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The Right to Privacy in Light of the Patriot Act and Social Contract Theory

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THE RIGHT TO PRIVACY IN LIGHT OF THE PATRIOT ACT AND SOCIAL
CONTRACT THEORY.

by

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Bachelor of Arts
American University, Washington DC
1992

A thesis submitted in partial fulfillment
of the requirements for the

**Master of Arts Degree in Ethics and Policy Studies
Department of Political Science
College of Liberal Arts**

**Graduate College
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THE GRADUATE COLLEGE

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ABSTRACT

Security vs. Privacy: The Use of Social Contract Theory to Support the Government's Obligation to Provide Security in lieu of Privacy

by

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There is a continual debate between individuals who attempt to measure the individual's right to privacy against the government's right to know in order to provide for the security of all citizens.

The questions that beg to be answered are whether the individual's right to privacy outweighs the government's duty to provide security; and if security is deemed more important, can there even be a right to privacy. It is critical to our nation's antiterrorism effort that our intelligence agencies possess the legal capacity to intercept all forms of communications utilized by terrorists and hostile intelligence agents. Inevitably this will lead to less privacy for everyone as a whole and the examination that follows will discuss the changes in the legal right to privacy that followed September 11, 2001.

In light of the diminished personal freedoms in this post 9/11 world, we need to study the right to privacy if we are to determine what the boundaries of personal freedom are. It is necessary to reiterate the importance of the right to privacy and its reinforcement of human dignity. Both philosophical and legal arguments that support the right to

privacy put forth human dignity as the driving focus and underlying principle for privacy. There is an inherent need for dignity and self-respect in every human being, and the right to privacy acknowledges and (one hopes) protects this need. It is important to be vigilant in studying the documentation of the strengthening or lessening of this right with regards to everyday life as well as the governmental impact of changing laws. Finally it serves to examine whether the government can continue to provide a “safe” way of life for its citizens by sacrificing the privacy of those same citizens (with safety as the primary priority), or is safety an excuse for this invasion, in essence an abuse of power with safety an essentially irrelevant issue.

The purpose of the study is to focus primarily on the legal and practical arguments for and against the right to privacy. The goal is to understand whether the human right to privacy should exist in light of the continued threat of terrorist attack (foreign and domestic) and the general public safety. Should an individual’s right to privacy outweigh society’s right to safety (in both physical and economic matters)? Is it even possible for privacy as it is traditionally defined to continue to exist? Existing case law will be looked at along with its impact in changing legislation (if any). Social contract theory will also be used to further define the government’s role in providing security for its citizens and the implications that represents in daily life.

Another reason to look to legal decisions is that I am examining the status of the right to privacy “today”. It is important to analyze the aspects of society that are affecting the right to privacy, and the aspect of society most in conflict with privacy is the Patriot Act. The policies involved in the Patriot Act have greatly altered the privacy provisions inherent in the First and Fourth Amendments. Therefore a look to legal

decisions that cite the Patriot Act in their justification or cite the over stepping by the Patriot Act, will illustrate the state of the right to privacy *today*. .

The methodology used in studying the right to privacy when dealing with the questions of government control and technological barriers to this right makes use of *case study* to examine these aspects. This study will examine *Griswold v. Connecticut* specifically for its creations of the legal right to privacy. Prior to *Griswold* there was no articulated constitutional right to privacy, so there is no doubt of its impact once constitutional precedence was founded. Then I will examine the specific provisions of the Privacy Act of 1974. The Privacy Act of 1974 (currently the 2007 edition) notes that the federal government compiles a wide range of information on individuals. The Privacy Act establishes certain controls over what personal information is collected by the federal government and how it is used. (*Your Right to Federal Records*, 2006). Next I will examine the Foreign Intelligence Surveillance Act (FISA). FISA is particularly important because it is the door through which many provisions of the Patriot Act were able to circumvent certain constitutional provisions as well as an expansion or modification of many of the original intents of FISA. The Patriot Act included far-reaching modifications to the Foreign Intelligence Surveillance Act. It served to further expand investigative powers under FISA to collect and analyze information (parts of the Patriot Act expanded the investigative powers of FISA – so FISA is both a separate entity *and* part of the Patriot Act).

And lastly, I will look at the Patriot Act itself, specifically the Patriot Act's impact on *Griswold v. Connecticut*, the Privacy Act and FISA. The terrorist attacks of September 11, 2001 created an immediate and reactionary redefinition of law

enforcement powers in the United States under the auspices of societal protection and the common good. It is important to look at these policies and their aftereffect and to examine whether the common good includes a right to privacy.

The right to privacy is not a clear cut issue, especially in light of 9/11. There is the important issue of national security and the common good. The questions that need to be answered address the balance of these two themes as well as addressing the prevailing concern of executive branch of government, with unchecked powers creating policy shrouded in secrecy and attacking the basic tenets of right that America was founded on (including the Fourth Amendment). The right to privacy must be reviewed and a line must be drawn that clearly defines its extent (if there indeed needs to be a separate right as opposed to the reductionist viewpoint). (The reductionist viewpoint does not believe there is a separate right to privacy). However, if the right exists, it can no longer be such a nebulous concept that is applicable only when convenient. There is no legislation that has eliminated the right to privacy but the Patriot Act has limited it. Therefore the right to privacy exists unless the need of the government takes precedence, making the right to privacy only applicable sometimes.

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CHAPTER 1 INTRODUCTION

Statement of Topic and Purpose

On September 10, 2001, the right to privacy was authentic, enforceable, and legitimate. On September 11, 2001 the right to privacy became irrelevant. The following will be an examination of the evolution and alleged extinction of the legal right to privacy. The examination will begin with the concept put forth by Warren and Brandeis in the 1890's and will continue through William Prosser's clarification of legal right with his four categories of torts in the 1960's. Following this, it will explore how the right was applied in *Griswold v. Connecticut*, the case which applied the right to privacy to the federal level, which led to the Privacy Act of 1974. It will examine the balance between The Privacy Act of 1974 and the Freedom of Information Act, which is an example of the difficulties that arise in finding the balance between information and privacy. The examination will move to the Foreign Intelligence Surveillance Act because it is the bedrock in which much of the Patriot Act is based. Finally, it will look at the Patriot Act itself, for that is the source of the decline of the legal right to privacy, through justification provided by social contract theory, the legal right to privacy will fall to the greater need to provide security the citizenry, the purpose of the social contract.

The right to privacy has been the subject of ongoing debate since the term was used by Samuel Warren and Louis Brandeis in 1890. The strength of the right to privacy perhaps reached its pinnacle in the landmark case *Griswold v. Connecticut* (381 U.S. 479), in which the Supreme Court explicitly stated that the right to privacy was covered

by the Fourth Amendment. It can also be argued that the right to privacy can be defined through the use of the First, Third, Fifth, and Ninth amendments.

There is not, however, complete agreement that people are somehow entitled to this right to privacy, especially in the post 9/11 world. There is a continual debate among individuals who attempt to measure the individual's right to privacy against the government's right to know in order to provide for the security of all citizens. Constitutional privacy should not be seen simply as a technical notion having no direct connection to our more practical everyday uses of privacy. It is precisely because our culture treats phone conversations as private, or decisions about sexuality or contraception as being immune from the judgment of other private citizens, that it makes sense to expect the Supreme Court to enforce a constitutional immunity from the judgment of the state within these narrowly circumscribed boundaries (Johnson 1992, 275).

The questions that ask to be answered are whether the individual's right to privacy outweighs the government's duty to provide security; and if security is deemed more important, can there even be a right to privacy. It is critical to our nation's anti-terrorism effort that our intelligence agencies possess the legal capacity to intercept all forms of communications utilized by terrorists and hostile intelligence agents. If one roving tap leads to the seizure of a large cache of botulism toxin in New York or a portable nuclear bomb in Los Angeles, have the benefits outweighed the risks to personal liberties? Moreover how does the potential loss of privacy to persons over the internet compare to the massacre of several thousand persons, the closure of international airspace, the utter destruction of skyscrapers in New York, an economy in a tailspin, and

Americans living in terror and afraid to fly on commercial airliners? (Privacy: Opposing Viewpoints, 2006).

It is important we continue to study of the right to privacy, especially in the light of the diminished personal freedoms in this post 9/11 world, it is especially significant in determining the continual need for personal boundaries. The specific changes in law that irrevocably changed the Fourth and First Amendments will be discussed in later chapters. It is necessary to reiterate the importance of the right to privacy and its reinforcement of human dignity. It is important to be vigilant in studying the documentation of the strengthening or lessening of this right with regards to everyday life as well as the governmental impact of changing laws. Finally, it is important to examine whether the government can continue to provide a safe way of life for its citizens by sacrificing the privacy of those same citizens (with safety as the primary priority) or is safety an excuse for this invasion, in essence an abuse of power with safety an essentially irrelevant issue.

There are two prevailing theories in the literature discussing the right to privacy: reductionism and coherentism. The reductionist view is based on the idea that privacy is essentially an inconsequential argument. Privacy, in and of itself, is not a specific right, just merely part of another right, therefore claims made citing a right to privacy should not and can not be honored. Edmund Byrne identifies reductivist privacy theorists in the legal field as those who believe that legal claims to privacy can all be resolved by other areas of law (Alfino, 2003). Coherentism, the other prevailing theory in the literature, takes the opposite stance to reductionism. Coherentism is the overview for many differing theories but what they all have in common is the belief in a distinct and “coherent” concept that is privacy (DeCew, 2006). As articulated by Justice William O.

Douglas in the landmark decision in *Griswold v. Connecticut*, “Privacy is its own basis for study and is a reasonable and appropriate justification within the law” (381 U.S. 479).

The purpose of the study is to focus primarily on the legal and practical arguments for and against the right to privacy. The goal is to understand whether the human right to privacy should exist in light of the continued threat of terrorist attack (foreign and domestic) and the general public safety. Should an individual’s right to privacy outweigh society’s right to safety in both physical and economic matters? Is it even possible for privacy, as it is traditionally defined, to continue to exist? Existing case law will be looked at along with its impact in changing legislation (if any). Social Contract theory will also be used to further define the Government’s role in providing security for its citizens and the implications that represents in daily life.

Though the origin and moral and philosophical arguments for right to privacy are an important area of study, these issues will not be addressed as a part of the study (with the exception of an occasional basis for the legal issue citing philosophical arguments as a rationale). Another reason to look to legal decisions is that I am examining “today”. It is important to analyze the aspects of society that are conflicting with the right to privacy, and the aspect most in conflict with privacy is the Patriot Act.

Literature Review

The literature review has been broken down into *quasi*-categories that will reflect the research questions that will be addressed above. There will be some overlap but essentially each issue will be addressed separately.

Individual vs. Government

As mentioned above, two prevailing privacy theories are coherentism and reductionism. It would seem, however, that most of the literature that debates the individual's right to privacy and the government's right to secure its citizens falls into the broader category of social contract theory (with regards to the government's duty to protect).

The traditional social contract view of Hobbes, Locke, and Rousseau crucially relied on the idea of consent. Now in the hands of these theorists – and in much ordinary discourse- the idea of consent implies a normative power to bind oneself (D'Agostino and Gaus, 2008). This illustrates the basic understanding of the contract between men in forming their government. As applied to the Patriot Act, therefore, we have to agree to give up our civil liberties (the right to privacy) in order for a more secure tomorrow. The government cannot make this decision for us.

The social contract theories of Hobbes, Locke, and Rousseau all stress that the justification of the state depended on showing that everyone would, in some way, consent to it. By relying on consent, social contract theory seemed to suppose a voluntarist conception of political justice and obligation: what is just depends on what people choose to agree to – what they *will*. (D'Agostino and Gaus, 2008). Therefore, if the people of the United States do not like actions taken under the Patriot Act, it is their responsibility to replace their current representation or accept that the government is fulfilling its end of the contract of providing security for all. In fact, Locke points out that it actually is part of the state of nature for all to look to the security of others, He says, "When (man's) own preservation comes not into competition, ought he as much as he can to preserve the

rest of mankind” (Locke 2002, 3). Locke says that it is preservation of one’s own life that takes this precedence over that of “mankind”, but nowhere is privacy or its invasion named as basis for the social contract that binds us all together.

The Patriot Act

The best known piece of legislation after 9/11 is the Patriot Act. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with the regulatory powers to combat corruption of the U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. While it is not without safeguards, critics contend some of its provisions go too far. It grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough (Doyle, 2002). As stated, it is important to understand the Patriot Act because it is the primary justification for all governmental action in regards to the diminishing boundaries for privacy. The subsequent articles will look further.

The Patriot Act was used to establish conditions under which the government could electronically monitor various types of ongoing communications within the United States in *non-emergency* situations (Henderson, 2002). The threat to privacy is not implicit in the legislation but only a possibility if safeguards are not put in place. The Fourth Amendment is probably going to be satisfied on the surface, but too much has been left to the discretion of the executive branch. This can be measured by looking like

the actual legislation under both FISA and the Patriot Act and how the Fourth Amendment is now applied (post 9/11); subsequent chapters will look further into this issue. The checks and balances system of American government was designed to keep each branch (executive, legislative, and judicial) in equal parity with no branch too weak or too powerful. The executive branch may try to increase its power especially through post 9/11 legislation, but within the balance of government it cannot be described with having too little power. American history teaches how dangerous it is to allow the executive power to conduct electronic surveillance unchecked. Thus where executive power has increased, as it has, Americans should be concerned that privacy may be unnecessarily threatened as a result (Henderson, 2002).

One area in particular that raises issues is the collection and analysis of personal information under the Foreign Intelligence Surveillance Act (FISA). Little, however, is known due to the secrecy clause and secretive nature of the FISC courts, the information that is known is only what law enforcement agencies are willing to disclose. (Jaeger et al, 2003). Because of the secrecy clause, unless government agencies choose to disclose such information, it is likely that the public will never know the extent to which law enforcement agencies request records containing personal information from various organizations. As a result, the public will not know the extent to which agencies are engaging in information collection, analysis, and sharing activities within and across agencies as well as across levels of government and sectors (Jaeger et al, 2003). To what extent do individuals have the right to know when their private information (in essence their privacy) has been accessed? This is an important dimension to the debate, and how we answer it will color to what extent there is a right to privacy. The question will

have to be asked with regard to what it will encompass, and how that remains in balance with the common good and the government's right or need to know.

On January 10, 2007, the United States Committee on the Judiciary held a hearing on *Balancing Privacy and Security: The Privacy Implications of Government Data Mining Programs*. Senator Patrick Leahy of Vermont, chairman of the committee, made the opening statement. He stated that the Bush administration dramatically increased its use of data mining technology, namely the collection and monitoring of large volumes of sensitive personal data to identify patterns or relationships. He noted in recent years that the federal government's use of data-mining technology has exploded, without congressional oversight or comprehensive privacy safeguards (2007). It seems that this hearing points out and illustrates that Congress is aware of the infringements on the right to privacy created by the Patriot Act as well as the lack of oversight for these programs. Leahy points out that following years of denial, the Transportation Security Administration has finally admitted that its controversial secure flight data-mining program, which collects and analyzes airline passenger data obtained from commercial data brokers, violated Federal privacy laws by failing to give notice to U.S. air travelers that their personal data was being collected for government use. Leahy believed that their years of denial were based on the fact that they were breaking the law and knew it (2007). This hearing illustrates that change in viewpoint in the six years after 9/11. The hearings do not state that there is no call for these data-mining programs, but rather a need for oversight and for an informed public.

On March 21, 2007, Linda D. Koontz testified before the House of Representatives Appropriation Committee's subcommittee on Homeland Security. Ms.

Koontz, Director of Information Management Issues, testified on the need for continuing attention to privacy concerns being needed as programs are developed. The General Accounting Office (GAO) commissioned this study for “the purpose of demonstrating that they recognized the need that securing the homeland and protecting the privacy rights of individuals are both important goals”. The study was to review programs of the Department of Homeland Security (DHS) and their privacy implications (2007). The testimony illustrated several challenges facing the DHS including the facilitation of information sharing regarding terrorism as well as the issuance of privacy guidelines for operation in this environment. The Department needs to establish clear departmental guidelines so that privacy protections are implemented properly and consistently (2007). The findings of this study found that privacy concerns cannot be neglected and appropriate legislation is needed to protect these concerns.

Some believe the issue with the Patriot Act is the haste in which it was passed. There was no time to consider the ramifications or far-reaching implications to the specific allowances made within its text. Unfortunately, in the rush to enact the Patriot Act, broad new powers were created with insufficient scrutiny given to the wording of most provisions. Congress spent little time studying or debating or hearing expert testimony on the proposed sections. At the heart of the Fourth Amendment is the freedom from unwarranted searches and seizures. Yet the Patriot Act greatly expands the scope of government authority when it comes to search warrants and subpoenas of telecommunication companies and subscribers. In particular, the Patriot Act allows for greater law enforcement access to ISP (Internet Service Provider) and cable company business records and subscriber records, as well as voicemail messages and personal

communications property such as a home computer (Privacy Opposing Viewpoints, 2006).

Of course, as in every argument or debate, there is an alternate viewpoint. In this case, there are some that see the expanded government power from the Patriot Act as an important tool in the protection of all Americans. The arrival of September 11, 2001, ushered in a new and foreboding era in the history of terrorism. Thus the U.S. intelligence agencies are faced not only with detecting and preventing the hijacking of airliners, but also with detecting and intercepting and preventing foreign-sponsored terrorists from unleashing biological, chemical, and portable nuclear weapons within our borders, all of which constitute a clear and present security threat to this nation. In order swiftly and effectively to meet these daunting challenges, speed and secrecy are of the utmost importance (Privacy Opposing Viewpoints, 2006). This argument goes on to note that there is still protection for citizens even under these heightened security measures. FISA specifically and affirmatively seeks to protect and preserve the inalienable rights guaranteed to American citizens, as well as to aliens lawfully admitted for permanent residence. FISA states that ‘no United States person may be considered a foreign power or an agent of a foreign power solely upon basis of activities protected by the first amendment to the Constitution of the United States’ (Privacy Opposing Viewpoints, 2006). Therefore, you are still protected from prosecution from any source of information gathered against you that is protected by the first amendment, even if your fourth amendment rights have been violated to get it.

Power of the Press

There is also a tendency in the literature to incite panic about the deprivation of rights and the fear of further terrorist attacks, for example “The USA Patriot Act: Collective Amnesia, Paranoia, and Convergent, Oligarchic Legislation in the ‘Politics of Fear’” (Thorne and Kouzmin, 2007). This article goes on to talk of the Patriot Act in terms stating that it has done more to destroy the rights of Americans than all of our enemies combined (Thorne and Kouzmin, 2007).

Another article notes an ABC-Washington Post was poll taken a day after 9/11; it found that two out of three Americans were willing to surrender civil liberties to stop terrorism. Critics of the Patriot Act noted that it took shape under the Bush administration’s “relentless” pressure to move quickly; without deliberation or debate it became apparent that several provisions of the bills would permit the government to intrude upon the private lives of law-abiding Americans- without assurance of any greater security against terrorism. The American Civil Liberties Union commented that “These new unchecked powers could be used against American citizens who are not under criminal investigation, immigrants who are here within our borders legally, and also against those whose First Amendment activities are deemed to be threats to national security by the Attorney General” (Rackow 2002, 1652).

Some literature is much more cautionary in what it infers regarding the Patriot Act. Where they see the need for the government intervention, they are still wary in light of the implications of that much increased and discretionary government power. Seth Kreimer examines the accumulation of data by governmental officials and bureaucrats (of all types governmental and non) in the course of daily events (license dispensation,

benefits, and government proceedings). Kreimer writes, “This information gathered in one place is available in many other arenas. Every employer accumulates information about her employees; every granter of credit files data about her customers, every transfer of funds leaves an increasingly accessible data trail, all of which is susceptible to government subpoena or request” (Kreimer, 1991). Kreimer notes that this expansion of government translates into an increase of the effective power of government, which means an increase in the ability to deploy governmental sanctions effectively. It also provides for a less straightforward means of exerting governmental power; it has the power through obtained information to publish offender names - a proven deterrent almost effective as prosecution. (Kreimer, 1991). Kreimer notes that information is currency; the prerequisite for political self-determination and a security against usurpation by secret cabals. Secrecy interferes with rational decision-making, accountability, and the choice of national goals (Kreimer, 1991). Please note that Kreimer wrote this article in 1991 a full decade before the events that transpired and the everlasting impact of September 11, 2001. There was obviously at least some support for this expansion of the Government’s gathering and disseminating information (anti-privacy, if you will) before the events of 9/11. The examination of the Government’s balancing of act of protecting both privacy rights and right to release information is studied and reported through the Government’s use of constitutional law.

Along with the purely cautionary literature, there are those that feel the wrong track has been taken entirely. Lisa Nelson notes, “The rhetoric of public policy after September 11th encourages us to believe that the preservation of freedom and the safety of the common good requires our universal acquiescence to technological invasions of

privacy”(Nelson 2002, 69). Nelson notes this rhetoric may be inconsistent with the philosophical and legal framework of American democracy. She continues, “While serving as a solution today, this rhetoric may pose a devastating blow to the balance of individual privacy and common good that is essential to the preservation of freedom” (Nelson 2002, 69).

The literature used as a basis for the arguments of individual privacy rights versus the government’s need to protect the common good, including safety, illustrates that the government needs to find a balance between protection of society and protection of the right to privacy. There is no argument that represents that the government does not have this right to seek information that in the end leads to societal protection, only that there need to be guidelines for this behavior and an appropriate respect for the right to privacy as well as due diligence with regard to its protection. Emergencies and dire circumstances do sometimes arise, and sometimes the scope of them cannot even be conceived of, but that does not mean that civil liberties become non-existent. It just may mean we have to work harder to keep them in place, as they are the bedrock of our society.

Methodology

Case study is the methodology used to study the right to privacy when dealing with the questions of government control and technological barriers. The case study is a research strategy which focuses on understanding the dynamics present within single settings. Case studies can involve either single or multiple cases and numerous levels of analysis. The evidence may be qualitative (e.g. words), quantitative (e.g. numbers) or

both. A qualitative study is more than a study that employs words, but “words” is the descriptive term to differentiate from a quantitative study based on mathematical equations that support or disprove a certain hypothesis. Case studies can be used to accomplish various aims: to *provide description*, test theory, or generate theory. (Eisenhardt, 1989). In this particular study, case study is being used *to illustrate* the specific evolution of the legal right to privacy, through the use of description of the work Warren and Brandeis, William Proser, Griswold v. Connecticut, The Privacy Act of 1974, the Freedom of Information Act. Case study will also be used to test the theory that the right to privacy was greatly diminished after the passing of the Patriot Act.

Case study methodology was used by Gregory E. McAvoy in Controlling Technocracy. He chose to study the placement of a waste management facility in Minnesota. This selection combined both state’s rights and hazardous waste policy to make this a critical case through which to examine these issues of state autonomy, political control, and the role of citizens in the policymaking process. (McAvoy, 1999).

Case study methodology was also used by George Gonzalez in Corporate Power and the Environment. In this case, to develop a general understanding of U.S. environmental policies he focused on four environmental policy areas: management of the national forests, management of the national parks, federal wilderness preservation, and federal clean air policies. He chose these policies because they are ‘hard cases’ for the view he puts forward. On the face of it, these cases seem unlikely to confirm the claim that economic elites are the most powerful influence in determining state behavior. (Gonzalez, 2001)

This study will examine *Griswold v. Connecticut* specifically for its creation of the legal right to privacy. Prior to *Griswold*, there was no articulated constitutional right to privacy, so there is no doubt of its impact once constitutional precedence was founded. Then I will examine the specific provisions of the Privacy Act of 1974. The Privacy Act of 1974 (currently the 2007 edition) notes that the federal government compiles a wide range of information on individuals. The Privacy Act establishes certain controls over what personal information is collected by the federal government and how it is used. (Your Right to Federal Records, 2006). Next, I will examine the Foreign Intelligence Surveillance Act (FISA). FISA is particularly important because it is the door through which many provisions of the Patriot Act were able to circumvent certain constitutional provisions as well as an expansion or modification of many of the original intents of FISA. The Patriot Act included far-reaching modifications to the Foreign Intelligence Surveillance Act. It served to further expand investigative powers under FISA to collect and analyze information (parts of the Patriot Act expanded the investigative powers of FISA – so FISA is both a separate entity *and* part of the Patriot Act) (Jaeger et al, 2003).

And lastly, I will examine the Patriot Act itself; specifically the Patriot Act's impact on *Griswold v. Connecticut*, the Privacy Act and FISA. The terrorist attacks of September 11, 2001 created an immediate and reactionary redefinition of law enforcement powers in the United States under the auspices of societal protection and the common good. It is important to look at these policies and their aftereffect and to define whether the common good includes a right to privacy. For example, Section 215 of the Patriot Act allows the FBI to order any person or entity to turn over "any tangible things" so long as the FBI specifies that the order is "for an authorized investigation to protect

against international terrorism or clandestine intelligence activities” (Reform the Patriot Act, 2009).

CHAPTER 2 HISTORY OF THE LEGAL RIGHT TO PRIVACY

What is Privacy

Before we delve into the aspect of the coverage of privacy, specifically into what has changed since *Griswold* and the Patriot Act, it is important to understand how privacy is defined. It is apparent that there are a number of different claims that can be made in the name of privacy. A number of them- and perhaps all – of them involve the question and degree of control that a person ought to be able to exercise in respect of knowledge or the disclosure of information about him or herself. This is not all there is to privacy but is surely one central theme. (Johnson, 1992). Privacy then is a structured portion of a person's total phenomenological field (the study of structures of experience, or consciousness). It is differentiated from the total field by virtue of the fact the self is in some degree involved in excluding in some (or possibly all) circumstances, some (or possibly all), other persons from knowledge of the person's possession. (Bates, 1964). Ruth Gavison's decomposition of privacy into three personal basic elements: Solitude: control over one's interpersonal interactions with other people, Confidentiality: control over other people's access to information about oneself, and Autonomy: control over what one does, i.e. freedom of will. (Boyle, 2003).

What all of these definitions have in agreement is that privacy is about control, the amount we wish to divulge to those around us. They also have as part of their definition that privacy is both a moral and legal right. There is a fundamental aspect to human nature that defines privacy as a basic component. We assume that privacy is a moral right, rather than simply a constitutional or legal right. We assume that privacy is a

fundamental right, rather than a right that can be explicated in terms of other fundamental rights (e.g. life, liberty, or property). (Alfino and Mayes, 2002). Privacy is an elastic concept. The limited-access view proposes that privacy represents control over unwanted access, or alternatively, the regulation of, limitations on, or exemption from scrutiny, surveillance, or unwanted access. Privacy, as a whole or in part, represents control over transactions between person (s) and other(s), the ultimate aim of which is to enhance autonomy and /or minimize vulnerability. (Margulis, 2005).

Warren and Brandeis

In 1890 Samuel D. Warren and Louis D. Brandeis wrote an article entitled “The Right to Privacy”. Alderman and Kennedy note that, “In their article Warren and Brandeis famously described the right to privacy as the ‘right to be left alone’. They recognized that an invasion of privacy would usually cause spiritual or emotional harm, rather than physical injury, but argued that the damage was just as serious and should be compensated through legal action” (Alderman and Kennedy 1995, 154). Though the article in question was prompted by a nosy press at a family event, Warren and Brandeis’s outrage became the basis for the legal coverage that protected the privacy of the individual and provided for compensation when it was violated. They argued that not only should an individual be left alone, but also that they had the right. Though this article became the basis for legislation and litigation, it did not protect the individual’s privacy from the government. There was not a constitutional right of protection. Throughout this chapter, the cases leading up to *Griswold vs. Connecticut* (the constitutional right to privacy) and the Privacy Act of 1974 will be examined.

Dorothy Glancy stated, “Warren and Brandeis argued that it was necessary for the legal system to recognize the right to privacy because, when information about an individual’s private life is made available to others, it tends to influence and even to injure the very core of an individual’s personality – ‘his estimate of himself’” (Glancy 1979, 2). From a small inciting incident, Warren and Brandeis looked to the law to encapsulate a protection that in essence was needed to protect an individual’s privacy both within his home and in public. Glancy continued, “They placed the right to privacy within the more general category of the individual’s right to be let alone. The right to be let alone was itself part of an even more general right, the right to enjoy life, which in turn was a part of the individual’s fundamental right to life itself”(Glancy 1979, 3).

Though this concept presented by Warren and Brandeis would give life to a more codified application and eventually protection even from government interference, evaluation of their arguments shows that they seem to understand that there are cases when privacy will not take precedence. Glancy stated that, “Emphasizing that the right to privacy should not operate as an all-encompassing absolute right of individuals somehow unilaterally to secede from the communities in which they lived, Warren and Brandeis pointed out that there would be circumstances in which the ‘dignity and convenience of the individual must yield to the demands of the public welfare or of private justice’ for personal information” (Glancy 1979, 37). This is an argument which will be looked at further when we examine the Patriot Act in chapter 5.

Warren and Brandeis were able to articulate the desire for privacy and look to the law for the support for that desire. Randall Bezanson describes it as such,” *The Right to Privacy* was a product of its time. Yet while using this definitional framework of the late

nineteenth century, the article expressed an age-old and still enduring concept of privacy. The continuing impact of the Warren and Brandeis article is a testament to the timeless quality of the idea of privacy, an idea reflecting much more than a plea for freedom from tasteless gossip and the salacious prying eye of the press” (Bezanson 1992, 1134). This homage to privacy was the building block with far-reaching repercussions that would someday legislate protection for the individual against intrusion from neighbors, the press, and the government.

Warren and Brandeis may have articulated this desire for privacy protection, but were not the only forces fueling this desire. Shank notes, “It was not the Warren-Brandeis article alone which impelled the public to push for privacy legislation. Innovations in the devices of communication increased the fear that government agents could learn things about the individual and use them to discomfort or harm people even though there might not be actual evidence of such action. The American penchant for keeping one’s counsel and remaining private grew stronger when faced with the possibility of the degradation of these characteristics” (Shank 1986, 12). Though this fear of government intrusion would not find protection in law for almost one hundred years, it would give rise to legislation on lower judicial ranges.

Robert Dixon notes, “The major contribution of Warren and Brandeis was in showing through rigorous critical analysis that doctrines of trespass, nuisance, and property were inadequate for the occasion, and that a new concept of protectable privacy could and should be evolved, both as a basis for an intelligible rationale for the handful of existing cases and for future development” (Dixon 1965, 199). In essence, Warren and Brandeis created the tort for the right to privacy. Their argument for privacy protection

included protection from individuals, the press and the government. Tort law however is not universal; it varied from state to state. Of course this meant that some states provided privacy protection and some did not. As stated there was little consistency in the application of the rights described by Warren and Brandeis; however, that changed with an article by William L. Prosser published in the *California Law Review* in August 1960.

The Impact of “Privacy” by William L. Prosser

Prosser looked to find some consistency in the application of this right to privacy as articulated by Warren and Brandeis. Alderman and Kennedy noted, “Prosser compiled varied privacy cases and wrote an influential article arguing that the tort known as ‘the invasion of privacy’ was really four distinct but related torts. He called these four torts: intrusion, public disclosure of private facts, false light, and appropriation” (Alderman and Kennedy 1995, 155). Prosser wrote, “For the next thirty years there was a continued dispute as whether the right to privacy existed at all. Along in the thirties, with the benediction of the Restatement of Torts, the tide set strongly in favor of recognition of the right to privacy, and the rejecting decisions began to be overruled. At the present time [1960], the right of privacy, in one form or another, is declared to exist by the overwhelming majority of the American courts” (Prosser 1960, 386).

Prosser reviewed over three hundred cases in his attempt to understand the right to privacy and how it was being successively applied. What he determined was that “the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost

nothing in common except each represents an interference with the right of the plaintiff 'to be left alone'" (Prosser 1960, 389).

As stated previously, Prosser noted that the cases fell into four distinct but separate torts; intrusion, public disclosure of private facts, false light, and appropriation.

1) Intrusion was defined as intruding (physically or otherwise) upon the solitude of another in a highly offensive manner.

2) Public disclosure of private facts is taken to mean the publicizing of highly offensive private information about someone which is not of legitimate concern to the public.

3) False light is the publicizing a highly offensive and false impression of another.

4) Appropriation is the using of another's name or likeness for some advantage without the other's consent.

After Prosser's article defining and clarifying the torts relating to the right to privacy, lawsuits became much more prevalent. There was still a lack of consistency among the states and a picking and choosing of which torts were applicable and even some and not others written into statutes. At this point (whether applied or not) these torts still held no protection against the government's invasion. The torts strictly applied to individual versus individual (or some sort of corporate entity) or individual versus the press.

Griswold v. Connecticut

As stated previously, Warren and Brandeis put forth the concept of privacy as a right and therefore it was due some type of legal protection and compensation. From this concept and its hit-or-miss application, William Prosser created a series of applicable torts for which violations of the right to privacy could seek legal redress. Despite Prosser's tort reform, there was still no protection or even acknowledged right to privacy

against the federal government. This would change with the case *Griswold v. Connecticut*.

To understand *Griswold* it is important to look at how Connecticut law read at the time. Jeffery Johnson stated, “In the early nineteen-sixties the state of Connecticut had the following laws on its books.

Any persons who use any drug, medical article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or both fined and imprisoned [53-32].

Any person who assists, abets, counsels, causes, hires or commands another person to commit any offense may be prosecuted and punished as if he were the principal offender [54-196]” (Johnson 1994, 171-172).

The details of *Griswold* are as follows, “Estelle Griswold, executive director of the Planned Parenthood League of Connecticut, provided information to a married people about how to use birth control devices to prevent pregnancy. This behavior violated the 1879 Connecticut law, which banned the use of drugs, materials, or instruments to prevent conception. *Griswold* was convicted of the crime of giving married couples advice on birth control and contraceptive devices” (McCann, 2009). The umbrella of privacy and how it will be applied by this case is the area which will be studied further.

The issue in expanding the right to privacy arose in the Constitutional debate of whether privacy was indeed a right covered in the document. Dixon wrote, “In regard to the relations between a government and its citizens, the use of the term ‘right to privacy’ suggests issues and values quite different from those encountered in private law. The term nowhere appears in the Constitution, but is quite obviously background interest underlying the specific guarantees of the third, fourth, and fifth amendments in regard to quartering of troops, search and seizure, and self-incrimination” (Dixon 1965, 200). In

Griswold v. Connecticut, Justice Douglas wrote the court's opinion. In writing this decision he looked to the Bill of Rights for the language which would support the right to privacy when in reality the right was not addressed or mentioned, whereas it can be argued that it was implied.

Justice Douglas wrote "...specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give life and substance.... Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner, is another fact of that privacy. The Fourth Amendment explicitly affirms the 'right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, certain rights, shall not be construed to deny or disparage others retained by the people'" (Johnson 1994, 172). This idea of zones of privacy articulated by Douglas and supported by the Bill of Rights is in essence a right that existed but just had not been put into those terms and therefore was due the full support and protection of the constitution.

The majority in *Griswold* determined that there was constitutional protection for privacy. McCann noted, "The majority holding in *Griswold* to a large extent was positioned within post-1937 constitutional theory. It protected basic constitutional rights and applied them against the states in conventional fashion under the Fourteenth

Amendment, and it mandated a stricter scrutiny for laws that interfere with ‘fundamental personal rights’ than those that regulate economic relations. The Court’s more controversial step of applying this logic to fundamental rights – here, of privacy- not expressly enumerated in the Bill of Rights likewise was hardly unprecedented”(McCann, 2009). This point illuminates that though controversial decisions had been made by the Supreme Court; it was not enough to dismiss a decision as controversial and move on this decision in *Griswold vs. Connecticut* created some division amongst the interpretations of the Constitution.

Johnson goes on to note that the problem with the interpretive argument is its inconsistency. He says, “If a principled approach to judicial enforcement of the constitution’s open-ended provisions cannot be developed, one that is not hopelessly inconsistent with our nation’s commitment to representative democracy, responsible commentators must consider seriously the possibility that courts simply should stay away from them” (Johnson 1994, 178-179). The argument seems to lie with not the decision but the decision making process.

The penumbra argument could you be used to support the legal right to privacy but there was still no specificity to it coverage. Johnson writes, “The Court’s evolving privacy jurisprudence can be read as an attempt to articulate precisely such ‘a principled approach to judicial enforcement of the Constitution’s open-ended provisions’. Douglas correctly saw that the penumbra argument required broad appeal to the constitutional text, careful analysis of legal and constitutional text, careful analysis of legal and constitutional history, and the sparing use of widely shared political and legal values” (Johnson 1994, 179). Despite Justice Douglas’s argument regarding his review, there

evolved no clear specific definition of privacy or its protections. Dixon writes, “In Griswold the court avoided defining privacy narrowly and particularly, and also avoided tying it to one or two supporting (but also necessarily limiting) clauses in the Constitution” (Dixon 1965, 205). So, though proponents of the right to privacy can claim victory with the Griswold decision, there can still be no definite or concrete right to look to with a cry of violation.

In the following chapter the Privacy Act of 1974 (and its future incarnations) will be looked at in contrast to the weight of the Freedom of Information Act. When conflicts arise between the two pieces of legislation, where does justice fall? And does this foreshadow the priorities of government in a post 9/11 world? Johnson concludes, “The concept of constitutional privacy can be seen as providing a workable test for when ‘rational and fair man would admit the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law’”(Johnson 1994, 191).

It is important to review what information is being released to the public not just why it is being released. The members of a Mosque or patients visiting a doctor known to perform abortions should be afforded the same privacy protections as the members of a church or anti-abortion doctors. The freedom of choice within the law is the bedrock of self-government. Knowing the privacy protection exists, enables citizens to be open without fear of reprisal for legal and reasonable behavior. These ideas will be further reviewed in the following chapter, but are mentioned here to underline the importance of the protected right to privacy.

Conclusion

The desire for privacy coupled with an ever more technologically advanced world has made many individuals feel insecure in their privacy and look more and more to the law for protection from what they see as unwarranted and unwanted invasions by the public including the United States government. What, in 1890, Warren and Brandeis articulated as the “right to privacy” and argued for the protection thereof gave rise to the codification of specific tort law by William Prosser in 1960. Prosser in turn gave rise to the specific protection for the right to privacy from the government in *Griswold vs. Connecticut* in 1965. However, the lack of specificity of the Constitution and especially the fact that there is no usage of the term ‘right to privacy’ created the need for specific legislation to protect this right. For continuing purposes, the definition of privacy that is applied for this study is the categories put forth by William Prosser when he examined the cases which had been brought before the law. (To reiterate), they are intrusion, public disclosure of private facts, false light and appropriation.

CHAPTER 3
THE PRIVACY ACT OF 1974 AND THE FREEDOM OF INFORMATION ACT

The Privacy Act of 1974

There has been a clear evolution in the development of privacy as a legal right, from the first articulation of the legal right by Warren and Brandeis to the clear cut tort legislation presented by William Prosser, through to the right to the protection from invasions by the United States government with *Griswold vs. Connecticut*. However, while *Griswold* was the precedent-setting case establishing the right to privacy where no specific citation of this right can be found in the Constitution. Congress created specific legislation to with a scope of coverage which entailed the type of privacy protection that existed.

There is an intricate balance between the right to privacy and the government's need for information. James Beverage describes it as follows, "The Privacy Act seeks to preserve the individual's interest in the privacy while at the same time recognizing the legitimate needs of the government for information" (Beverage 1976, 301). This duality of need (the individual's for privacy and the government's for information) will be visited with the review of the Freedom of Information Act (in this chapter) and revisited with the Patriot Act (chapter 5). The Privacy Act was federal legislation and only applied to those auspices of the agencies of the federal government. State and private legislation was still up to the individual states with the types of legislation and protections they enacted into law. The report entitled *Records, Computers, and Rights of Citizens* recommended a 'Code of Fair Information Practices' consisting of five basic principles:

1. There must be no data record-keeping system whose very existence is secret.

2. There must be a way for an individual to find out what information about him is in a record and how it is used.
3. There must be a way for an individual to prevent information about him obtained for one purpose from being used or made available for other purposes without his consent.
4. There must be a way for an individual to correct or amend a record of identifiable information about himself.
5. Any organization creating, maintaining, using or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take reasonable precautions to prevent the misuse of the data.” (Bushkin and Schaen, 1975)

This report had significant influence on the coverage of the Privacy Act. The Privacy Act did apply these five principles, providing both accessibility of records and corrective measures to address errors. These also provided a similar protection as those articulated by Prosser. There is the protection regarding intrusion. The data must be relevant and there are guidelines in place regarding interagency disclosure which provides some of the protection of Prosser’s public disclosure of private facts. The ability to correct incorrect data is similar to the false light protection.

As discussed at the end of the previous chapter, there should be a clear distinction in the type of information gathered. The Privacy Act was created to outline these distinctions. The goal was to prevent unnecessary intrusiveness, create fairness in the type of information kept, and be open with knowledge gathered on an individual. The openness is designed so that individuals are aware of the knowledge about themselves and aware when the information has been requested by another organization. They also have to have the ability to redress incorrect information. An example of this sort of information is a credit score. Individuals have access to the items compiled that create the score, they are informed when the data has been accessed, and the credit bureaus are required to correct information that the individual has noted is incorrect.

The Act is very clear about the type of information collected and maintained creating a distinction between relevant and necessary. Beverage says, “The information maintained must be ‘necessary’. It is not enough that it merely be relevant; rather, it must be determined that the ‘needs of the agency and goals of the program cannot reasonably be met through alternative means’. Such a determination will require a great deal of balancing of interests and, in the final analysis, agency judgment. The right to privacy should be given substantial weight in these determinations, for the basic goal of the Act is the protection of the right” (Beverage 1976, 308). The legislation seeks to find the proper balance due the individual while never forgetting that any information the government deems necessary shall remain accessible.

Not only is the collecting of the information limited to necessity, but also its use is controlled by this legislation. Beverage goes on to note, “Except in certain circumstances, no information may be disclosed without the consent of the individual. The listed circumstances are broad enough to allow disclosure in almost all situations where there is a legitimate need for disclosure. Indeed, one may question whether the consent provision provided a real limitation upon agency activity” (Beverage 1976, 311). Therefore, though there is a specific right of consent it seems to be in writing only. The circumstances for circumventing it are so broad that the right of consent for all practicality does not exist. This broad set of circumstances does not entirely let the agency off in entirety, because they still must account for all disclosures. One of the circumstances that circumvents the right to consent is when the federal government needs the information for civil or criminal prosecution. But as will be discussed in the chapters

on FISA and the Patriot Act, the standards for criminal investigation have significantly changed

Circumstances Leading to the Freedom of Information Act

As previously stated, there exists a duality of need for both information and privacy. The Freedom of Information Act was signed into law as a kind of check on the government. Cate, Fields, and McBain quote President Johnson, “A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest” (Cate, Fields, and McBain 1994, 46). This was the underlying purpose when the Freedom of Information Act was signed into law in 1966. There seems to be some sort of endemic fear within the American people about the government acting in secret with no accountability. They go on to note, “Citizens and lawmakers alike were concerned about the bureaucratic unaccountability, and Congress responded with an act that would open government ‘to the light of public scrutiny’” (Cate, Fields, and McBain 1994, 46). Citizens wanted their own privacy protected but the actions of the government illuminated.

The very age of some parts of the FOIA represents the need for transparency, as early as the foundation of the United States itself. However, the continued fine tuning of the legislation represents the resistance to exposure even by agencies claiming needs for privacy (or national security) rather than openness. Lotte Feinberg states, “The FOIA evolved from three laws. A ‘housekeeping’ statute, originally passed in 1789, gave the head of each federal department authority to ‘prescribe regulations for the government of

his department', set up filing systems, and keep records. The Administrative Procedure Act (APA) of 1946, which the FOIA subsequently amended, required that agencies publish information about their organizations, powers, procedures, and substantive rules in the Federal Register. Third, in 1958, a single sentence was added to the 'housekeeping' statute to prevent agencies from using it to withhold information"(Feinberg 1986, 615). The FOIA was compiled from these existing laws in an attempt to consistently make open the activities of government.

The Freedom of Information Act (FOIA) was a check to the balance of power of government bureaucracy. At least it was a measure created to ensure that there would be consequences to unchecked power. But the act itself was directed at government and the officials that composed it. It was meant to be, if not the ultimate oversight, at least a significant one. Feinberg notes, "Extensive congressional hearings in 1972 and 1973 led to the amendments of 1974 and a marked change in the way agencies responded to FOIA requests. Requesters now had only to 'reasonably describe' records, not identify them precisely. Time limits were set for processing requests. Penalties could be assessed against agencies and employees for failure to comply with the statute. Congress assumed a proactive role; since 1972, both Houses have conducted oversight as have their support agencies" (Feinberg 1986, 617). The very fact that Congress had to take these measures (after the initial law enactment in 1966) was in reaction to the very resistance of these agencies to releasing information to the public. Anthony Kronman puts it this way, "Prior to its enactment, private citizens had only a limited right to obtain government documents, making it easier, many believed, for public officials to conceal their own wrongdoing and ineptitude" (Kronman 1980, 727-728).

The origin and reasoning for the Freedom of Information Act (FOIA) seem to stem from an inherent distrust of government. This distrust began with the inception of government in the United States, as marked by the ‘housekeeping’ statute from 1789, and incorporated into the FOIA. From the beginning of American government, this safeguard was in place. If government officials were aware that their actions would be open to the public, it would stand to reason their behavior would reflect this. The hope being that there would be less “shady deals”, less self-aggrandizing, and less waste in government.

Even at its creation, the FOIA was designed with exceptions (mostly regarding privacy). There are nine official exceptions (USC 552b), but for relevancy The Exemption 6 Context will discuss specific privacy concerns. Cate, Fields and McBain noted, “The Court surveyed the legislative history of Exemption 6 and concluded, ‘the primary concern of Congress in drafting Exemption 6 was to provide for the confidentiality of personal matters.’ Therefore, it is the nature of the information, not the type of file in which it is contained, that is determinative” (Cate, Fields, and McBain 1994, 55). This decision and the fact that it was argued all the way to the Supreme Court are illustrative of the continual thirst for information versus the desire for privacy.

Freedom of Information Act 1985

The FOIA was created to prevent secrecy within government by allowing the public access to information. The amendments to the reworking of the FOIA resulted in the public’s access to information being further curtailed. Lawrence Goode and Douglas Williams state, “The most significant administrative development affecting the FOIA in 1985 was the publication of a proposed circular by the Office of Management and Budget

(OMB). The circular seeks, among other things, to limit the amount of information that agencies provide on their own initiative –without FOIA requests- as part of a cost – effective policy”(Goode and Williams 1986, 384-385). The effort to save money meant that the only information released under the FOIA was information that had a valid request. It also meant that the information should be disseminated in as cost-effective manner as possible, which the burden on the private sector for its distribution. It is obvious that the OMB is motivated by financial concerns; but in allowing that to rule legislation; it perhaps, and not wrongly, established limitations that required legitimacy of requests and made it more difficult to receive requested information. The effect of this revised act on privacy exemptions will be looked at below.

Privacy Exceptions within the Freedom of Information Act

The FOIA is a tool for monitoring the conduct of government. It has been emphatically denied as a tool for attacking the privacy of the individual. The FOIA was created to give the public access to the government. This way, the conduct of government officials could not be hidden. The FOIA also had access to public policy so that debate could take place and concerns noted while crafting this policy. Also, the FOIA hoped to prevent secret law making. But as noted, it was never meant to be about the individual. This protection was a clearly expressed exemption. The clearest expression of this concern is the act’s sixth exemption, which permits federal agencies to withhold from public scrutiny (per Kronman), “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” (Kronman 1980, 729). The Supreme Court in interpreting the FOIA has

continually supported the personal right to privacy as the act was deemed to be about transparency in government not about the individual.

The two areas in which the Supreme Court has maintained the individual's privacy with regard to the FOIA are in the revelation of embarrassing facts and freedom from solicitation. With regard to the first, Kronman says, "is the interest individuals have in concealing or more neutrally, in retaining the power to selectively disclose embarrassing facts about themselves. As the courts have acknowledged, revelation of such facts is likely to have a detrimental impact on an individual's opportunities for favorable social and professional interactions with others" (Kronman 1980, 739). The second protected area under the sixth exemption is rooted more in the traditional law protecting privacy: the desire to be left alone. Kronman goes on, "It reflects the widespread belief that people wish to be free from unrequested solicitations. A number of cases interpreting the act's sixth exemption state or imply that an individual's privacy is invaded whenever he receives a solicitation whether it take the form of a letter or telephone call or personal visit and whatever its purpose" (Kronman 1980, 739-740). This is the specific coverage that created the 'no call' list to avoid the constant intrusion of phone solicitation.

Many of the recommendations of the OMB were based on the outcomes of lawsuits regarding both the FOIA and Privacy Act. In one such case, *Bartel v. FAA*, Goode and Williams cite, "The United States Court of Appeals for the District of Columbia held that an agency must have an actual FOIA request in hand before disclosing information that is subject to both the Privacy Act and to the FOIA" (Goode and Williams 1986, 400). These recommendations, coupled with the reworked FOIA of

1985, streamlined the process for requesting information under the FOIA, but more importantly they more clearly defined and regulated that information that was still protected despite the FOIA and the procedures for accessing and releasing information that was not protected under FOIA exemptions.

The problem as many see is that there is a general misuse of the FOIA. Cate, Fields and McBain state, “Today, however, the FOIA has been extended by requesters, agencies, litigants, and courts far beyond its original purpose. Indeed, the vast majority of requests under the Act seek no information about the activities of the government, but rather information about business competitors, opposing parties in litigation, and the activities of other nongovernmental entities”(Cate, Fields and McBain 1994, 65). It has been reiterated to the point of redundancy, but the FOIA was not about gathering information about “your neighbors” but to keep the government in check. It is perhaps fair to say that the drafters of the FOIA did not foresee the rampant abuse of personal privacy in this attempt to create transparency in government. Cate, Fields, and McBain continue, “It also costs taxpayers the billions of dollars spent responding to requests seeking no information ‘about what the government is up to’. The government tramples privacy rights and confidentiality interests of individuals and organizations when it complies with requests seeking information about private citizens and organizations, rather than about the government. Such use of the Act circumvents the discovery process in civil litigation, subverts judicial efforts to improve speed and efficiency and reduce the cost of trials, and thwarts government efforts to collect information about industries, products, and markets” (Cate, Fields, and McBain 1994, 65-66). This misuse of the

FOIA not only negates its reason for being the cost is astronomical while invading personal privacy.

The responsibility of keeping the FOIA on track is both financial and prudential. As noted above, the cost of inappropriate requests totals billions. But obviously, the impact on personal privacy would be the antithesis to the FOIA, for it was designed to release, and still remains about releasing, information about the government. To curtail the misuse of FOIA with regards to personal privacy two specific privacy exemptions were meant to be applied as a litmus test. (Exemption 6 was discussed previously in this chapter.) Cate, Fields and McBain conclude, “The Court has held ‘that when a request seeks no ‘official information’ about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is unwarranted’. This dramatic interpretation of the Act’s two personal privacy exemptions is an important step toward limiting the misuse of the FOIA. The force of its logic applies not merely to the disclosures affecting personal privacy interests, but to all disclosures under the Act” (Cate, Fields, and McBain 1994, 65-66). The Supreme Court put the FOIA back on track. Requests for information could not be mere “fishing expeditions”. Legislated privacy protections in the FOIA, purposefully applied, would prevent privacy abuses of the FOIA.

Conclusion

The Privacy Act and the Freedom of Information Act were just an example of the struggle between the right to privacy and the public right to information. Though the FOIA was clearly not intended as a tool for gaining information regarding the individual,

it has been abused for that purpose. The FOIA was designed as a rein on government. Requests for information that were outside of the purview have only succeeded in wasting the government's time, and the cost has been carried by the taxpayer.

Within the FOIA are informational request exemptions designed with the Privacy Act in mind to continue the protection of the individual's privacy. Specifically, information which can be construed to be an embarrassment or a nuisance would fall under the protections of the FOIA and therefore would not be in conflict with the Privacy Act. However, the protections provided by both the Privacy Act and the FOIA were and are severely challenged after the events of 9/11. Up to this point in the historical development of Privacy Protections (in the United States), privacy would take priority with the individual, but with the examination of the Foreign Intelligence Surveillance Act and the Patriot Act (in the subsequent two chapters), other concerns will outweigh privacy.

CHAPTER 4 THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

The importance of the Foreign Intelligence Surveillance Act (FISA) is that it is the bedrock of the Patriot Act. To understand the power of the Patriot Act and its impact on personal privacy it is important to understand its legislative power, primarily the FISA. The idea behind FISA was somehow to legislate circumstances to circumvent the Fourth Amendment (the need for a warrant for searches and seizures), specifically electronic surveillance, if national security was at stake. Americo Cinquegrana writes, “The Act was a product of years of debate concerning whether the President possessed inherent constitutional authority to approve warrantless searches for national security purposes” (Cinquegrana 1989, 794). To this point, the concept of privacy has evolved from a concept to actual federal law (even in balance with Freedom of Information), but even within these protections, modern technology has evolved to a point that one may not know how or when privacy is being violated. The ability and permissions are found in FISA.

Creation of the Foreign Intelligence Surveillance Act

Early twentieth-century practice saw warrantless wiretapping by the Executive branch of government as a common practice. The practice was challenged in 1928 when the Supreme Court in *Olmstead v. United States* determined that phone conversations overheard by wiretap were not covered by the Fourth Amendment. Cinquegrana cites the majority decision, “Chief Justice Taft speaking for the majority, emphasized the fact that ‘voluntary conversations secretly overheard’ could not be equated with material ‘things’

seized by the government. Since the persons using the telephone intended to project their words outside their homes, and there had been no physical intrusion, the Court held that this mode of acquisition was not regulated by the fourth amendment” (Cinquegrana 1989, 795-796). However, considering the nature of the phone service in the early part of the twentieth century, it is not unreasonable that there would not be any expectation of privacy and that the Supreme Court would not see any due to “the projecting of words outside their homes” (though the decision in *Olmstead* was 5 to 4). This narrow interpretation of the fourth amendment left any electronic surveillance that took place without “physical intrusion” without regulation or scrutiny, and the power to continue this warrantless activity remained solely with the executive branch.

Congress was not in agreement with this unchecked power of the Executive branch and countered *Olmstead* by enacting the Communications Act of 1934. Within the Communications of Act of 1934 was provision 605. *The Michigan Law Review* published an article which defined provision 605 as follows, “605 prohibits both unauthorized interception of any private radio or wire communications and unauthorized use of publication of any information contained in such communications’ (“FISA: Legislating..” 1980, 1119). Though this provision was upheld by the Supreme Court when challenged (*Nardone v. United States*), it did not stem the continued warrantless electronic surveillance by the executive branch. The first reason it did not deter the executive branch was that the information was not necessarily being gathered for a criminal prosecution, but in essence it was being gathered for information’s sake. With no trial to dismiss the evidence as illegally obtained, there was no reason for the government to rethink its approach to gathering it. The second reason that provision 605

had little effect was that the executive branch stated that it did not apply to national security cases. National security was the justification that was used to circumvent Congress (and the law) in 1934 and today. Cinquegrana notes, “Almost 7000 wiretaps and 2200 microphone surveillances were used by the Executive between 1940 and the mid-1960’s in internal security investigations concerning foreign intelligence agents and Communist Party leaders, as well as major criminal activities.” (Cinquegrana 1989, 799).

It was not until 1967 that this behavior by the Executive was somewhat checked. The *Michigan Law Review* article reads, “In *Katz v. United States*, the Supreme Court overruled *Olmstead* and held for the first time that warrantless electronic surveillance constituted an unreasonable search and seizure under the fourth amendment. The Court held that government officers must obtain a warrant from a neutral magistrate before employing wiretapping or electronic surveillance in the course of any state or federal criminal investigation” (“FISA: Legislating...” 1980, 1120). The Supreme Court did not address issues of national security, nor did Congress when enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, an oversight not missed by the executive branch which essentially continued the status quo. By citing “*national security*” the continuation of warrantless surveillance continued essentially unchecked. However, the Omnibus Crime Control and Safe Streets Act did (per Cinquegrana) “define more clearly the proper use of electronic surveillance techniques in criminal investigations. The 1968 Omnibus Act established a detailed procedure for the issuance of warrant prior to using microphone surveillance or wire-tapping for law enforcement purposes” (Cinquegrana 1989, 801).

By 1968, Congress had made no attempt to define or limit the power of the Executive concerning warrantless surveillance in the name of national security. The Supreme Court also had made no direct decisions with regard to the scope of power of the Executive on this matter. As stated previously, the cases that came before the Court under existing law either saw provisions for national security or concluded that what the Executive had done did not at that time fall under the scope of the Fourth Amendment. In essence the “breaking point” for the Supreme Court was the case of *United States v. United States District Court* (or the so-called “Keith” case), decided in 1972. The Keith case involved three men charged with conspiracy to destroy government property (a CIA office in Michigan). Attorney General John Mitchell stated the case fell under the warrantless surveillance exception which read “warrantless act allows for an exception to prevent the overthrow of the government and when there is a clear and present danger to the U.S. government”. The Supreme Court decided in a unanimous decision that a warrant needed to be obtained before electronic surveillance even if domestic security issues were involved. Cinquegrana quotes the decision, “The Court was careful to point out that the case before it concerned only surveillance of domestic organizations. Moreover, the Court was quick to concede that the President has a fundamental duty to protect against unlawful subversion and that a government’s basic function is to defend itself and its citizens. The Court balanced the danger to individual privacy against the potential for frustrating governmental objectives and held that the fourth amendment required prior judicial review of any electronic surveillance for domestic security purposes. Furthermore, the Court urged Congress to enact legislation that would supplement the 1968 Omnibus Act and strike a constitutionally permissible balance

between criminal and domestic surveillance so as to create a more workable framework for judicial review” (Cinquegrana 1989, 802). The “Keith” case was the forerunner to or test case for the same issues that would be raised with the enacting of the Patriot Act. As noted, however, there was still no actual legislation that could make clear the types and scope of surveillance (especially in domestic cases).

In 1975, the only federal court case to strike at the constitutionality of warrantless surveillance in domestic cases was based on the Keith decision; it was *Zweibon v. Mitchell*. Cinquegrana again quotes the court decision, “In *Zweibon v. Mitchell*, the Court of Appeals for the District of Columbia recited the conclusion from Keith that a warrant is required for electronic surveillance of a domestic organization that is neither a foreign power nor an agent of, or collaborator with, such a power, regardless of whether the group’s activities might have some impact on U.S. foreign relations. Yet a plurality of the court went further and expressed its belief that ‘absent exigent circumstances, *all* warrantless electronic surveillance is unreasonable and therefore unconstitutional” (Cinquegrana 1989, 805).

The Supreme Court was obviously frustrated by the lack of distinction between foreign and domestic surveillance, and it obviously felt that fourth amendment privacy protections could not be dismissed without due process which was obviously lacking within the then current practice of warrantless surveillance (with regard to law enforcement and private citizens, not the military nor national security agencies whose scope and purview are legislated differently and not within the discussion of this thesis). Though Congress did not act directly with regard to the Court’s decision in the Keith

case, the concerns noted by the Supreme Court would help form some of the foundations of the Foreign Intelligence Surveillance Act.

The Foreign Intelligence Surveillance Act

By the mid-seventies, relations between Congress and the Executive were not amicable (partly due to Watergate), and Congress was ready to put a halt to the out-of-control behavior of the Executive, specifically in regard to the privacy violations. Worrisome were the cases where there were no discernable connection to foreign intelligence information, where the suspect was not deemed a threat, and there was a lack of criminal activity, yet warrantless electronic surveillance of United States citizens still had occurred. The resulting wrangling between Congress and the Executive to find a fair and *legal* balance for wiretapping resulted in the Foreign Intelligence Surveillance Act, signed into law by President Carter in October 1978.

The Foreign Intelligence Surveillance Act created the need for documentation and a justification for the warrants requesting electronic surveillance. *The Michigan Law Review* article specifies, “The Foreign Intelligence Surveillance Act (FISA) employs detailed warrant application and authorization procedures to prevent indiscriminate use of electronic surveillance. The Act’s warrant application and authorization procedures require executive branch officials to state in writing the circumstances for justifying each warrant” (“FISA: Legislating ..” 1980, 1129-1130). The FISA is intended to provide exclusive means of authorizing various types of electronic surveillance activities for national security purposes including:

- (1) Deliberate interception of the contents of international radio or wire communications to or from a particular United States

person (citizen) in the United States in circumstances where that person has a reasonable expectation of privacy and a warrant would be required if the interception were undertaken for law enforcement purposes.

- (2) Deliberate interception of contents of a wholly domestic radio communication, and the installation or use of any monitoring device to acquire information about a person's activities other than the contents of communications, when there is a reasonable expectation of privacy and a warrant would be required if the interception were undertaken for law enforcement purposes.
- (3) Interception in the United States of the contents of wire communication to or from any person in the United States without the consent of a party to the communication

The FISA established a requesting procedure from which all warrant requests are submitted to the Attorney General and brought before an exclusive court – the Foreign Intelligence Surveillance Court (FISC) and must be authorized in advance of the surveillance. Cinquegrana explains, “The FISC judge must find the location at which the surveillance is directed will be used by the targeted foreign power or agent, and the procedures proposed by the government in each case will adequately minimize the acquisition, retention, and dissemination of information concerning unconsenting United States persons, while preserving the government’s ability to obtain intelligence it seeks” (Cinquegrana 1989, 812-813). No government request for electronic surveillance had been denied by the FISC during its first ten years of existence. There are three situations where FISA waives the warrant requirement; first, the Attorney General may unilaterally authorize electronic surveillance in emergencies if the judicial proceeding would unacceptably delay surveillance. Second, when the communications are exclusively between or among foreign powers the warrant requirement does not apply. Third, the warrant requirement is waived during the first fifteen days following a congressional declaration of war. In 1981, after much review and debate it was determined that the

FISC has no authority for physical searches. However, physical searches became a covered area in 1994. Laura Donohue writes, “In 1994, Congress amended the statute to allow for warrantless, covert physical searches (not just electronic communications intercepts) when targeting ‘premises, information, material, or property used exclusively by, or under the open and exclusive control of, a foreign power or powers” (Donohue 2006, 1096) In essence, FISA put an end to the unchecked wire-tapping conducted by the Executive. Its creation was an outcome of this “abuse” of power. But when the Executive was forced to conform to the procedural policies of FISA its requests were approved every time in FISA’s first ten years, documenting the Executive understanding of its “out-of bounds behavior”.

FISA – Post 9/11

The protection of national security does not seem to have been lost among the enforceable limitations established by FISA; however, the immutable element to FISA seems to be the clear and obvious connection of the surveillee to be either a foreign power or an agent of a foreign power. Donohue states, “The application requires a designated national security or defense officer to certify that the information is related to foreign intelligence and that such ‘information cannot reasonably be obtained by normal investigative techniques” (Donohue 2006, 1095-1096). As stated earlier, the request for approval in front of the FISC is rarely declined, which may be a combination of how well the executive is able to work the system and the low threshold established by FISA for approval. Donohue writes, “For the first time in history, in 2002 and 2003, DOJ requested more wiretaps under FISA than under ordinary wiretap statutes. This suggests

a significant shift in the executive government's strategy for gathering information. Under FISA, law enforcement must cross a lower threshold, and is not subject to the same Fourth Amendment restrictions as in the ordinary criminal code"(Donohue 2006, 1098).

In the wake of 9/11, limitations and guidelines within FISA had to be re-examined. The Patriot Act was perhaps the most important piece of legislation in the wake of 9/11 (and it will be examined in the next chapter), but part of the Patriot Act was changes made to FISA. There were two important changes that the Patriot Act made to FISA: (Donohue) "Where previously FISA applications required that the gathering of foreign intelligence be *the* reason for search or surveillance, the new legislation allowed for application when foreign intelligence provided merely a significant reason. Such authorization could be sought even if the primary ends of the surveillance related to ordinary crime. The second significant change to FISA rested on the type of information obtained by the Executive. While FISA granted broad access to electronic surveillance, it did not specifically empower the state to obtain business records. The USA Patriot Act provided further access to any business or personal records" (Donohue 2006, 1103, 1105-1106). The Patriot Act expanded the power under FISA while lowering the threshold needed to obtain warrants, and the information that it covered was practically limitless. It is important to understand that before the Patriot Act's expansion of FISA, FISA was only understood to deal with issues of national security and foreign agents. The Patriot Act changed the purview to include regular crime. Nothing embodied the changes so much as Section 218 in the USA Patriot Act. Pre- Patriot Act FISA, the significant purpose of gathering foreign intelligence information was the basis for a warrant. Nola

Breglio writes, “Section 218 altered the language of the statute by substituting ‘a significant purpose’ for ‘the purpose’. In effect the amendment means that the DOJ can now use FISA warrants to pursue nonintelligence evidence to be used in criminal prosecutions” (Breglio 2003, 196).

These drastic changes in the interpretation of FISA did cause conflict between FISC and the executive. The resulting conflict led to a three-judge appellate court appointed by Chief Justice Rehnquist; their findings were as follows: Donohue writes from the Court’s opinion, “It suggested that FISA was never meant to apply only to foreign intelligence information relative to national security, but that it could also be used for ordinary criminal cases. And it went even further: the appeals court interpreted the USA Patriot Act to mean that the primary purpose of the investigation could, indeed be criminal investigations, ‘so long as the government entertains a realistic option of dealing with the agent other than through criminal prosecution’. Stopping a conspiracy, for instance would suffice” (Donohue 2006, 1104-1105). These findings drastically challenged all previous beliefs as to the applications of FISA.

The redirection of FISA along with the changes of its guidelines has led many to believe that there has been a total evisceration of any Fourth Amendment protection when FISA is applied. Donohue writes, “The way FISA previously withstood challenge was, precisely, the purpose for which it was directed; this purpose allowed it to fall outside the warrant requirements of the Fourth Amendment. By eliminating purpose from the equation, the appeals court eliminated the basis on which the statute passed constitutional muster” (Donohue 2006, 1105). Thus government officials have maintained the essence of FISA (the application process for warrants) but, have coupled

it with an almost limitless array of targets for surveillance no longer directed by the purpose or intent of FISA.

Some see the expanded purpose of FISA coupled with the lower requirements needed for a warrant as the ultimate circumvention of the Fourth Amendment. Instead of probable cause precipitating the call for a warrant, the warrant is being used to in essence search for probable cause. Richard Posner illustrates, “The lower the standard for getting a warrant, however, the more porous the filter that the requirement of a warrant creates, bearing in mind the ex parte character of warrant proceeding. If all the application need state is that an interception might yield data having value as intelligence, judges would have no basis for refusing to issue the warrant. Alternatively, reliance on warrants could invite legislation to expand the reach of the criminal laws relating to terrorism in order to make it easier to establish probable cause to believe that a search will reveal evidence of a crime”(Posner 2008, 256). The use of the word “might” in the legislation requesting the warrants can be seen as the death knell for the Fourth Amendment (at least in surveillance cases). The word “might” negates the probable cause that was and is the bedrock of the Fourth Amendment.

Conclusion

Throughout the chapter the evolution of the surveillance of foreign intelligence was examined: from the point where phone usage was unprotected with no expectation of privacy at all to FISA which enforced the executive to conform to procedures for a warrant, to the Patriot Act, which almost eliminated the need for probable cause. All of the objections (such as in Nardone, Zweibon, and of course Keith) seemed to be rooted in

the need to protect privacy. The Supreme Court agreed that a right to privacy was found within Fourth Amendment protections. The amendments to FISA, within The Patriot Act, undermined all the privacy protections that were endemic in the Fourth Amendment.

Legislatively speaking, pre-9/11, all challenges to executive-based foreign surveillance were based on privacy violations, and that reasoning led to adjustments and the creation of FISA. The government had to follow (and protect) Fourth Amendment guidelines for requesting surveillance warrants. Thus privacy was protected. The Patriot Act amendments to FISA in all but the specific language eliminated probable cause, and thus the privacy protection of the Fourth Amendment. The next chapter will explore the Patriot Act in its own context and how FISA was the model for now conducting domestic surveillance with little or no privacy protection.

CHAPTER 5 THE PATRIOT ACT

Up to this point, the question of privacy versus the law was almost academic. The government would (hypothetically) over step the line to infringe on the constitutional rights to privacy and the courts would review the cases and push the government back in line, understanding the importance of privacy. This pas de deux could have continued forever due to a certain complacency that seemed to exist. All this changed on September 11, 2001. The attacks on the United States by radical terrorists opened up the issue that the citizens of the United States did not live within some sort of impenetrable barrier that could not be breached by foreign terrorists and attacking non-military targets would lead to the death of thousands of innocents.

The dust had barely settled over the wreckage of the World Trade Center when the government moved to enact antiterrorism legislation. The executive branch wanted their powers increased exponentially and immediately. The bill went to print in the early hours of the morning with many legislators having never read the text due to the anthrax scare. The vote was yea or nay with no room for debate or amendment. The yea vote was pro-Administration the nay – was pro-terrorist. The legislators were either for the United States or against it. There was no room for arguments concerning personal rights or even the rightness or wrongness of a document many had never read. Either passage was approved or the terrorists won.

It can be argued that measures needed to be taken so that the events of 9/11 never happen again. The existing system had to be flawed; otherwise the attacks (or at least their level of devastation) would never have occurred. The actions of the government

cannot be looked upon as opportunistic, a bid towards authoritarian control or some sort of Orwellian nightmare. The September 11 terrorist attacks on the World Trade Center and the Pentagon caused Congress enacted the USA Patriot Act of 2001. The goal of Act was to achieve a way of making it easier for federal agents to identify and investigate possible terrorist threats. Essentially Congress modified preexisting surveillance law for nonemergency situations. The issues at hand were about security, with no thought given to individual privacy because, in a hierarchical basis of needs for The United States security issues had to become the priority.

Legislation

It is important to understand the far-reaching changes created by the USA Patriot Act. Prior to its passage and its modification of FISA, there in essence existed a “wall” between criminal investigation and information gathering, especially in the investigation of “foreign agents”. The Patriot Act in essence ripped down that wall. This “wall” had acted as a built in checks and balances system for criminal investigation or foreign surveillance. The elimination of the “wall” meant that FISA standards could be applied to regular criminal cases as long as some sort of a foreign element still existed (for example – surveillance of an accountant who works for a company that might have dealing with a country that might harbor terrorists. This is section 218 (which was discussed in the previous chapter). The Congressional Research Service noted, “Thus the presence of ancillary criminal investigation purposes no longer eliminates the ability to rely on FISA authorities, so long as a significant foreign intelligence purpose also exists” (Henning et al 2009, 11).

The Patriot Act modifies surveillance procedures on three levels of privacy protection within the law. The legislation is listed below:

- >permits pen register and trap and trace orders for electronic communications (e.g., e-mail)
- > authorizes nationwide execution of court orders for pen registers, trap and trace devices , and access to stored e-mail or communication records;
- >treats stored voice mail like stored e-mail (rather than like telephone conversations)
- >permits authorities to intercept communications to and from a trespasser within a computer system (with permission of the system's owner)
- >adds terrorist and computer crimes to Title III's predicate offense list
- >reinforces protection for those who help execute Title III, ch. 121 and ch. 206 orders
- >encourages cooperation between law enforcement and foreign intelligence investigators
- >establishes a claim against the U.S. for certain communications privacy violations by government personnel
- >terminates the authority found in many of these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005) (Doyle 2002)

It is important to understand the legislation that was enacted so that its impact on the Fourth and First Amendments (discussed later) will be understood. The legislation also caught up with the existing technology by allowing access to e-mail and voice mail and access to "suspect computers. Rackow describes the provisions, "Three discrete provisions of the Act allow the government far greater power to: (1) monitor the private telephone conversations of individuals suspected of purely domestic criminal activity, without demonstrating probable cause that a crime has been or is soon to be committed, under the guise of an 'intelligence' investigation; (2) overhear private conversations of non-suspects permitted by the extension of roving wiretap authority to foreign intelligence investigations without proper privacy protections; and (3) discourage political dissent by including the activities of unpopular political organizations within the

newly created definition of domestic terrorism”(Rackow 2002, 1653). All the new provisions listed above are about the expanded surveillance guidelines for law enforcement without the traditional protection of probable cause. It can be argued that a lot of the legislation was written out of a ‘knee-jerk’ reaction to the events of 9/11, but even with the sunset provision of December 31, 2005, the legislation was not reexamined with the intent to restore privacy deprivations. Donohue writes, “In the end, the USA Patriot Improvement and Reauthorization Act of 2005 made all but two of the temporary surveillance powers in the USA Patriot Act permanent; roving wire taps under FISA, and FBI authority, with a court order, to obtain tangible items (books, records, papers, and documents) for foreign intelligence and international terrorism investigations became subject to a four-year sunset provision” (Donohue 2006, 1102). The new legislation created under the auspices of the Patriot Act (as well as the alterations it made to FISA), seemed to affect an individual’s First and Fourth Amendment rights the most.

The Fourth Amendment

The Patriot Act strips away many of an individual’s privacy protections of the Fourth Amendment with the intent of safeguarding these same citizens. Pre-9/11 FISA had set the stage for how law enforcement could track a perceived foreign threat (within specific guidelines that protected Fourth Amendment rights) without prosecution necessarily as an end goal this type of information gathering would be used in domestic cases via the Patriot Act. Nathan Henderson writes, “Before Watergate, the executive branch essentially just monitored people whenever it thought that doing so was in the national interest. Since FISA was enacted, however, government agencies investigating

national security threats had to submit to judicial supervision of their domestic security surveillance activities. The Patriot Act did not change the fact that, if the executive branch cannot satisfy the threshold requirements, the designated judge will refuse to authorize surveillance” (Henderson 2002, 196). It was important to understand that the Patriot Act did not throw out the requirements for establishing the ‘go ahead’ for surveillance, but as stated earlier, probable cause was no longer a viable requirement.

In the *Katz* case in 1967 (discussed in chapter 4) Justice Harlan defined how the Fourth Amendment protected the privacy of the individual. Rackow quotes Justice Harlan, “Justice Harlan explained that ‘there is a twofold requirement, first that a person has exhibited an actual (subjective) expectation of privacy and, second that the expectation be one that society is prepared to recognize ‘reasonable’. This opinion was later accepted by a majority of the Court. Privacy as protected by the Fourth Amendment denotes a right to be free from unwarranted governmental surveillance, and such privacy interests should be kept in mind when considering the implications of the USA Patriot Act”(Rackow 2002, 1656). In understanding the privacy expectations of the Fourth Amendment a clear understanding of the ways the Patriot Act has if not undermined it, definitely circumvented it can be seen.

The *Katz* decision was important because, as discussed, it helped to develop the procedures which would be part of FISA, but it clearly established that the Fourth Amendment provided a right to privacy and not just property. Henderson writes, “Before the Patriot Act was enacted, roving wiretaps were only available in the law enforcement context, and to obtain one, the government had to show that the target was actually using the line to be tapped. The Patriot Act changed this. The government now

has the power to engage in roving surveillance in the intelligence context as well (i.e. pursuant to FISA), but it no longer has the corresponding obligation to demonstrate the target actually uses the device to be tapped” (Henderson 2002, 197). It is important to understand that, in a very real sense, for most law enforcement, there no longer has to be probable cause to engage in surveillance.

The First Amendment

As stated earlier, there is a pervasive belief that the Patriot Act has curtailed a person’s right to privacy in a general sense, but also the privacy entailed in their Fourth Amendment rights. There also seems to be a belief that a person’s First Amendment rights have also been greatly curtailed. Earlier in the chapter, it was noted that there was no open discussion or debate in the passing of the Patriot Act. There was the attitude that one was either for the Patriot Act or a supporter of terrorism. A dissenting opinion was anti-American and no longer celebrated as a valid, particularly basic American right. Susan Gellman describes the power of the First Amendment, “The First Amendment in particular, acts as a safety valve on a majority-rules democracy. The tyranny of the majority can be every bit as oppressive as the tyranny of a monarch- perhaps even more so, as there is no sense of noblesse oblige, but instead the assumed sense of fairness and legitimacy that comes with the right to vote. Thus the First Amendment exists, like a mini-Equal Protection Clause, to protect minorities- even minorities of one from losing every time”(Gellman 2002, 88-89).

Those who seem to feel the infringement of First Amendment rights the most (or at least the most vocal regarding the issue) are librarians. In an article for the *Library*

Journal Mary Minow wrote, “Law enforcement agencies now have expanded authority to subpoena records of ISPs. They can request detailed information about customers, including records of identification or network address” (Minow 2002, 54). Though on the surface this issue just seems to be another aspect of Fourth Amendment seizure, librarians and book store owners see themselves becoming forcibly complicit in the violation of their patrons privacy through the First Amendment’s right to free speech. Minow continues, “U.S. persons may not be investigated based solely on activities protected by the First Amendment. However, the orders are sealed, and they come with a ‘gag’ order, which means that librarians asked for information are only allowed to talk about the request with those directly involved with providing the information”(Minow 2002, 53). As stated, a person acting within their First Amendment rights cannot be the sole impetus in initiating a criminal investigation, but there are concerns that the government can circumvent this protection within a cloak of secrecy. Anna Henning (et.al.) for The Congressional Research Service reported, “Two First Amendment concerns arise with regard to electronic surveillance, access to records, and related investigatory activities. One addresses direct restriction on speech that may accompany government collection of private information, such as non-disclosure requirements accompanying orders compelling government access to business records. A second concern is that overly broad authorities permitting government intrusion may lead to a ‘chilling’ (i.e., stifling) effect on public discourse” (Henning et al 2009, 3).

These modifications of the First Amendment seem to stem from the provision for the right to free speech, but the right to assembly has also called into question. Though as noted a person’s exercising of their First Amendment’s rights is not in and of itself

enough to initiate an investigation, but that seems to be more theory than fact. Rackow writes the legislation of Section 802, “Section 802 of the Patriot Act amends 18 U.S.C. 2331, which defines international terrorism by instituting a new crime of ‘domestic terrorism’. The Act broadly defines ‘domestic terrorism’ as activities that:

- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or any State;
- (B) appear to be intended –
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States

Upon review of this expansive definition it becomes clear that many acts of political dissent and activism now will be characterized as ‘domestic terrorism’ (Rackow 2002, 1688). The attitude of “you are either for us or against” has grown to mean that if you speak against “us” then you are against “us” then you support terrorism. As was the case with the passing of the Patriot Act, no discourse on the legislation was allowed or “terrorism” would win. There is a prevailing understanding that United States citizens have the right to free speech and a right to assemble (among other rights enumerated within the First Amendment); however, to exercise these rights in light of 9/11, especially to criticize the government, can lead and has led to accusations of terrorism. This is not talking about sedition or incitement to violence which are not covered speech under the First Amendment, but the ability to voice dissent in open in public forums without being the subject of prosecution. The most basic of American rights can garner attention, followed by investigation. Despite laws stating specifically that the practice of one’s First Amendment rights shall not lead to investigation, the definitions involved in the

expansive definition of domestic terrorism do not lead to any confidence that that will be the case.

Privacy and the Patriot Act

Whether there is an ethical basis for the deprivation of privacy in the need for security will be looked at in the next chapter, but before that discussion it is important to understand exactly how the Patriot Act affects privacy. Henderson writes, “Americans should be greatly concerned about the effects of the two remaining provisions. First and foremost, facilitating the use of FISA to circumvent Title III intercept order requirements potentially puts non-terrorists at risk of being investigated and prosecuted as terrorists. Second, allowing roving surveillance to be conducted pursuant to FISA may result in the interception of numerous innocent conversations, many of which involve U.S. persons” (Henderson 2002, 203). As discussed earlier, there were sunset provisions put into the Patriot Act, so that it could be reviewed and parts discontinued. The first review of the legislation originally enacted in 2001 was reviewed in 2005. All the subsequent reviews have renewed the provisions that were used to expand FISA.

Three amendments were set to expire on February 28, 2011 but were extended to December 2013. As discussed in the previous chapter, the FISA amendments expanded to permit roving wiretaps and the scope of materials brought under FISA to “any tangible thing” while simultaneously lowering the standard required for warrants. A third amendment was added to FISA in 2004. “Section 6001 (a) of the Intelligence Reform and Terrorism Protection Act (IRTPA) changed the rules regarding the types of individuals who may be targets of FISA-authorized searches, it permits surveillance of

non-U.S. persons engaged in international terrorism without requiring evidence linking those persons to an identifiable foreign power or terrorist organization” (CRS, 2011).

The relevancy of these amendments is that even upon review with the distance of almost a decade, they are not only renewed year after year, their powers are expanded and the standard for initiation of investigations is lowered.

There was a lot of conjecture in the literature written after the Patriot Act was enacted in 2001. Authors who had read the Patriot Act understood with the amendments to FISA that there was going to be a real and permanent change to what American citizens could define as privacy. As the amendments are added to the Patriot Act, the scope and types of investigations they cover have been expanded leading to further encroachment of the privacy of American citizens. This new era of “transparency” has led to unprecedented sharing among federal agencies. This means that sensitive information within intercepted documents may be shared on the flimsiest context of some sort of a “foreign connection”. Lastly, there is concern that the Executive branch may still act outside the restrictions of FISA, and therefore there is some need to control the actions of the Executive within some clear and explicit framework.

There was a very real concern that with the enactment of the Patriot Act civil liberties would be threatened. At the time, in the wake of 9/11, there was not a lot of protest with regard to the loss of privacy. Perhaps there was even the belief that the system would ‘self-correct’. Throughout it has been shown that there has been a fairly consistent set of checks and balance between the government and the right for privacy. The government would overstep and the courts would correct until legislation was enacted that specifically protected the right to privacy. Post 9/11, there no longer seemed

to be any “checking” to government’s increasing powers of investigation that by definition invaded the privacy of the individual.

There are certain provisions within the Patriot Act which illustrate the specific declination of rights once protected by the Fourth Amendment, Section 213 is one example. Henning explains, “Section 213 of the USA Patriot Act, as amended, permits delayed notice search warrant under some circumstances. A delayed notice, or ‘sneak and peek’, search warrant is one that authorizes law enforcement officers to secretly enter a home or business, either physically or virtually, conduct a search, take pictures or copy documents, and depart without taking any tangible evidence or leaving notice of their presence” (Henning, et al 2009, 17). The delay of notification according to the law can be anywhere from 30 to 90 days or more. She continues, “In fiscal year 2008, federal courts issued 763 delayed notice warrants, most often for 90 days. Drug cases accounted for 474 of the initial warrants; terrorism cases accounted for 3 of the warrants” (Henning, et al 2009, 18). Another example is Section 215 which gives the FBI leave to seize documents and information, and per the law there is a non-disclosure restriction. Per the Congressional Record Service, “No persons shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section” (CRS, 2011). The legislation itself has sought to hide the activities of law enforcement. The repercussions may lead to decreased privacy, but as will be discussed in the next chapter their intent is to lead to a more secure United States.

The Patriot Act has not taken privacy for granted with many provision written into both the Act itself and FISA designed to ensure there is a minimal invasion of

privacy. There is specific Congressional Oversight regarding privacy and there is general sense of some control so that investigative officials are not indeed running amok poking their noses everywhere. Henning notes, “Measures following the USA Patriot Act established various reporting and notification requirements presumably to provide transparency regarding the use of enhanced authorities. Congress instituted additional reporting requirements when it reauthorized and made permanent many USA Patriot Act provisions in 2005” (Henning, et al 2009, 18). It is also seems that there were several areas in which the Patriot Act improved the privacy for individuals. Henderson notes on such example, “The Patriot Act also helps computer owners protect themselves against unauthorized trespassers. Before the Patriot bill became law, it was unclear whether the owner of a computer could obtain the assistance of law enforcement in monitoring people that engaged in computer trespassing, but now computer owners can authorize law enforcement to assist them” (Henderson 2002, 206-207). Therefore, the government is cognizant of the ongoing concerns of United States citizens’ need for privacy.

The General Accounting Office has commissioned several reports for just the purpose of researching the Patriot Act and its effect on privacy. One report outlined the following areas for concern and need for continual re-evaluation.

1. Ensuring that data mining efforts do not compromise privacy protections
2. Ensuring privacy protection in developing and implementing prescreening programs for airline passengers.
3. Controlling the collection and use of personal information obtained from information resellers.
4. Ensuring that applications using RFID (automated data-capture technology) Technology protect privacy consistently.
5. Ensuring privacy considerations are addressed consistently and effectively in the information sharing environment (Koontz, 2007).

These issues were enumerated and presented to the government as areas of specific concern with regard to the protection of privacy. Whether they have been adequately addressed or whether they even should be will be part of the ongoing debate.

There have been some arguments made that the Freedom of Information Act can be used to keep the Patriot Act in check. There is a point in this argument. However, as stated earlier, the FOIA is grossly misused. People often use the FOIA for information about their neighbors rather than as a tool to gather information about the government. Information that is vital to national security has always been excluded from FOIA release. Of course, what is defined as national security is determined by the government. Donohue notes, “Even as executive authority is expanding, secrecy surrounds the activities of the executive branch: use of classification is increasing; Attorney General Ashcroft reversed the policy granting Freedom of Information Act (‘FOIA’) requests to prevent some information from entering the public domain; and the new FOIA exemptions protect the National Security Agency (‘NSA’) and private industry” (Henderson 2009, 384-385). There is a veil of secrecy that has fallen over the Federal Government, and now not only is transparency illusive, in some quarters it is non-existent. How does someone request information for activity conducted in secret with no public safeguards?

Conclusion

The events of September 11, 2001, irrevocably changed the priority of how the United States would conduct criminal investigations. Security and protection were always paramount to the United States but inherent was a respect for the individual and the rights that they found to be integral as illustrated specifically in the Bill of Rights of

the United States Constitution. The change of priorities changed the weight that would be given to individual rights when balanced against the security of the nation.

The question that arises is whether the United States government has the legitimate right to change the balance of priorities. The next chapter will explain how social contract theory will indeed support the need of Government to provide security for its citizens as its tantamount responsibility, and the citizens themselves require this security, if nothing else, from their government...even at the sacrifice of privacy itself.

CHAPTER 6 CLASSIC SOCIAL CONTRACT THEORY

John Locke, Thomas Hobbes and Jean-Jacques Rousseau all wrote of what can be defined as the social contract: the reasoning or design that led men from the state of nature to an agreement of sorts to live together as a unit called society. By looking to the origin of this societal agreement, Rousseau looks at its legitimacy as much as its creation. Rousseau says, “Man is born free; and everywhere he is in chains. One thinks himself the master of others, and still remains a greater slave than they” (Rousseau 2005, 2). The actions that the United States government took post 9/11, especially with the Patriot Act, can be supported through the arguments put forth by these men (specifically Locke and Hobbes) and their idea of the “social contract”. In essence the agreement behind joining as society is so that each man can be left alone i.e. protected from interference by his fellow man. There is perhaps no greater interference than an out right act of war that led to the death of thousands of innocents.

Hobbes argues that due to the state of nature, people discover a need for laws of nature that direct them to live in peace with their neighbors, both on a one to one basis, and as neighboring countries. According to Hobbes, “The final cause, end, or design of men, (who naturally love liberty and dominion over others,) in the introduction of the restraint upon themselves, (in which we see them live in Commonwealths,) is the foresight of their own preservation, and of a more contented life thereby; that is to say, of getting themselves out from the miserable condition of war, which is necessarily consequent to the natural passions of men, when there is no visible power to keep them in awe, and tie them by fear of punishment to the performance of covenants of observation

of those laws of nature” (Hobbes 1985, 223). Therefore, Hobbes is stating that because men seek not only to preserve their own existence, they wish to do so in a contented manner and to do so war must be eliminated. Peace must be enforced, forcibly if necessary, because only peace is the absence of war and therefore a state in which man can live contentedly.

To understand the need for laws of nature it is first important to understand the rights of nature. Hobbes say, “The Right of Nature is the liberty each man has, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life, and consequently, of doing any thing, which in his own judgment and reason, he shall conceive to be the aptest means thereunto” (Hobbes 1985, 189). This status of man in this natural state is not governed by good and evil. There is no absolute morality at play and no confines on a man’s passion. So what rules man, what specific passion? Hobbes states that men do have a universal goal (passion desired by all) and that it is power; “So that in the first place, I put for a general inclination of all mankind, a perpetual and restless desire for power after power, that ceases only in death” (Hobbes 1985, 161). Therefore men are governed by their passions and their passions lead them on an endless pursuit of power where there is no action defined as good or evil. Hobbes notes, “Competition of riches, honor, command, or other power incline to contention, enmity, and war: Because the way of one competitor, to the attaining of his desire is to kill, subdue, supplant, or repel the other” (Hobbes 1985, 161). This constant competition is the force that drives men towards forming a society; to end this cutthroat existence that is neither good nor evil but unending competition very often with one’s life or the lives’ of loved ones at stake. Hobbes goes on to say, “This state of war, the result of the Right

of Nature, leads man to the need to establish Laws of Nature. A Law of Nature is a precept or general rule, found out by reason by which a man is forbidden to do, that, which is destructive of his life, or take away the mean of preserving the same; and to omit, that, by which he think it may be best preserved” (Hobbes 1985, 189).

In a situation where man is at total liberty, (which is man’s right by nature), it is every man for himself; there is no protection nor safety for a person’s good nor more importantly his life. Hobbes say, “And therefore, as long as this natural right of every man to everything endures, there can be no security to any man of living out the time, which Nature ordinarily allows men to live” (Hobbes 1985, 190). This desire for the security of life is the basis for the fundamental Law of Nature. Seek peace and follow it.

The first Law of Nature leads men to strive for peace which leads to the Second Law of Nature that men have to be willing to sacrifice his liberty when faced with others willing to do the same to maintain peace. Hobbes say, “From this fundamental Law of Nature, by which men are commanded to endeavor peace, is derived this second law; That a man be willing, when others are so too, as for peace and defense of himself, lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself” (Hobbes 1985, 190). This has to be done if there is ever to be peace. As long as man retains all of his liberties there will be a constant state of war. Hobbes notes, “For as long as every man holds this right of doing anything he likes; so long are all men in the condition of war” (Hobbes 1985, 190). This is the basic concept behind the legislation of the Patriot Act, but not only that this feeling that ‘when every man is for himself there will be war’ but to prevent war there must be a

cessation of some liberty. Thus in agreement, either whole heartedly or by tacit ignoring of the contrary, society at large follows this tenet.

Hobbes states that for these Laws of Nature to be followed and if there is a desire for peace, there is no choice in following them; there must be an agreement amongst the member of society to lay down their rights. Hobbes goes on to say, “To lay down a right to any thing, is to divest himself of the Liberty, of hindering another of the benefit of his own Right to the same” (Hobbes 1985, 190). The members of society are making a covenant to or pact to this agreement.

Hobbes states man needs a common power that keeps him in awe and binds him by fear of the consequence of breaking covenants; “For the laws of nature of themselves, without the terror of some power, to cause them to be observed are contrary to our natural passions, and covenants, without the sword, are but words and of no strength to secure a man at all” (Hobbes 1985, 223). This power is created to defend a man from his neighbors at home and enemies abroad. The Patriot Act really cannot be defined in other terms than as of means of defending this country from its neighbors at home and abroad by voting for the Congress that enacted this legislation; the citizens of the United States have in essence supported this covenant and therefore the sacrifice of some liberty for security. Thomas Hobbes has stated that man without the Laws of Nature and a Commonwealth to enforce them man will live in a State of Nature. Man battling his neighbor, a state of constant war. There is neither good nor evil. There is neither justice nor injustice. There is no sin. There are no laws so everything goes. Therefore the fundamental law of nature must take precedence. The seeking and keeping of peace

serves to preserve the life of every man in the society. The Commonwealth is formed to enforce this covenant of keeping man at peace.

John Locke also looked to the state of nature to explain man's needs for the 'social contract' and therefore acceptance of the legislation which stems to protect it. To understand the social contract that forms society, Locke looks to the state of nature. It is in this state in which the seeds of the contract will be sown. Locke says, "To understand political power...we must consider what state all men are naturally in, and that is a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man" (Locke 2002, 2).

As Locke points out, rationality is the law that governs the state of nature. Man has the tools to retain this liberty but as implied he does not always make use of them. Locke's "teaches all mankind *who will but consult it*", implies that obviously free will can prevent mankind from obeying this edict and thus causing harm to others when they "ought" not to.

There are definite repercussions for violating the law of nature, and by doing so the perpetrator loses all right to security from harm. Locke notes, "Reparation and restraint; for these two are the only reasons why one man may lawfully do harm to another, which is that we call punishment. In transgressing the law of nature, the offender declares himself to live by another rule than that of reason and common equity, so becomes dangerous to mankind, the tie which is to secure them from injury and violence being slighted and broken by him" (Locke 2002,4). So, though nature has

established a law in which no harm should be done, obviously there are those who never consult reason and act against others and therefore need to be punished.

Locke has also established that there are those who choose not to make use of this rationality and therefore open to punishment by the injured party. However, there is an even greater escalation of attack wherein it is a declared state of war amongst mankind. According to Locke, “The state of war is a state of enmity and destruction; and therefore declaring by word or action, a design upon another man’s life, puts him in a state of war with him against whom he has declared such an intention, and so he has exposed his life to the other’s power to be taken away by him, or any one that joins with him in his defense and espouses his quarrel” (Locke 2002, 8). This is not an accidental harm or one that needs quick reparation this is long and planned out with a specific ideal of destroying the other within the conflict. Locke continues, “Men living together according to reason, without a common superior on earth with authority to judge between them, are properly in the state of nature. But force, or a declared design of force, upon the person of another, where there is no common superior on earth to appeal to for relief, is the state of war; and ‘tis the want of such an appeal gives a man the right of war even against an aggressor” (Locke 2002, 9). That is the rub; the lack of a common superior means there is no one to appeal to in the case of aggression.

For Locke this need would in some ways conflict with his need for absolute freedom (which is his in the state of nature) and his need to interact in “society”. Locke says, “Man being born, as has been proved with a title to perfect freedom, and an uncontrolled enjoyment of all the rights and privileges of the law of nature equally with any other man or number of men in the world, hath by nature a power not only to

preserve his property against the injuries and attempts of other men, but to judge of and punish the breaches of that law in others as he is persuaded the offence deserves. But because no political society can be nor subsist without having in itself the power to preserve the property, and, in order thereunto, punish the offences of all those of that society; there and there only, is political society, where every one of the members hath quitted this natural power, resigned it up into the hands of the community” (Locke 2002, 39). In short, for political society to exist, it, too, needs the power to preserve property. For society itself to have this power, each member of its society must cede its previously aforementioned freedom to the society to act in its stead.

The power to protect property is ceded to the government. Locke describes this commonwealth ; “And thus the commonwealth comes by a power to set down what punishment shall belong to the several transgressions which they think worthy of it, committed amongst the members of that society (which is the power of making laws) as well as it has the power to punish any injury done unto any of its members by any one that is not of it (which is the power of war and peace); and all this for the preservation of the property of all the members of that society as far as possible” (Locke 2002, 39). This is how Locke defines the extent of the power of government; it is to protect the property of its members. Property is understood to mean life, liberty, and estate. Locke is quite clear that the only role of this legislative control is that which emulates that which man had in the state of nature. The protection of property of man (including his own life) is that goal and nothing more. There is no growing the virtues or fostering a sense of unity based on anything other than the need to interact which includes an inherent protection of property. It was Locke’s definition of the executive which behavior’s our own Executive

emulates. Locke states, “For the legislators not being able to foresee and provide by laws for all that may be useful to the community, the executor of laws, having the power in his hands, has by common law of nature a right to make use of it for the good of society, in many cases, where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it” (Locke 2002, 74). Locke has placed the duty the good of society in the hands of the “executor” and describes his duties outside which are legislated and sometimes even against the law– he names this “prerogative”. The Executive (in the United States) has made no excuses for its behavior in vigilant surveillance. This Executive privilege is but the duty of the “executor” to protect. Throughout this document, the Executive has continually maintained that certain legislation did not apply when national security was an issue. This was the basis for warrantless searches. Exigent circumstances have also been used to circumvent the prescribed law. The enactment of the Patriot Act is very clearly and reasonably designed for the preservation of life and property; the sole goals that Locke stated were the purpose of the society of which men had consigned (at least part of) their rights. Locke’s reason for the social contract is to retain as much personal freedom with the protection of authority to safeguard the property of each and every man.

The Social Contract by Jean-Jacques Rousseau also looks to the origin of societies and the driving force which led from the family, to the governments to which we submit our will. He also first looks to nature to seek the understanding of the circumstances which led men from the state of absolute freedom to this slavery by consent as that seems to be his view of society (or the perception others have of society which he will seek to clarify).

According to Rousseau, “The first law of nature is to provide for his own preservation, his first cares are those which he owes to himself; and as soon as he reaches years of discretion, he is the sole judge of the proper means of preserving himself, and consequently becomes his own master” (Rousseau 2005, 3). So this every man for himself is consistent with Hobbes. They also seem to agree that there is always some one stronger trying to cause submission to their will as opposed to their own. This belief existed in the state of nature but it also exists in civil society, substantiated by the continued need of government to provide the force to keep the peace. Rousseau continues, “The strongest is never strong enough to be always the master, unless he transforms strength into right and obedience into duty” (Rousseau 2005, 5). Rousseau sees nothing “right” in submitting to force, there is no consistency in force, and therefore the “right” of society would change constantly on the whim of whoever was strong enough to enforce his will. Therefore this is not a legitimate power; might does not make right.

Rousseau stated that the first law of nature was preservation; “Men have reached the point at which the obstacles in the way of their preservation in the state of nature show their power of resistance to be greater than the resources at the disposal of each individual for his maintenance in that state. That primitive condition can then subsist no longer; and the human race would perish unless it changed its manner of existence” (Rousseau 2005, 13). However, the resources available to the individual were not enough to stem the tide of enmity and the only option was to join forces; unite to overcome resistance. Rousseau says, “This sum of forces can arise only where several persons come together; but as the force and liberty of each man are the chief instruments of his

self-preservation, how can he pledge them without harming his own interests, and neglecting the care he owes himself?” (Rousseau 2005, 13). Therein lays the rub for Rousseau. How is man able to unite for self-preservation but maintain his liberty which is right?

Rousseau posed the issue as this, “The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before” (Rousseau 2005, 13). Rousseau believes this conundrum is solved with the social contract. The social contract is the tacit agreement entered into by all members of a society. Rousseau describes it as such, “These clauses, properly understood, may be reduced to one – the total alienation of each associate, together with all his rights, to the whole community; for, in the first place, as each gives himself absolutely, the conditions are the same for all; and, this being so, no one has any interest in making them burdensome to others” (Rousseau 2005, 14). It is a state of total equality, meaning a balance with what man provides to society, society provides to him. Each person must equally submit, as Rousseau stated it is a total alienation of each citizen’s rights to the whole community. He goes on, “Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole”(Rousseau 2005, 14). Rousseau creates a more symbiotic society between the members and the community describing each member as a part of the whole, which could argue that there is still room for dissent even while acting in concert for the good of the whole.

Since the collective is made of these individuals (acting in concert), they are the ruling party, the state, the republic, they are the sovereign power. All men are both subject and sovereign and therefore Rousseau maintains that not only is man's self-preservation guaranteed but his liberty as well. Rousseau describes it, "At once, in place of the individual personality of each contracting party, this act of association creates a moral and collective body composed of as many members as the assembly contains voters, and receiving from this act is unity and common identity, its life and its will" (Rousseau 2005, 14).

Rousseau says, "As soon as this multitude is so united in one body, it is impossible to offend against one of the members without attacking the body, and still more to offend against the body without the members resenting it. Duty and interest therefore equally oblige the two contracting parties to give each other help; and the same men should seek to combine, in their double capacity (subject and Sovereign), all the advantages dependent upon that capacity" (Rousseau 2005, 17). So as opposed to the enforced behavior of Hobbes's Social Contract, Rousseau's body politic almost seems to be a creation that ensures liberty not one that is created to discourage bad, immoral, or aggressive behavior. Rousseau sees that where there is loss there is also gain. He states, "What man loses by the social contract is his natural liberty and an unlimited right to everything he tries to get and succeeds in getting; what he gains is civil liberty and the proprietorship of all he possesses"(Rousseau 2005, 19) Accordingly, for Rousseau, "instead of destroying natural inequality, the fundamental compact substitutes, for such physical inequality as nature may have set up between men, an equality that is moral and

legitimate, and that men, who may be unequal in strength or intelligence, become everyone equal by convention and legal right”(Rousseau 2005, 23).

Hobbes saw the state of nature as one of constant war between man and his neighbors. Rousseau sees war as an invention of the State and men cannot be enemies with his neighbor, but with another State. Rousseau defines it thus, “War then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men nor even as citizens, but as soldiers; not as members of their country, but as its defenders. Finally, each State can have for enemies only other States, and not men; for between things disparate in nature there can be no real relation” (Rousseau 2005, 9). The enmity that exists between a man and his neighbors may be one born of a need to defend, and once arms are laid down there is no longer an enemy in reality or concept.

Hobbes believes in the strong centralized government which has the power to enforce obedience. The utmost of importance to Hobbes is that the government remain secure and thus its citizenry. As discussed, Rousseau would argue that the legitimacy of the government (as defined by the social contract), is just as relevant if not more so than the reasons behind entering the covenant. The government must be the voice of the people and open to moral and civic checks to its power if it is not accurately representing its own constituency. Thus man has achieved his self-preservation and retained his liberty.

Though the authors may have described different reasons for entering into the ‘social contract’, they all seem to agree that the reason behind the existence of the social contract and its continued existence is the security of its citizenry. Therefore, it is agreed

upon that society must act for the interest of the whole when dealing with a threat, especially a threat on the level of war. It can be argued that that is the sole purpose of the Patriot Act and that though some of its individual clauses or statutes may seem to violate other tenets held to be sacred to Americans, the Patriot Act as a whole is designed to honor and defend the social contract.

Patriot Act as a Failure

It is reasonable to state that the Patriot Act has created a fear in those it targets as well as those who are innocent of all crimes. There still exists the belief that some rights are sacrosanct and that to violate them is worse than the crimes committed. The idea that better a guilty man go free than an innocent man go to jail is illustrative of this belief. This belief would be valid because it stems from the tenets which created the Constitution. The founding fathers of the United States enumerated rights which were either denied to the people or not acknowledged as a right at all and though exceptions exist for the cessation of rights (marital law in time of war, convicted criminals forfeiture or rights), the value of these rights should not be diminished. This view does not see the Patriot Act as an attempt to protect society, which is the government's duty per social contract, but an attempt for the government to use its responsibility in an attempt to usurp more power. Dan Eggen presents one such example, "In a case brought by a Portland man who was wrongly detained as a terrorism suspect in 2004, U.S. District Judge Ann Aiken ruled that the Patriot Act violates the Constitution because it 'permits the executive branch of government to conduct surveillance and searches of American citizens without satisfying the probable cause requirements of the Fourth Amendment'" (Eggen, 2007).

However, this was not news. It was clearly documented that the Patriot Act practically rewrote the Fourth Amendment, and upon continued review Congress has continually renewed the provision laid out in the Patriot Act.

Perhaps it is better stated that there have not been ‘failures’ of the Patriot Act but abuses. In a series of articles he wrote for the *Los Angeles Times*, Julian Sanchez noted, “We know two successive inspector general reports found endemic misuse of NSLs {National Security Letters}, including requests for information the FBI wasn’t entitled to obtain and ‘exigent letters’ sent when no real emergency existed. We know that in at least one case, NSL’s were used to obtain records after a judge rejected an attempt to obtain them via court order, citing 1st Amendment concerns. We know the expanded wiretap powers of the National Security Agency, approved last year, have led to substantial ‘over collection of American’s purely domestic communications – including Bill Clinton’s e-mails” (Sanchez, 2009).

There are many stories that can be stated of “accidental” arrests, illegal wiretaps, etc...but can they really be defined as failures of the Patriot Act? If they are failures (or short comings, or abuses), are they not the failures of the people who support this legislation? As illustrated in the chapter on FISA, the Executive Branch has routinely looked for ways of circumventing prescribed procedures (which protect the rights of the people) for surveillance. The Patriot Act created a gateway to continue doing away with these rights as noted in the sections on the Fourth and First Amendments. There is no denying the repeated abuses of the Patriot Act in regard to the Bill of Rights, but, as stated earlier, is it really a case of abuse or a case of prioritization? The Social Contract

has defined security (protection from war) as its *raison d'être*; the remaining rights are ceded to its precedence.

Success of the Patriot Act

Can the Patriot Act be deemed a success? A particular example of expanded surveillance powers within the Patriot Act that the Government has stated has been very successful in catching terrorist is the roving wiretap. Sanchez gives this example, “We know these taps were indeed used in the recent investigation of alleged bomb plotter Najibullah Zazi” (Sanchez, 2009). Zazi was an Afghan born man living in Colorado who planned to put explosives on the subway in New York. There are many other foiled plots that can be attributed to the Patriot Act’s broadened power of investigation. There is no way of knowing if these plotters like Zazi might have been caught anyway, but there is the fact he had been plotting an attack with a devastating outcome. In 2004, The US Department of Justice reported, “The Patriot Act had been instrumental in the arrest of 310 terrorism suspects, 179 of whom were convicted” (Freddosso, 2004). The United States Department of Justice attributed these successes to the Patriot Act. The reality of the situation is that the Patriot Act is not going away anytime soon, if ever. The powers will expand and with the perception of success (which indeed can be deemed as real and tangible) and the lack of any real opposition, there is not any future without the Patriot Act.

There is a lot anxiety created by the “secret” provisions of the Patriot Act. A section 215 (for example), because of its inherent secrecy brings up nightmares of rendition and Guantanamo Bay. But there are many who believe that this is just a

boogeyman perpetuated by the liberal media. Then Attorney General John Ashcroft, spoke of the constitutionality of the Patriot Act. He cited the ease in which law enforcement officials can now track suspected criminal, “for example, prosecutors no longer must get permission for different wiretaps every time a suspect changes cell phones. Instead, the wiretap provision now applies to the suspect rather than the specific phone” (Fox News, 2003). Ashcroft also mentioned the sharing of information between law enforcement and intelligence agencies. Ashcroft’s goal was clarify the “miseducation” regarding the Patriot Act. He states that roving wiretaps create an ease tracking suspects across jurisdictions rather than having to get a warrant for each one (jurisdiction).

There has also been a lot of discussion regarding the Patriot Act’s impact on the Fourth Amendment. There are protections written into both the Patriot Act and FISA which outline the circumstances for warrants to engage in electronic surveillance. Of course, a great deal is made of the exceptions to get around the legislation (national security most commonly cited), but it has been pointed out that exceptions have always been written into legislation. Exceptions have also existed in exigent circumstances, such as times of war, and these have always been deemed constitutional. On that basis, then the exceptions to the Fourth Amendment written into the Patriot Act cannot be seen as outside the law.

Conclusion

There was a very specific evolution with regard to the right to privacy within the United States. It started with an idea, which developed into tort law. It developed into

specific protections provided on a state by state basis and eventually into a federally protected right with its pinnacle being the Privacy Act of 1974. Throughout the evolution, the debate was not whether there was some sort of theoretical right to privacy but whether it was a constitutionally granted right. The *Griswold vs. Connecticut* case determined that there was indeed a constitutionally protected right to privacy.

The right to privacy was balanced with the legislatively granted freedom of information. This acted like a tug of war between transparency and privacy. The Freedom of Information Act had safeguards that entailed some notification when personal information was requested or released. At some points the give and pull of these two acts seemed more like an academic discussion than one that had any real impact on the right to privacy; that is until the events of 9/11.

The events of 9/11 forever changed the reality that was privacy as well its priority on the food chain. Perhaps it can be argued that in a world without war, privacy would hold center in the rights all men fought to retain. But with the threat of global devastation, especially by fringe groups or terrorists, the need if not the right to privacy must be outweighed by the need for security. The Patriot Act with theoretical support from social contract theory illustrates the security that every member is entitled to by their tacit agreement in their acknowledged community.

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