

Contemporary Issues in Foreign Intelligence Gathering

Professor Jonathan Zittrain
Harvard Law School
Spring 2014

Wednesday
5:00pm – 7:00pm
WCC 5048

I. Course Description

The digital environment offers greatly expanded opportunities for foreign intelligence gathering. This seminar will explore some of the most difficult problems arising in managing the collection and use of intelligence for national security, including compliance with the law; avoidance of, and remedies for, over collection; and protection of privacy and other fundamental values.

We will discuss how an intelligence community's activities can be meaningfully communicated to the public while respecting its sources and methods; how agencies might internally reconcile their various missions to protect the public and protect public values; and what a set of authorities and limitations for intelligence collection might look like if a clean slate were available on which to develop them.

II. Class Meetings and Requirements

Below is the course outline with assigned readings. The class meets Wednesdays from 5:00pm-7:00pm in WCC 5048. Grading for the course will be based on in-class participation and a final 15-page paper (details below).

- **Introduction and Framework (February 5, 2014)**
 - Michael Adler, *Cyberspace, General Searches, and Digital Contraband: The Fourth Amendment and the Net-Wide Search*, **105 Yale L.J. 1093** (1996), Introduction and Part I
 - Orin Kerr, *Net-Wide Search?* (Apr 27, 2001)
 - Rachel Levinson-Waldman, [What the Government Does with Americans' Data](#), Brennan Center (Oct 8, 2013)

- **A Taxonomy of Surveillance (February 12, 2014)**
 - *H.R. 6304, the FISA Amendments Act of 2008*, Democratic Policy Committee (Jun 26, 2008)
 - **Scope**
 - Intelligence/Law Enforcement Separation
 - William Funk, *Electronic Surveillance of Terrorism: The Intelligence/Law Enforcement Dilemma -- A History*, **11 Lewis & Clark L. Rev. 1099** (Dec 2007)
 - Devlin Barrett, *U.S. Tells Suspect for First Time It Used NSA Surveillance Program in Criminal Case*, **Wall Street Journal** (Oct 25, 2013)
 - Spencer Kimball, *DEA Secretly Uses NSA to Prosecute Crime*, **Deutsche Welle**, (Apr 9, 2013)
 - Stewart Powell, *NSA Provides Details on Crimes Unrelated to Terror*, **SFGate**, (Aug 3, 2013)
 - Glenn Greenwald, Ryan Gallagher, and Ryan Grim, *Top-Secret Document Reveals NSA Spied On Porn Habits As Part Of Plan To Discredit 'Radicalizers'*, **Huffington Post**, (Nov 27, 2013)

- James Risen, *N.S.A. Gathers Data on Social Connections of U.S. Citizens*, **New York Times** (Sept 28, 2013)
 - **Process**
 - Offices of the Inspectors General, Unclassified Report on the President's Surveillance Program (2009), Parts I, II, and III
 - Barton Gellman, *NSA broke privacy rules thousands of times per year, audit finds*, **Washington Post**, (Aug 15, 2013)
 - Barton Gellman, *NSA statements to The Post*, **Washington Post** (Aug 15, 2013)
 - *Optional Resource*
 - Whittaker et al., The National Security Policy Process: The National Security Council and Interagency System, (Aug 15, 2011), pages 1-44
 - **Public-Private Interface**
 - Steven Levy, *Battle of the Clipper Chip*,” **New York Times** (Jun 12, 1994)
 - Ryan Gallagher, *The Problem With the FBI's Plan To 'Wiretap' Online Communications*, **Slate**, (May 8, 2012)
 - Declan McCullough, *FBI pressures Internet providers to install surveillance software*, **CNET**, (Aug 2, 2013)
 - Dana Liebelson, *Google, Yahoo, Facebook, and Twitter Have a New Lobbying Target—the NSA*, **Mother Jones** (Nov 15, 2013)
 - Paul Carsten, *Microsoft Blocks Censorship of Skype in China: Advocacy Group*, **Reuters** (Nov 27, 2013)
 - **Private Surveillance**
 - Charles Duhigg, *How Companies Learn Your Secrets*, **NY Times Magazine** (Feb 16, 2012)
 - Somini Sengupta, *A Cheap Spying Tool With a High Creepy Factor*, **New York Times**, (Aug 2, 2013)
 - Dhruvi Shah, *CCTV site Internet Eyes hopes to help catch criminals*, **BBC**, (Oct 3, 2010)
 - Stephanie Clifford and Quentin Hardy, *Attention, Shoppers: Store Is Tracking Your Cell*, **New York Times** (Jul 14, 2013)
 - Bruce Schneier, *The Trajectories of Government and Corporate Surveillance*, www.schneier.com, (Oct 21, 2013)
- **A Case Study in App-Layer Surveillance (February 19, 2014)**
 - *NSA slides explain the PRISM data-collection program*, **Washington Post** (Jun 6, 2013)
 - Director of National Intelligence, Facts on the Collection of Intelligence Pursuant to Section 702 of the Foreign Intelligence Surveillance Act (Jun 8, 2013)
 - Timothy B. Lee, *How Congress unknowingly legalized PRISM in 2007*, **Washington Post** (Jun 6, 2013)
 - Josh Gerstein, *NSA: PRISM stopped NYSE attack*, **Politico** (Jun 18, 2013)
 - The President's Review Group on Intelligence and Communications Technologies, Liberty and Security in a Changing World (2013), Chapter V
 - Charlie Savage, *N.S.A. Said to Have Paid E-Mail Providers Millions to Cover Costs From Court Ruling*, **New York Times** (Aug 25, 2013)
 - Daniel Castro, *How Much Will PRISM Cost the U.S. Cloud Computing Industry?*, **Information Technology and Innovation Foundation**, (Aug 2013)
 - Letter from Companies and Non-Profits requesting more transparency (Sept 30, 2013)

- **Envelopes and Contents: Is There a Difference? (February 26, 2014)**
 - *Katz v. United States*, 389 U.S. 347 (1967)
 - *Smith v. Maryland*, 442 U.S. 735 (1979), Syllabus
 - Glenn Greenwald, *NSA collecting phone records of millions of Verizon customers daily*, **The Guardian** (Jun 5, 2013)
 - The President’s Review Group on Intelligence and Communications Technologies, Liberty and Security in a Changing World (2013), Chapter III
 - Spencer Ackerman, *NSA Makes Final Push to Retain Most Mass Surveillance Powers*, **The Guardian**, (Jan 10, 2014)
 - David Gray and Danielle Citron, *The Right to Quantitative Privacy*, **98 Minn. L. Rev. 62** (Mar 6, 2013)

- **Logical-Layer Surveillance (March 5, 2014) – Abstracts Due on Friday!**
 - Nicole Perlroth, Jeff Larson, and Scott Shane, *N.S.A. Able to Foil Basic Safeguards of Privacy on Web*, **New York Times** (Sept 5, 2013)
 - *Procedures used by NSA to minimize data collection from US persons: Exhibit B – full document*, **The Guardian** (Jun 20, 2013)
 - John D. Bates, *Foreign Intelligence Surveillance Court Opinion* (Oct 3, 2011), pages 1-2, 27- 41, 49-56, 59-63, 67-81
 - Barton Gellman and Ashkan Soltani, *NSA infiltrates links to Yahoo, Google data centers worldwide, Snowden documents say*, **Washington Post** (Oct 30, 2013)
 - Jonathan Zittrain, The Future of the Internet (2008), pages 30-35, 67-69
 - Bruce Schneier, *The U.S. Government Has Betrayed the Internet. We Need to Take it Back.*, **The Guardian**, (Sept 5, 2013)

- **Historical Contextualization (March 12, 2014)**
 - **Nixon Era**
 - Thomas R. Johnson, American Cryptology During the Cold War (1998), Chapter 16
 - L. Britt Snider, *Recollections from the Church Committee’s Investigation of NSA*, **CIA Library** (Apr 14, 2007)
 - Conor Friedersdorf, *Lawbreaking at the NSA: Bring On a New Church Committee*, **The Atlantic** (Aug 16, 2013)
 - Bob Dreyfuss, *Spying by the NSA: Calm Down, It’s Not Nixon’s Plumbers*, **The Nation** (Jun 11, 2013)
 - **9/11 Commission**
 - National Commission on Terrorist Attacks Upon the United States, Final Report of the National Commission on Terrorist Attacks Upon the United States (2004), Chapter 3, “Counter Terrorism Evolves”
 - **Terrorist Surveillance Program**
 - Eric Lichtblau, James Risen, and Scott Shane, *Wider Spying Fuels Aid Plan for Telecomm Industry*, **The New York Times** (Dec 16, 2007)
 - U.S. Department of Justice, The NSA Program to Detect and Prevent Terrorist Attacks Myth v. Reality (Jan 27, 2006)

- Offices of the Inspectors General, Unclassified Report on the President's Surveillance Program (2009), Parts IV and V

- **Checks and Balances (March 26, 2014)**
 - Stephen Dycus et al., National Security Law, Fifth Edition, New York: Wolters Kluwer (2011), pages 443-471
 - Frequently Asked Questions on Oversight, **NSA.gov** (Last updated on Jan 13, 2011)
 - Robert Litt, *Privacy, Technology and National Security: An Overview of Intelligence Collection*, **Office of the Director of National Intelligence** (July 18, 2013)
 - Dan Merica, *Obama: NSA Revelations Show 'Oversight Worked'*, **CNN** (Aug 23, 2013)
 - Alan Grayson, *Congressional Oversight of the NSA is a Joke. I Should Know, I'm in Congress*, **The Guardian** (Oct 25, 2013)
 - Jameel Jaffer and Ben Wizner, *Checks, Balances, and the National Security Agency*, **MSNBC.com** (Jun 9, 2013)
 - Ron Wyden Questioning NSA Officials (Mar 2013)
 - Spencer Ackerman, *Republicans demand consequences for 'willful lie' by intelligence chief*, **The Guardian** (Dec 19, 2013)
 - Brendan Sasso, *House Intel panel blasts critics who skipped NSA briefings*, **The Hill**, (Sept 19, 2013)
 - Jack Goldsmith, *Reflections on NSA Oversight, and a Prediction That NSA Authorities (and Oversight, and Transparency) Will Expand*, **Lawfare** (Aug 9, 2013)

- **Leakers and Whistleblowers (April 2, 2014)**
 - David McCraw, Stephen Gikow, *The End to an Unspoken Bargain? National Security and Leaks in a Post-Pentagon Papers World*, **48 Harv. C.R.-C.L. L. Rev. 473** (2013)
 - Pew Research Center for the People & the Press, Public Split over Impact of NSA Leak, But Most Want Snowden Prosecuted (Jun 17, 2013)
 - Jeffrey Toobin, *Edward Snowden is no Hero*, **The New Yorker** (Jun 10, 2013)
 - Leonard Downie Jr. and Sara Rafsky, *The Obama Administration and the Press Leak investigations and surveillance in post-9/11 America*, **CPJ** (Oct 10, 2013)
 - Michelle C. Gabriel, *Plugging Leaks: The Necessity of Distinguishing Whistleblowers and Wrongdoers in the Free Flow of Information Act*, 40 Loy. U. Chi. L.J. 531 (2009)
 - Jesselyn Radack and Kathleen McClellan, *The Criminalization of Whistleblowing*, **2 Am. U. Lab. & Emp. L. F. 57** (2011)

- **What's a Little Spying Between Governments? (April 9, 2014)**
 - Craig Forces, *Spies Without Borders: International Law and Intelligence Collection*, **Journal of National Security Law and Policy**, Vol. 5 (2011)
 - Tim Padgett, *Leaders of Mexico and Brazil Rebuke U.S. for NSA Snooping*, **Time**, (Sept 6, 2013)
 - Amar Toor, *Brazil admits to spying on US diplomats after blasting NSA surveillance*, **The Verge** (Nov 5, 2013)
 - Laura Smith Spark, *Germany's Angela Merkel: Relations with U.S. 'severely shaken' over spying claims*, **CNN** (Oct 24, 2013)

- Steve Coll, *The N.S.A.'s Costly European Adventure*, **The New Yorker** (Jul 4, 2013)
 - Spiegel Staff, *Embassy Espionage: The NSA's Secret Spy Hub in Berlin*, **Der Spiegel** (Oct 27, 2013)
 - Melanie Amann, Hubert Gude, Jörg Schindler and Fidelius Schmid, *Germans Rejected: US Unlikely to Offer 'No-Spy' Agreement*, **Der Spiegel** (Nov 12, 2013)
 - Cheng Guangjin, *US should explain hacking activity*, **China Daily** (Jun 14, 2013)
 - Ewen MacAskill, Julian Borger, Nick Hopkins, Nick Davies and James Ball, *GCHQ taps fibre-optic cables for secret access to world's communications*, **The Guardian** (Jun 21, 2013)
 - Glenn Sulmasy and John Yoo, *Counterintuitive: Intelligence Operations and International Law*, Berkeley Law Scholarship Repository (2006)
- **Treaty-Making (April 16, 2014)**
 - AOL, Apple, Facebook, Google, LinkedIn, Microsoft, Twitter, Yahoo!, *Global Government Surveillance Reform*, <http://reformgovernmentsurveillance.com/> (2013)
 - Germany and Brazil, *The right to privacy in the digital age*, United Nations General Assembly (Nov 2013)
 - The President's Review Group on Intelligence and Communications Technologies, *Liberty and Security in a Changing World* (2013), pages 24-42
 - United Nations Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Frank La Rue, A/HRC/23/40 (Apr 17, 2013)
- **Looking Forward (April 23, 2013)**
 - David Kravets, *Supreme Court Rejects Case Challenging NSA Phone Spying*, **Wired** (Nov 18, 2013)
 - Judge James Carr, *A Better Secret Court*, **New York Times** (Aug 22, 2013)
 - Kara Brandeisky, *Six Ways Congress May Reform NSA Snooping*, **ProPublica** (July 25, 2013)
 - Michael German, *The Expanding State and Local Intelligence Enterprise and the Threat to Civil Liberties*, Brennan Center (Nov 8, 2013)
 - Nola K. Breglio, *Leaving FISA Behind: The Need to Return to Warrantless Foreign Intelligence Surveillance*, **113 Yale L.J. 179** (2003)
 - Yochai Benkler, *Time to Tame the NSA Behemoth Trampling Our Rights*, **The Guardian** (Sept 13, 2013)
 - The Office of the Press Secretary, *Presidential Policy Directive/PPD-28*, **The White House** (Jan 17, 2014)

IV. Final paper

The main written assignment for the semester will be a 4000-word paper in which you will make a policy recommendation in one of the areas we discuss in class. Abstracts of 200-400 words will be due by March 7th, and each student will have a meeting to discuss her or his abstract with Professor Zittrain in the weeks that follow. Abstracts may be submitted by email to Shailin Thomas at stthomas@cyber.law.harvard.edu. The final paper will be due on the last day of exam period, and may also be submitted by email to stthomas@cyber.law.harvard.edu.

V. Learning Technology

- H2O - All course readings will be posted on the course playlist

VI. General Information

For all scheduling/office hours questions relating to Professor Zittrain, please contact:

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Assistant to Professor Zittrain

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For course related questions (readings/paper), please contact:

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