

Civil Liberty and National Security: The Implications of the Debate for the
United States Intelligence Community

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Abstract

For years, the US Intelligence Community has worked to maintain the thin and often wavering line between civil liberty and national security in its attempts to protect the American people while simultaneously preserving their constitutional rights. However, this line has often shifted with the course of American history, including events such as the Alien and Sedition Acts, the establishment of the Church Committee, and the publication of the NSA's data collection program. One of the most significant of these factors was the passage and eventual amendment of the Foreign Intelligence Surveillance Act, which opened the door to later constitutional controversies. In the midst of this ever-changing national landscape, how is the US Intelligence Community to strike a balance between protecting the American people and ensuring their civil freedoms?

The Intelligence Community must remember that it has a responsibility to protect both the American people and their constitutional freedoms. The Intelligence Community faces the unique challenge of reconciling the freedom of the American people to live safely and the freedom of the US government, embodied by the executive branch, to lead. In recent history, it has done a remarkable job of instituting measures of oversight and enacting greater controls on itself as part of the executive branch to avoid the unconstitutional missteps it has taken in the past. Intelligence agencies in the present and future must continue to prioritize not only on the safety of the United States and its people but also on the maintenance of the liberties guaranteed to them under the US Constitution.

Civil Liberty and National Security: The Implications of the Debate for the United States Intelligence Community

For nearly as long as the United States has existed as a nation, there has been a perpetual struggle between the rights of the government and the rights of its citizens; in fact, the United States was itself the product of such tension. For decades, politicians, legislators, presidents, and the American public have all striven to find a balance between the guarantee of liberty for individual American citizens and the pressing demands of national security, which often appear in direct opposition. Over the centuries both pressure to cede greater control over the lives of its citizens to the federal government and countervailing pressure to reclaim individual civil liberty from government reach have created fluctuations in national power reflected in both federal legislative and executive action. The current state of domestic security concerns has arisen as a product of such events and corresponding actions on the part of both the American government and the American people, and the future condition of the intelligence and civil liberty balance will likewise reflect ongoing attitudes and events. Members of the Intelligence Community must consider the past, present, and future implications of national security measures in the light of civil liberty concerns in order to best protect American citizens both tangibly and intangibly.

The crucial distinction to make in the debate of civil liberty and national security is one of perspective, particularly regarding the primacy of ideas. Which is the baseline for determination of the country's atmosphere, liberty or security? Put another way, is civil liberty the foundation that is occasionally surrendered in the name of national security, or is national security the base state that is temporarily surrendered in the name

of civil liberty? The entire premise of the debate is comprised within this one central question, which Ben Franklin once answered succinctly: “Those who would give up essential Liberty to purchase little temporary Safety, deserve neither Liberty nor Safety.”¹ This oft-quoted maxim has been historically utilized by those adamant against government encroachment into American freedoms as guaranteed by the founding documents; however, according to Benjamin Wittes with the Brookings Institute, the quote’s original significance was to an opposite effect.²

Wittes recounts the history of the phrase as an influential Pennsylvania family attempting to avoid taxes on their property that would be used for defense purposes by encouraging the governor to overturn the legislature’s attempts to enforce taxation.³ Finally, the family offered a compromise; they would contribute to the town’s defense voluntarily in exchange for a cessation of attempted tax legislation, thereby undermining the authority of the legislature in the area of defense.⁴ Franklin’s quote regarding liberty and security did not mean surrendering freedom to the government in exchange for government protection but dichotomously sacrificing the freedom of the government to act in defense of its citizens in exchange for a momentary influx of funds which could immediately secure that defense.⁵

¹ Robert Siegel, “Ben Franklin’s Famous ‘Liberty, Safety’ Quote Lost Its Context In 21st Century,” NPR.org, March 2, 2015, accessed February 5, 2018, <https://www.npr.org/2015/03/02/390245038/ben-franklins-famous-liberty-safety-quote-lost-its-context-in-21st-century>.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

This view exposes the true heart of the civil liberty versus national security debate: despite countless other opinions and perspectives on the topic or related subjects, notwithstanding the passionate and intense rhetoric that mires the discussion in emotion, the center of the entire quagmire boils down to one primary question: whose liberty is superior? Does the state's liberty to govern,⁶ under which defense is a subcategory further delineated to national security, supersede an individual citizen's liberty to exist and act freely independently within his country, or vice versa? Abraham Lincoln asked a similar question when he said, "Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?"⁷ While this distinction clarifies the true aim of the debate, it unfortunately fails to simplify the complications, implications, or inevitable answer of the question. However, it does provide a proper perspective from which to analyze the historical evidence for each side, beginning with a summary of the circumstances, provisions, and results of each historical event from the founding of the United States through the USA PATRIOT and FREEDOM Acts, and their significance for the US Intelligence Community.

History

The document that established the American structure of government was the United States Constitution, which famously begins:

We the people of the United States, in order to form a more perfect union, establish Justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the Blessings of Liberty to ourselves and

⁶ Robert Siegel, "Ben Franklin's Famous 'Liberty, Safety' Quote Lost Its Context in 21st Century."

⁷ David Bromwich, "To Maintain a Republic," *Huffingtonpost.com*, September 2, 2011, accessed March 6, 2018, https://www.huffingtonpost.com/david-bromwich/to-maintain-a-republic_b_889509.html

posterity, do ordain and establish this Constitution for the United States of America.⁸

Even in its preamble, the dichotomous concepts of liberty and defense are not only present but interestingly lacking their traditional juxtaposition. However, the content of the document itself espouses a theme that runs forward through American history: the idea of government power limited by the will of the people, in no area more significant than that of military and intelligence matters. This concept entwines so thoroughly with the very structure of American government, from federalism to checks and balances between the branches of government, that it can hardly be understated. Above and beyond every other sentiment expressed in the nation's founding documents, a hesitation regarding the concentration of power in the hands of a governmental system has always reigned supreme. Stated outright in the Declaration of Independence, the authority and liberty to govern are deliberately granted to the federal government first by the people—"deriving their just powers from the consent of the governed"⁹— and then, in the Tenth Amendment, by the states—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹⁰

While the Constitution establishes the underlying foundation for the guarantee of rights to American citizens, liberties are directly explicated in the Bill of Rights. The ten amendments include various protected rights intended to secure freedom for the governed and dictate a proper framework of government in view of the consistent theme of the

⁸ The Essential Liberty Project, *The Patriot's Essential Liberty Pocket Guide*, (USA: Publius Press, Inc., 2014), 37.

⁹ *Ibid.*, 32.

¹⁰ *Ibid.*, 49.

delegation of power from the people to the government. Most relevant to the discussion of civil liberty are the First and Fourth Amendments. The First Amendment incorporates five key provisions: the freedoms of speech, petition, press, religion, and assembly.¹¹ The Fourth prevented the arbitrary person and property searches.¹² The Tenth Amendment, referenced above, reserves for the states those rights not explicitly given to the federal government.¹³ The sum total of the Declaration of Independence, the Constitution, and the Bill of Rights serves to provide the origin, foundation, and enumeration of the rights guaranteed to American citizens which are, by most accounts, straightforward. However, it would be less than a decade before the Constitution and the Bill of Rights faced their first major challenge of application in the form of the Alien and Sedition Acts.

The Alien and Sedition Acts were enacted during the tension between France and the United States and dated from the Fifth US Congress in 1798.¹⁴ Caught between Britain and an increasingly turbulent France that threatened to pull the US into a war that could condemn the newborn nation to an early grave, the United States sought desperately for a path that would allow it to remain clear of the debris of a disintegrating Europe.¹⁵ However, foreign policy struggles were not the only issues that faced the United States; domestic squabbles between the Federalists, who leaned towards support

¹¹ The Essential Liberty Project, *The Patriot's Essential Liberty Pocket Guide*, 48.

¹² *Ibid.*, 48-49.

¹³ *Ibid.*, 49.

¹⁴ Alan Taylor, "The Alien and Sedition Acts," in *The American Congress: The Building of Democracy*, ed. Julian E. Zelizer, (Boston, MAL Houghton Mifflin, 2004), 63, accessed March 30, 2018, https://books.google.com/books?id=_MGEIiwT5pUC&pg=PA63&lpg=PA63&dq=alan+taylor+the+alien+and+sedition+acts&source=bl&ots=4Y2HQp8c5f&sig=d_Vz64iowqiNijf77X5XM-XhEo&hl=en&sa=X&ved=0ahUKEwi3ssWEq5TaAhXH11MKHdU_DLoQ6AEIQTAD#v=onepage&q=alan%20taylor&f=false

¹⁵ *Ibid.*, 65

of Britain, and the Republicans, who related more consistently to the French cause, created serious complications for Congress and the nation as these party confrontations often used legislation and other matters of national importance as pawns for their political gamesmanship, with devastating consequences for civil liberties.¹⁶

Furious over implications that France had actors working on its behalf within the United States, a bitterly divided Congress enacted the Alien and Sedition Acts in an effort to eradicate any perilous rhetoric that could propel the young country into the European conflict.¹⁷ Comprised of four pieces of legislation, the Acts construed breaches of civil liberty that most Americans today would find unconscionable.¹⁸ The first, the Naturalization Act, was by far the least damaging to US freedoms, merely increasing the time required for a resident alien to become a citizen from five to fourteen years and requiring the registration of immigrants and aliens already in the United States within respective time periods of two days and six months.¹⁹ However, this legislation only arose following dissension in the Federalist ranks after the majority refused to endorse the original measures proposed by the party's firebrands, which included a halt on immigration and a ban against the vote for immigrants who were not yet naturalized, intended to cripple the Republicans who derived political support from Irish immigrants sympathetic to Britain.²⁰

¹⁶ Taylor, "The Alien and Sedition Acts," 64-65.

¹⁷ *Ibid.*, 66.

¹⁸ *Ibid.*, 67.

¹⁹ *Ibid.*, 68.

²⁰ *Ibid.*, 68.

The second part of the acts, the Alien Enemies Act, granted the president authority to arrest and deport immigrants from enemy nations during time of war, a statute never utilized during its originating context.²¹ This measure was one of the least complicated of the Acts, passing both houses easily with approval from both Republicans and Federalists.²²

However, the luck of smooth legislation passage quickly ran out as the third piece, the Alien Act, began in the Senate and quickly ran into opposition.²³ The Alien Act allowed the executive branch to order the deportation of any immigrant generically deemed “dangerous to the peace and safety of the United States,”²⁴ without a trial or even official charges brought against the individual.²⁵ The chief opponents of this legislation were Albert Gallatin, himself an immigrant and a Republican and Representative Edward Livingstone, considered by many a Federalist turncoat.²⁶ Gallatin and Livingstone argued vehemently against the Alien Act, citing interestingly not guaranteed liberties under the Bill of Rights, which may have been overturned based upon the lack of citizenship of those affected, but instead using the 10th Amendment and the Constitution to claim that powers of immigration were not given specifically to the federal government and therefore were reserved to the states, rendering the Alien Act’s

²¹ Taylor, “The Alien and Sedition Acts,” 68-69.

²² *Ibid.*, 69.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

passage at the federal level unconstitutional and ineffectual.²⁷ The Federalists in response argued that such powers fell under the purview of the federal government in its responsibility to defend American citizens, and this logic prevailed, leading to the passage of the Act, which was nevertheless never put into effect by a hesitant John Adams before its expiration in 1800.²⁸

Despite the political battles, intense discussion, and overall ineffectuality of the previous three acts, the fourth and final piece of the Alien and Sedition Acts would prove to be the most constitutionally devastating and the most often applied of the group.²⁹ Under the Sedition Act, “it became a federal crime to utter or publish ‘any false, scandalous, and malicious writing or writings against the government of the United States or the President of the United States, with intent to defame...or to bring them to contempt or disrepute.’”³⁰ To any modern reader, the violation of First Amendment freedoms by this legislation is obvious; however, in its historical context, the Sedition Act led to ultimate clarification of Bill of Rights protections where previous differentiation of interpretations existed.³¹ The Federalists, with their British-influenced take on political understanding, referenced William Blackstone’s view of the freedoms of speech and press:

‘The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published... Thus the will of individuals is

²⁷ Taylor, “The Alien and Sedition Acts,” 69-70.

²⁸ *Ibid.*, 70.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*, 70-71.

still left free, and only the abuse of this free-will is the object of legal punishment.³²

Based upon this interpretation of freedom of speech and considering the absence of any stated definition in either the Constitution or the Bill of Rights,³³ the Sedition Act was permissible and even progressive, given its deviation from British tradition in the jurisdiction of juries as opposed to judges, the requirement of malicious intent, and the permission of truth as defense.³⁴ However, the Republican viewpoint on the proper definition differed significantly, as Republican legislators used the Bill of Rights as a foundation to argue against the imposition of British common law at the American federal level, questioning the truth defense allowance and the resting of the burden of proof upon the defense as opposed to the prosecution.³⁵ Ultimately, the Republicans were overridden, and the legislation became law, though designed to expire in 1801.³⁶

Before it could do so, the Sedition Act was vigorously enforced by Federalist congressmen, Cabinet members, and even Federalist newspapers desiring increased profits as Republican papers were shut down by prosecutions and fines.³⁷ A temporary victory, the law allowed for the arrest of a Republican congressman critical of the Federalist president and electoral gains in the House during the next election cycle.³⁸ Instead of discouraging Republican-controlled or Republican-favoring papers to back

³² Taylor, "The Alien and Sedition Acts," 70-71.

³³ *Ibid.*, 71.

³⁴ *Ibid.*, 70-71.

³⁵ *Ibid.*, 71-72.

³⁶ *Ibid.*, 72.

³⁷ *Ibid.*, 72-74.

³⁸ *Ibid.*

down from critiquing Federalist actions, such organizations instead increased their opposition.³⁹ The ease of tension with France that followed shortly and the cessation of bellicosity was likewise a great detriment to the party, which had hoped to use the conflict as a platform to accomplish its goals.⁴⁰ In the 1800 elections, Republicans gained a majority in the House, an even stance in the Senate, and a presidential victory with the election of Thomas Jefferson.⁴¹ The Republican rise to power signified the end of the Federalist Party, which later descended to obscurity and oblivion.⁴²

The constitutional violations of civil liberties constituted by the Alien and Sedition Acts and the subsequent political defeat of the Federalist Party⁴³ speak volumes for the liberty and security debate. The events of the nation's founding and the buildup to a potential conflict with France both showcase a particular implication regarding the sacrifice of either freedom or security for the sake of the other. The unfortunate historical example of the Federalist Party demonstrates that in the face of pressing national security concerns, issues regarding civil liberty maintain precedence.

Unfortunately, the US Intelligence Community has been slow to comprehend and implement this lesson. In 2014, the United States became aware of a massive data collection program that had unintentionally surveilled its own citizens.⁴⁴ The public was

³⁹ Taylor, "The Alien and Sedition Acts," 74.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid., 74-75.

⁴³ Ibid., 63-75.

⁴⁴ Bart Gellman, Julie Tate, and Ashkan Soltani, "In NSA-intercepted data, those not targeted far outnumber the foreigners who are," *The Washington Post*, last modified July 5, 2014, accessed November 27, 2016, <https://www.washingtonpost.com/world/national-security/in-nsa-intercepted-data-those-not->

outraged, calling the program a violation of American constitutional rights.⁴⁵ However, the collection program's defenders argued that collection against US citizens had been incidental, with the true intelligence targets being foreign nationals.⁴⁶ Intelligence collection against foreign nationals is not bound by the constitutional strictures that apply to American citizens but instead falls under the jurisdiction of the Foreign Intelligence Surveillance Act of 1978, which created the Foreign Intelligence Surveillance Court to regulate electronic surveillance on behalf of the Intelligence Community.⁴⁷

The Foreign Intelligence Surveillance Act was a product of factors set in motion long before its passage in 1978.⁴⁸ American civil liberties had been under siege from both the executive and legislative branch, often via the Intelligence Community, for decades. "...In 1940... Roosevelt's order narrowed the use of wiretapping to listening in on espionage by foreign agents... President Harry S. Truman, presiding over the beginning of the Cold War, approved the tapping of phones in cases involving 'domestic security.'"⁴⁹ These directives, among others, began the slippery slope of compromising the individual freedoms of American citizens in the name of national security, particularly as the Cold War grew in intensity and bitterness.

targeted-far-outnumber-the-foreigners-who-are/2014/07/05/8139adf8-045a-11e4-8572-4b1b969b6322_story.html?tid=a_inl&utm_term=.375057730169

⁴⁵ Bart Gellman, Julie Tate, and Ashkan Soltani, "In NSA-intercepted data, those not targeted far outnumber the foreigners who are."

⁴⁶ Ibid.

⁴⁷ James McAdams, *Foreign Intelligence Surveillance Act (FISA): An Overview*, FLETC.gov, 1-2, accessed March 20, 2018, https://www.fletc.gov/sites/default/files/imported_files/training/programs/legal-division/downloads-articles-and-faqs/research-by-subject/miscellaneous/ForeignIntelligenceSurveillanceAct.pdf

⁴⁸ Ibid., 2.

⁴⁹ Thomas Allen, *Declassified: 50 Top-Secret Documents That Changed History*, (Washington, D.C.: National Geographic, 2008), 276.

The turbulent political arena of the early 1970s spawned trouble for the Intelligence Community.⁵⁰ Johnson writes, “The setting in Washington at the time included a resurgent Congress, which had resolved to halt the erosion of its powers at the hands of what Arthur Schlesinger famously described as the “imperial presidency,” symbolized most conspicuously by the events known in shorthand as “Watergate” and “Vietnam.””⁵¹ Many ambitious policymakers saw a sensational exposé on government overreach in the civil liberties arena as the ticket to power. One such politician was Idaho Senator Frank Church, who hoped to ride the wave of fame stemming from the committee that bore his name to a presidency.⁵²

The recent scandals faced by the legislative branches were deeply interconnected with those of the Intelligence Community. For decades, the Intelligence Community had operated with virtually no oversight, briefing only the president on ongoing intelligence activities, and that only when absolutely necessary.⁵³ Against this backdrop, Senator Church led a congressional inquiry into executive overreach in national security.⁵⁴ The Senate Select Committee to Study Governmental Operations with Respect to Intelligence

⁵⁰ Samuel Walker, *Presidents and Civil Liberties From Wilson to Obama: A Story of Poor Custodians*, (New York, NY: Cambridge University Press, 2012), 327-335.

⁵¹ Loch K. Johnson, “James Angleton and the Church Committee,” *Journal of Cold War Studies*, 15(4), Fall 2013, 128-147, para. 2, accessed April 13, 2018, <http://muse.jhu.edu.ezproxy.liberty.edu/article/534418>

⁵² Walker, *Presidents and Civil Liberties from Wilson to Obama*, 334.

⁵³ Johnson, “James Angleton and the Church Committee.”

⁵⁴ *Ibid.*

Activities, or the Church Committee,⁵⁵ attempted to rein in the Intelligence Community, particularly the CIA, to which he referred as ““a rogue elephant on a rampage.””⁵⁶

The Church Committee in 1975 began to unearth programs and actions conducted by the Intelligence Community that constituted potentially serious legal violations.⁵⁷ The Central Intelligence Agency (CIA) remained the primary focus of the Committee’s inquiry after the revelation of several incriminating programs. Operation CHAOS, the agency’s surveillance and collection against anti-war protestors during Vietnam, included Project HT Lingual, the opening of first-class mail in violation of the First Amendment rights and federal law.⁵⁸ These operations, among others, caused an uproar when information regarding its illegality was leaked to the *New York Times*.⁵⁹ The Huston Plan, enacted under President Nixon, granted the Intelligence Community the ability to violate the First and Fourth Amendment rights of student groups on university campuses.⁶⁰ The president believed these groups or at least a percentage of their members were in collusion with the Communist Party in an attempt to overthrow the United States.⁶¹

However, by far the most damaging was a leak that occurred after Director of Central

⁵⁵ Federal Judicial Center, “Foreign Intelligence Surveillance Court and Court of Review, 1978-present,” n.d., retrieved from <https://www.fjc.gov/history/courts/foreign-intelligence-surveillance-court-and-court-review-1978-present>

⁵⁶ Walker, *Presidents and Civil Liberties From Wilson to Obama*, 334.

⁵⁷ Ibid.

⁵⁸ Johnson, “James Angleton and the Church Committee.”

⁵⁹ Ibid.

⁶⁰ Melissa Graves, “Reform in the IC: Nixon’s Huston Plan,” *International Journal of Intelligence and CounterIntelligence*. Vol.30 Iss.1, published online November 2, 2016, 152-153, accessed March 26, 2018, <https://www.tandfonline.com/doi/abs/10.1080/08850607.2016.1230705?needAccess=true#aHR0cHM6Ly93d3cudGFuZGZvbmxpbmUuY29tL2RvaS9wZGYvMTAuMTA4MC8wODg1MDYwNy4yMDE2LjEyMzA3MDU/bmVIZEFjY2Vzcz10cnVlQEBA==>

⁶¹ Ibid., 151-153.

Intelligence James R. Schlesinger ordered the compilation of a list of all constitutional violations carried out by the agency in an attempt to solve many of the CIA's problems in-house.⁶² This list, known as "the family jewels,"⁶³ caused the CIA significant embarrassment when it leaked to the *New York Times* and was published for the world to read.⁶⁴

However, the CIA was not the only agency to lose face during the Church Committee's investigation. Church Committee lawyers also discovered a secret Federal Bureau of Investigation (FBI) counterintelligence program, Cointelpro, which "had harassed civil rights activists and Vietnam War dissidents in an attempt to fray and often break apart family and friendship ties."⁶⁵ This revelation, on top of the realization that the Bureau had maintained files on a million US citizens without court approval and had investigated nearly half that number, only added fuel to the Church Committee fire.⁶⁶

The last straw for many Americans was the result of the Committee's investigation into the National Security Agency (NSA). The NSA's involvement in a program codenamed SHAMROCK, which raised questions of constitutionality when Committee lawyers discovered that telegram companies had been providing overseas transmissions to the NSA, including the communications of American citizens to foreign nationals overseas, a historical foreshadowing of the current NSA data collection

⁶² Johnson, "James Angleton and the Church Committee."

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Loch K. Johnson, "Congressional Supervision of America's Secret Agencies: The Experience and Legacy of the Church Committee," *Public Administration Review*, 64(1), 3-14, January-February 2004, 6, accessed April 2, 2018, http://www.jstor.org/stable/3542622?pq-origsite=summon&seq=4#page_scan_tab_contents

⁶⁶ Johnson, "James Angleton and the Church Committee."

controversy.⁶⁷ The program revealed had existed during the presidency of Harry Truman in 1952 as a leftover from the Second World War, though it was uncertain whether any president or attorney general since had been informed of its existence, much less granted permission for it to continue.⁶⁸ While the NSA denied that its analysts had read American messages, the fact that private companies had contributed to such violations of constitutional privacy was solely alarming.⁶⁹

SHAMROCK was not the only questionable program unearthed by the Church Committee. “Under Operation MINARET, begun in the late 1960s, the agency compiled a watch list of dissenters, deserters, and anyone participating in civil disturbances, including notable individuals like Joan Baez, Dr. Martin Luther King, Jr., and Jane Fonda, which it distributed to the army and other government agencies.”⁷⁰ As unconstitutional programs began to pile up, the Church Committee’s report grew in significance as well as potential impact for both the Intelligence Community and Congress.⁷¹

The committee’s report, when it was finally published, prompted major changes to the Intelligence Community, primarily in the area of executive approval, while affirming its importance to national security and acknowledging the necessity of

⁶⁷ L. Britt Snider, “Unlucky Shamrock: Recollections from the Church Committee’s Investigation of NSA,” Center for the Study of Intelligence, 1999, accessed April 13, 2018, <https://search-proquest-com.ezproxy.liberty.edu/docview/1679112668?accountid=12085>

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Katherine Scott, *Reining in the State: Civil Society and Congress in the Vietnam and Watergate Eras*, (Lawrence, KS: University Press of Kansas, 2013), 144.

⁷¹ Ibid., 144-145.

operational covert action capacity.⁷² “The committee insisted on greater Congressional and policymaker oversight of intelligence...”⁷³ This was accomplished through the establishment of the intelligence oversight committees in both houses of Congress; the Senate Select Committee on Intelligence was established in 1976 as a direct result of the Church committee’s report.⁷⁴ Johnson explains, “The Senate put into place a potentially effective standing committee, equipped with a large and experienced professional staff, devoted to monitoring the secret agencies day by day and reviewing their programs and budgets with a fine-tooth comb.”⁷⁵ The House followed suit with its own intelligence committee.⁷⁶ No longer would the CIA or the NSA have free rein to enact any surveillance or covert action operations against American citizens or without prior approval, at minimum, of the attorney general.⁷⁷ Also, no longer would the president have full and total control over the actions of the Intelligence Community,⁷⁸ as the Church Committee’s research proved that, despite Church’s elephant metaphor, many of the CIA’s questionable actions had been presidentially approved.⁷⁹

Another direct result of the Church Committee’s investigation and eventual report was the creation of legislation dictating the requirement of judicial approval for

⁷² Central Intelligence Agency, “A Look Back... The Church Committee Meets,” *www.cia.gov*, 2011, accessed April 13, 2018, <https://search-proquest-com.ezproxy.liberty.edu/docview/1679073735?pq-origsite=summon&accountid=12085>.

⁷³ *Ibid.*, para. 3

⁷⁴ Johnson, “Congressional Supervision of America’s Secret Agencies,” 10-11.

⁷⁵ *Ibid.*, 10.

⁷⁶ *Ibid.*

⁷⁷ McAdams, *Foreign Intelligence Surveillance Act (FISA): An Overview*.

⁷⁸ Scott, *Reining in the State*, 162.

⁷⁹ Walker, *Presidents and Civil Liberties From Wilson to Obama*, 334.

surveillance and intelligence collection regarding particularly signals intelligence (SIGINT).⁸⁰ Walker writes, “The eventual FISA law was a compromise that for the first time granted the federal government explicit wiretap authority in national security cases but subjected it to procedural controls.”⁸¹ This authority and control eventually emerged from the legislative process in the form of the Foreign Intelligence Surveillance Act of 1978.⁸²

As a result of the Church Committee’s inquiry, “an Act to authorize electronic surveillance to obtain foreign intelligence information”⁸³ or the Foreign Intelligence Surveillance Act (FISA) was introduced to Congress in 1977.⁸⁴ FISA fundamentally changed the way intelligence agencies operated. The legislation marked the beginning of a new perspective on civil liberties and intelligence collection in the name of national security.⁸⁵ Walker claims, “The FISA law, the War Powers Act, and the new congressional intelligence committees were the monuments of the post-Watergate era efforts to subject national security activities to the rule of law.”⁸⁶ FISA reigned in both

⁸⁰ Johnson, “Congressional Supervision of America’s Secret Agencies.”

⁸¹ Walker, *Presidents and Civil Liberties From Wilson to Obama*, 370.

⁸² Johnson, “Congressional Supervision of America’s Secret Agencies.”

⁸³ Congress.gov, “S.1566 - An Act to Authorize Electronic Surveillance to Obtain Foreign Intelligence Information,” n.d., retrieved from <https://www.congress.gov/bill/95th-congress/senate-bill/1566?q=%7B%22search%22%3A%5B%22public+law+95-511%22%5D%7D&r=1>

⁸⁴ *Ibid.*

⁸⁵ Walker, *Presidents and Civil Liberties From Wilson to Obama*, 369.

⁸⁶ *Ibid.*

the operational surveillance capabilities of the Intelligence Community⁸⁷ and the authority of the president to arbitrarily order electronic surveillance.⁸⁸

The Foreign Intelligence Surveillance Act, as passed, included provisions regulating a myriad of electronic surveillance activities conducted by the Intelligence Community towards foreign nationals within the continental United States.⁸⁹ The act made any unauthorized surveillance by a law enforcement or intelligence officer illegal, as well as establishing precedent for the legality and use of any intelligence collected during such surveillance in criminal proceedings.⁹⁰ It “permit[ed] the President, acting through the Attorney General, to authorize electronic surveillances for foreign intelligence purposes without a court order in certain circumstances.”⁹¹ However, the attorney general was required to ascertain that surveillance methods conformed to established requirements before authorization, and to inform the Senate and House Intelligence Committees of these methods 30 days in advance of their application.⁹² He or she is also required to report to the Administrative Office of the United States Courts annually on the number of requests submitted and whether those requests were authorized or denied, as well as reporting to Congress and its respective Intelligence Committees, which were in turn required to report once every five years to the full House and

⁸⁷ Walker, *Presidents and Civil Liberties from Wilson to Obama*, 369.

⁸⁸ Scott, *Reining in the State*, 162.

⁸⁹ McAdams, *Foreign Intelligence Surveillance Act (FISA): An Overview*.

⁹⁰ Congress.gov, “S.1566 - An Act to Authorize Electronic Surveillance to Obtain Foreign Intelligence Information.”

⁹¹ *Ibid.*, para. 1.

⁹² *Ibid.*

Senate.⁹³ Finally, the Act allowed the President to authorize 15 days of surveillance on a foreign target without authorization of the Court in a time of war.⁹⁴

The Attorney General's responsibility increased significantly in regards to intelligence collection under FISA. He or she was to provide a copy of the authorization for electronic surveillance to the appropriate court before the action is undertaken.⁹⁵ The Attorney General also had the power to authorize electronic surveillance in an emergency scenario without waiting for approval from a FISA judge, given that the judge was notified of the action and the approval requested within 24 hours.⁹⁶ This emergency authority could last only for 24 hours, until the necessary intelligence was gathered, or until the appropriate judge approved the surveillance request.⁹⁷

The passage of FISA had immediate and drastic effects on the Intelligence Community, most directly the CIA, FBI, and NSA. It increased the oversight both of the legislature, through the recently established House and Senate Intelligence Committees,⁹⁸ and the judiciary, through the establishment of the Foreign Intelligence Surveillance Court.⁹⁹ It also shifted power to authorize electronic surveillance away from the direct control of the sitting US President,¹⁰⁰ a practice which had historically proved

⁹³ Congress.gov, "S. 1566."

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid., para. 1.

⁹⁷ Ibid.

⁹⁸ Walker, *Presidents and Civil Liberties From Wilson to Obama*, 338-339.

⁹⁹ Scott, *Reining in the State*, 162-164.

¹⁰⁰ Ibid., 162.

detrimental to the Intelligence Community itself and to overall national security and the protection of civil liberties.¹⁰¹

First, the Foreign Intelligence Surveillance Act protected the Intelligence Community from the arbitrary and often unconstitutional requests of US presidents. FISA was designed to “protect Americans from ‘the unchecked power of the President to engage in foreign intelligence electronic surveillances,’ a major accomplishment considering that ‘the personal attitudes of executive-branch officials remain the only governing standard for such operations.’”¹⁰² The powerful president could bend the Intelligence Community to his will, forcing them to condone and conduct unconstitutional actions against American citizens, but the intelligence agencies and their leaders and officers had no recourse.¹⁰³ FISA neutralized these problems by transferring the authorization power for intelligence actions from the executive branch to the legislative through the establishment of the House and Senate Intelligence Committees.¹⁰⁴

The passage of the Foreign Intelligence Surveillance Act did more than protect the Intelligence Community from the whims of any particular US president; it also served to protect the Intelligence Community from itself.¹⁰⁵ While certain of the unconstitutional programs revealed by the Church Committee were initiated or advocated by the President, the Intelligence Community had instigated several unconstitutional programs

¹⁰¹ Scott, *Reining in the State*, 162; Graves, “Reform in the IC,” 152-158.

¹⁰² Scott, *Reining in the State*, 162.

¹⁰³ *Ibid.*, 162, 165-166.

¹⁰⁴ Walker, *Presidents and Civil Liberties*, 338-339.

¹⁰⁵ Graves, “Reform in the IC: Nixon’s Huston Plan,” 152-158.

on its own volition, including the Huston Plan.¹⁰⁶ Graves writes, “When Nixon had revoked his authorization of the [Huston] plan five days after authorizing it, the agencies expressed their disappointment and quietly went back to doing everything the Huston Plan had authorized to them, without presidential direction or approval.”¹⁰⁷ The willingness of intelligence agencies to compromise the freedoms they had sworn to protect in order to accomplish their mission was troubling,¹⁰⁸ and the programs brought to light by the congressional investigations soon made it clear that the Intelligence Community required an outside control mechanism to rein in its own self-destructive tendency to violate civil liberties in the name of national security.¹⁰⁹ FISA provided the oversight to curb Intelligence Community leeway by requiring approval before electronic surveillance requests were authorized.¹¹⁰ Walker writes, “What is unknown, of course is the extent to which the mere existence of the FISA process deterred the government from seeking many dubious requests or forced it to do more investigation to provide a justifiable request.”¹¹¹ While as a counterfactual the true impact of the FISA court and its requirements on the Intelligence Community cannot be calculated, “Robert M. Gates, a career intelligence officer and DCI under the first President Bush...[stated that]‘[S]ome awfully crazy schemes might well have been approved had everyone present not known

¹⁰⁶ Graves, “Reform in the IC: Nixon’s Huston Plan,” 154-158.

¹⁰⁷ *Ibid.*, 155.

¹⁰⁸ *Ibid.*, 153.

¹⁰⁹ Johnson, “Congressional Supervision of America’s Secret Agencies.”

¹¹⁰ Walker, *Presidents and Civil Liberties From Wilson to Obama*, 370.

¹¹¹ *Ibid.*

and expected hard questions, debate, and criticism from the Hill...”¹¹² either from the congressional Intelligence Committees that had been co-products of the Church Committee alongside FISA or from the judges of the FISA court. The fact remains that FISA has done much to ensure that the Intelligence Community minds the delicate balance between constitutional freedoms and national security, primarily by consistently reminding intelligence agencies of the necessity of conforming to congressionally-set expectations.¹¹³

Finally, FISA served to protect the Intelligence Community from accusations of impropriety and unconstitutionality from the media and the American public. The continuous saga of intelligence revelations in the national media throughout the Church Committee investigations had served to undermine the image and credibility of the Intelligence Community in the eyes of the American public.¹¹⁴

Scott summarizes, “After years of disclosures of extralegal activities by intelligence agencies, which at the least violated certain constitutional, if not legal rights, the American public was in no mood to trust its leaders.”¹¹⁵ The imposition of controls and oversight on the Intelligence Community served to reassure the public that the intelligence agencies were indeed working on their behalf, striving to protect them from threats to national security, not constituting a threat to their liberties.¹¹⁶ The restrictions imposed by FISA and the necessity of authorization from the FISA court discouraged the

¹¹² Johnson, “Congressional Supervision of America’s Secret Agencies.”

¹¹³ Walker, *Presidents and Civil Liberties From Wilson to Obama*, 370.

¹¹⁴ Scott, *Reining in the State*, 144, 161.

¹¹⁵ *Ibid.*, 161.

¹¹⁶ *Ibid.*, 177-178.

belief that the Intelligence Community was, in Senator Church's words, "a rogue elephant,"¹¹⁷ free to undertake any form of intelligence collection, without any attempt at oversight or concern for civil freedoms.¹¹⁸

Despite FISA's success at reigning in overreach on the part of the Executive Branch and the Intelligence Community, it still suffered its share of failures and controversy. Walker writes, "Although a historic step toward controlling national security intelligence gathering, FISA proved to be as flawed as its critics feared."¹¹⁹ One of the most decried aspects of FISA was the method in which the FISA court conducted itself, particularly its lack of restraint upon the Intelligence Community. Walker expounds, "The FISA court was exceedingly compliant and granted virtually all government requests for warrants. Between 1978 and 2004, it rejected a grand total of 5 requests while granting 18,761. And perhaps four of those rejected were later granted after being modified to satisfy the court."¹²⁰

FISA critics also emphasized the secrecy of both the electronic surveillance allowed by FISA and the FISA Court itself.¹²¹ Rule writes, "The FISA court would deliberate in secret, so that targets of surveillance would not be aware of the fact unless ultimately prosecuted. Nor...would the public have the opportunity to evaluate appropriateness of the permissions that it granted..."¹²² Thus FISA fell prey to the

¹¹⁷ Walker, *Presidents and Civil Liberties From Wilson to Obama*, 334.

¹¹⁸ Scott, *Reining in the State*, 162, 177-178.

¹¹⁹ Walker, *Presidents and Civil Liberties From Wilson to Obama*, 370.

¹²⁰ *Ibid.*

¹²¹ James B. Rule, *Privacy in Peril: How We Are Sacrificing a Fundamental Right in Exchange for Security and Convenience*, (New York, NY: Oxford University Press, 2007), 53.

paradox that often afflicts national security programs: the challenge of maintaining an aura of transparency and accountability to oversight that will satiate the American public while maintaining the upmost secrecy possible. The establishment of the House and Senate Select Committees on Intelligence served to allay this dilemma as much as possible by providing an avenue for accountability of the intelligence services that had clearance to receive and understand classified information.¹²³

While FISA remains the law of the land in regards to restrictions on electronic and other methods of surveillance, the legislation has undergone multiple alterations since its passage. FISA was first amended in 1994 to widen its application from only electronic surveillance to physical searches.¹²⁴ Congress authorized the expansion of FISA provisions to extend to searches of physical property, arguing that these searches should be included under the jurisdiction of the entire FISA Court as opposed to solely that of the Attorney General.¹²⁵ Smaller changes also occurred in the following years, as in 2000, when Congress expanded FISA's definition of a foreign agent to workers of foreign governments who either use or obtain a false identification, or in 2001, when legislation clarified which sectors of federal investigators could utilize FISA procedures.¹²⁶

¹²² Rule, *Privacy in Peril*, 53.

¹²³ Walker, *Presidents and Civil Liberties From Wilson to Obama*, 370.

¹²⁴ Center for National Security Studies, "Foreign Intelligence Surveillance Act (FISA)," n.d. retrieved from <http://www.cnss.org/pages/foreign-intelligence-surveillance-act-fisa.html>

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

However, a major change was wrought to FISA courts and legislation after the tragedy of September 11, 2001.¹²⁷ Bamford writes, “For years, under [NSA Director Michael Hayden’s] leadership, the agency had deliberately taken an overly cautious approach to eavesdropping and, possibly as a result, contributed to the intelligence failures that led to the attacks. Now he had a different priority.”¹²⁸ This change of direction was spearheaded by then-Vice President Dick Cheney.¹²⁹ Bamford writes, “He also had serious disagreements with even the existence of FISA, an impediment on presidential power that he believed ‘served to erode the authority I think the president needs to be effective, especially in a national security area.’”¹³⁰ The problem of maintaining homeland security once again brought to the forefront of national discussion by a failure to do so on behalf of the world’s premier intelligence agencies, and the White House began to push an expansion of FISA protocol and procedures.¹³¹

Bamford also points out one of the problems with FISA rising from 9/11:

“...Under existing laws like FISA, you have to have the name of somebody, have to already suspect that someone’s a terrorist before you can get a warrant...”¹³² Intelligence agencies, particularly the NSA in regards to signals intelligence (SIGINT) or cyber intelligence (CYBER), could identify the locations of individuals involved in al-Qaeda, but could not request warrants to tap communications because they could not identify the

¹²⁷ James Bamford, *The Shadow Factory: the Ultra-Secret NSA from 9/11 to the Eavesdropping on America*, (New York, NY: Random House, Inc., 2008), 96, 108.

¹²⁸ *Ibid.*, 12, 27, 96.

¹²⁹ *Ibid.*, 112-115.

¹³⁰ *Ibid.*, 115.

¹³¹ *Ibid.*, 96, 112-115.

¹³² *Ibid.*, 115.

individuals to complete a FISA warrant.¹³³ The congressional effort to correct this lack of surveillance authority to reach those responsible for the national tragedy resulted in the USA PATRIOT Act of 2001.

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, or the USA PATRIOT Act,¹³⁴ expanded the provisions of the Foreign Intelligence Surveillance Act in several areas. First, it allowed for the sharing of collected intelligence on foreign targets between intelligence agencies and with law enforcement.¹³⁵ The PATRIOT Act expanded FISA procedures to account for this flaw, primarily through authorizing interagency communication and the sharing of intelligence gained through electronic surveillance.¹³⁶

This legislation also upheld FISA as the determining standard for electronic surveillance procedures, as well as increasing the number of judges presiding over the Foreign Intelligence Surveillance Court from seven, as the original bill had indicated, to eleven.¹³⁷ The law also adjusted FISA warrant requirements. Rule writes, “Instead of allowing secret monitoring of communications only for investigations declared to have obtaining foreign intelligence information as their ‘primary purpose,’ Patriot Act language permits such investigations where such intelligence was a ‘significant

¹³³ Bamford, *The Shadow Factory*, 115.

¹³⁴ “H.R.3162 - Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001,” Congress.gov, accessed March 20, 2018, <https://www.congress.gov/bill/107th-congress/house-bill/3162?q=%7B%22search%22%3A%5B%22PATRIOT%22%5D%7D&r=1>

¹³⁵ Ibid.

¹³⁶ “H.R.3162 - Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001,” Congress.gov.

¹³⁷ Ibid.

purpose.”¹³⁸ Finally, the expansion of the time period of surveillance for foreign targets was one of the law’s most crucial amendments to the original FISA protocols.¹³⁹

Aside from critiques against the permissibility of the Foreign Intelligence Surveillance Court, the actual FISA legislation accomplished much of what it was designed to do. However, that did not stop future presidents from ignoring it outright when necessary. One of the largest controversies surrounding FISA legislation occurred under the Bush Administration in 2005.¹⁴⁰ Walker writes, “FISA exploded into a major controversy under President George W. Bush when it was revealed that he authorized secret wiretaps evading the law altogether. That controversy was a sobering commentary on the limits of not just FISA but all of the post-Watergate national security reforms.”¹⁴¹ The subsequent investigation revealed that the Bush administration had tapped the NSA to conduct illegal wiretaps on American citizens in the immediate aftermath of the September 11, 2001 attacks on World Trade Center and the Pentagon.¹⁴² Exposure of the program resulted when an employee of one of the involved communications corporations had discovered the NSA’s use of equipment within the facility where he worked, and soon the nation was shocked to discover that the NSA had, against the congressional limitations of FISA, illegally wiretapped American citizens.¹⁴³

¹³⁸ Rule, *Privacy in Peril*, 55.

¹³⁹ “H.R.3162 - Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001.” Congress.gov.

¹⁴⁰ Walker, *Presidents and Civil Liberties From Wilson to Obama*, 466-467.

¹⁴¹ *Ibid.*, 370.

¹⁴² *Ibid.*, 466-467.

¹⁴³ *Ibid.*

The problem for the Bush Administration, particularly Vice President Dick Cheney and attorney David Addington, began when FISA started turning down his administration's requests for warrants in the wake of 9/11.¹⁴⁴ Bamford writes, "Judges on the court kicked back more wiretap requests from the Bush administration than from the four previous administrations combined."¹⁴⁵ Cheney and others in the administration also had a deep-seated resentment for the Foreign Intelligence Surveillance Act as detracting from presidential authority and thus jeopardizing national security.¹⁴⁶ Frustrated at their failure to gain the court's approval for the measures they felt were necessary to deter another terrorist attack and to hunt down those responsible for the devastation,¹⁴⁷ "after 9/11 they [Cheney and Addington]...dealt with FISA the way they dealt with other laws they didn't like: they blew through them in secret."¹⁴⁸ With Attorney General John Ashcroft, underling John C. Yoo, and NSA Director Michael Hayden, Cheney and Addington began looking for a way to avoid what they viewed as the court's impediment of necessary homeland security strategies.¹⁴⁹ This circumvention of the FISA requirements and the FISA court resulted in the development of a program that, through cooperation with companies, allowed the NSA to spy on incoming and outgoing messages in the form of both phone calls and emails.¹⁵⁰

¹⁴⁴ Bamford, *The Shadow Factory*, 113.

¹⁴⁵ *Ibid.*

¹⁴⁶ Bamford, *The Shadow Factory*, 115.

¹⁴⁷ *Ibid.*, 112.

¹⁴⁸ *Ibid.*, 112-113.

¹⁴⁹ *Ibid.*, 112-115.

¹⁵⁰ Walker, *Presidents and Civil Liberties From Wilson to Obama*, 467.

While NSA Director Hayden lacked Cheney's derision for the Foreign Intelligence Surveillance Act, he "complained that it was designed for an earlier period of time,"¹⁵¹ and this belief impacted his actions in regard to the NSA's wiretap program, which was designed to bypass "cumbersome and time-consuming"¹⁵² FISA procedures. As a result, Hayden found himself briefing the congressional intelligence committees on a related program that provided the springboard for the wiretaps.¹⁵³ Then, "just days after the briefing, on October 4, Hayden received authorization to bypass the Foreign Intelligence Surveillance Court and begin eavesdropping on international communications to and from Americans without a warrant."¹⁵⁴ The NSA had managed to completely nullify FISA restrictions, and the Intelligence Community once again began to closely reflect Senator Church's "rogue elephant on a rampage."¹⁵⁵

How had a premier US intelligence agency and a sitting US President managed to completely circumvent the Foreign Intelligence Surveillance Act, despite its expansions under the recently passed USA PATRIOT Act? FISA, despite the alterations of the PATRIOT Act, stood squarely in the path of such a program, as did its court.¹⁵⁶ Neither was capable of preventing the executive decision to merely ignore the constitutional requirements for electronic surveillance in the name of national security.¹⁵⁷ In fact, "except for the presiding judge, Royce Lamberth, the FISA Court was also kept in the

¹⁵¹ Bamford, *The Shadow Factory*, 109.

¹⁵² *Ibid.*, 110.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*, 118.

¹⁵⁵ Walker, *Presidents and Civil Liberties From Wilson to Obama*, 334.

¹⁵⁶ Bamford, *The Shadow Factory*, 112-113.

¹⁵⁷ *Ibid.*, 116-118.

dark about the NSA's warrantless program."¹⁵⁸ Lamberth was called into a meeting with Ashcroft, Yoo, and Hayden regarding the program, but rather than being consulted on the legality of such a program, he was informed that the "presidential decision"¹⁵⁹ to enact the program had already been made. Lamberth had no alternative but to go along with the program; the safeguards imposed by FISA had been steamrolled in the name of national security.¹⁶⁰ He would later critique the program publicly, warning, "We have to understand you can fight the war [on terrorism] and lose everything if you have no civil liberties left when you get through fighting the war."¹⁶¹

Unfortunately for the NSA, it did not seem to learn its lesson, for 2005 would not be the last time it was caught in violation of the Foreign Intelligence Surveillance Act. As referenced above, in 2014 the NSA was revealed to be collecting the communications of US citizens while conducting a data mining program targeted towards foreign nationals after a contractor leaked classified FISA information pulled from NSA computers.¹⁶² Once again, despite its best efforts at congressional and judicial oversight, the Intelligence Community was found on the wrong side of the fine line separating actions that ensure national security and those that violate the freedoms of the people it protects.

The story that one of America's premier intelligence agencies, the NSA, was running a top-secret data collection and retention program that had inadvertently gathered information on American citizens shocked the public when it was leaked by NSA

¹⁵⁸ Bamford, *The Shadow Factory*, 116.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*, 116-117.

¹⁶¹ *Ibid.*, 117.

¹⁶² Bart Gellman, Julie Tate, and Ashkan Soltani, "In NSA-intercepted data, those not targeted far outnumber the foreigners who are."

contractor Edward Snowden.¹⁶³ *Washington Post* reporter Bart Gellman published an article on the NSA's data collection programs in 2014, detailing the NSA's activities in programs such as PRISM and Upstream.¹⁶⁴ Gellman explained the accidental collection of data of American citizens including medical records, transcripts, and personal photographs as an unintended side effect of an attempt to target foreign actors who posed potential threats to national security.¹⁶⁵ The surveillance of Americans under these programs raised concerns about potential violations of the rights guaranteed to American citizens in the Bill of Rights.

The primary problems arose in the retention of the data and the amount of data collected relating to citizens versus the amount collected on the actual intended target.¹⁶⁶ The NSA kept much of the collected information, regardless of its relevance to current targets or ongoing operations, unwilling to let any potential intelligence slip through the cracks.¹⁶⁷ This practice raised concerns given Gellman's analysis that 9 out of 10 pieces of data were unrelated to foreign targets.¹⁶⁸

While many people were quick to condemn the NSA's actions, specifically in retaining the personal information of American citizens, American Enterprise Institute's Gary Schmitt makes a valid observation that increased cyber surveillance for the sake of national security was "demanded from the intelligence community in the wake of 9/11 in

¹⁶³ Bart Gellman, Julie Tate, and Ashkan Soltani, "In NSA-intercepted data, those not targeted far outnumber the foreigners who are."

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

order to help to preempt similar attacks.”¹⁶⁹ Reeling from the events of September 11, 2001 that left thousands of Americans dead, the American public began pressuring law enforcement and intelligence communities to step up their counterterrorism activities and forces.¹⁷⁰ As a result, Congress swiftly passed the Intelligence Reform and Terrorism Prevention Act of 2004, which, among other things, created the position of Director of National Intelligence (DNI) and reformed the process by which intelligence agencies share intelligence. Congress later enacted the FISA Amendments Act of 2008, which allowed the targeting of foreign actors outside the continental US under certain strict limitations, including the provisions of the Fourth Amendment, and which established the responsibility of the Attorney General and the Intelligence Community in overseeing counterterrorism activity under FISA.¹⁷¹

In discussions of privacy violations, the First and Fourth Amendment are often cited.¹⁷² The First Amendment guarantees the freedoms of speech, press, religion, petition, and assembly.¹⁷³ Some would argue that programs such as the NSA’s data collection of American citizens violate their freedoms of speech and press by cataloguing their online discussions, or even the right to assemble, given that some data was collected

¹⁶⁹ Gary J. Schmitt, “The NSA and Americans caught up in the data sweep,” Aei.org, July 7, 2014, accessed November 27, 2016, <https://www.aei.org/publication/the-nsa-and-americans-caught-up-in-the-data-sweep/>

¹⁷⁰ Ibid.

¹⁷¹ “H.R. 3773- FISA Amendments Act of 2008: Summary- H.R. 3773- 100th Congress (2007-2008),” Congress.gov, March 14, 2008, accessed November 27, 2016, <https://www.congress.gov/bill/110th-congress/house-bill/3773?q=%7B%22search%22%3A%5B%22FISA+2008%22%5D%7D&r=1>

¹⁷² Gary J. Schmitt, “Rogue panel reports on non-rogue NSA program,” Aei.org, December 21, 2013, accessed November 27, 2016, <https://www.aei.org/publication/rogue-panel-reports-on-non-rogue-nsa-program/>

¹⁷³ Essential Liberty Project, *The Patriot’s Essential Liberty Pocket Guide*, 48.

in online chat rooms, even of those who did not comment but were merely present.¹⁷⁴ The Fourth Amendment states that, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation...”¹⁷⁵

Several problems arise in any attempt to define the constitutionality of programs related to data collection on any form of cyber platform. According to Paul Rosenzweig, a Heritage Foundation Fellow, “...information you disclose to a third party is not protected by the Fourth Amendment. In the context of data privacy, that means that there is no constitutional protection against the collection and aggregation of your cyber data (credit card purchase and the like) for purposes of data analysis...”¹⁷⁶ His comment on third party information is a reference to the Supreme Court case *Smith v. Maryland*, where “the Court held that... when we reveal private information to a third party, we lose privacy rights over it.”¹⁷⁷ This case determined that data freely given to an outside source is no longer under Fourth Amendment protection;¹⁷⁸ according to this precedent, the NSA’s collection program would pass as constitutional because the information is freely

¹⁷⁴ Bart Gellman, Julie Tate, and Ashkan Soltani, “In NSA-intercepted data, those not targeted far outnumber the foreigners who are.”

¹⁷⁵ Essential Liberty Project, *The Patriot’s Essential Liberty Pocket Guide*, 48.

¹⁷⁶ Paul Rosenzweig, “The State of Privacy and Security- Our Antique Privacy Rules,” Heritage.org, July 2012, accessed November 28, 2016, <http://www.heritage.org/research/testimony/2012/08/the-state-of-privacy-and-security-our-antique-privacy-rules>

¹⁷⁷ John Yoo, “The flaw in the Fourth Amendment NSA ruling,” Aei.org, December 17, 2013, accessed November 27, 2016, <https://www.aei.org/publication/the-flaw-in-the-fourth-amendment-nsa-ruling/>

¹⁷⁸ Ibid.

shared with outside sources and then collected by the agency from those sources which are not protected by the Fourth Amendment.

Rosenzweig goes on to explain that a further problem with claiming invasion of privacy by the NSA is the lack of applicability of current privacy laws to modern data collection.¹⁷⁹ Put simply, privacy protection requirements are so antiquated as to be useless in defining what is legal or illegal in regards to modern data collection.¹⁸⁰ These laws are collated into a series of criteria known as the Fair Information Principles, which defined different aspects of privacy and dictated the constitutional limits of government access into the private lives of its citizens.¹⁸¹ However, many of these requirements are either inapplicable to data collection via modern Internet sources or fly in the face of the purpose of data collection in providing information from which analysts can extract valuable intelligence.¹⁸² The ever-changing definitions of privacy, anonymity, and obscurity, as referenced by Rosenzweig in his testimony, do nothing to assist in clarifying this argument.¹⁸³ What, then, is the final analysis of the programs' constitutionally?

The only true litmus test for a breach of constitutional limitation on federal government is the Constitution itself, in this case specifically the Bill of Rights. The most relevant amendment to the NSA's programs is the Fourth, which defends against the unqualified search of a person or their belongings, to include material and intellectual

¹⁷⁹ Rosenzweig, "The State of Privacy and Security- Our Antique Privacy Rules."

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid.

property.¹⁸⁴ It would seem simple that the collection of a person's online postings or messages by a federal agency would be a violation of this constitutional protection if not for the precedent set by the Supreme Court in *Smith v. Maryland*.¹⁸⁵ It is the responsibility of the Court to apply the Constitution and its amendments faithfully within a modern context that is not specifically spelled out in the original documents themselves. In the case of *Smith*, the Court ruled that information voluntarily surrendered to a third party was not protected under the Fourth Amendment, because the owner of that intellectual property had willingly released it to an actor outside of him or herself.¹⁸⁶ What happened to the information afterwards was not a matter of constitutionality, and it is under the cover of this third-party precedent that the NSA's programs fall. Because the American Internet users voluntarily turned this information over to either internet providers, which PRISM targeted,¹⁸⁷ or to other individuals via the Internet, they can no longer claim constitutional protection for that information under the Fourth Amendment.¹⁸⁸ Thus, it is not a constitutional violation for the NSA to collect this data for its own purposes.

The other controversial aspect of the NSA revelations is the retention of this data by the agency once it determined it to be inconsequential.¹⁸⁹ However, as problematic as this practice may strike some, it is not specifically addressed by the Constitution. In the

¹⁸⁴ Essential Liberty Project, *The Patriot's Essential Liberty Pocket Guide*, 48.

¹⁸⁵ Yoo, "The flaw in the Fourth Amendment NSA ruling."

¹⁸⁶ *Ibid.*

¹⁸⁷ Bart Gellman, Julie Tate, and Ashkan Soltani, "In NSA-intercepted data, those not targeted far outnumber the foreigners who are."

¹⁸⁸ Yoo, "The flaw in the Fourth Amendment NSA ruling."

¹⁸⁹ *Ibid.*

name of national security, this information continues to be collected and archived in the hope that eventually it may be used as a small piece of the puzzle that will prevent future attacks or deter potential threats against the United States and all of its citizens.

James Carafano summarized this analysis well when he wrote for the Heritage Foundation:

It is clear that the NSA has sufficient legal authority to conduct legitimate counterterrorism surveillance. It cannot be determined, from what is publically available, whether the NSA faithfully followed the law or whether the surveillance, even if legal, was appropriate to the threats being addressed. It is, however, up to the instruments of ordered liberty to provide us satisfactory answers.¹⁹⁰

While no American citizen would condone even the implication that his or her rights were being infringed upon by federal government, a strong case exists to support the conclusion that the NSA's actions were and are constitutional, enacted in the hopes of protecting American citizens from a catastrophic national security disaster on par with the event that triggered the genesis of these programs.

However, an important facet of this discussion is the relevance of the original context of these programs. The months and years following the unprecedented terror attacks of September 11, 2001, left the nation in a state of panic, confusion, and fear. Measures needed to be taken both to assuage the fears of the public and to deter other attacks in the immediate aftermath of 9/11, while US national security and military forces were trying to regain their footing and determine responsibility.¹⁹¹ Bamford writes, "Civil

¹⁹⁰ James Jay Carafano, "For Conservatives, Snowden Is Hero and Horror," Heritage.org, June 21, 2013, accessed November 27, 2016, <http://www.heritage.org/research/commentary/2013/6/for-conservatives-snowden-is-hero-and-horror>

¹⁹¹ Schmitt, "The NSA and Americans caught up in the data sweep."

liberties were out, Fortress America was in.”¹⁹² Americans were more willing to condone actions with potential privacy violations in the name of national defense in the wake of such a shocking attack than they were more than a decade removed from the horrors of September 11:

[Yoo] noted that while such unprecedented and intrusive actions might be rejected on constitutional grounds during normal times, they are now justified as a result of the 9/11 attacks. During such times, he said, ‘the government may be justified in taking measures which in less troubled conditions could be seen as infringements of individual liberties.’¹⁹³

Situational context is not ultimately a factor in determining constitutionality, but it does speak to the creation and implementation of the NSA’s data programs and the intention behind them.

Implications for the US Intelligence Community

While the NSA’s data collection program may pass the test of constitutionality, this does not eliminate the damage done by the initial revelation to the reputation of the Intelligence Community, already tragically wounded by the events that brought about the formation of Church Committee and subsequently the Intelligence Committees and spurred by the FISA revelations of 2005. The circumstances surrounding the birth of the United States, the country’s founding documents, and nearly every significant event that has occurred in US history reflect this sentiment: the American people always have and always will place the value of personal civil freedom above any other concern, including the all-important preservation of national security. Intelligence agencies must understand and share this perspective if they are to remain effective and relevant in the current political environment. Failure to do so on the part of the Federalist Party in 1798 and the

¹⁹² Bamford, *The Shadow Factory*, 108.

¹⁹³ *Ibid.*, 108, 116.

Intelligence Community in the 1970s resulted in the death of the party after the 1800 election and a loss of faith in and increased oversight of the Community in 1970s. Walker writes that Church's "[rogue elephant] metaphor caught the popular imagination and still defines the CIA for many people."¹⁹⁴ The US Intelligence Community has, through its own actions, lost the trust of the American people, resulting in an attitude of skepticism at best and calls for its disestablishment at worst.

If Intelligence Community agencies are to continue in their desire to protect the United States and its citizens, they must take drastic and immediate steps both to remedy its historic problems with civil liberties violations and repair its image in the eyes of those it strives to protect. However, this deference to civil liberty can be difficult for the US Intelligence Community, an organization primarily dedicated to the defense of national security. In this, as in all other sectors of the debate, perspective is key. The Intelligence Community is responsible not only for the protection of the people of the United States but also for the protections of the rights of those people. With this in mind, it is imperative that the agencies of the Intelligence Community consider the perspective of American citizens in the accomplishment of their goals; both the security of the people of the United States but the security of their rights must be kept in mind. This trend has recently become more apparent in the publications of Intelligence Community agencies. The CIA's official website declares its mission to "preempt threats and further US security objectives,"¹⁹⁵ while simultaneously addressing concerns over civil liberties: "We uphold the highest standards of lawful conduct... We maintain the Nation's trust

¹⁹⁴ Walker, *Presidents and Civil Liberties from Wilson to Obama*, 334.

¹⁹⁵ Central Intelligence Agency, "CIA Mission, Vision, Ethos & Challenge," CIA.gov, accessed March 6, 2018, <https://www.cia.gov/about-cia/cia-vision-mission-values>

through accountability and oversight.”¹⁹⁶ The NSA also boasts its commitment to “respect for the law”¹⁹⁷ and “accountability.”¹⁹⁸ The Defense Intelligence Agency (DIA) dedicates an entire internal organization to such concerns; the Office of Privacy and Civil Liberties advocates the protection of rights, with the reservation of “consistent with operational requirements.”¹⁹⁹

Such conditions are entirely the concern. As demonstrated above, Intelligence Community agencies tend to view civil liberty considerations as a restriction on their ability to accomplish their goals without realizing that the protection of rights is their primary goal as one of the most central aspects of protecting American citizens.²⁰⁰ If the Intelligence Community is earnest in its desire to protect the United States, its people, and their rights, several immediate steps must be taken to correct the current image of the Community and to craft a more constitutionally consistent vision moving forward.

First, the Intelligence Community must work tirelessly to improve the current perception of itself that resulted from the exposures of the Church Committee and other recent revelations. If the American people cannot trust the Intelligence Community with the defense of their constitutional rights, they will be hard-pressed to trust it with their lives and livelihoods; therefore, the Intelligence Community must go out of its way to assuage concerns over civil liberties in order to fulfill its purpose. Intelligence agencies

¹⁹⁶ Central Intelligence Agency, “CIA Mission, Vision, Ethos & Challenge.”

¹⁹⁷ National Security Agency, “Mission & Values,” NSA.gov, accessed March 6, 2018, <https://www.nsa.gov/about/mission-values/>

¹⁹⁸ Ibid.

¹⁹⁹ Defense Intelligence Agency, “Office of Privacy and Civil Liberties,” DIA.mil, accessed March 6, 2018, <http://www.dia.mil/About/Office-of-Privacy-and-Civil-Liberties/>

²⁰⁰ Ibid.

can accomplish this by immediately ceasing any programs analogous to PRISM, SHAMROCK, or anything remotely resembling a potential question of constitutionality. Compliance with oversight structures implemented following the Church Committee Report, including the congressional Intelligence Committees, is strictly necessary.

However, merely defensive solutions are not enough to restore American trust in the Intelligence Community to a satisfactory point of operation for its agencies. Proactive measures must be also be undertaken. The primary problem of the Intelligence Community arises from a lack of information. Many Americans view intelligence agencies with suspicion simply because they do not understand the practices and purposes of the Intelligence Community, and given the nature of intelligence, this is to a certain extent irremediable. However, intelligence agencies need to strive for as great a measure of transparency as is practical, or at the very least an atmosphere of such. While it is often not possible to prove that such practices as those revealed by the Church Committee no longer occur, the attitude of Intelligence Community leaders can attempt to communicate what their actions feasibly cannot.

A measure of transparency was initiated with the creation of the position of Director of National Intelligence (DNI) to serve as the public face of the Intelligence Community and to represent the IC before Congress and before the American people. One aspect of this is the DNI's annual Worldwide Threat Assessment, a "State of the Union" of the Intelligence Community listing and elaborating upon the Intelligence Community's primary foci for the year.²⁰¹ The 2018 Threat Assessment, presented to the

²⁰¹ Daniel R. Coats, "Statement for the Record: Worldwide Threat Assessment of the US Intelligence Community," DNI.gov, accessed March 6, 2018, <https://www.dni.gov/files/documents/Newsroom/Testimonies/Final-2018-ATA---Unclassified---SASC.pdf>

Senate Armed Services Committee²⁰² by current Director of National Intelligence Dan Coates, summarized the key threats facing the United States first by topic and then by geographic location.²⁰³ Such efforts, as well as testimony before Congress by members of the Intelligence Community, serve to demonstrate willingness on the part of the Intelligence Community to engage with the American people and go far in its attempt to demonstrate the depth of its commitment to the protection of themselves and their freedoms.

Conclusion

As demonstrated above, the line of demarcation between the protected freedoms guaranteed to American citizens and the ceded territory in which the US Intelligence Community can conduct its national security activities has been historically inconsistent, battered in each direction by continual tides of crises both of security and of dramatic overreach on the part of the federal government. The primary question the Intelligence Community faces today does not deal with history but with current events and public opinion. Where does the line fall in the present and immediate future?

The strong negative reaction from the public and correspondingly from the legislature surrounding recent incidents such as Gellman's exposure of PRISM, as well as the considerable distance from a significant national security event, indicate that America's citizens are highly unlikely to accept government encroachment into personal freedoms in the current political environment, and the Intelligence Community needs to

²⁰² United States Senate, "Committee Membership List: Committee on Armed Services," Senate.gov, accessed March 6, 2018, https://www.senate.gov/general/committee_membership/committee_memberships_SSAS.htm

²⁰³ Coats, "Statement for the Record: Worldwide Threat Assessment of the US Intelligence Community."

adjust its goals and practices accordingly. The House and Senate Intelligence Committees, designed in the aftermath of the Church Committee to provide additional oversight for the Intelligence Community, must be mindful both of the current challenges faced by intelligence agencies and of their intentions to protect American citizens, not endanger them through a reduction of their rights. A spirit of cooperation with oversight avenues as well as a degree of transparency are critical, though those responsible for intelligence supervision must understand the difficulty of transparency due to the nature of intelligence activities.

This analysis returns finally to the question of the primacy of liberty. Given the historic foundations of the concept of civil freedoms so deeply rooted in America's origins, the first and most basic state of American liberty is its investiture in the hands and hearts of the American people.²⁰⁴ If a baseline is to be established, the status quo must be the reservation of all rights and freedoms to US citizens, granted temporarily and partially to the federal government in order to obtain guarantees or protections not otherwise available.²⁰⁵ In the words of Abraham Lincoln, "The legitimate object of government, is to do for a community of people, whatever they need to have done, but can not do, at all, or can not, so well do, for themselves—in their separate, and individual capacities. In all that the people can individually do as well for themselves, government ought not to interfere."²⁰⁶

²⁰⁴ The Essential Liberty Project, *The Patriot's Essential Liberty Pocket Guide*, 32.

²⁰⁵ Collected Works of Abraham Lincoln, "Fragment on Government," Quod.lib.umich.edu, accessed March 6, 2018, <https://quod.lib.umich.edu/l/lincoln/lincoln2/1:261?rgn=div1;view=fulltext>

²⁰⁶ Ibid.

This parameter demonstrates the essential spirit exemplified in the creation of the federal government; freedom flows from the American people to the American government to accomplish effects otherwise impossible, an allowance that may at any time be rescinded.²⁰⁷ While the aims of the US Intelligence Community are easily subsumed in the category of goals not achievable by individual citizens and therefore the rightful and constitutional jurisdiction of governmental authority,²⁰⁸ the nature of this transmission should shape the attitude and viewpoint of Intelligence Community agencies. Not only their respective abilities but also their responsibilities are not inherently derived from their own goals and institutions but a delegation of power from those in whom it resides, namely American citizens.²⁰⁹ As such, agencies have a responsibility not solely to respect the rights of Americans as their beneficiaries but as their benefactors,²¹⁰ and intelligence agencies that have sworn to protect US citizens must incorporate this belief into their own perspectives of defense of freedoms as inherently linked to defense of the country and its people. While tensions between civil liberty and national security continue to exist in the present and future for both the Intelligence Community and the American people, President Barack Obama summarized best the only reliable and reasonable option for the resolution of this debate:

The men and women of our intelligence community work every single day to keep us safe because they love our country and believe in our values. They're patriots. And I believe that those who have lawfully raised their voices on behalf of privacy and civil liberties are also patriots who love our country and want it to live up to our highest ideals. So this is how we're going to resolve our differences

²⁰⁷ The Essential Liberty Project, *The Patriot's Essential Liberty Pocket Guide*, 32.

²⁰⁸ Collected Works of Abraham Lincoln, "Fragment on Government."

²⁰⁹ The Essential Liberty Project, *The Patriot's Essential Liberty Pocket Guide*, 32.

²¹⁰ *Ibid.*

in the United States—through vigorous public debate, guided by our Constitution, with reverence for our history as a nation of laws, and with respect for the facts.²¹¹

²¹¹ Barack Obama, “Remarks by the President in a Press Conference,” The White House, Office of the Press Secretary, April 9, 2013, accessed March 30, 2018, <https://obamawhitehouse.archives.gov/the-press-office/2013/08/09/remarks-president-press-conference>

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