WILLIAM BENDIX AND PAUL J. QUIRK

Introduction: Governing the Security State

This special issue addresses one of the great, persistent challenges of American democracy: how to maintain both a safe, stable homeland and a healthy, free society. Over the last fifteen years, since the 9/11 attacks, the war on terrorism has raised difficult questions about the trade-offs between national security and civil liberties. Do coercive interrogation methods yield valuable intelligence, or do they simply lead to human-rights abuses? Has expanded government surveillance helped authorities identify and capture terrorists, or has it led primarily to fishing expeditions and unwarranted investigations of Americans? Should websites frequented by extremist groups be shut down, or would such actions suppress legitimate political dissent? Policymakers have struggled to determine what sacrifices in due process, privacy, and speech rights are necessary for the country's defense against international terrorism. They have struggled even to consider what sacrifices of convenience or effectiveness for security and law-enforcement operations may be warranted for the sake of individual rights.

Scholars, pundits, and the public have weighed these same issues. The case of Edward Snowden, for example, has sparked a long, unresolved debate over the balance between government secrecy and transparency. Snowden, as a contractor for the National Security Agency (NSA), copied tens of thousands of classified documents on mass surveillance programs and leaked them to several journalists in 2013.[1] For the next year, the press published stories that revealed how the U.S. government, under George W. Bush and Barack Obama, had secretly spied on the American public without congressional oversight or statutory authority. Of course, the stories also provided terrorists, criminal hackers, and enemy states with detailed descriptions of U.S. intelligence-gathering techniques. According to several polls, most Americans

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are unsure whether Snowden should be viewed as a hero for exposing investigative abuses or as a traitor for divulging sensitive national-security records.[2] Even some presidential candidates in the 2016 race have taken ambivalent positions on the Snowden leaks.[3]

The country has sometimes managed relatively thoughtful debates over the values of security and liberty and struck a considered balance between them. But in times of national threat, it has reflexively prioritized defense and set aside constitutional principles. In 1798, as the United States faced possible war with France, Congress passed the Sedition Act and empowered authorities to imprison critics of President John Adams and his administration.[4] For both the Civil War and World War II, military tribunals were used in place of criminal courts to prosecute enemy combatants and traitorous citizens. Suspects were presumed guilty, denied access to council, prevented from calling witnesses, and barred from appealing verdicts—even when the verdicts came with a sentence of death.[5] During much of the Cold War, federal agents monitored and harassed political activists—including prominent civil-rights leaders—for allegedly being "subversive."[6]

Why has American democracy found it so hard to maintain a reasonably consistent, deliberate balance between security and liberty? Many political debates are straightforward matters of conflicting interests or enduring disagreements between left and right ideological camps. The balance of power in such debates is generally stable. By contrast, the question of what are appropriate restrictions on governmental power and constitutional rights is complex and contentious on multiple levels. National-security policy can spark heated, principled disagreements, but these disagreements do not divide policymakers into neat liberal and conservative factions. Because suspicion of executive power is strong on both ends of the ideological spectrum, liberals, libertarians, and small-government conservatives have at times united against expansive state power on a number of policing issues, such as search-and-seizure rules and wiretapping practices. Even before the Snowden leaks, both parties in Congress split their votes on surveillance bills.[7] These intra-party divisions have only intensified after the explosive NSA revelations, making it difficult for lawmakers to draft and pass privacy reforms.[8]

Beyond the ideological disagreements, policymakers must contend with two competing, speculative risks: on one hand, that of catastrophic terrorist attacks on civilians and, on the other hand, that of investigative abuse compromising political freedom or doing other significant harm. The likelihood of either risk is unknown, and the facts needed to assess them are hard to

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define and in any case missing from policy deliberations.[9] Even thoughtful, highly informed individuals may be uncertain what security practices and democratic protections to endorse. Many people will be highly susceptible to changing their minds, especially in response to a scandal that provokes anger or to a crisis or attack that provokes fear.

The need for secrecy in national security complicates matters further. On one side, the executive needs to use clandestine tactics against foreign actors in order to defend the country and maintain its international interests. On the other side, officials can order intelligence agencies to target political rivals and activist groups, and to conceal such actions by deeming them top secret. This "secrecy dilemma," as one scholar has termed it, presents severe challenges to democratic processes.[10] The big question is how to give ordinary citizens or even a representative group of elected officials genuine opportunity to scrutinize and assess classified programs, without revealing too many sensitive details and seriously diminishing the programs' effectiveness. The difficulty is fundamental, not just a result of the country's sometimes awkward institutional structure or of poor management. There is probably no institutional structure or management strategy that could fully reconcile these conflicting values.

Finally, although much of national-security policy is developed and implemented in secret, it remains vulnerable to shifts in public opinion—especially sudden escalations in fear over foreign threats. A large body of research has demonstrated that the public, facing even ambiguous challenges to the homeland, eagerly supports enhanced security at the expense of civil liberties.[11] Mass opinion, shaped by either legitimate concerns or baseless anxieties, has encouraged presidents and other elected officials to adopt, at key points, aggressive security practices that ignore legal checks. As noted above, overreactions to foreign-policy pressures have punctuated the country's history.

OVERVIEW OF ARTICLES

Unknowable risks, ideological confusion, policy complexity, institutional inadequacies, and periodic mass panic all challenge efforts to balance security needs with civil-liberties protections. Looking at security issues faced by the United States since World War II, the articles in this special issue explore the limited successes and frequent failures to achieve this balance.

A notable feature of the special issue is that the authors of three of the articles—Louis Fisher, Loch Johnson, and Athan Theoharis—have made

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special contributions, beyond those of mere scholarship, to the cause of protecting privacy and democratic processes against authoritarian impulses of the security state. Fisher, as a senior specialist in the Congressional Research Service, was threatened by superiors for writing critically about both Congress and the executive for their initiation of war against Iraq on the basis of false claims. His involuntary transfer to the Law Library of Congress did not curtail his widely read publications or congressional testimony. Johnson served as special assistant to the Chairman of the Church Committee during its historic mid-1970s investigations of government spying on domestic political groups. Athan Theoharis's dogged pursuit of Freedom of Information Act requests led to the discovery of J. Edgar Hoover's secret personal files and enabled him to expose decades of abuses by the Federal Bureau of Investigation (FBI). The editors are honored by their participation in this project.

We begin with Jessica Wang's article on how rumors, gossip, stereotypes, and cultural myths have, for decades, driven investigations against government scientists and engineers. She puts these phenomena in the context of prior theoretical work on the systematic, often sophisticated use of such "low knowledge" as an instrument of control—benefiting, counterintuitively, powerful actors. She then examines how federal authorities, starting in the 1940s, conducted background checks on atomic researchers to uncover possible communist infiltration in the U.S. government. Investigators, as Wang documents, held almost cartoonish beliefs about the so-called communist personality, and thus conducted crude, unprofessional inquiries to identify disloyal government scientists. Mere gossip was often enough to ruin careers. Anyone familiar with the anticommunist hysteria of the early Cold War will find this account familiar, but Wang shows that the same types of fears and tactics shaped federal investigations in the 1990s against Asian American researchers suspected of working as Chinese spies. Race was the overriding and, in some cases, only basis of suspicion. Wang demonstrates that politicians and intelligence officials can hold the same automatic suspicion of immigrants that sometimes overtakes the American public.

Continuing with concerns of investigative abuse, William Bendix and Paul Quirk examine the government's overcollection of private documents after the September 11th attacks. Although public concern over privacy violations has centered mostly on the NSA, the authors explain that the FBI has also conducted indiscriminate surveillance on Americans. It has used national security letters—a type of administrative subpoena issued by bureau officials, not courts—to seize records on thousands of U.S. persons each year. Bendix and Quirk show that few members of Congress understood that,

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by passing the Patriot Act in 2001, they had dramatically expanded the FBI's ability to conduct warrantless intelligence gathering. It took Congress more than five years to learn the extent to which agents had violated privacy protections with national security letters. Then, notwithstanding the revelation of these far-reaching abuses, Congress shelved multiple reform bills and allowed the Obama administration to produce new, classified rules for records seizures. Bendix and Quirk conclude that a combination of complex surveillance laws and partisan gridlock has encouraged Congress to shirk its deliberative duties on counterterrorism policy.

In the third article, Louis Fisher examines why the most controversial practices in the war on terrorism—including coercive interrogation and extraordinary rendition—have not received judicial scrutiny. The answer, he explains, is that the Bush and Obama administrations invoked the states secrets privilege to block the release of incriminating evidence against the Central Intelligence Agency (CIA), and the federal courts supported the White House without reviewing any of the documents. Fisher argues that the courts, by failing to verify the merits of privilege claims, have effectively surrendered their independence on security issues and have allowed the executive to conceal massively illegal activities, such as torture. The basis of this judicial acquiescence, he claims, is a deeply flawed ruling on executive privilege that the Supreme Court made in 1953. Fisher argues that the federal courts could restore their ability to check executive power by taking a very simple step. They could review classified documents in closed chambers to determine whether the executive has asserted its privilege for legitimate security purposes or for covering up unconstitutional acts.

Loch Johnson provides a somewhat less pessimistic assessment of national-security oversight than other contributors in this issue. He points out that the current system, despite its serious flaws, is much more robust than what existed for most of the country's history. Before the 1970s, Congress did not monitor intelligence agencies or place restrictions on clandestine programs. At most, it received occasional, vaguely worded reports on classified operations that few members were able to access. Johnson explains that, in the mid-1970s, scandals over domestic spying by the CIA and military pushed Congress to establish the House and Senate Intelligence committees and to start conducting extensive intelligence oversight. Since the 1970s, the panels have had an uneven record monitoring the executive, alternating between periods of neglect and diligence. However, as Johnson notes, even when the committees have acted slowly, they have nonetheless produced reports that exposed executive missteps and proposed meaningful reforms. He points to

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the 2014 report on torture by the Senate Intelligence Committee as a recent example of Congress holding the CIA accountable for serious abuses.

To conclude this special issue, Athan Theoharis presents a historical overview and a broad appraisal of domestic eavesdropping programs. For him, mass warrantless surveillance by the FBI and NSA in recent years simply reflects a continuation of, not an aberration from, long-standing practices by U.S. intelligence agencies. In the face of indefinite threats, either from Nazi saboteurs or Islamic terrorists, the executive has generally preferred to adopt abusive, unconstitutional methods in an attempt to increase, even minimally, the country's security rather than follow statutory requirements and heighten any possible risk of attack. Starting with Franklin Roosevelt, presidents and other executive-branch officials have authorized blatantly illegal actions—such as black bag jobs—and intelligence agencies have eagerly complied with orders. But this secret surveillance, as Theoharis explains, has sometimes lost its security purpose and turned into sleazy, politically motivated operations. From the 1940s to the 1970s, for example, FBI agents monitored and compiled embarrassing information on members of Congress, so that bureau officials could gain leverage over lawmakers. The overall lesson here is that an unchecked executive may at times abandon its national-security mission and, as a consequence, undermine both the democratic and defense interests of the country.

In fact, this lesson can be drawn from all the articles in this issue. But while the contributors suggest some legal and institutional fixes to enhance accountability in intelligence programs, their reforms, if implemented, would not dramatically alter the current conflict over security and liberty. This is because it remains an open question whether the increased level of oversight needed to prevent government abuses would hinder authorities from adequately protecting the homeland. So we are left with an intractable problem: The Constitution is not a suicide pact, but neither is the Bill of Rights merely a wish list.

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NOTES

1. Glenn Greenwald, *No Place to Hide: Edward Snowden, the NSA, and the U.S. Surveillance State* (New York, 2014), 90.

2. For example, in a poll conducted one year after the first NSA leaks, about 25 percent of respondents said they supported Snowden, about 35 percent said they opposed him, and the remaining 40 percent said they were unsure. See Mark Murray, "More Americans

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Oppose Edward Snowden's Actions than Support Them," *NBC News,* 1 June 2014, http://www.nbcnews.com/news/us-news/more-americans-oppose-edward-snowdens-actions-support-them-n119476.

3. Senator Rand Paul (R-Ky.) suggested that as president he would consider pardoning Snowden, while Senator Bernie Sanders (I-Vt.) said that he favored light penalties for the NSA leaker. See Jessica Hopper, "Would Rand Paul Pardon Edward Snowden?" *ABC News*, 10 October 2015, http://abcnews.go.com/Politics/rand-paul-pardon-edward-snowden/story?id=34379901; Sam Thielman, "Hillary Clinton and Bernie Sanders Call for Edward Snowden to Face Trial," *The Guardian*, 13 October 2015, http://www.theguardian.com/us-news/2015/oct/13/clinton-sanders-snowden-nsa-democratic-debate.

4. Eric Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (New York, 2007), 3.

5. Daryl A. Mundis, "The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts," *American Journal of International Law* 96 (2002): 320–28; John Yoo, *War by Other Means: An Insider's Account of the War on Terror* (New York, 2006).

6. James Kirkpatrick Davis, *Spying on America: The FBI's Domestic Counterintelligence Program* (New York, 1992).

7. Nate Silver, "Domestic Surveillance Could Create a Divide in the 2016 Primaries," *FiveThirtyEight/The New York Times,* 13 June 2013, http://fivethirtyeight.blogs.nytimes.com/2013/06/11/domestic-surveillance-could-create-a-divide-in-the-2016-primaries/?_r=0.

8. William Bendix and Paul J. Quirk, "Secrecy and Negligence: How Congress Lost Control of Domestic Surveillance," *Issues in Governance Studies* 68, Brookings Institution (March 2015): 14–15.

9. Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, 2005), chap. 1.

10. Michael P. Colaresi, *Democracy Declassified: The Secrecy Dilemma in National Security* (New York, 2014).

11. For example, see Bethany Albertson and Shana Kushner Gadarian, *Anxious Politics: Democratic Citizenship in a Threatening World* (New York, 2015); Clem Brooks and Jeff Manza, *Whose Rights? Counterterrorism and the Dark Side of American Public Opinion* (New York, 2013); Darren W. Davis and Brian D. Silver, "Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America," *American Journal of Political Science* 48, no. 1 (2004): 28–46; Leonie Huddy, Stanley Feldman, Charles Taber, and Gallya Lahav, "Threat, Anxiety, and Support of Antiterrorism Policies," *American Journal of Political Science* 49, no. 3 (2005): 593–608.

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