

The Birth of Big Brother: Privacy Rights in a Post-9/11 World

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ABSTRACT: *Western European and North American countries reinterpreted their privacy laws after the terrorist attacks on New York City and the Pentagon in 2001. The author compares the increased use of camera surveillance in the United Kingdom to the Patriot Act in the United States. The article focuses upon the debate between supporters and opponents of American counter-terrorism laws and policies over the past eight years.*

Since the attacks of September 11, 2001, and the subsequent attacks in Spain and the United Kingdom, the concerns over terrorism have sparked a massive response. From military action to clandestine operations and the enforcement of new anti-terror laws, the Western world is attempting to mobilize against this increasing threat. However, in our determination to secure our populace and our borders, certain concessions have been made concerning our most fundamental rights. Some consider the new laws designed to combat terrorism actually encroach on our freedoms. One right at the forefront of the controversy is the right to privacy. But what is privacy, and what is threatening our privacy rights?

Like most terms in political science, privacy is difficult to define. Though not explicitly spelled out in the United States Constitution among the more familiar rights, such as freedom of speech and religion, legal experts have concluded that a right to privacy exists under a constitutional penumbra. Experts have based these conclusions in part from the texts of the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution. A single standard legal definition of privacy, however, does not exist. Indeed, in other countries, privacy is defined in different ways. In the United Kingdom, the Calcutt Committee on privacy concluded, "Nowhere have we found a wholly satisfactory statutory definition of privacy." The committee did, however, create a definition for privacy for suggested use in Britain: "The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family by direct physical means, or by publication of information" (*Privacy.org*, 2006, para. 10). Robert Ellis Smith, editor of the *Privacy Journal*, said privacy is, "the desire of each of us for physical space where we can be free of interruption, intrusion, embarrassment, or accountability and the

attempt to control the time and manner of disclosure of personal information about ourselves" (*Privacy International*, 2003, para. 4).

In the United States, the Supreme Court has been the major source for our conception of the term. Supreme Court Justices Louis Brandeis and Samuel Warren (1890) wrote one of the first and most influential essays on privacy. In their paper they discuss many issues concerning the tangible and intangible aspects of privacy and what they view as threats to its protection. "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that, 'What is whispered in the closet shall be proclaimed from the housetops'" (Brandeis & Warren, para. 4). Warren and Brandeis defined privacy simply as, "the right to be let alone" (*Privacy International*, 2003, para. 4). Although there is no single privacy definition in the United States, the Supreme Court has time and again acknowledged its existence and the need for its protection in rulings from various high profile cases. Some of the more notable were *Griswold v. Connecticut*, *Roe v. Wade*, and *Lawrence v. Texas*. The Supreme Court has generally followed the principle of *stare decisis* when deciding cases of a similar nature.

Before 9/11, privacy intrusions in the United States did not seem to get much airtime. Overseas there were some concerns that certain programs involving cameras on the streets and in businesses were a threat to privacy. The United Kingdom is a prime example. Although street surveillance had been around for some time there, the number of cameras has increased drastically. In 2006 Brendan O'Neill, a British journalist, penned an article stating,

Throughout the country are an estimated five million CCTV cameras; that's one for every 12 citizens. We [in Britain] have more than 20 per cent of the world's CCTV cameras, which, considering that Britain occupies a tiny 0.2 per cent of the world's inhabitable landmass, is quite an achievement. The average Londoner going about his or her business may be monitored by 300 CCTV cameras a day. (O'Neill, p. 20)

In nearly all cases the justification for the use of cameras is that it makes the public safer. However, O'Neill (2006) interviewed Martin Gill, a professor of criminology at the University of Leicester who conducted research on crime rate in 14 different districts. Gill concluded cameras had little impact on crime. Only in one of the districts could a drop in crime be attributed to CCTV cameras. As he explained, "A camera can monitor things, but it cannot intervene and take decisive action, like a bobby on the beat" (O'Neill, 2006, p. 20).

If the evidence are indeed as credible as they seem, some disturbing conclusions must be made. The New York City Police Department launched a program in Brooklyn to install some 500 surveillance cameras throughout the borough in an attempt to stop street crime and terrorism. The program has cost nine million dollars, and the city has applied for 81.5 million more to watch all of lower Manhattan and parts of midtown (Privacy.org, 2006). Could the United States soon be as monitored as much as the United Kingdom? As unsettling as cameras in public places seem to be, other invasions into privacy are much more subtle and perhaps even more disturbing.

Privacy rights took a major hit after the 9/11 attacks. In our panic, desperate attempts were made to increase security. Legislation was passed hastily, airports were all but impossible to get through, and the nation was roughly awakened to the fact that there are some who despise all this country stands for. President Bush wasted little time in declaring "War on Terror," but his method of counterterrorism was unusual and nearly unprecedented. Years before 9/11, terrorism was dealt with by local police as a criminal matter in the United States as well as overseas. In this instance, the United States deployed its main combatative force on an overseas campaign as a response to the attacks. The President sought to unite the intelligence community under one "intelligence czar," making terrorism an issue of national security under control by the federal government.

Legislation immediately drafted included programs such as the Total Information Awareness project (TIA), the Terrorist Information and Prevention Systems

(TIPS), and the Patriot Act. The official motto of the TIA is "knowledge is power." This initiative's goal is to collect unprecedented amounts of data from average citizens. This data is then filed in an archive for future reference. Different types of data collected would include credit card transactions, telephone numbers, internet service providers logs, medical records, financial records, and other information gathered by corporate entities. Based on the data collected, every individual would then be placed into categories analyzing how much of a link the individual could have with terrorism (Sullivan, 2003). One might conclude that since all of this information is already floating around in the files of commercial enterprises that having them collected by the government would do us little harm. Indeed, the Supreme Court has upheld lower court rulings that permitted public access to an individual's personal information. In such cases it can be assumed that government officials can access the same information without fear of litigation (Sullivan, 2003). However the TIA would not just allowed this type of collection, but would be granted the authority to gather information on its own including consumer information. Concern over the civil rights of American citizens prompted Congress to pass legislation to halt the formation of the TIA until it could be proven it was needed and would address civil rights issues. The President signed the bill (Sullivan, 2003).

TIPS, the other White House's proposed operation, would have allowed employees working in such occupations as postal or utility workers to report any unusual or suspicious behavior directly to the government through a special hotline (Sullivan, 2003). The idea was to give workers at sensitive areas that may be potentially appealing to a terrorist attack the ability to alert the proper authorities, skipping local police altogether. Once again, Congress officially banned all provisions provided by TIPS.

Although TIPS and TIA were extremely controversial, one piece of anti-terror legislation that has been approved and reauthorized is the Patriot Act. The first authorization of the bill was passed just weeks after the September 11 attacks, and most of the bill was reauthorized late in 2005. Opponents and proponents of the Patriot Act are not hard to find. Some see the law as instrumental to protecting our nation. Others see it as an excuse for Uncle Sam to pry into our personal lives. But what exactly does the Patriot Act do?

Championed early in 2002 by Attorney General John Ashcroft and backed by the President, the bill was introduced to help assist Federal and local law enforce-

ment work together and to loosen restrictions on acquiring information that could possibly be used to prevent a terrorist attack. Ashcroft testified before Congress that “[t]he Patriot Act is al-Qaida’s worst nightmare when it comes to disrupting and disabling their operations here in America” (Associated Press, para. 3). Some major provisions of the bill include enhanced sentences for terrorist related crimes, eliminating the statute of limitation for certain terrorist crimes, allowing law enforcement to obtain a warrant anywhere a terror related incident occurs, and the use of “roving wiretaps” (DOJ, 2005). The Department of Justice’s Web site contains the government’s official stance on the Patriot Act, as well as the actual text of the law. After all, appropriate criticisms cannot be made unless one first has an understanding of the law.

Critics of the Patriot Act say that the law does nothing more than provide the government with a venue to monitor our personal lives and infringe on our civil liberties. Belgian sociologist Jean-Claude Paye (2006) argues that the Patriot Act has made special emergency powers permanent, effectively expanding the authority of the executive branch over its judicial counterbalance. “It legitimizes a change in the political system, granting to the executive power the prerogatives of the judiciary” (Paye, 2006, p. 29). According to Paye, one major goal of the Patriot Act was to incorporate the rules of gathering information on foreign intelligence into the realm of criminal investigation. The Foreign Intelligence Service Act (FISA) court, established in 1978 to provide information about counter espionage, can now share information with local police departments and other federal agencies. The FISA court now acts as an authorizing court to the law enforcement agencies seeking information concerning national security. Since the FISA court is comprised of members appointed by the president, the court itself allows nearly any method of data gathering without much hassle. The weight of the evidence need only be clear and convincing. Such a system seems to short-circuit the normal judicial checks and balances on government data gathering, and has thereby added to the power of the executive, according to Paye.

Another way in which the executive has gained power has been in the acquisition of warrants. Under Article 216 of the Patriot Act any federal judge may issue a warrant to acquire all incoming and outgoing electronic connection data. The Article makes the judge’s warrant valid anywhere in United States territory, and the enforcers applying for the warrant can choose the judge they want to hear the case. In addition, the burden of proof has been lessened substantially. This method of warrant

acquisition means that if the government wants a warrant they will get one (Paye, 2006).

Another controversial provision of the Patriot Act is the authorization of what has become known as “sneak and peek” warrants. Article 213 allows investigators access to any person’s home or belongings without notifying the resident of their intrusion. These warrants may be carried out while the resident is not present. In addition, under the old warrant system, the resident must be informed either before the search or shortly thereafter. Article 213 stipulates that the investigators must inform the resident, “within a reasonable period of its execution.” Article 213 also allows the investigators conducting the warrant to collect various pieces of evidence, both electronic and tangible, as well as the authority to install what is known as the “Magic Lantern” program, which records all activity taking place on the individual’s computer, not just internet activity (Paye, 2006, p. 30).

In an article agreeing with Paye’s criticism, Michael E. Tigar (2006) argues that the Patriot Act does indeed expand executive power by granting the power to arrest people who are loosely associated with possible terrorist organizations, even if they have committed no crimes. He maintains that

the Patriot Act and its kindred laws revive the old criminal syndicalism, restraint of trade, and conspiracy laws that have been used against every progressive and liberationist movement in the United States including labor unions, socialist parties, and civil rights organizations. . . . (p. 26)

According to Tigar, individuals can now be guilty of association, not just guilty for committing the criminal act. Furthermore, this curtails our first amendment rights of freedom of speech and of the press. Tigar notes that if, for example, a person speaks out in favor of terrorist organizations they may find themselves under constant surveillance by the government or even arrested merely for expressing their opinion.

Laws regarding the capture of suspected foreign terrorists may cause even more concern than the statutes regarding our own citizens. Stories of torture by our own troops at Abu Ghraib or Guantánamo Bay, Cuba, inflicted upon individuals captured on some Middle-Eastern battlefield continue to permeate the news media. The government does not believe the suspected enemy combatants should be allowed Geneva Convention rights granted to captured POWs. After continued public protest, Geneva Convention rights have more or less been granted to detainees, however the government still with-

holds some key rights such as access to lawyers and the right to a competent military tribunal (Lelyveld, 2003). Tigar (2006) expands on this subject saying, “A new statute passed in September 2006, expressly denies habeas corpus from detainees and strips them of well recognized protections under the laws of war . . .” (p.27).

Even with the many criticisms of the Patriot Act, others continue staunchly to support the efforts made by our government to protect the people from terrorists. The administration’s top officials continue to believe that it is the first, best line of defense when dealing with this global war on terror. In a recent editorial in *US News and World Report*, Mortimer Zuckerman maintains that the media has distorted the actual use of telephone monitoring by the government. He says that the government does not listen to the content of every call. Indeed the number of analysts needed to do so would be exhausting. Rather government monitoring of personal telephone communications merely looks at the patterns of the incoming and outgoing numbers. He goes further suggesting that there is no breach in privacy, and the government should be allowed to observe such information exchanges (Zuckerman, 2006).

In response to ongoing criticism of the Patriot Act, the Justice Department seeks to refute many claims organizations such as the ACLU make against the new law with what they assert to be the reality of the matter. As Paye noted, the Patriot Act allows delayed notification of search warrants. Paye insists this is a breach in the privacy of citizens. However, the Justice Department points out that delayed notification of search warrants is not a new concept; it has been used successfully for many years in prosecuting organized crime, drug cases and child pornography. “The Patriot Act simply codified the authority law enforcement had already had for decades. This tool is a vital aspect of our strategy of prevention—detecting and incapacitating terrorists before they are able to strike” (DOJ, 2007).

With regard to the indefinite detention of foreigners, the ACLU (n.d.) asserts, “Suspects convicted of no crime may be detained indefinitely in 6 month increments without meaningful judicial review” (para. 5). The Justice Department responds that,

[a]n extremely narrow class of aliens can be detained under section 412. There must be ‘reasonable grounds to believe’ that the alien: (1) entered the United States to violate espionage or sabotage laws; (2) entered to oppose the government by force; (3) engaged in terrorist activ-

ity; or (4) endangers the United States’ national security. (DOJ)

Indeed many, if not all, of the civil rights abuses claimed by the ACLU, or other such organizations, against the Patriot Act are addressed on the Justice Department’s Web site.

Research into a topic such as privacy is indeed an exhaustive effort. While criticism of government statutes is very common, few of those critics are very vocal about alternative ideas. Still, a few think tanks have come up with hypothetical models to follow in order to combat terrorism and protect civil rights simultaneously. Phillip Heymann and Juliette Kayyem (2005) penned a possible solution in *Protecting Liberty in an Age of Terror*. The authors suggest the United States use a system of biometric identification to collect information on the citizens of the country. They give rough guidelines on the appropriate use of such methods in identifying terrorists or persons subject to suspicion and distinguishing them from “trustworthy” citizens. They go on to lay down many guidelines restricting the power of the government to use the biometric ID as much as they wish.

So what does all this mean? Privacy is an important matter, and it does not look like it will fall from the headlines anytime soon. Thankfully, we live in a country where we can change the way the government operates if we do not like it. The people need to be vocal on this issue. If this does not affect them I do not know what will. In the end, however, it is not so much the law that threatens privacy rights, but the individuals in power. Any law can be abused. The founding fathers knew this and tried to create a delicate balance of power between the branches of government. As John Adams said, “There is danger from all men. The only maxim of a free government ought to be to trust no one man living with power to endanger public liberty.” If we, the citizens, become responsible enough to elect honest, well meaning people to office, no law would adversely affect us. It is time to take a stand against government abuses. Plato said, “The price good men pay for indifference to public affairs is to be ruled by evil men.”

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