From Chapter One, Christopher Slobogin,
Privacy at Risk: The New Government Surveillance and the Fourth Amendment

. . . This book criticizes all the post–Warren Court holdings described above, as well as the assumptions about privacy and the reach of government power that underlie them. The Court's willingness to declare that persons cannot reasonably expect their interactions with businesses and banks, their daily wanderings, and even some of their conduct at home to be free from suspicionless, warrantless surveillance by the government is contrary to societal mores and other legal norms. This book also criticizes the courts' failure to regulate other aspects of surveillance, ranging from maintenance and destruction of surveillance records to when and how notice of the surveillance should be communicated to its targets. Finally, it takes Congress and state legislatures to task for failing to rectify the Court's deficient case law and makes concrete proposals about what both courts and legislatures should be doing instead.

Chapter 2, the second chapter in this introductory section of the book, sets out an interpretation of Fourth Amendment doctrine that provides the springboard for these various criticisms and proposals. Most fundamentally, this chapter argues that when contemplating surveillance (or any other investigative technique), government should be required to provide justification proportionate to the intrusiveness of the surveillance and to seek third-party authorization in all nonexigent circumstances. These two basic precepts—what I call the proportionality and exigency principles—are consistent with the Court's general approach to search and seizure jurisprudence. In particular, they derive from the "balancing" analysis (i.e., weighing of government and individual interests) endorsed by the Court in the late 1960s and applied with a vengeance by the post–Warren Court. However, the similarities between my framework and the Court's are only skin deep. While I do not quarrel with balancing analysis per se, the remaining chapters demonstrate that the post–Warren Court's application of that analysis has attributed far too much weight to the government's interests and far too little to the individual's.

Part 2 of the book consists of three chapters, all concerning physical surveillance. Chapter 3 examines physical surveillance of the home. It argues that the Supreme Court's decision in *Kyllo*, which many hailed as a victory for privacy rights in our dwelling places, may not be as protective as it first appears. *Kyllo* not only announced the "general public use" exception but also declared that use of technology to view conditions that a naked eye observer could see from a public vantage point is not a search, even when the location viewed is the interior of the home. This chapter shows that both the general public use and the "naked eye" exceptions are inscrutable, conceptually incoherent, and normatively objectionable. It then argues that technological surveillance of the home should be regulated either through a proportionality approach, which varies the level of cause with the search's intrusiveness, or through a legislative approach, using Title III's regulation of communications surveillance as the model.

Chapters 4 and 5 take on physical surveillance outside the home. The primary thesis of these two chapters is that the advent of sophisticated technology that allows the government to watch, zoom in on, track, and record the activities of anyone, anywhere in public, twenty-four hours a day, demands regulation. A second thesis is that if the legislative and executive

branches are unwilling to undertake that regulation, courts should step in, using the Fourth Amendment. Chapter 4 builds the case for regulation, relying on philosophical and constitutional principles as well as on the results of an original empirical study investigating the reactions of ordinary citizens to public surveillance. Chapter 5 imagines what that regulation would look like. It builds on the Supreme Court's roadblock jurisprudence and the proportionality principle in defining when surveillance is permissible, and then addresses issues connected with implementing a public surveillance regime. On the latter score, it contends that politically accountable officials should decide where to place the cameras (an application of the exigency principle), that government should provide notice of the surveillance and regulate the disclosure and maintenance of surveillance records, and that enforcement of these rules requires both direct sanctions on violators and periodic dissemination of information about surveillance practices. Finally, the chapter briefly explores the role of the courts in bringing all of this to fruition. It suggests that courts set minimum guidelines and monitor police decisions to assure that public surveillance is conducted in a reasonable manner, but that most of the details be left up to the political process.

Part 3 of the book, discussing transaction surveillance, consists of two chapters. Chapter 6 analyzes the constitutional legitimacy of subpoenas, a subject that is crucial to understanding how transaction surveillance is currently regulated. Whether issued by a grand jury or an administrative agency, subpoenas are extremely easy to enforce, requiring only a demonstration that the items sought are "relevant" to an investigation. Yet today subpoenas and pseudo-subpoenas are routinely used to obtain not only business and other organizational records but also documents containing significant amounts of personal information about individuals, including medical, financial, and e-mail data. Chapter 6 explains why this regime is a historical accident, and why it is repugnant as a matter of policy.

Chapter 7 describes in more detail the current legal regulation of transaction surveillance, and then suggests how it can be improved. In contrast to physical surveillance, transaction surveillance has been the subject of significant legislative activity. However, this law is only minimally restrictive, and it is also confusing and contradictory; beyond the traditional subpoena, challengeable by the target of the investigation, current law recognizes a number of subpoena mutations that seem to have little rhyme or reason. The proposed reform recognizes, as does the current regime, that different sorts of records merit different (proportionate) levels of protection. But in contrast to current law, and bolstered by another empirical study of societal attitudes, I urge legislatures (or courts if legislatures fail to act) to increase the showing required to probable cause for private records obtained through target-driven surveillance and to reasonable suspicion for private records obtained through event-driven surveillance. I also recognize a category of quasi-private records that can be obtained only on reasonable suspicion if sought through target-driven surveillance. The relevance standard, which is the most demanding test that transaction surveillance must meet under current law, would be reserved for investigations seeking truly public records, records detailing the activities of businesses and other organizations, and data mining that does not access private records.

Chapter 8 summarizes the arguments made throughout the book and then explores a central implication of its proposals—that the traditional Fourth Amendment model requiring

probable cause for all searches and backed by the exclusion remedy serves neither societal nor individual interests. Much relatively nonintrusive physical and transaction surveillance cannot be justified at the probable cause level and should not have to be; rather than recognizing this fact and adjusting Fourth Amendment law accordingly (through a proportionality approach), the Court has insisted that searches be based on individualized probable cause, which has created an incentive to forgo constitutional constraints on investigative techniques aimed at individuals and to defer to the government with respect to surveillance of groups. Nor is the suppression remedy always an effective deterrent in the surveillance context; at best it benefits an infinitesimally small number of people subjected to illegal surveillance, and in any event it is a poor remedial fit with the types of violations that public surveillance.