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The Rapid Decline of Transparency and Privacy in America

by Jonathan Turley

The following is a transcript of a speech given at The Future of Freedom Foundation's June 2008 conference, "Restoring the Republic: Foreign Policy & Civil Liberties" held in Reston, Virginia.

Jacob Hornberger: Our speaker tonight after dinner, Jonathan Turley, is professor of law at George Washington University and one of the nation's most prominent public commentators on legal events. He's worked under contract as a legal analyst for NBC News and CBS News and is a frequent guest on such programs as Meet the Press, ABC This Week, Face the Nation, and Fox Sunday. Jonathan received his bachelor's degree from the University of Chicago and his law degree from Northwestern. He is actually one of the people that we Google every morning, looking for an article by Jonathan Turley, and when we hit, both Bart and I say, "Hey, we got a Turley article," and then almost always we link to him in our daily FFF e-mail update. Jonathan has testified several times before Congress, and his hundreds of articles have appeared in such publications as the *New York Times*, the *Washington Post*, *USA Today*, and the *Wall Street Journal*. He is also on the board of contributors to *USA Today*. The title of Jonathan's talk this evening is "The Rapid Decline of Transparency and Privacy in America." Please welcome Jonathan Turley.

Jonathan Turley: Thank you very much. This is the Snyder-Brown wedding, right? Oh, no; that's right, this is about the future of freedom. That's a different-- I can say that 'cause my wife's not here. Actually, it's nice to be in a place where we talk about freedom in the future sense. In Washington it's almost always past tense. As someone who teaches constitutional law, actually George Bush has been a great gift, because the way he's going I can actually teach the course out of a pamphlet 'cause there's just

not a lot left there. No. I'm here to talk to you about something that's dear to my heart, and that is privacy. I'm a bit of a privacy nut. That's no secret. I've got a streak of libertarianism in me a mile long, and privacy is the one thing that a free nation can't do without.

But we may soon find out, because privacy is one of those precious things that, once you lose them as a nation, history has shown you rarely get it back. It's perhaps the most vulnerable value in the Constitution. It's not mentioned. Some of us believe that it's there clearly in the penumbra and the meaning of the Constitution. There are many who say that it simply is not, that it is a modern creation. But if searches and seizures are in the Constitution, they must be protecting something. It's not just about letters and homes. It's about something that defines us, and that thing is privacy.

Now the weird thing about privacy is that it's cherished by all citizens so deeply but it is so easily and freely given away. When I speak at colleges and universities I always make the same offer to the students. I offer first to buy their free speech rights for \$100,000, and I ask them, "Now I want you to think seriously. I'll give you \$100,000 for your right of free speech. Would you sell it to me?" And usually the students are honest enough that the majority of them willingly would sell for a hundred grand, and the reason is because they don't really see what they get from free speech, but they know what they would get with a hundred grand.

But you see, what I just did was an old trick. I gave them something concrete, \$100,000, and I put it up against an abstraction, free speech. When's the last time someone said, "Oh, I had a great free speech day and tomorrow's going to be an even better free speech day"? But you sure the heck, talk a lot about money and you sure the heck know a lot about a hundred grand. In fact, one of the things I've learned from speaking at colleges and universities is not to make the number too big. If I make the number big, they actually waffle because the number itself becomes an abstraction; but if I make it small, they sell to me like that. Then I ask them, "How much would you sell your privacy for?" And that is more difficult. I usually have to go up to \$200,000, but they do require me to go up because privacy is something that they can sort of figure they need. They start to think of the stuff they don't want other people to see; but once again, when I can give them \$200,000, that seals the deal. It becomes just a forest of hands as everyone is trying to sell me their privacy soon enough. I tell them at the end I just don't have the money.

Now the question then is why? Why is it that privacy is so valuable but given away so easily? Louis Brandeis said that the most important right was the right to be left alone. He's one of the greatest civil libertarians in history. He was right; ultimately, none of your rights mean anything unless you have the right to be left alone. There is something about privacy.

Now the other interesting thing, I think, about privacy is that everyone understands privacy on some level. Privacy is actually the first right that people understand. I'm the father of four. I've got four kids 10 and younger. It's enough to fake your death at a boating accident and-- But the amazing thing for me has been to watch them develop their sense of legal rights. The first right of all four kids was privacy, usually around that time of potty training, when all of a sudden privacy becomes enormously important, so important that you will shut the family down, okay. And then there's actually a very clear step of rights that you can follow. After privacy there's cruel and unusual punishment that they know instinctively what's cruel and unusual, where you go too far, and then they get this idea of parental taking. Soon they develop that idea, and then due process, substantive and procedural, and then in their teenage years they get into free speech and, God help us, free association. And so I got to tell you, I have become the John Ashcroft of fathers. I now engage in warrantless surveillance and searches and seizures on an arbitrary level, punishment cruel and unusual. It's-- It works for me.

So you got this right. It's the first that we appreciate, and yet it's the first we give away. There is this disconnect. And then 9/11 came around. We are already losing ground in privacy, but nothing compared to that. If you go to Congress-- I think I worked in privacy. I probably testified two dozen, three dozen times at Congress, and I would be willing to bet that I have mentioned privacy in every single one of them. And whenever you do, whoever is in that hearing, they just coo because privacy's good, it's one of the good things, and then they proceed to eviscerate it. And when 9/11 happened, privacy was the great victim. We couldn't wait to give up our privacy and our rights.

I testified at the first hearing after the 9/11 attacks. This was before the Patriot Act happened and it was on the national identification card, and I testified against and it wasn't too hard. But I remember just being shocked how many members said, "We just have to do something, and this is easy." I remember some dolt who was testifying with me. I can't even remember his name but he was from New York-- that's all I remember--and he pulled out of his pockets after I spoke, and he said, "Look at all the IDs I have. What's the problem with having one more?" And I looked at this victim of inbreeding and I thought, the 9/11 hijackers had pockets filled with IDs. They were sleepers, most of them, so they would get this ID. But sure enough, members desperately thought this is a way to show that we're fixing the problem, and the problem always seems to be our Constitution and our rights.

And this President more than any others has sold us that bill of goods, that somehow it's the Constitution that made us vulnerable: not the blunders of the FBI that have been well documented, not the failure of the CIA to communicate with the FBI, not the series of mistakes that led to the hijackers getting on those planes, not the refusal of the airlines to put in secure cockpit doors like they had been asked to do for years, not the security system that had been under private contractors and had been

ridiculed for years. The real reason is our rights. If we didn't have so many of them, if we didn't have so much privacy, those hijackers would never have succeeded.

Well, of course, if we didn't have all of the rights and privacy, they would never have attacked us because we wouldn't be that different from them. So after 9/11 we got hit on all sides, but once again it was the abstraction that gave way to the practicalities of the moment. John Ashcroft was saying that there were going to be nuclear attacks. Right. That's because Jose Padilla, some former gang member dropout, was going to lead a nuclear attack on a major city. Even the Bush administration had to rein that one in. But a nuclear attack, or you could give up a little privacy-- man, that's an easy deal. It's better than a hundred grand.

The question then becomes, what are we if we lose our sense of privacy? What is it about privacy that's so important? I actually wanted to go to Australia to see the zoo exhibit. I don't know if you read about it, but there is this exhibit in Australia with this guy who put himself in a cage, and people would walk by and they'd see tiger, bear, monkey, and then there'd be this guy sitting there. He was a performance artist chewing on bark or something, and it was an incredibly poignant thing. People actually were captivated by it.

The question is, how far are we away from that? You see, privacy-- One of the great things about privacy is that there has never been a serious threat until recently that the government could spy on many of us. There were practicalities. There were technical problems. The government just couldn't do it. But that still didn't mean that privacy was safe. When you read Brandeis and Holmes and the other Supreme Court justices that heralded the right to privacy, they all talk about a chilling effect, something that would not be the case up here. No, the thing about privacy and this chilling effect is, that's the greatest danger to privacy.

When I teach this subject to law students I send them home on the holidays with a very serious assignment. I say that during the holidays I want them to wait until they're out with their friends or they're at the breakfast table with their families. And then I ask them to get a tape recorder, don't put a tape in it, and in the middle of the conversation put the tape recorder in the middle of the table. And I said, "You got to make sure you explain that no one will hear this but you, but it's for an assignment in class, but make sure you say no one will hear it but you, and then put the tape recorder on. Look what happens to the conversation with your friends. Suddenly they speak in complete sentences. They're currently erudite. They only want to talk about lofty issues, as opposed to who's getting fat or who's sleeping with whom. Well, what that is is a chilling effect-- that even though those people know that the

only person who's going to hear it is really you, the mere fact that someone might hear it or that their voices are captured is enough to change how they respond and how they relate.

The thing about privacy that is so inscrutable is that it defines us but we can't really define it. It defines us in so many ways because it's how we relate to each other-- that we need a feeling that we're able to exist independently, to be left alone, to speak freely, to not feel that our sentences are being analyzed. Now a lot of people say, "Well, the only people that are afraid of going over a barbed wire fence are the people who want to go over it. What do I care if anyone's listening to what I say." That's not the point. It's will the things you say be different? Will you relate to people differently?

A lot of times a chilling effect is all that they want. I remember I got a call once from the head of a major school system in California, and he asked if he could hire me as a consultant on some legal issues, and I said, "Really? What?" He said, "Well, we're going to put video cameras in all the buses of all of our schools." This was one of the largest school systems in the country. And I said, "Well, first of all I don't think this is a job for me, but that's a lot of cameras, a lot of tapes. How are you going to do that?" He goes, "Oh, no, no, no. We're only going to put them in a few cameras, but the kids won't know which cameras have tapes and which won't." And I remember sitting there thinking, my God, you're actually using the chilling effect. You're using it to get little kids to behave. You're raising them that way, that they never quite know whether someone's going to watch what they do or not. What does that do to them? What type of citizens do they become?

Well, look around you. It's the citizens we've become. Now when we leave we're on a constant daisy chain of surveillance in this country. When I leave my house and get into the car, I'm filmed going down the street by highway cameras. Actually, every road I drive on is under surveillance by either the police, red light cameras, speeding cameras, or the highway people. If I stop at the 7-Eleven to buy a Slurpee, I'm filmed in the parking lot; I'm filmed in the store itself. Then I get back in my car; I go to work. Do you know what it says, by the way? When I teach privacy, when I get to work, do you know what's behind me, at George Washington? A sign that says this room is under surveillance. Being a law school, they felt that they had to notify people, so every classroom is under surveillance. And then, when I'm off of work, I turn around and I follow that daisy chain home. In 2004, there were 29 million surveillance cameras in this country. In the next 10 years, they expect to pass a hundred million. They are growing exponentially.

Now part of the problem is that the Constitution is primarily designed to protect us from the government. It doesn't protect us from each other. And some of the greatest blows to privacy come from private companies that view surveillance now as a standard operating procedure. Most of those cameras I

described to you were private. Sometimes those same tapes are given over to the police, so the distinction is lost, but they fall outside the constitutional radar. Now cell phones will track you. I'm invited to China to give a talk about privacy, and that'll be interesting, but what was interesting is that the guy that called me said, "We now have this great cell phone system where the telephone company actually keeps tracks of the movement of each of the phones just in case someone needs to reach you."

I wonder who that would be who wouldn't just make a call to find you, but we love it. We love the technology. I gave a speech at the National Press Club last week, and I'm sitting there ready to talk, talking about constitutional rights, and I'm sitting next to one of my colleagues, a well-respected professor. And I'm sitting there talking to him, and he and his wife are telling me about how they just signed up with Steve Brill's frequent traveler program, this preferred traveler system, and how great it is. 'Cause all you have to do is fill out all of this personal stuff, subject yourself to an investigation by the government and by the organization, do the eye scans, and then do you know what you get? It means that you'll never be longer than 10 minutes in line. The average time is 15, 16 minutes, but you'll never go over 10. And they were so happy 'cause they were told that they'd be getting their cards next week. I tried to hide my sense of horror, but it shows that here you've got this incredibly gifted constitutional scholar who didn't hesitate to turn over personal information to go into a massive databank so he could shave off five minutes. That's even a better deal than a hundred grand.

So all of these forms of surveillance just sort of fall into this hole in the Constitution. But when you combine what the Bush administration has done and the private surveillance, it's a fundamental change. See, it used to be that we all lived in a fishbowl, but the bowl was dirty; you couldn't see through it. And with a dirty bowl you assumed they're all clean fish. Now we've got a clean bowl and dirty fish because we've got total transparency. That's the term they actually use in Washington. That's the catchword. That's a really hot "in" word, total transparency. The Bush administration loves it. When they first came in they went and got Admiral Poindexter. You remember him, the guy who just avoided Club Fed by the skin of his teeth for committing alleged crimes. But the Bush administration gathered all of these people from previous administrations that were indicted and brought them in. It was like the Bada Bing Club. You couldn't get in unless you did a guy.

And so Admiral Poindexter was right there in front. He was really, really-- His bona fides were great, and so they put him in charge of DARPA (Defense Advanced Research Projects Agency). Now DARPA is a sort of genius group of people that do things like invent the Internet before Al Gore did it, and they're incredibly bright. So when Admiral Poindexter showed up he got all that brain wattage and put it to good use, stripping America of its rights, and he came up with this thing called Total Information Awareness, TIA. Now Total Information Awareness was this great organization. They even had a logo.

Now what I love about Poindexter and this group is because they're so tone deaf about how most people would respond to their work, that they went in and they named it Total Information Awareness, which of course would freak most people out. And then as their symbol they had the all-seeing eye, this sort of ominous giant eye. And they said, "Love us. We are all seeing. We believe in total transparency."

And the idea was that there are so many databanks out there that they would like them up, and here is that problem we had before about the technical protections we had that we don't have anymore. See, these folks at DARPA realized that those had been eliminated, that for the first time you could actually follow most Americans in real time by linking up databanks from hospitals to shopping centers to police records, you name it. And so they started to create a massive computer system, the largest computer system in the history of the world. And this computer system would have the ability of total transparency, the ability to literally type in anyone's name and effectively follow them from buying gas to their hospital bills, any time they used a credit card, any time they came up on the grid, which is almost always, and they called it Total Information Awareness.

Now some of us wrote columns denouncing this, and the interesting thing is that two of us wrote the two first columns on this, and right after those columns hit, they changed the name from Total Information Awareness to Terrorism Information Awareness. And the thing is, this falls into the category of no shame-- that just the minute it became a controversial thing, it became a key terrorism-antiterrorism effort. But that didn't save it. Ultimately, Congress took away the funds for it, but most of us believe that they have not stopped the TIA, and that in fact what they've done is they've broken it up into pieces. And there is some support for that, that they're still working on the linkages of databases. This whole registered traveler thing is an example. The administration is trying to get more and more databanks created so that all you would really have to do is create a linkage, flip the switch, and you got TIA, and there is a lot of evidence that that's exactly what is happening.

So the practical barriers that we once relied upon are gone, and the ability to engage in continual surveillance of individuals is now reality. Now in the past we've seen a race in the Supreme Court between technology and privacy, and a lot of times the Supreme Court has done the right thing; that is, they've made adjustments when technology was threatening to wipe out privacy. The Katz test was an example, which was the test that would determine whether the government could get or would need a warrant to engage in surveillance of your home. Before Katz we had a thing called the Trespass Doctrine, where the Supreme Court said as long as they don't physically trespass on your home, they can do it without a warrant.

Well, what happened is that doctrine actually spurred technology, so everyone went out and started to develop technology that didn't require trespass. You got laser window pickups where you could use the windowpane as a vibration mechanism to listen to everything in the room. When I worked for a short time at NSA as an intern and went to FISA [Foreign Intelligence Surveillance Act], I used to hear stories about how they would do laser window pickups off the ice in people's cups, no trespass needed. We had spike mikes, parabolic mikes, no trespass. Finally, the Supreme Court realized that technology had once again gone in front of privacy in this everlasting race, and so it came up with the Katz test and it said that the Constitution of the United States and the Fourth Amendment protect people, not places. It's a particularly elegant line. And so suddenly the test became what was the reasonable expectation of citizens, the expectation of privacy.

Now the problem with that test is that it was a great advance but is now perhaps the seed of our destruction, 'cause the problem with a test that is based on expectations is that as people's expectations fall, the government's ability to engage in warrantless surveillance increases, and as the surveillance increases, their expectations fall more, and so you have this downward spiral. And so Katz had within it the seeds of its own destruction.

And so we go back to those school buses with those cameras. The citizens behind us have a fraction of the privacy expectations that we had, and we have a fraction of the privacy expectation of our grandparents; so what happens then when we have a country of citizens that have no expectations of privacy? So Katz has led unfortunately to this race to the bottom, and the great scourge of privacy became a test that followed Katz, the test of reasonableness. For all of these justices that say that they believe in strict construction and textualism, I'm actually pretty conservative when it comes to interpreting the Constitution. To me the Fourth Amendment's pretty darn clear. You actually need a warrant. You need probable cause to engage in surveillance. The reason I believe that is because it's in the amendment. It actually says that, yeah. It's actually pretty tough to get around it; it's there.

It really took quite an effort for the Supreme Court to find a way to read an amendment that talks about probable cause and warrants to mean that you need neither, and they did that in *Terry v. Ohio*. Now you see, *Terry v. Ohio* is a case that's hard to disagree with. It's part of the problem you always face because it was a case where officers wanted to pat down people, but they didn't have probable cause; they needed it for their safety. That makes a lot of sense to me, and maybe we should have amended the Constitution, have a nice, clear reason for it. But instead, what the Supreme Court said in *Terry* was that this would be a single exception, and what they did is they decoupled the Fourth Amendment right along the bridge of the clauses. They took the reasonableness reference and they separated it from the warrant

and probable cause reference and said that you could have reasonable searches or you could have searches that required warrants.

Once they decoupled the two clauses, then we were doomed, because what happened is that the court actually said, this is *sui generis*. It's a fancy Latin term for "it's unique." You can use that with your loved one. Say, "Honey, you're *sui generis*" and that's quite romantic, but for lawyers it is *sui generis*, that we're just doing it here for the officer's safety. Well, of course what happened is the minute we crossed that Rubicon, we had an explosion of reasonableness exceptions, and now more searches are done in this country under a standard of warrantless reasonableness than under a warrant. And so we've had this rapid decline where bank accounts, telephone records, international transactions, open fields, special needs, exigent circumstances, car searches, roadblocks, they're all under reasonableness now, and the list is expanding.

The court loves it-- The Supreme Court loves reasonableness. Do you know why? 'Cause they just sit there and they decide what they think is reasonable or not, and a lot of times they find it's perfectly reasonable even when the original reason is no longer there. For example, they said that you could search a car without probable cause. Now the reason they did that in the *Carroll* case was because they said, "Look. The officers can't go and get a warrant. When they stop the car they think is a bootlegger, they've got to look in the car." Okay. Now originally that was with probable cause to search the car. See, later they began to relax that, but the interesting thing is, even with probable cause the whole reason was they couldn't get a warrant.

Today you get a telephone warrant; in two minutes you can get a telephone warrant. Virtually every jurisdiction has a telephone warrant system. so the original purpose of *Carroll* no longer exists. And this was actually raised to the court and said, —"What you cite is no longer the problem. The officers can get it right there at their cruiser." And the court still said, "Yeah, we know that, but now we think it serves other unnamed purposes, and so we continue the rule."

The reason you don't have a privacy protection for PIN registers on the numbers that you dial or stuff that you give to the bank is because the Supreme Court said that you got to give that to a human operator. The operator clicks in the number. You can't have any expectation of privacy in that. Well, of course the problem now is that we don't have those operators anymore. You don't have those Lily Tomlins sitting there, "Okay." It's a computer, and in fact most people do their transactions on computers, so the original reason's not there. "It doesn't matter," the Supreme Court said. It's still open for warrantless surveillance. So the Supreme Court is not going to be a help.

The Supreme Court is particularly not a defender of civil liberties or of privacy, so the question is, what can we do? Does it matter? What matters? And what it takes is for us to have the courage and the commitment to make a change, to call for congressional hearings. In one hearing I even called for a constitutional amendment on privacy. Let's just put it in the Constitution and stop monkeying around. The problem is, we may need a constitutional amendment if we've got any hope. We've lost so much that we would need a seismic event like that to preserve privacy. Now some people do care. There are brave legislators in Maine that refuse to do the national identification card, and there are legislators around that have the courage of their convictions. But what I'm really afraid of is not just that privacy is going to be lost for my children, that they won't know what privacy truly is in its original form, in its unadulterated form, but that privacy will become just one more privilege of the rich; it'll become a commodity.

Phyllis McGinley once wrote that privacy has always been the mark of privilege. In each civilization as it advanced, those who could afford it chose the luxury of a withdrawing place. Most citizens don't have that luxury. They don't have a withdrawing place, and in fact the withdrawing places are getting fewer, with all of the new surveillance techniques and all the new powers, so that privilege will become just one more privilege of the wealthy and the few. If that should happen, we've changed in a fundamental way that I don't think we can imagine what we will be in the end. 'Cause unfortunately privacy is one of those things that you don't appreciate until it's really gone, and when it's gone it's pretty hard to get it back. And so I want to thank you very much for allowing me to speak to you today and the honor to attend this conference. Thank you very much.

MI: Do you want to take any questions?

Jonathan Turley: Sure.

Howard: What do you say-- And I'm sure all of us have this question put to us or actually it's a statement. My friends always say, "Howard, if you got nothing to hide, what's the big deal?" We constantly-- I'm sure you get that all the time. How do you respond to that?

Jonathan Turley: I say, "Romania." That is what you should look at is that Romania, Ceausescu's regime, had cameras at every single corner. Most of them didn't even work, but the fact is that people became robotic, that people don't really appreciate the things that they don't want to be filmed until they're being filmed. Suddenly when you have companies that are saying that they're going to fire people for political activities or for embarrassing things, they might not be willing to take a leaflet in the street. They don't want to be on film talking to somebody who's leading a protest or listening to a protest. They don't want to be seen going into a particular establishment. Suddenly you become aware of what you're

doing and how you're doing it. Not only does it give us all a collective neurosis, but it has a corrosive effect on all the other liberties, of free speech and free association, and unfortunately all you can tell them is, "You know why you can ask that question is because you've never had to make the decision. Go to Romania. Go to a place where people have to live like that. See how happy they are."

David Henderson: First of all, I just want to compliment you on your speech, and you could almost do standup, or maybe-- Second, another compliment: I saw Ron Paul interviewed a number of times, and I've forgotten who the interviewer was, but it was one of the few serious questions he got, and it was, if you were President, whom would you think of, who would be in your short list for Supreme Court? And he said Jonathan Turley, and now I see why.

Jonathan Turley: Thank you very much. It's a sad thing when you give away Supreme Court nominations for votes. But the fact is, even before he said that, which I was really honored with his saying that, Ron Paul is by far the most interesting man running today, and he stands out because he is a man of principle. And I knew him before he ran in Congress, not very well, but Ron Paul was one of the few members of Congress that you did not go into his office and talk politics. No one talked politics with Ron Paul. If you were talking about a piece of legislation, you cut straight to the chase as to why we needed legislation, and that says a lot about him.

David Henderson: Thank you, and I do have a question. The guy in California--I'm guessing was Roy Romer, but you can just refuse to answer that--who asked you about the school buses, did he end up getting something done about that once you refused? Do you know what happened with that?

Jonathan Turley: Yeah. He put videos in all the buses and the children became adorable.

Man 2: Could you describe your proposed constitutional amendment?

Jonathan Turley: Actually, it would be very simple in terms of the right to privacy. First of all, it would extend the right to privacy beyond the government itself. It would create a standard for privacy. Part of the problem with privacy is because it's not mentioned, because it's penumbral, it suffers not just in juxtaposing against practicalities like terrorism, but it also suffers from the fact that it does not have a footprint in the Constitution; it does not have a billet in one of the amendments. And so the justices constantly deal with it by treating it like it's some passing value. It's the same thing with parental rights. I'm a big parental rights advocate, but they do the same thing with parental rights. They just constantly say parental rights are protected in the Constitution, privacy protected in the Constitution, and you

always know the next sentence is, “But we’re not going to defend them here.” And so having it in the Constitution would make a big deal of a difference, in my view.

Rosalyn: Sir, excuse me, but I respectfully disagree with you. I know and I’ve interviewed Shalikashvili [from the Republic of Georgia. We’ve talked about this very subject. He said, “Rosalyn, you think you have this much rights. We had that much rights today.” I’m referring to—

Jonathan Turley: Where do you disagree with me?

Rosalyn: That privacy is not explicitly stated in the Constitution, right, but we have the means to deal and to get around it with the First Amendment, the Fourth Amendment, the Fifth Amendment, and the Ninth Amendment as they have been used. And there are cases where you can go and see the precedent of how they have been used in *Griswold v. Connecticut*, in *Roe v. Wade*, in *Lawrence v. Texas*. Let’s go back to 1963, *Griswold v. Connecticut*, which was when the government or the State of Connecticut tried to invade a married couple’s bedroom and tell them they couldn’t use contraceptive literature and they could not use contraceptives. That was taken to the Supreme Court and the law in Connecticut was struck down. A married couple has the right to use contraceptives and it became nationwide, and that was the precursor to *Roe v. Wade*, and then it led to *Lawrence v. Texas*, where two gay men have the right to have sex and they wanted the shame, they wanted the transparency. A friend of mine, Judge Janice Law, wrote a book, *Sex Appealed*. They wanted that case appealed all the way to the Supreme Court so that gay men could have sex in their bedroom legally in the state of Texas. To me, if you use the Constitution as it is now it works. Leave the Supreme Court alone. They’re doing fine or people taking this to court are doing fine. How would you write that law? How would you write that Amendment without screwing it up more?

Jonathan Turley: Well, I’m not too sure where to start. First of all, I didn’t say there weren’t privacy cases. There are privacy cases. The problem is that privacy is almost always honored in the breach, that most of the cases are not the cases that you talk about. Most of the cases involve people whose privacy is found in cars, in motor homes, the Internet, where the court continually finds against them. I happen to support *Lawrence v. Texas*. I happen to support the privacy of the homes, the use of contraceptives. All of that is rather obvious because I have a strong libertarian streak. I don’t think the government belongs in the bedroom of anyone, but the problem is that those [cases] are the exception. For example, when the court looked at whether you have an expectation of privacy in a motor home, it seemed pretty clear because the second word is “home.” But the court looked only at the first word, “motor,” and said, “It must be like a car. You don’t have expectation of privacy in cars, by the way, because we said so, and so you can’t have it in a motor home, even though you’re living in it.” That’s an example of the many

different ways privacy loses. You're right. We might screw it up, but I don't think we could screw it up more than we are now. I think we can only improve the situation.

Man 1: We have time for one more question.

Man 3: Hi. Thank you for your presentation. I guess the bottom line is, judging from all these Supreme Court cases and all these decisions, do we really in effect still have a Fourth Amendment?

Jonathan Turley: Well, there is a good question. It's not like computers, where you end up with 4.2 as an upgrade. This gets de-graded. I think we're now to 2.3. The answer is we do have it. It's a shambles. Even Scalia admitted in one opinion that the Supreme Court has made an unholy mess out of the Fourth Amendment and constitutional criminal procedure generally. I actually have not taught constitutional criminal procedure in a few years 'cause I hate it, because you can't teach it. You cannot teach that subject because the students constantly ask you, "How does this make sense? How does this case relate to this case?" And all you can say is, "They both involve Sandra Day O'Connor." It's the only consistent thing, and even Scalia admitted it's--that there's no coherency left in the Fourth Amendment, and part of it is reasonableness, part of it's because the court is remarkably political when it comes to the rights of criminals, and a good example of that is *Miranda*, where we started out with *Miranda*, which I got to say there is a debate whether *Miranda* is covered in the Constitution. —

But the Supreme Court created *Miranda*, which in my view by the way was a magnificent rule. Whether or not it could be found in the Constitution is a separate question, but *Miranda* was a brilliant rule; it was an elegant rule. There are few nations on earth that would tell the police that you have to educate a suspect about his rights. I think that's a magnificent thing, not the embarrassment everyone points to. It's an amazing thing, but as soon as they created *Miranda*, people like O'Connor started to just create exception after exception after exception. So by the time they finally said that it was part of the Constitution; I remember the *New York Times* called me and said, "Would you do a column on this?" 'Cause they said finally it's protected in the Constitution. And I said, "Of course it is, because the EKG is flat. That's why Rehnquist is saying it's in the Constitution, 'cause it's dead. There are more exceptions than are ruled there. It is almost impossible to get a case overturned with a *Miranda* violation because of all the exceptions, so after cutting it to pieces they then finally said, "We like what remains."

So the answer to you is not that *Miranda* is a Fourth Amendment issue. It's not. But much of the Fourth Amendment is like that. It's just filled with so many exceptions that it lacks coherency, and what that also means is that we're not going to be able to get back the Fourth Amendment or privacy unless we roll up our sleeves and do something about it, something comprehensive, something historic.

In many ways the United States defined privacy. We have a privacy right that is almost unique. Even our close cousins in England do not have the same privacy protections or free speech protections that we have. We defined it. What an extraordinary thing it would be if we regained it, if we show the world that with all the fears and all the terrorism and all of the scaring and fear mongering that you could do, a free people stopped and re-created privacy and a protected zone and withdrawing places. To me, that might be one of the most impressive things this Republic ever did. Thank you very much.