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Can we Find a Balance Between Privacy and Security?

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Can we find a balance between privacy and security?

This is the eighth year that The News Journal and Widener Law School have teamed up to celebrate Constitution Day, the national observance on Sept. 17 that marks the date in 1787 when the framers signed the Constitution. Each year, we try to honor the occasion by collecting essays on a constitutional law theme.



ALAN GARFIELD

We hope these essays prompt you to reflect upon how successfully our nation has created that "more perfect Union" envisioned by the Constitution's preamble. We hope you celebrate the ways in which the country has managed to "establish Justice," "secure the Blessings of Liberty," "promote the general Welfare," "insure domestic Tranquility" and "provide for the common defence." We also hope you ask yourself how each of us – the current generation of "We the



People" – can do our part to make the nation even more perfect.

This year's theme – Is Privacy Dead? – was brought to you by Edward Snowden and the National Security Agency. Snowden's revelation of the NSA's massive surveillance program was a wake-up call about government intrusion into our privacy. It highlighted two fundamental truths about the digital age that put our

privacy at risk.

The first is that each of us is leaving an extensive electronic trail with every Facebook posting, Google search and emission from our smartphone. The second is that both private companies and the government have powerful incentives to use this "big data": private companies to market to us and the government to search for clues to criminal or terrorist activities.

Neither of these activities sounds particularly sinister, but there is still something unnerving about others possessing so much of our information. After all, we might not want the world to know about some of the things we search for on Google. And, while we might appreciate that our smartphone can tell our friends when we are in the neighborhood, we might not want it to give the same information to the owners of every store we pass.

Government access to our private information is even creepier. Sure, we want the government to connect the dots leading to potential terror-

ist activities. (And we'll be the first to blame the government if another 9/11 occurs and it didn't.) But how do we know the government will use our information for only this limited purpose? And how can we comfortably make phone calls knowing the government is gathering the numbers we dial, the time we talk and possibly our cellphone location?

Fortunately, government surveillance implicates the Constitution because the Fourth Amendment protects us against "unreasonable searches." But that applies only when we have a reasonable expectation of privacy, and what can we reasonably expect when we so readily share our information with third parties like Google, Facebook or Verizon?

Even if the Fourth Amendment did apply, it's not clear how it would restrain the NSA surveillance. Professor Orin Kerr, for example, has found considerable caselaw "indicating that searching with the goal of finding national security information about foreign terrorist groups relaxes the warrant requirement."

Sure, we could insist the government be transparent about what it's doing. But wouldn't that tip off terrorists about which communication technologies to avoid?

We could say the government should collect data only from individuals it suspects are involved in terrorism. But the government could say it often doesn't know who these individuals are and that applying computer analytics to massive amounts of data will help it find them.

So, on Constitution Day, think about how we can protect our privacy, which is surely one of the "Blessings of Liberty," while also ensuring our safety, which is part of our obligation to "provide for the common defence." How do we square our resentment over constantly being captured by surveillance cameras with our appreciation when these cameras help us catch criminals like the Boston Marathon bombers?

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