

Privacy Rights vs. Security Issues

- Privacy rights have taken on particular importance since September 11, 2001. For example, legislation has been proposed that would allow for “roving” wiretaps, which would allow a person (and his or her communications) to be searched, rather than merely a place. Such rules may violate the Fourth Amendment.
- The USA Patriot Act
 - Civil liberties concerns

The USA-Patriot Act

The Basics for Information Technologies and Higher Education

USA-Patriot Act: Basics

- Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Acts
- Signed into law on October 26, 2001
- One of the longest pieces of emergency legislation passed in one of the shortest periods of time in American history

History of Emergency Acts and Government Actions

- Alien and Sedition Acts of 1790's
- Suspension of Habeas Corpus during Civil War
- *Abrams*: Muting of Free Speech during WWI
- Red Scare and Palmer Raids in post WWI period

History of Emergency Acts and Government Actions

- FDR, Great Depression New Deal Legislation
- Internment of Japanese during the WWII
- Blacklisting and Congressional Hearings in the McCarthy, Anti-Communist Era, Post WWII era
- Wiretapping and general harassment of government critics in civil rights and Vietnam War era

USA-Patriot Act: Basics

- Ten Sections covering a variety of areas, including banking, money laundering, surveillance, border protection, victims' support, information sharing within the infrastructure and the strengthening of criminal laws against terrorism.
- Severability clause
 - To protect against the whole the potential constitutional violation of a single section

Definition of Terrorism

- Act divides definition into two parts
 - Foreign
 - Domestic
- For the purposes of our discussion, the definition for domestic terrorism is the more helpful to keep in mind.

Definition of Terrorism

- Domestic
 - “the term ‘domestic terrorism’ means activities... [that] involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily within the territorial jurisdiction of the United States.

Enhanced Surveillance Procedures

- Sharing of Information
 - Law enforcement with federal agencies
- Obtaining Records
 - FERPA (507 of Title V)
 - FISA
 - ECPA
- Rewording to Include Electronic Communications
 - “routing,” “network addresses,” “signaling”

Enhanced Surveillance Procedures

- Computer Trespass
 - Deputizing owners and operators of IT
- New Access
 - “Rubber Stamp” and National Service for Subpoenas
- Compensations
 - FBI compensate ISP
 - Civil actions for computer abuse over \$5,000 (814 of Title VIII).

Patriot Act Amends Existing Legislation

- FERPA
 - Family Education Records and Privacy Act 1974
- FISA
 - Foreign Intelligence Surveillance Act 1978
- ECPA
 - Electronic Communications Privacy Act 1986

Electronic Communications Privacy Act of 1986

- What is it?
 - Wiretapping Act for the Internet
- What is the “Wiretapping Act?”
 - *Olmstead* 1928
 - *Katz* 1967
 - Omnibus Crime Control and Safe Streets Act of 1968 is the actual “Wiretapping Act”
- ECPA brings those same legal protections of telephonic communications to electronic environment

ECPA: What Does It Protect?

- Ideally the privacy of communications in electronic media
- Pre-Patriot Act list of exceptions
 - Usual course of business
 - But not disclosure to third parties
 - Wireless: distinction between listening and disclosing
 - Authorized law enforcement
 - Court or Administrative Order
 - Search Warrant or Subpoena
 - Executive Order 12333 Letter

ECPA: To Whom Does It Apply?

- Statutory Language:
 - "...providers of Internet *service to the public*"
- Does it apply to colleges and universities?
 - No case law on point
 - *Anderson Consulting*: ECPA does not apply
 - Digital Millennium Copyright Act as potential "safe harbor" model of distinction between students and staff/faculty?
 - Areas where there is service to the public, i.e. list serves?
- General Rule
 - Act as if it does, but hold question as potential defense

Patriot Act Amendments of ECPA

- New "emergency" disclosure
 - "Imminent danger to life and limb"
- New "required disclosure"
 - "Rubber-stamping subpoenas"
 - Below "probable cause"
 - "Routing:" Pen registers and trap and trace devices
 - Content is the constitutional question

Required Disclosure: Voice Mail 209 Patriot Act/2703

- Pre-Patriot Act
 - Obtainable only through highest level of court order corresponding to *transmission* (real time) of communications
 - Like telephone wiretap order
- Post Patriot
 - Now obtainable like any e-mail
 - Still with court order, but lower standard

Nation-Wide Service for Electronic Search Warrants

- Creates a "national subpoena" obtainable from magistrates in federal district courts which can be extended to any other jurisdiction
- i.e. if FBI in Washington want something in California, they can apply for warrant in Washington federal court and have it apply to California.

Patriot Act Amendments of ECPA

- Computer Trespass
 - Owner/Operator consent for federal intervention
 - So long as owner/operator reasonably believes investigation is relevant to computer trespass
 - Investigation of it and no other
 - No authorization required
 - No limits set, e.g. stop
 - No restraint on return with authorization based on information gathered during the invited investigation
 - No guarantee it is constitutional
 - Sunset provision

Areas of Potential Abuse and/or Concern

- Constitutional
 - First Amendment; speech
 - Fourth, Fifth and Sixth criminal procedure
 - Separation of powers (agencies as 4th branch)
- Privacy
 - Colleges/University Autonomy
 - FISA “business records”
 - FERPA new exception
 - ECPA disclosures

Areas of Potential Abuse and/or Concern

- Federalism
 - National service
- Case law definitions
 - “Public”
 - “Emergency”
 - “Color of law”
 - “Network Addresses,” “Routing,” “Customer Information”
- Deputized “Owner”
 - Computer Trespass
 - Policy and Procedure

Rights of the Accused

- Fourth Amendment
 - No unreasonable or unwarranted search or seizure.
 - No arrest except on probable cause.
- Fifth Amendment
 - No coerced confessions.
 - No compulsory self-incrimination.

Rights of the Accused (cont.)

- Sixth Amendment
 - Legal counsel.
 - Informed of charges.
 - Speedy and public jury trial.
 - Impartial jury by one’s peers.
- Eighth Amendment
 - Reasonable bail.
 - No cruel or unusual punishment.

Miranda v. Arizona



Facts of the Case

- Police arrest Ernesto Miranda after the victim identifies him in lineup
- Police interrogate Miranda for two hours



Facts

- Ernesto Miranda was arrested in 1966 for the kidnapping and rape of an 18 year old woman
- After being interrogated by police, Miranda provided the police with both an oral and written confession, however, he was never informed of his right to an attorney
- Miranda was originally convicted but during an appeal his case was taken to the supreme court

Facts of the Case

- Miranda confesses to charges of rape and kidnapping.
- At trial, the prosecutor uses confession to obtain conviction.
- Miranda is sentenced to 20-30 yrs on each count.



Question Before Court

What is the role of the police in protecting the rights of the accused, as guaranteed by the Fifth and Sixth Amendments to the Constitution?

5th & 6th Amendments

- Fifth Amendment: no person "shall be compelled in any criminal case to be a witness against himself. . . ."
- Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Issues

- The issues addressed in this case had to do with the fifth and sixth amendments
 - These both deal with the rights of the accused
- The fifth amendment:
 - Miranda was not informed of his right against self incrimination
- The sixth amendment:
 - Miranda was not given the right to have an attorney present during his interrogation

Supreme Court Decision

- The court voted 5-4 in favor
- Chief Justice Earl Warren ruled:
 - "The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him."
- Miranda's conviction was later overturned
- The court also said that if a defendant chose to initially waive their rights, they can exercise them at any time

Legal Precedents

- Fifth Amendment protects individuals from forced confessions. (*Brown v Mississippi*, 1936)
- Persons accused of felonies have a fundamental right to an attorney (*Gideon v Wainwright*, 1963)
- When an accused person is denied the right to consult with his attorney, his/her Sixth Amendment right to counsel is violated (*Escobedo v. Illinois*, 1964).

Ruling

- 5-4 ruling in favor of Miranda
- Police must ensure that defendants are aware of their rights before they are interrogated in custody.
 - They have the right to remain silent
 - Anything they say may be used against them in court
 - They have the right to an attorney, either retained by them or appointed by the court
 - They may waive these rights, but they retain the right to ask for an attorney any time during the interrogation

The Bill of Rights and the Accused

- *Miranda v. Arizona*: requires the police to inform suspects of their rights (*Miranda v. Arizona* 1966).
- Exceptions to the *Miranda* Rule. These include a “public safety” exception, a rule that illegal confessions need not bar a conviction if other evidence is strong, and that suspects must claim their rights unequivocally.



The Bill of Rights and the Accused (cont.)

- Video Recording of Interrogations. In the future, such a procedure might satisfy Fifth Amendment requirements.
- The Exclusionary Rule. This prohibits the admission of illegally seized evidence (*Mapp v. Ohio* 1961).

Landmark Supreme Court Case

Mapp v. Ohio (1961)



Background Information



- Police were investigating a recent bombing
- Informant reported...
 - a person wanted for questioning in the bombing was hiding in the home of Dollree Mapp
 - Mapp had equipment for a “numbers game” which was a form of illegal gambling
- May 23, 1957
 - Three Cleveland policemen demanded entry
 - Mapp called her attorney, insisted they have a search warrant
 - Officers radioed headquarters, cased the house for hours, then more police arrived
 - Knocked, waited a minute, then forced entry
 - Mapp’s attorney arrived, was denied entry to house

Background Information (cont.)

Search of House

- Mapp asked to see warrant
 - police waved a piece of paper
 - Mapp shoved it down her dress
 - Struggle ensued, police retrieved the paper, and arrested Mapp for her resistance
- Search began in bedrooms upstairs and included:
 - Suitcases, closets, chests of drawers
 - Photo albums, personal papers
 - Ended in basement – found a large trunk with books, pictures and photographs of an “obscene” nature



Ohio's Side

Charges against Mapp

- Violated Ohio statute that prohibits possession of “lewd or lascivious” books and pictures
- Simple possession is a crime
- Evidence was admissible in a state case (even if illegally obtained)
 - 1949 decision by the Supreme Court in *Wolf v. Colorado*
 - Exclusionary rule not required in state cases...



Mapp's Side

- Claimed the trunk was not hers
 - (stored in the basement by a former boarder)
 - But possession in Ohio is the crime
 - Mapp found guilty, 1 to 7 year sentence
- Prosecution never produced the search warrant
 - Materials found during the search were the only evidence
 - Exclusionary rule established by *Weeks v. US* states that evidence obtained by illegal searches or seizures cannot be admitted in court
- Appealed to state court based on 1st amendment
 - Ohio statute on obscene literature unconstitutional?
 - Court denied the appeal – but three dissented
 - Acknowledged material was “unlawfully seized during an unlawful search”



Supreme Court Outcome

- Appealed base on 1st, 4th, 5th, and 14th amendments
 - Justices focused on 4th – protection from illegal search and seizure (right to privacy)
 - “Is evidence obtained in violation of the search and seizure provision of the 4th amendment admissible in a state court?”
- 6-3 majority, reversed state's decision
- (three dissenting justices through state courts should decide their own rules for evidence)



Lasting Effects

- 4th amendment rules for admissible evidence are now applied to the states through the due process clause of the 14th amendment
- Thus limits on using illegal evidence now apply to states (exclusionary rule)
- Goal is to prevent law enforcement officials from violating citizens' constitutional rights (“police lawlessness”)



The Death Penalty

- Is the death penalty cruel and unusual punishment or is it a useful method for dealing with the worst criminals?



- ## The Death Penalty Today
- 37 states allow the death penalty.
 - Time Limits for Death Row Appeals.
 - The 1996 Anti-Terrorism and Effective Death Penalty Act limits appeals from death row.
 - Recently, DNA testing has led to the freeing of about a hundred death row inmates who were wrongly convicted, throwing doubt on the death penalty.

- ## Questions for Critical Thinking
- What do you think is the historical basis for civil liberties? Are people as concerned today about the protection of their civil liberties as were the founders?
 - Do you think the libel laws restrict a free press? Should the press be allowed to publish anything it wants about a person? Should the press have to prove that everything published is absolutely true?

- ## Questions for Critical Thinking
- Why are the rights of the accused so important? Is there any way to strike a balance between the rights of victims and the rights of the accused?