

INDISCRIMINATE POWER: RACIAL PROFILING AND SURVEILLANCE SINCE 9/11

CARLOS TORRES, AZADEH SHAHSHAHANI, AND TYE TAVARAS*

INTRODUCTION	283
I. PUBLIC SURVEILLANCE	284
II. WHAT IT IS, AND WHAT IT IS NOT: SURVEILLANCE IN LEGAL HISTORY AND ITS CURRENT LEGAL STATUS.....	286
III. MODERN SURVEILLANCE: SURVEILLANCE SINCE 9/11.....	292
IV. FBI GUIDELINES	296
V. IMPACT OF PROFILING ON CONSTITUTIONAL RIGHTS	299
VI. COURT CHALLENGES	301
VII. RACIAL DISCRIMINATION IN INTERNATIONAL LAW.....	304
VIII. PRIVACY IN INTERNATIONAL LAW.....	305
IX. THE UNITED STATES AND THE INTERSECTION OF INTERNATIONAL LAW, NATIONAL POLICY, AND SOCIAL CONVENTION.....	307
X. CONCLUSION	309

INTRODUCTION

The United States government, through many different agencies, has spent decades extensively monitoring constitutionally protected activities of its citizens. From the communications of prominent activists¹ to the mundane phone conversations of the politically uninvolved,² we are finding more and more that what we say and do in our everyday lives is no longer part of the private sphere, but is increasingly absorbed into the amorphous, indefinitely extensive, and nearly omnipresent mass of information at the disposal of government.

* Carlos Torres is a graduate of the University of Pennsylvania and the University of Michigan Law School. His work history includes work at the Georgia Capital Defender's Office, the University of Michigan Health System, Human Rights Watch as a Program in Refugee and Asylum Law Fellow, and public service in civil rights enforcement. Azadeh Shahshahani is President of the National Lawyers Guild and previously served as National Security/Immigrants' Rights Project Director with the ACLU of Georgia. She is a 2004 graduate of the University of Michigan Law School and also has a Master's in Modern Middle Eastern and North African Studies from Michigan. Tye Tavaras has a background in International Studies, Arabic, and Public International Law. She is a graduate of Emory University, The American University in Cairo, and Emory University School of Law. In addition to working at Emory University as a Study Abroad Advisor, she has served as a contributing writer to Mic and Ramel Media. The authors would like to thank the following students for their research support: Max T. Eichelberger, Rachel Reed, and Katie Rookard. The authors would also like to thank Elisa Wong for her help with initial research for the Article.

¹ See Allison Jones, *The 2008 FBI Guidelines: Contradiction of Original Purpose*, 19 B.U. PUB. INT. L.J. 137, 138 (2009).

² See *Photo Gallery: NSA Documentation of Spying in Germany*, SPIEGEL ONLINE (July 29, 2013), <http://www.spiegel.de/fotostrecke/photo-gallery-nsa-documentation-of-spying-in-germany-fotostrecke-99672-2.html>.

This Article begins with a general introduction to the surveillance currently underway in our country, with a focus from just after the 9/11 tragedy to the present day. This will be followed with a brief history of surveillance and race, from racial profiling to the Counterintelligence Program (“COINTELPRO”), the first major break in understanding the extent and nature of the surveillance state. By examining the mapping of communities of color in Georgia as a representative illustration of the broader system of surveillance, the Article delves into more extensive questions of international and constitutional law.

I. PUBLIC SURVEILLANCE

In an October 2011 letter to Attorney General Eric Holder, the American Civil Liberties Union (“ACLU”) urged the Federal Bureau of Investigation (“FBI” and the “Bureau”) to curtail the “overbroad investigat[ive] authorit[y] the FBI has claimed” in its investigation of American citizens based on racial, ethnic, religious, and political profiles.³ The letter summarizes how the FBI used its authority to spy on political advocacy organizations,⁴ gained expanded authority to operate in a new context under the pretext of threat assessment,⁵ significantly expanded the broad-scale usage of telephonic and e-mail surveillance,⁶ and garnered a doubt-inducing 4.02% rate for conversion of assessments to preliminary or full investigations.⁷ Nearly as egregious as the surveillance itself is the authority of the FBI to retain a plethora of information indefinitely—information that has not risen to the “reasonable indication” standard necessary to open a full investigation.⁸ Not uncommonly, the information collected, reviewed, and transmitted within the agency often has nothing to do with criminality, but rather the intimate details of people’s lives.⁹

³ Letter from ACLU to Eric H. Holder, Jr., Attorney General, 1 (Oct. 20, 2011) [hereinafter Holder Letter], available at https://www.aclu.org/files/assets/aclu_letter_to_ag_re_rm_102011_0.pdf.

⁴ *Id.* at 2.

⁵ *Id.*

⁶ *Id.*

⁷ *See id.* (noting that of 82,325 assessments, only 3,315 resulted in full or preliminary investigations) (citing Charlie Savage, *FBI Focusing on Security Over Ordinary Crime*, N.Y. TIMES, (Aug. 23, 2011), <http://www.nytimes.com/2011/08/24/us/24fbi.html>). This statistic is not a conviction rate, and counts only incidents where there was sufficient evidence to surpass the subjective standard involved in opening an assessment. A full investigation must be based on “an articulable factual basis of a ‘reasonable indication’ that a federal criminal violation or threat to the national security ‘has or may have occurred, is or may be occurring, or will or may occur’” OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF JUSTICE, A REVIEW OF THE FBI’S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS 10 (2010) (alteration in original), available at <http://www.justice.gov/oig/special/s1009r.pdf>. The FBI notes that the “‘reasonable indication’ standard is ‘substantially lower than probable cause.’” *Id.*

⁸ Holder Letter, *supra* note 3, at 3 (“A 2009 FBI Counterterrorism Division ‘Baseline Collection Plan’ obtained by the ACLU through FOIA reveals the broad scope of information the FBI gathers during Assessments and retains in its systems: identifying information (date of birth, social security number, driver’s license and passport number, etc.), telephone and e-mail addresses, current and previous addresses, current employer and job title, recent travel history, whether the person lives with other adults, possesses special licenses or permits or has received specialized training, and whether the person has purchased firearms or explosives.”).

⁹ Mollie Reilly, *NSA Workers Might Be Sharing Your Nude Photos*, HUFFINGTON POST (July 17, 2014), http://www.huffingtonpost.com/2014/07/17/nsa-nude-photos_n_5597472.html.

Such information has been collected on an ongoing, daily basis.¹⁰

These investigations do not stop at the individual level. As a predicate to finding the targets for individual investigations, the FBI also preliminarily and without a convincingly articulable standard engages in geo-mapping of ethnic communities when doing so will “‘reasonably aid in the analysis of potential threats and vulnerabilities’ and assist in ‘intelligence analysis.’”¹¹ By tracking the movements of persons within ethnic areas and the locations of “‘ethnically-oriented businesses and other facilities,’”¹² the FBI, as instructed by its 2008 internal Domestic Investigation and Operations Guide (“DIOG”), catalogues “‘specific and relevant ethnic behavior’”¹³ in particular locations. This data collection extends to “‘behavioral and cultural information about ethnic or racial communities’ that may be exploited by criminals or terrorists ‘who hide within those communities.’”¹⁴ This program is known as “Domain Management.”¹⁵ It relies on broad-brush, stereotypical associations between perceived criminality and affiliation with ethnic, national, religious, or political groups to justify surveilling and curtailing the civil liberties of people solely on the basis of belonging to these groups.¹⁶

This racial, ethnic, religious, and political profiling is an affront not to only the collective consciousness, but the FBI’s own internal directives. The U.S. Department of Justice’s *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies*¹⁷ prohibits race from being used “to any degree” in law enforcement action or decision-making without a specific indication of its appropriateness (i.e., a specific description of a particular perpetrator, witness, or other actor).¹⁸ However, in the case of national security and border integrity investigations, this restriction is very neatly loop-holed out of existence.¹⁹ These exceptions, barely facially neutral,

¹⁰ See *In re* Application of the FBI for an Order Requiring the Prod. of Tangible Things from Verizon Bus. Network Servs., Inc., no. BR 13-80, 2 (FISA Ct. Apr. 25, 2013), available at <https://epic.org/privacy/nsa/Section-215-Order-to-Verizon.pdf>.

¹¹ Holder Letter, *supra* note 3, at 3; see FBI, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE 32 (2008) [hereinafter DIOG], available at <http://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/fbi-domestic-investigations-and-operations-guide-diog-2008-version>.

¹² ACLU, UNLEASHED AND UNACCOUNTABLE: THE FBI’S UNCHECKED ABUSE OF AUTHORITY 14 (2013), available at <https://www.aclu.org/sites/default/files/assets/unleashed-and-unaccountable-fbi-report.pdf> (citing DIOG, *supra* note 11, at 32).

¹³ Holder Letter, *supra* note 3, at 3 (quoting DIOG at 33) (internal quotation marks omitted).

¹⁴ ACLU, *supra* note 12 (quoting DIOG, *supra* note 11, at 34).

¹⁵ See *id.* at 14.

¹⁶ *Id.* at 15-17 (noting various ethnicities and nationalities, such as Hispanic, African-American, Chinese, Russian, and their supposed criminal associations based on crude stereotypes used as predicates to unwarranted surveillance of constitutionally protected activities).

¹⁷ U.S. DEP’T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (2003), available at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

¹⁸ Holder Letter, *supra* note 3, at 3. The perversity of racial indications of criminality leads not only to surveillance and targeting of particular individuals based on their guilt by association with others of their own racial or ethnic group—which leads to a particularly wide-range of curtailment of constitutionally protected, everyday activities—but also to myopia regarding who it is that can commit particular crimes, demonstrated by the elimination from law enforcement and popular consciousness of the non-brown domestic terroristic threats represented by men like Ted Kaczynski, Timothy McVeigh, or the Covenant, the Sword and the Arm of the Lord.

¹⁹ Holder Letter, *supra* note 3, at 3; ACLU, *supra* note 12, at 14.

lead to the targeting of Latino populations (given that our most active border is to the south) and Middle Eastern populations (given the colloquial association between terrorism and persons of Middle Eastern origin). Most unfortunately, the historical lack of religious profiling restrictions has led to the further victimization of ethnic and immigrant populations, given the extensive intersection of immigration status and minority religious status (i.e., Islam).²⁰ Middle Eastern Muslim immigrants, for example, already have three strikes against them in the surveillance regime—and as such, their information and personal liberty are likely far from secure.

Often the most mundane of activities are reported under these constitutionally dubious circumstances.²¹ Examples of activities reported by ordinary citizens include Middle Eastern males purchasing large pallets of water, a professor taking photos of buildings for his art class, a Middle Eastern physician neighbor being “unfriendly,” or protestors engaged in a scheduled action sending an email regarding their concerns about the potential for police use of abusive force.²² When the government effectively deputizes its citizens (using untrained persons in pursuit of law enforcement priorities) to become reporting parties,²³ and the law enforcement community engages in blatant profiling without reasonable suspicion, it is inevitable that a large number of innocent persons, groups, and activities will become the subject of unwarranted suspicion and surveillance. Such surveillance not only chills one’s speech and perceived liberty, but may actually change the content of one’s identity.²⁴ Indiscriminate, mass surveillance activities may in fact be causing the United States to miss clues about terrorist activity that might be discovered with more limited, focused monitoring.²⁵

II. WHAT IT IS, AND WHAT IT IS NOT: SURVEILLANCE IN LEGAL HISTORY AND ITS CURRENT LEGAL STATUS

The effectiveness of public surveillance lies in the ability of the state to keep its activities secret. Secrecy, however, is not innate to the state, but is itself a legal construction with a

²⁰ See generally PEW RESEARCH CTR., MUSLIM AMERICANS: NO SIGNS OF GROWTH IN ALIENATION OR SUPPORT FOR EXTREMISM, (2011), available at <http://people-press.org/files/legacy-pdf/Muslim%20American%20Report%2010-02-12%20fix.pdf>. Sixty-three percent of American Muslims are immigrants. *Id.* at 8. Seventy percent of American Muslims identify as non-white, as compared to thirty-two percent of the U.S. population as a whole in 2011. See *id.* at 119.

²¹ Race, color, religion and national origin are all constitutionally protected classes under the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243 (1964) (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (2012)), and citizenship status is protected for employment purposes under the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.).

²² Julia Harumi Mass and Michael German, *The Government is Spying on You: ACLU Releases New Evidence of Overly Broad Surveillance of Everyday Activities*, ACLU (Sept. 19, 2013, 10:15AM), <http://www.aclu.org/blog/national-security-technology-and-liberty/government-spying-you-aclu-releases-new-evidence>.

²³ *If You See Something, Say Something™*, DEP’T OF HOMELAND SEC., <http://www.dhs.gov/if-you-see-something-say-something> (last visited June 29, 2015).

²⁴ Frank Rudy Cooper, *Surveillance and Identity Performance: Some Thoughts Inspired by Martin Luther King*, 32 N.Y.U. REV. L. & SOC. CHANGE 517, 536-38 (2008).

²⁵ Ellen Nakashima, *Snowden: Mass Surveillance is Backfiring on U.S. Efforts to Combat Terrorism*, WASH. POST (Mar. 10, 2014), http://www.washingtonpost.com/world/national-security/snowden-mass-surveillance-is-backfiring-on-us-in-effort-to-combat-terrorism/2014/03/10/61573dfa-a877-11e3-8d62-419db477a0e6_story.html.

tumultuous, and unwarrantedly successful, history in American law. Moreover, the decisions about what to keep secret—far from being matters of democratic debate—have been left to the agencies producing the information and standing to lose the most if it is revealed. The lack of judicial review and oversight and the fragmentation of the intelligence community, combined with a culture of rampant secrecy, have created a nebulous, constitutionally dubious status quo.²⁶

The privilege of the state to keep particular matters secret extends far back into our monarchical roots. In 2007, in *In re Sealed Case*, the D.C. Circuit reminded us that a state secrets privilege has long been recognized²⁷—coded phrasing that implies the privilege is a matter of English common law.²⁸ Various authors have located this privilege in traditions shielding the internal machinations of royal courts from the plebian view, and to kings refusing to allow certain debates to take place in Parliament.²⁹ The state secret privilege was not explicitly adopted in the United States until 1953, in *United States v. Reynolds*,³⁰ when government lawyers brought it to bear with great force, refusing to comply with judges' orders to produce materials for examination, even *ex parte, in camera*, citing the danger to national security that such information would cause.³¹ The Supreme Court, somewhat reluctantly, decided in favor of the government³² and conducted, in that single case, the last serious examination of state privilege in the American legal system.³³

Importantly, members of the family that raised the initial suit would later come to discover that the information, allegedly so detrimental to national security and so heavily relied upon by the government, was not so sensitive after all.³⁴ Mr. Reynolds, upon whose death the above suit was based, had died in a mysterious plane crash.³⁵ After the documents were declassified, it turned out that the B-29 in which he was flying was simply an accident-prone airplane, and that the engine had flamed out mid-flight.³⁶ There were, in other words, no state secrets to protect—only liability to avoid. The shaky ground upon which state secrecy stands in the United States has very well predicted the quality of the dubiously “high-value” information that it has shielded for over sixty years.

The McCarthyism of the 1940s and 1950s quickly seized on this newfound power, and

²⁶ See *In re Application of the FBI for an Order Requiring the Prod. of Tangible Things* no. BR 14-01, at 6 (FISA Ct., Feb. 5, 2014).

²⁷ *In re Sealed Case*, 494 F.3d 139, 143 (D.C. Cir. 2007).

²⁸ 26 KENNETH W. GRAHAM, JR., CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE EVID.* § 5663 (2015) [hereinafter *Privileges*].

²⁹ *Id.*

³⁰ *United States v. Reynolds*, 345 U.S. 1, 4-5 (1953).

³¹ *Reynolds v. United States*, 192 F.2d 987, 989-90, 997 (3d Cir. 1951), *rev'd* 345 U.S. 1 (1953); see Barry Siegel, *A Daughter Discovers What Really Happened*, L.A. TIMES, (Apr. 19, 2004), <http://articles.latimes.com/2004/apr/19/nation/na-b29parttwo19>.

³² *Reynolds*, 345 U.S. at 6-7, 11-12.

³³ See generally Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99 (2007).

³⁴ *Privileges*, *supra* note 28.

³⁵ *Reynolds*, 345 U.S. at 2.

³⁶ *Privileges*, *supra* note 28.

used it to its extremes.³⁷ Freed from the responsibility to share its actions publicly, the FBI began to rampantly abuse its strategic capacities.³⁸ The most well-studied aspect of these activities is the FBI's COINTELPRO, or Counter Intelligence Program.³⁹ Exposed by a break-in to an FBI field office in Pennsylvania,⁴⁰ COINTELPRO was the heart of the Bureau's "duty to do whatever [wa]s necessary to combat perceived threats to the existing social and political order."⁴¹ The FBI engaged in surveillance and infiltration of groups advocating for social change;⁴² disseminated false information about various groups to discredit and sow animosity amongst them through regular media and planted agents;⁴³ created and released documents purporting to come from various targeted groups that painted them and their ends in a negative light;⁴⁴ fostered discord between various previously coordinating groups or within groups;⁴⁵ used false arrest and testimony to displace and disorganize leadership and deplete group resources through legal battles;⁴⁶ and was complicit in the organization of the assault and murder of prominent group

³⁷ Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1078 (2002).

³⁸ *Id.* at 1079.

³⁹ *Id.* at 1060.

⁴⁰ Mark Mazzetti, *Burglars Who Took On F.B.I. Abandon Shadows*, N.Y. TIMES (Jan. 7, 2014), <http://www.nytimes.com/2014/01/07/us/burglars-who-took-on-fbi-abandon-shadows.html>.

⁴¹ Saito, *supra* note 37, at 1078-79; SENATE SELECT COMM. TO STUDY GOV'T OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, SUPPLEMENTAL DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, book III, at 3 (2d Sess. 1976) [hereinafter SENATE SELECT COMM.].

Professor Saito provides an excellent and thorough background of oppression by and shadowy activities of government agents intent on disturbing movements for change. A fuller history may be obtained in that article, which provided invaluable background, and from which the authors drew heavily with respect to orientation and historical sources for this Article.

⁴² The FBI intended to induce a state of paranoia and self-doubt, neatly summarized in J. Edgar Hoover's famous desire that he wanted his targets believe there was "an FBI agent behind every mailbox." Saito, *supra* note 37, at 1081-82.

⁴³ *Id.* at 1082.

⁴⁴ *Id.* Illustratively, the FBI commissioned a coloring book on behalf of the Black Panther Party that "promot[ed] racism and violence" and "mailed copies to companies which had been contributing food to the Panthers' Breakfast for Children program to get them to withdraw their support." *Id.*

⁴⁵ SENATE SELECT COMM., *supra* note 41, at 40. The report discussed COINTELPRO's strategies for creating tension between groups:

Approximately 28% of the Bureau's COINTELPRO efforts were designed to weaken groups by setting members against each other, or to separate groups which might otherwise be allies, and convert them into mutual enemies. The techniques used included anonymous mailings (reprints, Bureau-authored articles and letters) to group members criticizing a leader or an allied group; using informants to raise controversial issues; forming a "notional"—a Bureau-run splinter group—to draw away membership from the target organization; encouraging hostility up to and including gang warfare, between rival groups; and the "snitch jacket" [(attribution of being a police informant)].

Id. (footnote omitted).

⁴⁶ Saito, *supra* note 37, at 1084-85. One of the best examples includes:

leaders, regular members, and leaders' families—including children as young as one year old.⁴⁷ Contemporary commentators have noted that “the Bureau set out to destroy black leaders simply because they were black leaders,” and at least one historian, David Garrow, has noted the “strongly conservative” bent of the FBI, its employees’ right-wing inclinations, and thus the influence that their political proclivities had on the Bureau’s political and operational stance.⁴⁸ The secrecy under which the FBI was able to operate fostered a concept of invincibility at the same time that, without a check on its exercise of power, encouraged abuses that would never have been considered, if the watchful eye of the public and press had been allowed to remain on them.⁴⁹

Since that time, many of the more egregious abuses have either subsided or not yet come to light.⁵⁰ However, the American intelligence regime continues to suffer from a lack of definitional, operational, and oversight coherency.⁵¹ The Supreme Court has yet to fully define the

Los Angeles [Black Panther Party (“BPP”)] leader Geronio ji Jaga (Pratt), who was the subject of constant surveillance and numerous failed attempts to convict him of various crimes. Finally, in 1972, the government succeeded in convicting him of the 1968 “tennis court” murder of a woman in Santa Monica on the basis of the perjured testimony of an FBI informant, and despite the fact that the FBI, thanks to its surveillance, knew that Pratt had been 350 miles away at a BPP meeting in Oakland at the time of the murder.

Id. at 1086.

⁴⁷ *Id.* at 1087-88.

[T]he FBI provided direct support to the self-proclaimed “Guardians of the Oglala Nation” or “GOONS” on the Pine Ridge Reservation in South Dakota who have been implicated in the “unsolved” deaths of at least seventy individuals associated with [the American Indian Movement (“AIM”)] between 1972 and 1976. Particularly chilling is the fate of the family of John Trudell, AIM’s last national chairman:

In February 1979, Trudell led a march in Washington, D.C. to draw attention to the difficulties the Indians were having. Although he had received a warning against speaking out, he delivered an address from the steps of the FBI building on the subject of the agency’s harassment of Indians . . . Less than 12 hours later, Trudell’s wife, Tina, his three children [ages five, three and one], and his wife’s mother were burned alive in the family home in Duck Valley, Nevada—the apparent work of an arsonist.

Id. (alterations in original) (quoting WARD CHURCHILL & JIM VANDER WALL, *AGENTS OF REPRESSION: THE FBI’S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT*, 361 (2d ed. 2002) (quoting another source)).

⁴⁸ Paul Le Blanc, *Revolutionary Road, Partial Victory: The March on Washington for Jobs and Freedom*, 65 MONTHLY REV. (Sept. 2013), <http://monthlyreview.org/2013/09/01/revolutionary-road-partial-victory/>.

⁴⁹ See generally PHILIP ZIMBARDO, STANFORD UNIV., *THE STANFORD PRISON EXPERIMENT: A SIMULATION STUDY OF THE PSYCHOLOGY OF IMPRISONMENT CONDUCTED AUGUST 1971 AT STANFORD UNIVERSITY*, available at http://web.stanford.edu/dept/spec_coll/uarch/exhibits/Narration.pdf (illustrating the meditative effects of watchful authority—and the extremes to which unsupervised people in positions of power can go). It is of particular note that overnight, when the persons playing the role of “guard” were under the impression they were not being watched, the abuses observed escalated immensely in both type and severity. See Ronald Hilton, *US Soldiers’ Bad Behavior and Stanford Prison Experiment*, WORLD ASS’N INT’L STUD., http://wais.stanford.edu/War/war_05152004.htm (last visited June 29, 2015).

⁵⁰ See Saito, *supra* note 37, at 1102-04.

⁵¹ See generally Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. 575, 588-604 (2010).

Constitution's prohibitions on surveillance.⁵² Although confronted with the notion in at least two major cases,⁵³ the Court has not determined whether electronic surveillance (now the vast majority of surveillance) "involving the national security" or "with respect to the activities of foreign powers, within or without this country," is entitled to constitutional review.⁵⁴ Although the latter failure of distinction seems innocent enough, the Foreign Intelligence Surveillance Act ("FISA") of 1978 defines an "agent of a foreign power"—who is not, as of yet, constitutionally protected—to be anyone who "acts for or on behalf of a foreign power which engages in clandestine activities in the United States contrary to the interests of the United States"⁵⁵ Again, this seems innocuous enough. But in practice, agents of foreign powers are defined to include both official representatives of a nation as well as any foreign terrorist organization, a U.S. citizen or permanent resident who has committed certain crimes, or (per the National Security Law Unit, the FBI's non-criminal general counsel) any person not a citizen or permanent resident who has a connection with a foreign power.⁵⁶

Remarkably, the U.S. government is also allowed to deny that it is denying access to information. The Freedom of Information Act ("FOIA") is the primary tool by which citizens and public organizations gain access to government information that would otherwise be kept from the public eye.⁵⁷ The government is required to supply records responsive to citizen requests, with a certain number of exceptions. When invoking an exception, the government is nominally supposed to supply a description of the information withheld. However, even information regarding the withholding of documents may now be withheld.⁵⁸ This leeway, magnified by the ability of the government to keep "national security" information a secret from nearly all parties (including persons under investigation), gives almost complete *carte blanche* to the FBI—and any other agency—to electronically surveil most people anywhere, at any time, with near unaccountability.

Human intelligence—intelligence gathered by people who hear and see things themselves—provides the other primary inroad for surveilling agencies, and has already been exempted from First and Fourth Amendment protection.⁵⁹ Since the days of Jimmy Hoffa, the

⁵² See *id.* at 589-90.

⁵³ *Katz v. United States*, 389 U.S. 347, 349 (1967); *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 299 (1972).

⁵⁴ Rascoff, *supra* note 51, at 589-90.

⁵⁵ Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801(b)(1)(B) (2013).

⁵⁶ Michael P. Robotti, *Grasping the Pendulum: Coordination Between Law Enforcement and Intelligence Officers Within the Department of Justice in a Post-"Wall" Era*, 64 N.Y.U. ANN. SURV. AM. L. 751, 767 & n.125, 780 (2009).

⁵⁷ See 5 U.S.C. § 552(a)(1)(A) (2013).

⁵⁸ *ACLU of New Jersey v. FBI*, 733 F.3d 526, 533-34 (3d Cir. 2013). In *ACLU v. FBI*, the Third Circuit denied a FOIA request for the release of FBI studies regarding the racial and ethnic characteristics of an area based on the claim that the release of such information "could 'reasonably be expected to interfere with [law] enforcement proceedings,'" despite the prohibition on the use of race or ethnicity as a "dominant or primary factor" in its investigations. *Id.* at 531-32. The court rejected as "implausible" that "only disclosure of a 'dominant or primary factor' could impede an FBI investigation," *id.* at 532, potentially opening a Pandora's box of excuses for failing to comply with FOIA requests.

⁵⁹ Rascoff, *supra* note 51, at 591.

Supreme Court has found that, if you engage in speech that the government finds incriminating, you have forfeited your right to privacy (albeit circularly) because the government may be listening in.⁶⁰ The potential criminality of acts discussed preemptively forfeits constitutional protection of their discussion.

Oversight of government surveillance, already largely abdicated by the courts, is weakened further by the myriad of agencies that participate in the gathering of intelligence. The National Security Agency, the National Security Branch of the FBI, the Office of Intelligence and Analysis with the Department of Homeland Security, and the Office of the Director of National Intelligence are among the seventeen different agencies and offices that make up the United States Intelligence Community.⁶¹ Although they meet to coordinate activities and information, each agency operates independently, and brings its own expertise and motives to the table. A number of these agencies are devoted to non-domestic work, which further complicates matters.⁶² Even sub-federal authorities, like the New York City Police Department (“NYPD”), now play a domestic intelligence role.⁶³

Beyond this, the bodies responsible for oversight of these agencies have fractured jurisdictions that fail to exercise effective power over most aspects of public surveillance and cannot provide a coherent picture of the scope of American domestic intelligence programs. No particular body is charged with oversight of intelligence as a whole. The Foreign Intelligence Surveillance Court (“FISA Court”) only has an *ex ante* role in the determination of the sufficiency of an application for intelligence-gathering on a particular individual, group, or situation, and has no competency for follow-up with the investigation that results from its decision.⁶⁴ On the other end of the continuum of investigation, civil suits are also difficult to bring: most people who have been surveilled have no idea that surveillance is happening; it is difficult to prove an injury to obtain standing; and the state secrets doctrine hamstring any lawsuit before it can substantively begin.⁶⁵ Even in Congress, where there is supposed to be active oversight in place, committees are weak; limited terms and purviews prevent the development of expertise in the field; investigations generally only occur where there has been a public issue raised already; oversight committees generally lack budgeting authority, which effectively declaws any enforcement strategy; and the committees are miniscule compared to, yet just as fractured as, the agencies they purport to oversee.⁶⁶ Although pressure against these activities, a push for stronger regulations, and reduced

⁶⁰ *Id.* n.50 (citing *United States v. White*, 401 U.S. 745, 752 (1971); *Hoffa v. United States*, 385 U.S. 293 (1966)).

⁶¹ *Id.* at 593, 598 & n.84 (citing Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1662 (2006)); *Our Strength Lies in Who We Are*, INTELLIGENCE.GOV, <http://www.intelligence.gov/mission/member-agencies.html> (last visited June 29, 2015) (listing the seventeen U.S. agencies and offices that comprise the Intelligence Community).

⁶² See Rascoff, *supra* note 51, at 593.

⁶³ Adam Goldman & Matt Apuzzo, *Informant: NYPD Paid Me to “Bait” Muslims*, ASSOCIATED PRESS (Oct. 23, 2012), <http://www.ap.org/Content/AP-In-The-News/2012/Informant-NYPD-paid-me-to-bait-Muslims>.

⁶⁴ Rascoff, *supra* note 51, at 594-95. The FISA Court, in 2007, denied only three of the more than 2,300 warrant applications they were presented with which, although high, is “comparable to federal approval rates for search warrants more generally.” *Id.* at 595 n.70.

⁶⁵ Rascoff, *supra* note 51, at 596.

⁶⁶ *Id.* at 596-98.

informational accessibility is starting to build from within the government,⁶⁷ the monitoring bodies themselves are not always immune from the very surveillance they are supposed to be regulating. This was recently evidenced by the highly publicized findings of the U.S. Central Intelligence Agency (“CIA”) Office of the Inspector General’s report, completed on July 18, 2014, which found that CIA employees improperly accessed or caused access to Senate Select Committee on Intelligence files and email.⁶⁸

Intelligence and surveillance practices that the United States Intelligence Community engages in are kept secret based on a dubious legal footing. This secrecy is compounded by the organization of intelligence services in the United States, which, as explained above, is fractured among seventeen different agencies and offices, with no central coordination or responsible body.⁶⁹ Add to this the exceptions to public oversight; a rubberstamp warrant court with no follow-through authority; similarly confused and somewhat perpetually amateur toothless Congressional oversight; and a public unaware of and legally unable to redress the violations of its rights; and the result is an intelligence apparatus so fragmented and disorganized that it is nearly impossible to monitor or control. Without a tight rein, it is historically apparent that government intelligence agencies give in to some of their basest political and strategic desires, and engage in dubiously legal, and outright illegal, activity.

III. MODERN SURVEILLANCE: SURVEILLANCE SINCE 9/11

However disorganized it may be, the American surveillance regime is very effective at certain components of its job, regardless of their legality. The FBI and other agencies regularly map everyday activities, targeting ethnic communities and engaging in blatant, if sometimes seemingly innocent, racial profiling. Such programs invade the privacy of millions of Americans under no justifiable pretense. An examination of what the government looks for, and how it approaches the information it is seeking, can explain—though not excuse—the type of information they are currently gathering.

The NYPD has been one of the more active domestic intelligence gathering services for which we have extensive information. In his complaint against the NYPD, Hamid Raza quotes the NYPD Radicalization Report’s admonition to monitor “[e]nclaves of ethnic populations that are largely Muslim [that] often serve as ‘ideological sanctuaries’ for the seeds of radical thought.”⁷⁰ Warning of the dangers posed by middle-class families, college students, unemployed persons, first, second, and third generation immigrants, alongside persons suspected of criminal conduct, the Radicalization Report notes that the NYPD watches “radicalization incubators”—mosques, “cafes, cab driver hangouts, flophouses, . . . student associations, nongovernmental organizations,

⁶⁷ See generally PRESIDENT’S REVIEW GROUP ON INTELLIGENCE AND 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.

⁶⁸ Summary of Report, CIA Office of Inspector General (July 31, 2014), available at <http://images.politico.com/global/2014/07/31/cia-senateigrdisumm.pdf>.

⁶⁹ See Rascoff, *supra* note 51, at 593, 598 & n.84 (citing Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1662 (2006)).

⁷⁰ Complaint at 5, Raza v. City of New York, 998 F. Supp. 2d 70 (E.D.N.Y. 2013) (No. 13 Civ. 3448) (first alteration in original).

hookah bars, butcher shops, and book stores.”⁷¹ Most egregiously, it identifies as “radicalization indicators” the wearing of traditional Islamic clothing, beard growth, alcohol abstention, and “becoming involved in social activism and community issues,”—all of which are First Amendment-protected activities, and none of which inherently indicate criminality or terroristic activity.⁷² Put another way, even if a person engaging in these activities was plotting a terrorist action, these activities themselves would not substantiate a conclusion, one way or another. The complaint also reveals that the NYPD engaged in mapping “ancestries of interest,” including twenty-eight different nationalities and regions in addition to “American Black Muslims.”⁷³

The FBI engages in similarly broad mapping of ethnic communities in Georgia. The ACLU of Georgia obtained FBI documents that revealed the mapping of various ethnic populations in Atlanta and the surrounding region, as well as the mundanity of the activities in which they are engaged that apparently warrant suspicion.⁷⁴ The FBI was monitoring the “Black Separatist Threat” by noting rallies opposing the police killings of African Americans in Atlanta; noting dated eight-year-old information that a prominent Nation of Islam official had operated in Atlanta, and that “[i]n December 2001, . . . there [was] a strong alliance between the Crips and NBPP [the New Black Panther Party] in Atlanta”; and outlining the population percentages of African Americans through time and their projected growth in the future.⁷⁵ Another document appears to track the activities and nationalities of students and others in technological businesses, noting the types of immigrants in Atlanta, recent census data, and various technical and scientific conferences in the area, concluding with a list of U.S. military installations in the Atlanta area.⁷⁶ Other documents reveal assessments of the numbers of foreign-born persons in Atlanta;⁷⁷ “moderate confidence” information about the existence of Hizballah in Atlanta, which presumably relies partly on demographic and census information for support;⁷⁸ and an extensive look at the presence of persons of a variety of Latino nationalities, justified by the presence of some persons of those nationalities in the gang Mara Salvatrucha (“MS-13”)—also noting the use of deportation as an alternative means of threat elimination when information is insufficient to

⁷¹ *Id.* at 5-6 (internal quotation marks omitted).

⁷² *Id.* at 6.

⁷³ *Id.* The complaint listed the following countries and regions: “Afghanistan, Albania, Algeria, Bahrain, Bangladesh, Chechnya, Egypt, Guyana, India, Indonesia, Iran, Iraq, Jordan, Lebanon, Libya, Morocco, Pakistan, Palestine, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, the United Arab Emirates, Uzbekistan, Yemen, and Yugoslavia,” and noted that “[a]ll but three of these countries or regions have majority Muslim populations. One of those remaining three countries—India—is home to eleven percent of the world’s Muslim population.” *Id.*

⁷⁴ Letter from David M. Hardy, Section Chief, Record and Information Dissemination Section, Records Management Division, FBI, to Azadeh Shahshahani (Dec. 22, 2010) (on file with author). Documents sent with this letter in response to Shahshahani’s FOIA request are hereinafter referred to as “2010 FOIA.”

⁷⁵ 2010 FOIA, Document ACLURM011454 (Oct. 7, 2009), available at <https://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011454.pdf>.

⁷⁶ 2010 FOIA, Document ACLURM011477 (Oct. 23, 2009) (noting that FBI Atlanta hosts a “monthly Counterintelligence Working Group (CIWG) and a quarterly Region 5 CIWG in which all USIC partners participate.”), available at [aclu.org/files/fbimappingfoia/20111019/ACLURM011477.pdf](https://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011477.pdf).

⁷⁷ 2010 FOIA, Document ACLURM011418 (May 11, 2009), available at <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011418.pdf>.

⁷⁸ 2010 FOIA, Document ACLURM011403 (Jan. 30, 2009), available at <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011403.pdf>.

warrant criminal prosecution.⁷⁹ These local assessments, coupled with similar assessments across the country,⁸⁰ exhibit the blatant use of ethnic and demographic information as a primary component of domestic security threat assessments by the FBI.

What is clear from the manner of these assessments is that investigations by the FBI are no longer performed based on criminal predicates, but rather ethnic and demographic characteristics of communities of color that have some stereotypical and unfounded social association with particular types of crime. This predictive assessment very closely resembles another scientific practice that presents a host of uncomfortable metaphorical conclusions: “disease surveillance” by epidemiologists.⁸¹ Epidemiologists study diseases within a population with the aim of curtailing their spread and eliminating their presence within that population. Broad-based public surveillance efforts, like epidemiological studies, collect large quantities of simple information on as many individuals within a community as possible to determine behavioral patterns that may lead to the discovery of the “disease path,” or the transmission of the pathogen to be eliminated—or in the case of public surveillance: potential terrorist threats.⁸² Although dangers to personal privacy could be ameliorated by anonymizing the information gathered, the very presence of such “personal vectors” within the information available to an agency exposes individuals to severe threats to personal liberty should those gathering the information ever cease to self-monitor. Intelligence agencies are demonstrably vulnerable to this flaw, if past practice is any indicator. The FBI engages in these types of assessments under the name “domain management.”⁸³ The goal of domain management is to acquire an understanding of the threats and vulnerabilities within a territory. Tellingly, such threats were sometimes initially assessed through analysis based partly on the hope that “sales records of Middle Eastern food would lead to Iranian terrorists.”⁸⁴

The U.S. domestic security apparatus, as part of the war-on-terror paradigm, seems to be stuck in a wartime footing that demands dramatic, extensive surveillance as part of the guarantee of American security.⁸⁵ As is apparent from the FBI and NYPD investigations revealing the

⁷⁹ 2010 FOIA, Documents ACLURM011388 (Dec. 15, 2008), available at <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011388.pdf>.

⁸⁰ *ACLU Eye on the FBI: The FBI Is Engaged in Unconstitutional Racial Profiling and Racial “Mapping.”* ACLU (Oct. 20, 2011), https://www.aclu.org/sites/default/files/field_document/aclu_eye_on_the_fbi_alert_-_fbi_engaged_in_unconstitutional_racial_profiling_and_racial_mapping_0.pdf (“Without any evidence of actual wrongdoing and based on a generalized and entirely unsubstantiated threat assertion, the Detroit FBI sought to collect information about Middle-Eastern and Muslim communities in Michigan.”). In addition, Russian and Chinese populations in San Francisco were similarly targeted because they were of significant size and there has “been organized crime [within this community] for generations.” *Id.* Furthermore, the investigations into MS-13 in Georgia were duplicated in at least Alabama and New Jersey. *Id.*

⁸¹ Rascoff, *supra* note 51, at 605-13.

⁸² *See id.* at 610-11.

⁸³ *See* FBI, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE, at 15-3 (2011), available at <https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIQG%29/fbi-domestic-investigations-and-operations-guide-diog-2011-version/fbi-domestic-investigations-and-operations-guide-diog-october-15-2011-part-01-of-03/view>.

⁸⁴ Jeff Stein, *FBI Hoped to Follow Falafel Trail to Iranian Terrorists Here*, CONG. Q. HOMELAND SEC., Nov. 2, 2007, available at Westlaw 2007 WLNR 21995390.

⁸⁵ Victor Bascara, *Cultural Politics of Redress: Reassessing the Meaning of the Civil Liberties Act of 1988*

targeting of ethnic, national, and religious communities, there have been significant recent trends in investigation correlating criminality with certain ethnic characteristics. Profiling has occurred not merely because a racial, ethnic, national, or religious characteristic has been used to identify a target for surveillance, but rather because those characteristics have been used as substitutes for individualized investigation into, or particularized information about, the potential for criminality within a particular group or of individual persons. Thus, race is being used as a signal of criminality, not a descriptor of an individual.⁸⁶

Discrimination and discriminatory legal wrangling is no stranger to the American scene. From the expulsion of Native American tribes in violation of treaty obligations, to the three-fifths clause of our Constitution, to internment of Japanese-Americans during World War II, the U.S. government has taken sweeping actions to “secure” this country for its nominally (and inconsistently) “white” citizenry to the detriment of people of color and immigrants. Modern expressions of these tactics have manifested in discriminatory enforcement against, and searches of, populations of people of color and immigrants (in spite of the fact that actual drug possession rates do not significantly differ between races⁸⁸ and rates of usage for some drugs are twice as high for Caucasians as they are for non-Caucasian populations⁸⁹), disproportionate arrest⁹⁰ and imprisonment of people of color and immigrants,⁹¹ and now the targeting of ethnic and religious minority populations for surveillance and control.

Discrimination is also part of law enforcement outside of the security realm, particularly in the field of immigration. People from certain nations have been targeted for intensified identification measures, “voluntary” interviewing, discriminatory deportation, and baseless detention.⁹² During the ambit of the National Security Entry/Exit Registration System, immigrants from Muslim and Arab countries experienced an increase in deportation that was nearly ten times

after 9/11, 10 ASIAN L.J. 185, 185-86 (2003) (noting the hysteria that surrounded the treatment of Americans—both citizens and immigrants—who shared the nationality of a country with which the United States was at war and their treatment, including years of internment, deprivation of property and disruption of lives in every way possible, in the pursuit of American security).

⁸⁶ Deborah A. Ramirez, Jennifer Hoopes & Tara Lai Quinlan, *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1210-17 (2003).

⁸⁷ See Sam Roberts, *A Nation of None and All of the Above*, N.Y. TIMES, (Aug. 16, 2008), nytimes.com/2008/08/17/weekinreview/17roberts.html?_r=0 (discussing how the definition of “white” in America has been adapted through time).

⁸⁸ Ramirez, Hoopes & Quinlan, *supra* note 86, at 1211-12.

⁸⁹ See *List of Available Quick Tables for the National Survey on Drug Use and Health, 2011*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., http://www.icpsr.umich.edu/quicktables/quickconfig.do?34481-0001_all (providing links to create tables based on drug use and respondent characteristics of users, including race and ethnicity).

⁹⁰ Jamie Fellner, *Race, Drugs and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 271-72 (2009) (noting that in the United States, blacks were arrested at 3.5 to 3.9 times the rate of whites in recent years, and at five times the rate of whites from 1988 to 1993).

⁹¹ HEATHER C. WEST, U.S. DEP’T OF JUSTICE, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES 2 (2010), available at <http://www.bjs.gov/content/pub/pdf/pim09st.pdf> (finding that black males are incarcerated at six times the rate of white males).

⁹² See B.J. Smith, *Emma Lazarus Weeps: State-Based Anti-Immigration Initiatives and the Federalism Challenge*, 80 UMKC L. REV. 905, 915 (2012).

the average increase for immigrants from other countries.⁹³ Laws that permit law enforcement officers to detain suspected undocumented residents on a “reasonable suspicion” allow for extended detention of members of the public not accused of criminal activity.⁹⁴ “Show-me-your-papers” laws that require documentation of immigration status impose significant burdens on many immigrants and interfere with national uniformity of immigration systems.⁹⁵ Some states have even enacted laws that allow police officers to arrest an individual on “the probable belief that a person has committed a public offense that makes him or her removable from the United States.”⁹⁶ Removability determinations require due process, and are difficult for many experienced decision makers to handle, let alone untrained police officers without the necessary legal knowledge. Such statutory provisions serve as little more than a pretext to profile and harass immigrants and people of color.

IV. FBI GUIDELINES

Attorney General Edward Levi first devised an internal protocol⁹⁷ (known as the “Levi Guidelines”) for FBI domestic security investigations in 1976 in response to public criticism.⁹⁸ Allison Jones articulates the reasons for the criticism:

Attorney General Levi created the FBI guidelines to protect the liberties of U.S. citizens from the internal, domestic threats of President Nixon’s abuses of power. The executive power, extended to the Attorney General and the FBI by law, allowed President Nixon’s and previous administrations to conduct at-will and without predicate the kinds of investigations typically applied to suspects of criminal activity for the purpose of indictment. The FBI did not implement a formal court process, nor was there any set of rules governing the FBI’s requirement to establish probable cause before commencing an investigation. Under these practices, the abuses later uncovered by Attorney General Levi and the investigatory committees appointed by Congress included: secret surveillance of individuals opposing the Vietnam War; more than 500,000 files on domestic groups and U.S. citizens of all religions, beliefs, and political affiliations; and most infamously, the compilation of intelligence information and the surveillance of the National Association for the Advancement of Colored People (NAACP) and civil rights activists like Martin Luther King, Jr.,

⁹³ *Id.*

⁹⁴ *Id.* at 923.

⁹⁵ *See id.* at 924-25.

⁹⁶ *Id.* at 933-34.

⁹⁷ Letter from Edward H. Levi, Attorney General, to FBI Director Clarence M. Kelly (Nov. 4, 1976), reprinted in *FBI Statutory Charter: Hearings Before the S. Comm. on the Judiciary*, 95th Cong., pt. 1, 18, 20-26 (1978) [hereinafter *Levi Guidelines*].

⁹⁸ Shirin Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 *BROOK. L. REV.* 41, 58 (2011).

whom the FBI targeted because he might “abandon his supposed ‘obedience to white liberal doctrines.’”⁹⁹

The Levi Guidelines called for a factual basis for initiating investigations and for additional requirements if the investigation progressed further.¹⁰⁰ Under the Levi Guidelines, agents of the Bureau could launch preliminary investigations only if they possessed information that indicated activities which could be violent or “which involve or will involve the violation of federal law.”¹⁰¹ Preliminary investigations could last only ninety days.¹⁰² If the allegations had no factual basis, as determined by a limited review of public records and interviews, they were to be dropped.¹⁰³ Full investigations had to be predicated on “articulable facts giving reason to believe” that a person or group was engaging in activities that violate federal law.¹⁰⁴ Techniques such as electronic surveillance, informant recruitment, appearances at demonstrations or meetings,¹⁰⁵ and “mail covers”¹⁰⁶ could only be used during full investigations.¹⁰⁷

Former Attorney General Michael Mukasey issued a revised version of the guidelines in 2008.¹⁰⁸ The revisions, which represented the “weakest version” ever issued by an Attorney General, afforded the FBI unprecedented discretion.¹⁰⁹ The Mukasey Guidelines continued the trajectory that began after 9/11: “[p]urported ‘national security’ initiatives continue to trump the individual rights of U.S. citizens.”¹¹⁰ The Mukasey Guidelines afford FBI agents discretion to conduct interviews that extend far beyond those allowed under the Levi Guidelines.¹¹¹ The Mukasey guidelines opened the door to “a standard that could conceivably justify interviews initiated to inquire into the religious or political”¹¹² motivations whenever “the circumstances

⁹⁹ Jones, *supra* note 1.

¹⁰⁰ Levi Guidelines, *supra* note 97, at 21-22.

¹⁰¹ *Id.* at 20-21.

¹⁰² *Id.* at 22.

¹⁰³ *See id.* at 60-61.

¹⁰⁴ *Id.* at 22.

¹⁰⁵ The FBI agents’ attendance of public meetings has a chilling effect on free speech. *See generally* Gayle Horn, *Online Searches and Offline Challenges: The Chilling Effect, Anonymity and the New FBI Guidelines*, 60 N.Y.U. ANN. SURV. AM. L. 735 (2005) (evaluating the chilling effect from new internet provisions in the FBI Guidelines on General Crimes).

¹⁰⁶ Through the mail covers system, law enforcement requests that the United States Postal Service record information from the outside of letters and parcels before delivery and send the information to the requesting agency. Ron Nixon, *U.S. Postal Service Logging All Mail for Law Enforcement*, N.Y. TIMES, (July 3, 2013), <http://www.nytimes.com/2013/07/04/us/monitoring-of-snail-mail.html>.

¹⁰⁷ Jones, *supra* note 1, at 142.

¹⁰⁸ ATTORNEY GENERAL’S GUIDELINES FOR DOMESTIC FBI OPERATIONS (2008) [hereinafter MUKASEY GUIDELINES], available at <http://www.justice.gov/sites/default/files/ag/legacy/2008/10/03/guidelines.pdf>.

¹⁰⁹ Sinnar, *supra* note 98, at 58.

¹¹⁰ Jones, *supra* note 1, at 165.

¹¹¹ *See* Sinnar, *supra* note 98, at 59.

¹¹² *Id.*

warrant.”¹¹³ Moreover, the Mukasey Guidelines do nothing to mitigate potential First Amendment violations.¹¹⁴

Former Attorney General Eric H. Holder, Jr. has released his revisions to the guidelines.¹¹⁵ The proposed guidelines expand prohibited profiling to include “religion, national origin, gender and sexual orientation.”¹¹⁶ These prohibited categories would be functionally equivalent to the prohibition on racial profiling. The guidelines raise the standard that agents are required to meet before considering these factors: “unless there is specific, credible information that makes race relevant to a case,” it must be ignored.¹¹⁷ According to Hina Shamsi, an attorney with the ACLU, “Putting an end to [religious profiling] not only comports with the Constitution, it would put real teeth to the F.B.I.’s claims that it wants better relationships with religious minorities.”¹¹⁸

The revised guidelines do however, allow the FBI to map ethnic populations and use that information “to recruit informants and open investigations.”¹¹⁹ Furthermore, the guidelines do “not apply to interdiction activities in the vicinity of the border,”¹²⁰ and thus provide tacit approval to the FBI, the Transportation Security Administration (“TSA”), and Customs and Border Protection (“CBP”) to engage in profiling within the “vicinity” of the border. The “vicinity” of the border is understood to reach 100 miles from any external land or sea boundary, as well as airports and seaports that are located on inland waterways.¹²¹ The guidelines further do not cover state and local enforcement. While the guidelines cover some joint federal and local law enforcement activities,¹²² a nationwide ban on unconstitutional practices is sorely needed.

¹¹³ See MUKASEY GUIDELINES, *supra* note 108, at 16 (2008).

¹¹⁴ Sinnar, *supra* note 98, at 59.

¹¹⁵ Matt Apuzzo, *Profiling Rules Said to Give F.B.I. Tactical Leeway*, N.Y. TIMES, (Apr. 9, 2014), <http://www.nytimes.com/2014/04/10/us/profiling-rules-said-to-give-fbi-tactical-leeway.html>. See also Sari Horwitz, *Justice Dept. Announces New Rules to Curb Racial Profiling by Federal Law Enforcement*, WASH. POST (Dec. 8, 2014), http://www.washingtonpost.com/world/national-security/justice-dept-to-announce-new-rules-to-curb-racial-profiling-by-federal-law-enforcement/2014/12/07/e00eca18-7e79-11e4-9f38-95a187e4c1f7_story.html.

¹¹⁶ Apuzzo, *supra* note 115.

¹¹⁷ Matt Apuzzo, *U.S. to Expand Rules Limiting Use of Profiling by Federal Agents* (Jan. 15, 2014), <http://www.nytimes.com/2014/01/16/us/politics/us-to-expand-rules-limiting-use-of-profiling-by-federal-agents.html>. See also Sinnar, *supra* note 98, at 59.

¹¹⁸ Apuzzo, *supra* note 117.

¹¹⁹ Apuzzo, *supra* note 115. See also U.S. DEP’T OF JUSTICE, GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY 8 (2014) [hereinafter 2014 GUIDANCE], available at <http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>.

¹²⁰ 2014 GUIDANCE, *supra* note 119, at 2 n.2.

¹²¹ See 8 U.S.C. § 1357(a)(3) (2012); 8 C.F.R. § 287.1(b) (2015). See also Customs and Border Protection’s (CBP’s) *100-Mile Rule*, ACLU, <http://legalactioncenter.org/sites/default/files/CBP%20100%20Mile%20Rule.pdf> (last visited June 29, 2015).

¹²² 2014 GUIDANCE, *supra* note 119, at 1.

V. IMPACT OF PROFILING ON CONSTITUTIONAL RIGHTS

Racial profiling is the targeting of individuals based on individuals' "race, ethnicity, religion or national origin."¹²³ Racial profiling in the United States continues to occur, such as stopping people of color for minor traffic violations (often referred to as "driving while black or brown").¹²⁴ In New York City, the police department's "stop and frisk" practices provide another current example of racial profiling.¹²⁵

These examples reflect the continued tension between police power and the Fourth Amendment of the United States Constitution.¹²⁶ The Fourth Amendment "guarantees all people the right to be free from unreasonable searches and seizures and specifies that probable cause must exist before the issuance of a warrant."¹²⁷ If the facts and circumstances before the officer are sufficient "to warrant a man of reasonable caution in . . . belie[ving] that an offense has been . . . committed,' there is probable cause."¹²⁸ Probable cause "indicates that a crime likely has occurred rather than might have occurred."¹²⁹ Law enforcement must "possess fact-based particularized suspicion before they search or seize a person or property."¹³⁰ The search or seizure is often carried "through an official warrant, describing the place to be searched or the thing to be seized."¹³¹ At a minimum, however, officers cannot stop someone without some facts that justify them in doing so.¹³²

Police investigatory stops of both pedestrians and motorists—commonly known as *Terry* stops—must be based on specific, individualized, and articulable facts indicating that criminal or illegal activity might be taking place.¹³³ "This suspicion must be based on specific facts known to the officer, in light of the totality of the circumstances, and cannot stem from a mere hunch or subjective bias"¹³⁴ If reasonable suspicion exists, an officer can perform a *Terry* stop, ask the

¹²³ ACLU, *Racial Profiling: Definition*, <http://www.aclu.org/racial-justice/racial-profiling-definition/> (last visited June 29, 2015).

¹²⁴ *Id.*

¹²⁵ See ELIOT SPITZER, CIVIL RIGHTS BUREAU, THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL (1999), available at <http://purl.org/net/nysl/nysdocs/43037966>.

¹²⁶ See Azadeh Shahshahani, *Immigration and Racial Profiling*, in CULTURAL ISSUES IN CRIMINAL DEFENSE 477, 478-79 (Linda Friedman Ramirez ed., 3d ed. 2010).

¹²⁷ *Id.*; U.S. CONST. amend. IV.

¹²⁸ *Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. 364, 370 (2009) (quoting *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949)) (internal quotation marks omitted); see Shahshahani, *supra* note 126, at 479.

¹²⁹ Shahshahani, *supra* note 126, at 479; ACLU, THE PERSISTENCE OF RACIAL PROFILING IN GWINETT: TIME FOR ACCOUNTABILITY, TRANSPARENCY, AND AN END TO 287(G), at 18 (Azadeh Shahshahani ed., 2010), available at http://www.acluga.org/download_file/view_inline/1504/392/ (citing *Safford*, 129 U.S. at 2639).

¹³⁰ Morgan Cloud, *Quakers, Slaves and the Founders: Profiling to Save the Union*, 73 MISS. L.J. 369, 369 (2003).

¹³¹ Shahshahani, *supra* note 126, at 479 (citing *Payton v. New York*, 445 U.S. 573, 585 (1980)).

¹³² *Id.*; ACLU, *supra* note 129.

¹³³ *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

¹³⁴ Shahshahani, *supra* note 126, at 479; ACLU, *supra* note 129; see *Terry*, 392 U.S. at 21-22.

individual to identify him or herself, and ask what he or she is doing.¹³⁵ A *Terry* stop is different than a full police encounter and, from a constitutional perspective, requires no probable cause because the scope of the police's potential intrusion is curtailed.¹³⁶ "[W]ith probable cause, the officer can seize and arrest the individual. . . [and] if after the stop[] there is no information leading to probable cause, the officer must let the [individual] go."¹³⁷

"It is clear from these constitutional standards that an officer must possess at least some information indicating criminal or illegal activity in order to stop an individual, and even more information[—'probable cause'—]to make an arrest."¹³⁸ While the definitional standard is fuzzy, probable cause is less than a "preponderance of the evidence," which requires at least half of the evidence plus one to be found in favor of the moving party, but more than "reasonable suspicion," which is required to justify a temporary investigative detention.

As Azadeh Shahshahani—one of the authors of this Article—has maintained, these standards illustrate "exactly why racial profiling is problematic from a legal standpoint."¹³⁹ Because "[n]o logical relationship exists between [racial] characteristics and the commission of crimes,"¹⁴⁰ without other information, officers who conduct stops or make arrests based solely on an individual's race or ethnicity do not have probable cause or reasonable suspicion.¹⁴¹

Profiling based on certain forms of expression can chill free speech rights when it effectively becomes a proxy for racial or religious profiling:

The harms associated with First Amendment profiling mirror those arising from explicit racial or religious profiling. Where a form of expression is strongly linked to one's ethnicity, national origin, or religion, government selection of individuals for special scrutiny on account of their expression will "feel" the same as targeting members of that racial or religious group directly.¹⁴²

Professor Frank Cooper argues that identity—and thus, to a degree, one's personality—is composed of both an internal and an external component.¹⁴³ Since what you do is the only representative aspect of who you are, and your identity is to some extent constrained by what it is that you can do, social limitations on your ability to act or speak in certain ways constrain the parameters within which you can construct your identity.¹⁴⁴ Put differently, if you feel as though you cannot act, speak, or associate for fear of surveillance or prosecution, you will avoid those means of self-expression and—due to the social pressure constructing that constraint—your personality will actually be altered. Fear of surveillance creates changes in behavioral patterns

¹³⁵ United States v. Sokolow, 490 U.S. 1, 7 (1989).

¹³⁶ *Id.*; *Terry*, 392 U.S. at 25-26.

¹³⁷ Shahshahani, *supra* note 126, at 479 (footnote omitted); ACLU, *supra* note 129.

¹³⁸ *Id.*

¹³⁹ Shahshahani, *supra* note 126, at 480.

¹⁴⁰ Cloud, *supra* note 130, at 370.

¹⁴¹ Shahshahani, *supra* note 126, at 480; ACLU, *supra* note 129, at 18-19.

¹⁴² Sinnar, *supra* note 98, at 65 (footnote omitted).

¹⁴³ Cooper, *supra* note 24, at 536-38.

¹⁴⁴ *Id.*

that force conformity with status quo personal and political identities.¹⁴⁵

VI. COURT CHALLENGES

Some court rulings have curbed the government's unbridled surveillance. In two class action cases in particular, plaintiffs had claimed that the City of Chicago's police department and the FBI had conducted surveillance of plaintiffs' lawful activities and had gathered the information by unlawful means.¹⁴⁶ Unified in *Alliance to End Repression v. City of Chicago*, the decision evaluated whether the settlement reached by the two actions was equitable.¹⁴⁷ The resulting consent decrees erected strict limitations on how police could conduct surveillance of political activity.¹⁴⁸ The decrees stipulated that the City of Chicago would not conduct investigations solely on the basis of activities protected by the First Amendment and would only target conduct forbidden by criminal law.¹⁴⁹ Decided in 1982 by Judge Getzendanner, the district court held that the two parties' submission of proposed settlement agreements to the court provided plaintiffs with injunctive relief and was "fair, reasonable, and appropriate."¹⁵⁰

In 1986, in *Socialist Workers Party v. Attorney General of the United States*, the Socialist Workers Party alleged wrongdoing by the FBI, including electronic surveillance after the Attorney General classified the party as a subversive organization according to Section V.2.f of Executive Order 9835.¹⁵¹ The court found these activities to be violations of the Socialist Workers Party's constitutional rights.¹⁵² The court went further and awarded the Socialist Workers Party \$42,500 for disruptive activities by the FBI, \$96,500 for surreptitious entries, and \$125,000 for the FBI's use of informants, for a complete recovery of \$264,000.¹⁵³

Decided in 2003, *Handschu v. Special Services Division*¹⁵⁴ was the culmination of a prolonged legal challenge to the maintenance of dossiers on political activists and the use of various undercover and surveillance techniques to monitor the activities of political organizations and individuals in New York City.¹⁵⁵ A consent decree was entered into in 1985.¹⁵⁶ Among its

¹⁴⁵ *Id.*

¹⁴⁶ *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 537, 539-40 (N.D. Ill. 1982) (filed as *Alliance to End Repression v. City of Chicago*, No. 74 C 3268 (N.D. Ill. Nov. 13, 1974), and *ACLU v. City of Chicago*, No. 75 C 3295 (N.D. Ill. Oct. 3, 1975)).

¹⁴⁷ *See generally id.*

¹⁴⁸ *See id.* at 560-71.

¹⁴⁹ *Id.* at 562-64.

¹⁵⁰ *Id.* at 555.

¹⁵¹ *Socialist Workers Party v. Attorney Gen. of U.S.*, 642 F. Supp. 1357, 1363, 1396. (S.D.N.Y. 1986). Executive Order 9835 established the Employee Loyalty Program for civilian employees in the executive branch. *Id.* at 1396.

¹⁵² *Id.* at 1364.

¹⁵³ *Id.* at 1432.

¹⁵⁴ *Handschu v. Special Servs. Div.*, 273 F. Supp. 2d 327 (S.D.N.Y. 2003).

¹⁵⁵ *See Handschu v. Special Services Division (Challenging NYPD Surveillance Practices Targeting Political Groups)*, NYCLU, <http://www.nyclu.org/case/handschu-v-special-services-division-challenging-nypd-surveillance-practices-targeting-politica> (last visited June 29, 2015).

stipulations was a requirement that the NYPD would be prevented from investigating organizations unless there was “specific information” that the organization was intending to commit a crime or that it had committed a crime.¹⁵⁷ Most prominently, the decree also established a system of recordkeeping and procedures for approval of investigations by a three-member body, called the Handschu Authority.¹⁵⁸

Despite these judicial constraints, other cases have allowed government surveillance to continue or expand. In 1982, the Court of Appeals for the District of Columbia Circuit, led by Circuit Judge Harry T. Edwards, held that federal agencies, including the FBI, could withhold certain investigatory information—including how suspects are surveilled—even though the methods used by the FBI may have been improper, as long as the information was created in the pursuit of a law enforcement purpose.¹⁵⁹ As a result, the court did not distinguish the FBI’s documents on its program against “black nationalist groups,” which listed the goals of “prevent[ing] militant black nationalist groups and leaders from gaining respectability by discrediting them,” from other documents with law enforcement purpose.¹⁶⁰

In 1986, in *López-Pacheco v. United States*, the plaintiff claimed that he was injured as a result of FBI surveillance activity.¹⁶¹ The court dismissed the case, holding that the FBI’s activities were of the nature and quality that Congress had shielded from tort liability in the “discretionary function” exception to the Federal Torts Claim Act.¹⁶²

Other court challenges are currently pending. In 2013, the ACLU filed a complaint against the NYPD on behalf of Hamid Hassan Raza and several members of New York’s Muslim community.¹⁶³ The *Raza* complaint accused the NYPD of “engag[ing] in an unlawful policy and practice of religious profiling and suspicionless surveillance of Muslim New Yorkers” since 2002.¹⁶⁴ The complaint maintained that the policy, in theory and practice, targeted Muslims with the justification that their “religious belief and practices are a basis for law enforcement scrutiny.”¹⁶⁵ For example, in the 2007 NYPD Intelligence Division report titled *Radicalization in the West: The Homegrown Threat*, the NYPD identified a discrete “radicalization process” where certain, constitutionally protected expressions of religious belief, such as “wearing traditional Islamic clothing” and “becoming involved in social activism,” are justifying factors in surveillance.¹⁶⁶ In a similar action, *Hassan v. City of New York*,¹⁶⁷ a group of Muslims from New

¹⁵⁶ *Id.* at 331.

¹⁵⁷ *Id.* at 331-32.

¹⁵⁸ *Id.*; Handschu v. Special Services Division (*Challenging NYPD Surveillance Practices Targeting Political Groups*), *supra* note 155.

¹⁵⁹ Pratt v. Webster, 673 F.2d 408, 423-25 (D.C. Cir. 1982).

¹⁶⁰ *Id.* at 422.

¹⁶¹ *López-Pacheco v. United States*, 627 F. Supp. 1224, 1225 (D.P.R. 1986).

¹⁶² *Id.* at 1229-31.

¹⁶³ Complaint, Raza v. City of New York, No. 1:13-CV-03448 (E.D.N.Y. June 18, 2013), available at <https://www.aclu.org/national-security/raza-v-city-new-york-complaint>.

¹⁶⁴ *Id.* at 1.

¹⁶⁵ *Id.*

¹⁶⁶ MITCHELL D. SILBER & ARVIN BHATT, INTELLIGENCE DIV., NYPD, RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT 21, 33 (2007), available at http://www.nyc.gov/html/nypd/downloads/pdf/public_information/

Jersey represented by Muslim Advocates and the Center for Constitutional Rights challenged the NYPD's discriminatory spying program targeting American Muslims. In February 2014, Judge William J. Martini ruled that if the plaintiffs were harmed by the NYPD surveillance, it was a result of the reporting by the Associated Press rather than as a consequence of the secret practice.¹⁶⁸ The decision was appealed following the district court's dismissal.¹⁶⁹

In sum, these cases have established most investigatory practices as beyond practical restraint; even where they remain illegal, they are made legally invisible and thus uncontrollable by the courts.

As former ACLU national staff counsel and CEO of the JFK Library Foundation John H.F. Shattuck has noted, “[p]olitical surveillance . . . has a long and troubled history in the United States.”¹⁷⁰ This history is not about to get any brighter. For instance, instead of discussing modification with class counsel, the NYPD moved for an order modifying the Handschu Guidelines under Federal Rule of Civil Procedure 60(b) to significantly relax the restrictions placed on the NYPD.¹⁷¹ Judge Charles Sherman Haight, Jr. granted many of the NYPD's requested modifications.¹⁷² Judge Haight found significant factual changes since the Guidelines were enacted, noting that “[t]here is no disputing Deputy Commissioner Cohen's assertion that since the formulation of the Handschu Guidelines in 1985, '[t]he world has undergone remarkable changes[] . . . in terms of new threats we face.’”¹⁷³ That the longstanding Handschu lawsuit continues to this day, forty-four years after its inception, is sobering.¹⁷⁴

Such “remarkable changes” will also be the calling card of surveillance that views civil

NYPD_Report-Radicalization_in_the_West.pdf.

¹⁶⁷ Hassan v. City of New York, No. 2:12-3401, 2014 WL 654604 (D.N.J. Feb. 20, 2014), *appeal filed*, No. 14-1688 (3d Cir. Mar. 24, 2014).

¹⁶⁸ Hassan v. City of New York, No. 2:12-3401, 2014 WL 654604, *4 (D.N.J. Feb. 20, 2014).

¹⁶⁹ See Brief for Plaintiff-Appellants, Hassan v. City of New York, No. 14-1688-cv, (3d Cir. Jul. 3, 2014), *available at* <http://ccrjustice.org/files/7-3-14%20Plaintiffs%20Appeal%20Brief%20-%20Hassan.pdf>.

¹⁷⁰ John H.F. Shattuck, *Tilting at the Surveillance Apparatus*, 1 C.L. REV. 59, 59 (1974).

¹⁷¹ See *Handschu*, 273 F. Supp. 2d at 329. The resulting order granted alterations from the Guidelines of the 1985 Handschu Decree in the following respect: under the 1985 Decree, an investigation must have met the substantive threshold of “specific information” that a crime had been or was about to be committed. *Handschu v. Special Servs. Div.*, 605 F. Supp. 1384, 1421 (S.D.N.Y. 1985). Under the modified Handschu Guidelines, which incorporated the FBI Guidelines, a preliminary inquiry can be initiated when there is “information . . . which indicates the possibility of criminal activity.” *Handschu*, 273 F. Supp. 2d at 346 (quoting ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS 1 (2002), *available at* <http://fas.org/irp/agency/doj/fbi/generalcrimes2.pdf>) (internal quotation marks omitted); see also MUKASEY GUIDELINES, *supra* note 108, at 18.

¹⁷² *Handschu*, 273 F. Supp. 2d at 349.

¹⁷³ *Id.* at 337 (quoting Declaration of David Cohen, at ¶ 7 (Sept. 12, 2002)) (second alteration in original).

¹⁷⁴ See, e.g., *Handschu v. Special Services Div.*, No. 71 Civ. 2203(CSH), 2014 WL 407103 (S.D.N.Y. Jan. 30, 2014) (noting unsettled disputes between the parties); *Handschu v. Police Dep't of City of New York*, 905 F. Supp. 2d 555 (S.D.N.Y. 2012) (attempting to resolve dispute over a previous court order); *Handschu v. Special Servs. Div.*, 475 F. Supp. 2d 331, 332 (S.D.N.Y. 2007) (“There will be a Handschu class action and a judge of this Court in charge of it for it as long as New York City stands . . .”), *vacated*, No. 71 Civ. 2203, 2007 WL 1711775, at *1 (S.D.N.Y. June 13, 2007) (noting the case arose from an action filed in 1971).

liberties as obstacles to be overcome rather than respected. There is no doubt that police surveillance of constitutionally protected First Amendment activity will continue into the foreseeable future. The scope of the substantive changes to the Handschu Guidelines is still being litigated, though this battle is a mere microcosm of the larger struggle being waged to define the parameters of constitutional protection. It will likely be years before we can adequately assess the effect of the favorable legal decisions above on civil liberties in an era defined by September 11, 2001. Yet we can safely acknowledge that, despite these successes, recent trends show increased pressure to curtail civil liberties under the aegis of counter-terrorism and counter-intelligence.

VII. RACIAL DISCRIMINATION IN INTERNATIONAL LAW

The war on terror has served as pretext for increasing surveillance on American citizens, based on racial, ethnic, religious, or other status grounds. Racial, ethnic, religious, and political profiling is not only counter to U.S. law and internal Department of Justice directives, but it also contravenes principles of international law.

The United Nations provides extensive recommendations and guidelines on privacy and racial discrimination.¹⁷⁵ The Universal Declaration of Human Rights (“UDHR”) is one such document that establishes a basis for understanding the right to privacy.¹⁷⁶ UDHR Article 12 states: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence. . . .”¹⁷⁷ The rights in the UDHR are to be protected and provided for all persons regardless of race, religion, political association, or other similar status.¹⁷⁸ Although Article 17.1 of the International Covenant on Civil and Political Rights (“ICCPR”) reads similar to UDHR Article 12,¹⁷⁹ ICCPR Article 4 provides some clarification regarding derogation of rights, stating that, in times of emergency, states “may take measures derogating from their obligations” insofar as such measures are consistent with other obligations and “do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”¹⁸⁰ The difficulty in the

¹⁷⁵ Non-governmental organizations also provide guidance. See generally Open Soc’y Justice Initiative et al., *The Global Principles on National Security and the Right to Information (Tshwane Principles)*, ACLU (2013), <https://www.aclu.org/human-rights/global-principles-national-security-and-right-information-tshwane-principles> [hereinafter *Global Principles on National Security*].

¹⁷⁶ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). The UDHR was drafted as a result of the experience of the Second World War and served to complement the UN Charter with a way to guarantee the rights of individuals. It is considered a foundational document for international human rights law.

¹⁷⁷ *Id.* art. 12 (“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.”).

¹⁷⁸ *Id.* art. 2 (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

¹⁷⁹ See *id.* art. 12; International Covenant on Civil and Political Rights, art. 17, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 177 (entered into force Mar. 23, 1976) (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”), available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/v999.pdf>.

¹⁸⁰ International Covenant on Civil and Political Rights, *supra* note 179, art. 4, at 174.

United States is that government officials continually subvert international obligations due to perceived “national security” prerogatives on constitutionally dubious, if nominally legal, grounds.¹⁸¹ The new FBI guidelines will still allow these subversions as they do not apply to all government agencies, including but not limited to the TSA and the CBP.¹⁸² Even in times of war, however, status discrimination is always outside of a government’s permitted tool set.

Aside from violating the rights to privacy, current monitoring practices are founded on the profiling of potential suspects based on racial, ethnic, religious, and other status grounds. The International Convention on the Elimination of Racial Discrimination (“CERD”) sets clear guidelines and recommendations regarding state actions and policies that may rely on racial distinctions.¹⁸³ The CERD defines “racial discrimination” as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.¹⁸⁴

As parties to this treaty, states agree to the definitions therein, and also agree to review governmental policies, and to amend or rescind those that perpetuate racial discrimination.¹⁸⁵ Despite this requirement, the United States has expanded surveillance and intelligence powers and authorizations clearly targeting people based on racial, ethnic, religious, or other status grounds.

VIII. PRIVACY IN INTERNATIONAL LAW

Although the right to privacy is not as absolute as freedom from status discrimination, limitations on privacy are only justified in accord with the provisions and objectives of the ICCPR. In *Toonen v. Australia*, the United Nations Human Rights Committee, the body that monitors the implementation of the ICCPR, explained that it “interprets the requirement of reasonableness [in ICCPR article 17] to imply that any interference with privacy must be

¹⁸¹ International treaties are not self-executing in the United States; they must be approved by Congress and ratified by the President to be executed into law. MICHAEL JOHN GARCIA, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 2-3 (2015), available at <https://www.fas.org/sgp/crs/misc/RL32528.pdf>. In addition, via ratification, countries have the opportunity to place reservations or understandings on the treaties, which can alter the extent of obligations. *Id.* at 3. This means that quite often, treaties can be manipulated so that they are effectively null, even post ratification. *See id.*

¹⁸² *ACLU Response to Revised DOJ Guidance on the Use of Race by Federal Law Enforcement Agencies*, ACLU (Dec. 8, 2014), <https://www.aclu.org/criminal-law-reform-racial-justice/aclu-response-revised-doj-guidance-use-race-federal-law-enforceme>.

¹⁸³ International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, 212.

¹⁸⁴ *Id.* art. 1, at 216.

¹⁸⁵ *Id.* art. 2, at 218 (“Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; . . .”).

proportional to the end sought and be necessary in the circumstances of any given case.”¹⁸⁶ In the case of surveillance, one would need to determine whether perpetual monitoring is necessary and proportionate to the end sought. The end in this case is threat assessment and, should a threat be discovered, attempts at prevention. In the case of perpetual monitoring, the scope is shockingly broad.¹⁸⁷ These means are simply not necessary or proportional to achieve the desired outcome.

Outside of treaties, the international community has crafted a significant number of guidelines regarding privacy and surveillance. More specifically, the United Nations has taken a leading role in defining the right to privacy in the digital age, particularly given the special vulnerabilities of electronic communications and digital identities.¹⁸⁸ The discussion surrounding the right to privacy in the digital age began with a resolution in which the United Nations General Assembly expressed concern about the impact that surveillance has on human rights and affirmed that rights must be protected in online formats just as in real life.¹⁸⁹ The General Assembly also called upon states to:

review their procedures, practices and legislation regarding the surveillance of communications, their interception and the collection of personal data, including mass surveillance, interception and collection, with a view to

¹⁸⁶ *Toonen v. Australia*, U.N. Doc. CCPR/C/50/D/488/1992 (1994), reprinted in 5 U.N. Human Rights Comm., Selected Decisions of the Human Rights Committee under the Optional Protocol 133, 139, U.N. Doc. CCPR/C/OP/5, (2005), available at <http://www.ohchr.org/Documents/Publications/SDecisionsVol5en.pdf> (“[T]he Committee recalls that pursuant to its general comment 16 (32) on article 17, the ‘introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances[.]’ The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.”). See also Human Rights Comm., General Comment No. 16, U.N. Doc. HRI/GEN/1/REV.9 (Vol. I) (Apr. 8, 1988), available at [http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9\(Vol.I\)_GC16_en.pdf](http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9(Vol.I)_GC16_en.pdf).

¹⁸⁷ Letter from ACLU to Eric H. Holder, U.S. Att’y Gen. 3 (Oct. 20, 2011), available at https://www.aclu.org/files/assets/aclu_letter_to_ag_re_rm_102011_0.pdf (“A 2009 FBI Counterterrorism Division ‘Baseline Collection Plan’ obtained by the ACLU through FOIA reveals the broad scope of information the FBI gathers during Assessments and retains in its systems: identifying information (date of birth, social security number, driver’s license and passport number, etc.), telephone and e-mail addresses, current and previous addresses, current employer and job title, recent travel history, whether the person lives with other adults, possesses special licenses or permits or has received specialized training, and whether the person has purchased firearms or explosives.”). Information collected by the FBI Counterterrorism Division may or may not be related to criminal activity. *Id.*

¹⁸⁸ See *The Right to Privacy in the Digital Age*, U.N. OFF. HIGH COMM’R FOR HUM. RTS, <http://www.ohchr.org/EN/Issues/DigitalAge/Pages/DigitalAgeIndex.aspx> (last visited June 29, 2015) (“But at the same time it has become clear that these new technologies are vulnerable to electronic surveillance and interception. Recent discoveries have revealed how new technologies are being developed covertly, often to facilitate these practices, with chilling efficiency. . . . [S]uch surveillance threatens individual rights—including to privacy and to freedom of expression and association—and inhibits the free functioning of a vibrant civil society.”) [hereinafter *United Nations*]; see generally *Global Principles on National Security*, *supra* note 175.

¹⁸⁹ *The Right to Privacy in the Digital Age*, G.A. Res. 68/167, U.N. Doc A/RES/68/167 (Dec.18, 2013), available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/68/167; *United Nations*, *supra* note 188.

upholding the right to privacy by ensuring the full and effective implementation of all their obligations under international human rights law¹⁹⁰

Additionally, the resolution called upon the High Commissioner for Human Rights to prepare a report examining the right to privacy in the digital age.¹⁹¹ The report, issued in June 2014, specifically cites concerns that the U.S. National Security Agency and United Kingdom General Communications Headquarters have, together, created technologies that grant access to a vast amount of global Internet traffic.¹⁹² Furthermore, the report indicates that a significant number of human rights other than the right to privacy have been impacted by digital surveillance practices including, but not limited to, freedom of opinion and expression, family life, and the right to health by the implementation of practices as diverse as torture and drone warfare.¹⁹³ Member states and other stakeholders have expressed concerns with unfettered access to Internet traffic and requested that guidelines be set to ensure security and privacy within reason for all peoples.¹⁹⁴

IX. THE UNITED STATES AND THE INTERSECTION OF INTERNATIONAL LAW, NATIONAL POLICY, AND SOCIAL CONVENTION

Although the United States prides itself on being a (self-appointed) beacon of human rights protection for the international community, its adherence to international human rights

¹⁹⁰ G.A. Res. 68/167, *supra* note 189, at ¶ 4(c).

¹⁹¹ *Id.* at ¶ 5.

¹⁹² U.N. Human Rights Council Rep. of the High Comm'r for Human Rights, The Right to Privacy in the Digital Age ¶ 4, U.N. Doc. A/HRC/27/37 (June 30, 2014), *available at* ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37_en.pdf (“These technologies have reportedly been deployed through a transnational network comprising strategic intelligence relationships between Governments, regulatory control of private companies and commercial contracts.”).

¹⁹³ *Id.* at ¶ 14. In addition, the report also indicates that digital surveillance leads to concerns with compliance with international humanitarian law. *Id.* (“There are credible indications to suggest that digital technologies have been used to gather information that has then led to torture and other ill-treatment. Reports also indicate that metadata derived from electronic surveillance have been analysed to identify the location of targets for lethal drone strikes. Such strikes continue to raise grave concerns over compliance with international human rights law and humanitarian law, and accountability for any violations thereof. The linkages between mass surveillance and these other effects on human rights, while beyond the scope of the present report, merit further consideration.”) The rights referred to in the report include rights as listed in the UDHR, Universal Declaration of Human Rights, *supra* note 176, in addition to the ICCPR (which the United States has ratified), International Covenant on Civil and Political Rights, *supra* note 179, and the International Covenant on Economic, Social and Cultural Rights (to which the United States is a signatory). International Covenant on Economic, Social and Cultural Rights, *opened for signing* Dec. 19, 1966, 933 U.N.T.S. 3, *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%20993/v993.pdf>.

¹⁹⁴ The Right to Privacy in the Digital Age, *supra* note 189. Following on the concerns of member states and other stakeholders at the negative impact of surveillance practices on human rights, in December 2013 the General Assembly adopted resolution 68/167, without a vote, on the right to privacy in the digital age. *Id.* In the resolution, which was co-sponsored by fifty-seven member states, the Assembly affirmed that the rights held by people offline must also be protected online, and called upon all states to respect and protect the right to privacy in digital communication. *Id.*; *see also* U.N. Gen. Assembly, Rep. of the Third Comm., 23-25, U.N. Doc. A/68/456/Add.2 (Dec. 10, 2013), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/68/456/Add.2.

standards leaves much to be desired. The United States voted in favor of the UDHR and has ratified the ICCPR and the CERD, but has placed reservations and understandings on these instruments to ensure that it has room to maneuver around rights protection as necessary, a strategy that is allowable under international law.¹⁹⁵ The United States uses public safety and national security to undermine the effect of provisions pertaining to discrimination, clarifying that the United States guarantees protection for all peoples under the law, yet, in times of emergency, the United States reserves the right to implement distinctions “that may have a disproportionate effect upon persons of a particular status.”¹⁹⁶ Additionally, a U.S. reservation to the CERD denies that the convention can authorize action by the United States that is incompatible with the U.S. Constitution, and ensures that the United States has the power to determine its degree of adherence to conventions by means of domestic precedent based solely on domestic law.¹⁹⁷

The war on terror has caused a shift in the way the U.S. government and American society view war and wartime tactics. This shift to a mindset of constant war has made that which was once exceptional into the status quo, in addition to adjusting the social conceptions that traditionally drew distinct boundaries between war and peace and ratcheting up the level of subversion of rights that is commonly acceptable to the public during times of “war.” The former General Counsel of the U.S. Department of Defense, Jeh Johnson, stated in a speech at Oxford University in 2012 that “[w]ar’ must be regarded as a finite, extraordinary and unnatural state of affairs.”¹⁹⁸ The war on terror, with its unknowable opponent, unattainable objectives, and consequently indeterminate duration, shatters that traditional conception and, with it, the associated norms of governmental behavior and public expectations.

¹⁹⁵ Vienna Convention on the Law of Treaties art. 19, 1155 U.N.T.S. 331, *opened for signature* May 23, 1969.

¹⁹⁶ *Multilateral Treaties Deposited with the Secretary-General, Volume 1, Chapter IV, 4. International Covenant on Civil and Political Rights—Declarations and Reservations*, U.N. TREATY COLLECTION 13, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf> (“That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, prop[erty], birth or any other status—as those terms are used in article 2, paragraph 1 and article 26—to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of article 4 upon discrimination, in time of public emergency, based ‘solely’ on the status of race, colour, sex, language, religion or social origin, not to bar distinctions that may have a disproportionate effect upon persons of a particular status.”). *See also Multilateral Treaties Deposited with the Secretary-General, Volume 1, Chapter IV, 2. International Convention on the Elimination of All Forms of Racial Discrimination—Declarations and Reservations*, U.N. TREATY COLLECTION 9, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-2.en.pdf>.

¹⁹⁷ *Multilateral Treaties Deposited with the Secretary-General, Volume 1, Chapter IV, 2. International Convention on the Elimination of All Forms of Racial Discrimination—Declarations and Reservations*, U.N. TREATY COLLECTION 9 (“The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America.”) (internal quotation marks omitted). By reserving the right to make distinctions based on race, ethnicity, etc., the United States has the ability to circumvent the requirements of the convention and determine and police its own policies. *Reid v. Covert*, 354 U.S. 1, 15-20 (1957) (holding that the U.S. Constitution supersedes international law).

¹⁹⁸ Jeh Charles Johnson, Gen. Counsel of the U.S. Dep’t of Def., *Speech Given at Oxford University: The Conflict Against Al Qaeda and Its Affiliates: How Will It End?* 10 (Nov. 30, 2012), *available at* <http://www.state.gov/documents/organization/211954.pdf>.

The U.S. government has used the war on terror, to justify a number of rights restrictions for U.S. citizens and individuals it has detained on an indefinite basis. This “war” of indefinite duration has served as a justification for torture and the expansion of surveillance powers. Although the derogation of certain rights is allowed during times of certain predefined security crises, its continuation through a perpetual security crisis risks permanent rights infringements, and even the ultimate destruction of rights. The increase in rights abuses and racial targeting on American soil is but a single consequence of perpetual, normalized war.

X. CONCLUSION

The U.S. government has used a heavy hand to sort our nation by color, and continues to do so. The cultural and political motives of control and maintenance of the status quo exhibited during COINTELPRO are also part of the modern surveillance culture, albeit now more often along religious lines and differently drawn ethnic lines. Although current surveillance and intelligence efforts are intense, there have been recommendations, as early as 1970, that they be intensified further.¹⁹⁹ Suggestions ranged from opening physical mail to permitting surveillance of any foreign national “of interest” in the United States, and from increasing group-characteristic studies to ramping up CIA surveillance of American students and others living abroad:

- (1) “coverage by NSA of the communications of U.S. citizens using international facilities;”
- (2) “intensification” of “electronic surveillances and penetrations” directed at individuals and groups “who pose a major threat to the internal security” and at “foreign nationals” in the United States “of interest to the intelligence community;”
- (3) removal of restrictions on “legal” mail coverage and relaxation of “restrictions on covert coverage” [mail opening] on “selected targets of priority foreign intelligence and internal security interest;”
- (4) modification of “present restrictions” on “surreptitious entry” to allow “procurement of vitally needed foreign cryptographic material” and “to permit selective use” against “high priority internal security targets;”
- (5) relaxation of “present restrictions” on the “development of campus sources” to permit “expanded coverage of violence-prone and student-related groups;[”]
- (6) “increased” coverage by CIA “of American students (and others) traveling or living abroad;”

¹⁹⁹ SENATE SELECT COMM. TO STUDY GOV’T OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, book II, at 113 (2d Sess. 1976).

(7) appointment of a “permanent committee consisting of the FBI, CIA, NSA, DIA, and the military counterintelligence agencies” to evaluate “domestic intelligence” and to “carry out the other objectives specified in the report.”²⁰⁰

With more than forty years of evolution of technical capacities, executive power, and group identity politics, it is possible that even more than this would be desired and carried out by the government today.

What becomes apparent during even a brief recap of governmental profiling and biased surveillance activities, coupled with a basic understanding of American history, is that attitudes about race and other identities move freely back and forth between law enforcement and the public. It is no coincidence that anti-Arab and anti-Muslim country sentiments following 9/11 paralleled government action against people of Arab and Muslim-country descent in immigration and surveillance activities, nor that these types of discrimination have faced a lack of popular outcry when limited to immigrant populations and persons of color.²⁰¹ It would be naïve to think the internment of Japanese-Americans during World War II did not have roots in public sentiment about the Japanese, fed in turn at least in part by biased portrayals on mass media. It is also true that many major advances in the protection of civil rights have been fought every step along the way by status quo political forces, and fed by discriminatory social attitudes, in a conflict that ranges through social and political battlefields.²⁰² What has been required to force advancement of civil rights is effective governmental oversight and public information. Certain situations have been easier to monitor—racially segregated schools are fairly obvious. Workplace rights, equal access to public and private businesses, and the new push for equality for queer individuals have been harder to monitor, but are still largely apparent in the public sphere. But the newer types of discrimination and invasions of civil liberties seen here, worked in the relative secrecy of immigration courtrooms, NSA bunkers, and secret, redactable FBI files, are tougher to ferret out. Coupled with a lack of official oversight, it only stands to reason that this discrimination will pervade an intelligence apparatus made up of the very same population that holds, in part, these views.²⁰³

²⁰⁰ *Id.* White House staff assistant Tom Charles Huston made these recommendations, and also recommended the use of covert mail opening even though it was “illegal, and there are serious risks involved,” and the use of surreptitious entry even though it was “clearly illegal” and “amounts to burglary.” *Id.* at 113-14.

²⁰¹ See Nida Khan, *Why People Apparently Don't Care About Muslim Surveillance or Dead Palestinian Kids*, HUFFINGTON POST (Sept. 21, 2014 5:59 AM), http://www.huffingtonpost.com/nida-khan/why-people-apparently-don_b_5607744.html (discussing ties between broad public association of Muslims and Arab populations with terrorism and extremism, and the way in which these populations are generally perceived to deserve the abuses perpetrated against them that are considered more unwarranted when perpetrated against Caucasians or the U.S. population in general).

²⁰² There is also evidence that the longer these surveillance apparatuses continue to exist, the more compliant corporations will become with them. See Glenn Greenwald et al., *Microsoft Handed the NSA Access to Encrypted Messages*, GUARDIAN (July 12, 2013), <http://www.theguardian.com/world/2013/jul/11/microsoft-nsa-collaboration-user-data>. Extensive surveillance might also impact public perception of the acceptability of surveillance systems, even if it doesn't shift individual attitudes towards it, leading to a situation in which people believe, and publicly proclaim, that increasing surveillance is acceptable, even though they might not personally be convinced of it vis-à-vis their own selves. European Parliament Directorate Gen. Internal Policies, Union Policy Dep't C, Citizens' Rights and Constitutional Affairs, *A Review of the Increased Use of CCTV and Video-Surveillance for Crime Prevention Purposes in Europe 9* (Apr. 2009), available at <http://www.statewatch.org/news/2009/apr/ep-study-norris-cctv-video-surveillance.pdf>.

²⁰³ See generally Le Blanc, *supra* note 48 (showing that the type of people who populate the FBI has had an appreciable impact on the manner in which the agency pursued its tasks).