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PRIVACY AS CIVIL RIGHT

Alvaro M. Bedoya*

As the first U.S.-born Hispanic senator, Senator Dennis Chávez of New Mexico left a rich legacy of advocacy for civil rights and civil liberties. In this lecture, the fourth U.S. Senator Dennis Chávez Endowed Lecture on Law and Civil Rights, I explore an idea at the intersection of those two bodies of law: the right to privacy. In 2020, the hallmark of surveillance is its ubiquity; “everyone is watched.” Unfortunately, this discourse erases the fact that, across American history, the burdens of government surveillance have fallen overwhelmingly on the shoulders of immigrants, heretics, people of color, the poor, and anyone else considered “other.” Inspired by the legacy of “El Senador,” I trace that history from the English Puritans we now know as Pilgrims to the immigrant children detained at the southern U.S. border. I go on to argue that if we acknowledge the “color of surveillance,” we must reckon with its consequence. If surveillance is a tool used to threaten the vulnerable, we must understand privacy not just as a civil liberty, but also a civil right: A shield that allows the unpopular and persecuted to survive and thrive.

I.

I want to begin by thanking the people who made this lecture and my presence here possible: Gloria Tristani, Jorge Tristani, Jorge Thomson, Cissie Coy, and everyone in the Chávez and Tristani families; and the University of New Mexico School of Law, particularly Dean Pareja, Hannah Farrington, Carmen Rawls, Melissa Lobato, Katie Williams, and everyone on the communications, catering, janitorial and A/V staff. I feel deeply fortunate to be here at the University of New Mexico School of Law and to deliver this lecture in memory of Senator Chávez.

I would also like to thank my wife, Sima, who traveled here with me with our six-month-old daughter, Liyana Lucila. This is Liyana’s first time watching me speak. Either she will like it or she’ll start crying and fall asleep, in which case this will be her bedtime story.

One of the joys of preparing this lecture was learning how the Senator’s legacy echoes through our family. I teach in the classrooms of a law school that accepted Dennis Chávez when he was a 29-year-old with only a seventh grade formal

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education.¹ Sima counsels children as a pediatric psychologist at the National Institutes of Health, an institution that the Senator helped create decades later when he was one of the most powerful people in our country.²

For all of these things, for all of you, I am grateful.

II.

Let me start by setting a scene.

The country's most prominent political figure is a liar. He says that the sitting president is actually working for our enemies. He demeans war heroes, but lies about his own service.

He is a demagogue. Foreigners are taking over our country, he says. Before, he says, "no nation would dare do this to us." "What[] happened to our honor?" he asks.

He is effective, a fury on the campaign trail with an uncanny ability to incite a crowd. He undercuts basic institutions in our democracy. People wonder: Are lies more effective than the truth?

This scene is not set in 2016, or 2019, for that matter. It is set in the early 1950s. And I'm not talking about the 45th President of the United States. I'm talking about Joseph McCarthy, the late Senator from Wisconsin.³

Joe McCarthy who told the world that Harry Truman and the Democratic Party had committed "twenty years of treason." Joe McCarthy who derided George Marshall, yet lied his way into a Distinguished Flying Cross.⁴

1. See ARTHUR R. GOMEZ & CISSIE COY, CHÁVEZ: EL SENADOR 8 (1988); Wayne S. Scott, *A Fighter, Senator Dennis Chávez Battled to Top Post*, ALBUQUERQUE J., Nov. 19, 1962 ("Young Chávez was forced to quit school when in the seventh grade, to aid his father in supporting the family."), *excerpted in* 109 CONG. REC. 3325 (1963) (remarks of Sen. Yarborough).

2. See 109 CONG. REC. 3332 (1963) (remarks of Sen. Hill) (lauding Chávez's role in creating and sustaining the NIH).

3. See 109 CONG. REC. 3326–27 (1963) (remarks of Sen. McCarthy) ("It was a time when truth—which should be honored and guarded—had been redesigned and contracted by some; it was a time when many were called upon to prove in the marketplace whether truth was more effective than falsehood. . . ."); FRED J. COOK, *THE NIGHTMARE DECADE: THE LIFE AND TIMES OF SENATOR JOE MCCARTHY* 317 (1971) ("Single-handedly, Joseph McCarthy had toppled Senator Tydings, one of the most powerful men in the Senate."); 6,200 *Cheer McCarthy Charges of 'Twenty Years of Treason,'* STANFORD DAILY (Feb. 11, 1954), https://archives.stanforddaily.com/1954/02/11?page=1§ion=MODSMD_ARTICLE14#article ("What's happened to our honor?"); see also *id.* (describing a "spellbound" audience that "listened avidly and frequently burst into prolonged applause"); '20 Years of Treason' Charged, N.Y. TIMES (Feb. 6, 1954), <https://timesmachine.nytimes.com/timesmachine/1954/02/06/84103295.html?pageNumber=6> ("Senator McCarthy disclosed today the Democratic party was the 'party of treason,' and that the Administrations of Presidents Roosevelt and Truman constituted 'twenty years of treason.'"); Telegram from Senator Joseph McCarthy to President Harry S. Truman (Feb. 11, 1950), <https://www.archives.gov/files/education/lessons/mccarthy-telegram/images/telegram-page-1.gif> [<https://perma.cc/C2TS-FMJA>] (making a similar, albeit implicit, allegation against Truman shortly after his now infamous February 9, 1950, Wheeling, West Virginia speech). See generally JAMES CROSS GIBLIN, *THE RISE AND FALL OF SENATOR JOE MCCARTHY* 34 (2009) (describing McCarthy repeatedly inflating the number of combat missions he flew); JOSEPH R. MCCARTHY, *AMERICA'S RETREAT FROM VICTORY: THE STORY OF GEORGE CATLETT MARSHALL* (1954) (denouncing former Army Chief of Staff Gen. George C. Marshall, at the time Truman's Secretary of Defense).

4. See GIBLIN, *supra* note 4.

Joe McCarthy who, on February 9, 1950, stood at a Lincoln Day celebration in Wheeling, West Virginia, held up his hand, and declared that he had a list of 205 known Communists who were working in our country's State Department.⁵

Joe McCarthy who hauled people before the Senate, bullied and shamed them, and in many cases ruined their professional lives—even though McCarthy often had no evidence of actual wrongdoing.

I'd like to talk to you in particular about May 12, 1950. I call your attention to that date because it's four years before the Senate censured McCarthy.⁶

Four years before Joseph Welch would confront McCarthy and ask him if he had no decency, "at long last, have you left no sense of decency."⁷

No, on May 12, 1950, McCarthy was ascendant. He was growing in prominence and popularity. And other senators would not denounce him. There was "a silence of fear that almost completely paralyzed the Senate," said one senator. "[L]eaders became mental mutes afraid to speak their minds lest they commit political suicide."⁸

Yet it was on that day, that the Senator from New Mexico, Dennis Chávez, stood on the floor of the United States Senate and denounced Joseph McCarthy and his closest ally, a man named Louis Budenz.⁹

Senator Chávez made clear that dissent was our strength, not a weakness. "I contend that we are a nation of dissenters," he said. "Your ancestors and my ancestors . . . left Europe because they were dissenters. Our Nation was created by dissenters. . . . Our ancestors were not satisfied. The Declaration of Independence and the Constitution of the United States are based upon the fact that our ancestors were not satisfied with the things as they were."¹⁰

And so, Chávez explained, if you curb dissent, if you stifle difference, you don't just threaten liberty, you threaten "our entire democratic way of life."¹¹ He went on: "[T]he United States cannot gain strength from a population of 'safe' people . . . people who have never thought or dreamed or spoken anything that is not prescribed and dictated by higher authority," he said. "If we accept only 'safe' people the cement falls apart and we become a slave people."¹²

Senator Chávez was a powerful appropriator, and used his power to protect the water rights of his constituents.¹³ But he warned that "[i]t matters little if the Congress appropriates hundreds of millions of dollars to check the erosion of the soil

5. See Frank Desmond, *M'Carthy Charges Reds Hold U.S. Jobs*, WHEELING INTELLIGENCER, Feb. 10, 1950, at 1.

6. See James Reston, *Final Vote Condemns M'Carthy*, 67-22, *For Abusing Senate and Committee; Zwicker Count Eliminated in Debate*, N.Y. TIMES (Dec. 3, 1954), <https://timesmachine.nytimes.com/timesmachine/1954/12/03/issue.html>.

7. See Murrey Marder, *Welch Excoriates McCarthy as 'Cruel', Lacking 'Decency'; Draws Audience Applause*, WASH. POST, June 10, 1954, at 1.

8. 109 CONG. REC. 3328-29 (1963) (Remarks of Sen. Margaret Chase Smith).

9. See generally 96 CONG. REC. 6969 (1950) (Remarks of Sen. Dennis Chávez).

10. *Id.* at 6970.

11. *Id.* at 6969.

12. *Id.* at 6974.

13. See CISSIE COY, DENNIS CHÁVEZ: THE FIRST HISPANIC US SENATOR, 32-33, 44-45 (2017).

if we permit the erosion of our civil liberties, free institutions, and the untrammelled pursuit of truth.”¹⁴

Years later, his contemporaries would look back and say that it was this moment that started to turn the tide against Joseph McCarthy in the Senate. “Because of Senator Chávez[], others dared to speak out as well.”¹⁵

III.

Dionisio Chávez was born in April 8, 1888, in the town of Los Chávez. He lived in a small house with dirt floors and no running water. He rose from that house to become the first U.S.-born Hispanic to serve in the Senate, the fourth most senior member of the Senate, the chair of its most powerful subcommittee, and the chair of its Public Works Committee.¹⁶

Yet Chávez did not forget that house. He couldn’t forget it. When Chávez entered the Senate, there were no African American senators, no Native American senators, no Asian American senators.¹⁷ It was just Dennis Chávez. One of his colleagues would refer to him as “the Senator from Mexico.” Not *New Mexico*; the Senator from Mexico.¹⁸

That was the senator from Mississippi, Theodore Bilbo, an unabashed racist who was five foot two inches tall, and often referred to himself in the third person.¹⁹ True story. His colleagues would call him, quote “the Man” because . . . that is what he would call himself.²⁰

14. 96 CONG. REC. 6969 (1950) (Remarks of Sen. Dennis Chávez).

15. ACCEPTANCE OF THE STATUE OF DENNIS CHÁVEZ PRESENTED BY THE STATE OF NEW MEXICO, S. Doc. No. 89-128, at 45 (2d Sess. 1966) (Remarks of the Hon. Paul A. Porter) (“Thus on this 12th day of May, 1950, there came what I believe can be described as the beginning of the end. Because of Senator Chávez’s leadership, others dared to speak out as well.”). If any senator has received historical recognition for an early denunciation of McCarthy, it was Sen. Margaret Chase Smith of Maine, who denounced McCarthy on June 1, 1950, in a speech that came to be known as “A Declaration of Conscience.” 81 CONG. REC. 7894-95, (1950) https://www.senate.gov/artandhistory/history/common/generic/Speeches_Smith_Declaration.htm [https://perma.cc/QM2U-ZNZ7]. In her memorial remarks on the floor of the Senate in 1963, Sen. Smith cited Chávez as the senator who broke the “paralyzed” Senate’s silence. The exact language she uses is telling: “It was back in those fear-ridden days of 1950 that Dennis Chávez risked political suicide and with extraordinary political courage declared his moral conscience against the tactics that had gripped the Senate.” 109 CONG. REC. 3328-3329 (1963) (Remarks of Sen. Margaret Chase Smith).

16. For an overview of the life and career of Chávez, see generally GOMEZ & COY, *supra* note 2, and COY, *supra* note 14.

17. See *Ethnic Diversity in the Senate*, U.S. SENATE, <https://www.senate.gov/senators/EthnicDiversityintheSenate.htm> [https://perma.cc/KT2V-7N8L]. Chávez would remain the sole ethnic minority in the Senate for twenty-four years until the arrival of Sen. Hiram Fong of Hawaii in 1959. Fong was Asian American.

18. See 91 CONG. REC. 6897 (1945) (transcript of Senator Theodore Bilbo referring to Chávez as “the Senator from Mexico” and then, disingenuously, thanking Chávez for correcting him, explaining that Chávez’s policy positions might lead some to believe that “it comes from Mexico, not New Mexico”).

19. See BENJAMIN O. SPERRY, CAUGHT “BETWEEN OUR MORAL AND MATERIAL SELVES”: MISSISSIPPI’S ELITE WHITE MODERATES AND THEIR ROLE IN CHANGING RACE RELATIONS, 1945-1956, at 274 (2010) (“‘The Man’ stood a mere five-foot-two, with a bald pate, scarlet suspenders, a showy diamond stickpin and ubiquitous cigar.”).

20. *Id.* at 227-28.

Once he arrived in the Senate, Dennis Chávez had a relentless focus on the disadvantaged and the dispossessed. He pushed back against federal efforts to control the lives of Native Americans—and instead made sure to protect the water rights of the Laguna Pueblo and other Native communities.²¹ He made sure that female nurses received the same pay as male officers of the same grade.²² He was the first to introduce a bill to ban discrimination in hiring during World War II. That legislation would go on to become a foundation for modern civil rights legislation.²³

Senator Stephen Young of Ohio would later say that, quote “Dennis Chávez in many respects was a very predictable man. He was always with the underdog. He was for the little fellows whether they were struggling farmers fighting debts, drought, and low farm prices; underprivileged and forgotten American Indians; or workingmen seeking to better their lot and provide a more secure future for their children. At all times he was the champion of the poor and the humble . . . a voice for the oppressed.”²⁴

IV.

I see this lecture as a chance to advance Senator Chávez’s legacy and his principles.

So far, you’ve heard about two of the Senator’s core commitments: his defense of individual freedoms and civil liberties; and his belief in equality and promotion of civil rights. I want to talk to you about an idea at their intersection. I want to talk to you about our right to privacy.

This might seem strange. Sure, privacy is one of our oldest and most valued civil liberties, “the right most valued by civilized men,” to quote Justice Brandeis.²⁵ But is privacy a civil *right*?

Who hears the word “privacy” and thinks about equality? Who hears the word “surveillance” and thinks about racism or bigotry or intolerance? Not many. Nowadays, the motto is that “everyone is watched.”

What’s more, we don’t really talk about privacy as felt, visceral thing. Privacy is in the Business or Technology section of the newspaper. It’s about cookies on browsers. It’s about data breaches. It’s about Mark Zuckerberg and the NSA.

21. See *Survey of Conditions of the Indians of the United States: Hearing on S. 1084 Before the Subcomm. on S. Res. 79 of the S. Comm. on Indian Affairs*, 78th Cong. 22765 (1943) (Chávez: “I have hoped for a long while that the time might come in the not-far-distant future when all Indians in the United States will be able to run their own affairs without hearing from any bureau in Washington.”); COY, *supra* note 14, at 43–45 (advocacy on behalf of the Laguna Pueblo). See generally S. REP. 78-310 (1943) (a report co-authored by Chávez criticizing the conduct of the Bureau of Indian Affairs).

22. See 109 CONG. REC. 1416–17 (1963) (citing to JOHN J. FORD, BORN IN AN ADOBE HUT, ROA’S MINUTEMAN ROSE TO BECOME POWERFUL LEADER (1962)); see also GOMEZ & COY, *supra* note 2, at 19–20.

23. See *A Bill to Prohibit Discrimination in Employment Because of Race, Creed, Color, National Origin, or Ancestry: Hearing on S. 2048 Before the Subcomm. of the Comm. on Educ. and Labor*, 78th Cong. (1944); 109 CONG. REC. 3326 (1963) (Senator Eugene McCarthy recognizing Chávez as “the first sponsor of fair employment practices legislation” during World War II and how that legislation formed “a base” for modern civil rights laws).

24. 109 CONG. REC. 3324 (1963) (statement of Sen. Stephen M. Young).

25. *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

That, in a sense, is right. But at its heart, privacy is about human dignity: Whether the government feels it can invade your dignity, and whether the government feels it has to protect the most sensitive, most intimate facts of your life.

And invasions of privacy—the watching and tracking and sharing of data—those invasions do not affect everyone equally. Instead, across our history, you see a color to surveillance.²⁶ You see patterns.

Pattern: We watch those who are “less than.” Will you spy on your superior? Or will you spy on the poor man, the person of color, the immigrant, the heretic? We watch those who are “other.”

Pattern: When those “others” organize, mobilize, that watching is redoubled. Surveillance becomes a tool to stop marginalized people from achieving power.

Today, I want to trace those patterns through key moments in history. I want to talk about how our government has largely failed to reckon with those patterns. And I want to talk about what that reckoning might look like.

Yes, privacy is a civil liberty. I am here to tell you that privacy is also a civil right.²⁷ When we talk about privacy only as a civil liberty, we erase those patterns of harm, that color of surveillance. And when we talk about privacy only as a civil liberty, we also ignore the benefits of privacy: Surveillance threatens vulnerable people fighting for equality. Privacy is what protects them and makes it possible.²⁸

V.

Let's start near the beginning.

When he was chair of the subcommittee on defense appropriations, Senator Chávez would sit next to a senator from Massachusetts, Leverett Saltonstall, the ranking Republican on that subcommittee. Every bit the Boston Brahmin as his name suggests, Senator Saltonstall could trace his family to the Mayflower.²⁹

Chávez and Saltonstall would often make small talk about whose family came here first: Was it Senator Saltonstall's family? Or was it Senator Chávez's family?³⁰

It was Senator Chávez's family. In 1598, the Spanish explorer Pedro Durán y Chávez arrived in this land that we now call New Mexico, and settled here thanks

26. See generally Alvaro M. Bedoya, *The Color of Surveillance*, SLATE (Jan. 21, 2016) (broadly outlining the disparate impact of government surveillance); see also Alvaro M. Bedoya, *Big Data and the Underground Railroad*, SLATE (Nov. 7, 2014), <https://slate.com/technology/2014/11/big-data-underground-railroad-history-says-unfettered-collection-of-data-is-a-bad-idea.html> [<https://perma.cc/E8N8-742P>] (advocating for limited data collection in light of disparate impact).

27. This argument will focus on government, not corporate surveillance. For a discussion of the civil rights implications of commercial data collection and use, see Alvaro M. Bedoya, *A License to Discriminate*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/opinion/facebook-privacy-civil-rights-data-huawei-cambridge-analytica.html> [<https://perma.cc/NPF3-GLAE>].

28. See Bedoya, *The Color of Surveillance*, *supra* note 27 (“‘The arc of the moral universe is long, but it bends towards justice,’ said King. What would that arc have looked like if every time he picked up the phone, he knew that he was beyond the government's reach? . . . How much more sharply would that arc have bent toward justice?”).

29. See CHAIM M. ROSENBERG, *YANKEE COLONIES ACROSS AMERICA: CITIES UPON THE HILLS* 266 (2015).

30. See 109 CONG. REC. 3329 (1963) (statement of Sen. Leverett Saltonstall).

to a land grant from the Spanish Crown.³¹ Senator Saltonstall's family landed at Plymouth Rock in 1620. And so, when people asked about his ancestry, Senator Chávez would helpfully tell people that he was "American since before Plymouth Rock."³²

There's a reason Senator Chávez would say that: "Plymouth Rock" is more than a place; it's part of our origin story. Remember Senator Chávez: "Our Nation was created by dissenters. Your ancestors and my ancestors . . . left Europe because they were dissenters."³³

Well, what were the Pilgrims dissenting against? What were they dissatisfied with in the late 1500s and early 1600s in Tudor and Stuart England?

In grade school, we learn that Pilgrims worshipped differently than their neighbors. They were mistreated. They left England and settled in New England.

The reality is darker. When Elizabeth I came to the throne in 1558, she wanted to be religiously tolerant. But after the Catholic Pope excommunicated her, that was wiped away. Elizabeth built a network of spies and informants to root out perceived threats to her reign.³⁴

Her main focus was on Catholics. Catholics feared that their neighbors would report them to the authorities. Many built secret compartments in their houses called "priest holes," where clergy could hide if an agent of the Crown happened to stop by the house.³⁵ In fact, under Elizabeth's successor, James I, Parliament created a series of bounties to reward people for turning in crypto-Catholics.³⁶

But Elizabeth also trained her attention on the Puritan Separatists we now know as "Pilgrims." Under her reign, and under that of her successor, James I, the Pilgrims also lived in a surveillance state.³⁷

Example: The governor of Plymouth Colony was a man named William Bradford. He had been a passenger on the Mayflower. And when he wrote about the Pilgrim's time in England, he described being "hunted and persecuted," "their houses beset and watched night and day."³⁸

31. See 109 CONG. REC. 1417 (1963) (citing to JOHN J. FORD, BORN IN AN ADOBE HUT, ROA'S MINUTEMAN ROSE TO BECOME POWERFUL LEADER (1962) (land grant from Phillip II)); COY, *supra* note 14, at 1 (arrival in 1598).

32. 109 CONG. REC. 1417 (1963) (quoting JOHN J. FORD, BORN IN AN ADOBE HUT, ROA'S MINUTEMAN ROSE TO BECOME POWERFUL LEADER (1962)).

33. See 96 CONG. REC. 6960, 6970 (1950) (statement of Sen. Chávez).

34. JOHN COFFEY, PERSECUTION AND TOLERATION IN PROTESTANT ENGLAND, 1558-1689 (2000); *cf. id.* at 95-96 (describing government agents loitering in St. Paul's courtyard "pretending to be sympathetic" to the Puritans' cause); *id.* at 81-88 (reaction to excommunication). See generally *id.* at 78-133.

35. See *id.* at 88.

36. See An Act to Prevent and Avoid Dangers which Grow by Popish Recusants, 3 Jas. 1, c. 5 (immunizing informants and providing them one-third of the money seized from the offending individual).

37. See generally COFFEY, *supra* note 35, at 93-98, 102-04.

38. See WILLIAM BRADFORD, OF PLIMOTH PLANTATION 6 (1630-1650) ("But after these things they could not long continue in any peaceable condition, but were hunted & persecuted on every side, so as their former afflictions were but as flea-bitings in comparison of these which now came upon them. For some were taken & clapt up in prison, others had their houses besett & watcht night and day, & hardly escaped their hands."); see also COFFEY, *supra* note 35, at 103 ("The harsh repression of the Separatists in the 1580s and 90s was . . . out of all proportion to their threat. . . . Separatist congregations were hunted down and incarcerated, their ringleaders put to death.").

It was a dystopia. At the end of her reign, Elizabeth commissioned the so-called Rainbow Portrait. Look it up—and when you do, take a close look at Elizabeth's gown.³⁹ It is embroidered in human eyes and ears. Experts say that she wanted to tell her subjects that, quote “[t]he Queen watches and listens vigilantly, seeing in all perspectives, hearing in all directions . . .”⁴⁰

Plymouth Rock. The Pilgrims. This origin story of our Republic isn't just a story about religious persecution. It is also a story about surveillance, and a government's need to watch and control a heretical religious minority.

This did not just happen in England. In the Utah Territory, our neighbors to the northwest, a different but similar drama would unfold. In 1882 and 1887, through the Edmunds and Edmunds-Tucker Acts, Congress cracked down on the practice of polygamy among Mormon settlers. It outlawed “cohabitation.”⁴¹ It gave federal courts blanket power to access church documents.⁴² It tried to let federal prosecutors force a wife to testify against her husband.⁴³

Using these tools, in this period, the federal government prosecuted 2,300 Mormons for sex crimes.⁴⁴ Reflect on this for a moment: The first wave of federal sex crimes prosecutions in this country was waged not against LGBT people or 20th century servicemembers. No, it was waged against members of the Church of Jesus Christ of Latter Day Saints in the late 19th century.⁴⁵

How did federal prosecutors find 2,300 Mormons to prosecute? By watching them, night and day: Federal agents patrolled the streets, monitored homes, and raided those houses as they saw fit.⁴⁶ In 1886, the women of Salt Lake actually wrote an open letter to Congress asking for help:

“We . . . direct your attention to the outrages perpetrated by rough and brutal deputy marshals, who watch around our door-yards, peer into our bed-room windows, ply little children with questions about their parents, and, when hunting their human prey, burst into people's domiciles and terrorize the innocent.”⁴⁷

We watch those who are “other.” We watch those who are “less than.” There is a fascinating wrinkle here which underscores this. The Mormon population at the time was white. And so, how did anti-Mormons justify this campaign to the

39. See generally Daniel Fischlin, *Political Allegory, Absolutist Ideology, and the “Rainbow Portrait” of Queen Elizabeth I*, 50 *RENAISSANCE Q.* 170, 175–76 (1997).

40. *Id.* at 182–83.

41. See Edmunds Act of 1882, Pub. L. No. 47–47, §3, 22 Stat. 30, 31 (repealed 1983).

42. See Edmunds-Tucker Act of 1887, Pub. L. No. 49–397, §14, 24 Stat. 635, 637 (repealed 1978).

43. *Id.* §1. In response to criticism, the bill's sponsors added language to the final text of the law requiring spousal consent prior to testimony and prohibiting compelled testimony regarding “matters deemed confidential at common law.” See SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 167 (2002).

44. *Id.* at 157 n.16.

45. *Id.* at 156 (“This level of enforcement far exceeds anything historians have found elsewhere in the country. It is, literally, unique in American legal history. . . .”).

46. See generally Tracey E. Panek, *Search and Seizure in Utah: Recounting the Antipolygamy Raids*, 62 *UTAH HIST. Q.* 316, 320–34 (1994).

47. Sen. Henry Blair entered the letter into the Congressional Record. See 17 *CONG. REC.* 3136, 3137–38 (1886).

American public? They insisted that the Mormons weren't really white and Christian; they were actually Muslims, or "Mohammedans," as they were called in that era.⁴⁸ "Modern Mohammedanism has its Mecca at Salt Lake."⁴⁹ "Turkey is in our midst."⁵⁰ The Prophet Joseph Smith "closely resembles his master and model, Mahomet," they said.⁵¹

VI.

When we talk about the disparate impact of surveillance, we have to be careful. We must not reinforce the idea that the targets of surveillance are helpless victims. Often, in fact, the "other" is being watched precisely because they are fighting back. And sometimes, they win—and that watching fails and is utterly useless.

Members of the New Mexico legislature recently sought to create a holiday in memory of both César Chávez and Dennis Chávez.⁵² That holiday would have fallen on the first Friday of April—tomorrow, actually. So let's talk about César Chávez.

The FBI surveilled César Chávez for roughly a decade.⁵³ They justified the initial surveillance of Chávez partly on the fact that a communist newspaper ran a photo of Dolores Huerta—not Chávez, but Huerta.⁵⁴ That investigation intensified when the FBI learned that the photographer who took that photo in the communist newspaper was, surprise, likely a communist.⁵⁵ The FBI was off to the races.

The FBI followed César Chávez nearly everywhere he went. Farmworkers picket grape growers in Delano. The FBI is there.⁵⁶ Farmworkers march through the San Joaquin Valley to Sacramento. The FBI is on the route.⁵⁷ Farmworkers start to organize in the Rio Grande Valley. The FBI follows.⁵⁸

48. See CHRISTINE TALBOT, *A FOREIGN KINGDOM: MORMONS AND POLYGAMY IN AMERICAN POLITICAL CULTURE, 1852–1890*, at 130–36 (2013); *id.* at 136 ("By claiming that Mormons were not truly American, Orientalist anti-Mormons helped make Mormons into targets of federal discipline."); see also J. Spencer Fluhman, *An "American Mahomet": Joseph Smith, Muhammad, and the Problem of Prophets in Antebellum America*, 34 J. MORMON HIST. 23, 23–45 (2008).

49. *Id.* at 134.

50. *Id.*

51. *Id.* at 130–31.

52. See Associated Press, *New Mexico Lawmaker Proposes Holiday to Honor César Chavez, Dennis Chavez*, NBC NEWS (Jan. 7, 2019, 4:47 PM), <https://www.nbcnews.com/news/latino/new-mexico-lawmaker-proposes-holiday-honor-cesar-chavez-dennis-chavez-n955941> [https://perma.cc/PU8V-QX9Y].

53. See generally Richard Steven Street, *The FBI's Secret File on César Chávez*, 78 S. CAL. Q. 347, 347–84 (1996); José Angel Gutiérrez, *THE EAGLE HAS EYES: THE FBI SURVEILLANCE OF CÉSAR ESTRADA CHÁVEZ OF THE UNITED FARM WORKERS UNION OF AMERICA, 1965–1975* (2019).

54. See Street, *supra* note 54, at 347–48.

55. *Id.* at 351–52.

56. *Id.* at 354.

57. *Id.* at 357–59.

58. *Id.* at 364–65.

The final FBI file on César Chávez was fifteen hundred pages long.⁵⁹ It listed Chávez's daily routine, what he ate for breakfast.⁶⁰ The specific songs that Joan Baez sang at his rallies.⁶¹ His relatives, where they worked, where they lived.⁶² It was a minutely detailed portrait of César Chávez's life that has actually proven quite useful for historians of the farmworker rights movement.

What won't you find in those fifteen hundred pages? A single incriminating detail.⁶³

César Chávez was not a communist. His associates were not communists. He was faithful to his wife. He did not misuse union funds.⁶⁴ And when the farmworkers demonstrated, when they used their bodies to affect change, they were not violent. They turned the other cheek. There are actually FBI telegrams on farmworker protests that say in all caps "EXTREMELY ORDERLY."⁶⁵ And there is a note of frustration to them. Because the FBI never "caught" César Chávez in anything.

Unfortunately, César Chávez's story is uncommon: The man was a saint; the rest of us are human.

Marcus Garvey was human. J. Edgar Hoover followed him, also.⁶⁶ His agents would literally peer into the windows of his hotel rooms.⁶⁷ But Hoover hadn't caught Garvey on anything.

Then the government got a hold of a marketing brochure for stock in the Black Star Line, which Garvey founded and ran. The brochure showed a handsome steamship named for Phyllis Wheatley, the famous African American poet.

But Garvey had moved too quickly. He was negotiating for that ship, but he didn't own it yet. In fact, the sale fell through. And so the government learned that and used it to charge and convict Garvey of mail fraud.⁶⁸ They sent him to prison, and deported him in 1927.⁶⁹

Billie Holiday was human. In 1939—1939—she stood in a nightclub in Greenwich Village and sang a protest poem against lynching: "Southern trees bear a strange fruit, blood on the leaves and blood at the root, black body swinging in the Southern breeze, strange fruit hanging from the poplar trees." The song, and her protest against lynching, was a sensation.⁷⁰

59. *Id.* at 348.

60. *Id.* at 371.

61. *Id.* at 376–77.

62. *Id.* at 355.

63. *Id.* at 348–49.

64. *Id.* at 349.

65. *Id.* at 371.

66. See generally Justin Hansford, *Jailing a Rainbow: The Marcus Garvey Case*, 1 GEO. J. L. & MOD. CRITICAL RACE PERSP. 325 (2009).

67. *Id.* at 345.

68. *Id.* at 360–62.

69. *Id.* at 366.

70. See Johann Hari, *The Hunting of Billie Holiday: How Lady Day Was in the Middle of a Federal Bureau of Narcotics Fight for Survival*, POLITICO (Jan. 17, 2015), <https://www.politico.com/magazine/story/2015/01/drug-war-the-hunting-of-billie-holiday-114298> [<https://perma.cc/K3TY-97UB>].

But Holiday was an addict. And immediately after “Strange Fruit” entered her repertoire, the head of the Federal Bureau of Narcotics, a predecessor to the modern DEA, assigned an undercover agent to follow her, ingratiate himself into her circle, and eventually set her up for a drug bust. Holiday went to prison for a year. She was stripped of her cabaret license. She would no longer sing in nightclubs. It was the start of a long decline.⁷¹

The Rev. Martin Luther King, Jr. was human. Hoover’s FBI followed him, wiretapped him, and bugged his hotels. Senior FBI officials compiled a recording of his extramarital affairs and sent it to his office, along with a note threatening blackmail and implying that Dr. King should kill himself.⁷²

The package was forwarded to the King family home. It was Coretta Scott King who found it and opened it. “They are out to break me,” Dr. King told a friend. “They are out to get me, harass me, and break my spirit.”⁷³

VII.

It is easy to focus on J. Edgar Hoover, but these patterns predated him and continued long after his passing. Let’s talk about how they continue today.

In January 2017, when the President barred travel to the United States from several Muslim majority countries, people mobilized en masse against those travel restrictions. Fewer people focused on another section in that same executive order that called for every traveler to the U.S. to be “vetted” to see if he or she would, quote, “becom[e] a positively contributing member of society” and if they would be able to, quote, “make contributions to the national interest.”⁷⁴

Fewer people still noticed ICE procurement documents posted in the summer of 2017, proposing to build out a system to implement that charge. How were they planning to do that? According to the documents, Immigration and Customs Enforcement wanted to automatically and continuously scan immigrants’ social media—their Facebook, Twitter, and Instagram posts—and flag a minimum, a minimum, of 10,000 of them per year for deportation investigations.⁷⁵

71. *Id.*

72. See DAVID J. GARROW, *THE FBI AND MARTIN LUTHER KING, JR.: FROM “SOLO” TO MEMPHIS* 101–04, 125–26 (1981).

73. *Id.* at 132–33.

74. Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8,977, 8,978–79 (Feb. 1, 2017) (executive order of Jan. 27, 2017).

75. See IMMIGRATION & CUSTOMS ENF’T, EXTREME VETTING INITIATIVE: STATEMENT OF OBJECTIVES 2 (2012), <https://www.brennancenter.org/sites/default/files/Extreme%20Vetting%20Initiate%20-%20Statement%20of%20Objectives.pdf> [<https://perma.cc/68E5-6U3R>] (“The purpose of this effort is to obtain contractor services to establish an overarching vetting contract that automates, centralizes and streamlines the current manual vetting process while simultaneously making determinations via automation if the data retrieved is actionable. . . . ICE must develop processes that determine and evaluate an applicant’s probability of becoming a positively contributing member of society as well as their ability to contribute to national interests in order to meet the EOs outlined by the President.”); IMMIGRATION & CUSTOMS ENF’T, EXTREME VETTING INITIATIVE: BACKGROUND 2–3, <https://www.brennancenter.org/sites/default/files/Background.pdf> [<https://perma.cc/F8PN-EL9N>] (describing social media monitoring and stating that “the Contractor shall generate a minimum of 10,000 investigative leads annually to the appropriate HSI field offices”).

A coalition of civil rights and privacy organizations was able to stop that system, but unfortunately we have seen no limit to these kinds of abuses.⁷⁶ An Administration that sees immigrants as drug dealers, rapists, and animals is an Administration that will do anything it wants to a vulnerable person. It will break any law, violate any norm, take advantage of a child's pain and trust.

Here's a story that ran in the *Santa Fe New Mexican* two years ago. A teenager is living in a village in Guatemala with his uncle. He hasn't seen his brother, Gari, in more than a decade. Gari lives here in Santa Fe. But the teen needs to get out. His uncle abuses him. So he leaves his village, crosses Sonora, and shows up at the Arizona border.⁷⁷

The teenager is taken into custody. Officials from our government ask him, quote: "Do have any other close family members who live in the U.S.?" This question scares a lot of children, because a lot of their family members are undocumented, and the kids know that this might put them at risk. But the kids are scared. They are desperate to see their families. So they take the risk. And so this teen gives the Office of Refugee Resettlement his brother's name and phone number.⁷⁸

Gari gets the call in Santa Fe. He lives with his wife, Marisol, and their two kids, one seven months, one 11-years-old. Gari is undocumented.

The government official at the end of the line assures him that if he tells them where he lives, that won't be used to find and deport him. It will just be used to reunite him with his brother. So he does that, he gives them that information. He wants to take care of his little brother.

By the time the *Santa Fe New Mexican* ran the story, Gari wasn't living in Santa Fe anymore. He was in a detention facility in Chaparral, waiting for his deportation hearing. Once his brother told the government his name, and once Gari came forward, ICE came for him, arrested him, and placed him in deportation proceedings.⁷⁹

76. See Drew Harwell & Nick Miroff, *ICE Just Abandoned Its Dream of 'Extreme Vetting' Software That Could Predict Whether a Foreign Visitor Would Become a Terrorist*, WASH. POST (May 17, 2018, 10:33 AM), <https://www.washingtonpost.com/news/the-switch/wp/2018/05/17/ice-just-abandoned-its-dream-of-extreme-vetting-software-that-could-predict-whether-a-foreign-visitor-would-become-a-terrorist/> [https://perma.cc/C3L7-XTSJ]; see also Matt O'Brien, *Federal "Extreme Vetting" Plan Castigated By Tech Experts*, AP NEWS (Nov. 16, 2017), <https://apnews.com/08d469b81a31492e91682b24b6b8995a/Federal-%22extreme-vetting%22-plan-castigated-by-tech-experts> [https://perma.cc/C6E2-KCRF]; Dustin Volz, *IBM Urged to Avoid Working on 'Extreme Vetting' of Immigrants*, REUTERS (Nov. 16, 2017, 6:36 AM), <https://www.reuters.com/article/us-ibm-immigration/ibm-urged-to-avoid-working-on-extreme-vetting-of-u-s-immigrants-idUSKBN1DG1VT> (describing criticisms of civil society and tech experts) [https://perma.cc/2YYU-7BAZ].

77. See Uriel J. Garcia, *ICE Arrests Young Immigrant's Sponsor Months After Feds Assured Him He'd Be Safe*, SANTA FE NEW MEXICAN (Sept. 9, 2017), <https://www.santafenewmexican.com/news/localnews/ice-arrests-young-immigrant-s-sponsor-months-after-feds-assured/article428366f5-6d03-552c-a277-93b83d3005e2.html> [https://perma.cc/VW8A-9X87].

78. This passage is adapted from a translator's 2017 description of the standard ORR intake process. See VALERIA LUISELLI, *TELL ME HOW IT ENDS: AN ESSAY IN 40 QUESTIONS* 49 (2017).

79. See Garcia, *supra* note 78.

Since last summer, ICE has publicly reserved the right to use information from scared, detained kids, and the families who want to care for them, to find, arrest, and deport their families.⁸⁰ And it has happened to one hundred and seventy people, including at least three in New Mexico.⁸¹

There's a detail here that I think is haunting. Last fall, when a coalition of NGOs wrote a letter to DHS and HHS denouncing what was happening, there was an unusual number of Japanese American organizations who signed on: The Japanese Americans Citizens League, the Japanese American Service Committee, the Fred T. Korematsu Center for Law and Equality.⁸² There were many other civil rights groups, but no other national origin group was represented like that.

Why? Well, it turns out that in the 1940s, when our government ordered Americans of Japanese descent into internment camps, they had help from the Census. In 1940, Japanese American families had been surveyed, and were promised that their information would remain confidential. But Congress then waived those rules, and used that confidential census data to find and incarcerate them in internment camps like the ones that were here in Lordsburg and Santa Fe.⁸³

On May 12, 1950, when Senator Chávez said “we are a nation of dissenters,” when he said that “your ancestors and my ancestors . . . left [their homes] because they were dissenters,” because “[they] were not satisfied with the things as they were,” he wasn't just talking about the Pilgrims.⁸⁴ He was talking about immigrants, activists. He was talking about vulnerable people who dare to want more.

Surveillance is a tool that the powerful use to stop that.

80. See Notice of Modified System of Records: Docket No. DHS-2018-0013, 83 Fed. Reg. 20844, 20846 (May 8, 2018) (“The purposes of this system [of records] are . . . to assist in identifying and arresting individuals . . . who may be subject to removal.”). See generally Memorandum of Agreement Among the Office of Refugee Resettlement of the U.S. Department of Health and Human Services and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection of the U.S. Department of Homeland Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters (Apr. 13, 2018), <https://www.texasmonthly.com/wp-content/uploads/2018/06/Read-the-Memo-of-Agreement.pdf> [<https://perma.cc/AM4V-BUJW>].

81. See Tal Kopan, *ICE Arrested Undocumented Adults Who Sought to Take In Immigrant Children*, S.F. CHRON. (Dec. 10, 2018), <https://www.sfchronicle.com/politics/article/ICE-arrested-undocumented-adults-who-sought-to-13455142.php> [<https://perma.cc/7427-DLDD>] (reporting the arrests of 170 sponsors); Garcia, *supra* note 78 (detailing arrests of three New Mexicans).

82. Letter from 112 Civil Soc’y Orgs. to Sec’y Kirstjen Nielsen and Sec’y Alex Azar (Nov. 28, 2018), <https://www.brennancenter.org/our-work/research-reports/brennan-center-calls-government-stop-using-information-children-deport> [<https://perma.cc/NM8E-FJWQ>].

83. See JR Minkel, *Confirmed: The U.S. Census Bureau Gave Up Names of Japanese-Americans in WWII*, SCI. AM. (March 30, 2007), <https://www.scientificamerican.com/article/confirmed-the-us-census-b/> [<https://perma.cc/55P5-8886>]; William Seltzer & Margo Anderson, *Census Confidentiality under the Second War Powers Act (1942-1947)*, (March 12, 2007) (unpublished paper prepared for presentation at the 2007 Population Association of America Annual Meeting), <https://paa2007.princeton.edu/abstracts/70299> [<https://perma.cc/MA9K-LUVA>]; Lynne Horiuchi, *History of the War Relocation Authority (WRA) Sites*, NAT’L JAPANESE AM. HIST. SOC’Y, <https://njahs.org/confinementsites/history/> [<https://perma.cc/QBP3-LLEC>].

84. See 96 CONG. REC. 6,970 (1950) (remarks of Sen. Dennis Chávez).

VIII.

On June 6, 2013, I was sitting down for dinner at Bertucci's Pizza on Connecticut Avenue in Washington, D.C. And my Blackberry started lighting up.

So I opened it up. Edward Snowden had just revealed that the NSA was tracking the calls of not one, not some, but rather millions of Verizon customers.⁸⁵ That first leak ushered in the most intense and important surveillance debate in a generation.

At that time, I was the chief counsel to the Senate Judiciary Subcommittee on Privacy, Technology, and the Law. It was my job to run one of the key subcommittees tasked with finding out what the NSA was doing and then writing legislation to rein them in.

So, you know, no more pizza. The next year was a blur of hearings and negotiations. The NSA would do this brilliant thing where they would send all these guys to a negotiation, agree to something, and then send a totally different group of people to the second meeting who had no knowledge of the first. It was brilliant.

But we made some progress; we passed an NSA reform bill with many strengths and yes, many weaknesses.⁸⁶ Yet, even then, in that haze of activity, I remember thinking to myself during those negotiations, but particularly in the hearings, "When are we going to talk about the history of surveillance, and the people it affects? We're calling business groups to testify, civil liberties groups—why aren't we calling civil rights groups?"

Once I left the Senate and came to Georgetown Law, I had time to re-read the transcripts and all of the news stories in that period. And it was worse than I had thought. Because it turns out that three months after Edward Snowden went public, the NSA itself disclosed that it hadn't just been the FBI that had wiretapped Dr. King. The NSA wiretapped him, also, along with Mohammad Ali and Whitney Young of the National Urban League. This was a part of an operation aimed at finding out if U.S. political activists were working with the Soviet Union (They were not.).⁸⁷

Now, in any legislature, when you debate a policy, you talk about the highs and you talk about the lows: What happens when everything goes great—but also, what's the worst possible thing that could happen? In 2013 and 2014, the threat of surveillance to civil rights was not some obscure, abstract thing. It was staring us in the face. You would expect senators to debate that.

They did not. There Senate held twelve hearings focusing on NSA reform from the time of Edward Snowden's first leak and the passage of the USA FREEDOM Act two years later. Ten of those hearings happened after the NSA's

85. See Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, THE GUARDIAN (June 6, 2013), <https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order> [<https://perma.cc/UL8G-4GTG>].

86. See USA FREEDOM ACT of 2015, H.R. 2048, 114th Cong. (2015).

87. See Matthew M. Aid & William Burr, *Secret Cold War Documents Reveal NSA Spied on Senators*, FOREIGN POLICY (Sept. 25, 2013), <https://foreignpolicy.com/2013/09/25/secret-cold-war-documents-reveal-nsa-spied-on-senators/> [<https://perma.cc/FNY2-U5CF>]; Richard Lelby, *Declassified Documents Show NSA Listened in on MLK, Muhammad Ali and Art Buchwald*, WASH. POST (Sept. 25, 2013), https://www.washingtonpost.com/lifestyle/style/declassified-documents-show-nsa-listened-in-on-mlk-muhammad-ali-and-art-buchwald/2013/09/25/1a018178-262b-11e3-b3e9-d97fb087acd6_story.html [<https://perma.cc/LS55-VUF8>].

admission that the agency had spied on Dr. King.⁸⁸ Yet, across all of those hearings, never—not once—did any senator even say Martin Luther King’s name. In fact, senators never discussed, in depth, any aspect of how surveillance can be and has been used to target and harm racial and religious minorities.⁸⁹

The senators talked about how the revelations hurt our relationships with our allies.⁹⁰ They quantified the billions of dollars in predicted losses to American cloud computing companies and other businesses.⁹¹ They called three separate

88. See generally *The Intelligence Community: Keeping Watch Over Its Contractor Workforce: Hearing Before the Comm. on Homeland Sec. & Governmental Affairs, United States Senate*, 113th Cong. (June 18, 2014); S. Select Comm. on Intelligence, *Hearing on the USA Freedom Act*, U.S. SENATE COMMITTEE CHANNEL, (June 5, 2014), <https://www.intelligence.senate.gov/hearings/open-hearing-usa-freedom-act-hr-3361>; *Nominations Before the S. Armed Servs. Comm.: Hearing of the Comm. on Armed Servs., United States Senate*, 113th Cong. 435 (March 11, 2014) (testimony on the nomination of Vice Admiral Michael S. Rogers, U.S. Navy, to be Admiral and Director, National Security Agency; Chief, Central Security Services; and Commander, U.S. Cyber Command); *The Report of the Privacy and Civil Liberties Oversight Board on Reforms to the Section 215 Telephone Records Program and the Foreign Intelligence Surveillance Court: Hearing of the Comm. on the Judiciary, United States Senate*, 113th Cong. (Feb. 12, 2014); *Annual Open Hearing on Current and Projected National Security Threats to the United States: Hearing of the Select Comm. on Intelligence, United States Senate*, 113th Cong. (Jan. 29, 2014); *Hearing on the Report of the President’s Review Group on Intelligence and Communications Technologies: Hearing of the Comm. on the Judiciary, United States Senate*, 113th Cong. (Jan. 14, 2014); *Continued Oversight of the U.S. Government Surveillance Authorities: Hearing of the Comm. on the Judiciary, United States Senate*, 113th Cong. (Dec. 11, 2013); *The Surveillance Transparency Act of 2013: Hearing of the Subcomm. on Privacy, Technology, and the Law, Comm. on the Judiciary, United States Senate*, 113th Cong. (Nov. 13, 2013); *Continued Oversight of the Foreign Intelligence Surveillance Act: Hearing Before the Comm. on the Judiciary, United States Senate*, 113th Cong. (Oct. 2, 2013); S. Select Comm. on Intelligence, *Hearing on FISA Legislation*, U.S. SENATE COMMITTEE CHANNEL (Sept. 26, 2013), U.S. SENATE COMMITTEE CHANNEL; *Strengthening Privacy Rights and National Security: Oversight of FISA Surveillance Programs: Hearing of the Committee on the Judiciary, United States Senate*, 113th Cong. (July 31, 2013); *Safeguarding Our Nation’s Secrets: Examining the Security Clearance Process: Joint Hearing Before the Subcomm. on the Efficiency and Effectiveness of Fed. Programs and the Fed. Workforce and the Subcomm. on Fin. and Contracting Oversight of the Comm. on Homeland Sec. & Governmental Affairs, United States Senate*, 113th Cong. (June 20, 2013).

89. See generally *id.*

90. See, e.g., Sen. Ron Wyden, “Open Hearing on Foreign Intelligence Surveillance Authorities” (Sept. 26, 2013) at 1:31:39 (“There’s a loss of trust in our intelligence apparatus here at home and with friendly foreign allies and that trust is going to take time to rebuild.”); *Annual Open Hearing on Current and Projected National Security Threats to the United States: Hearing of the Select Comm. on Intelligence, United States Senate*, 113th Cong. 3 (Jan. 29, 2014) (statement of Sen. Saxby Chambliss) (press coverage of leaks of classified information “has, without a doubt, compromised our national security and complicated our foreign partnerships.”); *id.* at 43 (statement of Sen. Martin Heinrich) (“The revelations by Edward Snowden regarding U.S. intelligence collection have obviously caused some tensions with our European allies.”).

91. See, e.g., *Continued Oversight of the U.S. Government Surveillance Authorities: Hearing of the Comm. on the Judiciary, United States Senate*, 113th Cong. 2 (Dec. 11, 2013) (statement of Sen. Patrick Leahy) (“I have heard from a number of companies who worry that their global competitiveness has been weakened and undermined. They say that the American businesses stand to lose tens of billions of dollars in the coming years, and we need to make substantial reforms to our surveillance laws to rebuild confidence in the U.S. technology industry.”); S. Select Comm. on Intelligence, *Hearing on the USA Freedom Act*, U.S. SENATE COMMITTEE CHANNEL, (June 5, 2014), (statement of Sen. Ron Wyden)” at 2:39:00 (citing a reported \$35 billion loss to the cloud computing industry).

industry witnesses to talk about it.⁹² The senators even spoke about how the leaks harmed military morale and reputation.⁹³

But when it came time to talk about how NSA spying was affecting people—not nations or institutions—that granularity was gone. Instead, it was a high-level discussion about our right to privacy, free speech, and chilling effects. It was about how the spying had infringed on the liberties of “millions of Americans, “the American public,” or “the American people.”⁹⁴ It was the same story of “everyone is watched.”

Let me acknowledge that I’m just as guilty as anyone else for all of this. I organized one of those hearings. I suggested that my boss call an industry witness when we could have called a witness from the civil rights community. And I staffed my boss at numerous other hearings, floor speeches, and public events. I was a part of the problem.

What I want to stress to you, though, is that what happened during NSA reform is the rule, not the exception. When Congress meets to talk about surveillance, be it police surveillance and particularly NSA surveillance, it is the exceptional member of Congress who sees this pattern of disparate impact, and who acts to reverse it.

92. See *Continued Oversight of the U.S. Government Surveillance Authorities: Hearing of the Comm. on the Judiciary, United States Senate*, 113th Cong. 28 (Dec. 11, 2013) (testimony of Edward J. Black, President and Chief Executive Officer, Computer and Communications Industry Association); see also *The Surveillance Transparency Act of 2013: Hearing of the Subcomm. on Privacy, Technology, and the Law, Comm. on the Judiciary, United States Senate*, 113th Cong. 21 (Nov. 13, 2013) (testimony of Richard Salgado, Director, Law Enforcement and Information Security Matters, Google, Inc.); S. Select Comm. on Intelligence, *Hearing on the USA Freedom Act*, U.S. SENATE COMMITTEE CHANNEL, (June 5, 2014) (Testimony of Dean Garfield, President and CEO, Information Technology Industry Council) at 2:06:44.

93. See *Annual Open Hearing on Current and Projected National Security Threats to the United States: Hearing of the Select Comm. on Intelligence, United States Senate*, 113th Cong. 47 (Jan. 29, 2014) (statement of Sen. Barbara Mikulski (“[N]o group of employees has been battered more than the men and women who work at the National Security Agency because of the illegal leaks by Edward Snowden. NSA has been battered, and by de facto, so have the employees of the National Security Agency. We’re all well aware that the morale is extremely low there because of budget impacts and the impacts of Snowden.”); *id.* at 3 (statement of Sen. Saxby Chambliss) (“The inaccuracies and insinuations about intelligence activities that are in place to protect this country are especially frustrating and demoralizing to the men and women on the front lines.”); *id.* at 49 (statement of Sen. Susan Collins) (“General Flynn, thus far in the discussion today and in general, there has been very little focus on the damage that Edwin (sic) Snowden has done to our military.”).

94. See, e.g., *Strengthening Privacy Rights and National Security: Oversight of FISA Surveillance Programs: Hearing of the Committee on the Judiciary, United States Senate*, 113th Cong. 2 (July 31, 2013) (statement of Sen. Patrick Leahy) (“The Government is already collecting data on millions of innocent Americans on a daily basis based on a secret legal interpretation . . .”); *id.* at 29 (statement of Sen. Mike Lee) (“It still does not meet what many of my constituents believe to be well within their reasonable expectation of privacy for the Government to collect that much information, potentially information about 300 million Americans.”); *id.* at 38 (statement of Sen. Richard Blumenthal) (“Isn’t the problem that this relationship of trust has actually undermined trust in the American public and really threatens to completely eviscerate confidence in a system that operates in secret, makes secret law, and in the end the relationship of trust may undermine the whole system?”); Sen. Ron Wyden, “Open Hearing on Foreign Intelligence Surveillance Authorities” (Sept. 26, 2013) at 1:31:14 (“Time and time again the American people were told one thing about domestic surveillance in public forums while government agencies did something else in private.”).

In the last two to three years, this has started to change. In particular, Chairman Elijah Cummings, Chairman Bennie Thompson, Cedric Richmond of the Congressional Black Caucus, and others, are starting to ask questions.⁹⁵ Questions about racial bias in face recognition technology; about how ICE planned to scan the social media of all immigrants to target deportations; questions underscoring the fact that surveillance isn't just a threat to liberty—it is a threat to equality also.⁹⁶

IX.

We have a long road ahead of us. And so in closing, I want to offer in brief, some thoughts on what it might look like for Congress to finally reckon with the color of surveillance.

It looks like calling the NAACP and The Leadership Conference on Civil and Human Rights and Color of Change to testify not just at criminal justice reform hearings, but at hearings about the NSA and FBI.

It looks like ICE being asked questions at oversight hearings about the vast surveillance network they have built inside our country—a network that relies on automated license plate readers, and face scans of driver's license photos at DMVs.⁹⁷ We have to recognize that ICE is not just a law enforcement agency, it is a surveillance agency, also.

It looks like acknowledging the obvious fact that the primary goal of so much domestic surveillance is watching and controlling Muslim people.

It looks like quantifying the impact of surveillance not just on Google, Facebook, and Amazon Web Services—but on people, non-corporate people.

For years, Senator Ron Wyden of Oregon has demanded that the intelligence community estimate how many Americans had their communications collected under section 702, an NSA program that actually gets the content of communications, not just the metadata.⁹⁸ That is a great thing. But Congress should

95. See *Law Enforcement's Use of Face Recognition Technology: Hearing of the Committee on Oversight and Government Reform, U.S. House of Representatives* 115th Cong. 105 (March 22, 2017) (statement of Ranking Member Cummings); *Letter from Ranking Member Bennie Thompson, Ranking Member Filemon Vela, Ranking Member Kathleen Rice to the Honorable Kirstjen Nielsen, Committee on Homeland Security, U.S. House of Representatives*, 115th Cong. (April 5, 2018) (calling for halt in roll-out of ICE plan to scan social media of American immigrants); *Letter from Rep. Cedric Richmond, Chair, Congressional Black Caucus, to Mr. Jeffrey Bezos, CEO of Amazon, Inc.* (May 14, 2018) (criticizing alleged racial bias in Amazon's face recognition software for law enforcement.).

96. See *id.*

97. See Vasudha Talla, *Records Reveal ICE Agents Run Thousands of License Plate Queries a Month in Massive Location Database*, ACLU NORTHERN CAL. (Jun 5, 2019), <https://www.aclunc.org/blog/records-reveal-ice-agents-run-thousands-license-plate-queries-month-massive-location-database> [<https://perma.cc/6ZVG-T8NA>]; Catie Edmonson, *ICE Used Facial Recognition to Mine State Driver's License Databases*, N.Y. TIMES (July 7, 2019), <https://www.nytimes.com/2019/07/07/us/politics/ice-drivers-licenses-facial-recognition.html> [<https://perma.cc/X394-FJ4F>].

98. See Office of Sen. Ron Wyden, *Wyden Statement on NSA Ending Collection of Americans' Emails About Surveillance Targets Under FISA 702* (April 28, 2017) <https://www.wyden.senate.gov/news/press-releases/wyden-statement-on-nsa-ending-collection-of-americans-emails-about-surveillance-targets-under-fisa-702> [<https://perma.cc/A4UZ-96PM>] (“He has repeatedly called on the executive branch to finally reveal how many Americans have their phone calls,

go further. It is not enough to count people—Congress should also ask who they are, at least in general terms. Where do they live? Where do they come from? What do they look like?

Right this second, you can go online and find out how many times federal judges here in New Mexico ordered a wiretap, what crimes were involved, how long those wiretaps ran, how many arrests were made, and how many people were convicted.⁹⁹ Wiretaps have been around for ages. Why can't we do this for any surveillance technology invented in the 21st century?

X.

The last part of this vision that I want to leave you with is a hopeful one. I have spent much of this lecture talking about how surveillance harms vulnerable people. We cannot forget how privacy empowers them.

Harriet Tubman escaped bondage on the Eastern Shore of Maryland in 1849.¹⁰⁰ And as we all know, she began rescuing other enslaved people and guiding them to freedom. What most people do not realize is that Harriet Tubman returned repeatedly to the one region where she would be most recognizable and most at risk—the Eastern Shore of Maryland. She wanted to free the rest of her family, and she did. She was never caught.¹⁰¹

After the Civil War, Tubman struggled to obtain a pension for her service in the Union Army. And so, in 1868, a group of abolitionists organized for a biography of Tubman to be written and published to raise funds for her cause. They called on Tubman's peers to write testimonials on her behalf. Frederick Douglass answered that call.¹⁰² He wrote:

Most that I have done and suffered in the service of our cause has been in public . . . You on the other hand have labored in a private way. I have wrought in the day—you in the night. I have had the applause of the crowd . . . while the most that you have done has been witnessed by a few trembling, scarred, and foot-sore bondmen and women . . . The midnight sky and the silent stars have been the witnesses of your devotion to freedom and of your heroism.¹⁰³

There was a time when it was legal to own people, and illegal for them to run away. There was a time when it was essentially illegal for Black people to march on the streets of Selma. When there is that moral lag, that gap between what is legal and what is right, privacy is the shield that allows the unpopular and persecuted to

emails and other communications swept up—without warrants—under this surveillance program, which is intended to target people overseas.”).

99. See, e.g., U.S. COURTS, WIRETAP REPORT 2018 (December 31, 2018).

100. See CATHERINE CLINTON, *HARRIET TUBMAN: THE ROAD TO FREEDOM* 34 (2004).

101. *Id.* at 80–83, 95 (describing Tubman's rescue of her niece Keziah (“Kizzy”) and her two children, her brothers James Isaac, Henry, Benjamin, and Robert Ross, and her attempted rescue of her husband, John Tubman, who refused to leave his new wife, Caroline).

102. *Id.* at 193–95.

103. See Letter from Frederick Douglass to Harriet Tubman (Aug. 29, 1868), in *Preface to SARAH HOPKINS BRADFORD, SCENES IN THE LIFE OF HARRIET TUBMAN* 7 (1869).

survive and thrive. It is what allows them to labor “in a private way,” far beyond the government’s eyes.

And so, as we build a world of pervasive surveillance, we have to ask ourselves: Are we building a world without underground railroads? Are we building a world where that kind of dissent is impossible?

Thank you for your time and attention.