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Narrowing the "Routine Use" Exemption to the Privacy Act of 1974

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NARROWING THE "ROUTINE USE" EXEMPTION TO THE PRIVACY ACT OF 1974

Respect for individual privacy[1] runs deep in Anglo-American culture and history.[2] Nonetheless, a legal right to privacy was not suggested until 1890,[3] and it was not until this century that

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[1] By denying individuality and uniqueness, invasion of privacy strikes at the root of human identity. Similarly, by so highly illuminating the individual, privacy infringement serves as a source of insight and, ultimately, control. For example, consider these true-false questions from a psychological test required for certain federal jobs:

1. My sex life is satisfactory.
2. I have no difficulty in starting or holding my bowel movements.
3. I am very strongly attracted to members of my own sex.
4. I believe there is a God.

Minnesota Multiphasic Personality Inventory: Hearings on Psychological Tests and Constitutional Rights Before the Subcomm. on Constitutional Rights of the State Comm. on the Judiciary, 89th Cong., 1st Sess. (1965), *reprinted in* Ervin, *The First Amendment—A Living Thought in the Computer Age*, 4 COLUM. HUMAN RIGHTS REV. 13, 31 (1972). When knowledge of this depth is coupled with the organizational ability and omnipresence of modern government, political disaster may result. *See, e.g., Privacy, the Collection, Use, and Computerization of Personal Data: Joint Hearings on S. 3418, S. 3633, S. 2810, S. 2542, Before the Ad Hoc Subcomm. on Privacy and Informations Systems of the Comm. on Government Operations and the Subcomm. on Constitutional Rights of the Comm. of the Judiciary*, 93d Cong., 2d Sess. 68 (1974) (statement of Alan F. Westin) [hereinafter cited as *Personal Data Hearings*].

As Alexander Solzhenitzyn says:

> As every man goes through life, he fills in a number of forms for the record, each containing a number of questions . . . There are thus hundreds of little threads radiating from each man, millions of threads in all. If these threads were suddenly to become visible, the whole sky would look like a spider's web . . . .

A. SOLZHENITSYN, CANCER WARD 192 (1969).

[2] Witness the durability of Lord Coke's phrase, "a man's house is his castle." COKE, INSTITUTES: COMMENTS UPON LITTLETON, THIRD INSTITUTE 161 (1797). In the United States, the Supreme Court has long regarded the Fourth Amendment's prohibition on unreasonable searches and seizures as an assurance of "the sanctity of a man's home and the privacies of life." Boyd v. United States, 116 U.S. 616, 630 (1886). Even early census takers, the most inquisitive of the young republic's officials, carefully guarded the confidentiality of certain commercial information. U.S. COMM. ON FEDERAL PAPERWORK: CONFIDENTIALITY AND PRIVACY, 16-17 (1977) [hereinafter cited as FEDERAL PAPERWORK COMMISSION].

[3] Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The authors surveyed a number of cases decided under the guise of defamation or breach of confidence, and concluded that the holdings could be explained better by postulating a right of privacy. All but four states have recognized the consequent tort, invasion of privacy. *See* W. PROSSER, THE LAW OF TORTS 804 (4th ed. 1971).

the courts recognized remedies for privacy invasions.[4] More recently, Congress has addressed the specific privacy objections arising from government collection and use of personal information. Indeed, by the mid-1970's, congressional concern over federal abuse of sensitive personal data had become so significant[5] that Congress passed the seminal Privacy Act of 1974.[6]

The Privacy Act prohibits any disclosure of federal agency records without the explicit written consent of the person to whom the record pertains.[7] Although this prohibition is extensive, applying to all records and means of disclosure, it is subject to several major exceptions.[8] Of these, the one most subject to

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[4] The first significant tort case to recognize a formal right to privacy was Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905), in which damages were awarded for the unauthorized use of plaintiff's photograph and the publication of a fake testimonial. Since then, tort law has found invasion of privacy in such diverse situations as invasion of a residence, *see, e.g.*, Ford Motor Co. v. Williams, 108 Ga. App. 21, 132 S.E.2d 206 (1963); publication of private information, *see, e.g.*, Melvin v. Reid, 131 Cal. App. 285, 297 P. 91 (1931); and false attribution of a belief or opinion, *see, e.g.*, Hinish v. Meier & Frank Co., 166 Or. 482, 113 P.2d 438 (1941).

Within the last twenty years, the Supreme Court has also recognized a constitutional right to privacy. In a recent attempt to defend this right, the Court stated that privacy includes, "[an] individual interest in avoiding disclosure of personal matters, [and an] interest in independence in making certain kinds of important decisions." Wahlen v. Roe, 429 U.S. 589, 599-600 (1977) (state statute authorizing computer records of drug prescriptions held not to be an invasion of privacy). Although the Court may continue to refine the scope of privacy protection, there can be little doubt of its constitutional mandate to do so. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (constitutional right of privacy includes woman's right to abortion); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (violation by federal agents of Fourth Amendment's prohibition of unreasonable searches and seizures created private cause of action); Griswold v. Connecticut, 381 U.S. 479 (1964) (state statute banning use of contraceptives by married couple held unconstitutional invasion of privacy).

[5] Popular outcry, to a large degree, spurred Congress' concern. For example, one man wrote to the Senate Subcommittee on Constitutional Rights complaining about an FBI file which detailed his arrest on theft charges. The man, an adolescent at the time of the arrest, was quickly cleared of the charges. Nonetheless, for at least fifteen years the FBI file was sent to employers upon their request. Ervin, *supra* note 1, at 24.

[6] 5 U.S.C. § 552a (1976).

[7] The Act states in pertinent part: "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . ." Privacy Act of 1974, 5 U.S.C. § 552a(b) (1976).

[8] The eleven exceptions allow disclosure:

> (1) to those officers and employees of the agency which maintains the records . . .
>
> (2) required under [the Freedom of Information Act] . . .
>
> (3) *for a routine use* . . .
>
> (4) to the Bureau of the Census . . .
>
> (5) to a recipient who has provided the agency with . . . written assurance that the record will be used solely as a statistical research . . . in a form that is not individually identifiable;

abuse is the routine use exemption, which allows the communication of records, without consent, "for a purpose which is compatible with the purpose for which [the information] was collected."[9]

This article suggests a balancing test to determine which routine uses of information legitimately fall within the Privacy Act. Part I briefly examines the background of the Act, concentrating on the legislative history of the routine use exemption, and examining problems the exemption presents. Part II then proposes a balancing test, based on notice and need for data, as a means of ascertaining proper routine uses.

I. THE PRIVACY ACT OF 1974

A. The Statutory Framework: Prohibition and Exemption

The Privacy Act is the first statutory attempt to regulate the distribution of personal records held by federal agencies. Intended "to provide certain safeguards for an individual against an invasion of personal privacy,"[10] the statute requires federal agencies to inform individuals supplying information of the authority for the data collection. In addition, agencies must specify the principle purposes for which the data will be used, the routine uses of the collected records, and the effects of refusing to provide requested information.[11]

The Act has an even greater effect, however, on information disclosure. The legislation explicitly prohibits agencies from disclosing records to any person or agency without the written consent of the individual who is the subject of the records.[12] This blanket proscription curtails the spread of government-held per-

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(6) to the National Archives . . .
(7) to another agency . . . for a civil or criminal law enforcement activity . . .
(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual . . .
(9) to either House of Congress . . .
(10) to the Comptroller General . . .
(11) pursuant to the order of a court . . . .

Privacy Act of 1974, 5 U.S.C. § 552a(b)(1)-(11) (1976) (emphasis added).

[9] *Id.* §§ 552a(b)(3), (a)(7) (1976).

[10] Privacy Act of 1974, Pub. L. No. 93-579, § 2(b), 88 Stat. 1896.

[11] Privacy Act of 1974, 5 U.S.C. § 552a(e)(3) (1976).

[12] *Id.* § 552a(b) (1976).

sonal information, but also precludes exchanges of data among federal agencies for legitimate purposes. To allow for information-sharing essential to the everyday functioning of government,[13] Congress enacted eleven exemptions to the broad disclosure prohibition.[14]

One of these exemptions is the routine use exemption,[15] which allows disclosure of personal data for uses "compatible with the purpose for which the record was collected."[16] As a means of limiting the agency discretion permitted by the exemption, the Act also requires every agency to inform those supplying information of the routine uses of the gathered data,[17] and to publish annually a list of all its routine uses in the Federal Register.[18] This publication provides constructive notice of routine uses created after the pertinent data was collected, and allows diligent individuals to locate many of the federal records which concern them.[19] As with other provisions of the Act, violations of the routine use exemption may result in civil and criminal liability.[20]

Recently, Congress has exhibited some concern as to whether the printing of routine uses sufficiently informs the public.[21] However, there has been no such concern as to whether routine use *designations* are justified. The significance of this latter issue is evident: if federal agencies are allowed to define a routine use without oversight or review, then any disclosure of information may fall within the routine use exemption. The primary purpose of the Privacy Act would thus be defeated. The solution of this abuse, already more real than potential, is the concern of

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[13] *See* notes 58-65 and accompanying text *infra*.

[14] Privacy Act of 1974, 5 U.S.C. § 552a(b) (1976). *See* note 8 *supra*.

[15] *Id.* § 552a(b)(3).

[16] *Id.* § 552a(a)(7).

[17] *Id.* § 552a(e)(3).

[18] *Id.* § 552a(e)(4)(D). Agencies must also publish the categories of individuals on whom records are kept and the kinds of records on file. *Id.* §§ 552a(e)(4) (B), (C).

[19] By searching the *Federal Register* for routine uses and then writing to those agencies which may have pertinent information, an individual could locate many of the records which concern him. This procedure is applauded in Project: *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1316 (1975) [hereinafter referred to as *Government Information Project*].

[20] In case of breach of the routine use exemption, an "adversely affected" individual may sue the appropriate agency in federal district court. Privacy Act of 1974, 5 U.S.C. § 552a(g)(1)(D) (1976). Liability for such a breach requires proof that the agency acted willfully or intentionally, and recovery is limited to actual damages, costs, and reasonable attorneys' fees. *Id.* § 552a(g)(4). In addition, any officer or employee of an agency who knowingly and willfully violates the exemption is guilty of a misdemeanor, and may be fined up to $5,000. *Id.* § 552a(i)(1).

[21] *See Records Maintained by Government Agencies: Hearings on H.R. 9527 and Related Bills Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess. 52 (1977).

this article.

B. The Legislative History of Routine Use

The fitful legislative history of the phrase "routine use" sheds little light on its statutory definition. In the House, the Privacy Act, as originally introduced[22] tautologically defined routine use as "a routine purpose for which the records are used or intended to be used."[23] The principle of routine use was later enlarged in committee by adding a complete ban on disclosure to officials who did "not have a need for the records in the performance of their duties . . . ."[24] The Senate bill[25] is even less enlightening. Here, the Senate never even considered the term "routine use." Rather, it created an exemption which allowed the release of records to those who needed the information "in [the] ordinary course of . . . their duties."[26] The Senate, however, neither defined nor explained the critical term "ordinary course."

Evidently then, the phrase "routine use" emerged as part of a compromise struck between the staffs of the House and Senate Government Operations Committees.[27] A staff report explains

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[22] H.R. 16373, 93d Cong., 2d Sess. (1974).

[23] *Id.* § 3(e)(4). The bill prohibited the release of agency records, without consent, unless "disclosure would be . . . for a routine use described in any rule promulgated pursuant to subsection (e)(4)" (defining routine use). *Id.* at § 3(b)(4).

[24] H.R. 16373, 93d Cong., 2d Sess. (1974).

[25] S. 3418, 93d Cong., 2d Sess., 120 CONG. REC. 37067 (1974).

[26] *Id.* As introduced, the bill required agencies to disclose "only personal information necessary to accomplish a proper purpose of the organization." *Id.* § 201(a)(1). "Proper purpose" was not defined. In a similar vein, Senate hearings on the bill barely considered the routine use concept. For example, Professor Alan Westin, a leading authority on privacy problems, dismissed concern over agency abuse of common uses of information by stating, "I think it can be provided that regular use of the personal records for routine administrative tasks . . . are not ones that require specific individual consent." *Personal Data Hearings*, *supra* note 1, at 82. Professor Westin, however, did not suggest criteria for identifying "routine administrative tasks." Nor did the reported versions of the precursor bills or their Committee Reports propose any such criteria. *See* H.R. Rep. No. 93-1416, 93d Cong., 2d Sess. (1974); S. Rep. No. 93-1183, 93d Cong., 2d Sess., *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 6916.

[27] Senator Ervin commented on the unusual compromise:

> On November 21, just before the Thanksgiving recess, both the Senate and House passed in different forms Federal privacy legislation. Because of the limited amount of time available between the time of the reconvening of Congress after the recess and the end of the session of Congress members of the Government Operations Committee of the Senate and the House agreed that they would have the different versions studied by their respective staffs during the recess.
>
> After the recess the members of the staffs who made this study reported to the members of the two committees, and after that the members of the two committees met informally and agreed on the amendments . . . . We thought this was a

the compromise as a middle ground between the Senate bill's "tight restrictions" and the House bill's allowance of agency disclosure "without applying the standards of accuracy, relevancy, timeliness, or completeness."[28] More accurately, the phrase may be described as a compromise between those who opposed any disclosure of information without the consent of the subject, and those who favored agency disclosure so long as the subject is notified.[29] Presumably, the statute's ambiguous definition of "routine use"[30] was chosen to please all parties, and thereby guarantee passage of the bill. As a consequence, however, the statutory definition offers no standard for determining the validity of routine use regulations.

C. *Some Problems with the Routine Use Exemption*

1. Overlap with the Freedom of Information Act — Another provision of the Privacy Act exempts material disclosable under the Freedom of Information Act[31] (FOIA) from the Act's general prohibition of disclosure. In effect, this subordination of the Privacy Act means that some records sought by agencies under the routine use provision may also be available under the FOIA exemption.

While the Privacy Act prevents disclosure of federal records, the FOIA encourages public knowledge of many government activities.[32] The statute provides, in part, that all "reasonably

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better way of doing it without having a conference . . . .
120 CONG. REC. 40,400 (1974).

[28] *Id.* at 40,405. The staff report, as introduced by Senator Ervin, also states that the "compromise definition should serve as a caution to agencies to think out in advance what uses it will make of information." *Id.* at 40,406.

[29] *Government Information Project, supra* note 18, at 1324.

[30] "The term 'routine use' means . . . the use of such record for a purpose which is compatible with the purpose for which it was collected." Privacy Act of 1974, 5 U.S.C. § 552a(a)(7) (1976).

[31] 5 U.S.C. § 552 (1979).

[32] The FOIA is based on the belief that "[i]f government is to be truly of, by, and for the people, the people must know in detail the activities of government." *United States Department of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act III* (1967). *See also* S. REP. No. 89-813, 89th Cong., 1st Sess. 3 (1965); H.R. REP. No. 89-1497, 89th Cong., 2d Sess. 1 (1966). Originally, commentators subjected the FOIA to considerable criticism, including charges of vagueness and poor draftmanship. *See Government Information Project, supra* note 18, at 1023-25. A 1972 House Committee on Government Operations report objected to frequent withholding of supposedly unidentifiable records, agency delay in responding to requests for information, and poor agency communication with Congress. H.R. REP. No. 92-1419, 92d Cong., 2d Sess. 10-11 (1972). However, several 1975 Amendments to the Act have largely rectified these problems, and the FOIA today is praised as "a tribute to the

described"[33] executive branch materials are to be made available to the public. Nine exemptions,[34] however, prohibit certain disclosures, including those which may constitute a "clearly unwarranted invasion"[35] of personal privacy. Though this last provision resembles the Privacy Act in its concern for individual interests, it nonetheless differs by its failure to expressly consider consent or notice. Although these notions may enter into a determination of "clearly unwarranted," the courts have generally ignored them, and instead have focused on the possible public benefit of disclosure.[36]

Aside from this vague safeguard, the FOIA's and the Privacy Act's exemptions do not necessarily complement one another: overlap may be possible.[37] Moreover, the characters of the Act's

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self-confidence of American society." W. SHAWCROSS, SIDESHOW: KISSINGER, NIXON, AND THE DESTRUCTION OF CAMBODIA 12 (1979). *See also* H.R. REP. No. 93-854, 93d Cong., 2d Sess. (1974).

[33] FOIA, 5 U.S.C. § 552(a)(3) (1976).

[34] The FOIA does not apply to matters that are:

> (1)(A) specifically authorized . . . to be kept secret . . . and (B) are in fact properly classified . . .
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> (3) specifically exempted from disclosure by statute . . .
>
> (4) trade secrets . . .
>
> (5) inter-agency or intra-agency [documents] . . . which would not be available by law to a party other than an agency in litigation with an agency;
>
> (6) personnel and medical files . . . the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) investigatory records compiled for law enforcement purposes . . .
>
> (8) . . . for the use of an agency responsible for the regulation . . . of financial institutions; or
>
> (9) geological and geophysical information . . . .

Id. § 552(b)(1)-(9).

[35] *Id.* § 552(b)(6). The meaning of "clearly unwarranted invasion" of privacy remains uncertain. Most courts hold that the term requires application of a balancing test, weighing considerations of public interest in disclosure against possible invasion of individual privacy. *See, e.g.*, Wine Hobby USA, Inc. v. IRS, 502 F.2d 133 (3d Cir. 1974); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971); Ferguson v. Kelly, 455 F. Supp. 324 (N.D. Ill. 1978). At least one court has held that the statute's language requires only an inquiry into the seriousness of the privacy invasion. *See, e.g.*, Robles v. EPA, 484 F.2d 843 (4th Cir. 1973).

[36] "In performing the balancing, the courts have considered such factors as whether there may be an invasion of privacy, the nature of the privacy invaded, the extent of the invasion, the public interest that would be served by disclosure, [and] whether the interest could be satisfied without the requested material . . . ." *Government Information Project, supra* note 18, at 1080 n.714.

[37] Congress reduced the potential for overlap of the Acts' exemptions by amending the FOIA in 1976. For example, § 552(b)(3) of the original FOIA stated that the Act did not apply to material "specifically exempted from disclosure by statute . . . ." FOIA, Pub. L. No. 90-23, § 552(b)(3) (1967). The exception now applies, however, to statutes *other than* the Privacy Act, thus insuring that the Privacy Act will not affect, at the very least, this FOIA exemption. FOIA, 5 U.S.C. § 552(b)(3) (1976).

exemptions differ: while the FOIA's exemptions are flexible and usually demand a weighing of competing considerations,[38] those of the Privacy Act are generally rigid, with no balancing of interests required. Congress, aware of the variance between the laws' exemptions and eager to maintain judicial interpretation of the FOIA's disclosure provisions,[39] thus created a Privacy Act exemption for any material required to be released by the FOIA.[40] As a practical matter, the FOIA exemption means that even a successful challenge to a routine use designation may not prevent disclosure of records to the public. Thus, routine use litigation spurred by privacy considerations may prove futile, unless knowledge of the Privacy Act is coupled with a thorough understanding of the FOIA.

2. *Executive and congressional abuse* — The routine use exemption, designed to insure the proper inter-agency transfer of information, is the Privacy Act's largest loophole.[41] Already the provision has led to dangerous abuse of the statute. Indeed, within a year of the Act's signing, federal agencies began circumventing the legislation by declaring routine uses which ran contrary to the spirit of the Privacy Act.

In the most publicized abuse of the Privacy Act, Attorney General Levi in 1975 requested all federal agencies to designate as a routine use the transfer to law enforcement agencies of any record indicating a possible violation of the law.[42] The Department of Justice also asked agencies to create as a routine use the transfer of information to bureaus conducting employment and security clearance investigations.[43] Subsequently, Justice officials admitted that such uses do not accord with the Privacy Act's definition of a routine use.[44] Rather, the suggested uses consti-

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[38] *See, e.g., Government Information Project, supra* note 19, at 1080-85, which discusses the need for a balancing test to give meaning to "clearly unwarranted invasion of personal privacy." The article also characterizes the Acts' exemptions as "flexible" (FOIA), and "blanket approach" (Privacy Act). *Id.* at 1336-37.

[39] 120 CONG. REC. 12,244 (1974).

[40] FOIA, 5 U.S.C. § 552a(b)(2) (1976). "No agency shall disclose any record . . . unless disclosure of the record would be—(2) required under section 522 of this title.

[41] *See* Comment, *Privacy Act of 1974: An Overview and Critique*, 1976 WASH. U. L.Q. 667 (1976).

[42] Memorandum from the Attorney General to the Heads of All Executive Departments and Agencies, Office of the Attorney General, Washington, D.C., on the Implementation of the Privacy Act of 1974 Routine Uses of Information (June 5, 1975).

[43] *Id.*

[44] Interview with Mary Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, in Washington, D.C. (Nov. 3, 1976), *cited in* Belair, *Agency Implementation of the Privacy Act and the Freedom of Information Act: Impact on the Government's Collection, Maintenance and Dissemination of Personally Identifiable Information*, 10 J. MAR. J. OF PRAC. & PROC. 465, 501 (1977).

tute an attempt to avoid the stringent procedural requirements of another Privacy Act exemption[45] which does allow disclosure for law enforcement activities. To date, the Attorney General's recommendations have been widely adopted—so widely that a 1977 Report of the Commission on Federal Paperwork noted that, "[i]n many instances, agency 'routine use' notices authorize transfers for purposes which, by no stretch of the imagination"[46] could be considered legitimate routine uses.

Congress has also manipulated the routine use exemption. Immediately after the Act's signing, many agencies refused to transfer personal information to congressional caseworkers who were trying to aid constituents. Under significant pressure from Congress, the Office of Management and Budget soon advised agencies to consider disclosure to congressional staff a routine use.[47] The agencies, however, received no reciprocal assurance that congressional workers would use the information in a manner compatible with the purpose for which it was first collected.[48] Congress, in other words, has exempted its employees from the Privacy Act.[49]

II. A BALANCING TEST TO DEFINE APPROPRIATE ROUTINE USES

To date, the response to this distortion of congressional intent has been limited. A few commentators have called for legislative reform of the Privacy Act,[50] suggesting that routine use disclosures fall more clearly within previously designated routine

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[45] Privacy Act of 1974, 5 U.S.C. § 552a(b)(7) (1976), allows the release of information without consent if the disclosure is:

> to another agency . . . for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a *written request* to the agency which maintains the record *specifying the particular portion desired* and the law enforcement activity for which the record is sought . . . (emphasis added).

[46] FEDERAL PAPERWORK COMMISSION, *supra* note 2, at 65-66.

[47] 40 Fed. Reg. 56,741-42 (1975). The agency—and not the Congress—promulgates the routine use.

[48] *See* Belair, *supra* note 44, at 502.

[49] That is, Congress itself has a statutory exemption under the Privacy Act of 1974, 5 U.S.C. § 552a(b)(9) (1976).

[50] *See, e.g.*, Singleton & Hunter, *Statutory and Judicial Response to the Problem of Access to Government Information*, 1979 DET. C. L. REV. 51 (1979); Vache & Makibe, *Privacy in Government Records: Philosophical Perspectives and Proposals for Legislation*, 14 GONZ. L. REV. 515 (1979). Note, *Protecting Privacy from Government Invasion: Legislation at the Federal and State Levels*, 8 MEM. ST. U. L. REV. 783 (1978).

uses.[51] However, even such innocuous reform is extremely unlikely, given Congress' own selective abuse of the statute. As a consequence, responsibility for the true execution of the Act rests with the courts. Here too though, the reaction has been muted. The cases have been few, and the courts, without clear definitional standards, seem unwilling to determine the validity of routine use designations.[52]

A. Components of the Test

Fortunately, the criteria necessary to ascertain the legitimacy of a routine use may be found in the underlying purposes of the Privacy Act. Indeed, by balancing the statute's general goal (preserving privacy) against the specific designs of the routine use exemption (maintaining government functions), a test for appropriate routine uses may be designed which accurately reflects

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[51] *See, e.g.*, Note, *Protecting Privacy from Government Invasion*, *supra* note 50 (which proposes a state privacy act based on the Privacy Act of 1974).

[52] Only four cases have considered routine use regulations. In Local 2047, Am. Fed'n of Gov't Employees v. Defense Gen. Supply Center, 573 F.2d 184 (4th Cir. 1978), the *absence* of an applicable routine use regulation presented the primary issue. In *Defense General*, the plaintiff union sought enforcement of a collective bargaining agreement which required the defendant to release certain information concerning its employees. The court, affirming the district court decision, found that the release of records required by the labor contract did not fall within a routine use regulation, and was thus prohibited by the Privacy Act. In reaching its decision, the court readily accepted the Civil Service Commission's interpretation of its own regulations. Similarly, in Stiles v. Atlanta Gas Light Co., 453 F. Supp. 798 (N.D. Ga. 1978), the court quashed a subpoena issued to the Department of Labor on the grounds that the information requested was not covered by one of the Department's routine uses. The court did not test the legitimacy of the pertinent routine use designations, merely stating "[t]o construe the routine use provisions as defendant requests would undermine the purpose of the Privacy Act." *Id.* at 799-800.

However, the court upheld a disclosure of information in Burley v. United States Drug Enforcement Administration, 443 F. Supp. 619 (M.D. Tenn. 1977). In *Burley*, the court, without significant analysis, held that a Department of Justice routine use regulation allowed the transfer of an investigative report from the Drug Enforcement Administration to the Kentucky Board of Pharmacy. The information was sought for a hearing which considered the revocation of plaintiff's pharmacist license. Finally, in Harper v. United States, 423 F. Supp. 192 (D.S.C. 1976), the court denied an injunction and damages for the transfer of data between branches of the Internal Revenue Service. Again the opinion merely noted the applicable routine use regulation, and avoided any evaluation of its legitimacy.

The rationales of these cases are marked by a paucity of analysis. One lower court emphasized the deference traditionally given to agency regulations. *See, e.g.*, Local 2047, Am. Fed'n of Gov't Employees v. Defense Gen. Supply Center, 423 F. Supp. 481, 485 (E.D. Va. 1976), *aff'd*, 573 F.2d 184 (4th Cir. 1978). Whether a balancing test designed to evaluate the validity of routine use regulations would remove this and other obstacles to judicial assessment remains unknown. But at the very least, it would ease the courts' task, and place the decisions on analytic grounds.

congressional intent.

In developing this test, courts should place on one side of the balance those factors which favor the frequently repeated goal of insuring individual privacy in the face of a growing government.[53] According to Congress, the Privacy Act achieves this objective by both prohibiting information disclosure, and by providing public notice of the routine uses of government held personal records.[54]

This notice, however, should not be equated with the constructive notice provided by publication of routine uses in the *Federal Register*. Such constructive notice assumes, without adequate reason, actual knowledge of a routine use,[55] and thus fails to further privacy interests. Rather, notice should correspond directly to the foreseeability of a routine use.[56] By so defining notice, one insures that an individual will not be charged with knowledge of a completely unanticipated routine use.

In turn, foreseeability would depend upon the nature and specificity of the information requested, and its relation to the apparent reasons for its gathering. Generally, the narrower the information supplied, or the more closely the data relates to the reasons for its collection, the less the foreseeability of potential routine uses. Thus, for example, if an individual were to supply detailed, specific information, closely related to the purposes for its collection, then his notice would be low, save for those routine uses clearly foreseeable.[57] On the other hand, if the individual were to supply broad, nonspecific information, not closely related to the apparent reasons for its collection, then his notice would be high, unless the pertinent routine uses were clearly unrelated to the object of the data acquisition.

The counterweight to the general goal of protecting privacy is the desire to guarantee the proper and efficient distribution of state services. This may be stated more specifically as the intention to meet legitimate agency information requirements.[58] Here,

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[53] *See* note 10 and accompanying text *supra;* notes 61-63 and accompanying text *infra.*

[54] S. REP. No. 93-1183, *supra* note 25, at 1.

[55] Constructive notice is the equivalent of notice assumed as a matter of law.

[56] Thus, the greater the foreseeability of a routine use, the higher the "presumptive" notice of the use.

[57] *Actual* notice or knowledge of a routine use would, of course, carry the highest possible degree of presumptive notice.

[58] *See, e.g.,* H.R. REP. No. 93-1416, *supra* note 25, at 3:

> H.R. 16373 provides a series of basic safeguards for the individual to help remedy the misuse of personal information by the Federal Government and reassert the fundamental rights of personal privacy of all Americans that are derived from the Constitution of the United States. At the same time, it recognizes the

departmental need of requested records should rest on the *actual* relevance of the information to the agency's assigned function, and not on the information's *possible* utility.

In determining the relevance of requested data, the courts must examine the agency's proper role, rather than its potential duties. Clearly, data collection for reasons of political advantage or personal vendetta fall beyond the pale of any agency. Hence, the need for such data must be viewed as nonexistent. Similarly, the gathering of information in unjustified anticipation of new duties fails to establish great need for the records. On the other hand, long-established transfers of information, essential to the requesting agency's function, may be considered highly relevant to bureaucratic duties. Thus, for example, the Commerce Department may be said to have a high need for Agriculture Department statistics, particularly when predicting future exports. Between these two extremes, however, abstract principles are of little value. A case-by-case approach would serve the courts far better.

Once a court determines the relative weights of these countervailing forces, it becomes fairly easy to strike the balance between them. If both the agency's need for data and the subject's notice of the designated routine uses are high, then the court should allow the routine use exemption.[59] In such a case, the agency's use of the information may be considered compatible with the purpose for which the records were collected. On the other hand, if both of these determining factors are low, then the court should view the intended uses as "incompatible," and preclude application of the routine use exemption.[60]

Difficulties in application of the test could arise, of course, in situations where one of the competing interests fails to clearly outweigh the other—for example, when an individual's presumptive notice of the use is low, while the agency's need for the data sharing is high. Given the great deference the courts customarily

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legitimate need of the Federal Government to collect, store, use, and share among various agencies certain types of personal data.

[59] Privacy Act of 1974, 5 U.S.C. § 552a(a)(7) (1976). For example, a legitimate routine use would allow the Nuclear Regulatory Commission (NRC), attempting to establish maximum levels of safe exposure to radiation, to receive information from the Veteran's Administration (VA) regarding the disability claims of servicemen who attended nuclear tests. Here, both the Commission's need for the data and the degree of foreseeability would be great. Indeed, many servicemen may welcome such use of their records, for the data may not only aid their claims, but also insure safer radiation standards.

[60] Thus, a request by the NRC to the VA for information concerning disability claims of servicemen exposed to Agent Orange could not be a legitimate routine use. Neither the agency's need for the records (which bears no relation to the NRC's purpose), nor the soldiers' presumptive notice would be sufficiently high to justify the transfer.

accord agency regulations, the burden of proof in these cases should rest on the plaintiff.[61]

B. Support in the Legislative History

A review of the Privacy Act's legislative history supports a balancing test weighing individual notice against agency need. As already mentioned, the express purpose of the Privacy Act is "to promote governmental respect for the privacy of citizens."[62] More specifically, the Act is a reaction to the growing potential for invasion of privacy occasioned by the expansion of federal agencies and the sophistication of modern computers.[63] Accordingly, the substantive provisions of the law attempt to insure that an agency may have access only to the private information it truly needs.[64] At the same time, the Act was specifically designed not to hamper orderly and necessary government functions.[65]

In light of these purposes, the most expansive notion of "routine use" comes from Congressman Carlos Moorhead, the Chairman of the House Subcommittee on Foreign Operations and Government Information. Moorhead, who introduced the routine use exemption bill, described the exemption as not merely

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[61] Courts have already taken this position:

> Agency regulations promulgated pursuant to specific congressional authority are presumptively valid and are entitled to great deference . . . . It is not enough to show that other policy considerations could justify the adoption of a different regulation. The burden is placed upon the person attacking the regulation to establish that it is inconsistent with the statute it implements.

Local 2047, Am. Fed'n of Gov't Employees v. Defense Gen. Supply Center, 423 F. Supp. 481, 485 (E.D. Va. 1976), *aff'd*, 573 F.2d 184 (4th Cir. 1978). Though the placement of the burden of proof on the plaintiff may be dictated by well-established administrative law, it does not necessarily follow from the Privacy Act, whose primary purpose is to protect the individual from government intrusion. *See* S. REP. No. 93-1183, *supra* note 25, at 1.

[62] S. REP. No. 93-1183, *supra* note 25, at 46.

[63] *See* the legislative findings, *reprinted in* 120 CONG. REC. 40,400 (1974).

[64] *See* 120 CONG. REC. 40,398 (1974) which discusses the stated purpose of S. 3418.

[65] *See, e.g.*, Congressman Horton's remarks supporting the Act:

> Mr. Speaker, in writing H.R. 16373, the House [precursor] bill which is very similar to the measure now before us, the Government Operations Committee, on which I serve as ranking minority member, made great efforts toward this end: as we added privacy protections for citizens, we did not want to add great burdens for Government agencies in implementing the bill. I think that we accomplished that goal by drawing the legislation so that agencies would have to publicize what they were doing, but would not have to submit to unreasonable requirements which would in effect prevent them from carrying out constructive programs.

120 CONG. REC. 40,885 (1974).

referring to the common and ordinary use of records, but also "includ[ing] all of the proper and necessary uses, even if any such use occurs infrequently."[66] Moorhead's remarks evince a far-reaching interpretation of "routine use," and his comments were echoed by the House Report of the bill, which indicated that it was the Committee's intention not to interfere with the orderly conduct of government.[67] When one considers that the bill reported out of the House Committee was ultimately amended to restrict its broad conception of routine use,[68] it becomes clear that the Congressman's and the Committee's statements define the widest possible interpretation of the exemption. In other words, routine use may not exceed an agency's delegated and proper function.

In contrast to this "proper function" limit for a routine use, the Senate chose a "statutory limit," which required statutory authorization and agreement between the agencies before records could be released.[69] Inasmuch as the Senate later amended the bill to broaden disclosure of information,[70] one may conclude that even under the harshest test, a routine use created by statute and written agreement is legitimate.

Though the original House and Senate positions establish the limits of routine use, they remain flawed and inconsistent. The House proper function test insures the efficiency of government, but fails to protect privacy; conversely, the Senate statutory standard guards the individual, but hampers provision of state services. Neither standard furthers both the broad goals of the Privacy Act and the specific purposes of the exemption. In contrast, the balancing test proposed here not only incorporates the broad goals of the Privacy Act and the routine use exemption, but also insures routine use determinations consistent with the Act's definition and the House and Senate proposals. Indeed, by examining those factors which affect agency need—such as the House bill's concept of proper administrative function, or the

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[66] 120 CONG. REC. 36,967 (1974).

[67] H.R. REP. No. 93-1416, *supra* note 25, at 12.

[68] *See* 120 CONG. REC. 40,405-06 (1974) and notes 26, 27 and accompanying text *supra*. In setting forth the limits of routine use, it is best to remember "the tendency will exist for agencies to construe any exemption more broadly than it is intended to apply or than is necessary to achieve the purpose of exemption." FEDERAL PAPERWORK COMMISSION, *supra* note 2, at 43 (statement of Elliot Richardson).

[69] More specifically, the Senate Report stated that the type of "regular" use envisioned is that "where, by statute and written agreement for information-sharing among agencies, there is access . . . ." S. Rep. No. 93-1183, *supra* note 25, at 51. The report does not indicate the meaning of "written agreement."

[70] *See* 120 CONG. REC. 40,405-06 (1974).

Senate bill's concept of publicized authorization—the test proposed here incorporates both Congressional proposals, thereby guaranteeing routine use designations compatible with the House and Senate perspectives.[71]

CONCLUSION

The Privacy Act's routine use exemption remains susceptible to further abuse. In an effort to ameliorate these abuses, this article proposes a balancing test for determining the validity of routine use regulations. Under this analysis, a court weighs the presumptive notice of a routine use against the agency's legitimate need to share information. The balancing test thereby attempts to further the purposes of the Privacy Act, yet maintain responsiveness to different fact situations. Although statutory classification of the term "routine use" would be desirable, such amendment is unlikely.[72] The courts, therefore, must bear the burden of restricting the agencies' unqualified use of the exemption. Until then, the public's privacy rests upon the self-restraint of the federal bureaucracy.

—*John W. Finger*

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[71] It is probable that many members of Congress recognized the balancing of interests inherent in the drafting of the Privacy Act. For example, Senator Muskie said, "I am pleased to note that this Act has developed an important balance between the rights of privacy of each of our citizens and the public need for disclosure . . . ." 120 CONG. REC. 40,410 (1974).

[72] *See* notes 50-52 and accompanying text *supra*.