

Woodrow Wilson School of Public and International Affairs
Princeton University

Conference on

THE BOUNDARIES OF PRIVACY IN AMERICAN SOCIETY

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Statement of the Problem

Where and how should the line be drawn between the individual's right of (or need for) privacy and society's need to know about its citizens? Aided by increasingly sophisticated data-gathering methods (including electronic bugging), private companies, institutions, and governmental agencies at all levels are gathering data on individuals and groups and compiling them in networks of computer storage systems. This information ranges from political views and activities to credit and employment records to sex habits and other personality traits of individuals. It has been estimated that the average American is the subject of between ten and twenty dossiers stored in one place or another. (Each member of this Conference, of course, is the subject of a file kept here in the Woodrow Wilson School.) The collection, storage, and use of information occurs in an environment in which the law is unclear, in which technology is rapidly changing, and in which the potential for abuse of privacy would seem to be enormous.

This Conference will face two main tasks. First, we must find out as rapidly as we can what the existing laws are and have been in these areas, how technology bears upon the problem, what kinds of data are being gathered now, and what they are being used for. With this background we can turn to our second task, which is to recommend policies. These could range from proposals for a constitutional amendment, to proposals for federal and state laws, to recommendations to individual citizens on ways in which they can preserve or regain their privacy. I propose that the work of the Conference be divided into the following four commissions:

Commission I: Domestic Surveillance Activities of the Federal Government

Commission II: State and Private Data-Gathering Activities

Commission III: Technology and Invasions of Privacy

Commission IV: The Regulation of Stored Data

Certain questions relating to privacy will cut across the work of all the commissions, and will have to be at least implicitly answered by each one. Privacy may be the right "most valued by civilized men," as Justice Brandeis once remarked, but it may also be seen as a value associated with nineteenth century gentility and individualism, and antagonistic both to the needs of a modern mass society and to the communitarian ideals characteristic

of many young Americans in the last decade. Probably most of us could find a right that we would rank above privacy. The issue is finally one of drawing a boundary between competing demands that are legitimate and compelling. This is the line that the Conference will attempt to draw.

Commission I: Domestic Surveillance Activities of the Federal Government

This commission must first find out as much as it can about the present scope of domestic surveillance, who is carrying it out, and what is being done with the data. It must then decide what, if any, forms of domestic surveillance are necessary, who should carry them out, under what kinds of restrictions and supervision, and for what specific uses. What kinds of data should the government be permitted to gather? Should distinctions be drawn between surveillance of people who are alleged to endanger the "national security" and people who are not alleged to do so? If so, who should define the "national security" and decide how, when, and by whom it is endangered? Should the Attorney General, as he contends, be given sole power to determine these questions? Are warrants issued by federal courts a sufficient safeguard against unreasonable searches and seizures? What kinds of safeguards can be established to protect against a "fishing expedition"? In granting a warrant to listen in on the mad radical bomber's house, how do we protect the privacy of his Establishment wife who dallies with an apolitical non-bomber while her husband is off planting dynamite?

Commission II: State and Private Data-Gathering Activities

This commission should concern itself with three areas: (1) State eavesdropping laws. Approximately thirteen states (including New Jersey) have enacted such laws, and the American Bar Association has recommended that the rest of the states do so. The commission must study these laws, recommend whether to retain, amend, or repeal those laws that exist, and urge their adoption or rejection in states which don't have them. (2) Sexual activities between consenting adults. Homosexual (and certain heterosexual) acts between consenting adults are illegal in 46 states. The commission will study these laws and recommend their retention, amending, or repeal. Should laws be passed that would make it illegal to discriminate in jobs, housing, and public accommodations on grounds of sexual orientation? (If so, should certain exceptions be made for such positions as that of a camp counselor?) In short, to what extent does society have a right or need to know about it? (3) Credit files and other privately compiled dossiers. The TRW Credit Data Company of Anaheim, California has over 40,000,000 files, adds over 50,000 a week, and expects that by 1975 it will have a dossier on every American who ever applied for credit of any kind anywhere. The Retail Credit Company of Atlanta has a similar number of files and a similar ambition. The Fair Credit Reporting Act (which went into effect in April 1971) was designed to regulate these gigantic repositories, but it is mainly concerned with the use of data, rather than the gathering of data in the first place. The commission should study the way in which credit bureaus gather information, and from what sources, and recommend methods that would control what kinds of data are collected. It might also consider such varied private activities as psychological testing (and the filing of the results), insurance records, and the monitoring of telephone calls by the telephone companies themselves.

Commission III: Technology and Invasions of Privacy

This commission should immerse itself in the technological aspects of the privacy problem. This is vital to the work of the Conference because changing technology, more than any other single factor, has been responsible for the erosion of traditional standards of privacy and "search and seizure." The commission should perhaps assume that what can be done will be done (or at least attempted) and it should therefore develop a series of recommendations for controlling the uses of electronic devices as they relate to issues of privacy. This task will necessarily involve at least an elementary working knowledge of what computers can do, how a wiretap is installed, etc., because some of the best ways to deal with these incursions may turn out to be themselves technological. (For example, as it becomes easier to plug computers into one another, it becomes a simple matter to transfer data from one area or level of government to another. We need to know how this works in order to know how to regulate the flow of information.) The work of this commission could also involve an attempt to project current technological change into the future in order to suggest guidelines that will not be rapidly outmoded by technological change.

Commission IV: The Regulation of Stored Data

No matter what policy recommendations are conceived by Commissions I-III, we must still deal with the existing data that sit in the dossiers and memory banks of both public and private bureaus and organizations. Moreover, whatever the recommendations of these first three commissions, society cannot function without the accumulation of some records. Since data will continue to be collected and stored, the problem becomes one of preventing its abuse while it is stored, and of getting rid of it when it becomes obsolete. Who should control existing data? Who should have access to files? The subject himself? Others? Who should have the authority to transfer data from one storage area to another? What safeguards should be established to protect against leaks, to correct inaccuracies, and to insure that information legitimately gathered for one purpose is not illegitimately used for another? Finally, what procedures should be set up to flush obsolete data from one's file?

BIOGRAPHICAL GUIDE

Each member of the Conference will of course have to track down the available materials most pertinent to his own particular area of investigation. For general background, begin with these four recent works: Adam Carlyle Breckenridge, THE RIGHT TO PRIVACY (1970); Arthur R. Miller, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS (1971); J. Roland Pennock and John W. Chapman, eds., PRIVACY (1971); and Alan F. Westin, PRIVACY AND FREEDOM (1967). Miller and Westin have substantial bibliographies. These materials have been placed on SPIA reserve, as have the following items of general interest:

I. Books

Myron Brenton, THE PRIVACY INVADERS (1964)

COMPUTERS AND THE LAW (American Bar Association Standing Committee on Law & Technology, ed ed. 1969)

E. Long, THE INTRUDERS (1967)

S. Wheeler, ed., ON RECORD: FILES AND DOSSIERS IN AMERICAN LIFE (1969)

J. Rosenberg, THE DEATH OF PRIVACY (1969)

II. Periodicals

Bates, "Privacy--A Useful Concept?" 42 SOCIAL FORCES 429 (1964)

Beaney, "The Right to Privacy and American Law," 31 LAW AND CONTEMPORARY PROBLEMS 253 (1966)

Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," 39 NEW YORK UNIVERSITY LAW REVIEW 962 (1964)

Bloustein, "Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional As Well," 46 TEXAS LAW REVIEW 611 (1968)

Comment, "Privacy, Defamation, and the First Amendment: The Implications of Time, Inc. v. Hill," 67 COLUMBIA LAW REVIEW 926 (1967)

Creech, "Psychological Testing and Constitutional Rights," 1966 DUKE LAW JOURNAL 332.

Fried, "Privacy," 77 YALE LAW JOURNAL 475 (1968)

Hoffman, "Computers and Privacy: A Survey," 1 COMPUTING SURVEYS 85 (1969)

Jourard, "Some Psychological Aspects of Privacy," 31 LAW AND CONTEMPORARY PROBLEMS 307 (1966)

Kamisar, "The Wiretapping-Eavesdropping Problem: A Professor's View," 44 MINNESOTA LAW REVIEW 891 (1960)

Karst, "The Files: Legal Controls over the Accuracy of Stored Personal Data," 31 LAW AND CONTEMPORARY PROBLEMS 342 (1966)

Michael, "Speculations on the Relation of the Computer to Individual Freedom and the Right to Privacy," 33 GEORGE WASHINGTON LAW REVIEW 270 (1964)

Note, "Credit Investigations and the Right to Privacy: Quest for a Remedy," 57 GEORGETOWN LAW JOURNAL 509 (1969)

Note, "Privacy and Efficient Government: Proposals for a National Data Center," 82 HARVARD LAW REVIEW 400 (1968)

Prosser, "Privacy," 48 CALIFORNIA LAW REVIEW 383 (1960)

Pyle, "CONUS Intelligence: The Army Watches Civilian Politics," WASHINGTON MONTHLY, Jan. 1970, at 4.

Pyle, CONUS Revisited: The Army Covers Up," WASHINGTON MONTHLY, July 1970,
at 49.

Schwartz, "The Legitimation of Electronic Eavesdropping: The Politics of
'Law and Order'," 67 MICHIGAN LAW REVIEW 455 (1969)

Warren & Brandies, "The Right to Privacy," 4 HARVARD LAW REVIEW 193 (1890)

Finally, there is a small file of clippings from newspapers and magazines on the reserve shelf. To get beyond these materials, check the bibliographies in Miller and Westin and the obvious starting points: the card catalogs, the periodical indices, the New York Times Index. Because both law and technology have been changing so rapidly, the most recent sources will probably be the most useful.