact that countries’ strategies—whether fair and consistent with global rules or not—can have in shifting comparative advantage in critical technology-based sectors their way. There are two aspects to this competition worth discussing.

First, an increasingly globalized economy means that countries have become price takers—not price makers—on international markets. In other words, companies now shop the world for the best locations to situate their globally mobile innovation activity, such as where to locate R&D facilities or build new factories. These companies look for which countries offer the best pools of talent (skilled scientists and engineers and a highly educated, highly skilled populace); which have the most attractive tax laws in terms of low corporate tax rates and generous and stable R&D tax credits; which have the most robust physical and digital infrastructures, the latter especially in terms of fixed and mobile broadband, electric smart grids, or intelligent transportation systems; which have the best high-skill immigration policies; the deepest pools of capital; the best funding for R&D; the easiest place to start a business; etc.. Collectively, these attributes constitute a nation’s innovation ecosystem, and governments play a legitimate and crucial role in shaping their nation’s innovation ecosystem. In fact, it is these innovation ecosystems on which countries increasingly compete. As Greg Tassey, a Senior Economist at the Department of Commerce National Institute of Standards and Technology argues, “Competition among governments has become a critical factor in determining which economies win and which lose in the increasingly intense process of creative destruction.”

But Krugman refuses to see this because “only companies compete.” This raises a consequent challenge again explained by Tassey: “Another underlying problem is that U.S. firms are attempting to compete largely as independent entities against a growing number of national economies in Europe and Asia in which government, industry, and a broad infrastructure (technical, education, economic, and information) are evolving into increasingly effective technology-based ecosystems.” Or as Wayne Johnson, Hewlett Packard’s Director of Worldwide Strategic University Customer Relations, said at a 2008 conference, “We in the United States find ourselves in competition not only with individuals, companies, and private institutions, but also with governments and mixed government-private collaborations.” In other words, the United States has a collection of players (businesses) running around competing against other players (nations) that are well equipped, well coached, and running specific plays.

#### High tech competitiveness is key to U.S. leadership.

Segal 4 — Adam Segal, Maurice R. Greenberg Senior Fellow in China Studies at the Council on Foreign Relations, 2004 (“Is America Losing Its Edge?; Innovation in a Globalized World,” *Foreign Affairs*, January-February, Available Online to Subscribing Institutions via Lexis-Nexis)

The United States' global primacy depends in large part on its ability to develop new technologies and industries faster than anyone else. For the last five decades, U.S. scientific innovation and technological entrepreneurship have ensured the country's economic prosperity and military power. It was Americans who invented and commercialized the semiconductor, the personal computer, and the Internet; other countries merely followed the U.S. lead.

Today, however, this technological edge—so long taken for granted—may be slipping, and the most serious challenge is coming from Asia. Through competitive tax policies, increased investment in research and development(R&D), and preferential policies for science and technology (S&T) personnel, Asian governments are improving the quality of their science and ensuring the exploitation of future innovations. The percentage of patents issued to and science journal articles published by scientists in China, Singapore, South Korea, and Taiwan is rising. Indian companies are quickly becoming the second-largest producers of application services in the world, developing, supplying, and managing database and other types of software for clients around the world. South Korea has rapidly eaten away at the U.S. advantage in the manufacture of computer chips and telecommunications software. And even China has made impressive gains in advanced technologies such as lasers, biotechnology, and advanced materials used in semiconductors, aerospace, and many other types of manufacturing.

Although the United States' technical dominance remains solid, the globalization of research and development is exerting considerable pressures on the American system. Indeed, as the United States is learning, globalization cuts both ways: it is both a potent catalyst of U.S. technological innovation and a significant threat to it. The United States will never be able to prevent rivals from developing new technologies; it can remain dominant only by continuing to innovate faster than everyone else. But this won't be easy; to keep its privileged position in the world, the United States must get better at fostering technological entrepreneurship at home.

### They Say: “No U.S. Leadership Impact”

#### Strong *relative* growth is crucial to maintain U.S. military power.

Manzi 11 — Jim Manzi, Senior Fellow at the Manhattan Institute, Chief Executive Officer of Applied Predictive Technologies—an applied artificial intelligence software company, holds a B.S. in Mathematics from the Massachusetts Institute of Technology, 2011 (“On Not Ceding ‘Competitiveness’ to the Left,” *National Review Online*, September 16th, Available Online at http://www.nationalreview.com/corner/277406/not-ceding-competitiveness-left-jim-manzi, Accessed 08-11-2013)

An idiosyncrasy of contemporary American political debate is that concern with “competitiveness” is so often associated with the Democratic party, and is often used as a code word for industrial policy and a host of social engineering initiatives. I think it is a mistake for the right to concede this territory.

You link to a quote from Paul Krugman, supposedly discrediting the idea of national competitiveness:

International trade, unlike competition among businesses for a limited market, is not a zero-sum game in which one nation’s gain is another’s loss. It is [a] positive-sum game, which is why the word “competitiveness” can be dangerously misleading when applied to international trade.

But this doesn’t make a lot of sense to me. Sure, some product markets are somewhat limited, but competition between companies as a whole is not generally “zero-sum” either — hence, economic growth.

International trade can make both parties better off than they would be without the exchange. But there are still relative winners and losers. Some societies are populated by lots of people with high-wage jobs, nice houses, and good schools, and other societies are populated by lots of people hustling for tips from vacationers from the first kind of society. Over time, people who spend their working hours generating goods or services that they can sell for a big margin versus the costs of the required inputs will tend to live in the first kind of society. Nothing is forever in this world, but I want America to remain in that camp for a very long time.

In the most important sense, competitiveness is relative productivity. And relative productivity is likely to matter a lot, because it will materially influence future absolute wealth by affecting the flow of global technology and innovation. But relative productivity and the wealth wealth it produces also matter in and of themselves. First, they will impact the global prestige and success of the Western idea of the open society which we value independently of its economic benefits — people naturally look to economically successful societies for lessons and inspiration. Second, maintenance of a very large GDP per capita gap between the West and the rest of the world will be essential to maintaining relative Western aggregate GDP, and therefore, long-run military power.

In sum, we want the rest of the world to get richer, but we want to stay much richer than they get.

#### Maintaining strong economic growth is vital to prevent great power conflict — *relative* growth is key.

Goldstein 7 — Avery Goldstein, David M. Knott Professor of Global Politics and International Relations at the University of Pennsylvania, Associate Director of the Christopher H. Browne Center for International Politics, Senior Fellow at the Foreign Policy Research Institute, holds a Ph.D. from the University of California-Berkeley, 2007 (“Power transitions, institutions, and China's rise in East Asia: Theoretical expectations and evidence,” *Journal of Strategic Studies*, Volume 30, Number 4-5, August-October, Available Online to Subscribing Institutions via Taylor & Francis Online, p. 647-648)

Two closely related, though distinct, theoretical arguments focus explicitly on the consequences for international politics of a shift in power between a dominant state and a rising power. In War and Change in World Politics, Robert Gilpin suggested that peace prevails when a dominant state’s capabilities enable it to ‘govern’ an international order that it has shaped. Over time, however, as economic and technological diffusion proceeds during eras of peace and development, other states are empowered. Moreover, the burdens of international governance drain and distract the reigning hegemon, and challengers eventually emerge who seek to rewrite the rules of governance. As the power advantage of the erstwhile hegemon ebbs, it may become desperate enough to resort to the ultima ratio of international politics, force, to forestall the increasingly urgent demands of a rising challenger. Or as the power of the challenger rises, it may be tempted to press its case with threats to use force. It is the rise and fall of the great powers that creates the circumstances under which major wars, what Gilpin labels ‘hegemonic wars’, break out.13

Gilpin’s argument logically encourages pessimism about the implications of a rising China. It leads to the expectation that international trade, investment, and technology transfer will result in a steady diffusion of American economic power, benefiting the rapidly developing states of the world, including China. As the US simultaneously scurries to put out the many brushfires that threaten its far-flung global interests (i.e., the classic problem of overextension), it will be unable to devote sufficient resources to maintain or restore its former advantage over emerging competitors like China. While the erosion of the once clear American advantage plays itself out, the US will find it ever more difficult to preserve the order in Asia that it created during its era of preponderance. The expectation is an increase in the likelihood for the use of force – either by a Chinese challenger able to field a stronger military in support of its demands for greater influence over international arrangements in Asia, or by a besieged American hegemon desperate to head off further decline. Among the trends that alarm [end page 647] those who would look at Asia through the lens of Gilpin’s theory are China’s expanding share of world trade and wealth (much of it resulting from the gains made possible by the international economic order a dominant US established); its acquisition of technology in key sectors that have both civilian and military applications (e.g., information, communications, and electronics linked with the ‘revolution in military affairs’); and an expanding military burden for the US (as it copes with the challenges of its global war on terrorism and especially its struggle in Iraq) that limits the resources it can devote to preserving its interests in East Asia.14

Although similar to Gilpin’s work insofar as it emphasizes the importance of shifts in the capabilities of a dominant state and a rising challenger, the power-transition theory A. F. K. Organski and Jacek Kugler present in The War Ledger focuses more closely on the allegedly dangerous phenomenon of ‘crossover’– the point at which a dissatisfied challenger is about to overtake the established leading state.15 In such cases, when the power gap narrows, the dominant state becomes increasingly desperate to forestall, and the challenger becomes increasingly determined to realize the transition to a new international order whose contours it will define.

#### U.S. relative decline creates a power vacuum that risks war.

Friedberg and Schoenfeld 8 — Aaron Friedberg, Professor of Politics and International Relations at the Woodrow Wilson School at Princeton University, and Gabriel Schoenfeld, Senior Editor of Commentary and Visiting Scholar at the Witherspoon Institute—an independent research center in Princeton, NJ, 2008 (“The Dangers of a Diminished America,” *Wall Street Journal*, October 21st, Available Online at http://online.wsj.com/article/SB122455074012352571.html, Accessed 11-11-2008)

If America now tries to pull back from the world stage, it will leave a dangerous power vacuum. The stabilizing effects of our presence in Asia, our continuing commitment to Europe, and our position as defender of last resort for Middle East energy sources and supply lines could all be placed at risk.

In such a scenario there are shades of the 1930s, when global trade and finance ground nearly to a halt, the peaceful democracies failed to cooperate, and aggressive powers led by the remorseless fanatics who rose up on the crest of economic disaster exploited their divisions. Today we run the risk that rogue states may choose to become ever more reckless with their nuclear toys, just at our moment of maximum vulnerability.

The aftershocks of the financial crisis will almost certainly rock our principal strategic competitors even harder than they will rock us. The dramatic free fall of the Russian stock market has demonstrated the fragility of a state whose economic performance hinges on high oil prices, now driven down by the global slowdown. China is perhaps even more fragile, its economic growth depending heavily on foreign investment and access to foreign markets. Both will now be constricted, inflicting economic pain and perhaps even sparking unrest in a country where political legitimacy rests on progress in the long march to prosperity.

None of this is good news if the authoritarian leaders of these countries seek to divert attention from internal travails with external adventures.

As for our democratic friends, the present crisis comes when many European nations are struggling to deal with decades of anemic growth, sclerotic governance and an impending demographic crisis. Despite its past dynamism, Japan faces similar challenges. India is still in the early stages of its emergence as a world economic and geopolitical power.

What does this all mean? There is no substitute for America on the world stage. The choice we have before us is between the potentially disastrous effects of disengagement and the stiff price tag of continued American leadership.

## 2AC — Investigative Journalism Advantage

### They Say: “No Chilling Effect”

#### Mass surveillance has a substantial, ongoing chilling effect on journalism.

Tow Center 13 — The Tow Center for Digital Journalism, part of the Graduate School of Journalism at Columbia University, citing a letter to the President’s Review Group on Intelligence and Communication Technologies by a group of scholars, journalists, and researchers from the Columbia Journalism School and the MIT Center for Civic Media, 2013 (“The Effects of Mass Surveillance on Journalism,” October 10th, Available Online at <http://towcenter.org/the-effects-of-mass-surveillance-on-journalism/>, Accessed 08-12-2015)

Mass surveillance of the kind practiced by the NSA produces a chilling effect on journalism, because sources do not feel they can have a private conversation with a reporter. That’s the message of a group of scholars, journalists, and researchers from Columbia Journalism School and the MIT Center for Civic Media, in a public comment to the Review Group on Intelligence and Communication Technologies convened by President Obama.

The 15 page letter argues that mass surveillance is harmful to journalism and incompatible with existing law and policy. It goes on to document recent chilling effects, showing that real harm has already occurred.

“Put plainly, what the NSA is doing is incompatible with the existing law and policy protecting the confidentiality of journalist-source communications. This is not merely an incompatibility in spirit, but a series of specific and serious discrepancies between the activities of the intelligence community and existing law, policy, and practice in the rest of the government. Further, the climate of secrecy around mass surveillance activities is itself actively harmful to journalism, as sources cannot know when they might be monitored, or how intercepted information might be used against them.”

The letter documents how NSA’s domestic phone and internet surveillance activities contradict recent Department of Justice policy. The DoJ released new guidelines regarding access to reporter-source communication records in July, after a review prompted by the secret seizure of records for 20 Associated Press phone lines. The new guidelines say that “the Department views the use of tools to seek evidence from or involving the news media as an extraordinary measure” and requires advance notification to journalists in most cases, to give them the opportunity to contest the matter. It also requires Attorney General approval for searches and seizures.

The NSA operates with far greater latitude. It preemptively collects and archives the records of all calls made to or by journalists, effectively bypassing both the notice and the authorization provisions of the DoJ policy. The NSA operates under “minimization” procedures designed to protect the confidentiality of Americans’ communications obtained by warrantless surveillance, but these rules contain an important exception: the NSA can report many different types of crimes to law enforcement authorities.

The letter argues that this double standard is intolerable: “there must be one set of rules, and those rules must protect journalist-source communications.” The authors also reject the logic of the Foreign Intelligence Surveillance Court when it asserts that collecting information on everyone is no different, from a privacy point of view, than collecting information on specific individuals.

“The surveillance of essentially everyone has effects far beyond the surveillance of journalists alone. … For a free press to function we must also protect the means of communicating with a journalist. At the present time, the NSA has made private electronic communication essentially impossible.”

This state of affairs has made sources nervous about talking to reporters. Journalists from news organizations including the Associated Press, the Washington Post, the New York Times, and the Center for Public Integrity have recently reported chilling effects. As quoted in a newly released report of the Committee To Protect Journalists, New York Times national security reporter Scott Shane describes the problem:

“There’s a gray zone between classified and unclassified information, and most sources were in that gray zone. Sources are now afraid to enter that gray zone. It’s having a deterrent effect. If we consider aggressive press coverage of government activities being at the core of American democracy, this tips the balance heavily in favor of the government.”

Mass surveillance is not merely a theoretical risk to a free press, but has real consequences that are already preventing journalists from doing their job.

#### The overwhelming consensus of evidence demonstrates a large chilling effect.

Cohn 14 — Cindy Cohn, Executive Director and former Legal Director and General Counsel of the Electronic Frontier Foundation, holds a J.D. from the University of Michigan Law School, 2014 (“NSA Surveillance Chilling Effects: HRW and ACLU Gather More Evidence,” Electronic Frontier Foundation, July 28th, Available Online at https://www.eff.org/deeplinks/2014/07/nsa-surveillance-chilling-effects, Accessed 08-12-2015)

Human Rights Watch and the ACLU today published a terrific report documenting the chilling effect on journalists and lawyers from the NSA's surveillance programs entitled: "With Liberty to Monitor All: How Large-Scale US Surveillance is Harming Journalism, Law and American Democracy." The report, which is chock full of evidence about the very real harms caused by the NSA's surveillance programs, is the result of interviews of 92 lawyers and journalists, plus several senior government officials.

This report adds to the growing body of evidence that the NSA's surveillance programs are causing real harm. It also links these harms to key parts of both U.S. constitutional and international law, including the right to counsel, the right of access to information, the right of association and the free press. It is a welcome addition to the PEN report detailing the effects on authors, called Chilling Effects: How NSA Surveillance Drives US Writers to Self-Censor and the declarations of 22 of EFF's clients in our First Unitarian Church of Los Angeles v. NSA case.

The HRW and ACLU report documents the increasing treatment of journalists and lawyers as legitimate surveillance targets and surveys how they are responding. Brian Ross of ABC says:

There’s something about using elaborate evasion and security techniques that’s offensive to me—that I should have to operate as like a criminal, like a spy.

The report also notes that the government increasingly likens journalists to criminals. As Scott Shane of the New York Times explains:

To compare the exchange of information about sensitive programs between officials and the media, which has gone on for decades, to burglary seems to miss the point. Burglary is not part of a larger set of activities protected by the Constitution, and at the heart of our democracy. Unfortunately, that mindset is sort of the problem.

Especially striking in the report is the disconnect between the real stories of chilling effects from reporters and lawyers and the skeptical, but undocumented, rejections from senior government officials. The reporters explain difficulties in building trust with their sources and the attorneys echo that with stories about the difficulties building client trust. The senior government officials, in contrast, just say that they don't believe the journalists and appear to have thought little, if at all about the issues facing lawyers.

Thanks to ACLU and HRW for adding the important faces of journalists and lawyers to the growing list of people directly harmed by NSA surveillance.

#### Prefer evidence about journalists that work on national security, foreign affairs, and the federal government.

Holcomb et al. 15 — Jesse Holcomb, Associate Director of Research at the Pew Research Center, former Adjunct Professor of Media and Public Affairs at George Washington University, former Writing Associate at the Fund for Public Interest Research, holds an M.A. in Media and Public Affairs from George Washington University, with Amy Mitchell, Director of Journalism Research for the Pew Research Center, former Congressional Research Associate at the American Enterprise Institute, holds a B.A. in English and Government from Georgetown University, and Kristen Purcell, Associate Director for Research at Pew Research Center’s Internet Project, holds a Ph.D. in Sociology from Rutgers University, 2015 (“Heightened Concerns Among National Government/Security/Foreign Affairs Journalists,” Pew Research Center on Journalism & Media, February 5th, Available Online at http://www.journalism.org/2015/02/05/heightened-concerns-among-national-governmentsecurityforeign-affairs-journalists/, Accessed 08-11-2015)

As noted earlier, many IRE journalists perceive issues of digital security — particularly stemming from government surveillance programs — as a serious concern mainly for journalists who cover national security, foreign affairs or the federal government. Survey data confirm this perception to some degree, with journalists working in these sensitive national and international areas expressing more concern about their digital security and making more behavioral changes in response to recent events than other journalists. Throughout this section of the report, this group is referred to as “national government/foreign affairs” journalists.

Of the 671 survey participants, 164 are journalists who focus on national security, foreign affairs and/or the federal government. Among this group, 71% believe the government has collected data about their phone calls, emails and other online communications. That is higher than the 62% of IRE journalists covering other topics who believe their data has been collected as part of government surveillance programs.

These national government/foreign affairs journalists are also more likely than others to have changed their behaviors in the past year with regard to how they store potentially sensitive documents and how they communicate with colleagues.

### They Say: “Alternate Causality – Resources”

#### Surveillance is particularly important for journalists covering national security, foreign affairs, and the federal government.

Holcomb et al. 15 — Jesse Holcomb, Associate Director of Research at the Pew Research Center, former Adjunct Professor of Media and Public Affairs at George Washington University, former Writing Associate at the Fund for Public Interest Research, holds an M.A. in Media and Public Affairs from George Washington University, with Amy Mitchell, Director of Journalism Research for the Pew Research Center, former Congressional Research Associate at the American Enterprise Institute, holds a B.A. in English and Government from Georgetown University, and Kristen Purcell, Associate Director for Research at Pew Research Center’s Internet Project, holds a Ph.D. in Sociology from Rutgers University, 2015 (“Heightened Concerns Among National Government/Security/Foreign Affairs Journalists,” Pew Research Center on Journalism & Media, February 5th, Available Online at http://www.journalism.org/2015/02/05/heightened-concerns-among-national-governmentsecurityforeign-affairs-journalists/, Accessed 08-11-2015)

More than four-in-ten national government/foreign affairs journalists rank surveillance as the Number one or number two challenge for their profession among four different challenges asked about. And one-third worry about losing a story to a competitor with more advanced digital security protocols in place. In both cases, fewer investigative journalists who deal with other topics express these concerns.

#### Surveillance is especially damaging to investigative journalism.

Sinha 14 — G. Alex Sinha, Aryeh Neier Fellow with the U.S. Program at Human Rights Watch and the Human Rights Program at the American Civil Liberties Union, former Institute for International Law & Justice Scholar at the New York University School of Law, holds a Ph.D. in Philosophy from the University of Toronto and a J.D. from the New York University School of Law, 2014 (“With Liberty to Monitor All: How Large-Scale US Surveillance is Harming Journalism, Law, and American Democracy,” Report by Human Rights Watch and the American Civil Liberties Union, July 28th, Available Online at <https://www.hrw.org/report/2014/07/28/liberty-monitor-all/how-large-scale-us-surveillance-harming-journalism-law-and>, Accessed 08-12-2015)

Impact of Surveillance on Journalists

For journalists, the surveillance programs and a government crackdown on unregulated contact between officials and the press have combined to constrict the flow of information concerning government activity. An increase in the frequency of leak prosecutions, as well as the government’s implementations of programs—such as the Insider Threat Program—aimed at discouraging officials from sharing information outside the government, have raised the stakes for officials who might consider even talking to journalists.

Large-scale surveillance dramatically exacerbates those concerns by largely cutting away at the ability of government officials to remain anonymous in their interactions with the press, as any interaction—any email, any phone call—risks leaving a digital trace that could subsequently be used against them. This is particularly worrisome in light of changes to US law that allow intelligence information to be used more easily in criminal investigations, potentially allowing law enforcement to circumvent traditional warrant requirements.

Journalists told us that officials are substantially less willing to be in contact with the press, even with regard to unclassified matters or personal opinions, than they were even a few years ago. This can create serious challenges for journalists who cover national security, intelligence and law enforcement, and who often operate in a gray area—working with information that is sensitive but not necessarily classified, and speaking with multiple sources to confirm and piece together the details of a story that may be of tremendous public interest.

In turn, journalists increasingly feel the need to adopt elaborate steps to protect sources and information, and eliminate any digital trail of their investigations—from using high-end encryption, to resorting to burner phones, to abandoning all online communication and trying exclusively to meet sources in person.

Journalists expressed concern that, rather than being treated as essential checks on government and partners in ensuring a healthy democratic debate, they now feel they may be viewed as suspect for doing their jobs. One prominent journalist summed up what many seemed to be feeling as follows: “I don’t want the government to force me to act like a spy. I’m not a spy; I’m a journalist.”

This situation has a direct effect on the public’s ability to obtain important information about government activities, and on the ability of the media to serve as a check on government. Many journalists said it is taking them significantly longer to gather information (when they can get it at all), and they are ultimately able to publish fewer stories for public consumption. As suggested above, these effects stand out most starkly in the case of reporting on the intelligence community, national security, and law enforcement—all areas of legitimate—indeed, extremely important—public concern.

#### Resource shortage will be overcome — the industry is innovating to sustain investigative journalism.

Nevill 15 — Glenda Nevill, Editor of *Media Online* and freelance journalist, 2015 (“How companies are paying for investigative journalism,” *World News Publishing Focus*—a publication of the World Association of Newspapers and News Publishers, February 2nd, Available Online at <http://blog.wan-ifra.org/2015/02/02/how-companies-are-paying-for-investigative-journalism>, Accessed 08-12-2015)

The blueprint for funding 21st century journalism is still being drawn. The details are sketchy, but it is clear the current model is hopelessly out of date and out of touch with the reality of digital evolution. The upheaval has paralysed some media houses and given others the impetus both to revisit not just how journalism is practised, but to reinvent the whole concept of news, how it is delivered, and how it is funded.

Julie Posetti, an Australian journalist and journalism academic from the University of Wollongong, is Research Fellow at WAN-IFRA in Paris, says that the global publishing industry is in the midst of a “seemingly never-ending stage of upheaval and reinvention” when it comes to journalism business models.

“The shift from reliance on the traditional advertising model has been slow and painful in some sections of the industry, with Western developed countries, in particular, suffering a huge blow as the tidal wave of convergent crises hit. These include the collapse in advertising, the rise of interactive digital media, and reducing trust in journalists following various scandals. The impacts have included the closure of many publications and the sacking of more journalists globally,” she says.

But this is a period of transition in which new forms of journalism and publication methods are being developed, along with new business models. “We don’t know yet what a sustainable 21st century news business model will look like, but it is likely to involve a combination of philanthropic backing, crowdfunding, collaborations between journalists and non-profit organisations, universities, and traditional advertising,” Posetti says.

There are three things we do know for sure, she says. “Firstly, there remains a very strong appetite for investigative journalism in the public interest. Secondly, video drives advertising sales (and traffic), and thirdly, this is an evolutionary process.”

While the appetite for investigative journalism might be strong, it isn’t always sated by a matching investment in the labour-intensive and expensive craft.

Francois Pierre Nel, director of the Journalism Leaders’ Programme at the School of Journalism and Media at the University of Central Lancashire in the UK, says that tying the future of journalism to the future of legacy media organisations “would be a mistake”.

He believes there are several reasons why investigative journalism has a bright future. “Traditional media companies, struggling to find ways of distinguishing themselves in the intensely competitive digital landscape, are increasingly establishing hubs to work data-driven content, including investigative reporting. Investigative efforts are being funded by concerned individual philanthropists and groups.”

### They Say: “Encryption Solves”

#### Encryption doesn’t solve — it’s too difficult for journalists to implement.

Sinha 14 — G. Alex Sinha, Aryeh Neier Fellow with the U.S. Program at Human Rights Watch and the Human Rights Program at the American Civil Liberties Union, former Institute for International Law & Justice Scholar at the New York University School of Law, holds a Ph.D. in Philosophy from the University of Toronto and a J.D. from the New York University School of Law, 2014 (“With Liberty to Monitor All: How Large-Scale US Surveillance is Harming Journalism, Law, and American Democracy,” Report by Human Rights Watch and the American Civil Liberties Union, July 28th, Available Online at <https://www.hrw.org/report/2014/07/28/liberty-monitor-all/how-large-scale-us-surveillance-harming-journalism-law-and>, Accessed 08-11-2015)

On the other hand, some journalists actively avoid encryption, or use it with reservations. One prominent concern is that encryption is not entirely secure.[138] One national security reporter asked, “Will it save you in the end? Isn’t the NSA going to crack it, or get someone to give up the code?”[139] Steve Coll noted that he has been “interested in the debate about whether any encryption approach is effective.”[140] According to some of the people he has looked to for information on the subject, the biggest worry is not that the NSA will find a way to crack encryption, but rather that one’s electronic “hygiene” in using it must be “excellent.”[141] In other words, one lapse in protecting encryption passphrases or hardware can provide others with direct access to sensitive data in unencrypted form. Bart Gellman noted similar challenges with Tor: “You forget to launch Tor once before logging onto the account, and you’re linked to it.”[142]

Another worry is that encrypting communications might only draw the government’s attention.[143] The NSA’s minimization procedures that have been made public allow its employees to seek permission from the Attorney General to retain encrypted communications even if they are purely domestic.[144] Scott Shane, an intelligence reporter for the New York Times, said that while he has used encryption in the past, he is “skeptical that it is a solution of significance.”[145] He noted that encrypted email “wasn’t even a speed bump” for prosecutors in some recent leak cases, “who even used that to suggest the source knew he was doing something wrong.”[146] Shane was referring to the prosecutions of Thomas Drake. Drake was suspected of leaking information to a reporter about wasteful spending at the NSA, and in their case against him, prosecutors highlighted his use of encrypted email (Hushmail) to communicate with the reporter.[147]

Eric Schmitt, a Pulitzer Prize-winning reporter for the New York Times who covers terrorism and national security, had similar misgivings. He observed that while certain sources might be better off using encrypted email, and journalists have begun using it among themselves and with some of their sources, “if you ask … government sources to do it, it brands them.”[148] Steve Aftergood suggested the same concern: “Maybe you’re drawing more attention to yourself by using it, suggesting the contents are sensitive.”[149]

Several journalists highlighted another significant difficulty: In many instances, for encryption to work, both the journalist and the source must have some facility with the same encryption tool. Some journalists expressed doubts about their own ability to master encryption and related technologies.[150] Others noted that many would-be sources lack the technical savvy to approach journalists safely,[151] and even that using encrypted methods of communication with typical sources—as opposed to sources who already prefer to use encryption—might “spook” them. “They’re going to feel like they’re doing something wrong.”[152] Jane Mayer added, “Your source has to be really committed [to bother with advanced security measures].”[153]

#### Most journalists aren’t using needed tools.

Holcomb et al. 15 — Jesse Holcomb, Associate Director of Research at the Pew Research Center, former Adjunct Professor of Media and Public Affairs at George Washington University, former Writing Associate at the Fund for Public Interest Research, holds an M.A. in Media and Public Affairs from George Washington University, with Amy Mitchell, Director of Journalism Research for the Pew Research Center, former Congressional Research Associate at the American Enterprise Institute, holds a B.A. in English and Government from Georgetown University, and Kristen Purcell, Associate Director for Research at Pew Research Center’s Internet Project, holds a Ph.D. in Sociology from Rutgers University, 2015 (“Adoption of Digital Security Tools,” Pew Research Center on Journalism & Media, February 5th, Available Online at http://www.journalism.org/2015/02/05/adoption-of-digital-security-tools/, Accessed 08-12-2015)

Usage of specific tools and software is less common.

Respondents were asked about eight different tools they could employ on their home or work computers, tablets or cellphones, as well as whether they had adopted them recently. While we do not list these tools individually due to concerns expressed by those surveyed, they included everything from turning off geolocation on mobile devices to using email encryption or privacy-enhanced search engines.2

Half of respondents (50%) do not employ any of the eight measures on their personal or work-issued devices, while just one-in-ten (9%) employ five or more. Three-in-ten (30%) employ one or two.

#### Journalists don’t trust encryption.

Reporters Committee 14 — Reporters Committee for Freedom of the Press, an organization that promotes and defends press freedom, 2014 (“The encryption decision,” The News Media and The Law, Vol. 38, No. 4, Fall, Available Online at <https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2014/encryption-decision>, Accessed 08-12-2015)

With all the relevations in the last few years about the government's snooping on communications data, what should the responsible journalist do to protect their confidential sources?

That question was the central focus of a conference organized by The Reporters Committee for Freedom of the Press, the Freedom of the Press Foundation, and New America’s Open Technology Institute, held at The Newseum in Washington, D.C., on November 7.

The discussions, described more fully in the following articles, made a few things clear. To summarize: encryption is too difficult to use, scares sources when mentioned, and raises red flags for those snooping around to find the sources. But security in electronic communications is incredibly important, not just to protect sources and whistleblowers against retaliation but to protect journalistic work product from all prying eyes -- governmental and private, domestic and foreign.

Some reporters believe that electronic communications are so completely compromised that they simply cannot be used in discussions with sources. Discussions about sensitive information – especially concerning leaks of sensitive or classified government information – must be done in person, in parking garages and public parks and other places where meet-ups won't seem suspicious.

### They Say: “Public Opinion Irrelevant”

#### Public opinion *does* shape government policy-making.

Stimson 14 — James Stimson, Raymond Dawson Bicentennial Distinguished Professor of Political Science at the University of North Carolina, Fellow of the American Academy of Arts and Sciences, holds a Ph.D. in Political Science from the University of North Carolina, 2014 (“Don’t Underestimate the Power of Public Opinion,” *Room for Debate*—a *New York Times* expert blog, April 22nd, Available Online at <http://www.nytimes.com/roomfordebate/2014/04/21/do-the-rich-call-the-shots-13/dont-underestimate-the-power-of-public-opinion>, Accessed 08-12-2015)

“Government doesn’t care about the views of people like me,” people often say in surveys. And undoubtedly they believe it to be true.

But that pessimistic view is wrong. The systematic evidence of broad opinion movements and government policy-making shows a strong connection between them. When public opinion changes, demanding for example more or less government, government responds in the demanded direction. And it does so quickly.

Such evidence is broadly consistent with the ideas that professionals in politics are ambitious to be re-elected and that they are astute observers of public opinion movements. We have a constitutional structure that makes them attuned to the important subgroup of Americans who turn out at the polls. (Among nonvoters the “government doesn’t care” claim is probably closer to the truth.)

And we don’t need sophisticated statistical analyses to see such a pattern. Observe a 2008 election in which a more left-leaning than usual public elected Barack Obama and produced a jobs-producing stimulus and healthcare reform, followed by a Tea Party election result in 2010 which shifted the public debate to budget cuts and deficit reduction, coming close to repeal of the Affordable Care Act. This sort of evidence tells us that the public as a whole gets what it wants.

#### Public opinion *can* make a difference. Their reading of Gilens and Page is too pessimistic.

Krugman 14 — Paul Krugman, Columnist for the *New York Times*, Professor of Economics and International Affairs at Princeton University, and Recipient of the 2008 Nobel Prize in Economics, 2014 (“Class, Oligarchy, and the Limits of Cynicism,” *The Conscience of a Liberal*—Paul Krugman’s *New York Times* blog, April 21st, Available Online at http://krugman.blogs.nytimes.com/2014/04/21/class-oligarchy-and-the-limits-of-cynicism/, Accessed 08-11-2015)

A recent paper (pdf) by Martin Gilens and Benjamin Page is getting a lot of attention, and deservedly so. Gilens and Page look at a number of issues over the past 30+ years where polling data let us identify public policy preferences, which can be compared with elite and interest-group preferences. And what they find is that politicians don’t seem to care very much about what the public thinks: when elite preferences and popular preferences are different, the elite almost always wins.

This is an important insight — and it gains special force these days, when the elite’s views not only favor the elite versus the rest (duh) but have also been systematically wrong, on issues from invading Iraq to giving deficits a higher priority than jobs.

But there is a danger here of going too far, and imagining that electoral politics is irrelevant. Why bother getting involved in campaigns, when the oligarchy rules whichever party is in power?

So it’s worth pointing out it does make a difference. Yes, Democrats pay a lot of attention to plutocrats, and even make a point of inviting Patrimonial Capitalism: The Next Generation to White House galas (I would have missed that, even though it’s in my own paper, but for Kathleen Geier. Thanks!). But it’s quite wrong to say that the parties’ behavior in office is the same. As Floyd Norris points out, Obama has in fact significantly raised taxes on very high incomes, largely through special surcharges included in the Affordable Care Act; and what the Act does with the extra revenue is expand Medicaid and provide subsidies on the exchanges, both means-tested programs whose beneficiaries tend to be mainly lower-income adults. The net effect will be significant losses for the super-elite — not crippling losses, to be sure, and hardly anything that will affect their elite status — and major gains to tens of millions of less fortunate Americans.

If you’re waiting for a revolution, or even a new New Deal, this may seem disappointing. But it matters a lot all the same.

#### Prefer our evidence — the media has blown the Gilens and Page study out of proportion.

Romeyn-Sanabria 14 — Marjorie Romeyn-Sanabria, Editorial Assistant at *The American Conservative*, former Pundit for *PolicyMic*, M.A. Candidate in International Studies and International Development at Concordia University Irvine, holds a B.A. in East Asian Studies from Wesleyan University, 2014 (“America’s Not an Oligarchy—Yet,” *The American Conservative*, April 25th, Available Online at <http://www.theamericanconservative.com/2014/04/25/americas-not-an-oligarchy-yet/>, Accessed 08-12-2015)

A new study released over the weekend sparked a miniature firestorm on the Internet, mostly because it confirmed long-held suspicions about the role of money in politics. While the researchers make strongly-worded conclusions about the state of American democracy, journalists have used hyperbolic language to state that America is already a de facto oligarchy: PolicyMic calls the findings “beyond alarming…their statistics say your opinion literally does not matter. [italics in original]” Such overblown rhetoric makes it difficult to examine the root of the problem dispassionately in order to address the underlying issues beneath the growing inequality; instead, such reporting is fueling hysteria and pessimism about America’s inexorable decline.

Martin Gilens of Princeton and Benjamin Page of Northwestern University conducted a study measuring the impact of the wealthy and powerful interests groups on American democracy. Looking at over 1,700 proposed policy shifts, they tested whether the interest of the general public, the preferences of elites, or the desires of interest groups had the greatest influence over whether the policy was put into practice. It was hard to test the relative influence of elites and ordinary Americans, since, for the most part, the two groups had identical policy preferences. But, when the groups differed, the elites were much more likely to prevail against the popular will than vice versa. In the statistical model used by the researchers, the effect of popular opinion dwindled into insignificance once the will of the elites was factored in. The idea of “oligarchy” is never explicitly endorsed by the paper; it’s only referenced in other cited works. Furthermore, they admit that there are other factors outside the analysis they performed: “[I]t is also possible that there may exist important explanatory factors outside the three theoretical traditions addressed in this analysis[.]”

The New Yorker offered a cool-headed take of what the numbers might mean, a welcome counterpoint to the media hand-wringing. Their blog post points out that the model only explains 10 percent of the data, which, by the authors’ own admission, is a low number that lends itself to weak explanatory ability. The New Yorker wisely doesn’t presume to judge the full validity of Gilens and Page’s argument, but gently suggests that less inflammatory language be used besides the term “oligarchy” that media outlets have picked up. It’s chiding sensationalist journalism more so than attacking the authors, but a look over the study’s introduction and conclusion does reveal some charged language: “But we believe that if policymaking is dominated by powerful business organizations and a small number of affluent Americans, then America’s claims to being a democratic society are seriously threatened.” Ultimately, the statistics they used suggest an interesting narrative, but do not tell a complete story. Another thing worth noting is the lack of future predictions regarding the impact of wealth on the political process—all the data is from 1981 to 2002. It would be helpful if the researchers could predict which direction they think America’s political process is going based on their findings. “America May Become an Oligarchy” is still a very clickable headline, but a more responsible one.

## 2AC — Solvency

### They Say: “Plan Gets Circumvented”

#### The plan *won’t* be circumvented — it eliminates all authority for warrantless domestic surveillance.

Kibbe 15 — Matt Kibbe, President of *FreedomWorks*— a conservative and libertarian advocacy group, former Chief of Staff to U.S. Representative Dan Miller (R-FL), former Senior Economist at the Republican National Committee, former Director of Federal Budget Policy at the U.S. Chamber of Commerce, and former Managing Editor of Market Process—an academic economics journal published by the Center for the Study of Market Processes at George Mason University, 2015 (“Letter in Support of the Surveillance State Repeal Act,” *FreedomWorks*, March 24th, Available Online at <http://www.freedomworks.org/content/letter-support-surveillance-state-repeal-act>, Accessed 06-19-2015)

As one of our more than 6.9 million FreedomWorks members nationwide, I urge you to contact your representative today and ask him or her to support H.R. 1466, the Surveillance State Repeal Act. Introduced by Rep. Mark Pocan (D-Wis.) and Rep. Thomas Massie (R-Ky.), the bipartisan bill would restore our civil liberties and stop unconstitutional domestic spying on U.S. citizens.

The Surveillance State Repeal Act would repeal the misguided USA PATRIOT Act and the FISA Amendments Act of 2008. The PATRIOT Act, passed in the panicked aftermath of the tragic September 11th attacks, gives the federal government an unprecedented amount of power to monitor the private communications of U.S. citizens without a warrant. The FISA Amendments Act of 2008 expanded the wiretapping program to grant the government more power. Both laws clearly violate our 4th Amendment right against unreasonable searches.

The Surveillance State Repeal Act would prohibit the government from collecting information on U.S. citizens obtained through private communications without a warrant. It would mandate that the Government Accountability Office (GAO) regularly monitor domestic surveillance programs for compliance with the law and issue an annual report. A section of the bill explicitly forbids the government from mandating that electronic manufacturers install “back door” spy software into their products. This is a legitimate concern due to a recently released security report finding government spying software on hard drives in personal computers in the United States.

It’s important to note that the Surveillance State Repeal Act saves anti-terrorism tools that are useful to law enforcement. It retains the ability for government surveillance capabilities against targeted individuals, regardless of the type of communications methods or devices being used. It would also protect intelligence collection practices involving foreign targets for the purpose of investigating weapons of mass destruction.

We urge you to voice your support for the Surveillance State Repeal Act to stop unconstitutional spying on U.S. citizens. It is our hope that you will ask your representatives to co-sponsor and otherwise support the bill if they have not already done so.

#### The plan is a “*hard reset*” of surveillance authority — it can’t be circumvented.

Meinrath 15 — Sascha Meinrath, Founder of X-Lab—a future-focused technology policy and innovation project, Fellow and Doctoral Candidate at the Institute of Communications Research at the University of Illinois at Urbana-Champaign, Founder and former Director of the Open Technology Institute, former Vice President and Research Director of the Wireless Futures Program at the New America Foundation, holds an M.A. in Social-Ecological Psychology from the University of Illinois at Urbana-Champaign, 2015 (“Opinion: Meaningful surveillance reform must prioritize civil liberties,” *Passcode*—the *Christian Science Monitor* security and privacy publication, March 24th, Available Online at <http://www.csmonitor.com/World/Passcode/Passcode-Voices/2015/0324/Opinion-Meaningful-surveillance-reform-must-prioritize-civil-liberties>, Accessed 06-20-2015)

Now is the time for meaningful surveillance reform. Across the political spectrum, from the progressive left to libertarian right, there is widespread agreement that mass surveillance has exceeded the bounds of legality, morality, and efficacy. Today, the key ingredients for a successful surveillance reform agenda can be found in the boldly titled Surveillance State Repeal Act.

Among its bold provisions, it repeals the Patriot Act and the excesses of the 2008 amendment to the Foreign Intelligence Surveillance Act. It would also restore our civil liberties by clearing out legislation that even the Patriot Act’s main author, Rep. Jim Sensenbrenner (R) of Wisconsin, has stated is extremely troubling.

The Surveillance State Repeal Act begins with the right questions: What parts of these laws, which have proven to be the catalysts for widespread civil liberties violations, should we even keep? What kinds of surveillance actually work?

While many have made light of Benjamin Franklin’s quote, “Those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety,” few have trivialized the conditions undergirding his missive – namely, that interpretations of law were often “‘of an extraordinary nature,’ without informing us wherein that extraordinary nature consisted,” and rejected participatory democracy for “disagreeing with new discovered meanings, and forced constructions of a clause in the proprietary [secret] commission.”

The parallels to the current surveillance state that the proposed repeal act aims to address couldn’t be clearer.

Previous reform efforts have floundered because they compromised – attempting to lessen the diminution of our freedoms, rather than prioritizing our inherent and inalienable right to “the preservation of life, liberty and the pursuit of happiness.”

Surveillance reform needs grassroots support – same as the millions of people who killed the Stop Online Piracy Act in 2012 by overloading congressional phone lines – in order to pass, and Americans of all stripes are only mobilized by unambiguous and forceful legislation to protect their rights.

The Surveillance repeal act is clear, concise, and accessible (the latest version is less than 10 pages long), and rolls back some of the worst constitutional abuses with a hard reset of the US government’s surveillance powers.

#### The problem is the law, not NSA compliance. The plan solves.

Jaffer 13 — Jameel Jaffer, ACLU Deputy Legal Director and Director of the ACLU Center for Democracy, 2013 (“’There Have Been Some Compliance Incidents’: NSA Violates Surveillance Rules Multiple Times a Day,” ACLU Blog, August 16th, Available Online at <https://www.aclu.org/blog/there-have-been-some-compliance-incidents-nsa-violates-surveillance-rules-multiple-times-day?redirect=blog/national-security/nsa-privacy-violations-even-more-frequent-we-imagined>, Accessed 06-05-2015)

One final note: The NSA's noncompliance incidents are a big deal, but we shouldn't let them become a distraction. The far bigger problem is with the law itself, which gives the NSA almost unchecked authority to monitor Americans' international calls and emails. The problem arises, in other words, not just from the NSA's non-compliance with the law, but from its compliance with it.