

BALANCING LIBERTY AND SECURITY



AN ETHICAL STUDY OF U.S. FOREIGN
INTELLIGENCE SURVEILLANCE, 2001–2009

MICHELLE LOUISE ATKIN

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ROWMAN & LITTLEFIELD PUBLISHERS, INC.
Lanham • Boulder • New York • Toronto • Plymouth, UK

Published by Rowman & Littlefield Publishers, Inc.
A wholly owned subsidiary of The Rowman & Littlefield Publishing Group,
Inc.
4501 Forbes Boulevard, Suite 200, Lanham, Maryland 20706
www.rowman.com

10 Thornbury Road, Plymouth PL6 7PP, United Kingdom


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British Library Cataloguing in Publication Information Available

Library of Congress Cataloging-in-Publication Data

ISBN 978-1-4422-1909-0 (cloth : alk. paper)—978-1-4422-1910-6 (electronic)

™ The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences Permanence of Paper for Printed Library Materials, ANSI/NISO Z39.48-1992.

Printed in the United States of America

BALANCING LIBERTY AND SECURITY

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PREFACE

The idea for this book came out of my information studies PhD research, which examined the philosophical foundations of information ethics and their potential for application to contemporary problems in U.S. foreign intelligence surveillance. In this book, I examine questions concerning the limits of government intrusion on protected Fourth Amendment rights in light of post-9/11 changes to the U.S. foreign intelligence surveillance law and policy under George W. Bush. Using the U.S.A. PATRIOT Act, the Foreign Intelligence Surveillance Act (FISA), and the Terrorist Surveillance Program as case examples, I develop and apply a normative ethical framework based on a legal proportionality test that can be applied to future cases involving U.S. foreign intelligence surveillance.

The proportionality test put forward in this research, which is based on a modified version of the Canadian Oakes test, seeks to balance legitimate concerns over collective security against the rights of the individual. As a new synthesis of utilitarian and contractarian ethical principles, the proportionality test laid out in this research has potential for application beyond U.S. foreign-intelligence surveillance. Read in this light, this work has the ability to serve as a guide to future research in other applied areas in information-policy research where there is a clear tension between individual civil liberties and the collective good of society. The book concludes with a discussion of the potential application of the ethical framework developed herein to other problems involving Fourth Amendment rights, such as airline passenger screening, racial and ethnic profiling, and cybersecurity.

I would like to take this opportunity to thank Dr. Andrew Large, my PhD supervisor at McGill University, for his continued guidance and to

my many treasured colleagues at both Carleton University and Algoma University for their support and encouragement.

Dr. Michelle Louise Atkin

ABBREVIATIONS

ACLU	American Civil Liberties Union
AG	attorney general
AUMF	Authorization for Use of Military Force
DNI	director of national intelligence
DOD	Department of Defense
DOJ	Department of Justice
ECPA	Electronic Communications Privacy Act
EFF	Electronic Frontier Foundation
FAA	FISA Amendments Act of 2008
FBI	Federal Bureau of Investigation
FISA	Foreign Intelligence Surveillance Act of 1978
FISC	Foreign Intelligence Surveillance Court
ISP	Internet service provider
NSL	national security letter
NSA	National Security Agency
PAA	Protect America Act of 2007
Patriot Act	U.S.A. PATRIOT Act of 2001
Patriot Reauthorization Act	U.S.A. PATRIOT Improvement and Reauthorization Act of 2005

PSP	President's Surveillance Program
TSA	Transportation Security Administration
TSP	Terrorist Surveillance Program

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**Information Ethics in
the Post-9/11 Period**

INFORMATION ETHICS IN THE POST-9/11 PERIOD

Following the terrorist attacks on the Twin Towers and the Pentagon that took place on September 11, 2001, the U.S. government under the Bush administration took unprecedented measures in an effort to apprehend and punish the perpetrators of those attacks and to prevent future attempts against the American homeland. Law-enforcement agencies were given the right to access database information concerning individuals held by any U.S.-based organization (including library patron information) through the use of national security letters (NSLs). They were also given the right to intercept phone calls and to engage in other forms of warrantless surveillance as deemed necessary in the "War on Terror." Eventually, additional legislation was passed to ensure that such warrantless activities, if not initially legal, were at least retroactively so. The results of these legislative and policy changes have served to shape the discussion of rights and responsibilities in the United States, a discussion that has become largely about the balancing of individual rights with such things as the right to privacy against any government intrusions on such rights in the name of national security.

In the wake of the terrorist attacks of September 11, 2001, the federal government acted swiftly in order to protect the security of the nation. Issues related to the collection of specific types of personal information as well as barriers to information sharing among different government agencies were immediately highlighted as key problems in preventing the attacks. The passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act¹ (U.S.A. PATRIOT Act or Patriot Act, for short) was the initial legislative response to the events of September 11.

This act, in combination with the National Security Agency's (NSA) program of warrantless surveillance and subsequent amendments to the Foreign Intelligence Surveillance Act of 1978 (FISA)² through the Protect America Act of 2007 (PAA)³ and the FISA Amendments of 2008 (FAA),⁴ has been subject to a great deal of controversy among civil-liberties groups, who argue that such measures have served to reduce civil liberties in America.

Although one of the crucial responsibilities for any government is the provision of national security for its people, the potential for gross abuses of governmental power in instances where certain individual rights may be waived is something that requires further investigation.

Much of the discussion in the post-9/11 period has centered on the twin pillars of liberty and security, with each of these pillars having been fashioned in lofty terms and in an almost solitary manner—as though to guarantee one would be to sacrifice the other. The position taken in this book is one of balance, not exchange.

The aim of this research is to examine how the general implications of these legislative and policy shifts in the United States play out in the domain of information ethics. Only time will tell whether or not the Obama administration (or future administrations) will look to reverse the legislative and administrative policy trends set by the previous government. In the meantime, studying the ethical impact of the decisions taken in the eight years of the Bush administration may prove insightful to the study of information ethics, law, and policy.

As this research is an applied study in information ethics, it will be useful to lay out the terms of reference right from the start. Ethics is the philosophical study of morality: that is, of right conduct, obligation, responsibility, and social justice. Information ethics, narrowly construed, is the application of traditional ethical theories, such as utilitarianism or contractarianism, to issues regarding the collection, classification, and dissemination of information. More broadly construed, information ethics includes standards of professional practice, codes of conduct, and aspects of information law, public policy, and so forth.

This book sets out a plan for first exploring the philosophical foundations of information ethics and, second, combining this foundation with an applied study in information ethics with a focus on U.S. foreign intelligence surveillance. The aim of this study is partly theoretical (or abstract), and partly practical (or concrete). That is to say, it is interested in both the development and application of a normative ethical framework that can be applied to cases involving U.S. foreign intelligence surveillance. By seeking to combine foundational ethical theory in a way that is flexible enough to deal with real-world problems (transforming ethical theory to ethical practice in the form of applied ethics),

this research falls squarely in line with that of prominent recent work in social and political philosophy. The American philosopher Martha Nussbaum, for example, offers the following by way of a description of the central goals of her most recent book, *Frontiers of Justice: Disability, Nationality, Species Membership*:

Theories of justice should be abstract. They should, that is, have a generality and theoretical power that enables them to reach beyond the political conflicts of their time, even if they have their origins in such conflicts. . . . On the other hand, theories of social justice must also be responsive to the world and its most urgent problems, and must be open to changes in their formulations and even in their structures in response to a new problem or to an old one that has been culpably ignored.⁵

The need for ethical theory that is both abstract, insofar as it is able to reach beyond current legal and political conflicts, while at the same time practical enough, in that it can be applied to particular issues with some degree of malleability, is at the heart of the problem in the liberty versus security debate. If we are to ask where the boundaries limiting government intrusion upon protected individual civil liberties lie, and furthermore how such boundaries are to be drawn, it would seem that we need some kind of means for determining the reasonableness or unreasonableness of such limits upon individual freedoms. To ask where the limits of government intrusion upon such individual liberties lie is a more complex question than might be suggested by the simple response that freedom must be traded for security in a dangerous world. Any such justification of the limitation of civil liberties turns on the nature and the severity of the threat posed by terrorism and the effectiveness of the measures in question in countering that threat. Even if it is granted, for the sake of argument, that legislative measures such as those provided by the U.S.A. Patriot Act, the presidential authorization of the Terrorist Surveillance Program, and the recent changes to the Foreign Intelligence Surveillance Act do enhance public security in the face of a serious, ongoing threat, there remain deeper issues with respect to justifying the sacrifice of such rights for security. The United States is a liberal democracy founded on a rights-based constitution combined with the rule of law. The fundamental claim to legitimacy advanced by such a constitution is not the achievement of common goods through binding together in a community (e.g., the welfare of the security of its citizens) but rather the preservation of the rights to which citizens are entitled and from which they derive their dignity as equal members of the community. This research seeks to

address whether there can be a coherent justification for trading constitutionally protected civil liberties in exchange for security in insecure times.

In order to address this question, this research will analyze a variety of different sources: primary texts in philosophy; primary and secondary sources related to government legislation, court decisions, committee reports, policy documents; and position statements of government departments and nongovernmental organizations. If a justification emerges that coheres with the core principles of American democracy that underlie the U.S. Constitution, then new legislative and policy measures may be seen as just another step in the continuous evolution of the scope and limits of rights and liberties in that country. If no such justification is forthcoming—that is, if security and common good take precedence over civil liberties in any justification that can be offered—these new changes must be seen to represent an attempt at rethinking the fundamental principles upon which the most powerful liberal democracy in the world was founded. If so, then “everything” has indeed “changed.”

To address in any concrete sense the question of where the boundaries on government intrusion upon privacy rights lie, the use of case examples is essential. Although this book uses real cases, that is to say that it is focused on actual historical events rather than purely hypothetical thought experiments, the approach is in many respects closer to one an analytic philosopher might use when testing out a theory or principle in humanities research. In that sense, the use of the term “case” is different from how the term “case” might be used in much of the social sciences. The cases set out are descriptive, that is, they outline the events as they were portrayed in the media, through government reports, committee meetings, and debates, through various court challenges, and in the relevant scholarly literature. The benefit of using real cases when dealing with ethical questions is that they illustrate the need for critical ethical theory and research to address real-world problems in the area of information ethics.

This research is different from that of social scientists like Robert E. Stake, Robert K. Yin, Pamela Baxter, and Susan Jack, among others, who use case studies as an instrument for developing a constructivist paradigm. In such a paradigm, the claim is that “truth is relative and that it is dependent on one’s perspective.”⁶ Case studies in that sense examine the social construction of reality through participant narratives. The study of those narratives is what allows researchers the ability to gain a better understanding of a participant’s actions. The main concern of this work is not why individual actors behaved the way they did (which raises more complicated social and political questions related to