

# Session 7

## Security versus Freedom: Which Rights Prevail?

### **OBJECTIVES:**

- To discuss states' responsibilities to protect citizens' freedom and their right to security.
- To consider when the right to freedom of expression conflicts with the right to security.
- To examine privacy rights and whether the state may impinge on privacy to provide adequate security.

### **In This Session:**

In this session, we will read about legitimate and illegitimate security measures by the state and discuss at what point the state begins to impinge on liberty rather than protect liberty. Every security concern for a state is different, and of course there are no hard and fast rules about the right amount of security and the right amount of freedom. For that reason, human rights advocates weigh the costs and the benefits of freedoms and the costs and benefits of security measures to assess when the state has not done enough to protect its people and when the state has gone too far. Frequently, in the modern world the first casualty of heightened state security is an individual's privacy. States have the capacity to monitor phones, emails, texts, internet searches, and even the content on people's computers, and many governments do so to some degree. We will read and discuss an article by Amnesty International's Director of Law and Policy on the human rights ramifications of state surveillance. This article is followed by an optional reading assignment, a blog entry on the impact of state surveillance on journalistic freedom, freedom of expression, and freedom of thought and beliefs.

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## Reading Assignment:

### When Security Impinges on Freedom

The purpose of a state's security apparatus is to protect the citizens and the stability of the state. Human rights demand reasonable limits on the power of security forces and security laws so that while citizens are protected from danger and chaos, their other rights are not impinged. However, what are "reasonable limits" depends very much on the culture, history, and politics in a given country. What is acceptable interference by the government in one country may be unacceptable in another. And, there are some levels of interference – regardless of the culture or politics of the region – that are always violations of human rights. Some examples are: where individuals are forbidden to gather in groups to discuss their political ideas; where non-governmental organizations are forbidden to raise funds to support their activities; or where doctors or lawyers are forced to share with the government private information about patients or clients who may have criticized the government. In each of these scenarios, the security measures have over-reached, no longer creating a safer and more orderly society, but instead a society where human rights are being violated.

However, the line between a citizen's right to security and a citizen's right to be free from excessive security measures is not always clear. For example, a state is responsible for protecting its citizens from disruptive, violent, and criminal acts. However, if a crowd gathers to complain about people of a certain religion, ethnicity, or political belief, and the state fears that the crowd will become violent, it may be reasonable for security forces to disperse the crowd in order to protect the citizens. But should the state use violence if it cannot control the group in any other way? What if protestors are injured? What is a reasonable response by the state?

After 9/11, governments around the world stepped up their surveillance of people at home and abroad in an effort to catch potential terrorists before lives were lost. Information – political, economic, social, and other intelligence – has become governments' most touted bulwark against terrorism. The United States, for example, has justified how it gathers information, whether through wire-taps, extensive surveillance, or enhanced interrogation, in the name of security and preventing another 9/11. Although the threats are very real, the United States and other nations have sometimes been too quick to curtail liberty in their pursuit of security. The result is that the *fear of terrorism* has succeeded in restricting freedoms and rights, even where no terrorist action has occurred.

Governments have the difficult task of identifying legitimate and reasonable measures that adequately respond to threats. Human rights advocates must be vigilant in evaluating those measures for their efficacy and their cost to human liberty.

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**Team Exercise:**

Imagine an incident in which some participants in a demonstration against a new cigarette tax were destroying and stealing property from local businesses that sell cigarettes. Meanwhile, the majority of the participants were exercising their right to peacefully assemble.

Divide the group into teams of three or four and ask each team to discuss what obligations the security forces have to protect property, the peaceful protestors, and themselves. What level of force would be appropriate, if any, for the security forces to use in carrying out their responsibilities? Ask each team to draft three to five guidelines for the security forces that address how they should fulfill their duty to:

- Protect the peaceful protestors
- Protect the community
- Protect themselves

When the group reconvenes, ask a volunteer from each group to read their team's guidelines.

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**Questions for Group Discussion:**

- What are some examples of states and/or security services using excessive, even deadly, force to "protect" the security in a community?
- Does the threat of violence used as a policing strategy make a community safer? Why or why not? What does the community lose when its members fear police and security forces? What are the rights that become harder to exercise when fear of violent repercussions exists?
- Describe examples of situations (real or hypothetical) where the right to freedom of expression could conflict with the right to security. Is there a point at which the value of free speech is outweighed by the need for peace and security?
- States sometimes characterize criminalize speech as punishable because they claim that the speech is destabilizing to society and jeopardizing citizen's security. Can you think of examples where this might in fact be true?

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**Reading Assignment:**

### UN Response to Surveillance Must Strike Balance between Privacy and Security

*Michael Bochenek*

#### *Excerpts*

[Revelations] that the USA's National Security Agency (NSA) has spied on 35 world leaders has only further exacerbated international outrage about its massive electronic surveillance programme. . . .

Brazil and Germany in particular are calling for a UN resolution to demand internet privacy.

Any UN debate on the issue must not lose sight of how this surveillance is damaging to fundamental human rights. It must not be limited to protecting world leaders or cross-border surveillance. Instead, it must address – or at least start a proper discussion on – the wider impact that massive electronic surveillance programmes have on whole societies.

There's no question that the nature and extent of communications surveillance by the USA, the UK and other countries raise serious human rights concerns. The obvious one is the lack of respect for the right to privacy. Such measures also create a significant chilling effect on free expression and association.

More generally, privacy is essential to a person's liberty and dignity. It is critical to personal identity, integrity, intimacy, autonomy and communication, and has overarching benefits for society as a whole.

Any measures to interfere with privacy must always be proportionate to a legitimate aim being pursued. And justifications for doing so must be subject to judicial oversight and parliamentary scrutiny that are transparent, robust and independent. . . .

[When] governments are engaging in mass surveillance of internet communication, the only terms so far seem to be that it's open season; any and all intrusion on our privacy is fair game.

Put it another way – imagine a government agent sitting in your living room, thumbing through your text logs, opening up and reading through the day's emails, and making note of the websites you've visited. Would you feel uneasy about that?

And even if these governments can say that they're not giving everyone this level of scrutiny, it's still true that they can do so at any time. Some of the surveillance techniques actually allow States to collect and store the content of individual communications for years.

That might not make a difference to some of us. But in my line of work, it's a chilling thought. We know that governments routinely share the information they collect with their allies. What if part of the conversation I had yesterday with a lawyer in another country is shared with her government, which is already looking for a reason to make her stop advocating on behalf of human rights victims?<sup>34</sup>

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### **Questions for Group Discussion:**

- Is it ever justifiable to violate certain individual liberties in the name of national security? Explain your answer.
- Amnesty International's Michael Bochenek described the level of the NSA's privacy invasion as being akin to a government agent sitting in your living room, thumbing through your text logs, opening up and reading through the day's emails, and making note of the websites you have visited. If

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<sup>34</sup> <https://www.amnesty.org/en/latest/news/2013/10/un-response-surveillance-must-strike-balance-between-privacy-and-security/>

someone has nothing to hide, and the government feels strongly that this level of surveillance is necessary, what are the human rights objections to such a high level of scrutiny?

- How might journalists and lawyers be uniquely impacted by their private correspondence being under surveillance? If journalists become reluctant to cover some types of stories, particularly about possible over-reach by government surveillance, does that have repercussions for society? What about lawyers who become reluctant to take on some clients because they might be placed in a situation where the government demands private information about their clients?
- Do individuals have a right to personal sovereignty, to their person, their possessions, and their communications? At what point is a state justified in violating those personal sovereignty rights for the greater good of the state?

### **Optional Additional Reading:**

#### **How Surveillance is Changing Journalism and the Law**

*Alex Sinha*

*“If I can’t report a story without keeping a source safe, I’m not going to report a story.”*

**Jonathan S. Landay**

*Senior National Security and Intelligence Correspondent*

*McClatchy newspapers*

It turns out that surveillance affects more than just privacy.

We know the government collects massive amounts of data about us, including bulk domestic calling records in the millions, many of our international emails and calls, and much more. Those programs have obvious privacy implications, but more than a year since the first Edward Snowden disclosure, we need to focus on the other democratic pillars that government spying has imperiled.

*A new report*,<sup>35</sup> produced jointly by the ACLU and Human Rights Watch, shows that large-scale surveillance by the U.S. government is undermining the work of journalists and lawyers. Many leading journalists covering national security, law enforcement, and intelligence have found sources and information increasingly hard to come by. Surveillance is compounding a host of other challenges faced by journalists lately, like a significant spike in the prosecution of their sources and new government initiatives to minimize even minor leaks.

Many of the journalists I interviewed for the report described struggling to find ways to protect their data and communications, adopting new and sometimes elaborate techniques to do so. Encryption? Check. Air-gapped computers? Check. And many of these journalists are now using “burner

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35 For the complete text of the report, published by the ACLU and Human Rights Watch, 2014, go to: [http://www.hrw.org/sites/default/files/reports/usnsa0714\\_ForUpload\\_0.pdf](http://www.hrw.org/sites/default/files/reports/usnsa0714_ForUpload_0.pdf)

phones,” going back to payphones, or even trying to contrive ways to bump into sources in person. These techniques can take extra time. Combined with sources’ growing reluctance to speak – even about unclassified matters that the government has no business protecting in the first place – that means reporters are producing stories at a slower rate.

The result? We have less information about our own government.

Lawyers need to modify their practices, as well. The Snowden revelations have made it clear that attorneys need to go to new lengths to maintain their clients’ confidences. Increasing challenges in communicating securely make it harder for them to build trust with their clients and to develop legal strategies with clients and co-counsel. A number of lawyers have begun adopting techniques similar to those used by journalists.

Both journalists and lawyers also emphasized that taking such elaborate steps to do their jobs makes them feel like they’re doing something wrong. As one lawyer put it, “I’ll be damned if I’m going to start acting like a drug dealer in order to protect my client’s confidentiality.”

That feeling is understandable, and it is a profound problem that so many others shared it, given that journalists and lawyers play such integral roles in our democracy. We depend on the press to tell us what our government is doing, and without that information, it is much harder to hold our government to account when it missteps or overreaches. In the age of drones, mass surveillance, and indefinite detention, we need coverage of national security and intelligence as badly as ever.

The same goes for lawyers – especially defense lawyers. Confidentiality and attorney-client trust are crucial for effective representation, cornerstones of fairness in the justice system.

We know that mass surveillance can obliterate privacy. But more than that is at stake. Without privacy, essential democratic processes are in danger.<sup>36</sup>

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<sup>36</sup> Sinha is Aryeh Neier Fellow at Human Rights Watch /American Civil Liberties Union, and writes a blog. This entry is from July 28, 2014 and can be found at: <https://www.aclu.org/blog/how-surveillance-changing-journalism-and-law> .