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*A Discussion on Civil Liberties and The Harm Principal*

September 11, 2001 was a day most Americans will never forget. In just under two hours almost 3,000 lives were lost. In just under two hours, an attack leading to complete destruction of the iconic Twin Towers in New York City, a plane crash into The Pentagon, and a failed attempt to attack a high-profile target in Washington DC resulting in the crash of United Airlines 93 shocked the world. It was not long before George W. Bush, the President of the United States at the time, declared the act of war as terrorism linked to Al-Qaeda. Before September 11, 2001, few people knew about Osama bin-Laden or Al-Qaeda. In the following days, the President made it clear – The United States was attacked and we would take every measure possible to prevent such an attack again. Shortly thereafter, with emotions running high and security risks still at soaring levels, The United States Congress and President near-unanimously signed into law the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001,* more commonly referred to as the USA PATRIOT Act. At the time, the bill passed in record time and with strong bipartisan support. The USA PATRIOT Act is a ***massive*** piece of legislation, and it provides the Federal Government with hundreds of tools to collect mass surveillance, authorize searches and arrests, allow widespread access to otherwise classified data, enhance collaborations between agencies like the FBI and CIA, and significantly expanded the power of the National Security

Agency (NSA). In 2001, the USA PATRIOT Act was signed with almost no discussion, despite its scope and breadth. Fast forward fifteen years to today – 2016 – and the dialogue has changed tremendously. A great increase in technology – smartphones, powerful computing and anonymous computer software to name a few led to a huge discussion about privacy in the 2010s, culminating with the release of thousands of classified documents by whistleblower Edward Snowden, who was an employee of a large defense contractor and had access to a multitude of data. All of these revealings, combined with the technology surge and a general increase in individual privacy opened the door for the discussion that was shelved a decade earlier. At the heart of the discussion: nonprofits such as the EFF (Electronic Frontier Foundation) and ACLU (American Civil Liberties Union), supported by thousands of Americans, began to oppose portions of the USA PATRIOT Act that they deemed unconstitutional. One of the most controversial parts of the USA PATRIOT Act is Section 215, which allowed the government to collect data with very vague limitations; that is anything from personal driver records to bulk phone collection of millions of Americans. A leaked FISA report from June 2013 revealed that the United States Government was utilizing the language in Section 215 to collect immense amounts of user information without the standards of probable cause and without a warrant, which are judicial procedures and rights granted to all citizens. As a response, ACLU filed a lawsuit which eventually led to a major case in the United States Federal Circuit Court, 2nd district. The lawsuit claimed that the *bulk* collection of metadata, that is data about other data (such as phone records), was against the law and a severe violation of the rights of an American Citizen. The case was

eventually ruled in ACLU's favor, with the court citing the vague and improper language to which the NSA used to warrant such collection. In JS Mill's *On Liberty,* which was written in the mid 19th century, we are presented with a principle that is "entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion" (*On Liberty, 13).* Mill's Harm Principle states that the "sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection" (*On Liberty, 13).* Mill is strong in his point and makes it clear that the **only** reasoning for action by society or government against the will of a citizen, thereby interfering his/her liberty, is direct harm to others. Mill is extremely clear in separating the individual from another member(s) of society, stating that the individual can be reasoned with or persuaded in a friendly, conversational and open format in certain situations where other members of society believe they are doing good, or attempting to prevent physical/moral harm of an individual who is autonomous and fully in control of himself and his actions. However, such "friendly persuasion" or dialogue must not be met with *any* harmful intention or compelling tone. In this way, Mill is drawing a strong line between the rights of an individual and the prevention of harm to others. If there is not a connection between the prevention of harm to others in society and any action taken by a government or society that limits an individual(s) personal liberty on such grounds, then it is not justifiable under the Harm Principal. The collection of bulk metadata under Section 215 of the USA PATRIOT Act would not be warranted because there is no *clear and straightforward*

connection between the mass collection of such data and the prevention of harm to others in society.

In the ruling of ACLU v. Clapper, the court cited several reasons why the wording in Section 215 of the USA PATRIOT Act was not appropriate or even legal with the resultant actions of agencies like the NSA utilizing the act to perform widespread and essentially unregulated collection of metadata. The court ruled that the extremely vague use of the word "relevance" was not an appropriate action because of the variation of the term in other statutes. Specifically, the court cited *18 U.S.C. § 2709(b)(1)* and *20 U.S.C. § 1232g(j)(1)(A),* two other laws in which the United States Congress did not show any intent to store in bulk, with a limitless authority, the collection of toll-billing records and educational records respectively when such records were relevant to an authorized investigation related to terrorism. However, the court ruled that the same language of "relevance" was drafted in Section 215 and bulk collection was performed and data was stored for any American that the NSA wished to collect from. The argument of a limiting principle – which states that there must be some limit to the power of the US Congress – was not rationalized in Section 215 of the USA PATRIOT Act. Therefore, it was a defiant interpretation of the text and subsequent action by the NSA and related agencies would lead to a harmful precedent if allowed to utilize such a law for their purposes of surveillance. It was argued strongly that such a precedent would allow the government to essentially act with no limitations – the extension of bulk phone metadata (which was the concern of the NSA and the main focus in the ACLU v. Clapper case) could be extrapolated to almost any other form of metadata in the private sector such as health records, financial records, and electronic communications (e-mail, social media, etc.).

This would be a clear violation and abuse of power as well as a strong infringement on the privacy of an American Citizen. The court also stated that the NSA's bulk metadata collection programs in the interest of ***potential*** national security investigations in the future did not even pass the permissible relevance test, which calls for evidence (such as the bulk metadata) to be directly connected to a specific investigation of terrorism or to have some clear and derived use for *each* individual record of the bulk metadata stored. Instead, the government did not provide this. The courts also weighed in on a potential Constitutional violation, specifically the Fourth Amendment, which calls for probable, justifiable cause to allow the warranted search and seizure of an individual who wishes to secure him/herself. While the government argued that metadata was *not* part of the individual's pool of security under the Fourth Amendment, the majority of the court was in consensus that, especially in the 21st century, individual citizens utilize technology such as cell phones to perform daily and widespread tasks and that metadata collected from such phone calls was likely an extension of the security guaranteed under the Fourth Amendment. The ruling, however, was not based on the constitutional principal at all as there was enough legal justification for the court to rule in the favor of ACLU (that the collection programs, in their current form and the subsequent text of Section 215, was unwarranted and furthermore over the fine line of limitations when it comes to the authority of Congress and their power to enact such a subsection of a law).

An interesting argument from the ACLU v. Clapper case came from the appellants, who stated that:

*"Such expansive development of government repositories of formerly private records would be an unprecedented contraction of the privacy expectations of all Americans. Perhaps such a contraction is required by national security needs in the face of the dangers of contemporary domestic and international terrorism. But we would expect such*

*a momentous decision to be preceded by substantial debate, and expressed in unmistakable language."*

This is an interesting point because the appellants from the ACLU and related organizations are stating that perhaps such a strong contradiction of privacy expectations is **needed** for national security reasons, but that such a large decision must be debated and expressed clearly. Furthermore, they state that there was no proper legislative debate about Section 215, nor was there any evidence in the direct text of Section 215 that clearly stated the limitations and procedures for agencies like the NSA to collect metadata for the direct purpose of an ongoing investigation. Again, the court ruled that collecting data for the purpose of <u>future</u> (and obviously not guaranteed) developments or crimes is not admissible in a court of law nor legal to carry out. We come back to Mill, who, in 1859, laid out the criteria for government involvement when it comes to ones' individual liberty. The collection of this sort was likely never envisioned by Mill in his time, but the principal he laid out is in agreement with the court decision. Mill would encourage and honor such debate about the issue as he mentions "friendly" dialogue is not a violation of his principal, and the appellants' from the ACLU v. Clapper case who argued that, although they strongly believed against the NSA bulk collection programs, that such an action should be debated and widely distributed in media, etc. Mill would be fine with this as it concurs with both his idea of conversation and dialogue so long as it does not violate the liberty of another as there is no direct harm to others involved. Repeatedly, it was shown that the future implications of collecting such data and storing it in a database could lead to, among other things, potential privacy hacks and other cybercrime. It was also shown that the mass collection of such metadata is not warranted on the grounds of

future investigations; the burden of proof (that is the government's claims that the data was to be used for important terrorism investigations in the future as they arose) falls on the government and related agencies like the NSA to show a *direct and clear* connection between all data collected and an existing investigation of crime/terrorism to which probable cause and appropriate procedures have been verified. Because there was no such direct connection between terrorism investigations and massive collection of metadata, Mill's Harm Principal would be in agreement with the court: the actions taken by the NSA were a violation of the civil liberties of individuals in society, and **no** proof of direct prevention of harm was ever presented. The individual liberty of a citizen in a society is therefore completely violated and the Harm Principal is *not* in concurrence with the government to utilize for the actions performed by the NSA. The discussion between privacy and national security is important, but in the case of ACLU v. Clapper and Section 215 of the USA PATRIOT Act, there was *no warranted evidence* that would support Mill's argument and make the case that such programs were enacted as to prevent harm to society. The courts, in 2015, ruled in a similar manner: the data did **not** produce permissible and succinct evidence of any acceptable "harm prevention" to society – only hurting the privacy of the individual citizen and his/her liberties.

*Main Works Cited*

**JS Mill, *On Liberty:*** http://socserv.mcmaster.ca/econ/ugcm/3ll3/mill/liberty.pdf

**ACLU v. Clapper, case document:** http://www.ca2.uscourts.gov/decisions/isysquery/5c81be63-c2ed-4c0e-9707-6bff831b4aba/1/doc/14-42_complete_opn.pdf