Committee of Inquiry – 18. Bundestag
Report on the Legal Situation in the United States

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I. Introduction

The Committee of Inquiry is interested in several legal, political and social subjects that converge dramatically in the disclosures about American intelligence practices made by former NSA-Contractor Edward Snowden. These subjects include the State's interest in gathering intelligence through espionage, surveillance, and the collection of communications data. The subjects also include the new and profound ways in which technology is used today, particularly to promote communication but also for many other purposes, some not imaginable even as recently as a few years ago. Finally, the Committee's work implicates the serious security threats to which democracies are uniquely vulnerable. At least since the 11 September 2001 terrorist attacks in the United States, it is no longer possible to treat such dangers as mere alarmism or their existential gravity as a mere specter invented for the benefit of specific interests.

In our globalized era these issues—intelligence gathering, technology and security—naturally transcend the border of any single nation. The revelation that American intelligence practices involved the collection of breathtaking amounts of communication data produced by *Germans in Germany*—efforts that included monitoring Chancellor Angela Merkel's cell-phone—is a startling reminder of the global nature of these issues.

To better understand the character of American intelligence practices, and in order to give a legal frame to the unease Edward Snowden's revelations stirred in many Germans, the Committee of Inquiry (Committee) has asked me to provide insight into the relevant legal situation in the United States. I do so in the following four sections. Section II briefly treats, in theoretical terms, the question of the relationship between the State as a political institution and intelligence gathering activities. Section III presents the institutional and legal framework for America's intelligence community, including its history, infrastructure, legal authority, the relevant oversight non-judicial oversight, and the legal limitations upon intelligence activities. Special attention is given to the National Security Agency (NSA) and its collection of communications data. Section IV presents the legal framework for data-protection in the United States as it relates to the private sector. I conclude in Section V by offering some comparative reflections on the different way the subjects of the Committee's inquiry are viewed and understood—as a matter of law and policy—in Germany and the United States.

II. State Theory & Intelligence Activities

Nearly every theory of the State makes external security and internal order a basis for the existence of the State.[1] This is true, albeit with fundamental differences in the explanation and resulting consequences, for theories offered by Aristotle,[2] Hobbes,[3] Locke,[4] and Rousseau.[5] Roughly grouped around the notion of a "social contract,"[6] these theorists understood that the State's magnified power was necessary to promote the order and security necessary for humankind's wellbeing.[7] Some went so far as to argue that the State's ability to secure order and provide protection was a necessary part of core human flourishing.[8] For Aristotle, the State would help ensure "the good life."[9] Hobbes, as is well known, thought a dominant State was necessary to pull humankind out of the "state of nature."[10] Locke argued that the security provided by the State would help realize human potential by ensuring the preservation of the most human of institutions: property.[11] Rousseau emphasized the State's ability to provide "collective security."[12] These claims rely on an understanding of the State that prioritizes a duty to protect society from violence within the community and from invasion from other societies.[13] These views have a deep and strong hold on the American understanding of government and State power.

German *Staatstheorie* has been less preoccupied with the fiction of a social contract as the exclusive justification for public authority. Instead, it has sought to explain State power on alternative grounds, such as ideal claims about the full realization of the human spirit through the legitimization of the State, or ideal claims about individual identity embedded in the State community. German State theory also has sought to justify the State on the basis of its redistributive power to deliver social welfare benefits. Alongside these propositions German State theory nonetheless concedes that the State's security function is one of the fundamental bases for the exercise of public authority.

States pursue their security function by organizing and empowering domestic police forces, on one hand, and external defense and military forces, on the other hand.[14] They also undertake espionage activities through which they try to gather intelligence.

Perhaps the most neutral characterization of this long-standing and universal practice is the recognition that surprise can create asymmetries that augment a State's power as it seeks to promote security and order. From this perspective States pursue espionage and gather intelligence for two reasons. On one hand, it allows them to benefit from the element of surprise in their affirmative dealings with other powers. On the other hand, effective intelligence gathering allows a State, in its defensive posture, to undercut other powers' attempts to take advantage of the element of surprise.

Another less benign characterization of States' tradition of espionage has less to do with the State's security function and is more concerned with the role intelligence gathering plays in enhancing the State's power for its own sake. From this perspective espionage serves the autonomous interests of the State and its institutions by placing in the State's possession ever more information. If the well-worn notion that "information is power" draws on a basis in truth, then this view understands the State's intelligence activities as serving, at least in part, the State's

impulse towards institutional aggrandizement and social control.[15] In our information-era these concerns have particular resonance.[16]

The long tradition, involving an almost inherent nexus between State power and States' intelligence gathering activities, is reflected in public international law's ambivalence on the subject.[17] States' unbroken and universal practice of espionage might suggest that intelligence gathering is an inherent right of statehood enshrined in customary international law.[18] This claim is undermined, however, by the fact that there is little evidence that States' pursue espionage as a *legal* right. It is more likely that States' intelligence gathering has been a matter of geo-political realism, power-projection, and institutional efficiency.[19] There is no explicit endorsement of espionage in international law. But neither is there an explicit, general prohibition on States' practice of espionage. It is not, for example, prohibited in concrete terms in the United Nations Charter.[20] And espionage is not the subject of a concise, positive international criminal prohibition.[21] Still, discrete elements of intelligence gathering conduct might be deemed internationally wrongful acts. For example, espionage constituting an unauthorized intrusion into the territory of another State or interference with another State's political independence might qualify as a violation of the principle of non-intervention. Some intelligence gathering activities also might implicate a State's human rights obligations, although the international law principle of extraterritoriality would be a significant limitation on this possibility.

III. U.S. Intelligence

The following is a summary of America's intelligence community, including its history, infrastructure, legal authority, the relevant mechanisms for oversight, and the legal limitations on intelligence practices.

A. History

Even before the promulgation of the 1787 Constitution that established the United States of America, espionage and intelligence gathering played a fundamental role in the revolutionary politics of England's former colonies in North America. America has been a robust practitioner of espionage ever since.

The birth of the United States of America benefitted, in no-small part, from the development and cultivation of an effective intelligence network. The tales may be shrouded in national myth.[22] But it is said, for example, that John Honeyman misled the King's Hessian mercenaries leaving them exposed to General Washington's celebrated surprise attack on Trenton the day after Christmas in 1776.[23] Washington had many spies, including the Culper Ring in New York City.[24] James Rivington's deceit and covert intelligence also made a profound contribution to the success of the Revolutionary Army in New York.[25] Washington needed methods to be able to communicate with his spies and many safeguards were implemented to protect letters from being read should they be intercepted by the enemy. One remarkable encryption technique used by Washington and his intelligence network was the use of "invisible" or "white" ink.[26] The colonials also developed codes to be used when passing messages, especially messages passed along to the Revolutionary Army from spies embedded in Loyalist territory.[27] As a bookseller,

Rivington would write secret messages and bind them into the covers of books that were later purchased by agents in the Revolutionary intelligence network and taken to Washington.[28]

After the war, in his first State of the Union address, President Washington acknowledged the success of this war-time intelligence network and asked Congress to establish a secret service fund.[29] Congress obliged and by the early 1800s these resources had been used to support operations including, among other programs, the attempted overthrow of a North African Barbary State andthe clandestine efforts to "influence Spain to relinquish territory in Florida."[30]

During the American Civil War both the Union and the Confederacy engaged in intensive intelligence gathering efforts. The Union had an organized network the sole purpose of which was espionage and counterintelligence.[31] The Confederacy had less-centralized but still extremely active intelligence operations.[32] Both governments sent agents abroad in an attempt to influence foreign powers.[33]

America first established permanent, formal intelligence organizations in the 1880s. The Office of Naval Intelligence (ONI) and the Military Intelligence Division (MID) were formed,[34] and these institutions made substantial contributions to the American cause during the Spanish-American War.[35] Post-war budget cuts saw the diminution of foreign intelligence activities even as Europe was staggering towards the First World War.[36] The much-reduced American intelligence institutions did not have a significant impact on the Great War,[37] but the Army did establish a dedicated signals intelligence group inside MID.[38]

The Department of Justice's Bureau of Investigation (later the Federal Bureau of Investigation) was established in 1908 and was responsible for domestic counterintelligence activities.[39]

In the Inter-War period, the U.S. began to use its signals intelligence capability more aggressively. Both German and Japanese communications were intercepted and decoded, allowing the United States to "launch an extremely effective counterintelligence attack on German and Japanese espionage and sabotage operations in the Western Hemisphere in the late 1930s and early 1940s."[40] At the same time, the American intelligence apparatus was attempting to prevent infiltration by the Soviet Union.[41] These activities were led by the Office of the Coordinator of Information (OCI), which had been established by President Franklin Roosevelt.[42] This agency was charged with organizing the collection and analysis of foreign intelligence data.[43] But glaring mistakes—and skilled Japanese counterintelligence—prevented OCI from anticipating and preparing the United States for Japan's surprise attack on American naval operations at Pearl Harbor, Hawaii.[44]

That devastating failure—and the fact that it lead directly to America's entry into World War II—are the foundation stones of America's contemporary intelligence community. As a result of this intelligence failure, and to aid the country in the war effort, the more robust Office of Strategic Services (OSS) was created.[45] OSS was responsible for wartime intelligence gathering in the U.S.[46] The agency made many significant contributions to the eventual Allied victory.[47] That success, and the looming Cold War, were responsible for America's post-war "intelligence boom." Congress passed the National Security Act of 1947,[48] which created the Central Intelligence Agency (CIA).[49] The CIA is largely responsible for American foreign intelligence

gathering.[50] Shortly thereafter the National Security Agency was established by Presidential Memorandum and was charged with gathering signals intelligence.[51]

Fear of Soviet infiltration as the Cold War grew hotter stoked the powers of the fledgling American intelligence community.[52] Its performance was not always praiseworthy. The Soviets were able to surprise the world with their successful space program, seeming undetected by America's intelligence community.[53] Domestic intelligence efforts were said to have confirmed that Americans in many walks of life were communist sympathizers.[54] The founding and long-serving Director of the FBI, J. Edgar Hoover, pushed the extreme outer-limits of the Bureau's authority, especially as American law enforcement struggled to adapt to the new landscape of liberty and constitutional protection being shaped by the Supreme Court.[55] The FBI maintained dossiers on citizens and the population was encouraged to report anyone that they thought might be a threat to the American way of life.[56] The resulting hysteria led to blacklisting and persecution, until the claims were finally discredited. The intelligence community's role in McCarthy's "red scare" was not a significant part of the subsequent public debate.

As part of broader, tumultuous social changes in post-war America, the intelligence community received its fair share of the suspicion aimed generally at institutions and authority. This was part of a climate that showed increasingly less tolerance for police excesses and an increasing distaste for American domestic intelligence operations. The CIA was humiliated at the Bay of Pigs. At the same time it was serving as the pointed end of the spear that America would eventually thrust into South East Asia. America descended into violence, chaos, and assassinations, unchecked—and in some cases fostered—by the work of the intelligence community.

The 1960s and 1970s saw American courts and Congressmen attempting to exercise oversight over the various agencies of the intelligence community. Laws were passed to guarantee some degree of privacy to American citizens. International terrorism was recognized as an ever-increasing threat. Also, America's emergence as a superpower increased its thirst for foreign intelligence, both to be able to predict threats to her and her allies, and to maintain her position of dominance in the international community.

The 1980s saw a series of intelligence disasters. The intelligence community failed to predict or detect the Iranian Revolution and the revolutionaries' attack on the U.S. embassy in Tehran. This was followed by an ill-conceived operation to fund insurgents in Nicaragua by selling arms to Iran. It was also planned that this operation would allow for the release of American hostages in Lebanon. This operation violated American law, and further reduced public faith in American intelligence.

The increasing incidents of terrorism throughout the 1990s were a concern for Congress, and reports were requested from several agencies about how effectively they were able to collect and analyze data.[57] The reports Congress received were grim: agencies were able to gather enormous amounts of data, but lacked the funding or manpower to effectively digest that data.[58] Several plans for intelligence reform were drafted, but it was ultimately the events of 11 September 2001 that forced reform.[59]

The terrorist attacks almost immediately changed America's intelligence community. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) was enacted by Congress a little more than a month after the 11 September 2001 attacks.[60] It was meant to be a response to the most successful terrorist attack in American history. Whether they contributed to the failure to detect and prevent the attacks or not, the USA PATRIOT Act was designed to adapt and amend a number of issues.[61] The Act expanded or modified the processes of information gathering under existing statutory regimes. For example, the government's authority to search under the Foreign Intelligence Surveillance Act (FISA) was expanded significantly.[62] The Act allowed (and indeed, insisted that) the disparate arms of the American government to actively communicate details of investigations to one another.[63] The Act also expanded the discretion that the Foreign Intelligence Surveillance Court (FISC) has in issuing warrants.[64] Document demands were also greatly expanded under the Act, both in scope and in application. Library and bookstore records could now be obtained by the intelligence community.[65] The Act permitted an expanded use of pen registers and trap/trace devices. These devices now include any electronic monitoring of email send and destination addresses, as well as routing and site browsing information.[66] Finally, delayed-notice surveillance was also expanded. Delayed-notice warrants could be issued if notice "may have" negative impact, including such things as "intimidation of potential witnesses."[67] The delay has been increased to a maximum of ninety days.[68]

The USA PATRIOT Act has been extended several times, most recently with President Obama's approval.

The USA PATRIOT Act was not the only response to the 11 September 2001 terrorist attacks. By Executive Order President Bush created the Office of Homeland Security (OHS).[69] The Homeland Security Act of 2002 then established the Department of Homeland Security (DHS) in order to consolidate "homeland security" functions under one Executive organ.[70] In 2004, the Intelligence Reform Act created the Director of National Intelligence (DNI).[71] The DHS has many domestic purposes unrelated to intelligence gathering, but it also has an Office of Intelligence and Analysis that is responsible for collecting and analyzing data about terrorist activities.[72] The DNI is responsible for collecting, analyzing, and providing the President with up-to-date briefs of intelligence gathered.[73]

B. Infrastructure

America's contemporary Intelligence Community consists in the sometimes-overlapping activities of a number of Executive Branch institutions under the loose supervision of the Director of National Intelligence (DNI).[74] The DNI was established by the Intelligence Reform Act of 2004,[75] and an Office of the Director of National Intelligence (ODNI) was established to assist the Director of National Intelligence in his or her duties.[76] The DNI serves as the head of the American intelligence community.[77] He or she is appointed by the President and is confirmed by the Senate.[78] The DNI serves as the President's chief advisor on intelligence matters relating to national security.[79] As head of the intelligence community, the DNI also establishes "objectives, priorities, and guidance for the intelligence community to ensure timely and effective collection, processing, analysis, and dissemination of intelligence."[80] The DNI is responsible for ensuring that this intelligence is shared with the appropriate parties.[81]

The institutions charged with the collection of intelligence include the Central Intelligence Agency (CIA) (working through two of its four Directorates);[82] the Department of Defense (working through autonomous agencies such as the National Security Agency [NSA][83] and the Defense Intelligence Agency [DIA],[84] as well as the intelligence groups of each of the branches of the American military); and several other Cabinet Agency intelligence operations (the Department of Justice's Federal Bureau of Investigation [FBI],[85] Department of Treasury,[86] Department of State,[87] Department of Energy,[88] and the newly-created Department of Homeland Security[89]).

Each of these institutions has its foundation in a distinct statute, regulation, or Presidential Executive Order. Each also has a distinct mandate, jurisdiction or intelligence specialization.[90]

For several reasons, at this point I will turn my focus to the National Security Agency (NSA). I will not attempt here to catalogue the infrastructure of, and describe the legal basis for, the entirety of the American intelligence community. First, with respect to its legal mandate and function within the Executive Branch, the NSA may be taken to be somewhat representative of the other components of America's intelligence community. Second, I am aware that the Committee's inquiry is largely focused on revelations about communications data collection carried out by the NSA. Third, a more complete survey of America's intelligence infrastructure would involve a much larger effort than can be justified by the questions presented to me by the Committee.[91]

The root organization for the NSA was the Signal Security Agency (SSA), which was created to intercept and decode Axis cyphers and communications.[92] The SSA was one of many organizations that gathered intelligence during World War II. The diversity of institutions doing this work during the war was seen by America's political and military leadership to be a serious problem.[93] A great deal of intelligence was flowing into several agencies, but these agencies operated independently of one another. Parochialism and power-struggles amongst these groups created a competitive culture that led the agencies to jealously guard their intelligence and to share it only reluctantly.[94] To correct this, the SSA was merged with the Army Security Agency (ASA).[95] The newly-expanded ASA was responsible for providing communications intelligence for the growing American intelligence community.[96]

The National Security Act of 1947 added to the bureaucratic muddle by creating three new communications intelligence groups.[97] These groups each served a branch of the U.S. Armed Forces.[98] But the lack of coordination amongst agencies continued to be a concern.[99] To promote efficiency and coordination the three new groups were merged in 1949, under a further restructuring, and renamed the Armed Forces Security Agency [AFSA].[100] As a military organization the AFSA was thought be less responsive to the intelligence interests of civilian agencies.[101] The AFSA also was plagued by infighting amongst the three former crypt-analytical groups that had been placed under its authority.[102]

President Truman established the NSA by Presidential Memorandum in 1952, with the mandate that it gather and analyze signals and communications intelligence.[103] The new agency was meant to revive America's signal intelligence capabilities by focusing and consolidating the

functions of previous entities.[104] The new institution was also meant to give force to Truman's belief that signals intelligence and crypt-analysis were a civilian and not just military interest.[105] It was also meant to resolve the ASFA's persistent shortcomings, including the intra-agency jealousy that impeded its effectiveness.[106] Above all, Truman hoped the new agency would consolidate and secure the code-breaking and intelligence superiority America had achieved by the end of the Second World War.[107] The agency's mandate, later refined and expanded by an executive order from President Regan,[108] is as broad as it is ambiguous. The NSA is charged with "collecting (including through clandestine means), processing, analyzing, producing, and disseminating signals intelligence information and data for foreign intelligence and counterintelligence purposes to support national and departmental missions."[109]

The NSA is a nearly complete presidential estate. A praise-worthy example of civilian and democratic control of the military, the United States Constitution makes the President the "Commander and Chief of the Army and Navy of the United States."[110] The president's power in the realm of military affairs is almost total, with the notable exceptions of the constitution's assignment of military budgetary authority to the Congress and the Congress' authority to declare war.[111] Significantly, President Truman created the NSA as a unit of the Department of Defense so that it operates within this jealously-guarded executive domain. Its director is required to be a high-ranking military officer, even though it is largely staffed by civilians.[112]

Today the NSA describes itself in these modest and reassuring terms:

- The NSA's "vision" is "global cryptologic dominance through responsive presence and network advantage;[113]
- The NSA's "values" include the "protection of national security interests by adhering to the highest standards of behavior."[114]

The NSA is the largest, most secretive, and likely the most expensive of America's intelligence institutions. It is thought to employ around 40,000 people, although the NSA's Deputy Director once jokingly put the figure between 30,000 and one billion staffers.[115] Its signals intelligence and information efforts—supposedly aimed only at foreign sources—is said to involve the interception of 1.7 billion radio, email, telephone, internet, and other communications each day, only a fraction of which are sorted across 70 different categories of security interests.[116]

C. Oversight

The American intelligence community, including the NSA, is subject to Executive Branch and Legislative Branch oversight. Executive Branch oversight is carried out through the President's Intelligence Advisory Board, the Joint Intelligence Community Council, the Office of the Inspector General, and the Office of Management and Budget. Legislative Branch oversight is performed by the U.S. House Permanent Select Committee on Intelligence and the U.S. Senate Select Committee on Intelligence.

1) Executive Branch Oversight

The President's Intelligence Advisory Board (PIAB) is an advisory body composed of up to 16 members "who are not full-time employees of the federal government."[117] These members are appointed by the President and serve without compensation.[118] The PIAB's primary function is to "assess the quality, quantity, and adequacy of intelligence collection, of analysis and estimates, and of counterintelligence and other intelligence activities."[119] Among its operations, the PIAB hosts an Intelligence Oversight Board (IOB), which is responsible for reporting to the President and Attorney General any intelligence gathering activity that "may be unlawful or contrary to Executive Order or presidential directive."[120] The PIAB also communicates concerns to the DNI, who is responsible for making appropriate modifications.[121] Due to the sensitive, classified nature of the issues that come before the IOB, data on its activities is scarce. Nevertheless, in 2005 (and again in 2009) the Electronic Privacy Information Center made a Freedom of Information Act (FOIA) request of the FBI relating to a series of electronic surveillance cases from 2002-2004. The released documentation shows that the IOB has a deliberative process that is concerned with the sound legal oversight of intelligence operations.[122] These documents do not, however, indicate what disciplinary steps the IOB might recommend.

The Intelligence Reform and Terrorism Prevention Act of 2004 created the Joint Intelligence Community Council (JICC).[123] The JICC is responsible for assisting the DNI (who serves as Chair of the JICC) in "monitoring and evaluating the performance of the intelligence community."[124] The JICC performs primarily budgetary and advisory duties, but the actual scope of the issues that they can examine are as broad as the DNI wishes, as he can bring any issue he sees fit before Council.[125] The members of the JICC may offer dissenting or affirming advice to the President at the same time as the DNI presents advice.[126] Members of the JICC may also offer advice to Congress.[127] As the members of the JICC are the Secretaries of State, Defense, Energy, Homeland Security, the Treasury, the DNI, and the Attorney General,[128] it is likely that the JICC merely formalizes the input that each of these senior administration officials has on the intelligence community.

In recent years Congress has sought to reinforce and expand Executive Branch oversight of America's intelligence activities. In 2004, for example, Congress enacted the Intelligence Reform and Terrorism Prevention Act.[129] The Act created a Civil Liberties Protection Officer (CLPO) who is assigned to the Office of the Director of National Intelligence.[130] The CLPO, who is appointed by the DNI, has several duties related to maintaining the right to privacy under the Act. The CLPO is responsible for ensuring that concern for privacy is included in any of the policies initiated under the National Intelligence Program.[131] The CLPO is also responsible for ensuring that the Director of National Intelligence complies with constitutional, statutory, and common law privacy frameworks.[132]

The Privacy and Civil Liberties Oversight Board was also created by the 2004 Act.[133] The Board was intended to fill a position similar to the CLPO, in that it has an advisory role. Whereas the CLPO is a member of the ODNI and answers to the DNI, the Board "advise[s] the President and the departments, agencies, and elements of the executive branch."[134] The Board was formed because Congress recognized the potential for dangerous governmental overreach and felt that this risk called "for an enhanced system of checks and balances to protect the precious liberties

that are vital to our way of life."[135] The Board is founded on the recognition that "[t]he choice between security and liberty is a false choice, as nothing is more likely to endanger America's liberties than the success of a terrorist attack at home. Our history has shown us that insecurity threatens liberty. Yet, if our liberties are curtailed, we lose the values that we are struggling to defend."[136]

In addition to the advisory role, the Board reviews proposed regulations to ensure they respect civil liberties and privacy.[137] The Board may also designate a department as requiring a privacy officer or civil liberties officer if that department is not already statutorily obliged to have such an officer.[138] The Board then receives and reviews reports, offers advice to the oversight officers, and, in turn, reports to the relevant Congressional committees.[139]

Historically, Executive Branch oversight has been characterized by extreme deference to the intelligence community. In the American system of separate powers, which depends in part on each branch aggressively pursuing its own interests to realize the necessary checks and balances, there is little motivation for the respective branches to behave with modesty or restraint.[140] Especially the balance of power between Congress and the President has a tendency to encourage the respective branches to push the limits of their authority.[141] As a result, the Executive Branch has a penchant for action. Presidents often fear the erosion of their powers if they do not use them; in particular, Presidents fear that Congress will perceive a lack of action as a concession, and claim the neglected power for itself. These dynamics are no less true with respect to the Executive Branch's intelligence activities. One consequence is that Executive Branch oversight does little to limit or contain the activities of the intelligence community.

That being said, the American political system has not rewarded those with despotic tendencies.[142] Sitting presidents who want to serve more than a single term are keenly aware of the power of the electorate and those who make unpopular decisions, especially regarding an issues as important and polarizing liberty and security, will have made a difficult path to reelection for themselves.[143] As such, if a President sees an impending shift in the national mood, he will try to take advantage of it.[144] The Rockefeller Commission is an example of how these political tendencies can affect the intelligence community. President Gerald Ford, aware of the attention CIA activities were receiving in the media and the scrutiny they were due to receive from the Church Committee, established the Commission as an investigative body.[145] It issued one report before being supplanted by various Congressional Committees.[146] In this report, the Commission investigated "mail intercepts; intelligence community coordination; 'Operation CHAOS' (collecting information on dissidents); protection of the Agency against threats of violence; other investigations by the Office of Security; involvement of the CIA in improper activities for the White House (including Watergate); domestic activities of the Directorate of Operations; domestic activities of the Directorate of Science and Technology; CIA relationships with other federal, state, and local agencies; indices and files on American citizens; and allegations concerning the assassination of President Kennedy."[147]

2) *Legislative Branch Oversight*

Congress also plays an important role in monitoring the conduct of America's intelligence community. For example, the United States House Permanent Select Committee on Intelligence can engage in investigations of American intelligence organizations, as long as the investigation is approved by the Chair, in conjunction with the Ranking Minority Member.[148] The Committee can receive and handle classified information, but its members are limited in how they can discuss that material outside of closed sessions.[149] The House Permanent Select Committee has a subcommittee dedicated specifically to oversight.[150]

The United States Senate Select Committee on Intelligence has a similar mandate. It was created "to oversee and make continuing studies of the intelligence activities and programs of the United States Government, to submit to the Senate appropriate proposals for legislation and report to the Senate concerning such intelligence activities and programs, and to provide vigilant legislative oversight over the intelligence activities of the United States to assure that such activities are in conformity with the Constitution and laws of the United States."[151] It holds hearings on intelligence matters, performs budgetary and appropriations functions, and also conducts audits and investigations of intelligence gathering programs.[152] The Senate Committee is also privy to classified information, which is meant to further the goal of Congressional oversight.[153] One of the major early undertakings of the SSCI was a careful pre-vote assessment of the Foreign Intelligence Surveillance Act after it was introduced before Congress as draft legislation.[154] The SSCI was also responsible for drafting the Report of the Select Committee on Intelligence on the U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq.[155] This report, released on 9 June 2004 concluded that the intelligence community's pre-war assessment on Iraq's WMD capabilities "either overstated, or [was] not supported by, the underlying intelligence reporting. A series of failures, particularly in analytic trade craft, led to the mischaracterization of the intelligence."[156] A later Phase II report indicated that the Executive Branch may have deliberately misreported intelligence to make speculation seem more like a certainty.[157]

Maybe because of its strongly-felt popular mandate, which might give greater weight to Americans' basic desire for security, Congress has not rigorously superintended the work of America's intelligence community.[158] Congressional oversight must be largely regarded as deferential, if not outright sycophantic.[159]

3) *Church Committee*

There have been a few notable instances in which Congress felt the need to reign-in America's intelligence community. None of these efforts was more dramatic and important than the work of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (1975-1976).[160] That Committee came to be known by the last name of its Chairman, Idaho Senator Frank Church. The Church Committee was called to service in 1975 after the *New York Times* published extraordinary reports revealing that tens of thousands of Americans had been placed under CIA surveillance, including members of Congress, often by direct order of the Nixon White House. The surveillance was aimed at monitoring and undermining antiwar campaigners, especially in America's 1968 student movement.[161] With some understatement the *New York Times* reports referred to the CIA's domestic break-ins and wiretaps as a "massive

illegality" and a direct violation of the CIA's 1947 charter, which forbade it from engaging in any domestic security functions.[162]

The Church Committee's aggressive and thorough examination of America's intelligence community remains the most "comprehensive and thoughtfully critical study [ever] made of the shadowy world of U.S. intelligence."[163] Nothing like it has occurred since, not in the United States and perhaps in no other country. The Church Committee was to investigate domestic intelligence activities to determine whether they conformed to the law, especially constitutional limits on executive power and the constitutional protection of individual liberty. The investigation covered presidential administrations of both parties, dating back to the Kennedy White House. This was the committee's modest project: shine light into every corner of more than a quarter-century of America's vast, secretive intelligence empire (including the CIA, the FBI, the Defense Intelligence Agency, the NSA, the federal tax authorities, and other institutions) in the face of presidential and agency hostility.

The Church Committee managed an 18 month inquiry consisting of more than one hundred full committee hearings, hundreds more subcommittee hearings, scores of depositions of individual witnesses, the review of nearly a ton of subpoenaed documents, and the publication of scores of staff reports. It was truly as complete an investigation of the U.S. intelligence community across the whole of the cold war as was possible under the circumstances. The Church Committee's efforts concluded in 1976 with the publication of 14 volumes of shocking and despairing reports.

The reports documented decades of surveillance abuses, including infiltration that extended beyond national security information to the gathering of personal and political views. Often the operations sought to damage, destroy and discredit their targets. There was evidence that these activities had been employed for the political advantage of presidents. Above all, it seemed the appetite for domestic intelligence was constantly expanding. It is difficult to highlight specific details from such an extensive project, involving more than 50,000 pages of reports, testimony, documents and commentary. Perhaps the following gives a flavor of the committee's sweeping and troubling findings. First, huge numbers of Americans (both ordinary and prominent—including President Richard Nixon and Senator Frank Church) were affected by surveillance that involved access to mail and telegraphs, wire-tapping, and the use of live informants. These widespread and invasive surveillance operations had names such as COINTELPRO and the Houston Plan. Second, the full political spectrum was touched by the abuses, ranging from the Women's Liberation Movement to the neo-conservative John Birch Society. Third, as is typical of America, race played a uniquely central and pathological role in the abuses. The committee discovered that the leading African-American civil rights organization, the NAACP, had been the special object of intense surveillance for more than three decades. Grotesquely, the Church Committee reports documented the American intelligence community's persecution of Dr. Martin Luther King. The "covert war" to discredit the civil rights leader reached its nadir with repeated attempts to pressure King to commit suicide with threats that tapes from his bugged hotel rooms would be released to the public.

In the present context there is good reason to linger over the Church Committee's 165 page fifth report, entitled "The National Security Agency and Fourth Amendment Rights." The report's title alone was a revelation because, until the Church Committee's investigation, the NSA was

almost unknown to Americans, earning it the nick-name "No Such Agency" in the American Cold War intelligence community. The Church Committee's report on the NSA is indispensable reading for a proper understanding of the risks this secretive institution poses for the enjoyment of liberty and privacy. It also provides invaluable insight into the Foreign Intelligence Surveillance Act, which, as will be discussed later, is the single most important piece of American security legislation. That statutory regime was extensively prefigured and debated in the hearings that contributed to the Church Committee's report on the NSA. First, as for the risks, the committee called the NSA the intelligence community's most secretive and reticent institution, noting that there was no statutory mandate and that its charter consisted in executive orders that did not provide a clear definition of the "technical and intelligence information" the NSA had been created to collect. The Church Committee noted that representatives of the NSA had never before appeared before the Congress to account for the agency's activities. In terms that resonate quite poignantly today, Senator Church concluded that the NSA poses a tremendous potential for abuse:

> The NSA has the capacity to monitor the private communications of American citizens without the use of "bug" or "tap". The interception of international communications signals sent through the air is the job of the NSA; and thanks to modern technological developments, it does its job very well. The danger lies in the ability of the NSA to turn its awesome technology against domestic communications ... Indeed ... a previous administration and a former NSA Director favored using this potential against certain U.S. citizens for domestic intelligence purposes.

The committee found that such excesses had in fact occurred. Advised by Harvard Law Professor Philipp Heymann, the Church Committee urged legislative action to ensure the protection of Americans' liberties. Professor Heymann insisted to the committee that

> Ultimately the Congress is going to have to pass a statute that sets forth standards and then requires a warrant from a court [for NSA activities] ... Congress is going to have to set forth the standards and courts are going to have to come in and apply them.

Spurred on by the Church Committee's reports, that is exactly what Congress did.

The Church Committee can be credited with a number of reforms leading to statutory limits on intelligence services' activities and requiring permanent Congressional oversight of America's intelligence apparatus. Although demonized by the staunchest cold warriors, many of these reforms were meant to protect and empower the American intelligence services by giving them sound Congressional authority, clear standards for their activities, and the reassurance that they would not be sacrificed to political expedience. As an example of the latter, the Hughes—Ryan Act required the White House to issue written approval for all foreign covert actions so that presidents could no longer cast the blame for their botched covert programs on rogue and unaccountable security institutions.

But it is the former reform—the creation of standards, requiring judicial approval, and congressional oversight—that has had the most significant impact on American intelligence operations. Several new statutory schemes pursuing these aims emerged from the Church Committee's investigation and the most important is the Foreign Intelligence Surveillance Act of 1978. This was the reform that Professor Heymann advocated when he was called to testify as part of the Church Committee's NSA hearings. And this is the most prominent part of the legal framework relevant to the Snowden affair.

As I will explain in some greater detail below, the Foreign Intelligence Surveillance Act—or FISA—does exactly what the Church Committee hoped. First, it established standards for American intelligence surveillance. Second, it created a secret court—the Foreign Intelligence Surveillance Court (FISC)—for the enforcement of those standards. Third, it established permanent congressional oversight of these operations. This regime covers government conduct relating to a broad range of intelligence activities, including electronic surveillance, physical searches, the use of devices for the collection of phone numbers and other electronic "addresses," and access to business records for intelligence purposes. As the regime's title makes clear, the standards and procedures established are meant to apply to the government's collection of foreign intelligence information, that is, information communicated outside America by what the law calls "non-U.S. persons."

D. Legal Authority for Collection of Communications Data

The Presidential Memorandum establishing the NSA says that the agency shall "organize and control the communications intelligence activities of the United States conducted against foreign governments."[164] The NSA's mandate has two parts: an intelligence specialization focused on the collection and analysis of "signals" and a territorial or jurisdictional focus on intelligence gathering outside the United States.

The NSA's mandate consists in signals intelligence (SIGINT) and not human intelligence gathering (HUMINT). Communications intelligence is defined as "all procedures and methods used in the interception of communications...and the obtaining of information from such communications by other than the intended recipients."[165] The NSA's authority was reinforced by Executive Order 12,333,[166] which was issued by President Ronald Reagan on 4 December 1981.[167] Under President Regan's Order the NSA is tasked with "collecting (including through clandestine means), processing, analyzing, producing, and disseminating signals intelligence information and data for foreign intelligence and counterintelligence purposes to support national and departmental missions."[168] To further this mission, the NSA is granted the authority to "conduct administrative and technical support activities within and outside the United States as necessary for cover arrangements."[169]

This Executive Order, amended and reprinted in statute, emphasized that the NSA is responsible for and obligated to gather SIGINT and only SIGINT.[170] It envisions, however, that human espionage may be necessary to fully realize this mandate. In fact, it all but explicitly states this by authorizing the NSA to assign its agents as employees to other government institutions in support roles, in order to provide those agents with cover stories.[171] This, coupled with the

admittedly clandestine nature of the NSA data collection mandate, creates and legitimizes an extensive mandate for espionage beyond the agency's SIGINT mission.

The NSA's mission is aimed at foreign signals intelligence. The current version of the National Security Act of 1947 defines foreign intelligence as "information relating to the capabilities, intentions, or activities of foreign governments or elements thereof."[172]

In order to perform its mission, the Director of the NSA is tasked with "controlling signals intelligence collection and processing activities"[173] and with "providing signals intelligence support for national and departmental requirements and for the conduct of military operations."[174]

Congress authorized the President to delegate the authority to the Attorney General to initiate foreign electronic surveillance, including signals intelligence gathering, without a court order.[175] President Carter subsequently issued an Executive Order providing the Attorney General with the blanket authority to initiate surveillance without a court order.[176] This surveillance may be conducted for a period of one year. [177] In order to initiate this surveillance, however, the Attorney General must still provide the Foreign Intelligence Surveillance Court with a certification that minimization procedures are being followed.[178]

The PRISM Program, exposed as part of the Snowden disclosures, demonstrates the scope of the NSA's understanding of its legal mandate. PRISM is as a bulk electronic data collection program through which the NSA sought to capture and store various types of electronic communications data, such as VOIP calls, online chats, and email communications.[179] The NSA was assembling a database in which it could store all of this data so that, in the event of an investigation, the government could get a court order allowing it to retrospectively access and analyze the vast cache of records.[180]

The NSA's Bulk Telephony Metadata Collection Program, also revealed as a result of media investigations, is another example of the scope of the Agency's understanding of its intelligence gathering mission.[181] Under this program, the U.S. government has been requiring telephone providers to turn over "the numbers of both parties on a call...location data, call duration, unique identifiers, and the time and duration of all calls."[182] Although not gathering content, this allows the NSA to build a "comprehensive picture of who any individual contacted, how and when, and possibly from where, retrospectively."[183]

At the very least, programs such as PRISM or Bulk Telephony Metadata point out the human risk (perhaps even eventuality) that the NSA's legal mandate will be broadly interpreted and exceeded. Without sufficient oversight, for example, an investigator was able to access a great deal more information than was originally imagined under the metadata collection program.[184] PRISM was supposed to allow NSA employees access only to certain subsets of data that they were assigned, in order to limit violations of privacy. Unfortunately, the program does not function that way. NSA employees were able to perform searches of the telephones of romantic partners and track who they were talking to, and for how long.[185] Email and video chat records were also accessible, as was Facebook profile data.[186]

For the purposes of the Committee's inquiry, the most significant aspect of the NSA's legal mandate is the fact that it grants the NSA seeming unchecked authority to pursue intelligence gathering in foreign settings.

E. Legal Limits on Collection of Communications Data

1) Constitutional Limits

As the supreme law of the land,[187] and as the foremost locus of Americans' liberty protections,[188] the United States Constitution should provide the most meaningful limitation on the intelligence gathering activities carried out by the United States government, including the collection of telecommunications data by the NSA. In fact, the constitution guarantees privacy from State intrusions in a number of profound ways. Privacy is explicitly and implicitly at the core of a number of specific protections. It is an implicit part of the right to free speech, for example.[189] And it is an explicit part of the relatively dormant prohibition on housing soldiers in private homes.[190] In one instance the United States Supreme Court concluded that the concept of freedom that emanates from the combination of the liberties that have a textual anchor in the Bill of Rights, add up to an independent—albeit unarticulated—right to privacy.[191] Another important source of constitutional privacy protection has been the personal autonomy secured by the Supreme Court's substantive due process jurisprudence. The constitutional protection for privacy that might be most relevant for the intelligence gathering activities of the American intelligence community is the more explicit protection against warrantless or unreasonable searches and seizures that is secured by the Fourth Amendment.[192]

This is a convoluted but robust constitutional privacy regime. And, although it has produced long and bitter disputes in some instances, for more than 200 years it has adequately managed the intrinsic constitutional challenge of balancing the State's interest in maintaining security and order, on the one hand, with individuals' interest in liberty, privacy and dignity, on the other hand.

Yet, for several reasons, the constitutional privacy regime is much less promising as a limit on the intelligence gathering activities with which the Committee is concerned—especially those aimed at collecting telecommunications data from Germans in Germany. First, this is a consequence of the Supreme Court's conclusion that the United States Constitution, if it has application at all, has only limited force regarding American actions taken against foreigners or that transpire beyond America's territorial jurisdiction. Second, the substance of American constitutional privacy law—particularly the Fourth Amendment protection against warrantless or unreasonable searches and seizures—may not regard telecommunications data that has been publicly exposed as constitutionally protectable private content. Finally, the regime the Supreme Court has carved out for the enforcement of Fourth Amendment privacy finds its greatest force in the context of criminal prosecutions. If the Government is not seeking to use unconstitutionally obtained private information as evidence in support of a criminal prosecution, then the remedies available for challenging the intrusion on an individual's privacy are underdeveloped and weak.

In the following discussion I begin by surveying the substance of American constitutional privacy law. First, I describe a range of less-relevant (at least as concerns the NSA affair) or less-explicit protections arising out of the Bill of Rights, including substantive due process privacy protections. Second, I describe the more-relevant Fourth Amendment privacy jurisprudence and account for the possibility that, as a matter of substantive law, this protection may not apply to the NSA's collection of telecommunications data at all. I will also report on the limits on the enforcement of the Fourth Amendment at this point. Finally, I will address the limits on the constitution's application to foreigners or to the conduct of the American government that takes place outside the United States.

a) The Substance of Constitutional Privacy

i) Textual and Implied Privacy Provisions

America's Founding Fathers were profoundly aware of privacy's deeply-human significance. Many had risked the perils of a new start in the colonies, an ocean away from the King's England, in pursuit of the privacy that is an inherent part of a free and autonomous life. The earliest colonial constitutions provided explicit privacy protections. But it must also be acknowledged that the prevailing view in the revolutionary era was that the greatest threat to individual freedom was excessive public authority. It was a firm conviction that the most important source of individual autonomy—including privacy—lay in a small, weak and limited government. The inherited common law, with its notions of privacy and trespass, would provide the necessary protection of autonomy against intrusions by individuals. This sentiment helps explain why the founders of the republic could imagine writing and ratifying the 1787 constitution without a defined catalogue of basic rights.[193]

This makes it all the more significant that, when the Bill of Rights was added to the United States Constitution as a slate of amendments ratified in 1791, it contained a number of protections that are explicitly or implicitly concerned with privacy.

The First Amendment, which is concerned with free-speech, the right to assemble, and the freedom of religion, implies a right to privacy. The Supreme Court has held, for example, that the privacy involved in membership in civil society groups (such as political parties, labor unions, or civic advocacy organizations) must be protected from government discovery. Disclosure of these membership lists to the government, the Court reasoned, would chill political activity and self-expression, which are protected as speech and under the right to assemble.[194] Privacy with respect to these kinds of activities and choices is thought to be necessary for the effective functioning of the First Amendment's explicit speech and religion guarantees.

The Third Amendment's prohibition on housing troops in private homes during peacetime also suggests a right to privacy.[195] The drafters of the Bill of Rights knew very well that being forced to accommodate the King's Army in their homes left them with no private space, outside the probing eyes of the State, to which they could retreat in nearly-absolute autonomy. The privacy implicated by the Third Amendment recognizes that individuals need a secure space where they can live without fear of being observed by representatives of the government.

The Fifth Amendment guarantees a person accused of a crime the right to decline to incriminate him- or herself.[196] This protection recognizes an intimate sphere of autonomy into which the State may not intrude. This is especially true with respect to the overwhelming advantage the State enjoys when accusing an individual of a crime. In that context, the Fifth Amendment insists that the State respect an individual's private and autonomous personality by protecting the accused from having to contribute to his or her conviction. Instead, the State has the burden of proving guilt by its own means, and the accused has the right to force the State to carry that burden.

The founders also sought to establish that the Bill of Rights did not provide an exhaustive catalogue of the individual freedom that must be protected from government infringement. The Ninth Amendment acknowledges the existence of other rights "retained by the people."[197] This might be a reference to the continuing validity of the freedoms secured by the common law, including privacy rights. It is also surely an acknowledgment of the many distinct rights secured by the state constitutions. Many of these charters predated the federal, 1787 constitution.[198] The rights they secure remain in effect with respect to the exercise of public authority by the respective states, so long as they do not articulate a liberty regime that is weaker than the one established by the federal Bill of Rights. State constitutional protections may, however, provide greater freedom than that which is guaranteed by the federal Bill of Rights. Many state constitutions have explicit privacy clauses.[199] Finally, the Ninth Amendment invites the conclusion that the Bill of Rights itself is open to flexible and dynamic interpretation so that it might serve as the basis of the protection of liberty even where the written text may not explicitly anticipate it.

In one instance the Supreme Court seized on the last of these possibilities and concluded that the array of implied privacy protections in the Bill of Rights resulted in a discrete but unarticulated constitutional privacy protection. Justice William Douglas, writing for the majority of the Court in *Griswold v. Connecticut*,[200] reasoned that the constitution protects a right to privacy even if the Bill of Rights does not explicitly refer to "privacy."[201] This protection, Justice Douglas explained, is to be found in the "penumbras" and "emanations" of the explicit constitutional protections, including the First, Third and Fifth Amendments.[202] The "penumbral" right to privacy, Justice Douglas concluded, consists in a right to "protection from governmental intrusion." The *Griswold* case involved a challenge to a Connecticut state statute that prohibited any person from using contraception. The Court ruled that the law violated a "right to marital privacy" by envisioning police searches of a couple's bedroom in pursuit of evidence of criminal contraception use. This absurd prospect, Justice Douglas reasoned, would involve an intolerable state intrusion into Americans' most intimate private sphere.[203]

The reasoning of the *Griswold* case has never again been followed by the Supreme Court. But the case provides a useful pivot to yet another constitutional basis for privacy protection. Just as *Griswold* involved the deeply intimate and private sphere of sexual and reproductive liberty, the Court's extensive jurisprudence involving privacy and substantive due process also has focused on the issues of family, marriage and sexual freedom. "Substantive due process" derives from the Fifth Amendment (applicable to federal government actions) and the Fourteenth Amendment (applicable to state government actions). Both amendments protect against the deprivation of "life, liberty, or property, without due process of law."[204] One reading of this guarantee imposes

a *procedural* demand on all exercises of State authority affecting these personal interests. At a minimum, this has been understood to mean that the State must give fair notice of its actions in advance so that the individual affected can challenge the action.[205] Minimal procedural due process also provides an individual with an opportunity to appeal, to a higher authority, the unsatisfactory resolutions of an initial complaint. Another reading of the constitutional commitment to due process is that it empowers the judiciary to review the *substance* of exercises of State authority (both legislative and administrative) to ensure that they fulfill a society's expectations of fundamental fairness, justice, and liberty.

Substantive due process as secured by the Fifth and Fourteenth Amendments has proven contentious, not only because it seems to align with concepts of natural law, but also because the Supreme Court has used it as the basis for articulating a significant range of controversial privacy protections, including most-spectacularly a woman's privacy right to terminate her pregnancy. Justice Blackmun, writing for the Court's majority in *Roe v. Wade*,[206] explained that laws restricting a woman's access to abortion implicate privacy in a number of profound ways:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[207]

The criticism leveled at the Court's reliance on the privacy protection it divined from the mandates of substantive due process have persisted, especially as the Court has extended this jurisprudence into other areas of intense social controversy.[208] In recent years, for example, the Court has also granted homosexual conduct protection under the substantive due process right to privacy.[209]

The Supreme Court has not yet found the need to enforce a substantive due process right to informational privacy. In *Whalen v. Roe* (1977) for example, the Court found that a right of this kind might exist, but that the state law at stake in the case did not constitute a constitutional violation. The case involved a New York state statute that required prescribing physicians and pharmacists to collect and provide to the state a range of personal data about medical patients using particular drugs.[210] The Court found a constitutionally protected: interest in controlling the disclosure of personal matters. But the Court found that the state had adequate justifications for the law's intrusion on this privacy, and that it was not necessary for the state to show that policy it had chosen was necessary (that is, narrowly tailored or as minimally intrusive as possible). In *NASA v. Nelson* (2011), to as another example of the Court's reticence the Court found that the federal government's post-9/11 uniform hiring protocol, did not violate the constitution.

It is difficult—but perhaps not impossible—to imagine the application of this tapestry of constitutional privacy protections to the NSA's intelligence gathering activities. The sweeping and indiscriminate collection of communications data does not have an obvious link to any of the textual Bill of Rights provisions that have been found to imply a right to privacy. Only the First Amendment's protections of speech and assembly seem potentially relevant. But the Court's more general First Amendment jurisprudence would raise its own obstacles to a constitutional challenge on those grounds. The Court's jurisprudence identifying a more ethereal privacy protection in the emanations of the Bill of Rights has not gained broad acceptance. Finally, there are compelling distinctions between the fundamentally human liberty interests involved in the cases that have inspired the Court's application of privacy as a matter of substantive due process and the liberty interest implicated by the government's intelligence gathering activities. The former involves sexuality—the most intimate and personal human sphere. Although serious, it is not obvious that the privacy implicated by intelligence gathering has parallel significance for the human condition.

ii) Fourth Amendment Privacy

The stronger constitutional privacy claim with respect to intelligence gathering—including the collection of telecommunications data—should arise out of the Fourth Amendment's guarantee that the people be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[211] The Fourth Amendment was implemented in response to the British practice of issuing general search warrants that lacked probable cause.[212] And, to the degree that it secures protection of the individual against the overwhelming power of the state, the Fourth Amendment also is a reflection of the founding precepts of the American form of democracy.

In its seminal decision in *Katz v. U.S.* the Supreme Court rejected the traditional jurisprudence, which had aligned the Fourth Amendment's privacy protection with notions of property and trespass.[213] The Court in *Katz* emphatically declared that "the Fourth Amendment protects people, not places."[214] The substance of this protection consists in the requirement that government searches may be performed only when authorized by a detailed and specific warrant that has been issued by a neutral and detached magistrate on the basis of sworn evidence demonstrating probable cause. The Court has, however, identified a number of exceptions to the Fourth Amendment's warrant requirement, permitting searches that are otherwise "reasonable." Some contend that these exceptions have swallowed the rule, leaving the Fourth Amendment a hollow form that no longer provides meaningful privacy protection.

A threshold question is what constitutes a "search" for Fourth Amendment purposes. Far more than the substantive elements of Fourth Amendment protection, this preliminary issue seems likely to complicate the application of the Fourth Amendment to American intelligence gathering activities—and telecommunications data collection in particular. After *Katz* the occurrence of a "search" no longer depended on evidence that the State had made a physical intrusion into a private space. Instead, the Court found an intrusion into Katz's personal sphere of privacy. In the *Katz* case a wiretap had been placed on the outside of a glass pay-phone box permitting law enforcement officers to listen to Katz's phone conversation.[215] Although no physical intrusion into the pay-phone box had taken place, the Court reasoned that Katz had a subjective expectation that "the words he utters into the mouthpiece will not be broadcast to the world" and

that society would accept Katz's expectation as reasonable.[216] This is now the standard for determining whether a "search" has taken place, without which the substantive protections of the Fourth Amendment will not apply: (1) a person "has exhibited an actual (subjective) expectation of privacy"; and (2) society is prepared to recognize that this expectation is (objectively) reasonable.

The Supreme Court applied this standard in *Smith v. Maryland* and found that a Fourth Amendment search had not occurred.[217] This is relevant because the circumstances of the *Smith* case might be seen as closely analogous to those involved in the NSA's telecommunications data collection activities. In *Smith* law enforcement officers collected evidence of the suspect's telephone contacts and dealings by installing a "pen register" on his telephone line at the telephone company's offices. An electronic device, the pen register records only the numbers called from a particular telephone line. The content of phone calls is not documented. The Court concluded that neither of the elements necessary for a Fourth Amendment search existed in the case. First, Smith did not have a subjective expectation in the privacy of the telephone numbers he dialed. The Court reasoned:

> We doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must "convey" phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills. In fact, pen registers and similar devices are routinely used by telephone companies "for the purposes of checking billing operations, detecting fraud, and preventing violations of law."[218]

Second, the Court found that a subjective expectation of privacy with respect to the phone numbers one dials—as unlikely as that expectation would be—cannot be regarded as reasonable. Society objectively appreciates, the Court explained, that electronic equipment is used extensively to track and catalogue the telephone numbers called from any particular phone. At the very least, the Court concluded, this is common (and commonly known) because it is necessary for the telephone company to keep billing records.

The Court ruled that, in dialing the telephone numbers, Smith held that information out to others (at least the telephone company). Exposing information in such an indiscriminate way, which stripped it of any subjective or objective expectation of privacy, meant that the government's collection of the telephone numbers involved only the acquisition of non-private information. No Fourth Amendment search had occurred.

Judge William Pauley of the Southern District of the New York Federal Court drew on the obvious parallels between the facts in the *Smith* case and the NSA's bulk phone data collection activities when he dismissed a Fourth Amendment challenge to the program in December, 2013.[219] Citing *Smith*, Judge Pauley ruled that phone users had no reasonable expectation of

privacy that would give them Fourth Amendment rights, especially with respect to information they voluntarily provide to third parties, such as telephone companies.[220]

Creating a dramatic conflict between two first-instance federal courts on the issue, however, Judge Richard Leon of the District of Columbia Federal District Court refused to be bound by *Smith* in a similar but separate case challenging the NSA's bulk phone data collection program as a violation of the Fourth Amendment.[221] Troubled by the "Orwellian" character of the NSA program,[222] Judge Leon sought to distinguish—in quantity and quality—the information collected by the NSA from the information collected by the government in the *Smith* case. In a judgment that also issued in December, 2013, Judge Leon found that, for at least four reasons, the claimant had a reasonable expectation of privacy in the telephone data collected by the NSA. First, even if the short-term use of the pen register in *Smith* was reasonably foreseeable, there is no reasonable expectation that the government engage in a long-term data collection effort of the kind involved in the NSA program (lasting half a decade or more).[223] Second, the anticipated third-party exposure of telephone numbers in the *Smith* case is a mere sliver of the vast amount of personally revealing information the NSA can now collect on the basis of telecommunications activities as a result of a quantum technological leap in the years since *Smith* was decided.[224] Third, the use to which phones were put in the *Smith* era is not at all comparable with today's deeply personal use of telephones and other technologies.[225] Fourth, while there might have been an expectation in the *Smith* era that the government could hope for the assistance of the private telephone company in obtaining a person's telephone data, there is no reasonable expectation of the deeply synergistic cooperation that takes place between the NSA and telecommunications firms. Judge Leon's judgment essentially calls for a dynamic and evolving Fourth Amendment jurisprudence that can account for dramatic technological changes.

Having found that a Fourth Amendment search had occurred, Judge Leon concluded that the claimant was likely to succeed on the substance of the claim.

b) Application of the Constitution to Foreigners or to American Government Conduct that Takes Place Beyond America's Territorial Jurisdiction

The text of the United States Constitution does not clearly and definitively resolve the question of its application to foreigners or beyond America's territorial jurisdiction. This question, in the same way as so many other issues not resolved by the constitution's plain meaning, must be settled by the United States Supreme Court. American constitutional law, as interpreted and applied by the Supreme Court, is fundamentally shaped by the Anglo-American common law tradition. It is necessary to mention this because the Supreme Court's jurisprudence on the question of the foreign and extraterritorial application of the constitution has not resulted in a single, bright-line rule applicable in abstract terms to all related cases. Instead, the issue has been addressed across a number of specific cases over more than a hundred years, with each case resolving a distinct facet of the issue on the basis of the unique facts involved in each case. To make matters more impressionistic, many of these Supreme Court decisions consist in mosaic of separate opinions written by the Court's justices. What follows, then, is an attempt to distill a general rule from an otherwise dynamic and evolving jurisprudential landscape.

It would be incorrect to say, as a general matter, that the United States Constitution never applies to U.S. government actions undertaken outside America's territorial jurisdiction and having an effect on non-Americans. But this may be of little comfort in the present circumstances because the Court has definitively held, with regard to the more discrete question of the extraterritorial application of the Fourth Amendment for the benefit of foreigners, that the United States Constitution does not apply. This, of course, might be the precise scenario involved in the NSA's expansive collection of Germans' telecommunications data in Germany. In its decision in *United States v. Verdugo-Urquidez* a majority of the Court found that the Fourth Amendment protections are limited to the *people* who constitute the "national community" (primarily citizens) or those with a connection to the United States that approximates membership in the national community.[226] This would exclude most Germans, leading lives far removed from the United States, whose telecommunications data is being collected by the NSA. The majority of the Court also concluded that searches and seizures taking place outside America's jurisdiction are not limited by the Fourth Amendment. In support of this position the majority cited a number of cases that "emphatically" rejected the extraterritorial application of more universally-oriented liberty protections (such as the Fifth Amendment's right to be free from self-incrimination). One of these cases expressed, in almost bemused terms, the extreme novelty of the possibility: "Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view."[227]

Even if the Supreme Court's decision in U.S. v. Verdugo-Urquidez seems to preclude the application of the Fourth Amendment to the NSA's collection of Germans' telecommunications data in Germany, some room for constitutional maneuver may still exist.

Another rule might apply if the NSA's collection of Germans' telecommunications data took place in the United States. This would be the case, for example, if the data was obtained from telecommunications firms based in the United States or collection involved gaining access to the data via telecommunications infrastructure located in the United States. The latter might be the case, for example, if the NSA hacked into American-based fiber-optic cables or gained access to Internet companies' servers that are located in the United States. In these circumstances, involving foreign nationals subjected to American conduct that originates within the jurisdiction of the U.S., it may not be determinative that the foreigner lacks substantial ties to the American national community. On one hand, the analysis would hinge on the nature of the U.S. government's actions and the significance of its impact on the foreigner. On the other hand, the analysis would assess the quality and degree of any constitutional protection to be extended.

This possibility draws its strength from the Supreme Court's decision in *Boumediene v. Bush*.[228] In that case the Court found that the constitution's Habeas Corpus guarantee could not be denied foreign detainees being held in the Guantanamo Bay prison, which formally lies outside the territorial jurisdiction of the United States.[229] Nevertheless, some important distinctions lie between that case and the possible effect NSA data collection carried out in the U.S. has on Germans. First, no matter how intrusive or degrading, it would be difficult to argue that the (secret) collection of telecommunications data approximates the State-imposed hardship of the infamously brutal prison-like custody endured by the Guantanamo detainees. Second, a

comparison of the Supreme Court's jurisprudence in the Habeas Corpus and Fourth Amendment contexts leaves open the possibility that the Court would give greater weight to the constitution's Habeas protection than it would to the protection the constitution offers against warrantless or unreasonable searches and seizures.

Ultimately, even in the more permissive view seemingly endorsed by the Supreme Court in *Boumediene v. Bush*, the question of the constitution's application in circumstances such as those with which the Committee is concerned would depend on several factors, including the citizenship of those affected, the nature of the location where the government conduct occurs, the pragmatic obstacles to the enjoyment of the claimed rights, and the gravity the Court assigns to the claimed liberty interest.

2. Statutory Limits

a) FISA

The Foreign Intelligence Surveillance Act (FISA) principally does two things. First, it provides statutory authority, standards, and approval processes that makes intelligence gathering reasonable where the Fourth Amendment might be thought to apply. Second, it provides statutory authority, standards, and approval processes even in cases where the Fourth Amendment does not apply, including surveillance affecting non-U.S. persons abroad. There has been no definitive Supreme Court ruling on FISA's compatibility with the Fourth Amendment, although, not surprisingly, it is believed that the secretive Foreign Intelligence Surveillance Court has regularly determined that FISA provides the required constitutional protections.

Pursuant to FISA there are only two ways for the American government to collect intelligence information, each involving a distinct standard. In the first instance the President, in conjunction with the Attorney General, can undertake intelligence gathering activities (including electronic surveillance) without a court order of any kind. But each of these discrete efforts must be limited to just a twelve month operation, must be aimed at gathering foreign intelligence information, and only foreign powers or their agents may be targeted in this way.[230] In these circumstances it must be established that there is no substantial likelihood that the surveillance will acquire the content of any communication to which a U.S. person is a party.[231] The Attorney General must certify all of this to the Foreign Intelligence Surveillance Court and report on compliance to the relevant oversight bodies.[232] Alternatively, intelligence operatives can request a warrant for electronic surveillance from the Foreign Intelligence Surveillance Court.[233] But an intelligence warrant requires a showing that there is probable cause to believe that the target is a foreign power or an agent of a foreign power—or, since 2004, a "lone wolf" terrorist threat not affiliated with a foreign government. The FISC will issue an intelligence warrant under these conditions only if the risk of gathering information pertaining to U.S. persons is appropriately minimized.[234]

FISA has been amended many times, especially in the post-9/11 era. But this general framework, handed down almost directly from the Church Committee, remains in place. The amendments to the law have had two main characteristics. First, they have expanded the range of potential FISA targets. Second, they have softened the government's burden in cases involving incidental contact with the communications of a U.S. person. The programs revealed

by Edward Snowden, including the extensive surveillance operation known as PRISM and the massive data-mining operation, have been defended by the Obama administration as squarely within the more permissive standards created by the 2008 amendments to FISA. With respect to PRISM, civil rights advocates have argued that the amendments violated the protections of the Fourth Amendment by substituting minimization standards for the warrant that had previously been required for surveillance that incidentally implicates a U.S. person. The 2008 amendments also seem to have moved away from case-by-case authorizations of discrete incidents of surveillance to the approval of large-scale surveillance operations. With respect to the NSA's data-mining operation, the Obama Administration has argued that the information involved was never protected by the Fourth Amendment, which doesn't provide privacy to information held out to third parties, including Internet and other telecommunications service providers.

Under United States law, it is illegal to intercept electronic communications,[235] except when ordered by a court. FISA provides the framework pursuant to which such court-ordered, intelligence gathering involving U.S. persons can be conducted. Federal Judges, selected by the Chief Justice of the Supreme Court, function as the FISC.[236] Applications can be made to these judges for a court order that directs an agency to conduct electronic surveillance involving a U.S. person.[237]

The process for applying for a court order for electronic surveillance requires the specification of the target, probable cause that the target is the agent of a foreign power, and the required minimization procedures.[238] If these criteria have been met, then the FISC has the authority to grant a court order allowing for domestic electronic surveillance.

The minimization procedures are to be designed to "minimize the acquisition...of nonpublicly available information concerning unconsenting United States persons."[239] They are also to take into account the needs of the State.[240] The FISC is charged with striking a reasonable balance between these two competing interests.[241]

Should electronic surveillance accidently collect the contents of a communication unintentionally, and both parties to the communication are United States persons, that communication must be destroyed unless it provides evidence of a threat of death or serious bodily harm.[242]

Any electronic surveillance other than governmentally authorized activities is illegal, and carries with it criminal penalties up to five years in prison.[243] Also, a cause of action has been provided to the public. Should someone be the victim of criminal surveillance as described in § 1809, they may initiate a civil action against the defender and recover damages.[244]

b) USA FREEDOM Act

Congressional concerns over intelligence excesses have resulted in pending legislation that would further limit Americans' exposure to intelligence activities. Some of the sweeping, federally authorized data collection programs have come under attack from the public and from privacy advocates. The result of this negative feedback is the Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet-Collection and Online

Monitoring Act (USA FREEDOM Act). The FREEDOM Act was recently passed by the House of Representatives and is now under consideration by the Senate.[245] This Act aims at reducing the ability of intelligence gathering agencies that operate inside the United States to gather data on United States persons. This includes attempting to foreclose bulk data collection. The Act proposes to do this by requiring any request for data collection to contain a "specific selection term."[246] A specific selection term is a term that "means a discrete term, such as a term specifically identifying a person, entity, account, address, or device, used by the Government to limit the scope of the information or tangible things sought."[247]

3) Regulatory Limitations

The NSA, like all other government agencies, is governed by regulations and procedures promulgated by the Director. The procedures that direct the execution of signals intelligence operations are classified. But some of these classified rules have been leaked. A recent *Washington Post* report claimed that "under the classified rules set forth by the president, the NSA is allowed to presume that any data collected overseas belongs to a foreigner."[248] This serves as just one example of the types of operational rules that govern the work of the NSA.

4) Limits Based on Presidential Executive Orders / Directives

When collecting intelligence, agents are required to "use the least intrusive collection techniques feasible within the United States or directed against United States persons abroad."[249] Agencies are also required to abide by the procedures established by department heads.[250] The instructions for establishing procedures include working with the DNI to ensure that all applicable federal privacy laws are followed.[251]

The head of any unit of the intelligence community is responsible for reporting to the IOB any activity "they believe to be unlawful or contrary to executive order or presidential directive."[252]

In light of the recent revelations regarding the conduct of America's intelligence community, President Obama issued a directive demanding that, in pursuing foreign intelligence, agencies ensure that "all persons should be treated with dignity and respect, regardless of their nationality or wherever they might reside, and all persons have legitimate privacy interests in the handling of their personal information."[253] This directive throws into dramatic relief the balancing between legitimate security operations and individuals' interest in dignity and liberty that lies at the heart of intelligence work. The intelligence community must perform the duties it has been assigned, but it must be mindful of the impact its methods can have on individual freedom.

Bulk telephone data collection has also been restricted by President Obama's directive. Bulk data of this type that has been collected may now only be used to look for a few specific types of behavior.[254] Nevertheless, the collection of such data can continue within the pre-existing limits.

5) *Limits Associated with the "Five Eyes" Group*

The UK-US agreement that forms the basis of the Five Eyes group does not offer a new or independent remedy to the citizens of the participating nations who feel they have suffered intelligence gathering abuses.[255] The only remedies available are those in existing international or domestic law. Significantly, American officials claim that the United States has never entered into a treaty that forbids the country from conducting surveillance on another nation.[256] By statute, no treaty joined by the United States after 27 December 2000 can make "unlawful an otherwise lawful and authorized intelligence activity of the United States Government or its employees."[257] Intelligence gathering activities will be covered by this law as long as they have been approved of by an "appropriate official" and are an operation that functions within the scope of the implementing agency.[258]

It is illustrative at this point to consider the UK-US Communications Agreement. This formerly top-secret treaty established the intelligence-sharing that became known as the ECHELON program.[259] Under this agreement, the United Kingdom and United States agreed to share the fruits of all foreign intelligence gathering, including their respective signals intelligence concerned with foreign communications. There were, however, some refinements to this broad information-sharing agreement. It is important to note, for example, that foreign communications are defined as "Communications of the Government, or of any military...forces, faction, party, department, agency or bureau of a foreign country, or of any person or persons acting or purporting to act therefore, and shall include...communications originated by nationals of a foreign country which may contain information of value."[260] Foreign country is defined as any country other than the United States or Commonwealth nation.[261]

The agreement does not explicitly foreclose one party from gathering intelligence relevant to the other party. But the agreement does preclude the parties from sharing intelligence concerning the other party.[262] Whatever the agreement may provide, it should be noted that any intelligence activities conducted inside the United States by agents of a foreign power—including the United Kingdom—are likely to be a violation of American law.[263] If a foreign nation attempted to gather intelligence inside the United States and the agent was caught, that agent could be prosecuted to the fullest extent of the law. The United States has convicted the spy of an ally and sentenced him to life imprisonment with the possibility of parole after serving 30 years.[264]

It may appear that the ECHELON program allows the participating nations to gather communications intelligence from other participating nations and then share that information with the nation from which the intelligence was gathered.[265] This would allow a Five Eyes nation to circumvent its own privacy protection laws. Under American federal law, for example, foreign intelligence may be gathered without a court order so long as a United States person is not involved.[266] But recently leaked documents suggest that Australia, one of the Five Eyes nations, intercepted communications between an unnamed U.S. law firm and the government of Indonesia.[267] It seems that Australia then offered to give these communications to the NSA.[268] Because of the minimization requirements associated with information gathering that effects U.S. person, this is precisely the kind of information the NSA should not be able to collect.[269] There is no evidence that the NSA has accepted information of this kind from Five Eyes partners, but with a high level of signals intelligence gathering integration, the possibility exists.

IV. Data Protection

A. Introduction

The United States does not have a single, comprehensive data protection regime.

Data protection does not enjoy the same high profile in America as it does in Germany (and elsewhere in Europe). No set of factors can fully account for this stark difference. The fundamentalist commitment to free speech in American law and culture may be one explanation. This cultural orientation favors open and uninhibited flows of information in a "market place of ideas" and that perspective casts some suspicion on any call to shield any information. This is the tenor of the American reaction to the recent decision of the European Court of Justice in which the Court enforced a "right to forget" against the American Internet company Google. The American news-magazine *New Republic* reported on the European Commission's related efforts to establish a "right to be forgotten" under the headline "A Grave New Threat to Free Speech from Europe."[270] The *Wall Street Journal* blog "Digits" struck the same tone: "Google Ruling: Freedom of Speech vs. the Right to Be Forgotten."[271] As the earlier discussion about American constitutional law and privacy demonstrates, the priority Americans give to free speech has a textual basis: "our free-speech right is explicit, but our privacy right is merely implicit."[272] Another explanation for the difference between the U.S. and Germany on the question of data protection is America's *laissez faire* economic tradition, which offers resistance to nearly any form of regulation. This would be especially true where significant commercial interests are at stake, as they are with respect to the marketing possibilities associated with the collection and use of personal data. An additional explanation might be the distinct natures of the Anglo-American and Continental legal cultures. This claim draws on crude generalizations about these richly diverse law worlds. But, on those terms, I would suggest that the Anglo-American common law tradition is distinguished by its fragmented, fact-specific, judicially-crafted, inductive and retrospective normative ethos. The European civil law tradition, for its part, is distinguished by its comprehensive, systematic, abstract, conceptual, legislated, deductive and *ex ante* normative ethos. If these generalizations stand as anything more than banal stereotypes, then it might not be surprising to find that the United States lacks a comprehensive and systematic statutory regime for regulating, *ex ante*, the conceptual field Europeans refer to as "data protection."

To some degree, American law regarding data protection confirms the generalizations about the Anglo-American legal culture. As noted earlier, there is no single, comprehensive data protection regime in the United States. But there is a fragmented web of laws that imposes some limits on the public and private collection, storage and distribution of personal data. For several reasons, these measures cannot be systematically integrated. First, as a product of American federalism, data protection is subject to both federal and state law. There are a number of relevant federal statutes and hundreds of relevant state laws. California alone has enacted more than twenty-five laws dealing in some way with personal data and privacy. Considering California's significant, global economic role and its important ties to the global technology industry, its state laws would be relevant to any complete consideration of American data protection law. Second, American law related to data protection has developed differently in relation to specific social and

industrial sectors, or in relation to discrete forms of media. There are no rules addressing personal data as a general and abstract social phenomenon. Instead, there are rules regarding data collection, storage and distribution for commercial actors regulated by the Federal Trade Commission. There are separate rules regarding the protection of personal data in the context of education. Personal data related to health care has its own set of protections. Telecommunications service providers and cable television operators have to observe their own regulations regarding the collection, storage and distribution of personal data. The list could go on.

The whole picture is made more complicated by the fact that there is jurisdictional (federal/state) and sectoral overlap across the various systems of rules.

I am not expert in the statutory framework for data protection applicable to each of the various sectors. With this report I can only provide an overview. I begin with a brief summary of data protection law applicable to public authorities. I follow this with a survey of the law regulating private actors' collection, storage and distribution of data. I pay particular attention to the law most relevant to personal data associated with or produced in the process of using communications systems.

B. Data Protection and Public Authorities

The high value Americans place on transparency and open government means that many government records are readily accessible and available to the public. A large amount of data about individuals can be found in this publicly accessible government information. Of course, not all the records produced or kept by America's governments are open to the public. A tautology is used to generally distinguish between the different kinds of government records: *public records* are accessible to scrutiny by the public; *confidential records* are kept in confidence, at least for a defined period of time.

Public records are available to anyone who requests them, including journalists or marketing firms. That access has been facilitated by the effort to shift many government functions to Internet or other electronic platforms. It has also been facilitated by the effort to digitize existing government archives. In many cases public records can now be found with simple Internet searches. Information from the following commonly maintained government records is generally available to the public in some from (although access varies from state-to-state): birth records, driver and auto license records, voting records, marriage records, property records, court records, and death records. Some other commonly maintained government records are generally regarded as confidential, including: social services and welfare records, tax records, and school records.

Federal law defines "records" in the broadest possible terms:

> all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the

> transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.[273]

Federal authorities are obliged to maintain the records they generate.[274] The failure to do so, as well as the loss or unauthorized destruction of records, is a punishable federal crime.[275]

The most important federal legislation concerned with the protection of personal data found in federal records is the Privacy Act of 1974. The Privacy Act protects American citizens' privacy with procedural and substantive rights. First, it requires government agencies to show an individual any records kept on him or her. Second, it requires agencies to follow certain principles, called "fair information practices," when gathering and handling personal data. Third, it places restrictions on how agencies can share an individual's data with other people and agencies. Fourth, it gives individuals a cause of action to sue the government and collect damages for violations of the Privacy Act. The Privacy Act does not, however, exclusively serve the individual's interest in controlling the information the government creates and maintains. The law contains a number of exceptions. On one hand, the Privacy Act promotes government efficiency by permitting federal officials to make records containing personal information about a citizen available in discrete circumstances: when the records will be used for a purpose similar to the original reason for collecting the information (the "routine use" exception); for statistical research; for law enforcement purposes; or when ordered by a court. On the other hand, the Privacy Act's exceptions promote the use of the information the government collects in pursuit of security. For example, an individual may be denied access to government records containing personal information if the records involve: law enforcement activities; intelligence activities; or confidential government sources.

The Electronic Communications Privacy Act of 1986 (ECPA) was enacted to extend government restrictions on wire-taps from telephone calls to include transmissions of electronic data by computer. The ECPA also added new provisions prohibiting government access to stored electronic communications. These provisions focus on protecting the content of communications and not data produced by the process of engaging in communication. The ECPA's "pen/trap" provisions allow the government to trace communications.[276]

Another prominent federal public records law is the Freedom of Information Act (FOIA).[277] It says a lot about distinct posture towards the issue data protection that FOIA's purpose is to promote more—not less—access to public records. Pursuant to the federal FOIA statute (the states have enacted similar laws) previously undisclosed Executive Branch records must be made available on the basis of a formal FOIA request. The law imposes penalties, some of which are automatically triggered, if authorities seek to obstruct the release of properly requested records. FOIA carves out a number of exceptions to its laudable insistence on government transparency. The exceptions include law enforcement and national security records. The exceptions provide some measure of data protection as they also include federal government personnel and medical records, "and similar files," if FOIA disclosure would "constitute a clearly unwarranted invasion of personal privacy." But what the FOIA exceptions give with respect to data protection, they

also take away. The law permits the president to use Executive Orders to bloc some FOIA disclosures when necessary for national security or foreign affairs reasons. Presidents have made liberal use of this authority. President Reagan, for example, allowed federal agencies to withhold enormous amounts of information because of its national security relevance. In the mid-1990s, responding to broad and persistent condemnation of Reagan's secretive approach to public records, President Clinton once again narrowed the national security exception. President Obama issued an Executive Order permitting federal authorities to designate a record as meaningful for national security—and therefore exempt from FOIA disclosure—for the first time after it has been requested under FOIA. Foreign governments and their agents cannot secure American intelligence records through a FOIA request.

C. Data Protection and Private Authorities

America's legislatures and courts have produced a wide-array of laws and rules relevant to the collection, storage and distribution of personal data by private actors. These data protection laws are specific to discrete sectors and they vary between the federal government and the fifty states.

The Federal Trade Commission, which occupies some of the regulatory space attributable to a consumer protection agency or advocate, has taken a leading role in promoting data protection in the private sector. The new "Division of Privacy and Identity Protection" oversees issues related to "consumer privacy, credit reporting, identity theft, and information security." Primarily, the FTC will seek to enforce privacy protections pursuant to its Section 5 authority, which "prohibits unfair or deceptive acts or practices, including deceptive statements and unfair practices involving the use or protection of consumers' personal information." This usually means that a commercial actor makes "materially different" use of the personal data it acquires from consumers than the use it claimed it would make, especially in its privacy policy. A recent, relevant example involved a settlement secured by the FTC from the popular mobile electronic-application Snapchat. The FTC pursued a "deceptive trade practices" complaint because, despite Snapchat's loud claims that the photos sent through its service disappear forever after a brief time-span associated with the delivery of a short message, a number of programmatic work-arounds make it possible to access, retrieve and redistribute the photos indefinitely. The resulting settlement agreement does not, however, ensure the privacy of the relevant data (let alone a European-style right to have it deleted). Instead, the settlement only prohibits Snapchat from "misrepresenting the extent to which Snapchat or its products or services protect the privacy, security, or confidentiality of covered information." In its press-release giving notice of the settlement, the FTC describes the victory as "part of the FTC's ongoing effort to ensure that companies market their apps truthfully and keep their privacy promises to consumers."

The federal Cable Communications Policy Act of 1984 requires any cable or wire communication service to provide a customer with notice informing them of the nature of personal information that will be gathered by the provider,[278] along with the types of disclosure they are allowed to make.[279] Records can be disclosed without the consent of the customer only under very limited circumstances. Of relevant interest is the ability to disclose this information pursuant to a delayed-notice warrant issued by FISC.[280] Even under these circumstances the service provider is forbidden from providing the government with the specific video programming selections made by the customer.[281]

The Federal Telecommunications Act of 1996 is another example of a sector-specific data protection law. It was amended in the last decade to provide protection for a communication customer's routing and destination information and network usage. The amendments also protect toll information billed to the customer.[282] This is subject to the usual allowances for business practice disclosures, or disclosures authorized by law.[283] At least it ensures that, unless warranted, the government will not legally be able to know the webpages a communications customer visits.

It is illegal under Federal law to trace the incoming or outgoing electronic communications of a person without a warrant, unless one of the FISA exceptions is met.[284] Federal law also makes illegal to wiretap electronic communications.[285] These protections function as a privately enforced data-privacy law because, if they are violated, the law creates a statutory civil remedy.[286] Anyone who has violated the statute's wiretapping prohibition, for example, is liable to a civil action that could run from hundreds to thousands of dollars per violation.[287] The available damages, however, seem unlikely to serve as a strong deterrent for major telecommunications providers. That calculus changes, however, if a company's compliance with the government's request for bulk data is considered alongside the American civil procedure rules that permit class-action law suits. The potential liability to which every major communication provider is exposed as a result would be significant. These concerns led the Department of Justice to offer immunity from criminal and civil enforcement to cooperating communication service providers.

V. Comparative Reflections

A. Introduction

I do not see my service to the Committee as strictly limited to providing descriptive answers to the questions put to me about American intelligence activities and data protection law. It is also an opportunity to help Germans' develop a fuller understanding of these legal regimes. If the earlier parts of this report have made any contribution to clarifying *what* the key elements of the law are, then I hope this closing section will contribute a little to the Committee's understanding of *why* the American law on these issues takes the form and advances the values that it does. This is particularly important because, in many cases, the American law described in this report seems to advance principles and values that are dramatically at odds with the values and principles that animate the related legal regimes in Germany. These differences are all the more startling if one begins with the assumption that, as western democracies and long-standing, close allies, Germany and the United States should have much in common when it comes to the way their respective legal systems—constitutional and statutory—balance security and liberty.

The following remarks might demonstrate that this assumption was never correct and itself has been the source of considerable misunderstanding. The so-called "west" has never been so harmonized, consisting as it does in a richly diverse array of societies. And close alliances matter, not because they represent clusters of identical communities, but because they bind very different communities together around shared points of interest. And there are profound differences between all legal systems, especially in the area of constitutional law. As the

eminent comparative lawyer Alan Watson once remarked, "countries have a stubborn way of writing their own constitutions." Those differences are the consequence—to name just a few of the more obvious factors—of different histories, different social forces, different political traditions and institutions, different legal cultures, and different economic conditions and orientations. Those are the elements that inform the handful of comparative points I raise here.

B. Historical and Cultural Differences

Americans and Europeans made very different experiences with respect to their governments' use of personal surveillance and social control during the 20th Century. There is no shortage of evidence that the American government has long had an excessive interest in collecting information about its citizens. And that information has too often been put to malign uses. Still, Americans have not had to confront brutal and invidious totalitarian dictatorships such as those that used personal data to terrorize all Germans between 1933 and 1945, on one hand, and East Germans between 1949 and 1990, on the other hand. Other European societies have similar, recent political traumas involving governments' brutal misuse of personal data.

Those distinct histories help explain why America's privacy protections remain implicit (at the level of constitutional basic rights) and fragmented (at the level of statutory protections). Those distinct histories also help explain why Europeans have done so much to establish privacy as an explicit fundamental liberty protection.

C. Democratic Differences

Political scientists commonly remark that America's political culture and institutions are much more susceptible to popular sentiment than Germany's post-war political culture, which is more consensus-oriented. These postures have clear roots in the two countries' distinct political histories. America's majoritarian politics derives from the country's revolutionary and individualist tradition. These strains of American political culture make government particularly (sometimes even unproductively) responsive to popular sentiment. Germany's corporatist politics derives from a rejection of Weimar-era liberalism and a deep yearning for political stability. The German political system can be less directly responsive to popular sentiment because it has institutionalized cooperation between major interest groups and elites. The post-war *Parteienstaat* and the tradition of corporate *Mitbestimmung* are examples of Germany's corporatist politics. The different political cultures also reflect, and respond to, the complex diversity of American society, on one hand, and the relative homogeneity of German society, on the other hand.

America's majoritarian political culture matters because it helps explain the country's seeming preference for security policies over policies that promote privacy. The bi-partisan aggrandizement of security, at the expense of liberty and privacy, is at least partially a consequence of a basic political calculation. In a political system that is highly sensitive to popular sentiment, it is reasonable to assume that the political costs for having allowed (or having done too little to try to discover and prevent) the next devastating terrorist attack in America are unknown but can fairly assumed to be extremely high. The political costs for maintaining invasive intelligence activities aimed at preventing another attack can be better

ascertained and, because they are shrouded in secrecy, may never be realized in any case. This assessment, which is deeply conscious of the popular electoral consequences of the two policy positions, promotes an unequivocal embrace of the security state. Neither party in the American political system would welcome a political future in which it must campaign in America's populist democratic processes as the party that allowed the next major terrorist attack to occur because it refrained from pursuing invasive intelligence practices. In this sense we might even speak of a tyranny of the majority or of a "democratic security state."

D. Difference in Legal Culture

Two differences in the legal cultures of Germany and the United States seem relevant to the different legal approaches the countries take towards security and liberty. The first is the distinct understanding they have of the *Rechtsstaat*. The second is the regulatory distinction that results from their roots in the distinct common law and civil law traditions.

Germany and the United States share a strong commitment to the *Rechtsstaat* or the rule of law. In Germany this has taken the form of a thick framework of material basic rights that has been aggressively and expansively interpreted and applied by the Federal Constitutional Court. The Constitutional Court enforces that substantive and objective *Wertordnung* against otherwise legitimate democratic processes that produce results that depart from the order of values prescribed by the Basic Law. Despite the Supreme Court's grand tradition of fundamental rights jurisprudence, it is nonetheless possible to characterize the American commitment to the rule of law as procedural rather than material. That is, the rights in the American constitution have largely been interpreted and applied in a way that ensures the legitimacy and fairness of the democratic processes that settle policy. It has not been a jurisprudence in pursuit of a substantive vision of the good society. The distinction between the two understandings of the *Rechtsstaat* and their manifestation in American constitutional law (promoting procedural justice) and German constitutional law (promoting material justice) has been confirmed by Rawls and Habermas.

This difference matters because it helps explain the German instinct to enshrine privacy as a substantive right that should be judicially administered against political forces. It also helps explain the American hesitance to do so. In fact, as the story of the Church Committee suggests, the question of how America will balance security and liberty is as much a story of political action as it is judicial review. It is true that that much American liberty has as much been won through judicial action. No case represents this legacy as dramatically as the Supreme Court's 1954 decision in *Brown v. Board of Education*, in which the Court unanimously ruled that racial segregation in America's schools was unconstitutional, thereby calling into question the whole of America's apartheid regime.[288] Women's rights,[289] and free speech,[290] and religious freedom,[291] and recently the rights of homosexuals can each claim landmark Supreme Court cases.[292] But these achievements also can be told through the lens of political processes. And with respect to the topic of liberty and security—indeed, even the broader topic of executive power—the Supreme Court has been conspicuously quiet. This has much to do with the Court's respect for the intricate separation of powers achieved by the constitution, an approach it often enforces through what we call the "political question doctrine." This is clearly a procedural understanding of the *Rechtssaat*.

The two countries' distinct legal heritage, as examples of the common law and civil law traditions, also sheds valuable explanatory light on the different approach they take to balancing security and liberty. Americans have not recognized a right to informational self-determination in no-small-part because a preventive defense against anticipated threats runs counter to the common law regulatory vision, which is less oriented towards systematic prevention. Instead, in keeping with the common law tradition, American law develops in response to distinct, actual cases. The common law does not try to regulate potential problems. Rather, problems are addressed by the law when they actually arise. American data protection law is an example of this fact-specific pragmatism. As discussed earlier in the report, data protection law is oriented towards responding to actual misuses of personal information in discrete functional settings. From the perspective of the civil law culture that prevails in Germany and Europe, data protection is an abstract social phenomenon that can be regulated *ex ante* by comprehensive and systematic statutes (including rights provisions in constitutions or treaties). From the American perspective, the potential misuse is less the concern. Rather, it is much more important that an actual abuse can be demonstrated. With this in mind, the issue is whether—although the NSA can be said to have pursued disproportionate and ill-conceived programs—the personal information resulted in manipulation and abuse of the kind discovered by the Church Committee.

[1] Simon Aondohemba Shaapera, *Theories of the State: Perspectives on the Nigerian Varient in European Scientific Journal* 21, 8 E. S. J. 20 accessed at http://eujournal.org/index.php/esj/article/view/318/347 (pointing out that "essential functions of the State are those which are necessary to uphold the power and safeguard the existence of the State such as: i. The maintenance of such armed forces as are necessary for defence (sic) against foreign invasion or domestic violence; ii. The maintenance of such police forces as are essential for the suppression of crime and the prosecution of criminals....".

[2] Aristotle, *Politics* (C.D.C. Reeve trans., Hackett Publishing 1998) (350 B.C.E.).

[3] Thomas Hobbes, *Leviathan*, (Edwin Curley ed., Hackett Publishing, 1994) (1651).

[4] John Locke, *Two Treatises of Government*, (Peter Laslett ed., Cambridge University Press 1988) (1690).

[5] Jean-Jacques Rousseau, Of t*he Social Contract*, in *The Social Contract and Other Later Political Writings*, (Victor Gourevitch trans., Cambridge University Press 1997) (1762).

[6] Rousseau, *supra*.

[7] Hobbes, *supra*.

[8] The State as the means by which humans can realize the best in themselves. Utilitarian understanding? *See, e.g.* Shaapera, *supra* at 20.

[9] Aristotle, *supra*.

[10] Hobbes, *supra*.

[11] Locke, *supra*.

[12] Rousseau, *supra*.

[13] Shaapera points out Marxist theories of statehood originate from an excess of productive capital being claimed as personal property, and these "social relations of production necessitated the emergence of the State which rests upon economic conditions and is expected to provide the necessary conditions to improve the living standards of the people in the society." Shaapera, *supra* at 19. Even economic theories of statehood require the state to provide security and stability.

[14] See footnote 1.

[15] "In a world where information is power, a vital element of our national security lies in our intelligence services. They are essential to our nation's security in peace as in war." Gerald Ford, Remarks to Congress (April 10, 1975) (partial transcript available at CIA.gov, https://www.cia.gov/news-information/featured-story-archive/2011-featured-story-archive/presidential-reflections-gerald-r.-ford.html).

[16] Mark Jaycox, *Update: Polls Continue to Show Majority of Americans Against NSA Spying*, Electronic Frontier Foundation, Jan.22, 2014, https://www.eff.org/deeplinks/2013/10/polls-continue-show-majority-americans-against-nsa-spying.

[17] John Norton Moore and Robert F. Turner, *National Security Law* 965 (Carolina Academic Press, 2005).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] U.N. Charter.

[22] *See, e.g.*, Alexander Rose, *The Strange Case of John Honeyman and Revolutionary War Espionage*, CIA.gov, https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol52no2/pdf/U-%20Studies%2052-2%20-Jun08-HoneymanCase-Web.pdf.

[23] P.K. Rose, *The Founding Fathers of American Intelligence*, Mar. 16, 2007, https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/the-founding-fathers-of-american-intelligence/art-1.html.

[24] *Id.*

[25] Kara Pierce, *A Revolutionary Masquerade: The Chronicles of James Rivington*, Binghamton University, http://www2.binghamton.edu/history/resources/journal-of-history/chronicles-of-james-rivington.html.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *History of American Intelligence*, CIA.gov, https://www.cia.gov/kids-page/6-12th-grade/operation-history/history-of-american-intelligence.html.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *History of the CIA*, CIA.gov, https://www.cia.gov/kids-page/6-12th-grade/operation-history/history-of-the-cia.html.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *What We Do*, CIA.gov, https://www.cia.gov/about-cia/todays-cia/what-we-do.

[51] Harry S. Truman, *Communications Intelligence Activities Memo*, Oct. 24, 1952, 5 (formerly classified document accessed at http://www.nsa.gov/public_info/_files/truman/truman_memo.pdf).

[52] *See generally Cold War Counterintelligence*, Federation of American Scientists, *accessed at* http://www.fas.org/irp/ops/ci/docs/ci3/ch1.pdf.

[53] Roger D. Launius, *Sputnik and the Origins of the Space Age*, NASA.gov, http://history.nasa.gov/sputnik/sputorig.html (illustrating the "Pearl Harbor effect" the Sputnik I launch had on American leaders and the American public).

[54] Federation of American Scientists, *supra* (providing biographical data on many of the Americans charged with Soviet espionage during the Cold War).

[55] Stephen J. Schulhofer, *Rethinking the Patriot Act* 23-24 (Century Foundation Press, 2005).

[56] *Id.*

[57] Schulhofer, *supra* at 15-21.

[58] *Id.*

[59] *Id.*

[60] USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 271.

[61] *Id.*

[62] Stephen J. Schulhofer, *Rethinking the Patriot Act* 39-46 (Century Foundation Press, 2005).

[63] *Id* at 39-40.

[64] *Id* at 40 (demonstrating the amendment of the purpose clause. Initially, under FISA, FISC was required to find the purpose of the surveillance was to gather foreign intelligence. The amended purpose clause only required the court to find a "substantial purpose" of the intelligence to be the collection of foreign intelligence).

[65] *Id* at 62.

[66] *Id* at 85-89.

[67] 18 U.S.C. § 2705(a)(2)(D).

[68] Schulhofer, *supra* at 80-84.

[69] Exec. Order No. 13228, 66 FR 51812 (October 8, 2001).

[70] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

[71] Intelligence Reform and Terrorism Protection Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004), codified at 50 U.S.C §3023.

[72] 6 U.S.C. § 121a.

[73] 50 U.S.C. § 3024.

[74] Exec. Order No. 12,333(1.3), 46 F.R. 59,941 (1981), reprinted as amended in 50 U.S.C. § 3001.

[75] Intelligence Reform and Terrorism Protection Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004), codified at 50 U.S.C §3023.

[76] 50 U.S.C. § 3025(b).

[77] 50 U.S.C. § 3023(b)(1).

[78] 50 U.S.C. § 3023(a)(1).

[79] 50 U.S.C. § 3023(b)(2).

[80] Exec. Order No. 12,333(1.3)(b)(1), 46 F.R. 59,941 (1981), reprinted as amended in 50 U.S.C. § 3001.

[81] 50 U.S.C. § 3024(a)(1).

[82] 50 U.S.C. § 3035.

[83] Harry S. Truman, Communications Intelligence Activities Memo, Oct. 24, 1952, 5 (formerly classified document accessed at http://www.nsa.gov/public_info/_files/truman/truman_memo.pdf).

[84] Department of Defense Directive No. 5105.21, Mar. 18, 2008, http://www.dtic.mil/whs/directives/corres/pdf/510521p.pdf

[85] 28 U.S.C. § 531

[86] 31 U.S.C. § 311

[87] The Bureau of Intelligence and Research (INR) was originally the Research and Analysis Branch of the OSS, but was transferred to the State Department after the war. See *The OSS Primer: An Enduring Legacy*, U.S. Army Special Operations Command, SOC.mil, http://www.soc.mil/OSS/oss-legacy.html.

[88] 42 U.S.C. § 7144b (Office of Counterintelligence). 42 U.S.C. § 7144c (Office of Intelligence).

[89] 6 U.S.C. § 121a

[90] See Jeffrey T Richelson, The US Intelligence Community (6th ed. 2011).

[91] See *id.*

[92] Thomas L. Burns, *The Origins of the National Security Agency: 1940-1952* 16, (Center for Cryptologic History, National Security Agency, 1990) *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB278/02.PDF.

[93] *Id* at 45.

[94] *Id* at 45-48.

[95] *Army Security Agency Established, 15 September 1945*, army.mil, http://www.army.mil/article/110544/.

[96] *Id.*

[97] Burns, *supra* at 16, 51 (illustrating the three different COMINT competing prior to the establishment of the NSA).

[98] *Id.*

[99] *Id* at 60.

[100] *Id* at 68.

[101] *Id* at 77.

[102] *Id* at 75-76.

[103] Harry S. Truman, *Communications Intelligence Activities Memo*, Oct. 24, 1952, 5 (formerly classified document accessed at http://www.nsa.gov/public_info/_files/truman/truman_memo.pdf).

[104] *Id.*

[105] Burns, *supra* at 97.

[106] *Id* at 97-98.

[107] David A. Hatch, *The Creation of NSA - Part 2 of3: The Brownell Committee*, http://www.nsa.gov/public_info/_files/crypto_almanac_50th/The_Creation_of_NSA_Part_3.pdf.

[108] Exec. Order No. 12,333, 46 F.R. 59,941 (1981), reprinted as amended in 50 U.S.C. § 3001.

[109] *Id* at (1.7)(c)(1).

[110] U.S. Const. art. II § 2 cl. 1.

[111] U.S. Const. art. I §8.

[112] DoDD 5100.20(9)(a).

[113] NSA / CSS Strategy, NSA.gov, http://www.nsa.gov/about/strategic_plan/.

[114] *NSA / CSS Mission, Vision, Values*, NSA.gov, http://www.nsa.gov/about/values/index.shtml.

[115] Camille Tuutti, *Introverted? Then NSA wants you.*, Apr. 16, 2012, FCW.com, http://fcw.com/blogs/circuit/2012/04/fedsmc-chris-inglis-federal-workforce.aspx.

[116] Dana Priest and William M. Arkin, *A Hidden World, Growing Beyond Control*, July 19, 2010, WashingtonPost.com, http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/print/.

[117] Exec. Order No. 13,462(3)(b), 73 F.R. 11,805, reprinted as amended in 50 U.S.C. § 3001.

[118] Exec. Order No. 13,462(3)(d)(i), 73 F.R. 11,805, reprinted as amended in 50 U.S.C. § 3001.

[119] Exec. Order No. 13,462(4)(a), 73 F.R. 11,805, reprinted as amended in 50 U.S.C. § 3001.

[120] Exec. Order No. 13,462(6)(b)(i)(A), 73 F.R. 11,805, reprinted as amended in 50 U.S.C. § 3001.

[121] Exec. Order No. 13,462(4)(a)(ii), 73 F.R. 11,805, reprinted as amended in 50 U.S.C. § 3001.

[122] See, e.g., IOB Matter 2007-3240, http://epic.org/foia_1/iob/INCORR00.PDF (overcollection of data); IOB Matter 2007-523, http://epic.org/foia_1/iob_1/LOGIN200.PDF (unauthorized interception of electronic communications data); IOB Matter 2005-132, http://epic.org/foia_1/iob_1/EXPIR300.PDF (continued wiretapping after the expiration of a warrant); IOB Matter 2007-835, http://epic.org/foia_1/iob_1/COMPOU00.PDF (use of unauthorized toll records in a case file).

[123] Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108–458, 118 Stat. 3638 § 1031 (2004) as codified in 50 U.S.C. § 3022.

[124] 50 U.S.C. § 3022(c)(1).

[125] Id.

[126] 50 U.S.C. § 3022(e)(1).

[127] 50 U.S.C. § 3022(f).

[128] 50 U.S.C. § 3022(b).

[129] Pub. L. No. 108-458 (2004).

[130] 50 U.S.C. § 3029(a)(1).

[131] 50 U.S.C. § 3029(b)(1).

[132] 50 U.S.C. § 3029.

[133] 42 U.S.C. § 2000ee.

[134] 42 U.S.C. § 2000ee(d)(1)(C).

[135] Pub. L. No. 108-458 Sec. 1061 (2004).

[136] 42 U.S.C. § 2000ee(b)(3).

[137] 42 U.S.C. § 2000ee(d)(2)(A).

[138] 42 U.S.C. § 2000ee-1(a).

[139] 42 U.S.C. § 2000ee(d)(3); 42 U.S.C. § 2000ee(e). .

[140] *See, e.g.*, Ronald L. Claveloux, The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy, 1983 Duke L.J. 1333 (1983) (demonstrating the tendency for the branches of government to each try to exert maximum authority to the detriment of the other); *see also* Scott Shane, *Recent Flexing of Presidential Powers Had Personal Roots in Ford White House*, NYTimes.com, Dec. 30, 2006, http://www.nytimes.com/2006/12/30/washington/30roots.html?pagewanted=all&_r=0.

[141] *Id.*

[142] For example, President Hoover's claims that caring for the poor during the Great Depression ought to be a local voluntary effort were used against him in his bid for re-election. He was "unfairly painted [] as a callous and cruel President." *Biography of Herbert Hoover*, WhiteHouse.gov, http://www.whitehouse.gov/about/presidents/herberthoover.

[143] Gerald Ford was the sitting President when leaks about CIA overreaches were published in the New York Times. The public backlash from this was a contributing factor to his failure to be re-elected.

[144] President Ford established the Rockefeller Commission in an effort to forestall investigation by Congress. *See* Andrew Downer Crain, *The Ford Presidency: A History* 117 (McFarland and Co., 2009).

[145] *Id.*

[146] *Id* at 119.

[147] U.S. President's Commission on CIA Activities Within the United States: Files, [1947-1974] 1975, Gerald R. Ford , Library, http://www.fordlibrarymuseum.gov/library/guides/findingaid/U.S.%20President's%20Commission%20on%20CIA%20Activities%20Within%20the%20United%20States%20-%20Files.htm.

[148] HPSCI R. P. 9(a).

[149] HPSCI R. P. 12-14.

[150] HPSCI R. P. 7(b)(3).

[151] *Overview of the Senate Select Committee on Intelligence Responsibilities and Activities*, Intelligence.Senate.gov, http://www.intelligence.senate.gov/about.html.

[152] *Id.*

[153] SSCI R. P. 9.

[154] *See* 95th Congress S. 1566, http://beta.congress.gov/bill/95th-congress/senate-bill/1566/actions (showing the actions taken with regard to the bill).

[155] Report of the Select Committee on Intelligence on the U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq, S. Report 108-301, 14, July 9, 2004.

[156] *Id.*

[157] Report on Whether Public Statements Regarding Iraq by U.S. Government Officials were Substantiated by Intelligence Information, S. Report 110-345, June 5, 2008.

[158] L. Elaine Halchin and Frederick M. Kaiser, *Congressional Oversight of Intelligence: Current Structure and Alternatives*, May 14, 2012, http://www.fas.org/sgp/crs/intel/RL32525.pdf.

[159] *Id* (pointing out reports that indicate Congressional oversight as being dysfunctional and counterproductive).

[160] *Church Committee Created*, Senate.gov, http://www.senate.gov/artandhistory/history/minute/Church_Committee_Created.htm.

[161] Seymore M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, New York Times, Dec. 22, 1974, *accessed at* http://s3.documentcloud.org/documents/238963/huge-c-i-a-operation-reported-in-u-s-against.pdf.

[162] National Security Act of 1947, 61 Stat. 496, § 104A(d).

[163] Inquest on Intelligence, *Newsweek*, May 10, 1976, at 40.

[164] Harry S. Truman, *Communications Intelligence Activities Memo*, Oct. 24, 1952, 5 (formerly classified document accessed at http://www.nsa.gov/public_info/_files/truman/truman_memo.pdf).

[165] Id.

[166] Exec. Order No. 12,333(1.7)(c), 46 F.R. 59,941 (1981), reprinted as amended in 50 U.S.C. § 3001.

[167] Exec. Order No. 12,333, 46 F.R. 59,941 (1981), reprinted as amended in 50 U.S.C. § 3001.

[168] Exec. Order No. 12,333(1.7)(c)(1), 46 F.R. 59,941 (1981), reprinted as amended in 50 U.S.C. § 3001.

[169] Exec. Order No. 12,333(1.7)(c)(4), 46 F.R. 59,941 (1981), reprinted as amended in 50 U.S.C. § 3001.

[170] Exec. Order No. 12,333(1.7)(c), 46 F.R. 59,941 (1981), reprinted as amended in 50 U.S.C. § 3001 (all the directives given to the Director of the NSA are in regards to signals intelligence).

[171] Exec. Order No. 12,333(1.7)(c)(4), 46 F.R. 59,941 (1981), reprinted as amended in 50 U.S.C. § 3001.

[172] 50 U.S.C. § 3003(2).

[173] Exec. Order No. 12,333(1.7)(c)(3), 46 F.R. 59,941 (1981), reprinted as amended in 50 U.S.C. § 3001.

[174] Exec. Order No. 12,333(1.7)(c)(5), 46 F.R. 59,941 (1981), reprinted as amended in 50 U.S.C. § 3001.

[175] 50 U.S.C. § 1802(a)(1).

[176] Executive Order No. 12,139, 44 F.R. 30311 (May 23, 1979), reprinted as amended in 50 U.S.C. § 1802.

[177] 50 U.S.C. § 1802(a)(1).

[178] 50 U.S.C. § 1802(a)(3).

[179] *Everything you Need to Know About PRISM*, The Verge (July 17, 2013), *available at* http://www.theverge.com/2013/7/17/4517480/nsa-spying-prism-surveillance-cheat-sheet.

[180] James Bamford, *The NSA Is Building the Country's Biggest Spy Center (Watch What You Say)*, Wired (Mar. 15, 2012) *available at* http://www.wired.com/2012/03/ff_nsadatacenter/all/.

[181] Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, The Guardian (June 5, 2013), http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order.

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.* See also Evan Perez, *NSA: Some Used Spying Power to Snoop on Lovers*, cnn.com, http://www.cnn.com/2013/09/27/politics/nsa-snooping/.

[186] The Verge, *supra*.

[187] U.S. Const. art. VI, cl. 2.

[188] *See, e.g.* U.S. Const. amend. I, U.S. Const. amend. II, U.S. Const. amend IV.

[189] U.S. Const. amend. I *See also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (demonstrating implied privacy in the freedom of association demanded by the First Amendment).

[190] U.S. Const. Amend III.

[191] *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

[192] U.S. Const. amend. IV.

[193] *Constitution of the United States of America*, Bill of Rights Institute, http://billofrightsinstitute.org/founding-documents/constitution/.

[194] See, e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

[195] U.S. Const. amend. III.

[196] U.S. Const. amend. V.

[197] U.S. Const. amend. IX.

[198]

[199] Alaska Const art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed."); Arizona Const. art. II, § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); California Const. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are . . . privacy."); Florida Const. art. I, § 12 ("Searches and Seizures -- The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated.") and art. I, § 23 ("Right to Privacy -- Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."); Hawaii Const. art. I, § 6 ("Right To Privacy -- The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.") and art. I, § 7 ("Searches, Seizures and Invasion of Privacy -- The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted."); Illinois Const. art. I, § 6 ("Searches, Seizures, Privacy and Interceptions -- The people shall have the right to be secure in their persons, houses, papers and other

possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.") and art. I, § 12 ("Right To Remedy and Justice -- Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly."); Louisiana Const. art. I, § 5 ("Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court."); Montana const. art. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."); South Carolina Const. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained."); Washington const art. I, § 7 ("Invasion of Private Affairs or Home Prohibited -- No person shall be disturbed in his private affairs, or his home invaded, without authority of law.").

[200] *Griswold*, 381 U.S. at 480.

[201] *Id* at 485.

[202] *Id* at 484.

[203] *Id* at 485-86.

[204] U.S. Const. amends. V, XIV.

[205] *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950) (Justice Jackson says that "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

[206] *Roe v. Wade*, 410 U.S. 113 (1973).

[207] *Roe*, 410 U.S. at 153.

[208] Quotes from dissenting justices in various cases expression doubt about the credibility of substantive d.p.? Scalia/Thomas? An example from a prominent law review article or book?

[209] See e.g. Lawrence v. Texas, 539 U.S. 558 (2003).

[210] 429 U.S. 589 (1977).

[211] U.S. Const. amend. IV.

[212] R. Carter Pittman, *The Supremacy of the Judiciary: A Study of Preconstitutional History*, 40 A.B.A. J. 389 at 391 (quoting Justice Horace Gray Jr.).

[213] 389 U.S. 347 (1967).

[214] Id. at 351.

[215] *Katz*, 389 U.S. at 348.

[216] *Id* at 352.

[217] 442 U.S. 735 (1979).

[218] Id. at 742 (quoting United States v. New York Tel. Co., 434 U.S. 159, 174 -175 (1977)).

[219] *American Civil Liberties Union v. James Clapper*, 959 F.Supp.2d 724, No. 13-3994 (S.D. New York December 28, 2013).

[220] *Id*. At 750-52.

[221] *Klayman v. Obama*, 957 F.Supp.2d 1 (D. D.C. 2013).

[222] *Id* at 33.

[223] *Id* at 32.

[224] *Id* at 32-33.

[225] *Id* at 33-36.

[226] 494 U.S. 259 (1990).

[227] U.S. v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) (quoting Johnson v. Eisentrager, 339 U.S. 763, 784 (1950)).

[228] 553 U.S. 723 (2008).

[229] *See* Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S.C. LAW REV. 259 (2009).

[230] 50 U.S.C. § 1802(a)(1).

[231] 50 U.S.C. § 1802(a)(1)(B).

[232] 50 U.S.C. § 1802(a)(3).

[233] 50 U.S.C. § 1804.

[234] 50 U.S.C. § 1805(a)(3).

[235] 18 U.S.C. § 2511.

[236] 50 U.S.C. § 1803.

[237] 50 U.S.C. § 1804.

[238] 50 U.S.C. § 1805.

[239] 50 U.S.C. § 1801(h)(1).

[240] 50 U.S.C. § 1801(h) (minimization procedures are to be "designed in light of the purpose and technique of the particular surveillance").

[241] 50 U.S.C. §1805.

[242] 50 U.S.C. § 1806.

[243] 50 U.S.C. § 1809

[244] 50 U.S.C. § 1810

[245] Congress.gov, http://beta.congress.gov/bill/113th-congress/house-bill/3361/actions (Detailing Congressional action with regards to the USA FREEDOM Act).

[246] H.R. 3361.

[247] Id.

[248] Barton Gellman, *Obama's Restrictions on NSA Surveillance Rely on Narrow Definition of 'Spying'*, WashingtonPost.com, Jan. 17, 2014, http://www.washingtonpost.com/world/national-security/obamas-restrictions-on-nsa-surveillance-rely-on-narrow-definition-of-spying/2014/01/17/2478cc02-7fcb-11e3-93c1-0e888170b723_story.html

[249] Exec. Order No. 12,333(2.4), 46 F.R. 59,941 (1981), reprinted as amended in 50 U.S.C. § 3001.

[250] Exec. Order No. 12,333(1.7), 46 F.R. 59,941 (1981), reprinted as amended in 50 U.S.C. § 3001.

[251] Exec. Order No. 12,333(1.5)(c), 46 F.R. 59,941 (1981), reprinted as amended in 50 U.S.C. § 3001.

[252] Exec. Order No. 12,333(1.6)(c), 46 F.R. 59,941 (1981), reprinted as amended in 50 U.S.C. § 3001.

[253] Presidential Policy Directive / PPD-28, The White House Office of the Press Secretary, http://www.whitehouse.gov/sites/default/files/docs/2014sigint_mem_ppd_rel.pdf

[254] Id.

[255] Amendment No. 4 to THE Appendices to the UKUSA Agreement, Appendix A (top secret treaty recently declassified).

[256] David E. Sanger, U.S. and Germany Fail to Reach a Deal on Spying, NYTimes.com, May 1, 2014, http://www.nytimes.com/2014/05/02/world/europe/us-and-germany-fail-to-reach-a-deal-on-spying.html?_r=1.

[257] 50 U.S.C. § 3231(a).

[258] 50 U.S.C. § 3231(b).

[259] *Q&A: What you need to know about Echelon*, BBC News, May 29, 2001, accessed at http://news.bbc.co.uk/2/hi/sci/tech/1357513.stm.

[260] UKUSA Agreement, *supra*.

[261] *Id.*

[262] *Id.*

[263] *See, e.g.*, Richards J. Heuer, Jr. and Katherine Herbig, *Espionage by the Numbers: A Statistical Overview*, United States Department of Agriculture Personnel and Document Security Division, accessed at http://www.dm.usda.gov/ocpm/Security%20Guide/Treason/Numbers.htm.

[264] *See U.S. v. Pollard*, 959 F.2d 1011, 295 U.S. App. D.C. 7 at 1017-18, 13-14. See also Maya Shwayder, *Israel Might Offer Palestinian Prisoners To Obama In Exchange For Convicted Spy Jonathan Pollard*, International Business Times, Feb. 19, 2013, accessed at http://www.ibtimes.com/israel-might-offer-palestinian-prisoners-obama-exchange-convicted-spy-jonathan-pollard-1094264.

[265] : Sociologically speaking, with an intelligence-sharing agreement in place, and sharing channels established, social inertia alone could be responsible for sharing regardless of applicable law. See James Risen and Laura Poitras, *Spying by N.S.A. Ally Entangled U.S. Law Firm*, NYTimes.com, http://www.nytimes.com/2014/02/16/us/eavesdropping-ensnared-american-law-firm.html?_r=0 (Feb. 15, 2014) (demonstrating at least one occasion when a five eyes nation has offered to share intelligence that the NSA could not have legally obtained).

[266] 50 U.S.C. § 1802.

[267] Risen and Poitras, *supra*.

[268] *Id.*

[269] 50 U.S.C. § 1801(h).

[270] Jeffrey Rosen, *A Grave New Threat to Free Speech From Europe*, NEW REPUBLIC (Feb. 10, 2012), *available at* http://www.newrepublic.com/article/politics/100664/freedom-forgotten-internet-privacy-facebook.

[271] Lisa Fleischer, *Google Ruling: Freedom of Speech vs. the Right to Be Forgotten*, WSJ-DIGITS (May 13, 2014), available at http://blogs.wsj.com/digits/2014/05/13/eu-court-google-decision-freedom-of-speech-vs-right-to-be-forgotten/.

[272] Id, 3.

[273] 44 U.S. Code § 3301

[274] 44 U.S. Code § 3101-3107.

[275] 18 U.S.C. § 2071..

[276] 18 U.S.C. § 3121 et seq.

[277] Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) codified as amended in 5 U.S.C. § 552.

[278] 47 U.S.C. § 551(a)(1)(A).

[279] 47 U.S.C. § 551(a)(1)(B).

[280] 47 U.S.C. § 551(c)(2)(D).

[281] Id.

[282] 47 U.S.C. § 222(c)(1).

[283] 47 U.S.C. § 222(c)(1).

[284] I8 U.S.C. § 3121.

[285] 18 U.S.C. § 2511.

[286] 18 U.S.C. § 2520.

[287] 18 U.S.C. § 2520(c)(2)(B).

[288] 347 U.S. 483 (1954).

[289] *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973)(providing a measure of reproductive autonomy to women); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923)(striking down federal minimum wage legislation that was specific to women); *Reed v. Reed*, 404 U.S. 71 (1971)(held that executors of estates cannot be preferred based on gender).

[290] *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969)(protecting the speech of white supremacists at a rally); *Cohen v. California*, 403 U.S. 15 (1971)(protecting the use of profanity in public); *Texas v. Johnson*, 491 U.S. 397 (1989)(protecting flag-burning as political speech); *Watchtower Society v. Village of Stratton*, 536 U.S. 150 (2002)(declaring unconstitutional the requirement of a permit for door-to-door communication on the grounds that it would have a chilling effect on political discourse).

[291] *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296 (1940)(declaring unconstitutional the permit requirements for religious solicitation in a jurisdiction that had no permit requirement for non-religious solicitation); *Abington School District v. Schempp*, 374 U.S. 203 (1963)(holding that mandatory school prayer violates the Establishment Clause); *McDaniel v. Paty*, 435 U.S. 618 (1978)(forbidding states from barring clergy from government office); *Edwards v. Aguillard*, 482 U.S. 578 (1987)(declaring a law requiring the teaching of creationism alongside evolution as having no secular purpose and therefore violating the Establishment Clause); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993)(protecting Santeria practitioners right to sacrifice animals in religious ceremonies)

[292] *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003).