

**The National Security Agency Following September 11th, 2001**

by

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## Introduction

This senior project explores the evolution of the National Security Agency following the September 11th, 2001 terrorist attacks. I was interested in exploring this topic due to the shift in America after the attacks. While born two years before 2001, my life has only been in post-9/11 America. My only knowledge of the events on that Tuesday morning of 9/11 was from my primary education and growing up on Long Island. Even at a young age, the images of 9/11 and stories showed me the tragedy and importance of the development of the 21st century America following these events.

The research and scholarly work written about the National Security Agency (NSA) following 9/11 are limited due to the recent events. Some sources investigating this topic typically fall on a tight binary of the National Security Agency's actions as good or bad, or further constitutional or unconstitutional. Throughout this senior project, the effort was to find a balance between the two. The emotions attached to September 11th also sometimes blur the history of the NSA and the Bush Administrations' actions.

Understanding the NSA's origin is pivotal in seeing the actions exhibited in the years after September 11th. The NSA's role in the security of America had a substantial shift in the past 20 years. The events of 9/11 are also vital to understanding the state of fear the country lived in for years to follow. This fear and uncertainty led to many decisions from the US government that later were questioned on legality and the infringement on American citizens' civil rights. The very recent revelations of these events and actions bring into question how much security and protection is too much.

## The Birth of the National Security State

Today, we live in a world highly attentive to issues of national security. Central to the governance of national security is the National Security Agency, which has come to play a significant role within the U.S. Department of Defense. It wasn't always this way.

The NSA emerged similarly to other defense departments in that it was formed out of several pre-existing smaller groups within the government. Prior to its creation in 1952, the NSA had several predecessor organizations, all of which helped to introduce security as a key component of the U.S. military, and, by extension, the U.S. government. One predecessor was a cipher and code decryption unit that was created in 1917. The unit became the blueprint of the later development of the NSA following the United States' declaration of war against Germany during the First World War. In comparison to the NSA today, the decryption unit occupied a relatively small role within the broader U.S. defense forces. The unit was a part of the U.S. Army and focused mainly on cryptography. Cryptography is the conversion of readable information into an unintelligible message to hide the information. One main form of code creation and breaking during WWI were known as Trench Codes where coded messages would be transmitted through telephone, radio, and carrier pigeons within the trenches.

Following the end of the war, another organization similar to the decryption unit known as the Cipher Bureau or Black Chamber was created. This was the United States' first peacetime cryptanalysis organization. The aftermath of the World War, the U.S. government had a priority change in their view on national security. This could be due to the horrific consequences of the war or an insight of the importance of surveillance and cryptography in the following years. The

government might have seen the continuation of a Cipher Bureau in a time of peace as a way to keep up with the developing and evolving technology. Black Chamber only lasted ten years after the Department of Defense eliminated funding to the organization.

World War II witnessed an enormous investment on the part of the U.S. government in the military and new technology.<sup>1</sup> Part of this rapid growth in technology included an increase in Signal Intelligence Service or SIS. Like the decryption unit, SIS was part of a growing US military focus on creating and breaking code. SIS was part of the U.S. Army Signal Corps and later absorbed into the Army Security Agency (ASA). Their main goal was decoding and intercepting communications between the Axis Powers while also supplying technology to the Army.

The NSA itself was finally formed after WWII in 1952 under President Harry Truman. The creation of the NSA arose after the failings of the AFSA during the Korean War due to the ineffectiveness of distribution of the decryptions to high level officials. In 1951, CIA director Walter Bedell Smith sent a memo to James Lay, the head of the National Security Agency, suggesting the development and embedding of a constant Security agency as part of the Defense Department. This memo was later created into the “Brownell Report.”<sup>2</sup> It “surveyed the history of U.S. communications intelligence activities and suggested the need for a much greater degree

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<sup>1</sup> Margaret O’Mara, *The Code: Silicon Valley and the Remaking of America* (New York, NY: Penguin Random House, 2020).

<sup>2</sup> Andrew Glass, “The National Security Agency Is Established, Nov. 4, 1952,” *Politico*, November 4, 2010, <https://www.politico.com/story/2010/11/the-national-security-agency-is-established-nov-4-1952-044671>.

of coordination and direction at the national level” which inevitably led to President Truman’s decision in creating the NSA.<sup>3</sup>

Seemingly with the official creation of the NSA came the secrecy in tow. The agency quickly earned a nickname as the “No Such Agency” among those who worked in the Defense Department.<sup>4</sup> This secrecy could be a result of the classified information collected, or protection of programs and actions within the agency.

The Vietnam War is noted as a shift in the importance of the NSA as one of the prominent defense departments. Here, the NSA was credited with intercepting the Gulf of Tonkin incident communications. This was only released to the public in 2005 by declassified documents by the NSA and later more information was released in 2006- further showing the secrecy within the agency.<sup>5</sup> In August 1964, a report came back to the U.S. that two unprovoked attacks by the North Vietnamese had occurred.<sup>6</sup> The attacks targeted the U.S. Maddox and Turner Joy, two destroyers off the coast of Vietnam. Based on the intercepted communications, these attacks seemed to have been planned by the North Vietnamese. The intercepted communications served to bolster the United States narrative that the Prime Minister of North Vietnam, Ho Chi Minh, was the aggressor, and that the United States had no other option than to attack North Vietnam.

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<sup>3</sup> “The National Security Agency: Declassified.” The National Security Archive. Accessed April 7, 2022. <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB23/index.html#:~:text=Generally%20known%20as%20the%20%22Brownell,direction%20at%20the%20national%20level.>

<sup>4</sup> Anne Gearan, “‘No Such Agency’ Spies on the Communications of the World,” *The Washington Post*, [https://www.washingtonpost.com/world/national-security/no-such-agency-spies-on-the-communications-of-the-world/2013/06/06/5bcd46a6-ceb9-11e2-8845-d970ccb04497\\_story.html](https://www.washingtonpost.com/world/national-security/no-such-agency-spies-on-the-communications-of-the-world/2013/06/06/5bcd46a6-ceb9-11e2-8845-d970ccb04497_story.html).

<sup>5</sup> “Gulf of Tonkin,” National Security Agency/Central Security Service > Home, accessed April 10, 2022, <https://www.nsa.gov/Helpful-Links/NSA-FOIA/Declassification-Transparency-Initiatives/Historical-Releases/Gulf-of-Tonkin/>.

<sup>6</sup> John W Finney, "U.S. Believes Destroyers Scored Hits in Tonkin Gulf: Radar Observations during Encounter Reported to Indicate that 1 to 3 of Red Vessels Sank Under Fire RADAR INDICATES TONKIN GULF HITS." *New York Times*, September 23, 1964.

As a result of these two attacks, President Lyndon B. Johnson issued the Gulf of Tonkin Resolution. The Gulf of Tonkin Resolution inevitably led to President Lyndon B. Johnson escalating the United States' involvement in the Vietnam War.

Recently, in 2005, the *New York Times* wrote a report based on newly released NSA documents related to the Gulf of Tonkin incident. In the article, “an agency historian argued that the agency's intelligence officers ‘deliberately skewed’ the evidence passed on to policy makers and the public to falsely suggest that North Vietnamese ships had attacked American destroyers.”<sup>7</sup> This was concluded years after the Vietnam War, but does show a pattern of secrecy and deception created by the NSA. While the NSA seemed to have a clean record in the public eye during this time, the real exposure of malpractice and secrecy was exposed in the early 2000s.

During the 1970s, the NSA increasingly faced public scrutiny amid what came to be known as the Church Committee Hearings. After years of secrecy on the part of multiple Department of Defense branches, including the Central Intelligence Agency (CIA), Federal Bureau of Investigation (FBI), and NSA, the Church hearings, led by Senator Frank Church, were created in 1975 to unearth the secret practices of these agencies. The hearings were part of a broader move to increase government accountability and transparency following the Watergate Scandal. In short, the Watergate scandal involved the bugging and other illegal activities done by

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<sup>7</sup> Scott Shane, “Vietnam War Intelligence ‘Deliberately Skewed,’ Secret Study Says,” *The New York Times*, December 2, 2005, <https://www.nytimes.com/2005/12/02/politics/vietnam-war-intelligence-deliberately-skewed-secret-study-says.html>.

President Nixon's administration and numerous defense agencies against President Nixon's opponents in the 1972 election, Senator George McGovern, and other political figures.<sup>8</sup>

The scandal increased the incentive for media outlets to investigate and bring to light questionable government practices, particularly as they concerned the growing security apparatus. On Sunday, December 22, 1974, the *New York Times* released an article with the headline, "Huge C.I.A Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years."<sup>9</sup> While not a direct indictment of the NSA, the article questioned the morals and ethics of the intelligence departments specifically during the Nixon administration. The *NYT* may have focused specifically on the CIA due to their larger involvement in the incident but gave brief accountability to the NSA for their involvement.

This was but the beginning of the *New York Times'* work investigating the NSA. In subsequent decades, the newspaper would come to play a pivotal key in exposing questionable NSA practices. Following the *New York Times'* expose, the U.S. Senate created a committee to look into these concerns of agencies' abuses and overstepping regulations. Here, we can see the relationship between media and governmental oversight of the growing security state in action. The mistrust by the U.S. citizens and the exposure of the practice of abusing power of surveillance and misusing authority led directly to the Church Committee Hearing. The Church Committee had an enormous feat at hand; to investigate some of the most secretive agencies and programs of the U.S. government. The Church Committee saw the importance of the checks and

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<sup>8</sup> "Select Committee on Presidential Campaign Activities," U.S. Senate: Select Committee on Presidential Campaign Activities, January 27, 2022, <https://www.senate.gov/about/powers-procedures/investigations/watergate.htm>.

<sup>9</sup> Seymour M. Hersh, "Huge C.I.A Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years," *New York Times*, December 22, 1974, p. 1.

balances within the U.S. government, even for the most secretive agencies.<sup>10</sup> The investigation revealed that the CIA, NSA, FBI, and Internal Revenue Service (IRS) all engaged in intelligence abuses of illegal surveilling American citizens, including through the NSA's deployment of projects SHAMROCK and MINARET. Projects SHAMROCK and MINARET were NSA programs that collected communications internally and externally from the United States and shared them throughout the intelligence departments. This is important to note the shift to internal and external surveillance the agency performs. Project SHAMROCK, in particular, granted access to daily microfilm copies of incoming, outgoing and transitioning telegrams from Western Union, one of the largest communications and Telegraph companies. Meanwhile, Project MINARET, the sister program to SHAMROCK, was a domestic espionage program. The project actually dated back to 1962 when the agency saw fit to create a "watch list" of prominent figures like Muhammad Ali, Tom Wicker (a journalist from the NYT), Martin Luther King Jr. and Jane Fonda.<sup>11</sup> Many of those on the watchlist were either anti-war and civil rights Activists or spoke out against the government.<sup>12</sup> The watch list was subsequently shared with different governments departments that were not legally allowed to conduct these types of surveillance. While the inter-departmental transmission of information seems legal, the watchlist was concerning due to those on the watchlist having no legal reason to be surveilled other than speaking out against the US government, which is not illegal. Neither program had judicial

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<sup>10</sup> "Looking Back at the Church Committee," National Constitution Center, accessed March 12, 2022, <https://constitutioncenter.org/blog/looking-back-at-the-church-committee>.

<sup>11</sup> "Project Minaret and Project Shamrock," Omeka RSS, accessed March 12, 2022, <https://kimon.hosting.nyu.edu/physical-electrical-digital/items/show/1184>.

<sup>12</sup> Matthew M. Aid and William Burr, "Secret Cold War Documents Reveal NSA Spied on Senators," *Foreign Policy*, September 26, 2013, <https://foreignpolicy.com/2013/09/25/secret-cold-war-documents-reveal-nsa-spied-on-senators/>.



oversight, nor did they involve warrants. The warrantless surveillance is a recurring fault in the NSA's programs while the programs hold up legally the warrant dodging is the legal issue.

Following the Church Committee's investigation into the security-related branches of the U.S. government, the committee members took the next step of recommending actions to correct what they viewed as a serious overreach of governmental authority. Specifically, the committee recommended ninety-six legislative actions to prevent these abuses from occurring again, including the use of executive oversight and other forms of checks and balances. Senator Church appeared on *Meet the Press* and gave a profound state of internal surveillance, which almost sees a glimpse into the future. It is not specifically clear why Senator Church appeared on this weekly NBC News broadcast but it does show the link between media coverage/exposure in regards to governmental faults and controversy. He reflects on if the US government fell under a tyranny

I don't want to see this country ever go across the bridge. I know the capacity that is there to make tyranny total in America, and we must see to it that this agency and all agencies that possess this technology operate within the law and under proper supervision so that we never cross over that abyss. That is the abyss from which there is no return.<sup>13</sup>

One of the most impactful outcomes from the Church Committee was the development of Foreign Intelligence Surveillance (FISA), which was created in 1978 to help curtail intelligence abuses through providing for judicial and congressional oversight of the NSA.<sup>14</sup> As outlined in the act that created the FISA, the "FISA, as amended, establishes procedures for the

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<sup>13</sup> NBCUniversal Archives, *The Intelligence Gathering Debate* [Video] YouTube, uploaded January 23, 2014, <https://www.youtube.com/watch?v=YAG1N4a84Dk>.

<sup>14</sup> "Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities," U.S. Senate: Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, February 26, 2021, <https://www.senate.gov/about/powers-procedures/investigations/church-committee.htm>.

authorization of electronic surveillance, use of pen registers and trap and trace devices, physical searches, and business records for the purpose of gathering foreign intelligence.”<sup>15</sup> Congress developed the Foreign Intelligence Surveillance Court (FISC) to review and approve electronic surveillance warrants due to the evolved procedure. Congress developed the Foreign Intelligence Surveillance Court (FISC) to review and approve electronic surveillance warrants due to the evolved procedure. An electronic surveillance warrant is a detailed procedure that involves specifying who is being surveilled, the reasons why they are being surveilled, how long the surveillance will last, and what methods of electronic surveillance technology will be used. At the time, the main forms of electronic surveillance used by the NSA were wiretapping, bugging, and videotaping, all of which now required an electronic surveillance warrant before they could be initiated.

It is worth noting an important exception to the electronic surveillance warrant procedures required by the FISC. As stated in the act, “The President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies.”<sup>16</sup> In simple terms, this section allowed the president to surpass the oversight of FISC to perform surveillance on his own terms. This exception would come to play an important role in the years following the 9/11 attack when it functioned as a loophole that enabled the NSA to skirt the oversight of the FISC.

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<sup>15</sup> “The Foreign Intelligence Surveillance Act of 1978 (FISA),” Bureau of Justice Assistance, <https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1286>.

<sup>16</sup> “50 U.S. Code § 1802 - Electronic Surveillance Authorization Without Court Order,” Legal Information Institute, <https://www.law.cornell.edu/uscode/text/50/1802>.

Despite these and other challenges to the NSA's credibility, the agency persisted. Indeed, it played an important role in the Cold War. The NSA going into the Cold War had the massive project of breaking the complex and seemingly unbreakable Soviet codes and ciphers. There were many hurdles to overcome and a few failures during this time, specifically losing access to Korean communications during the Korean War and once able to reenact surveillance all codes were changed. The NSA did rise back to credibility as one of the main figures in the Cuban Missile Crisis. They were able to track Soviet ships holding the missiles, but this did expose the NSA missed previous missiles brought to Cuba by the Soviets months before.<sup>17</sup> The year 1986 marked a particularly significant moment for the NSA in terms of achievements. This entailed an interception of communications following the West Berlin discotheque bombing, which killed two and injured 79 Americans out of a total of 232 victims. In the process of investigating the bombing, the NSA, allegedly, found irrefutable evidence of Libya's involvement...which lead to the bombing of Libya in an operation code-named Operation El Dorado Canyon ten days after the West Berlin attack. The operation was widely deemed a success by the US government showing a decrease in terrorist attacks following Operation El Dorado Canyon.<sup>18</sup> At first, this Operation seemed to be successful by the US government due to the drop in terrorist attacks, but many others questioned if this attack was unprovoked and had little evidence to prove Libya's involvement. It seems like the NSA provided the White House with the communication interceptions and the White House Administration concluded this evidence was irrefutable in

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<sup>17</sup> "National Security Agency Releases History of Cold War Intelligence Activities," National Security Agency releases history of Cold War Intelligence Activities, accessed April 11, 2022, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB260/index.htm>.

<sup>18</sup> H W Prunckun and P B Mohr, "Military Deterrence of International Terrorism: An Evaluation of Operation El Dorado Canyon," Military Deterrence of International Terrorism: An Evaluation of Operation El Dorado Canyon | Office of Justice Programs, accessed March 12, 2022, <https://www.ojp.gov/ncjrs/virtual-library/abstracts/military-deterrence-international-terrorism-evaluation-operation-el>.

attacking Libya, but the NSA was not convinced. Overall this does seem to be credited as a success by the government and public due to the decline in terrorism- which might have been a correlation, not causation.<sup>19</sup>

Despite this success, the NSA, as well as the Defense Department as a whole, suffered in the 1990s due to major budget cuts. These budget cuts arose out of the end of the Cold War and cut the defense departments by 61.2% in reduction of spending. It seems that the cuts were caused by the shifting mindset in the United States' idea of defense after the end of a 40 year long war.<sup>20</sup> The deterioration became all the more noticeable on January 24, 2000, when the NSA suffered a total outage of its overall networks. Lasting for three days, this outage cost \$3 million to recover the NSA's systems. Many News outlets reported on this outage to the public. Just days following the outage and the final reboot, Director Michael Hayden was contacted while cross country skiing that ABC news had the story and was getting ready to inform the public.<sup>21</sup> With the development of new technology, employee cuts, and budget cuts following the end of the Cold War, the agency was unable to keep up or expand under these circumstances. While seen as a major error in the upkeep of our Defense Department, the outage was seen as a "Wake Up Call" by Director of the NSA, Michael Hayden, which led to the overall expansion of the NSA more than a year later in 2001.

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<sup>19</sup> Seymour M Hersh, "Target Gaddafi," *The New York Times*, February 22, 1987, <https://www.nytimes.com/1987/02/22/magazine/target-qaddafi.html>.

<sup>20</sup> David R Henderson, "US Federal Budget Restraint in the 1990s: A Success Story," Mercatus Center, September 15, 2019, <https://www.mercatus.org/publications/government-spending/us-federal-budget-restraint-1990s-success-story>.

<sup>21</sup> Vernon Loeb, "Test of Strength," *The Washington Post*, July 29, 2001, <https://www.washingtonpost.com/archive/lifestyle/magazine/2001/07/29/test-of-strength/344fa870-068f-4b10-9311-901e516ff3c1/>.

One lesson in particular drawn from the outage was the impact of new technologies on the NSA. One newspaper article written in March 2000 stated, “To some extent, [the] NSA is a victim of its own success. The agency helped spark the new age of intelligence by investing in early computers and telecommunications. Now it is drowning in a daily deluge of data from digital phones, faxes and e-mail--technology that barely existed a decade or so ago.”<sup>22</sup> The NSA had to adapt to the new influx of technology communication at the turn of the century. While the increase in technology was beneficial for the agency it brought along a bunch of new data to log that inevitably overwhelmed the agency, especially during a time of department budget cuts. Michael Hayden, the NSA director during the time, was the leading figure for pushing the NSA into the 21st century. A new emphasis was put on education and the renewal of the antiquated technology to never experience the 2000 outage again. While it seems like the NSA was allocated funds pre September 11th to evolve, the terrorist attacks subsequently added an even wider budget for the NSA.

## September 11th, 2001

September 11th started as a beautiful sunny Tuesday. The day before felt the cold Fall of New York creeping in, but there were bright blue skies and warmer weather on Tuesday morning. That warmer weather was soon overshadowed by one of the worst tragedies in American history. In a matter of hours, the trajectory of American history changed 19 members of the Terrorist group al-Qaeda reigned terror throughout the country creating last effects to this day.

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<sup>22</sup> Bob Drogin, “NSA Blackout Reveals Downside of Secrecy,” *Los Angeles Times*, accessed March 13, 2000, <https://irp.fas.org/news/2000/03/e20000313nsa.htm>.

The World Trade Center (WTC) consisted of seven buildings in the Financial District of Lower Manhattan, created in 1973. The North and South tower, also known as the Twin Towers, were prominent features of the New York skyline and quickly became a symbolic image of this fateful morning. The 110 floors housed over 50,000 workers on a usual workday, while over 40,000 passed through the complex daily. The September 11th attack was not the only attack on the WTC, eight years previous, killing six people and injuring over 1,000.

The September 11<sup>th</sup> attack on the World Trade Center began at 8:46 am when American Airlines Flight 11, coming from Boston, flew into the North Tower, hitting floors 93 through 99. One survivor, Dianne DeFontes, who had been on the 89th floor of the WTC in her office later recounted that seconds after the plane hit, "...all this noise happened at once. I'm getting up, said 'Wow, how the heck did they get a bomb up this high?' Because what else could it be?"<sup>23</sup> Hundreds of Americans were killed instantly on impact, while those on floors 92 and up were trapped due to the impact, which destroyed the three main stairwells.<sup>24</sup>

Many suspected the cause of the explosion to have been a bombing similar to the WTC attack in 1993, while few expected one of the most significant terrorist attacks on U.S. soil since Pearl Harbor. During the 1993 WTC attack bombs were set off in the parking garage killing six Americans. Those eight years later, expected a small scale bombing similar to years previous nowhere near the magnitude that occurred.<sup>25</sup> Nine one one was quickly inundated with calls from eyewitnesses and those inside the North Tower. A fireball from the plane's impact shot down one

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<sup>23</sup> Dianne DeFontes, "Oral Histories," National September 11 Memorial & Museum, accessed February 23, 2022, <https://www.911memorial.org/learn/resources/oral-histories>.

<sup>24</sup> National Commission on Terrorist Attacks. 2004. *The 9/11 Commission Report*. New York, NY: WW Norton.

<sup>25</sup> "World Trade Center Bombing 1993," FBI (FBI, May 18, 2016), <https://www.fbi.gov/history/famous-cases/world-trade-center-bombing-1993>.

elevator bank, spreading the fire to more floors. Burning jet fuel likewise created thick billowing smoke filling the upper floors of the North Tower, which drifted towards the South Tower due to the winds. With no knowledge of how massive the impact was, operators informed those in the tower to stay low and wait for emergency dispatch.

Ten minutes later, those in the South Tower were told to evacuate due to the massive destruction of the North Tower. Still, there was widespread confusion. During the 1993 bombing, a majority of the injuries came about as a result of the evacuation with the need to evacuate over 100,000 people due to the chaos many were injured during the panic of evacuation. This led to many companies with the WTC to revamp their evacuation plans, the overall security was handed over to the New York Port Authority and stairwells were lit with battery-operated emergency lights and luminescent paints in efforts to lessen chaos during evacuation, specifically used years later on that Tuesday morning.<sup>26</sup> Some floors evacuated like Morgan Stanley, but over the PA (released in the *9/11 Commission Report*) came an announcement that prompted only confusion: “the incident had occurred in the other building and advised tenants, generally, that their building was safe and that they should remain on or return to their offices or floors.”<sup>27</sup> Confusion filled the air. Those within the South Tower seemed to think that a horrible accident had occurred in the North Tower, but that the South Tower would remain relatively safe. This non-evacuation was rescinded only two minutes before the fatal South Tower attack.

Thousands of New York Police Department (NYPD), Fire Department of New York (FDNY), and Port Authority Police Department (PAPD) officers were sent to aid those in the

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<sup>26</sup> Jesse Greenspan, “Remembering the 1993 World Trade Center Bombing,” History.com (A&E Television Networks, February 26, 2013), <https://www.history.com/news/remembering-the-1993-world-trade-center-bombing>.

<sup>27</sup> National Commission on Terrorist Attacks, *The 9/11 Commission Report* (New York, NY: WW Norton, 2004), page 288.

North Tower minutes after the attack. Major thruways were cleared and bridges shut down in an effort to get emergency services to the WTC as quickly as possible. In only 17 minutes from the start of the attack to the First Responders, the largest rescue operation was confirmed in New York City history as reported in the 9/11 Commission Report. The men and women officers in the tristate area were true heroes that morning- risking their lives for the lives of other civilians.

Eighteen minutes after the first tower was hit, at 9:04 AM (EST), a Boeing 767 carrying passengers on United Airlines Flight 175 from Boston sliced through the Manhattan sky, hitting the South Tower. The impact zone was between floors 77th to 85th. Many were killed on impact like the first tower, but some were only minimally harmed. In true American brotherhood, those who were relatively uninjured helped those who were injured and moved those to the stairwells for rescue. One survivor from the impact zone on the 81st floor looked like a demolition site and was unable to breathe due to the heavy fumes of jet fuel. Those who could make it to the stairwells were met with pitch black and smoky. Those in the North Tower after impact were informed to stay in their offices and floors by the 911 operators. Even with the previous 1993 WTC bombing, there seems to be a split narrative of the attack on the North Tower as an accident or a similar terrorist attack of 1993. Once the second tower was hit, it became abundantly clear that this was not an accident. Speaking on the morning of 9/11 during a meeting, the Director of the NSA, Michael Hayden, stated: “One plane’s an accident, two planes is an attack.”<sup>28</sup>

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<sup>28</sup> James Bamford, *The Shadow Factory: The Ultra-Secret NSA from 9/11 to the Eavesdropping on America* (New York: Doubleday, 2009), pp. 89.



At 9:37 am, only 33 minutes later, a final 911 call from a civilian trapped on the 106th floor of the [South Tower] reported that the “90 something floor” was crumbling.<sup>29</sup> Twenty minutes later, the South Tower collapsed in a matter of ten seconds. One hundred ten floors in ten seconds. The collapse killed all of the civilians and first responders who were still in the South Tower.

Those still in the North Tower, including both civilians and first responders, were not aware of the total collapse of the South Tower. While some in the North Tower later recalled hearing evacuation announcements, information regarding what people were told when remains unclear. One NYPD chief had a bullhorn and shouted, “All NYPD, get the fuck out!” in an effort to save as many people as he could, an action that saved many firefighters who previously refused to evacuate. At 10:28 am, the North Tower began to collapse. Like the South Tower, many were killed on impact amid the collapse. Surprisingly, despite the destruction, twelve firefighters, one PAPD officer, and three civilians were able to descend from staircase B and managed to survive.

Chaos filled the streets of Lower Manhattan then spread throughout the city. For those bystanders, victims, and first responders present in the Financial District that morning, September 11 was one of, if not, the worst day(s) of their lives. Memories of that fateful day would stick with them for years to come.

The World Trade Center was not the only location to come under attack on September 11th, 2001. The Pentagon in Arlington County, Virginia, was also targeted. Being the headquarters of the Defense Department, those inside the Pentagon on September 11th were

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<sup>29</sup> National Commission on Terrorist Attacks, *The 9/11 Commission Report* (New York, NY: WW Norton, 2004), page 288.

believed to be in the safest location in the United States. At the time, over 23,000 military and civilian employees worked in the over 6.5 million square foot office building alongside an additional 3,000 non-defense support personnel.<sup>30</sup>

The Washington D.C. sky was as blue as it was in New York City that Tuesday morning when, at 9:37 am, American Airlines Flight 77 crashed into the west wall of the Pentagon. The impact killed everyone on the flight, 64 people in total, and 125 inside the Pentagon. An additional 106 people were injured. Large blooms of black billowing smoke mirrored the ones occurring almost simultaneously over 200 miles north. Thankfully construction was happening in the Pentagon, lessening the death toll; usually, more than 4,500 workers would have been in that area.

In addition to those who experienced September 11<sup>th</sup> from the ground, there were the victims of the air. There were four flights that were hijacked on that fateful morning. Two from Boston, Flight 175 and Flight 11 that attack the WTC, Flight 77 from Washington Dulles Airport that attacks the Pentagon, and United Airlines 93 from Newark, which ultimately came down in a field in Pennsylvania. The first flight from Boston, Flight 11, had 92 passengers plus five al-Qaeda hijackers. Through the flight recorder, Americans later heard the voice of one hijacker say at 8:24 am EST, "Nobody move. Everything will be okay. If you try to make any moves, you'll endanger yourself and the airplane. Just stay quiet."<sup>31</sup> Twenty-two minutes later, this Boeing 767 crashed into the North Tower of the WTC. All of the passengers died on impact with the youngest victim at only two and a half years old and the oldest victim being 85 years old.

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<sup>30</sup> National Commission on Terrorist Attacks, *The 9/11 Commission Report* (New York, NY: WW Norton, 2004), page 288.

<sup>31</sup> National Transportation Safety Board, "Flight Path Study," February 1, 2009, [https://web.archive.org/web/20090201053016/https://www.nts.gov/info/Flight\\_%20Path\\_%20Study\\_AA11.pdf](https://web.archive.org/web/20090201053016/https://www.nts.gov/info/Flight_%20Path_%20Study_AA11.pdf).

Flight 175, which hit the South Tower, had 60 passengers plus five al-Qaeda hijackers and nine crew members. The hijacking started at 8:42 am EST, only minutes before hitting the South Tower. The impact killed everyone on the flight, including all of the passengers, crew, and hijackers. Sadly three young children ages two, three, and four were passengers on the flight.

The flight that hit the Pentagon, Flight 77, left from Dulles, Virginia, with 64 passengers, six crew members, and five hijackers. Thirty-five minutes into the flight, the hijackers stormed the cockpit and took control of the flight. Sadly, all passengers and crew members passed on impact into the west side of the Pentagon, including five children from ages 3 to 11.

Lastly, there was United Airlines Flight 93 with 37 passengers including four hijackers and seven crew members. This flight left Newark at 8:00 am EST heading to San Francisco. Forty-six minutes following take off, the four hijackers took control of the cockpit following a struggle with the pilots. The U.S. Capitol in Washington D.C. was the target for this attack. With knowledge of the attacks on the WTC, passengers and crew tried to take control back from the hijackers via a passenger revolt. While trying to take control back of the cockpit, the passengers used the food cart on the plane as a ram to break down the door. The flight recorder, which was later recovered, captured the struggle that ensued. Once in the cockpit, the passengers struggled to regain control of the plane from the hijackers. In the process, the hijackers lost control and the plane crashed in a field in Stonycreek, Pennsylvania, around 10:03 am EST, over 175 miles away from the U.S. Capitol. While, tragically, all of the passengers on Flight 93 died on impact from the crash, their struggle showcased courage and true heroism through saving countless other lives.

## The Effects of September 11

Following the September 11<sup>th</sup> attacks, the NSA and other security organizations within the U.S. government witnessed a dramatic expansion. It is vital to understand the destruction and chaos 9/11 caused in America and the culture of fear that was produced as a result. Without this deleted context, it's difficult to convey the feelings or atmosphere of this era if you did not live through it. The culture of fear essentially allowed for the rise in government surveillance as an acceptable and unquestionable decision. In order to understand this expansion, it is necessary to explain a bit more about the political climate and U.S. presidential politics preceding 9/11. The 2000 election fostered confusion and turmoil, which cast a shadow over President George W. Bush Jr.'s time in office. The election was the first time since 1888 that the winning candidate lost the popular vote. Bush's opponent, Al Gore, received over 500,000 more votes than Bush. Following the election, multiple lawsuits were filed due to alleged voter suppression, fraud, and the infamous "hanging Chads," delaying the final results. Indeed, it wasn't until December 2000 that the Supreme Court finally decided the election, leaving Americans in suspense for over a month. Some Americans felt that the election had been stolen due to their vote not being the final decision for the 43rd President but the Supreme Court decision.

George W. Bush Jr. was inaugurated as the 43rd president on January 20th, 2001, a mere eight years following his father, George H. W. Bush. This was only the second time in history that had happened. In his inauguration speech, Bush Jr. attempted to move past the divisions and controversy surrounding his election through focusing on hope and the United States' place in the world at the turn of the 21<sup>st</sup> century. In it, he stated:

It is the American story--a story of flawed and fallible people, united across the generations by grand and enduring ideals... The grandest of these ideals is an unfolding American promise that everyone belongs, that everyone deserves a chance, that no insignificant person was ever born.<sup>32</sup>

Optimism indeed seemed to permeate the Bush administration, which seemed hopeful regarding its ability to unify Americans. Expectations of a better America seemed to be on the horizon at the excitement of the new century.

Alongside Bush, Vice President Dick Cheney played an important role in surveillance and security as the US government's response to the terrorist. Cheney previously served as U.S. Secretary of Defense from 1989 to 1993 under President George H.W. Bush. Compared to other Vice Presidents, Cheney is credited as being one of the most powerful Vice Presidents in history.<sup>33</sup> In the months and years following the terrorist attacks on September 11<sup>th</sup>, Cheney emerged as a key figure in the production of the War on Terror. remaining adamant that weapons of mass destruction were located in Iraq.

Within the context of 9/11 and the emerging War on Terror, the NSA seemed to focus solely on the surveillance within America during the War. This could be in part to the switch to domestic surveillance or an interesting theory could be in relation to the terrorist on 9/11 being within the US months prior. The shift in American perspective during this time is a fear of immigrants within the US are the threat rather than the othering of foreign nations as a whole.

At the time of the September 11<sup>th</sup> attacks, Michael Hayden served as director of the NSA. With an extensive background in the Air Force as a four-star general, Hayden seemed like a perfect

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<sup>32</sup> "President George W. Bush's Inaugural Address," National Archives and Records Administration (National Archives and Records Administration, January 20, 2001), <https://georgewbush-whitehouse.archives.gov/news/inaugural-address.html>.

<sup>33</sup> Paul Reynolds, "The Most Powerful Vice-President Ever?," *BBC News*, October 29, 2006, <http://news.bbc.co.uk/2/hi/americas/6096042.stm>.

candidate for the NSA. Appointed in 1999, amid the aforementioned infrastructure issues, Hayden came to the NSA at a very pivotal point of renewal and development in the agency. At first, it seemed like Hayden was focused on protecting the privacy of Americans on a domestic level but following 9/11, as many others' view shifted to eliminating terrorists at any expense. In 2000, Hayden gave a speech stating, "NSA is authorized to collect information only for foreign intelligence purposes and to provide it only to authorized government recipients. This means that NSA is not authorized to provide signals intelligence information to private U.S. companies and we do not do so."<sup>34</sup> While one statement does not encapsulate someone's expansive opinions and motives, it does give a slight insight on at least Hayden's outward intentions prior to 9/11. In comparison, in October of 2002, Hayden spoke in front of the Joint Inquiry of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence. Hayden stated:

When I spoke with our workforce shortly after the September 11th attacks, I told them that free people always had to decide where to draw the line between their liberty and their security, and I noted that the attacks would almost certainly push us as a nation more toward security. I then gave the NSA workforce a challenge: We were going to keep America free by making Americans feel safe again.<sup>35</sup>

While once again, this does not speak for all of Hayden's activities but it does show that his priorities shift from seeing the importance of safety over privacy. This is important to show the changing motives of Hayden and the NSA during this era.

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<sup>34</sup> "Statement for the Record by Lt Gen Michael V. Hayden, USAF, Director before the House Perm," National Security Agency/Central Security Service, accessed April 19, 2022, <https://www.nsa.gov/Press-Room/Speeches-Testimony/Article-View/Article/1620510/statement-for-the-record-by-lt-gen-michael-v-hayden-usaf-director-before-the-ho/>.

<sup>35</sup> "Statement for the Record by Lieutenant General Michael V. Hayden, USAF, Director, National," National Security Agency/Central Security Service, accessed April 19, 2022, <https://www.nsa.gov/Press-Room/Speeches-Testimony/Article-View/Article/1620494/statement-for-the-record-by-lieutenant-general-michael-v-hayden-usaf-director-n/>.

The National Security Agency runs programs that have a main goal and focus in hopes of organization and creating a positive outcome. The programs following 9/11 adapted to the new threat of terrorism, while also evolving with the new and expanding technology. Prior to September 2001, project ThinThread was the NSA's main intelligence-gathering program. "Codenamed ThinThread, the project was intended to develop complex digital filters to sift through the Nile-size rivers of phone calls, emails, faxes and other communications signals channeled into the agency by satellites and ground stations."<sup>36</sup> The development of this program came out of the need to organize these new massive amounts of communication in the 90s. Once again, it is apparent that privacy of American's information was vital to this program. The safeguard of privacy was the program was able to encrypt the body of all messages entering and leaving the US.<sup>37</sup> Only three weeks predating the 9/11 attacks, ThinThread was disbanded due to a "change in priority." This seemed to be due in part to the inundation of calls and communications skyrocketing during 2000 with mobile phones becoming popular and the internet becoming more available. There needed to be another option to process all these communications, then came along Trailblazer.

Subsequently, Hayden launched the Trailblazer Project in response to developing technology. This project, which was used to track communications through email and cell phones, soon emerged as one of the key markers of Hayden's reign as director of the NSA and served as a crucial link with regards to the NSA's role in protecting Americans following the September 11th attacks and the controversies that emerged later regarding its surveillance of

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<sup>36</sup> Bamford, *The Shadow Factory*, pp. 45

<sup>37</sup> Bamford, *The Shadow Factory*, pp. 46

American citizens, a practice that continues to this day. Trailblazer was, in a sense, a version of ThinThread, but the former was less costly and included fewer protections against Americans' privacy.<sup>38</sup> Trailblazer had no form of encryption system similar to ThinThreads.<sup>39</sup> Even so, between 2002 to 2006 Trailblazer was billions of dollars over budget and was surrounded by massive criticisms from NSA employees. The main criticism other than it being expensive, was that it was poorly executed to enable results.

In 2006, the Trailblazer project was replaced by another program, named Turbulence. Compared to its predecessor, Turbulence has a program comprised of nine separate programs in efforts to spread out workloads. Quickly though the downfalls began to show. Despite efforts to curtail spending, Turbulence, like Trailblazer and ThinThread before it operated over budget, and was poorly managed. An NSA senior official stated, "NSA's transformation program, Trailblazer, has been terminated because of severe management problems, and its successor, Turbulence, is experiencing the same management deficiencies that have plagued the NSA since at least the end of the Cold War."<sup>40</sup> Misstep after misstep shows the ineffectiveness of these programs following September 11th.

Each of these projects not only shows the faults within the agency but also the decaying importance of Americans' privacy. It almost seems the fear and urgency caused the agency to not create an effective program. The importance of these programs showcases the patterns of moving the boundaries of privacy in efforts to surveil. Yet, knowledge of their existence was, for

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<sup>38</sup> Science X staff, "NSA Datamining Pushes Tech Envelope," Phys.org, May 25, 2006, <https://phys.org/news/2006-05-nsa-datamining-tech-envelope.html>.

<sup>39</sup> Bamford, *The Shadow Factory*, pp. 46

<sup>40</sup> Bamford, *The Shadow Factory*, pp. 331



the most part, kept secret from the American public until the revelations of the mid-2000s brought the NSA and its various surveillance practice to the public's attention. This public engagement with the NSA came about, in large part, due to the actions of whistleblowers.

While whistleblowers have been a part of history for centuries, the NSA seems to have a higher demand for those to call attention to malpractice and abuses in the agency. The increase of whistleblowers could be due in part to these questionable programs and activities within the agency, they hold an important value in safeguarding classified positions. Whistleblowers, who are usually employees, are often smeared in the mainstream media and/or by the government, but they are essential to exposing illegal and/or immoral aspects of an organization. The most infamous whistleblower in the NSA's history was Edward Snowden. Snowden was a subcontractor for the NSA in 2013 and was part of the information collection program known as PRISM. This program arose after the Protect America Act in 2007. During the process of working for the NSA, Snowden learned that the NSA was collecting personal calls, emails, and other forms of communication without the consent or knowledge of the citizens. He felt the need to expose this practice to Americans, which he did by contacting publications like The Guardian and The Washington Post while working with journalists Glenn Greenwald, Laura Poitras, Barton Gellman, and Ewen MacAskill.<sup>41</sup> As a result of his actions, Snowden was accused by the U.S. government of espionage and compelled to leave the country. Snowden now lives in Russia.<sup>42</sup>

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<sup>41</sup> Timothy H. Edgar, *Beyond Snowden Privacy, Mass Surveillance, and the Struggle to Reform the NSA* (Washington, D.C: Brookings Institution Press, 2017).

<sup>42</sup> "Why Edward Snowden Should Be Pardoned," Amnesty International UK, accessed February 14, 2022, <https://www.amnesty.org.uk/edward-snowden-nsa-whistleblower-pardon>.

Snowden's actions were preceded by that of a lesser-known NSA whistleblower, Thomas A. Drake, who, in 2002, sought to expose the Trailblazer Project. Drake was a former Senior Executive at the NSA and was a major supporter of ThinThread due to the safeguards the program utilized to protect Americans' privacy. He saw the mismanagement and overspending that occurred during Trailblazer essentially lead to his release to the press about these issues within the NSA.<sup>43</sup> It seems essentially, from a *60 Minutes* report, Drake and many other NSA officials believed that taxpayers' money was being wasted on "useless" programs like Trailblazer. But once releasing his accusations, Drake was charged with violations of the Espionage Act. He was seen as a traitor and an enemy of the United States.<sup>44</sup>

## Legal Context for Post-9/11 U.S. Surveillance

At issue in both the Drake and Snowden cases was the NSA's collection of personal information without the consent of those involved. This was an issue, theoretically, regulated by the 1978 Foreign Intelligence Surveillance Act (FISA). The act "regulates certain types of foreign intelligence collection including certain collection that occurs with compelled assistance from U.S. telecommunications companies."<sup>45</sup> The FISA is the act that enacted the physical and electronic procedure of electronic surveillance and the collection of foreign intelligence.

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<sup>43</sup> David Wise, "Leaks and the Law: The Story of Thomas Drake," *Smithsonian Magazine*, August 1, 2011, <https://www.smithsonianmag.com/history/leaks-and-the-law-the-story-of-thomas-drake-14796786/>.

<sup>44</sup> *60 Minutes*, *60 Minutes Archive: U.S. v. Whistleblower Tom Drake* [Video], YouTube, accessed April 20, 2022, <https://www.youtube.com/watch?v=ewFZ5FZwVQM>.

<sup>45</sup> "Foreign Intelligence Surveillance Act of 1978 (FISA)," National Security Agency/Central Security Service > Signals Intelligence > FISA, accessed March 24, 2022, <https://www.nsa.gov/Signals-Intelligence/FISA/#:~:text=The%20Foreign%20Intelligence%20Surveillance%20Act,assistance%20from%20U.S.%20telecommunications%20companies.>

Previously there was not as detailed legislation other than the Omnibus Crime Control and Safe Streets Act of 1968 predating FISA.<sup>46</sup> The FISA was introduced into federal legislation under President Jimmy Carter by Senator Ted Kennedy. The main reason for the creation of FISA came out of the Church Committee and this was the committee created out of concerning practices within the NSA and other DoD in the 1970s. In response FISA was created for oversight procedure, the FISA mandated the use of surveillance warrants, overseen by the Foreign Intelligence Surveillance Court (FISC). This court was created to provide oversight and checks and balances for the intelligence agencies, including the NSA and FBI.

Under the warrant procedures enacted by FISA, the U.S. Attorney General was granted the power to authorize the use of election surveillance if needed. Another interesting fact about FISC warrant approval is the rarity of a warrant being turned down for approval. The FISC's approval rates over the years are evidential of the relaxed regulation the courts undertook prior to the warrantless surveillance. Prior to 9/11, it seems warrantless surveillance was not an issue and only started to be practiced following the terrorist attacks as fear and immediacy became priority. Over a thirty-three year span, the court approved nearly 34,000 applications, while rejecting only 11. This equates to an approximately 99.7% approval rate. While this does not negate the effectiveness of FISC, it is important to realize the allowances that were allowed under the FISA, establishing a relaxed view on surveillance or the least on warrants.<sup>47</sup> FISA allows for the checks

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<sup>46</sup> "The Foreign Intelligence Surveillance Act of 1978 (Fisa)," Bureau of Justice Assistance, accessed April 21, 2022, <https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1286#:~:text=Background,the%20name%20of%20national%20security>.

<sup>47</sup> Conor Clarke, "Is the Foreign Intelligence Surveillance Court Really a Rubber Stamp?," *Stanford Law Review*, April 12, 2019, <https://www.stanfordlawreview.org/online/is-the-foreign-intelligence-surveillance-court-really-a-rubber-stamp/>.

and balances but does not have hard restrictions to obtain a warrant and especially following the terrorist attacks the process of going through FISC was disregarded to a degree.

Over time, the FISA was amended to keep up with changing technology, as well as in response to the changing political environment. The main amendments that impacted Americans between 2001 and 2007 were the U.S. Patriot Act of 2001, the Terrorist Surveillance Act of 2006, and the Protect America Act of 2007. This seven year span was during the Bush Administration and is where the most legislation and reactions by the US government following the attacks. 2001 to 2007 also was the timespan of the Terrorist Surveillance Program (TSP) and when the most public criticism arose. The first of these to be enacted, the U.S. Patriot Act, was passed into law just a mere forty-five days following the attacks of September 11<sup>th</sup>. While also showing patriotism, the U.S. Patriot Act is an acronym for “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.” With a stated goal of tightening national security in the wake of 9/11 and the Anthrax attacks, which further put the country into a state of national panic, the Patriot Act, signed by President Bush on October 26th, 2001, allowed for the expanded surveillance of U.S. citizens. It also reduced the checks and balances to assure legality, including the requirement for a warrant by using National Security Letters (NSL), which allows for the obtainment of personal information like phone calls, computer records, credit card history and banking history without a judge’s approval-therefore warrantless.<sup>48</sup> It seems like the Patriot Act was the quick reaction to 9/11 that expanded all aspects of the government’s power over surveilling their citizens.<sup>49</sup> Following 9/11 and the

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<sup>48</sup> “Surveillance under the Patriot Act,” American Civil Liberties Union, accessed April 21, 2022, <https://www.aclu.org/issues/national-security/privacy-and-surveillance/surveillance-under-patriot-act>.

<sup>49</sup> “Surveillance under the USA/Patriot Act,” American Civil Liberties Union, accessed April 21, 2022, <https://www.aclu.org/other/surveillance-under-usapatriot-act>.

anthrax attacks, the United States was, as discussed, in a state of fear. This environment enabled the speedy passage of the Patriot Act, which passed the Senate with little to no hearings, debates, or revisions.<sup>50</sup> In the years since, the Patriot Act as one of the building blocks of the surveillance state of America.

The Patriot Act had as its primary goal the protection of Americans from future terrorist attacks. It quickly came under scrutiny, however, from various political figures, activists, and citizens, who claimed it was an infringement on civil liberties. Under the act, three new practices of surveillance came into effect in an effort to quicken the process of searches and therefore intending to find terrorists faster. First, communication record searches became more readily available in a U.S. citizen's activities like mobile communications from the third party. This included phone call records from service providers like AT&T.<sup>51</sup> Second, the act portended an expansion of secret searches allowing law enforcement to search a U.S. citizen's property without notifying the owner beforehand. This is a violation of basic privacy, the common law and assumption of the government not being allowed to come on your property without notice or warning is thrown aside by this act. Finally, the third expansion of surveillance was in regards to “trap and trace searches.” This practice allowed for the collection of phone numbers or internet addresses communication but the communications collected does not divulge the content of said communications. Taken together, these four surveillance practices, all of which were either first enabled by or allowed to expand under the Patriot Act, formed the building blocks of the NSA and the Bush Administration's practice of warrantless surveillance.

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<sup>50</sup> “Surveillance under the USA/Patriot Act,” American Civil Liberties Union, accessed March 23, 2022, <https://www.aclu.org/other/surveillance-under-usapatriot-act>.

<sup>51</sup> “How AT&T Helped the NSA Spy on Millions,” *Public Broadcasting Service (PBS)*, August 17, 2015, <https://www.pbs.org/wgbh/frontline/article/how-att-helped-the-nsa-spy-on-millions/>.

Despite widespread support for its initial passage, it did not take long for the Patriot Act to receive massive scrutiny by the public. One New York Times article states, “liberals and some conservatives in Congress have repeatedly raised concerns about whether the law has given the federal government too much power and have urged a go-slow approach in considering whether it should be renewed in its entirety.”<sup>52</sup> Concerns regarding the law’s constitutionality came quickly after its enactment. These concerns revolved around the acts legality under the First and Fourth Amendments of the U.S. Constitution were bent to fit the administration's efforts in protecting Americans. In regards to the First Amendment, the Patriot Act was said by critics to have violated the amendment by posing a threat to a citizen’s freedom of speech. Meanwhile, the Act also posed problems in the context of the Fourth Amendment, which protects the rights of U.S. citizens in the case of searches and guarantees them the right to be notified unless authorized by a judge.<sup>53</sup>

The issue of the Patriot Act’s legality was subsequently made the matter of discussion in a Senate meeting on September 13th, 2006. Records of the meeting begin by detailing Senator Jay Rockefeller and other senate members’ concerns regarding the legality of the NSA’s wiretapping on Americans. Senator John Davison (Jay) Rockefeller IV was a Democratic senator from West Virginia between 1985 to 2015. The committee of senators that led the questioning were members of the U.S. Senate Select Committee on Intelligence, which was created to provide oversight of the intelligence departments following the Church Committee in 1975.

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<sup>52</sup> Eric Lichtblau, “Bush Aide Calls Criticism of Patriot Act Uninformed,” *The New York Times*, October 27, 2004, <https://www.nytimes.com/2004/10/27/politics/bush-aide-calls-criticism-of-patriot-act-uninformed.html?searchResultPosition=30>.

<sup>53</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT), Public Law, U.S. Statutes at Large 115 Stat. 272 (2001): 107-156, <https://www.fincen.gov/resources/statutes-regulations/usa-patriot-act>.

In his opening statement, Rockefeller reflected on the concerns of political leaders had with the violations of FISA. His main issue with the actions performed by the NSA and President Bush were the secrecy around the program, which sparked additional questions about the program's efficiency and legitimacy. In one particularly notable passage from Rockefeller's testimony, he stated, "I support all efforts to track down terrorists wherever they are using all of our best technology and resources. But it can and must be done legally and in a way that protects the rights of all Americans." Rockefeller perfectly incarnates the feeling of wanting to seek out the terrorists, while, at the same time, demonstrating concern over the concerns of overstepping Americans' civil rights. Later in his testimony, Rockefeller accused the White House and the NSA of creating an "iron cloak of secrecy" to allow illegal wiretapping. Rockefeller's testimony was informed by the fact that the Senate committee had recently sent the NSA a series of questions regarding the activities of the agency and were sent back a politically driven runaround by sending a letter back with no clear answers. Rockefeller ended his plea with, "I urge my colleagues—we must insist on a full accounting of the NSA's ongoing 5-year program before acting on legislation that gives the President the authority to wiretap the phone conversations of Americans where a court has not determined that a probable cause standard has been met."<sup>54</sup>

Less than a year later, on August 3rd, 2007, a House of Representatives meeting was held focusing on improving the FISA. The goals talked about in this meeting included "clarification of electronic surveillance of persons outside the United States" and "additional procedure for authorizing certain electronic surveillance."<sup>55</sup> While reiterating the rights of U.S. citizens as

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<sup>54</sup> U.S. Congress, Senate, *NSA Warrentless Surveillance Program*, 109th Cong., 2nd sess., September 13, 2006, S9450.

<sup>55</sup> U.S. Congress, House, *Improving Foreign Intelligence Surveillance to Defend the Nation and the Constitution Act of 2007*, 109th Cong., 1st sess., August 3, 2007, H9685.

guaranteed by the Constitution, Congress made a number of concessions to the NSA with regards to the surveilling of people located outside the U.S., and non-U.S. citizens within the U.S. Over the course of these discussions, Congress allowed for the need by the NSA to surveil people located outside the United States and did not require the agency to serve such person with a court order or warrant in these cases. The discussion of people located within the U.S. was a bit more complex. First, in the case of non-U.S. citizens, Congress granted that the person being surveilled did not have to be identified in the order submitted to the court, just the foreign power meaning the country of origin of communications. The NSA did need to include a statement with confidence that the target was not located in U.S. territory, the identity of the federal agent performing the surveillance, how the NSA was performing said surveillance to reach and ensure an “achievement,” or find evidence, a description of the information the NSA was looking for, and information concerning any other surveillance techniques that were being used.

Another House of Representatives meeting in regards to improving FISA on August 3rd, 2007, began with John Conyers, a Democrat from Michigan, agreeing with the amendments to the FISA, saying that they protect civil liberties due to the audits that would be put in place. Conyers credited his background protecting civil liberties to ensure that Americans’ constitutional rights are not being overstepped like they predated these improvements. Around a year earlier, Conyers released his report *The Constitution in Crisis: The Downing Street Minutes and Deception, Manipulation, Torture, Retributions and Cover-ups in the Iraq War*, which shows a clear opinion against the actions of the government following the September 11th attacks.<sup>56</sup>

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<sup>56</sup> John Conyers, “The Constitution in Crisis: Censure and Investigate Possible Impeachment,” [https://www.huffpost.com/entry/the-constitution-in-crisi\\_b\\_12626](https://www.huffpost.com/entry/the-constitution-in-crisi_b_12626).



The next representative to speak was Lamar Smith, a Republican from Texas. Smith had a very different view than Conyers, stating, “Madam Speaker, this bill should be opposed by anyone who wants to protect America from terrorists.”<sup>57</sup> Overall, Smith’s main argument was that the amendments would create added bureaucracy, which would, in turn, jeopardize Americans’ safety. Here, it is clear Smith objected to the safeguards other members of Congress sought with regards to the FISA and American civil liberties, seeing those safeguards as putting Americans at a greater risk of terrorist interference.

A major theme after September 11th was the unification of the United States to better protect U.S. citizens and the nation’s assets. Protecting America from terrorists while also securing the most important document in US history, the Constitution, should not be a political debate. Civilian rights should not be a partisan argument. One house representative further explained President Bush and his administration’s intentional division in the matter to greater influence a warrantless surveillance system. The representative stated, “Let’s tell the President that we don’t need a politician right now in the White House, we need a leader, somebody to stand up and draw this country together, somebody to make sure that we get the intelligence we need, that knows how to say “yes” when the DNI’s requests are done.” seeming this representative strongly sides with President’s authority and action.<sup>58</sup> DNI stands for Director of National Intelligence of the United States. Rather than pushing either side of the decision, some would have preferred President Bush to be a bipartisan leader whose goal was to protect and

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<sup>57</sup> U.S. Congress, House, *Improving Foreign Intelligence Surveillance to Defend the Nation and the Constitution Act of 2007* (italicized), 109th Cong., 1st sess., August 3, 2007, H9685.

<sup>58</sup> U.S. Congress, House, *Improving Foreign Intelligence Surveillance to Defend the Nation and the Constitution Act of 2007*, 109th Cong., 1st sess., August 3, 2007, H9688.

connect Americans, which is hard to determine what this protection means and how far it should go. Ultimately, the Senate voted 218 to 207 with regards to the proposed amendment to the FISA. As the Senate needs a two-thirds majority for most legislation, the amendment was rejected. As a result, the NSA was allowed to continue performing warrantless surveillance.

## Protect America Act of 2007

Another key piece of legislation with regards to the surveillance state was the Protect America Act of 2007, also signed into law by President Bush. The main objective of this act was to lessen the restrictions put in place by the FISA in regards to the surveillance of suspects where one party resided overseas. This act was created out of the turmoil previously investigated regarding modernizing the FISA. While developing technology and massive increase in mobile and online communications and 9/11 further showed the need for modernization. Taken from the United States Department of Justice Archives, “The Protect America Act modernized the Foreign Intelligence Surveillance Act (FISA) to provide our intelligence community essential tools to acquire important information about terrorists who want to harm America.”<sup>59</sup> One of the main sections of modernization is the use of FISC. This act allowed FISC to obtain aid from third parties to assist in collection of communication and allows intelligence officials to collect information from “foreign intelligence information on targets in foreign lands without first

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<sup>59</sup> "What is the Protect America Act?" *United States Department of Justice Archive*, <https://www.justice.gov/archive/ll/index.html>.

receiving court approval.”<sup>60</sup> President Bush’s main purpose in passing the Protect America Act of 2007 was to refocus the FISA towards its original aim of protecting US citizens’ rights amid evolving technology. Truthfully, FISA needed to be updated, from 1978 to 2007 the expansion of technology like mobile phones, Emails and online interaction, but it does not seem that FISA needed to be put back on track as Bush stated. In a radio speech delivered on July 28th, 2007, Bush stated, “As the recent National Intelligence Estimate reported, America is in a heightened threat environment. Reforming FISA will help our intelligence professionals address those threats -- and they should not have to wait any longer. Congress will soon be leaving for its August recess. I ask Republicans and Democrats to work together to pass FISA modernization now before they leave town. Our national security depends on it.”<sup>61</sup> While these dramatized life or death situations might have some merit, the urgency of the Protect America Act puts an unnecessary and heightened stress on government officials to pass the bill. In essence, President Bush was creating a situation where Senators, Congressmen and House of Representatives really had no other option than to pass this act- otherwise if they do not America would be at risk of another 9/11 if Congress and the House of Representatives did not pass the FISA amendments as outlined, they, according to Bush would be putting all Americans at risk of another terrorist attack.

Similar kinds of tactics can be seen in the debates held in Congress over the bill. After reading the new amendments to FISA, Mr. Smith stated, “We are a Nation at war with foreign

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<sup>60</sup> “Fact Sheet: FISA 101: Why FISA Modernization Amendments Must Be Made Permanent,” National Archives and Records Administration (National Archives and Records Administration), accessed April 22, 2022, <https://georgewbush-whitehouse.archives.gov/news/releases/2007/09/20070919-1.html>.

<sup>61</sup> George W. Bush, Jr., President's Radio Address, July 28, 2007, <https://georgewbush-whitehouse.archives.gov/news/releases/2007/07/print/20070728.html>.

terrorists who are plotting deadly attacks.”<sup>62</sup> His statement shows the fear-mongering used to push legislation authorizing expanded surveillance during this time. Rather than providing Congress with an option to debate further and potentially revise the act, Smith sought to create a sense that if Congress didn’t pass the Protect Act of America as is, the United States would become victim to a new terrorist attack- similar to 9/11 or even worse.

A very different point of view was expressed by John F. Tierney, a Democrat from Massachusetts, and shows the divisions between Republic and Democrats regarding the bill. In his statement before the House of Representatives, Tierney pleaded:

The American people have a right to expect more from us. This is the Protect America Act of 2007. The American people expect to be protected and to be secure, not just against terrorists and other foreign threats, but also to be secure in the rights established in the Constitution of the United States, to know that we are standing up for the Constitution and fulfilling our pledge and our oath of office.<sup>63</sup>

Compared to Smith’s opinion, Tierney prioritized Americans needed to be protected from the government overstepping their civil liberties, while also fighting terrorists. This seems to be the overarching issue from the NSA and Bush Administration’s reaction and action to 9/11.

As a reaction to Tierney’s statement, Louie Gohmert, a Republican from Texas, once again sought to install fear into the minds of the House. He remarked, “Some people have some confusion, I think, over civil rights versus rights in a time of war. Believe it or not, and I think most of you should understand, we are in a war.”<sup>64</sup> Gohmert was referring to the War on Terror. In doing so, he implied that Americans need to alter their thoughts of liberties and rights because

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<sup>62</sup> U.S. Congress, House, *Protect America Act of 2007*, 110th Cong., 1st sess., August 4, 2007, H9956.

<sup>63</sup> U.S. Congress, House, *Protect America Act of 2007*, 110th Cong., 1st sess., August 4, 2007, H9955.

<sup>64</sup> U.S. Congress, House, *Protect America Act of 2007*, 110th Cong., 1st sess., August 4, 2007, H9955.

the country is at war. These loose-based references of the War on Terror are a tactic of fear-mongering.

Overall, the Congressional hearings on the Protection America Act consist of passionate and demanding statements from both sides of the aisle. These statements show the harsh binary during this time in regards to American civil liberties during this era. Further on in the discussion, one representative stated, “The Democrats cannot shrink from this fight. We must demand that the President cease his attacks on our civil liberties.” Another remarked, “Why should we tie the hands of our intelligence-gathering capability at a time when we are facing an increasing threat?” Even with these two statements, one can feel the intensity and urgency during this House meeting. The double-edged sword of protecting Americans while also protecting Americans’ civil liberties.

The Protect America Act of 2007 was approved by Senate with a vote of 60 to 28 on August 3rd, 2007, after which it went to the House of Representatives, where, following a heated debate, it was finally passed on August 5th, 2007. On August 5th, 2008, President Bush signed the act into office, further deteriorating the civil liberties of Americans.<sup>65</sup>

## The Media’s Role in Exposing the Cracks

A man walks down Greenwich street in Manhattan, only blocks away from the site where the Twin Towers once stood, now referred to as Ground Zero. It had been three years, six months, and sixteen days since the final clean-up after that fateful day. The man wore a coat, but

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<sup>65</sup> Protect America Act of 2007 (PAA), Public Law 110-55, U.S. Statutes at Large 121 Stat. 552 (2007): 552-557, <https://web.archive.org/web/20071222101804/http://www.opencongress.org/bill/110-s1927/show>.

it was still warm for December 16th, a Friday morning as he walked to the bodega to pick up a copy of the *New York Times* (*NYT*), his favorite newspaper. He assumed it would be similar to the previous day's reports; same stuff, nothing monumental. The world had been in such turmoil in the aftermath of 9/11, which was followed by the launch of the War on Terror.

He turned the corner, and there it was, his spot for \$1 coffee, an egg sandwich, and his *NYT*, everything he needed to start his morning. After checking out with the older woman who seemed to have worked there since the 1980s, he went over to the park to enjoy the cool temperature before the New York winter blew in strong. He sipped his coffee as he got comfortable on the bench under the bare trees overhead. He flipped to the front page, and the headline sent a shiver down his spine—*Bush Lets U.S. Spy on Callers Without Court*.<sup>66</sup>

Credited as the first piece against the NSA post 9/11, the article by James Risen and Eric Lichtblau *NYT* Journalists succeeded in pulling the curtain aside and exposing the NSA's activities. While this was groundbreaking news for the public, Risen had actually been sitting on the story for over a year. In summer 2004, Michael Hayden, Director of the NSA, received a call from Risen inquiring about suspending the NSA's surveilling American citizens' calls without warrants. It has been reported that Hayden was shocked and left Risen with vague answers; Hayden allied if the program was real, it was "intensely operational."<sup>67</sup> Hayden made sure to add that this alleged program Risen was accusing him of was "legal, appropriate and effective."<sup>68</sup> The year between his conversation with Risen and the article's release provided ample time for

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<sup>66</sup> James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts," *New York Times*, December 16, 2005, <https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html>.

<sup>67</sup> Bamford, *The Shadow Factory*, pp. 287-292

<sup>68</sup> Bamford, *The Shadow Factory*, pp. 288

Hayden to clear his tracks or at least prepare his employees at the NSA for the backlash coming their way.

In the Fall of 2005, the *NYT* contacted the NSA again to either confirm information or clear the air. A meeting was held between members of the NSA, the White House, and journalists and editors from the *NYT*. Threats were used against Risen and Lichtblau that if the story was released to the public, terrorists would essentially get the alert and figure out the NSA's secrets. President Bush himself specified if there were another terrorist attack similar to September 11th, there would be blood on the *NYT's* hands.<sup>69</sup> Even with the vague threats, the *NYT* had already decided, and the meeting did not change their minds. Millions would soon find the NSA's secrets, causing those to look to the government for answers.

Risen and Lichtblau created an understandable read to allow to a broad audience of readers. The article first addressed President Bush's significant responsibility in the warrantless eavesdropping happening, and pointed to a presidential order in 2002. The article states the presidential order "the intelligence agency has monitored the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants over the past three years in an effort to track possible "dirty numbers" linked to Al Qaeda, the officials said."<sup>70</sup> Originally, the NSA's main objective was on foreign affairs, but after the presidential order, the department saw a sudden shift towards American surveillance. This new path the NSA was following brought into question how far the legality of surveillance

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<sup>69</sup> Bamford, *The Shadow Factory*, pp. 288

<sup>70</sup> James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts," *New York Times*, December 16, 2005, <https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html>.

and eavesdropping can stretch. Many of the informants for the article were previous intelligence department employees who saw this new practice as extremely concerning.

The Bush administration was reported as seeing these new operations as essential to the protection of American lives regardless of the increased eavesdropping on communications. Rather than going through the legal process of obtaining a warrant from FISC, skip the process and start listening in on calls. What if there's a terrorist plot happening during that call? What if there are "dirty numbers" linked to Al Qaeda? The fear following 9/11 blurred the vision of many officials, who were in fear of missing signs of another terrorist attack.

The limited public information about eavesdropping noted that over 500 Americans at any time could fall victim to eavesdropping without a warrant by the NSA. The article did give some credit to the program for some successes. A terrorist plot was intercepted through this program. The plot involved an Ohio Trucker who planned to burning down the Brooklyn Bridge with blowtorches. A two-sided coin was shown: break the law and overstep civil liberties, but maybe protect the lives of thousands of Americans.

The article put forward a clear history of the NSA's powers to emphasize the shift in the agency's ethos. Typically the NSA focused on international communications, but the new presidential order forced the agency to focus on domestic surveillance. The agency, prior to September 11th, was able to eavesdrop on American soil, but a warrant was necessary. Once again, after the switch under President Bush, the hurdles and bureaucracy going through FISC needed to be pushed aside to stomp out the terrorist threat. Pre-9/11, the Federal Bureau of Investigation (FBI) handled all domestic surveillance, but after 9/11, the NSA increased its activities in this arena.



The article explained the chain of surveillance that was created once monitoring one caller. A chain was created to the communications between one caller and another making another target of surveillance-almost a guilty by association perspective. If a caller from New York was communicating with another person in Afghanistan, that call would be able to be monitored warrantless under this program due to one caller being outside of the United States. On the other hand, strictly domestic calls, say from New York to New Jersey, would need a warrant specifically would be needed. Essentially only one caller has to be in the US to override the warrant under this eavesdropping program.

## Governmental Reactions

When looking to Congressmen and Congresswomen in obtaining information for the *NYT* piece, it became apparent that only a small number of officials were debriefed on the program outside the Intelligence departments and Bush Administration. Those informed about the program saw it as overstepping the legal boundaries and maybe unconstitutional. Some saw the safeguards added in 2003 as helpful in creating a more secure program, while others saw the whole eavesdropping program as unnecessary. “By getting warrants through the foreign intelligence court, the NSA and FBI could eavesdrop on people inside the United States who might be tied to terrorist groups without skirting longstanding rules, they say.”<sup>71</sup> The main concern for most was the sidestepping of the FISC, not surveilling Americans with terrorist links or suspensions. Risen and Lichtblau even explained the work that went into obtaining a warrant

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<sup>71</sup> James Risen and Eric Lichtblau, “Bush Lets U.S. Spy on Callers Without Courts,” *New York Times*, December 16, 2005, <https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html>.

from FISC; not only was it more accessible in regards to the proof needed than getting a criminal case warrant, but the ratio of approved versus dismissed warrants was disproportionately in favor of approval. The FISC, the Journalists noted, could even approve a rushed order for eavesdropping within hours. Most officials saw the program as shocking overall due to the longstanding ethics and strict regulations the NSA has followed since the Church Hearings back in the 1970s.

## Bush's Reaction

President George Bush reacted quickly to the *NYT* article. The piece came out Friday, December 16th, and Bush addressed the American public Saturday, December 17th at 10 am during his Saturday radio address. Like most avoidance following 9/11, Bush recounted the horrors of that day in a move widely read as his attempt to overshadow the questionable eavesdropping program millions of Americans were just informed on. He brought up the controversial Patriot Act and noted the expiration date in the following weeks. He added, but “The terrorist threat to our country will not expire in two weeks.” Directly addressing the *NYT* article, President Bush stated:

Yesterday the existence of this secret program was revealed in media reports after being improperly provided to news organizations. As a result, our enemies have learned information they should not have, and the unauthorized disclosure of this effort damages our national security and puts our citizens at risk. Revealing classified information is illegal, alerts our enemies, and endangers our country.<sup>72</sup>

He essentially accused Risen and Lichtblau as the sole reason for the next potential terrorist attack. President Bush then recalled the “safeguards” or checks and balances that occurred every

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<sup>72</sup> George W. Bush Jr., "President's Radio Address," *White House Radio*, December 17, 2005, <https://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051217.html>.

45 days to monitor these programs. He concluded his remarks by noting that he would not back down till terrorism and Al Qaeda is eradicated, and America is finally safe.

The *NYT* article was one of the first to break down the secrecy of the NSA and the Bush Administration. Not only did it expose these concerns with the government, but it also shows the freedom of speech and press Americans are granted as a citizen. The article also paved the way for further publications and exposes of this time of turmoil in the US.

## Conclusion

The National Security Agency's detailed history shows an engaging evolution of surveillance. Pre-dating the September 11th attacks, evidence shows the agency's faults, specifically the Church Committee Hearings. Over the years, the NSA created numerous programs that seemed to fault each time for overspending and being poorly managed. The combination of one of the most horrific attacks on American soil since the 1940s during Pearl Harbor, an agency struggling under a booming technology evolution, and the new presidency of George W. Bush subsequently led to the events that unfolded. The US government's role was expanded to such a degree under a state of fear that allowances were made. The NSA's position in the DoD had a massive shift that will forever be fixed in surveillance on foreign and American communications.

There are many unanswered questions in regards to these events. This could result from the recency of these events, or these questions are not simple- they live in a morally grey area. Are the events following 9/11 surprising for an agency with a recurring history of faults and

miscalculations? Should all this scrutiny be placed on an agency but rather the Bush Administration for perpetuating the fear of another terrorist attack? What is truly too much surveillance to protect Americans' lives?

Interestingly the allowance of surveillance the US government had following 9/11 opened the floodgates for everyday surveillance Americans submit to, like Amazon Alexas or iPhones. While surveillance and "Big Brother " were the enemy pre-9/11, the acceptance of surveillance is just accepted in modern life after 9/11. The cultural shift following September 11th is imprinted in American cultural norms that surveillance is not even questioned in everyday life.

During this time, the abundant newspaper coverage does show a glimmer of hope for the allowance of freedom of speech even during a time of fear and uncertainty. It gave an insight to Americans of the different perspectives of the US government's actions. Especially years after the popularization of the internet, these sentiments were able to spread and create a community in an alliance of protecting the rights of Americans.

From the origin of the National Security Agency, their nickname of "No Such Agency" established an accepted narrative of total secrecy. Even with all the articles, press releases, and whistleblowing reports, this level of secrecy seems to have only shifted a small degree.

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