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**SARAH BALDWIN:** Mass surveillance versus bulk collection, contents versus call records, the Freedom Act versus the Patriot Act-- four years after Edward Snowden leaked government documents, how has the politics of privacy changed? Join us as we take a deep and detailed dive into the debate about mass surveillance reform.

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From Brown University's Watson Institute for International and Public Affairs, this is *Trending Globally*. I'm Sarah Baldwin. Today, we're joined by Timothy Edgard, a senior fellow at the Watson Institute.

Tim served as the first Director of Privacy and Civil Liberties for the White House national security staff under President Obama, focusing on cybersecurity, open government, and data privacy initiatives. Prior to that, he served as the National Security and Immigration Counsel for the American Civil Liberties Union, where he worked on safeguards for a number of post-9/11 counterterrorism initiatives, including the Patriot Act.

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Tim, take us back to 2013. James Clapper, the Director of National Intelligence, lies under oath. And you say that that's the breaking point for Snowden. And he's in Hong Kong with his four laptops. Take it from there.

**TIMOTHY EDGARD:** Well, first, there's some dispute about that. That's what Snowden himself said. He had actually been in touch with journalists for many months, and so some of his critics discount that point. But it is true that Jim Clapper denies the existence of bulk collection by the NSA. That's not true.

**RON WYDEN:** If you could give me a yes or no answer to the question-- does the NSA collect any type of data at all on millions or hundreds of millions of Americans?

**JAMES CLAPPER:** No, sir.

**TIMOTHY EDGARD:** I knew that at the time, because I'd worked on these programs. Part of the reason is that this was a highly classified program. So what Senator Wyden was doing-- and I talk about this in the book-- is he was behaving like an effective lawyer does who's engaged in cross-examination.

He's asking a question he already knows the answer to. The problem is that the true answer is a classified one. And so this puts Clapper in a real dilemma. He's whipsawed by competing duties. It's his job to keep secrets. It's also his job to tell the truth.

So what I say in the book is I think a fairly obvious point, which is that the answer to this is to be more transparent, to make that program public. But in doing so, you have to do it proactively. You have to go ahead and say, this is too important a program to keep from the public.

If a senator in the Congress has strong objections to us keeping it private, we ought to really think about working with him to make that program available. But it's not quite as simple as just saying, he lied under oath. Well, yeah. He did so to keep a secret. At least, that's my general sense of what happened.

**SARAH BALDWIN:** Or he said the least untrue thing he could.

**TIMOTHY EDGARD:** That's what he said. And as I say in the book, it sounds a little bit like Pontius Pilate. What is truth? But this is what intelligence officials do. They deal in shades of gray.

And another point I make is that there are dangers to transparency. There are ways in which it's hard. General Clapper is one of a generation of NSA officials who routinely have to testify under oath in public hearings. That wasn't always the case.

Prior to the '70s, no officials of the US intelligence community would ever appear in public. And in fact, Clapper talks about how he is reluctant to answer questions under oath in a public setting because of the danger of revealing classified information.

**SARAH BALDWIN:** But do you not also think that transparency gives secrecy some legitimacy?

**TIMOTHY EDGARD:** Yes. In fact, that's, I think, a basic point of my book is that you have to make transparent the basic contours of what you were doing as an intelligence community in a democracy and that before Snowden came along, there were major programs, major things the government was doing, which they had not come clean about.

And this is because of the transformation in our intelligence community after 9/11, after the terrorist attacks of 9/11. And it has to do with the transnational nature of our intelligence gathering and our collection of data.

**SARAH BALDWIN:** What do you mean?

**TIMOTHY EDGARD:** So yeah, that's an important part of the book. Two things-- the nature of the threat changed to include international terrorist groups that operate across national boundaries inside and outside the United States.

The nature of the technology changed. With the growth of the internet, with the growth of web mail and other services, huge amounts of data from people all over the world are being stored or transited inside the United States.

And the nature of our lives have changed since the 1970s. People just travel much more. They have contacts much more overseas. And so a rule that says that you can spy on foreigners but not Americans not only becomes difficult to administer, but it also becomes a serious threat to the privacy of Americans in a way that it wasn't several decades earlier.

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**SARAH BALDWIN:** So you say that the NSA became more transparent, accountable, protective, and effective because of Snowden's revelations.

**TIMOTHY EDGARD:** Yes. And I think this is one of the other surprises. I think that Snowden and his supporters thought that by revealing the mass surveillance activities of the NSA, they would spark a global debate on privacy and that when people found out what the NSA was doing, that they would object. And they would demand that it stop.

That happened to an extent with the bulk collection programs involving domestic telephone records, which turned out not to be particularly effective. This is where the NSA has become more accountable for its actions. But in many cases, it became clear that what the majority of the public, at least as represented in Congress, thought was, we think these programs pose serious risks to privacy.

We want them to be better controlled. But we don't want them to stop. We think that they're important in protecting our national security. So the debate that he started was incredibly

helpful not only in the reforms that I talk about in the book, but also in giving the NSA greater legitimacy for the activities it is doing.

**SARAH BALDWIN:** Let's talk about FISA, the FISA court, for a minute. You say that originally, it was a shield to protect civil liberties. But after 9/11, it became a sword to compel cooperation with transnational surveillance. Can you explain what you mean by that?

**TIMOTHY** Sure. So FISA starts out really as a protection against old-fashioned national security  
**EDGARD:** wiretapping.

**SARAH BALDWIN:** In 1978.

**TIMOTHY** Yeah. Think about J. Edgar Hoover and civil rights leaders and Martin Luther King. Before  
**EDGARD:** FISA came along, the FBI could put a wiretap on an American for national security reasons without any court oversight.

And FISA stops that. FISA says no. If you're saying this is for national security reasons, you're going to have to show this person has a connection and is acting for a foreign government or a foreign power.

After 9/11, though, what happens is the Bush Administration decides to use the Patriot Act and other amendments to FISA to basically compel the cooperation of major communications providers, both traditional telecoms and new internet companies, in mass surveillance of both metadata and of foreigners overseas. This is not something the FISA court had ever been used to do before that time.

FISA court was just about individual wiretap cases. So you think you've got a guy. Is there enough probable cause to get this person surveillance? With the transformation of FISA after 9/11 and the use of it for what I'm calling "transnational surveillance," what you get instead is the FISA court overseeing broad programs of mass surveillance and bulk collection.

Give you an example. You have the bulk collection program of telephone records involving every telephone record in the United States, both international and domestic, being given to the NSA on a daily basis to be searched by NSA analysts under very detailed privacy rules that we work to try to implement.

That program ended in 2015 with the Freedom Act. But there's a substitute for it that allows the NSA to query those records up to two hops away from their initial target. So that's still a

very significant program of intelligence collection and surveillance that's going on.

Another is the FISA Amendments Act that I talk about in the book or Section 702 of FISA. And that allows or that requires companies who have information from users that are located overseas, based on technical data and other data they have about their location, to cooperate with NSA queries that analysts give them without individual probable cause, without an individual court order.

So one order under this program, according to the most recent transparency report, which is a reform adopted after Snowden-- so that's why we know about it. One order under this program affects over 100,000 targets. So these are really broad programs of mass surveillance that the public didn't understand this was something that the FISA court had gotten itself into.

Previously, they just had individual wiretaps inside the country. The NSA did its thing overseas, and that was that. Now, we have this transnational surveillance, this surveillance where the NSA is getting data inside the country, metadata or data that's targeted at foreigners outside the country, doing so using the FISA law.

**SARAH BALDWIN:** Well, this point you make that we didn't know this before and now we do brings me back to Snowden and the fact that you say in the book he had much, much, much, much, much more than he actually revealed.

**TIMOTHY EDGARD:** So the government fought back in 2013 and 2014, kind of like fighting fire with fire. They said, let's open up much more of what we're doing. This is an unusual response.

Usually, the government clams up when there's a leak. They say, we're not going to confirm it. We're not going to comment on it. Here, the government did that sometimes for some programs. But for many programs, they actually revealed more about what they were doing.

**SARAH BALDWIN:** They created a website--

**TIMOTHY EDGARD:** Created a website to show the public, this is the rules that we have to follow when we engage in these new broad programs of transnational surveillance. This is what the FISA court has told us we have to do. Here are some mistakes we made, very embarrassing mistakes that we made, and what we did to correct them.

So they engaged in a major transparency drive. And I think that all comes back to Clapper, as we talked about. Clapper was the one who was behind this transparency.

**SARAH BALDWIN:** Right.

**TIMOTHY** He was deeply embarrassed. His reputation was seriously damaged when it came out a few  
**EDGARD:** months after he testified that it had been a false answer under oath. And I think he felt like, I'm never going to let that happen again.

**SARAH BALDWIN:** Right.

**TIMOTHY** I want to make sure that we put out the information that the public needs to know and that me  
**EDGARD:** or my successors aren't put in a situation where they're talking to the public under oath, and they have to say something false or say nothing at all and reveal a classified program. So I say that this is the zeal of a convert, even if he's a convert who is mainly afraid of being burned at the stake. And I think that's sort of point one.

Couple other points about the reforms the NSA made-- some of them involve the Freedom Act, working with Congress to scale back this bulk collection program I talked about of American phone records, ending that program, but allowing the NSA to query the data it needs from the phone companies.

That was an important reform. Not for routine cases, for these routine wiretap cases I was talking about, but in many complex cases, appointing an outside lawyer who will provide a different perspective than the government lawyers they normally hear from--

**SARAH BALDWIN:** And an aura of legitimacy.

**TIMOTHY** That's right. And then something we haven't talked about that I think is a major reform, a really  
**EDGARD:** huge, huge shift in thinking for the intelligence community, is something called "Presidential Policy Directive 28."

**SARAH BALDWIN:** Oh, right, under Obama.

**TIMOTHY** These are rules to protect the privacy of foreign citizens outside the United States. Never in  
**EDGARD:** the history of the US intelligence community or of the world, that I'm aware of, has there been a detailed set of binding rules, guidelines, that protect the privacy of people outside the community of that intelligence service.

**SARAH BALDWIN:** And why is that important?

**TIMOTHY** Well, it's important for several reasons. One is that the United States is the hub of the global internet. So what we do affects people around the world. It's difficult to protect the privacy of Americans while leaving the privacy of most of the world's population totally unprotected--

**SARAH BALDWIN:** Right--

**TIMOTHY** Because of the transformation I talked about. Our lives are connected far more with people living in other countries. Our data is connected far more around the world.

**SARAH BALDWIN:** But isn't it also an ethical question?

**TIMOTHY** It's in part an ethical question, and it's in part a practical question. I'd like to think that the ethics was the main reason for this reform, but I actually doubt it.

Certainly, there are human rights that everyone around the world has. And one of those is the right to privacy of correspondence. And that would mean, in the 21st century, digital correspondence. So that's the ethical reason for PPD 28.

The practical reason is that the United States and the Obama Administration was under a lot of pressure from Silicon Valley, from the big tech giants who were deeply embarrassed by the revelations of the Snowden leaks and who wanted some way of going to their customers who are all over the world and saying, your data is protected when it's in our hands. And previously, the government had always pointed to these protections I was talking about for Americans.

**SARAH BALDWIN:** Yes.

**TIMOTHY** So if you don't have any protections for foreigners, that's not going to be very reassuring. PPD 28 was intended to fill that gap.

Also helped with negotiations with the European Union over a data transfer agreement called "Safe Harbor" and now the "Privacy Shield." This was very important to making the Europeans comfortable with having the data of their citizens transiting the Atlantic and being stored by American companies.

**SARAH BALDWIN:** Can I just say in the book, I think you make the point-- speaking of Europe-- that there's this impression that Americans care less about privacy or are less protective of those civil liberties. But in fact, that right is more protected in the US than in many European countries?

**TIMOTHY** Yes. And the difference is that the Europeans have a more comprehensive set of rules that  
**EDGARD:** govern the private sector and how personal data is held by private companies. The Americans are a much more laissez faire, we'll let the companies do what they want as long as they publish privacy policies. We all know those privacy policies give a lot of power to the companies.

But when it comes to government surveillance, it's flipped. The Europeans traditionally have had a great deal of trust in their governments--

**SARAH BALDWIN:** Right--

**TIMOTHY** In a way that Americans traditionally have not. And so if you look at the powers of European  
**EDGARD:** intelligence services, they're often far more unfettered than the powers of American intelligence services.

Now, you add to that another complication, which the Europeans would point out. And they would say, yes, but our intelligence services are so much smaller. And they get so much less data than yours do. And we aren't the hub of the internet in the way you are. And those are all fair points.

Our services may have more laws that control them, but they also have far more advanced capabilities of mass surveillance. And we have more data available because of our connection, our being the hub of the global internet.

**SARAH BALDWIN:** Mm-hm. Well, that an interesting misperception that I wasn't aware of.

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You say that a so-called "Snowden treaty" banning mass surveillance universally is undesirable. Why?

**TIMOTHY** I think that I make a sort of realistic case for the idea that as much as we are right to be  
**EDGARD:** nervous about mass surveillance, there are times when the capabilities that are offered by these advanced central intelligence programs are useful for national security.

And they need to be controlled, but that to end mass surveillance, to essentially say that the only time that you can engage in surveillance is when you have an individual level of suspicion for an individual person, is unrealistic. And a treaty like that would require, for it to be



universal, the agreement of the major intelligence powers.

So that's the United States, Russia, China, United Kingdom, Germany, those kinds of countries-- Israel. Those countries do not have the level of trust that would ever allow them to agree to those kinds of limits. We would essentially be unilaterally giving up capabilities without any assurance that our rivals or adversaries were doing the same.

So instead, I propose something a little bit less broad than that kind of universal treaty. I think we need to work with our closest allies-- especially in Europe, but not exclusively-- democratic countries that we already have intelligence partnerships with in order to improve oversight of intelligence.

And PPD 28, the directive that protects the privacy of foreigners, is a great first step. We should be asking our partners. So what are you doing? How are you protecting the privacy of foreigners in your intelligence activities?

**SARAH BALDWIN:** And we're not doing that?

**TIMOTHY EDGARD:** Not so much. I think that we have typically been on the defensive since Snowden, arguing and justifying our own activities instead of putting the spotlight on others.

One exception to that, which I talk about in the book, is Germany. Germany has engaged in a lot of soul searching since Snowden. They started out kind of thinking, we're outraged at the NSA's activities on German soil. The story about the monitoring of the German chancellor was a huge scandal in Germany.

But since then, I think the debate over there has focused much more on the BND-- that's the German external intelligence service-- and the recognition that they need rules, much like the Americans adopted after Snowden, to protect the privacy of people outside German territory.

Because of its history, Germany had very strong protections, unlike other European countries, for domestic.

**SARAH BALDWIN:** Stasi and--

**TIMOTHY EDGARD:** Right, because of the Stasi, because of the Nazi era. But they didn't have very strong protections for external surveillance.

**SARAH BALDWIN:** I see.

**TIMOTHY EDGARD:** Last year, in 2016, the end of 2016, Germany adopted a law that does provide for protections for privacy for all of these activities of the BND, including activities outside the territory of Germany. In many ways, this goes farther than our reforms, because our reforms are just a policy directive, whereas their reforms are actually a law.

**SARAH BALDWIN:** Wow. Uh-huh.

One thing-- in addition to all the really fascinating behind-the-scenes stories and incredible detail and nuance that is in this book, I got the sense of how deeply you care about democracy and our democracy. And I just wonder when that consciousness was born in you and how you ended up being interested in civil liberties in the first place and--

**TIMOTHY EDGARD:** Well, it's a great question. And in my afterword, I thank my parents and the way I was raised--

**SARAH BALDWIN:** "For their quiet patriotism."

**TIMOTHY EDGARD:** That's right. I think it's a value that sometimes, we fail to recognize the good things that we have in the United States because of our constitutional traditions, especially when they come to be at risk.

And I talk a little bit about the danger of an erosion of civil liberties under President Trump. Among any other things, he is in charge of these mass surveillance capabilities. I would say freedom of speech, warrants for surveillance or searches, are very much at risk when people are frightened. That is really what many people have fought and died for.

So my sense is that it's a complex topic because the United States, as a powerful nation, as a superpower, has global interests and responsibilities and has these advanced surveillance capabilities to make that system work in a context where it's hard for it to work. And that is in the area of intelligence.

It's difficult to have democratic legitimacy because of secrecy, both necessary and sometimes excessive secrecy. And so to me, it's a fascinating intellectual challenge and one that I've wrestled with really most of my adult career. But it's also an important challenge for citizens.

So one reason that I wrote this book is that I wanted there to be an explanation of these issues that doesn't dumb the complexity and this nuance down, but that is accessible to an average

educated person who wants to pick up a book and understand not only sort of the headlines or the Hollywood version of the Snowden story and the NSA, but what actually happened, how this data is gathered, what rules govern its collection and use, and what we might do to reform our safeguards.

**SARAH BALDWIN:** Right. That's the "*Beyond Snowden*" part of your title, right?

**TIMOTHY** Yes. And that title was very much my feeling that this is an important historic moment in the  
**EDGARD:** history of intelligence gathering and privacy and surveillance.

But the real question for us is, what do we do now that that initial period has passed?

**SARAH BALDWIN:** Right.

**TIMOTHY** We can see the changes the NSA has made. I think they're very significant, but I don't think  
**EDGARD:** they're enough. I think there's a lot more we need to do to control mass surveillance in the 21st century.

And the panic over Trump I think is a good example of how people still have questions and real concerns about the capabilities that the government has available to monitor our emails and our communications and our data in a world that is very different from the world that most of our laws were written in back in the 1970s.

**SARAH BALDWIN:** So true. So true. And you do list some really astute recommendations for going forward. All the issues are more complex than we have any idea.

And I really appreciated the patience and the clarity with which you sort of parsed everything out that we, the public who do read headlines, wouldn't ever have learned, really.

**TIMOTHY** Well, I think that's right, because I think that secrecy is not the only obstacle to a national  
**EDGARD:** conversation about privacy and surveillance. It's also the legalism.

And my goal in this book was to penetrate some of that without dumbing it down, but to penetrate some of that and explain to people what has really changed in the 21st century. What really was happening with Snowden's revelations?

And I think that a part of what was happening is that we had perfectly good laws to protect against domestic spying. They were, for the most part, observed. You can argue about particular programs.

But really, what's happened is a transformation of the way in which data flows all over the world. And this enabled the NSA to obtain far more data and learn far more things than they would have otherwise.

And so what might have appeared perfectly normal to people back in the 1970s, people in 2013 and up to 2017 are saying, wait a second. They can do that?

**SARAH BALDWIN:** Right.

**TIMOTHY EDGARD:** And so this explains to some degree the disconnect between Snowden and his supporters saying, the NSA and the US are engaged in this Orwellian mass surveillance of all of the world's data. And look at how scary this is, and we need to stop it.

Do we want to give carte blanche to the NSA and other agencies to collect the data of people, just because they happen to be foreigners? Maybe in 1970, that didn't seem very threatening to your average American.

**SARAH BALDWIN:** In the analog world.

**TIMOTHY EDGARD:** Today, it might seem a lot more threatening. And so we've taken some modest steps-- I talk about them in the book-- to reform surveillance. And I think those have strengthened the NSA. But we have a long way to go, a lot more reforms to make.

One thing I want to talk about briefly, because it's important, Congress is going to debate over the next few months Section 702 of FISA. That's the part of FISA that authorizes the NSA to get court orders for cooperation with foreign surveillance, the 100,000 targets I talked about.

These are exactly the kinds of things Congress should be debating. And I hope that they find the time to do it in a real way, instead of just punting it to the next time that they look at these issues.

**SARAH BALDWIN:** I hope so, too. And I hope you'll come back and talk to us about it when we know more.

**TIMOTHY EDGARD:** Sure. Thank you.

**EDGARD:**

**SARAH BALDWIN:** Fascinating book-- thank you so much, Tim. Thanks for being here.

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