RESISTING WHOLESALE ELECTRONIC INVASION OF THE FOURTH AMENDMENT

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A few months ago, I spoke to a group of lawyers in Los Angeles. I talked about legal ethics. I mentioned Henry Drinker, author of ABA ethical rules, author of a book that was the basis for the 1955 Rules of Professional Responsibility, and a founder of the Drinker Biddle firm. In noting the solipsistic nature of many ethical rules, I pointed out that in a speech to the ABA in 1927, Henry Drinker said one of his biggest problems in enforcing legal ethics was "keeping the Russian Jew boys out of the profession."

When the floor was open for questions, a Drinker Biddle partner – and himself an authority on ethics – criticized me for attacking Henry Drinker. "We must remember," the questioner said, "that he was the product of his time."

And I thought, "what a miserable excuse." One of the worst things that could be said of anybody in this room would be he or she is "the product of his or her time." How often have we stood beside some poor soul at sentencing and heard the judge intone a sentence that is simply "the product of its time." How often have we got a mindless appellate court opinion that is simply "the product of its time."?

I mean, whatever happened to the song lyric, "O beautiful for patriot dream that sees beyond the years. . . .

Some years ago, I was in South Africa during the apartheid period. I picked up the magazine issued by the lawyers' association. And I read an editorial that said that lawyers have no duty to resist apartheid. Their job is to take the law as it is. Fortunately, there were many lawyers in South Africa who didn't subscribe to that view.

No, we are advocates. Our job is to mediate between what is given and what is desired. Our job is to bridge the gap between our client's present fear and misery to a *time* when the client may receive something that merits the name justice. We do not have the luxury of being products of our time. As Angela Davis has said, we do not accept the things we cannot change. We struggle to change the things we cannot accept.

So tonight I ask, what is our time, this time? And what time should it be? This is a time of unprecedented intrusion into the private lives, words, communications, and thoughts of almost every person in the world. This is a time when this surveillance, and the technology of it, seems beyond the reach of meaningful reform.

John Oliver sent reporters into Times Square a few months ago, and almost nobody remembered Edward Snowden and his path-breaking revelations. And for the most part, nobody cared much about all this snooping. Well, that is until the reporter pointed out that if for some reason you had sent somebody a picture of your genitals, the NSA could and would store that picture. That provoked outrage. "What! They would have a picture of my dick? That's an outrage." Which says more about the male psyche than we have time to discuss this evening.

I know. I know. We voted for people who promised to take us out of the Bush era. And had we listened we would know. They did what they promised: The NSA – at last we have a government agency that really listens to you.

Candidate Obama promised that whistleblowers should not be subject to reprisals. Tell Ed Snowden and Julian Assange. Reminds me a little of Bill Clinton. Barack Obama once taught constitutional law. But apparently he didn't inhale.

And the Congress. Are they up there enforcing the constitution? I don't think so. All the members of Congress should be replaced with undocumented aliens, because they will do jobs that American's won't .

And so it is left to us, the advocates. To move from this time, to a time we can all describe. This is a difficult task. Look what has happened to Edward Snowden, who had the courage to reveal what NSA is doing. The word "traitor" was shouted from the ramparts of government, not only refusing to accept that Snowden had revealed wholesale constitutional violations, but reflecting an ignorance of the constitutional text that defines treason quite narrowly. The truth shall set you free? Maybe. But as the Nigerian poet Wole Soyinka reminds us, first the truth must be set free.

We may contrast the treatment of Edward Snowden with that given to General David Petraeus, who revealed government secrets simply in order to lubricate his adultery.

Not only that. While the snoopers sling the word "traitor," they also point to something they call the Foreign Intelligence Surveillance *Court*. This thing is not a court. Courts hear both sides. They have a public jurisprudence.

And this entire apparatus of snoopery rests on fear. We are told to accept it because we are afraid. Afraid of what? Basically of ethnic violence, in and from the Middle *East*. That is the problem the snoopers tell us they can solve. Nonsense. How about starting closer to home? How about addressing the violence in the Middle *West.* And then working out from there, maybe to South Carolina, New York, Arizona? And then, when we have understood the true causes and cures for that violence, we could look outwards.

Next door in Utah, you are more likely to be killed by a cop than by gang violence or child abuse. Being killed by a cop is the second most prevalent kind of homicide. What is the first one? Well, let me just say that if you are married and it is not going well, watch out. I mean, guys, you can tell a lot about how a woman is feeling by looking at her hands. If she is holding a gun, she is probably angry.

Remember what Justice Jackson said in *Brinegar v. United States* – having come back from his service at the Nuremburg Tribunal:

> Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. . . . But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court.

You and I have the means to address these issues. More than that, we have the duty to do it. The NSA's bulk collection of personal communications predictably and inevitably leads to the use of that information as the basis for jailing and prosecuting our clients.

Civil suits against this snooping have met with some success, but they face the government's assertion of state secrets and political question. They risk becoming entangled in discovery disputes.

No, the frontier of battle here is where it has always been: Government levels a charge against our client. And we have the power and the duty to inquire how they got the evidence. This is not, as we know, saying that our client must be guilty and we are going to quibble about evidence-gathering. The full inquiry into the government's methods often discovers that exculpatory evidence has been hidden, and that the word "intelligence" is simply a name that is given to hasty conclusions and unregulated suspicion. The term "intelligence" is simply another example of how language has been hijacked in the service of unaccountable power.

I cannot predict how the coming struggle will turn out. I am heartened by knowing that in our lifetimes in the law, we have won victories by returning to the constitutional text – think of *Crawford v. Washington* and *Apprendi v. New Jersey*.

I want, therefore, to identify two tools that we have – ways of seeing the law in action, if you will. Call them weapons if you like, and imagine yourselves as Davids, wearing only a jockstrap and with just a slingshot and a rock. Two rocks actually, as we shall see.

Our first weapon is the fourth amendment definition of a search. A search of "persons, houses, papers and effects," which must not be "unreasonable" and presumptively governed by a warrant based on probable cause. For nearly 50 years, since *Katz v. United States*, the Supreme Court has recognized that the new instruments of search and seizure do not destroy the old-fashioned fourth amendment protection. That protection was conceived in the shadow of broad-gauge searches of political dissidents, as we know from the old cases of *Entick v. Carrington* and *Wilkes v. Wood*. And, in a nod to my mentor Edward Bennett Williams, Katz was adumbrated in *Silverman v. United States*, which held that for fourth amendment purposes, penetration – however slight – was . . . . well, you know.

It was the British searches under writs of assistance that led John Adams and others to their acts of resistance. James Otis declaimed against arbitrary search, speaking on the Boston Common in 1761. Of that speech, John Adams later wrote, "Then and there was the child independence born.

So the *Katz* holding that the fourth amendment protects people not places heralded a series of other decisions. *Camara* held that the fourth amendment applies to administrative searches. *Quon* held that the fourth amendment protection is not limited to searches designed to get evidence for criminal cases. So much for the "we are just gathering intelligence" argument, which is not only a lie but constitutionally illiterate.

The *Jardines* case applied the fourth amendment to drug sniffer dogs around your front porch. In April of this year, *Rodriguez v. United States* added some more sniffer dog protection.

Riley v. California protects the contents of your cell phone. *Jones* put fourth amendments limits on GPS trackers. And just this Term, the Supreme Court per curiam reviewed and renewed all this law in *Grady v. North Carolina*. Tracking is a search, no matter where you are tracked.

And just this Term, the Court held that warrantless routine searches of hotel registrations are facially invalid under the fourth amendment. This case, *City of Los Angeles v. Patel*, is already being used by Google and others to protect internet customer privacy.

The Second Circuit has given us *ACLU v. Clapper*, an opinion rich in fourth amendment lore, even as Judge Gerry Lynch disclaims an intention to write constitutional law. The court holds that Section 215 of the Patriot Act cannot validly be the basis for what NSA is doing. If Congress intended that the NSA should have powers that raise such serious fourth amendment issues, it must say so without equivocation. This judicial technique in avoiding a constitutional issue has a long and distinguished history in such Supreme Court cases as *Kent v. Dulles* and *Gutknecht v, United States*.

Judge Lynch's opinion does say two things that are very important to the work that we do. First, he rejects the government's assertion that intelligence gathering is somehow exempt from the fourth amendment because the objective is not to provide information for

criminal cases. We have heard this argument before. I first argued against it in 1969, and it has been rejected over and over. But the government still trots it out, even though it is at bottom a lie because the gathered information will always be leaked out to cops and prosecutors.

So Judge Lynch says no, the fourth amendment violation occurs at the moment of a prohibited incursion.

Second, Judge Lynch rejects the government argument that bulk collection does not intrude on the *content* of conversations, but only on the addresses or phone numbers, and the names, of what it sent and received. No, the court says, this sort of collection "does proxy" for content collection. If the government has information about two people who are in regular communication, or about a particular e-mail address with certain characteristics, it can and does infer what those people are talking about. Indeed, I can remember a case I briefed in the Ninth Circuit forty-five years ago in which a pattern of phone calls was used by the government at trial to argue what the callers must have been talking about.

But the Second Circuit opinion, and the line of Supreme Court cases, says something broader and deeper than might be suggested by this simple list. The message here is that this constitution of ours was designed by people who were not so arrogant to think that they had anticipated every detail of every issue that might arise. They were not forging a set of fetters. They knew their words would have to be interpreted to make sense of things in changing times.

I know the Congress has reworked the law on surveillance. For us, that is a "so what?" The fruits of the earlier illegality are still in government hands. Is there anybody in this room who trusts the government to obey the law, whatever the law might be. Is there anybody who believes that if a tool of intrusion is in the government's hands, it will not be used?

The Foreign Intelligence Surveillance Court has already spoken. "We are not bound by what the Second Circuit says," they proclaim. "The new law from Congress doesn't bar bulk collection. Things should go on as before." Pause a minute. The Foreign Intelligence Court is not a "court." A court hears arguments from both sides. Its proceedings are generally open to public scrutiny. You can't just call something like that a "court." A buffalo does not become a giraffe by simply sticking its neck out.

It just thinks it is a court. Like the guy who walks into a bar with a duck under his arm, sidles up to a woman at the bar, and says "Hey, honey, you come here often?" And she says, "What do you mean bringing that pig in here?" He says, "I'll have you know this is a duck." And she says, "I was talking to the duck."

This so-called court is a creature of The War Against Terror, known by its acronym as T.W.A.T.

But pause again. No gender bias allowed. Let it be Secret Collection and Retention of Operational Terrorism Utility Material – S.C.R.O.T.U.M.

I know also that the line of fourth amendment success is not unbroken. But we have been given the basic materials with which to strengthen the protection the amendment was designed to provide. Like Sisyphus, we keep rolling that rock up the hill.

And so our first weapon is the text and history and meaning of the fourth amendment, not as seen in former times, not as the government sees it in this time, but in a timeless and forward-looking way. The fourth amendment is not dead, though the devil's choir known as the NSA is loudly singing its requiem.

Here is another thought. Many of the cases are about dope dealers, gamblers and defrauders. But the enduring value of the fourth amendment was established in those early precedents, about opponents of colonial rule and organizers against tyranny. The right to be free of intrusion is the right of all people in a world filled with injustice to communicate with one another, to understand their circumstances, and to act together in their common interest. That was Justice Jackson's message in *Brinegar*, brought to us fresh from his experiences at Nuremberg.

These, then, are our truths. How shall we set them free? In the defense of criminal cases, the government's claims to secrecy and non-justiciability are at their weakest. Government assertions of the need for secrecy still exercise a powerful influence on judges, as many in this room have learned – at their client's expense. Our 1970s efforts to force revelation of exculpatory evidence shielded by "state secrets" claims were met with the Confidential Information Pretrial Procedures Act – CIPPA.

Brady and *Giglio* still exist. They are a powerful counterweight to CIPPA's strictures. We are speaking after all of not one but *three* constitution-based rights to obtain information. There is a due process right to disclosure of exculpatory evidence. The right to confrontation is useless unless we have the information with which to do the confronting. Think *Jencks*, the case and not just the Jencks Act. And the right to compulsory process means we can seek and obtain what our clients need. Think *Chambers v. Mississippi* and the wonderful article by Peter Westen in the Michigan Law Review.

But when we can show that the government has, or even may well have, relied on illegally obtained evidence to make its case, those restrictions on disclosure retreat. The story begins with Learned Hand's opinion in *United States v. Coplon*. To purge the taint of illegal wiretaps, the court held, all the taps must be disclosed. Listen again to the words:

> Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens. All governments . . . believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism.

The Supreme Court cited Coplon with approval in *Dennis v. United States*. This is a dinner talk and not a law review article. If you want a history of the way that judicial power has been rightly exercised in the face of "national security" claims, look at my book Thinking About Terrorism, and at the article cited in the footnotes to this talk. Yes, there will be a copy available sometime soon. This history of judicial independence dates to the time of John Marshall.

Some years after *Coplon*, along came *Alderman*, with its companion case of *Ivanov v. United States*. The government had claimed that when it committed an illegality, the Department that calls itself Justice would review the matter and determine if the illegality was "arguably relevant" to the defendant's prosecution. Then and only then would it disclose. Well, whoever said that Justice should be blind did not mean that the Department

of Justice should be blind. The Supreme Court rejected the government's view, even in the face of dire warnings about Mafia killers and Soviet spies.

In oral argument, Justice Harlan raised the national security issue. Edward Bennett Williams replied:

> If we are driven to the unhappy conclusion that the alleged spy goes free, then I think we can draw some consolation that in the last three decades of recorded federal jurisprudence, during which there were three wars, we have only one instance of an averred spy going free in this frame of reference, and she was the defendant in the case to which I allude, the Coplon case, and I think we can also get a measure of consolation from the fact that of all the crimes in jurisprudence, the amount of recidivism that takes place in the area of espionage is by and large defused.

Here, then, are some but not all of the ways we gain access to a place where something worthy of the name "justice" can be done. Here again Ed Williams' language in the Supreme Court:

> It is not our argument in this Court today that the Executive Branch should be manacled or impeded or harassed in the conduct of relationships with other governments. It is our argument here today that at least the federal courts should be a sanctuary in the jungle, . . . and that the fruits of this kind of conduct should not become evidence in a criminal case brought by the sovereign power against an accused . . . .

I am not suggesting that the Supreme Court, or any courts, will surely honor the constitutional commitments of which I speak. So many of those judges are products of their time. Think of such horrors as the Dred Scott case, which Justice Grier said would put a peaceful end to the slavery debate. Think of how many times judges have abandoned their duty in the face of rumored war and factitious claims of national security.

We see the past, but it is not there to bind us. It is the way over which we have come. Seeing it tells us where we must now go.

We are arguing before the judges, with the support of our colleagues, because we have this duty to do so. Our clients are not willingly in those courtrooms. We will win *some* battles. And in *all* of the battles, we will be painting a public picture of threatened injustice.

These tasks that I have discussed are not easy. I am reminded of what William James said in 1887, dedicating a monument to Robert Gould Shaw. Shaw served in the Civil War, bravely. But James celebrated him because Shaw chose to command a regiment of African-American soldiers. Military valor, in that time as in this one, was widely celebrated. As William James said:

> That lonely kind of courage . . . is the kind of valor to which the monuments of nations should most of all be reared, for the survival of the fittest has not bred it into the bone of human beings as it has bred military valor; and of five hundred of us who could storm a battery side by side with others, perhaps not one would be found ready to risk his worldly fortunes all alone in resisting an enthroned abuse.

Of course, I hope we are not alone. I look around this room, and I know we are not alone.

We stand in a line of advocates and their clients. From Andrew Hamilton in the Zenger case, to James Otis in 1761, to David Paul Brown representing workers, to Darrow,

to Clara Foltz and beyond. They stood up for justice. How can we stand down. This movement doesn't need everybody, but it always needs somebody. The struggle is a relay race. The baton is passed to us, and we must carry it and look out for who will take it when our part of the race is run.

If you share that hope, and that fragile faith, take out a piece of paper and a pen. Write your name and the amount you will give to the Foundation for Criminal Justice. Hand that paper to someone at your table who will collect your responses.

Even Hamlet, confused though he was, recognized that these battles cannot be fought alone. He said this:

> The time is out of joint—O cursèd spite,
> That ever I was born to set it right!
> Nay, come, let's go together.

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