



## Chapter 6: Privacy and the Government

# Chapter Overview (1/2)

- Introduction
- US legislation restricting information collection
- Information collection by the government
- Covert government surveillance
- US legislation authorizing wiretapping
- USA PATRIOT Act

# Chapter Overview (2/2)

- Regulation of public and private databases
- Data mining by the government
- National identification card
- Information dissemination
- Invasion

# 6.1 Introduction

# A Balancing Act

- Federal, state, and local governments in United States have had significant impact on privacy of individuals
- Government must balance competing desires of citizens
  - desire to be left alone
  - desire for safety and security
- National security concerns increased significantly after 9/11 attacks

# Solove's Taxonomy of Privacy

- **Information collection:** Activities that gather personal information
- **Information processing:** Activities that store, manipulate, and use personal information that has been collected
- **Information dissemination:** Activities that spread personal information
- **Invasion:** Activities that intrude upon a person's daily life, interrupt someone's solitude, or interfere with decision-making

## **6.2 US Legislation Restricting Information Collection**

# Employee Polygraph Protection Act

- Passed in 1988
- Prohibits private employers from using lie detector tests under most conditions
- Cannot require test for employment
- Exceptions
  - Pharmaceutical companies and security firms may give test to certain classes of employees
  - Employers who have suffered a theft may administer tests to reasonable suspects
  - Federal, state, and local governments exempt



# Children's Online Privacy Protection Act

- Reduces amount of public information gathered from children
- Online services must gain parental consent before collecting information from children 12 and under

# Genetic Information Nondiscrimination Act

- Health insurance companies
  - Can't request genetic information
  - Can't use genetic information when making decisions about coverage, rates, etc.
  - Doesn't apply to life insurance, disability insurance, long-term care insurance
- Employers
  - Can't take genetic information into account when hiring, firing, promoting, etc.
  - Small companies (< 15 employees) are exempt

## **6.3 Information Collection by the Government**

# Census Records

- Census required to ensure every state has fair representation
- Number of questions steadily rising
- Sometimes Census Bureau has broken confidentiality requirement
  - World War I: draft resisters
  - World War II: Japanese-Americans

# Japanese-Americans on Way to Internment Camp in 1942



National Archives, file #210-G-3B-414)

# Internal Revenue Service Records

- The 16<sup>th</sup> Amendment to the US Constitution gives the federal government the power to collect an income tax
- IRS collects more than \$2 trillion a year in income taxes
- Income tax forms contain a tremendous amount of personal information: income, assets, to whom you make charitable contributions, medical expenses, and more

# FBI National Crime Information Center 2000

- NCIC
  - Collection of databases related to various crimes
  - Contains > 39 million records
- Successes
  - Helps police solve hundreds of thousands of cases every year
  - Helped FBI tie James Earl Ray to assassination of Dr. Martin Luther King, Jr.
  - Helped FBI apprehend Timothy McVeigh for bombing of federal building in Oklahoma City

# Timothy McVeigh



# OneDOJ Database

- Database being constructed by US Department of Justice
- Gives state and local police officers access to information provided by five federal law enforcement agencies
  - Incident reports
  - Interrogation summaries
  - Other information not available through NCIC
- Criticisms
  - OneDOJ gives local police access to information about people who have not been charged with a crime
  - There is no way to correct misinformation in raw police reports

# Closed-circuit Television Cameras

- First use in Olean, New York in 1968
- Now more than 30 million cameras in US
- New York City's effort in lower Manhattan
  - \$201 million for 3,000 new cameras
  - License plate readers
  - Radiation detectors
- Effectiveness of cameras debated

# Surveillance Camera Images of Boston Marathon Bombing Suspects



# Police Drones

- A few police departments in US operate small unmanned drones
- FAA puts restrictions on use
- Public opinion mixed
  - Yes: Search and rescue
  - No: Identify speeders
- Should police be required to get a search warrant before surveillance of a residence?

# Police Drone Surveillance Platform



## **6.4 Covert Government Surveillance**

# 4<sup>th</sup> Amendment to US Constitution

“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.”

# Wiretaps and Bugs

- *Omstead v. United States* — wiretapping OK
- Federal Communications Act — wiretapping made illegal
- *Nardone v. United States* — wiretapping not OK
- FBI continues secret wiretapping
- *Katz v. United States* — bugs not OK



# J. Edgar Hoover

# Operation Shamrock

- Continuation of World War II interception of international telegrams
- National Security Agency (1952)
- Expanded to telephone calls
- Kennedy
  - Organized crime figures
  - Cuba-related individuals and businesses
- Johnson and Nixon
  - Vietnam war protesters
- Nixon
  - War on drugs

# Carnivore Surveillance System

- Created by FBI in late 1990s
- Monitored Internet traffic, including email exchanges
- Carnivore = Windows PC + “packet-sniffing” software
- Captured packets going to/from a particular IP address
- Used about 25 times between 1998 and 2000
- Replaced with commercial software

# Covert Activities after 9/11

- September 11, 2001 attacks on World Trade Center and Pentagon
- President Bush authorized new, secret, intelligence-gathering operations inside United States

# National Security Administration

## Wiretapping

- President Bush signed presidential order
  - OK for NSA to intercept international phone calls & emails initiated by people inside US
  - No search warrant required
- Number of people monitored
  - About 500 people inside US
  - Another 5,000-7,000 people outside US
- Two al-Qaeda plots foiled
  - Plot to take down Brooklyn bridge
  - Plot to bomb British pubs and train stations

# TALON Database

- Created by US Department of Defense in 2003
- Supposed to contain reports of suspicious activities or terrorist threats near military bases
- Reports submitted by military personnel or civilians
- Reports assessed as “credible” or “not credible” by military experts
- Reports about anti-war protests added to database
- Many of these reports later deleted from database
- In 2007 new Under Secretary of Defense for Intelligence recommended that TALON be terminated

## **6.5 US Legislation Authorizing Wiretapping**

# Title III

- Part of Omnibus Crime Control and Safe Streets Act of 1968
- Allows a police agency with a court order to tap a phone for up to 30 days
- In 1972 US Supreme Court again rejected warrantless wiretapping, even for national security



# Foreign Intelligence Surveillance Act

- FISA provides judicial and congressional oversight of covert surveillance of foreign governments and agents
- Allows electronic surveillance of foreign nationals for up to one year without a court order
- Amended in 2007 to allow government to wiretap communications to/from foreign countries without oversight by FISA Court

# PRISM Program

- Documents provided by Edward Snowden revealed NSA had obtained access to servers at Microsoft, Yahoo, Google, Facebook, YouTube, Skype, AOL, and Apple
- PRISM program enabled NSA to access email messages and monitor live communications of foreigners outside US
- All companies contacted by the *Guardian* denied knowledge of the PRISM program

# Electronic Communications Privacy Act

- Passed by Congress in 1986
- Allows police to attach two kinds of surveillance devices to a suspect's phone line
  - Pen register: displays number being dialed
  - Trap-and-trace device: displays caller's phone number
- Court order needed, but prosecutors do not need to show probable cause
- Allows police to do roving wiretaps (following suspect from phone to phone)

# Stored Communications Act

- Part of Electronic Communications Privacy Act
- Government does not need a search warrant to obtain from an Internet service provider email messages more than 180 days old
- Advent of cloud computing raises new privacy concerns
- Digital Due Process organization (nearly 50 companies and privacy rights organizations) lobbying Congress to change law

# Communications Assistance for Law Enforcement Act

- Passed in 1994
- Designed to ensure police can still do wiretapping as digital networks are introduced
- FBI asked for new abilities, such as ability to intercept digits typed by caller after phone call placed
- Federal Communications Commission included these capabilities in its guidelines to phone companies
- Privacy-rights advocates argued that new capabilities went beyond Congress's intent

## **6.6 USA PATRIOT Act**

# USA PATRIOT Act

- Provisions
  - Greater authority to monitor communications
  - Greater powers to regulate banks
  - Greater border controls
  - New crimes and penalties for terrorist activity
- Critics say Act undermines 4<sup>th</sup> Amendment rights
  - Pen registers on Web browsers
  - Roving surveillance
  - Searches and seizures without warrants
  - Warrants issued without need for showing probable cause

# National Security Letters

- FBI can collect Internet, business, medical, educational, library, and church/mosque/ synagogue records without showing probable cause
- Issues a National Security Letter stating the records are related to an ongoing investigation; no approval from judge needed
- Gag orders prevent recipients (e.g., libraries) from disclosing receipt
- FBI issued 50,000 National Security Letters a year between 2003 and 2006



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# Patriot Act Successes

- Charges against 361 individuals
  - Guilty pleas or convictions for 191 people
  - Shoe-bomber Richard Reid
  - John Walker Lindh
- More than 500 people removed from United States
- Terrorist cells broken up in Buffalo, Seattle, Tampa, and Portland (“the Portland Seven”)

# Patriot Act Failure

- March 11, 2004 bombings in Madrid Spain
- FBI makes Brandon Mayfield a suspect
  - Claims partial fingerprint match
  - Conducts electronic surveillance
  - Enters home without revealing search warrant
  - Copies documents and computer hard drives
- Spanish authorities match fingerprint with an Algerian
  - Judge orders Mayfield released
  - FBI apologizes
- Civil rights groups: Mayfield was targeted for his religious beliefs

# Patriot Act Renewal

- Nearly all provisions have been made permanent
- Four-year sunset clause on two provisions
  - Roving wiretaps
  - FBI ability to seize records from financial institutions, libraries, doctors, and businesses with approval from secret Foreign Intelligence Surveillance Court

# NSA Access to Telephone Records

- Edward Snowden leaked documents to the *Guardian* newspaper
- *Guardian* revealed Foreign Intelligence Surveillance Court had ordered Verizon to provide NSA with all of its telephone metadata for 3-month period in 2013 (date, time, location, and length of call, but not contents of call)
- *Guardian* critique: NSA's mission now "focuses increasingly on domestic communications"
- Obama administration: Court orders for telephone records "are something that have been in place a number of years now"

# **6.7 Regulation of Public and Private Databases**

# Genesis of Code of Fair Information Practices

- 1965: Director of Budget asked committee of economists to look at problems caused by decentralization of statistical data across federal agencies
- Committee recommended creation of a National Data Center
- Citizens and legislators expressed concerns about possible abuses of such a system
- Another group formed to draft guidelines for government databases

# Code of Fair Information Practices

- No secret databases
- People should have access to personal information in databases
- Organizations cannot change how information is used without consent
- People should be able to correct or amend records
- Database owners, users responsible for reliability of data and preventing misuse



# Privacy Act of 1974 Falls Short

- Applies only to government databases
- Only covers records indexed by a personal ID
- No federal employee responsible to enforcing Privacy Act provisions
- Allows agencies to share records with other agencies

# Legislation for Private Institutions

- Fair Credit Reporting Act
- Fair and Accurate Credit Transactions Act
- Financial Services Modernization Act

# Fair Credit Reporting Act

- Promotes accuracy and privacy of information used by credit bureaus
- Major credit bureaus: Equifax, Experian, Trans Union
- Negative information kept only 7 years
- Exceptions
  - Bankruptcies: 10 years
  - Criminal convictions: indefinitely

# Fair and Accurate Credit Transactions Act

- Passed in 2004
- Requires three major credit bureaus to provide consumers a free copy of their credit report every 12 months
- Not automatic: consumers must request credit reports
- Provisions to reduce identity theft

# Financial Services Modernization Act

- Also called Gramm-Leach-Bliley Act of 1999
- Creates “financial supermarkets” offering banking, insurance, and brokerage services
- Privacy-related provisions
  - Privacy policies must be disclosed to customers
  - Notices must provide an opt-out clause
  - Companies must develop procedures to protect customers’ confidential information

## **6.8 Data Mining by the Government**

# Definition of Data Mining

- Data mining: Process of searching through one or more databases looking for patterns or relationships among the data

# IRS Audits

- IRS uses computer matching and data mining to look for possible income tax fraud
- Computer matching: matching tax form information with information provided by employers, banks, etc.
- Data mining: searching through forms to detect those that appear most likely to have errors resulting in underpayment of taxes



# Syndromic Surveillance Systems

- Syndromic surveillance system: A data mining system that searches for patterns indicating the outbreak of an epidemic or bioterrorism
  - 911 calls
  - emergency room visits
  - school absenteeism
  - Internet searches
- Example: A system in New York City detected an outbreak of a virus in 2002

# Telecommunications Records Database

- Created by National Security Agency after 9/11
- Contains phone call records of tens of millions of Americans
- NSA analyzing calling patterns to detect terrorist networks
- Phone records voluntarily provided by several major telecommunications companies
- *USA Today* revealed existence of database in May 2006
- Several dozen class-action lawsuits filed
- August 2006: Federal judge in Detroit ruled program illegal and unconstitutional
- July 2007: US Court of Appeals overturned ruling, saying plaintiffs did not have standing to bring suit forward

# Predictive Policing

- Criminals behave in a predictable way
  - Times of crimes fall into patterns
  - Some areas have higher incidence of crimes
- Predictive policing: use of data mining to deploy police officers to areas where crimes are more likely to occur
- Police in Santa Cruz and Los Angeles saw significant declines in property crime

## **6.9 National Identification Card**

# Social Security Number

- Social Security cards first issued 1936
- Originally used only for Social Security purposes
- Use of SSN has gradually increased
- SSN is a poor identification number
  - Not unique
  - Rarely checked
  - No error-detecting capability

# Arguments for National ID Card

- Current ID cards are second-rate
- Would reduce illegal entry to US
- Would prevent illegal aliens from working
- Would reduce crime
- Other democratic countries have national ID cards

# Arguments against National ID Card

- No card positively guarantees identification
- No biometric-based system is 100% accurate
- No evidence it will reduce crime
- Makes government data mining simpler
- Make law-abiding people more vulnerable to fraud and indiscretions

# The REAL ID Act

- Signed in May 2005
- Significantly changes driver's licenses in the United States
- New licenses
  - Issued by end of 2013
  - Required to open bank account, fly on commercial airplane, or receive government service
  - Requires applicants to supply 4 different IDs
  - Will probably contain a biometric identifier
  - Must contain data in machine-readable form
- Most states missed 2013 deadline; temporary deferments being granted



# Possible Consequences of New Licenses

- Better identification means better law enforcement
- People won't be able to change identities
  - Parents ducking child support
  - Criminals on the run
- New, centralized databases could lead to more identity theft

## **6.10 Information Dissemination**

- Legislation to restrict information dissemination
  - Family Education Rights and Privacy Act
  - Video Privacy Protection Act
  - Health Insurance Portability and Accountability Act
- Examples of information dissemination
  - Freedom of Information Act
  - Toll booth records used in court

# Family Education Rights and Privacy Act (FERPA)

- Rights given to
  - Students 18 years and older
  - Parents of younger students
- Rights include
  - Reviewing educational records
  - Requesting changes to erroneous records
  - Preventing release of records without permission

# Video Privacy Protection Act

- Videotape service providers cannot disclose rental records without consumer's written consent
- Rental stores must destroy personal information related to rentals within a year of when it is no longer needed

# Judge Robert Bork

AP Photo/Charles Tasnadi

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# Health Insurance Portability and Accountability Act

- Limits how doctors, hospitals, pharmacies, and insurance companies can use medical information
- Health care providers need signed authorization to release information
- Health care providers must provide patients with notice describing how they use medical information

# Freedom of Information Act

- Federal law designed to ensure public has access to US government records
- Signed by President Johnson (1966)
- Applies only to executive branch
- Nine exemptions
  - Classified documents
  - Trade secrets or financial information
  - Documents related to law enforcement investigations



# Toll Booth Records

- E-ZPass: an automatic toll-collection system used on most toll roads, bridges, and tunnels between Illinois and Maine
- Drivers with E-ZPass tags pass through without stopping to pay attendant
- Records have been provided in response to court orders in criminal and civil cases

# 6.11 Invasion

- Government actions to prevent invasion
  - Do Not Call Registry
  - CALM Act
- Invasive government actions
  - Requiring identification for pseudoephedrine purchases
  - Advanced Imaging Technology scanners at airports

# National Do Not Call Registry

- FTC responded to public opinion
  - Created Do Not Call Registry in 2003
  - More than 50 million phone numbers registered before it even took affect
- Example of how privacy is treated as a prudential right
  - Benefit of shielding people from telemarketers judged to be greater than harm caused by limiting telephone advertising

# CALM Act

- Television watchers have complained to FCC about loud commercials since 1960s
- CALM Act signed by President Obama in 2010
- Requires FCC to ensure television commercials are played at same volume as programs they are interrupting

# Pseudoephedrine Purchases

- Pseudoephedrine an ingredient of Sudafed and other cold medications
- It is also an ingredient of methamphetamine (“meth”)
- Federal and state governments have passed laws limiting access to pseudoephedrine
  - Limits quantity that can be purchased in a month
  - Identification and signature required for purchase in most states

# Advanced Imaging Technology Scanners

- Transportation Security Administration began installing AIT scanners in 2007
- AIT scanners revealed anatomical features
- Electronic Privacy Information Center sued government in 2010, saying systems violated 4<sup>th</sup> Amendment and various laws
- TSA announced it would develop new software that would replace passenger-specific images with generic outlines
- All body scanners producing passenger specific images removed in 2013

# Advanced Imaging Technology Scanner



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