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## Essay

# National Security and the Constitution: A Conversation Between Walter F. Mondale and Robert A. Stein

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<sup>†</sup> Walter F. Mondale is a 1956 graduate of the University of Minnesota Law School which now holds his name, Mondale Hall. He served on the Minnesota Law Review and as a law clerk in the Minnesota Supreme Court. Just four years out of law school, Mondale became the youngest Attorney General of Minnesota. Later, as a United States Senator, Mondale was an instrumental member of the Church Committee. He chaired the Domestic Task Force and investigated the intelligence abuses against Americans by its own agencies. The Domestic Task Force uncovered numerous violations of Constitutional rights and the proposals of the Church Committee sparked deep reforms of the intelligence community. The Committee called for permanent Senate and House committees on intelligence that would have authority over the entire intelligence community. In 1976, Mondale was elected Vice President of the United States. In the White House, Mondale continued to shape intelligence policy and, in 1978, the Foreign Intelligence Surveillance Act (FISA) was passed and the Foreign Intelligence Surveillance Court (FISC) was created to oversee requests for surveillance warrants against suspected foreign intelligence agents inside the United States. Mondale has a recurrent long term interest in the operation of FISA and remains a strong advocate for the privacy rights of Americans.

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*Professor Robert A. Stein, Dean of the University of Minnesota Law School for fifteen years and former Chief Operating Officer of the American Bar Association, endowed this lecture series to enrich the program of the University of Minnesota Law School by inviting leaders of the bench and bar and of the governments of the United States and other nations to deliver an annual lecture on a topic of national or international interest. Former Vice President of the United States Walter F. Mondale was invited to speak at the Inaugural Stein Lecture and engaged in a conversation with Professor Stein regarding the juxtaposition of national security and the Constitution.*

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National security and justice is a strange and challenging subject—much of what we need to know about it is classified and operates behind a dark curtain of obfuscation and secrecy. I had the unique opportunity to be involved behind the curtain as a member of the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, also known as the “Church Committee” named for its chairman, Senator Frank Church. I headed the investigation of the domestic operations of the FBI, CIA, NSA, DIA, IRS, U.S. Postal Service, and the White House. The Church Committee conducted the most thorough intelligence investigation in history. Later, I observed the intelligence community from a different perspective and was able to closely watch these same agencies from inside the White House. I served on the National Security Council; I was informed and often involved in many significant secret efforts over those years; and I was also one of the few in the government who read the ultimate secret document—The President’s Daily Brief—every day for those four years.

The United States needs a strong, and mostly secret, intelligence service. The United States faces many dangerous threats and it must fully prepare for and meet them: however, this must be done in a way that protects our constitutional liberties. The idea that security requires the sacrifice of our constitutional rights is a false choice. In fact, it is the other way around. A free and open nation will face its true problems more effectively, earn the public’s trust more completely, and avoid the recurrent abuse of power that predictably arises from unaccountable government.

This is not a new concept. Our founders demonstrated their fear of tyranny by the adoption of the Bill of Rights; I’ve

often marveled at how compelling and specific our founders could be.

The right of the people to be secure in their person, 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.<sup>1</sup>

History teaches us that our founders, in proposing the Fourth Amendment, sought to prohibit the use of the notorious “general warrants” used by the crown in the colonies.<sup>2</sup> General warrants permitted its possessors to ransack and harass people without restraint.<sup>3</sup> Great Britain had long since prohibited the hated general warrant,<sup>4</sup> but it was still in use in the colonies. Our founders were also constructing a government of checks and balances that would protect us against the concentration of power in one branch or person and against what they thought could be the resulting tyranny.

The great challenge in the conduct of our classified intelligence operations is that it is very difficult, and sometimes almost impossible, to ensure the accountability envisioned in our Constitution. Exotic technology has also had an incredible impact upon intelligence operations and should not be underestimated.<sup>5</sup> When the United States experiences something horrible, like 9/11 or the Vietnam War, the law is often overlooked in the desperate pursuit of safety.<sup>6</sup> In the Civil War, President

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1. U.S. CONST. amend. IV.

2. *Continued Oversight of the Foreign Intelligence Surveillance Act: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 61–62 (2013) (statement of Laura K. Donohue, Professor, Georgetown Law), available at <http://www.judiciary.senate.gov/imo/media/doc/10-2-13DonohueTestimony.pdf> (describing general warrants as “the worst instrument of arbitrary power, turning colonists against the crown”).

3. See *id.* at 62 (“Acting under [general] writs established by Parliamentary statute, officers of the crown had permission to search homes, papers, and belongs of *any* person.” (emphasis added)).

4. See *id.* (discussing *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (C.B.), an English case from 1765 that finally, and “flatly,” ended the use of general warrants).

5. See, e.g., Alexander W. Joel, *Choosing Both: Making Technology Choices at the Intersections of Privacy and Security*, 88 TEX. L. REV. 1751, 1751 (2010) (“Technology plays a critical role in intelligence activities, enabling intelligence agencies to pursue their national-security mission more effectively and efficiently.”).

6. See *id.* at 1756 (envisioning this occurrence as a government official using a scale to “metaphorically weigh[] the benefits for national security that a new technology has to offer against the costs to privacy or civil liberties that using the technology might entail”).

Lincoln waived habeas corpus protections;<sup>7</sup> in World War I, the infamous Palmer Raids were conducted wholesale against political suspects;<sup>8</sup> in Minnesota, we adopted the shameful Minnesota Public Safety Commission, which sought to remove Minnesotans of German ancestry from office and censor the news.<sup>9</sup> In World War II, horrified by Pearl Harbor, we placed thousands of Americans of Japanese ancestry, suspected of no criminal conduct, in so-called “relocation camps.”<sup>10</sup>

After 9/11, our government ignored the law requiring warrants for the investigation of alleged spying in America and established jails in Guantanamo, Abu Ghraib, and elsewhere where suspects could be held incommunicado, without counsel, in a miasma of lawlessness.<sup>11</sup> Many were tortured with little right to counsel or trial by virtue of legal opinions issued in secret while skirting normal channels. As one high official said, we went to the “dark side.”<sup>12</sup> When Supreme Court Justice Sandra Day O’Connor wrote an opinion striking down some of these excesses, she famously wrote: “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”<sup>13</sup> In all of

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7. Jonathan Hafetz, *A Different View of the Law: Habeas Corpus During the Lincoln and Bush Presidencies*, 12 CHAP. L. REV. 439, 444 (2009).

8. See CHRISTOPHER M. FINAN, FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA 3 (2007) (noting that over three thousand members of the Communist Party and the Communist Labor Party were seized in January of 1919 alone).

9. Dan Olson, *In Another Time of War, Minnesota Suspended Civil Liberties*, MINN. PUB. RADIO (July 4, 2005), [http://news.minnesota.publicradio.org/features/2005/07/04\\_olsond\\_safety/](http://news.minnesota.publicradio.org/features/2005/07/04_olsond_safety/) (describing the commission as “presid[ing] over a reign of terror”).

10. See generally Orville Schell, *Rounding up Americans*, N.Y. TIMES, Jan. 1, 1984, <http://www.nytimes.com/1984/01/01/books/rounding-up-americans.html> (reviewing PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE INTERNMENT CASES (1983), and describing Irons’ relentless pursuit of information pertaining to Japanese relocation during World War II).

11. Thomas P. Crocker, *Torture, with Apologies*, 86 TEX. L. REV. 569, 597 (2008) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS (2007) and RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2002)) (recounting the Bush administration’s stance toward Guantanamo Bay, and its attempt to argue that the “Executive has unchecked unilateral authority to detain individuals, including U.S. citizens, he deems ‘enemy combatants’ in the war on terror”).

12. JANE MAYER, THE DARK SIDE: THE INSIDE STORY ON HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 9–10 (2008) (referring to former Vice President Dick Cheney, who candidly stated “[w]e’ve got to spend time in the shadows in the intelligence world”).

13. Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

these cases, fear overcame clear thinking and certainly undermined the belief in our own laws. And in every case, when the peril of the situation finally subsided, we have unveiled and realized the shameful things we have done to our wonderful country and its citizens.

It is not only these profound abuses that need concern us. As we found in our Church Committee Report, improper intelligence activities can chill and undermine the vitality of our democracy by discrediting citizens, manipulating the media, distorting data to influence public policy and perception, chilling First Amendment rights, and imperiling the free exchange of ideas.<sup>14</sup>

### I. THE CHURCH COMMITTEE

The Church Committee was established after *The New York Times* published an article written by Seymour Hersh detailing “a massive, illegal domestic intelligence operation during the Nixon Administration.”<sup>15</sup> Hersh reported on a host of “illegal activities by members of the C.I.A. inside the United States, beginning in the nineteen-fifties, including break-ins, wiretapping and the surreptitious inspection of mail.”<sup>16</sup> The Church Committee marked the first time, and maybe the last time, in history that intelligence agencies would be so thoroughly investigated. The Domestic Task Force, which I chaired, was charged with investigating the intelligence abuses against Americans by our own agencies, i.e., FBI, CIA, NSA, DIA, IRS, and the White House. By early 1976, the Church Committee had interviewed eight hundred witnesses and reviewed over 110,000 pages of classified documents.

In our final report<sup>17</sup> on domestic abuses, we found that every President from Roosevelt to Nixon had pressed secret agen-

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14. INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, at 15–17 (2d Sess. 1976), available at <https://archive.org/stream/finalreportofsel02unit#page/14/mode/2up>.

15. Seymour M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES, Dec. 22, 1974, at 1.

16. *Id.*

17. See generally FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, UNITED STATES SENATE, S. REP. NO. 94-755 (2d Sess. 1976), available at [https://openlibrary.org/books/OL5014209M/Final\\_report\\_of\\_the\\_Select\\_Committee\\_to\\_Study\\_Governmental\\_Operations\\_with\\_Respect\\_to\\_Intelligence\\_A](https://openlibrary.org/books/OL5014209M/Final_report_of_the_Select_Committee_to_Study_Governmental_Operations_with_Respect_to_Intelligence_A).

cies to go beyond the law; the CIA, with the Post Office's cooperation, illegally opened mail for over twenty years, collecting information on 1.5 million Americans;<sup>18</sup> the CIA conducted experiments with LSD on unwitting subjects;<sup>19</sup> the NSA intercepted every overseas telegram sent or received by an American citizen between 1947 and 1975;<sup>20</sup> the FBI kept files on one million Americans and a half million so-called "subversives" all without a single court conviction; as a form of political harassment, the FBI conducted audits of the tax returns of 11,000 groups and individuals; the FBI conducted hundreds of burglaries, coined "black bag jobs," of political groups;<sup>21</sup> the FBI designated 26,000 individuals to be incarcerated in the event of a "national emergency" (the list included Dr. Martin Luther King and Norman Mailer); and President Nixon approved a so-called "Huston Plan" to monitor Vietnam War protesters, who were assumed to be under the direction of foreign powers.<sup>22</sup> We also found that Army intelligence investigated 100,000 citizens during the Vietnam War.

During our hearings, we often heard the complaint that innocent people need not worry about unauthorized investigations. So, what about the FBI's secret war against Dr. Martin Luther King? He was a gentle apostle of non-violence. Yet Director Hoover and the Bureau thought Dr. King to be the "most dangerous Negro leader" and a communist.<sup>23</sup> They sought to damage his marriage, block the conferral of a Nobel Peace Prize, prevent a Papal visit, and, at one point, a Bureau inspired letter appeared to suggest that he commit suicide.<sup>24</sup> People at the top of the FBI wanted to delegitimize Dr. King and replace him with a leader of their choice.<sup>25</sup>

These abuses were bi-partisan. These Presidents saw the intelligence agencies as extensions of their private power, as

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18. *Id.* at 282.

19. *Id.* at 286.

20. *Id.* at 57–60.

21. *Id.* at 176.

22. *Id.* at 428–29.

23. 143 CONG. REC. 2210–12 (1997).

24. Danielle Cadet, *How the FBI Invaded Martin Luther King Jr.'s Privacy—And Tried to Blackmail Him into Suicide*, HUFFINGTON POST (Jan. 20, 2014, 8:36 AM), [http://www.huffingtonpost.com/2014/01/20/martin-luther-king-fbi\\_n\\_4631112.html](http://www.huffingtonpost.com/2014/01/20/martin-luther-king-fbi_n_4631112.html) (discussing the FBI's anonymous note "chastising [King] for his affairs and implying that he should commit suicide").

25. 143 CONG. REC. 2210 (1997) (stating that the FBI ultimately wanted to "replace King with a manageable black leader").

indeed they were. What those Presidents and Director Hoover also shared was a belief that they had to break the law in order to protect our nation; that is, the law weakened us. There was also a widespread belief among many leaders that the President held vast implied national security power to circumvent the law to protect us. The campaign against Dr. King and the other intelligence excesses, I believe, showed that we had created a secret government accountable only to itself.

The Church Committee proposed deep reforms of the intelligence community.<sup>26</sup> The Committee found there was no inherent authority in the name of “national security” authorizing a President or any agency to violate the law.<sup>27</sup> The Committee called for permanent Senate and House committees on intelligence that would have authority over the entire intelligence community, the power of oversight over the agencies and their budgets, and the responsibility to clear nominees for top CIA, NSA, and other security positions. Beginning with the 1974 Hughes-Ryan Act, Presidents are now required to personally approve all important covert actions and report them to the intelligence committees “in a timely fashion.”<sup>28</sup> Attorney General Levi issued new regulations to keep the FBI out of political matters.<sup>29</sup>

In 1978, we authorized a unique U.S. Federal Court under the Foreign Intelligence Surveillance Act to oversee requests for surveillance warrants against suspected foreign intelligence agents inside the United States.<sup>30</sup> The Foreign Intelligence Surveillance Court (FISC) operates *ex parte* and *in camera* to-

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26. See generally S. REP. NO. 94-755 (1976).

27. Cf. *id.* at 425 (“The Committee finds that intelligence activities should not be regarded as ends in themselves.”).

28. Foreign Assistance Act of 1974, Pub. L. No. 93-559, sec. 32, § 662(a), 88 Stat. 1795, 1804 (“No funds appropriated under the authority of this or any other Act may be expended by or on behalf of the Central Intelligence Agency . . . unless and until the President finds that each such operation is important to the national security of the United States and reports, *in a timely fashion*, a description and scope of such operation to the appropriate committees of the Congress . . .” (emphasis added)).

29. OFFICE OF THE INSPECTOR GEN., U.S. DEPT. OF JUSTICE, THE FEDERAL BUREAU OF INVESTIGATION’S COMPLIANCE WITH THE ATTORNEY GENERAL’S INVESTIGATIVE GUIDELINES 36 (2005), available at <http://www.justice.gov/oig/special/0509/final.pdf> (reiterating Attorney General Levi’s contempt for “Government monitoring of individuals or groups because they hold unpopular or controversial political views,” calling it “intolerable”).

30. Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, § 103, 92 Stat. 1783, 1788 (codified as amended at 50 U.S.C. § 1803 (2006)).

gether with a separate FISA appellate court. The reforms recommended by the Church Committee sought to grapple with the tension between security and our liberty.<sup>31</sup> We had no past experiences to look to for guidance and the reforms were unprecedented. They worked, I think, for several years but, with time, several weaknesses became apparent. A new set of reforms must be implemented to once again insure that the Constitution is protected.

## II. REFORMS

Reforms are needed to modernize our law to reflect current challenges. These reforms should focus both on the FISC and the various intelligence agencies and committees. At times, the FISC was abused by government agencies and the Court ignored or failed to report the abuses.<sup>32</sup> The FISC, at times, seems to act as a buffer against Congress and the regular courts, giving the intelligence agencies a closed-circuit kind of private justice and “supreme court.”<sup>33</sup> I suggest the FISC be restricted to warrant issuance only and be required to publicly report most of its decisions interpreting the law. Congress did not envision a law-making role for the FISC.<sup>34</sup> Its decisions were not to serve as precedent, nor was the FISC to offer lengthy legal analyses, crafting in the process, for instance, exceptions to the Fourth Amendment warrant requirement or defenses of wholesale surveillance programs. A recently disclosed decision by the FISC held that “because the Application at issue here concerns only the production of call detail records or ‘telephony metadata’ belonging to a telephone company, and not the contents of communications . . . there is no Fourth Amendment impediment to the collection.”<sup>35</sup> We never intended the Court to make this type of broad ruling.<sup>36</sup> Because this type of determination is often necessary, these cases should be brought before a federal district court of general jurisdiction to issue an opinion and establish the rule of law.

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31. See S. REP. NO. 95-604, at 7–9 (1978), reprinted in 1978 U.S.C.C.A.N. 3904, 3908–10.

32. Accord Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. TIMES, July 6, 2013, <http://www.nytimes.com/2013/07/07/us/in-secret-court-vastly-broadens-powers-of-nsa.html>.

33. See *id.*

34. See generally S. REP. NO. 95-604.

35. *In re* FBI, No. BR 13-109, 2013 WL 5741573, at \*3 (FISA Ct. Aug. 29, 2013) (declassified U.S. Foreign Intelligence Surveillance Court decision).

36. See generally S. REP. NO. 95-604.

An independent legal office should be established to represent the nation's interests in the protection of privacy and civil liberties before the FISC, including appeals. The manner of appointment of judges to the Court, lack of technical expertise, and absence of an effective adversarial process has harmed the Court's ability to function. Broad issues should be left to a court of general jurisdiction.

Another barrier to analyzing the constitutionality of government actions is the state secrets privilege. The state secrets privilege is an evidentiary privilege that the government can utilize to exclude evidence that might disclose sensitive information that would threaten national security.<sup>37</sup> Often the judge does not even conduct an *in camera* review of the information and therefore the privilege may be easily abused. As an evidentiary privilege, the state secrets privilege excludes evidence, but alarmingly, some courts have used the privilege to dismiss the entire case as claimed.<sup>38</sup> Excluding the evidence may hinder the plaintiff's case so severely that it is voluntarily dismissed. This creates a justiciability issue rather than just an evidentiary issue. Besides requiring the judge or a third-party neutral to review the evidence before it is excluded, I suggest a formal appeals process to review the application of the state secrets privilege.

Clearly, the United States must keep some secrets. By law, a person may not disclose the identity of an undercover secret agent; knowing and willful disclosure of certain classified information is prohibited; secrecy orders have been issued on certain areas of research such as atomic energy and cryptography; and all data concerning the design, manufacture, or utilization of atomic weapons and the production of special nuclear material is classified.<sup>39</sup> Also, some of the reform could be administra-

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37. See generally Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77 (2010).

38. See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2009); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Trulock v. Lee*, 66 F. App'x 472 (4th Cir. 2003).

39. 50 U.S.C. § 421 (2012) (prohibiting the disclosure of undercover secret agent identities); U.S. DEP'T OF DEF. ET AL., REPORT OF THE JOINT POLICY GROUP FOR THE PROTECTION OF NUCLEAR WEAPONS DESIGN AND USE CONTROL INFORMATION (2000), available at [http://www.fas.org/sgp/othergov/doe/joint\\_report.html](http://www.fas.org/sgp/othergov/doe/joint_report.html) (detailing the prohibited use of classified nuclear information).

tive, but I hope we do not move towards a “states secrets act” found in many nations.<sup>40</sup>

Now, let me point out the alarming size of the United States intelligence community. According to an article in *The Washington Post*,<sup>41</sup> 1271 government organizations and 1931 private companies work on programs related to counterterrorism, homeland security, and intelligence in about 10,000 locations across the United States; in Washington D.C. and the surrounding area, thirty-three building complexes for top-secret intelligence work are under construction or have been built since September 2001. Departmental intelligence agencies include: the Defense Intelligence Agency of the Department of Defense; intelligence agencies of the Army, Navy, Air Force, and Marines; the Bureau of Intelligence and Research of the Department of State; the Office of Terrorism and Finance Intelligence of the Department of Treasury; the Office of Intelligence and the Counterterrorism and Counterintelligence Divisions of the FBI; the Office of Intelligence of the Department of Energy; and the Directorate of Information Analysis and Infrastructure Protection and Directorate of Coast Guard Intelligence of the Department of Homeland Security. Unfortunately, as a result of the severely fragmented intelligence community, many security and intelligence agencies do the same work, creating redundancy and waste. For example, fifty-one federal organizations and military commands, operating in fifteen United States cities, track the flow of money to and from terrorist networks.<sup>42</sup>

Additionally, an estimated 854,000 people, nearly 1.5 times as many people as live in Washington, D.C., hold top-secret security clearances.<sup>43</sup> I believe we should take a very close look at the size and disarray existing among our many agencies and the growing privatization of security and intelligence services. Secret clearances should be determined at the highest level of our government and should be limited to the subject matter that the employee needs to complete his job function. Too many

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40. See, e.g., Lucy Craft, *Japan's State Secrets Law: Hailed by U.S., Denounced by Japanese*, NPR (Dec. 31, 2013, 6:53 PM), <http://www.npr.org/blogs/parallels/2013/12/31/258655342/japans-state-secrets-law-hailed-by-u-s-denounced-by-japanese>.

41. Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST, July 19, 2010, <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/print/>.

42. *Id.*

43. *Id.*

people are given top secret status in a very sloppy system (e.g., Edward Snowden).<sup>44</sup> We must also look at the runaway size and the sheer ballooning cost of our secret activities. Classification systems are much abused in our government. Everything is classified; some, but not all of it, top secret. We need a different standard.

Recent news has been flooded with leaks of secret intelligence programs. In 2013, a top secret order issued by the FISC was leaked to the media by Edward Snowden.<sup>45</sup> It required a subsidiary of Verizon to provide a daily, ongoing feed of all call detail records—including those for domestic calls—to the NSA (telephone metadata program).<sup>46</sup> I believe much of the metadata collection directed against innocent Americans should be prohibited. Currently, at least one federal court has also agreed that the bulk collection of telephone metadata violates the Constitution.<sup>47</sup> The recent clashes with our friends overseas who have apparently been wiretapped by the NSA—like Chancellor Merkel in Germany, President Hollande in France, and others—tell us that our technology prowess far exceeds the quality of our judgment.<sup>48</sup> Certainly, the public debate about what happened, and who knew what and when, makes us look ridiculous.

On December 12, 2013, the President's Review Group on Intelligence and Communications Technologies made a series of remarkable recommendations for the NSA.<sup>49</sup> These recommendations, which I suggest merit serious consideration, include:

- End the domestic program storing bulk telephone metadata by placing such materials in separate

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44. See Eric Schmitt, *C.I.A. Warning on Snowden in '09 Said to Slip Through the Cracks*, N.Y. TIMES, Oct. 10, 2013, <http://www.nytimes.com/2013/10/11/us/cia-warning-on-snowden-in-09-said-to-slip-through-the-cracks.html>.

45. Mark Mazzetti & Michael S. Schmidt, *Ex-Worker at C.I.A. Says He Leaked Data on Surveillance*, N.Y. TIMES, June 9, 2013, <http://www.nytimes.com/2013/06/10/us/former-cia-worker-says-he-leaked-surveillance-data.html>.

46. *Edward Snowden: Leaks that Exposed US Spy Programme*, BBC NEWS (Jan. 17, 2014, 9:56 AM), <http://www.bbc.com/news/world-us-canada-23123964>.

47. *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013).

48. See Alison Smale, *Anger Growing Among Allies on U.S. Spying*, N.Y. TIMES, Oct. 23, 2013, <http://www.nytimes.com/2013/10/24/world/europe/united-states-disputes-reports-of-wiretapping-in-Europe.html>.

49. PRESIDENT'S REVIEW GRP. ON INTELLIGENCE & COMM'NS TECHS., LIBERTY AND SECURITY IN A CHANGING WORLD (2013), available at [http://www.whitehouse.gov/sites/default/files/docs/2013-12-12\\_rg\\_final\\_report.pdf](http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf).

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storage and allowing the NSA access only through a court order;

- Public officials should not have access to otherwise private information (such as bank records, credit card records, telephone records, and Internet data) from third parties (such as banks, credit card companies, telephone companies, and Internet providers) without a court order;
- Congress should enact legislation to authorize telephone, Internet, and other providers to disclose to the public general information about orders they receive directing them to provide information to the government, and the government should disclose, on a regular basis, similar general information about the orders it has issued in programs whose existence is unclassified;
- The President should create a new process requiring high-level policy approval of all sensitive intelligence requirements and the methods that the intelligence community may use;
- Congress should create the position of public interest advocate to represent the nation's interests in the protection of privacy and civil liberties before the FISC, including appeals, and make decisions of the court declassified whenever possible;
- Congress should create a strengthened and independent Civil Liberties and Privacy Protection Board;
- Regarding the classification system, departments and agencies should institute a "work-related access" approach to the dissemination of sensitive, classified information and should adopt network security practices that are at the cutting edge of technology.

On January 17, 2014, President Obama announced that the government would stop storing massive amounts of telephone metadata on NSA computers and asked the Attorney General and intelligence agencies to work with Congress to determine an alternative location for the metadata.<sup>50</sup> He has also

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50. Carol E. Lee & Siobhan Gorman, *Obama Says NSA's Mass Collection of U.S. Phone Data Will End*, WALL ST. J., Jan. 17, 2014, <http://online.wsj.com/news/articles/SB10001424052702304603704579326333792513314>.

directed the Attorney General to work with the FISC so that during the transition period, the database can be queried only after a judicial finding, or in an emergency.<sup>51</sup> Additionally, “[t]o ensure that the [FISC] hears a broader range of privacy perspectives, the President called on Congress to authorize the establishment of a panel of advocates from outside the government to provide an independent voice in significant cases before the [FISC].”<sup>52</sup> The President also ended the monitoring of communications of heads of state of close American allies and implemented various other reforms.<sup>53</sup> These reforms are a step in the right direction, but many concerns remain unaddressed.<sup>54</sup>

The week following the President’s announcement, the Privacy and Civil Liberties Oversight Board, an independent bipartisan agency within the executive branch, concluded that the government has no statutory authority for the domestic program storing bulk telephone metadata.<sup>55</sup> The Board found the program infringed on First<sup>56</sup> and Fourth Amendment<sup>57</sup> rights, and had “not proven useful in identifying unknown terrorists or terrorist plots.”<sup>58</sup> It also made recommendations to improve the FISC.<sup>59</sup> Two prestigious presidentially appointed committees have now arrived at essentially the same conclusion.

Thirty years ago, I might have expected that the reforms implemented by the Church Committee and the changes discussed above would fix most intelligence problems for the long term, but now, I doubt it. In addition to reforms, we need to keep a closer watch on the activities of our intelligence agencies. Checks and balances restraints, when made in secret, do

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51. *Id.*

52. Press Release, White House, Fact Sheet: Review of U.S. Signals Intelligence, (Jan. 17, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/01/17/fact-sheet-review-us-signals-intelligence>.

53. *Id.*

54. Devlin Barrett, *Obama’s Plan Leaves Unanswered Questions*, WALL ST. J. WASH. WIRE (Jan. 17, 2014, 1:39 PM), <http://blogs.wsj.com/washwire/2014/01/17/obamas-plan-leaves-unanswered-questions/>.

55. PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT (2014), *available at* <http://www.pclob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf>.

56. *Id.* at 128–36.

57. *Id.* at 106–28.

58. *Id.* at 158.

59. *Id.* at 182–98.

not work as well as our founders intended. Sometimes they do not work at all. Accountability must be a priority despite the great challenges that our nation has and will have. The Fourth Amendment was drafted not for the “good times” or when things are status quo; it was drafted to protect our liberties in the worst of times. We must therefore be especially alert to abuse. As President Ronald Reagan once said, “trust, but verify.”<sup>60</sup>

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60. Ronald Reagan, President of the United States, Remarks on Signing the Intermediate-Range Nuclear Forces Treaty (Dec. 8, 1987), *available at* [http://www.reaganfoundation.org/pdf/Remarks\\_on\\_Signing\\_the\\_INF%20treaty\\_120887.pdf](http://www.reaganfoundation.org/pdf/Remarks_on_Signing_the_INF%20treaty_120887.pdf).