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[REDACTED TEXT] AND SURVEILLANCE: AN IDEOGRAPHIC ANALYSIS OF THE  
STRUGGLE BETWEEN PRIVACY AND NATIONAL SECURITY

by

ERIC CONNELLY

ABSTRACT

In the aftermath of the events of 9/11, the U.S. executive branch has repeatedly maintained that its need for action to secure the nation requires a revised interpretation of individual liberties. This study will explore the tensions between the positive ideographs <privacy> and <national security> in response to the negative ideograph <terrorism> in a contemporary United States court ruling. Using Burke's pentad, and cluster analysis, as well as Brummett's notion of strategic silence, the study examines how the FISCR substantially changed the interrelationship between the two ideographs. The study concludes that the FISCR situated strengthening national security as the purpose of the case it ruled on, which privileged national security over privacy. Throughout the expansion of <national security,> the court used silence to justify its decision. This analysis both adds to our understanding of the synchronic relationship between ideographs, and examines how the courts utilize such interplays to reconstitute community.

INDEX WORDS: Ideograph, Privacy, National security, Synchronic relationships, Constitution, Silence, Cluster analysis, Pentadic analysis

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by

ERIC CONNELLY

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of

Master of Arts

in the College of Arts and Sciences

Georgia State University

2010

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2010

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STRUGGLE BETWEEN PRIVACY AND NATIONAL SECURITY

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## CHAPTER 1.

### INTRODUCTION

In August 2008, the Foreign Intelligence Surveillance Court of Review (FISCR) issued a rare public judicial opinion on a case petitioning a warrantless directive to turn over information on customers, even U.S. citizens, considered to be outside the United States. The service provider argued that the directive issued under the Protect America Act violated its customers' Fourth Amendment rights, and that the surveillance mandated by the directive was unreasonable. The FISCR disagreed, saying that safeguards to prevent unnecessary invasions of privacy were in place, and that the courts should not frustrate government attempts to protect its citizens.<sup>1</sup> This opinion is an important, contemporary example of the longstanding confrontation between national security and civil liberties in U.S. history.

Since the earliest days of the United States, political leaders have used national security as a warrant to curtail civil liberties in times of crisis. The Alien and Sedition Acts of 1798 restricted free speech during a quasi-conflict with France, and during World War I, the Espionage Act of 1917 was similarly exercised. Abraham Lincoln suspended the writ of habeas corpus during the Civil War, and Franklin Roosevelt trampled due process by rounding up and holding Japanese citizens during World War II. In a December 1940 Fireside chat entitled "On National Security," Roosevelt said, "This is not a fireside chat on war. It is a talk on national security; because the nub of the whole purpose of your President is to keep you now, and your children later, and your grandchildren much later, out of a last-ditch war for the preservation of American independence, and all of the things that

American independence means to you and to me and to ours.”<sup>2</sup> In a speech to United States newspaper editors, John F. Kennedy cited the First Amendment’s need to bend before necessities of national security in times of duress and beseeched editors to ask, “Is this in the interests of national security?” before printing a story.<sup>3</sup> These are just a handful of examples of national security in dissonance with civil liberties throughout United States history.

Due to the development of privacy as a civil liberty within the context of technological advancements, national security and privacy more often begin to intersect in elite discourse in the 1950s. Samuel Warren and Louis Brandeis introduced the notion of privacy in U.S. law in 1890 in response to an increasingly invasive media. The article garnered support for privacy as a right, but an informal one. The development of telephones and surveillance equipment proved to be the step that brought security and privacy into conflict. Because communications technology linked people, the government could encroach on privacy through surveillance. By the 1960s, privacy had gained traction as a popular term. However, fearing communists, Joseph McCarthy and Richard Nixon justified surveillance programs that invaded privacy on national security grounds. In response to civil unrest related to unhappiness over Vietnam and the fear of communists, “The NSA, the CIA, and the FBI deployed conventional investigative techniques against a variety of domestic critics and political opponents, but engaged as well in break-ins, mail openings, and warrantless wiretaps.”<sup>4</sup> In addition, Nixon attempted to use the IRS and the Defense Intelligence Agency to stop internal threats, which included the use of extra-constitutional searches and seizures.<sup>5</sup>

During the 1950s, 1960s, and 1970s, interests of national security and privacy increasingly collided, and courts more frequently allowed the government to invoke the state secrets privilege. In case law, *United States v. Reynolds* set an early precedent for state privilege to restrict information, and *Halkin v. Helms* reinforced the state secrets doctrine.<sup>6</sup> In these cases of suspected privacy violations, plaintiffs were unable to prove any kind of damage had been done because the government argued that releasing information that might have built such cases would jeopardize national security. *Laird v. Tatum* and *United States v. United States District Court* are two surveillance cases from the early 1970s that further illustrate this synchronic relationship between privacy and national security.<sup>7</sup> In *Laird*, the plaintiff alleged the U.S. Army encroached on his privacy, but the court ruled that the danger of damage was too speculative. *United States v. United States District Court*, also known as the Keith case, directly led to the development of Foreign Intelligence Surveillance Act (FISA) and its court (FISC) for the approval of wiretaps.

The growing problem of terrorism furthered the competition between privacy and national security. During the Reagan administration, in particular, surveillance in the guise of counterterrorism increasingly pitted the two terms against one another. During Reagan's tenure, the FBI used surveillance to gather information on more than 100 groups highlighted by the Committee in Solidarity with the People of El Salvador. In addition, the FBI arrested a group of Middle Easterners, who became known as the L.A. 8, for supporting terrorists.<sup>8</sup> Despite 10,000-pages of evidence amassed by the government, the judge dismissed the case because it lacked merit. The judge accused the government of overreaching by

acting solely in the name of national security and said it was quite disturbing “to hear from the government its justification for its conduct in a case where the plaintiffs have made a preliminary showing that the government in effect treated them as if it could do whatever it wants.”<sup>9</sup> In short, the 1980s shifted the public context for tensions between privacy and national security from communism to terrorism.

Since the September 11, 2001 terrorist attacks, national security and privacy have clashed more frequently than any time since the 1980s. Privacy advocates argue that the FBI has suffered an egregious breakdown in oversight, as it can look at portions of emails through extended pen registers.<sup>10</sup> The Patriot Act made it easier to receive a warrant for wiretapping, and it extended the period that wiretaps could be active. Civil liberties leaders have blasted “sneak and peak” warrants that allow for secret searches and the blurring of the “the wall” between intelligence and enforcement agencies.<sup>11</sup> Linda Fisher notes that in the wake of these changes, it is much easier to target groups and individuals based on political tendencies and guilt by association rather than actual illegal activity.<sup>12</sup> Brenton Hund points out that minorities, immigrant and aliens will likely suffer the most.<sup>13</sup> The passage of the Patriot Act and the initiation of the Terrorist Surveillance Project provide a rich example of the conflict between privacy and national security, as demonstrated by the FISCR decision. In the weeks following 9/11, the terms were evoked in memory of the tragedy, leading to a rushed passage of the bill that sacrificed some conventional privacy expectations due to national security claims.

Based on the usage of these terms to unify the culture around the passage of the Patriot Act and the Terrorist Surveillance Project, the following will review the literature on what Michael McGee termed ideographs and demonstrate how the terms “privacy” and “national security” now qualify as ideographs for the American culture. Particularly in times of crisis, the phrase “national security” gains prominence in political and popular rhetoric. I will argue that national security functions as what Michael Calvin McGee calls an ideograph, which is a culture-specific linkage between rhetoric and ideology that prompts collective commitment.<sup>14</sup> Then I will discuss how legal discourse should be viewed as appropriate texts for analyzing ideographs because such decisions can constitute and reconstitute imagined communities. Last, I will describe a method of analysis appropriate for understanding how the two ideographs interrelate.

### **Ideographs**

McGee views ideographs as the basic unit for constituting community. According to McGee, ideographs, when analyzed closely, are not difficult to identify. The slogan-like terms often masquerade as technical political terms, and what is unifying about ideographs is that they enter everyday discourse as articulations of personal motives. They become one-sum orientations, a heuristic symbolizing an entire line of ideological argumentation.<sup>15</sup>

McGee is clear that elites, like members of the general public, are susceptible to ideological appeals because they are culturally learned. Rhetorical resources in general and ideographs in particular influence those exercising power:

By learning the meaning of ideographs...everyone in society, even the 'freest' of us, those who control the state, seem predisposed to structured mass responses. Such terms as 'liberty' constitute by our very use of them in political discourse an ideology that governs or 'dominates' our consciousness. In practice, ideology is a political language composed of slogan-like terms signifying collective commitment.<sup>16</sup>

In this way, McGee connects rhetoric to ideology through the ideograph. Thus, how the ideograph is deployed rhetorically allows, limits, or changes access to ideology, reflecting normative collective commitment.

McGee outlined four defining characteristics of ideographs. These include: 1) they are ordinary language terms in political discourse; 2) they are high-order abstractions representing collective commitment; 3) they warrant the use of power, guiding inappropriate behavior into acceptable channels; and 4) they are culture-bound.<sup>17</sup> For McGee, a negative ideograph, like slavery, represents an unacceptable action in a community, while a positive ideograph, like liberty, represents an ideal.<sup>18</sup>

But, most importantly, the ideograph is distinguishable from other rhetorical tropes because of persuasive power. Ideographs have more persuasiveness than other tropes because of the socialization process that trains the mind to accept and invoke culturally imbedded ideologies. Ideographs are central to the structure of the culture they constitute, and, thus, can sometimes change the perception of a rhetorical situation when invoked.

A number of scholars have employed McGee's concept of the ideograph in their examinations of U.S. culture. In *Crafting Equality*, Celeste Condit and John

Lucaites conducted an extensive diachronic analysis of the term <equality> beginning at the early period of U.S. history. Condit and Lucaites examined the negotiated meaning of <equality> and its development as an ideograph. They looked at its flexibility as it articulated with other ideographs, such as <property> and <liberty>, by analyzing speeches, newspapers, and other culture-bound popular discourses.

While scholars tend to agree that ideographs exert power within cultures, disagreement exists about who defines their meaning. In her work on the ideograph <clash of civilizations>, Dana Cloud argues, in contrast to McGee and Condit's conceptualization of the ideograph, that a hegemonic elite always frames the term <clash of civilizations>, with the result that the phrase lacks the flexibility of <equality> and other ideographs. She writes that the ideologies and exigencies exercised with the term are "so similar in each war...the phrase's meaning echoes the reified interpretation of the past."<sup>19</sup> Carol Winkler also advocates that elites can control the meaning of ideographs when she argues that the executive branch frames the meaning of terrorism due to its control of information about the threat.<sup>20</sup>

A point of agreement in the literature on ideographs is that positive and negative ideographs frequently form an oppositional relationship to one another. Carol Winkler argues that the negative ideograph <terrorism> functions as the most "pejorative, emotive" ideological marker of American culture.<sup>21</sup> She details its use in presidential discourse in opposition to the positive ideographs <freedom> and <democracy>, contending that <terrorism> demarcates what is acceptable in American culture verses what is not. Winkler notes that the terms "barbarism,"

“Communism,” and “tyranny” have all contributed to the meaning of the ideograph, as well as narratives of war and crime.<sup>22</sup> Winkler examines negative and positive ideographs in opposition to each other, but analyzing how positive ideographs are in conflict with other positive ideographs is not a focus of her project.

Few scholars, however, have examined how a negative ideograph can change the synchronic relationship between two positive ideographs. Trevor Parry-Giles examination of Margaret Thatcher’s use of the negative ideograph <terrorism> in relation to positive ideographs like <rule of law> and <freedom of speech> is a notable exception. He determines that Thatcher’s rhetorical use of <terrorism> forces a specific construction of <freedom> and <rule of law> that allowed her to restrict <freedom of speech>.<sup>23</sup>

My study examines how <terrorism> functions to change the synchronic relationship between the two ideographs, <privacy> and <national security>. It adds to the insights of Parry-Giles by demonstrating how tools other than the cluster analysis expand our understanding of how the meaning of positive ideographs shifts in the context of both competing ideals and threatening, unacceptable behaviors. As a result, future critics will be able to better examine the synchronic relationship between positive and negative ideographs. Specifically, this study asks, “How do the positive ideographs <national security> and <privacy> function in response to the negative ideograph <terrorism>?”

As well as potentially adding to ideographic theory, this study will consider the implications for the United States’ community based on the intersection of the terms <privacy> and <national security>. Detailing the interactions between the

two terms could illuminate collective commitment of the United States community through our usage of the ideographs. Agreement, tension, and privilege between these terms represent cultural commitments that can have an impact on many members of the population. As noted above, a number of United States minorities can suffer if the terms align in a way that subordinates the interests of privacy to those of national security.

### **Privacy as an Ideograph**

Privacy qualifies as an appropriate term to analyze in this study because it meets all four characteristics of an ideograph. First, McGee argues that ideographs are “ordinary terms in political discourse.”<sup>24</sup> Marouf Hasian catalogues the prevalence of the term <privacy> in popular 1960s discourse. Articles highlighting privacy appeared in the New York Times, Redbook, Atlantic Monthly, and several other publications. Almost universally, popular discourse demonstrated a “vibrant rhetorical culture” that applauded “liberal conceptions of privacy.”<sup>25</sup>

Second, McGee argues that an ideograph is an abstraction that represents commitment to an “equivocal but ill-defined normative goal.”<sup>26</sup> According to Winkler and Edwards, this ambiguity allows subgroups to remain committed to a larger community despite difference in interpretation.<sup>27</sup> The abstract nature of privacy can be seen in the Constitution. Privacy is not mentioned explicitly anywhere in the Constitution, but it is protected implicitly by the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. The variety of different Amendments applicable to the protection of privacy demonstrates the flexible application of the term.

Another venue for examining the vagueness of privacy is the legal debate over the nature of the term. William Prosser drives the legal discourse by pitting a reductionist approach to privacy against a protective one. Prosser argues that privacy is not a single identifiable right, but an amalgam of other rights.<sup>28</sup> Edward Bloustein and Jefferey Rieman challenge Prosser's analysis, arguing that privacy is actually related to the human condition much more fundamentally than property. Rieman contends that privacy was a necessary condition for the formation of intimate relationships.<sup>29</sup> Bloustein argues that privacy was an essential component of human dignity.<sup>30</sup> According to Hasian, popular discourse not only mirrors the arguments Rieman and Bloustein were making, but co-created a narrative of <privacy>. He quotes a *Time* magazine author who claims that, "For only in the healing and sometimes illuminating moments of privacy can a man make himself truly fit to live with others."<sup>31</sup> Hasian cites the *New York Times*' observation that right to privacy was becoming "more and more firmly established."<sup>32</sup> The competing conceptions of privacy demonstrate a flexible, abstract quality necessary to serve as an ideograph.

Third, McGee contends that an ideograph "warrants uses of power" and "guides behavior and belief into channels easily recognized by a community as acceptable and laudable."<sup>33</sup> In *Katz v. United States*, privacy warrants a citizen's right to talk on the phone without being wiretapped, even when they were doing something illegal, such as gambling.<sup>34</sup> Abortion activists argue that the right to privacy covers a woman's decision whether to terminate a pregnancy. In *Griswold v. Connecticut*, the judiciary justifies a couple's right to purchase and use birth control

as a matter of privacy. Despite reservation by some gay marriage activists, the right to privacy is often invoked to defend same-sex unions, and for more than a decade, the “Don’t Ask, Don’t Tell” policy has been applied to homosexuals in the armed forces. Additionally, the ACLU defends a citizen’s right to smoke marijuana in their home based on an expectation of privacy. Whether relating to issues of intrusion, search and seizure, or other facets of privacy, the term warrants the individual’s power to reject interference of another party.

Last, McGee asserts that ideographs are culture-bound. He claims that groups of the public who do not respond appropriately to ideographic interaction will suffer societal penalties.<sup>35</sup> According to Alan Westin, moments of natural function such as birth, death, illness, excretion, and sex are taboo and require a degree of privacy in the United States as well as many other societies.<sup>36</sup> However, he lists several cultures that defy these expectations of privacy. He notes Margaret Mead’s study of Samoan’s who wear little to no clothing, bathe in the sea, and use beaches as a bathroom without seeking solitude.<sup>37</sup> Westin points out several cultures in the South Pacific as well as the Siriono Indians in Bolivia that seek a low degree of privacy for sex. Because of tight living quarters they often have intercourse in the bushes, but “do not seem to mind the presence of other persons that come onto the scene.”<sup>38</sup>

A key characteristic that lends privacy its persuasive power is its connection to ideology. The “right to be let alone,” as Judge Thomas M. Cooley put it, is a powerful sentiment stemming from the classical liberalism on which the Declaration of Independence was based.<sup>39</sup> Although privacy was never articulated in early

American documents, privacy's connection to liberal individualism seems to reinforce other early notions of American thought. Ferdinand Schoeman argues that privacy is a necessity for social freedom<sup>40</sup>, and L. Susan Brown supports this, writing that liberal individualism as an ideology places "paramount importance" on freedom of the individual.<sup>41</sup> Brown further explains that the exercise of free will and self-determination is what defines humans and sets them apart for early liberal thinkers.<sup>42</sup> Oren M. Levin-Waldman supports this assertion, writing that privacy speaks to liberal individualism, "which is no less than the essence of agency."<sup>43</sup> Deriving from fear of reduced agency, Schoeman notes that Americans increasingly fear that their sphere of privacy is being reduced despite ample evidence that we actually enjoy a much higher level of privacy than our ancestors.<sup>44</sup> According to Levin-Waldman, the fundamental purpose of liberal individualism is "to defend against oppressive demands and intrusions of authority" that might chip away at American's freedom or agency.<sup>45</sup> In sum, <privacy> invokes the notions of free will, autonomy, and personal freedom associated with liberal individualism, which Americans have been socialized to identify as central to their community.

### **National Security as an Ideograph**

National security is also an ordinary language term in political discourse. According to Elisabeth Anker, national security concerns are often framed as a melodramatic narration that depicts victimization and redemption. It plays well in the media, providing plenty of opportunity for popular discourse.<sup>46</sup> Robert Ivie notes that popular and elite discourse often frame threats to <national security> as attacks by "savages."<sup>47</sup> He interprets George Bush's rhetoric as positioning the U.S.

as a blessed country whose security is under assault by evil men intent on destroying democracy and freedom.<sup>48</sup> In addition to Bush, nearly every president in the 20<sup>th</sup> century has addressed national security on multiple occasions. Hollywood has fixated on the topic as numerous movies and television shows, including *24*, *National Security*, *The Sum of All Fears*, and *Patriot Games*. Countless authors as popular as Tom Clancy and John Updike have based novels on national security.

Second, the term represents a collective commitment to a vague, normative objective. Michael Hirsh outlines three phases of commitment for <national security>: the Monroe Doctrine from the early stages of the nation until World War I, a global conception ushered in by Woodrow Wilson, and a preemptive notion of national security founded by George Bush.<sup>49</sup> The Monroe Doctrine warned the United States to avoid “entangling alliances” with the U.S. getting embroiled in only a handful of conflicts. Woodrow Wilson and his successors offered a much more expansive idea of U.S. <national security> leading to conflicts in Vietnam and Korea as well as helping rebuild Europe after World War II. Finally, Bush’s conception of national security includes intervening anywhere in the world as long as it can stop an attack on U.S. interests.<sup>50</sup> In these different phases, national security has meant avoiding alliances, assisting in global conflicts, and even invading nations to stop a threat before it exists.

Denise Bostdorff, argues the usage of the term “crises,” which bears some similarities to national security, has become rhetorically appealing for American leaders. “Crisis” focuses the attention of citizens and implies a sense of urgency for quick action and possible sacrifice, even when presented with limited, unclear

information. The term generates fear in an audience and demarcates those included in the scenario into the threat and the threatened, forcing commitment to an objective outlined by leaders.<sup>51</sup> The enemy and the objective in these situations are often ill-defined. Though Bostdorff is not analyzing ideographs, her work illuminates the study of national security as an ideograph. For example, Bostdorff looks at enemies in Cambodia, Cuba, and Grenada. In various crises, Muslims, Soviets, and Chinese communists represent the enemy. In other cases, such as the Oklahoma City bombings, the enemy is a domestic foe. The meanings associated with national security, as well as the vague, ill-defined nature of enemies and threats when presented with national security concerns represents a collective commitment to an unclear, normative goal.

Third, national security warrants the use of power and guides behavior. When a public official, particularly a president, gives voice to a crisis, it warrants action because of the gravity of a threat. Not only does the fear of a threat muddle clear thought on the exigence, but government officials often withhold information to prevent hysteria. According to Robert Ivie, it is impossible to determine actual risk objectively when rhetors invoke national security because a cycle of interconnected symbols short circuits any clear thoughts.<sup>52</sup> Additionally, invoking national security during a crisis serves to shut down competing discourses and prompt deference to elite discourse because of tightly guarded information.<sup>53</sup> On the basis of national security, governments have engaged in behavior that would, in almost all cases, be considered antisocial in more normal contexts. The threat of terrorism warranted war in Afghanistan and Iraq, as well as extensive surveillance

programs historically in the United States. In the 1960s and 1970s, the FBI sought to disrupt the activities of civil rights activists and peace protesters by engaging in break-ins, warrantless wiretaps, and bugging homes and offices.<sup>54</sup> According to David Cole and Jack Dempsey, the FBI attempted to “spread misinformation, foment internal dissention, and even provoke illegal activity.”<sup>55</sup> During the 1980s, in an attempt to identify CISPES members, the FBI “checked license plate numbers in church parking lots, sent an informant into CISPES offices to copy and steal records, and questioned activists both at home and at work.”<sup>56</sup> In 2004 the United States, fearing a threat to national security, indicted a Saudi student on charges of supporting terrorism for creating a website that linked to websites featuring texts of Muslim clerics. After 18 months in jail, the student was acquitted when the prosecution failed to show any evidence that he had advocated violence despite listening to roughly 9,000 phone calls and collecting some 20,000 emails.<sup>57</sup>

Last, national security is culture-bound because a community’s security interests vary by culture. For the United States, controlling the spread of nuclear weapons is a matter of national security. Iran or North Korea acquiring nuclear weapons represents a threat to national security, and leaders in those countries view nuclear weapons as a way to ensure their security. The United States is unwilling to disarm because nuclear weapons protect security, and the government is opposed to allowing rival nations to gain the same advantage.

A significant portion of national security’s persuasive power comes from its connection to personal safety. National security represents a protection designed to ensure a country’s well-being by stopping threats from harming the state. For

instance, in times of crisis, citizens frequently swap rights for an enhanced feeling of security, as curfew restrictions and internment camps for Japanese Americans in World War II attest. The term both appeals to our need to protect our own safety, as well as the safety of our culture. For example, when terrorists attacked the World Trade Center, relatively few Americans died, but popular support for national security prompted two wars and the passage of laws that substantially strengthened the powers of both law enforcement and intelligence agencies.

The power of national security stems, in large measure, from the American exceptionalism myth. Mary Stuckey argues that an ideograph's persuasive power comes from working in concert with other terms to gain a "wealth of associations," which are often connected to mythic narratives.<sup>58</sup> Andrew Rojecki explains the myth, writing, "The values that support the exceptionalist view marry Enlightenment ideals of individual reason and liberty with religious and moral views uprooted from their origins in Puritan piety."<sup>59</sup> This marriage leads Americans to imagine themselves as morally superior to a fallen world, according to Ivie and Giner.<sup>60</sup> Ivie, Campbell, and Rojecki all note that a sense of moral superiority can develop into a "you're with us or against us" attitude. Thus, during crises the use of national security is particularly persuasive because the term draws not only on a threat to American values such as liberty, but a threat to the moral purity of the nation. By drawing on the American exceptionalist myth, <national security> gains significant persuasive power as an ideograph within the American culture.

## Analyzing Ideographs within Legal Discourse

Many communication scholars argue that because ideographs both represent a socialization process and appear abundantly in popular history, they should be examined in popular discourse. However, a handful of communication scholars prefer to examine ideographs found in elite discourse rather than popular discourse. Parry-Giles examines the discourse of the prime minister because he is interested in the limits of terms in public debates. Similarly, Winkler looks at presidential discourse on <terrorism> because “the offices primarily responsible for responding to terrorism fall within the purview of the chief executive.”<sup>61</sup> In addition, the executive controls the bulk of the nation’s terrorism information, meaning the media must rely heavily on executive sources.<sup>62</sup> Such powers privilege the president’s ability to constitute community and identity.

While presidential discourse is useful for examining <terrorism>, legal discourse also provides a rich context for analyzing the nexus of <privacy> and <national security>. For my case study of <privacy> and <national security> in the law, I rely on two theories to justify the analysis of legal discourse. First, White’s theory of law as constitutive rhetoric explores the connection between law, rhetoric, and the constitution of community. Second, Anderson’s theory of the imagined community clarifies the nature of community. I utilize these theories to gain a nuanced look at how ideographs in the law constitute community by drawing on ideology. By looking at particular applications of these theories, a picture of the ways in which ideographs are negotiated and framed by disparate interests emerges.

According to James Boyd White, law is constitutive rhetoric that is situated in a rhetorical culture. In other words, court opinions are records of a negotiation of public interests that employ rhetorical resources to varying degrees of persuasiveness to help constitute community through binding statutes. White offers a conception of the law as a narrative in which what is probable is established. Law defines expectations of speech and conduct, thus giving us the terms for constructing a “social universe.”<sup>63</sup>

According to White, lawmakers must take into account three principles when embarking on the construction of a community. First, law is a culture-specific intervention of thought and argument.<sup>64</sup> Employing the language of their audience, lawmakers must persuade the intended group that a statute is justified to impose on the community in a certain way. The language of an audience presents resources and limits when making law. Celeste Condit calls what White is describing a “rhetorical culture,” which is the range of linguistic options available to a rhetor, including, to name a few, allusions, images, metaphors, and ideographs, to name a few.<sup>65</sup>

Second, if the law is conceived as a set of resources for thought and argument based on a shared language, disagreements often arise on terms or interpretation of resources.<sup>66</sup> The uncertainty leads to a process of creative debate and continuous change, where lawmakers spar over the primacy of particular ideographs or the applicability of certain metaphors. White writes, “In speaking the language of the law, the lawyer must always be ready to try to change it: add or drop a distinction, to admit a new voice, to claim a new source of authority, and so on.”<sup>67</sup> Since the law

is open to change, it can respond to exigencies. Change may be incremental, but the law does provide flexibility. Condit concurs, writing, "...laws are always open to reinterpretation and change when advocates craft new ideologies or invent new and compelling usages of the components of the rhetorical culture."<sup>68</sup> McGee argues that this characteristic of law is partially based on the abstract meaning of ideographs.<sup>69</sup>

Third, if the law has boundaries that expand and contract based on response to an exigency, then the nature of the society it constitutes is open for debate. White calls law a constitutive rhetoric, meaning it enables people to say "we" and share a consistent meaning, and therefore is a building block of community.<sup>70</sup> Stuart A. Scheingold takes this argument even further, examining three principles of the rule of law: realism, convenience, and ethics. He argues people see law as based on the reality of a community rather than the way the ideal community, so people trust the pragmatism of the law. He contends that most people are willing to leave the implementation of law to professionals out of convenience. Last, he sees the law as grounded in popular American ethical values such as equality and professional responsibility, giving the law even more popular legitimacy.<sup>71</sup> Maurice Charland clarifies that not all constitutive rhetorics are successful; a community member can accept none, part, or all of a constitutive rhetoric.<sup>72</sup> He claims that constitutive rhetorics "work upon previous discourses" to capture new subjects in an experience more like "conversion" than "persuasion."<sup>73</sup>

McGee argues that ideographs are culture-bound, meaning their power comes from the specific communities that they constitute. Ideographs are a socializing force, and Scheingold argues that a hallmark characteristic of United

States culture is an intense historical dependence on legal symbols.<sup>74</sup> Because of the American dependence on the <rule of law> as well as the binding nature of the law, legal discourse can set the agenda for what issues the public will face. Ideographs are derived from the culture they come out of, but legal discourse can set boundaries on the meaning of those terms within popular discourse.

As such, a constitutive rhetoric should primarily be concerned with defining the type of community that is possible. White's work on constitutive rhetoric suggests that the law can place boundaries on a community and constrain behavior. Condit believes that ideographs, more than any other tool in a rhetorical culture, enable the law to coalesce into a temporary compromise between competing interests.<sup>75</sup> This case study on <privacy> and <national security> will provide an example of ideographic analysis to underscore the value of White and Condit's theoretical contributions.

While White's work provides useful theoretical background, the value of his perspective can be extended. For White, simply being able to say "we" and imagine that "we" share a consistent meaning is enough to describe a community. However, White also describes the law as shifting and elusive. If the law is not consistent, as in the case of the Protect America Act that was enacted for only a short window of time, what are "we" actually claiming? If there is no continuity to the community that "we" are claiming, what are "we?" Not only does the law have dynamic boundaries that are constantly debated, but also few in a national community can claim knowledge of what the law actually says. Within a select group of experts on security and privacy, community can be claimed under this description. But a

broader community encompassing those not familiar with the intricacies of the law becomes troublesome because the rules and boundaries are unclear.

Benedict Anderson's work on nationalism provides a more nuanced look at what he calls the imagined community, which helps clarify some of White's notions without addressing legal discourse explicitly. Anderson disputes the notion that people can reasonably say "we" since so few people can possibly have a material connection among millions. He calls the community imagined because "members of even the smallest nation will never know most of their fellow members."<sup>76</sup> Despite this and the fact that all communities have varying degrees of inequality, communities demand a "deep, horizontal comradeship."<sup>77</sup> He cites a nation's ability not just to send troops to war, but its ability to instill a motivation to possibly die for one's country.

Another important distinction Anderson draws about imagined communities is that they are limited. A community defines its boundaries and can rhetorically create others in opposition to them. A negative ideograph, such as <terrorism>, is often powerful because it is defined in opposition to one's own personal or national identity. Robert Ivie provides an example of this dichotomy, arguing that politicians and the media in America portray terrorists as savages or barbarians bent on destruction in contrast to sophisticated rational Americans who love freedom.<sup>78</sup>

Certain texts provide touchstones that foster the development of community, and some scholars argue that legal documents play a significant role in the constitution of American community. Anderson treats the novel and the newspaper as the shared texts that underpin the nationalistic bond between people that have

not and will not ever meet.<sup>79</sup> According to Kenneth Burke, documents such as United States Constitution, the Declaration of Independence, and the Bill of Rights represent symbolic interactions for the United States by setting rules.<sup>80</sup> It creates a “trained incapacity” for citizens to think of governmental alternatives to democracy by generating a “terminology, or a set of coordinates for the analysis of motive.”<sup>81</sup> Supporting this assertion, Scheingold argues that most people believe the Constitution protects the interests of the citizens by codifying political principles, such as rights and obligations. As outlined in Scheingold’s myth of rights, the majority of Americans think judges only have to follow the letter of the law in the Constitution, and they will wisely protect the democratic community.<sup>82</sup>

While case law may be little known by most and dynamic for all, the material consequences of the law are still the same, and Scheingold argues most Americans are content to trust professionals to handle the contours of the law.<sup>83</sup> Because the full might of government can back enforcement, the law, in this sense, creates a social universe by defining the limits of acceptable behavior among those in the imagined community. Furthermore, the law often invokes ideographs within the law to sanction or deter behavior. For example, a negative ideograph like <terrorism> would not only prompt judges to assign material consequences to those associated with such activities, but speakers would invoke the term in opposition to positive ideographs like <liberty> to justify such punishments.

Because legal documents constitute community by providing a common vocabulary and demarcating acceptable behaviors for its citizens, the language that courts use to constitute that community is important to analyze. By looking at

cultural terms, such as ideographs, a critic can determine what strategies a judge uses to constitute community. This study will focus on the interplay between the positive ideographs <national security> and <privacy> in response to the negative ideograph <terrorism>.

### **Method**

To study the tension between the ideographs <privacy> and <national security> in legal discourse, I focused on a legal opinion, *In Re Directives*, published by the Foreign Intelligence Surveillance Court of Review in January 2008. Established by the Foreign Intelligence Surveillance Act in 1978, the FISC is a secret court in which the government can apply for a special warrant for foreign intelligence surveillance. The court can expedite surveillance in matters sensitive matters of national security, and the FISCR is the court of appeals for the FISC. Because the court handles surveillance related to national security, which intersects with privacy concerns, it is a useful place to examine the tension between privacy and national security. Additionally, due to the secret nature of the court, this is only the second opinion the court has published in its 40-year history, making it a unique document worthy of study.

Besides offering a rare glimpse into the court's balancing of the two ideographs, the FISCR opinion is swirling within the controversy surrounding the Bush administration's warrantless wiretapping. In 2005 the *New York Times* revealed that the Bush administration was conducting surveillance of United States citizens through the Terrorist Surveillance program. According to LexisNexis, from 2005-2010, more than 500 articles subsequently focused on the phone surveillance.

The Senate and House responded to growing public awareness and concern about the wiretapping by holding hearings in which they questioned Bush administration officials on the government's methods and the scope of their application.<sup>84</sup> Despite much public backlash, Congress passed the Protect America Act, which authorized the executive to continue wiretapping.

Borrowing from Parry-Giles's methodological approach, I will use Kenneth Burke's cluster analysis as a foundation for determining the interactions between the ideographs in the FISCR decision. Cluster analysis is well suited to analyzing privacy and national security because clusters reveal tension and ideology by identifying how terms are agonistically paired. According to Burke, a rhetor's choice of vocabulary constitutes a particular reflection of reality. By looking at words that cluster around particular term, a critic can identify what aspects of that term the rhetor is attempting to highlight. Burke writes, "You may, by examining his work, find 'what goes with what' in these clusters—what kinds of acts and images and personalities and situations go with his notions of heroism, villainy, consolation, despair, etc."<sup>85</sup> For Burke, word clusters map a rhetor's associations of images and words, which can reveal motive or ideology. So by examining word clusters that emerge around the ideographs <privacy> and <national security>, I will be able to identify points of incompatibility between the ideographs and determine how ideology is articulated in the opinion.

I will add a second step, however, by examining the pentad in the court's opinion. Language clustered around the various pentadic elements in the opinion will provide further insight into the court's meaning. By analyzing the ratios of the

pentad, this study will help reveal the underlying meaning of the court's opinion.

Finally, I will explore how the language clusters in the introductions and conclusions bracketing the extensive use of redaction in the opinion will help readers understand how the use of silence in *In Re Directives* functions to contribute to the ideographs' meaning. Burke advises critics to attend to transitions in rhetoric, such as introductions and conclusions, because they tend to be particularly revealing about underlying motives of the rhetor.<sup>86</sup> While such insights will not be definitive about the withheld content, they do offer revealing hints about how the meaning of the employed ideographs evolved in the court's opinion.

### **Chapter Outlines**

Chapter two will analyze how <privacy> and <national security> function within the court's discussions of constitutionality. It will review literature that develops Burke's notion of constitutionality for background, identify the court's use of pentad to depict its opinion, and specifically look at the how the scene-act ratio determines what the Court calls constitutional. To further explicate the court's motives, the chapter will also examine how the inclusion and exclusion of former definitions of the ideographs influences the ruling on constitutionality.

Chapter three will examine how <privacy> and <national security> function within the court's use of redactions. It will draw upon previous literature about rhetorical silence, analyze the court's language immediately preceding and following its use of redactions, and then consider the redactions as clusters that reveal motivations of the court. This chapter will analyze how ideographs can help readers understand the strategic meaning of silence within court opinions.

Chapter four will offer concluding comments on the analysis, including a summary of major conclusions and arguments presented throughout this project. It will also present limitations of the study and offer further avenues for research and contributions to the disciplines of communication and law.

## CHAPTER 2.

## CONSTITUTION AND EXCEPTION

Much legal discourse in the United States is concerned with the constitutionality of government actions and legislation, and the FISCR opinion is no exception. The opinion mentions the words “constitutional” or “constitutionality” twenty-two times. A number of scholars have analyzed the Constitution, but Kenneth Burke provides one of the richest accounts. In *Grammar of Motives*, he examines the U.S. Constitution as a representative anecdote of symbolic action. As such a “calculus of motives,” the Constitution provides underlying principles that govern the nation.<sup>87</sup> Even more importantly, it establishes the scene for future action.

A number of scholars mention Burke’s take on the Constitution. In developing what he calls a “dialectic of motives,” Jeffery Murray briefly notes that the Constitution, according to Burke, produces social cohesion because it provides a shared rhetoric of motives.<sup>88</sup> James P. Zappen argues that the Constitution is an agonistic instrument that exemplifies a dialectical transcendence. It “upholds at once both unity and diversity, as in the very name ‘The United States.’”<sup>89</sup> According to Ellen Quandahl, constitutions exemplify specific motives that come into conflict with other social covenants, and which covenants are chosen constitutes human psyche as well as social order.<sup>90</sup> For these scholars, Burke’s work on Constitution represents a central aspect of the constitution of the U.S. community.

A handful of scholars have examined Burke’s work on Constitution in depth. Trevor Parry-Giles argues for an alternate conception of the Constitution. Instead of

a traditional model where the Constitution expresses tension between power and limits, Parry-Giles contends that the Constitution should be read as a characterological document. Parry-Giles writes, "The characterological nature of the American Constitution permits, indeed compels, a character/leader based politics that results in the embodiment of ideology and the commitments that constitute ideology with particular individuals facing scrutiny as they attempt to lead."<sup>91</sup> Parry-Giles's conception provides a novel way of viewing the Constitution, but a traditional model is more applicable to my study. On the traditional model, Parry-Giles writes, "A constitution of power 'exists to make governmental action possible [and] it trusts those who govern,' while a constitution of limits 'exists to prevent governmental abuse, and distrusts those who govern.'"<sup>92</sup> This views the Constitution as a document that establishes powers for each branch of government, but also places limits on the authority of each branch.

Despite following a more traditional model for my study, Parry-Giles's focus on ideology in the Constitution is instructive. According to Stephen Bygrave, all of Burke's work centers on ideology. In particular, Burke's notion of the constitution beneath the constitution allows for the analysis of ideology.<sup>93</sup> Robert Wess takes Bygrave's ideas further, arguing that for Burke, ideology is a struggle for definition. Every act of constitution is a response, but it selects elements of past constitutions, actively redefining the scene to which it responds. The act of selection thereby reconstituting its own foundations."<sup>94</sup> Henry L. Ewbank adds:

More precisely, the Constitution is only a part of the constantly changing scene that includes a great many other important details which provide

motives for action—as well as decisions not to act—of the humans who inhabit the scene. These other scenic aspects identify a context, or a larger circumference. They include social, economic, and political realities that determine the ways in which the language of the Constitution is interpreted...<sup>95</sup>

But even though the language of the Constitution can be interpreted differently based on a shifting circumference, the Constitution provides a vocabulary, or terministic screen, which limits and guides the actors operating within this scene. The Constitution is “an act so comprehensive that it set up and defined the overall motivational scene, in terms of which countless personal acts of its citizens would be both performed and judged.”<sup>96</sup> Actors take action based on their understanding of the Constitution, and courts then judge their constitutionality, determining—and in some cases reshaping—the scene.

Robert Wade Kenny outlines a model for understanding Burke’s concept of constitution and a way of applying it to legal discourse. He argues that whenever symbolic action occurs, a descriptive constitution and a declared constitution are present. Descriptive constitutions name things, while declared constitutions command responsibility. Implicitly, descriptive constitutions call forth certain declared constitutions. Kenny writes, “In Burke’s own words, instead of calling a man ‘by nature a criminal,’ you say, ‘he will end on the gallows.’”<sup>97</sup> Thus, a descriptive constitution, or naming, symbolically “engineer[s] for the sake of a forthcoming (motive)” or declared constitution.<sup>98</sup>

Kenny argues that the nexus of the two types of constitution represents the point of interplay between scene/act as well. Because the Constitution was conceived in ambiguous terms that can be conflicting, “the law that frustrates one wish in the Constitution will, by the same token, gratify another.”<sup>99</sup> At the point of tension between scene and act, the courts “contrive to articulate as if [a court decision] straightens, rather than bends the document.”<sup>100</sup> As a result the Constitution is treated as descriptive though it was originally declared, allowing the document to transform over time.<sup>101</sup> As case law accumulates, it provides a variety of precedents for judges to draw from, allowing them to reshape the scene depending on the cases they choose to privilege.<sup>102</sup> By examining the legal reasoning of the court and its choice of cases, a critic can look at ideology in the “constitution underneath the constitution”<sup>103</sup> at the nexus of scene and act. To shift to McGee’s terminology, looking at ideographs through Kenny’s reading of Burke, I can determine how a court decision privileges a specific synchronic meaning of an ideograph, which influences the diachronic shifts in the ideograph’s meaning.

To examine the ideology embedded in the FISCR opinion, the remainder of this chapter will analyze the word clusters surrounding the terms privacy and national security as they operate within Burke’s pentad. The clusters will expose how the language and cases chosen to support the decision privilege an ideology and reshape the scene, possibly leading to a change in the synchronic relationship between the two terms’ meaning.

## **Pentadic Analysis of the FISCR Opinion**

Burke developed dramatism to analyze and critique human action by revealing motive. Burke bases the method of inquiry on a pentad: scene, agent, agency, purpose, and act. Scene refers to the setting or in which the other variables of the pentad function. Agent is the object or character. Agency is the means to act. Purpose is the intent with which an agent acts, and act is the action an agent chooses.<sup>104</sup> In the FISCR opinion, the United States government is the agent, and the purpose is to strengthen national security. The FISCR sets a scene in which terrorists threaten the United States in a setting where legal precedents, such as the Fourth Amendment, constrain response options. The government carries out foreign intelligence surveillance by directing and certifying communication service providers to assist in the surveillance process. The following will explore each element of the pentad indicating how the court's choice of language is revealing about its intent.

### **Agent**

Referenced forty-nine times, government is the primary actor in the case. Despite the number of mentions, government is never explicitly defined. The FISCR three times calls it the "executive" and refers to numerous agencies, including the Department of Defense, National Security Agency, and Department of Justice. It also names two individual actors: the Attorney General and the Director of National Intelligence. The variety of groups and people associated with "government" presents a sprawling body. However, the FISCR reduces the interest of the government to military and legal matters by explicitly mentioning only the DNI and

AG. By focusing on only these two aspects, the FISCR chooses not to acknowledge other functions of the government, such as taxation, building infrastructure, or providing assistance to citizens in need. The implication is that the government is concerned only with the legality of its actions and how it can further the goals of the military.

The FISCR presents the government as a powerful entity with authority. It has the ability to send “directives” and issue “certifications,” which allow the government to force a “communications service provider” to help the government conduct warrantless surveillance. The text of the opinion identifies the government as the “appropriate officials”<sup>105</sup> with the power to “command”<sup>106</sup> surveillance and “compel compliance.”<sup>107</sup> Though the petitioner appealed the government’s directive and requested an injunction, the petitioner began compliance “under threat of civil contempt.”<sup>108</sup> The FISCR constitutes the government as having the authority to coerce businesses like communication service providers into assisting even in cases where they are unwilling to participate.

### **Act**

The FISCR presents “foreign intelligence surveillance” as the act of the government in the opinion, referencing the term thirty times. The language in the opinion suggests that the surveillance was “warrantless,”<sup>109</sup> but that it was also “lawful”<sup>110</sup> and “reasonable.”<sup>111</sup> However, the term most frequently associated with surveillance is “foreign intelligence,” which limits the scope of the surveillance.

Mentioned 26 times, “foreign intelligence” is strongly associated with “national security.” The FISCR introduces the case as dealing with “foreign

intelligence surveillance.”<sup>112</sup> The court elaborated, writing that “obtain[ing] foreign intelligence for national security purposes when those surveillances are directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States.”<sup>113</sup> The object of surveillance is “foreign agents,”<sup>114</sup> “foreign powers,”<sup>115</sup> or their “collaborators.”<sup>116</sup> These words legitimize the government’s actions, and even open up the possibility of domestic surveillance with the mention of “collaborators.” The Protect America Act, which is the legislation in question in this opinion, allowed the government to conduct warrantless surveillance as long as a “significant purpose of that surveillance was to obtain foreign intelligence information.”<sup>117</sup> Foreign intelligence represents an indirect object, result or type of surveillance for the FISCR. These quotes indicate that as long as foreign intelligence targeting a foreign agent or power is a partial motive for their surveillance, a warrant is not necessary.

### **Scene**

The opinion takes place in a post-September 11 context. The terror attack and the subsequent reaction by the government heightened the focus on national security. The passage of the PATRIOT Act and the Protect America Act altered the legal landscape by lowering the standards for warrants for wiretaps when foreign intelligence was concerned.

The FISCR considers the Fourth Amendment and its warrant requirement as scenic conditions in its opinion. The FISCR presents the Fourth Amendment and warrants, which are aligned with privacy, as obstacles to gathering foreign

intelligence for national security. The government offers a foreign intelligence exception as a challenge to the Fourth Amendment.

Mentioned nineteen times, Fourth Amendment acts as a protection to privacy. In the introduction the court writes, “At its most elemental level, the petition requires us to weigh the nation’s security interests against the Fourth Amendment privacy interests of the United States.”<sup>118</sup> The FISCR places national security against privacy, and the Fourth Amendment provides the Constitutional backing for privacy. The court contends that government intrusion on privacy must “comport with the Fourth Amendment’s reasonableness requirement.”<sup>119</sup> Explicitly, the court adds, “The Fourth Amendment protects the right ‘to be secure...against unreasonable searches and seizures.’”<sup>120</sup> Because the court places privacy and national security as polar opposites, these two quotes align the Fourth Amendment with reasonableness and national security with searches and seizures.

Aligned with the Fourth Amendment and privacy is the term “warrant,” which is referenced twenty-one times. According to the FISCR, “The [petitioner] asserts that the government...had to abide by the requirements attendant to the Warrant Clause of the Fourth Amendment.” Initially, the FISCR presents the Warrant Clause as a particular protection in the Fourth Amendment that prohibits the government from encroaching on citizens’ privacy. Traditional warrant requirements include “prior judicial review, probable cause, and particularity.”<sup>121</sup> The language of the term “warrant” and its attendant requirements limit surveillance and narrow its scope, placing it in opposition to word clusters around “national security.” Indeed, the FISCR writes, “...there is a high degree of probability

that requiring a warrant would hinder the government's ability to collect time-sensitive information and, thus, would impede the vital national security interests that are at stake."<sup>122</sup> The term "warrant" forces the court to consider probable cause and particularity against gathering time-sensitive information.

While the petitioner contends that the Fourth Amendment's Warrant Clause should be privileged, the government agonistically argues that a "foreign intelligence" exception to the Fourth Amendment exists, which allows warrantless surveillance. The court compares foreign intelligence to cases where the Fourth Amendment has been waived, writing, "Applying principles derived from the special needs cases, we conclude that this type of foreign intelligence surveillance possesses characteristics that qualify it for such an exception."<sup>123</sup> Supporting this judgment and dismissing an argument of the petitioner, the court writes, "The prevention or apprehension of terrorism suspects, for instance, is inextricably intertwined with the national security concerns that are at the core of foreign intelligence collection."<sup>124</sup> The FISCR concludes that because of the intensity of governmental claims of national security, a foreign intelligence exception must exist as a special needs case. By granting that a foreign intelligence exception exists in "special needs" cases, the FISCR further develops a conception of privacy as contextual. The implication of exception is that privacy exists until the government claims an intense interest, such as national security.

The FISCR's case for exception is significant particularly because it excludes legal arguments from previous privacy cases that rejected such reasoning. In the first major wiretapping case, *Olmstead v. United States* in 1928, the Supreme Court

upheld wiretapping, but Louis Brandeis wrote a much-cited dissent. Besides his Constitutional objection to invasions of privacy, Brandeis specifically attacked wiretapping and agents engaging in it. Brandeis wrote, "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."<sup>125</sup> Brandeis contended that in the hands of these men wiretapping was a much greater threat than tampering with mail. "As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping," he wrote.<sup>126</sup> His main objection was that a wiretap invades the privacy of whoever is on the line with the person under surveillance, as well. In his dissent, Justice Butler agreed, writing that privileged communications between doctors and patients, husbands and wives, etc. take place over the phone.<sup>127</sup>

In 1965 the Supreme Court officially recognized the right to privacy in *Griswold v. Connecticut* as a fundamentally human right older than the Constitution. Justice Douglas wrote, "We deal with a right of privacy older than the Bill of Rights ... It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."<sup>128</sup> This case not only recognized privacy, but privileged it as noble purpose, not a contextual concern.

Overturing the *Olmstead* decision in 1967, *Katz v. United States* explicitly stated the wiretapping without a warrant was illegal. In opposition to *Olmstead*, which ruled that intrusion protected a place, Justice Stewart wrote, "The Fourth

Amendment protects people, not places.”<sup>129</sup> The court held that a conversation in a phone booth should be private, and “The Government’s activities in electronically listening to and recording the petitioner’s words violate the privacy upon which he justifiably relied while using the telephone booth.”<sup>130</sup> This case expanded the definition of privacy applying to individuals, not just domiciles. These cases represent just a few notable examples of definitions of privacy that the FISCR excludes when developing its exception to the Fourth Amendment and its warrant clause.

Additionally, the FISCR is excluding the philosophical foundations of privacy that explains why other judges support a strong definition of privacy. The petitioner’s claim that the intrusion is not reasonable recalls Warren and Brandeis’s definition of privacy as an “inviolate personality.”<sup>131</sup> Though Warren and Brandeis were concerned about an aggressive press and this case deals with government intrusion, Warren and Brandeis provide the foundation for both, writing, “The common law has always recognized a man’s home as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?”<sup>132</sup> Similar to the press peeping in the back door is the government listening in on the phone lines or looking at emails.

Another privacy scholar attempted to define Warren and Brandeis’s vague but central term “inviolate personality.” Edward Bloustein wrote a law review article that argued an intrusion of privacy was an assault on human personality. Bloustein shifts the interests of privacy remedies from mental distress or

proprietary concerns to an affront against human dignity, which diverges significantly from the FISCER conception of privacy as a contextual variable.<sup>133</sup> In an attempt to justify the right to privacy, a number of scholars attempted to link privacy with another, more basic, value.<sup>134</sup>

By excluding these former definitions of privacy, the FISCER treated the Fourth Amendment as a contextual variable, which implies that privacy exists only situationally. The FISCER argues that government surveillance must comport with the Fourth Amendment, but then it writes that “the greater the government’s interest, the greater the intrusion that may be constitutionally tolerated.”<sup>135</sup> The FISCER argues that “individual interests” are balanced against “governmental interests” with the scales “tilt[ing] in favor of upholding the government’s actions” if the interests are sufficiently supported.<sup>136</sup> By initially arguing that governmental action must comport with the Fourth Amendment, and then saying that government interest is balanced against individual privacy, the FISCER implies that the Fourth Amendment is a contextual variable. Thus, individual privacy rights exist only when the government deems they do.

### **Agency**

The FISCER identifies the agency to be the means the United States government uses to implement foreign intelligence surveillance. Specifically, the government issues directives, which are supported by certifications, to the communications service providers. The service provider is, in turn, compelled to assist the government in surveillance of the service provider’s customers.

First, the government's authority allows it to "issue directives to the petitioner commanding"<sup>137</sup> the communications service provider to begin surveillance of its customers. It is through these directives, mentioned twenty-nine times, that the government exercises its authority. As such, the directives are the point of contention when the communications service provider challenges their "legality."<sup>138</sup> However, the court rules that the directives are "lawful and that compliance is obligatory,"<sup>139</sup> based on the certifications that accompany the directives.

Second, the FISCER establishes that certifications, as a form of agency, provide "protections"<sup>140</sup> and "safeguards"<sup>141</sup> to any potential abuse of warrantless surveillance. Based on these protections that are referenced 10 times, the FISCER argued that, "in essence...certifications permit surveillance conducted to obtain foreign intelligence for national security."<sup>142</sup> The FISCER enunciates specific protections in place, citing "procedures" and "affidavits." According to the court, each directive had "a written certification 'supported as appropriate by affidavit of appropriate officials in the national security field.'"<sup>143</sup> The court adds, "The procedures incorporated through the section 2.5 of Executive Order 12333, made applicable to the surveillance through certifications and directives, serve to allay the probable cause concern."<sup>144</sup> Further supporting this, the court writes, "in order for the government to act upon the certifications, the Attorney General first had to make a determination that probable cause existed."<sup>145</sup> By including verifications and affidavits from "appropriate officials," the certifications serve to support the legality of directives ordering surveillance by communications service providers.

Last, the directives “direct the communications service provider to assist [the government] in acquiring foreign intelligence.”<sup>146</sup> “Assistance” and “acquisition” are the two words most commonly linked with communications service provider, relegating the service provider to a tool of the federal government. In this case, the communications service provider is noted only seven times, all in the early background section of the opinion. From then on, the FISCR refers to the communication service provider only as the petitioner. Though the communications service provider is challenging the government using them as a tool for surveillance, the name given, petitioner, conjures the image of someone requesting to be heard rather than someone one with equal footing.

### **Purpose**

For the FISCR, strengthening national security is the purpose. When writing about national security as a government interest, the FISCR argues that “the more important the government’s interest, the greater the intrusion that may be constitutionally tolerated.”<sup>147</sup> For the court, the importance of the nation’s security interest is paramount. And the FISCR defines national security as “an interest of utmost significance.”<sup>148</sup> The court adds, “the interest of national security is of the highest order of magnitude.”<sup>149</sup> In cases where national security is the purpose, “the constitutional scales will tip in favor of upholding the government’s actions.”<sup>150</sup> In FISCR’s conclusion, which notably mentions national security four times while referencing privacy only once, the FISCR writes:

[T]he Constitution is the cornerstone of our freedoms, and the government cannot unilaterally sacrifice constitutional rights on the altar of national

security...Our decision recognizes that where the government has instituted several layers of serviceable safeguards to protect individuals against unwarranted harms and to minimize incidental intrusions, its efforts to protect national security should not be frustrated by the courts.<sup>151</sup>

Despite denying that the government can take unilateral action, the court places itself as subservient to the government for national security cases, effectively arguing that an avenue for recourse for citizen's whose rights been violated should not exist in matters of national security. Rather than protecting the rights of Americans through national security, the FISCR constitutes national security as the ultimate purpose. Instead of presenting national security as a means of protecting rights, the FISCR places national security as the end goal of the legal system, which minimizes recourse for aggrieved citizens and opens the United States to abuses by "men of zeal, well-meaning but without understanding."

### **Conclusions**

To this point, the analysis has established that the government is an authoritative agent that can command within legal boundaries to protect the nation's security. The government's action is surveillance of possible threats to the community as long as gathering foreign intelligence is a significant purpose. The tools, or agencies, used to gather surveillance are directives supported by certifications that compel communications service providers to assist the government. The scene is governed by a threat to national security, and in that context the Fourth Amendment becomes not a protection of privacy, but an obstacle to national security. When the action is combating a threat from terrorists, the

FISCR granted a “special needs” foreign intelligence exception to the Fourth Amendment, which circumvented the warrant requirement.

In this case, the FISCR develops a descriptive constitution that protected national security interests rather than privacy concerns, concluding that the government intrusion was reasonable. By naming an exception to the Fourth Amendment, the court is establishing a descriptive constitution—or scene—in which the government has the power to engage in warrantless wiretapping in cases of special needs. As detailed above, the FISCR cited cases that supported a foreign intelligence exception while excluding those that did not. The declared constitution reshapes the constitutional scene by justifying government actions such as wiretapping by naming that activity an exception in the descriptive constitution. Further, the government, through certifications, controls much of the information that determines the intensity of a case.

Just as important as the implications of the descriptive and declared constitutions outlined by the FISCR are the motives behind the decision. To access the constitution beneath the constitution and look at the ideology driving this decision, an examination of the ideographs is helpful. The FISCR pits privacy against national security in the introduction of this case. Mentioned eight times, the FISCR places privacy in an inferior role to national security—mentioned fourteen times—in number of references and gravity of references. In one instance, the FISCR writes an entire section about the merits of privacy only to conclude that governmental interest in national security trumped the Fourth Amendment. In the conclusion, the FISCR refers to national security four times more than privacy, and rules that the

government's efforts to protect national security should not be frustrated by the courts. The court is describing its decision as a matter of protecting national security, and any other decision would jeopardize "the safety and security of its people."<sup>152</sup> The court notes that the executive cannot "unilaterally sacrifice constitutional rights on the altar of national security."<sup>153</sup> However, by establishing an exception to the Fourth Amendment and arguing for limiting the Amendment's application, the FISCR reduces the scope of the meaning of privacy established in earlier cases.

The FISCR presents this case as straightening constitutionality, not bending it. By structuring their legal reasoning to provide for an exception to the Fourth Amendment, the FISCR's descriptive constitution calls forth a declared constitution that allows for warrantless wiretapping. Basing their descriptive constitution on national security grounds and excluding significant privacy cases demonstrates the ideology at work in the constitution beneath the constitution.

By establishing the constitutionality of the government's surveillance of its citizens, the FISCR attempts to reshape the constitutional scene by constituting privacy as contextual. It presents the Fourth Amendment and its warrant requirement as an obstacle to protecting national security, rather than protecting the rights of individuals. Choosing its precedents, the FISCR establishes a foreign intelligence exception to the Fourth Amendment, allowing the government to conduct warrantless surveillance.

Examining the constitution beneath the constitution reveals that by making national security the purpose of the government, the FISCR elevates it above privacy

as an ideograph. In fact, the FISCRC presents the ideographs as terms that are in competition, which means the terms are always dissonant. The court offers little hope reconciling the tension between the terms; instead it privileged national security.

The decision constitutes a community that looks at national security rather than at rights or freedoms as the ultimate purpose. It minimizes recourse for violations of rights when national security is invoked, and elevates national security to an “exceptional” term. This diachronic expansion of the meaning of national security represents a danger for the community. A term so ideologically charged could justify curtailing a wide range of liberties in favor of national security. Particularly for minorities and immigrants an expansion in the meaning of national security poses problems, such as deportation and detention.

## CHAPTER 3

### STATE SECRETS, REDACTION, AND SILENCE

Silence serves a multitude of purposes in rhetoric: a tool for survival, a path to liberation, and an exercise of power on a group. Silence allows for ambiguity of meaning, which is, in turn, interpreted by listeners. The words that bracket silence shape its potential meaning by suggesting to a listener what should fill the silence or hint at the meaning that should be attributed to the silence. Language bracketing a silence can exercise influence over its potential meaning because terms, particularly those that encompass ideological freight, can persuade a specific construction of meaning. Audiences fill in their expectations from the rhetorical context, with community-understood norms central to the process.

For this chapter, I will examine redaction as a form of silence. To gain a better understanding of how ideology shapes the meaning of silence, I will look at word clusters bracketing the redactions in the FISCR opinion. Redactions in the opinion represent information the court has chosen to silence. Because the opinion is about government surveillance of citizens, the words that cluster around the redactions are intimately related to privacy and national security. Analyzing those clusters will yield understanding about the interaction between the ideographs, as well as how ideology helps shape the meaning of silence. The chapter will review the literature on silence to glean approaches for critically analyzing silence, place the FISCR document in historical context to best understand how situational circumstances may have affected the use of silence in the document, and analyze word clusters bracketing the redactions in the FISCR opinion for the purpose of

better understanding the synchronic relationship between the ideographs <privacy> and <national security>.

### **The Scholarship on Silence**

The question of the role of silence in communication has generated research across a multitude of fields. In the arena of communication studies, Robert Johannesen's 1974 survey of literature on silence sparked much of the current research on the topic. He argues that, "... sound and silence define each other. Silence takes on meaning only in a surrounding context of verbal and nonverbal signals."<sup>154</sup> Focusing on interpersonal communication, Johannesen points out that humans "... cannot *not* communicate," thus silence will carry meaning regardless of intention.<sup>155</sup> He lists at least 20 meanings that could be attached to silence based on prior experience and cultural conditioning.<sup>156</sup> Robert Scott provides a more succinct list, writing that silence can be a mark of respect or awe.<sup>157</sup> It can symbolize obedience, attention, and contemplation.<sup>158</sup>

Scott also contends that silence can be threatening.<sup>159</sup> Indeed, Johannesen reiterates that silence often is considered antisocial, citing what Baker calls a "negative silence" motivated by fear or insecurity.<sup>160</sup> This development in the literature offers important background for this study because of the nature of the redactions in the FISCR opinion. Depending on the perspective of those interpreting the FISCR opinion, the silences can be viewed as a negative because they threaten privacy or as a positive because protect national security.

A number of scholars have argued that silence, particularly when infused with ideology, has political implications. Radha S. Hegde and Lester Olson focus not

just on the political meaning of silence, but also on the ideological and cultural factors contributing to that meaning. Hegde's ethnographic interviews with battered women in a shelter in India reveal a deep-rooted paternalism that led to silence.<sup>161</sup> Similar to this study, Hegde analyzes the language around silences to determine the ideological factors that indicate and influence the meaning of silence.

At least two scholars have argued that silence represents an exercise of power on minority groups. Lester Olson examines a speech by poet Audre Lorde, concluding that silence can be imposed on disenfranchised groups.<sup>162</sup> His study is primarily concerned with the way power can be exercised through silence.

Similarly, Dana Cloud looks at a 1934 mill strike in which white workers discovered an avenue to voice their displeasure. However, the black workers learned to keep their silence because oppression by a paternalistic power structure could lead to racial violence.<sup>163</sup>

While the previously discussed authors added to the theory of silence, Barry Brummett provides a blueprint for analyzing what he calls a "strategic silence."<sup>164</sup> Strategic silence must 1) violate expectations, 2) draw public attribution of predictable meaning, and 3) seem intentional and directed at an audience.<sup>165</sup> While interpersonal silence can take on a multiplicity of meanings, Brummett argues that strategic silence actually evokes predictable meanings, but audiences frequently interpret strategic silence as mystery, uncertainty, passivity, and relinquishment.<sup>166</sup> In his example on Jimmy Carter, Brummett notes that by relinquishing control, a politician allows for unchecked speculation and avenues for others to define the

situation.<sup>167</sup> Thus, for Brummett, relinquishing control of meaning-making must be a desirable action for a strategic silence to be an effective decision.

Brummett, however, rules out what he calls “explained silences” as part of his strategic silence framework.<sup>168</sup> He writes, “If the President adequately explains the silence as required by national security, then the public comes to expect silence as appropriate in that instance.”<sup>169</sup> I contend that even if the redaction in the FISCR opinion is a silence explained by national security, the content of what the opinion is silent on is just as strategic as any other silence. The FISCR redactions represent explained silences in the opinion. Additionally, an explained silence provides an opportunity to examine how ideology can shape the meaning of silence.

### **Judicial Justification for Silence**

The legal justification for redaction in the national security context is the states secret privilege, which is a common law principle that allows the government to withhold information based on protection of U.S. citizens and property. It is an evidentiary rule that “protects information from discovery when disclosure would be inimical to the national security.”<sup>170</sup> In essence, it allows the government to silence others by claiming silence. Redaction and states secrets can provide a point of tension between national security and privacy where the ability to claim silence is power.

Two cases provide an early foundation for the principle: *United States v. Burr* and *Totten v. United States*. In Aaron Burr’s 1807 trial for treason, Chief Justice Marshall wrote that if a letter under subpoena, “contain[s] any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose,

such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed."<sup>171</sup> Chief Justice Marshall was skeptical of the rule and wrote that it should be narrowly used, but supported granting the executive the discretion bar information coming to trial based on state secrets.

In *Totten v. United States*, the Supreme Court case that set the precedent for the modern application of the state secrets privilege, the estate of a former spy sued the government for the enforcement of a contract signed by Abraham Lincoln during the Civil War. The court found:

The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent.<sup>172</sup>

The court makes it clear that especially in times of war, the government has the legal right to invoke state secrets when the government might be "embarrassed" or disclosures could endanger an agent. A number of years passed before courts dealt with another significant state secrets case, leaving these two cases as legal precedent for the government's claims.

During 1900s a number of cases tested the state secrets privilege. The results fleshed out what the state secrets privilege covers, why it exists, and the limits on the privilege. The 1998 *Kasza v. Browner* case, which made it to the federal appeals court, issues a definitive ruling on the state secrets privilege explaining the limits of the state secrets privilege when invoked by the government. The case established that the state secrets privilege can 1) remove evidence from consideration, 2) deprive the defendant of information that would validate a defense, and 3) dismiss the case because it's very subject matter is a state secret.<sup>173</sup> Based on the breadth and intensity of information involved in a case, the state secrets privilege can do as little as bar evidence from consideration, but can go as far as completely dismissing a case. Additionally, *Halkin v. Helms* provides a precedent in which a federal appeals court ruled that the states secrets privilege is an overriding principle. The court argues that when related to state secrets, a case "is not a balancing of ultimate interests at stake in the litigation."<sup>174</sup> Instead, it requires a showing of harm that could result from disclosing information.<sup>175</sup> Without a significant harm determined by the court, an entire case can be dismissed based on state secrets as well.

The Supreme Court first reinforced the early decisions on the reasons for the existence of the state secrets privilege in the 1953 *United States v. Reynolds* case. A military aircraft crashed killing three, and a widow sued for damages. Ultimately, the court refused to allow discovery, writing that if "reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, [it] should not be divulged."<sup>176</sup> While the *Totten v. United States*

case argues that the government had an interest in protecting its secrets during times of war, the *Reynolds v. United States* case expands the privilege to protecting all national security secrets that could expose military matters.

In 1978 the U.S. Court of Appeals elaborated on the conclusions in the *Reynolds* case in *Halkin v. Helms*. Vietnam war protesters accused the NSA of illegal wiretapping with the cooperation of communication providers through operations MINARET and SHAMROCK. The government argues that the state secrets privilege applied because litigation could ““(1) confirm the identity of individuals or organizations whose foreign communications were acquired by NSA, (2) disclose the dates and contents of such communications, or (3) divulge the methods and techniques by which the communications were acquired by NSA.”<sup>177</sup> Despite an enormous amount of disclosure about SHAMROCK in Congressional testimony, the court argues that “even ‘seemingly innocuous’ information is privileged if that information is part of a classified ‘mosaic’ that ‘can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.’”<sup>178</sup> Taken with *Reynolds*, the court asserts that the government should be given broad discretion to apply state secrets particularly in military matters. Such latitude is warranted because the identities, dates, and techniques could be divulged, and agents of foreign powers could use it as counterintelligence to subvert national security.

A few court cases have attempted to define the limits of the state secrets privilege. In *United States v. Reynolds*, the Supreme Court notes that judicial control should not be ceded to executive “caprice,” but it does not provide explicit circumstances under which the executive has proved invoking state secrets is

necessary.<sup>179</sup> In *Ellsberg v. Mitchell*, the United States Appeals court upheld the assertion of the state secrets privilege. However, it writes, “Whenever possible, sensitive information must be disentangled from non-sensitive information to allow for the release of the latter.”<sup>180</sup> Additionally, the court, in a case related to the government application for two wiretaps without warrants, reaffirms that the burden for an exemption from the Fourth Amendment is on those seeking it. These two cases limit the state secrets privilege by requiring it to comport with the Fourth Amendment unless the government presents a compelling reason, and it requires the government to release any information that is non-sensitive rather than trying to shield an entire case from litigation.

The common law state secrets privilege warrants withholding evidence and even precluding a trial from reaching court. As noted in *Totten*, the state secrets privilege is particularly relevant during times of war and crisis. It is tightly tied to the protection of national security, and cases like *Halkin v. Helms* and the *Keith* case led to the development of FISA and the FISC. The courts, in short, have historically recognized the power of the executive to take extreme action when national security is threatened.

### **Executive/Legislative Justifications for Silence**

While the judiciary affected the FISC opinion through state secrets privilege, the executive and the legislature also influenced the context in which the case took place. Two historical developments that significantly influenced the FISC when ruling on *In re Directives* were the Terrorist Surveillance Program (TSP) and the Protect America Act (PAA). Public outrage at the TSP program led to the passage of

the Protect America Act, which provided the executive with legislation to support activities that were formerly undertaken through the TSP. The FISC ruling on *In re Directives* was based on its interpretation of the PAA statutes, with many of the court's justifications grounded in references to the legislation. Because the TSP and the PAA played a considerable role in the circumstantial development of the case and later the legal reasoning that legitimized the government's surveillance, a brief review of the two measures is relevant to my analysis. This section will describe the TSP and its duties, document the public outrage, and explain the passage of the PAA.

On December 16, 2005, *The New York Times* revealed the existence of a domestic surveillance program related to the War on Terror. According to the article:

Under a presidential order signed in 2002, the intelligence agency 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. The agency, they said, still seeks warrants to monitor entirely domestic communications.<sup>181</sup>

The White House requested the *New York Times* kill the article because it could jeopardize national security investigations.<sup>182</sup> The following day, George Bush addressed the nation, saying:

I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al Qaeda and related terrorist organizations. Before we

intercept these communications, the government must have information that establishes a clear link to these terrorist networks.<sup>183</sup>

Bush said the program was “crucial to our national security” and the newspaper’s disclosure threatened citizens. NSA whistleblower Russell Tice said that some employees worried the warrantless program was illegal.<sup>184</sup> He also claimed that the program affected millions of Americans<sup>185</sup>. A subsequent USA Today story reported that AT&T, MCI, and Sprint were the communications service providers that assisted the government in the surveillance.<sup>186</sup>

In the wake of the controversy, the Bush administration submitted the Protect America Act bill to Congress on July 28, 2007. The bill passed only six days later. The Protect America Act established that surveillance could take place inside the United States as long as it was not targeted at a particular person.<sup>187</sup> It also adopted the PATRIOT Act’s lowered standard of intelligence gathering as “significant” instead of the “primary” purpose of the surveillance. Formerly, that meant that intelligence gathering was the only goal of surveillance. Substituting “significant” for “primary” meant that the government can conduct surveillance for law enforcement purposes as well. The bill was only active for a six-month period, but the FISA Amendment Act reauthorized many of the PAA’s provisions, including all of the above-mentioned changes.<sup>188</sup>

The details on the TSP reported by the national media launched numerous lawsuits through state and federal courts alleging privacy violations.<sup>189</sup> The majority of the lawsuits were initially dismissed by the state secrets privilege.<sup>190</sup> All of these cases dealt with communications providers assisting the government in

surveillance for national security. In most, an individual or group representing privacy rights sued either the government or a service provider for privacy violations. The case analyzed in this study stems from the same controversy, with the notable difference that the communication service provider appealed on behalf of its customers to FISA insisting that surveillance was an unconstitutional invasion of privacy.

### **The FISC Opinion**

In the nearly 40 years of the FISC's existence, it has published only two opinions: *In re Sealed Case*<sup>191</sup> and *In re Directives*. In the *In re Directives* case, Judge Bruce Selya argues that it was in the public's interest to have access to the court's findings, but declined to specify its reasons for its ruling. Despite publishing the opinion, the court is cautious about revealing too much information to the general public. Judge Selya writes, "This Court shall act on any request to disclose court records or other documents containing classified information anent this case only after consultation with the Executive branch."<sup>192</sup> Within the public decision, the court relies heavily on redaction to restrict access to what it considers necessary to protect the nation. The court explicitly notes that it will protect "...the identity of the petitioner and the intelligence sources and methods at issue."<sup>193</sup> Examination of the introductions and conclusions to the redactions, however, is revealing.

The following will identify the five types of information that the FISC redacted, namely, the name of the communications service provider, the names of the customers the provider wiretapped, the dates on which surveillance took place, the procedures relating to intelligence activities, and the criticisms of the

surveillance practices. Within the discussion of each information type, it will offer the findings of the related cluster analysis, identify the explicit justifications used by the court for the use of redactions, and offer implications of decisions regarding the information appropriate for the public sphere.

### **The Petitioner**

As the publication order points out, the name of the petitioner is redacted. The formal name of the case is *In re Directives [redacted text]*. Throughout the document, the FISCR refers to the service provider only as the petitioner. The court identifies the petitioner in the first sentence of the opinion, writing, "This petition for review stems from directives issued to the petitioner [redacted text] pursuant to a now expired set of amendments to the Foreign Intelligence Surveillance Act."<sup>194</sup> The name of the service provider is never mentioned again.

The court does not offer any reasons for redacting the name of the service provider. However, redacting the name of the service provider invites the reader to assume the redaction was a security measure for the service provider and the public for several reasons. First, revealing the name of the service provider could open it to the liability of lawsuits and losing customers. For instance, when the TSP story broke, at least two cases, *Hepting v. AT&T* and *Terkel v. AT&T*, were filed against service providers. The negative press surrounding wiretapping could also lead customers to switch to a service provider that might not be cooperating with the government or to render the service provider the target of a potential terrorist attack. Terrorists often target those perceived to be assisting the government. For example, the Taliban has targeted American and Afghan civilians asserting they

were working with the government.<sup>195</sup> Last, providing the name of the service provider could frustrate the government's efforts to catch terrorists. Judge Vaughn Walker outlines the security issue in *Hepting v. AT&T*, writing, "In short, when deciding what communications channel to use, a terrorist 'balanc[es] the risk that a particular method of communication will be intercepted against the operational inefficiencies of having to use ever more elaborate ways to circumvent what he thinks may be intercepted.'"<sup>196</sup> While the first two scenarios for redacting the name of the petitioner protect the service provider, the last one protects the public.

Redacting the service provider erases the responsibility by these actors in the war on terrorism. Stuckey argues that history has demonstrated the plausibility of such an interpretation when she maintains that William Taft was able to ignore civil rights issues, mask regional divisions, and exclude specific groups from the national identity by homogenizing all Americans.<sup>197</sup> The redaction masks the service provider, which may prompt future civil rights violations by removing public scrutiny of potentially a wide range of actors, including businesses, groups of individuals, or even individual actors.

### **The Customers**

In addition to redacting the name of the service provider, the document redacted the names of the customers the government wished to wiretap. Judge Selya writes, "The government issued directives to the petitioner commanding it to assist in the warrantless surveillance of certain customers [redacted text and footnote]. These directives were issued pursuant to certifications that purported to

contain all the information required by the PAA.”<sup>198</sup> After redacting this early mention, the court does not address customers again.

This redaction following “certain customers” invites readers to believe that the court had information about the specific customers targeted and the redacted footnote as containing an appropriate justification for their wiretap of those specific customers. The sentence immediately following the redaction focuses on the legality of the surveillance of these certain customers, relying on “certifications” required by the PAA. The language around the redaction tempts readers to infer that the names of these certain customers were redacted because they could file suit against the service provider and government because of the surveillance. Or, the government could still be monitoring these people as terrorist suspects.

Depending on the interpretation of the removed content, redacting customer names arguably homogenizes the victims into a silent space that aligns them with a threat to national security and denies them an identity. Writing about the Gulf War, Winkler argues that categorizing Iraq under the general label “terrorist” allowed the Bush administration to portray “the attack on one small country into a threat to all the civilized nations of the world.”<sup>199</sup> By constructing Iraq as a part of a collective terrorist threat, the Bush administration attributed characteristics of irrationality and desperation to the entire nation.<sup>200</sup> Similarly, the FISC frequently cites the certifications and procedures in place to target only those suspected to be terrorist agents of a foreign power. By denying the customers an identity and associating them with a homogenous threat justifies redaction by fusing the customers with an irrational enemy.

## The Chronology

The opinion also redacted chronology of events connected with the surveillance under review by the court. When explaining the background of the case, the opinion redacted at least four different dates. “On [redacted text], the government moved to compel compliance.”<sup>201</sup> “The FISC’s decision was docketed on [redacted text]. Six business days later, the petitioner filed a petition for review.”<sup>202</sup> The final redaction read, “On [redacted text], the petitioner began compliance under the threat of civil contempt. [redacted text] On [redacted text], the petitioner moved in this court for a stay pending appeal.”<sup>203</sup> In the final redaction, at least an entire sentence has been removed.

The court’s stated reason for these redactions was that they risked becoming part of a “mosaic,” as noted in *Halkin v. Helms*, which could lend insight into how the U.S. intelligence agencies operate. However, the PAA was signed into law on August 5, 2007, and its sunset was February 17, 2008. Readers knowledgeable about the relevant time frame could assume that redacting the dates calls into question whether the surveillance took place during those six months. The court so thoroughly redacted the dates that the only indication of time is that “six business days” after the FISC ruled on the case, the petitioner appealed to the FISCR.<sup>204</sup>

For readers that assume the surveillance happened outside the active period of the PAA, the implication of these redactions is that the government knowingly engaged in illegal wiretapping. In *Totten v. United States*, the court allows the government to invoke state secrets to protect itself from “embarrassment” during times of war. By redacting the dates, the government denies the public the ability to

evaluate if the government's surveillance activities were legal. It opens the government to the possible interpretation that it used state secrets to redact the dates to avoid embarrassment from the questionable legality of its actions.

More generally, silencing aspects of the scene alters the context in which actions take place. By redacting chronology, the FISCR allows readers to speculate on whether an action was illegal because of its timing. Scenic shifts dramatically change how an action is interpreted. An action can be legal or illegal depending on the scene in which it takes place, and by silencing elements of the scene the FISCR denies readers the opportunity to make a well-informed judgment.

### **The Surveillance Procedures**

Intelligence-gathering procedures are another textual grouping that the court redacted. The opinion explains the procedures as minimizing harm and protecting citizen rights, and at least seven redactions apply to these procedures:

This matrix of safeguards comprises at least five components: targeting procedures, minimization procedures, a procedure to ensure a significant purpose of a surveillance is to obtain foreign intelligence information, procedures incorporated through Executive Order 12333, and [redacted text] procedures [redacted text] outlined in an affidavit supporting the certifications.<sup>205</sup>

Judge Selya outlines these safeguards in response to the petitioner's complaint that the surveillance lacked particularity. The FISCR rejected this claim, writing, "...the [redacted text] procedures and the procedures incorporated through the Executive Order are constitutionally sufficient compensation for any encroachments."<sup>206</sup> A

further discussion of the procedures outlined in the certifications is provided, but in a confidential government brief. To lend the certification further credibility, the court notes that the Attorney General must sign off on the potential wiretapping.

For the FISCR, procedures represent a protection of privacy. The court indicates “targeting,” “minimization,” and “certifications” procedures exist to buffer privacy rights from aggressive national security interests. These terms imply that any harm done by the surveillance will be limited. Additionally, the court argues the procedures provide sufficient “compensation for any encroachments.” However, the opinion redacts a number of the procedures. By silencing the procedures, readers could infer that the opinion silences the very provisions present to protect privacy. The government is able to silence the provisions because of its reliance on certifications approved by “appropriate national security officials” and the Attorney General. If such is the case, redacting the procedures reinforces the authority of the government.

Readers could construe the implications of this set of redactions as allowing the government to act any way it wishes if it has certifications. In this scenario, the government’s need for “speed, stealth, and secrecy” in the protection of national security silences concerns for individual privacy, particularly when procedures are in place. Government interests in national security require the ability to “compel compliance” from the service providers because of the gravity of national security concerns. Failure to comply with a government request in this situation carries “a threat of civil contempt,” and compliance must continue despite an appeal for a stay regarding the surveillance. Despite the fact that “the government’s efforts did not

impress the petitioner,"<sup>207</sup> the service provider has no option but to assist the government in surveillance of its customers because the procedures provide sufficient compensation for encroachment.

Broadly, the procedures and certifications represent actions taken by the government to ensure that the privacy of citizens is protected. By redacting executive branch actions, the opinion arguably obscures the extent to which the government protects privacy, instead replacing it with the government's need to act swiftly and silently. By silencing intelligence procedures, the FISCR denies the reader knowledge of the full range of actions, and readers could assume that some undertakings by actors are too secret for the general public to know. Silencing allows actors to place deeds out of the public eye even if it directly involves aspects of an individual's life.

### **Criticisms of the PAA Surveillance**

At least seven redactions seem to be criticisms of the surveillance or potential errors that could result from the surveillance activities. In both number and length, this category by far represents the most redactions. The petitioner argues that the lack of judicial oversight could lead to mistakes in warrantless wiretapping. The FISCR court rejects this claim on two grounds. It holds that the previously discussed procedures were in place to prevent mistakes. Second, the court writes, "the government has the greatest need for speed, stealth, and secrecy". [redacted text] Compulsory compliance with the warrant requirement would introduce an element of delay, thus frustrating the government's ability to collect information in a timely manner. [redacted text]."<sup>208</sup> In another instance, when

discussing potential errors, the court writes, “A prior judicial review process does not ensure that the types of errors complained of here [redacted text] would have been prevented.”<sup>209</sup> During the same discussion, the court adds, “Similarly, the fact that there is some potential for error is not sufficient reason to invalidate the surveillances. [redacted text]. Equally as important, some risk of errors exists under the original FISA procedures...”<sup>210</sup> These two redactions invite readers to conclude that the FISC is redacting examples of the assertions they support.

All of the preceding quotes offer an assertion, and then the court redacts what appear to be concrete examples supporting those assertions. For example, the court’s language suggests a need for timeliness as a reason for dismissing the warrant requirement, but then it redacts what could be interpreted as examples supporting the need for “speed, stealth, and secrecy.” The following sentence stresses the dangers of compulsory compliance with a warrant requirement, and then redacts what appear to be examples that prove the claim.

In instances where the petitioner complains of possible privacy violations, the government makes a rebutting claim, but the court redacts the examples that possibly support its claim. By redacting the examples supporting the assertions, the court denies readers the opportunity to judge the applicability of the claims. In effect, the court could be seen as silencing criticisms of errors by denying readers access to the examples that support the government.

In addition to redacting examples that support the government, readers could assume that the FISC redacts entire arguments that the petitioner makes. Following a lengthy discussion of procedures that minimize risk, the court writes,

“[redacted text and footnote] The petitioner’s additional criticisms about the surveillance can be grouped into concerns about potential abuse of executive discretion and concerns about the risk of government error...”<sup>211</sup> Similarly, an entire section, which Judge Selya titles “A Parting Shot,” deals with an argument made during the appeal hearing by the petitioner. The court provides a cryptic summary, dismissing the argument:

We need not probe that point, however, because the petitioner is firing blanks: no issue falling within this description has arisen to date. Were such an issue to arise, there are safeguards in place that may meet the reasonableness standard. We do, however, direct the government promptly to notify the petitioner if this issue arises under the directives.<sup>212</sup>

Other than this summary, the entire section is redacted, reserved only for the classified version of the document. Both of these redactions remove significant portions of text, making it difficult to deduce what potential issues or criticisms are under discussion.

The phrase “additional criticisms” following the first redaction suggests that the entire paragraph, including the footnote, deals with a criticism of the wiretaps deemed too sensitive to be published. The footnote may have contained any court cases that supported the petitioner’s argument. In the summary for the extended redaction, the court notes, “no issue falling within this description has arisen,” and “safeguards are in place.” This language suggests that in the redaction, the petitioner argues that the surveillance could lead to a specific privacy violation, but the court dismisses the argument.

Readers may interpret the redaction of the petitioner's arguments that criticize the government as denying the petitioner status as an actor. The government claims silence for examples that support its own arguments, empowering itself. Then, the government silences the petitioner by redacting entire sections that detailed potential errors of surveillance. Taken in tandem, the implication of redacting criticisms is that their discussion is simply too dangerous for the public to read.

### **Conclusion**

In sum, the FISCR redacts the name of the service provider and customers under surveillance, the chronology of the surveillance, procedures used during surveillance, and criticisms of the surveillance. The court's rationale for redacting information assumes that any information the executive deems classified could be used as counterintelligence by foreign agents. However, my analysis reveals that numerous other motivations could be attributed to the court's silence, including covering up possible illegal surveillance, legitimizing the surveillance, and minimizing the chance of lawsuits.

Regardless of this interpretation of the redaction's content, alternative conclusions can be reached. While the word clusters around the silence invite the reader to make certain assumptions about the removed content's meaning, the redactions make certainty of interpretation impossible. Brummett's second characteristic of a strategic silence—public attribution of predictable meaning—is driven in large part by ideology. The United States government has a long history of

violating privacy in the name of national security,<sup>213</sup> and the state secrets privilege has provided the government with a justification for silencing judicial review.

This study has only explored attributions of meaning to the silence that could potentially lead to abuses of privacy. However, the conclusions of the FISCR are significant because they represent a constitutive rhetoric that implies the authority of the government is of a higher importance than the autonomy of its people. According to White, legal discourse should be concerned with the type of community it constitutes. Based on this assertion, it is crucial to scrutinize the ideology that justifies using silence to intrude on an individual's privacy for national security.

The two ideologies most prominent in the opinion, liberal individualism and American exceptionalism, are forced into tension with each other in the FISCR opinion in three ways: redacting names, redacting procedures, and redacting criticisms. First, silencing the names in the document undercuts privacy's connection to liberal individualism by denying the individual's identity. An ideograph's connection to ideology is what provides it with its persuasive power, and without the backing of liberal individualism, privacy lacks persuasiveness. Portraying the nameless group as part of a terrorist threat confers irrationality associated with terrorism onto the customers. A facet of the American exceptionalist myth is an adherence to individual reason and liberty. The irrationality of terrorists stands in opposition to this value, putting the group of nameless customers at odds with American exceptionalism. Thus, when a group whose identity is unknown but is aligned with terrorists, it severs the link between

privacy and the ideology that lends it persuasive power, concretizing an understanding of national security and American exceptionalism as more necessary to the community.

Second, the court's language presents the procedures as if they are in place to defend privacy. Liberal individualism, and by extension privacy, stand against what Levin-Waldman calls "oppressive demands and intrusions of authority."<sup>214</sup> However, by redacting the procedures the opinion silences the very things that are supposed to support liberal individualism. Certifications, in turn, support national security because they are what allow the government to justify its claims and redact the procedures. Proper national security officials must sign all the certifications, which draws on American exceptionalism's sense of moral authority.<sup>215</sup> Thus, the government's ability to silence through certifications reinforces their power justified by moral authority.

Last, redactions of criticisms and possible errors represent the most obvious exercise of ideological power through national security. Much like the studies presented by Hegde and Olson in which an exercise of power silenced a minority group, silencing criticisms—particularly an entire section—indicates the privileging of the American exceptionalist ideology that undergirds the persuasive power of national security. In this case, the "essence of agency,"<sup>216</sup> which privacy is supposed to protect, gives way to the wealth of associations connected to the exceptionalist myth.

## CHAPTER 4.

### CONCLUSIONS

This study has explored the relationship between the positive ideographs <privacy> and <national security> in legal discourse, which can constitute community. The positive ideographs are thrust into tension by the negative ideograph <terrorism>, and the FISCR negotiates that tension when explaining the court's decision in its opinion. The FISCR developed a descriptive constitution that implies certain declared actions to resolve the tension between the ideographs, which, in turn, constitutes community by demarcating acceptable action and providing a common vocabulary for its citizens.

In this case, the FISCR constituted a community in which strengthening national security is the purpose of the government rather than using national security as a means to protect liberties, such as civil rights. By situating national security its primary purpose term, the FISCR privileges an American exceptionalist ideology over privacy and liberal individualism. The FISCR justified its reading of the Constitution through silence. The FISCR redacted the names of service providers, the names of customers under surveillance, procedures, chronology, and criticisms. The redactions rationalized privileging American exceptionalism and reified the persuasive power of national security by using it both as an end and as an explanation for silence.

To conclude my study, I offer some reflections on my cluster analysis of positive and negative ideographs in the FISCR opinion on *In Re Directives*. I will reiterate the conclusions of my analysis and their implications for the community

the opinion constitutes, detail the significance of the study's contributions to the communication scholarship on ideographs and silence, identify the limitations of the study, and provide fruitful avenues for future research.

### **Ideographs, Constitution, and Silence**

In both its word choice and its silence, the FISCR demonstrated a way of elevating one positive ideograph above another. One step of that process would be to marginalize the value of the ideograph not preferred by the court. Through both what the FISCR said and what it excluded, the court developed a descriptive constitution that treated the Fourth Amendment and privacy as situationally defined by the Executive Branch. Situationally defining privacy marginalizes the term because it presents privacy not as fundamental right, but as a privilege that can be enjoyed when it the government permits.

The FISCR excluded former definitions of privacy that had more expansive interpretations of the term. The FISCR ignored meanings of <privacy>, such as the *Griswold* court calling it "a noble purpose"<sup>217</sup> and Warren and Brandeis defining it as an "inviolate personality,"<sup>218</sup> that would have challenged the court's shift in the meaning of the ideograph. Instead, the FISCR focused on developing a "foreign intelligence exception" to the Fourth Amendment, which presented <privacy> as a contextual variable. The foreign intelligence exception the FISCR writes into its descriptive constitution limits the scope of privacy to that of a scenic obstacle to be overcome. Rendered part of the context, <privacy> functions with other scenic variables to serve as merely a backdrop for governmental action. Understood within the broader context of the interplay of ideographs, the rhetor can marginalize an

ideograph by shifting it from serving as a purpose term to an element of the scene in Burke's pentad.

Redaction also works to marginalize <privacy> by silencing the petitioner's criticisms of the government's surveillance. Redacting the petitioner's criticisms silences any arguments against the FISCR shift of the meaning of privacy to a contextual variable. The redactions deny readers a chance to assess what the petitioner viewed as the most dangerous encroachments by the government's surveillance, meaning that they are denied access to arguments that might motivate them to pressure the legislative or executive branch to enact needed reforms. Additionally, the FISCR redacts examples that support the government's claims, leaving the audience only with assertions that "the record supports the government."<sup>219</sup> By redacting the support for the government's arguments, the FISCR allows the government to silence the petitioner's criticisms with silence. In essence, the FISCR emphasizes the notion that the public does not need to question the authority of government by redacting the petitioner's criticisms and the examples that support why the petitioner's criticisms are not persuasive. Such redactions—both of the criticisms and the evidence used in response—represent the clearest exercise of ideological power. The FISCR did not explicitly note that it would redact such items, suggesting that the Executive Branch may have been concerned both about its image and revealing intelligence secrets. The court's decision to silence criticisms indicates that redaction more broadly used in conjunction with <national security> can create a synchronic relationship that contracts the meaning of other ideographs.

Much like redacting the criticisms, redacting the procedures in place to protect privacy reinforces the FISC's understanding of privacy as a contextual variable with a marginalized meaning. According to the FISC, the procedures and certifications, which the executive branch controls, will prevent violations of privacy. Based on these safeguards, the FISC argues the government has the authority to use "speed, stealth, and secrecy," to strengthen national security, justifying the use of warrantless surveillance.<sup>220</sup> However, the court redacts the several of the procedures and the certifications come from "appropriate national security officials" within the Executive Branch.<sup>221</sup> Redacting procedures in place to protect privacy denies the public a chance to determine for themselves whether the procedures actually do ensure that intrusions are not occurring or if more information is needed. The redactions marginalize privacy by focusing on the government's authority and silencing the safeguards for privacy.

Not only does the FISC contract the meaning of <privacy>, but the court also expands the meaning of <national security>. The FISC argues for an expansion in executive authority, writing that the courts should not "frustrate" government efforts to protect national security.<sup>222</sup> The implication is that the Executive Branch should have expanded powers of surveillance and fewer checks on its use of that power. The FISC constituted a community in which domestic warrantless surveillance by the government is not only acceptable, but expected in order to strengthen national security. And by arguing that the courts should not impinge on the authority of the Executive Branch, the FISC constitutes a community in which current judicial checks on surveillance for national security are sufficient and any

more expansive interpretations would be an unacceptable hindrance. This construction of <national security> inoculates it from future attempts to reduce the ideograph's scope and power. Arguing for the exclusion of the courts from complaints of national security surveillance removes any means of legal recourse from citizens. For example, in a district court case about warrantless surveillance dismissed because of the state secrets privilege, Judge Kennelly reinforces the FISC's constitution of the community, writing:

Nothing in this opinion, however, prevents the plaintiffs from using of the legislative process, not to mention their right to free speech, to seek further inquiry by the executive and legislative branches into the allegations in their complaint. In short, though the Terkel plaintiffs cannot seek relief in court for the claims made in their complaint as it now stands, they are free to seek redress from the political branches, which are equally responsible to ensure that the law is followed.<sup>223</sup>

According to Kennelly, the proper venue for addressing complaints of privacy violations when national security is concerned is the legislature or the executive. This assertion supports the FISC's conception of privacy as a contextual variable. It removes the redress of privacy complaints from the legal sphere and places it at the discretion of the legislature and the executive, which is often the source of the complaint.

Silence also bolsters the FISC's expansion in the meaning of <national security> by redacting the names of the communications service provider in the opinion. Removing the name of the service provider allows the company to escape

repercussions from assisting in the surveillance of its customers. For example, public knowledge of the name of the service provider could lead to lawsuits or spark a terrorist attack. However, by redacting names in the opinion, the FISCR relieved the communication service provider of responsibility for assisting the government in surveillance. It also allows the government to call on the service provider for assistance in the future, which means the anonymous company could still be engaged in surveillance for the Executive Branch. Broadly, the implication for the community is that silencing the service provider expands executive privilege to business activities as long as appropriate national security officials direct the action.

Redacting the names of customers also helped expand the meaning of national security by aligning the customers with a threat. The redaction of the names of the customers under surveillance denies them an identity, and the FISCR asserts that the government is targeting only those that could reasonably be potential threats to national security. The court focuses on the government's certifications and procedures in place to ensure only people who were risks to national security were wiretapped, which aligned the redacted customers with "foreign agents" or "collaborators," presenting them as a threat to national security. Because the customers are denied an identity, they can never be certain that they were ever wiretapped. The redaction constitutes a community in which the citizens have no legal recourse for warrantless surveillance, and denies citizens an opportunity to challenge government suspicion of illegal activity. The redaction expands the meaning of <national security> to include preempting legal redress if the government claims a customer is a threat.

Similarly, the opinion redacts the dates of the surveillance, which reinforces the authority of the government and, essentially, places members of the executive branch above the law if a national security concern exists. Since the Protect America Act was enacted for only six months and the dates are unavailable, the public and even members of the legal community have no way to judge the legality of the government's surveillance. The surveillance could have taken place before or after the PAA, and other service providers could have been involved outside that time frame. By redacting the chronology, the FISCR has, in effect, silenced possible evaluation and debate by the public. Without knowledge of when the surveillance happened, the public cannot prove that any of the surveillance was illegal, denying it necessary information to push for recourse. Judge Kennelly argues that using free speech to pressure the executive or the legislature is the proper avenue for addressing violations of privacy by national security by the Executive Branch. But without knowledge of the dates of the surveillance, the public cannot pressure any branch of the government effectively to address domestic warrantless surveillance, constituting a community in which the government can shut down public debate for national security.

In sum, the FISCR decision can be interpreted as constituting a community that emphasizes moral authority and taking action to correct the perceived immorality of a fallen world. The opinion constitutes liberal individualism's emphasis on personal freedom as situationally established by the government and secondary to protecting national security. The tenets of American exceptionalism influence the FISCR's descriptive constitution and help rationalize warrantless

wiretapping to strengthen national security, while dismissing the Fourth Amendment's role in shielding citizen's from intrusions of authority.

### **Contributions to Ideographic Theory**

My study adds to ideographic theory by examining the way a rhetor can shift the meaning of an ideograph by repositioning it from its conventional placement in Burke's pentad. McGee's definition of a positive ideograph focuses on society's ideals, which conceived in Burkean terms would arguably equate with the pentad's purpose. George W. Bush, for example, presented the purpose terms related to his war on terrorism as freedom, democracy, and our way of life. Similarly, Martin Luther King presented <equality> as the purpose of his address to the nation during his March on Washington.

In the case of *In re Directives*, the court has two competing positive ideographs that could serve as the purpose in the pentad. By choosing one over the other, the court yields insight into its underlying ideology. The FISC places <national security> as its ultimate goal in the opinion, thus elevating it above the rival positive ideograph. By positioning the competing ideograph, <privacy>, in the scene, the court reduces it to one of several contextual variables. As such, the court contracts the meaning of <privacy>, subordinating it to <national security>.

This study also contributes to rhetorical criticism by demonstrating how analyzing the linguistic context of redactions can become a useful tool for future rhetorical analyses. Language clusters immediately preceding and following redactions can provide the critic clues to the content of what the court withheld from public view. Such an approach suggests ways to understand the justifications

used to persuade the audience to accept contractions and expansions of competing ideographic meaning.

### **Limitations and Future Avenues of Research**

This study has at least three easily identifiable limitations. The first limitation is the time frame it analyzes. A central feature of my argument is that the time period following 9/11 and the passage of the PATRIOT Act presents a unique period in American history, particularly for the ideographs national security and privacy. This time period offers a unique look at the synchronic relationship between the ideographs, but it represents only a narrow slice of history in the interaction of the ideographs. As McGee notes, ideographs are best studied diachronically as well as synchronically.<sup>224</sup> My study presents limited historic information, but does not provide an exhaustive diachronic analysis of the terms. A potential avenue for future research could fill this gap by looking at the expansions and contractions of the terms throughout the history of the United States. A full diachronic study, similar to Condit and Lucaites' study on equality, could provide a way to examine whether the ideographs have always been dissonant or if history offers a meaning of the ideographs that could negotiate some kind of consonance.

Second, my study is limited to a concentration on legal discourse. I argued that legal discourse plays a significant part in the constitution of community, and, therefore, is an important place to analyze ideographs. However, many scholars see the value of analyzing ideographs in the context of popular discourse, given the role of ideology in the public sphere more generally. Legal discourse has a specific, technical vocabulary that can muffle ideological commitments. Analyzing usage of

the ideographs in popular discourse could offer additional insights into the relationship between the two terms. Studies ranging from examining the terms in presidential discourse to usage in movies or news could provide interesting results for a more nuanced understanding of how privacy and national security interact rhetorically.

Third, the conclusions related to ideology embedded in the redactions are speculative. While no solution to this shortcoming is readily available, future scholars should examine any historical parallels that might contain relevance to question of how the court interprets the boundaries of <privacy> and <national security> in threatening times. Careful readings of biographies and papers of members of the executive branch may also yield insights into the context of the court's opinion.

Despite these limitations, this study has provided insight into how <national security> and <privacy> in legal discourse constitutes community in the United States. The study demonstrates that when one ideograph becomes more important than another, it can reshape the Constitutional scene, allowing for expansions in executive authority. When <national security> becomes the nation's focus, the chief executive's power can override the checks and balances built into the Constitution to protect individual liberties.

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<sup>18</sup> *Ibid.*, 15.

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<sup>118</sup> *Ibid.*, 1007.

<sup>119</sup> *Ibid.*, 1021.

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<sup>124</sup> *Ibid.*, 1020.

<sup>125</sup> *Olmstead v. United States*, 49 S. Ct. 346, 360 (1828).

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- <sup>126</sup> *Ibid.*, 359.
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- <sup>134</sup> Charles Fried suggested that a threat to privacy is a threat to respect, love, friendship, and trust. He argued that privacy provides the means for control that allow all of these desirables to develop. Building on Fried's work in an attempt to elevate privacy beyond a relativistic value, Stanley I. Benn identified personal relations, free citizenship, and personal autonomy as "personal ideals." These ideals represented spheres of privacy that were common to all humans. James Rachels argued that physical intimacy was a necessary component of privacy. He noted that our interest in who views our body is very different than who views our cars. Jeffery Rieman contended that moral ownership of a body requires the right to control a body and the right to control who views that body. He admitted that moral ownership can exist by satisfying only the first condition, but called that an "impoverished and partial" existence.
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- <sup>136</sup> *Ibid.*, 1020-1021.
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- <sup>145</sup> *Ibid.*, 1027
- <sup>146</sup> *Ibid.*, 1007.
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- <sup>149</sup> *Ibid.*, 1023.
- <sup>150</sup> *Ibid.*, 1020-1021.
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- 170 *Hepting v. AT&T*, 439 F. Supp. 2d 974, 975 (N. D. Cal. 2006)
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- 172 *Totten v. United States*, 92 U.S. 105, 105 (1875).
- 173 *Kasza v Browner*, 133 F.3d 1159 (9th Cir. 1998).
- 174 *Halkin v Helms*, 690 F.2d 977, 987 (D.C. Cir. 1982).
- 175 Ibid.
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- <sup>190</sup> *Terkel v. AT&T*. 441 F. Supp. 2d 899. (N.D. Ill. 2006), *ACLU v. NSA*, 493 F.3d 644 (6<sup>th</sup> Cir. 2007), *Electronic Privacy Information Center v. Department of Justice*, 511 F. Supp. 2d 56 (D.D.C. 2007).
- <sup>191</sup> *In Re Sealed Case*. 310 F.3d 717 (FISCR 2002).
- <sup>192</sup> Foreign Intelligence Surveillance Court of Review. *Order*. Judge Bruce M. Selya. January 12, 2009. Docket No. 08-01, 2.
- <sup>193</sup> *Ibid.*
- <sup>194</sup> *In Re Directives*, 551 F.3d 1004, 1004 (FISCR 2008)..
- <sup>195</sup> Straziuso, Jason. "Taliban militants overrun Afghan town, destroy government center." *Associated Press*. February 2, 2007. <http://www.afghanistannewscenter.com/news/2007/february/feb22007.html#4>. Accessed May 27, 2010.
- <sup>196</sup> *Hepting v. AT&T*, 439 F. Supp. 2d 974, 981 (N. D. Cal. 2006).
- <sup>197</sup> Stuckey, Mary and Karen S. Hoffman. "Constituting 'The People': National Identity Under William H. Taft and Richard M. Nixon." *Congress and the Presidency* 33:2 (Autumn 2006), 79-81.
- <sup>198</sup> *In Re Directives*, 551 F.3d 1004, 1010 (FISCR 2008).
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- <sup>200</sup> *Ibid.*, 123.
- <sup>201</sup> *In Re Directives*, 551 F.3d 1004, 1011 (FISCR 2008).
- <sup>202</sup> *Ibid.*
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- <sup>204</sup> *Ibid.*
- <sup>205</sup> *Ibid.*, 1025.
- <sup>206</sup> *Ibid.*, 1026.
- <sup>207</sup> *Ibid.*, 1001.
- <sup>208</sup> *Ibid.*, 1021.
- <sup>209</sup> *Ibid.*, 1028.
- <sup>210</sup> *Ibid.*, 1029.
- <sup>211</sup> *Ibid.*, 1028.

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<sup>212</sup> *Ibid.*, 1031.

<sup>213</sup> The FISCER also excludes well-documented abuses of privacy that have taken place with too little oversight. COINTELPRO was initiated as a foreign intelligence program, but shifted focus to the domestic front during the early 1960s. Their mission was to “disrupt” and “neutralize” threats, which were often identified by association and speech, which could “undermine or subvert national security.” The FBI compiled dossiers on peaceful targets such as Martin Luther King, Jr., the NAACP and numerous Anti-War and civil rights groups. In its investigation of the Socialist Workers Party, the FBI used 1,300 informants without receiving any indication of violence. Among the FBI’s tactics for compiling information included physical and electronic surveillance, illegal break-ins, and stealing documents. FBI agents tried to break up marriages by sending anonymous poison pen letters and incited gang infighting by planting false evidence that members were police informants. A letter in the Church report cited the attorney general justifying the FBI’s surveillance program as a matter of national security.

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<sup>215</sup> Ivie, Robert L., and Oscar Giner. “American Exceptionalism in a Democratic Idiom: Transacting the Mythos of Change in the 2008 Presidential Campaign,” *Communication Studies* 60:4 (2009), 361.

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<sup>217</sup> *Griswold v. Connecticut*. 381 U.S. 479, 481 (1965).

<sup>218</sup> Warren, Samuel, and Louis Brandeis. “The Right to Privacy.” *Harvard Law Review* 4 (1890), 200.

<sup>219</sup> *In Re Directives*. 551 F.3d 1004, 1025 (FISCER 2008).

<sup>220</sup> *Ibid.*, 1021.

<sup>221</sup> *Ibid.*, 1009.

<sup>222</sup> *Ibid.*, 1033.

<sup>223</sup> *Terkel v. AT&T*. 441 F. Supp. 2d 899, 913 (N.D. Ill. 2006)

<sup>224</sup> McGee, Michael Calvin. “The ‘Ideograph’: A Link Between Rhetoric and Ideology.” *Quarterly Journal of Speech* 60:1 (February 1980), 16.