

**Abstract:**

Revelations of the government’s failure to comply with limits on its surveillance authorities have come with alarming regularity over the past two decades. The early aughts’ focus on terrorism prevention had prompted the government to, as then-NSA Director General Michael Hayden put it, get “chalk dust on [our] cleats”—to push the boundaries of what the law permitted. This aggressive posture inevitably has resulted in repeated, systemic failures to conform surveillance activities to Fourth Amendment constraints.

This article argues that these frequent constitutional violations are inevitable under the current model, impose unacceptable costs on American’s privacy interests, and can only be prevented by approaching the problem from a different perspective. The article seeks to do so by drawing on Professor Henry Monaghan’s influential 1975 *Forward* to the *Harvard Law Review* articulating the idea of “constitutional common law” and the elaboration on that concept that subsequent scholars have labeled “prophylactic” rules—rules that intentionally *over*protect constitutional rights.

The argument proceeds in three parts. Part I details the recurring violations in which surveillance agencies have engaged. Part II then demonstrates that surveillance law evinces many of the characteristics that commentators have identified as justifications for deploying prophylactic rules. I therefore propose in Part III multiple reforms, modeled on prophylactic measures implemented in analogous contexts, to address the specific compliance challenges that have become apparent in recent decades. I contend that adopting these rules would reduce constitutional violations by providing the intelligence community a greater margin for error in the contexts where those errors are most likely to occur.

**Bio:**

Emily Berman is Associate Professor and Royce R. Till Professor at the University of Houston Law Center. Her scholarship addresses oversight and accountability deficits inherent in the legal constraints on executive power. Her work has appeared in top journals, such as the *Boston University Law Review*, *Iowa Law Review*, and *Minnesota Law Review*. She makes frequent media appearances; her opinion pieces have appeared in *JustSecurity*, *Atlantic Online*, *National Law Journal*, and *CNN*, among others; and she is co-author of the leading casebooks on National Security Law and Counterterrorism Law. Prior to joining the UHLC faculty, she was a Visiting Assistant Professor at Brooklyn Law School, a Furman Fellow at NYU School of Law, and Counsel and Katz Fellow at the Brennan Center for Justice’s Liberty and National Security Project. Immediately after law school, Berman clerked for the Hon. John M. Walker, Jr. of the Second Circuit Court of Appeals.

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**Key words:**

Fourth Amendment  
Surveillance  
NSA

FBI  
Privacy

National security  
Constitutional rights

