Privacy perils in the digital age

Who should draw the line between national security and citizen rights?

Jeffrey Rosen

JEFFREY ROSEN is a professor of law at George Washington University and the legal affairs editor of The New Republic. His first book was The Unwanted Gaze: The Destruction of Privacy in America, which The New York Times called “the definitive text on privacy perils in the digital age.” His second book The Naked Crowd: Reclaiming Security and Freedom in an Anxious Age, was called “the most disturbing book of the year” by the London Guardian. Rosen is a graduate of Harvard College, summa cum laude; Oxford University, where he was a Marshall Scholar; and Yale Law School. His essays and commentaries have appeared in the New York Times Magazine, and Atlantic Monthly among others. The Chicago Tribune named him one of the ten best magazine journalists in America.

With the growth of intrusive technologies, more and more privacy issues will likely come before the Supreme Court in the next several decades, said Jeffrey Rosen in his address to the Global Executive Forum. “The Court’s challenge will be to strike a balance between the constitutional rights of citizens and pressing security needs of the nation,” he said.

“But should the Supreme Court act unilaterally in making decisions that will profoundly affect the public in ways that no one could have imagined when the Constitution was drawn?”

Security and privacy were not on opposite sides of the political spectrum when the framers of the Constitution handwrote the document in the glow of oil lamps. In today’s high-tech world, security and privacy issues look vastly different and the question is: How do you have one without impinging on the other?

Thus far, the public seems willing to trade off some privacy for increased security. Rosen described a remarkable new technology that London, in the wake of the recent underground bombings, is preparing to implement on a broad scale. He calls this a “naked machine” because it digitally undresses the person within its scope.

“It’s very effective in revealing what might be hidden under the clothes but the downside is that it shows us stark naked.” There is an alternative to the naked machine, a “blog” machine that is equally effective but can protect the individual’s privacy while also protecting security. “It really is possible to have both at the same time.”

However, there has been no public outcry for the blog machine in preference to the naked machine even though the blog technology is readily available and not much more costly. In a test run of the naked machine, people entering the underground had the choice of passing through this fast new technology or submitting to the slightly slower x-ray inspection.

“Lots of people chose the former,” said Rosen. “Many of them expressed the feeling that the new technology was a good way to prove the trustworthiness of themselves and fellow passengers. And if they had to be naked to accomplish this, they didn’t care.”

Said Rosen, “We shouldn’t assume that all of us have the same intuitions about privacy and security.” A poll in the US about the constitutionality of the Patriot Act bears this out. “According to the poll, 50 percent
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of the public thinks the Patriot Act strikes the right balance between privacy and security, 20 percent thinks it doesn’t go far enough, and 20 percent thinks it goes too far. The other 10 percent is undecided.”

Will these numbers turn upside down in the future when increasingly intrusive technologies impact citizens’ day-to-day lives? fMRI (functional Magnetic Resonance Imaging) brain scan technology is already here and has many implications for security purposes. “The scan, when used as a high-tech lie detector test, can see if you’re telling the truth about where you’ve been, places you’ve visited. In this regard, it’s like a blog machine; it probes for guilty information but doesn’t look more broadly into your mental processes. However, the brain scan could be devised in a way that looks much more like the naked machine.”

Rosen laid out a scenario where brain scans are used to identify parts of the brain that show a propensity to violence. “So imagine a situation in the future where there’s a terrorist attack. People are fearful; citizens are stopped on the street and given brain scans. If their brains fire in a way that suggests they have a propensity to violence, they are detained indefinitely as enemy combatants, likely to commit future crimes.

“Can people be imprisoned for their violent thoughts even if no subsequent crime was committed?” Rosen asked. “No,” said a guest. “The law provides for dealing with people who break the law, not for people who are prone to break the law.” Another guest disagreed. “If you have somebody who is set up to attack you and take away your rights, it’s a function of the government to protect citizens against that threat.”

Rosen said he could imagine both arguments being presented to the Supreme Court in 2025. But he could not predict how the Court would rule because “constitutional doctrine doesn’t clearly answer the question. Shoehorning moral and political intuitions into crisp legal arguments is not so easy.

“Trying to figure out when and under what circumstances the government can access personal data, with whom the data can be shared and for what crimes people can be prosecuted based on their data makes the mind reel,” said Rosen.

“In theory it is possible to strike a reasonable balance between privacy and security. But who would ensure that the architectures of surveillance and security were designed in ways that protected liberty and privacy at the same time?”

Rosen does not believe this is something the Supreme Court can or should do on its own. “Privacy laws in the United States came about because the Court set forth a broad framework for regulation and Congress responded by filling in the details.

“Ultimately, the final balance between privacy and security should be struck by the Court in collaboration with Congress, the President and the real people who will define the lines: all of us.”