

National Security vs. Privacy of Information

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For 5,000 years, humans lived in the past tense: "Yesterday was the same as tomorrow." For the next 500 years people lived in the present tense: "Today can be whatever we want it to be." But now, for the next 50 years we must start living in the future tense: "Tomorrow's social, economic and political constraints must become today's reality."

"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 IV, U. S. Constitution, Dec. 15, 1791

Julliette Kayyem, a former Assistant Secretary at the Department of Homeland Security wrote: "A nation free from threat wouldn't be free." Therein lies the dilemma.

Under what circumstances does the government's need for access to private information trump a person's right to privacy? The issue is a dilemma because the problem is not simply a "never" or "always" issue, and because 21st century digital communication technology has created totally new situations that did not exist when the constitutional constraints were created in 1791.

Two recent events have brought the extrapolation of the Fourth Amendment to 21st Century into contemporary focus. The first is the FBI's legal challenge of Apple to gain access to the contents of a specific iPhone in order to obtain the contacts of a known terrorist. The second is the release of the Panama papers disclosing the extensive use of offshore shell corporations to hide large amounts of wealth by the rich and famous from taxation.

Both the fear of terrorism and the anger over America's richest individuals having an estimated \$1.2 trillion stashed in offshore tax havens are highly charged issues. Accessing private registers of stocks and bonds and transferring the information to a public record would allow tax collectors to find and tax this hidden wealth. However, the cases should not be the occasion for emotional either/or arguments between security and taxation versus privacy, all of which are statutory responsibilities of government. Rather, the debate should be about the *general concepts* that define the constraints between government's need to know and an individual's privacy, which can then be applied to any specific case.

Fortunately, social science research on human decision-making has provided knowledge about why making such decisions are often difficult, and how to resolve the resulting dilemmas. Under highly emotional conditions, such as fear or anger, people's attention becomes narrowly focused and they often make choices that are objectively poor; likewise, strongly held ideological beliefs and values can bias judgements. One solution to this human weakness is to first establish a rational frame of reference before attempting to make the decision. This decision-making process requires participants who are not competing to win their point of view, but rather one's who share the mutual goal of finding the best possible solution. The decision then becomes a matter for cooperative democratic civic participation.

An essential part of restoring respect to our democratic political process is to rise above our current practice of making such decisions based on fear, anger or ideological beliefs and values, rather than using social science knowledge and factual information to make rational decisions. In such cases, the rational context is a matrix which establishes the general principles as a legislative matter. The matrix itself does not provide the answer, but rather is a process for solving the problem.

The methodology

Step 1: There are a limited number of considerations for determining the issue of when government's access to information should trump personal privacy. In this illustrative exercise I will limit the number to three obvious ones.

- How essential is the access?
- How intrusive is the access?
- How adequate are the safeguards to prevent abuse?

In an actual application there can be as many considerations as can be rationally justified.

Step 2: Rate each of the issues on a scale ranging from 1 (not at all) to 100 (always). There are established psychometric procedures for creating such scales that can be used reliably.

Step 3: Weight the relative importance of each of the considerations by allocating a total of 100% between each of the three.

The Application

Of course, different people will assign different scores. But, that is exactly the point; it is to provide an objective basis for civic discussion about the reasons for any given score and its relative weight. For example: How reasonable is my assumption that access to the iPhone's contact list is unlikely to identify anyone who has not already been identified or who could not be identified in other ways? Or, is there any good reason to treat accessing information from off-shore sources as more intrusive than requiring a W-2 form to be submitted by a recognized employer?

The matrix focuses attention on the assumptions on which the ratings are made, and on identifying the relevant facts and information. The methodology can be applied to any situation that requires establishing the appropriate balance between government intrusion and personal privacy. With the matrix, it is possible to compare qualitatively different situations, such as terrorism and tax evasion (i.e., apples and oranges).

The Results

The matrix yields a score between 1 (reflecting a situation where government access would be an unreasonable invasion of privacy) and 100, (where there would be absolutely no doubt that access was an absolutely reasonable intrusion into individual privacy).

As a civics exercise, the process allows for widespread participation in four ways:

- Individuals can engage in a face-to-face discussion about their own ratings in a structured way that promotes thoughtful reflection.

- The exercise is actually a class from my university course. Newspapers, schools, social media and any other institution can use the method as a tool for promoting participatory civics.
- The matrix is a research tool for scholarship on issues of public policy. Professional surveys can provide descriptive statistical distributions showing averages and the range and extent of deviations. This allows social comparisons for individuals to see where they stand with respect other groups of people (e.g., male vs. female, younger vs. older) and where there is consensus.
- Substantial civic discussion can directly support a legislative process based on public participation and consensus rather than on legislation authored by lobbyists representing special interests.

The Conclusion

Such a process is a modern replication of the Commons Green where popular civic participation can take place. Once the general principles are identified, they can be given legislative status to enable the FBI or IRS to know the legal constraints for doing their job. Of course, such legislation is likely to find its way to the Supreme Court. But, such a process of functional democracy would rescue a court of elderly Justices from being the ones extrapolating “unreasonable” from 1791 to modern times in the narrow context of a terrorist’s iPhone or a cloud based data file. Rather, their task would be to decide if the process and resulting legislation had established what is or is not an unreasonable intrusion into privacy today.

Decision making as a rational process is an example of democracy at work in which popular participation can replace the fact-free ideological chatter that has been the defining characteristic of the current political process. We have the capacity to do this. The time is overdue for modern knowledge and technology to become the currency of politics as the means to meet the new challenges -- such as environmental collapse or an unsustainable national debt -- of living in the 21st Century.

(Use the Exercise Box below to create your own matrix for defining the basis for the balance between security and privacy, and for discussing your perspective with that of others in the service of finding common consensus.)



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Exercise

The issues

- (1) *Should the government be able to force Apple to help the FBI gain access to the content of a specific iPhone in order to learn the contact network of a known terrorist?*
- (2) *Should the government be able to access registers of stocks and bonds and transfer the information to a public record that would allow tax collectors to find and tax hidden wealth?*

Directions

Assign a score of 1 to 100 for each of the three considerations for both the iPhone and Panama Papers. Give a relative percentage weight to each of the three considerations such that their sum is 100%. Multiple each score by the weight and record the calculated value of each consideration. Add the values to obtain the score for each issue. This final sum will be a score between 1 (government access is an unreasonable intrusion into protected privacy) and 100 (government access to private information is absolutely reasonable).

iPhone			
Considerations	Score (1 to 100)	Weight (.01 to 1.0)	Value (Score x Weight)
Not Essential = 1, Very Essential = 100			
Very Intrusive = 1, Not Intrusive = 100			
Inadequate Safeguards = 1, Adequate Safeguards = 100			
Sum		1.00	
Panama Papers			
Considerations	Score (1 to 100)	Weight (.01 to 1.0)	Value (Score x Weight)
Not Essential = 1, Very Essential = 100			
Very Intrusive = 1, Not Intrusive = 100			
Inadequate Safeguards = 1, Adequate Safeguards = 100			
Sum		1.00	

After completing the exercise consider comparing your answers, and the reasons for them, with others. Go the [Forums for Future Blog](#) and reply to the essay by posting your scores and comments, and by reading and responding to the comments posted by others.