



Winter 2017

Keeping Up with New Legal Titles

Franklin L. Runge

University of Kentucky College of Law, frunge@wlu.edu

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Follow this and additional works at: https://uknowledge.uky.edu/law_facpub

 Part of the [Privacy Law Commons](#)

Repository Citation

Runge, Franklin L., "Keeping Up with New Legal Titles" (2017). *Law Faculty Scholarly Articles*. 609.
https://uknowledge.uky.edu/law_facpub/609

This Book Review is brought to you for free and open access by the Law Faculty Publications at UKnowledge. It has been accepted for inclusion in Law Faculty Scholarly Articles by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Naval Base were deprived of hearings and legal representation. Ratner and other activist groups working to protect civil liberties and human rights faced an uphill battle, as the Supreme Court had held that foreign prisoners of war may not be heard in U.S. courts. However, these groups formed a strategy to focus on foreign audiences and governments, beseeching them to pressure the United States to abide by principles of basic human rights. They found support from retired military commanders, a very credible resource; they sought transparency, acquiring records under the Freedom of Information Act and publicizing them to draw scrutiny to the administration's controversial initiatives; and they resorted to a public shaming strategy that many human rights organizations use when formal remedies are not available. Human rights organizations also took their constitutional concerns to the federal courts, since delaying such a tactic (as same-sex marriage advocates and gun right advocates had done) is not feasible when individuals are facing detention. In 2004, the Supreme Court ruled that the Guantanamo prisoners had a right to sue in federal court to challenge the legality of their detentions.³ However, the threat of judicial oversight brought about reform. President Bush curtailed most of his highly aggressive counterterrorism initiatives.

¶19 All three groups chronicled in this book eventually succeeded in federal court because they had helped to transform popular consensus via advocacy outside the court, often triumphing without any express court involvement. All were dedicated to constitutional reform with lengthy periods of sustained and intensive advocacy, and each worked with civil society organizations that were focused on safeguarding, protecting, and upholding fundamental values.

¶20 Cole presents a fascinating perspective on constitutional law that is well supported with citations to documents and personal interviews, all written in an accessible, engaging, and clear style. Cole has made a strong case that individuals with such a desire can shape the law to their own ends. I highly recommend this first-rate work to law, general academic, and public libraries.

Donohue, Laura K. *The Future of Foreign Intelligence: Privacy and Surveillance in a Digital Age*. New York: Oxford University Press, 2016. 183p. \$24.95.

*Reviewed by Franklin L. Runge**

¶21 International spying seems like a good profession. Judging by the James Bond films, a spy's job description includes the extrajudicial killing of awful people, dressing sharply, falling in "love" with much younger individuals, and visiting exotic locations. Laura K. Donohue's new book, *The Future of Foreign Intelligence: Privacy and Surveillance in a Digital Age*, obliterates this archetype. She convincingly asserts that the United States of America's intelligence agencies repeatedly and brazenly violate the Constitution to spy on their own citizens.

¶22 If you play a role in collection development at an academic library (law or otherwise), you should add this monograph to your shelves. As a reader, I zipped

3. *Rasul v. Bush*, 542 U.S. 466 (2004).

* © Franklin L. Runge, 2017. Faculty Services Librarian, University of Kentucky College of Law, Lexington, Kentucky.

through some of the chapters, whereas I soldiered through others. My difficulties were not a reflection of Donohue's writing style. When discussing intelligence agencies, a thorough author is required to use a lot of acronyms, discuss bureaucrats at congressional hearings, and detail the timing of various off-the-record meetings. These portions of the book required me to slow down and reread some sections; however, Donohue's prose shone in her chapters on metadata, the origins of the Fourth Amendment, and general warrants.

¶23 National security, data collection, and privacy are the defining issues of our time, and Donohue makes an important contribution to the discussion. Throughout the book, her arguments are logical, thorough, and well sourced; additionally, Donohue's recommendations for reforming the foreign intelligence system are detailed and reasonable.

¶24 With respect to security and privacy, a citizen's relationship to the U.S. government is a pendulum in perpetual motion. This book opens with descriptions of the Federal Bureau of Investigation (FBI), Central Intelligence Agency (CIA), and National Security Agency (NSA) conducting massive intelligence operations against U.S. citizens between the 1950s and 1970s. When the malfeasance was brought to light, a reform movement was born, and a legal framework delineating domestic and foreign intelligence was patched together across the government's three branches. In 1972, the U.S. Supreme Court held that the surveillance of domestic groups required the government to obtain a warrant; notably, the surveillance of foreign powers and their agents was not addressed by the Court's opinion.⁴ After the September 11, 2001, attacks, the pendulum of privacy swung again, and the federal government prioritized massive foreign surveillance operations. Therein lies the rub. Donohue successfully parses the post-9/11 landscape to describe how foreign intelligence collection merged with criminal law principles, which allowed the FBI, CIA, and NSA backdoor access to massive domestic operations.

¶25 In her most inspiring chapters, Donohue describes the history and principles behind the Fourth Amendment and general warrants. In the colonial era, British officials could receive a general warrant without specifying who or where they were going to search, or providing evidence under oath about any potential crime. With this unchecked power, British officials entered the homes and businesses of colonists with impunity. This tyrannical exercise of power helped to foment the American Revolution. Two hundred and forty years later, in a sad twist, general warrants have returned as a common instrument for the U.S. government. To prevent against executive branch overreach, Congress created the Foreign Intelligence Surveillance Court (FISC) to ensure that an independent entity was reviewing surveillance decisions. In establishing her position on the modern-day general warrant, Donohue describes an order issued by FISC that allows for the collection of international Internet and telephone content. This decision was not based on suspicious wrongdoing or focused on a particular person or place, yet it effectively captures the communications of millions of U.S. citizens.

¶26 This book deftly lays out the United States' mercurial relationship to security and privacy. In the past few years, I have considered myself a centrist on this issue. I

4. *United States v. U.S. Dist. Ct. (Plamondon)*, 407 U.S. 297, 321–22 (1972).

found Edward Snowden's revelations to be critical for our society, but I found his worldview and recklessness troubling. I was not Pollyanna-ish with respect to our government's behavior, but I had faith that there are well-intentioned bureaucrats running the FBI, CIA, and NSA. Donohue's book has persuaded me that poor behavior has become the norm in our federal government. Any reader will be stunned by the number of unconstitutional actions taken by executive branch agencies.

Garton Ash, Timothy. *Free Speech: Ten Principles for a Connected World*. New Haven, Conn.: Yale University Press, 2016. 491p. \$30.

*Reviewed by Margaret Butler**

¶27 Timothy Garton Ash advocates for the universality of free speech in his recent project, *Free Speech: Ten Principles for a Connected World*. I recommend addition of this title to the academic library collection, as well as to the collection of any firm library in which there is either general interest in free speech or litigation specifically in that area. Garton Ash's project, which has a goal of achieving consensus regarding free speech principles across the cosmopolis (the connected and networked world in which we live), is grounded in both national and international law. Although densely written and rife with so many examples that the message may get lost, those examples and issues are often timely. Such examples include the necessity for trigger warnings on college campuses, editorial standards and the application of community standards on Facebook, and the degree of protection provided by hate-speech legislation. The book includes hundreds of end-notes as well as an index.

¶28 Written in two parts, the book first describes the international commitment to free speech, the networked world in which we live, and the resulting ways in which speech, such as "a sleazy little video posted on YouTube by a convicted fraudster in Southern California" (p.70), has echoing effects around the world. Functionally, the first part lays out Garton Ash's position that "we should limit free speech as little as possible by law and the executive action of governments or corporations, but do correspondingly more to develop shared norms and practices that enable us to make best use of this essential freedom" (p.81). The thought Garton Ash put into the first section may be lost on readers already convinced of the importance of free speech, though it does not hurt to read the analysis of the interplay between "international bodies, nation states, private powers and electronically enabled networks of individuals" (*id.*) or his efforts to capture the complexity of free speech as applied in a variety of countries and traditions.

¶29 The principles laid out in the second part of the book largely explore ways in which speech should be free. In his final challenge to readers, Garton Ash posits alternate paths by which the principles may be adopted. He writes that "[a] minimal consensus would consist in endorsing the first two principles" (p.379). Those principles are that "[f]reedom of expression is not merely one among many freedoms. It is the one upon which all others depend" (p.119), and that "we do not

* © Margaret Butler, 2017. Associate Director for Public Services, Georgia State University College of Law Library, Atlanta, Georgia.