

**Contemporary Issues in Intelligence Gathering**  
Professor Jonathan Zittrain  
Harvard Law School | Harvard Kennedy School  
Harvard School of Engineering and Applied Sciences  
Spring 2017

Monday  
5:00pm - 7:00pm  
WCC 4063

## **Syllabus**

### I. Course Description

The digital environment offers greatly expanded opportunities for 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 Schedule

The class will meet on Monday from 5pm to 7pm in WCC 4063.

### III. Class Requirements

Students will be graded on class participation and a final 15-page paper. In the final paper, students will make a policy recommendation in one of the areas discussed in class.

The final paper will be due on the last day of the exam period and may be submitted via email to Samantha Bates at [sbates@law.harvard.edu](mailto:sbates@law.harvard.edu).

### IV. Class Materials

There is no required textbook for this class. All readings will be available online on the class H2O playlist: <https://h2o.law.harvard.edu/playlists/51792>.

## V. Laptop Policy

Laptops and digital devices are **not** permitted in class.

## VI. General Information

Office hours are available by appointment. For general scheduling/appointment questions, please contact:

### **Amanda McMahan**

*Assistant to Professor Zittrain*

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

### **Samantha Bates**

*Research Associate for Professor Zittrain*

Email: [sbates@law.harvard.edu](mailto:sbates@law.harvard.edu)

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### **Jordi Weinstock**

*Visiting Scholar*

Email: [jordi.weinstock@gmail.com](mailto:jordi.weinstock@gmail.com)

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## **Reading assignments**

Day 1: *January 23rd, 2017*

### **Introduction and Framework**

- Jonathan Zittrain, "A Few Keystrokes Could Solve the Crime. Would You Press Enter?," *Just Security* (January 12, 2016)  
<https://www.justsecurity.org/28752/keystrokes-solve-crime-press-enter/> archived at <https://perma.cc/6ETL-PLLD>.
- Rachel Levinson-Waldman, "What the Government Does with Americans' Data," Brennan Center for Justice (October 3, 2013)  
<http://www.brennancenter.org/sites/default/files/publications/Data%20Retention%20-%200FINAL.pdf> archived at <https://perma.cc/9ULA-6XKU>.
- Daniel J. Solove, 'I've Got Nothing to Hide' and Other Misunderstandings of Privacy, 44 *San Diego L. Rev.* 745, (2007)  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=998565](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=998565) archived at <https://perma.cc/6NJ2-6V2Q>.

Day 2: January 30th, 2017

\*John DeLong class visit

### The NSA Scope and Process, Part 1

- [FOR REFERENCE] "American Big Brother: A Century of Political Surveillance and Repression," Cato Institute (2016) <http://www.cato.org/american-big-brother> archived at <https://perma.cc/Q2ZC-37Y5>.
- Michael Hirsch, "Birth of the Surveillance State," *The Atlantic* (June 7, 2013) <http://www.theatlantic.com/national/archive/2013/06/birth-of-the-surveillance-state/276650/> archived at <https://perma.cc/RQ4L-CKEK>.
- "Timeline of NSA Domestic Spying," *Electronic Frontier Foundation* (2016) <https://www.eff.org/nsa-spying/timeline> archived at <https://perma.cc/BAE8-G9MT>.
- National Commission on Terrorist Attacks Upon the United States, "9/11 Final Report on the National Commission on Terrorist Attacks Upon the United States" (2004) <https://www.9-11commission.gov/report/911Report.pdf> archived at <https://perma.cc/PB64-5MN5>.
  - Read Chapter 3: Counterterrorism Evolves
- *The National Security Agency: Missions, Authorities, Oversight and Partnerships* (August 9, 2013) <https://www.nsa.gov/news-features/press-room/statements/2013-08-09-the-nsa-story.shtml> archived at <https://perma.cc/D9BR-UE4E>.
- Benjamin Wittes, "NSA General Counsel Rajesh De Speech at Georgetown, February 27, 2013" *Lawfare* (March 1, 2013) <https://www.lawfareblog.com/nsa-general-counsel-rajesh-de-speech-georgetown> archived at <https://perma.cc/XN6F-S4JB>.

Day 3: February 6th, 2017

### The NSA Scope and Process, Part 2

- Susan Landau, "Making Sense from Snowden: What's Significant In The NSA Surveillance Revelations," *IEEE Security & Privacy* (August 2, 2013) <https://www.computer.org/cms/Computer.org/ComputingNow/pdfs/MakingSenseFromSnowden-IEEESecurityAndPrivacy.pdf> archived at <https://perma.cc/DJC9-E7K6>
- Barton Gellman, "NSA broke privacy rules thousands of times per year, audit finds," *The Washington Post* (August 15, 2013) [https://www.washingtonpost.com/world/national-security/nsa-broke-privacy-rules-thousands-of-times-per-year-audit-finds/2013/08/15/3310e554-05ca-11e3-a07f-49ddc7417125\\_story.html](https://www.washingtonpost.com/world/national-security/nsa-broke-privacy-rules-thousands-of-times-per-year-audit-finds/2013/08/15/3310e554-05ca-11e3-a07f-49ddc7417125_story.html) archived at <https://perma.cc/35XQ-6B65>.
- Conor Friedersdorf, "Lawbreaking at the NSA: Bring On a New Church Committee," *The Atlantic* (August 16, 2013) <http://www.theatlantic.com/politics/archive/2013/08/lawbreaking-at-the-nsa-bring-on-a-new-church-committee/278750/> archived at <https://perma.cc/726Y-S7MB>.
- Michael Isikoff, "NSA program stopped no terror attacks, says White House panel member," *NBC News* (December 20, 2013)

<http://www.nbcnews.com/news/other/nsa-program-stopped-no-terror-attacks-says-white-house-panel-f2D11783588> archived at <https://perma.cc/N6KW-G6SC>.

- National Research Council: Committee on Responding to Section 5(d) of Presidential Policy Directive 28, *Bulk Collection of Signals Intelligence: Technical Options*, National Academies Press (2015) <https://www.nap.edu/read/19414/chapter/4> archived at <https://perma.cc/JX6G-WKQA>.
  - Read Chapter 2
- “President Obama’s January 17, 2014 speech on NSA Reforms,” *The Washington Post* (January 17, 2014) (video) [https://www.washingtonpost.com/politics/full-text-of-president-obamas-jan-17-speech-on-nsa-reforms/2014/01/17/fa33590a-7f8c-11e3-9556-4a4bf7bcdb84\\_story.html](https://www.washingtonpost.com/politics/full-text-of-president-obamas-jan-17-speech-on-nsa-reforms/2014/01/17/fa33590a-7f8c-11e3-9556-4a4bf7bcdb84_story.html) archived at <https://perma.cc/HH8P-3BU4>.

Tentative: [Berklett](#) evening event Thursday, February 9th, at 5:30pm. Location TBD.

Day 4: February 13th, 2017

### Envelopes and Contents

- *Katz v. United States*, 389 U.S. 347 (1967) <https://h2o.law.harvard.edu/collages/42873>.
- *Smith v. Maryland*, 442 U.S. 735 (1979) <https://h2o.law.harvard.edu/collages/42874>.
- The President’s Review Group on Intelligence and Communications Technologies, *Liberty and Security in a Changing World*, (December 12, 2013) archived at <https://perma.cc/UCH3-NHLN>.
  - Read Chapter 3
- Susan Landau, “Making Sense of Snowden, Part II: What’s Significant In The Snowden Revelations,” *IEEE Security & Privacy* (2014) <https://www.computer.org/cms/Computer.org/ComputingNow/pdfs/HighlightsFromMakingSenseOfSnowdenPartII.pdf> archived at <https://perma.cc/END5-YXWH>.
- [FOR REFERENCE] USA FREEDOM Act, 50 U.S. 1801 (2015) <https://www.congress.gov/114/plaws/publ23/PLAW-114publ23.pdf> archived at <https://perma.cc/5N28-97EG>.

Day 5: February 20th, 2017

### A Case Study in App-Layer Surveillance

- Jonathan Zittrain, *The Future of the Internet and How to Stop It*. New Haven: 2008 <http://blogs.harvard.edu/futureoftheinternet/files/2013/06/ZittrainTheFutureoftheInternet.pdf> archived at <https://perma.cc/3NH8-EG39>.
  - Read pages 30-35, 67-69.
- David Gray and Danielle Citron, *The Right to Quantitative Privacy*, 98 Minn. L. Rev. 62 (March 5, 2013) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2228919](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2228919) archived at <https://perma.cc/X4BA-3VQT>.
  - Read Introduction, Part I, and Part III (pages 62-82 and 101-125)



<http://www.theatlantic.com/technology/archive/2013/04/do-you-want-the-government-buying-your-data-from-corporations/275431/> archived at <https://perma.cc/KNS3-DFT3>.

- Charles Duhigg, "How Companies Learn Your Secrets," *The New York Times Magazine* (February 19, 2012) <http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html?pagewanted=all> archived at <https://perma.cc/B7CX-7QEY>.
- Alexander Furnas, "It's Not All About You: What Privacy Advocates Don't Get About Data Tracking On The Web," *The Atlantic* (March 15, 2012) <http://www.theatlantic.com/technology/archive/2012/03/its-not-all-about-you-what-privacy-advocates-dont-get-about-data-tracking-on-the-web/254533/> archived at <https://perma.cc/Z4BQ-FMYB>.
- Bruce Schneier, "The Trajectories of Government and Corporate Surveillance," (October 21, 2013) [https://www.schneier.com/blog/archives/2013/10/the\\_trajectory.html](https://www.schneier.com/blog/archives/2013/10/the_trajectory.html) archived at <https://perma.cc/S6NT-ESQD>.
- Federal Trade Commission, *Data Brokers: A Call for Transparency and Accountability*, (May 2014) <https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf> archived at <https://perma.cc/YPU9-WLQF>.
  - Read pages 46-49.
- Julia Angwin, Charlie Savage, Jeff Larson, Henrik Moltke, Laura Poitras and James Risen, "AT&T Helped U.S. Spy on Internet on a Vast Scale," *The New York Times* (August 16, 2015) <http://www.nytimes.com/2015/08/16/us/politics/att-helped-nsa-spy-on-an-array-of-internet-traffic.html>.

*Spring Break March 13th through March 17th.*

*Day 8: March 20th, 2017*

### **Checks and Balances**

- Thomas R. Johnson, *American Cryptology During the Cold War, 1945-1989*, National Security Agency (1999) [https://www.nsa.gov/news-features/declassified-documents/cryptologic-histories/assets/files/cold\\_war\\_iii.pdf](https://www.nsa.gov/news-features/declassified-documents/cryptologic-histories/assets/files/cold_war_iii.pdf) archived at <https://perma.cc/4T35-AY8Q>.
  - Read Chapter 16
- L. Britt Snider, *Recollections from the Church Committee's Investigation of NSA*, CIA Library (Winter 99-00) <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter99-00/art4.html> archived at <https://perma.cc/JF2R-6J54>.
- Robert Litt, *Privacy, Technology and National Security: An Overview of Intelligence Collection*, Office of the Director of National Intelligence (July 18, 2013) <https://www.dni.gov/index.php/newsroom/speeches-and-interviews/195-speeches-interviews>

[ews-2013/896-privacy,-technology-and-national-security-an-overview-of-intelligence-collection](#) archived at <https://perma.cc/0sUGY9ca7Wq>.

- Gregory J. Millman, “Compliance in Government: Q&A with John DeLong of the NSA,” *The Wall Street Journal* (January 23, 2014) <http://blogs.wsj.com/riskandcompliance/2014/01/23/compliance-in-government-ga-with-john-delong-of-the-nsa/> archived at <https://perma.cc/8WVZ-CPW9>.
- Offices of the Inspectors General, *Unclassified Report on the President's Surveillance Program*, (July 10, 2009) <https://fas.org/irp/eprint/psp.pdf> archived at <https://perma.cc/KF6K-NVH5>.
  - Read Parts IV and V
- Office of the Director of National Intelligence, *Statistical Transparency Report Regarding Use of National Security Authorities*, (April 30, 2016) [https://www.dni.gov/files/icotr/ODNICY15 Statistical Transparency Report.pdf](https://www.dni.gov/files/icotr/ODNICY15%20Statistical%20Transparency%20Report.pdf) archived at <https://perma.cc/WZ89-2QVP>.
- Dustin Volz, “US spy court rejected zero surveillance orders in 2015,” *Reuters* (May 2, 2016) <http://www.reuters.com/article/us-usa-cybersecurity-surveillance-idUSKCN0XR009> archived at <https://perma.cc/83LC-XF9F>.
- Charlie Savage, “Judge Rejects Challenge to Searches of Emails Gathered Without Warrant,” *The New York Times* (April 19, 2016) <http://www.nytimes.com/2016/04/20/world/judge-rejects-challenge-to-searches-of-emails-gathered-without-warrant.html?ref=world>.

Day 9: March 27th, 2017

## Going Dark and the Encryption Problem

\*Matt Olsen class visit

- Steven Levy, “Battle of the Clipper Chip,” *The New York Times* (June 12, 1994) <http://www.nytimes.com/1994/06/12/magazine/battle-of-the-clipper-chip.html?pagewanted=all&src=pm> archived at <https://perma.cc/NT25-8Y53>.
- James Comey, “Going Dark: Are Technology, Privacy, and Public Safety on a Collision Course?,” FBI News (October 16, 2014) <https://www.fbi.gov/news/speeches/going-dark-are-technology-privacy-and-public-safety-on-a-collision-course> archived at <https://perma.cc/9PDB-BRW6>.
- Matt Olsen, Bruce Schneier, and Jonathan Zittrain, et al. “Don’t Panic. Making Progress on the “Going Dark” Debate,” The Berkman Center for Internet & Society at Harvard University (February 1, 2016) [https://cyber.law.harvard.edu/pubrelease/dont-panic/Dont\\_Panic\\_Making\\_Progress\\_on\\_Going\\_Dark\\_Debate.pdf](https://cyber.law.harvard.edu/pubrelease/dont-panic/Dont_Panic_Making_Progress_on_Going_Dark_Debate.pdf) archived at <https://perma.cc/NT9M-ELAG>.
- *Electronic Communications Privacy Act of 1986*, 18 U.S.C. § 2510-22, (7/30/2013) <https://it.ojp.gov/privacyliberty/authorities/statutes/1285> archived at <https://perma.cc/2EF7-A7CS>.

- [FOR REFERENCE] Electronic Communications Privacy Act (ECPA), Electronic Privacy Information Center (epic.org), <https://epic.org/privacy/ecpa/> archived at <https://perma.cc/WK2R-NZML>.
- *Google Transparency Report*, Google <https://www.google.com/transparencyreport/userdatarequests/legalprocess/> archived at <https://perma.cc/4EBX-B2RR>.
- Jessica Glenza and Nicky Woolf, “Stingray spying: FBI’s secret deal with police hides phone dragnet from courts,” *The Guardian* (April 10, 2015) <https://www.theguardian.com/us-news/2015/apr/10/stingray-spying-fbi-phone-drag-net-police> archived at <https://perma.cc/52MQ-AVAS>.
- William H. Pauley, *US v. Raymond Lambis* (Stingray Opinion) (July 12, 2016) <https://epic.org/amicus/tracker/United-States-v-Lambis.pdf> archived at <https://perma.cc/6APU-Y62Z>.
- [OPTIONAL] Harold Abelson et al., “Keys Under Doormats: Mandating insecurity by requiring government access to all data and communications,” CSAIL (July 6, 2015) <https://dspace.mit.edu/bitstream/handle/1721.1/97690/MIT-CSAIL-TR-2015-026.pdf> archived at <https://perma.cc/2L3U-QST8>.

Day 10: April 3rd, 2017

\*Bruce Schneier class visit

### A Case Study: Apple v. FBI

- Sheri Pym, *Order Compelling Apple, Inc. To Assist Agents In Search*, (February 16, 2016) <https://assets.documentcloud.org/documents/2714001/SB-Shooter-Order-Compelling-Apple-Asst-iPhone.pdf> archived at <https://perma.cc/BAA2-4Y4F>.
- Tim Cook, “A Message to Our Customers,” Apple (February 16, 2016) <http://www.apple.com/customer-letter/> archived at <https://perma.cc/7UHU-DLW3>.
- Eileen M. Decker, Patricia A. Donahue, and Tracy L. Wilkison, *Government’s Reply In Support Of Motion To Compel And Opposition To Apple Inc.’s Motion To Vacate Order*, (March 10, 2016) <https://www.eff.org/files/2016/03/15/20150310-govt-response-to-apple.pdf> archived at <https://perma.cc/Y53B-E6KN>.
- Theodore J. Boutrous Jr., Nicola T. Hanna and Eric D. Vandavelde, *Apple Inc.’s Reply To Government’s Opposition To Apple Inc.’s Motion To Vacate Order Compelling Apple Inc. To Assist Agents In Search*, (March 15, 2016) <https://www.eff.org/files/2016/03/15/apple-reply-to-govt-opposition-to-apple-motion-to-vacate.pdf> archived at <https://perma.cc/SMX6-4J7V>.
- Ellen Nakashima, “FBI paid professional hackers one-time fee to crack San Bernardino iPhone,” *The Washington Post* (April 12, 2016) [https://www.washingtonpost.com/world/national-security/fbi-paid-professional-hackers-one-time-fee-to-crack-san-bernardino-iphone/2016/04/12/5397814a-00de-11e6-9d36-33d198ea26c5\\_story.html](https://www.washingtonpost.com/world/national-security/fbi-paid-professional-hackers-one-time-fee-to-crack-san-bernardino-iphone/2016/04/12/5397814a-00de-11e6-9d36-33d198ea26c5_story.html) archived at <https://perma.cc/N76H-EK8R>.

- John Cassidy, “Lessons from Apple vs. the F.B.I.,” *The New Yorker* (March 29, 2016) <http://www.newyorker.com/news/john-cassidy/lessons-from-apple-versus-the-f-b-i> archived at <https://perma.cc/2G55-FA24>.
- Sebastian Rotella, “ISIS via WhatsApp: ‘Blow yourself up, O Lion,’” *Ars Technica* (July 13, 2016) <http://arstechnica.com/tech-policy/2016/07/isis-via-whatsapp-blow-yourself-up-o-lion/> archived at <https://perma.cc/AVA9-U7CZ>.

Day 11: April 10th, 2017

### Looking Forward

- Eric Geller, “Congress gets early start on debating surveillance powers that expire in 2017,” *The Daily Dot* (May 4, 2016) <http://www.dailydot.com/layer8/fisa-section-702-surveillance-reauthorization-senate-judiciary-committee-announcement/> archived at <http://perma.cc/6DC4-FKCG>.
- Yochai Benkler, “Time to Tame the NSA Behemoth Trampling Our Rights,” *The Guardian* (September 13, 2013) <https://www.theguardian.com/commentisfree/2013/sep/13/nsa-behemoth-trampling-rights> archived at <https://perma.cc/7LUF-LK4T>.
- Elizabeth Goitein, Oversight and Reauthorization of the FISA Amendments Act, Senate Committee on the Judiciary (May 10, 2016) <https://www.brennancenter.org/analysis/oversight-and-reauthorization-fisa-amendment-act> archived at <https://perma.cc/4E68-5YD2>.
- Matthew G. Olsen, Oversight and Reauthorization of the FISA Amendments Act, Senate Committee on the Judiciary (May 10, 2016) <https://www.judiciary.senate.gov/imo/media/doc/05-10-16%20Olsen%20Testimony.pdf> archived at <https://perma.cc/3NYC-KWBL>.
- Nola K. Breglio, *Leaving FISA Behind: The Need To Return to Warrantless Foreign Intelligence Surveillance*, 113 Yale L.F. 179, (2003) <http://www.yalelawjournal.org/note/leaving-fisa-behind-the-need-to-return-to-warrantless-foreign-intelligence-surveillance> archived at <https://perma.cc/974B-79GY>.
- Jack Goldsmith, “Reflections on NSA Oversight and a Prediction That NSA Authorities (and Oversight, and Transparency) Will Expand,” *Lawfare* (August 9, 2013) [https://www.lawfareblog.com/reflections-nsa-oversight-and-prediction-nsa-authorities-and-oversight-and-transparency-will-expand#.UuVy\\_2Qo5sM](https://www.lawfareblog.com/reflections-nsa-oversight-and-prediction-nsa-authorities-and-oversight-and-transparency-will-expand#.UuVy_2Qo5sM) archived at <https://perma.cc/53BN-YVZ6>.