Plato's Dreams Realized

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Surveillance and Citizen Rights from KGB to FBI

Alexander V. Avakov

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Front Cover: GEORGE W. BUSH MEETS VLADIMIR PUTIN IN SLOVENIA.
Original caption: U.S. President George W. Bush (L) shakes hands with Russian President Vladimir Putin at Brdo castle in Slovenia, June 16, 2001. The former Texas oilman and the one-time KGB spy were expected to discuss a series of thorny issues including U.S. missile defence plans, weapons proliferation, NATO enlargement and hot spots like the Middle East and the Balkans. REUTERS/Michael Leckel
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Introduction: The Spell of Plato

Karl Popper, in *The Open Society and Its Enemies*, presented the most devastating critique of the totalitarian philosophy. Popper argued forcefully that in *The Republic* Plato laid down a vision of society which, through a philosophical tradition including Hegel, led to totalitarianism.

Popper's work begins with the section named "The Spell of Plato," which starts with citations for and against the open society.

For the Open Society (about 430 BC):

> Although only a few may originate a policy, we all are able to judge it.
>
> — Pericles of Athens

Against the Open Society (about 80 years later):

> The greatest principle of all is that nobody, whether male or female, should be without a leader. Nor should the mind of anybody be habituated to letting him do anything at all on his own initiative; neither out of zeal, nor even playfully. But in war and in the midst of peace — to his leader he shall direct his eye and follow him faithfully. And even in the smallest matter he should stand under leadership. For example, he should get up, or move, or wash, or take his meals... only if he has been told to do so. In a word, he should teach his soul, by long habit, never to dream of acting independently, and to become utterly incapable of it.
>
> —Plato of Athens[1]

Totalitarian methods prove to be very seductive for politicians of all stripes. Whenever advances in technology and social organization make it feasible, they jump into using any newly available form of political surveillance. It is often said that America is not Germany or Russia and therefore will avoid the dangerous

1. Philosophy: Popper (1996), p. 7.

degradation of its democracy. But let us not forget that Germany in the 1930s too was a highly developed Western society with a long cultural tradition, which had given the world great philosophers, scientists, and artists. It seems that no society is immune to certain methods of chauvinistic propaganda and modern social control. When unscrupulous politicians choose to employ such methods, we are set on a road leading to predictable results, which put our own country in peril. This work reminds us how chillingly similar the germ of police machinery and political manipulation in the old Soviet Union is to the newly unfolding American Empire.

1. The Subjective: US Intelligence Greets a Soviet Dissident

"Philosophy is most of all an action." — *Karl Jaspers*

Introduction: The FBI was Interested in Me

In 1987 it came to my attention that the FBI was interested in me. For some period of time I had been writing letters to my friends and I sent copies to Sakharov. In these letters, I spoke of certain general human problems of life in America and permitted myself to express some doubt that the total rejection of socialism in all its social aspects would be the best thing for the people of the USSR. In 1987, I sent letters more often. I have noticed that this coincided with the apogee of the FBI's work with me.

It is hard for a human being to oppose the pressure of the state apparatus, especially if he is ideologically unprepared for this. As a Soviet "dissident" I emigrated from the Soviet Union in 1981 and was admitted that same year as a political refugee into the United States. Being a fresh pro-American immigrant from the USSR, I was not ready for a "reality check" with the FBI and it took some time for me to adapt to my discovery.

To explain the origins of this conflict I have to return in my story many years earlier.

Family and Childhood

I was born in 1954. My father's father was Armenian. He changed his name from Avakyan to Avakov in the 1920s, when a Russian sounding name was considered more "progressive." My father's mother was Russian; her people were

Don Cossacks. Her family was persecuted for being "kulaks" (rich peasants), and she was forced to resettle in the Caucasus where such persecution was less intense.

My mother is a Russian from Leningrad. My grandparents on her side died before I was born. As a child, my mother lived in Leningrad throughout the siege and by some miracle survived. During the siege, this little schoolgirl read every classic of Russian literature to be found in the libraries. To this day, her knowledge of Russian literature astonishes American professors, who have called her a phenomenal talent.

My grandparents on both sides were simple people without any higher education, but they were all highly moral. They were called strong people, people with a strong will to survive. My grandmother Elena Pavlovna never in her life permitted herself to do anything that she considered wrong. For example, throughout her life she never even tasted vodka.

When my mother graduated from school, she was awarded a silver medal. My parents are both engineers by profession. When they met and married, my mother without hesitation gave up her permit to live in Leningrad (which Leningraders very rarely do) and went to live with my father in Baku, in what was then the Azerbaijan Republic of the USSR. My father obtained a master's degree after completing work at the institute (university), a candidate's degree (Ph.D.) and then Doctor of Science (a post-doctoral degree which existed in the USSR).

The political aspects of my ancestry are not as irreproachable. My father's father was an old Bolshevik. He was never in opposition with the Party line and was never repressed. In the privacy of the family he used to throw around some pre-1917 Bolshevik slogans, like "Russia is a prison of nations," to which nobody except me seemed to pay attention. He lived to be 80. My father's mother joined the party during World War II, as she herself says, out of patriotic feelings. My father joined the party because issues concerning his work were decided at Party meetings. It is true that neither my mother nor any of her forebears ever was a Party member. But, considering everything, it could be said that I come from a family of Communists.

One of the major sources which I had studied thoroughly in the early years, was The Great Soviet Encyclopedia,[2] which contained many things which were a source of thought for a young mind: from colorful illustrations of different animals, insects, and plants, to parameters of naval ships, to historical maps, to the sketches of the design of nuclear weapons. It was published during the years of changing ideological attitudes — thus I was at once acquainted with the way articles were written in the final years of Stalin's cult and with the rehabilitation of the victims of Stalin during the Khrushchev years.

2. Reference: Great Soviet Encyclopedia (1949-1958).

Youth: Enthusiasm for Economics and Philosophy

My parents sent me to the English language school in Baku. In 1964, when I was 10, we moved to Sverdlovsk. Our home was within a few hundred yards of the forest. During our whole Sverdlovsk period we used this as an opportunity for regular excursions into the woods: in the summer it was on bicycle, in the winter it was on cross-country skis. In Sverdlovsk once again I was enrolled in an English school. The school provided a fine education and the students were very competitive.

In 1965, when I was 11, my grandmother gave me a reference book on international economics. At that age, gifts can have extremely serious repercussions: I memorized all the tables in the handbook and drew graphs for all of them. My father encouraged my new enthusiasm with leading questions. At his advice, I began to buy references and other books on Soviet and international economics. In our home there was a kind of cult of books, of which I was a member in good standing. I made rapid progress, since I had to respond to my father's critical rejoinders. I conducted analyses and drew graphs. To this day, there is nothing that gives me greater satisfaction than getting my hands on an economics handbook with tables of numbers. I look at the numbers and see graphs before my eyes.

My father told me that to understand economics one must know philosophy. At that time in the Soviet Union "philosophy" primarily meant Marxism. I began to read the classics of Marxism. In 1966 I broke my arm playing basketball, and because I had to stay at home I became even more introverted and spent more time with the classics. My father would challenge me with questions that were far from orthodox, and I quickly mastered Marxism (Marx/Engels[3]; also Lenin[4] and Plekhanov) and went on to other philosophies that were available to me.

I understood Marxism in my own way. This, however, did not prevent me, right up through advanced university courses, from creating a small furor every time it came to discussing the classics. The instructors didn't like to tangle with me — I knew the original sources a great deal better than they did.

At the University: Yura Yudkevich Refuses to Take the Military Oath of Allegiance

In 1971, on my father's advice, I enrolled in the school of mathematics and mechanics at Ural State University — only mathematicians were able to do real

3. Philosophy: Marx/Engels (1954-1981).
4. Philosophy: Lenin (1958-1974).

work in economics in the Soviet Union. After my third year, I specialized in mathematical economics.

After our fourth year, at the student military muster my friend Yura Yudkevich pointed his automatic rifle at the ground and said that only God had power over a man and that for this reason he refused to take the military oath of allegiance. At first our military instructors took fright and dismissed the class, not knowing what to do. Then they set students from the schools of journalism, history, and philosophy on Yura. Yura had little trouble dealing with them, since they really didn't have much of a grip on journalism, history, or philosophy. Everybody at the muster was talking about it. It was not for nothing that Yura was a talented mathematician — he had been able to find the most vulnerable point to strike. Many other students began to say that they would have joined him in refusing to take the oath if Yura's turn had come earlier (we were called up to take the oath in alphabetical order). Seeing that they were losing control of the situation, our authorities immediately sent Yura off to a psychiatric hospital, although it was obvious to everyone that there was absolutely nothing wrong with him. Gossip about this affair refused to die and continued throughout the autumn following the muster.

Leaflets: Psychological Motivator and Convictions

Yura had done exactly what our best teachers and parents had taught us. As for me, even in my schooldays it was clear that the greater world around us was not living according to the truth. And there already existed historical precedents for what honorable people should try to do in such situations. I had lived through all my days at the university almost to the end in the secret hope that the students would do something against the government. And I had almost given up hope.

On the other hand, it was very possible to understand all this extremely well and still not do anything much beyond telling a political joke to one's friends. In order to overcome the fear that held sway over everyone, something additional was required — what I call here a psychological motivator. And eventually I found my psychological motivator.

I was suffering from unrequited love.

My attempts to come of age in this situation were laughably inadequate: I tried to write poems. I made a rule that every Monday I had to present a new poem to the girl whom I loved. That exercise continued for about one year. In the cause of this pursuit I became acquainted with many modern poets, both Soviet and foreign.

And the whole thing came crashing down right before my eyes, at the time of the very events I have just described. Disappointment in love is a very powerful emotion when you are 21 years old. I will not spend much time describing

my state of mind, but will merely cite an excerpt from a letter written by Zhukovskiy to Gogol "On the Poet and his Current Significance" (1848), which perfectly describes my thinking at the time[5]:

> ...Beauty exists, but is not really present in the world, since it, so to speak, appears to us solely in order to disappear, to speak to us, to invigorate, renew our soul — but we cannot touch it, nor inspect it, nor grasp it; it has neither name nor form... Thus, it is easy to understand why it is nearly always associated with sadness — however, this is not the kind of sadness that leads to depression but rather, because it is so ephemeral, so inexpressible, so ineffable, it gives rise to a sort of creative, sweet, somewhat vague aspiration. Beauty is only what does not exist — during those moments of anxious and vivifying emotion, you experience a desire not for what actually exists and lies before you, but for something better, mysterious, remote; you aspire to unite with it, with that which cannot exist in the world but which somewhere exists for your soul alone. And this aspiration is one of the ineffable proofs of immortality: if this were not the case, why is it that when we achieve pleasure, what we feel is neither complete nor clear? No! The sadness we experience at such moments convincingly demonstrates that beauty is not at home here, that it is only a transient messenger telling us of something better: it is the enchanting longing for one's fatherland, the dark memory of what was lost, sought and in time attained in Eden.

Thus, I was personally unhappy, exactly as was required. I began to analyze the "meaning of my life."

It is worth noting that probably no action having ethical implications, nor morality in general, exists before we are faced with some formative events in our life. It is not that we do not know what the "right," moral thing, is — as somehow we do (even though I am not sure that this is because of theological seminars or their left-wing equivalents). We formulate our real moral position when we experience conflicting impulses at the crucial moments of life and make a moral choice. A path to personal maturity may be surrounded by very ambiguous feelings and the initial preference for what might become a person's fate and a decisive turn in the genesis of his personality may be very slight.

A remarkably coincidental phenomenon has been noted in one commentary to Derrida:

> For a decision to be worthy of the name, it must be more than the simple determinative subsumption of a case under a rule. Looking up the rule for the case and applying the rule is a matter for administration rather than ethics. Ethics begins where the case does not entirely correspond to any rule, and where the decision has to be taken without subsumption. A decision worthy of its name thus takes place in a situation of radical *indecision* or of undecidability of the case in question in terms of any rules for judging it. The decision must therefore involve a measure of *invention*, and that invention entails both an uncertainty and the affirmative projection of a future. A decision is like a performative which has both to perform and to invent the rules, according to which it might, after the event of its performance, be received as "happy."[6]

5. Literature: Zhukovskiy (1848).

At this particular moment of my life, it seemed to me that if I did something nonconformist I would be on the right track, that I would be doing what my education and upbringing had prepared me for. The first problem was that I was aware that I almost certainly would have to answer to the Committee for State Security (*Komitet Gosudarstvennoy Bezopasnosti* in Russian, commonly known in the West by its acronym, KGB) for my actions. This problem can be paraphrased as a problem of will.

> Will is the capacity to choose an action, and then to bring to bear the internal effort necessary to perform it. A specific act consists not merely of consciousness and activity per se. In performing an act of will, the individual overcomes the power of his immediate needs and impulsive desires: the appropriate concomitant of an act of will is not "I want to," but "I should" or "I must," the awareness of the values to be achieved by the action. An act of will includes the making of a decision, often accompanied by a conflict of desires (act of choice) and its implementation.[7]

But this was not all. It is not for me to explain to the reader that, in a totalitarian state, family members serve as hostages guaranteeing the behavior of the individual. For this reason everything is vastly more complicated than simply the problem of will. Carl Jung comments disparagingly on the fact that "modern man is proud of what he considers his self-control and the omnipotence of his will."[8] Jung further argues that "true moral problems begin where the criminal code leaves off, their solutions seldom, if ever, depend on precedent, still less on formulae or sermons. True moral problems grow out of conflict of duties. He who trusts others as little as himself will never reach a decision at all, if it is not the result of what common law calls an 'act of God.' In all such cases, unconscious authority puts an end to doubts. This authority can either be described as 'God's will,' or as an 'act of uncontrollable natural forces.'"[9]

Finding in myself, after some self-analysis and vacillation, such unconscious self-justifying authority, I began to compose and distribute leaflets. For my own existence, this action was as essential as breathing or eating.

Commentary on the Leaflets

In the autumn of 1975 I distributed leaflets devoted to four topics, about 125 copies each: "This is our history in brief," "Do you know what kind of country you live in?," "You must be aware of your power and your role," "Do you want to avoid a nuclear catastrophe?"

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6. Philosophy: Bennington (1998), p. 556.
7. Reference: Soviet Encyclopedia (1991), v. 1, p. 243.
8. Psychology: Jung (1989), p. 26.
9. Ibid., p. 25-26.

Bearing in mind the potential reaction of the KGB, I composed the leaflets mainly by piecing together excerpts from official Soviet sources. I am unable to reconstruct the first leaflet completely, since I do not have the appropriate sources at hand: from these I will cite only the short excerpts that I can remember. The other three were compiled from sources that are available in the US and it was possible to reconstruct their complete texts. While I was typing and distributing the leaflets they went through several revisions involving slight variations in the text. The versions I give here are the ones that stand out in my memory.

The leaflet "This is Our History in Brief" was composed, with one exception, of quotes from the Collected Works of Marx and Engels. These included quotations:

1. From Engels's work *Anti-Duhring* on the inevitability of class stratification and subsequent exploitation by the ruling class.
2. From Marx's *German Ideology*, "the more a society's ideology diverges from reality, the more holy, metaphorical and elevated its language becomes...," etc.[10]
3. From the article on the "Cult of Personality" in *The Philosophical Encyclopedia*, "...at the XVIIth Congress of the All-Union Communist Party (Bolsheviks) in 1934, it occurred to certain delegates to replace Stalin in the post of General Secretary. After the Congress, Stalin took his own measures eliminating more than half of the participants of the XVIIth Congress: 1108 of the 1966 delegates. 98 of the 139 members and candidates for membership in the Central Committee were liquidated."[11]

And other quotes from Marx and Engels.

The leaflet "Do You Know What Kind of Country You Live in?" was a slightly abridged quotation from the article on Fascism from the *Soviet Philosophical Encyclopedia.*

The leaflet "You must be Aware of Your Power and Your Role" was about the role of the intelligentsia.

The leaflet "Do You Want to Avoid a Nuclear Catastrophe?" consisted about 80% of quotes, mostly from the US and Japanese constitutions.

There was one exception — paragraph 13 — "No agitation to overthrow the existing order...," which was taken from a 1956 decision of the US Supreme Court, according to which members of the US Communist Party were released from prison.

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10. Philosophy: Marx/Engels (1954-1981).
11. Philosophy: Philosophical Encyclopedia (1960-1970), v. 3, "Cult of Personality."

The paragraph containing the definition of due process of the law is taken from a decision of the US Supreme Court.

The last paragraph, which follows the enumeration of human rights, and the slogans, are mine.

In general, over the intervening years, the leaflet has not grown as outdated as might have been expected. It concluded with a ringing call:

> Amnesty for political prisoners!
> Down with the KGB — the Soviet Gestapo!
> Down with the dictatorship of bureaucracy!
> Long live freedom of speech and mass media!
> To the workers — the right to strike; to the peasants — a new NEP (New Economic Policy); to the universities — autonomy!
> Down with Great Russian and Soviet chauvinism!
> Long live internationalism!
> Long live freedom of assembly and association!
> ...
> All power to elected Soviets!
> Long live the revolution!

Investigation and Trial. Encounter with the Committee for State Security (KGB)

When I was composing my leaflets I felt inspired, and I understood that this was my hour of destiny. In general terms the leaflets had been written in my head since my school days. It was easy enough to type them out. When I was apprehended on November 28, 1975, the facts of the case were clear; there was no question as to who had written the leaflets and where or how they had been printed. My family remembers one moment when the KGB agents came to search the apartment and saw all my books. One of them said: "It would have been better if he were a drunkard."

The worst moment is when the door slams behind you for the first time. It is also terribly hard because you cannot communicate with your family and friends and have no lawyer. But a person can get used to anything. There is no need to say that this was the work of the KGB. I was kept in a room where there was one other person — you can guess whom he was working for — and he kept trying to talk politics with me. I was accused under Article 70 of the Criminal Code of the Russian Republic of the Soviet Union: Anti-Soviet Agitation and Propaganda.

Strange as it may seem, the stumbling block was my refusal to acknowledge my guilt. At that time I didn't know that the Moscow dissidents considered this point to be very important. Nevertheless, out of some sort of general considerations, I simply did not want to say that I was guilty. I had a feeling that this issue could hold up the whole investigation indefinitely. They threatened me

with a sentence of 7 years of hard labor and 5 years of exile. (Several years later, I found out that the same terms had been mentioned to my relatives by the head of the Sverdlovsk Region KGB, Kornilov). I understood that I would not get out for 12 years, when I would be 33. That upset me very much but I continued to hold out. I didn't acknowledge any guilt and I didn't express repentance.

The investigators passed the time by going over Marxist theory with me. They were clearly astonished by my knowledge of the original sources. At one point the public prosecutor supervising the KGB of the Sverdlovsk Region came to the interrogation. He began to read my leaflet on the role of the intelligentsia (see leaflet: "You must be aware of your power and your role"). His eyebrows gradually rose and finally he blurted out in disgust: "What blatant anti-Soviet propaganda!" The investigator whispered: "He's quoting Lenin, that's Lenin!"

Finally, after a month's investigation they sent me for a forensic psychiatric examination, which was obligatory for the prosecution of especially dangerous state crimes (that is, it was obligatory under Article 70: Anti-Soviet Agitation and Propaganda).

The chief physician of the hospital told me straight out that if I didn't acknowledge my guilt, they wouldn't even let me into the courtroom but would send me to the psychiatric hospital. The other prisoners told me (possibly at the instigation of the KGB) that I would be sent to the psychiatric prison in Kazan for especially dangerous criminals, from which no one ever left alive. They cited the example of the head of a small underground "Party" who had been sent there from Sverdlovsk not long before I arrived. This prospect scared me and I agreed to acknowledge my guilt. I must say that at the age of 21 I had a very poor idea of the actual nature of one or another of the punishments that might await me. All this was shrouded in secrecy in the Soviet Union in general, and in the Sverdlovsk region, which was under a special KGB regime, even more so.

Before the trial, they promised me that they would let me go if I wrote an article for the newspaper about the harmful influence of Western radio stations. I was seduced by their promises. My desire to get out of jail as fast as possible was very strong. I believed that I had already done my share with my leaflets.

I was sentenced to a year and a half in a maximum-security camp (the article of the Criminal Code stipulates from 6 months to 7 years of maximum-security and/or from 2 to 5 years of exile). The fact that in prosecuting a "Marxist" the authorities were putting themselves in an uncomfortable position may have played a role in my relatively lenient sentence. At the trial I acknowledged my guilt on all counts of the indictment, except for one. I refused to acknowledge that I had called for the armed overthrow of Soviet power. This was not consistent with my principles.

After the trial, my truce with the KGB ended on its own. They brought me an article to sign but I couldn't stomach it. It was full of Soviet journalistic clichés. Everything about the article was false. Even the language was false. I also understood that if I knuckled under I would never again be free of the KGB. I

protested and made many changes and corrections in the article. They never contacted me again about it. As far as I know, the article was never published. Probably the corrected variant smacked excessively of the intelligentsia. No one said a word about shortening my sentence. Soon I was sent to the camp.

Among regular books which I read in prison during the investigation, the major one was *World Light*, by the Icelandic Nobel prizewinner Haldor Laxness.[12]

At the Camp: My Horizons Expand

I ended up in Camp 37 in the Perm region. The very existence of this corrective labor colony, like that of several other analogous places of incarceration under the aegis of the KGB (as opposed to the Ministry of Internal Affairs) was secret. The fact is that the criminal codes of all the Union republics stipulated that convicts be sentenced to incarceration on the territory of this republic. The camp held people from all over the Soviet Union. Previously the KGB camps had been in the Mordovinian Autonomous SSR, but at the time I am writing about almost all prisoners convicted of "especially dangerous state crimes" had been transferred to the Perm region, to CLC 35, 36, and 37. Only a small female prison remained in Mordoviya.

The camp was modern. According to the other prisoners, the older camps had towers with soldiers and there the prisoners could exchange words with the soldiers. Here, there were no towers. An opaque wall with electronic alarms surrounded the grounds. The idea was to exclude harmful contact between the soldiers and prisoners and to use instead specially trained officers ("re-educators").

The total number of people in the camp fluctuated during my stay there from 30 to 55, including 20-25 imprisoned for anti-Soviet agitation and propaganda. The average person's ideas about political prison camps in the USSR are not completely accurate. The Soviet Union did not acknowledge that these were political prisoners (an acknowledgment which, by the way, some of the prisoners tried to compel through hunger strikes).

In addition to violators of Article 70: Anti-Soviet Agitation ("students") there were violators of Article 64: Treason ("soldiers"). The term "soldiers" came from the fact that Article 64 was used to prosecute soldiers who had run away from military units stationed abroad. In actuality, among the "soldiers" were actual soldiers and a number of spies (or double agents or triple agents — no one knew precisely whom they were working for). None of these spies had been soldiers, but instead were officers or diplomats. In general, there was no contact between the "students" and the "soldiers." The "soldiers" had no particular

12. Literature: Laxness (1969).

political convictions and typically worked for the Ministry of Internal Affairs or the KGB.

In my case, the KGB operatives turned out to be poor psychologists. In the camp I encountered other people who had views analogous to my own. Everyone expressed these views openly — I felt as if I had ended up in the British Parliament. You have to remember the atmosphere of fear in the Soviet Union of that time in order to understand the contrast between the camp and "freedom in the outside world." My recent experience with the investigation and my acknowledgment of guilt and initial readiness to sign the newspaper article lay like a heavy weight on my conscience. I shared my experience with the other prisoners and very openly acknowledged that I had behaved badly at the trial. I began to try to prove that I would never repeat such weakness with the KGB. I gradually became very uncompromising and went from being a moderate anti-Soviet to being an extreme anti-Soviet.

I took advantage of the ambiguity present in the camp and as soon as I arrived, and behaved as if I were in a political camp. I participated in a protest against the quality of the beds (and those who protested were granted an improvement in their living conditions). There were other hunger strikes for various reasons in which I also participated. There were always meetings, strikes, and hunger strikes going on. The officers who were "re-educating" us had a tough time of it. They were deluged with questions, and demands for improvements in living conditions on general checks of the prisoners.

When I was in the camp, I found common ground with nationalists from all over the USSR because my "program" included a call for the right to secede from the Soviet Union (see leaflet "Do You Want to Avoid a Nuclear Catastrophe?"). Among these nationalists were Ukrainians, Armenians, Moldovans, Lithuanians and one Estonian. Many interesting people — journalists, historians, philologists, diplomats, and military personnel — had been sentenced for violations of Article 70. Indeed, even the books that were brought to be sold at our camp were difficult to find outside (or in the "greater world" as we called it).

Other prisoners told me that everyone who had been convicted of violating Article 70 would be allowed to emigrate from the Soviet Union. This was a complete surprise to me. I thought about this quite a bit. (A former military attaché also told me that I would be under surveillance in the West all my life — a fact to which I did not pay much attention at the time.) Several times I was put into solitary confinement for organizing strikes. Once it was 40 degrees below zero and the temperature in solitary dropped to 0 Centigrade (32 Fahrenheit). I was sent to solitary without any warm clothes and I got chilled to the bone and couldn't stop shaking. At that point I decided, "I will leave this country and get my whole family out." For some reason, I kept thinking in particular about my younger brother, who was still a schoolboy.

My behavior in the camp made the authorities uneasy. The investigator on my case was called in from Sverdlovsk. He called me in and, staring at the

ground, as if he himself were ashamed of what he was saying, he told me that I had deceived the KGB and they had given me too short a sentence. He then announced that if I wanted to continue my studies at the university, I would have to inform on my friends. Appalled, I absolutely refused. This was the last time I ever saw a KGB agent in his official capacity. My relationship with the KGB had been defined once and for all.

A month before my sentence was up, I was taken back to the prison in Sverdlovsk as a prisoner "showing no signs of rehabilitation." On the way back to Sverdlovsk, the convoy referred to me not merely as a "maximum-security prisoner" but as a "special" prisoner. The idea that I had earned myself the most "stringent" designation in the Soviet labor camp code filled me with pride.

I was carrying a heavy pack containing books bought with the money I had earned.

In Sverdlovsk they tried to brainwash me, but nothing came of it: my convictions had been strengthened in camp. Then an incident occurred which I suspect was instigated by the KGB. A prisoner who shared my cell picked a fight with me. In response I declared myself to be on a hunger strike (I wrote a report to the Supreme Soviet that I was thus protesting the Gestapo methods of the KGB) and spent the last 2 weeks until my sentence was over alone in a cell (there was a regulation that prisoners on hunger strikes must be isolated completely, and this regulation was observed by the prison administration). I left the prison on May 28, 1977, having served my entire sentence.

On the whole, I can say that my time in the camp was the time I felt myself the freest. People who are at liberty are not truly free. This is hard to understand. The philosopher who comes closest of all to elucidating this is Heidegger, who said that a person could feel himself to be free even in prison. Consider also:

> For ... Martin Heidegger, a sense of authentic existence is given to each person when he realizes his true subjectivity, which his life in the world and his social transactions so often conceal. Authentic existence is often contrasted with cosmic anxiety — *i.e.*, anxiety of a deep and far-reaching kind to which the antidote is to find oneself and one's freedom in a total commitment to what is called the ground of Being.[13]

After Camp: A More Dangerous and More Interesting Life

Because I showed no signs of being "rehabilitated," I was placed under administrative supervision. This is an extrajudicial punishment, which meant that I had to remain at home between 8 p.m. and 6 a.m., and that I had to report to the police once a month. Because of this restriction, the only job I could get was as a mail carrier. After a year, the administrative supervision was terminated

13. Reference: Encyclopedia Britannica (1983)(1), v. 15, p. 597.

and I began to work as a programmer (a profession at which I still work to this day).

Neither my brother nor I had to serve in the Army — they gave us "white tickets" (exemptions). (I was called in before the military commissariat (draft board) and just when I was sure that I was going to be drafted, they informed me that I was "denied the right to serve in the Soviet Army due to my behavior.")

If you don't count petty inconveniences, on the whole it wasn't so bad. My entire family was behind me. We found certain advantages in the position in which we found ourselves.

I will put this even more strongly: my life only began in earnest after the camp, and the period after my release and before our emigration was one of the most interesting and best periods of my life. For this I am beholden first and foremost to our friends. It should be stated that after my arrest, society (the people around us) split with regard to our family: some friends turned away from us, and others remained. Those who remained revealed themselves to us in a new and better light. Our friends created a completely extraordinary atmosphere around us. We lived an intense spiritual life in a kind of intellectual magnetic field that was clearly delineated from the rest of the milieu. After camp, I became vastly more confident and creative in my convictions and everyone forgot that I had once been a "Marxist."

It is true that we had to be very careful and constantly analyze the people around us for signs that someone might be an *agent provocateur*. This somewhat spoiled the atmosphere of trust that otherwise surrounded us.

My brother and I adapted to our situation better than our parents did. Right up until the time we went abroad we continued to work. My father and mother had held a high social position before my arrest. Ultimately, they were compelled to leave their jobs. They were left with dramatically fewer friends than my brother and I.

Although I had begun to think about emigration while I was still in the camp, the first one to mention it was my father. My father went to the Office of Visas and Registration and submitted a petition saying that we wanted to emigrate to "any capitalistic country." The first time we were refused. Then my parents, brother and I requested permission to go abroad three more times. Twice we were refused for a number of reasons: we weren't Jewish, we lived in a "closed" city, my father had a security clearance, and the invitation (from friends) was not from close relatives. Nevertheless, the mere hypothetical possibility that some day we would leave was emancipating for us. We began to speak and think more openly and thus hastened our own departure. They had to find a way to defuse us, only this time all of us; either they had to put us all in prison or let us all leave.

Our first attempt to emigrate by Israeli papers was in 1978; we received permission to emigrate in 1981 on the third attempt when the USSR was being "cleansed" of suspicious elements after Afghanistan. (My FBI file says that we

left the Soviet Union "without any apparent difficulty." If somebody has already forgotten, I would remind him that people like us were called "refuzniks.")

I should mention one more important aspect of this period: I fell in love often, but got only suffering from it. The girls I was in love with either were afraid to have anything to do with me or mistakenly believed that they could "reeducate" me. For this reason when I truly met the right girl, I didn't hesitate to ask her to marry me. We took a dizzy flight on an airplane to a remote part of the Sverdlovsk region, to the village where Lina had been born, and we were registered (as man and wife) in an instant, without a waiting period. This was while we were waiting for our emigration documents. It was a real risk since, according to the Visa Office rules of that time, changes in family status during issuance of documents could serve as a pretext for refusing permission. I was betting that if they were letting us go, it was not due to the fact that our dossiers were in proper order but quite the opposite. And I was right. However, at the age of 27, it seemed to me that permission to emigrate came sadistically soon after my wedding. Since Lina had not been registered in our emigration documents, according to bureaucratic logic, she had to wait until she was invited.

Interrupting my "honeymoon," I left the country with a heavy heart.

Life in the US: We are Reaganites

My parents and I left the Soviet Union in October 1981. Lina was able to come only in August of the next year. Then my brother came. Then my brother's wife and his son came. Every one of us was only allowed to take two suitcases. We tried to send the rest of our belongings by train, but they were stopped at the border and returned to our relatives. (Curiously enough, my FBI file says that we shipped furniture from the Soviet Union. There was no furniture. This is an illustration of the FBI's lack of professionalism.)

In hindsight, of all the material possessions we left behind I regret only losing our large book library, which we had to sell to pay "Tax for the Rejection of Soviet Citizenship" and for visas. I would estimate that in Sverdlovsk and in Baku we had easily 10,000 books, some of them rare editions.

All of us — Lina, my parents, my brother, and I — began to live in the United States with a very positive attitude toward this country and its "right wing." For example, we supported Reagan with all our hearts. When I see certain current ultra-reformers in Russia, I understand them very well — I myself was like that at one time.

But life always has something new to teach us.

By 1987, I understood that the FBI was watching me.

Life After 1987

1987 was my "1984" and now I was beyond it. I realized that all I had to do was not be afraid to apply all the experience "opposing" the status quo that I had gained in the Soviet Union. Then everything was all right.

Gradually, the initial shock of the collision with the FBI dissipated.

I have done well in the profession of software development. After 1987, I traveled a great deal within the US and abroad, to Western Europe 86 times (for a total of 1381 days) as well as visiting the Middle East, South-East Asia, Australia, South Africa, Latin America, and Canada. This travel has expanded my horizons, made my world-view more cosmopolitan, and helped me deepen my understanding of international cultural, socio-economic, and political problems.

I started my life as a typical "homo sovieticus." In my youth I became strongly anti-Soviet. I arrived to America as a Reagan supporter. However, with the passage of time, my views moved to the left, i.e., became more moderate. A visitor from Russia once called my comprehensive and deliberately objective opinion about America by "highly dialectical."

Interestingly enough, I do not necessarily like the thinkers with whom I have become acquainted during my years in America and it seems that the proportion of works that I dislike is greater than in the earlier periods of life (maybe that is because the excitement of discovery is not so strong when you have unrestricted access).

What's Next?

In 1990, I made a request to the FBI pursuant to the Freedom of Information/Privacy Act. The material I received confirmed my suspicions. As this material shows, the Bureau was probably worried about certain aspects of my personality or worldview. The FBI also entered into contact with the CIA, evidently trying to determine the reactions of the people receiving the letters in the USSR or trying to use more convenient means of surveillance available through that organization.

It should come as no surprise that my background prepared me to look with passion upon the violation of my rights in the US

This book tries to answer to a basic question: Is there, objectively speaking, a problem of rights vs. the national security state in America?

2. Is There A Problem of Rights vs. The National Security State in America?

2.1 In Lieu of an Epigraph

> A problem that has long been of concern to D. is that in his home in the mountains there is a mirror telescope, a bulky and cumbersome thing, which he from time to time aims at a certain cliff, from which some people are watching him in binoculars; and every time, as soon as the people who are watching him discover that he is watching them, they immediately take their binoculars out; this once more confirms a logical postulate that somebody who is watching does not exist without somebody being watched, and he himself starts watching if he is an object of somebody else's watching, — a banal logical counteraction, but being transposed into reality it acquires a potential of an aggressive quality — somebody is watching him because he, in turn, is watching him in his telescope, feels himself caught with a smoking gun; exposure causes shame, the shame often causes aggression; some of those who have disappeared would have come back if he had removed his instrument and would have started to throw rocks at his home; generally speaking, what has been going on between them watching him and him watching his watchers is characteristic for our time, — everybody feels that he is being observed by everybody and he observes everybody; a modern man is a man being watched, a state watches him using more and more sophisticated techniques, a man tries as much as he can to avoid observation; a man to a state and a state to a man are becoming increasingly suspicious, similarly every state watches the others and feels that it is being watched by every other state.
>
> —Durrenmatt [14]

14. Literature: Durrenmatt (1995), p. 313-314.

2.2 Myth and Reality

A Political Refugee as an Object of the Attention of US Intelligence

Let us consider the situation when a political refugee from the former Soviet Union finds himself an object of the attention of US intelligence. How realistic would it be for him to insist on his constitutional rights?

A Myth Existing Outside of the USA

To understand the situation, we should look at who might be watching such a refugee.

The myth that used to be disseminated beyond the borders of the US says that "The only organization in the US authorized for such surveillance is the FBI."

And that, in any event, materials collected on somebody by the FBI are available through the Freedom of Information/Privacy Act.

Freedom of Information/Privacy Act

Since indeed I felt myself under such surveillance I made a request according to the Freedom of Information/Privacy Act in 1990. In fact, I made three requests: one to the Washington Headquarters of the FBI; one to the local FBI; and the third one to the CIA.

The Request to the Washington Headquarters of the FBI

I mailed my request to the Washington Headquarters of FBI pursuant to the Freedom of Information/Privacy Act on July 4, 1990. I received an answer three years later, on March 4, 1993 (despite the fact that the law stipulates that a response will be made within 10 days).

The majority of the dossier is crossed out, as information that it is not desirable for me to know — even things it would seem I would know better than anyone. For example, on the two pages headed "Arrests in the Soviet Union," everything is crossed out. The points of law justifying this are cited. The predominant reasons given were:

> "...specifically authorized under criteria established by an Executive order to be kept secret in the interest of ... foreign policy and ... are in fact properly classified pursuant to such Executive order..."
>
> "...information compiled by ... an agency conducting a lawful national security intelligence investigation..."

The FBI was interested in me from 1982 to the end of 1988. During the period of my 1987 letters, I am named in memoranda as a "disloyal alien." No evidence of further FBI investigation for periods later than this is contained in the dossier.

What Does "Disloyal Person" Mean?

In 1972, a study was conducted for the Democratic National Committee in an attempt to answer this question.

> We wanted to know to what extent different groups of citizens were able to agree on a definition of loyalty.[15]
>
> Our 48 cooperative respondents included 14 who said they were politically conservative, 11 who were moderate, 13 liberal, and 6 radical.[16]
>
> Who is disloyal? Most of the citizens in our sample, except radicals, held that political dissidence [scored on a scale of seven different items] was disloyal.[17]

(Obviously most Americans, not having lived under the Soviet regime, fail to see where such a definition may logically lead.)

> Governmental responses to disloyalty sanctions: If someone were defined as disloyal by appropriate government agency what would be an appropriate responses: execution, life imprisonment, a prison term, exile, fines, or inaction? Conservatives were advocates of the sterner punishments; none other than conservatives called, for example, for execution.[18]

(This is dangerous because the views of the population may materialize into social institutions and public policies.)

The dossier I received from the FBI headquarters describes why the FBI was particularly interested in me. As far as I can tell, there are nine given reasons. Only the second and the third reasons are not censored: "Reason Number Two: Subject left the Soviet Union… to settle in the United States, even though he is not Jewish. Reason Number Three: Subject has a solid educational background…" Actually, Reason Number Three would appear to be meaningless because most of the people who emigrated from the USSR in the 1970s and 1980s had a higher education. Meanwhile, Reason Number Two seems to say that my main crime was that I was of the wrong national, ethnic or religious origin.

At the bottom of every page of the dossier "SPY-BJA/TMG" is written. I do not know what "BJA/TMG" means, but "SPY" seems clear enough — and not "suspected spy" or "potential spy," either. If I, even with my exemplary anti-Soviet biography, was considered a spy, then any educated Russian admitted to the United States is a priori considered a spy.

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15. Law: Blum (1972), p. 150.
16. Ibid., p. 151.
17. Ibid., p. 152.
18. Ibid., p. 153.

The Request to the Local Organization of the FBI

A response from the local organization of the FBI came in 1998, eight years later; 99% of the file was blacked out for the same national security considerations. In some sense this file contained even less material than the one obtained in 1993. Still, in the uncensored part of the dossier the FBI discussed the possibility of relying on CIA agents in the US to resolve some of its questions.

The Appeal to the FBI

In 1993, I made an appeal asking the FBI to provide me with the censored parts of my dossier. In the appeal papers I said that failure to disclose the censored parts of my file would undermine trust in the democratic system. The appeal was completely denied.

The Request to the CIA

To an analogous request made to the CIA in 1990, I received a response a year later, in 1991. My request was denied. The Privacy Act of 1974 specifically exempts the CIA from its purview. Its associated law, the Freedom of Information Act of 1967, allows, among other exemptions, the involvement of "national security and foreign policy." As noted in the brochure of a private organization called the Freedom of Information Clearinghouse, federal judges interpret this law in the sense that an agency associated with national security has the right to deny its possession of material if this material falls under the category of exemption. Supporting the hypothesis that the CIA really did have information on me is the fact that in the FBI dossier, there is (judging by the part that was left uncensored, at least one) document addressed to the Director, Central Intelligence Agency, Washington, D.C. 20505.

Unfortunately the contents of the document had been completely censored.

The Role of the CIA

As far as memos from the FBI to the CIA, Section 102 of the 1947 National Security Act, which contained the CIA provision, set forth a number of guidelines for US foreign intelligence. About half of the relatively brief section dealt with the military-civilian balance. The section went on to stipulate that the CIA should coordinate the intelligence effort.[19]

Whatever the intentions of Congress in 1947, the CIA developed in accord with a maximalist interpretation of the act. Thus, the CIA has become the primary US government agency for intelligence analysis, clandestine human intelligence collection, and covert action. In addition, the Director of the CIA is

19. Law: Jeffrey-Jones (1989), p. 41.

also the Director of Central Intelligence and is responsible for managing the activities of the entire intelligence community. Under President Reagan's 1981 Executive Order 12333, which is still in effect, the CIA is permitted to collect "significant" foreign intelligence secretly within the United States.[20]

As I have become aware, the law exempts the CIA from Freedom of Information requests. This provides a very convenient means for surveillance of suspect persons: it is completely secret and unaccountable.

As the Director of Central Intelligence, the Director of the CIA was guiding the entire US intelligence community. As of 2004, that community officially consisted of 15 intelligence agencies:

1. Army Intelligence
2. Navy Intelligence
3. Air Force Intelligence
4. Marine Corps Intelligence
5. Central Intelligence Agency
6. Defense Intelligence Agency
7. Department of Homeland Security
8. Energy Department
9. Federal Bureau of Investigation
10. National Geospatial-Intelligence Agency
11. National Reconnaissance Office
12. National Security Agency
13. Bureau of Intelligence and Research (of the State Department)
14. Office of Terrorism and Financial Intelligence (of the Treasury Department)
15. United States Coast Guard.[21]

In 2004, the traditional role of the CIA was modified when all the intelligence community was subordinated to the newly created office of the Director of National Intelligence. The legal basis for this was the Intelligence Reform and Terrorism Prevention Act of 2004. Between the issuance of the 9/11 Commission's report and the enactment of this law just a few months later , based largely on the commission's recommendations, there was no sustained public debate over the merits of the recommendations. They were taken for granted; critics such as Henry Kissinger were ignored.[22] As a result, we are now dealing now with an over-centralized intelligence apparatus with all the dangers which ensue.

20. Law: Richelson (1989), p. 13.
21. Law: United States Intelligence Community C Who We Are.
22. Law: Posner (2005), p. 19.

2.3 Why Is There a Question about Electronic Surveillance?

Practical Side of the Issue

A handbook for detectives which describes itself as a desk reference for all police officers, including the FBI, provides the following very precise formulation:

> With regard to electronic surveillance, the use of illegally obtained recordings of conversation may invalidate the procedure of grand jury investigation, and the formulation of issues based on information obtained through illegal electronic surveillance directed against a witness may be a violation of that witness' Fourth Amendment rights.[23] [Note the verb "may" as opposed to "must" or "will."]

As for cases involving the interests of foreign policy and national security, then the US system of legal procedures completely loses its sense of humor. The FBI counter-intelligence teams do not need a criminal predicate in order to tap a telephone, only a "strong" suspicion that the subject may be collecting intelligence information. They also have the unique capacity to open a case on US citizens even if they have no evidence that they are involved in criminal activity.[24]

"*Spiderweb*"

Spiderman's Solution: 'Don't send him to jail. Send him home'. So reads the glossy brochure advertising 'Justice Electronic Monitoring Systems Inc'."[25]

The methods that are currently available for the surveillance are very invasive in nature and may include a lot of electronics. The theory governing the use of such surveillance was more or less openly formulated.

> William H. Webster, former FBI chief and newly appointed Director of Central Intelligence, introduced a colorful new bit of spy-speak in a speech last December. Addressing the tricky problem of counterintelligence in our democratic society, he said: "As our main tactic... we 'spiderweb' known or suspected intelligence operatives. Spinning our webs with physical and electronic surveillance... we weave a barrier between hostile agents and our citizens.[26]

Thus, the object of such surveillance is left to make wild guesses based on circumstantial facts. I am certain that I was subject to two types of surveillance: the FBI surveillance and third party surveillance. However, the question of possible coordination and mutual dependency between these two types of surveillance remains open to speculation. If in fact the third party surveillance was independent from the FBI surveillance, I do not know its motives; it seems to

23. Law: Grau (1993), p. 11-7.
24. Law: Jeffreys (1994), p. 227.
25. Law: Lyon (1994), p. 102.
26. Law: The New York Times Magazine (July 26, 1987).

intersect with the official FBI motives in its vague expressions of some "spy" or "mole" mania.

Whatever the motives of my surveyors, as a net result I am now uniquely qualified to speak about the methods of surveillance in the US. I have indeed experienced all the surveillance types mentioned in the subsection "Summary of Surveillance Methods." I can also say from my personal experience that unsavory right-wing characters are drawn into US intelligence due to its uncontrollable secrecy.

Missing Pages

Most of the file that was given to me was blacked out with special ink. But there are pages which are said to have been removed altogether, explained as "related solely to the internal... practices of an agency"; and "could reasonably be expected to disclose the identity of a confidential source... in the case of a record or information compiled by... an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source."

How can these pages be so secret that they cannot be shown even in a redacted form? Interviews with other people were shown to me (redacted). The blacked out memorandum to the Director of the CIA was shown to me; what is more secret than that? Could a more compromising and inconvenient address be mentioned?

A Phantom Court

If we are talking about the latter, then it is most probably The Foreign Intelligence Surveillance Court, which gives permissions for electronic surveillance on the territory of the United States. The existence of this court is beyond any doubt.[27]

Nevertheless, the US government shows strange timidity in acknowledging this fact. The last edition of the US Government Manual, which describes all the organs of the federal government of all levels, does not mention it at all.[28]

On official jargon the organ, which is so secret that it is not even mentioned, is called "not charted." All real spies know about its existence. The real motive for the cover up may be something else: if everybody were told about that Kafka-style creature, "administering justice without a day in court," it would be too obvious that fundamental rights, including rights to privacy and due process, are being violated.

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27. Law: Ducat (1992), p. 899-900; Jeffreys (1994), p. 222; Marist College (1).
28. Law: Office of the Federal Register, National Archives and Records Administration (1997-1998).

Innovative Surveillance Methods Used by the Government

The US government uses some innovative methods to bypass restrictions on domestic surveillance. One of these ways is the use of the CIA. Another way is to use intelligence services from friendly foreign countries.

The Berlin Wall would never have stood for so long if the East German Stasi had not been able to monitor the telephone conversations and open the mail of every East German citizen. Unlike former East Germans, US citizens need not be paranoid about the potential abuse of government power, but it would be foolish to ignore the fact that the FBI has bugged peaceful civil rights leaders like Martin Luther King, Jr., as well as members of Congress and the Supreme Court.

Nor is government monitoring of phone calls a thing of the past. If you ever made a phone call to anyone outside the Unites States (and, as you will see from the following discussion, in the recent years also inside the United States), your phone call — or fax, or e-mail or other data transmission — was probably recorded by the National Security Agency. The name of any US citizen is supposed to be erased whenever a human analyzes captured recordings. But the Echelon surveillance network is run jointly by US, British, Canadian, Australian and New Zealand agencies and no law prevents intelligence agencies of other countries from spying on US citizens. According to Mike Frost, a former employee of Canada's NSA counterpart, the NSA and other agencies get around laws against spying on their own citizens by asking their international counterparts to do it for them.[29]

There is reason to believe that Israeli intelligence is utilized in this way to spy on immigrants from the former Soviet Union.

Did September 11 Render Human Rights Concerns Obsolete?

Some readers at this point would comment that my rights were clearly violated in the past, but that after 9/11 we have to think about new boundaries between personal rights and public security concerns.

Indeed, after September 11, it may have appeared that the march of progress in human rights had come to a full stop, proving once again the realist perspective that state security must prevail over other ethical and human rights considerations.[30]

I would like to make a counter argument to these observations.

First, the fact that I was apparently an object of FBI surveillance is now just a foundation for other thoughts. It leads to a murky world of surveillance techniques and possible philosophical and judicial problems. Regardless of my own

29. Law: *San Francisco Chronicle* (September 8, 1999).
30. Law: Ishay (2004), p. 284.

surveillance experience, the facts uncovered in my research are fascinating and somewhat troubling.

Second, I acknowledge that we live in the world where an individual or a small group of individuals can cause a great deal of trouble if not full-blown catastrophes. However, the methods to thwart potential terrorists and spies are a double-edged sword. If you do not observe proper judicial constraints, you risk destroying the open democratic society we all associate with normal life. I would be much more concerned about proper constitutional judicial procedures accompanying surveillance than about the scale of surveillance programs as such.

Third, we are the witnesses of a great tragedy in America and that story is not complete yet. What we see in America is very much a failure of policies. Many people have observed that George W. Bush started his term in office with an extraordinary dose of arrogance. He wants to build a missile defense system despite the argument of other countries and many Americans that it would only make the world a less safe place. He even managed to irritate America's traditional allies in Western Europe with his stance on global warming, the convention on biological weapons, and a whole range of other issues. And as far as the complicated scene in the Middle East, he has abandoned the efforts of the previous administration to achieve a better accommodation with the Palestinians. The fact that terrorist acts were perpetrated on this administration's watch indicates that there is likely a causal link with current policies. Those who like to live in a free society and not in a police state should not unnecessarily antagonize the world around them.

There is another issue which is less obvious. It is common knowledge internationally that the Taliban and fighters of Bin Laden are direct creations of the intelligence services of two countries: Pakistan and Saudi Arabia; and these two intelligence services are clients of the CIA. The officially sponsored *Encyclopedia of the Central Intelligence Agency* denies that there ever been any cooperation between the CIA and Bin Laden.[31] This is a blatant lie. Steve Coll, the managing editor of *The Washington Post*, published a well-documented book, *Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, from the Soviet Invasion to September 10, 2001.*[32] (See also the book by Naftali.[33]) Coll demonstrates on the basis of his investigation that the CIA created Al-Qaeda during the war in Afghanistan, that it used Al-Qaeda during the Chechen war, and that only by 1998 did the CIA realize that the danger of Al-Qaeda outweighed any possible further benefits.

Considerable evidence has surfaced of involvement by Pakistan in 9/11, in particular its ISI (Inter-Services Intelligence). One report said that an ISI agent, Saeed Sheikh, wired $100,000 to Mohamed Atta, considered the ringleader of the

31. Law: Smith (2003), p. 258.
32. Law: Coll (2004).
33. Law: Naftali (2005).

9/11 hijackers. Even more potentially devastating was the report that Saeed Sheikh wired this money at the instruction of none other than ISI chief Mahmoud Ahmad. This "damning link," as Agence France Presse called it, had — given the close relations between the CIA and the ISI — explosive implications for the question of CIA competence.[34]

It begs the question why did the CIA deal with such unsavory people despite their virulent fundamentalism? The answer seems to be that the CIA was playing geopolitical games (see Friedman[35]). The same people who have now turned against the United States provided ideology, logistics, weapons, training, finances, and volunteers for the war in Chechnya. The overriding desire to subvert Russia was used to rationalize a betrayal of democracy. This is a betrayal of the ideals which America says it holds dear, the very ideals it says it is fighting to bring to Iraq, for instance. The people in the US intelligence community knew what they were doing, but the policy was dangerous.

In the end either Pakistani and Saudi Arabian intelligence fooled the CIA or somebody in the CIA made a grave mistake. This only underscores that good neighborly relations among democracies makes both moral and practical sense. Instead of trying to forever demonize Russia, politicians should think hard about which philosophical ideas their allegiance belongs. I am saying this especially in view of the negative effects the emotionally-driven antiterrorist measures may have on US democracy. In the final account, the attempt to subvert Russia was not only a betrayal of democracy in Russia but also in America and everywhere else in the world. Once again, that is a failure of policies and does not necessarily mean that the judicial procedures which existed in the United States prior to September 11 jeopardized its security.

During the hearings of the 9/11 Commission in 2004, it became evident that overzealous behavior on the part of the Bush administration after September 11 was partly caused by the desire to compensate for the government's neglect of the antiterrorist responsibilities prior to September 11. Attorney General John Ashcroft in particular had failed to comprehend the gravity of the threat. After two briefings in the summer of 2001 about such threats, he told his subordinates he did not want to hear this information anymore.[36] This contrasts with the fact that the State Department had issued a warning about Bin Laden on May 12, 2001, just months before the September 11 attacks.[37] Ashcroft did not even include terrorism among the top seven priorities of the Strategic Plan he outlined on August 9, 2001, for the Justice Department.[38] Ashcroft rejected a request for

34. Law: Griffin (2005), p. 103-105.
35. Law: Friedman (2004).
36. Law: International Herald Tribune (April 14, 2004).
37. Law: Miniter (2004), p. 187.
38. Law: Brzezinski (2004), p. 12.

more FBI counterterror funding a day before the deadly Al-Qaeda attacks on US soil.[39]

The failure is evident also at the presidential level. National security adviser Condoleezza Rice testified before the 9/11 Commission that the president was tired of swatting flies. As a member of the Commission, former senator Bob Kerrey, replied, "We only swatted a fly once on the 20th of August 1998 [when the US launched a cruise missile against a building in Afghanistan where the Al-Qaeda leadership was supposed to be meeting with Bin Laden]. We didn't swat any flies afterwards. How the hell could he be tired?"[40] Richard Clarke, former Bush White House counterterrorism coordinator, said: "I find it outrageous that the president is running for re-election on the grounds that he's done such great things about terrorism. He ignored it. He ignored terrorism for months when maybe we could have done something to stop 9/11."[41]

There is no doubt that the attacks brought benefits to the agenda long coveted by American right-wingers.

The president himself declared that the attacks provided "a great opportunity." Donald Rumsfeld stated that 9/11 created "the kind of opportunities that World War II offered, to refashion the world." Condoleezza Rice had the same thing in mind when she told senior members of the National Security Council to "think about 'how do you capitalize on these opportunities' to fundamentally change ... the shape of the world." The National Security Strategy of the United States of America, issued by the Bush administration in September 2002, said: "The events of September 11, 2001 opened vast new opportunities."[42] Other military establishment authors also started to talk about "opportunities" presented by 9/11.[43] The war in Iraq is an example of the attempts to use these opportunities on the world arena. (There are reports that already the Republican administration of Richard Nixon considered going to war against Iraq in order to bring to power a more friendly government and establish control over Iraq's enormous petroleum reserves.)

And as far as its attitude towards human rights is concerned, after September 11, 2001, the Bush administration just took from the shelf old suggestions of right-wing elements in the US intelligence community. The administration has been trying to prove that the laws securing compliance with the US constitution were the main reason for its incompetence prior to the attacks. The Bush administration orchestrated the most determined assault on the constitutional liberties in the US history, but to no avail. Though US leaders try to convince the

39. Law: International Herald Tribune (April 14, 2004).
40. Law: Strasser (2004)(1), p. 230; see also: Law: *The 9/11 Commission Report*; Law: Hufschmid (2002); Law: Griffin (2004).
41. Law: *CNN* (April 9, 2004); see also: Law: Clarke (2004).
42. Law: Griffin (2005), p. 116.
43. See, for example: Military: Barnett (2004), p. 142.

world of their success in fighting Al-Qaeda, some senior members of the US intelligence community would like to inform the public that the United States and its allies are, in fact, losing the war on terror.[44] Some sober professionals even warn that it is a mistake to formulate the struggle against terrorism as a "war." It is time to remember one RAND Corporation study which came to the conclusion that "terrorist risks cannot be eliminated, only contained and managed."[45]

What is in Dispute

Of course every state uses surveillance to advance its purposes. But every state operates within a context, and a law-abiding democratic society is founded on rights which apply even to an individual at the bottom of the social pyramid. These rights are not in the declarations of the constitution but in the legal procedures which constitute a person's guarantee against unjustifiable restrictions of his rights. The Fifth Amendment of the US Constitution requires that nobody should be deprived of "life, liberty, or property without due process of law." What this means is that rights can indeed be denied, but when they are, certain procedural guarantees have to be always obeyed.

The inspiration of this book is to defend the procedural definition of rights for the citizens, political refugees and other foreigners in the United States.

We Do Not Recognize What is in Front of Us

People are usually late to give labels to the developing events and phenomena of life. Russian revolutionaries confronted with Stalin's growing dictatorship used to talk about the dangers of "Bonapartism." Time has passed and we call the regime which transpired in Russia after 1917 "Soviet totalitarianism." Similarly, many people in Germany in the beginning of 1930s thought of Hitler's party primarily as right-wing nationalists. Nowadays, "Nazism," "Gestapo," "KGB" are all parts of folk-culture in their own right.

We do not yet have a commonly accepted name for what is developing in the United States right now. Our children and grandchildren may know that name. One prominent retired American diplomat said in an interview on British television that since the 1950s the US has had a "national security state." Let us use this name in this book. And let us call the complex of social, psychological, and philosophical factors which led to the creation of the national security state a "meltdown."

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44. Law: Anonymous (2004).
45. Law: RAND Corp. (1999), p. 126.

Meltdown

When I was confronted with an apparent violation of my rights in 1987, I gave it considerable thought. There was no doubt in my mind that there could not be a proper "America" without procedural rights. But in my microcosm I was denied those rights. Should I draw far-reaching conclusions from my experience? I decided that I should, because I perceived what was happening with me as a "meltdown" in a country respectful of human rights.

One allegorical thought occurred frequently to me in 1987. It explains my idea of a meltdown as a catastrophic materialization of a deeply held philosophy. Here it is:

In 1934, some deputies of the Congress of the Party decided to remove Stalin from his position. They voted against him. After that, Stalin took steps himself. 1108 out of 1966 delegates of the Congress and 98 out of 139 members of the Central Committee were eliminated.[46]

Nobody knows the count of votes. Just the numbers 1108 out of 1966 — enough to impeach the President; and 98 out of 139 — enough to convict the President. But it was already too late.

Word about these numbers spread and with it spread the terror.

It was a meltdown of the philosophical core. In 1917 they began to build their Super-Power station. Yes, they were the first to build it. They wanted Super-Power. In 1934, it was already a meltdown in progress. Everybody who heard about it was running in terror. However, it was too late. He was after them all. Millions had perished by 1938. Nobody knows the exact count. Just the numbers: 98 out of 139.

He wanted to eliminate that memory and he went after everybody who could understand the numbers. He almost succeeded. After my arrest, when I told the investigators about it, they did not understand at first. I explained to them about the explosion. They were silent. The prosecutor did not know anything about nuclear physics either. But then he understood — these were the magic numbers.

These numbers were opening the doors. Saying "98 out of 139," I was permitted to go. I was the only one permitted to leave my city in many years — as if after the Event there had been enough oxygen left only for one flight.

They all, all who were along my way, in effect sent me armed with these numbers to warn others. But it was already too late. I saw a meltdown in process.

I began to pay attention to the issue of modern surveillance in American life, and the more I learned, the more I realized that my personal experience was part of a much bigger picture.

46. See: Philosophy: Philosophical Encyclopedia (1960-1970), v. 3, "Cult of Personality."

2.4 Political Spying in the US

Dynamics of Political Spying

There is logic, both in internal and external, in the dynamics of political spying in the US over the last 200 plus years. Internally, certain violations of the Constitution that occur in the course of political spying demonstrate consistent patterns and modus operandi. The external logic is in the fact that political spying is dictated by the international role of the United States, which has been growing.

It is remarkable that the US started as a very anti-militaristic and democratic state. Thomas Jefferson reduced the army to 2,000 men. That coincided with very relaxed political regime and absence of secret police and political spying. Some political spying emerged in the first half of the 20th century, driven initially by domestic needs. But the emergence of the true intelligence apparatus and highly-developed political spying coincides with the Second World War and the role that America has taken upon itself in the world since then.

The American world view since the World War II had been anti-Communism. By comparison, Russia has had internal political police since the early 19th century, but effective Russian foreign intelligence has emerged only since 1917 and for decades had been associated with the idea of Communism. After the collapse of Communism in Russia in 1991, there have no longer been substantial ideological differences between the United States and Russia. But the intelligence apparatuses of both countries survived. In the years since 1991, it has become abundantly clear that the true motive of the conflict between these two countries was super-power rivalry for world dominance. America won that struggle and now the main idea of its foreign policy is simply maintaining and enforcing of its world dominance.

The world role of the United States exacts a price in terms of the state of affairs inside the country. The intelligence apparatus, both foreign and domestic, has grown tremendously since the 1940s. Despite some scandals and temporary retreats, political spying has been on a path of ascendancy. The G. W. Bush administration has committed, for example, much more outrageous violations of Constitution than those which cost Nixon his presidency.

Such development is at obvious odds with nature of the US state as a democracy. In this regard Montesquieu suggested that democracy is possible only in small states.[47]

47. Law: Montesquieu (1949).

Transgressions of the 18th Century

In 1798, fearing the "alien" radicalism of the French Revolution might affect the polity in America, Congress enacted the notorious Alien and Sedition Acts. The Alien Act allowed the president to deport any noncitizen he deemed dangerous, without judicial review, while the Sedition Act made it a crime for anyone to criticize government officials. Although the Alien Act was never enforced, the Sedition Act was used — exclusively against Republican critics of the 1798 to 1800 Federalist Administration. Two years later, these laws expired under sunset provision and subsequent president Republican Thomas Jefferson pardoned those convicted under the Sedition Act. The Alien and Sedition Acts illustrate what can go wrong when the government fails to adhere to First Amendment freedoms and due process.[48]

Undercover Surveillance in the 19th Century

Thomas Jefferson's presidency at the outset of the 19th century marks the beginning of modern democracy in America. At that time, the United States feared a centralized, permanently organized police force and the associated spies and informants which accompanied despotisms. These concerns were particularly prominent in the United States with respect to the United Kingdom due to the American struggle for independence.[49]

The first local police forces reflected the country's fear of centralized, militarized government: they were comprised of non-uniformed and unarmed men. But as the United States grew more urban and ethnically diverse, it was unable to resist the need for a formal police system to respond to increased crime and disorder.[50]

By the 1850s, many large US cities had created uniformed municipal police departments modeled after London's. As in England, the idea was that a visible police force would deter crime and public disorder. However, most municipal departments initially had few, if any, formal provisions for crime detection. Some new municipal departments resisted pressures to add a detective bureau, leaving room for small detective branches to develop in most cities by the later nineteenth century. Because the detective's involvement with criminals and lawbreakers, there were frequent charges of corruption and calls for reform.[51]

In the absence of established law enforcement, new opportunities for crime and covert practices developed with the westward migration and technical changes following the Civil War. The West was rife with robberies of everything

48. Law: Cole (2003), p. 91.
49. Law: Marx (1988), p. 22-23.
50. Ibid., p. 23.
51. Ibid., p. 23-24.

from trains to banks, not to mention horse and cattle rustling; and the conflicting interests of cattlemen, homesteaders (and Native Americans) often led to violence. The mobility and independence (read: unwillingness to abide by any constraints) characteristic of the West allowed criminals to easily switch over to law enforcement, or work both sides simultaneously.[52]

One tactic sometimes used by agents on the frontier was the infiltration of outlaw gangs. Charles Siringo, a famous Texas Pinkerton agent, successfully infiltrated Butch Cassidy's Wild Bunch and captured some of its members. A less successful agent was killed while trying to infiltrate the Jesse James gang. Meanwhile, arrested criminals like Charles (Black Bart) Bolton were recruited as undercover operatives.[53]

The reward and fee system of early Western law enforcement was an important feature which also led to abuses.[54]

Undercover Surveillance in the Beginning of the 20th Century

In 1902, Leon Czolgosz's assassination of President McKinley triggered the first citizen-noncitizen political divide in the US. Although Czolgosz was a US citizen, his foreign-sounding name and anarchist identification spurred Congress to enact an immigration law in 1903 that barred entry to "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law." Congress also considered bills that would have imposed similar prohibitions on the political advocacy and beliefs of US citizens. Thus, as of 1903, foreign nations could be denied entry for speech and beliefs that were legal for US citizens. This created a double standard with respect to political freedom.[55]

New York established its "Italian" squad in 1906 in a response to the perceived threat from foreign radicals, anarchists, socialists, labor organizers, and secret societies to the established order.[56]

In 1914, the Harrison Act made distribution of nonmedical drugs a federal crime, and the Eighteenth Amendment of 1920 mandated Prohibition. This resulted in the creation of narcotics and alcohol enforcement units within the Treasury Department. In 1919, a tax enforcement intelligence unit was created. The FBI had only about 300 agents in the 1920s, yet within a few years the number of federal prohibition agents reached 4,000. While the number of federal agents dwarfed previous detective forces, police practices also grew more

52. Ibid., p. 26-27.
53. Ibid., p. 27.
54. Ibid.
55. Law: Cole (2003), p. 107.
56. Law: Marx (1988), p. 25.

inventive and sometimes involved questionable covert activities to enforce the ban on narcotics and alcohol.[57]

Emergence of Organized Political Spying

Political spying is the tip of the pyramid of any developed system of surveillance. By some definitions only political spying can be truly called "surveillance." For example, for Anthony Giddens, it "refers to the supervision of the activities of subject population in the political sphere."[58]

Until the "Red Scare" period following World War I, the majority of political policing in the United States was done by local or private agents.[59] When Attorney General Charles J. Bonaparte created an unnamed investigative bureau of 34 special agents within the Justice Department on June 29, 1908, no one could have guessed it would evolve into an agency that would involve itself in almost every facet of American life.[60]

On April 6, 1917, the United States entered the war against Germany and Austria-Hungary. President Woodrow Wilson authorized the Justice Department to apprehend and detain "enemy aliens." Two months later, Congress enacted the Espionage Act, which made seditious utterances "during the course of hostilities" a criminal act.[61] [62] It also criminally prohibited speech intended to result in insubordination or disloyalty in the military, and proscribed any advocacy of resistance to federal law.[63]

In June 1917, Attorney General A. Mitchell Palmer chose 22-year-old attorney J. Edgar Hoover to head a newly created special political section of the Justice Department.[64]

In May 1918, Congress passed the Sedition Act. Broader than the Espionage Act, it made it a crime to speak "any disloyal, profane, scurrilous, or abusive language…as regards the form of government of the United States, or the Constitution, or the flag."[65] War-time prosecutions under this law involved widespread violations of the rights of free speech, free press and peaceful assemblage.[66]

Suddenly, the Bureau had been transformed from an agency that merely investigated violations of criminal laws to one that was responsible for investi-

57. Ibid., p. 30.
58. Sociology: Giddens (1990), p. 635-639.
59. Law: Marx (1988), p. 31.
60. Law: Kessler (2002), p. 9.
61. Ibid., p. 10.
62. Law: Benson (2003), p. 11.
63. Law: Cole (2003), p. 111.
64. Law: Schmidt (2000), p. 25.
65. Law: Cole (2003), p. 112.
66. Law: National Civil Liberties Bureau (1919).

gating spying and the internal security of the country. After the end of the war, on August 1, 1919, a new attorney general, A. Mitchell Palmer created within the bureau a Radical Division — later renamed the General Intelligence Division — to collect information on revolutionaries or radicals. This new division was placed under the direction of J. Edgar Hoover.[67]

Hoover directed his division to record information about radicals on index cards, and the collection grew to 450,000 records. Regardless of the right to freedom of speech, he made no distinction between beliefs and criminal conduct. With the Enemy Alien Registration Section, when Hoover recommended that a 24-year-old man who had "belittled the United States, talked against the war, spread pacifist propaganda, and wrote against conscription" to be imprisoned for the duration of the war, he was. Similarly, when Hoover recommended that a German who had "engaged in a conversation with a Negro in which he indulged in pro-German utterances and in derogatory remarks regarding the United States government" be jailed, he was, despite having been resident in the United States for 30 years.[68] The same standards were applied when compiling index cards on radicals. Within months, Hoover's division was indiscriminately entering index cards with an undifferentiated mix of facts and rumors on the radical movement, scanned from 625 newspapers.[69]

Because of an illegal roundup and deportation of suspected radicals, the FBI faced criticism early on.[70] On January 2, 1920, based on the index cards, thousands of dragnet arrests were conducted by the FBI in conjunction with the local police in 33 cities on alien residents and US citizens attending meetings of the Communist Party and Communist Labor Party. Newspapers reported that some suspects were beaten.[71] In the first mass sweep, 10,000 persons were arrested; 3,500 of them were held and 556 deported.[72] Many detention facilities were overwhelmed by the massive arrests,[73] which came to be known as the Palmer Raids, after the attorney general. When it became known that most of those arrested were not aliens, but US citizens, it only increased the scandal.[74]

When new attorney general Harry M. Daugherty took over in 1921, he sent a curt telegram to Flynn, the FBI director, firing him. He was replaced by Daugherty's boyhood friend William J. Burns.[75]

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67. Law: Kessler (2002), p. 10-11.
68. Ibid., p. 15-16.
69. Ibid., p. 16.
70. Law: Marx (1988), p. 31.
71. Law: Kessler (2002), p. 16.
72. Law: Simeone (2003), p. 29.
73. Law: Churchill (2002), p. 35.
74. Law: Kessler (2002), p. 16.
75. Ibid., p. 17.

Burns was happy to be director of the Bureau, but still didn't want to give up his private detective business, which consisted mainly of spying on labor organizations. With no hiring standards to hamper them, Burns and Daugherty recruited political hacks as agents, including Gaston B. Means, who sold Bureau protection to some and Bureau files to others.[76]

The FBI continued to investigate suspected radicals until 1924, when Congress deemed their spying on prominent activists such as social reformer Jane Addams and future New York Mayor Fiorello LaGuardia an abuse of power. As a result, William J. Burns was fired.[77] "On May 10, 1924, the new attorney general Harlan Fiske Stone asked Hoover, then 29, to come to his office. 'Young man,' Stone said, 'I want you to be the acting director of the Bureau of Investigation.' Hoover kept the office for nearly 48 years."[78]

"In the early 1930s, Hoover told Walter Trohan, who was chief of the *Chicago Tribune*'s Washington bureau, that 'his goal was to make the FBI like Interpol and keep records from throughout the world.'"[79]

In 1936, President Franklin D. Roosevelt charged the FBI with the investigation of domestic Communist and Fascist groups.[80]

> On August 24, 1936, Franklin D. Roosevelt met with Hoover in the White House. According to Hoover's memorandum of the meeting, Roosevelt wanted to discuss "subversive activities in the United States, particularly Fascism and Communism." Ever since his days in the Radical Division, Hoover had been more concerned about the Communist threat than Fascism. Hoover told the president at their meeting about that.[81]
>
> On September 5, Hoover instructed all field offices to obtain "from all possible sources" — meaning wiretaps and bugs as well as human sources — information concerning "subversive activities."[82]
>
> Most FBI and military officers engaged in counterespionage work in the period tended to regard all activities by the CPUSA (Communist Party of the USA), even those that were open and political, as subversive.[83]
>
> In 1938, House Committee on Un-American Activities (HUAC) was founded, with a mandate to investigate "un-American propaganda activities," "the diffusion of subversive and un-American propaganda," and "all other questions in relation hereto."[84]

76. Ibid., p. 17-18.
77. Law: Axelrod (2003), p. 243.
78. Law: Kessler (2002), p. 19-20.
79. Ibid., p. 66-67.
80. Law: Marx (1988), p. 31-32.
81. Law: Kessler (2002), p. 57-58.
82. Ibid., p. 59.
83. Law: Carlisle (2003), p. 39.
84. Law: Cole (2003), p. 130.

> In 1938, Attorney General Murphy coupled his public endorsements of free speech with seemingly contradictory assertions of the need to deal with un-Americans.[85]
>
> The most significant bill of the 1930s affecting political freedoms was H.R. 5138, which eventually became the Alien Registration Act of 1940, more commonly known as the Smith Act, for its sponsor, Representative Howard W. Smith. The Smith Act, in many ways the centerpiece of federal anti-Communist legislation, was given an anti-alien title, and featured several immigration provisions, among them a requirement that all aliens register and be fingerprinted. But the Alien Registration Act was by no means limited to non-citizens. It made it a federal crime for anyone to advocate the overthrow of the government by force and violence, to organize a group to so advocate, or to belong to such a group with knowledge of its ends. It also authorized seizure of any printed material advocating overthrow of the government. With this statute, the language of the 1903 immigration law was given the force of criminal law, and extended to all US citizens. For the first time since the short-lived Sedition Act of 1798, Congress had enacted a criminal law explicitly proscribing subversive speech outside the context of a declared war.[86]

In 1939, Hoover created a Custodial Detention List of individuals to be placed in concentration camps if necessary. He did so without statutory authority or informing Congress or the public. "Those on the list consisted of 'both aliens and citizens of the United States [who were of] German, Italian, and Communist sympathies,' along with radical labor leaders, journalists critical of the administration, and some members of Congress."[87]

On January 18, 1940, Robert H. Jackson replaced Murphy as attorney general, and demanded that the Custodial Detention program was to be transferred from the FBI to the Justice Department. Hoover argued he needed to keep the names of the informants confidential. When Jackson requested the dossiers, Hoover provided selectively edited summaries instead.[88]

In response, Hoover secretly created a new filing system, beginning on April 11, 1940, known as the "Do Not File" procedure. Now any sensitive memos to the director were prepared on blue pages that, unlike the rest of the Bureau's documents, did not bear serial numbers. They would exist only as one copy, which the director would read and then decide whether to retain or destroy.[89] "There was one problem. 'In the file-conscious bureau, agents recognized that any paper potent enough for "Do Not File" status was important and worth keeping,' said Neil J. Welch, a former Special Agent in Charge in New York. Thus, the New York office kept a nearly complete record of surreptitious entries, or black bag jobs, from 1954 to 1973."[90]

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85. Law: Steele (1999), p. 38.
86. Law: Cole (2003), p. 131.
87. Law: Kessler (2002), p. 60.
88. Ibid., p. 63-64.
89. Ibid., p. 64.
90. Ibid.

Throughout Roosevelt's presidency from 1933 to 1945, the bureau's agents increased from 353 to 4,380, support employees from 422 to 7,422, and appropriations from $2.8 million to $44.2 million.[91]

> During Hoover's reign the FBI became a national thought police, keeping files on the comments and activities of movie and television stars, poets, writers and playwrights ranging from Thomas Mann, Henry Miller, John Steinbeck, and Ernst Hemingway to Lewis Mumford, T.S. Eliot, William Faulkner, John Gunther, Thomas Wolfe, John Dos Passos, and Charlie Chaplin.[92]

> Hoover even went so far as to put such subversives as Einstein, Steinbeck, Hemingway, and Douglas on a "watch list" so he would be informed if they traveled overseas.[93]

> In their massive monitoring of the American Communist Party and other left wing political and labor union organizations from the 1920s on, FBI investigations focused not on espionage but on Communist influence in American society. FBI agents were directed to uncover the role of Communists in organizing labor unions, in promoting labor strikes, in challenging racial segregation, in lobbying for reform of a corporate-dominated economy, and in forming alliances with or seeking to influence liberal and left-liberal groups. Employing both legal and illegal investigative techniques, FBI agents amassed information about the personal and political activities of American activists.[94]

However, from a legitimate counterintelligence or law enforcement perspective, the information the FBI collected on Communist and left wing political activities was of little value. Often, the information did not actually document a violation of a federal statute. Also, since much of it was illegally obtained, so that the information was rendered useless in court. Furthermore, many of these investigations aimed to uncover information about the plans and objectives of radical activists rather than federal crimes.

> Hoover himself conceded that not all FBI investigations were intended to uncover federal crimes — pointedly distinguishing between "intelligence" and "investigative" activities. Spelling out this difference, the FBI director affirmed that "investigative" activity was predicated on "a specific violation of a Criminal Statute" and was intended to develop "facts and information that will enable prosecution under such legislation." On the other hand, "intelligence" activity sought information about "Communists and subversive elements" which "does not, in its original stage, involve an overt act of a violation of a specific statute."[95]

The Intelligence Culture

The traditional culture of US intelligence includes two basic beliefs:

91. Ibid., p. 63.
92. Law: Kessler (1993), p. 3.
93. Law: Kessler (2002), p. 104.
94. Law: Theoharis (2002), p. 139-140.
95. Ibid., p. 140.

1. Intelligence usually involves secrecy; and
2. The intelligence community can provide "wisdom," or judgments on events that are better than those one would find elsewhere.[96]

Is this secrecy necessary? In an op-ed article in the *New York Times*, George F. Kennan, the doyen of American cold-warriors, wrote that,

> The need by our government for secret intelligence about affairs elsewhere in the world has been vastly overrated. I would say that something upward of 95 percent of what we need to know could be very well obtained by the careful and competent study of perfectly legitimate sources of information open and available to us in the rich library and archival holdings of this country. Much of the remainder, if it could not be found here... could easily be non-secretively elicited from similar sources abroad.[97]

Intelligence professionals would probably never use the term, but they often perceive their role as developing "wisdom." It is as almost much a part of the intelligence culture as is secrecy.[98]

Needless to say, belief in their own wisdom only disguises the fact that the intelligence apparatus is very much subject to political pressure in formulating their conclusions. And it is another way of saying that they make fewer mistakes than others because they do not share with the public their way of reasoning and because they believe in their own exclusivity. In fact, in view of what we know about the history of the US intelligence community, what we still may not know only saves the public from some very nasty surprises.[99]

Rationale for Political Spying

"Intelligence is many things: a mission, a skill, a national capability. In addition to all of this, however, intelligence is also a matter of public policy, and, like most other policy issues, it can be discussed intelligently by the general public."[100] However, entrenched institutional interests of the intelligence apparatus lead to attempts to obscure any public discussions of the overall policy towards intelligence issues and to undermining the principle of democratic control over intelligence agencies.

On July 24, 1947, President Truman signed the National Security Act, creating the CIA, the National Security Council, and other intelligence-oriented organizations.[101]

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96. Law: Berkowitz (2002), p. 148.
97. Ibid., p. 149.
98. Ibid., p. 160.
99. See: Law: Turner (2005).
100. Law: Berkowitz (1989), p. ix.
101. Law: Swenson (2003), p. 69.

> In 1947, when a National Security Act was being passed, many legislators in Congress were alarmed that it "opens the door to a potential Gestapo," as Marine Corps Gen. Merritt A. Edson explicitly warned in testimony before a committee in the House of Representatives. The Truman administration stepped forward to mollify the critics. "The prohibition against police power or internal security functions will assure," said Gen. Hoyt Vanderberg, soothingly, in Senate hearings, "that the Central Intelligence Group [of which he was the director] can never become a Gestapo or security police." The reference was to President Truman's Executive Order that created the Central Intelligence Group (CIG) in 1946. "No police, law enforcement or internal security functions shall be exercised under this directive" read one of its provisions. The Congress set into the concrete of law a similar stipulation when drafting the National Security Act of 1947; CIA domestic espionage was now strictly prohibited in explicit, statutory language.[102]

Yet with in a year, the CIA requested more authority from Congress via a series of amendments to the National Security Act of 1947, known as the Central Intelligence Act of 1949.

The law was worded in such a way as to give the director freedom from Civil Service regulations in hiring and firing, exemption from the usual public reporting requirements, and wide discretion over the covert spending of CIA funds without the check of normal auditing procedures. The Agency wanted complete invisibility, not only from other nations, but from overseers within the US government as well. The amendments "were introduced to permit [the CIA] a secrecy so absolute that accountability might be impossible."[103]

To answer the critics the administration urged members of Congress to "bear in mind that the CIA is prohibited by law from any internal security function." Moreover, the "CIA functions exclusively under the powers granted it by the National Security Act of 1947 and not under any Executive order whatsoever." Thus reassured, the prophets of future abuses backed away, the bill passed (on June 20, 1949), and a thick curtain of secrecy descended over the Central Intelligence Agency.[104]

But even though the historical rationale for the "national security state" was in a struggle with foreign adversaries, once the apparatus of secret police was developed, it could not be confined to catching spies.

There are many American books glorifying those who spy for the US government.[105] But the dilemma of spying is that it "has spawned a powerful culture in the intelligence that is fundamentally at odds with accountability in the US government, however one judges the results of espionage."[106]

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102. Law: Johnson (1989), p. 36.
103. Ibid.
104. Ibid., p. 36-37.
105. See, for example: Law: Ashley (2004).
106. Law: Treverton (2001), p. 145-146.

That is the problem, because "the health of constitutional government depends very largely on observance of democratic procedures, onerous as they frequently are."[107]

Political Spying since the Outset of the Cold War

After World War II, the main target of the FBI was the Communist party.

> In 1947, Congress passed the Taft-Hartley Act which required union officials to swear that they were not members of any organization advocating the overthrow of the US government by force and violence, by then the legal catch-phrase for the Communist Party.[108]
>
> "Since the close of World War II, the US intelligence agencies have developed a consistent record of trampling the rights and liberties of the American people.[109]
>
> [At the same time,] intelligence agencies developed a doctrine of deception about the nature of its activity and denial of any such activity. While "denial" and "deception" are separate terms that can be distinguished conceptually, they are closely intertwined in practice. Almost by definition, deception must include denial.[110]

Written in June 1947 by the National Security Council along with a series of directives, the document known as N.S.C. 10/2 allows the CIA to carry out covert operations. Together these documents form what is referred to as the CIA's "secret charter."

> N.S.C. 10/2 formally created the Office of Special Projects, which was later to become the Division of Clandestine Services, or the department of "dirty tricks." This document reflects the almost limitless range of secret operations that the CIA is now allowed to engage in. Also established is the concept of "plausible deniability," which allows the US government to disclaim responsibility for its clandestine activities if they are ever exposed.[111] [In particular]... this document reads: "As used in this directive, 'covert operations' are understood to be all activities which are conducted or sponsored by this government against hostile foreign states or groups or in support of friendly foreign states or groups but which are so planned and conducted that any US Government responsibility for them is not evident to unauthorized persons and that if uncovered the US Government can plausibly disclaim any responsibility for them."[112]
>
> [F]ormer CIA Counterintelligence Chief James Angleton noted, "Fundamentally, the founding fathers of US intelligence were liars. The better you lied and the more you betrayed, the more likely you would be promoted. These people attracted and promoted each other. Outside of their duplicity, the only thing they had in common was a desire for absolute power."[113] Remarkably enough, Angleton himself fostered

107. Law: Felix (1992), p. 46.
108. Law: Cole (2003), p. 131.
109. Law: Poole (1).
110. Law: Godson (2002), p. 16.
111. Law: Macy (1980), p. 158.
112. Ibid., p. 160-161.

> the misconception that counterintelligence officers need to be a different breed — suspicious to the point of paranoia. Often this outlook is referred to as a "counterintelligence mentality."[114]

The situation in the FBI was similar.

> As William C. Sullivan, former FBI Assistant Director from the Domestic Intelligence Division observed, "During the ten years that I was on the US Intelligence Board... never once did I hear anybody, including myself, raise he question: 'Is this course of action which we have agreed upon lawful, is it legal, is it moral and ethical?'"[115]

Since its creation in 1947, covert action programs maintained by the CIA have been guided by presidential direction. "Many Americans are reluctant to believe that operations they may personally find objectionable for whatever reason were in fact explicit presidential policy. These skeptics would much rather cling to the myth that the CIA runs a rogue foreign policy beyond the ken and control of the man they elected to be a moral, as well as political, leader of the nation. The reluctance to accept the truth may also lie partly in the unease that citizens in liberal democracies feel over hidden policies and governmental action, preferring instead to see 'overt influences' as the engine of foreign policy. Regardless of motive, willful disregard of the truth produces a distorted history of our country's role in the world, a situation that all concerned Americans should deplore."[116]

Because there is a link between foreign and domestic policies, the authorization for foreign covert operations against foreign entities in practice has been interpreted as allowing clandestine domestic political activities. As such, in addition to the CIA, it has routinely involved the prime domestic arm of the intelligence, the FBI. And despite the attempt to maintain plausible denials about such operations, quite a lot has become known about domestic political spying since late 1940s. This information illustrates the modus operandi, or methods of political spying, of the US intelligence agencies. Some of these methods always have been used by those agencies. Others, which might have been terminated in the past, can be revived in the atmosphere existing in the United States after the terrorist acts of September 11, 2001.

> Most longtime intelligence professionals believe... that basic intelligence work remains the same.[117]

113. Law: Trento (2001), p. 479.
114. Law: Kessler (2002), p. 231.
115. Law: Swearingen (1995), p. i.
116. Law: Daugherty (2004), p. xv-xvi.
117. Law: Powers (2002), p. 372.

Political Spying in the 1950s

The national security agent is not always sure which people he should spy on, and what information he should gather on them. It is, of course, easy for him to identify the outspoken critics of the government.[118]

The files show that in the 1950s and 1960s federal agents investigated a series of stars and household names, including Marilyn Monroe, The Beach Boys, and Liberace. Albert Einstein was watched for decades because of his alleged ties to communists.[119]

Owen Lattimore was a noted China scholar who taught at Johns Hopkins University. In 1950, he was named by Senator Joe McCarthy as the top Soviet spy in America. This bizarre charge, backed behind the scenes by Hoover's FBI, precipitated what Lattimore later called an "ordeal by slander," culminating in a perjury case against Lattimore that was finally called off in 1955 for an utter lack of evidence. Lattimore noted that the FBI and other agencies of the US government and Congress had built up on him a dossier of a "*man who might have existed*." That phrase catches the very essence of the creations of the national security state: a data world that shadows, mimics, and caricatures the real world.[120]

During the early 1950s, the FBI launched a secret operation known as SOLO to monitor the Communist Party of the United States, or CPUSA. Throughout the subsequent thirty years, SOLO continued to collect sensitive information.[121]

Hoover himself authorized the formation of COINTELPRO ("counterintelligence program") in 1956. "COINTELPRO activities, based on a self-determined mission of defining the parameters of permissible political conduct, were unknown even to the president and the attorney general, and they were not subject to public or judicial challenge as to their purpose and legality."[122]

"Looking back, Courtland J. Jones, who was in charge of counterintelligence in the Washington Field Office, called COINTELPRO 'wrong and childish.' By the time Hoover initiated COINTELPRO, 'The Communist party was basically a bunch of discussion groups,' he said."[123] "The purpose of this and following COINTELPRO programs were to go beyond simple gathering of intelligence information, but to 'harass, disrupt, and discredit' targeted organizations."[124]

Covert tactics fall under the rubric of social control through threat. Like any tactics which invade the individual's privacy, it is possible to carry out these

118. Law: Macy (1980), p. 125.
119. Law: *CNN* (September 22, 2005).
120. Philosophy: Whitaker (1999), p. 26.
121. Law: Petersen (2001), p. 2-34.
122. Law: Theoharis (1999), p. 29.
123. Law: Kessler (2002), p. 108.
124. Law: Theoharis (2002), p. 143.

undercover activities with no intent to formally prosecute. Rather, covert means create an opportunity to exercise control simply by threatening to reveal incriminating information. The information can then be kept hidden so long as the target cooperates with the controlling agent, whether through legal means such as providing information or setting up other targets, or illegal means, such as payoffs.[125]

Hoover authorized planting newspaper stories, whether true or not, about misuse of party funds by Communist officials; placing anonymous calls or sending anonymous letters to start rumors that party officials were homosexuals or sexual deviants; and assigning agents to conduct lockstep surveillance, intrusive photography, or make hang-up calls to telegraph to associates of Communists that they were under investigation.[126]

Intimate relations have also been exploited for purposes of disruption. Thus, an aspect of the COINTELPRO programs involved the writing of anonymous letters to spouses of activists accusing them of infidelities. An informant testified that he was instructed "to sleep with as many wives as I could" in an attempt to break up marriages and gain information.[127]

As well as investigating suspected Communists overall, the FBI opened cases on almost every CPUSA member, which amounted to several hundred thousand cases. In the 1940s, CPUSA membership peaked at around 75,000 to 85,000 members; there were around 25,000 members in the 1950s, and only a few thousand in the 1970s.[128]

The most extensive ideological and exclusionary provisions so far resulted from the Internal Security act of 1950 and the McCarran-Walter Act of 1952. For the first time, the Communist Party was explicitly mentioned. The government was also granted the power to bar entry to a foreign national on the basis of secret evidence neither he or his lawyer could see. "Other provisions of the Internal Security Act required all 'Communist-action organizations' to register with the attorney general and disclose their membership lists and contributions; imposed penalties on registered organizations and their members, including deportation of aliens and denials of passports and federal employment to US citizens; and authorized emergency preventive detention."[129]

In 1950, the FBI opened files on thousands more individuals in response to the Emergency Detention Act, which allowed they to investigate anyone who might be detained in the event of war or national emergency.[130]

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125. Law: Marx (1988), p. 139.
126. Ibid.
127. Law: Marx (1988), p. 149.
128. Law: Godson (2001), p. 77.
129. Law: Cole (2003), p. 131-132.
130. Law: Godson (2001), p. 77-78.

The FBI classified "suspicious" people by well-defined categories. The Bureau maintained a file entitled "Section A of the Reserve Index," which included those people "who in time of national emergency are in a position to influence others against the national interests or are likely to furnish material or financial aid to subversive elements due to their subversive associations and ideology." The actual FBI list of such persons reads:

1. Professors, teachers or leaders;
2. Labor union organizers or leaders;
3. Writers, lecturers, newsmen, entertainers, and others in mass media field;
4. Lawyers, doctors and scientists;
5. Other potentially influential persons on a local or national level;
6. Individuals who could potentially furnish material financial aid.[131]

> "Intelligence" information was to be disseminated — at first only to the White House and other executive agencies, alerting the president to the plans and objectives of radical activists. This information was also useful in federal employee clearance programs, instituted temporarily during World War II and then made permanent after 1947, to dismiss potentially "disloyal" federal employees or preclude their employment. Then, during the cold war era, FBI dissemination practices exploded.[132]

The shift in dissemination practices resulted largely in part to Hoover's frustration over the limitations of his intelligence work. Attempting to influence public policy, from the 1930s on, Hoover had been regularly providing the Roosevelt White House with information on Communists and other people he deemed subversive. Information was generally disseminated to ideologically sympathetic military and naval intelligence officials, reporters, and members of Congress.[133]

With the start of the Cold War, the FBI director maintained his leaks to the White House and military and naval intelligence; and after 1945, he increased the number of selective informal leaks to favorable reporters and politicians in an attempt to affect public policy more strongly. "The explicit purpose of Hoover and his senior officials was to legitimate and sustain government policies. Publicly projecting the image of a disinterested, professional law enforcement agency which disdained the role of a national police force and respected the First Amendment and privacy rights of US citizens, FBI officials privately took great care to ensure that their purposeful leaking of derogatory political and personal information could not be discovered. They succeeded partly because of Hoover's ingenious special records procedures — blind memoranda, JUNE Mail, administrative pages, Do Not File documents. These procedures ensured that records of

131. Law: Macy (1980), p. 128.
132. Law: Theoharis (2002), p. 141.
133. Ibid., p. 141-142.

illegal conduct or of the dissemination of information were not incorporated in the FBI's Central Records System."[134]

By 1960, the FBI had over 432,000 files on individuals and groups.[135] In the 1950s, about a third of the FBI's 4,800 special agents were dedicated to internal security and there were 5,000 informants on its payroll.[136]

> While Hoover was harassing Communists, he was also harassing the press and the book publishing industry. In August 1950, Hoover learned from an advance review *Publishers Weekly* that Max Lowenthal, a lawyer who was a friend of Truman, had written *The Federal Bureau of Investigation*, the first critical book about Hoover and the FBI....Hoover did his best to discredit the book. His friends in Congress, Iowa's Senator Bourke B. Hickenlooper and Michigan's Senator Homer Ferguson, attacked it as "an utterly biased piece of propaganda" and a "vile, monstrous libel." Hoover's friends in the press, Walter Mitchell, Rex Collier of the *Washington Evening Star*, and Walter Trohan of the *Chicago Tribune*, all unleashed tirades. Agents were instructed to discourage booksellers from selling the book.[137]

According to William Sullivan, one of Hoover's top officials, the FBI planted informants in the publishing houses to warn them of any future FBI critiques.[138]

The FBI also published its own book in response about the Communist menace, titled *Masters of Deceit* and published by Henry Holt. Written by FBI employees, it sold a quarter of a million copies hardcover. A television series controlled entirely by the bureau, *The FBI*, was aired on ABC and watched by 40 million people each week.[139]

> Many Americans, including most legal process scholars and political theorists, had believed throughout the 1950s that the nation was joined in a consensus celebrating democracy and the rule of law. Yet, this period of consensus was, perhaps, "a fool's paradise... a time of false complacency and hubristic and dangerous illusions."[140]

Political Spying in the 1960s

FBI Director Hoover began launching spinoffs of COINTELPRO targeting specific groups for counterintelligence investigations. COINTELPRO C, aimed at the Socialist Workers Party, was begun in 1961.

Officially, there were only seventy-eight wiretaps in operation during the cold war, possibly including all the associated properties of an individual.[141] However, "according to figures released in 1975, the Roosevelt, Truman, Eisen-

134. Ibid., p. 142.
135. Law: Godson (2001), p. 78.
136. Ibid., p. 79.
137. Law: Kessler (2002), p. 108.
138. Ibid., p. 109.
139. Ibid., p. 111.
140. Philosophy: Feldman (2000), p. 137.
141. Law: Godson (2001), p. 80.

hower, Kennedy, and Johnson administrations had done a total of about 10,000 electronic surveillances without court approval,"[142] an average of about 300 per year.

Since 1949, Hoover's policy for reporting questionable electronic surveillance was restricted to a separate cover page in an investigatory file. Thus, if the FBI was court-ordered to provide any defendant with an investigative report, the defendant would remain unaware he or she was the target of questionable electronic surveillance. Instead, bureau agents usually referred to information gained from a wiretap as coming from "a reliable source."[143]

Another technique the FBI used to garner information was a break-in or "black bag" job, wherein the FBI would search an individual's property and copy any interesting documents. Successful break-ins ranged up to official installations such as foreign embassies. From 1942 to 1968, the FBI conducted 238 entries at fourteen domestic targets as well.[144]

The purpose of the break-ins had not been limited to simple collection of intelligence information, but had been often aimed at "disruption" of the objects of surveillance, as can be seen from the following FBI Memorandum to assistant to the director Mr. Cartha D. "Deke" DeLoach:

> You may recall that recently through a "black bag" job we obtained the records in the possession of three high-ranking officials of a ... organization in.... These records gave us the complete membership and financial information concerning the ... operation which we have been using most effectively to disrupt the organization and, in fact, to bring about its near disintegration.[145]

By the time the National Security Agency disclosed the existence of Operation Shamrock, international telegraph companies had been supplying the United States government with copies of cable traffic sent and received by its citizens for over three decades.[146]

In the 1950s and 1960s, with the help of CIA investigations of communication between the United States and the Soviet Union, the FBI intercepted and opened mail of selected targets.[147] Through the CIA's secret mail-opening program, HTLINGUAL, millions of letters to and from US citizens were photographed, and hundreds of thousands were opened and read.[148] By 1973, the FBI received over 57,000 pieces of intercepted mail by supplying the CIA with the names of just three hundred people whose mail it was interested in.[149] From

142. Law: Smith (2000), p. 181.
143. Ibid., p. 163.
144. Law: Godson (2001), p. 80.
145. Law: Macy (1980), p. 48.
146. Law: Miller (1989), p. 398.
147. Law: Godson (2001), p. 80.
148. Law: Macy (1980), p. 53.
149. Ibid., p. 56.

1940 to 1973, a total of twelve mail-opening programs were run between the two organizations.[150]

So clearly was the mail-opening known to be illegal that the conclusion within the CIA was that, if it was discovered, no cover story was possible. At the beginning of 1962, according to a memorandum on CIA files, a contingency was prepared in the event of the CIA activity becoming known. It reads: "Unless the charge is supported by the presentation of interior items from the projects, it should be relatively easy to 'hush up' the entire affair or explain that it consists of legal mail cover activities conducted by the Post Office at the request of authorized Federal agencies. Under the most unfavorable circumstances it might be necessary after the matter has cooled off during an extended period of investigation to find a scapegoat to blame for unauthorized tampering with the mails. Such cases by their very nature do not have much appeal to the imagination of the public and would be an effective way to resolve the initial charge of censorship of the mails.'"[151]

The FBI also sought to recruit leaders of US organizations suspected of being subversive, resorting to lures such as sex, money, and appeals to the ego.[152]

During the 1960s, US governments often conducted wiretaps on innocent citizens. Even presidents such as Lyndon B. Johnson, Richard Nixon, and John F. Kennedy were guilty of unjustified wiretaps. Kennedy, for example, placed wiretaps on several congressmen, claiming he was concerned they were being bribed. Instead of finding evidence of bribery, however, Kennedy collected valuable political information which helped his administration pass a bill concerning Dominican cigar imports.[153]

And, "Hoover responded to the upsurge of civil rights activism during the 1960s by ordering all FBI field offices to evaluate 'Communist influence in racial matters.' It would be 'reasonable to assume,' he emphasized, that the American Communist Party would 'inject itself into... the struggle for equal rights for Negroes.'"[154]

This FBI investigation was coordinated by the "Racial Matters" program.[155] The FBI monitored the NAACP for over two decades and kept dossiers on key officers and board members. In 1963, President John F. Kennedy authorized the IRS to turn over tax records to the House Un-American Activities Committee.[156]

The decision to monitor civil rights activities mimicked Hoover's authorizations of investigations of suspected Communist influence. Projects included

150. Law: Freemantle (1984), p. 211.
151. Ibid., p. 213.
152. Law: Godson (2001), p. 79.
153. Law: Singh (2000), p. 185.
154. Law: Theoharis (2002), p. 140-141.
155. Ibid., p. 141.
156. Philosophy: Sykes (1999), p. 160.

COMPIC, which investigated "Communist influence in the motion picture industry," and COMINFIL, which looked into potential Communist infiltration of liberal social and political movements. It should be noted neither of these programs served and law enforcement purpose.[157]

When Johnson asked Hoover if he would monitor dissident factions at the 1964 Democratic convention in Atlantic City, Hoover eagerly complied. On August 29, 1964, DeLoach reported that he had successfully completed the assignment, using informants, wiretaps, bugs, and FBI agents posing as reporters. "Through our counterintelligence efforts," DeLoach wrote, "the FBI was able to advise the president in advance regarding major plans of the ... [dissident] delegates."[158]

COINTELPRO C Black Nationalist Hate was created in 1967. Civil rights leader Martin Luther King, Jr. was one victim of unjustified wiretapping; his telephone conversations were monitored for several years.[159] "What concerned Hoover, Sullivan later commented, was not that King might be influenced by Communists. Rather, Hoover 'was concerned about King's repeated criticism of the FBI and its alleged lack of interest in the civil rights movement.'"[160]

Hoover supporters would later claim that Robert Kennedy, rather than Hoover, pushed for a wiretap on King. Kennedy supporters say he wanted to wiretap King to show Hoover that King was not under the influence of Communists. What is clear is that by July 25, 1964, Kennedy had decided that such surveillance would be "ill advised." But Sullivan had checked out King's home and office and determined that wiretaps would be productive. When told this, Hoover wrote to Sullivan, "I hope you don't change your minds on this." Hoover then asked Courtney Evans, the FBI liaison to the Justice Department, to obtain Kennedy's approval for installation of wiretaps. Still expressing concerns, Kennedy on October 10 said he might authorize the wiretaps on a "trial" basis. Finally, on October 21, Evans persuaded Kennedy to approve the wiretaps, but for only 30 days. At the end of that period, the results would be evaluated. If the FBI wanted an extension, it would have to ask Kennedy for reauthorization. But Hoover never returned for an extension. The FBI continued the wiretaps.[161]

The FBI did conclude that King was a danger to the country and tried to weaken his influence using underhanded methods.[162] For example, "in 1963 the FBI obtained information on King via a wiretap and fed it to Senator James Eastland in order to help him in debates on a civil-rights bill. More generally, the FBI gathered details about King's personal life, which were used to discredit

157. Ibid.
158. Law: Kessler (2002), p. 150.
159. Law: Singh (2000), p. 185.
160. Law: Kessler (2002), p. 157-158.
161. Ibid., p. 158.
162. Law: Godson (2001), p. 84.

him. Recordings of King telling bawdy stories were sent to his wife and played in front of President Johnson. Then, after King's award of the Nobel Prize in 1964, embarrassing details about King's life were passed to any organization that was considering conferring an honor upon him."[163]

One year after COINTELPRO C Black Nationalist Hate, Hoover created COINTELPRO — New Left. As the Watergate disclosures made clear, in the first months of his presidency in 1969 Nixon had ordered the FBI to install wiretaps on the homes and/or offices of thirteen former government officials and four reporters including Nixon speechwriter William Safire. Safire later became a columnist for *The New York Times* and a strong advocate for protection against electronic surveillance by government agencies.[164] "In all, there would be 17 wiretaps, including ones on a brigadier general, four newsmen, and two White House advisers. At one point, Kissinger personally reviewed logs of the wiretaps in Sullivan's office. The wiretaps remained in place for 21 months."[165]

Political Spying in the 1970s

> The Washington FBI Special Agent in Charge (SAC) memoranda of 1970 in the FBI's Record Destruction File confirms the FBI's wiretapping of [all?] individuals currently under investigation and of FBI interest in destroying the logs of these wiretaps. Had the Washington SAC recommendation been approved in 1970, not only the wiretap logs would have been destroyed; the memorandum recommending this record destruction would also have been done away with. Inadvertently, these records confirm that the FBI's Record Destruction File does not constitute a complete record of all FBI record destruction decisions and practices.[166]

From the 1940s to the early 1970s, mail of suspected individuals was routinely opened by intelligence agencies. Additionally, mail was sometimes opened at random, despite federal laws prohibiting tampering with mail.[167]

Any government power can be abused, as a 1971 memo to President Nixon from John Dean implies: "We can use the available political machinery to screw our political enemies." But the potential for misuse of undercover means appears to be greater than for overt means. The tactic is well suited for partisan political use.[168]

On June 5, 1970, with antiwar protests intensifying, President Nixon called a meeting in the Oval Office with the heads of the CIA, NSA, and Defense Intelligence Agency. "Nixon railed about the demonstrations and said he needed 'hard intelligence' in order to 'curtail the illegal activities of those who are determined

163. Law: Singh (2001), p. 185.
164. Law: Smith (2000), p. 184.
165. Law: Kessler (2002), p. 168.
166. Law: Theoharis (2002), p. 241 (brackets in Theoharis).
167. Philosophy: Sykes (1999), p. 160.
168. Law: Marx (1988), p. 138.

to destroy our society.'"[169] Uncharacteristically, however, Hoover was becoming more cautious, and had begun to hold back on FBI break-ins during purported domestic security investigations. "Having previously severed liaison with the CIA in a fit of pique, Hoover ordered ties cut with the Secret Service, DIA, IRS, and Army, Navy, and Air Force intelligence."[170] "[A]lready in the 1960s, according to Robert Kennedy's successor as attorney general Nicholas deB. Katzenbach, 'Hoover was getting senile.'"[171] Yet FBI agents defied orders and continued to work with CIA personnel and other intelligence agencies.[172]

In early 1971, Nixon approved assistant Tom Huston's plan to conduct illicit wiretaps, mail openings, and infiltrations to monitor African-Americans, students, and anti-war dissidents.[173]

By April of 1971, the US Senate's Subcommittee on Constitutional Rights, or Ervin Committee, exposed a broad-ranging military system of spying on civilians. "Tens of thousands of card files and dossiers of potential 'dissidents' were kept on file by the Military Intelligence headquarters at Fort Holabird, Maryland."[174]

On September 3, 1971, government agents broke into the offices of former Pentagon staffer Daniel Ellsburg's psychiatrist and removed documents.[175]

Meanwhile, a special unit of the IRS was covertly collecting information on targeted US citizens and subjecting them to audits. The gathered information would then be passed on to other federal agencies. These individuals happened to be US citizens whose political views were out of line with those of the Nixon Administration.[176]

The FBI intensely monitored former Beatle John Lennon's public and private life for nine months before the 1972 Republican convention. There was fear that Lennon would lead an antiwar demonstration that would embarrass President Nixon by disrupting the convention. Police were urged to see if Lennon could be "arrested, if at all possible, on possession of narcotics charges," so he would become more "deportable."[177]

A former CIA official, Victor Marchetti, wrote in the April 3, 1972, *Nation* under the headline "CIA: The President's Loyal Tool," that the CIA was using the news media to create myths about the Central Intelligence Agency and was fooling such influential publications as *The New York Times* and *Newsweek*. Addi-

169. Law: Kessler (2002), p. 169.
170. Ibid., p. 170.
171. Ibid., p. 159.
172. Ibid., p. 170-171.
173. Law: Smith (2000), p. 266.
174. Philosophy: Sykes (2000), p. 161.
175. Law: Smith (2000), p. 266.
176. Ibid.
177. Law: Marx (1988), p. 140.

tionally, he claimed, the CIA had continued to control youth, labor, and cultural organizations in the United States. Marchetti concluded: "Secrecy, like power, tends to corrupt, and it will not be easy to persuade those who rule in the United States to change their ways." Concerned, Richard Helms (Director of CIA) ordered Marchetti placed under surveillance.[178]

On June 17, 1972, Democratic National Committee offices in the Watergate Office Building were broken into under the supervision of White House agents.[179]

The FBI even wiretapped William O. Douglas, a justice on the US Supreme Court, and eavesdropped on his conversations with Chief Justice Earl Warren and Associate Justices Potter Stewart and Abe Fortas.[180]

Also in the 1970s, the history of the various COINTELPROs began to emerge. In March 1971, a "Citizen's committee to Investigate the FBI" acquired secret files from an FBI office in Media, Pennsylvania, which they released to the press. Bureau agents began to resign and expose the FBI's covert operations.[181] Nelson Blackstock's 1975 book gave the public its first in-depth look at the covert and illegal FBI practices in COINTELPRO.[182]

Though the name COINTELPRO stands for "Counterintelligence Program," the government's targets were not enemy spies. The Senate Intelligence Committee later found that "Under COINTELPRO certain techniques the Bureau had used against hostile foreign agents were adopted for use against perceived domestic threats to the established political and social order."[183]

In 1972, the CIA's domestic surveillance operation CHAOS continued to hold radicals in its sight, specifically what it considered radical youth, Blacks, women, and antiwar militants. The current label "international terrorist" was designed to replace "political dissident" as the ongoing justification for domestic operations.[184]

By 1973, when CHAOS was canceled, the Agency had already collected information on thousands of US citizens. Their names were in its computer index; it possessed 7,200 separate personality files, and had begun 1,000 "subject files."[185]

In August of 1974, President Nixon resigned among suspicions he had obstructed Watergate investigations, using the CIA.[186]

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178. Law: Mackenzie (1997), p. 42.
179. Law: Smith (2000), p. 266.
180. Philosophy: Sykes (1999), p. 160.
181. Law: Glick (1989), p. 7.
182. Law: Blackstock (1975).
183. Law: Glick (1989), p. 11.
184. Law: Mackenzie (1997), p. 48.
185. Law: Macy (1980), p. 126.
186. Law: Zegart (1999), p. 195.

The real blow came on December 22 with a front-page *New York Times* article by Seymour Hersh. Citing "well-placed Government sources," the article chronicled a "massive illegal domestic intelligence operations during the Nixon Administration against the antiwar movement and other dissident groups in the United States." The CIA had been spying on US citizens since 1950s, in direct violation of its statutory charter.[187]

On January 4, 1975, President Ford created the Commission on CIA Activities Within the United States, chaired by Vice President Nelson Rockefeller. That June, the Rockefeller Commission reported that the CIA, from the late 1960s to early 1970s, had kept files on 300,000 US citizens and organizations relating to domestic dissident activities.[188]

Through the unprecedented congressional investigations of the Church and Pike Committees in 1975 and 1976, intelligence records gained even more independent scrutiny.[189]

It was revealed that these federal law-enforcement agencies closely monitored groups considered to be potentially subversive. The office of the Socialist Workers Party, for example, was entered over 200 times from 1941 to 1976, and agents accumulated photographs of almost 10,000 documents.[190]

Numerous books and articles have since been based on the released if often heavily redacted intelligence files. These publications confirm that intelligence investigations were not confined to criminals or spies but extended to political activists and prominent citizens. Some of the subjects were liberal political activists (First Lady Eleanor Roosevelt, Democratic presidential nominee Adlai E. Stevenson II), popular culture celebrities (Frank Sinatra, John Lennon), prominent authors (Norman Mailer) and reporters (Harrison Salisbury, Peter Arnett). The released records further confirm that intelligence officials also recruited the covert assistance of prominent informers (Joseph Kennedy, Walt Disney, Ronald Reagan).[191]

A continuing series of scandals has eroded the CIA's public credibility. In November 1975, Frank Church's Senate committee reported that the CIA had tried to assassinate Cuban leader Fidel Castro and had engineered the murder of Patrice Lumumba, the prime minister of the new Republic of Congo. The Church Committee also contradicted the sworn testimony of the CIA Director Richard Helms by revealing that the CIA had helped engineer the 1973 coup in Chile against the constitutionally elected government of Salvador Allende. Although the House of Representatives had voted to suppress a report by the House Select Committee on Intelligence at President Ford's request, someone

187. Ibid.
188. Law: Johnson (2004), p. 13-14.
189. Law: Theoharis (2002), p. 144.
190. Philosophy: Sykes (1999), p. 160.
191. Law: Theoharis (2002), p. 144.

leaked it. The whole report, known as the Pike Report after US Representative Otis Pike, Democrat of New York, was reprinted in the *Village Voice* issues of February 16 and 23, 1976. The Pike Report was shocking because it provided the first official overview of CIA excesses: the Agency ran large propaganda operations, bankrolled armies of its own, and incurred billions of unsupervised expenses. The report revealed that top CIA officials had tolerated cost overruns nearly 400 percent beyond the Agency budget for foreign operations and 500 percent beyond the budget for domestic operations, for years concealing their profligacy from Congress. The CIA also was said to have secretly built up a military capacity larger than most foreign armies; the CIA and FBI between them had spent $10 billion with little independent supervision. Further, the CIA's single biggest category of overseas covert projects involved the news media: it supported friendly news publications, planted articles in newspapers, and distributed CIA-sponsored books and leaflets. The CIA disinformation had often found its way into domestic news stories, thus polluting with inaccuracies the news received by Americans.[192]

However, presidents continue to rely on covert CIA operations, as they had done from 1947 to 1974.[193]

In 1976, it seemed the CIA's covert operations would soon come to an end. The Agency was in the spotlight of public scandal and congressional investigations, as well as Jimmy Carter's presidential campaign. "Condemning the national disgraces of 'Watergate, Vietnam and the CIA,' Carter made no secret for his distaste for secret activities."[194] Yet in the following 21 months, Carter's stance on covert activities changed. Ronald Reagan further expanded the use of covert operations, dramatically increasing intelligence budgets and issuing an executive order which increased the CIA's power and jurisdiction, especially with respect to covert activities. "Since 1974, when back-alley warfare began to make front-page headlines, activity has swirled around the Central Intelligence Agency. Yet all this attention has produced little change in the agency's broad evolutionary pattern....[As a result,] CIA covert operations have never been seriously constrained by the legislators."[195]

Under Carter, Attorney General Griffin Bell decided to prosecute FBI agents responsible for the break-ins. This would serve to demonstrate that federal agencies must still be responsive to the rule of law.[196] After conducting an expanded Justice Department Inquiry, Bell discovered that the break ins were authorized by assistant attorney general and director of the FBI after Hoover, L.

192. Law: Mackenzie (1997), p. 64.
193. Law: Zegart (1999), p. 206.
194. Ibid.
195. Ibid.
196. Law: Kessler (2002), p. 216.

Patrick Gray III, acting associate director W. Mark Felt, and assistant director for domestic intelligence Edward S. Miller.[197]

> Regardless of whether the FBI director had authorized the break-ins, they were still illegal. In July 19, 1966, memo, Sullivan explained to DeLoach, "We do not obtain authorization for black bag jobs from outside the bureau. Such a technique involves trespass and is clearly illegal; therefore, it would be impossible to obtain any legal sanction for it. Despite this, black bag jobs have been used because they represent an invaluable technique in combating subversive activities of a clandestine nature aimed at undermining and destroying our nation."[198]

Following two days of deliberation, Felt and Miller were convicted on November 6, 1980. In December, a judge fined Felt $5,000 and Miller $3,500. Partly because of insufficient evidence, the case against Gray was dropped.[199] When Reagan became president, Miller received a proposal from Attorney General Edwin Meese asking him if he would accept a pardon. On April 15, 1981, President Reagan pardoned both Felt and Miller. "Reagan said they had served the country with "great distinction" and had approved the break-ins in good faith in pursuing radical fugitives."[200]

It was too much for the rule of law.

Political Spying in the 1980s

Political spying by the FBI continued through the 1980s. The *New York Times* ran an article in 1998 reporting that musical genius Leonard Bernstein (1918-1990) had been a subject of FBI surveillance most of his life because of his liberal views. The United States must be unique among the Western democracies when liberal political affiliation is considered subversive.

More information on the work of the FBI in the 1980s is found in *The Bureau: Inside Today's FBI*, published in London.[201] I will cite only certain of the author's major conclusions.

The FBI presents an image of itself to the media and the people, assuring them its only interest in the political opinions of US citizen is in relation to foreign spying. Yet the FBI has the power to investigate any internal political groups or citizens that it considers to be a threat to national security, regardless of whether or not they suspect them of violating any laws.[202]

In the 1980s, one of the organizations the FBI was focused on was the Committee in Support of the People of El Salvador, or CIPSES. It was largely composed of and associated with religious groups, pacifist groups, and radical

197. Ibid.
198. Ibid., p. 217.
199. Ibid.
200. Ibid., p. 217-218.
201. Law: Jeffreys (1994).
202. Ibid., p. 265.

political organizations. Over a hundred of these groups were investigated, fueled by information the FBI obtained from extremist conservative groups in the United States. Investigations such as this cast doubt on the FBI's ability to distinguish between legal criminal investigation and political agenda.[203]

One of President Reagan's first acts in office was to sign Executive Order 12333. Since it was classified, it was not subject to approval by Congress.[204] "The most important among the executive orders and laws that establish the guidelines for governmental intelligence organizations are those that limit the CIA (and the FBI) use of surveillance techniques at home. President Reagan's omnibus executive order on intelligence issued early in his administration seems to permit investigations of domestic groups, for example, under the rationale that they may be tools of foreign powers or possess information that could be relevant to the US interests abroad. The exact standards for the use of such techniques remain unknown."[205]

Under Executive Order 12333, much of what was done outside the law under COINTELPRO became legal.[206]

Largely influenced by the conservative Heritage Foundation, Reagan restored many of the FBI and CIA surveillance powers taken away after Watergate. Once again, they were allowed to extensively use surveillance methods such as wiretaps and informers, as well as to hire private investigators.[207]

The executive order stated that the FBI, the CIA, or the military was allowed to employ electronic and mail surveillance without a warrant, so long as the Attorney General found probable cause that the surveillance was used "against a foreign power or an agent of a foreign power." Additionally, the FBI was now permitted to conduct warrantless break-ins.[208]

Meanwhile, the executive branch also restricted the issuing of government dossiers to individuals under the Freedom of Information/Privacy Act.[209]

The FBI's investigation of CISPES and strong associations with Colonel Oliver North hinted at its involvement with the Iran-Contra scandal.[210] "There is evidence that the FBI not only knew something about the interest of the National Security Council in pressuring those who disagreed with foreign policy, but also turned a blind eye to the growing violation of the law in schemes to help the Contras."[211]

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203. Ibid., p. 266.
204. Ibid., p. 267.
205. Law: Johnson (1989), p. 254-255.
206. Law: Glick (1989), p. 31.
207. Law: Jeffreys (1994), p. 267.
208. Law: Glick (1989), p. 31.
209. Law: Jeffreys (1994), p. 267.
210. Ibid., p. 287.

The Center for Constitutional Rights, a group of attorneys based in Manhattan interested in social issues and civil rights, began to notice that something was happening as early as 1982. This organization began to receive complaints from the affected activists. At first these complaints were relatively mild — people returning from El Salvador and Nicaragua and other places were subject to extremely thorough customs inspections; others claimed that their mail was being interfered with, or that they were visited by FBI agents who asked their opinions about Central America. In late 1983, the Center for Constitutional Rights began to hear more alarming stories: inexplicable break-ins in which money and valuables were ignored, but documents and membership lists were taken; confiscation of papers at customs; telephones that made strange noises, and people following activists on the streets. More than a few people were subjected to unexplained tax audits — a traditional method of FBI intimidation (and the favorite method of the Hoover's FBI). Some individuals, particularly those who had participated in the refugee sanctuary movement, began to ask for their dossiers from the FBI pursuant to the Freedom of Information/Privacy Act. When the dossiers did not arrive in a reasonable amount of time, they appealed to the Center for Constitutional Rights for help.The CCR was particularly disturbed to find that the investigation was proceeding under cover of counterintelligence directives, which permitted the FBI to use such inexcusable investigative techniques as forced body searches, planting of agents, and disruption of the subjects of surveillance.[212]

All this leaves one question unanswered. Why, bearing in mind that the FBI agents are generally intelligent and decent people, did they agree to conduct such an investigation? Why were the agents prepared to photograph, conduct surveillance on, and scrutinize those whom they knew, virtually from the beginning, were innocent of any crimes or terrorist acts? The answer is very simple. The FBI is a quasi-military organization. Its rules of discipline and loyalty code are so strong that their superiors give agents orders, they obey them regardless of how absurd or ethically suspicious the orders might seem.[213]

The United States continued to deprive aliens of their fundamental rights in the 1980s. In 1987, the government used provisions of the McCarran-Walter Act threatened to deport eight Palestinians living in Los Angeles. The reason cited was their association with a group that advocated global communism. "In a chilling preview of what was to come in other cases, the INS sought to detain the 'Los Angeles Eight' on the basis of secret evidence but an immigration judge refused to go along, and released them. Federal courts blocked the deportations, characterizing the government's case as based on 'guilt by association,' but the

211. Ibid., p. 289.
212. Ibid., p. 296.
213. Ibid., p. 203.

Justice Department appealed to the Supreme Court, which ruled that aliens can be singled out for deportation based on their legal, political activities."[214]

From 1987 to 1989, the FBI interviewed more than two dozen Amnesty International members who had written to Soviet or East Bloc embassies on behalf of political prisoners. Those interviewed included school teachers, doctors, business professionals, housewives, and students. The interviews lasted from a few minutes to an hour. In several cases FBI agents telephoned or visited people at work. Many of those interviewed found the agents polite, but many also sensed the implication of wrongdoing. FBI agents generally conducted the interviews by asking open-ended questions and avoided disclosing how the contact came to the Bureau's attention. Instead, the Amnesty members faced vague questions such as, "Have you been in contact with any Russians lately?" Many of those interviewed expressed both confusion and anger that the FBI would scrutinize their human rights work.[215]

Although the FBI defended itself, stating it was not investigating Amnesty International, US citizens were nevertheless being questioned for having engaged in activities supported by the First Amendment.[216]

In 1985, the FBI began to visit public and university libraries to "develop counterintelligence awareness" among librarians. Agents interviewed librarians and questioned them about readers of unclassified technical and scientific journals. "FBI agents asked librarians to be wary of 'foreigners' or persons with 'east European or Russian-sounding names.'"[217]

One recent trend is that the FBI's political spying is increasingly supplemented by political spying on the part of the NSA.

> Even after the investigations into the domestic and political activities of the agencies that followed in the wake of the Watergate fiasco, the NSA continues to target the political activity of "unpopular" political groups and duly elected representatives. One whistleblower charged in a 1988 *Cleveland Plain Dealer* interview that, while she was stationed at the Menwith Hill facility [listening station in the United Kingdom] in the 1980s, she heard real-time intercepts of South Carolina Senator Strom Thurmond.[218]

Political Spying in the 1990s

Many people began questioning the need for intelligence once the Cold War was over. Yet, even at the height of the Cold War, only about 10 to 12 percent of the intelligence budget was devoted to the Soviet Union.[219]

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214. Law: Cole (2002), p. 9.
215. Ibid., p. 50.
216. Ibid., p. 51-52.
217. Ibid., p. 52.
218. Law: Poole (1).
219. Law: Kessler (1992), p. 10.

The system created during the Cold War years was too big to change its character.

The Associated Press Freedom of Information Act request for every FBI "High Visibility Memorandum" filed between 1974 and 2005 produced more than 500 memos totaling nearly 1,500 pages — a stack of documents six inches high, allowing a lengthy traipse through the lives of celebrities from A (Louis Armstrong) to Kaye (Danny) to Z (Efrem Zimbalist). The FBI will not divulge its exact number of files, but estimates are that it could total more than 6 million.[220]

By 1990, the FBI possessed computerized records on over 20 million Americans.[221]

In a 1995 *Baltimore Sun* article, former Maryland Congressman Michael Barnes claimed his phone calls had been intercepted regularly under previous Republican administrations. He only discovered this after reporters were passed transcripts of his conversations with the White House.

> One of the most shocking revelations came to light after GCHQ officials became concerned about targeting of peaceful political groups and told the London *Observer* in 1992 that the ECHELON dictionaries targeted Amnesty International, Greenpeace, and even Christian ministries.[222]

In 1995, despite bans prohibiting the CIA from releasing such information, a Clinton White House official asked the CIA for intelligence on several US citizens. An NSC spokesman maintained while it was generally illegal for the CIA to spy on US citizens or release information gathered on them, it is not illegal for the White House to ask for the information. Meanwhile, CIA attorneys maintained that the agency does not keep files on individual US citizens. Also, the CIA can legally keep information mentioning US citizens in files relating to operations on foreign citizens, organizations, or governments.[223]

Political Spying and Rights in the 2000s

In his opinion in *Olmstead v. United States* (1928), Supreme Court Justice Louis Brandeis said prophetically:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.[224]

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220. Law: *CNN* (September 22, 2005).
221. Philosophy: Ermann (1997), p. 266.
222. Law: Poole (1).
223. Law: *Los Angeles Times* (December 19, 1997).
224. Law: Parenti (2003), p. 199.

"Significant days in world history are like turning points of fate."[225] On September 11, 2001, the United States found itself at such a turning point when the hijacked American Airlines flight 11 smashed into the North Tower of the World Trade Center in New York City, American Airlines flight 175 flew into the South Tower, two more planes were hijacked, an explosion took a chunk out of the Pentagon and United Airlines flight 93 crashed southeast of Pittsburgh.

If the measures taken after September 11 had been rights neutral — such as an increase in the counter-terrorism budgets and beefing up the number of policemen — nobody would object.

But significant departures from normal legal practice in the United States were permitted due to the fear of terrorism, causing the country to be seen as one that claims its high ideals should apply to all others, but not itself.[226]

"Nothing dictates or requires we use the metaphor of war to suggest and justify the steps we should take after September 11, 2001."[227] When unscrupulous politicians, however, use this metaphor, the consequences are foreseeable. "In Ralph Waldo Emerson's words: 'When a whole nation is roaring Patriotism at the top of its voice, I am fain to explore the cleanness of its hands and purity of its heart.'"[228]

> Because of the actions of a handful of terrorists on September 11, federal agents could have more power over all Americans in perpetuity. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA-PATRIOT) Act treats every citizen like a suspected terrorist and every federal agent like a proven angel.[229]

When the Bush administration could not get the powers it desired from Congress, it resorted to mechanisms such as executive orders, interim agency rules, and policy guidelines to bestow the powers upon itself.[230]

On October 11, 2001, Senator Russ Feingold, dissenting to the USA-PATRIOT Act, said on the floor of the Senate:

> There is no doubt that if we lived in a police state, it would be easier to catch terrorists. If we lived in a country where the police were allowed to search your home at any time for any reason; if we lived in a country where the government is entitled to open your mail, eavesdrop on your phone conversations, or intercept our e-mail communications; if we lived in a country where people could be held in jail indefinitely based on what they write or think, or based on mere suspicion that they are up to no good, the government would probably discover and arrest more terrorists or would-be terrorists, just as it would find more lawbreakers generally. But that wouldn't be a country in which we would want to live.[231]

225. Law: *Der Speigel Magazine* (2002), p. ix.
226. Law: Ratner (2004), p. x.
227. Law: Heymann (2003), p. 87.
228. Law: Dadge (2004), p. 103.
229. Law: Bovard (2003), p. 2.
230. Law: Brown (2003), p. 34.

Rather than targeting terrorists, the Bush administration and Congress effectively granted new powers to federal agents (of which there are over 3,000) to use against anyone suspected of committing any federal crime.[232]

Following September 11, Attorney General John Ashcroft resolved to use the full authority of the federal government against the terrorists.[233] In a speech to the nation's mayors, he stated:

> Robert Kennedy's Justice Department, it is said, would arrest mobsters for "spitting on the sidewalk" if it would help in the battle against organized crime. It has been and will be the policy of this Department of Justice to use the same aggressive arrest and detention tactics in the war on terror. Let the terrorists among us be warned: If you overstay your visa — even by one day — we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage.[234]

> The most questionable restrictions of liberties included indefinite detention, with no access to judicial review, of more than a thousand *noncitizens* who were lawfully in the United States and had not been charged with any crime; blanket secrecy concerning the identity of these detainees; refusal to permit many of these detainees to communicate with an attorney; an unprecedented assertion of authority to eavesdrop on constitutionally protected attorney-client communications; secret deportation proceedings; the incarceration for more than two years of a US citizen, arrested on US soil, held incommunicado, with no access to a lawyer, solely on the basis of an executive determination that he was an "enemy combatant"; significant new limitations on the scope of the Freedom of Information Act; expanded authority to conduct undercover infiltration and surveillance of political and religious groups; increased power to wiretap, engage in electronic eavesdropping, and covertly review Internet and e-mail communications; new power secretly to review banking, brokerage, and other financial records; and expanded authority to conduct clandestine physical searches.[235]

Over 1,200 people were detained on suspicion of violating immigration laws, being material witnesses to terrorism, or fighting for the enemy.[236] Immigrants were rounded up and jailed with no respect for due process, inviting comparisons to the scenario in Sinclair Lewis's *It Can't Happen Here*.[237]

Currently the intelligence forces are engaged in a three-front struggle with the remnants of those rights granted by the US Constitution and other law. First, individuals held for immigration violations are seeking to contest the new regulations that require their cases be heard in secret, using this to criticize the so-called unconstitutional preventive detentions.[238] Second, individuals held as

231. Law: Hentoff (2003), p. 24-25.
232. Law: Bovard (2003), p. 2.
233. Law: *The New York Times* (August 4, 2002)(1).
234. Law: Chang (2002), p. 73-74.
235. Law: Stone (2004), p. 552.
236. Law: *The New York Times* (August 4, 2002)(1).
237. Law: Hentoff (2003), p. 14-15.

material witnesses argue they should not be detained simply so that they can give testimony in grand jury investigations.[239]

And lastly, "extra-legal zones have been created."[240] "Government officials admit there is a global detention system run by the Pentagon and the CIA. It is a secretive universe, they said, made up of large and small facilities scattered throughout the world that has sprouted up to handle hundreds of suspected Al-Qaeda terrorists, Taliban warlords and former officials of the Iraqi regime arrested by the United States and its allies since September 11 attacks and the war in Iraq. Many prisoners are still being held in a network of detention centers from Afghanistan to the US naval base at Guantanamo Bay in Cuba. Officials described it as a prison system with its own hierarchy, one in which the most important captives are kept at the greatest distance from the prying eyes of the public and the news media. And it is a system in which the jailers have refined the art of interrogation in order to drain the detainees of critical information."[241]

> Eyewitness accounts of this momentous and deeply sobering chapter in American history have been published. They are full of powerful cautionary tales about the risks of defaming the very values we are fighting for as we wage the war on terror. It has become evident how ill conceived and counterproductive an operation like Guantanamo detention center is in the war on terror and in the history of US military engagement.[242]

A few such accounts follow.

> The military aircraft in which the first prisoners destined for the concentration camp in Guantanamo sat chained to a bench, soaked in their own urine, earmuffed, masked and unable to see, landed at the US airstrip at Guantanamo Bay, Cuba, on January 14, 2002. During the preceding week, marines had labored to build their makeshift prison, Camp X-ray: a dozen rows of steel mesh cages, open to the elements, ringed by a razor-wire fence. On arrival, the detainees had been led into its compound and photographed as they waited to be processed. Shackled hand and foot, dressed in orange jumpsuits, still wearing the black-lensed goggles, surgical masks, headphones and taped-on gloves that they had been forced to don at the start of their twenty-seven-hour flight, the detainees knelt in the Gitmo dust as crew-cut servicemen loomed in threatening poses over them. Within a few days, US Defense Secretary Donald Rumsfeld would regret allowing these pictures to be released: to have done so, he said, was "probably unfortunate." The front-page headline used with the photos in Britain's conservative Daily Mail typified responses outside the United States. It consisted of a single word: TORTURE![243]
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> The CIA analyst had been sent to Guantanamo to find out what was going wrong. He was held in high respect within the agency and was capable of reporting

238. Ibid.
239. Ibid.
240. Law: *The Economist* (November 1st-7th, 2003).
241. Law: *International Herald Tribune* (December 19, 2003).
242. See: Law: Saar (2005).
243. Law: Rose (2004), p. 1-2.

> directly, if he chose, to the CIA director. The analyst did more than just visit and inspect. He interviewed at least 30 prisoners to find out who they were and how they ended up in Guantanamo. Some of his findings, he later confided to a former CIA colleague, were devastating. "He came back convinced that we were committing war crimes in Guantanamo," the colleague told. "Based on his sample, more than a half the people there didn't belong there. He found people lying in their own feces," including two captives, perhaps in their eighties, who were clearly suffering from dementia. "He thought what was going on was an outrage," the CIA colleague added.[244]

In March of 2004, it was reported that among the 660 Guantanamo prisoners from 42 countries, apparently three children are in detention, as well as several people over the age of 70. "Red Cross officials who visited the site commented on the high rates of depression and mental illness. Professor Daryl Matthews, a forensic psychiatrist, spent a week examining the Guantanamo detainees in May 2003. 'It is hard to imagine a more highly stressed group,' he said. People were becoming mad because they were saying: 'When will they release us? They should take us to the high court.'"[245] Over 32 suicide attempts have been reported, yet as of 2003 the Bush administration was planning to spend $25m to increase Guantanamo's detention capacity to 1,100.[246] (On June 28, 2004, the US Supreme Court ruled that enemy combatants at Guantanamo, who had already been detained for two and half years, had the right to use federal courts to challenge their detention.[247])

The CIA has established its own detention system for particularly important prisoners. Third World countries around the world host detention locations in which Al-Qaeda leaders are interrogated without any guarantee of release.[248]

The front page of the December 26, 2002, *Washington Post* says: "Those who refuse to cooperate inside these secret CIA interrogation and detention centers are sometimes kept standing or kneeling for hours, in black hoods or spray-painted goggles, according to intelligence specialists familiar with CIA interrogation methods. At times, they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of light — subject to what are known as 'stress and duress' techniques."[249]

> These CIA facilities are closed to the press and other outsiders, including some other government agencies. Moreover, according to Americans with direct knowledge and others who witnessed the treatment, captives are often "softened up" by MPs and US Army Special Forces troops who beat them up and confine them to

244. Law: Hersh (2004), p. 2.
245. Law: *The Times* (March 10, 2004).
246. Law: *The Economist* (November 1st - 7th, 2003).
247. Law: *CNN* (July 7, 2004).
248. Law: *International Herald Tribune* (December 19, 2003).
249. Law: Hentoff (2003), p. 66.

tiny rooms. The alleged terrorists are commonly blindfolded and thrown into walls. Medication to alleviate pain is withheld. An official who has supervised treatment of accused terrorists says, "If you don't violate someone's human rights some of the time, you probably aren't doing your job."[250]

The *Economist* wrote on January 9, 2003, about this report of tortures:

> Although well documented, the account has produced official denials and only desultory discussion among American commentators, who seem no keener to discuss the subject than the British and French were when the issue arose in Northern Ireland and Algiers.[251]

Maher Arar is a 34-year-old native of Syria who immigrated to Canada as a teenager. On September 26, 2002, as he was returning from a family vacation in Tunisia, he was seized by US authorities at Kennedy Airport in New York, where he was changing planes. Arar, a Canadian citizen, was not charged with a crime. But as Jane Mayer tells us in "Outsourcing Torture," a deeply disturbing article of The New Yorker, he "was placed in handcuffs and leg irons by plainclothes officials and transferred to an executive jet." In an instant, Arar was swept into an increasingly common nightmare, courtesy of the United States of America. The plane that took off with him from Kennedy "flew to Washington, continued to Portland, Maine, stopped in Rome, Italy, and then landed in Amman, Jordan." Any rights Arar might have thought he had, either as a Canadian citizen or a human being, had been left behind. At times during the trip, Arar heard the pilots and crew identify themselves in radio communications as members of "the Special Removal Unit." He was being taken, on the orders of the US government, to Syria, where he would be tortured. "Extraordinary rendition" is one of the great euphemisms of our time. It means a policy of seizing individuals without even semblance of due process and sending them to be interrogated by regimes known to practice torture. It is almost on a par with contract killings. Yet the United States couches its electoral campaigns in terms of moral values. Arar was seized because his name had turned up on a watch list of terror suspects; he eventually confessed, under torture, but such a confession was worthless. Syrian officials reported to the United States that they could find no links between Arar and terrorism. He was released in October 2003. Barbara Olshansky, the assistant legal director of the Center for Constitutional Rights, is familiar with Arar's case. "He's not a big guy," she said. "He had lost more than 40 pounds. His pallor was terrible, and his eyes were sunken. He looked like someone who was kind of dead inside."[252]

Photographs have an insuperable power to determine what we recall of events. For most people worldwide the photographs of the torture of Iraqi prisoners by Americans in Abu Ghraib will be the defining association with the war that the United States launched preemptively in Iraq in 2003. Yet the Bush administration tried to brush it off as a public-relations problem. The word "torture" was studiously avoided, and only "abuse" and "humiliation" were admitted. To refuse to call what took place in Abu Ghraib (and what has taken place elsewhere in Iraq, Afghanistan, Guantanamo Bay and secret prisons whose existence is rarely mentioned) by its true name, torture, is as outrageous as the refusal to call a genocide a genocide. One

250. Ibid.
251. Ibid., p. 67.
252. Law: *International Herald Tribune* (February 12-13, 2005).

> of the conventions to which the United States is a signatory defines torture as: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession."[253] "The same convention declares, "No exceptional circumstances, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." And all covenants on torture specify that it includes treatment intended to humiliate the victim, such as leaving prisoners naked in cells and corridors."[254]

The question of how high-level officials authorized the use of harsh methods in the treatment of prisoners is covered in other books.

> The decision was made at the outset of the Iraq war, in March 2003, when administration lawyers concluded that the president was not bound by a treaty prohibiting torture.[255]

> The use of harsh interrogation techniques by the CIA, first, created a permissive climate that eventually permeated the entire government and transformed American attitudes toward the handling of prisoners. Once the CIA got the green light, the United States military, which had a proud tradition of adhering to the Geneva Conventions, began to get signals from the Bush administration that the rules had changed. According to CIA sources, these harsh practices appear to be in direct violation of the Geneva Conventions and could be defined as a "grave breach" under international law. That would make it a war crime in the United States, and a crime under federal law. Suggestions to push the CIA to "get rough with the terrorists" were mostly given indirectly, without a paper trail. At the same time senior administration officials, apparently including Vice President Dick Cheney, made certain to protect the president from personal involvement in the internal debates on torture. Thus the Abu Ghraib scandal eventually ebbed, in part because of the lack of proof that the president had ordered it. In June 2004, just after the Abu Ghraib photos first emerged, Bush insisted that he would never order torture. "Let me make very clear the position of my government and our country," he told the reporters. "We do not condone torture. I have never ordered torture. I will never order torture. The values of our country are such that torture is not a part of our soul and our being."[256]

"The situation at Abu Ghraib was compounded by a shadowy role of US intelligence, because as a high-level Army investigation has found, military intelligence interrogators played a major role in the abuse of Iraqi prisoners";[257] "technically, military intelligence merely 'leased' prisoners from the MPs for questioning."[258] Reports show that "abuse involving service branches in Afghan-

253. The definition comes from the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Similar definitions have existed for some time in customary law and treaties, starting from Article 3 — common to the four Geneva conventions of 1949 — and many recent human rights conventions.
254. Law: *The New York Times Magazine* (May 23, 2004); see also: Law: Strasser (2004)(2).
255. Law: *The New York Times* (June 8, 2004).
256. Law: Risen (2006), p. 11-37.
257. Law: *The New York Times* (August 26, 2004).

istan, Iraq, and Cuba began in 2002 and continued after the investigation of Abu Ghraib."[259] "Soldiers told a human rights group that Iraqi prisoners had been beaten and abused to help gather intelligence — and for amusement."[260]

Behind the exotic brutality so painstakingly recorded in Abu Ghraib lies a simple truth, well known but not yet publicly admitted in Washington: that since the attacks of September 11, 2001, officials of the United States, at various locations around the world, from Bagram in Afghanistan to Guantanamo in Cuba to Abu Ghraib in Iraq, has been torturing prisoners. They did it under the gaze of Red Cross investigators, who reported that "methods of physical and psychological coercion were used by the military intelligence in a systematic way to gain confessions and extract information," then set out these "methods" in stark and sickening detail. These confidential reports were handed over to US military and government authorities and then mysteriously "became lost in the Army's bureaucracy."[261]

After September 11, 2001 some American jurists — including such distinguished individuals as Richard Posner — have gone to great lengths trying to make distinctions between torture and interrogation which is "merely coercive."[262] However, for anyone who examines the documents about the treatment of terrorist suspects by US military and intelligence officials after 9/11 there is no doubt that real torture has been used.

An anonymous prisoner on January 21, 2004, gave a sworn statement — obtained by *The Washington Post* — about his time in Abu Ghraib:

> The first day they put me in a dark room and started hitting me in the head and stomach and legs.
>
> They made me raise my hands and sit on my knees. I was like that for four hours. Then the Interrogator came and he was looking at me while they were beating me. Then I stayed in this room for 5 days, naked with no clothes.... They put handcuffs on my hand and they cuffed me high for 7 or 8 hours. And that caused a rupture to my hand and I had a cut that was bleeding and had pus coming from it. They kept me this way on 24, 25, and 26 October. ...
>
> Then the police started beating me on my kidneys and then they hit on my right ear and it started bleeding and I lost consciousness. ...
>
> A few days before they hit me on my ear, the American police, the guy who wears glasses, he put red woman's underwear over my head. And then he tied me to the window that is in the cell with my hands behind my back until I lost consciousness. And also when I was in Room #1 they told me to lie down on my stomach and they were jumping from the table onto my back and legs. And the other two were spitting on me and calling me names, and they held my hands and legs. After the guy

258. Law: Mackey (2004), p. 175.
259. Law: *The New York Times* (January 6, 2005); see also: Law: Zimmerman (2004).
260. Law: *The New York Times* (September 24, 2005).
261. Law: Danner (2004), p. 10-11.
262. See: Law: Posner (2004), p. 291-298.

> with the glasses got tired, two of the US soldiers brought me to the ground and tied my hands to the door while lying down on my stomach. One of the police was pissing on me and laughing on me. ... And the soldier and his friend told me in a loud voice to lie down, so I did that. And then the policeman was opening my legs, with a bag over my head, and he sat down between my legs on his knees and I was looking at him from under the bag and they wanted to do me because I saw him and he was opening his pants, so I started screaming loudly and the other police started hitting me with his feet on my neck and put his feet on my head so I couldn't scream. ...
>
> ...They took me to the room and they signaled me to get on to the floor. And one of the police he put a part of his stick that he always carries inside my ass and I felt it going inside me about 2 centimeters, approximately. And I started screaming, and he pulled it out and he washed it with water inside the room. And then two American girls that were there when they were beating me, they were hitting me with a ball made of sponge on my dick. And when I was tied up in my room, one of the girls, with blonde hair, she is white, she was playing with my dick. ... And they were taking pictures of me during all these instances.[263]

These techniques were all common torture techniques, right out of the book.[264]

Everything that was done increases the sense of isolation and defenselessness. Essential to torture is the sense that the interrogators control everything: food, clothing, dignity, light, even life itself. Everything is designed to make it clear to the victim that he or she is at the mercy of those whose job it is not to have any mercy. Hooding victims dehumanizes them, making them anonymous and thing-like and easier for the interrogators to "work on." They become just bodies. You can do anything you want to them.[265]

A new category of "extra-legal person" has been created.[266] Prisoners such as Yasser Esam Hamdi and Jose Padilla are Americans who have been declared "enemy combatants," allegedly involved with terrorist groups. They were long deprived of the fundamental rights of a US citizen, such as the right to a lawyer's representation and the right to challenge their detention before a civilian judge.[267] "The cases of these two persons led to legal battles that transformed our nation."[268] (One of the two, Yasser Hamdi, was allowed access to an attorney after two years being held incommunicado.[269])

On May 8, 2002, Padilla returned from abroad and landed in Chicago, where he was taken into custody by federal agents. The Justice Department obtained a warrant for his arrest and detention as a material witness. He was to be detained in order to testify for a grand jury investigating the September 11, 2001,

263. Law: Danner (2004), p. 12-14.
264. See, for example: Law: Conroy (2000).
265. Law: Levi Strauss (2004), p. 88.
266. Law: *The Economist* (November 1st - 7th, 2003).
267. Law: *The New York Times* (August 4, 2002)(1).
268. Law: Dershowitz (2004).
269. Law: *CNN* (December 2, 2003).

attacks.[270] Just one month later, on June 9, the government informed the judge that it was withdrawing its subpoena for Padilla to testify. Padilla was instead classified as an enemy combatant by President Bush and was placed in the custody of Secretary of Defense Donald Rumsfeld.[271]

The next day, June 10, Attorney General Ashcroft, who happened to be in Moscow, made a statement that was broadcast on television to the United States. "We have captured a known terrorist," Ashcroft said. "While in Afghanistan and Pakistan [he] trained with the enemy.... In apprehending [him] as he sought entry into the United States, we have disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive 'dirty bomb'."[272]

The following day, June 11, Padilla's lawyer told the judge she had been barred from visiting or speaking with Padilla.[273]

She filed a petition for habeas corpus, which requires any authority holding a prisoner show justification for doing so. In response, government lawyers argued the courts were not equipped to weigh wartime necessities, and thus the judge should defer to President Bush and the Defense Department.[274]

> "We have acted," Ashcroft said, under "clear Supreme Court precedent, which [establishes] that the military may detain a United States citizen who has joined the enemy and has entered our country to carry out hostile acts." That was evidently a reference to the 1942 case of *Ex parte Quirin*, in which the Court upheld the military trial of a group of German saboteurs — one of them a US citizen — who were landed on Long Island by a submarine in World War II. But to call that decision a clear precedent could politely be called an exaggeration. The Nazi saboteurs, unlike Padilla, were given a trial. They had full access to lawyers, and very able lawyers they were. (One of them, Kenneth C. Royall, was later secretary of the Army.)[275]

Yet Padilla was never indicted and tried for the offenses he was accused of by Attorney General Ashcroft. It was more convenient for the government to hold Padilla without having to produce the necessary evidence to convince a jury he was guilty.[276]

As Harvard constitutional law professor Laurence H. Tribe said on ABC's *Nightline* (August 12, 2002):

> It bothers me that the executive branch is taking the amazing position that just on the president's say-so, any US citizen can be picked up, not just in Afghanistan, but at O'Hare Airport or on the streets of any city in this country, and locked up without access to a lawyer or court just because the government says he's connected

270. Law: Leone (2003), p. 52.
271. Ibid., p. 53.
272. Ibid.
273. Ibid.
274. Ibid., p. 53-54.
275. Ibid., p. 54.
276. Ibid.

> somehow with the Taliban or Al-Qaeda. That's not the American way. It's not the constitutional way.... And no court can even figure out whether we've got the wrong guy.[277]

(On January 5, 2006 Jose Padilla, detained for over three years without charges as an "enemy combatant", appeared in court for the first time after being flown to Miami from a military prison.[278])

Hamdi, meanwhile had not had a court for quite a while, making him the first US citizen in American jurisprudence history to be held indefinitely without any contact with a lawyer, without charge, and without any findings by a military tribunal.[279] His case, however, was less blatantly abusive than Padilla's, since Hamdi was allegedly captured on the battlefield in Afghanistan, making it easier to classify him as an enemy combatant.[280] "He surrendered with an enemy unit, armed with a military-style assault rifle, on a foreign battlefield," government counsel argued. So whether or not he was a citizen, he was "subject to capture and detention by the military during the conflict."[281]

The problem is that any such assertion may look convincing if it has not been tested by cross-examination and checking evidence typical of the trial court.[282]

On June 28, 2004, the US Supreme Court ruled the executive branch did not have the final say in imposing open-ended detentions of citizens and noncitizens.[283] However, despite the Bill of Rights, Yasser Hamdi became the first United States citizen to be stripped of his citizenship and deported without ever being charged with a crime.[284]

> Under the terms of his release, Hamdi was forced to:
>
> 1. Renounce his US citizenship.
> 2. Pledge not to sue for his travails of the last three years.
> 3. Promise not to leave Saudi Arabia for five years.
> 4. Agree never to travel to Afghanistan, Iraq, Pakistan, Syria, Israel, the West Bank or Gaza.
> 5. Advise the US embassy 30 days before any foreign travel.
>
> "I wanted to sign anything, everything, just to get out of there, to get back here," Hamdi told the press shortly after his release.[285]

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277. Law: Hentoff (2003), p. 62-63.
278. Law: Yahoo! News (January 5, 2006).
279. Law: Leone (2003), p. 58.
280. Ibid., p. 58-59.
281. Ibid., p. 59.
282. Ibid., p. 62.
283. Law: *The New York Times* (June 29, 2004).
284. Law: Whitney (October 13, 2004).
285. Law: *Covert Action Quarterly*, No. 78, p. 25.

The cases of Jose Padilla and Yasser Hamdi may be only the trial balloons of the administration in preparation to handling terrorist suspects and dissenters after the next 9/11.

> Halliburton's subsidiary KBR (formerly Kellogg, Brown and Root) announced on January 24, 2006 that it had been awarded a $385 million contingency contract by the Department of Homeland Security to build detention camps in the United States.[286]

Maureen Farrell speculates that because another terror attack is all but certain, it seems likely that the detention centers would be used for post-September 11-type detentions of rounded-up immigrants.[287]

Vietnam-era whistleblower Daniel Ellsberg ventures, "Almost certainly this is preparation for a roundup after the next September 11 for Mid-Easterners, Muslims and possibly dissenters. They've already done this on a smaller scale, with the 'special registration' detentions of immigrant men from Muslim countries, and with Guantanamo."[288]

Nat Parry notes that the *Washington Post* reported on February 15, 2006 that the National Counterterrorism Center's (NCTC) central repository holds the names of 325,000 terrorist suspects, a fourfold increase since fall of 2003.[289]

> Asked whether the names in the repository were collected through the NSA's domestic surveillance program, an NCTC official told the Post, "Our database includes names of known and suspected international terrorists provided by all intelligence community organizations, including NSA."[290]
>
> As the administration scoops up more and more names, members of Congress have questioned the elasticity of Bush's definitions for words like terrorist "affiliates" used to justify wiretapping Americans allegedly in contact with such people or entities.[291]
>
> A Defense Department document, entitled the "Strategy for Homeland Defense and Civil Support," has set out a military strategy against terrorism that envisions an "active, layered defense" both inside and outside US territory. In the document, the Pentagon pledges to "transform US military forces to execute homeland defense missions in the…US homeland." The strategy calls for increased military reconnaissance and surveillance to "defeat potential challengers before they threaten the United States." The plan "maximizes threat awareness and seizes the initiative from those who would harm us."[292]

286. Law: Phillips (2006), p. 80.
287. Law: Buzzflash (February 13, 2006).
288. Law: Phillips (2006), p. 80.
289. Law: Consortium (February 21, 2006).
290. Ibid.
291. Ibid.
292. Ibid.

> But there are concerns, warns Parry, over how the Pentagon judges "threats" and who falls under the category of "those who would harm us." A Pentagon official said the Counterintelligence Field Activity's TALON program has amassed files on antiwar protesters.[293]
>
> In the view of some civil libertarians, a form of martial law already exists in the US and has been in place since shortly after the September 11 attacks when Bush issued Military Order Number One, which empowered him to detain any noncitizen as an international terrorist or enemy combatant. Today that order extends to US citizens as well.[294]

The USA-PATRIOT Act also resurrects another practice thought to be put to rest in 1990 — the ideological exclusion of immigrants. The McCarran-Walter Act authorized federal officials to deny visas to those who had advocated various proscribed political views, including Communism. With much fanfare about the commitment to freedom of expression, Congress in 1990 finally repealed these ideological exclusion provisions. But that history was quickly forgotten in the wake of September 11. The USA-PATRIOT Act denies admission to noncitizens who "endorse or espouse terrorist activity," or who "persuade others to support terrorist activity or a terrorist organization," in ways that the secretary of state determines hamper US efforts to combat terrorism. It also excludes noncitizens who are representatives of groups that "endorse acts of terrorist activity." Because of the breadth of the definitions of "terrorist activity" and "terrorist organizations," this authority would empower the government to deny entry to any noncitizen who advocated support for the ANC, the Contras during the war against the Sandinistas, or opposition forces in Afghanistan and Iran today.[295]

Attorney General Ashcroft relaxed the guidelines for FBI domestic spying. The guidelines originated in 1976, after a congressional committee revealed that the FBI had engaged in widespread illegal spying on and disruption of domestic political organizations, including many civil rights and antiwar groups. The 1976 guidelines, adopted by then-Attorney General Edward Levi, were designed to focus the FBI on the investigation of crime, and to prohibit political spying by barring investigations where there was no basis for concern about federal crime. These guidelines had already been relaxed twice, by William French Smith in 1983 and by Louis Freeh in 1995. But Smith and Freeh left in place the fundamental requirement that the FBI have some indication of at least the potential for criminal activity before it undertook an investigation. Since September 11, however, one of the most commonly heard complaints is that the FBI was and continues to be too focused on crime. In May 2002, Ashcroft amended the guidelines to authorize the FBI to undertake certain types of investigations — monitoring any gathering open to the public, including religious services; visiting

293. Ibid.
294. Law: Phillips (2006), p. 82-83
295. Law: Cole (2003), p. 64-65.

Web sites, electronic bulletin boards, and chat rooms; and obtaining information from commercial data-mining services — without any reason to believe that those being monitored may be engaged in or preparing for criminal activity.[296]

This a dangerous road, one the FBI has already traveled with disastrous consequences for political freedom in the United States. The conventional wisdom about the FBI being too focused on crime ignores the abuses of the past. Moreover, the pre-Ashcroft guidelines hardly erected a major obstacle to investigations; all that was required to initiate a preliminary inquiry was "an allegation or information indicating the possibility of criminal activity." Since terrorism is a crime, the guidelines did not inhibit legitimate investigations of terrorism. If the FBI is not guided by concerns about potential crime in its investigations, what is it to be guided by? History suggests that intelligence gathering not focused on crime tends to sweep far too broadly, and to expend substantial resources tracking the activities of wholly lawful political groups simply because they dissent from the mainstream. This has costs not only for political freedoms but also for security, as resources used to investigate the innocent are resources that cannot be used to investigate the guilty.[297]

In the words of Justice Robert H. Jackson:

> Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or the matter of opinion.[298]

The George W. Bush administration has done violence to these cherished traditions by challenging not simply the ideas but the patriotism of its critics. Shortly after the September 11 attacks, Bill Maher, the host of the television show *Politically Incorrect*, quipped, "We have been cowards, lobbing cruise missiles from two thousand miles away... Staying in the airplane when it hits the building — say what you want about that, it's not cowardly." White House Press Secretary Ari Fleischer seized upon Maher's statement and angrily warned that Americans "need to watch what the say," and that "this is not a time for remarks like that."[299]

More ominous yet was the warning of Attorney General Ashcroft, who, as the nation's top law enforcement officer, heads the Department of Justice and all of its divisions, including the FBI, the INS, the Bureau of Prisons, and the US Attorneys. Testifying before the Senate Committee on the Judiciary in December 2001, Ashcroft admonished that "those who scare peace-loving people with

296. Ibid., p. 79-80.
297. Ibid., p. 80.
298. Law: Chang (2002), p. 93.
299. Ibid., p. 93-94.

phantoms of lost liberty... your tactics only aid terrorists, for they erode our national unity and diminish our resolve," and "they give ammunition to America's enemies and pause to America's friends."[300]

The initiation of FBI investigations of law-abiding Americans based on tips that they hold controversial views has become all too common since September 11. On October 23, 2001, shortly after a 60-year-old retiree in San Francisco, Barry Reingold, complained at his local gym, "This war is not just about getting terrorists, it's also about money and corporate oil profits," FBI agents arrived at his home to question him about his political views. On October 26, 2001, FBI agents turned up at the home of A. J. Brown, a college freshman in North Carolina, to investigate a report of an "un-American poster" on display in her home. As it turned out, the poster in question criticized President George W. Bush's support for the death penalty during his tenure as the governor of Texas.[301]

FBI agents even paid a visit to the Art Car Museum in Houston, Texas, based on a tip that "there was some material or artwork that was of a threatening nature to the President." On November 7, 2001, the agents spent an hour examining the gallery's exhibit, "Secret Wars," which included a number of antiwar pieces commissioned before September 11, and questioning the docent as to who the artists were, how the gallery was funded, and who had visited the exhibit.[302]

On September 14, 2001, Congress granted President George W. Bush broad and open-ended authority under the War Powers Act to use force, not only against nations but against any "organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States." Convinced that military action would not prevent further acts of international terrorism against the United States, Representative Barbara Lee cast the lone vote in Congress against the resolution and called for diplomatic efforts "to ensure this never happens again." For holding true to her principles, Lee found herself accused of being a traitor and the subject of death threats.[303]

> Janis Besler Heaphy, the publisher of the Sacramento Bee, was booed off the stage just minutes after she began to present a commencement speech at the California State University in Sacramento before an audience of 17,000 people in December 2001 concerning the government's response to the September 11 attacks. Heaphy's speech recognized "the validity and need for both retaliation and security." To the evident displeasure of her audience, however, she went on to ask, "To what lengths are we willing to go to achieve them? Specifically, to what degree are we willing to compromise our civil liberties in the name of security?"[304]

300. Ibid., p. 94.
301. Ibid., p. 94-95.
302. Ibid., p. 95.
303. Ibid., p. 98.

> While the intolerance encountered by Lee and Heaphy appears to have been spontaneous and unorganized, two organizations with close ties to the George W. Bush administration have made calculated and methodical efforts to intimidate the administration's critics into silence. In November 2001, the American Council of Trustees and Alumni (ACTA), a conservative think tank founded by Lynne Cheney, the wife of Vice President Dick Cheney, issued a report grandly entitled Defending Civilization: How Our Universities Are Failing America and What Can Be Done About It. The report accused university faculty of making statements "short on patriotism and long on self-flagellation" and went on to document 117 statements made on university campuses that in ACTA's view were objectionable because they "blamed America first." The names of the professors who had made the statements were removed in a reissued version of the report, but not before they had been publicly circulated.[305]
>
> Highlighted in ACTA's report was a quote from Hugh Gusterson, an anthropology professor at MIT, who had commented, "Imagine the real suffering and grief of people in other countries." Gusterson reported being inundated with angry anonymous e-mails after the report's publication and expressed concern that the report would cause junior faculty members seeking tenure to keep their views to themselves. Eric Foner, a professor of history at Columbia University who was also quoted in the report, warned that ACTA "is trying to intimidate individuals who hold different points of view. There aren't loyalty oaths being demanded of teachers yet, but we seem to be at the beginning of a process that could get a lot worse and is already cause for considerable alarm.[306]
>
> The ACTA report was followed in March 2002 with the publication of a full-page ad in the New York Times by the newly formed Americans for Victory over Terrorism (AVOT), an organization headed by several high-powered Republicans, including William Bennett, who served as secretary of education under President Ronald Reagan and drug czar under President George H. W. Bush. The ad criticized those "who are attempting to use this opportunity to promulgate their agenda of 'blame America first'" and concluded that their views "stem from either hatred for the American ideals of freedom and equality or a misunderstanding of those ideals and their practice." The AVOT ad documented a number of statements — not only by professors but by journalists, politicians, and others — that it found objectionable. The AVOT ad attacked President Jimmy Carter for criticizing President George W. Bush's use of the phrase "axis of evil" in his State of the Union address in January 2002 as "overly simplistic and counter-productive," and Bennett accused the former president of weakening the national resolve.[307]

On the backdrop of these tectonic shifts over civil liberties some less noticeable changes have occurred. The veil of secrecy once again is descending over the government operations. At the National Archives, intelligence agencies have been removing from public access thousands of historical documents.[308] But the most disturbing of shifts are connected with the Fourth Amendment

304. Ibid., p. 98-99.
305. Ibid., p. 99.
306. Ibid., p. 99-100.
307. Ibid., p. 100.
308. Law: *The New York Times* (February 21, 2006).

protection and privacy in general. American Civil Liberties Union cyberchief Barry Steinhardt said, "The surveillance monster is growing, but the legal chains to these monsters are weakened even when we should be strengthening them."[309]

A letter sent by Assistant Attorney General Daniel J. Bryant of the Department of Justice's Office of Legislative Affairs to key senators shortly after September 11 lays bare the George W. Bush administration's desire to be freed from the Fourth Amendment's imposition of judicial oversight and review of its surveillance activities. In the letter, Bryant brazenly advocated for a suspension of the Fourth Amendment requirement in situations in which the government is investigating a national security threat.[310]

As US government admitted, private mail is opened in the war on terror.[311] "Tax accountants cannot protect their clients' privacy, and anything having to do with the Internet is fair game. The USA-PATRIOT gave the FBI access to the nation's email with its Carnivore wiretapping system."[312] "USA-PATRIOT Act permitted court-ordered access to any tangible item, beyond business records.[313] In addition, government agencies like the FBI and the CIA now have 'the right' to obtain individuals' tax files, bank and medical records, information about visits to libraries or on-line bookstores, and the web-sites a person visits — without even a court order. The government has started working on the Total Information Awareness Program (T.I.A.), which would maintain a database of any information on all residents of the US. 'It would collect every sort of information imaginable, including student grades, Internet activity and medical histories.'"[314] The intensely invasive Total Information Awareness program was headed by Vice Admiral John Poindexter of Iran-Contra infamy. (Later the name of the program was changed to the "Terrorism" Information Awareness Program.)

> The Poindexter program's slogan, "Knowledge Is Power," struck many as Orwellian. Senators Ron Wyden and Russell D. Feingold were able to limit funding for the government-sponsored data mining, and Poindexter soon resigned. But a Pentagon group later found that "T.I.A. was a flawed effort to achieve worthwhile ends." O'Harrow reports in No Place to Hide that a former Poindexter colleague at T.I.A. "said government interest in the program's research actually broadened after it was apparently killed by Congress."[315]

On December 13, 2003, President George W. Bush, with little fanfare and no mainstream coverage, signed into law the controversial Intelligence Authori-

309. Law: Fischer (2004), p. 18.
310. Law: Chang (2002), p. 55.
311. Law: CNN (January 9, 2006).
312. Law: Bovard (2003), p. 2.
313. Law: Chapman (2004), p. 107.
314. Law: *The New York Times* (November 24, 2002).
315. Law: *The New York Times Book Review* (April 10, 2005); O'Harrow (2005).

zation Act. None of the corporate press covered the signing of this legislation, which increases the funding for intelligence agencies, dramatically expands the definition of surveillable financial institutions to include real estate agencies, insurance companies, travel agencies, Internet service providers, post offices, casinos and other businesses as well. The law authorizes the FBI to acquire private records of those individuals it suspects of criminal activity without a judicial review.[316]

A Senate Defense Appropriation bill passed unanimously on July 18, 2003, expressly denied any funding to Terrorist Information Awareness research. In response, the Pentagon proposed the Multistate Anti-Terrorism Information Exchange, or MATRIX, a program devised by longtime Bush family friend Hank Asher, of the Pentagon, as a pilot effort to increase the exchange of sensitive terrorism and other criminal activity information between local, state, and federal law enforcement agencies. The MATRIX is a State-run information generating tool that circumvents Congress in the appropriation of federal funds. According to *LiP Magazine*, "Governmental and law-enforcement agencies and MATRIX contractors across the nation will gain extensive and unprecedented access to financial records, medical records, court records, voter registration, travel history, group and religious affiliations, names and addresses of family members, purchases made and books read."[317]

The officials of Justice Department are on the record claiming that at the time of clear and present danger to national security the executive branch has a "legal right" to obtain information without a court order for search and seizure. There is generally no constitutional barrier to the government obtaining such information, because the Supreme Court has ruled that the Fourth Amendment's probable cause and warrant requirements do not apply to any information shared with a third party. In effect, the Court has reasoned, when we share any such information with a third party, we assume the risk that the third party will share it with the government, and therefore we have no "reasonable expectation of privacy" in that information. But the government has not previously sought to collect and mine all this data. Notwithstanding the Supreme Court's reasoning, it is one thing to share one's private transactions with the credit card company as a necessary incident to obtaining credit, but another matter entirely to share them with the US government.[318]

Anyone can be stopped in an airport because his name matches one on the government's No Fly or Selectee lists, a collection of names gathered through myriad intelligence sources and distributed to airlines and security officials around the country. The lists were around long before the terror attacks, but since then they have grown tremendously, with thousands of new names culled

316. Law: Phillips (2006), p. 53, 55.
317. Ibid., p. 54-55.
318. Law: Cole (2003), p. 73-74.

from an array of undisclosed sources. The first sign of this may be simply getting tickets stamped with an "S."[319]

As some observers put it, the Fourth Amendment is dead in the United States.

It is only logical that the onslaught on liberties at home found its continuation in an intensification of "dirty diplomacy" abroad.

> Katherine Gun, 29, was working at Britain's top-secret Government Communication Headquarters in 2003 when she learned of a US plan to spy on at least a half-dozen UN delegations as part of the US effort to win Security Council support for an invasion of Iraq. The plans, which included e-mail surveillance and taps on home and office telephones, were outlined in a highly classified National Security Agency memo. The agency, which was seeking British assistance in the project, was interested in 'the whole gamut of information that could give US policymakers an edge in obtaining results favorable to US goals.' In a move that deeply embarrassed the US and British governments, the memo was leaked to the London *Observer*.[320]
>
> The *Observer* article prompted angry editorials in newspapers in England and around the world — though not, as it happened, in the United States. US coverage was limited to brief articles in *The Washington Post* and the *Los Angeles Times*, both of which downplayed the significance of the allegations.[321]
>
> Katherine Gun was charged with the violation of the British Official Secrets Act. The illegal war was started anyway.[322]

The question of the legality of a war is, of course, not a question of an absolute value but of a relative one. But it is an important criterion to use in deciding whether the war is just. We must be realistic about the nature of war. As Howard Zinn wrote, "War in our time is always indiscriminate, a war against innocents, a war against children. War is terrorism, magnified a hundred times."[323]

The US government is trying to solve this dilemma not through self-examination and trying to make sure that their actions are truly just, but by "selling" to other world the idea its wars are just. "Before she resigned her position for health reasons in March 2003, Undersecretary of State for Public Diplomacy Charlotte Beers undertook the biggest public-relations effort in the history of United States foreign policy, using traditional public-relations and marketing techniques like focus groups, market research, and video projects about Muslim Americans to show the United States to the world as a tolerant and open society. Beers announced that she would use one of the "best practices" of modern advertising — a strong emphasis on the emotional with the rational; but from what we know about modern US advertising techniques, the emotional always wins

319. Law: O'Harrow (2005), p. 228-229.
320. Law: *International Herald Tribune* (January 20, 2004).
321. Law: Keefe (2005), p. 32.
322. Law: *International Herald Tribune* (January 20, 2004).
323. Law: Snow (2003), p. 17.

out. As the contemptible but clever German Nazi propagandist Joseph Goebbels pointed out, 'There is no need for propaganda to be rich in intellectual content.'"[324]

On September 24, 2002, as Congress prepared to vote on the resolution authorizing President George W. Bush to wage war in Iraq, a group of senior intelligence officials, including George Tenet, the director of Central Intelligence, briefed the Senate Foreign Relations Committee on Iraq's weapons capability. It was an important presentation for the Bush Administration. Just the day before, former Vice President Al Gore had sharply criticized the Administration's advocacy of preemptive war, calling it a doctrine that would replace "a world in which states consider themselves subjects of law" with "the notion that there is no law but the discretion of the President of the United States." According to two of those present at the briefing, which was highly classified and took place in the committee's secure hearing room, Tenet declared, as he had done before, that a shipment of high-strength aluminum tubes that was intercepted on its way to Iraq had been meant for the construction of centrifuges that could be used to produce enriched uranium. The suitability of the tubes for that purpose had been disputed, but this time the argument that Iraq had a nuclear program under way was buttressed by a new and striking assertion: the CIA had recently received intelligence showing that, between 1999 and 2001, Iraq had attempted to buy five hundred tons of uranium oxide from Niger, one of the world's largest producers. On the same day, in London, Tony Blair's government made public a dossier containing some of the information that the Senate committee was being given in secret — that Iraq had sought to buy "significant quantities of uranium" from an unnamed African country. Then the story fell apart. On March 7, less than two weeks before the war against Iraq began, Mohamed ElBaradei, the director general of the International Atomic Energy Agency, in Vienna, told the U.N. Security Council that the documents involving the Niger-Iraq uranium sale were fakes.[325]

The Bush administration's massive disinformation campaign, abetted by a lazy and timid press, succeeded spectacularly in driving the public to support its long-planned war. In October 2002, the Pew Research Center for People and the Press took a survey and found that 66 percent of Americans said they believed Saddam Hussein was involved in the 9/11 attacks, despite the lack of proof. With regard to weapons of mass destruction, 79 percent believed that Iraq currently possessed — or was close to possessing — nuclear weapons. Three months later, a Knight-Ridder poll found that "half of those surveyed said one or more of the September 11 terrorists were Iraqi citizens. In fact, none was."[326]

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324. Ibid., p. 24-25.
325. Law: Hersh (2004), p. 203-205.
326. Law: Bamford (2004), p. 377.

Like all good television, the war in Iraq had been a dramatic soap-opera — a "tax-subsidized commercial" for the upcoming re-election campaign of the president.[327]

> Even columnist Thomas L. Friedman of *The New York Times* wrote that he was struck by the .... observation [that] "America as an idea, as a source of optimism and as a beacon of liberty is critical to the world — but ... Americans seem to have forgotten that since September 11. You have stopped talking about who you are, and are only talking about who you're going to invade, oust or sanction."[328]

Human rights activists over the world express their concern over these developments. A prominent human rights activist from Sri Lanka, Mrs. Coomaraswamy, said,

> None of us in the human rights community would think of appealing to US support for upholding a human rights case — maybe to Canada, to Norway or to Sweden — but not to the US. Before there were always three faces of America out in the world — the face of the Peace Corps, the America that helps others; the face of multinationals; and the face of US military power. My sense is that the balance has gone wrong lately and that the only face of America we see now is one of military power, and it really frightens the world.... I understand that there is always a tension between security concerns and holding governments accountable for human rights. But if you focus on security alone and allow basic human rights violations in the name of security, then, well, as someone who grew up in America and went to law school there, I find that heartbreaking.[329]

Lessons of History: State Political Directorate

Finally, there is credible evidence that the FBI should be properly defined not as a law enforcement agency but as some kind "State Political Directorate."

Since the 1940s, FBI officials had compiled "summary" memoranda on prominent politicians including members of Congress, governors, and presidential and vice presidential candidates and their key advisors.[330] By the 1950s, this informal practice evolved to the point where "summary memoranda" were prepared on Congressional candidates.[331]

> The "summary" memorandum procedure was an ingenious system that allowed senior FBI officials to deny that "files" or "dossiers" were maintained on members of Congress. No such files or dossiers could be uncovered through a search of the FBI's central record system — nor could it be discovered that a system had been established whereby officials at FBI headquarters.[332]

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327. See: Law: Rampton (2003), p. 189-190.
328. Law: *The New York Times* (August 4, 2002)(2).
329. Ibid.
330. Law: Theoharis (2002), p. 241.
331. Ibid., p. 242.
332. Ibid., p. 243.

In 1972, FBI officials were ordered to cease creating "summary" memorandums.[333] However, in the context of all other actions of the FBI taken before or after 1972, this practice is evidence that this agency has always operated in the spirit of a "State Political Directorate."

Parallels between the KGB and FBI

The above paragraphs remind me of a story from my other life. We had an acquaintance from Baku who worked for KGB and was responsible for electronic surveillance there. She was primarily listening to foreigners. But she also had compromising material on the first secretary of the Communist Party of Azerbaijan, Geydar Aliyev. Aliyev knew where the incriminating material against him was, but he could not do much about it. Despite the fact that our acquaintance was of a much lower rank, Aliyev always went to greet her whenever he noticed her in public.

Additional Political Targets

In addition to political spying per se, the intelligence services also engage in other political activity.

Manipulation of the media has always been one of the intelligence network's favorite surreptitious activities. At times the intelligence agencies attempt to suppress material that they don't want made public. At other times they release information that they do want printed, a practice known as selective leak.[334]

Censorship of Information Related to National Security

> In 1971, in the Pentagon Papers Case, the Supreme Court indicated that two requirements must be fulfilled before a court could order a publication stopped or censored on grounds of national security. First, Congress should have authorized the courts to do so. Second, there must be a direct, immediate, irreparable threat to the nation — or else the First Amendment protects the right to publish without censorship.[335]

There are some laws which restrict freedom of speech with regard to national security.

- In 1950, Congress passed a law prohibiting the publication of communications intelligence.[336]

333. Ibid.
334. Law: Macy (1980), p. 110.
335. Law: Snepp (1999), p. xi.
336. Law: Casey (1989), p. 94.

- In 1980, Congress passed the Classified Information Procedures Act, protecting against classified information disclosures by defendants in criminal trials.[337]
- In 1982, Congress passed the Intelligence Identities Protection Act, protecting intelligence officers and sources abroad.[338]

The CIA has a formal censorship board for all former CIA employees. It is called the Publications Review Board. In the late 1990s (pre-9/11), the board forbade publication of approximately one-third of the manuscripts submitted. The legal basis of the censorship lies in secrecy contracts signed by CIA employees. Failure to submit a manuscript prior to publication is punishable by jail term (according to unconfirmed information, without jury trial, or for that matter without any trial at all; the latter seems doubtful, but would be difficult to substantiate either way). Some prohibitions deal with legitimate national security concerns. But in a certain sense, the CIA censorship amounts to stifling a democratic debate about national security policies.[339]

James Madison, the principal author of the First Amendment, saw the danger. He warned against the power to punish free speech — a power, he said, that "more than any other ought to produce universal alarm, because it is leveled against the right freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right."[340]

Do We Need Less Control Over Intelligence in the Wake of 9/11?

There are persistent calls to reduce restrictions on both domestic and international intelligence in the US after September 11.[341] This reflects a dangerous misconception about the nature of intelligence — and suggests an intelligence failure of a different sort. As Adlai E. Stevenson 3rd, a former US senator from Illinois, wrote:

> Studies have recommended reforms of the intelligence community. But reform does not change the limited nature and function of intelligence. There is no substitute for the pragmatic intelligence of policy makers acquired from history and experience in the real world — and the courage to act on it. Before September 11, conservatives like Condoleezza Rice, the national security adviser, and Vice President Dick Cheney inhabited a world of contending great powers in which force and technology were transcendent. Nineteen men armed with box cutters — and now Iraqis

337. Ibid., p. 85.
338. Ibid.
339. Law: Sources on the Web, including among others: Stockwell; Hedley (1998); *USA Today* (January 11, 2005).
340. Law: Snepp (1999), p. xii.
341. See, for example: Law: Berkowitz (2003), p. 200-206.

> resisting occupation — have exploded their fantasy. The failures of the Bush administration are not those of foreign intelligence but of a cerebral sort of intelligence.[342]

In view of the history of US abuses of intelligence practices for political purposes, if any reform is needed, it is in reinforcing constitutional controls over intelligence.

2.5 The Art of Surveillance in the United States

Definition of Surveillance

> *Surveillance* is defined as 'the secretive and continuous observation of persons, places, and things to obtain information concerning the activities and identity of individuals.[343]

Literature about surveillance, some of it intended for private investigators, is plentiful.[344] The following methods, devices, and sites for planting surveillance instruments are used frequently in today's surveillance.

Tailing

Until the 1960s, tailing was the most common form of surveillance. For overt surveillance at least six people, divided into pairs working eight hour shifts each, were required to follow a person. This method was low-tech but very expensive.[345] For twenty-four hour covert surveillance, at least twenty-four people and twelve cars were required.[346]

Tailing techniques include "dolphin surveillance," in which the target sees the agents intermittently, and "waterfall surveillance," in which the team walks directly at the target rather than following.[347]

"Physical surveillance is still the most integral aspect of any surveillance operation." So says the book called *Secrets of Surveillance: A Professional's Guide to Tailing Subjects by Vehicle, Foot, Airplane, and Public Transportation.*[348]

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342. Law: *International Herald Tribune* (April 24-25, 2004).
343. Law: Swanson (2000), p. 167.
344. See, for example: Law: French (1985); Lapin (1989); Harrison (1991); Blythe (1993); Pankau (1993); Travers (1995); Willard (1997); McKeown (2000); McMahon (2001); Woodhull (2001); Melton (2002); Scott (2002); Brown (2003); Melton (2003); Barth (2004).
345. Law: McGwire (2001), p. 5.
346. Law: Godson (2001), p. 217.
347. Law: Baer (2002), p. 42.
348. Law: ACM IV Security Services (1993), p. viii.

Opening of Postal Mail

> There are two types of mail coverage... Routine coverage involves recording information from the face of envelopes. It is available, legally, to any duly authorized Federal or state investigative agency submitting a written request to the Post Office Department and has been used frequently by the military intelligence services. Covert mail coverage, also known as "sophisticated mail coverage," or "flaps and seals," entails surreptitious screening and may include opening and examination of domestic or foreign mail.[349]

Some of the most common techniques for opening mail are "steam opening," "dry opening," and "wet opening" (in which water is used).[350]

Surveillance — or opening — of mail is one of the oldest forms of surveillance, although modern technology has introduced some new methods. One is a so-called X-ray spray which allows the agent to see the contents of an envelope without ever opening it. After about a minute, the envelope becomes opaque again.[351]

Surreptitious Entry

If you are going to take the risk of an SE, you will want to minimize your exposure time as well as locating everything of interest.[352]

Assuming you are going on an information fishing trip, and not a-get-rich-quick venture, you will want to leave your little intrusion unnoticed.[353]

Listening through Walls

> In many surveillance situations it is possible to gain access to at least one connecting wall, or window, which is shared by the target room. Renting the room next door or the room directly below or above the target room can sometimes accomplish this. Floors/ceilings are not always as vulnerable to sonic penetration as walls but will often serve in a pinch.[354]

The adjacent walls will vibrate in response to noise produced in the neighboring room.[355] A contact microphone placed directly on the wall's surface will pick up these vibrations, and the resulting signal can be processed through an amplifier to be heard by human ear or recorded.[356]

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349. Law: Macy (1980), p. 58.
350. Law: Melton (1996), p. 108; compare: Law: Seaman (2001).
351. Law: Grau (1993), p. 47-11.
352. Law: Lapin (1987), p. 147.
353. Ibid.
354. Ibid., p. 32.
355. Ibid., p. 33.
356. Ibid.

Some contact microphones, known as spike microphones, also have a metal rod which extends from the microphone outward. These are inserted into a hole drilled on the user's side until they are in contact with the target's, or "hot" side.[357]

Sensitive non-contact microphones may also be used, especially when coupled with a physical method of increasing sound, such as placing a hollow bell against the wall.[358]

Tube microphones are comprised of a foot-long plastic tube attached to a microphone physically isolated from surrounding noise by a protective casing and absorbent foam. Like spike microphones, they can be placed in a drilled hole, but since most apartment type buildings have adjoining outlets, it is often installed through a hole behind an electrical outlet, allowing the microphone to be placed directly behind the target's wall. Tube microphones may also have smaller, more flexible tubes which can be inserted under doors or through key-holes.[359]

Seeing through Walls

Using fiber optics requires a hole in the wall only about one millimeter in diameter to provide a wide angle view of the opposite side of the room. Flexible fiber optics can also be placed in a number of locations including keyholes and shared electrical outlets.[360]

Listening to Conversations Far Away

Condenser microphones can pick up normal conversation from up to 20 feet.[361] Parabolic microphones, however, can pick up a conversation from over 1000 feet.[362]

"Technical surveillance operations may also employ lasers. A laser beam can be directed at a closed window from outside and used to detect the vibrations of the sound waves resulting from a conversation inside the room. The vibrations can be transformed back into the words spoken."[363]

A laser that is aimed at a window can pick up a conversation up to one mile away.[364]

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357. Ibid.
358. Ibid., p. 34.
359. Ibid.
360. Law: Lapin (1991), p. 34.
361. Ibid., p. 44.
362. Ibid., p. 45.
363. Law: Richelson (1989), p. 266.
364. Law: Lapin (1987), p. 84.

Wiretapping and Eavesdropping (Bugging)

> A wiretap is a device that intercepts a transmission carried over a wire or related form of telecommunication. A bug, on the other hand, is any technology that transmits sound from one area to a listening post. A bug doesn't depend on telecommunications; it can be planted anywhere — in a home or office, on a park bench, on a person's clothing, in the saltcellar at the local diner. Or an olive.[365]

The technology of wiretapping and bugging is well known;[366] there are even books describing how wiretapping devices can be made by an amateur.[367] There are very few restrictions on the sale of electronic "bugging" equipment.[368]

"In the Hollywood film *The Conversation*, the man engaged in wiretapping had to be present in the vicinity of his devices. Today, he may be miles away or not be present at all. Given today's technology, wiretapping may occur by remote control at whatever distances can be supported by telephone communications."[369] Typically, police wiretaps are placed on phone lines outside the home.[370]

> Wiretaps are difficult to detect. Most make no noise, and they consume very little detectable energy. Especially vulnerable are *space radio communications*. These include cellular phones, marine and mobile radio telephones, microwave radio relays, satellite radio, and high-frequency radio used in remote locations of the world. Although interception of microwave and satellite signals typically requires special equipment, cellular phone and radio telephone communications can be monitored with devices purchased at a local retail electronic store.[371]

> With advances in microchip technology, transmitters can be so small as to be enmeshed in wallpaper, inserted under a stamp, or placed on the head of a nail.[372]

A special chip can be inserted into a watch to tap conversations anywhere a person might be.

Before 1988, every wiretap had to be approved by a judge. Then, Congress passed a law allowing roving wiretaps, which further allowed police to tap any line they believe to be used or close to a suspect. "This means that if the police see someone they think might be a criminal entering someone's house or place of business, they can tap the phone there phone without a warrant."[373]

> These are some basic definitions:

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365. Law: Fallis (1998), p. 160.
366. See: Law: Bruno (1992); Brookes (1996); Larsen (1996), (1997).
367. Law: Chiaroscuro (1997); Bugman (1999); Charrett (1999).
368. Law: Gavin (2001), p. 50.
369. Law: Grau (1993), p. 47-6.
370. Law: Etzioni (1999), p. 94.
371. Law: Ortmeier (2005), p. 184.
372. Law: Tyska (1999), p. 52.
373. Law: McGwire (2001), p. 39.

- Acoustic patch — Installation of a microphone near a loudspeaker or telephone.
- Bug — Concealed listening device, typically a small radio transmitter or hidden microphone.
- Bypass — Alteration of a telephone so that it transmits sound even when the receiver is in the cradle.
- Cheese box — Device used for mutual break in of two telephone lines that end in the same place.
- Directional microphone — A microphone that is sensitive to sound frequencies coming from a certain direction and cuts off frequencies from other directions.
- Drop-in — A series of eavesdropping devices affixed to the back of the telephone receiver.
- Hookswitch — Contacts within the telephone that take the telephone off circuit when the telephone is on the hook. (When the phone is not in use this can be used to eavesdrop on sounds in the room.)
- Infinity transmitter (harmonic bug) — Transmitter intended to be installed inside a telephone. It transmits the sound received from the telephone and is activated by the ring or telephone conversation.
- Minitap — Isolated recording on a miniature tape recorder.
- Parallel radio tap — Transmission for recording at radio frequency.
- Parasitic device — Series of listening devices that use the telephone line as an antenna for radio transmission of a conversation.
- Pen register — Electronic device that can simultaneously register a telephone number and the number of the phone that calls it.
- Series radio tap — A radio transmitter that obtains energy for transmission from the telephone line.
- Third wire bypass — Telephone transmission in which one of the cables is used for obtaining access to a carbon or dynamic microphone.
- Trap and trace device — A device that stores the originating number of an electronic transmission.[374]
- SAS — Surveillance Administration System. In the olden days, in order to tap a particular line, federal agents had to get the security people at the switch to make the physical connection from the target line to the extender. With SAS, this is no longer necessary. They access the switch by computer and type in the number to be tapped, and the SAS makes the connection electronically. This system has been set up, apparently, as part of the CALEA: Communications Assistance to Law Enforcement Act.[375]

Generally CALEA has had problems with watchdog groups. As the Electronic Privacy Information Center said, "the FBI has been trying to push telephone companies into making design changes not required by the act. For instance the bureau said that it is entitled to listen in on a conference call even

374. Law: Grau (1993), p. 47-6 through 47-8.
375. Law: Shannon (2000), p. 80.

after the target of its warrant has hung up, is entitled to know the location of a targeted cell-telephone caller, is entitled to know whether a target has voice mail, and is entitled to record the voice mail."[376]

Room Surveillance through a Telephone

In the early 1960s, a small device called the infinity transmitter was invented. These were placed inside a telephone and activated when the operator dialed the phone and blew a small harmonica into the mouthpiece of his telephone to connect a direct dial phone. The infinity transmitter prevented the phone from ringing and instead transmitted all of the room audio to an eavesdropper.[377] When AT&T transferred over to electronic switching, eliminating the need for an audio path activation tone, the infinity transmitter was rendered obsolete.[378]

Other devices created to take the place of the infinity transmitter included the *surveillance telephone*, which contained a built-in infinity. The eavesdropper could call, punch in the appropriate code on the telephone, and listen to all the conversations in the target location.[379]

For cellular phones, the Covert Cellular Voice Transmission System allows covert monitoring of a target's conversation anywhere within range of a cellular telephone service. The audio is transmitted through the cellular phone network to another cellular or land line monitoring location. It can also be programmed with any cellular phone number of the eavesdropper's choice.[380]

Cellular Interception

An eavesdropping device called "cellphone" can read out any cellular telephone number, number called, and *Electronic Serial Number* of a target phone. It can produce audio and auto-store the last 99 calls the target has made, along with time and date. This powerful device is hand-held and has a range of over two miles.[381]

FAX Interception

For FAX monitoring, a device called boomerang is plugged into the line ahead of the FAX machine itself, where it waits for incoming messages. When a message arrives, the boomerang device digitally records the information on its

376. Law: Smith (2000), p. 191.
377. Law: Lapin (1995), p. 287.
378. Ibid.
379. Ibid.
380. Law: Lapin (2003-2004), p. 188.
381. Law: Lapin (1995), p. 320.

RAM before passing it on to the FAX machine. The agent can call in from a remote FAX and obtain the stored messages, or the boomerang can be programmed to direct dial another FAX machine and pass on the data itself at a given time.[382]

Pager Interception

> Paging intercept systems have been available for several years. One such unit is a universal decoder; hook it up to a receiver and it will automatically decode DTMF (touch tones), FAX (graphics only), ASCII, Baudot (aircraft addressing and reporting systems), CTCSS tones (used to "hide" private conversations) and both POCSAG and GOLAY.[383]

Tracking

The location of a subject can be obtained by the 360-degree tracking system which is used with portable electronics such as cellular phones, modems, computing center base stations, and software. One such tracking device, available since 1987, can be paged at a regular interval ranging from 30 seconds to an hour. In response to each page, the device transmits the coded location of the automobile. This information can then be transferred to a mapping center and the time and coordinates of a subject can be plotted on a computer.[384]

Wireless systems capable of tracking vehicles and people all over the planet are leaving businesses aglow with new possibilities, and some privacy advocates are deeply concerned. Companies seeking to tap the commercial potential of these technologies are installing wireless location systems in vehicles, hand-held computers, cell phones — even watchbands. Scientists have developed a chip that can be inserted beneath the skin so that a person's location can be pinpointed anywhere.[385]

Another service uses satellites to track cellular phones. Using the area query feature, the target phone responds several times and provides its exact location. As low as 3mW can be sufficient for a satellite to track the phone using directional antennas. Notably, the telephone does not have to be in use to respond to the query from a local cellular company.[386]

Optics

> Manuals for private investigators and those who wish to emulate them recommend that "Some sort of optical enhancement device should be part of any surveillance

382. Ibid., p. 312.
383. Ibid., p. 313.
384. Law: Grau (1993), p. 47-8.
385. Law: International Herald Tribune (March 5, 2001).
386. Law: Lapin (1995), p. 423.

> kit, no matter how small. The most common, and probably the most useful is the binocular or field glass."[387]

Night Vision Options

> In the active viewing device the invisible infrared light is aimed at the area one wishes to observe and the result is viewed through a viewer.[388]

> One disadvantage....is that anyone with a simple IR filter can also see your light source.... With the advent of Star-Tron type viewers many people consider the IR units to be totally obsolete....Passive viewers, often called Star-Tron (a brand name, like Xerox) or Starlight viewers have the unique ability to turn night into day.... I have seen photographs taken from 3 miles away with a telescope and a Starlight device. You could read license numbers and identify people.[389]

> A fairly recent toy on the surveillance market is the thermal viewer. This is a passive device that picks up, amplifies and displays heat.... These viewers will show people, objects handled by people (until they cool off), decaying vegetation, warm engines (it's possible to tell which car was recently driven in a series of cars) and so on.[390]

Video-Recorded Surveillance

Modern video recording no longer requires developing film, and thus a video image can be transmitted remotely to a surveillance van or information collection center. A surveillance camera and radio transmitter together, capable of transmitting both images and sound, may be as small as the size of a cigarette box.[391]

There are at least two types of video-recorded surveillance: external observation and closed-circuit TV for observation inside a house.

Naked Machine

> After the terrorist attacks of September 11, 2001, officials at Orlando International Airport began testing a remarkable new security device. Let's call it the Naked Machine, for that's more or less what it is. A kind of electronic strip search, the Naked Machine bounces microwaves and millimeter waves off the human body. In addition to exposing any guns or other weapons that are concealed by clothing, the Naked Machine produces a three-dimensional naked image of everyone it scrutinizes.[392]

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387. Law: Lapin (1987), p. 131.
388. Ibid., p. 135.
389. Ibid., p. 136.
390. Ibid., p. 137.
391. Law: Grau (1993), p. 47-9 through 47-10.
392. Philosophy: Rosen (2004), p. 3.

Closed Circuit TV

Closed circuit TV (CCTV) should be mentioned specially. Most people know how it is used for surveillance in public places;[393] but federal agents may have been using it to keep an eye on targets inside a house already in the 1950s. In recent years this system has been widely used. "The cameras used today are based on microelectronic technology and can be camouflaged in store mannequins, books, fire sprinklers on the ceiling, etc."[394]

Covert Pinhole Lens

> This special security lens class is used when the lens and CCTV camera must be hidden.[395]
>
> A very effective covert system uses a camera and lens camouflaged in a ceiling-mounted sprinkler head. Of the large variety of covert lenses available for the security television industry (pinhole, mini, fiber-optic), this unique, extremely useful product hides the pinhole lens in a ceiling sprinkler fixture, making it very difficult for an observer standing at floor level to detect or identify the lens and camera....The covert surveillance sprinkler installed in the ceiling in no way affects the operation of the active fire-suppression sprinkler system....[The] pinhole lens...transmits and focuses the scene onto the camera sensor. In the straight version, the image comes out reversed. In surveillance applications, this is often only an annoyance and not really a problem; an electronic scan-reversal unit will correct this condition.[396]

Such clandestine surveillance can also be augmented by covert infrared lighting that allows the covert CCTV system to operate in near or total darkness, and the person under surveillance will not be aware he or she is under observation.[397]

> CCTV cameras and lenses are concealed in many different objects and locations, including overhead track lighting fixtures, emergency lighting fixtures, exit signs, tabletop radios, table lamps, wall or desk clocks.[398]
>
> Amber or mirrored surfaces hide where the camera is aimed.[399]
>
> A pinhole lens can be concealed inside an automobile mirror.[400]
>
> A hidden camera can also be installed inside a standard motion detector or smoke detector.[401]

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393. See, for example: Law: Regazzoni (1999).
394. Law: Grau (1993), p. 47-10 through 47-11.
395. Law: Kruegle (1995), p. 21.
396. Ibid., p. 320.
397. Ibid., p. 328.
398. Ibid., p. 331.
399. Law: Marx (1988), p. 211.
400. Law: Marchett (2003), p. 62.
401. Ibid., p. 161-162.

> Also, "'bare bones" cameras are available which can be mounted into almost anything.[402]

A video image can be transmitted in monochrome, color, or even with sound. It can be transmitted by a regular wire, a fiber-optic wire, or by a high-frequency radio transmitter which could be as small as a pencil.[403]

For covert CCTV surveillance in totally dark environments, infrared illumination and infrared-sensitive cameras may be used. Other methods include laser spot illumination cameras and Thermal-imaging cameras.[404]

Third-generation cameras with image intensification have now entered the nonmilitary market, which extends the range of regular cameras to total darkness.[405]

Modern CCTV technology also includes digital zoom, video motion detection, image recognition, and apparatuses which can see in light and dark simultaneously.[406]

> A couple of tricks to help this procedure come off without a hitch:
>
> If possible always mount the lens above eye level. Most people do not look up.
>
> If possible mount the lens near a light that will cause the viewer's eyes to "shut down" before they see the lens.
>
> If the lens is brought through a dropped tile ceiling or white wall use liquid paper to "white out" the tip of the lens tube.
>
> A little bit of talcum powder and charcoal in an air sprayer creates instant dust. You mix it right in and use a special wire and it's not likely to be noticed.[407]

Any PC with a digital camera can also function as a video surveillance monitor, allowing it to potentially act as an entire security system.[408] Since PCs use digital video, their signals are also more immune to noise, unlike an analog video.[409] Furthermore, if a CCTV system is connected to the Internet, the signal is no longer limited by distance.[410]

Surveillance of Personal Computers

There are several technologies which may use special hardware or special software to monitor personal computers. Software looks like the wave of the

402. Law: Cieszynski (2001), p. 122; see also: Law: Cieszynski (2004).
403. Law: Kruegle (1995), p. 331.
404. Law: Cumming (1992), p. 191.
405. Ibid., p. 190.
406. Law: Phillips (2002), p. 112-114.
407. Law: Lapin (1995), p. 344.
408. Law: Lapin (2003-2004), p. 417.
409. Law: Damjanovski (2005), p. 252.
410. Ibid., p. 270.

future because it can be installed and operated more surreptitiously. For example,

> Spector is the first automatic screen recording software designed for consumers and corporations. Spector records PC and Internet activity, much like a camcorder, and lets you play information. Spector records all applications loaded, all web sites visited, all chat conversations, all keystrokes typed, and all incoming and outgoing e-mail activity. You see what THEY see. Spector automatically takes snapshots of your display screen, as often as once per second, or as infrequently as once every few minutes. You decide how often Spector records.[411]

In the first court case on the new surveillance method, federal judge Nicholas Politan ruled on December 26, 2001 that the FBI could use the keystroke-recording software without a wiretap order — and that the details of the new system could be kept secret because its disclosure "would cause identifiable damage to the national security of the United States."[412]

As CNN noted, there were also efforts under way to radically undermine any attempts to encrypt data on personal computers. "FBI officials are reportedly developing a computer worm/Trojan horse called 'Magic Lantern' that's designed to capture keystrokes on a target computer and encryption keys used to conceal data."[413] Such a virus would enable installation of surveillance software that would be automatic and invisible for a subject of surveillance.

James Dempsey of the Center for Democracy and Technology observed: "In order for the government to seize your diary or read your letters, they have to knock on your door with a search warrant. But [Magic Lantern] would allow them to seize these without notice."[414]

> After word leaked out about Magic lantern, the Associated Press reported that anti-virus software companies contacted the FBI to ensure their software wouldn't inadvertently detect the bureau's snooping software and alert the suspect.[415]

There is also a commercially available version of this software made by the Omniquad Company.

Covert Action Quarterly reported on a technology which is undetectable and does not depend on the use of the Internet, called Van Eck Monitoring. Every computer emits low levels of electromagnetic radiation from the monitor, processor, and attached devices. Although experts disagree whether the actual range is only a few yards or up to a mile, these signals can be remotely recreated on another computer. Aided by a transmitting device to enhance the signals, the FBI reportedly used Van Eck Monitoring to extract information from spy Aldrich Ames' computer and relay it for analysis.[416]

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411. Law: Lapin (2002), p. 247.
412. Law: Bovard (2003), p. 138.
413. Law: *CNN* (December 11, 2001).
414. Law: Bovard (2003), p. 137.
415. Ibid.

The NSA has classified the US sources about Van Eck monitoring, including engineering textbooks. The detailed knowledge about this technique is buried deep within their secret Tempest program.[417]

Surveillance of Electronic Communications

The surveillance of electronic communications by the US government is well-known and is one of the reasons why the United States does not have a perfect score in the human rights index prepared by *The World Human Rights Guide*.[418]

In 1987, the Computer Security Act called for a national standard of computer encryption. One goal of such a standard is to continue to allow law enforcement agencies to eavesdrop and wiretap conversations regardless of any encryption employed by the targets.[419]

In the words of world-known cryptographer and political activist Phil Zimmermann:

> In the past, if the government wanted to violate the privacy of ordinary citizens, it had to expend a certain amount of effort to intercept and steam open and read paper mail, or listen to and possibly transcribe spoken telephone conversations. This is analogous to catching fish with a hook and a line, one fish at a time. Fortunately for freedom and democracy, this kind of labor-intensive monitoring is not practical on a large scale. Today, electronic mail is gradually replacing conventional paper mail, and is soon to be the norm for everyone, not the novelty it is today. Unlike paper mail, e-mail messages are just too easy to intercept and scan for interesting keywords. This can be done easily, routinely, automatically, and undetectably on a grand scale. This is analogous to driftnet fishing — making a quantitative and qualitative Orwellian difference to the health of democracy....
>
> A future government could inherit a technology infrastructure that's optimized for surveillance, where they can watch the movements of their political opposition, every financial transaction, every communication, every bit of e-mail, every phone call. Everything could be filtered and scanned and automatically recognized by voice recognition technology and transcribed." [420]
>
> In the USA-PATRIOT Act, Congress officially blessed the FBI's use of its Carnivore email wiretapping system. Carnivore is contained in a black box that the FBI compels Internet service providers (ISPs) to attach to their operating system. Though a Carnivore tap might be imposed to target a single person, Carnivore can automatically impound the email of all the customers using that ISP. Technology writer John Guerra noted, "The Carnivore package is designed to scan millions of e-mails per second. By adjusting filters and other parameters, it can be directed to scan only subject lines and headers of incoming or outgoing messages that are linked to a par-

416. Law: *Covert Action Quarterly*, No. 56, p. 10.
417. Law: Schwartau (1996), p. 222-231.
418. See: Law: Humana (1986), (1992).
419. Philosophy: Spinello (1997), p. 256.
420. Cited by: Law: Singh (2000), p. 179-180

> ticular suspect or group of suspects. ... By hitting a single button, the agent can put the software into full mode, and attempt to collect all [email traffic]."[421]

What It Is Not

There are many myths about the use of parapsychology for surveillance purposes.

> In August 1977, Adm. Stansfield Turner, Jimmy Carter's Director of Central Intelligence, was asked about CIA support of parapsychology research after the *Washington Post* ran an article about the government's support of psychic research. Turner noted that the CIA had a man gifted with "visio-perception" of places he had never seen but, he added with a smile, the man had died two years earlier, "and we haven't heard from him since." According to Gene Poteat, the CIA's support of psychic research was a "dumb exercise" that produced "lots of laughing," but it was born out of knowledge that the Soviets were conducting such experiments and an attitude of "let's not leave anything uncovered."[422]

Summary of Surveillance Methods

The complete set of surveillance methods includes: tailing, opening mail, surreptitiously entering homes, listening to conversations through walls and from long distance, wiretapping phone conversations and conversations in a room where the phone is installed, eavesdropping on what is being said in a public transport or personal car, roving wiretaps of conversations at home and at the workplace, tracking of the location and conversations of a person during all his movements, interception of electronic mail and faxes, monitoring of what is being written on a personal computer, secret search of luggage during air travel and in hotels, optical surveillance, night vision surveillance, external video-recorded surveillance, and CCTV surveillance of what a person does at work or in the privacy of his residence.

How All Encompassing Can Surveillance Be?

> There was of course no way of knowing whether you were being watched at any given moment.... You had to live — did live, from habit that became instinct — in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized (George Orwell in *1984*[423]).

Most individuals may be confident that there is no possibility that they could be followed on a 24-hour basis for a period ranging from months to years, having their most intimate secrets and conversations compromised without any

421. Law: Bovard (2003), p. 134.
422. Law: Richelson (2001), p. 187.
423. Law: Smith (2000), p. 182.

indication. There are a number of spies, terrorists, and general criminals in prison today who now know the truth.[424]

Countermeasures

There are books on technical countermeasures.[425] But the reader is left with a feeling that government spy agencies are few steps ahead. This impression is confirmed by some sources: "Although some manufacturers will cheerfully sell you 'home debugging' equipment, these products are basically worthless."[426]

PSYOPs

In real life surveillance often goes hand in hand with psychological pressure on the subjects of surveillance (called "psychological operations" or "PSYOPs"). There has been a long history of cooperation between US intelligence and the US military in perfecting this side of surveillance.[427]

2.6 The Foreign Intelligence Surveillance Court

The Legal History of Surveillance of Private Communications in the USA

> The Supreme Court has long recognized that the government has no right to read everyone's mail. In 1878, the Court declared: "The constitutional guarantee of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant... as is required when papers are subjected to search in one's household." Supreme Court Justice Oliver Wendell Holmes, in an opinion recognizing that private letters deserve sanctity from federal prying, declared in 1921: "The use of the mails is almost as much a part of free speech as the right to use our tongues." For most of the twentieth century, federal courts required federal agents to possess search warrants before they could legally open private mail."[428]

The Legal History of Electronic Surveillance in the USA

Under ordinary circumstances, a court order was required in order to use electronic surveillance. It must be emphasized that federal law distinguishes

424. Law: ACM IV Security Services (1993), p. x.
425. Law: ACM IV Security Services (1994); Shannon (1998); Marinelli Companies (1999); Hyatt (2001); Sontag (2001); Chesbro (2002); Mitnick (2002).
426. Law: Fallis (1998)(1), p. 199.
427. Military: Barnett (1989); Radvanyi (1990); Goldstein (1996); Hosmer (1996); Paddock (2002); Zacharias (2003); Armistead (2004); Mandel (2004).
428. Law: Bovard (2003), p. 133-134.

between live voice recording (wiretapping) in circumstances where the speaker has a reasonable expectation of privacy, for which under ordinary circumstances a court order is required and can be issued only if a number of special criteria are met — and the acquisition of non-private conversations and non-voice electronic communications, for which there are less stringent requirements. Thus the recording of a conversation taking place in a house in a family situation is wiretapping, while recording a conversation in public (for example, in a bus or subway) is not.[429] Initially, in the Electronic Communications Privacy Act of 1986, Congress allowed the monitoring of household cordless phones because they use the public airwaves and "you have no reasonable expectation of privacy."[430] Later, when cellular phones had become widespread, the Congress conceded that people have a reasonable expectation of privacy while using their cordless or cellular phones, and that, therefore, listening in amounted to wiretapping and would require court warrants.

In addition, in cases relating to the foreign policy and national security interests of the state an exception is made. The legal history of this point demands special commentary.

> When the telegraph joined the covered wagon and the stagecoach as channels of long-distance communication, wiretapping followed quickly. During the Civil War, General Jeb Stuart traveled with his own tapper. In California in 1864, a former stockbroker obtained market information by intercepting telegraph messages; he was prosecuted for violating a surprisingly early California statute against wiretapping.[431]
>
> The convenience of voice communication made it obvious that intercepted telephone calls would be a rich source of information. In 1899 the *San Francisco Call* accused a rival, the *San Francisco Examiner*, of wiretapping conversations between the *Call* and its reporters and stealing the *Call*'s exclusives. The 1905 California legislature responded by extending an 1862 law prohibiting telegraph wiretapping to telephones.[432]
>
> The first tapping of telephones by police occurred in the early 1890s in New York City. An 1892 state law had made telephone tapping a felony, but New York policemen believed that the law did not apply to them and applied wiretaps anyway. In 1916 the mayor of New York was found to have authorized wiretapping of some Catholic priests in connection with a charity-fraud investigation, despite the fact that none of the priests were suspected of participating in the illegal activity.[433]
>
> In America in 1918, wiretaps were used to counteract the presence of wartime spies, and in the 1920s they proved especially effective in convicting bootleggers. The view that wiretapping was a necessary tool of law enforcement became firmly established.[434]

429. Law: Grau (1993), p. 32-1 through 32-27.
430. Law: Larsen (1996), p. 84-85.
431. Philosophy: Diffie (1999), p. 154-155.
432. Ibid., p. 155.
433. Ibid.

Between 1928 and 1967 eavesdropping on telephone conversations and electronic surveillance by the federal government, as far as the main constitutional doctrine of the time was concerned, were not restricted. The relevant decision of the US Supreme Court which became the basis for allowing this was *Olmstead v. United States*, 1928.[435]

> *Olmstead v. United States*, 277 US 438 (1928), argued 20-21 February 1928, decided 4 June 1928 by vote of 5 to 4; Taft for the Court, Holmes, Brandeis, Butler, and Stone in dissent. Olmstead was convicted of unlawfully transporting and selling liquor under the National Prohibition Act. His petition from the court of appeals provided the Supreme Court with its first opportunity to consider whether the use of evidence obtained by an illegal wiretap in a federal court criminal trial violated the defendant's Fourth and Fifth Amendment rights. Chief Justice William H. Taft held that it did not, finding that conversations are not protected by the Fourth Amendment and that no invasion of the defendant's house was involved in the wiretapping. In dissent, Justice Louis D. Brandeis argued that the Fourth and Fifth Amendment confer a general right to individual privacy rather than mere protection of material things and that allowing the introduction of evidence illegally acquired by federal officers makes government a law-breaker.[436]

The reaction of the political branches of government to the Court's decision has been inconsistent. At times it depended upon which party had the presidency, with the Democrats taking a more restricted line and the Republicans more inclined to defend the right of the executive branch to be involved in wiretapping. The following comments illustrate various ways in which *Olmstead* and related rulings have been interpreted:

> Nothing created as much controversy — or gave the FBI as much power — as the use of wiretaps. With or without Hoover's approval, the bureau had engaged in sporadic wiretapping from its very beginnings. However, in 1924, Attorney General Stone banned the practice. Hoover himself declared the practice "unethical." By 1932, the bureau was again tapping phones. Hoover claimed that the practice was limited to kidnapping and white slavery investigations, along with cases where the "national security is involved."[437]
>
> In 1934, responding to significant criticism of the *Olmstead* decision, Congress enacted the Federal Communications Act.[438] The Federal Communications Act of 1934, under Section 605, banned the interception and divulgence of telephone calls. That meant that listening in on calls — except by telephone company personnel who did not divulge their contents — was prohibited.[439]
>
> At first, Hoover ignored the ban. Despite the clear language of the law, he argued that so long as the Bureau did not disclose the contents of a call outside the Justice

434. Law: Singh (2000), p. 183.
435. Law: Spaeth (1987).
436. Law: Hall (1999), p. 226.
437. Law: Kessler (2002), p. 65.
438. Law: Solove (2003), p. 322.
439. Law: Kessler (2002), p. 65.

Department, it was not disclosing its contents. When the Supreme Court knocked down this argument, Hoover claimed that the act meant that the Bureau could wiretap so long as the information was not used as evidence in court. In December 1939, the Supreme Court rejected that argument as well.[440]

Based on that decision, Attorney General Jackson on March 15, 1940 issued an order prohibiting the FBI from engaging in wiretapping. As he had in the past, Hoover pretended to go along, but privately fought to overturn Jackson's ban.[441] Rather than going over Jackson's head and appealing directly to Roosevelt, the director waged a campaign through the press and cabinet officers. He said that FBI agents had heard German agents plotting to blow up the *Queen Mary*, but because of Jackson's order, they had to stop listening. Hoover presented his case to Treasury Secretary Henry Morgenthau, who sided with him and conveyed his concerns to the White House. When Roosevelt learned of Morgenthau's position, he immediately met with Jackson and followed up with a confidential memo saying that, while he agreed with the Supreme Court decision, he was sure the Court never intended to apply its ruling to "grave matters involving the defense of the nation." Roosevelt ordered Jackson to obtain information through "listening devices" about people "suspected of subversive activities against the government of the United States, including suspected spies."[442]

Appalled that he was being forced to participate in a circumvention of a Supreme Court ruling, Jackson told Hoover he did not want to authorize specific wiretaps and did not even want to know who was being tapped. However, Jackson loyally told the House Judiciary Committee that he interpreted the court's ruling to mean that the FBI could continue to wiretap as long as it did not divulge in court the information obtained. That reasoning — clearly at odds with the plain language of the 1934 FCC statute — would be used to justify FBI wiretapping into the late 1960s.[443]

Jackson, who became a Supreme Court justice, would later write of his misgivings about a "central police" that has "enough on people" so that no one would oppose it. Significantly, he wrote, "Even those who are supposed to supervise it are likely to fear it."[444]

"Unlike Truman, who was skeptical of anything Hoover offered," Sullivan recalled, "Eisenhower blindly believed everything the director told him, never questioned a word... He may have been a great general but he was a very gullible man, and Hoover soon had him wrapped right around his finger."[445]

Eisenhower's attorney general, Herbert Brownell Jr., gave Hoover the authorization to conduct the microphone surveillance and bugging he had long been engaging in anyway. Even though such bugging usually involved criminal trespass and was therefore illegal, Brownell said it could be used in cases of espionage or when the

440. Ibid.
441. Ibid.
442. Ibid., p. 65-66.
443. Ibid., p. 66.
444. Ibid.
445. Ibid., p. 104.

FBI was performing an "intelligence function in connection with internal security matters."[446]

As the Court later put the matter in *Silverman v. United States* (1961), for there to be a Fourth Amendment search the police must have physically intruded into "a constitutionally protected area."[447]

While roundly criticized, *Olmstead* was not overruled until 1967 by *Berger v. New York* and *Katz v. United States*. In *Berger*, the Court held that a New York eavesdropping statute violates Berger's Fourth and Fourteenth Amendment rights because it allowed "a trespassory intrusion into a constitutionally protected area." Pursuant to the New York statute, an eavesdrop court order was obtained that allowed the installation of a recording device in an attorney's office for sixty days. Based on evidence from the first device, a second eavesdrop order allowed the installation of a recording device in another man's office. The *Berger* Court explained that the overboard New York statute violated the Fourth Amendment because it failed to require evidence that a particular crime has been or was being committed, it failed to require a description with particularity of the conversations to be intercepted, it allowed extension of the original two-month eavesdropping period with no proof of its necessity, it failed to require evidence of exigent circumstances, and it failed to require a return on the warrant.[448]

In 1967, the US Supreme Court in the case of *Katz v. the United States* reversed this practice, in existence since 1928, and demanded compliance with the Fourth Amendment to the Constitution guaranteeing citizens procedural rights with regard to electronic surveillance. However, the Supreme Court left a loophole for electronic surveillance without the preliminary issue of a court order for individuals associated with foreign governments or suspected of subversive activity within the country.[449]

Katz v. United States, 389 US 347 (1967), argued 17 October 1967, decided 18 December 1967 by vote of 7 to 1; Stewart for the Court, Harlan and White concurring, Black in dissent, Marshall not participating. At his trial for transmitting wagering information by phone, the government introduced over Katz's objection evidence of his end of telephone conversations, overheard by federal agents who had attached an electronic listening/recording device to the exterior of a public phone booth habitually used by Katz. The lower court concluded there was no search because the wall of the booth had not been physically penetrated. The Supreme Court reversed, holding that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within meaning of the Fourth Amendment." This proposition was elaborated in Justice John M. Harlan's concurring opinion, later relied upon by lower courts and the Supreme Court itself in determining the meaning of *Katz*. Harlan stated that "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'."[450]

446. Ibid.
447. Law: Hall (1999), p. 147.
448. Law: Hall (2002), p. 840.
449. Law: Spaeth (1987).

Ironically, in June 1968 Congress enacted the Omnibus Crime Control and Safe Streets Act, which finally authorized the FBI and other law enforcement agencies to conduct wiretapping and bugging with a court order during criminal investigations.[451] One could say that the political branches of the government have become more realistic and candid about the use of electronic surveillance by the law enforcement and intelligence agencies. But the inverse is more accurate: they were forced to come to terms with the requirements of due process formulated by the developing constitutional doctrine. Some sources also raise another interesting question: does this development mean that, in addition to wiretaps which are authorized by courts and can be presented as evidence in courts, the executive branch still can engage in unauthorized wiretaps as long as it does not divulge their contents in court proceedings? We will present some opinions about that later on.

In 1972, in *United States v. United States District Court*, the Supreme Court established that the government did not have the right to perform electronic surveillance without a court order regarding individuals suspected of subversive activity within the country.[452]

> *United States v. United States District Court*, 407 US 297 (1972), argued 24 February 1972, decided 19 June 1972 by vote of 8 to 0; Powell for the Court, Burger, Douglas, and White concurring, Rehnquist not participating. In the early 1970s various groups were accused of bombing buildings and plotting against the government. In the name of national security, the administration of President Richard Nixon claimed authority to use electronic surveillance to monitor US citizens allegedly involved in subversive activities without first obtaining a warrant from a magistrate on a showing of probable cause. The government argued that the vesting of executive power in the president in Article II of the Constitution implied authority to use electronic surveillance to secure information necessary to protect the government from destruction. A judicial warrant requirement would interfere with the executive's responsibility by increasing the risk that sensitive information would be disclosed. Moreover, judges would not be able to evaluate domestic intelligence involving issues beyond judicial expertise. A unanimous Court rejected the administration's claim. The Court emphasized that the case involved First Amendment as well as Fourth Amendment values because political organizations antagonistic to prevailing policies are the organizations most likely to be suspected by government of raising domestic national security dangers. In light of these First Amendment values and the vagueness of the concept of national security, the Court concluded that to permit official surveillance of domestic groups on the basis of a presidential decision without prior judicial warrant would create undue dangers of abuse.[453]

As it stands now, for purposes other than foreign policy and national security, "the electronic wiretapping or eavesdropping court order authorized by

450. Law: Hall (1999), p. 147-148.
451. Law: Kessler (2002), p. 169-170.
452. Law: Spaeth (1987).
453. Law: Hall (1999), p. 313.

the federal statutes is a special type of warrant that must comply with the Fourth Amendment. The application necessary for the court order is quite detailed. The order is limited to obtaining evidence of a specified list of crimes. A high-ranking official in the Justice Department or in a state's prosecutor's office must authorize the application for the court order. The application must contain the targeted offense, the place where the communication is to be intercepted, a description of it, and the identity of the person whose communication is to be intercepted. The court order authorizes interception for no longer than thirty days, although extensions may be granted. At the end of the interception, the recording must be made available to the judge who issued the court order, and the recording must be sealed."[454]

The Supreme Court has held that the government can secretly enter a residence or private property to install electronic devices such as bugs. Moreover, the Court concluded that the Fourth Amendment does not require that an electronic surveillance order include a specific authorization to enter covertly the premises described in the order. In other words, the police need not request permission to make covert entry when applying for an electronic surveillance order; and the order authorizing the use of electronic surveillance need not make any reference to a covert entry.[455]

New technologies pose related issues. For example, the police may, without a warrant, install a beeper on a car to follow it along the public roads, but they need warrant to install a beeper in a private residence that would enable them to verify whether a particular object is continuously present.[456]

Electronic surveillance in cases involving foreign policy and national security interests has been allowed to remain ungoverned by clear constitutional principles.[457]

The Supreme Court prophetically noted in its 1972 decision that there would doubtless be cases where it would be difficult to distinguish between "internal" and "foreign" illegal activity directed against the United States Government.[458] As a consequence of the absence of clear constitutional guidelines for electronic surveillance for counterintelligence, this issue has been resolved according to the prevailing political atmosphere.

Origins of the Foreign Intelligence Surveillance Court

Following the Watergate scandal, the Senate Select Committee to Study Governmental operations with Respect to Intelligence Activities, or Church

454. Law: Hall (2002), p. 841.
455. Law: Solove (2003), p. 330-331.
456. Law: Lieberman (1999), p. 448.
457. Law: Spaeth (1987).
458. Law: Ducat (1992), p. 899.

Committee, uncovered that the federal government had been relying on domestic surveillance for decades. Thus, the Foreign Intelligence Surveillance Act (FISA), 92 Stat. 1783, was passed in 1978, in order to regulate federal warrantless surveillance. Specifically, FISA would serve to limit and review warrantless surveillance and searches conducted for national security. Unfortunately, the present use of FISA has resulted in "the erosion of numerous Constitutional rights and basic legal procedures that have their roots in free societies dating back to the Magna Carta."[459]

> This legislation provided some control over electronic surveillance and wiretapping by agents of the federal government of "foreign states" or "agents of foreign states." In such cases, although a court order was required — with the exception of a specially stipulated category of classified surveillance by the National Security Agency — the law did not require the government to demonstrate illegal activity, but only demanded the existence of "probable cause" for believing that the subject of surveillance was a "foreign state" or "agent of a foreign state." The law also forbade foreign states and their agents to receive compensation for damages incurred through violation of the law. Other points of the law stipulated the creation of special courts to issue orders for electronic surveillance associated with national security.[460]
>
> Thus unlike other court orders, orders for cases in which the interests of foreign policy and national security are involved are outside the jurisdiction of ordinary courts. According to D. Jeffreys, a court in Washington appointed by the President issues orders for foreign counterintelligence investigations.[461]

The information in his book is in contradiction with information available from Marist College,[462] which says the Chief Justice of the United States appoints the judges of this court. Quite possibly the law was changed after the publication of the cited book. The designation of this court is not usually mentioned in the US, but the *New York Times* for the first time referred to it by name in 1990, in an article about the Eric Bloch affair, as the Foreign Intelligence Surveillance Court (FISC).

As national security expert James Bamford observed, "like a modern Star Chamber, the FISA court meets behind a cipher-locked door in a windowless, bug-proof, vault-like room guarded 24 hours a day on the top floor of the Justice Department building. The eleven judges (increased from seven by the USA-PATRIOT Act) hear only the government's side." When FISC authorizes surveillance, the federal agents can switch on all the turbos. In a 2002 decision, the Foreign Intelligence Surveillance Court noted that after it grants a surveillance request, "the FBI will be authorized to conduct simultaneously, telephone, microphone, cell phone, e-mail and computer surveillance of the US person

459. Law: Poole (2).
460. Law: Ducat (1992), p. 899-900.
461. Law: Jeffreys (1994), p. 222.
462. Law: Marist College (1).

target's home, workplace and vehicles. Similar breadth is accorded the FBI in physical searches of the target's residence, office, vehicles, computer, safe deposit box and US mails where supported by probable cause.[463]

FISA orders approve surveillance for up to 90 days.[464] Each application for any order approving electronic surveillance for foreign intelligence purposes has to be approved by the Attorney General.[465]

> The following officials are designated to make the certifications to that court in support of applications to conduct electronic surveillance:
>
> 1. Secretary of State
> 2. Secretary of Defense
> 3. Director of Central Intelligence
> 4. Director of the Federal Bureau of Investigation
> 5. Deputy Secretary of State
> 6. Deputy Secretary of Defense
> 7. Deputy Director of Central Intelligence[466]

A similar executive order designates the same officials to make certifications to that court in support of applications to conduct physical searches.[467]

The latter executive order is noteworthy in that — for the first time, as far as this author could determine — the name of the Foreign Intelligence Surveillance Court is officially mentioned. The Foreign Intelligence Surveillance Court considers orders from the Department of Justice and US intelligence agencies. The FISC rulings may result in criminal charges, convictions, and prison sentences for US citizens. Yet the court's rulings are permanently sealed from review by the accused and by thorough civilian review.[468]

There is a basis for believing that the orders issued by the Foreign Intelligence Surveillance Court are *pro forma* to a significant extent. Those who are involved in the daily operation of American counterintelligence realize there is a significant difference between the literal judicial aspect and the practical application of a given law. Thus, an FBI counterintelligence team can use practically unrestricted wiretaps regardless of the regulations.[469] During its existence, the FISC has processed over 13,000 applications for covert surveillance and physical searches.[470] At the time of the September 11 attacks, the Foreign Intelligence Surveillance Court had been known to have turned down only one request.[471]

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463. Law: Bovard (2003), p. 138.
464. Law: FISA Summary.
465. Ibid.
466. Law: Executive Order No. 12139 (May 23, 1979).
467. Law: Executive Order No. 12949 (February 9, 1995).
468. Law: Poole (2).
469. Law: Jeffreys (1994), p. 227.
470. Law: Poole (2).

> Jonathan Turley, a leading FISA critic who teaches law at George Washington University and served as defense counsel in a number of national security and espionage cases before moving to academia, has written that the United States federal law enforcement officials "are gradually shifting searches from the Fourth Amendment process to a secure court that is neither mentioned in or consistent with the Constitution."[472]

National Security Letters

> Since the September 11, 2001, attacks, the Justice Department and FBI have dramatically increased the use of two little-known powers that allow authorities to tap telephones, seize bank and telephone records and obtain other information in counterterrorism investigations with no immediate court oversight, according to officials and newly disclosed documents.[473]

One of those two items is the "national security letter," which require businesses to submit electronic records of personal information such as finances, telephone calls, and emails. The FBI has used them frequently. According to officials, these letters are issued independently by FBI field offices, and do not require judicial review unless the case comes to court.[474]

> According to documents given to the Electronic Privacy Information Center and the American Civil Liberties Union (ACLU) as part of their lawsuit, the FBI had issued enough national security letters since October 2001 (until the beginning of 2003) to fill more than five pages of logs. There is no way to determine exactly how many times the documents have been employed because the logs were almost entirely blacked out, according to a copy provided to *The Washington Post* by the ACLU.[475]

In part, national security letters are being used more frequently due to the provisions in the USA-PATRIOT Act which loosened the standards for targeting individuals and allowed FBI field officers, rather than senior officials, to issue them.[476]

If a target reveals he has received a national security letter, he can be punished by up to five years in prison.[477]

More incentive to use national security letters after Attorney General Ashcroft notified the House Judiciary Committee in 2003 that the FBI agents could more easily use the letters instead of applying for a FISA search warrant in order to seize library records.[478]

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471. Law: Hersh (2004), p. 114.
472. Ibid., p. 114-115.
473. Law: The Washington Post.
474. Ibid.
475. Ibid.
476. Ibid.
477. Law: Bovard (2003), p. 145.
478. Ibid., p. 146.

> Beryl A. Howell, former general counsel to Sen. Patrick Leahy (D-Vt.) and a specialist in surveillance law, described national security letters as "an unchecked, secret power that makes it invisible to public scrutiny and difficult even for congressional oversight.""[479] "National security letters turn the Fourth Amendment on its head by creating a presumption that the government is entitled to personal or confidential information unless the citizen or business can prove to a federal judge that the national security letter should not be enforced against him. But few Americans can afford the cost of litigating against the Justice Department to preserve their privacy.[480]

Emergency Foreign Intelligence Warrants

The second item is the "emergency foreign intelligence warrant."

> From September 11, 2001 to the end of March, 2003, Attorney General John D. Ashcroft has also personally signed more than 170 [such warrants], three times the number authorized in the preceding 23 years, according to congressional testimony in early 2003.[481]

Under federal law, the Attorney General is allowed to unilaterally issue the classified "emergency foreign intelligence warrants" for wiretaps and physical searches of national security threats, under certain circumstances. Such a warrant against a suspected terrorist can be enforced up to 72 hours before it is subject to the review and approval of the Foreign Intelligence Surveillance Court.[482]

Surveillance without Court Orders

In certain circumstances, FISA authorizes surveillance without having to first obtain a court order. In particular, the surveillance must be "solely directed at" obtaining intelligence exclusively from "foreign powers."[483]

Surveillance in the Case of War

During a congressionally declared war, the President, through the Attorney General, can authorize electronic surveillance without a court order for up to 15 days, to obtain information relating to foreign intelligence.[484]

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479. Law: The Washington Post.
480. Law: Bovard (2003), p. 146.
481. Ibid.
482. Ibid.
483. Law: Solove (2003), p. 339.
484. Law: FISA Summary.

Exploitation of September 11 to Expand Government Powers

> The USA-PATRIOT Act made changes to FISA that ironically rewarded federal incompetence and misconduct with greater power. Federal surveillance of the American public was already skyrocketing in the years preceding the September 11.[485]

Using the public fear of potential terrorist attacks to shield themselves from potential criticism, law enforcement agencies and Congress increased surveillance during the 1990s, purportedly in the interest of public safety. Yet less than one percent of all wiretapping requests were related to cases involving bombs, guns, or potential terrorist activity.[486]

Under the USA-PATRIOT Act, authorized wiretaps are not restricted just to people suspected of plotting attacks.

> Georgetown University law professor David Cole warned: "If you're involved in any kind of political activity, you have to fear surveillance by the FBI. We've seen in the past... the FBI engaged in political spying on civil rights activists, on people who are concerned about our policies in Central America, on people concerned about our policies in the Middle East." Morton Halperin, a Nixon White House aide, observed: "Historically, the government has often believed that anyone who is protesting government policy is doing it at the behest of a foreign government and opened counterintelligence investigations of them."[487]

Scope of Surveillance since September 11

Besides typical methods such as intimidation, over 18,000 counter-terrorism subpoenas and search warrants were issued between September 11, 2001, and February of 2003 in order for federal agents to gain personal and proprietary information.[488]

Surveillance of Privileged Communications

Shortly following the USA-PATRIOT Act, the Justice Department declared it would eavesdrop on any individual detained in a terrorist investigation and their lawyers.[489]

> Sen. Patrick Leahy, from the Senate Judiciary Committee, complained in a letter to Ashcroft that there are "few safeguards to liberty that are more fundamental than the Sixth Amendment. When the detainee's legal adversary — the government that seeks to deprive him of his liberty — listens in on his communications with his attorney, that fundamental right and the adversary process that depends upon it are profoundly compromised." Irwin Schwartz, president of the National Association

485. Law: Bovard (2003), p. 138, 144.
486. Ibid., p. 145.
487. Ibid.
488. Ibid., p. 2.
489. Ibid., p. 114.

> of Criminal Defense Lawyers, declared: "The Code of Professional Responsibility is quite clear: a lawyer must maintain confidentiality. If we can't speak with a client confidentially, we may not speak to him at all. And if we can't do that, the client is stripped of his Sixth Amendment right to have a lawyer."[490]

Expansion of Roving Wiretaps

> The USA-PATRIOT Act allows federal agents to get "nationwide roving wiretaps." As the Electronic Frontier Foundation noted, the FBI "can now go from phone to phone, computer to computer without demonstrating that each is even being used by a suspect or target of an order.... The government need not make any showing to a court that the particular information or communication to be acquired is relevant to a criminal investigation." Law enforcement will have leeway to wiretap whomever they choose on the outside chance that the suspect might use someone's phone. Boston University law professor Tracey Maclin warns: "If the government suspects that a particular target uses different pay phones at Boston's Logan Airport, then the government would have the power to wire all the public telephones at Logan Airport and the discretion to decide which conversations to monitor."[491]

Circumventing the Bill of Rights

> FISA surveillance and searches circumvent explicit Constitutional guarantees expressed in the First, Fourth, Fifth and Sixth Amendments to the Constitution.[492]

For example, through the Intelligence Appropriation Act of 1995 and Executive Order 12949, both under the Clinton Administration, the FISC saw an expansion of powers which allowed government agents to search a suspect's private property without a reasonable cause.[493] Yet,

> [t]he US Constitution was crafted in an era when the memory of intrusive searches conducted by British military and governmental personnel for British "national security" interests was still fresh; activities like those allowed by FISA were clearly prohibited when the colonists ratified the Bill of Rights with its explicit prohibitions of unreasonable, indiscriminate searches.[494]

Under the Fifth Amendment, the individual has the right not to be forced to act as a witness against himself. Under surveillance, this right is severely compromised if people expect privacy in their personal communications, since their seemingly private conversations can be recorded and analyzed by law enforcement or intelligence agencies. FISC orders are often given without cause, and alarmingly, the wrongfully acquired surveillance information may be admissible in criminal trials.[495]

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490. Ibid.
491. Ibid., p. 144.
492. Law: Poole (2).
493. Ibid.
494. Ibid.
495. Ibid.

> This is one dimension to the "Catch-22" problem: if surveillance is conducted with cause and criminal prosecution results, the government should be required to meet the same surveillance requirements imposed upon all other law enforcement efforts conducted on the federal, state and local level in order to present that evidence in a criminal trial.[496]

The Sixth Amendment guarantees the right of the defendant to confront his accusers, review the evidence against him, and have access to legal counsel. With FISC-approved surveillance these rights are violated, since the evidence is sealed from the defendant, his legal counsel, and the jury. There have been cases in which the judge has told the jury that evidence against the accused exists yet can not be presented due to "national security" concerns. Thus, the jury is informed to rely solely on the "testimony" of the judge when making their decision. As a result, the defendant's lawyer is also unable to challenge such evidence.[497]

The Consequences of the Existence of FISC

One might argue that the existence and practices of the FISC court violate the separation of powers and privacy and due process guarantees of the US Constitution. Indeed, "[n]o free society has ever survived the type of rapid expansion of government power we are seeing in the US in recent decades. This pattern of secret power is quickly replicated, as can be seen in the 1995 establishment of another secret court by Congress and the Clinton administration — the Alien Terrorist Removal Court."[498]

> Free societies hang in a precarious balance. Very little is actually needed to tip the societal scales in favor of anarchy or tyranny; the main consequence of the existence of FISC is in tipping the scales in favor of tyranny.[499]

Recent Changes to FISA Probable Cause

After September 11, 2001, there have been troubling changes to the FISA's definition of "probable cause."

The Fourth Amendment establishes that a search (including electronic surveillance) must be premised on having a "probable cause" (for suspecting the presence of illegal activity); according to the current interpretation of the Constitution, in cases of domestic surveillance "probable cause" implies "criminal predicate," while in the case of surveillance of foreign intelligence (which roughly speaking is supposed to mean spies and terrorists) the "probable cause" requirement is less rigorous, demanding only a suspicion; (in fact, some people have argued that this is not "probable cause" at all).

496. Ibid.
497. Ibid.
498. Ibid.
499. Ibid.

FISA used to say that for surveillance under FISA "the purpose" of surveillance had to be a surveillance of foreign intelligence. When determining the applicability of FISA to initiate surveillance or determining whether the evidence collected through surveillance is admissible in criminal court, courts (usually) asked the question, "What is (or has been) the purpose of surveillance?" That was consistent with the fact that a legal threshold for FISA surveillance is much lower.

The USA-PATRIOT Act, rushed through Congress immediately after September 11, 2001, changes the standard for FISA surveillance to "a significant purpose."[500] This means that surveillance of foreign intelligence may be one of many purposes, and the only other purpose that exists in the context of the Constitution is criminal prosecution.

This change allows evidence collected under FISA to be used for criminal prosecutions in court. Thus the changes in FISA have the net effect of eroding of the constitutional requirement for probable cause for admissibility of evidence in criminal court.

Sharing of Sensitive Criminal and Foreign Intelligence Information

Section 203 of the USA-PATRIOT Act authorizes the sharing of foreign intelligence information between officials of the FBI, CIA, INS, and other federal agencies without judicial review, so long as the information is deemed to help the recipient perform his official duties. Section 203 also allows the sharing of information which contains foreign intelligence or counterintelligence information.[501]

> Of greatest concern is Subsection (a) of Section 203, which permits the disclosure of grand jury information. A grand jury is a body consisting of up to 23 jurors that is charged with considering evidence and deciding whether to issue a criminal indictment. The powers of a grand jury to subpoena records and witnesses are nearly boundless. Grand juries are generally unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. Grand jury subpoenas are issued pro forma and in blank and the court exercises no prior control whatsoever upon their use. A grand jury witness may be compelled to testify about, and turn over records revealing, the most personal and sensitive of matters without a showing of probable cause, under threat of being jailed for civil or criminal contempt of court. Those witnesses who are less than truthful in their testimony risk being charged with perjury. No judge monitors a grand jury's inquisitorial powers except in clear cases of abuse. The psychological pressure of grand jury interrogation enables the grand jury to pry statements from witnesses that they would not provide to the police.[502]

500. Law: *Covert Action Quarterly*, No. 71, p. 17.
501. Law: Chang (2002), p. 59-60.
502. Ibid., p. 60.

Grand juries are subject to a heavy curtain of secrecy in order to encourage witnesses to make their disclosures. Section 203(a) of the USA-PATRIOT Act removes this secrecy by allowing grand jury materials to be shared with federal agency officials. This can be done without prior court approval or supervision, and regardless of whether the information concerns terrorist activities. Thus, a CIA agent may use grand jury subpoena powers without accounting to the judiciary, to compel testimony and produce documents.[503]

Permanent Provisions of the USA-PATRIOT Act

Although some member of Congress were afraid the hastily passed USA-PATRIOT Act infringed on Constitutional rights, they approved it because the "sunset" clause allowed Congress to review the legislation in four years. Yet some of the most severe infringements were not subject to the sunset clause.[504] Others have already come up for review and been approved or extended.

> As described by the American Civil Liberties Union, one of these provisions "would allow law enforcement agencies to delay giving notice when they conduct a search. This means that the government could enter a house, apartment, or office with a search warrant when the occupant was away, search through his property and take photographs, and in some cases, seize physical property and electronic communications, and not tell him until later. This provision would mark a sea change in the way search warrants are executed in the United States."[505]

And in fact, years later, it does allow the delay in giving notice.

Section 213 does make the provision that notice of a secret search must be given within a reasonable period; Ashcroft's Justice Department interpreted that to mean up to 90 days. Past that, the government can ask a judge to extend the period for "good cause." "As Rachel King, legislative counsel for the ACLU in Washington, tells us, extensions can be granted indefinitely. Remember that these black bag jobs — where no one leaves a receipt for what has been taken — apply to any criminal investigation, not only terrorism probes."[506]

Totalitarian "Patriotism" as a Replacement for Formal Laws

Many companies are now being pressured to disclose their records to federal agents without a warrant or subpoena.

> Washington lawyer Bill Lawler observed that FBI agents "don't seem to be bothering with [warrants or subpoenas] these days. They just show up and say 'Here we are' and 'Give us your stuff.' Ohio State University law professor Peter Swire reported that companies are receiving 'requests for cooperation from law enforce-

503. Ibid., p. 60-61.
504. Law: Hentoff (2003), p. 39.
505. Ibid., p. 39-40.
506. Ibid., p. 41.

> ment agencies with the idea that it is unpatriotic if the companies insist too much on legal subpoenas first.' Telecom lawyer Albert Gidari observed: 'Investigators have quickly learned that they don't need to leave a paper trail anymore so nobody can judge the lawfulness of a request.' Gidari noted that FBI 'agents in certain field offices are impatient and view you as unpatriotic [if you do not surrender information on demand].'"[507]

FISA as a Domestic Intelligence Act

> A few months after the USA-PATRIOT Act was signed, Ashcroft proposed new regulations to "allow FISA to be used primarily for a law enforcement purpose." The seven FISC judges unanimously rejected the proposal as a power grab contrary to federal law.[508]

The Justice Department, however, refused to give senators a copy of that decision. When the senators eventually obtained a copy directly from the court, they released it to the public in August of 2002. Ashcroft then tried to appeal the decision to the US Foreign Intelligence Surveillance Court of Review.

> The judges were picked by Supreme Court Chief Justice William Rehnquist, a jurist renowned for his minimalist interpretation of the Fourth Amendment. The FISA appeals court met in secret and only the Justice Department was permitted to argue its side. Steve Aftergood, editor of the Federation of American Scientist's *Secrecy News*, commented that the transcript of the hearing (released months later) showed that "the judges generally assumed a servile posture toward the executive branch, even consulting the Justice Department on how to handle its critics." They gave Ashcroft everything he wanted.[509]

This appeals court decision allows federal agents to pursue FISA warrants in cases with very dubious links to terrorism, limiting their freedom to wiretap Americans only by the creativity of their arguments. "American Civil Liberties Union lawyer Ann Beeson observed that the FISA appeals court decision 'suggests that this special court exists only to rubber-stamp government applications for intrusive surveillance warrants.' Beeson noted: 'This is a major constitutional decision that will affect every American's privacy rights, yet there is no way anyone but the government can automatically appeal this ruling to the Supreme Court.' The Supreme Court rejected the ACLU's request to consider the FISA ruling."[510]

> Miami Attorney Neal Sonnett, chair of an American Bar Association panel on terrorism law, observed that FISA "has now turned into a de facto domestic intelligence act. The line was blurred with FISA for a long time. And when [Congress] passed the [USA-]PATRIOT Act, they wiped it out completely."[511]

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507. Law: Bovard (2003), p. 146.
508. Ibid., p. 139.
509. Ibid., p. 139-140.
510. Ibid.
511. Ibid.

2.7 Intercepting Americans' Communications with the Outside World: National Security Agency

Birth of the National Security Agency

On October 24, 1952, President Harry Truman signed a classified top secret presidential memorandum, stamped with a classified code word, which ordered the creation of the National Security Agency. Eleven days later, on November 4, 1952, the NSA was secretly created, without any public announcement or coverage, without congressional debate. No mention of it was included within the *Government Organization Manual* or the *Congressional Record*.[512] [513]

The NSA operates under the Department of Defense, and plays a role within the broader Intelligence Community.[514] Its headquarters are located in Fort Mead, Maryland and employs over 100,000 personnel.[515] Compared to the rather paltry 15,000 FBI counter-espionage agents, the NSA is the largest and most expensive intelligence agency in Western history.[516] "Much of the story of the NSA operations still remains officially secret. Not a single decrypt produced by the National Security Agency has so far been declassified."[517]

Function of the NSA

It should be noted that NSA is not a single stand-alone entity. Rather, the NSA works in concert with a vast body known as United States Signal Intelligence System (USSIS), which is comprised of several intelligence organizations.[518]

The NSA employs a variety of extremely expensive "vacuum cleaner" collection systems. In December of 1992, former NSA director Admiral William O. Studeman admitted a collection system may only produce one reportable intelligence item on average for every million inputs.[519]

"The NSA appears to have interpreted the 1958 National Security Council Intelligence Directive (NSCID number 6, dated September 15, 1958) as a *carte blanche* to intercept and process all foreign communications, i.e. all those in which at least one terminal is foreign."[520] The 1978 FISA law seemed to put a limit on NSA operations by requiring a warrant for the surveillance of the US

512. Law: Bamford (1982), p. 15.
513. Ibid.
514. Law: Lewis (2005), p. xv.
515. Law: Lloyd (1994), p. 95.
516. Ibid.
517. Law: Andrew (1995), p. 537.
518. Law: Johnson (2004), p. 73.
519. Ibid., p. 81.
520. Law: Committee on Government Operations (1977), p. 13.

person communicating abroad. But, as later developments have shown, the pre-1978 precedent of warrantless operations has never been completely forgotten.

Domestic Espionage

> The NSA says that it intercepts only communications that have at least one foreign terminal, but it does not explain or deny press reports that it monitors domestic long-distance communications to determine what the foreign powers obtain from US domestic communications.[521]

Espionage over US Residents Abroad

The Foreign Intelligence Surveillance Act first specified what the NSA was and was not allowed to do. It prohibited the NSA from making arbitrary lists of US citizens and demanded it obtain a secret warrant from the Foreign Intelligence Surveillance Court in order to target a US citizen, a permanent resident alien, or a green card holder within the United States. Furthermore, NSA officials must show that their target is an agent of a foreign power or involved in espionage or terrorism. Domestically, these issues generally fall under the jurisdiction of the FBI, and thus the NSA rarely becomes involved. "Judicial protections, however, stop at the border. 'FISA doesn't cover the US person who's outside the United States,' added the official. To target Americans outside the country, all that is needed is the approval of the US attorney general."[522]

Subversion of the Very Idea of Court Warrants for International Communications

Under a 2002 presidential court order, the NSA has acted independently of the courts and spied on hundreds of people within the United States who were communicating with others abroad.[523] There was no real need to issue a presidential order for this. First of all, under FISA the executive branch can use "Emergency Foreign Intelligence Warrants" where the executive can first order the surveillance and obtain a warrant within the following 72 hours. Second, technically there is no need to wiretap someone in the United States for international communications, because as soon as such a person makes an international communication, he or she is under the surveillance of ECHELON, the special international spying network operated by the NSA.

It looks as though President Bush chose to employ an overtly warrantless surveillance in order to subvert the very idea of judicial control over executive electronic surveillance. It should be remembered that it was Nixon's idea that the president has a constitutional right to conduct warrantless electronic sur-

521. Ibid., p. 23.
522. Law: Bamford (2001), p. 440-441.
523. Law: *The New York Times* (December 16, 2005).

veillance, an idea that was rejected by the US Supreme Court in the 1970s. In this sense, as a result of the Bush administration's constitutional *coup d'etat*, we have been thrown back to a pre-Watergate doctrine of warrantless NSA surveillance.

2.8 Domestic Surveillance by the NSA

An Alternative Interpretation of the Reports About Warrantless NSA Surveillance

Media reports indicate that NSA surveillance without court orders has been aimed at communications of Americans with people abroad. However, knowing the NSA technical capabilities and reading between the lines of some published reports, it is possible to come to much broader conclusions. One such maximalist interpretation of events is given in the following section. (The consensus of major media outlets has moved in the direction of this interpretation since it was revealed that the NSA has collected and analyzed telephone numbers called by all US residents. And that may not be the end of the story.)

Domestic Surveillance by the NSA

> President Bush has secretly authorized the NSA to monitor and eavesdrop on large volumes of telephone calls, e-mail messages, and other Internet traffic inside the United States to search for potential evidence of terrorist activity, without search warrants or any new laws that would permit such domestic intelligence collection. The administration apparently has several legal opinions to support the NSA operation, written by lawyers at the White House, the CIA, the NSA, and the Justice Department. They all rely heavily on a broad interpretation of Article Two of the Constitution, which grants power to the president as commander-in-chief of the armed forces. Congress passed a resolution just days after the September 11 attacks granting the president the authority to wage a global war on terrorism, and Bush administration lawyers later decided that the war resolution provided the legal basis they needed to support the NSA operation to eavesdrop on US citizens.[524]

Domestic NSA Surveillance Mocks the Debate over USA-PATRIOT Act

> The small handful of experts on national security law within the government who know about the NSA program say they believe it has made a mockery of the public debate over the Patriot Act. The Patriot Act of 2001 was widely criticized for giving the government too much power to engage in secret searches and to spy on suspects, and even some Republicans chafed at the idea of giving the government still more surveillance powers under an extended and expanded version (and this expanded version was so controversial that it has never been presented to Congress for adoption as law). The Patriot Act has increased the ability of the nation's intelli-

524. Law: Risen (2006), p. 44, 45.

> gence and law-enforcement agencies to monitor conversations and Internet traffic by terrorist suspects with the approval of FISA court.[525]

Taking into account what the NSA was already doing, "The Patriot Act has given no new powers to the NSA."[526]

Domestic NSA Surveillance as Massive Dragnet Surveillance

With President Bush's secret order, the NSA gained the freedom to employ computerized search programs, once restricted to foreign communications, on large volumes of domestic communications.[527] With the cooperation of major telecommunications companies, the NSA easily gained access to large switches carrying the load of the nation's telephone calls. Similarly, it also accessed a vast majority of the email traffic traveling through the US telecommunications system.[528]

The Emergence of A Three-Tiered Surveillance System

Although warrantless NSA wiretaps may be being used to identify suspects, such intelligence is not admissible in a US court.[529]

> The Bush administration is obtaining FISA court approval for wiretaps at least in part on the basis of information gathered from the earlier warrantless eavesdropping. The government is apparently following that practice with increasing frequency; by the estimate of two lawyers, some 10 percent to 20 percent of the search warrants issued by the secret FISA court now grow out of information generated by the NSA's domestic surveillance program.[530]

As the result of these developments, a three-tiered surveillance system is now in place in the US: massive warrantless NSA surveillance, total surveillance according to the warrants of the FISA court, and surveillance according to the warrants of criminal courts. The broad scale warrantless NSA surveillance identifies candidates for FISA surveillance. Total FISA surveillance of selected candidates determines which targets should be subject to surveillance in accordance with the warrants of regular courts with the purpose of criminal prosecution.

525. Ibid., p. 47.
526. Ibid.
527. Ibid., p. 48.
528. Ibid.
529. Ibid., p. 53.
530. Ibid., p. 54.

2.9 Wiretapping the Whole World: ECHELON

What is ECHELON?

The National Security Agency has developed a global spy system, code-named ECHELON, which captures and analyzes almost every electronic communication anywhere in the world. ECHELON is controlled by the NSA but is also operated by a number of organizations bound together under the secret UKUSA agreement of 1948. The list of participating organizations includes the General Communications Head Quarters (GCHQ) of England, the Communications Security Establishment (CSE) of Canada, the Australian Defense Security Directorate (DSD), and the General Communications Security Bureau (GCSB) of New Zealand.[531]

ECHELON's Design

The ECHELON system works by intercepting satellite, microwave, cellular and fiber-optic communications traffic, and processing these signals through its computers equipped with voice recognition and optical character recognition software. Certain words or phrases, found in the ECHELON "Dictionary," trigger the computers to flag the message for recording and transcribing for future analysis. The intelligence analysts then have another set of keywords to look for. Finally, their analysis is sent to the intelligence agency headquarters which requested the intercept.[532]

These agencies can intercept all communications using satellite, including short-range signals such as walkie-talkies.[533]

In what are known as "embassy collection" operations, interception receivers and processors are planted in the embassies of the UKUSA nations in order to intercept communications in foreign capitals, where most of the nation's microwave networks converge. As a bonus, the agents are protected by diplomatic privilege.[534]

As one theoretician of modern intelligence writes, "Knowledge is now the most salient aspect of social control and hence the most important foundation for national power."[535]

The NSA has maintained control over the ECHELON system in part by subsidizing its allies in UKUSA with the specialized software used in the system and by providing the largest amount of interception operations.[536]

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531. Law: Poole (1).
532. Ibid.
533. Law: Bennett (2002), p. 82.
534. Ibid.
535. Law: Steele (2001), p. 270.

The ECHELON system allows the United States to continuously monitor the world's communications, both civilian and military, and significantly contributes to the United States' global power and influence.[537]

> Oliver North gave us a sense of NSA's capabilities as early as November 22, 1985. He reported that as a plane left Tel Aviv carrying missiles for Iran, NSA instantly notified the CIA and placed in motion plans for monitoring activities moment by moment. According to North, NSA set up "some very specific, targeted intelligence collection that would give us, almost instantly, exactly what was happening very, very accurately.... Within hours, we would have detailed information on what these people were saying to each other, and the plans they were making. It is probably the most reliable form of intelligence there is."[538]

ECHELON's Targets

> But apart from monitoring what they consider terrorists and rogue states, ECHELON is also used for purposes well outside its original mission. Domestic surveillance of American civilians targeted for reasons of "unpopular" political affiliation or for no probable cause at all, in violation of the First, Fourth and Fifth Amendments of the Constitution, is regularly uncovered but it is almost impossible to defend against, due to the elaborate legal arguments and privilege claims by the intelligence agencies and the US government. Among the activities that the ECHELON targets are political spying and commercial espionage. Elected political representatives give scarce attention to these activities, let alone the abuses that occur under their watch.[539]

Commercial Espionage

After the fall of the Soviet Union, intelligence agencies have redefined national security in terms of economic, commercial, and corporate concerts in an effort to justify their surveillance capabilities and budgets.[540] In 1995, the United States used ECHELON information about the Japanese to strengthen its hand in the World Trade Organization talks with Europe concerning a dispute over car part exports.[541] In 1998, the British *The Sunday Times* revealed that the United States was using ECHELON information to help US companies bid for foreign contracts.[542] The European company Airbus Industries believes it lost a $1 billion contract to the US companies Boeing and McDonnell Douglas because of information intercepted by United States surveillance systems.

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536. Law: Bennett (2002), p. 82-83.
537. Ibid., p. 82.
538. Law: Friedman (1996), p. 323.
539. Law: Poole (1).
540. Ibid.
541. Law: McGwire (2001), p. 14.
542. Ibid.

ECHELON and Civil Liberties

> The activities of ECHELON are undoubtedly capable of infringing directly on the civil liberties of people throughout the world. This causes objections of some of the governments.[543]

> ECHELON has expanded to include intercept of the Internet. In May 1999, the administration of President Bill Clinton, through the International Law Enforcement Telecommunications Seminar (ILETS), an umbrella organization set up by the FBI in 1992 which includes security and law enforcement agencies from twenty Western countries, was pressuring EU members to force European ISPs to provide "interception interfaces" for all future digital communications to allow police and spies to monitor an individual's web activity, check newsgroup membership and intercept email. Caspar Bowden, director of the London-based Foundation for Information Policy Research (FIPR), stated at the time that the data-taps probably infringe on human rights. Mr. Bowden claimed that even if Internet users encrypt their email, sophisticated analysis programs — such as communications traffic analysis — can reveal a great deal to the trained professional about an individual's usage and his or her network of personal contacts. Thus, traffic analysis could be used even to counter encryption-based public privacy in communications. This seems to be one of the uses of traffic analysis by ECHELON.[544]

European countries have pointed out that ECHELON breaches Article 8 of the European Convention on Human Rights (ECHR), which guarantees privacy, as well as Article 10 of the Treaty of Amsterdam.[545] On September 5, 2001, the European Union adopted recommendations to counter ECHELON.[546] Yet plans to close down the ECHELON station in Germany were considerably delayed with the onset of the "War on Terrorism."[547]

> ECHELON has been used for spying on the citizens of the owners of the network as well as on allies. It whas reported, for example, that CSE (the Canadian analog of the NSA) used ECHELON to spy on Quebec separatists and on Japan, Mexico, Costa Rica, India, and France.[548]

2.10 Use of Foreign Intelligence Agencies to Circumvent Restrictions on Political Spying

Use of ECHELON

There is evidence that ECHELON is used to circumvent the domestic restrictions on political spying.

543. Ibid., p. 81.
544. Law: Schmidt (2005), p. 201.
545. Law: Owen (2002), p. 188.
546. Law: Marcella (2003), p. 184.
547. Law: McGwire (2001), p. 81.
548. Law: *Covert Action Quarterly*, No. 59, p. 20.

The ECHELON system circumvents the issue of obtaining warrants to intercept international calls made by that country's nationals. The NSA can intercept British calls at American sites in return for the same favor from the British government — although "since the building of Menwith Hill and routing of most British telephone calls through Hunters Stone, many internal British calls could be legally intercepted by the NSA in Britain."[549]

Even the closest US allies are not immune to political spying by ECHELON.

> In February 1983, the British Senior Liaison Officer (BRLO) asked CSE to use ECHELON to mount a special two-week operation in London, paid for by the Brits. The Head of the CSE special collections section described the request to Mike Frost (who later published an account in *Covert Action Quarterly*): " 'Well,' he said, 'Margaret Thatcher [then prime minister] thinks two of the ministers in her cabinet are not "on her side"... so she wants to find out if they are.... So GCHQ asked if we were given the frequencies to look for, and the time frame to do the intercept, we could assist [Thatcher] in her intelligence gathering on her own ministers.' "
>
> The section head explained that GCHQ wished to assist Thatcher but did not want to be implicated in the operation. If the Canadian agents intercept the suspected ministers' conversations, the British officials could effectively deny culpability. In an effort to build up good will and test new equipment, the CSE agreed to the all-expenses paid trip to London. Furthermore, the Canadians had very little risk of getting caught because it was the British agencies themselves who were asking them to do it. The section head intercepted the communication using the frequency provided by the BRLO, using a briefcase-sized receiver in locations such as the Macdonald House, the Canadian High Commission, and the agent's hotel room. Recordings of the intercepted conversations conducted by the targeted ministers were then submitted to GCHQ.[550]

Use of Mossad

Israel has several intelligence agencies, but "the term Mossad — short for Ha Mossad Le modi'm UleTafkidim Meyuhadim (the Institute for Intelligence and Special Tasks) — is invariably used when speaking of the Jewish state's intelligence activities."[551]

> Many operatives of Israeli intelligence who are actively spying, recruiting, organizing, and carrying out covert activities — mainly in New York and Washington, which they refer to as their "playground" — belong to a special, super-secret division of the Mossad called simply *Al*, Hebrew for "above" or "on top." The unit is so secretive, and so separate from the main organization, that the majority of Mossad employees don't even know what it does.[552]

549. Law: Bennett (2002), p. 79.
550. Law: *Covert Action Quarterly*, No. 59, p. 22.
551. Law: Polmar (2004), p. 432.
552. Law: Ostrovsky (1990), p. 269.

The core of Al consists of a small number of professional officers. Many of them operate under nonofficial cover. Official cover generally refers to disguising an intelligence officer as a government official who would normally be posted abroad, such as a diplomat. Thus, nonofficial *cover* refers to any other type of disguise.[553] In addition, thousands of Jews routinely volunteer to help Mossad operations.[554]

Some of this information gathering might be contrary to US interests. For example, in "a report to the Senate Intelligence Committee, the CIA identified Israel as one of six foreign countries with 'a government-directed, orchestrated, clandestine effort to collect US economic secrets."[555] This intelligence work on the territory of the US has been tolerated largely because its results have been shared with the United States.

Since Mossad did not have a station in the Soviet Union, the overwhelming majority of its information on the Eastern Bloc during the Cold War came from emigrating Soviet Jews, and analysis of that information.[556]

The Mossad still doesn't admit the existence of Al. Inside the Institute, it's said that the Mossad does not work in the United States. But most Mossad people know that Al exists, even if they don't know exactly what it does.

Information about Al was disclosed in a book by former Mossad officer Victor Ostrovsky. This book was considered so sensitive that the Israeli government tried to stop its publication.[557] Ostrovsky's books still inflame the entire Israeli intelligence community.[558]

2.11 Statistics about Electronic Surveillance in the US

The number of installations and interceptions approved in regular courts has grown exponentially. A similar picture exists with Foreign Intelligence Surveillance Court (FISC) secret surveillance orders in response to applications primarily from the FBI, but also from the NSA, in the interests of national security without criminal predicate. In recent years the FISC has approved more applications for electronic surveillance than the whole of the entire federal and state judiciary.

Some available statistics about the growth of the electronic surveillance in the US are as follows:

553. Law: Shulsky (2002), p. 12.
554. Law: Black (1991), p. 493.
555. Law: Thomas (1999), p. 69.
556. Law: Ostrovsky (1990), p. 271.
557. Law: Ostrovsky (1994), p. 256-258.
558. Law: Thomas (1999), p. 200.

Wiretaps and Intercepts of Communications in the United States

	1970	1975	1980	1985	1990	1995	2000	2005
Intercept applications authorized	596	701	564	784	872	1058	1190	1773
Intercept installations (Total)	582	676	524	722	812	1024	1139	1694
Federal	179	106	79	235	321	527	472	624
State	403	570	445	487	491	497	667	1070
Intercepted communications, average	656	654	1058	1320	1487	2028	1769	2835
Total number intercepted communications, in thousands	382	442	554	953	1207	2077	2015	4802

Sources: 1970-1995: Economics: US Bureau of the Census
2000-2005: Law: Administrative Office of the United States Courts

FISA orders

	1979	1980	1985	1990	1995	2000	2005
FISC orders for electronic surveillance and secret physical searches	199	319	587	595	697	1012	2074
Orders to access business records							155
National security letters							3501

Sources: Law: 1979-95: 50 USC Sec. 1807
2000: Administrative Office of the United States Courts
2005: US Department of Justice

The above numbers do not include surveillance done on US territory by intelligence agencies of friendly countries in response to US requests.

> Most of us streetwise countermeasures folks just about fall out of our chairs when we see these published statistics on the number of court-ordered wiretaps. If you have some long talks with honest ex-lawmen, you will quickly realize that these 800 to 900 [in 1996] reported court-ordered electronic surveillance operations are just the tip of the iceberg. Perhaps 100 illegal operations to 1 legal operation may be understating the fact.[559]

Here we are talking about regular police wiretapping. As was noted above, warrantless surveillance by the National Security Agency listens on average to a million conversations before it catches one that deserves attention. Of approximately 30,000 conversations which come to its attention, the NSA may initiate further wiretapping on one target based on a warrant from the Foreign Intelligence Surveillance Court. (The only difference in cases of warrantless surveillance — both by the police and the NSA — is that evidence obtained without a court order probably would be suppressed in a court hearing due to "exclusionary rule."[560])

2.12 Possible Dangers

Existing Outlooks on the State and Future of Privacy

A wide range of opinions is expressed in America on the state of privacy in the society and outlook for its future:

The optimistic view holds that information and communication technologies create more democratic systems. From this perspective, these technologies will inevitably spread information far and wide, thereby eroding hierarchies and monopolies of power across all sectors of society.[561]

Other perspectives include:

- A view that affirms that the legal right to privacy still exists.[562]
- Concern about the influence of surveillance on social institutions and social change.[563]
- Analysis of the politics of wiretapping and encryption.[564]
- Concern about the ways in which information technology opens new avenues for invasion of privacy by private investigators.[565]
- An understanding that surveillance is a weapon of social control[566] and that it changes the character of postmodern life.[567]
- Confirmation that we live in a surveillance society.[568]

559. Larsen (1996), p. 86.
560. Law: Alderman (1991), p. 138.
561. Philosophy: de Sola Pool (1983); Cleveland (1985); Gilder (1994); Dyson (1997).
562. Law: Alderman (1997).
563. Philosophy: Nock (1993).
564. Philosophy: Diffie (1999).
565. Law: Copeland (1997); Pankau (1998).
566. Philosophy: Staples (1997)(2).
567. Philosophy: Staples (1997)(1).
568. Philosophy: Lyon (2001).

- A conclusion that we are witnessing the destruction of privacy in America.[569]
- A declaration that privacy has already come to an end.[570]

Many social scientists regard the information and communication technology revolution as primarily a means for extending social control.[571] Some have argued that this revolution is enabling the construction of a "surveillance society" in which every citizen imagines their actions to be on camera.[572] The general consensus is shifting into acknowledgement of the erosion of privacy and a varying degree of alarm about that.

Surveillance Society

All societies that are dependent on communication and information technologies for administrative and control processes can be called surveillance societies.[573] But as Gary T. Marx cautioned, the new surveillance technologies used in US policing may portend the coming of a "maximum surveillance society."[574]

Erosion of Privacy as an Issue of Social Control

The issues around undercover police work in general and electronic surveillance in particular go far beyond tactical and strategic questions and even beyond whether, in any given investigation, justice was done. Specifically, they include consideration of what may be a subtle and deep-lying shift in the nature of American society. Social control has become more specialized and technical, and, in many ways, more penetrating and intrusive. In some ways we are moving toward a Napoleonic view of the relationship between the individual and the state, where the individual is assumed to be guilty and must prove his or her innocence. The state's power to seek out violations, even without specific grounds for suspicion, has been enhanced.[575] The question, "Is he corrupt?" may be replaced by the question, "Is he corruptible?" Some police operations amount to random integrity testing of selected individuals or social groups. Rather than intervention into ongoing criminal activities, there is an effort to create them in *a priori* targeted individuals or to criminalize such individuals apart from specific grounds for suspicion.[576] With this comes a cult and culture of surveillance that

569. Philosophy: Rosen (2000).
570. Philosophy: Sykes (1999); Whitaker (1999); Garfunkel (2000).
571. Philosophy: Beniger (1986); Carey (1989); Schiller (1989), (1996).
572. Philosophy: Falherty (1985); Gandy (1989), (1993).
573. Philosophy: Lyon (2001), p. 1.
574. Ibid., p. 108.
575. Law: Marx (1988), p. 2.
576. Ibid., p. 11.

goes beyond government to the private sector and the interaction of individuals.[577]

Is the Nature of Surveillance Changed?

It had been common among observers of modern surveillance to declare that though the creep of surveillance was unquestionable, "the new Panopticon differed from the old in two significant ways: it was decentered and it was predominantly consensual."[578] Some even said that there was no Big Brother, or that "we were him."[579]

These positions reflect wishful thinking because they either confuse the collective nature of the exercise of social control with the existence of centers of social power, or treat a temporary political atmosphere as a permanent guarantee against possible centralization of the means of political control. Even in a pre-September 11 world they ignored a synchronized behavior of seemingly decentralized instruments of power. After the attacks on the World Trade Center and the Pentagon, these declarations about the demise of Big Brother are obviously out of touch with what is happening.

Is This Really Important for an Average Person?

There is a view that electronic surveillance and privacy are issues of concern only to a small minority of people who are subjected to surveillance because they are criminals or for reasons of national security. But that is not so.

First, the scale of electronic surveillance, as the statistics demonstrates, is growing rapidly.

Second, as the facts presented above show, not only criminals or spies are subjected to surveillance. "Defensive counterintelligence includes measures to monitor your own personnel."[580] Politically active people of undesirable views may also be under surveillance.

Third, the issue of privacy touches not only people under intense surveillance. "In a 1998 Louis Harris poll, 88 percent of Americans said they were concerned about their privacy, while a majority (55 percent) said they were 'very concerned'."[581]

Some people, including some authorities on the issues of privacy and surveillance, tend to have a dismissive attitude to the problems and dangers of modern surveillance. They note that "those whose risk histories reveal mental instability, brushes with the law, or an inability to provide for dependents...will

577. Ibid., p. 2.
578. Philosophy: Whitaker (1999), p. 139.
579. Philosophy: Staples (1997)(2), p. 129.
580. Law: Steele (2002), p. 22.
581. Law: Sykes (1999), p. 5.

discover that they are targets for fairly intensive police and health and welfare surveillance," but the general attitude they convey is that this is not a big problem because it does not affect them.[582]

This is a very precarious position. What if "mental instability" was a reaction to surveillance? What if "brushes with the law" included only a non-violent attempt to exercise the right of political free speech? What if "inability to provide for dependents" was another term for "unemployment," to which nobody is immune in the Western world?

> The struggle over privacy is the preeminent issue of the Information Age. And, one way or another, there will be a revolution in personal privacy over the next several decades.[583]

The Old Warning

There is no substantial public debate in the US about electronic surveillance. There should be no doubt that the potential significance of the development of the techniques and practices of such surveillance in America in the recent years is much greater than anything discussed in media about rights.

Over 25 years ago Senator Frank Church made the following warning.

> At the same time, that capability at any time could be turned around on the American people and no American would have any privacy left, such [is] the capability to monitor everything: telephone conversations, telegrams, it doesn't matter. There would be no place to hide. If this government ever became a tyranny, if a dictator ever took charge in this country, the technological capacity that the intelligence community has given the government could enable it to impose total tyranny, and there would be no way to fight back, because the most careful effort to combine together in resistance to the government, no matter how privately it was done, is within the reach of the government to know. Such is the capability of this technology...
>
> I don't want to see this country ever go across the bridge. I know the capacity that is there to make tyranny total in America, and we must see to it that this agency and all agencies that possess this technology operate within the law and under proper supervision, so that we never cross over that abyss. That is the abyss from which there is no return.[584]

Corporate Surveillance

The situation at the work place is of particular concern.

> Abstract statements about the "dignity" of the employee or the responsibility to respect his or her "personality" are ... of no help. The guarantees ... are not appeals,

582. Law: Lyon (2001), p. 6.
583. Law: Sykes (1999), p. 221.
584. Law: National Broadcasting Company (1975).

> they are instructions. They must contain clear prohibitions as well as precise regulations constraining especially the employer to act in a certain way.[585]

In the absence of such guarantees, "It is [now] perfectly legal for your boss to monitor your family life, check up on the organizations you belong to, delve into your medical history, and even do background checks on your personality traits and education."[586]

And that practice is pervasive. "One survey found that nearly three-quarters of large corporations collect information about their workers beyond what employees provide voluntarily; more than two-thirds report hiring private investigators to check into the background of their workers....Some employers have installed video cameras in locker rooms and restrooms."[587]

> Employers can listen in to your phone calls....They can read your e-mail — even if your message is marked "private." They can listen in to your voice mail. They can monitor what is on the screen of your computer and what left on your hard drive.... They can read your credit reports, and look at your medical records....They can share information about you with your creditors and government agents.[588]

Regular people who are busy with their day-to-day routines often do not notice surveillance. That is not surprising. First, it is difficult to ascertain (in particular electronic) surveillance. Second, at the first sign of surveillance people are intimidated and instead of fighting it, they modify their behavior.

The most devastating effect of electronic monitoring on employees is fear of losing their jobs.[589] Such surveillance is, therefore, an instrument of social control.

When it comes to private corporate security services working in cooperation with government agents, we are dealing with new totalitarian paradigm — totalitarianism with an American face.

Since the early 1970s, an escalating share of the responsibility for social control in the developed world has shifted from public law enforcement agencies to private security companies. The trend has been especially pronounced in the United States. Already by the end of 2001 the US private security industry employed far more guards, patrol personnel, and detectives than the federal, state, and local governments combined, and the disparity is growing.[590]

The legal rules governing private security firms differ from those applied to public law enforcement organizations. Constitutional restrictions on the police do not apply to private firms, nor does the exclusionary rule, which often bars prosecutors from relying on evidence the police obtain illegally.[591]

585. Law: Gearty (1999), p. 373.
586. Law: Sykes (1999), p. 137.
587. Ibid., p. 6.
588. Ibid., p. 137-138.
589. Philosophy: Kizza (1998), p. 100.
590. Law: Hall (2002), p. 639.

Dossiers circulate throughout government and corporate bureaucracies, and individuals are not informed how their information is used and how decisions are made based on their data. The existence of dossiers of personal information in government and corporate bureaucracies can lead to dangers such as hasty judgments in times of crisis, a disparate impact on particular social and political minorities, cover-ups, petty retaliation for criticism, blackmail, framing, sweeping and disruptive investigations, and so on.[592]

An almost complete lack of restraints on private and corporate surveillance is only one aspect of that new totalitarianism in making. There are others.

A New Totalitarian Paradigm

Thirty years ago there were philosophers who thought that in the end totalitarianism would never work, because it was impossible to adequately process the volume of information necessary for total control. The progress of technology shows that this is not true. Computers enable investigators to automatically filter through conversations and messages, scanning for selected keywords, and only messages meeting certain criteria are marked and passed to the attention of human specialists.

A smart mafia has been created under the name of "intelligence community." Its main distinctive feature is not the adherence to democratic principles but cheating those principles. In conjunction, the perfection of manipulation of the mass media (as has been demonstrated in connection with America's recent military conflicts) means that totalitarianism is not far away.

The intentional elimination of legal and organizational barriers between intelligence and criminal surveillance, between foreign and domestic arms of intelligence, among different intelligence agencies, between federal, state and local law enforcement, and between government and private security services in the new political atmosphere after September 11, 2001, are destroying the decentralized architecture of the US mechanisms of power. All too easily it is forgotten that this decentralization was put into place to avoid the dangers of sliding into a police state, the dangers of totalitarianism.

The US had been sliding toward totalitarianism relatively gradually in the decades before the attacks on the World Trade Center; the engine driving that slide had been a natural technological progression; and there had been and still are residual, historically known "physical" freedoms, such as freedom of movement and speech for individuals. But with all this, there has been an exponential growth of the superstructure of electronic surveillance. Such electronic surveillance step by step has reduced the relevance of physical freedoms. Taken to its logical conclusion, such a change cannot be anything else but totalitari-

591. Ibid.
592. Stimulated by reading: Law: Solove (2004), p. 178.

anism. Good intentions do not prevent this because technical surveillance has its own logic which will bring an ever-greater proportion of deleterious effects as the power of technology increases.

With modern technology at hand, to secure effective control over society there is no need to establish an irrationally murderous totalitarian system in the style of low-technology societies like Stalin's Soviet Union. It is enough to control and intimidate the most politically active and independent-minded. There are not that many of the latter in any society. Hitler established his control over Germany by removing from political life just a few thousand journalists and activists. US government in its research about the Internet openly speaks not only about fighting cyberterrorism and hacktivism, but about confronting or neutralizing undesirable political activism.[593] Where Hitler used concentration camps, nowadays the modern technology of social control can be used, ranging from Internet surveillance to total surveillance.

All these latent tendencies have been enormously accelerated with the "war on terrorism."

There are certain truths that reveal themselves only at the times of catastrophic change. Russian philosopher Berdyayev wrote after the Communist takeover of 1917:

> Freedom does not captivate masses. Masses do not trust freedom and do not know how to connect it with their pressing interests. Really, there is an aristocratic beginning in freedom, rather than a democratic one. This is a value which is more precious to a minority of human beings, not a majority, appealing first of all to a person, to individuality.[594]

In this sense it is naive to expect that a majority of the people would resist totalitarian encroachment on their rights.

2.13 What Must We Demand?

Historical Precedents Showing the Necessity of Proper Judicial Oversight for Electronic Surveillance

In the era of the Chief Justice Burger, when there was a liberal majority in the Supreme Court, the following opinion was expressed:

> Mr. Justice DOUGLAS, concurring.
>
> While I join the opinion of the Court, I add these words in support of it.

593. See: Law: Molander (1996); Waltz (1998); Denning (1999); Forno (1999); Khalilzad (1999); Arquilla (2001); Rattray (2001).
594. Philosophy: Berdyayev (2000), p. 599.

> This is an important phase in the campaign of the police and intelligence agencies to obtain the exemptions from the Warrant Clause of the Fifth Amendment....
>
> Here federal agents wish to rummage for months on end through every conversation, no matter how intimate or personal, carried over selected telephone lines simply to seize those few utterances which may add to their sense of the pulse of a domestic underground.
>
> We are told that one national security wiretap lasted for 14 months and monitored over 900 conversations... Even the most innocent and random caller who uses or telephones into a tapped line can become a flagged number in the Government's data bank.[595]

Constructive Suggestions for Protection of the First Amendment

These general suggestions about protection of political freedoms in the United States are inspired by what is known as the "Law Professors' Petition to Congress."[596]

> Having witnessed the inadequacy of internal guidelines to restrain the FBI's excesses, we conclude that federal legislation is needed to ensure that the FBI (and, through its example, other federal law enforcement agencies) not use its investigatory powers to intrude upon political activities protected by the Constitution. This legislation should include the following:
>
> - Provisions limiting FBI investigations to situations where there are specific and articulable facts giving reason to believe that the person has committed, is committing, or is about to commit a specific act that violates federal law, and also limiting such investigations to obtaining evidence of criminal activity.
> - Provisions specifically prohibiting investigations of groups because of their members' exercise of First Amendment rights.
> - Provisions specifically prohibiting preventive or covert action by the FBI designed to disrupt or discredit organizations engaged in lawful political activity.
> - Repeal of federal speech and association crimes, including the Seditious Conspiracy statute, the Smith Act, the Voorhis Act, the Peacetime Military Sedition Act, the extension of the Wartime Military Sedition Act", and the aspects of the USA-PATRIOT Act, which violate the constitution.
> - Provisions limiting how information acquired during investigations is disseminated to other agencies of the government, to the media, and to non-governmental organizations.
> - The requirement of a warrant before the FBI may engage in the most intrusive investigative techniques, including wiretapping and bugging, use of informers and infiltrators, searches of private records (held by banks, employers, health insurers, etc.), mail opening and mail covers.

595. *Laird v. Tatum*, 408 US 1, 92 S. Ct. 2318 (1972); cited by: Law: Ducat (1992), p. 899.
596. Law: Cole (2002), p. 189-201.

- Provisions designed to ensure that the FBI will not exceed its lawful authority, including a requirement that sensitive investigations be approved, in writing, at a high level; establishment of regular Congressional oversight; protection for employees who disclose illegal or improper activities; creation of an independent office with responsibility for auditing FBI investigations; a requirement that all records of illegal practices be segregated from the FBI's operational files and that the victims of such illegal investigative practices be notified of such segregation of records, allowed to inspect such records, and be given the option of having these records either destroyed or archived for historical purposes; and establishment of a private cause of action for individuals injured by unlawful investigative activity.

Constructive Suggestions for the Protection of Privacy

We would like to stress the importance of the protection of privacy as the foundation of all rights.

As far as can be judged from documentary evidence, the Foreign Intelligence Surveillance Court, the CIA, and the NSA, in cooperation with intelligence agencies of friendly countries, essentially continue faulty practices which were condemned during Watergate investigations. These methods were brought into use during the Cold War.

> Our Cold War policy, for all its successes in dissolving the USSR, was so grievously flawed that the United States may never fully recover from its effects upon our values, our freedoms, our politics, our security, the conditions of our material life... and the very air we breathe.[597]

If we do not wish this to become an epitaph to American democracy, it would be logical to formulate the following — legally enforceable — suggestions. These suggestions are born out of an understanding of the importance of certain fundamental legal principles. "It is the lawyers who understand best of all, perhaps, the integrity of law, the universality of legal standards — in other words, the threat to legality *in general* which is posed by any particular infringement of legality."[598]

For the purposes of the discussion in the rest of this subsection, the term "secret surveillance" will be used to indicate "any surveillance of US residents on the territory of the United States, including any clandestine collection of information, wiretapping or electronic surveillance, which is conducted when the subject of surveillance has a reasonable expectation of privacy (according to the criteria articulated by the Supreme Court in *Katz v. United States*)."

- There should be no exceptions to the court order requirements for secret surveillance and the requirements must be strictly enforced. The NSA

597. Law: Pessen (1993), p. 11.
598. Philosophy: Fuller (1964), p. 203.

and any other agencies currently exempt from such requirements should have their exemption revoked. That is especially important because, the way technology is developing now, the role of the NSA will increase.

• Court orders for secret surveillance in the interests of national security (this applies primarily to the FBI), contrary to the practice in domestic secret surveillance, do not now require criminal predicate. But secret surveillance in the interests of national security should be subject to the same standards of the judicial oversight as domestic secret surveillance.

• Even in the case of domestic secret surveillance, courts may act now in complete secrecy. The courts must stop operating in secrecy and become regular — that is, open — courts, or they will continue to violate the due process guarantee.

• Secret surveillance must be put on the same level with the regular search of a home. If it is not desirable to disclose the warrant at the time, could there not be a time prescription after which all the circumstances of the court proceedings should be made known to the subject of prior secret surveillance?

• The previous point would mean that, A) there should be a mandatory notification of a subject of secret surveillance within a certain period of time after the secret surveillance takes place; B) any evidence about such secret surveillance should available under the Freedom of Information/Privacy Act after a reasonable obsolescence period, within the lifespan of a subject of secret surveillance; C) government agencies affected by points A and B should not have the right to delay the mandatory notification or to delay compliance with the Freedom of Information/Privacy Act beyond the limits established by law; and D) points A, B and C should be valid even in the case of secret surveillance by reason of "national security."

• The CIA and the NSA's (and any other intelligence agency exempt from the Freedom of Information/Privacy Act or the mandatory notification discussed above) authority to conduct secret surveillance (on the territory of the United States) should be revoked. The level of secrecy and unaccountability resulting from such exemptions makes them a threat to fundamental rights.

• Intelligence agencies of friendly countries should not be allowed to conduct secret surveillance (on the territory of the United States). Allowing them to so operate on the territory of the US undermines all other achievements in judicial oversight over secret surveillance.

• All judicial restrictions on secret surveillance should be extended to private investigators, and commercial and corporate espionage, especially when they collude with the government.

2.14 Means to Achieve the Aim

Formal Judicial Challenge

The Supreme Court remains the final authority in the US judicial system. Hypothetically — with enough money, energy and time — it might be possible to challenge the violation of constitutional rights in a regular court and lead the appeal up to the Supreme Court (if it would agree to consider the case). But, first of all, what facts can be used? All the leads are usually eliminated. Second, the chance of winning the case in the Supreme Court does not seem encouraging, even if there was evidence necessary for the court of law.

A Politically Popular Interpretation of the Constitution

The prevailing political winds in the US are currently right wing. As a result of appointments by Republican presidents, the Supreme Court has a working conservative majority which ideologically gravitates to narrow, "literal" interpretation of the Constitution. In particular, I think that the whole issue of freedom from electronic surveillance may appear to this Supreme Court as an area not covered by the initial intent of the framers and being contrary to the popular political will.

An Alternative Opinion about the Meaning of the Constitution: Intent of the Framers

In this connection, my own views on the Constitution concur to a great degree with the views of Justice Brennan:

> It is the very purpose of a Constitution — and particularly of the Bill of Rights — to declare certain values transcendent, beyond the reach of temporary political majorities.[599]

Bernard Schwartz observes, "Brennan's rejection of original-intention and historical-tradition jurisprudence enabled him to give effect to his vision of evolving law under which 'we adapt our institutions to the ever-changing conditions of national...life.' To Brennan, the Rehnquist-Scalia approach 'would restrict claims of right to the values of 1789 specifically articulated in the Constitution'; the law would 'turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance'."[600]

599. Law: Schwartz (1993), p. 634.
600. Ibid., p. 639.

An Alternative Opinion about the Meaning of the Constitution: Popular Will

Philosophers of the Enlightenment considered the judicial branch an embodiment of the aristocratic principle in a government. As such it was viewed as a check on the possible tyrannical inclinations of the political majority.

The recent history of the US shows that this is applicable to the core values of the US Constitution. As Dworkin notes, "a referendum might well reveal, for example, that a majority of Americans would prefer government to have the power to censor what it deems to be politically and diplomatically sensitive material, items such as the *Pentagon Papers*. The great expansion of the First Amendment protection (by the Supreme Court) in the decades after World War I plainly contracted, rather than expanded, the majority's power to have the form of government it itself wants."[601]

It is important to fully appreciate such facts in order to avoid the simplistic view of democracy as rule by a majority.

Proposed 28th and 29th Amendments

In order to prevent consequences that would not make the vast majority of the people happy, constructive legal counter-measures are required. It is necessary to give an axiomatic justification to the rights which are part of America's historical heritage but which are the subject of dispute today. It is necessary to generalize traditional constitutional guarantees and extend them to information obtained through the invasion of privacy, which is not physically obvious.

My views about modern-day surveillance can be summarized in the following amendment to the constitution suggested by Lawrence Tribe almost twenty years ago (and which may be especially needed in view of the narrow philosophy of the current Supreme Court):

> In an age of conservative judiciary and complex technologies we need to fashion and enact laws to embody our constitutional principles. ...
>
> Laurence H. Tribe [who came to national prominence as a legal adviser to Al Gore during the Florida vote recount], a constitutional scholar at Harvard University, proposed a constitutional amendment to help the nation cope with the thorny legal challenges presented by new computer and communications technologies. He suggested a 27th amendment that would read: "This Constitution's protections for the freedoms of speech, press, petitions, and assembly and its protection against unreasonable searches and seizures and the deprivation of life, liberty, or property without due process of law, shall be construed as fully applicable without regard to the technological method or medium through which information content is generated, stored, altered, transmitted, or controlled." [602]

601. Philosophy: Dworkin (1996)(2), p. 203.
602. Law: *The New York Times* (March 31, 1991).

But that is not sufficient. There should be a constitutionally recognized protection of privacy against third parties, as the Universal Declaration of Human Rights and laws of other democracies imply. If such protection cannot be deduced from the current text of the Constitution, an amendment is needed to cover that as well. Otherwise, modern technology opens the potential for abuses that are worse than slavery.

2.15 Conclusion

One of the purposes of this proposal is to preserve respect for the Constitution, to avoid the temptation of denigrating the Constitution and to forestall its dismantling.

However, it is very difficult to adopt any constitutional amendment in the United States, especially such amendments as these, and especially in the current political climate. This may be especially true of the second of the proposed amendments, because we can see now collusion between the state and employers (which I call in this book a "new totalitarian paradigm").

And, of course, these proposed amendments are meaningful only in the context of a law-abiding constitutional society. After all, any constitution is just a piece of paper — a fact which tyrants of the world tested long ago.

Today we hear in America that "the Constitution is not a suicide pact." To that we can answer that many people have learned throughout history that life without a constitution that provides a civilized framework in which to pursue one's life may be equivalent to a true suicide.

And this is not just a hollow observation. For what we are building now in America is an imperial national security state, and it is a sign of a meltdown in progress.

3. Philosophy of Rights

3.1 The Relationship between Morality and Law

A Question about Constitutional Rights

> The Constitution has been slain in the house of its friends. So far as...people are concerned, the Constitution has been a stupendous sham, a rope of sand, a Dead Sea apple, fair without and foul within, keeping promise to the eye and breaking it to the heart.
>
> — Frederick Douglas, 1886.[603]

As part of my purpose in writing this book is to alert readers to some of the unintended consequences and negative dimensions of modern surveillance, I shall not spend time elaborating its benefits. In any case, plenty of politicians and advertisers of new technology products may readily be heard extolling the virtues of modern surveillance for efficiency or public order.[604]

One might say that what I have described in the section about political spying in the US are extreme cases. In some sense they are. But my own life is an extreme case. And I have learned something in my life: the rarity of the cases I am referring to does not make them less instructive. No one reports the 9,999 planes that safely landed today; they only report planes that crash. The political rights of any country are best measured by people who are actually trying to use those rights, no matter how small a minority they are in that nation. Rights are about the real options of people who are not afraid to be themselves and — for better or worse — life is such that there are not too many people who dare to be in the political arena themselves. As F. M. Kamm puts it:

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603. Law: Schultz (2001), p. 119.
604. This paragraph was stimulated by reading: Philosophy: Lyon (2001), p. 2.

> Rights are most often thought of as claims to something or alternatively as protected options to act.[605]

Judging any society or era, historians refer to the illuminating existential situations of those few who make their claims to rights. In mathematics it is known that not all observations are equally informative. In mathematics, if you want to take an integral you can select hundreds of points for estimation randomly, but if you know the nature of the function, you may achieve the same precision by selecting just a few highly informative points.

Let me return to the main question which concerns me: What about constitutional rights of a person who is subjected to modern surveillance?

In the following sections I will try to give an answer to that question, writing in a logical sequence of definitions and postulates.

Distinguishing Descriptive and Normative Claims

It is important to recognize the distinction between descriptive and normative claims in any discussion of ethics and law. Not only is there a distinction between facts and values, but the question of what counts as fact is itself highly contentious in philosophy. *Descriptive* statements are simply statements which describe the state of something in the world. On the other hand, philosophical ethics is *normative*. There is also a normative element in legal theory; both philosophical ethics and legal theory explore what people should do. More precisely, philosophical ethics and legal theory serve to evaluate the arguments, reasons, and theories which attempt to justify accounts of morality and law.[606]

Law as a Category of Social Mediation between Facts and Norms

"A category of social mediation between facts and norms" — that is the basic definition of law given by Habermas.[607]

Ethical Relativism

The assertion that "ethics is relative" could be interpreted as either an empirical or normative claim.[608]

If we take the claim "ethics is relative" to be a description of human behavior, then it does follow from the facts. Yet if "ethics is relative" is understood to be a normative claim, then the facts do not support the claim. Furthermore, it is also possible that a universal moral code does apply to everyone even though some or all fail to recognize it.[609]

605. Law: Coleman (2002), p. 476.
606. Philosophy: Johnson (2001), p. 28-29.
607. Philosophy: Habermas (2001), p. 1-41.
608. Philosophy: Johnson (2001), p. 30-31.

Utilitarianism

Utilitarianism is an ethical theory claiming that the consequences are what determine whether behavior is right or wrong. Thus, utilitarianism claims that the important aspect of human behavior is the outcome or result of the behavior rather than the intention with which one acts. The basic principle of utilitarianism can be summarized as: "Everyone ought to act so as to bring about the greatest amount of happiness for the greatest number of people."[610]

Intrinsic and Instrumental Value

Utilitarians distinguish between things that are valued because they lead to something and things that are valued for themselves as *instrumental* goods and *intrinsic* goods.[611]

Utilitarianism claims happiness is the ultimate intrinsic good, since it is valuable for its own sake. Some utilitarians claim that everything else has only a derivative instrumental value, since it is desired as a means to happiness.[612]

Acts versus Rules

One key issue of utilitarian interpretation is whether emphasis should be placed on *rules* of behavior or on individual *acts*. Proponents of rule-based behavior argue that we should adopt rules that would maximize happiness in the long run if followed by everyone. Meanwhile, proponents of act-based behavior stress individual actions, believing that individuals should try to anticipate the consequences of their actions, although it may be difficult to do.[613]

For example Bolsheviks, as far as their approach to morality and law, can be classified as act-utilitarians.

Deontological Theories

Deontological theories, in contrast, claim the internal character of the act itself determines right and wrong.

> For example, if I tell the truth [not just because it is convenient for me to do so, but] because I recognize that I must respect the other person, then I act from duty and my action is right. If I tell the truth because I fear getting caught or because I believe I will be rewarded for doing so, then my act is not morally worthy.[614]

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609. Ibid., p. 31-32.
610. Ibid., p. 36.
611. Ibid.
612. Ibid., p. 37.
613. Ibid., p.39.
614. Ibid., p. 43-44.

The idea of what it means to be a person is central to deontological theory, and connects with the idea of moral agency.[615] This point can be put as follows:

> The substantive contents of the norms of right and wrong express the value of persons, of respect for personality. What we may not do to each other, the things which are wrong, are precisely those forms of personal interaction which deny to our victim the status of a freely choosing, rationally valuing, specially efficacious person, the special status of moral personality.[616]

Deontologists hold that utilitarians incorrectly focus on happiness as the highest good. Given that individuals possess the rational faculties for reasoning about what they want, they can decide and act accordingly. This suggests the end, or highest good, can be something other than happiness.[617]

In this view, the capacity for rational decision-making becomes the most important aspect of human beings.

> Each of us can make choices, choices about what we will do, and what kind of persons we will become. We are moral beings because we are rational beings, that is, because we have the capacity to give ourselves rules (laws) and follow them.[618]

Immanuel Kant lived out his entire life in Königsberg, eastern Prussia, from 1714 to 1804. His 1781 publication the *Critique of Pure Reason* greatly affected epistemology and metaphysics. Kant later presented his basic moral theory in the *Groundwork for the Metaphysics of Morals*, published in 1785. He argued that good will is the only unconditional good.[619]

> Kant put forward what he called the *categorical imperative*. While there are several versions of it, the second version goes as follows: *Never treat another human being merely as a means but always as an end.*[620]

Rights as Moral Issue

> Ethicists often associate rights with deontological theories.[621]

Totalitarian practitioners of the 20th century (Nazis and Bolsheviks) did not respect rights and philosophically they were not deontologists. On the other hand the most prominent deontologist, Kant, is also one of the most sympathetic to rights philosophers.

Since the deontological theory requires each person be viewed as an end in himself or herself, this translates to the idea that each person has an implicit

615. Ibid., p. 44.
616. Philosophy: Fried (1978), p. 28-29.
617. Philosophy: Johnson (2001), p.44.
618. Ibid., p. 45.
619. Philosophy: Hayden (2001), p. 109.
620. Philosophy: Johnson (2001), p. 45.
621. Ibid., p. 47.

"right" to be treated in a way which is implied in being treated as an end. The inherent value of the individual implies each individual has rights which should not be interfered with in certain ways.[622]

Rights and Social Contract Theories

The tradition of social contract theories provides a long-standing framework for rights. Social contracts can occur between individuals, or between individuals and government, and the idea is traditionally offered as an explanation and justification for the obligations human beings have to one another.[623]

Kant also strove to define the relationship between his moral theory to political applications in many of his later essays. In his 1793 essay, *On the Common Saying: This May be True in Theory, But It does not Apply in Practice*, he discusses the social justifications of a civil state. Specifically, he declares that a social contract which expresses the idea of humanity as an end in itself is the necessary justification for the civil state. Thus, in a just civil government, the rights of humanity are key. This constructs a mutual obligation on the part of each citizen to the rights of each other citizen. The state necessarily imposes some limitations to freedom, through the rule of law and the state's right to punish. Paradoxically, these limitations to freedom actually serve to increase freedom by prohibiting and redressing the wrongs present in a lawless society. Thus, Kant's view is that the government's value is to guarantee humanity's natural right to freedom, and further to provide a foundation to acquire other rights.[624]

Rawlsian Justice

John Rawls, a Harvard University professor, presented a new version of social contract theory in his 1971 book *A Theory of Justice*, in which he attempts to understand what types of social contracts between individuals would be just.[625]

> The problem is that we would each want rules that would favor us. Smart people would want rules that favored intelligence. Strong people would want a system that rewarded strength. Women would not want rules that were biased against women, and so on.[626]

Therefore, Rawls presented the idea that the individuals who decide upon the rules for society should be behind a veil of ignorance, through which they can't know what characteristics they will have.[627] These individuals must yet be

622. Ibid.
623. Ibid., p. 48-49.
624. Philosophy: Hayden (2001), p. 109-110.
625. Philosophy: Johnson (2001), p. 49.
626. Ibid., p. 49-50.

rational and self-interested, and have a basic understanding of human nature and human psychology. By endowing them with characteristics all humans presumably shares, Rawls effectively proposes a set of generic human beings.[628]

> Rawls argues that such individuals would agree to two rules:
>
> 1) Each person should have an equal right to the most extensive basic liberty compatible with a similar basic liberty for others.
> 2) Social and economic inequalities should be arranged so that they are both (a) reasonably expected to be to everyone's advantage and (b) attached to positions and offices open to all."[629]

Virtue Ethics

Virtue ethics dates back to ancient Greek philosophers Plato and Aristotle, who sought to define which virtues were associated with being a good person. The Greeks defined *virtue* as excellence, and thus ethics dealt with excellences in human character.[630] Rather than just focusing on action or decision-making like other theories, virtue theory addresses the question of moral character itself.[631] For example, it is a virtue in itself to have good laws and obey them.

Athens-born Plato (427-347 B.C.) argues in his great work, the *Republic*, that justice is good for its own sake, and is a fundamental virtue of an ideal, well-ordered society.[632] Aristotle (384-322 B.C.), born in Stagira in Macedonia, views the political state as natural, given the nature of human beings as political animals. Thus, humans attain their highest good—justice—only in a true and unperverted state.[633]

Individual and Social Policy Ethics

When examining issues of law and morality, a distinction must be made in the levels of analysis. From the macro perspective, a problem can be approached through analysis of social practices and public policy; from the micro perspective, it can be viewed through the lens of individual choice.[634]

Individual and social policy ethics are dialectically interrelated.

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627. Ibid., p. 50.
628. Ibid.
629. Ibid.
630. Ibid., p. 51.
631. Ibid.
632. Philosophy: Hayden (2001), p. 13.
633. Ibid., p. 24.
634. Philosophy: Johnson (2001), p. 51-52.

Changes in Commonly Accepted Ethics and Morals over Time

> Commonly accepted ethics and morals change over time. For example, slavery was an acceptable condition in Britain as late as the 1830s, in some parts of the United States as late as the 1860s, and in Brazil as late as the 1880s. Slavery reportedly continues in Sudan. As late as the 1910s the issue of women's suffrage was still being vigorously debated in Britain and the United States.[635]

The evolution of commonly accepted ethics and morals over time is a driving force of changes in the law.

3.2 The Nature of Rights

Definition of Rights

> The word "rights" is of relatively recent origin, although the ideas embodied in it trace their roots to biblical times. Nor is it free of ambiguities, multiple meanings, and deliberate misuses.[636]

> Rights, first of all, define relations of *persons*. One that is not a person cannot be a subject of law. Things do not have rights. To say "I have rights" (rights generally, without specifying which ones) is the same as to say "I am a person." What distinguishes a person from a thing is that a person does not fully exist for others, that is, by its nature it is not only a means for others but is an aim in itself and for itself, a being, in which any external action meets a resistance, something which does not unconditionally respond to the external action and is, therefore, an intrinsic thing, is *freedom*. In a real sense of the word (that is, not a sense of *liberum arbitrium indifferentile* but otherwise, in a sense of complete definiteness and constant specificity of any being, equally reflected in all its actions). That is, freedom as a characteristic sign of the person lies in a foundation of rights; because from a capacity to be free follows a requirement for independence, that is, its acceptance by others, that finds its expression in rights. But freedom by itself, as a quality of a separately considered person, does not constitute rights yet because here freedom is only a factual property of a person coinciding with his or her *power*. If I am left alone, I freely act within the limits of my power: there are no rights here. There are no rights either in a case when my action meets some impersonal natural actor which can be only an accidental limit on my power. Rights exist only when my free action meets a free action of another person. Here, in relation to that other person, my freedom which originally expressed only *my power* is affirmed by me as *my right*, that is, as something which another person is obliged to recognize, and the recognition is obligatory because, if freedom is equally a property of any person, then by denying freedom to another person I lose the objective foundation for my own freedom. That is, I may affirm my freedom towards others as something obligatory for them to recognize only in the case that I recognize as obligatory for myself to acknowledge the freedom of all others, or, in other words, to recognize the equality of everybody in that sense. That is, my freedom as right and not as power only, directly depends on recognition of an

635. Law: Lowenthal (2000), p. 187.
636. Philosophy: Dershowitz (2004), p. 15.

> *equal* right of others. Hence, we have arrived at the main definition of rights: *Rights is freedom delineated by equality.*[637]

Natural and Positive Law

> The concepts of person, freedom, and equality constitute the essence of natural law. The rational essence of law differs from its historical manifestations, or positive law.[638]
>
> In this sense natural law is that general algebraic formula in which history substitutes different real values of positive law.[639]

A Modified Theory of Natural Law

There has been a revival in interest in natural law theory recently (see, for example, Philosophy: George (2001).

Some modifications can be suggested to the classical theory of natural law. The classical theory of natural law is based upon a postulate of "equality." In practice all observed societies have a degree of inequality. To reconcile the theory with what may be observed, a modified theory of natural law would have the following basic propositions:

- To each person in a society there corresponds a function of power, which would be a generalized indicator of socio-economic and political status.
- A distribution function of power in society typically would be an unequal distribution function.
- A normal sphere of freedom (right) of each individual in a society can be described as his or her individual space.
- An unequal distribution of power among individuals in a society causes an expansion of individual space for high-powered individuals and contraction of individual space for low-powered individuals.
- In case of a collision of interests between individuals, if one individual enters the individual space of another individual, the person whose individual space has been violated resists the intrusion of his or her individual space with a certain resistance force.
- This resistance force is described by a function that increases quickly the deeper is the intrusion into the individual space.
- At a certain distance from the "center" of individual space, resistance force of a violated person equalizes the force of any intruding person, no matter how high-powered.

637. Philosophy: Solovyev (1999), p. 606-607.
638. Ibid., p. 607.
639. Ibid.

The described model would explain why, even in societies with the most unequal distribution of power, the high-powered persons are unable to squeeze out completely the individual space (freedom) of low-powered persons.

"Equality" in this context means the equality of an intrusion force of an intruding person to the resistance force of an intruded person, which is bound to occur at a certain distance from the "center" of the individual space of a violated person. This equilibrium maintains itself no matter what is the relative power of the intruding and intruded persons.

This modified theory of natural law would be reduced to a classical theory of natural law under the conditions of equal distribution function of power.

Though each society involves inequality, the degree of this inequality varies from society to society. For a description of the degree of power inequality in a society (and, therefore, the degree of unequal freedoms and unequal rights in that society), we might hypothesize a function measuring the distance between the observed distribution of power and equal distribution (similar to the way the Gini coefficient is used in economics to measure the deviation of real distribution of wealth from equal distribution).

Overall, this modified theory of natural law implies that everybody has rights (as in a classical theory of natural law), but, as George Orwell says, "some are more equal than others."

Legal Validity of Law

Born in Roccasecca, Italy, Thomas Aquinas (1225-1274) was a prominent medieval Scholastic philosopher. Scholasticism concerned itself with reconciling rational thought with the Christian faith and Catholic doctrine. In the Summa Theologica, Aquinas's most important work, he created a systematic introduction to theology which included the definition and classification of various types of law.[640]

> If we may translate the relevant portion of Thomas Aquinas's theory of natural law into more modern terminology (as far as possible), it might run as follows: The legal validity (in the focal, moral sense of "legal validity") of positive law is derived from its rational connection with (i.e. derivation from) natural law, and this connection holds good, normally, if and only if (i) the law originates in a way which is legally valid (in the specifically restricted, purely legal sense of "legal validity") and (ii) the law is not materially unjust either in its content or in relevant circumstances of its positing.[641]

640. Philosophy: Hayden (2001), p. 43.
641. Philosophy: Finnis (2000), p. 27.

Are Rights a Reality or an Illusion?

The political theory of liberalism draws many of its components from English philosopher and political theorist John Locke (1632-1704). In his greatest political analysis, *Two Treatises of Government*, published in 1690, Locke declares that the actions of people are governed by natural law. In Locke's view, in the state of nature each individual is required to preserve his or her basic natural rights to life, which Locke identifies as the rights to life, liberty, and property. Furthermore, each individual should strive to help others achieve the same goals. The difficulties one encounters in preserving these rights in the state of nature lead to a desire for a form of government, which is then created via social contract when all agree to bestow a political authority with the right to execute the law of nature.[642]

Much as rights sound like an ideal, however, most individuals who set public policy prefer the more utilitarian analysis. The goal is typically to choose the course of action which produces the greatest balance of satisfaction over suffering and is calculated by taking into account the effects of a given proposal on every individual."[643]

Critics of social contract and natural law theories, such Jeremy Bentham (1748-1832), considered to be the founder of the British utilitarian tradition, have argued that these theories are merely abstracted, unhistorical "fictions." Bentham believed ideas such as Locke's "natural" liberty were flawed because humans have always lived in society. He further asserts that laws are simply commands of state authority rather than of nature or God.[644] "Reasoned social reform, Bentham argued, requires detailed attention to empirical circumstances, and that in turn requires 'strength of mind to weigh, and patience to investigate.' The language of natural rights, by contrast, 'is from beginning to end so much flat assertion: it lays down as fundamental and inviolable principle whatever is in dispute.'"[645]

Rights as a Normative Value

The normative value of rights helps explain the antipathy in modern political theory between "communitarians" and defenders of rights.[646] The communitarian's perspective on human society is that culture or community provides the terms around which people make their lives. Therefore, it would be incorrect to believe that each individual lives life on his or her own terms, and

642. Philosophy: Hayden (2001), p. 71-72.
643. Philosophy: Waldron (1996), p. 581.
644. Philosophy: Hayden (2001), p. 118.
645. Philosophy: Bentham (1796).
646. Philosophy: Sandel (1984).

may even be dangerous if it leads people to neglect or undermine the communal structures which actually make life bearable.[647]

Here is an example of such an argument:

> We live in numerous communities of ascending sizes. We are social animals and must take that into account. We are not and should not be completely empowered, self-absorbed autonomous agents seeking only our own paths to our personal good. We must also be self- and other-regarding,[648] and as a result we are enjoined to actively engage our fellow community members in an ongoing dialogue that will determine the policies by which we may all live. The common vision of a shared good that follows from this process binds every individual in the community. It is in this way that the shared community world-view limits personal autonomy. Without this community authority over the individual, the ideal of a participatory democracy will become a fiction. And when that happens, we will all be diminished.[649]

Nevertheless, there is an important distinction to be made between the moral and sociological issues at play. Scientifically, it may be possible to explain a person's life simply in terms of social and cultural frameworks, yet this neglects to address the claim about the value of human life. Regardless of the frameworks of its origin, the life of an individual is his and feels important to him.[650]

There are also more serious counter-arguments than the ones simply based on pointing to a logical mistake. Communitarian justice, insofar as it accepts the primacy of the community over individual and to that extent undermines the significance of the individual and individual rights, is a conception of justice about which one might have grave reservations. It is said that justice is a *communal* virtue rather than of people and their individual situations. Looking back over the Western tradition in social philosophy, one might well object to calling community-centered justice a virtue at all. The virtues of the community, like the virtue of beta-carotene and vitamin C, are not what that philosophy has mostly in mind. The virtues in question are the virtues of persons and their individual existential situations, and are in that sense questions about their individual qualities and individual rights.[651]

Individualism and Community in Moral Context

> Individualism and community by themselves do not represent a direct relationship to moral norm, and are by their nature neither evil nor good, but may become evil or good depending on how they are affirmed. Thus individualism, giving preference to

647. Philosophy: Taylor (1985), p. 187-210.
648. See: Philosophy: Slote (1992), p. 126-144.
649. Philosophy: Boylan (2001), p. 198.
650. Philosophy: Waldron (1996), p. 582.
651. This paragraph was stimulated by reading: Philosophy: Solomon (2001), p. 170, 172, although the views expressed here may not coincide with the views of Robert Solomon.

> individual quality, is evil if the person itself lacks ideal content: here the evil is not individualism generally, not a self-affirmation of a person, but a lack of content of that self-affirmation. Conversely, individualism is a good thing when a person has a higher [moral] content and, affirming itself, affirms and implements some universal [moral] idea; but a universal [moral] idea presupposes communication and solidarity of a person with everybody, and, thus, real individualism requires intrinsic communitarianism and is inseparable from it. Similarly, communitarianism is a good thing only when a communal unity is capable of covering by itself all the potential richness and completeness of life's contents, which is impossible without the development of a person; that is, real communitarianism is inseparably connected with real individualism.[652]

Rights and Responsibilities

Some critics[653] of rights do not provide a sufficient basis for community morality because they focus too much on the individual. Instead, they argue, we should put more emphasis on responsibilities. "This is a misconception (except insofar as the self-indulgent trend in modern society tends to talk only about rights, as if they could exist without engendering concomitant responsibilities). Indeed, rights are correlative to duties, so that talking about rights is a way of talking about people's responsibilities. Moreover, most rights are conceived in universal terms: if P has a right against Q, then Q will usually have a similar right against P so that Q's own duties are reciprocated by responsibilities that his right in turn imposes on P."[654]

Rights and Material Interests

Other critics maintain that a humane society should focus more on needs than rights. "This too is a misunderstanding, confusing as it does the content of the claim with the normative form in which that claim is couched. (It is like saying we should concentrate less on duties and more on truth telling!) The language of rights as it is nowadays understood is perfectly accommodating to a concern about human need. To invoke a right is to predicate a duty on some concern for a certain individual interest,[655] and while the interest in question is often an interest in liberty, it might equally be an interest in some material satisfaction."[656]

652. Philosophy: Solovyev (1999), p. 566-567.
653. Philosophy: Glendon (1991).
654. Philosophy: Waldron (1996), p. 576.
655. Philosophy: Raz (1986), p. 166.
656. Philosophy: Waldron (1996), p. 576.

Axiomatic Foundation of Rights

The idea of rights attaches an irrefutable worth to the existence of each person, regardless of any virtue or ability which may determine his or her specific value to others. This was traditionally viewed from a religious perspective, hinging on the idea that God's creating each individual imbues him or her with some value, and we should thus treat each other accordingly.[657]

3.3 Differences between Law and Morality

A Question about the Justification for Changes in the Legal System

As the reader can see, the logic of the discussion in the Section "The Objective" will lead to some suggestions for changes in the law. It is difficult to justify such changes without reference to moral norms.

Remarkably enough, professional jurists often display a disdain for mentioning the relationship between morality and law and instead make distinctions between them. We feel obliged to address these intellectual distinctions and show that that such jurists are missing an obvious truth.

Positivism and Anti-Positivism

Legal positivism is a well known jurisprudential theory urging the separation of law and morality. There is a sharp distinction drawn between what it is for a norm to exist as a valid law and what it is for a norm to exist as a valid moral standard. Thus, it is possible for even a system of iniquitous norms to count as system of law.[658]

Post World War II, a modern theory of legal positivism, advanced by English proponents, led to heated debate in the United States during the 1960s.[659] Legal positivist H. L. A. Hart (1907-1992), Professor of Jurisprudence in Oxford University from 1952 to 1968, maintained there is no overlap between law and morality, such as suggested by natural law theorists.[660] One foundation to legal positivism was the work of nineteenth-century philosopher John Austin, who believed law was simply an order supported by threats.[661]

In contrast, the idea behind anti-positivistic jurisprudential theories, such as classic natural law tradition, stresses the nature of law has some inherent tie

657. Philosophy: Locke (1689).
658. Philosophy: Shiner (1996), p. 436.
659. Philosophy: Minda (1996), p. 47.
660. Philosophy: Hayden (2001), p. 151.
661. Philosophy: Minda (1995), p. 47.

to morality. Thus, the question of whether or not a candidate or system of norms should count as a system of law depends largely on the valid substantive norms of morality.[662]

Basis for Positivistic Position

Positivism's idea of the separation of law and morality stems from the real differences between law and morality as normative systems.[663]

First, laws are brought into existence, and subject to procedures of change or cessation. In non-democratic societies, the command of the ruler is sufficient to make a norm law, while in democracies, a norm can become a law through the process of a legislative body. Moral norms, on the other hand, can evolve and develop, become established, or vary over time.[664]

Another difference is that the laws of a society are *public*. Any citizen may have access to legislation which is written down and published in official records. Morality, however, is not expected to be public in this sense.[665] The public nature of the law effectively results in public access to many of the law's sub-systems and mechanisms. "These includes sub-institutions for the enforcement of law, for the determination of breaches of the law, for the settlement of disputes and the administration of activities under the law, for the imposition of sanctions for breaches of the law, for authoritative interpretation of the law, and for the use by citizens of the facilitative aspects of the law." The analog of these functions regarding moral norms are handled by members of society within their social interactions.[666]

> Joseph Raz asserted that legal systems as a species of normative system have the characteristics of being "comprehensive," "supreme," and "open," and that, as a result, the legal system of a society is the most important normative system of that society.[667]

Is "Morality" a Jurisprudentially Neutral Term?

The previous discussion has mostly treated law and morality as separate entities, independent of any jurisprudential dispute about the relation they have to one another. The view that law and morality are distinct normative systems must be held by an observer from without the system who merely observes social fact. "Law and morality are thought of in extensional terms; they are pictured by spatial images, as occupying areas with boundaries, and as overlapping or not in

662. Philosophy: Shiner (1996), p. 436.
663. Ibid., p. 441.
664. Ibid., p. 441-442.
665. Ibid., p. 442.
666. Ibid.
667. Philosophy: Raz (1975), p. 150-154.

complex ways. The boundaries of neither law nor morality are coincident with the boundaries of life."[668] Such a perspective lends itself to positivist theory, including its limitations of the law. Anti-positivists, however, perceive law and morality to be related, and possibly even interdependent.

Positivist philosophy on this matter can be illustrated by the following citation:

> It is possible to take this truth [about the relationship between morality and law] illicitly: namely that a legal system *must* exhibit some specific conformity with morality or justice, or *must* rest on a widely diffused conviction that there is a moral obligation to obey it....Though this proposition may, in some sense, be true, it does not follow from it that the criteria of legal validity of particular laws used in a legal system must include, tacitly if not explicitly, a reference to morality or justice.[669]

Support for the positivist point of view can be found even among the best-known contemporary American jurists:

> What law does is not helpfully described as backing up morality, and even if it were, it would not follow that when the relevant moral principles are contested the judges should choose between the contestants.[670]

This viewpoint disguises a position that is philosophically very precarious. It is rooted in one-sided overstatement of the socially temporal aspect of truth while underestimating the absolute meaning of truth, as can be seen from the following citation from this self-proclaimed pragmatist.

> "Truth" is a problematic concept for a pragmatist. Its essential meaning, after all, is observer independence, which is just what the pragmatist is inclined to deny. It is no surprise, therefore, that the pragmatists' stabs at defining truth — truth is what is fated to be believed in the long run (Pierce), truth is what is good to believe (James), or truth is what survives in the competition among ideas (Holmes) — are riven by paradox. The pragmatist's real interest is not in truth at all but in belief justified by social need.[671]

Pragmatism is at its best when it is used to discuss ways of achieving an aim rather than formulating convincing priorities among different competing values. It is not surprising that, as we will see later, Posner's denial of the independent worth of truth leads to the diminishing of the value of constitutional norms and rights in the name of executive efficiency.

The anti-positivist stand maintains that since, legal obligations may be enforced by the threat or use of legal force, the existence of the force must be morally justified. Thus, legal theory is burdened with identifying the circumstances in which legal enforcement is morally justified.[672]

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668. Philosophy: Shiner (1996), p. 448.
669. Philosophy: Hart (1997), p. 185.
670. Philosophy: Posner (2000), p. 108.
671. Philosophy: Posner (2001)(2), p. 464.
672. Philosophy: Frey (1991), p. 138.

Yet the legal positivists reject "the internal morality of law" upon the belief that the existence or non-existence of law is irrelevant from a moral perspective. Secondly, there is an assumption that the law is a unidirectional projection of authority from the government to the people, rather than the result of purposeful interactions between the citizen and his government.[673]

To support the anti-positivist position, one may refer to the history of the movement "in defense of the law" in the former Soviet Union and see that moral pressure is an essential prerequisite for any serious legal and constitutional reforms.

Distinction between Law and Justice

The relationship between law and morality can be formulated as a distinction between law and justice.

One of the several important themes that emerge in Derrida's *Force of Law* is a distinction between law and justice in that justice is *not* deconstructible while law *can* be deconstructed.[674]

> When this is not understood, there is a tendency to collapse justice into positive law, which results in a sort of naive legal positivism, the view that there is no justice apart from the rights and remedies available within the existing legal system. In order to combat this position, Derrida adamantly insists that justice *cannot* be collapsed into law. One can never say, in good conscience, that "the law is [completely] just."[675]

3.4 Why Are Rights Important?

Concern for Rights as a Trait of Modern Times

Geneva-born Jean-Jacques Rousseau (1712-1778) is considered one of the greatest intellectuals of the Enlightenment. In *The Social Contract*, he explores why it is that people accept the authority of society. Following in the footsteps of Hobbes and Locke, Rousseau expands on the idea of the social contract to explain how government behaves. The terms of the voluntary agreement between the citizens and government determine the mechanisms and level of oversight the political authority can exercise. Thus, while sovereign authority continues to exist under the contract, it must be obeyed because the authority is founded on the freely-given consent of the people it governs. Further, the authority must recognize the equality and autonomy that each individual deserves. This serves to remove the illegitimate power of political oppression.[676]

673. Philosophy: Fuller (1964), p. 204.
674. Philosophy: Litowitz (1997), p. 91.
675. Ibid, p. 94.

> It is a commonplace of intellectual history that what chiefly separates the political thought of the moderns from that of the ancients and the medievals is a concern with individual freedom. Rousseau, in the most famous line from the *Social Contract*, expressed this concern brilliantly when he wrote, "Man is born free and everywhere he is in chains."[677]
>
> One can only marvel at how much of modern political philosophy Rousseau crystallized in these words. It is the birthright of every human being to be free, and it is the task of political philosophy to find an arrangement of the institutions and practices of political society that will secure this right for each of its members. A society that falls short of this ideal is an unjust society. It denies some of its members this right. It keeps them in chains.[678]

The Key Argument about the Value of Rights

> An important lecture by one of the most prominent political theorists of our time, T. H. Greene, supplies the key argument about the value of rights. In brief, Greene's argument is that individual liberty is realized only through the development of those human faculties by whose exercise men and women could "make the best of themselves."[679]

Connection of the Key Argument to Classical Political Theory

Greene's thought is clearly influenced by British liberal J. S. Mill (1806-1873) in this argument. In his 1859 work *On Liberty*, Mill presents the utilitarian argument that individuals are free to do whatever they wish, so long as they do not harm others. "Mill's 'liberty principle' promotes utility by protecting humanity's 'permanent interests' in security and autonomy, interests which Mill believes are vital for obtaining happiness."[680] "The appeal of Greene's argument to the development of our distinctively human faculties echoes Mill's own appeal to self-development in chapter 3 of *On Liberty*. Mill, of course, was concerned with how custom and popular opinion worked to stunt such development and crush its expression in a man's or woman's individual personality, and the argument at the heart of *On Liberty* is an argument for absolute freedom of purely personal conduct, freedom to live one's life by one's own lights and plans, as a necessary condition for self-development and the individuality that results from it."[681]

> He who lets the world, or his own portion of it, choose his plan of life for him has no need of any other faculty [more] than the ape.... He who chooses his plan for himself employs all his faculties. He must use observation to see, reasoning and judgment to

676. Philosophy: Hayden (2001), p. 80.
677. Philosophy: Rousseau (1988), p. 3.
678. Philosophy: Deigh (2001), p. 151.
679. Philosophy: Greene (1986), p. 194-212.
680. Philosophy: Hayden (2001), p. 136.
681. Philosophy: Deigh (2001), p. 153.

> foresee, activity to gather materials for decision, discrimination for decision, and when he has decided firmness and self-control to hold to his deliberate decision.[682]

Resume of the Value of Rights

"Rights are important because each of us wants a life governed in large part by his own thinking, feeling and decision-making."[683]

3.5 Categories of Rights

Fundamental Rights

More rights are protected by law in the United States than in most other societies. This is primarily due to the emphasis on individual liberties upon which the United States constructional system is founded.[684]

Under such conditions not all rights will be considered equal but a hierarchy of valued liberties will emerge. The freedoms that Americans deem the most important are denominated fundamental rights.

> The justices of the Supreme Court have defined fundamental rights to be those without which neither liberty nor justice would exist. They are freedoms essential to the concept of ordered liberty, inherent in human nature, and consequently inalienable (*Palko v. Connecticut, 1937*). As such, these are rights that should prevail if they come in conflict with governmental authority or other, less valued, liberties. The Supreme Court has determined that with only a few exceptions the provisions of the Bill of Rights meet the definition of fundamental liberties.[685]

Due Process of Law

The Fifth Amendment of the Constitution protects an individual, ensuring he or she will not be deprived of "life, liberty, or property without due process of law." The due process doctrine exists to ensure fair procedure when the government imposes a burden on an individual. By preventing arbitrary uses of authority and mistaken deprivations, as well as affording persons a chance to know and respond to the charges against them, it also provides a sense of legitimacy to official behavior.[686]

> The essential purpose of the due process clause is to prevent government from acting arbitrarily. The focus is on the procedure itself, unlike other freedoms protected

682. Philosophy: Mill (1975), p. 56.
683. Philosophy: Waldron (1996), p. 583.
684. See, for example: Law: Power (2000).
685. Law: Hall (1992), p. 323.
686. Ibid., p. 236.

> in the Bill of Rights, where the concern is with the substance and scope of protection. The right to due process of law exists in both the criminal and civil justice systems. When "life" is at stake, procedures ensuring a fair trial and appeals process are required by due process as well as by the Sixth Amendment.[687]

The origins of due process trace back to chapter 39 of the Magna Carta in 1215, which stated, "No free man shall be captured or imprisoned…or outlawed or exiled or in any way destroyed except by the lawful judgment of his peers and by the law of the land."[688]

For protection of fundamental rights which are not explicitly mentioned in the Constitution, the courts look to the Fifth and Fourteenth amendments. While early in their history the courts focused more on the procedure clause, during the twentieth century they shifted their focus to the word "liberty", so that this right is not unduly infringed. "By the 1950s the due process clause had been interpreted to protect many unenumerated rights — from a student's right to study a foreign language to a criminal suspect's right to refuse to allow the police to pump his stomach for evidence." This emphasis on the right of liberty is also referred to as substantive due process, as opposed to the focus on procedural due process of the earlier courts.[689]

It should be stressed that "the right to privacy" is an unenumerated right.

> The Supreme Court recognized that the Bill of Rights was not written to ensure the most efficient, cost-effective system government. It was written to protect the individual. "The Constitution recognizes higher values than speed and efficiency," the Court explained. "Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials."[690]

> Depending on the individual and governmental interests at stake, persons may be entitled to a full-blown adversarial proceeding in which both sides are represented by lawyers and allowed to call witnesses, while at other times individuals may have only the right to appear before an administrative official and present their own case. But no matter what form the hearing takes, the due process clause requires that it be a real and meaningful test, and when the individual interests are high, it must take place before a person can be deprived of life, liberty, or property.[691]

The due process clause is closely tied to the compulsory clause of the Sixth Amendment, which provides the following as part of the trial rights of a defendant: "In all criminal prosecutions the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor."[692]

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687. Law: Alderman (1991), p. 185.
688. Ibid.
689. Ibid., p. 316.
690. Ibid., p. 187.
691. Ibid., p. 188 (my emphasis).
692. Ibid., p. 253.

> The right of compulsory process and its companion, the confrontation clause, directly provide defendants with their most basic right: the right to present a defense. As Chief Justice Earl Warren wrote for the Supreme Court, "The right to offer testimony of witnesses, and compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies."[693]

In the words of the lawyer Henry Furst,

> the Sixth Amendment is the paramount amendment. It guarantees all our other rights, including our First Amendment rights, because it provides for a fair trial. It prevents the press and the courts from being taken over, as they are in a totalitarian country.[694]

Rights of Non-Citizens on the Territory of the United States

Fundamental rights — including the due process guarantee — are considered to be important enough to be extended to all residents of the United States including non-citizens. Giving the defendant "his day in court" is the essence of due process of law.[695] The right to due process is extended even to illegal immigrants waiting for deportation.[696]

3.6 Categories of Privacy

An Anthropological View

Jean Bethke Elshtain has claimed that "distinctions between public and private have been and remain fundamental, not incidental or tangential, ordering principles in all known societies save, perhaps, the most simple."[697] She points out that this distinction exists even within the most primitive societies, creating a divide between activities which may be seen by others and those, due to taboo and shame, which must be done in private. Anthropological studies support the idea that privacy is a cross-cultural and cross-species universal.[698] *"They have shown that virtually all societies have techniques for setting distances and avoiding contact with others in order to establish physical boundaries to maintain privacy. Concealment of genitals, seclusion at moments of birth and death, the preference for intimacy or sexual relations*

693. Ibid.
694. Ibid., p. 254.
695. Law: Ducat (1992), p. 629.
696. *Japanese Immigrant Case*, 189 US 86 (1903); *Wang Yang Sung v. McGrath*, 339 US 33 (1950); see: Law: Asimow (1988), p. 50.
697. Anthropology: Elshtain (1981), p. 6.
698. Anthropology: Mead (1961 [1928/1949]).

(usually performed away from the view of others or at least away from the view of children), restricted rules of entry into homes by nonresidents, and the secrecy of group ceremonies are the most common examples of setting such boundaries."[699]

Privacy also serves to filter unwanted interaction.[700] "Restriction of access to oneself or the flow of information about oneself by withholding feelings and expression, averting one's eyes, facing a wall and so on are more subtle ways of putting up social barriers."[701] Other marks of this universal need to protect the private sphere include the near universal tendencies of societies to use surveillance. This surveillance is intended to prevent individuals from violating group norms and intruding on privacy.[702] The value of privacy protection can be seen in how strongly enforced the social rules and taboos are.[703]

A Connection between Rights and the Concept of Privacy

> *There are many definitions of privacy. Those definitions in which the idea of restricted access to people and personal information play a role have been especially popular.*"[704]
>
> *For example, privacy has been defined as limitations on others' access*
>
> 1. *To an individual's life experiences and engagements;*[705]
> 2. *To certain modes of being in a person's life;*[706]
> 3. *To an entity that possesses experiences.*[707]
>
> *It has also been defined as the condition of being protected from unwanted access by others.*[708]
>
> *In addition to protecting freedom and self-expression, it is suggested, the privacy of the backstage protects us from the unfairness of being misjudged by strangers who don't have time to put our informal speech and conduct into broader context.*[709]
>
> *Ruth Gavison's influential definition of restricted access includes, in her words: "such 'typical' invasions of privacy as the collection, storage, and computerization of information; the dissemination of information about individuals; peeping, following, watching, and photographing individuals; intruding or entering 'private' places; eavesdropping, wiretapping, reading of letters.*[710]

699. Law: DeCew (1997), p. 12 (my emphasis).
700. Anthropology: Ingold (2002), p. 495.
701. Anthropology: Westin (1967), p. 59.
702. Anthropology: *Journal of Social Issues* (1977); Benn (1983).
703. Law: DeCew (1997), p. 12-13; see also: Anthropology: An-Na'im (1992); Wilson (1997).
704. Philosophy: Allen (1988) (my emphasis in this and the following paragraphs).
705. Philosophy: O'Brien (1979).
706. Philosophy: Boone (1983).
707. Philosophy: Garrett (1974).
708. Philosophy: Bok (1983).
709. Philosophy: Rosen (2000), p. 12.
710. Philosophy: Gavison (1980).

Without Privacy there is no Autonomy of Person, and Without Autonomy there is no Freedom

Many philosophical arguments have been made to justify the right to privacy, but the most convincing arguments consider privacy to be an instrumental value which is necessary for the pursuit and stability of other basic rights such as property, bodily security, and freedom. The necessity of privacy for freedom, or autonomy, provides it with a strong moral foundation as well.[711]

> According to James Reiman, without privacy there are two ways in which our freedom can be appreciably attenuated.[712]
>
> First, without privacy, the individual becomes subject to having his or her behavior monitored and controlled by others, resulting in a possible extrinsic loss of freedom. "Sensitive information collected without one's permission and knowledge can be a potent weapon in the hands of those in positions of authority. Such information might be used to deprive individuals of certain rewards and opportunities, such as job promotions and transfers, or may preclude eligibility for insurance and other important necessities. This thwarts our autonomy, our basic capacity for making choices and directing our lives without outside interference. As Carol Gould has observed, "privacy is a protection against unwanted imposition or coercion by others and thus a protection of one's freedom of action."[713]

Second, most individuals will change their behavior when they are aware of others watching. Without privacy, the individual may also risk an intrinsic loss of freedom resulting from such self-conscious behavior. "As Richard Wassestrom puts it, without privacy life is often 'less spontaneous and more measured.'"[714]

Thus, without privacy, the individual is more vulnerable to both the external manipulation and control of others, and the internal self-inhibition, both of which hinder the pursuit of the individual's goals and activities. "Foucault believes that this is precisely the 'panoptic effect' that most prison systems seek to achieve whereby the inmate feels that he or she is in a 'state of conscious and permanent visibility that assures the automatic functioning of power.'"[715]

Main Types of Privacy

> Constitutional uses of "privacy" include three types:
>
> 1. Privacy used in a physical sense, to denote seclusion, solitude, security, or bodily integrity, at home and elsewhere;

711. Philosophy: Spinello (2000), p. 103.
712. Philosophy: Reiman (1995), p. 27-44.
713. Philosophy: Gould (1989), p. 44.
714. Philosophy: Wassestrom (1984), p. 328.
715. Philosophy: Foucault (1979), p. 200.

2. Privacy used in an informational sense, to denote confidentiality, secrecy, or anonymity, especially with respect to correspondence, conversation, and records;
3. Privacy used in decisional sense, to denote liberty, freedom, choice or autonomy in decision-making about sex, family, and health care.[716]

Standards of Fair Information Practices

In certain cases in the name of "privacy" some statutes establish qualitative standards for the collection, use, transfer, and storage of information. Fair information practices require that data collectors:

1. Protect personal information from public exposure.
2. Take reasonable steps to verify and update information.
3. Allow individuals access to records of which they are the subject.
4. Obtain consent prior to otherwise unauthorized uses of information.

The Freedom of Information/Privacy Act exists precisely for the purpose of protecting fair information practices in the United States.[717]

The Freedom of Information Act (FOIA) gives citizens the ability to file a request for specific information from a government agency and provides recourse in federal court if that agency fails to comply with FOIA requirements. Over the last two decades, beginning with Reagan, this law has become increasingly diluted and has been circumvented by each succeeding administration. Under the G.W. Bush Administration, agencies make extensive and arbitrary use of FOIA exemptions (such as those for classified information, privileged attorney-client documents and certain information compiled for law enforcement purposes) often inappropriately or with inadequate justification. Quite commonly, the Bush Administration simply fails to respond to FOIA requests at all. Whether this is simply an inordinate delay or an unstated final refusal to respond to the request, the requesting party is never told.[718]

Privacy in the World

The belief that privacy is a fundamental human right is recognized by Article 12 of the Universal Declaration of Human Rights: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."[719]

It is also declared in Article 17 of the International Covenant on Civil and Political Rights.[720]

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716. Philosophy: Allen (1996), p. 140.
717. Ibid.
718. Law: Phillips (2006), p. 38-39.
719. Cited by: Law: Singh (2000), p. 185.
720. Law: Donnelly (2003), p. 24.

Around the world, protecting a vast range of privacy interests is considered to be an integral function of government. This is reflected in that almost every country's Constitution limits government access to homes, possessions, and persons, thus providing for some degree of physical, informational, and decisional privacy for its citizens.[721]

> Thus Chapter 2, Article 6, of the Swedish Constitution provides for physical and informational privacy, declaring that: "Every citizen shall in relation to the community be protected against forced encroachment on his body...[and] shall be protected against any bodily search, search of his home or similar encroachment as well as against any examination of letters or other confidential correspondence and against eavesdropping or recording of telephone conversations or other confidential communication."[722]

Privacy in the US Constitution

The First Amendment provides that "Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble." The Supreme Court has held that this provision guarantees a right of free association for individuals and a right of privacy for groups. Restricted access to meeting places is the demand for physical privacy; restricted access to membership lists, the demand for informational privacy.

The conception of the physical privacy of the home is reflected in Third Amendment strictures on access to private houses: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

The privacy norms that motivated the Third Amendment are highly consonant with the privacy norms that underlie the Fourth Amendment. Also carving out a sphere of physical household privacy, the Fourth Amendment asserts that: "The right of the people to be secure in their persons, houses papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause...particularly describing the place to be searched, and persons or things to be seized." Fourth Amendment cases since *Katz v. United States*, 389 US 347, 351 (1968), have ascribed a right to a "reasonable expectation of privacy." To fall under the protection of the Fourth Amendment's limit on search and seizure: "[A] person must...exhibit...an actual (subjective) expectation of privacy and...the expectation [must] be the one that society is prepared to recognize as 'reasonable'."

> The Fifth Amendment: "[N]or shall any person... be compelled in any criminal case to be a witness against himself."[723] "Personal dignity and integrity, both intimately tied to the ability to keep information about ourselves from others, are demeaned

721. Law: Blaustein (1971).
722. Law: Swedish Constitution (1971).
723. Philosophy: Allen (1996), p. 146-147.

when the state is permitted to use tactics that make the unwilling to incriminate themselves."[724]

The Supreme Court has also held that a fundamental "right of privacy" derived from the 14th Amendment limits government interference with autonomous personal decision-making respecting birth control and abortion.[725]

In general, it should be noted that the concept of privacy has been evolving in the US from the concept of nonintrusion (e.g., the Fourth Amendment to the US Constitution offering protection against unreasonable searches and seizures) to a concept of noninterference (e.g., the *Roe v. Wade* decision giving a woman the right to choose to have an abortion) to limited information access (e.g., Privacy Act of 1974 restricting collection, use, and distribution of information by federal agencies).[726]

Reduction of Physical Privacy to Informational Privacy

The claim that the Bill of Rights privacy jurisprudence relates both to physical and informational privacy raises an interesting conceptual question. Is physical privacy reducible to informational privacy? The Fourth Amendment restricts access to people, households, and other private areas, while also restricting access to information of the sort that might be contained in a person's papers, effects, and conversations. Since physical contact can yield new information, one might take the view that concerns about restricting physical access ultimately boil down to concerns about information learned through sensory exposure.[727]

The Publicity Principle

Rules and conditions governing private situations should be clear and known to the persons affected by them.[728]

In effect, we can plan to protect our privacy better if we know where the zones of privacy are and under what conditions and to whom information will be given.[729]

Comparison of Privacy Regulation in Europe and in the United States

In all of history, we have found just one cure for error — a partial antidote against making and repeating grand, foolish mistakes, a remedy against self-deception. That antidote is criticism....Alas, criticism has always been what human beings, especially leaders, most hate to hear.[730]

Privacy legislation, national privacy statutes, and now the most comprehensive protection for information privacy in the world all appeared first in Europe. That protection reflects apparent consensus within Europe that privacy is a fundamental

724. Philosophy: Berger (1978).
725. Philosophy: Allen (1996), p. 142.
726. Philosophy: Baird (2000), p. 206.
727. Philosophy: Allen (1996), p. 148.
728. Philosophy: Baird (2000), p. 210.
729. Ibid.
730. Philosophy: Brin (1998), p. 10-11.

> human right, with few if any other rights on a par with it. In the context of European history and civil law culture, that consensus makes possible extensive, detailed regulation of virtually all activities concerning "any information relating to an identified or identifiable natural person." It is difficult to imagine a regulatory regime offering greater protection to information privacy, or any greater contrast to US law.[731]

Within the United States, fundamental rights are generally expressed in the federal Constitution. However, with the exception of the Thirteenth Amendment, which prohibits slavery, rights articulated in the Constitution are generally protected against government, but not private parties. Also, constitutional rights are usually "negative" and do not go further than prohibiting the government from taking certain actions. In other words, unlike "positive" rights, constitutionally defined rights do not require the government to take action to protect those rights.[732]

Thus, "an assessment of constitutional rights is essential to any discussion of privacy regulation in the United States precisely because the Constitution constrains the power of the government to act on the citizenry and to create and enforce laws regulating conduct among citizens."[733]

The Fourth Amendment right of privacy is of limited use outside a criminal defense situation. Like the other constitutional rights, it only applies to government activities. In addition, the Supreme Court has rule that it neither applies to readily discernible activities and objects nor to objects controlled by a third party.[734]

Furthermore, the Fourth Amendment requires there be a "reasonable" expectation of privacy. This requirement significantly affects the extent of its usefulness against societal encroachment. As new technology is developed, the concept of "reasonable" often lags far behind, severely constricting the Fourth Amendment's effectiveness. "As a result, the Court evaluates privacy issues presented in the context of new technologies against measures of reasonableness that were formed without regard for those technologies. By the time society incorporates into its view of "reasonableness" the benefits and risks of a new technology, the Court is likely to have already decided one or more cases determining the applicable expectation of privacy based on the inapplicable measure of reasonableness. Society's views have evolved, but the precedent established by those cases is not likely to change."[735] Other authors share this opinion.[736]

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731. Law: Cate (1997), p. 47-48.
732. Ibid., p. 50-51.
733. Ibid., p. 51.
734. Ibid., p. 58.
735. Ibid., p. 59.
736. Law: Agre (2001), p. 202-209.

> As a result of the absence of legal protection of privacy against private parties, personal information has become an openly marketable commodity.[737]

3.7 May Fundamental Rights be Violated?

A Point of View: Theoretical American Jurisprudence

> The present civilization differs so from the civilization of our fathers that our fathers' law has, in many respects, become a sorry guide. And in none more than in the values it sought to maintain.[738]

This citation from Schwartz, about Posner, illustrates one of the latest theoretical trends that may exist in the current US judiciary:

> No "academic..." has been more important in the emerging contemporary jurisprudence than Richard A. Posner, who developed his approach to law while he was a professor at the University of Chicago Law School.[739]
>
> Cost-benefit analysis (CBA) is ... a general tool of modern economics and Posner's economic analysis of law uses CBA as a general tool in legal analysis as well....
>
> A striking application of CBA to law is contained in two Posner articles on the exclusionary rule (which bars admission of illegally seized evidence in a criminal case) under the Fourth Amendment....
>
> Posner gives the following example: "Suppose that B, the cost to the defendant of the search in terms of damage to property or seizure of lawful private communications is $1,000; P, the probability that he could not be convicted without this search, was one percent at the time of the search; and L, the social cost (in reduced deterrence and prevention of crime) of not convicting him is $50,000." Such a search would be illegal under CBA. Suppose, however, that "the evidence obtained in the search is essential for conviction." In that case, under the Posner analysis, "even though the social cost of the search is only $1,000, the exclusionary rule will impose punishment of $50,000 on the society." Hence, to Judge Posner, the exclusionary rule clearly fails the CBA test: "the private (and social) cost imposed on the government may greatly exceed the social cost of the [police] misconduct."[740]

Key Constitutional Rights as Special Points

If the constitutional rights of the object of surveillance are weighted at just $1,000, then, of course, any violation of his rights is "justified." I, however, refuse to put such a low price on my rights. Indeed I think that such rights as freedom of speech, the right to privacy, and the right to be free from illegal searches, are points where arbitrary valuation is misleading: these are what is known as

737. Law: Barnscomb (1994).
738. Law: Schwartz (1993), p. 554.
739. Ibid., p. 566; see also: Law: Cane (2003).
740. Ibid., p. 571-572.

"special points" in mathematics, or points where "the function" ceases to be differentiable, and may have infinite values. Life experience tells us that certain rights are so essential that they outweigh more "ordinary," rational considerations. For me, to value the violation of my privacy at $100,000,000 would be too low.

Legal Precedents with Respect to Privacy Violations

The Fourth Amendment is the most direct constitutional protection of our right to privacy.[741]

The historic birth of the right of privacy is traced to the Warren and Brandeis article, "The Right to Privacy," in the *Harvard Law Review* in 1890:

> That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of the society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, — the right to be left alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession — intangible, as well as tangible."[742]

In 1928, Justice Brandeis, already a judge of the Supreme Court, in his dissent in the case *Olmstead v. United States*, wrote:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feeling and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

The Supreme Court adopted the Brandeis interpretation of the Fourth Amendment nearly fifty years later.[743]

741. Law: Alderman (1997), p. 10.
742. Law: Warren (1890), p. 193.
743. Law: Alderman (1991), p. 137.

The Supreme Court created the "exclusionary rule" to ensure the Fourth Amendment was respected. Under this rule, any evidence seized in an illegal search could not be presented at trial against the individual whose Fourth Amendment rights were violated.[744]

> The most basic aspect of a traditional Fourth Amendment search is that it must be done pursuant to a warrant that is based on "probable cause" and describes with particularity "the place to be searched, and the persons or things to be seized." The person who makes these determinations must be a "neutral and detached magistrate," not the police officer who is in the business of ferreting out crime.[745]

744. Ibid., p. 138.
745. Ibid.

Appendix I: The Constitution of the United States

WE THE PEOPLE OF THE UNITED STATES, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

Section 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[Representatives and direct Taxes shall be apportioned among the several States which may be included in this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.][746] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made,

746. The part included in brackets was changed by section 2 of the 14th amendment.

the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3.

The Senate of the United States shall be composed of two Senators from each State, [chosen by the Legislature thereof,][747] for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; [and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may take temporary Appointments until the next Meeting of the Legislature, which shall the fill such Vacancies].[748]

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall choose their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4.

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

747. The part included in brackets was changed by section 1 of the 17th amendment.
748. The part included in brackets was changed by section 2 of the 17th amendment.

The Congress shall assemble at least once in every Year, and such Meeting shall [be on the first Monday in December,][749] unless they shall by Law appoint a different Day.

Section 5.

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6.

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7.

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall like wise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of

749. The part included in brackets was changed by section 2 of the 20th amendment.

the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8.

The Congress shall have Power To lay and Collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9.

The Migration and Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or Duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless in cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.[750]

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

750. See also the 16th amendment.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it is inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II.

Section 1.

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Vote, then the House of Representatives shall immediately choose by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner choose the President. But in choosing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the Senate, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall choose from them by Ballot the Vice President.][751]

The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of adoption of this Constitution, shall be eligible to the Office of President; nei-

751. This paragraph has been superseded by the 12th amendment.

ther shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office,[752] the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, as stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enters on the Execution of his Office, he shall take the following Oath or Affirmation: — "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointment are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3.

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the

752. This provision has been affected by the 25th amendment.

Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4.

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State;[753] — between citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State a State, or the Citizens thereof, and foreign States, Citizens, Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

ARTICLE IV.

753. This clause has been affected by the 11th amendment.

Section 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[No Person held to Service or Labor in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or labor, but shall be delivered up on Claim of the Party to whom such Service or Labor may be due.][754]

Section 3.

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4.

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V.

The Congress, whenever two thirds of both Houses shall deem necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided [that no Amendment which may be made prior to the Year one thousand eight hundred and eight shall in any Manner affect the first and the fourth Clauses in the Ninth Section of the first Article;

754. This paragraph has been superseded by the 13th amendment.

and][755] that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and eighty seven and of the Independence of the United States of America the Twelfth

IN WITNESS whereof We have hereunto subscribed our Names,

‹Signatures›

Articles in addition to, and amendment of, The Constitution of the United States of America, proposed by Congress, and ratified by the legislatures of the several states pursuant to the fifth article of the original Constitution

AMENDMENT I. [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II. [1791]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III. [1791]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV. [1791]

755. Obsolete.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V. [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI. [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VII. [1791]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII. [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX. [1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X. [1791]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI. [1795]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subject of any Foreign State.

AMENDMENT XII. [1804]

The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and shall make

distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. [And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-president shall act as President, as in the case of the death or other constitutional disability of the President.][756] The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII. [1865]

Section 1.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2.

Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV. [1868]

Section 1.

All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, excluding

756. The part included in brackets has been superseded by section 3 of the 20th amendment.

Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-president of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,[757] and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV. [1870]

Section 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2.

The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI. [1913]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

AMENDMENT XVII. [1913]

757. See the 26th amendment.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be construed as to affect the election or term of any Senator chosen before it becomes valid as part of the constitution.

AMENDMENT XVIII. [1919][758]

Section 1.

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2.

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XIX. [1920]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XX. [1933]

Section 1.

The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3rd day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2.

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January, unless they shall by law appoint a different day.

758. Repealed by section 1 of the 21st amendment.

Section 3.[759]

If, at the time fixed for the beginning of the term of the President, the president elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4.

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5.

Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

AMENDMENT XXI. [1933]

Section 1.

The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2.

The transportation and importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XXII. [1951]

Section 1.

759. See the 25th amendment.

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

AMENDMENT XXIII. [1961]

Section 1.

The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2.

The congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXIV. [1964]

Section 1.

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2.

The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXV. [1967]

Section 1.

In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2.

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3.

Whenever the president transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4.

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress by law may provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

AMENDMENT XXVI. [1971]

Section 1.

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2.

The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXVII. [1992]

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

APPENDIX II: COMMENTARY TO THE CONSTITUTION OF THE UNITED STATES

OUTLINE OF THE CONSTITUTION

The Constitution consists of seven Articles and ten Amendments that comprise the Bill of Rights, plus 17 additional Amendments.

Main Articles of the Constitution

Each Article covers specific questions as outlined in the table below.

Main Text of the Constitution	
Article I	The organization, procedures, powers, and limitations of Congress (that is, the House of Representatives and the Senate).
Article II	The election, powers, and duties of the President and Vice President.
Article III	The powers and jurisdictions of the "supreme" and "inferior" courts to be established by Congress.
Article IV	Relations among the states and their citizens and with admission of new states.
Article V	The process for making amendments the Constitution.
Article VI	Public debt and with the supremacy of, and allegiance to, the Constitution.
Article VII	The terms of its ratification.

The Bill of Rights

The first ten Amendments are the Bill of Rights. They relate to:

1. the freedom of religion, speech, press, assembly, and petition,
2. the right to keep and bear arms,

3. the quartering of soldiers,
4. security from unreasonable search and seizure,
5. general rights of the accused and due process of law,
6. the right of the accused before and during trial,
7. the right to trial by jury in civil cases,
8. prohibitions against excessive bail and fines and against cruel and unusual punishment,
9. reservation of unenumerated rights to the people, and
10. reservation of unenumerated powers to the states or the people.[760]

The Remaining Amendments

The remaining amendments deal with

11. restrictions on judicial power,
12. the manner of electing the President and Vice President,
13. abolition of slavery,
14. enumeration of certain post-Civil War settlements, including forbidding states to abridge citizenship rights except by due process of law, apportioning representatives in Congress, disqualifying rebels for office, and validating federal debts while invalidating rebel debts,
15. universal male suffrage without regard to race or color,
16. authorization of income taxes,
17. popular election of Senate,
18. national liquor prohibition,
19. universal suffrage without regard to sex,
20. specifications of the terms of President, Vice President, and Congress and of the line of succession upon the death of the President,
21. repeal of the 18th Amendment,
22. two-term limitation on the Presidency,
23. grant of federal suffrage and representation to the District of Columbia,
24. prohibition against poll taxes,
25. specifications for succession upon the death or disability of the President and for filing a vacancy in the office of Vice President,
26. grant of suffrage to citizens eighteen years of age or older, and
27. regulation of laws on compensation of Senators and Representatives.[761]

760. Reference: Britannica (1983)(2), v. III, p.106.
761. Ibid.

Fundamental Rights

> In addition to the bill of rights, article I, section 9, of the constitution prohibits, among other things, suspension of the writ of habeas corpus, except in time of rebellion or invasion; any bill of attainder or ex post facto law; direct taxation not based proportionally on the latest census; and taxation on goods exported from a state.
>
> The first ten amendments that constitute the bill of rights were originally intended to protect individual rights against actions by the national government, but by the terms of the fourteenth amendment, ratified after the Civil War, individual rights are now protected against actions by the states.
>
> Other rights such as protection against involuntary servitude and discrimination in voting on the basis of race or sex have been added by later amendments.[762]

Separation of Powers

The Place of the Separation of Powers in the Philosophy of Constitutional Law

The framers of the Constitution tried to protect the liberties of the people through the mechanism of separation of powers.

This idea was first formulated by the ancient Greek historian Polybius [second century B.C.].[763] Polybius, using examples from ancient history, believed that history is a cycle of political forms each of which passes through a cycle of decline. Monarchy (the rule of one) gives way to aristocracy (rule by a select few), aristocracy gives way to ochlocracy (rule of the mob), which monarchy again arises to oppose. All these forms of government have their inherent strengths and weaknesses.

Polybius' analysis of the mixed constitution of the Roman republic influenced Cicero [1st century B.C.].[764] Cicero hypothesized that the Roman republic was an example of a felicitous combination of monarchy, aristocracy, and democracy, making it possible to avoid cycles of decline. In later times the problem of separation of powers was formulated by Locke (1632-1704).[765] The most complete formulation of this doctrine is given by Montesquieu (1689-1755) in *Spirit of the Laws* [1750].[766]

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762. Law: Maddex (1995), p. 302.
763. History: Polybius (1979-1993).
764. Philosophy: Cicero (1970).
765. Philosophy: Locke (1988).
766. Philosophy: Montesquieu (1949).

Separation of Powers in the US

The founders of the American state believed that the executive, legislative, and judicial powers must be separate and have equal rights (balanced). They followed Montesquieu's definition that democracy is the separation of powers. For them the executive power was the embodiment of monarchic power; the Supreme Court, consisting of nine members appointed for life, was the representative of the aristocratic principle; and Congress, with a large number of Congressmen, was the embodiment of the democratic principle. They perceived viability of the republic to be tied up with the balance among these principles.

The principle of separation of powers permeates the entire US Constitution of 1789. It is important that the powers were not simply divided, but balanced. Thus, the president can veto the laws of the Congress; however, the veto can be overruled by two-thirds vote of both houses. The members of the Supreme Court are appointed by the President and approved by the Senate. Congress itself is divided into an upper and a lower house, which are meant to balance each other. Checks and balance are built into the procedures for forming various bodies. The President is elected for 4 years, the lower house of Congress, the House of Representatives, for 2 years (making it more flexible and allowing it to rapidly reflect the evolving views of the electorate). The Senate, a third of which is reelected every 2 years (and where the term of office is 6 years), was designed to be the instrument of continuity and gradualness compared to the House of Representatives and the President. The Supreme Court was intended to be an even stronger representative of tradition. And all these bodies actually do play these roles. Thus in the 1930s when Roosevelt, with the support of the Democratic majority in the Congress, introduced reforms, many reforms were halted because the Supreme Court ruled the corresponding laws to be unconstitutional.

The separation of powers exists not only at the highest level in the US but also between the federal government and state governments. This is a very important point for a country as large the United States. Even if the central government charts a course in one direction, the state governments have significant autonomy to decelerate an imprudent movement that is taking the country in a certain direction.

The power of the individual states is nowhere more strongly expressed than in their role in approving amendments to the constitution. Amendments to the constitution must be ratified by a two-thirds vote of both houses of Congress, but, what is more important, they must be approved by three quarters of the state legislatures, or their special constitutional conventions. In practice it is hardest to overcome this last obstacle.

Separation of powers is also implemented through the constitutions of the states themselves. They all stipulate separation of powers between the legislative, executive and judicial bodies, with only slight deviations from the federal model (for example, some states have unicameral legislatures).

Finally, the separation of powers is also observed in areas going beyond the constitution. In the late 19th and 20th centuries there was a great increase in federal executive power. The constitution stipulates that the president governs through his cabinet. To avoid extreme increases in presidential power, the executive power itself was subdivided. Many so-called independent agencies were created. The laws establishing them stipulate procedures for forming the governing bodies of these agencies, allowing the agencies significant autonomy in their practical operations. Typically the directors of agencies or members of the supervisory boards are appointed by the President with the approval of Congress. Many of the directors and governing boards of the agencies are appointed for terms longer than that of the President himself. When a president from a different party comes to power, a new director may be appointed (as was the case with Clinton for the FBI and CIA) or not (Federal Reserve Board or central bank, Post Office). Within each independent agency there is a separation of powers in the form of administrative justice, the decisions of which typically may be appealed in the regular courts. An example of administrative justice, which many of us know about, is the appeals of individuals asking for refugee status in the US.

The separation of powers in the US does not signify the weakness of the branches of power, but their balance. Balance may be appropriately supported only by bodies that have sufficient authority with respect to other branches of power. The US has a very powerful president, one of the strongest legislative bodies in the world (including, most likely, the strongest upper house) and the strongest supreme court in the world.

Precedents of the Judicial Power v. Precedents of the Executive Power

The Constitution strictly speaking is the precedents of the judicial power and of the Supreme Court. This is what is studied in US schools and university law departments and what foreigners usually think is US constitutional law. These precedents are the basis for the above "Commentaries to the Constitution of the United States."

However, the executive power has its own set of precedents. The judicial and the executive branches of government live in their own parallel worlds. Based on the executive precedents, the executive power often does what it knows is unlawful or unconstitutional from the point of view of the precedents of the Supreme Court. The section about political spying in this book is largely based on the precedents of the executive power.

Appendix III. The "Subversive" Leaflets

The following pages provide the text of three of the leaflets that I put together as I came of age as a "soviet person," thus bringing myself to the attention of the KGB in the first place. The leaflet on "our history in brief" cannot be reconstructed since the sources are no longer available to me.

Do You Know What Kind of Country You Live in?

You live in a country where power is held by a flagrant terrorist dictatorship of the most reactionary, most chauvinistic state capitalism. The distinguishing feature of this regime, compared to other regimes of military dictatorship, personal power, Bonapartism, etc., is its use of an all-encompassing state-political machine, including a system of mass organizations, and a wide-spread ideological machine, supplemented by a system of mass terror to coerce the masses. The state makes extensive use of pseudo revolutionary and pseudo socialist slogans and various forms of organization of the masses to camouflage its totalitarian coercion.

The decline and lack of development of democratic and parliamentary forms of political life, the contradiction between the degree of ideological organization and the level of mass culture, the use of the "latest" methods to mobilize old mass prejudices — all these are characteristic components of the soil on which this regime flourishes.

This regime unites political coercion with extremely intense ideological compulsion.

Exploiting and exacerbating historical prejudices, the regime foists on the mass consciousness its own ideology, stereotypes (chauvinism, militarism, a cult of force, etc.), and attempts to create anew, or regenerate, an active system of

ideological and ritual compulsion. This regime has deliberately abandoned all claims to having a scientific basis, and draws a sharp distinction (not only in propaganda, but in practice) between the system of "useful" knowledge and convictions (useful, that is, to the state), and the "decomposing objectivism" of scientific thinking, suitable only for official purposes.

Claiming a "historical" rationale for their opinions, the state ideologists refer to a canonization by ruling ideas in Hegel. In actuality, the regime has selected from this theoretical legacy only what has proved to be useful for influencing mass consciousness: it has accepted the reactionary systems of the past only in their "practical-mass" significance. What it needs most of all is an ideology of the "herd mentality" type and this it has constructed from the material at hand. The basic components of the regime's ideology are the doctrine of the totalitarian state and of aggressive chauvinism.

The totalitarian state is depicted in the ruling ideology as the highest and most universal form of the life of society. By subordinating or encompassing all other forms of social organization, the state identifies itself with "society" and "the people": social institutions, groups, and individuals have the right to exist only as organs and components of this universal whole. For the regime, society is the end, individuals are the means, and all of life consists of the use of individual means for social ends. For an adherent of the regime, the state is everything and nothing human or spiritual is of value outside of the state. In actuality, this regime that acts in the name of the "people" uses the unity of the people and the party as a justification for the totalitarian state system, for which the highest source of power are the leaders who purport to embody the will and spirit of the people. In the extremely centralized state machine, in which each agency answers only to its superior agency, there is no separation of powers; legislation and enforcement of "laws," legal and extralegal terror, administrative and ideological compulsions are all concentrated in the same hands. The doctrine of the totalitarian state excludes autonomy in any area or values of social life — religion, morality, art, family, etc. — everything is subject to state control and regulation. In the prevailing doctrine, there is no room for the individual outside the state organization: a person exists only as a "person of the state," as a possession of the current, i.e., totalitarian, social machine. The ideas of the individual's inalienable rights, freedom, and free competition of ideas, etc. are rejected out of hand by the regime. There is no freedom of thought in the state; there are simply correct thoughts, incorrect thoughts, and thoughts that need to be eradicated.

The wave of aggressive chauvinism, which the state has elevated to the level of state policy and which it uses as a lash against extensive segments of the population, is one of the most important phenomena of the ideological climate in the country. In the official ideology, such defective aspects of the national self-consciousness as ethnic limitations, prejudices, inferiority complexes, etc., are transformed into active factors of mass propaganda and policy. The psychosocial

structures associated with the lowest levels of social consciousness are brought to the surface of the ideology. The slogan "unity of the people and the party," of totally organized political machine, serves at least three functions: 1) it provides a rationale for "class peace" and the integration of society, in opposition to the "visible enemy;" 2) it supports the psychological affirmation of the level of society which the regime has turned into its chief source support; 3) it justifies the enslavement of other peoples. The freedom and existence of separate individuals of other states is not seen as having value and is considered only from the standpoint of their "usefulness" to this state and its ideology.

The militarization of all social relations, including ideological ones, is a characteristic trait of the regime. The regime needs a state of tension and creates this state, since it fosters maintenance of discipline and military-command methods of management and demands repudiation of class and individual interests and self-renunciation in the name of the fiction of the people's unity. Fixation on the constant "struggle," which is furthermore a struggle against a "visible" enemy, i.e., one who is obvious to the man in the street, and even personified internally and externally (alien ethnic group, foreign state) has become a way of life.

Acting to repress democratic movements, the regime at the same time widely advertises its ideology as "revolutionary" and "socialist." The most immediate goal of slogans of this type involves eliminating representative government, constitutional freedom and the rights of the individual and thus strengthening the totalitarian state. Totalitarian "socialism" as opposed to a formal, parliamentary, legal system, sets itself up as a kind of informal, unstructured, system based, not on law, but on the "will of the people," the totalitarian mechanism of the "people's" state and court. Socialism, if you consider it from a technical point of view, is the principle of the civil service. Ultimately, every worker assumes the status of a civil servant.

The culmination of the whole system of ideology and political relations characteristic of the regime is the cult of the leaders, the bearers of absolute, supreme power.

With regard to the structure and methods of influencing mass consciousness, the ideology of the regime may be classified as a system of religious (cult) relations. This is precisely the way many of the regime's founders and ideologist saw it. The cult-like nature of the ideological system of the regime is defined not by the statements or ideals of its adherents, but by such traits as the universal mythologism of its doctrine, channeling the emotions and — more broadly — the subconscious of the masses by means of an extensive system of ritual acts (symbolic processions, meetings, hymns, etc.) and a charismatic type of leadership. A peculiarity of this regime as an ideological system is its highly developed political cult, such as is typical of the ancient religions (clear sanctification of the power of the authorities, and social community, as opposed to the personalism and cosmopolitism of Christianity).

This totalitarian regime represents a centralized-hierarchical system of anti-democratic dictatorship, realized through an apparatus of mass political and ideological compulsion and terror. The most important components of the structure of the regime are the ruling party — the unity of the political organization of the regime, subordinating to its control or directly swallowing up the organs of state control, and a broad range of organizations with many million members — professional, youth, women's, athletic, etc. The system of women's, charitable, athletic, scientific and other unions is intended to disseminate the regime's influence in all spheres of social life. Another support of the regime is the system of specialized organs of terror: the secret police, informers, censors, closed courts, and political camps.

The ruling party, as the central link in the political mechanism of the regime differs from ordinary parties not only by virtue of its orientation, but also in the structure of its activity. Subjugating its millions of members to strictly centralized ideological and political control, the party virtually makes them into moral collaborators in the actions of the ruling clique; while any influence of the organized party-member masses on the directors of the regime is excluded. It is not the party that rules in such a system, but rather a narrow clique, united by ambition, fanaticism, and suspicion, that rules the people and nation through the party and the mass organizations it controls. This function of the party in many respects explains its broad-based social composition, but this is far from an index of the extent to which various groups participate in control of the regime.

The state mechanism of the regime at its highest levels is actually and formally merged with the apex of the party hierarchy; the legal institutions are simply a screen for the totalitarian regime. Having eliminated popular representation, division of powers, and any kind of open political conflict (the sole internal form of this is the endless intrigues within the ruling clique) in the course of seizing power, the regime has retained, expanded and included in its system the civil-service-bureaucratic executive apparatus, military, and police organizations. At the same time the state machine is intentionally "ideologized," and has been declared the expression of the universal spirit of the "people," and not of any particular group interests.[767]

You must be Aware of Your Power and Your Role

"Modern power lies not in capital and not in tons of steel, modern power lies in the capacity of people to think and create." (*American Challenge*; cited in *The Contemporary Scientific Technological Revolution in the Developed Capitalist Countries: Economic Problems*).

767. Philosophy: Philosophical Encyclopedia (1960-1970), vol. 5, "Fascism."

A small slice of the intelligentsia constitutes the "nerves" of the gigantic organism of the country, the intellectual force necessary for any state. The intelligentsia possesses knowledge, talents, habits of organization and government. It is this that determines its weight in society. The ability to express broadly understood class interests, and to awaken and develop the self-awareness of all classes of society, are the qualities organically related to the intelligentsia. "Always and everywhere, the leaders of any class have been its most advanced, most intelligent representatives."[768] "The Intelligentsia is called the intelligentsia exactly because it most consciously, most decisively and most precisely represents and expresses the development of class interests and political groupings in a whole society."[769]

"Educated people, 'the intelligentsia' in general, cannot but rise against barbarous police oppression, absolutism, persecution of thought and knowledge."[770]

The liberal movement comes into being "with an outstanding role played by students and intellectuals."[771] "In the olden days in Russia only the intelligentsia had been revolutionary."[772] With a complete lack of any rights for the people at large and domination of a "remarkably organized, ideologically united"[773] bureaucracy, public discontent and protest inevitably manifests itself only in sub-universes like universities and the press, where the democratic and liberal intelligentsia are concentrated.

Representatives of the intelligentsia "closely observe and take personally the lack of rights and suppression of the people."[774] The interests of the intelligentsia as a "professional" group, being by its very position in society a proponent of democratic freedoms and an enemy of any dark forces and despotism, correspond to an "intelligent person's democracy." Different forms of opposition to the existing order from the intelligentsia come from antagonism between a dictatorship "with interests of societal development, with interests of the intelligentsia in general."[775] With this are related manifestations of discontent by the intelligentsia,[776] collisions of educated people with a "dictatorship of bureaucracy," protests of individual representatives and groups of the intelligentsia related, for example, for a doctor with interests of "health care," for a statistician with interests of statistics. In the foundation of the conflict of the intelligentsia

768. Philosophy: Lenin (1958-1974), v. 4, p. 316.
769. Ibid., v. 7, p. 343.
770. Ibid., v. 2, p.454.
771. Ibid., v. 23, p. 398.
772. Ibid., v. 10, p. 281.
773. Ibid., v. 7, p. 345.
774. Ibid., v. 4, p. 238.
775. Ibid., v. 5, p. 333.
776. Ibid., v. 5, p. 330.

with governing camp lies an antagonism of a dictatorship "with *any* autonomy, honesty, independence of convictions, pride of real knowledge,"[777] which are characteristic of the intelligentsia.

Being in possession of knowledge and culture, the intelligentsia is interested most of all in political freedom. "If people fulfilling public functions are valued not for their formal position but for their knowledge and merits, will that not logically and inevitably lead to freedom of public opinion and public control? ... Does this not undermine at their roots those privileges... of formal titles which are the only foundation" of a dictatorship?[778]

The intelligentsia "has taken upon itself the role of publicists, orators and political leaders always and everywhere, in all European revolutions."[779]

Only the intelligentsia develops and formulates social-reformist and revolutionary programs based on a "wide collective experience of mankind."[780]

Do You Want to Avoid a Nuclear Catastrophe?

If this is to be achieved all people must be respected as individuals. That's right — as individuals! If history has taught us anything, then this means that:

No one must be deprived of life, liberty or property without due process of the law.

- The executive, legislative, and judicial authorities must be separate and have equal powers.
- People must not be impeded in the exercise of basic human rights.
- All people must be equal before the law and must not be subject to political, economic, or social discrimination as a result of race, nationality, religion, gender, or social status or origin.
- People must have the inalienable right to choose and replace their government representatives. The right to universal secret balloting must be guaranteed. A voter must not be liable socially or personally for his vote.
- Each individual must have the right to submit petitions.
- Each individual must have the right to redress injuries caused by unlawful actions of government representatives.
- Slavery must be forbidden. Forced labor, including as punishment for crimes, must be forbidden.
- Freedom of thought and conscience must not be violated.
- Freedom of religion must be guaranteed. There must be separation of religion (and atheism) and state.

777. Ibid., v. 5, p. 327.
778. Ibid., v. 5, p. 328.
779. Ibid., v. 9, p. 133-134.
780. Ibid., v. 11, p. 134-135.

- Freedom of assembly and association, as well as freedom of speech, press, and all forms of expression must be guaranteed. No censorship must be permitted; the privacy of all forms of personal communication must not be violated.
- No agitation for overthrow of the existing order must be considered grounds for criminal prosecution, if it is not accompanied by specific acts of force.
- Academic freedom must be guaranteed.
- The right to strike must be guaranteed.
- The right to own private property must not be violated.
- There must be no violation of the freedom to leave the country and to renounce one's citizenship.
- No one can be detained except on the basis of a court order.
- No one can be arrested without charge or without immediate access to a lawyer; when the arrested individual demands it he must have a rapid open trial at which he and his lawyer are present.
- Every person's right to the inviolability of his home and documents against all intrusions, searches and seizures must not be breached except on the basis of a court order, issued on sufficient grounds and stipulating a specifically designated place of search and objects of seizure.
- Torture and cruel or unusual punishment must be absolutely forbidden.
- Due process of the law should be understood to mean a rapid and public legal or quasijudicial hearing. During this hearing the accused must have full opportunity to learn the charges against him, to present evidence, and submit witness to cross examination; he must have the right to have access to his witnesses and expenses for this must paid for at the public expense. In all cases the accused must have access to a competent attorney, who if the accused is not able to designate one, must be provided by the state.
- No one may be forced to testify against himself. Confessions obtained through force, torture or threat, or after prolonged arrest or detainment must not be admitted as evidence. No one must be sentenced or punished if the only evidence against him is his own confession.
- No one must be condemned for an act that was legal at the time it was committed.
- Everyone found not guilty after arrest or detainment must have the right to sue the state for redress of injury.

Of course all of this is just a dream so long as people are being incarcerated in prisons, and camps, and psychiatric hospitals because of their convictions. In order to create a foundation for these changes, the productive forces must be emancipated. The areas of service, trade, ... and ... industries must be denationalized. State enterprises must be managed by elected bodies of their employees. Agriculture must be put into private hands. The country must be freed from the burden of backbreaking military expenditure. If this is to be achieved freedom

must be given to our "friends." The constituent republics of the Soviet Union and possibly the Autonomous Republics as well must be granted the true right to leave the Union.

All these changes are not possible while the conservative forces of the state — the KGB, the police, the Army — are intact.

In other words:

- Amnesty for political prisoners!
- Down with the KGB — the Soviet Gestapo!
- Down with the dictatorship of bureaucracy!
- Long live freedom of speech and the media!
- To the workers — the right to strike; to the peasants — a new NEP (New Economic Policy); to the universities — autonomy!
- Down with Great Russian and Soviet chauvinism!
- Long live internationalism!
- Long live freedom of assembly and association!
- All power to elected Soviets!
- Long live the revolution!

Appendix IV. What an Educated Russian Reads

Russian intellectuals — or any intellectuals, perhaps — represent an endangered species these days. I have been lucky that in my life I was surrounded by friends belonging to this rare kind of people. In my microcosm they were not endangered species but typical ones. The world of my ideas is a result of mutual influences with my reading friends. For anyone who might like to know where we looked for ideas and information, I offer the following lists of readings that I found formative. Specific book titles are listed in the References section.

Among the information sources that I devoured in my youth were:

American enlightenment (Jefferson, Paine, Franklin). This was inspired by the interest in America caused by detente. A collection of their works was printed in the late 1960s and early 1970s.

Constitutions of the countries of the world: I had a book about Japan giving the full text of its constitution. Others were found in books at the public library.

A Critique of Christianity and its role in the emergence of socialism. (Nietzsche — I did not like Nietzsche, and do not like him to this day.)

Sociology: A translated book, *Social Psychology* (Shibutani was my first introduction to western sociology).

"Opportunists": My grandfather managed to retain stenographic records of the party congresses and conferences of the early Soviet period. It included the speeches of such "renegades" as Bukharin, Zinovyev, Kamenev, and Rykov. I especially liked Trotsky for his clear thoughts, superior style and courage in the face of overwhelming odds, which he demonstrated in the years of Stalin's growing tyranny. I also had at hand texts of Bolshevik leaflets from the democratic revolution of 1905, with fresh-sounding calls for freedom and democracy.

History: *The Correspondence among Roosevelt, Churchill and Stalin* was a part of a standard digest of that generation. The books *Strategy* and *Big Strategy* by British authors introduced us to the fundamentals of the modern war strategy. We read the memoirs of German generals Guderian and Galder.

Alternative news: We religiously listened to the Voice of America, BBC, Deutsche Welle, Radio Canada, Radio Freedom; we occasionally heard French radio, Israeli radio, Chinese radio, Japanese radio. Although we did not always agree with their views, they were an important source of information to counter Soviet propaganda.

Journals: I subscribed to the Soviet think-tank journals "The World Economy and International Relations" and "The USA and Canada."

Economics: There were many interesting books on economics — too many of them to be presented here — and innumerable Soviet publications with economic (primarily international) statistics. There was *Statistical Abstract of the United States 1968*, which I got from a friend who got it from the American exhibition "Education in the United States." I also managed to get hold of a few issues of the *U.N. Statistical Yearbook* in the public library and copied data from them. Among the books which provided both data and ideas were: Albert Vainshtein, *National Income in Russia and the USSR*; Angus Maddison, *Economic Development in the West* Denison, *Why Do Growth Rates Differ?*

Literature consisted primarily of the regular school curriculum: Fonvizin, Pushkin, Griboedov, Radishchev, Lermontov, Belinskiy, Gogol, Tyutchev, Fet, Nekrasov, Hertzen, Chernyshevskiy, Turgenev, Goncharov, Dostoevsky, Leo Tolstoy, Chekhov, Gorkiy, Blok, Bryussov, and Mayakovskiy. But the interpretation of these works by my Russian literature teacher was not orthodox — she encouraged us to write essays on the borders of the ideologically permissible and to think beyond those limits.

Foreign literature: At school, we also had an extended course in English language literature.

The books I read during my university years were not much different from the books I had read during my school years. Two things may be worth mentioning:

Economics: Many western books were translated on mathematical economics.

Literature: These were the years of experimentation with modern writers of the 20th century. Proust, Beckett, Joyce, Ionesco are some of the authors who come to mind. But somehow these were not the most influential in my life. I usually remember the writings which were particularly interesting for me to read in the connection with something happening in my life. The modernistic writers were part of my life only in a sense that I knew they were famous, and perhaps I tried to connect with their "modern" aura and make impression on somebody else.

Among the books I managed to buy while in camp were books on:

Structuralism: I bought a good introduction to structuralist thinkers, published in the USSR, at a prison bookstore. Structuralism made large impression on me.

Sociology, Mead, Weber, Durkheim, and Fromm. Mead Weber Durkheim and Fromm interested me after I studied a book *American Sociology* (translated from English and with the legend: "Only for public libraries").

The main books I read after getting out of camp and while waiting to emigrate were:

Anthropology: Lévi-Strauss, a colorful representative of structuralism.

Sociology: Sorokin. Sorokin received his reference for additional reading from the book describing forcible emigration of intellectuals from Russia in 1922 and from the book about the history of philosophy in Russia in yearly 1920s.

Theorists of the separation of powers and law: Polybius, Cicero, Hobbes, Locke, Montesquieu. The question that concerned me was: how America had managed to avoid cataclysms in its 200-year history. A dissident Soviet academic historian introduced me to Polybius and Cicero. A good book about Montesquieu with massive citations accompanied by commentaries was published in the USSR. Analogous books about Hobbes and Locke followed.

Encyclopedists: Voltaire, Diderot, Rousseau. These are the best companions of any free thinkers under authoritarian rule. A book of selected chapters from the French Encyclopedia was published in the Soviet Union.

Liberal theory of the 19th century: Mill. Liberal political theory seemed universal and most contemporary. Mill was in a book with heavy citations.

History of philosophy: Russel. This was a window into western perspective on philosophy. It was published in Russia.

Renaissance thinkers: Erasmus. The correspondence between Erasmus and Luther had a magical attraction. Erasmus did not look suspicious to the Soviet censors — it was published.

American pragmatists: James. Psychological aspects of philosophy in James' pre-revolutionary publications were a big hit.

Critique of the enlightenment: Ortega y Gasset. Anything that could give an answer to the question, "When did all this madness start?" was interesting.

Theory of cognition: Husserl. This philosophy sounded like a mathematical justification to "the other possibilities" in this "hopeless" life. The theory of cognition was not deemed particularly subversive in the late Soviet Union.

Existentialism: Jaspers. I was attracted to it because it was written in a comparatively clear style for existentialism. I acquainted with Jaspers from a special "critical" book.

Religious existentialism: Marcel. It sounded like a good idea to unite religion with the modern philosophy. There was a good book about Marcel published in the Soviet Union.

Classical philosophy: Kant, Hegel. The Soviet establishment did take him seriously. Kant was the philosophy of a person who understood the spirit of mathematics, which is the foundation of modern science; besides, Kant was a good person — he had a good attitude towards human rights.

Early renaissance political philosophy: Machiavelli. I was attracted to his deep thoughts about statesmen, but was troubled by his cynicism.

"Dark" philosophies: Heidegger, Sartre. I did not like philosophers whose style I considered difficult for understanding; for that reason I avoided spending too much time reading Heidegger and Sartre, but I had to acknowledge the originality of some of their ideas when they were clearly formulated — usually by commentators.

Psychology: Freud.

Analysis of constitutions of the countries of the world.

Administrative law of the US: I carefully studied the book about US administrative law — that is where I learned about the Freedom of Information Act.

The most devastating critique of Marxism: Popper. There was a big book published in the Soviet Union with detailed "critique" of Popper, which was accompanied by much more convincing lengthy citations from Popper's works. After reading Popper I became an ardent follower. I became highly critical of Hegel and shied away from Plato.[781] Both Plato and Hegel redeemed themselves somewhat in my eyes later in life.

Journals: After camp I dramatically expanded my subscriptions to include "Questions of Philosophy," "Questions of History," "Foreign Military Review," "Questions of Statistics," and various "reference journals" on economics.

Report to the Club of Rome: Meadows. That report from the point of view of non-economic scientists introduced us to the problems of the environment and limits to growth.

U.N.-sponsored report prepared under the guidance of the Nobel prizewinner in economics: Leontief This was a study about scenarios of world economic growth in the next 100 years taking into account resource constraints.

Literary existentialism: We all (I mean our friends and our family) had read *The Plague* by Albert Camus during the outbreak of anthrax after an accident in the Sverdlovsk biological weapons laboratory in 1979.

General literature: Faulkner, Hemingway, France, Remarque, Bitov, Chapek, Ovchinnikov, Amiradjibi Astafyev, Marquez, Vonnegut, Fallada Böll We were mesmerized by Faulkner's language and the fact that he was American; but from the socialist soil we were able to penetrate the depth of his descriptions only to a limited degree. In that period, I read books by Hemingway which were different from his regular apolitical works: *Farewell to Arms*, *For Whom the Bell Tolls*, — they had especial meaning in the Soviet context. We young guys were curious about the views of Anatole France on the role of love in human society and history in his *Penguin Island*. We absolutely adored Erich Maria Remarque, the hilarious humor of *The Black Obelisk* and the Parisian romantics of *Arch of Triumph*. Among Andrey Bitov's short stories *The Trip to Armenia* was especially memorable, describing the genocide of Armenians. The Russian intelligentsia has always had nostalgia for British Magna Carta conservatism — so we read Chapek's *Travel to England* and Ovchinnikov's *Roots of an*

781. Philosophy: Plato (1996).

Oak Tree. Amiradjibi's book *Data Tutashkhia*, about a person in pre-revolutionary Russia going against the government out of moral principles, was one of the most memorable fiction books of the period for me. We also loved Astafyev at that time for his realistic descriptions of collectivization and the war. The magical realism of Gabriel Garcia Marquez is beautiful without any politics; but we also noticed some parallels between the conditions of life in Colombia and the USSR. We were easily convinced by the anti-war attitude of Kurt Vonnegut's *Slaughterhouse Five*. We were greatly impressed by Hans Fallada's description of pre-Nazi Germany; we could easily identify with the heroes of *Everybody Dies Alone*, a husband and wife posting leaflets in war-time Berlin after the death of their son at the front until their inevitable capture by the Gestapo. Heinrich Böll was an important symbol of the new Germany for us; his description of the war from the viewpoint of regular people — as well as his sympathy for social dissidents — appealed to us.

Arriving in the United States, highlights of the period were:

History of Stalin's purges: Solzhenitsyn. *Gulag Archipelago* was, of cause, the major impression.

The main other must-reads: Zinovyev, Ayhenvald Zamyatin, *Metropol* Aksenov, Pasternak Veresayev, Nabokov, Terts, Mann. Zinovyev and Zamyatin are of a classical anti-Soviet genre. The literary almanac *Metropol* and Aksenov appear too specific to that period of existence of the Soviet Union. Ayhenvald's book *Don Quixote on Russian Soil*, is more ambiguous and in the long run more interesting. It was very interesting to read *Pushkin in Life* by Veresayev, which was difficult to get in the Soviet Union. Nabokov and Pasternak are of course classics. We admired the intellect of the former dissident Sinyavskiy/Terts in his works *Walks with Pushkin*, *In the Shadow of Gogol*, and "T*he Fallen Leaves*" by Rozanov. It was a pleasure to read *Joseph and his Brothers* by Thomas Mann, which was difficult to find in the Soviet Union.

Personalism: Berdyayev. For me, Berdyayev was a missing link between the debates of the Russian intelligentsia of the beginning of 20th century and contemporary events — I was fortified in my thoughts about the "modern-day Bolsheviks." I also appropriated as mine the idea that a religious person may reject religious orthodoxy if the latter contradicts the freedom of philosophical inquiry.

By the time my family recovered from the initial exuberance of arrival in America and could take a more balanced view, we began to see through the right-wing overtones of some politically-oriented thinkers. I note, in particular:

A famous old treatise, *The Decline of the West* Reading even a small part of this book is enough to understand what made Spengler ideologically close to the Nazis.

Modern right-wing political philosophy: Hayek. I saw a practical connection to the absurd tendencies of Russian right-wingers of the 1990s.

Right-wing analysis of the failures of the Russian revolution: Pipes. It goes a step further than *Mileposts* in its critique of intellectuals. If you take his view, even the founding fathers of the United States might be implicated in wrong thinking — that was too much for me.

The books that I loved were (in the approximate order they were read):

Russian liberal philosophies: Walicki This book was an important in-depth review of the historical evolution of Russian liberal political philosophy starting from early 19th century. Some of the typical reactions and counter-reactions of the movement seem to repeat themselves over time. Only the lack of the historical continuity in the country, caused by the cataclysms of the 20th century, can explain the little degree of self-awareness of the people of that school.

Literature: Veresayev, Negretov, Orwell, Shaw. I think now of the half-forgotten Veresayev's *At the Dead End* (about honest people caught between the Red and White terror during the Russian civil war) as one of the best books in Russian literature. A similar theme unites Negretov's book about Korolenko in the revolutionary years 1917-1921. George Orwell's *1984* and Irwin Shaw's *The Troubled Air* specifically describe something which I grasped even better after 1987.

Psychology: Jung. I read a great deal of Jung. He is without any doubt one of the strongest influences on me during the American period of my life. I was receptive to the example of modern psychology sympathetic to religion (as opposed to clearly thinking but atheistic Freud). I was also fascinated by Jung's analysis of personality and the collective unconscious.

The intelligentsia in Russia: *Mileposts.* A major reevaluation had taken place — I was ready to comprehend what clever people were already saying in 1909. This book is the key to understanding the mysteries of Russian modern era.

Speaking of Solzhenitsyn: Conquest. In certain respects, I found Conquest's book more convincing than Solzhenitsyn's one. It looked more historically professional, less prejudicial: for example, Conquest tries to make a comparison between Nazi camps and Stalin's camps.

The dynamics of political belief and disillusionment: Goertzel A decidedly psycho-analytical look at the turncoats and true believers found throughout the history of different countries. One of the major conclusions is that healthy skepticism should be considered a sign of political maturity.

Religious existentialism: Kierkegaard offers an example of a religious existentialism expressed in a clear style.

Revisiting some old themes: Radzinskiy, Valentinoff, Radzinskiy's book was a gift from a friend living in Russia. It contains new information about the Stalin phenomenon. Valentinoff's book about encounters with Lenin in 1904 contains some early insights into the nature of the party — model of the future society — Lenin was building.

A description of childhood and family by a literary icon: Shalamov. Though the author is psychoanalytically naive and obviously unfamiliar with Freud, Varlam Shalamov's autobiography is an impressive piece of literature. In his other works in this volume Shalamov differs from Solzhenitsyn in that he has a clear view of 1937-1938 as the most difficult period of Stalin's terror. Trotskyists, social-revolutionaries and other members of opposition, which was repressed in that period were not cowards who shamefully surrendered in show trials but were politically active people subjected to

horrible tortures during their interrogations and to treatment in the camps that aimed at their complete physical extermination.

A unity of thought between metaphysics, ethics, aesthetics, religion and psychology: Schopenhauer. I was interested in a more realistic philosophy of the connection between morality and life.

American constitutional law: Tribe Laurence Tribe is one of the leading interpreters of the US constitution. His books deepened my understanding of the constitution, for which I have had interest for some time.

Leading liberal political thinkers of our times: Dworkin and Rawls. Reading these authors helped my evolution towards liberal side.

Russia and Russian-US relations in the 1990s: Cohen Stephen Cohen notes, among other things, that it is extremely important to remain objective and truthful in the complex matters of Russian historical development. "Cooks have to produce for popular tastes and approving customers, but in a democratic culture, scholars and journalists are supposed to be indifferent to prevailing appetites Such objectivity it takes civic courage.

Mass psychology and the nature of social manipulation: Freud. I reread Sigmund Freud's essay after September 11, 2001, with the almost forgotten sense of reading highly subversive intellectually stimulating material.

A collection of portraits of famous thinkers of the 20th century who tricked themselves into supporting totalitarian regimes: Lilla. The conclusion of the author of these portraits is that the reasons for those — often convenient — self-deceptions was not lack of intelligence but weakness of moral character.

A two-and-a-half-century old example of candid talk: Voltaire. This is a sure antidote to any double-talk.

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