

LAW QUADRANGLE NOTES

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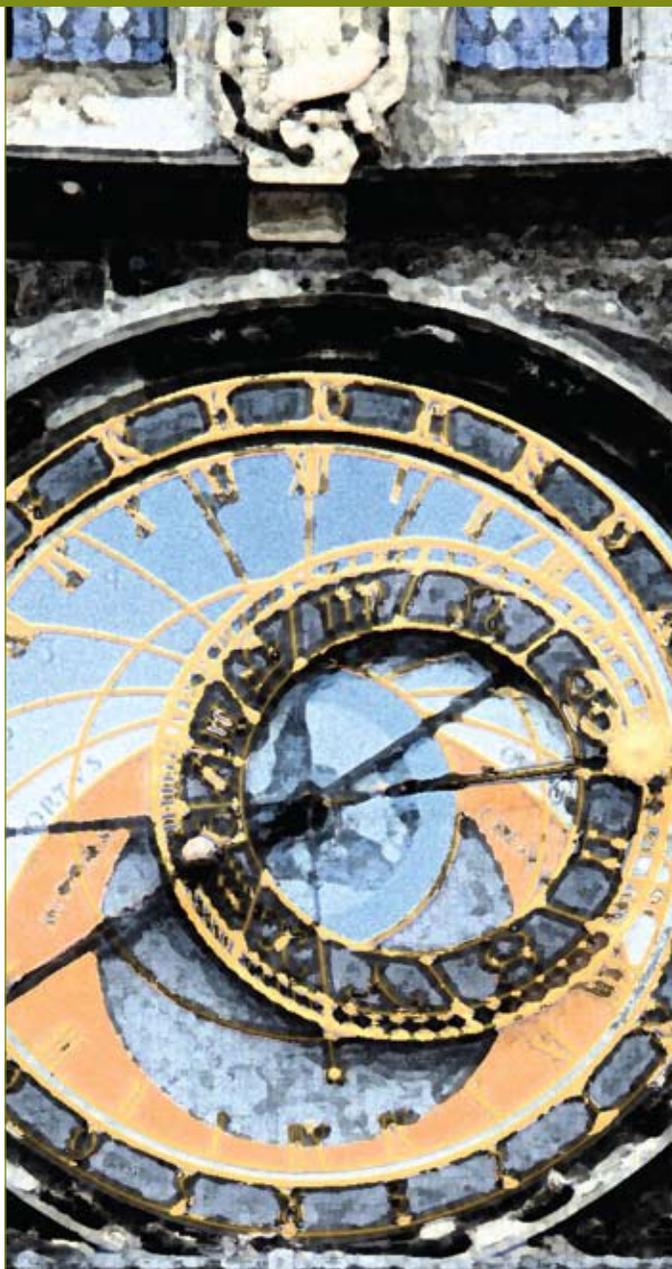
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The rich diversity of the law

The law is the portal to an endlessly stimulating conversation. Here at Michigan Law, conferences and symposia during this academic year have presented fascinating evidence of the variety of intellectual exchange that the law nourishes, from discussions of patent law in the face of blurringly fast technological change to the interplay of international law with the United States' and other countries' ever-more-global intelligence gathering. The conference Looking Ahead to the Next 30 Years of Child Advocacy both celebrated the 30th anniversary of Michigan Law's pioneering Child Advocacy Law Clinic (CALC) and used the expertise of professionals and scholars from this country and abroad to identify and examine future issues in the field of child welfare.

In this special section on the breadth and reach of the law, on page 6 CALC founder Donald N. Duquette, '75, discusses the clinic, the child advocacy field, and issues of child welfare; on page 14, the keynote address of former CIA General Counsel Jeffrey H. Smith, '71, and the remarks of national civil liberties protection officer Alexander Joel, '87, illuminate issues raised at the conference State Intelligence Gathering and International Law; and on page 26,

L. Hart Wright Collegiate Professor of Law James Boyd White explains how changes affecting the role of law and core of democracy led him to co-organize the conference Law and Democracy in the Empire of Force.

Each of these selections also reflects part of the life story of every conference or symposium: Duquette provides history and context; Smith's keynote address and Joel's remarks exemplify the thought-provoking commentary that hallmarks such gatherings; and White shows how shared concerns initiate and then coalesce into the organized exchange of ideas we call a conference or symposium.

On pages 12 and 24, you can peruse agendas of the many other conferences and symposia at Michigan Law this academic year. These conferences are rich in variety—from the Great Lakes to international tax issues, from voter initiatives to Native American exploitation—and they all share the law as their common ground. As White so aptly said in his call for papers, participants could address "human rights, international law, law and economics, the Supreme Court, teaching law, the practice of law, the culture of consumerism, the news media, corporate law and accounting, civil liberties, the uses of history, torture and 'rendition,' government lying and propaganda, the premises on which law works in the world, the way that women are thought about, race, poverty, education, the cultural effects of TV and the Internet, the way Congress talks about its business, etc." Indeed, each conference becomes an extended dialogue that, like the law itself, has the capacity to lead us toward expanded awareness.

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A matter of balance

by Alexander Joel

The following essay is based on remarks delivered at the Law School February 10 as a member of the panel discussing "Intelligence Gathering and Human Rights," part of the symposium State Intelligence Gathering and International Law. The author (left), a 1987 graduate of the Law School, is the civil liberties protection officer for the director of National Intelligence (DNI), filling a position created by the Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004, which also created the DNI. According to the author: "Congress enacted the IRTPA because it felt that reform of the intelligence community was needed in order to prevent another 9/11, and created the DNI to lead the 16 agencies of the intelligence community. It created the author's position to ensure that as we strengthened our intelligence capabilities, we remained protective of privacy and civil liberties."

I'd like to get right to the point and discuss the so-called domestic wiretapping case that many of you are quite familiar with. In that case, the plaintiffs claimed that the government had instituted a system of secret surveillance that may have intercepted their communications without court order or judicial review. The government defended the program on the grounds that it was necessary for national security, and that applicable legal principles did not require a court order, or even informing the plaintiffs whether they had been surveilled. The government argued the program's protections were legally sufficient: There had to be specific factual indications for suspecting the target; only the individual suspect and his contacts could be targeted; the surveillance had to be approved by senior officials; it was for limited—albeit renewable—durations; and it was subject to close oversight.

You know the outcome. The court upheld the surveillance, and dismissed the complaint. I am referring, of course, to the case of *Klass and Others v. Germany*, before the European Court of Human Rights, decided September 6, 1978. The court examined whether Germany's secret surveillance program was consistent with Article 8 of the European Code of Human Rights—the privacy right—which provides that there shall be no interference by a public authority with the exercise of the right to privacy except in



accordance with the law and to the extent necessary in a democratic society in the interests of national security. It found that secret, warrantless domestic wiretapping was not a violation of the right to privacy, provided that there were “adequate and equivalent guarantees safeguarding the individual’s rights.”

For obvious reasons, I find this to be a fascinating case. While it’s important to remain mindful of the oft-repeated admonition of the European Commission on Human Rights, that “reference to other systems [is of] limited relevance,” *Klass* and its progeny do lay out several key points that should resonate when considering how the United States protects privacy in the conduct of secret intelligence activities. Of course, this case is not binding on the United States, and by discussing it, I am by no means suggesting that it establishes any sort of legal precedent for the United States. I do think, however, that it is important to remember that, as illustrated by the *Klass* case, the challenges we face today in the United States are not unique, and that these challenges are in some ways inherent to the collection of intelligence in a free and democratic society.

- First and most obviously, it is interesting to note that the court said that judicial review was preferred, but not required, so long as there are “adequate and equivalent guarantees.” The Foreign Intelligence Surveillance Act, on the other hand, requires a court order for surveillance in most cases, and the surveillance previously conducted under the Terrorist Surveillance Program is now subject to FISA court orders as well.

- Second, the court recognized the need for secrecy in conducting surveillance, a need that could continue for “years,

even decades.” This need for secrecy creates a fundamental problem, one that I face every day. How do you provide necessary transparency while also keeping secrets? As recognized by *Klass*, one way of doing this is creating what I call agents of transparency—internal and external overseers who have the security clearances to see what the intelligence agencies are doing.

- Third, the court found that the mere possibility of abuse was not enough by itself to invalidate a system of secret surveillance. It is, of course, vitally important that we do what we can to guard against rogue, illegal, or inappropriate actions on the part of our intelligence officials and agencies. But the possibility that such action may occur should not by itself shut down otherwise important intelligence activities. Instead, we must, as the *Klass* court found, ensure that we have the right safeguards in place

to guard against abuse and misuse of information and authority.

- Fourth, and of greatest interest to me, the court founded its decision on the principle of “balance.” This is a principle that one finds embedded in the U.S. Constitution, the preamble of which states that we are establishing and ordaining this Constitution to both provide for the common defense and secure the blessings of liberty. The *Klass* court cited a similar formulation in the preamble to the Convention, and stated that “this means that a *balance* must be sought between the exercise by the individual of the right [to privacy] and the necessity . . . to impose secret surveillance for the protection of the democratic society as a whole.”

I’d like to pursue this concept of balance. When we talk of safety and freedom—security and liberty—as a balance, some worry this implies that if

Panelists ponder how intelligence gathering and human rights mix. From left: Human Rights First Washington Director Elisa C. Massimono, '88; Duke University Law Professor Francesca Bignami; keynote speaker and former CIA General Counsel Jeffrey H. Smith, '71; Civil Liberties Protection Officer Alexander Joel, '87; and U-M Law Professor and panel moderator Daniel Halberstam.





you have more of one, you necessarily have less of the other. I think of it this way—if we add more to the security side of

the scale, we have to do things differently on the other side to safeguard our liberties, to keep the scale balanced.

I have an inside perspective on how we're maintaining that balance. We rely on what I call the civil liberties protection infrastructure. It is founded on our Constitution, which establishes a system of checks and *balances*. I am a product of this system—my position is established by statute, yet I am a career civil servant working within the executive branch. I meet periodically with congressional staff to discuss a variety of issues, ranging from electronic surveillance to data mining, and expect many, many more such meetings in the coming months—and I welcome them.

Also in the Constitution is the Bill of Rights, not the least of which is the Fourth Amendment's protections against unreasonable searches and seizures. The Fourth Amendment has generated an enormous body of case law, much of which is applicable by analogy to our intelligence activities. We are, of course, bound and constrained by the Fourth Amendment.

In this system of separated powers, Congress has enacted various statutes to regulate how the executive carries out its activities. The National Security Act of 1947 established the Department of Defense and the Central Intelligence Agency. It contains the so-called "law enforcement proviso," which states that the CIA shall have no internal security functions or law enforcement

or subpoena powers. This was to avoid creating another secret internal security force, like the Gestapo of Nazi Germany. The Posse Comitatus Act, enacted after the Civil War, imposes a comparable restraint on our military. FISA establishes a system of judicial orders for electronic surveillance and physical searches for foreign intelligence. The Privacy Act imposes the fair information practices principles on the information collected and retained by the U.S. government—these principles were first articulated and enacted into law in the United States, and are now reflected in laws around the world. And there are a panoply of laws governing specific types of data and specific activities.

Like the intelligence agencies of every country, our agencies have their own particular history. In the 1970's, after Watergate, two congressional committees (Church and Pike) conducted in-depth investigations of alleged abuses by our intelligence agencies. They had spied on Americans for reasons that were only remotely related to national

security, penetrated student organizations, surveilled the women's liberation movement and the NAACP, and otherwise gone beyond the bounds of what we as Americans were willing to tolerate from our intelligence services. These sorts of abuses were not unique to the American experience—other countries went through similar periods of investigation and regulation.

Following these investigations, new rules were established and codified restricting what intelligence agencies could do inside the United States and with respect to United States persons anywhere in the world. Their current incarnation is Executive Order 12333, issued by President Reagan in 1981. Under EO 12333, intelligence agencies are further constrained by guidelines established by the head of the agency and the Attorney General. These rules are interpreted and applied by agency Offices of General Counsel, and audited and enforced by agency Offices of Inspector General.

Just as important, following those

Duke University Law Professor Francesca Bignami addresses the conference.



hearings both the Senate and the House established intelligence oversight committees. These committees have secure facilities to receive and store classified information, and by law are kept fully and currently informed of significant intelligence activities, including violations of law. These are not the only committees that impact the intelligence community—the judiciary, homeland security, armed services, and appropriations committees also exercise varying degrees of oversight and control over intelligence activities. By having the ability to hold hearings, enact legislation, and control the power of the purse, the Congress has powerful tools at its disposal to serve as a check and balance on the conduct of intelligence activities.

Since 9/11, Congress has further reinforced the civil liberties protection infrastructure. It created not only my position, but also that of the Privacy and Civil Liberties Oversight Board, which has advice and oversight responsibility for privacy and civil liberties issues arising out of counterterrorism activities across the federal government. There are also other privacy and civil liberties officers throughout the federal government, such as at the Department of Justice and the Department of Homeland Security. And Congress is currently considering further additions to this system of internal checks and balances. I believe we have a healthy, robust infrastructure in place that helps provide “adequate and effective guarantees” of individual rights.

Striking that balance is not easy, and showing the public that we are maintaining that balance, even less so. But I believe in the system—in *our* system. It is a system of internal *and* external checks and balances, of rules that reflect the wisdom and experience of genera-

tions, under a Constitution that has stood the test of time, and implemented by people sworn to support and defend that Constitution. It is not perfect—nor are the alternatives—and I view it as my job to find ways to improve it. It is a system that is comparable in many ways to those of other countries, which are working closely with us to protect against the global threat of terrorism. It is a system that, as the *Klass* court envisioned, enables necessary intelligence activities to go forward while providing “adequate and effective guarantees” of individual rights. ■



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On the cover: The tower of Michigan Law's Reading Room seen through a window of the renowned Law Library. The Legal Research Building is ranked 94th of 150 of America's best-loved architectural sites in a recent survey conducted for the American Institute of Architects. The survey put Michigan Law's treasured building, designed by the firm of York & Sawyer and built in the first half of the 20th century, on a list with gems like the National Cathedral, Lincoln Memorial, Washington Monument, and Golden Gate Bridge. (Photo by Sam Hollenshead)

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