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### National Security Law: Up Close and Personal, An Introduction

Robert Knowles

*Valparaiso University Law School*

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# Symposium

## NATIONAL SECURITY LAW: UP CLOSE AND PERSONAL

### AN INTRODUCTION

Robert Knowles\*

In its 2014 Annual Symposium, entitled *National Security: Up Close and Personal*, the Valparaiso Law Review gathered scholars and practitioners to discuss the ways in which the United States government's exercise of national security powers intersects with the private lives of American citizens and people around the world. The panels comprised speakers with diverse roles and diverse perspectives, including former prosecutors, former government officials, and counsel for defendants accused of terrorism.

The symposium participants grappled with one of the most difficult legal questions of our time: when advances in communication and globalization have so blurred the lines between what is foreign and what is domestic, can the special deference traditionally given to executive branch authority in the realm of national security still be justified?

To be sure, the boundaries of U.S. national security law have never been limited strictly to operations abroad or the conduct of members of the armed forces.<sup>1</sup> But what is different now than in the past is how regularly the government's national security activities implicate the daily lives of American citizens.<sup>2</sup> In the years after 9/11, a series of leaks and disclosures gradually revealed the massive extent to which the National Security Agency ("NSA") conducts surveillance of Americans' private, domestic, electronic information in the course of gathering "foreign" intelligence.<sup>3</sup> If the surveillance happened to uncover evidence of domestic criminal activity (such as drug distribution), the NSA policy was

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\* Professor of Law, Valparaiso University Law School

<sup>1</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 543 U.S. 579 (1952); *Amy Warwick*, 67 U.S. (2 Black) 635 (1862) (The Prize Cases).

<sup>2</sup> See Robert Knowles, *National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883, 891 (2014).

<sup>3</sup> See, e.g., Privacy and Civil Liberties Oversight Board, Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court, 9 (Jan. 23, 2014).

to hand over the evidence to domestic law enforcement agencies, such as the FBI or DEA, for further action.<sup>4</sup>

The NSA operates as part of the Department of Defense, and its activities are the most prominent example of the many ways in which national security and domestic law enforcement have become entangled. In 2015, for example, the Ninth Circuit held that the Naval Criminal Investigative Service (“NCIS”) had violated the Posse Comitatus Act when, during an investigation of possession of child pornography by servicemembers, it conducted dragnet surveillance of all the civilian computers in Washington state.<sup>5</sup> Like the NSA, the NCIS would hand over evidence of civilian criminal activity to local law enforcement and the FBI.<sup>6</sup> Indeed, Attorney Thomas Durkin, in his insightful Article for this symposium issue, described his own observation that the secrecy and procedural irregularities that characterized the military prosecutions at Guantanamo Bay Naval Base have spread to the growing number of terrorism cases in U.S. federal courts.

What is troubling about this line-blurring and entanglement is not that criminal activity is being uncovered and prosecuted, of course, but that the traditional limits on domestic law enforcement authority are being circumvented. These limits exist to prevent abuses of authority. Special deference to the executive branch in the national security realm has always rested on the presumption that national security is concerned with narrow or exceptional circumstances—that it rarely intersects with Americans’ daily lives. The more national security regulation and ordinary regulation become indistinguishable, the less tenable such special deference becomes. In fact, the more matters of national security intrude on domestic affairs, the more national security law should conform to principles of ordinary law, rather than the opposite.

Professor Jimmy Gurulé’s Article in this symposium issue discusses a key example of the ways in which traditional law enforcement tools can be better utilized in the national security realm. Professor Gurulé proposes that the U.S. government can weaken terrorist organizations like ISIS by more aggressively pursuing criminal prosecution of entities that enable them to obtain financing. More generally, the federal courts should

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<sup>4</sup> See John Shiffman & Kristina Cooke, *Exclusive: U.S. Directs Agents to Cover up Program Used to Investigate Americans*, REUTERS (Aug. 5, 2013), <http://www.reuters.com/article/2013/08/05/us-dea-sod-idUSBRE97409R20130805> [<https://perma.cc/HVT9-8TT2>].

<sup>5</sup> United States v. Dreyer, 804 F.3d 1266 (9th Cir. 2015).

<sup>6</sup> *Id.*

re-think and reverse the recent trend toward avoiding entanglement with foreign law and activities in foreign countries.<sup>7</sup>

In a globalized world where the most serious threats to U.S. national security operate across borders and lurk in the shadows online, it is logical that the government would respond by more closely monitoring individuals' lives. Yet this is exactly why the government's national security activities should be more open to judicial oversight and public scrutiny than they have been in the past. Transparency and accountability will help ensure that privacy is protected. Moreover, in an interconnected world, the collateral consequences for the United States from surveillance abuses – such as wiretapping allied leaders' cell phones, for example – are much greater than they would have been in the past. Greater transparency and scrutiny can also help protect the intelligence community from itself by preventing the type of failures that result from too much insularity and secrecy.

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<sup>7</sup> See, e.g., Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1084–85 (2015); Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U.L. REV. 1117, 1123 (2011).

