

Marilee Green
Commission I
Topic 2

THE BALANCE BETWEEN THE INDIVIDUAL'S NEEDS FOR PRIVACY
AND THE GOVERNMENT'S NEEDS FOR INFORMATION:
THE MORAL AND LEGAL PERSPECTIVE

I. STATEMENT OF THE PROBLEM

A delineation of the boundaries of privacy in American society can only arise after a balance is struck between the competing needs of the individual to obtain privacy and the needs of the government to obtain information. This paper will attempt to achieve this balance through an examination of the legal and moral arguments which militate for the right of the individual to have privacy and the arguments concerning the necessity of collecting information about the non-threatening and threatening activities of citizens which militate for the right of the government to know.

II. SUMMARY OF PRINCIPAL FINDINGS

1. The amount of protection of the individual's privacy which the common law provides has been growing since 1890 with the tort being the chief method of redress for the individual's grievances. The common law does not, however, try to delineate the boundary between the government's need for information and the individual's need for privacy.
2. The statutory law, as currently interpreted by the Supreme Court, does not strongly affirm an individual's unconditional right to privacy. However, certain specified areas of an individual's privacy have been ruled protected. An important case involving the amount of control the government (the executive branch) will have over the delineation of the boundary between the government's need for information and the individual's need for privacy is currently awaiting a hearing before the Supreme Court.
3. The moral rights of an individual to act freely and responsibly, to respond to his environment creatively, and to relate to other human beings are dependent upon the existence of a minimal but irreducible level of individual privacy. The necessity of preserving these rights is the individual's strongest argument for why his privacy should be protected.
4. The government needs to gather information on the non-threatening activities of its citizens so that it may intelligently exercise the increasing amount of power which has been delegated to it. However, a careful assessment of the costs and benefits to the individual in terms of his loss of privacy will point out the necessity of reducing the high costs.
5. The government needs to gather information on the threatening activities of its citizens in order to protect individual personal security and the national security. This governmental need is insatiable and a full consideration of the implications of not restraining this need will militate for the reconciliation of the individual's need for privacy and the government's need to know.

III: POLICY RECOMMENDATIONS

Whereas the current governmental procedures for gathering information on the non-threatening activities of its citizens changes the citizen's self-conception and impedes his activities, it is proposed that:

1. Senate Bill 1791 shall be recalled from committee and passed since it will limit the number of mandatory requests that government can make upon the individual for information and further that a Data Review Board be established to hear citizen comments concerning the nature and extent of the mandatory requests (pp. 18-19).
2. A law shall be passed by Congress which shall abolish the use of psychological testing ^{in the form of standardized tests} by any federal agency (p. 19).
3. A law shall be passed by Congress which shall enumerate the procedures under which home visits shall take place. (pp. 19-20).
4. Administrative searches shall continue to take place under the warrant procedures of the Fourth Amendment. (p. 20).
5. A law shall be passed by Congress which shall prohibit the use of wiretapping, bugging or infiltration of groups to gather information on the non-threatening activities of its citizens (p. 20).
6. House of Representatives bill 9527 shall be recalled from committee and passed since it gives the individual access to his record while at the same time restricting other's access to it (pp. 20 -21).

Whereas the current governmental procedures for gathering information on the threatening activities of its citizens allow the government too much discretion in the initiation of surveillance processes which are capable of destroying required minimal level of individual privacy necessary for the existence of a democratic society (pp. 21-25), it is proposed that:

7. Congress shall establish a Judicial Authorization Board which shall only authorize federal surveillance of the individual if the government has proved to the board that the individual has both the intent to commit and the means to commit a physical criminal act. These authorizations shall be limited in duration and specific in intent and information not introduced into a court of law within a reasonable amount of time should be destroyed. (pp. 25-29-a)

IV. TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF THE PROBLEM.....	ii
II. SUMMARY OF PRINCIPAL FINDINGS.....	iii
III. POLICY RECOMMENDATIONS.....	iv
V. DISCUSSION.....	1
The Moral and Legal Arguments.....	1
The Common Law.....	1
The Statutory Law.....	2
The Moral Rights.....	6
The Government's Arguments.....	110
The Non-Threatening Activities.....	10
The Threatening Activities.....	11
The Balance.....	14
Summary of the Conflicting Needs.....	14
Non-Threatening Activities.....	14
Threatening Activities.....	21
Concluding Statement.....	30
Appendix.....	31
VI. BIBLIOGRAPHY.....	39

V. DISCUSSION

Chapter I: THE LEGAL AND MORAL ARGUMENTS WHICH MILITATE FOR THE PRESERVATION OF AN INDIVIDUAL'S PRIVACY.

The Common Law

The development of a single tort concerning privacy has been emerging since the publication of the Warren and Brandeis article, "The Right to Privacy," in 1890. The degree to which this tort is recognized is illustrated by Justices Fortas', Warren's and Clark's referral to it in their dissenting opinion in the Time vs. Hill case.

A distinct right of privacy is now recognized, either as a 'common law' right or by statute, in at least 35 states. Its exact scope varies in the respective jurisdictions. It is, simply stated, the right to be let alone; to live one's life as one chooses free from assault, intrusion or invasion except as they can be justified by the clear needs of community living under a government or law.¹

Generally, this tort is an extension of common law's concern with the individual free will and personal liberty. As Pound comments, the common law is, "...jealous of all interference with individual freedom of action, physical, mental or economic."² As Elackstone states in a discourse on the common law right to freedom of the press:

....the will of individuals is still left free: the abuse only of that free will is the object of legal

¹ Time vs. Hill 385 U.S. 374 at 480 (1967).

² Roscoe Pound, The Spirit of the Common Law, p. 14.

punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left.¹

Specifically, the privacy tort is the result of the application of four other previously established torts to the problem of privacy. According to Prosser, these torts concern:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.²

The privacy tort has limited applicability to the problems arising out of federal intrusion into an individual's privacy since (1) it does not concern itself with problems arising out of the accumulation of data given freely by the individual---with facts which have become public and (2) it does not attempt to mediate the conflict between individual and societal (governmental) needs. The extent of federal intrusion into an individual's privacy (which will be determined in Mr. Glauberman's paper) forces us to examine the nature of the statutory law's concern with privacy.

The Statutory Law

Any attempt to determine the extent to which an individual's privacy is protected in the statutory law must recognize the existence of two schools of thought regarding the

¹
St. George Tucker (ed.), Blackstone's Commentaries Volume IV, p. 152.

²
William L. Prosser, "Privacy," Harvard Law Review, (August 1960), p. 389.

the correct method of reading and interpreting the constitutional provisions. The two schools of thought result in either a strictly construed or a more flexibly construed opinion in judicial decisions.

Illustrative of the 'strict constructionist's' approach is this statement by Justice Black.

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word, more or less flexible and more or less restricted in its meaning.¹

The denial of a 'right to privacy' as the result of using this approach is clearly evident from a reading of the remainder of

Mr. Black's statement.

This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures." "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures.²

Illustrative of the more flexible approach to constitutional interpretation is this opinion of the court in the 1910 Weems vs. U.S. case.

Legislation, both statutory and constitutional is enacted, it is true from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into exist-

¹ Mr. Justice Black, Griswold vs. Connecticut 14 L. Ed. 2d 510 at 530 (1965).

² Ibid., at 530.

ence new conditions and purposes. Therefore a principal to be vital must be capable of wider application than the mischief which gave its birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution, would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.¹

The affirmation of a 'right to privacy' as a result of use of this approach is clearly evident in Justices Goldberg', Warren's and Brennan's concurring opinion in the Griswold vs. Connecticut case.

I agree fully with the Court that, applying these tests, the right of privacy is a fundamental "personal" right, "emanating from the totality of the constitutional scheme under which we live."²

Short of a constitutional amendment³, a strict constructionist approach will prevent the formal acknowledgment of a 'right to privacy' but this approach does allow for the protection of various aspects of an individual's privacy when they are derived from a reading of the first, third, fourth, fifth, or

¹
Weems vs. U.S. 217 U.S. 349 at 373 (1910).

²
Messrs. Justices Goldberg, Warren and Brennan, Griswold vs. Connecticut 14 L. Ed. 2d 510 at 521 (1965).

³
As Mr. Justice Black points out in Griswold vs. Connecticut 14 L. Ed. 2d 510 at 537 (1965), "The Constitution's makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification."

seventh, ninth and fourteenth amendments. So, while no court has declared in a majority opinion the existence of a statutory right which provides for an unconditional protection of the individual's right to privacy, the court has ruled that certain specified areas involving the individual's privacy are protected by the Bill of Rights. These areas cannot be infringed upon without utilization of the procedures laid out in the amendments. The areas included are:

(1) privacy between married persons. Griswold vs. Connecticut (1965)¹ held that this right existed as the result of the penumbra created by the guarantees of six amendments.

(2) privacy of the individual's membership in a non-Communist group. Gibson vs. Florida Legislative Investigation Committee (1963)² held that this right existed because of the first and fourteenth amendment guarantees of free speech and association.

(3) privacy of the home from administrative searches. Camara vs. Municipal Court (1967)³ held that an administrative search is a search and seizure which should be protected under the warrant procedures of the fourth amendment. However, Wyman vs. James (1971)⁴ held that a home visit by a social worker was not to be regarded as a fourth amendment search. (This is illustrative of the way this type of approach may produce rulings

¹ Griswold vs. Connecticut 14 L Ed 2d 510 (1965).

² Gibson vs. Florida Legislative Investigation Committee 372 U.S. 539 (1963).

³ Camara vs. Municipal Court 387 U.S. 523 (1967).

⁴ Wyman vs. James 39 L.W. 4093 (1971).

which have differing implications for an individual's privacy.)

(4) privacy of the individual's phone conversations from wiretapping. Katz vs. U.S. (1967)¹ holds that electronic surveillance is a method of seizing evidence but the determination of whether the fourth amendment warrant procedures will apply to national security cases has not been made as yet. This determination shall be made when the Supreme Court hears the pending Smith-Plamondon case.

A more detailed examination of the Supreme Court's rulings in these areas is found in the Appendix to this paper.

The absence of a strong affirmation of the individual's statutory right to privacy necessitates an examination of the moral basis for the individual's claims to privacy.

The Moral Rights

The individual² is entitled to a certain amount of privacy³ because privacy is the necessary condition which enables the individual to:

Take Free and Responsible Action.

Free and responsible actions involves consideration of all possibilities for action whether they be within societally

¹ Katz vs. U.S. 389 U.S. 347 (1967).

² The individual being examined here is a member of this twentieth century American democratic society.

³ Privacy is, unless otherwise qualified in this section, "The quality or state of being apart from the company or observation of others." Webster's Third New International Dictionary, p. 1804.

approved limits or not. The individual must not be held responsible for conforming to these limits until the action is taken. As Pennock and Chapman state:

Thus, if the invasion of privacy will result in bringing some coercive force to bear, it tends to interfere with free and responsible action, which according to most ethical theories, is the very essence of morality.¹

The individual must be granted privacy, control over any of the oral and written statements he makes, while he is considering possible actions up to the point that he actually takes these actions. It is only at the point when he takes these actions that society has the right to observe and judge them. To deny the privacy necessary for considering all possible courses of action is to deny the right of the individual to take free and responsible actions, a right which is fundamental to the workings of a democratic society.

Creatively Respond to his Environment.

The individual is sparked to creation by interacting with his environment but the actual creative act occurs during those moments when the individual has withdrawn from that environment---when he has shut off the inputs of the environment in order to reach his own individual response to it. The creative efforts are, "Disrupted, distorted or frustrated even by so limited an intrusion as watching."² This is especially so

¹ Roland J. Pennock and John W. Chapman, Privacy: NOMOS XIII, pp. xii-xiii.

² Stanley I. Benn, "Privacy, Freedom and Respect for Persons." In Privacy: NOMOS XIII, p. 26.

since the watching might also lead to the societal judging of one's efforts thereby discouraging the individual's creative efforts to deviate from the societally accepted response to the environment. This discouragement of creativity could lead to a stagnant and non-progressive (in all fields of human endeavor, in the areas of both technological and humanistic exploration) society since:

Most of the great steps of progress in almost any field involve a certain amount of iconoclasm, a certain deviance, a breaking with the current principles.¹

(It is recognized that this deviance can be of a criminal nature also but societal grant to the individual of the freedom to formulate behavior does not preclude the societal exercise of judgment once the behavior occurs.) Therefore, there must exist for the individual moments of privacy when he can withdraw from society's observation and begin to create---to challenge and change the status quo.

Relate to His Fellow Human Beings with Respect, Love, Friendship, and Trust.

Relationships of respect, love, friendship and trust are built upon the individual's desire to reveal portions of his innermost thoughts, wishes, and beliefs that are not publicly disclosable to all because unqualified adverse reaction to them may threaten the individual's self-conception. Bates notes that

1

Dr. Klein, testimony before the Senate Subcommittee on Administrative Practice and Procedure, April 19, 1967 in U.S. 90th Congress, 1st Session, Senate Committee on the Judiciary, To Protect the Right of Privacy-Hearings on S. 928, p. 314.

privacy

...also protects the self; protects it from disclosure of mistakes made, motives, feelings, and actions, which would be humiliating or damaging to have known.¹

To make public through observation, the individual's disclosures of his private thoughts, is to destroy the basis for these relationships to exist.

The Amount of Privacy Required.

The amount of privacy needed by each individual to act, create and relate varies according to the individual but a certain minimal but irreducible level is required by everyone if these fundamental activities are to exist.

¹
Alan P. Bates, "Privacy---A Useful Concept?" Social Forces 42 (1964), p. 433.

Chapter II: THE GOVERNMENTAL ARGUMENTS WHICH MILITATE FOR THE
COLLECTION OF INFORMATION ON ITS CITIZENS

The Necessity to Collect Data
on the Non-Threatening Activities of its Citizens

Information must be collected on the non-threatening activities of citizens in order to allow for the intelligent exercise of governmental power. Intelligent exercise of governmental power results when there is sufficient amounts of information known to enable (1) responsive, effective planning and (2) efficient, equitable administration of programs. Today, the amount of information required by the government for intelligent exercise of power has increased as its power has increased. American citizens are demanding more and more from their government. This is particularly evident when one realizes that citizens now expect their government to play a significant role in the achievement of societal and economic welfare. A reading of the justifications for each question on the census cannot fail to impress one with the extent to which government is expected to and has decided to act in the social and economic spheres.¹ Since the demands placed upon the government have resulted in increased governmental responsibility and function (this is evidenced by the proliferation of executive branch and independent regulating agencies since the New Deal), then it is only reasonable to allow the government to utilize new methods to gather information on the non-threatening activities

1

¹ "Census Bureau Memoranda," article considered by the Senate Subcommittee on Constitutional Rights, 1969 in U.S. 91st Congress, 1st Session, Senate Committee on the Judiciary, To Secure Personal Privacy---Hearings on S. 1791, pp. 460-468.

of its citizens and to put this information to more extensive use in order that the government may intelligently carry them out.

In 1971, with the 1970 census a thing of the past, citizens are increasingly questioning the government's necessity for and the methods used to collect data on the threatening activities of its citizens. It is therefore necessary to examine the government's rationale for investigating this type of activity.

The Necessity to Collect Data
on the Threatening Activities of its Citizens

The government's need to collect data on the threatening activities is imperative due to the increasing threat to personal security and national security which is posed by organized crime and extremist groups. This threat is so acute that the utilization of all effective methods to collect information on these activities should be considered. Thus, the use of various forms of surveillance which result in unprecedented invasions of the individual's privacy are justified by the unprecedented degree of threat to society.

Illustrative of the government's perception of the threat is Mr. Mitchell's statement that:

Certainly in this period of intensive organized crime activity, we cannot afford to shun a method that is both effective and compatible with constitutional law....¹

¹ Congressional Quarterly Weekly Report, 29 (February 19, 1971), p. 430.

Illustrative of the administration's convictions concerning the utility of surveillance, is this statement by Mr. Rehnquist:

Surveillance, whether by examination of public records, observation of activities carried on in public places, or by the use of undercover agents, is a vital tool of law enforcement.¹

Re: the utility of wiretapping, Mr. Mitchell's statement in 1970:

In other words, on the average, approximately 80% of the messages (federal level) intercepted contained incriminating evidence.²

However, Mr. Lewin observes that an examination of the 1970 statistics on the 183 authorized wiretaps reveals that not one of these wiretaps was granted on the grounds of national security.³

This examination can only leave one to conjecture that either (1) wiretapping is not a useful tool for protecting national security or (2) that the executive branch has wiretapped in national security cases without obtaining a warrant by utilizing the the emergency clause in Title III of the Omnibus Crime and Control Act.⁴

¹ William H. Rehnquist in a speech before the National Conference of Law Reviews, Williamsburg, Virginia, March 19, 1971, p. 8.

² John N. Mitchell in an address before the 77th Annual Conference of the International Association of Chiefs of Police, Atlantic City, New Jersey, October 5, 1970, p. 9.

³ Nathan Lewin in a presentation to the F.B.I. Conference, Princeton, New Jersey, October 29, 1971.

⁴ According to Congress and the Nation Volume II, p. 327, Title III "Authorized any federal official designated by the Attorney General or any state or local official designated by the principal prosecuting attorney of his jurisdiction, who who reasonably determined that an emergency situation existed relating to conspiratorial activities threatening the national security or involving organized crime, to conduct wire or oral intercepts without a warrant." This can take place for 48 hours

18

Mr. Kennedy has recently released Justice Department figures which state that 97 telephone wiretaps and 16 hidden microphones were installed without court approval in national security cases in 1970.¹ He also noted that the duration of these wiretaps is, "Three to nine times greater than the duration of those authorized by court order in criminal cases."² If one utilizes the figures that the Justice Department released to Senator Kennedy, it is evident that in terms of the government's utilization of wiretapping and bugging the court procedures are almost as often not utilized as they are. (180 court authorized versus 113 Justice Department authorized wiretaps and bugs.³)

¹Lyle Deniston, "How Much Eavesdropping?" The Evening Star, December 20, 1971.

²Ronald Kessler, "Wiretap Extent Disputed." The Washington Post, December 19, 1971.

³Lyle Deniston, op. cit.

This brings one to the government's contention that the nature of the threat to society militates for the utilization of surveillance in national security cases without judicial authorization. The rationale behind this is that:

The judicial process is ill suited to regulation of detailed and continuing investigative activities of law enforcement agencies, where frequently time is of essence.¹

Presidential authorization should be substituted for judicial authorization because (1) the President has need for the information provided by these investigative activities

...the President has an obligation to collect, in advance and on a continuing basis, whatever information is reasonable and necessary for present and future decisions in using the forces at his command. No less can be expected of him if he is faithfully and dutifully to exercise his constitutionally imposed responsibility to protect the national security.²

and (2) he will be able to render a decision quickly utilizing the criterion of:

Those reasonably suspected of having violated federal crime statutes ought to be the subject of surveillance, if such surveillance appears reasonably designed to enable the government to apprehend them and bring them to trial.³

The constitutionality of this assertion will be tested before the Supreme Court in either late 1971 or early 1972. (See the discussion of the U.S. vs. Smith case in the Appendix.)

1

William H. Rehnquist in a speech before the National Conference of Law R views, Williamsburg, Virginia, March 19, 1971, p. 18.

2

John N. Mitchell in an address before the Virginia State Bar Association, Roanoke, Virginia, June 11, 1971, p. 5.

3

Rehnquist, op.cit., p. 18, supra.

Chapter III: THE BALANCE WHICH MUST BE STRUCK BETWEEN THE
INDIVIDUAL'S NEED TO HAVE PRIVACY AND THE GOV-
ERNMENT'S NEED TO COLLECT INFORMATION

Restatement of the Conflicting Needs

The findings of this paper are: (1) that the moral arguments for why an individual's privacy must be protected are stronger than the legal arguments for this protection and (2) that the government's need to gather information at the increasing expense of certain aspects of an individual's privacy is the result of the increasing pressures put on it by its citizens either through their increased demands for it to function as regulator of economic and social welfare or through their increased participation in criminal or subversive activity. An examination of the implications of the government's methods for gathering information should point the way to the balance which must be struck between the conflicting private and public needs.

The Non-threatening Activities

The government argues that it must collect data on the non-threatening activities of its citizens in order to intelligently carry out the power which the citizens have mandated to it. However, the question arises^{as to} whether the citizens intended to relinquish their rights to individual privacy in the process. It would seem that the individual's loss of privacy has been the inadvertent product of the recent trend towards increased federal power; a product that was expected and accepted

by few of the citizens. Thus, no determination of this trend's cost-benefits to the individual in terms of his loss of privacy was made. The necessity to make this assessment is upon us now.

The costs to the individual in terms of his privacy primarily result, at the federal level, from the government's demands upon the individual to: (1) fill out innumerable government forms under the threat that non-compliance will result in governmental disapproval which may carry with it criminal penalties (in the case of refusing to answer the census) or the penalty of not receiving that for which one is applying (in the case of any application at all if the clerk or the issuing agency chooses to be inflexible), (2) submit to psychological testing with the refusal affecting one's chances at attaining or maintaining a particular task, (3) submit to home visitation with the termination of welfare benefits a possibility for refusal to participate in the process (see the discussion of Wyman vs. James in the Appendix), and (4) allow one's home to be inspected for purposes of enforcing municipal health, fire and building regulations (see the discussion of Camara vs. Municipal Court on the Appendix).

The costs to the individual of these programs arise out of the fact that the government, in either a real or potential judging role, penetrates, with the threat of actual or tacit sanctions, aspects of an individual's life whose revelation to the general public would normally be tightly con-

trolled by the individual himself. Normally, an individual would have the choice as to whether he would answer questions about his sexual thoughts (psychological testing) or the number of bathrooms in his home (originally on the 1970 census) or allow someone into his home if a disagreement had just taken place (the home visit by the social worker). The choice as to whether things such as the above would be revealed would be dependent upon the context of the situation and upon whether the observer would be sympathetic to the individual's cause. When the individual is faced with governmental penetrations into these aspects of his life, he has lost most of his ability to control the context in which these revelations take place and all of his ability to determine whether the observer will be sympathetic to his cause. In essence, the government is penetrating these aspects of an individual's life in the unasked role of either potential or real judge.

The government's judging of the individual does damage to him in terms of (1) changing the individual's self-conception and (2) impeding the individual's free and responsible and creative activity. The changing of the individual's self conception occurs because the standards for judging one's performance may be depreciated by the realization that these are not the standards which the government considers significant. *Depreciation occurs because* The gradual process of the individual's interaction with his society has resulted in the formulation of these standards for performance and this gradual process would be interrupted

(seemingly all authoritative, all correct)

by the sudden imposition of the governmental standards for performance. The changing of the individual's self conception occurs because a feeling of powerlessness may arise with the loss of control over the inexorable processes which produce a record on one's life. The changing of the individual's self conception occurs because a feeling of de-personalization may arise with the manipulation of the facts of one's life through the collection and processing of the information which will make up this record. The impeding of the individual's activities occurs because the individual knows that the government may have selectively recorded, out of context, certain of his activities and that on the basis of this selective record, the government may at some unknown time utilize these frozen records of his activities in order to judge his activities in another period of his life. The individual thus experiences uncertainty as to when and for what purpose the government's information on his activities will be used. This may result in the impeding of one's actions with the formulation of a maxim for one's activities which is: act so that one's activities look good in one's record, under all circumstances.

The high costs to privacy which the individual must bear as the price for the benefits which he derives from governmental programs must be reduced even if this reduction entails the sacrifice of some of these benefits. The following recommendations are therefore suggested.

In order to minimize the degree to which an individual's

self conception is changed, recommendations one through four should be adopted.

(1) The gathering of information by utilizing questionnaires shall be undertaken following the procedures enumerated in Senate bill 1791 whereby the request for personal information for statistical purposes can only be mandatory "...as a result of a specific provision of the Constitution and a specific Act of Congress" and if the request is not a result of the above it is to be considered a voluntary request and the individual shall be informed that he does not have to comply with the request. ¹ It is further recommended that Congress shall create a Data Review Board which: shall hear citizens' complaints concerning the effects of those provisions

¹ of

The text of S 1791, Mr. Ervin's bill, which was proposed in April of 1969 and sent back to the Subcommittee on Constitutional Rights before the end of that Congressional session is: "That it shall be unlawful for any officer or employee of any executive branch or any executive agency of the United States Government, or for any person acting or purporting to act under his authority---

(1) to require or to attempt to require any individual to disclose for statistical purposes any information concerning his personal or financial activities or those of any member of his family or concerning his personal or real property or that of any member of his family unless the information is sought as a result of a specific provision of the Constitution and a specific Act of Congress, in which case the disclosure shall be mandatory and the individual shall be informed under which constitutional provision and which Act of Congress the disclosure is mandatory; or

(2) to request or attempt to request any person in the United States to disclose for statistical purposes any information concerning his personal or financial activities or those of any member of his family, unless such has been specifically authorized by Act of Congress, in which case the individual shall be advised that such disclosure is voluntary and that he is not compelled to comply with such request."

which are held to be mandatory and shall have the power to make recommendations concerning their continued mandatory existence to the appropriate Congressional committee. The determination of the composition of this committee shall be left to Congressional discretion.

(2) The use of psychological testing which utilizes standardized test forms would seem to be the most damaging method of collecting information on the non-threatening activities of citizens. This method is still being used in government agencies such as the Peace Corps to determine if an individual has the qualifications for a particularly difficult task. However, the accuracy of the various tests has been much disputed so it would appear that little in the way of governmental efficiency would be sacrificed if these tests were abolished until such a time when more accurate tests are developed. It is therefore recommended that the use of psychological testing by any federal agency shall be prohibited. This prohibition does not include the use of the personal interview method and this prohibition shall be subject to periodic Congressional review.

(3) The home visitation is a tool utilized mainly in social work on the premise that the government should know what is going on in the homes into which it is pouring money. However, there have been notorious abuses of this tool i.e. the use of midnight raids by social workers to determine whether the woman who is receiving 'sole-supporter' benefits is in reality sleeping with 'her man'. (Wyman vs. James was not such a case.) To curb these abuses it is recommended that the home visit shall only take place under those procedures which Congress shall

¹See Alan F. Westin's discussion of this subject in Privacy and Freedom, pp. 133-157.

enumerate in public law. Attention shall be particularly given to the question of the timing of these visits i.e. the amount of notification which must be given to the 'visitee', the frequency of the home visits and the hours during which the visit will be permitted. The visitor's observations will probably be restrained by the final recommendation in this section which will allow the individual to have access to his file.

(4) Administrative searches result in the entrance into one's home of an unmasked official. A Supreme Court case, Camara vs. Municipal Court, challenged the government's right to conduct these administrative searches for the purposes of enforcing health, fire and other building codes. The Supreme Court ruled that these searches were to be covered by the fourth amendment warrant process and that individual warrants were to be issued upon the individual's demand. It is recommended that the reasonableness of these searches shall continue to be determined by the rulings of the judiciary.

In order to minimize the individual's feelings of powerlessness and depersonalization and to prevent the impeding of his activities which results from the knowledge that a record has been compiled on him by the government, it is recommended that:

The agency which holds the records resulting from the compilation of the data on the non-threatening activities citizens which has been obtained from the above processes (excluding psychological testing and certainly excluding wiretapping, bugging and infiltration of organizations) shall, under the

procedures specified in House of Representatives bill 9527¹:
 notify the individual of the existence of the record, not disclose the information in the record to any person or agency without the permission of the individual or the notification of the individual if the disclosure is required by law, maintain a record of the names and positions of the persons inspecting the records and the purposes for their inspections, permit the individual to inspect the record and have copies made of it, permit the individual to supplement the records with documents or other information, and permit the removal of erroneous information. As further enumerated in H.R. 9527, a Federal Privacy Board (composition of which shall be left up to the Congress) shall be established which shall consider complaints from individuals if the requirements of this proposal are not being met by the agencies and shall have the power to issue a final binding order directing the agency to comply with the requirements of this proposal.

With the balance between the government's needs for information on the non-threatening activities of its citizens and the individual's needs for privacy having been hopefully struck, the problem of achieving a balance when the government needs information on the threatening activities of its citizens can now be addressed.

The Threatening Activities

The government argues that it must utilize all effective

1

H.R. 9527 was introduced by Mr. Koch during the first session of Congress this year however, it was sent back to the House Committee on Government Operations on June 30, 1971.

methods which are not constitutionally prohibited¹ to gather information on the threatening activities of its citizens in order to protect personal and national security. There is, within this demand, the assumption that if the government were not restrained in its efforts, it would be able to gather enough information to protect society from these threats. As Senator Ervin observes,

...these are predicated on the theory that if government officials can only acquire sufficient information in advance on individuals, then they can predict and control behavior.²

One must realize, however, that while government might be able to gain enough information to protect society from most of these threats, it would never gain enough information to protect society from all threats. Thus, one is faced with three possible responses when one realizes that the governmental need for information can never be satisfied. They are:

- (1) That since one can never gather enough information to completely protect society from all the possible threats to it, one should not bother to gather any information at all. The argument against this response would be that even though one may not be entirely assured of the continued existence of the

1

The Supreme Court rulings on the subject of which methods of surveillance are unconstitutional have not resulted in the unconditional prohibition of any of them. See the Appendix.

2

Sam Ervin, "The Most Precious Freedom," New York Times, June 21, 1971, p. 29. Alan F. Westin has also pointed this out in his book, Privacy and Freedom.

society---government, the society---government fulfills enough useful functions for us that it is worth a certain amount of effort to preserve that society even if those efforts have the possibility of resulting in failure; the possibility is still there that one's efforts might be successful and that then the individual will be able to take advantage of the government's continued services.

(2) That even though one can never get enough information, every effort should be made to get as much information as one can, using all methods which are not specifically forbidden by the courts, because the continued existence of the society---government is essential to the continued existence of the individual's welfare. The response is to struggle unceasingly in the face of despair. There is nothing wrong with the heroic stance except that the zealous drive to preserve society through the use of all methods (except those specifically forbidden by Congress or the Supreme Court) will in of itself result in the destruction of society. The fault lies with the means used to gather the information which is supposed to protect society. If these means are destructive of the minimum amount of privacy that an individual needs in order to freely and responsibly act, create and relate to others in the society, then society is destroying itself by the means it is using in trying to protect itself. It is useful to recall Edward Shils' questioning of the value of Mc Carthyism .

Has the tremendous disturbance and degradation which America has suffered from its own zealots of secrecy and loyalty been worthwhile? Has the increment to

our national security been great enough to justify all the distraction and injustice? Are the secrets we have sought to guard so essential to our national life that it has been worthwhile raising so much passion, injuring so many persons and harming so many institutions? Undoubtedly, the answer is: No.¹

Perhaps Dewey's conceptions of what a mean and what an end really is should be utilized to prevent this destruction. Dewey states that:

Means are means; they are intermediate, middle terms. To grasp this fact is to have done with the ordinary dualism of means and ends. The "end" is merely a series of acts viewed at a remote state; and a mean is merely the series viewed at an earlier one...The "end" is the last act thought of; the means are the acts to be performed prior to it in time.²

Therefore, the means which is contradictory to the goals which society is trying to achieve is destructive of that goal. If the means is not an intermediate end for society to achieve, then, society will never achieve (arrive at) its final end. Society will not be preserved by preventing the individual, whose totality is that society, from interacting because that society's life is a function of that interaction. The words of Justice Brandeis should be remembered: "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding."³ There is only one more possible response to consider^{and} that is:

1

Edward A. Shils, The Torment of Secrecy, p. 221.

2

John Dewey, Human Nature and Conduct, p. 34.

3

Olmstead vs. United States 277 U.S. 438 at 479 (1928).

(3) That since one can never gather enough information to completely protect society from all the possible threats to it, it will have to face this fact and be content with gathering less information. Since trying to gather too much information would result in the destruction of that minimal but irreducible amount of privacy that each individual requires, society must, as part of its being content with less information, realize that one of the constraints which must be applied to the process of information gathering is that it cannot result in the destruction of that critical amount of privacy. The government must therefore allow some restraints on its gathering of information on those individuals or groups that are threatening the personal or national security. The proposal of these restraints does not deny the very real existence of these threats; it merely means that a careful choice of the means for counteracting these threats must be made in order to preserve the democratic nature of this society.

At the present time, the Executive Branch is given too much discretion in the initiation and utilization of surveillance methods. Under the present law which governs the use of one type of surveillance, the wiretap, the Attorney General is allowed a great deal of discretion in the initiation of surveillance. This discretion exists because in emergency situations his evaluation does not have to be tested by the judicial processes. As stated in P.L. 90-35 (The Omnibus Crime Control and Safe Streets Act):

Title III authorized any federal official designated by the Attorney General or of any state or local official designated by the principal prosecuting attorney of his jurisdiction, who reasonably determined that an emergency situation existed relating to conspiratorial activities threatening the national security or involving organized crime, to conduct wire or oral intercepts without a warrant. It required such an officer to apply for a warrant within 48 hours thereafter.¹

At the present time, no laws exist which regulate the use of other methods of surveillance of individuals and groups. The government is contending in the pending Smith-Flamondon case before the Supreme Court that national security cases involving the use of electronic surveillance should be exempted by the fourth amendment's warrant procedures. The government is asking for the power to determine what constitutes reasonable and probable cause for initiating surveillance. The undesirable ramifications of such a demand are enumerated in Justices Douglas¹ and Brennan's separate concurring opinion in the Katz vs. U.S. (1967) case:

Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be. Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather it should vigorously investigate and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The President and Attorney General are properly interested parties, cast in the role of adversary, in national security cases. They may even be the intended victims of subversive action. Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected

1

Congress and the Nation Volume II, p. 327.

gamblers like petitioner, I cannot agree that where spies and saboteurs are involved adequate protection of the Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate.¹

In order to preserve the meaning and the impartiality of the Fourth Amendment warrant process, while at the same time fulfilling the administration's demands for confidentiality and rapid decision, it is recommended that a Judicial Authorization Board be established by an Act of Congress.

This board shall be composed of nine members who will be drawn from an increased pool of District judges. (The procedure by which these judges shall be selected for the board shall be analagous to the procedures involved with an appointment to the Supreme Court.) These judges shall serve a term of one year on the board after which time they shall return to a regular district bench.

The function of the board will be to make binding recommendations upon all government agencies concerning their initiation of any process of surveillance of any individual. There shall be no instances of initiation of surveillance of a group unless the surveillance of each individual in that group has been separately authorized by the board. A recommendation approving the initiation of surveillance shall only be made if the board determines that an individual has both the intention to commit and the means to commit a physical criminal act.

Examples of criminal acts which do not involve physical crimes but are crimes merely in thought and speech are found in the provisions of the Smith Act, the Espionage Act, the Military Selective Service Act of 1967 and the Civil Rights Act of 1968. I would advocate the repeal of

¹Katz vs. U.S. 389 U.S. 347 at 587 (1967).

of these provisions on the grounds that an individual should only be held legally responsible for the physical actions he takes and not for his thoughts or spoken or written deliberations preliminary to those actions. To hold an individual legally responsible for the second category of actions is to deny the individual his right to truly take free and responsible action. (see pps. 6-7.) If this recommendation is viewed by the reader as being beyond the scope of this paper, it is certainly not beyond the scope of this paper to recommend that authorizations for the initiation of surveillance shall not be granted to the government if the individual to be placed under surveillance is suspected of only committing a crime in thought or spoken or written word. The relevant provisions are: In the Smith Act, Section 2 which makes it a crime to "advocate, abet, advise or teach the duty, necessity, desirability or propriety of overthrowing or destroying any Government in the U.S. by force or violence" and in Section 3 which makes it a crime to organize any "society, group or assembly of persons who teach, advocate or encourage such overthrow or destruction, or to be a member of such a group, knowing its purposes."¹ In the Military Selective Service Act of 1967, Section 12 which makes it a crime for a conspiracy to "counsel, aid and abet" resistance to the draft.² In the Civil Rights Act of 1968, the Riot Section, which makes it a crime for a conspiracy to travel in interstate commerce with the intent to incite riots.³

These provisions probably arose out of the conception that if the idea of treason or resistance to the draft or riot is not allowed to be even talked about, then the likelihood of someone contemplating and attempting these actions would be minimal. (The sociological literature on the subject

¹Nathaniel L. Nathanson, "The Right of Association." In The Rights of Americans: What are they---What should they be? p. 232.

²Ibid., p. 245.

³Ibid., p. 245.

of the strength of norms does provide some backing for this belief: the stronger the norm, the more unconscious is its acceptance and the less amount of discussion will be provoked by it.) At this point in American history, the solution to the problem of ^e disenchanted groups ^{the} resisting ^{the} government's ^{actions} does not lie in a legal prohibition on the discussion of the subject because the concept is too well planted in men's minds to effectively make the expression of it illegal. Furthermore, the existence of these laws gives the government a carte blanche to gather information on the activities of many individuals since an activity which authorizes surveillance in response to a threat to national security (as is the case with wiretapping under the emergency clause of Title III of the Omnibus Crime and Control Act) need only be a voicing of one's disillusion with the government and the desire to get rid of Nixon and Hoover and Agnew. Justices Douglas and Black have registered strong disagreement with this "outlaw^{of ideas} and trial on ideas["]. Justice Black states in a separate concurring opinion in Gibson vs. Florida Legislative Investigation Committee (1963) that

By the First Amendment we have staked our security on freedom to promote a multiplicity of ideas, to associate at will with kindred spirits, and to defy governmental intrusion into these precincts.

Justice Douglas states that:

...we hesitate to conclude that Congress told the Executive to ferret out the ideological strays in

¹
Gibson vs. Florida Legislative Investigation Committee
 372 U.S. 539 at 952 (1963).

the maritime industry. The words it used---"to safeguard...from sabotage or other subversive acts"---refer to actions, not ideas or beliefs.¹

Thus it is recommended that the Judicial Authorization Board only authorize surveillance if the individual has both the intention to commit and the means to commit a physical criminal act.

As far as the amount of proof that a governmental agency must give to the Judicial Authorization Board of the correlation of the individual's intent to commit and his possession of the means to commit a physical criminal act, this shall be left up to board's standards of reasonableness. An example of the correlation would be an individual's declaration of intent to bomb the Capitol and his possession of T.N.T.

Furthermore, these authorizations shall be limited in duration and specific in intent and information from these authorizations not introduced into a court of law within a reasonable amount of time should be destroyed.

¹ Schneider vs. Smith 390 U.S. 17 (1968).

Concluding Statement: The Balance which has been Struck
by the Policy Recommendations

It has been found in the preceding pages that the government's needs to gather information on the non-threatening and the threatening activities of its citizens seriously conflict with the individual's needs to maintain a certain minimal but irreducible level of privacy. The policy recommendations reflect the balance which has been struck between these conflicting needs---^{the necessities of} between granting the individual the necessary minimal level of privacy while at the same time allowing the government to continue to gather the information it needs to function and survive. It is felt that the costs to the government in terms of loss of efficiency (in the collection of information on the non-threatening activities of its citizens) and in terms of loss of discretionary power (in the collection of information on the threatening activities of its citizens) are less than the benefits which society will derive from the continued existence of the individual's privacy.

Appendix: A SELECTIVE EXAMINATION OF SUPREME COURT CASES
WHICH HAVE RULED SPECIFIC ASPECTS OF AN INDIVIDUAL'S
PRIVACY PROTECTED.

Preface

This appendix is written to illustrate the conflicting and sometimes halting process by which a certain specific aspect of privacy will be held to be protected by a Bill of Rights guarantee.

Discussion of Cases

An early Supreme Court case which refers to the "private affairs" of the citizen is Interstate Commerce Commission vs. Brinson (1894). This case holds that there are limits on the scope of investigatory inquiry by a Congressionally constituted regulating agency. An individual must testify before the agency if the testimony sought is related to the matter under investigation and if the witness is not excused by the law on some personal ground from doing what the commission requires. However, the commission cannot destroy certain fundamentally guaranteed personal rights.

Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses or can be invested with a general power of making inquiry into the private affairs of the citizen.¹

The definition of "private affairs" is not spelled out.

¹
Interstate Commerce Commission vs. Brinson 154 U.S. 477 at 1894 (1894).

In the process of trying to clarify the term "liberty" in the Fourteenth Amendment, Meyer vs. Nebraska (1923) enumerates certain personal freedoms to which an individual is entitled.

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹

Griswold vs. Connecticut (1965) specifies what one of those personal freedoms is when it holds that a right of privacy exists for married persons. This right, specified by Douglas in the opinion of the court, is derived from an analysis of the Bill of Rights which

...suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.²

The guarantees of the First (right of association), Third (prohibition against quartering of soldiers in any house in time of peace without the owner's consent), Fourth (right against unreasonable searches and seizures), Fifth (right not to be found guilty as the result of self-incrimination and right not to lose liberty without the due process of the law³), Ninth (right of the people to retain those rights not enumerated in the Constitution⁴), and Fourteenth (application of the due process clause of the Fifth to the states) Amendments have the

¹
Meyer vs. Nebraska 262 U.S. 390 at 399 (1923).

²
Griswold vs. Connecticut 14 L. Ed. 2d 510 at 540 (1965).

3

As Messrs. Justices Goldberg, Warren and Brennan state in Griswold vs. Connecticut 14 L. Ed. 2d 510 at 517 (1965), "The court stated many years ago that the Due Process Clause protects those liberties that are so rooted in the traditions and conscience of our people as to 'be ranked as fundamental'."

4

Mr. Justice Black objects to this flexible interpretation of the Ninth Amendment: "That Amendment was passed, not to broaden the powers of this Court or any other department of 'the General Government,' but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication. If any broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be 'the collective conscience of our people' is vested in this Court by the Ninth Amendment, the Fourteenth Amendment, or any other provision of the Constitution, it was not given by the Framers, but rather has been bestowed on the Court by the Court." In Griswold vs. Connecticut 14 L. Ed. 510 at 536 (1965).

penumbras which create the right of marital privacy. However, Justices Black and Stewart dissented from the courts' rather flexible joining of six amendment's to create one limited right to privacy.

Two other cases, besides the Griswold case, ^{which} try to determine the extent to which the individual's privacy is protected with reference to the First Amendment are: Gibson vs. Florida Legislative Investigation Committee (1963) and Time, Inc. v. ^{Inc.} James J. Hill (1967). In the first case, it was ruled that a non-Communist group (NAACP) can guarantee to its members that their membership lists will not be revealed to a state investigative committee. Justice Goldberg held in the opinion of the court that in light of the insufficient proof of connection between the NAACP and Communist activities, the committee's demands to see the membership lists violated the First and Fourteenth Amendment rights of free speech and free association. It should be noted that Justice Black states in a separate concurring opinion that all citizens are entitled to the First Amendment guarantee of free association.

In my view, the constitutional right of association includes the privilege of any person to associate with Communists or anti-Communists, socialists or anti-socialists, or, for that matter, with people of all kinds of beliefs, popular or unpopular.

Mr. Black goes on to affirm the individual's right to privacy as a member of a group:

¹
Gibson vs. Florida Investigation Committee 372 U.S. 539 at 943 (1963).

...it (government) is also precluded from probing the intimacies of spiritual and intellectual relationships in the myriad number of such societies and groups that exist in this country regardless of the legislative purpose sought to be served.

In the second case, Time, Incorporated vs. James J. Hill, it was ruled that the individual must sacrifice the privacy of certain of his activities if they are matters of public interest and therefore are entitled to be reported under the First Amendment's guarantees of freedom of the press. Thus, the court ruled that a New York statute protecting the individual's privacy must give way to the First Amendment.

The constitutional protections for speech and press precluded the application of the statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth....²

Cases which rise from the Fourth Amendment's prohibitions against unreasonable searches and seizures have resulted in relevant rulings as regards the protection of the individual's privacy. In Camara vs. Municipal Court (1967), it was ruled that administrative searches were allowed but that the individual was entitled to the protection of the Fourth Amendment's warrant procedures when this search was conducted. Thus, in order for the search to take place, a judge must determine whether or not that particular search is reasonable. The reasonableness of the search in this case was determined by weighing

¹ Gibson vs. Florida Investigation Committee 372 U.S. 539 at 946 (1963).

² Time, Incorporated vs. James J. Hill 385 U.S. 374 at 456-457 (1967).

the public and private interests. In Wyman vs. James (1971) however, it was ruled that the visit of a social worker to the home of a welfare recipient was a reasonable administrative tool (as it was structured in New York statutory law) and therefore was not an unwarranted invasion of personal privacy. Thus, the home visit, as contrasted to the municipal fire, health and housing inspection, does not require the warrant process enumerated in the Fourth Amendment. Strong dissent on this denial of the warrant process was expressed by Justices Marshall and Brennan:

An unbroken line of cases holds that subject to a few narrowly drawn exceptions, any search without a warrant is constitutionally unreasonable.¹

and by Justice Douglas:

Whatever the semantics, the central question is whether the government by force of its largesse has the power to "buy up" rights guaranteed by the Constitution. But for the assertion of her constitutional right (the request for the Fourth Amendment's warrant procedure before the social worker would enter her home), Barbara James² in this case would have received her welfare benefit.

In Terry vs. Ohio (1968), it was ruled that the warrant procedure could be dispensed with if a policeman felt a search of an individual for a weapon was reasonable in light of his past experience and present personal danger. Therefore, a revolver which was discovered as the result of such a search was held to be admissible evidence in the trial proceedings.³ Justice Douglas

¹ Wyman vs. James 39 LW 4093 at 4095 (1971).

² Ibid., at 4090.

³ Mapp vs. Ohio 367 U.S. 643 (1961) held that the product of an unconstitutional search is not admissible evidence in trial proceedings.

dissented from this opinion by denying the reasonableness of the search by the policeman because in his judgement the policeman did not have probable cause to undertake the search. In Vale vs. Louisiana (1970), it was ruled that the warrant procedures which govern the entrance of officials into one's home could not be dispensed with when a man was being arrested on the basis of his speech. "...arrest on speech does not provide its own exigent circumstances to justify a warrantless search of the arrestee's house."¹ The question as to whether electronic surveillance must take place under the warrant procedures of the Fourth Amendment has had a long and as yet unresolved history. This history begins with the Olmstead vs. U.S. case (1928) which ruled that a reading of the Fourth Amendment as covering persons, houses, papers and effects would preclude the application of the warrant procedures to phone-tapping (wiretapping) unless actual physical trespass had taken place. Justice Brandeis strongly dissented from this decision as he affirmed the individual's right to be let alone. This ruling was later overturned by section 605 of the Federal Communications Act which forbade all wire-tapping. Section 605 itself was then overturned by title III of the Omnibus Crime and Control Act which has been discussed at an earlier point in this paper. In Katz vs. U.S. (1967), protection of the individual's general right to privacy was stated to be left up to the individual state but the specific invasion of the individual's privacy through the use of electronic sur-

¹
Vale vs. Louisiana 399 U.S. 30 (1970).

veillance was held to be regulated by the provisions of the Fourth Amendment regardless of whether ~~any~~ physical trespass had taken place. "Words of the Fourth Amendment should be construed in terms of protection of the person, not place."¹ The court did not, however rule upon

Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security....²

The decision as to whether the Fourth Amendment's warrant procedures are applicable to national security cases which utilize electronic surveillance is pending before the Supreme Court. A case heard earlier in the year at the district level appears to have raised most of the issues which will be examined in the pending case before the Supreme Court (as far as this writer was able to determine, the case that will eventually be heard by the Supreme Court will combine the two district cases: U.S. vs. Smith and U.S. vs. Plamondon); an examination of its findings may therefore be helpful. In January of this year, Justice Ferguson ruled in U.S. vs. Smith that:

This court is forced to conclude that in wholly domestic situations there is no national security exemption from the warrant requirement of the Fourth Amendment.³

Justice Ferguson's ^{ruling} is not to be precedent ^{setting} since the Supreme Court has undertaken to review it, but his restatement of the government's position is very useful to an understanding ^{of} the government's

¹ Katz vs. U.S. 389 U.S. 347 (1967).

² Ibid., at 586.

³ U.S. vs. Smith 321 Federal Supplement 424 at 429 (1971).

position of the

...that the Fourth Amendment prohibited only unreasonable searches and seizures. Thus, the warrant provision is viewed as merely one possible means of insuring that the search is reasonable. With this basis the government then asserts that: "Faced with such a state of affairs, any President who takes seriously his oath to 'preserve, protect and defend that Constitution' will no doubt determine that it is not 'unreasonable' to utilize electronic surveillance to gather intelligence information concerning those organizations which are committed to the use of illegal methods to bring about changes in our form of Government and which may be seeking to foment violent disorders."

The implications of accepting the government's position are discussed in the body of the paper on pages 25 through 30. One should not expect that when the Supreme Court does reach its decisions concerning this issue that its ruling will result in either a clear affirmation or a clear denial of an individual's general, overall right to privacy. One could safely guess, based on the legal precedent found in this appendix, that the Supreme Court's ruling will be hedged.

Maureen Green

U.S. vs. Smith 321 Federal Supplement 424 at 427 (1971).

VI. BIBLIOGRAPHYBooks and Pamphlets

- Arendt, Hannah. The Human Condition. Garden City, Doubleday, 1959. Discussion of the historical evolution of the public and private sectors of life.
- Barth, Alan. The Price of Liberty. New York, Viking Press, 1961. Examines the costs to law enforcement of granting the individual his right to privacy.
- Beaney, William M. "The Constitutional Right to Privacy in the Supreme Court." In Kurland, Philip B., ed. The Supreme Court Review - 1962. Chicago, University of Chicago Press, 1962, pp. 212-251. Excellent but dated discussion of the possible ways the Supreme Court could evolve a right to privacy.
- Beardsley, Elizabeth L. "Privacy: Autonomy and Selective Disclosure." In Pennock, Roland J. and Chapman, John W., eds. Privacy: NOMOS XIII. New York, Atherton Press, 1971, pp. 56-70. A moral examination breaking privacy down into its autonomous aspects and its selective disclosure aspects.
- Benn, Stanley I. "Privacy, Freedom and Respect for Persons." In Pennock, Roland J. and Chapman, John W., eds. Privacy: NOMOS XIII. New York, Atherton Press, 1971, pp. 1-26. Presents moral and ethical arguments about privacy.
- Berlin, Isaiah. Two Concepts of Liberty. Oxford, Clarendon Press, 1958. Excellent analysis of the positive and negative types of liberty.
- _____. Black's Law Dictionary. St. Paul, West Publishing, cop. 1957.
- Breckenridge, Adam Carlyle. The Right to Privacy. Lincoln, University of Nebraska, cop. 1970. Excellent review of the legal sources for the right to privacy.
- Cooley, Thomas M. A Treatise on the Law of Torts or the Wrongs which Arise Independent of Contract. 2d ed. Chicago, Callaghan, 1888. 19th Century textbook with section on the individual's rights which are established by law.
- Dewey, John. Human Nature and Conduct: An Introduction to Social Psychology. New York, Random House, cop. 1957. Discussion of the meaning of means and ends.
- Douglas, William O. Points of Rebellion. New York, Random House, cop. 1970. Brief essay which touches on the need for privacy.

Miller, Arthur R. The Assault on Privacy: Computers, Data Banks and Dossiers. Ann Arbor, University of Michigan, cop. 1971. Basic book on this area.

Nathanson, Nathaniel L. "The Right of Association." In Dor- sen, Norman, ed. The Rights of Americans: What they are- What they should be. New York, Random House, cop. 1971, pp. 231-252. Excellent review, focuses on the first amend- ment.

O'Sullivan, Richard. The Inheritance of the Common Law. Lon- don, Stevens, 1950. Doesn't address itself to the problems of privacy.

Packard, Vance. The Naked Society. New York, D. McKay, 1964. Not a great deal of help.

Pennock, Roland J. "Introduction." In Pennock, Roland J. and Chapman, John W., eds. Privacy: NOMOS XIII. New York, Atherton Press, 1971, pp. xi-xvi. Good delineation of the moral questions which must be faced when dealing with the individual's right to privacy.

Pound, Roscoe. The Spirit of the Common Law. Francetown, Mar- shall Jones, 1947. Rather slanted but does contain a dis- cussion of the nature of the Common Law.

Rieff, Philip. The Triumph of the Therapeutic: Uses of Faith after Freud. New York, Harper and Row, 1966. Not much help in analyzing the problems of privacy that are presented by today's society.

Rosenberg, Jerry Martin. The Death of Privacy. New York, Random House, 1969. Of general help in the area of constitutional law.

Russell, Bertrand. Authority and the Individual. Boston, Beacon, 1963. Short philosophical distillation of Russell's atti- tudes towards government and authority.

Russell, Bertrand. Political Ideals. London, George Allen and Unwin, 1963. Russell's political philosophy; partial examination of the interaction between the individual and the state.

Shils, Edward A. The Torment of Secrecy: The Background and Consequences of American Security Policies. Glencoe, The Free Press, 1956. Discussion of the interrelationship of secrecy, publicity and privacy in a pluralistic society. Made with the memory of McCarthyism close at hand.

Slough, M.C. Privacy, Freedom and Responsibility. Springfield, Thomas, 1969. No tight analysis of the issues; no con- templation of the possibility that the government might have to be restrained in its concern for national security.

Taylor, Telford. Two Studies in Constitutional Interpretation. Columbus, Ohio State University, 1969. Excellent study of interpretations of the first and fourth amendments.

Tucker, St. George (ed.). Blackstone's Commentaries Volumes I - V. New York, Augustus M. Kelley, 1969. Blackstone is one of the most authoritative sources on the Common Law.

Webster's Third New International Dictionary of the English Language Unabridged. Springfield, G. and C. Merriam, 1967.

Weinstein, Michael A. "The Uses of Privacy in the Godd Life." In Pennock, Roland J. and Chapman, John W., eds. Privacy: NOMOS XIII. New York, Atherton Press, 1971, pp. 88-104. Gives a definition of privacy which reflects his attitude towards privacy as a whole.

Westin, Alan F. Privacy and Freedom. New York, Atheneum Press, 1967. Excellent.

Periodicals and Newspapers

"ACLU Report Doubts Wiretap Worth." The Washington Post, December 19, 1971.

Bates, Alan P. "Privacy - A Useful Concept?" Social Forces. 42: 429-433. 1964. Discusses the functions of privacy.

Batten, James K. "Sam Ervin and The Privacy Invaders." New Republic. :19-23. May 8, 1971. Background on Ervin's activities in the Senate.

Beane, William M. "The Right to Privacy and American Law." Law and Contemporary Problems. 31: 253-435. Spring, 1966. Discussion of the prospects of a right to privacy being created by the Supreme Court.

Bloustein, Edward S. "Privacy, Tort Law, and The Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?" Texas Law Review. 46: 611-629. April, 1968. Synthesizes the opinions of Meikeljohn, Warren, Branceis and Frosser.

Boeth, Richard. "The Assault on Privacy." National Affairs. : 15-20. July 27, 1970. Description of the assault.

Carrington, Frank G. and Inbau, Fred E. "The Case for the so-called 'Hard Line' Approach to Crime." The Annals of the American Academy of Political and Social Science. 397: 19-27. September, 1971. Enlightening.

Oenniston, Lyle. "How Much Eavesdropping?" The Evening Star. December 29, 1971.

Eisenberg, Lawrence D. "The Constitutional Law of Defamation and Privacy: Butts and Walker." Cornell Law Review. 53: 649-662. April, 1968. Review of recent court cases which illustrate the interaction between the first amendment and privacy.

Books and Pamphlets

- Boveri, Margret. Treason in the Twentieth Century. New York, G.P. Putnam, cop. 1961. Valuable for its observation that while a determination of treason is made by utilizing a relative standard of values, this relative standard is given the status of an absolute.
- Carson, Hampton L. The Law of Criminal Conspiracies and Agreements As Found in the American Cases. Philadelphia, Blackstone, cop. 1887. A fairly complete but dated discussion of conspiracy in America. The sole offering of Firestone on this matter.
- Wright, R.S. The Law of Criminal Conspiracies and Agreements. Philadelphia, Blackstone, cop. 1887. A good discussion of the common law definitions of conspiracy.

- Ervin, Sam J. "The Most Precious Freedom." New York Times.
June 21, 1971. Read.
- Gerstein, Robert S. "Privacy and Self-Incrimination." Ethics.
80: 87-101. January, 1970. Some help.
- Graham, Fred P. "Mitchell backs U.S. Right to Wiretap for
Security." New York Times. April 23, 1971.
- Graham, Fred P. "Mitchell Upholds Wiretap of 'Dangerous Radicals'."
New York Times. June 12, 1971. Read; it's the government's
case.
- Graham, Fred P. "White House View of Wiretap Right Denied on
Appeal." New York Times. April 9, 1971. Read.
- Halloran, Richard. "Justice Aide Says Government Has the Right
to Put a Senator Under Surveillance." New York Times.
March 18, 1971. Read.
- Kesser, Ronald. "Wiretap Extent Disputed." The Washington Post. December 19, 1971.
- O'Connor, Thomas H. "The Right to Privacy in Historical Per-
spective." Massachusetts Law Quarterly. 53: 101-115.
June, 1968. Discusses privacy in the United States from
the 1700's.
- Prosser, William L. "Privacy." California Law Review. 48:
383-423. August, 1960. Discusses the four torts upon
which the privacy tort is based.
- Reveley, W. Taylor III. "The Fourth Amendment Right of Privacy:
Mapping the Future." Virginia Law Review. 53: 1314-1359.
October, 1967. Excellent review of fourth amendment rulings
which affect privacy.
- Schrag, Peter. "Dossier Dictatorship." The Saturday Review.
: 24-25. April 17, 1971. Some general use.
- "The Threat to Privacy." Time. :38-39. March 8, 1971. Back-
ground article.
- Warren, Samuel D. and Brandeis, Louis D. "The Right to Privacy."
Harvard Law Review. 4: 193-220. December 15, 1890. Abso-
lutely essential to an understanding of the legal aspects
of the privacy issue.
- Wechsler, Herbert. "Toward Neutral Principles of Constitutional
Law." Harvard Law Review. 73: 1-35. November 1959. A
justification for a judicial review of legislation based
on reasoning and analysis that transcends the immediate
result.
- Wicker, Tom. "The Goat and the Cabbage Patch." New York Times.
March 11, 1971. Discusses government's surveillance acti-
vities.

Government Publications

Blakey, Robert G. "Aspects of the evidence gathering process in organized crime cases: A preliminary analysis." In Task Force Report: Organized Crime Annotations and Consultants' Papers. Washington, Government Printing Office, 1967, pp. 80-113. Comprehensive article which studies the feasibility of legitimizing electronic surveillance methods.

Congress and the Nation 1945 - 1964: A Review of Government and Politics in the Postwar Years. Washington, Congressional Quarterly, cop. 1965. Excellent place to begin research.

Congress and the Nation Volume II. Washington, Congressional Quarterly Service, cop. 1969. Excellent starting point for research.

Congressional Quarterly Weekly Report. Volume 29, Numbers 8, 11, 13, Washington, Congressional Quarterly, cop. 1971. Contains excerpts from the hearings of the Senate Subcommittee on Constitutional Rights (Senator Ervin is chairman.).

The Constitution of the United States of America. Washington, U.S. Government Printing Office, 1964.

Digest of Public General Bills and Resolutions. Final Issue 1969 Part 1. Washington, Library of Congress Legislative Reference Service, 1969. Contains summary of bills and reports any action taken on them.

Digest of Public General Bills and Resolutions. Final Issue 1969 Part 2, Washington, Library of Congress Legislative Reference Service, 1969. See above.

U.S. 90th Congress, 1st Session. Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary United States Senate. To Protect the Right of Privacy - Hearings on S. 928. Washington, Government Printing Office, 1967. Contains useful information.

U.S. 91st Congress, 1st Session. Subcommittee on Constitutional Rights of the Committee on the Judiciary United States Senate. To Secure Personal Privacy and to Protect the Constitutional Right of Individuals to Ignore Unwarranted Requests For Personal Information - Hearings on S. 1791. Washington, Government Printing Office, 1970. Contains useful information.

Judicial Decisions

Camara vs. Municipal Court 387 U.S. 523 (1967). Discusses the applicability of the fourth amendment to administrative searches.

Gibson vs. Florida Legislative Investigation Committee 372 U.S. 539 (1963). Discussion of the first amendment's applications of the right of association and the privacy of membership lists.

Giordano vs. U.S. 394 U.S. 310 (1969). Sends cases involving electronic surveillance back to the district courts.

Griswold vs. Connecticut 14 L ed 2d 510 (1965). Determines that a right to privacy between married persons does exist.

Interstate Commerce Commission vs. Brimson 154 U.S. 477 (1894). Discusses the limits of investigation for a legislative commission.

Katz vs. U.S. 389 U.S. 347 (1967). Rules that wiretapping is subject to the fourth amendment's controls over search and seizure.

Mapp vs. Ohio 367 U.S. 643 (1961). Contains the justifications for the judiciary's use of the exclusionary rule.

Meyer vs. Nebraska 262 U.S. 390 (1923). Discusses the meaning of the term, liberty, in the fourteenth amendment.

Olmstead et al. vs. United States 277 U.S. 438 (1928). Rules that evidence gotten from wiretapping is admissible in a court of law. Contains Brandeis' dissenting opinion which affirms the right of the individual to privacy.

Schneider vs. Smith 390 U.S. 17 (1968). Discusses the Coast Guard's use of the Magnuson Act, which concerns the prevention of sabotage and other subversive acts.

Terry vs. Ohio 392 U.S. 1 (1968). Uses a balancing process to determine whether a search and seizure was made on reasonable grounds.

Time, Income vs. James J. Hill 385 U.S. 374 (1967). Rules that this is a case where the freedom of the press is must be protected rather than the need for the individual to have privacy. (Mr. Richard M. Nixon argued the Hill case.)

U.S. vs. Smith 321 Federal Supplement 424 (January 8, 1971). One of the cases which is awaiting hearing before the Supreme Court. Contains the governments arguments concerning their right to determine what constitutes a national security threat in electronic surveillance cases.

Vale vs. Louisiana 399 U.S. 30 (1970). Rules that an arrest on speech does not provide its own exigent circumstances to justify a warrantless search of the arrestee's house.

Weems vs. U.S. 217 U.S. 347 (1910). Discusses the nature of a constitution while dealing with its applicability to U.S. territory in the Philippines.

Wyman vs. James 39 L.W. 4093 (1971). Examines the right of privacy to the home when one is in the government's largesse. Rules that home visits are not subject to the fourth amendment warrant processes.

Interviews and Manuscript Sources

Dear, John, October 30, 1971. Princeton, New Jersey.

Emerson, Thomas I., "The Federal Bureau of Investigation and the Bill of Rights." (Prepared for the F.B.I. Conference held at Princeton University on October 29-30, 1971; they are awaiting publication.) Current article on the subject which expresses the author's concern with the government's invasion of privacy.

Lewin, Nathan, Presentation at the F.B.I. Conference on October 29, 1971, Princeton, New Jersey.

Mitchell, John N., Remarks before the Kentucky State Bar Association Cincinnati, Ohio April 23, 1971 (Department of Justice). Enumeration of government's current position re: national security.

Mitchell, John N., Address before the 77th Annual Conference of the International Association of Chiefs of Police Atlantic City, New Jersey October 5, 1970 (Department of Justice). Helpful, more of the above.

Mitchell, John N., Address before the Virginia State Bar Association Roanoke, Virginia June 11, 1971 (Department of Justice). Helpful (see above).

Nardian, Robert C., "Electronic Surveillance for National Security and Foreign Intelligence Purposes." Paper presented before the Ninth Circuit Judicial Conference June 30, 1971 (Department of Justice). Helpful.

Rehnquist, William H., "Privacy, Surveillance and the Law." Remarks before the National Conference of Law Reviews Williamsburg, Virginia March 19, 1971 (Department of Justice). Helpful.

Rehnquist, William H., Remarks at a panel discussion on Privacy and the Law in the 1970's at the American Bar Association Convention London, England 1971 (Department of Justice). Helpful.