



Legal Thinkers Clash in Debate on U.S. Surveillance

By Ari Kaplan

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Better more domestic surveillance than another Sept. 11, 2001, type of attack on U.S. soil? That was the question in a lively, sold-out, Oxford-style debate sponsored by The Rosenkranz Foundation at the Asia Society's New York headquarters Wednesday night.

Hundreds of attendees paid \$40 apiece to hear *New York Times* best-selling author David Frum, the Foundation for Defense of Democracies senior fellow Andrew C. McCarthy and UC Berkeley law professor John Yoo make 8-minute-long presentations in support of a proposition for more surveillance, while former U.S. Congressman Bob Barr, R.-Ga., George Washington University law professor Jeffrey Rosen and ACLU President Nadine Strossen opposed it. ABC News correspondent Chris Bury moderated.

"The traditional legal framework was never created for terrorists, so the lines made before 9/11 have to be redrawn," Rosenkranz Foundation Director Robert Rosenkranz noted in opening remarks.

Prior to the debate, an audience vote revealed 41 percent in favor of greater surveillance, 37 percent against and 22 percent undecided.

Individual politics aside, the panelists' comments during this seventh debate in the Intelligence Squared series showcased an impressive merger of legal scholarship and practical experience.

THE UNITED STATES NEEDS BETTER SURVEILLANCE

The debate opened with comments by Frum, a graduate of Harvard Law School and former speechwriter for President George W. Bush. He shared an anecdote about his own government background check, in which the FBI erroneously interviewed his wife instead of his neighbor's wife. He proposed that a better quality of security could and should be readily available in this country.

Frum, like the other speakers supporting the premise, suggested that the United States should

have more surveillance than the level that made 9/11 possible. Frum compared a terrorist plot to a ball that travels through a maze and is forced to navigate obstacles in its path. He noted that enhanced domestic surveillance could stop that plot at any obstacle point if done properly.

Frum also questioned what he described as the radical and alarmist nature of the contrary position.

"[It is as if] a stop sign is the first step on a slippery slope of the abolition of motion," he said.

ADDITIONAL LOSS OF PRIVACY WOULD BE INSIGNIFICANT

McCarthy, the former supervisor of the U.S. Attorney's Anti-Terrorism Command Post in Manhattan following the attacks of 9/11, echoed Frum's point, noting that most of an individual's personal information is already maintained and mined by utility companies, banks and other institutions. Any additional government infringement would be "trifling," reflecting a reasonable balancing of minor intrusions.

He remarked that while all liberties are precious, none are worthy of the designation unless we can secure life to pursue them.

"Ask yourself about whether you are comfortable with the increased level of surveillance since 9/11," he said.

CURTAILING CIVIL LIBERTIES IS JUSTIFIED IN WAR

Yoo, former deputy assistant attorney general in the Office of Legal Counsel of the U.S. Department of Justice, used blogging as an example of how certain freedoms have actually flourished since 9/11.

He also cited various periods of war in which civil liberties were justifiably curtailed in favor of personal safety. Yoo suggested that, historically, wartime has not produced a permanent impact on

civil liberties and is currently defensible because there have been no new domestic attacks.

"Complacency is the real enemy," Yoo said. He also recommended the creation of a new national security protection agency.

PRIVACY IS THE ESSENCE OF CIVILIZATION

Barr, once the U.S. Attorney for the Northern District of Georgia, cited Frum's example of his background check as the very reason why the government does not need or deserve additional power. He quoted Ayn Rand's "The Fountainhead" in stating "privacy is the essence of civilization itself," and noted that if the American people allow the government to intrude into their lives, then they are not free.

In response to the question at the core of the debate, Barr's short answer was, "hell no."

He compared the government's request for additional surveillance power to a divorce proceeding in that no matter how much one gives to the other side, the opposing party will always want more.

"The greatest tool for the government is not domestic surveillance, but better foreign intelligence," he said.

TECHNOLOGY MAY BE THE ANSWER

Professor Rosen argued that technology makes it possible to simultaneously secure privacy and security.

Rosen offered the example of new airport X-ray machines that create naked images of individuals who pass through them. Making purportedly simple "silver bullet" technological adjustments, the machine can distort the area of the body that causes embarrassment and violations to individual privacy.

"We have the ability to protect privacy and security at the same time," Rosen said. "What we need now is the will."

Rosen did caution, however, that too much technology could have a negative impact. A future of enhanced domestic surveillance "is not an

Orwellian possibility, but a very real possibility," he said, citing the increased use of public cameras in the United Kingdom.

"Britain resembles the set of 'The Truman Show,'" he said, referring to the Jim Carrey film in which the main character's entire life is secretly the subject of a popular TV show.

WE HAVE 'SECURITY THEATER'

Picking up on the "Truman Show" theme, Strossen, a New York Law School professor and the first woman to lead the ACLU, said that in America today, we have "security theater" as opposed to actual security.

She remarked that ACLU lawyers who have experimentally signed into buildings as Osama Bin Laden were allowed entry without a problem and characterized an expansion of domestic surveillance powers as unjustified, unwarranted and unconstitutional.

Strossen, like the others opposing the question at issue, is not opposed to surveillance, per se -- just surveillance that is not carried out according to the Constitution's precepts.

"The government is trying to find a needle in a haystack by adding more hay," she said of the increasing surveillance information through which authorities need to search.

While all of the speakers occasionally cited complex laws, such as the Foreign Intelligence Surveillance Act and the Patriot Act, as well as the system of secret federal courts created in 1978, their arguments more often contained practical examples and thoughtful guidance.

Each panelist agreed that privacy and security needs to be balanced and that there is no perfect level of protection.

"No freedom is absolute, other than the right to think and believe," Strossen said.

In the end, those against greater domestic surveillance were apparently most convincing. In a poll following the debate, 56 percent of the audience sided with them compared to 40 percent in favor and 4 percent undecided.

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