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The Boundaries of
Privacy in American
Society
Federal Government
Surveillance
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The Commission on Federal Government Surveillance investigated four aspects of the controversy over the boundaries of privacy in American society. The Commission sought to: identify the primary federal agencies engaged in surveillance activity (Glauberman); determine the scope of that activity (Vinson); consider the psychological impact of surveillance upon individuals (Nenno); and balance the needs of government for information with the needs of its citizens for privacy (Green). Significantly, Commission members all agreed that privacy is both a need and a right, implied in the First, Fourth, Fifth and Sixth Amendments to the Constitution.

In a philosophical sense, a certain amount of privacy is necessary to enable an individual to take free and responsible action, for privacy invasions, or the fear of privacy invasions, are coercive forces which do not conduce to the consideration of alternative courses of action, a consideration which is the essence of morality (Green, 6-7). Privacy also permits an individual to creatively respond to the environment, whereas the presence of observers and the specter of observance tend to inhibit creative responses (Nenno, 20). Moreover, the basic relationships of respect, love, friendship and trust are dependent upon the selective disclosure of one's innermost thoughts, without which selectivity these relationships could not be maintained (Green, 8-9).

Threats to privacy are broadly divisible into two types: invasions of the physical life space; and invasions of the conceptual life space (Nenno, 1). The first incursion refers to such circumstances as crowded living conditions. Several studies have explored the effects of crowding, but with unclear results. More information is desperately needed, and it is therefore suggested that the federal government initiate a substantial research effort in this area (Nenno, iv). The second type of threat, incursions into the intellectual life space, is characterized by governmental information gathering by surveillance of individuals and groups of individuals. It was with this latter type that Commission One was primarily concerned.

The federal government gathers information on both the threatening and the non-threatening activities of its citizens. The executive agencies, especially the Departments of Commerce; Labor; and Health, Education and Welfare are the major collectors of data on the non-threatening activities of the American people (Glauberman, 6). The government's need for information has risen steadily since the first decennial census in 1790, but has risen more sharply since the post-New Deal emphasis on government services. The recent development of the computer is also partially responsible for the steeper incline, because this technological advance has increased both the government's ability to store data and its appetite for it (Freeman, Commission Three, reports a parallel finding for the private sector).

Steven Pavstner
Commission One
Page Two

Government surveillance of the non-threatening activities of the populace is comprised of four major varieties. Individuals may be required to: (1) fill out questionnaires; (2) submit to psychological testing; (3) allow unannounced home visitations; or (4) permit inspections of their residences for the purpose of enforcement of building codes, health laws, and the like (Green, 15). The Bureau of the Census in the Department of Commerce has included some privacy-invading questions in its forms in the past, and has a potential for increased surveillance in the future, due to the legal requirement that citizens answer questions posited by the Bureau in its decennial census (Glauberman, 11). The Bureau has a commendable record for maintaining the confidentiality of its own material, but other federal agencies often subcontract with the Census Bureau to conduct the other agencies' surveys. The Bureau processes the surveys for the requesting agency and transfers the information via computer tapes to that agency. Obviously, after transfer, the Bureau can no longer guarantee non-disclosure of the data (Glauberman, 12). This misuse of the Bureau seal, which implicitly commands the divulgence of the requested information, could be avoided if the Bureau were: (a) instructed by Congress to exclude those questions not authorized by the Congress or the Constitution in its decennial census; (b) required to clearly distinguish on the surveys between questions to which responses are mandatory and questions to which answers are voluntary; and (c) allowed to report only aggregate data to other federal agencies; and (d) enjoined from conducting surveys for, or reporting information to, private concerns (Glauberman, 11-14; Green, 18-19). Provisions similar to these are included in Senate Bill 1791, and the Commission strongly urges the speedy passage of that proposed legislation.

Government surveillance also takes the forms of psychological testing, home visitations and home inspections. Psychological testing is especially contentious because it attempts to probe beyond the level of consciousness, and is thus an invasion of privacy of the greatest magnitude, but its results are of questionable validity and marginal value for all but the most super-sensitive jobs. It is not clear that psychological testing could not be of some minimal value in choosing air traffic controllers, for example, but certainly for the overwhelming majority of jobs they should be abolished. A valid psychological test may be devised at some future date but the present ones should not be used (Green, 19; also Wolf, Commission Three). Home visitation is an administrative tool which can be of some value to social workers, but outrageous abuses of these visits have occurred. It is recommended, therefore, controls over the timing of these visits, their frequency, and the amount of prior notification due the visatee should be written into law (Green, 19-20; Nenno, 6). Home inspections for the enforcement of federal laws have also been abused, but at issue here is not personal surveillance but building code compliance. It is suggested that these administrative searches still be subject to the judicial warrant process (Green, 20).

House of Representatives Bill 9527 contains several additional safeguards against governmental surveillance of the non-threatening activities of its citizens which the Commission recommends be adopted. These safeguards include: notification of an individual by an

agency which maintains a record on him of the existence of that record; non-disclosure of the information in a dossier without the consent of the individual on whom it was compiled, or notification of the individual if the disclosure is required by law; maintenance of a list of names and positions of persons inspecting records and the purposes of their inspections; inspection of dossiers by their subjects, with the subjects given permission to make copies of their files; addition of records or other information to the subjects' files by the subjects; and the removal of erroneous information. (A small number of exceptions to these provisions, such as in the case of mental patient, may have to be allowed, but the rule should remain.) Finally, in order to ensure agency compliance with these regulations, a Federal Privacy Board should be established with authority to direct the agencies to comply with these provisions and to hear complaints from citizens charging non-compliance. An initial proposal for a separate Data Review Board could be incorporated into H.R. 9527, so that the mandate of the Federal Privacy Board would include citizen complaints of inclusion of unnecessary questions in agency questionnaires (Green, 18).

The Departments of Justice and Defense are the chief collectors of information on the threatening activities of Americans. The Federal Bureau of Investigation and, more recently, the Army, have compiled dossiers on millions of individuals and groups. Some of these files, such as Justice's Professional Check Passers File and the Organized Crime Intelligence System, have caused little concern. They should be improved: adults should not be classified with minors; the criminal records of juvenile delinquents should be destroyed if the records remain clear for five years; and the data on persons charged with a crime but acquitted should be expunged; but criminal surveillance was not the main concern of the Commission (Vinson, 36-37). Rather, the Commission concentrated on domestic political surveillance, and found it widespread and unjustified (Vinson, 28-37). "The basic question at issue is the power [of the Army, Justice Department and Central Intelligence Agency] to monitor the activities of individuals when there is no probable cause to believe they have committed a crime (Glauberman, 28)." Of the three major collectors of domestic political data, the Central Intelligence Agency should be ordered to cease and desist its domestic operations; the Federal Bureau of Investigation should be directed to return to its crime-fighting functions; and the Army's intelligence activities should be carefully circumscribed.

The original purpose for the authorization of the Army's political data collection activities was to help it quell civil disturbances (Vinson, 4; Glauberman, 19). However, the operation has expanded by its own momentum to an organ which not only gathers data on violence-prone organizations, but on such non-violent groups as the Southern Christian Leadership Conference and the National Association for the Advancement of Colored People, as well. The Army also reportedly has files devoted exclusively to descriptions of the lawful political activities of civilians (Glauberman, 19).

Political data collection must be brought under control. Commission One recommends that separate Boards of Overseers be established by the Congress to watch over the Federal Bureau of Investigation, the Central Intelligence Agency, the Army, Navy and Air Force. The

Boards should have civilian majorities and their own investigative task forces to help constrain illegal or unwarranted surveillance. A second function of these Boards should be to guarantee the continued separation of intelligence and security clearance files, originally a function of a proposed Joint Congressional Committee (Glauberman, iv). Besides managing the separation of intelligence and clearance files; the distinction between adults and youthful offenders; the destruction of the records of juveniles; and the erasure of the files of acquitted persons, these Boards of Overseers could serve a valuable educative function. The Commission discovered that most Americans are either unaware of the existence of covert political intelligence gathering operations or unaware of its scope (Vinson, 26). These Boards could serve the important function of enlightening the people to the activities of their government.

The principal governmental means of data collection on the activities which threaten the society are wiretapping and electronic surveillance, or "bugging." The Federal Communications Act of 1934 (47 U.S.C. 605) attempted to limit surveillance by prohibiting the interception and divulgence of intercepted communications without the sender's authorization, but the government interpreted the Act to proscribe only interception and divulgence to private parties, not mere interception for data gathering purposes (Glauberman, 31). Instead of eliminating wiretapping and electronic surveillance, the Act as interpreted by the government only made it more secretive. The one control on government surveillance of this nature is the requirement that a judicial warrant must be obtained, but three factors have neutralized this safeguard: (1) "consensual surveillance," in which one of two or more parties is aware that the interaction is being recorded, has been arbitrarily excluded from the government's definition of surveillance; (2) retroactive warrants have been issued after the fact of surveillance; and (3) in cases of national security, the government has interpreted the warrant provision as requiring that the President obtain a warrant from his Attorney General-- or vice-versa-- rather than from a magistrate. (Vinson, 23; Glauberman, 37). The qualifications which the federal government has imposed on earlier legislation which limited the executive branch's surveillance powers have effected a carte blanche involvement in widespread surveillance (Glauberman, 35-37). Because the executive branch has failed to faithfully abide by the spirit of Congressional limitations, the Congress should establish a Judicial Authorization Board to replace executive discretion and to rule on governmental requests for surveillance authority. (Green, 27-30; Glauberman, 39-40).

The Judicial Authorization Board should be created in legislation which specifically circumscribed the permissible circumstances of surveillance; the mandate of the Board would be to enforce those circumscriptions. The Board should be given a definition of privacy against which to measure governmental information needs, for without such a definition the creation of a Judicial Board only accomplishes a transfer of discretionary power from one locus to another. (Stevens, in Commission Four, also cited the need for a Congressional definition of privacy). The Authorization Board should not operate as an adversary proceeding; it should be likened to a grand jury, not a trial jury.

Steven Pavsner
Commission One
Page Five

The central tenet of this definition of privacy should be that wiretaps and electronic surveillance are unjustified unless the government can demonstrate to the Authorization Board that an individual possesses the intention to commit, and the ability to commit, a physical, criminal act. This criterion of intention and ability would not replace the warrant process-- specific search warrants could still be issued by lower courts-- but it would supplement it so that all federal wiretapping and electronic surveillance authorization would be within the Board's domain. As a part of the definition of privacy, the enabling legislation should also require the government to obtain a separate warrant for each individual to be surveyed; surveillance authorizations should 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 (Glauberman, 40; Vinson, 7-9). The composition of the Board which would enforce these regulations is negotiable. Two possibilities are a Board composed of three members, serving two year terms in staggered rotation (Glauberman, 40); and a Board composed of nine members, serving one year staggered terms (Green, 29). In each case, the standard constitutional practice of senatorial advise and consent should be employed.

In its reports, Commission One has recommended that restrictions be placed on the means the federal government may employ to gather information on the non-threatening and the threatening activities of its citizens. To restrict the means is not to deny that dangers to the security of the government and the people exist, but rather to make a conscious trade-off between the tolerance of risk and the maintenance of individual liberty. If the means used to gather information to protect the society are destructive of the minimum amount of privacy that an individual needs to freely and responsibly act, then the society is destroying itself by the means it is using to protect itself. (Green, 23). In the words of Justice Brandeis (Olmstead vs. United States, 277 U.S. 438 at 479, 1928): "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding." Commission One has argued for an increased understanding of the individual's need for privacy, which must be protected if the society is to flourish.

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