Universidade do Minho
Escola de Economia e Gestão

Ana Vanessa Miranda Antunes da Silva

Enhancing Surveillance through the PATRIOT Act and the Foreign Intelligence Surveillance Amendment Act, and their Impact on Civil Liberties: Can Human Security be Compromised by Securitization?

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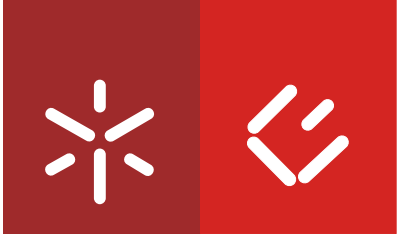

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Mestrado em Relações Internacionais

Trabalho realizado sob a orientação da
Professora Doutora Ana Paula Lima Pinto de Oliveira Almeida Brandão

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ABSTRACT

The post-9/11 period, particularly in the US, is demarcated by exacerbated security concerns and the emergence of a state of exception that marked the proliferation of exceptional legislative measures. The enhancement of surveillance surfaced as one the main tools to prevent future terrorist attacks. Therefore, the analysis of this dissertation will focus specifically on exceptional provisions that reinforce surveillance capabilities of American authorities: section 215 of the PATRIOT Act and section 702 of the FAA.

Focusing on the US case-study and combining the securitization theory and human security framework, this dissertation intends to demonstrate that an intensification of terrorism securitization occurred after September 2001 generating exceptional legislative measures, whose impact upon civil liberties, and subsequently human security was felt. A contextual operationalization of human security is thus presented, defining it as the freedom from material violence – physical threats to security – and the freedom from immaterial violence – the disrespect for civil and political rights.

The transnational character of terrorism, the ever-increasing dynamics of globalization and technological development have all contributed to the increment of transnational mass surveillance. Consequently, the aim is to focus on two groups of individuals, United States and European Union citizens, in order to scrutinize the domestic and transnational impact of these legislative provisions on civil liberties.

The enactment of the PATRIOT Act and the FAA – and of particular interest for this dissertation, sections 215 and 702, respectively – are thus justified in a context of terrorism securitization associated with a nexus of exceptionality. The Snowden disclosures, on June 2013, of several secret surveillance programs once again brought to the forefront the scope of section 215 and section 702, as well as their impact upon civil liberties through the justification of PRISM and the Bulk Collection of Telephony Metadata Programs. Hence, in order to scrutinize the impact of these surveillance-enhancing sections on US and EU citizens' civil liberties, a comparison will be made of its provisions and the fundamental guarantees of rights established; this with reference not only to the US Bill of Rights, but also to European legal tools, such as the European Convention on Human Rights, the EU Charter of Fundamental rights and the EU-US agreements on data transfers.

Keywords: Securitization; Human Security; Civil Liberties; Terrorism; Surveillance; USA; PATRIOT Act; Foreign Intelligence Surveillance Amendments Act.

RESUMO ANALÍTICO

O pós-11 de Setembro é marcado, particularmente nos Estados Unidos, por preocupações securitárias exacerbadas e pela emergência de um estado de exceção que contribuiu para a proliferação de medidas legislativas excecionais. O aperfeiçoamento da vigilância emergiu como um dos principais instrumentos de prevenção face a futuros ataques terroristas. Assim, esta dissertação foca-se especificamente em provisões excecionais que reforçam as capacidades de vigilância das autoridades norte-americanas: a secção 215 do *PATRIOT Act* e a seção 702 do *Foreign Intelligence Surveillance Amendment Act*. Tendo por base o estudo de caso dos EUA, e combinando os quadros teóricos da segurança humana e da teoria da securitização, esta dissertação pretende demonstrar que uma intensificação da securitização do terrorismo ocorreu após o 11 de Setembro, gerando medidas legislativas excecionais, cujos impactos nas liberdades civis, e subsequentemente na segurança humana, foram sentidos.

Uma operacionalização contextual da segurança humana é assim apresentada, definindo-a não só como a liberdade de violência material – ameaças físicas à segurança – mas também como a liberdade de violência imaterial – o desrespeito pelos direitos cívicos e políticos. O caráter transnacional do terrorismo, as crescentes dinâmicas de globalização, bem como o desenvolvimento tecnológico têm contribuído para o incremento da vigilância transnacional em massa. Consequentemente, o objetivo desta dissertação assenta em focar dois grupos de indivíduos: cidadãos norte-americanos e cidadãos da União Europeia, a fim de analisar o impacto doméstico e transnacional destas provisões legislativas nas liberdades cívicas. O estabelecimento do *PATRIOT Act* e do *FAA* – e, de particular relevância para esta dissertação, as seções 215 e 702, respetivamente – é assim justificado num contexto de securitização do terrorismo com um nexo de excecionalidade. As revelações de Edward Snowden, em Junho de 2013, relativas à existência de inúmeros programas secretos de vigilância trouxeram mais uma vez para o domínio do debate público o escopo das seções 215 e 702, bem como o seu impacto nas liberdades civis através da justificação de programas como o *PRISM* e o *Bulk Collection of Telephony Metadata Program.*

Deste modo, no sentido de descortinar o impacto destas medidas impulsionadoras de vigilância nas liberdades civis de cidadãos norte-americanos e cidadãos da União Europeia, uma comparação será estabelecida entre as suas provisões e as garantias de direitos fundamentais estabelecidas na Carta dos Direitos norte-americana e nos instrumentos legais europeus, tais como a Convenção Europeia dos Direitos Humanos, a Carta dos Direitos Fundamentais da União Europeia e os acordos transatlânticos de transferência de dados.

Palavras-chave: Securitização; Segurança Humana; Liberdades Civis; Terrorismo; Vigilância; USA; PATRIOT Act; Foreign Intelligence Surveillance Amendment Act.

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ABBREVIATIONS

ACLU	American Civil Liberties Union
CIA	Central Intelligence Agency
Data Protection Directive	Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data
ECFR	Charter of Fundamental Rights of the European Union
ECHR	European Convention on Human Rights
EU	European Union
FAA	Foreign Intelligence Surveillance Amendment Act of 2008
FISA	Foreign Intelligence Surveillance Act of 1978
NGOs	Non-Governmental Organizations
NSA	National Security Agency
PATRIOT Act	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act
PCLOB	Privacy and Civil Liberties Oversight Board
PPD-28	Presidential Policy Directive 28
R2P	Responsibility to Protect
RGICT	Review Group on Intelligence and Communications Technologies
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNHDR	United Nations Human Development Report
US/USA	United States of America

INTRODUCTION

Security constitutes one of the pillars, and sub-disciplines, of International Relations, as well as one of the main concerns of States. Due to its relevance, during decades, numerous attempts of conceptualization occurred nevertheless consensus to a sole concept was never achieved (Hough 2008; Terrif et al. 1999). The development and enlargement of this concept arose, mostly, in a post-Cold War period, with the emergence of debates concerning the maintenance of a strict concept of security or the introduction of deep definition, whose agenda would encompass non-military threats and new actors (Buzan et al. 1998; Williams 2003). Nevertheless, the evolution of the concept is marked by a peculiarity, since it divided more strongly than other fields. Besides, some of its sub-divisions present no mutual recognition or awareness (Wæver and Buzan 2007, 385).

It is in a context of enlargement of security that two new theories emerge, both focusing on distinct issues of the security field: the securitization theory, which centres on the social-construction of security issues, and human security, which intends to identify the existential threats to the individual's security, and also intends to bypass the academic dissatisfaction regarding state-centric security approaches (Kerr 2010; Floyd 2007).

The post-9/11 period is globally marked by reformulations and significant alterations on the posture of states regarding terrorism worldwide. Terrorism, and its transnational character, is perceived as one of the main threats to international security. A revitalization of national security concerns was immediately raised, mostly due to the awareness of the difficulty of containing or deterring terrorism. In the context of a War on Terror with a pre-emptive character, an enhancement on surveillance emerged as a favourable tool to prevent future attacks and to deal with the unexpected and unpredictable nature of this threat.

Using the securitization and human security frameworks, it is intended to analyse the impact of the securitization of terrorism in the post-9/11period upon civil liberties and, consequently, human security. It is relevant to highlight that terrorism is a phenomenon whose securitization did not emerge solely after 2001 it had long before been contemplated on international and national security agendas. However, the scope of the attacks and the proliferation of security concerns after this period contributed to an intensification of this securitization (Brandão 2011b).

The awareness of the new, and increasingly complex, challenges imposed by terrorism after 9/11 contributed to further counterterrorism legislation, which relied

upon surveillance improvements. As Tori Mohanan claims, the terrorist attacks in September 2001 incited a restructuring of the surveillance field, through the development of legislation that facilitated governmental surveillance, national security prioritization, and financial and political commitments to enhance surveillance capabilities (Mohanan 2012, 285).

The increased concerns with security, the transnational character of terrorism, and the difficulty in distinguishing what is internal and external in a globalized world, blurred the distinctions between internal and external security. This is visible on the extraterritorial application of United States [hereinafter US] domestic legislation to gather foreign citizens' data. The disclosure of secret surveillance programs – of a domestic and international scope – authorized and justified by the provisions of the USA PATRIOT Act [hereinafter PATRIOT Act] and the Foreign Intelligence Surveillance Amendment Act [hereinafter FAA] show that domestic surveillance enhancements have been extrapolating the respect for civil liberties. Thus, these measures do not coadunate with the international principles of respect for fundamental rights. Indeed, on June 2013 a former official for the National Security Agency [hereinafter NSA] disclosed numerous secret documents revealing the existence of numerous secret mass surveillance programs. Among these programs there were particularly the PRISM and the Bulk Collection of Telephony Metadata, which were implemented under the authority of the PATRIOT Act and FAA, respectively.

The post-9/11 period is characterized by an idea, present within policy mechanisms and elite discourses, that national security and civil liberties are mutually exclusive (Chandler 2004; Ruddock 2004). In fact, the traditional understanding of counterterrorism is that in order to enhance national security, the state must place limits on the exercise of civil liberties (Golder and Williams 2006, 50).

In fact, the fight against terrorism, which has been marking international and national security agendas, introduced a relevant question: *Quis custodiet ipsos custodes?* In other words, *who will control the controllers*. As Russel Hardin highlights, even though terrorism has existed for a long time, its contemporary nature presents a menacing dilemma: how to allow the government to protect us from terrorism while also protecting us from the governmental excesses (Hardin 2004, 78).

Indeed, even though terrorism shudders democratic values, it may also contribute to reveal democracy's lack of commitment to such values and its readiness to embrace authoritarian policies (Freedman 2002, 80).

In spite of an increasing international reflection concerning the relevance of human security and its correlation with aggregated respect for human rights, reality shows that the legislative measures applied in the context of the War on Terror, have not always been framed by the maintenance and defence of those.

Research Problem

The structure of this dissertation centres on a main research question and three secondary research questions. In fact, due to the complexity and depth of the main research question, its deconstruction into three secondary questions emerged as the easiest approach to tackle its main points. The main purpose of this dissertation is to answer: *how did terrorism securitization, and its subsequent application of the PATRIOT Act and FAA, contribute to human insecurity in the post-9/11 period?*

Moreover, in order to clearly analyse this complex question, it was divided into three secondary questions: How did securitization contribute to the application of the PATRIOT Act and the FAA?; How do the PATRIOT Act and the FAA disrespect US citizens' civil liberties?; How do the PATRIOT Act and the FAA disrespect EU citizens' civil liberties?

Concerning the main hypothesis, the occurrence of a terrorism securitization process after September 11, 2001 is presupposed, which consequently ushered in two extraordinary legislative measures, the PATRIOT Act and the FAA, whose propositions increased surveillance powers, and allowed for an encroachment upon civil liberties through the disrespect of provisions granted by the American Constitution and the disrespect of EU legal tools that granted privacy and data protection. Thus, and bearing in mind the close relation between civil liberties and human security, this disrespect generates human insecurity.

Regarding the first secondary research question, the hypothesis presented is that solely a terrorism securitization process and the exceptionality associated to it is able to explain the extension of surveillance capabilities and their legal application to extraordinary counterterrorist measures, such as the PATRIOT Act and the FAA. It was thus the construction of a speech act, defining terrorism as an existential threat, which occurred in order to justify exceptional measures to fight this threat (Buzan et al. 1998; Wæver 1995). As for the second secondary research question, the hypothesis proposed

points out that section 215 and section 702 of the PATRIOT Act and FAA respectively impinge upon US citizens' civil liberties, particularly privacy, which is granted by the First and Fourth Amendment of the American Constitution. Finally, concerning the last secondary research question, the hypothesis presented denotes that the PATRIOT Act, as well as FAA propositions (in particular sections 215 and 702) do not coadunate with the provisions granted by European legal tools, such as the European Convention on Human Rights, the EU Charter of Fundamental Rights and EU-US agreements concerning international data transfers.

Justification and Delimitation

With regard to the justification, the reasons for the choice of this research question are several. Firstly, it is a profoundly current theme, whose impact has been visible since the terrorist attacks of 2001. In fact, the impact of the securitization of terrorism has been widely debated, particularly due to its encroachments on individuals' civil liberties. However, the disclosure of secret surveillance programs has brought this issue to the forefront once more. Secondly, the national awareness – prompted by the revelation of the abovementioned programs – that surveillance is not directed exclusively at terrorists, but may also be applied to ordinary citizens, as well as the international recognition that US surveillance is not restricted by borders contributed to the resurgence of the necessity to consider its consequences. The aim of this dissertation is grounded on the analysis of the effect of extended surveillance on fundamental rights, and subsequently on human security. Thus, one intends to scientifically contribute to an analysis of the normative impact of this securitization process on human security. Thirdly, the complexity of the War on Terror demands an effort of theoretical conciliation, in pursuance of a profound comprehension of its impact on fundamental rights. Thus, an in-depth scrutiny of the disrespect of civil liberties – and subsequently of human security – and its subjacent roots, requires a theoretical combination of human security and securitization theories. As a matter of fact:

> that there is fragmentation in the field of security studies does not mean that we cannot study security. Rather, our argument is that when studying security it is necessary to be aware of the range of perspectives contained within the field (…) Just as there is a spectrum of theoretical perspectives to defining security, so there is a range in the unit of analyses that we may be concerned to secure from harm (Terrif et al. 1999: 172).

This statement by Terry Terrif [et al.] clearly highlights what is intended within the course of this dissertation: to combine different security perspectives in order to analyse the impact and harm that may derive from its application.

Concerning the geographical delimitation of this case-study, it will focus on the US. Even though several countries, including European States, endured their surveillance capabilities and developed surveillance programs of an extraterritorial scope, the US presents a unique context and extension, particularly in terms of technological development and financial availability, which is crucial for surveillance extension. This particular conditioning contributed to the choice of analysing its particular case.

Conditioned by terrorist attacks on domestic soil and its prominent position in the international scene, the US developed some of the most intrusive counterterrorist legislative measures that enhanced surveillance and restricted traditional oversight mechanisms to control governmental excesses. US legislation has been intensely criticized due to its encroachments upon civil liberties. Some of its measures have been harming not only US citizens' fundamental rights, but also those of non-citizens – in particular privacy – through the enactment, for instance, of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism of 2001[hereinafter PATRIOT Act] and the Foreign Intelligence Surveillance Amendment Act [hereinafter FAA] of 2008. The focus of this dissertation anchors on these two legislative documents, since they share a common feature: amongst their purposes was mainly the enhancement of surveillance capabilities.

Henceforth, it is relevant to clarify that this dissertation does not intend to consider the military dimension of the War on Terror neither does it cover the foreign policy of the USA. It intends to focus on two domestic legislative measures – more specifically on one section of each – and interpret the impact that those had on both US citizens and foreign citizens. Considering that its impact affects not only US citizens but also foreigners, through the extraterritorial application of US domestic legislation enabled by technological developments, such as cloud computing and others, the focus of this dissertation is that of the impact on European citizens' fundamental rights, even though several other foreign individuals may be affected regardless of their geo-localization. The first reason for this choice is grounded on the geographical conditioning of the scholar and, secondly, on the fact that the close transatlantic

relationship between the US and EU does not seem to fit in with these extraterritorial surveillance practices.

It is within this context that some concepts, surface; these are profoundly interconnected and are essential in seeking to understand this analytical framework: terrorism, War on Terror and surveillance. Hence, these concepts will be scrutinized and operationalized in the course of this dissertation.

In order to comprehend the motives for the drawing up of the PATRIOT Act and the FAA, it is necessary to demonstrate how the securitization of terrorism occurred, thus contributing to a social construction of terrorism as an existential threat. This has led to the employment of these exceptional measures, once they impose determinations that would not be easily publicly accepted within any other context. In other words, the securitization of terrorism contributed to an acceptance of exceptional measures. A further purpose of this dissertation is to clarify how disrespect for civil liberties occurred through the application of these counterterrorist legislative measures.

Bearing in mind this objective, as well as the extension of the PATRIOT Act and the FAA this dissertation will focus solely on section 215 of the PATRIOT Act and section 702 of the latter. Both these sections concentrate on the alteration of surveillance procedures, which have allowed the US government to access the personal data not only of US citizens, but also that of foreign citizens. Besides, both triggered intense debates not only within the US, but also internationally. They were used to legally justify two secret surveillance programs under the guardianship of the NSA, whose purpose is to collect domestic and foreign intelligence data that comprises the Bulk Collection of Telephony Metadata and that of the PRISM programs.

The scope of these surveillance programs will also be analysed, since its application is justified and legitimated by both sections. Hereafter, these sections of the PATRIOT ACT and the FAA will be comparatively examined with the US Bill of Rights in order to comprehend how they can increment disrespect for human rights and civil liberties. Secondly, these will be compared with the EU legal tools aimed at protecting personal data, such as the European Convention of Human Rights and the EU Charter of Fundamental Rights, in contemplation of their impact upon EU citizens' civil liberties.

The focus of this dissertation centres on two groups of individuals: US citizens and EU citizens. While the justification for the first group seems clear, in order to understand the domestic effects of national legislative measures, the choice of EU

citizens surfaces due to the European dependence upon US cloud services, to which the US government has access through the application of the PATRIOT Act and the FAA and directly affects European citizen's rights. Therefore, an analysis of the transnational impact of surveillance, particularly between allies, seems interesting and worthy of attention. Even though, any other particular group of non-US citizens could have been chosen, the scholar's geographical localization also contributed to this specific analytical option.

The time space considered in this dissertation will be from 2001, when the PATRIOT Act was enacted, to the present time (October 2014). The choice lies within this time period as the improved surveillance legislative measures set a precedent, opened by the PATRIOT Act, and were developed and improved in the following years. This is visible with the emergence of the FAA in 2008. The choice of these two documents relates to their crucial impact on American society after September 11, 2001, and also due to national and international contestation regarding the disrespect of civil liberties. As a matter of fact, the application of these measures, which target citizens and foreigners – and, particularly within this dissertation the case of EU citizens – generated intense debate revolving around the fragility of human security when dealing with antiterrorist legislation.

Methodology

Methodology points out the path to follow during investigation and assumes an extremely relevant role in research. This is composed by method, which is the nature of data, and the techniques involved in collecting and treating information. Before the determination of the methodology, one must opt for an epistemological posture. Epistemology corresponds to the nature of knowledge and how this can be achieved. The epistemological position adopted during this dissertation is an interpretative one, once the goal is to analyse other academics' opinions and perceptions.

Regarding the epistemology adopted in this dissertation, it is crucial to highlight that interpretativism focuses on the relevance of interpretation and observation so as to comprehend the social world. Moreover, this epistemology defends that the researcher and the social world are mutually affected, the values and facts are not precise, and hence it is impossible to develop a research which is objective and free of values (Snape

and Spencer 2003, 17). As Silbergh refers, the epistemological choice has a relevant role to play in the determination of methods used in a research (Silbergh 2001, 16). Therefore, an interpretative epistemology determines a qualitative method for this dissertation. Methods are the unifying tool of science, and can be used, eventually, to research any issue (King, Keohane and Verba 1994, 9). The method used will be that of qualitative research, once it aims to encompass and analyse many approaches that do not rely upon numerical data (King, Keohane and Verba 1994, 4). This is a:

> naturalistic, interpretative approach concerned with understanding the meanings which people attach to phenomena (actions, decisions, beliefs, values etc.) within their social worlds (Snape and Spencer 2003, 2).

This method consists of descriptive, and not statistical, data. The goal behind this choice is the development of a profound comprehension of this theme and the withdrawal of subjective outcomes, instead of statistical results.

Secondly, it is relevant to highlight that the research design of this dissertation is a crucial case study, focusing on the US, and more particularly on two particular US legislative measures and their impact on two selected groups of individuals: the US citizens and the EU citizens. This choice emerged as one intends to specifically explore the impact of these two measures upon civil liberties, and consequently on human security. Thus, it is subjected to the inherent limitations of a case study. As qualitative research encompasses a great number of approaches, the tendency is to focus on a specific case in order to restrict and deepen the analysis. Hence, case studies centre "on a particular event, decision, institution, location, issue, or piece of legislation" (King, Keohane and Verba 1994, 4). Crucial case studies are cases that are critical to a concept or theory (Gerring 2001, 220). Bearing in mind, that the PATRIOT Act and the FAA are two documents which produced a critical impact on human security, their analysis through a case study is justified.

Concerning the technique of collection and treatment of data it will be qualitative documental analysis, not only of primary, but also of secondary sources, which allow for the revision, evaluation and interpretation of documents. Documental analysis may focus on a variety of messages, such as literary works, journal articles, official documents, political speeches or interview reports (Quivy and Campenhoudt 1995, 226). The process of documental analysis focuses on finding, selecting, interpreting and summarizing documental information and, at the same time, enhances the rigour and profundity. Moreover, there is also the intention to use semi-structured qualitative

interviews during this dissertation, in order to broaden the knowledge of this topic. This technique is particularly useful for the analysis of the meaning that actors attribute to the events with which they are confronted, as well as in the analysis of a particular problem (Quivy and Campenhoudt 1995, 192). Thus, this technique fits clearly within this dissertation, since it allows for an individualized analysis of the securitization of terrorism and its impacts upon civil liberties. As Bill Gillham states, it can be argued that the semi-structured interview is one of the most important ways of collecting data, due to the flexibility of its structure and the quality of data collected (Gillham 2005, 70).

During an interview, one can access fundamental processes of human communication and interaction, which allow the researcher to extract extremely rich data and elements for reflection (Quivy and Campenhoudt 1995, 192). Semi-structured interviews are based on an interview guide that is relatively open and may be altered during the course of the conversation (Quivy and Campenhoudt 1995, 192). During this dissertation a variety of scholars and specialists were questioned over a course of seven semi-structured interviews. For the selection of the interviewees, the knowledge of the US and transatlantic relations, as well as their professional experience was valued. Thus, in order to collect a greater amount of information and bearing in mind the professional and academic experience of each interviewee the interview guides were adapted to each case, thus resulting in significant differences. Finally, the content of the interviews was analysed in order to test the hypothesis (Quivy and Campenhoudt 1995, 192).

Resorting to primary sources, such as the PATRIOT Act, the FAA and the American Constitution, as well as political speeches and governmental reports, is also a fundamental tool to successfully accomplish this research and to deepen the comprehension of the phenomena at hand and their impact. Moreover, by using secondary sources, the ability to analyse other academics interpretations is enhanced.

Brief Outline of the Dissertation

For the purpose of this dissertation four chapters will be developed. The first chapter, whose title is *Theoretical and Conceptual Framework: Securitization and Human Security*, analyses the evolution of security conceptualization and its implications upon the emergence and development of human security and securitization.

Besides, the theoretical analysis of the development of human security and securitization, a contextual operationalization of this particular case-study and a presentation of the main critical debates surrounding both theories are also scrutinized. One has additionally approached the correlation between human security and human rights in order to comprehend how the impact upon civil liberties hinders human security. Finally, an operationalization of the key concepts is presented, focusing on terrorism, the War on Terror and surveillance.

Securitization of Terrorism after 9/11 and its Consequential Dialectics is the title of the second chapter, whose focus is the analysis and development of the securitization of terrorism, initiated by the Bush Administration immediately after September 11, 2001 and prolonged to this day. The foremost aim is to prove the occurrence of this process through the comparison of its premises with public reaction, political speeches and the context itself. Besides, one intends to demonstrate that this process is responsible for the emergence of a state of exception that justified the jurisdiction of extraordinary measures, which resulted in the PATRIOT Act and the FAA. The description and analysis of these legislative measures and its contours are also introduced within this chapter. Moreover, the impact of the securitization of terrorism, and its subsequent exceptional measures, on the resurgence of two dialectics – the national security vs. liberty and the state of exception vs. normality – is also scrutinized.

The third chapter – *PATRIOT Act and FAA: Domestic Surveillance Impact on Constitutional Guarantees* – focuses on the internal impact of the PATRIOT Act and FAA, more specifically section 215 and section 702. Firstly, it analyses US tradition concerning civil liberties and the effect of increased national security concerns, particularly during periods of war, on respect for this issue. Then, both sections, as well as the two NSA surveillance programs justified by them – the bulk collection of telephony metadata and PRISM - are scrutinized, comparing both provisions with the rights granted by the US constitution. A brief analysis of the evolution of domestic surveillance is also introduced.

Finally, the fourth chapter – *PATRIOT Act and FAA: Transnational Surveillance Impact on EU Citizens' Civil Liberties* – aims to dissect the repercussion of the abovementioned legislative documents on EU citizens' civil liberties. Firstly, the EU and US' models of data protection will be pointed out, in order to comprehend their divergences. Secondly, the emergence of transnational surveillance will be connected with technological development, more particularly with the triggering of cloud

computing services. The potential regulation of international law with regard to US transnational surveillance excesses is also approached, focusing on the possibility that US extraterritorial surveillance may hinder the respect for international law tools, such as the International Covenant on Civil and Political Rights [hereinafter ICCPR]. Finally, an analysis of the evolution of transnational surveillance and its prospective future is also advanced.

The main purposes of this dissertation are: to verify how securitization may contribute to a comprehension and understanding of the application and acceptance of the PATRIOT Act and FAA, on a War on Terror context; to analyse section 215 of the PATRIOT Act and section 702 of the FAA; to raise pertinent issues regarding the application of these documents in a context of individuals' civil liberties; to compare these legislative measures with the provisions of the Bill of Rights and the guarantees granted by European legal tools to ensure privacy and data protection; and finally, to understand and demonstrate how these legislative sections may disrespect US and EU citizens' civil liberties.

To sum up, with these goals, which are fundamental to this academic research, one intends to make analytical cuts, thus limiting the scope of analysis and allowing for a profound comprehension of its relations. Thus, one also recognizes that even though many other analytical variations could have been pointed out, – such as focusing on European surveillance programs and legislation – which demonstrates the richness and complexity of this theme, these are the analytical choices. The September 11 attacks have facilitated a restructuring of surveillance that has transpired into the legal sphere with the enactment of exceptional measures, which have extended governmental surveillance capabilities, tools and powers. Combining human security and securitization allows for a deep understanding of how terrorism was constructed as a security issue, thus permitting exceptional measures and what the consequences of these legislative measures were to civil liberties.

CHAPTER I. SECURITIZATION AND HUMAN SECURITY

1. Security: The Evolution of a Concept

Security is not only a manifest preoccupation of states, but also one of the structural pillars of International Relations. The concept of security is described as being "essentially contested" (Buzan 1991), "ambiguous" (Haftendorm 1991; Wolfers 1952), or even "underdeveloped" (Buzan 1991) in the International Relations academic field (Buzan 1983; Buzan and Wæver 2003; Lipschutz 1995). These characteristics are pointed out, due to the proliferation of theoretical approaches to phenomenon, as well as the lack of a consensual understanding of security, of its conceptualization and its relevant research questions (Haftendorn 1991, 15). Security Studies constitute one of the many subfields of International Relations and its emergence can be traced back to the 40s[1] (Wæver 2010; Williams 2008; Buzan et al. 1998).

Despite the fact that its origin is correlated with two outstanding episodes of international relations, the early days of the Cold War and nuclear emergence, the interest in security precedes both events (Baldwin 1995, 119). Until the late 20th century, the history[2] of Security Studies was strictly connected with the concept of national security[3] and the realist theory[4]. Scholars, such as Hobbes, Clausewitz and Thucydides caused a great impact on conceptualization of security through the consideration and exploration of its numerous dimensions and facets, in particular the dilemma of security. They demonstrated:

> that human could step out of their own time and look beyond their own particular historically defined security problems to generalize about the security behaviour of actors across different societies and eras (Kolodziej 2005, 77).

Traditionally, the progression of security was strictly related to the state, its territory and military threats, as well as to the use of force to maintain and preserve

[1] It is relevant to highlight the need to "recognize the limitations of presenting neatly packaged accounts of how (international) security studies have become established as a subdiscipline" (Rowley and Weldes 2012, 526). For more information,consult: Christina Rowley and Jutta Weldes. 2012. "The Evolution of International Security Studies and the Everyday: Suggestions from the Buffyverse." *Security Dialogue* 43(6):513-530.

[2] For further details concerning the history of Security Studies from its origins until nowadays, consult: David Baldwin. 1995. "Security Studies and the End of Cold War." *World Politics* (48): 117-141; Ana Paula Brandão. 2011. "Vinte Anos Depois: Mapeando o Quadro Teórico e a Agenda de Pesquisa dos Estudos de Segurança." Presented on *I OBSERVARE International Congress* Lisbon; Barry Buzan and Lene Hansen. 2009. *The Evolution of International Security Studies*. Cambridge: Cambridge University Press; "Special Section on The Evolution of International Security Studies."2010. *Security Dialogue* 41(6).

[3] The concept of national security that marked the Cold-War period "was more entailed as a fusion of the security of the state and the security of the nation," (Buzan and Hansen 2009,11) in other words, it can be considered tricky, since the word 'national' brings to the forefront the fact that the nation constitutes the referent object of security. However, its true and intrinsic significance applies to the state. Thus, this concept was traditionally connected with the survival of the state against external threats (Buzan 2007).

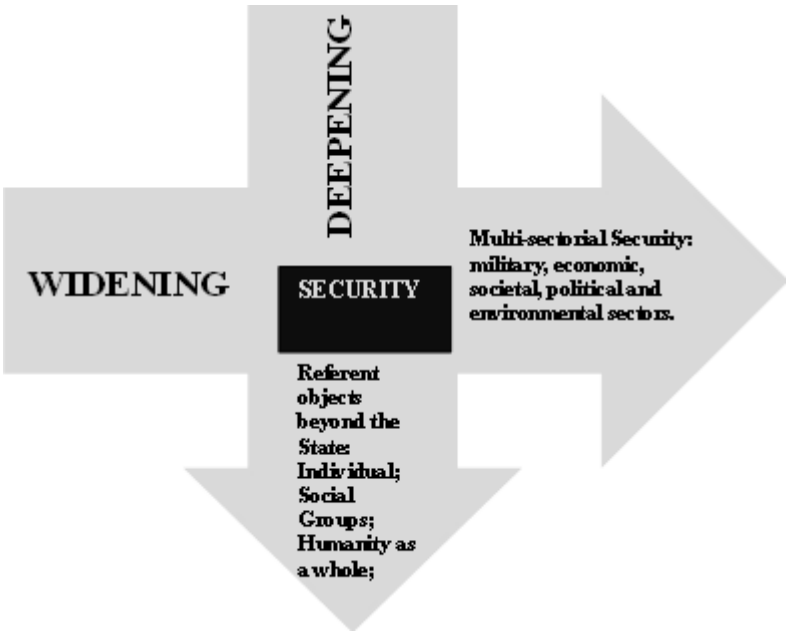
[4] Realism's foundation resides in a balance of power logic that stems from the anarchic conception of an international system. According to this theory, the state is the point of reference of security (Terrif et al. 1999, 18).

sovereignty[5] (Terrif et al. 1999; Caldwell and Williams 2012; Sheehan 2005; Aldis and Herd 2005). While the Cold War period was marked by the regeneration and revitalization of a realist and militaristic perspective of and approach to security, the early 80s were the spectators of emerging tendencies. Debates about the necessity of widening and deepening the security agenda (Figure 1) were constant and persistent. The aim was to include a multi-sectorial character (with the inclusion of new sectors beyond the military, such as the political, environmental, economic, and societal sectors[6]) in security agendas, and consequently new referent objects, too (Buzan 1991; Lipschutz 1995; Sheehan 2005; Aldis and Herd 2005).

This vertical and horizontal extension would constitute a break from the restriction imposed by the concept of national security. As it was understood that security did not had a fixed and singular meaning, it was possible to launch a negotiation and analysis process (Sheehan 2005, 49). A revitalization and expansion of security as a discipline and concept was thus highlighted, according to its proponents, since security was:

> poorly equipped to deal with the post-cold war world, having emerged from the cold war with a narrow military conception of national security and a tendency to assert its primacy over other public policy goals (Baldwin 1995, 132).

Figure 1 – Widening and Deepening Security



[5] War, peace, threats, strategies or epidemics were issues that filled and completed the traditional security agenda (Wæver and Buzan 2007, 386).

[6] In his book People, States and Fear, Buzan establishes a wider notion of security based on a multissectorial and multilevel character. Henceforth, the author highlights five sectors of security: military, economic, political, social and environmental (Buzan 1991, 19-20). For more information, consult: Barry Buzan. 1991. *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era*. Boulder: Lynne Rienner.

The attempts to withdraw from an exclusively political and military approach to security were mainly experienced in the post-Cold War period. Although, the proposals were diverse, there was some resistance due to the opposition they imposed on the methodological and policy bases of the realism paradigm (Mathews 1989; Buzan 1991; Caldwell and Williams Jr 2012; Lipschutz 1995; Buzan and Hansen 2009; Mearsheimer 1995). Despite aiming to remove the limitations imposed by (neo)realist principles, this vertical and horizontal extension also intended to further the continuous evolution of this field in a context of outstanding, emergent and unsettled transformations[7] – initiated in the early 90s – within the social order: the advent of re-dimensioned phenomena, actors, transnational issues and, mainly, the impact of globalization[8] (Caldwell and Williams 2012). Indeed, the processes of globalization may be responsible for diminishing or increasing security threats.

However, aware of the impelling conditions referred above, more groundbreaking approaches emerged. While Barry Buzan defended the continuation of the state as a main referent object in the analysis of international security, authors such as Ken Booth and Steve Smith preferred to focus on the individual, bringing it to the centre of security analysis (Caldwell and Williams 2012, Sheehan 2005; Smith 2005). Hence, it is in this context of innovation and breakthroughs that new security approaches surfaced and were propagated. It is relevant to try to comprehend the diversity of these approaches. As Peter Hough states:

> the main paradigms of International Relations offer alternative conceptual frameworks for comprehending the complexity that emerges from attempting to study the huge volume of interactions between actors that makes up the contemporary global system. These different 'lenses' for making sense of this political complexity focus in very different ways when it comes to thinking about issues of security in International Relations (Hough 2008, 2).

Several critical security approaches[9] mark this period, such as the Securitization Theory, from the Copenhagen School, and Human Security, which goes beyond the mere traditional state-centric (neo)realist conceptions. The inheritance ensuing from this debate, which began in the 90s, is notorious: it resulted on a theoretical, methodological

[7] An impelling motive for security redefinition, and the inclusion of non-military threats stems from a progressive awareness of the environmental degradation that represented a threat to individual's security and transcended a strict notion of national security (Mathews 1989; Baldwin 1995; Krause and Williams 1997).

[8] Numerous academics highlight the impact of globalization, and its subsequent affirmation of new actors and transnational threats, in the restructuration of security. Security has also adopted a multilevel character – as Buzan claims in his *People, States and Fear* – which includes not only state dimensions, in other words national, but also individual and international and global facades (Sperling 2007).

[9] The critical concept is defined within this dissertation in a sense of separation from the traditional realist vision of security. With its use one intends to "gather together these disparate 'dissident' views" that set apart from the (neo) realist security propositions (Mutimer, Grayson and Beier 2013, 1).

and thematic pluralism that today demarcates the agenda for security studies (Brandão 2011a, 2).

2. Securitization Theory

2.1 Origins and Operationalization of Securitization Theory

The Copenhagen School emerges in the 80s amidst a vigorous debate concerning the 'broad' and 'narrow' conceptualizations of security, and generated a novel and innovative analysis of security that not only aimed to 'widen' security, but also to 'deepen' it. Its conception is intrinsically connected with the academic work developed mainly by two authors, Ole Wæver and Barry Buzan, at the nowadays defunct 'Center for Peace and Conflict Research' located in Copenhagen. Their research, situates itself between two different approaches to security: realism/neo-realism (mostly due to the influence of Barry Buzan), and peace studies/ social-constructivism (with a great influence from Ole Wæver). A multi-sectorial approach to security, a focus on regional security and securitization (a social-constructivist process through which groups of people construct something as a threat) are some of the novelties introduce by this emergent school (Buzan et al. 1998; Charret 2009; Huysmans 1998; Hough 2008; Šulovic 2010; Huysmans 1998).

One of the concepts it developed and acknowledged most is that of securitization, – also known as the Copenhagen School's main contribution to the study and analysis of security – whose main innovation is a discursive conceptualization of security (McDonald 2008; Huysmans 1998). In fact, it brings a speech-act conceptualization of security, which was firstly introduced and presented by Ole Wæver in 1989[10]. Ole Wæver's work has diverse intellectual influences. Among them is the discursive construction of security, which stems from Austin's[11] speech-act theory.

[10] See: Ole Wæver. 1989. "Security, the Speech-Act: Analysing the Politics of a World." *Copenhagen Peace Research Institute* Working Paper 19.

[11] Other authors, such as Jacques Derrida, Carl Schmitt and Kenneth Waltz are also influential to Wæver and the intellectual inheritance of the securitization theory, as he himself recognizes (Wæver, 2004:13). For more information, see: Ole Wæver. 2004. "Aberystwyth, Paris, Copenhagen: New Schools in Security Theory and the Origins between Core and Periphery." Paper presented at the *ISA Conference Montreal*; Holger Stritzel. 2007. "Towards a Theory of Securitization: Copenhagen and Beyond." *European Journal of International Relations* 13(3):357-383; Thierry Balzacq. 2005. "The Three Faces of Securitization: Political Agency, Audience and Context." *European Journal of International Relations* 11(2): 171-201; Taurek, Rita. 2006. *Securitisation theory – The Story so far: Theoretical Inheritance and What it Means To Be a Post-Structural Realist.* Paper for presentation at the 4th annual CEEISA convention University of Tartu, 25 -27 June.
Another interesting debate that has arisen through Michael Williams (2003) is the influence of realism, particularly Carl Schmitt's concept of 'political', in the securitization edification, and more especially the Copenhagen School's security concept. A parallel is

According to John Austin, there are certain discursive acts, in other words statements, which have a performative ability. Thus, these do much more than simply defining something as being true or false or merely describe it (Austin 1962; Balzacq 2005). As stated by Austin, there is a clear distinction in three different types of speech-acts the locutionary, illocutionary act and perlocutionary act[12] (Austin 1962; Balzacq 2005; Habermas 1984).

According to Wæver, a security speech-act is an illocutionary act ('to act in saying something') (Wæver 1989; Habermas, 1984; Austin 1962). Despite the great relevance of this article, a more complete and consistent work was later developed by Wæver, together with his two colleagues Barry Buzan and Jaap de Wilde concerning securitization[13]. The core premise of securitization is that security is what "is in language theory called a speech-act (…) it is the utterance itself that is the act." In other words, it is a self-referential practice, because the act has a performative power and it transforms an issue into a security issue, not because it is necessarily an objective threat but because it is presented as such: a simple reference to security by a state representative implies certain alterations and consequences (Wæver 1989, Buzan et al. 1998).

Henceforth, security is:

> about survival. It is when an issue is presented as posing an existential threat to a designated referent object (traditionally, but not necessarily, the state incorporating government, territory and society). The special nature of security threats justifies the use of extraordinary measures to handle them (Buzan et al. 1998, 21).

Security problems are consequently - in spite of being military or non-military- distinguishably characterized by emergency, urgency and extraordinary measures, which are used to impede subsequent developments of security threats and raise them 'above politics' (Buzan et al. 1998; Wæver 1995; McDonald 2008; Hough 2008). Thus, an existential threat to a referent object and a subsequent and consequential emergency action with "effects on inter-unit relations by breaking free of rules" result in a

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also drawn between the 'securitizing actor' and a Schmittian concept of 'sovereign' (Williams 2003, 514-516). For more details, see: Michael C. Williams. 2003. "Words, Images, Enemies: Securitization and International Politics." *International Studies Quaterly* (47):511-531; Ole Wæver. 2011. "Politics, Security, Theory" *Security Dialogue* 42(4-5): 465-480. Marko Žilović, 2009. "The Concept of Political and Future of the Copenhagen School of Security Studies." *Western Balkans Security Observer* 13:17-28; Filip Ejdus. 2009. "Dangerous Liaisons: Securitization Theory and Schmittian Legacy." *Western Balkans Security Observer* 13: 9-15.

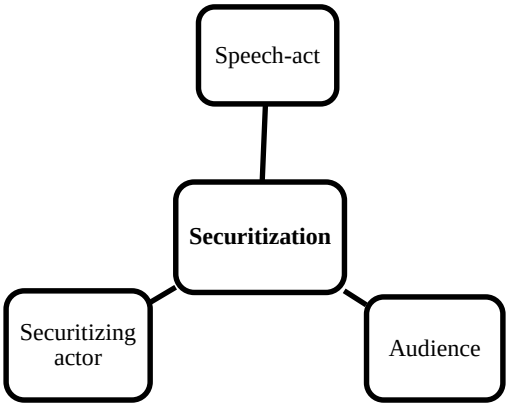
[12] J.L. Austin defines it as such: the locutionary act ("equivalent to uttering a certain sentence with a certain sense and reference, which again is roughly equivalent to 'meaning' in the traditional sense"); illocutionary act ("such as informing, ordering, warning, undertaking, &c, i.e. utterances that have a certain (conventional) force"); and finally the perlocutionary act ("what we bring about or achieve by saying something, such as convincing, persuading, deterring, and even, say, surprising or misleading") (Austin 1962, 108).

[13] The outcome materialized in a book: "Security: A New Framework for Analysis" (1998), that launched the foundations for the securitization theory.

combination of components which are compulsory for a successful securitizing speech-act (Buzan et al. 1998; Wæver 2011).

Approaching security as a 'speech-act' allows securitization to open the security agenda for other threats besides military issues, as well as to integrate other referent objects beyond the State (Hough 2008; Buzan et al. 1998). Therefore, a mere uttering of the word 'security' does not define the speech-act; this requires the combination of a trilogy. Securitization becomes the process through which an actor – a securitizing actor – declares that a specific issue, through a speech-act, is an 'existential threat' to a certain referent object (Buzan et al. 1998, McDonald 2008). An essential 'trilogy', as Stritzel defines it, – comprising a speech-act (composed of the abovementioned elements), a securitizing actor (those who securitize the issue by declaring that a referent object is being existentially threatened) and an audience (the group of people who will receive and process the securitizing speech-act and accept it or deny it) – is then required within the securitization theory (Stritzel 2007; Buzan et al. 1998).

Figure 2 – Securitization Trilogy



(Adapted from Stritzel 2007).

Securitization is defined in opposition to 'normal' politics (legal rules and norms of policy-making and political cogitation that are characteristic of Western liberal democracies) (Taureck 2006, 54; MacDonald 2008). To define the concept of securitization Buzan, Wæver and de Wilde use a spectrum of public issues that can range from being non-politicized to politicized and, finally, securitized.

Figure 3 – Continuum of Securitization

Non-Politicized	Politicized	Securitized
The state does not deal with the issue and it is not even included in public debate or decision.	It becomes part of the public policy and requires governmental consideration, resources or any other form of collective governance.	The issue is no longer a matter of policy debate, and demands accelerated measures that may encroach upon the normal legal and social norms.

(Adapted from Buzan and Hansen 2009, 214).

A discourse that presents a specific issue as being an existential threat to a referent object does not immediately becomes a security issue – not every speech-act is a security 'speech-act – but it is simply called a *securitization move*. In fact, it only becomes a security speech act if the audience accepts it as such (Buzan et al. 1998, 25; Balzacq 2005). As a result, securitization is an intersubjective process, because it depends on negotiations between a securitizing actor and the audience, which has the power to accept or decline the securitization of a particular issue. In other words, "security (as with all politics) rests neither with the objects nor with the subjects but *among* the subjects" (Buzan et al. 1998, 31). Besides, it is also a social construction, since it can be everything the securitizing actor says it is (Taureck 2006, 54). To summarize, through securitization an issue becomes a matter of security due to its materialization: this is driven by a securitizing actor in a security speech-act, after which there is the subsequent acceptance by an audience.

Moreover, Barry Buzan, Ole Wæver and Japp de Wilde emphasize the need for a speech-act to meet certain conditions ('facilitating conditions')[14] which influence the audience's approval. These conditions determine whether a speech-act works or not (Buzan et al. 1998, 32). There are two types of 'facilitating conditions': Internal – linguistic-grammatical – and External – contextual and social. The first consist of conditions which relate mainly to language and the rules of the act; in other words, it is important to construct a speech-act that follows the grammar of security, inspired by the idea of conventional procedures presented by Austin[15]. Secondly, there are the external conditions, which can be divided into two sub-conditions: actor-authority (concerning the social power of the securitizing actor, particularly this actor's position of authority,

[14] The J.L Austin's 'felicity conditions' are also used as a point of reference for the 'facilitating conditions' that influence the success of securitization (Buzan et al. 1998; Taureck 2006).
[15] According to Austin a conventional procedure must "include the uttering of certain words by certain persons in certain circumstances" (Austin 1962, 15)

although it is not restricted to official authority); and the features of the threat (relating to the tendency of a specific issue to be considered as threatening, which impede or promote securitization) (Buzan et al 1998, 32-33)[16].

Regarding the element of actor-authority – which relates to the social power of a securitizing-actor to securitize an issue, in spite of not restricting it to the official authority (of state representatives) – the reality is that, as a result of the power frameworks inherent to the field of security, successful securitization tends to involve the articulation of a threat "only from a specific place, in an institutional voice, by elites", largely due to their advantageous position when articulating security speech-acts (Wæver 1995; McDonald 2008; Charret 2009). Besides, despite the fact that securitizing actors are supposedly capable of securitizing any referent objects, some are more easily securitized than others due to the restriction imposed by 'facilitating conditions' (Buzan et al. 1998, 38). In addition, the 'broadening' of the security agenda is not unlimited or infinite, since both the 'facilitating conditions', as well as a dependence on audience acceptance impose some limits (Williams 2003, 514).

Securitization allows authorized securitizing actors to bypass 'normal' politics and embrace extraordinary and exceptional measures in order to deal with an existential threat (Fako 2012, 9). The normative perspective of the securitization theory differs from the typical traditionalist one, which views security as positive. According to securitization theorists desecuritization is preferable to security and it aims for "less security, more politics" (Wæver 2011, 95).

Desecuritization consists of taking the issues from the security agenda back into public political discourse and 'normal' politics; more specifically it intends to retrieve the urgent and extraordinary character, which characterizes securitization, also known as 'panic politics', from an issue and to bounce it back into the politicization arena. It usually occurs when the socially constructed (through speech-act) existential threat is perceived to have disappeared or simply became 'non-existential' (Wæver 1995; Roe 2008; Šulovic 2010; Åtland and Bruusgaard 2009). The justification for this bias relies upon the fact that:

> ideally, politics should be able to unfold according to routine procedures without this extraordinary elevation of specific 'threats' to a prepolitical immediacy. (…) But desecuritization is the optimal long-range option, since it means not to have issues phrased as 'threats against which we have countermeasures' but to move them out of these threat-defense sequences and into the ordinary public sphere (Buzan et al. 1998, 29).

[16] For a more complete and detailed explanation of 'facilitating conditions' consult: Barry Buzan, et al. 1998. *Security: A New Framework for Analysis.* Colorado: Lynne Rienner Publishers.

However, as Wæver denotes securitization has a careful bias for desecuritization (Wæver 2011, 469). Even though desecuritization is desirable in abstract, in some particular contexts securitization might be necessary. Besides desecuritization, another two concepts that are interconnected with securitization are: a-security and macro-securitization. While the former comprises a feasible optimal situation in which an issue is so firmly politicized that it has little chance of becoming re-securitized (Williams 2003; Žilović 2009), the latter is the idea of macro-securitization[17], whose guidelines are based on the same foundations that shape securitization, but on a superior scale (bigger repercussions and longer temporal impact): "they are based on universalist constructions of threats and/or referent objects" (Stone 2009, 9).

The securitization theory encompasses a great analytical utility, since it allows one to examine the origin, development and eradication of security problems. As Buzan, Wæver and de Wilde elucidated, to study a securitization is to analyse the power politic of a concept. Securitization allows for a deep and precise comprehension of:

> who securitizes, on what issues (threats), for whom (referent objects), why, with what results, and not least, under what conditions (i.e. what explains when securitization is successful) (Buzan et al. 1998, 32).

It is exactly by virtue of its analytical richness that this theory will be applied to this case study. As a result, it will be used to analyse how a security discourse, regarding terrorism, emerged after the 9/11 attacks and resulted in a 'panic politics' characterized by extraordinary measures (*Patriot Act* and *FAA*).

2.2 Critical Debate Surrounding Securitization

On immersing oneself in the literature of the securitization theory, one can almost immediately identify some strands of discussion and debate. With the purpose of summing up some of the critiques, a focus will be placed on three main areas of appraisal as distinguished by Gad and Petersen: first, the lack of an explanatory potential of the theory; secondly, the normative inferences of securitization, and finally the theoretical problem that emerges from the dichotomy between exceptional and 'normal' politics (Gad and Petersen 2011, 316).

[17] The Cold War is mentioned by Buzan as an example of a macro-securitization; on the other hand, the GWoT is used as an example of a non-macro-securitization, although its outcome has not yet been determined (Buzan 2006).

One of the most debated questions that have arisen is chiefly due to the distinction made between an internalist approach of securitization – focused mainly on the performative power of the illocutionary security speech-act, with influences of post-structuralism -, and an externalist approach, which is more constructivist and underscores the importance of the social context and audience. This distinction between the internalist and externalist visions of securitization was introduced by the so-called second-generation of securitization (Stritzel 2007; Balzacq 2005; Roe 2008) to point out the incapability of securitization to incorporate adequately the role of social context and audience and to support a more externalist reading of the theory. It was introduced by Holger Stritzel[18], but was also recaptured by other scholars (Stritzel 2007; Balzacq 2005; Balzacq 2010; McDonald 2008).

Regarding the social context, the scholars defend the relevance of context, audience and power, which they believe is relegated to a secondary position when compared with the discursive construction of security. According to them there is a tension[19] between a self-referential practice (speech-act) and intersubjective nature (a negotiation of the securitization process between the securitizing actor and the audience), which is also affected by external conditions ('facilitating conditions' and the authority of the securitizing actor), which are undertheorized and poorly explained (McDonald 2008; Balzacq 2010; Stritzel 2007). As Stritzel argues:

> in light of internalism/externalism, it becomes clear that the Copenhagen School struggles with and suffers from an attempt to have both, a social sphere (with 'actors', 'fields', 'authority', 'intersubjectivity', 'audience', and 'facilitating conditions') and a post-structural/postmodern) linguistic theory based on Derrida and performativity" (Stritzel 2007, 377).

A failure occurs when the theory tries to integrate and combine this social domain with the performativity of the act. Indeed it leaves several questions unanswered, such as: How can we know if an issue was successfully securitized?; Which audience, and why, needs to be convinced in order to achieve successful securitization? (Roe 2012; McDonald 2008; Stritzel 2007). As Buzan and Hansen ackowledge there is a certain methodological ambiguity[20]. Balzacq proposes conceptualizing security as a strategic

[18] According to Stritzel, an internalist approach to securitization is more present within the early work of Ole Wæver. However it is attenuated in his joint work with Barry Buzan, when externalist elements are integrated into the theory (Stritzel 2007, 359).
[19] According to the securitization theory, the securitization process is a self-referential practice which has an inherent power within it, just 'by saying security'. However, at the same time scholars (Wæver, Buzan and Wilde) highlight the importance of 'facilitating conditions' and the role of the audience for securitization's success (Buzan et al. 1998).
[20] A methodological ambiguity emerges "as it argues that the utterance of the word 'security' is not the decisive criterion and that securitization might consist of 'only a metaphorical security reference'. Yet what it entails has not been further explored, and the majority of the theory leans in the direction of a more explicit verbal speech act methodology" (Buzan and Hansen 2009, 216).

(pragmatic) act, where the "discourse is not self-referential" (Balzacq 2005), instead of a speech-act. This framework proposed by Balzacq is based on an externalist reading of securitization (Balzacq 2010)[21].

Furthermore, correlated to the audience and its relevance Balzacq also suggests that the securitization process is better apprehended by a perlocutionary act instead of an illocution, because the first more appropriately captures the correlation between act and audience (Balzacq 2005; Taureck 2006).[22] As Balzacq explains, the focus on the illocutionary has diminished the relevant role of the audience, and the emphasis has been placed on textualism, which skirts around the importance of context in securitization processes (Balzacq 2010, 67).

From another perspective, the so-called School of Paris, as contended by Didier Bigo, also criticizes the focus placed on speech-acts, arguing that one must not exclusively emphasize an inherent exceptionalism[23]. According to Didier Bigo[24]:

> if securitization is correlated with the use of performatives, with symbolic struggles and symbolic politics, as Ole Wæver, shows, these elements are the surface of an iceberg, not the core (Bigo 2002; McDonald 2008; Fako 2012).

Another criticism directed at the theory is that, even though Wæver and Buzan declare the theory to be constructivist "all the way down" (Buzan and Wæver 1997, 245), since the 'facilitating conditions' are not integrated in the constitution of the speech-act and the agents – actors and audience – and system are not recognized as being socially constructed, securitization suffers from what Huysmans calls a 'dualistic constructivism'[25] (Huysmans 1998; Šulovic 2010, 5).

Numerous authors have also criticised the lack of attention attributed to visual securitization and that the relevance images may develop in the securitization of a

[21] Advocating the extreme relevance of social context for a comprehensive securitization theory, the author refuses security as a speech-act and proposes to re-conceptualize it as a strategic (pragmatic) act which can be decomposed into two levels: agent and act (Balzacq 2005, 178). Balzacq asserts that "securitization is better understood as a strategic (pragmatic) practice that occurs within, and as a part of, a configuration of circumstances, including the context, the psycho-cultural disposition of the audience, and the power that both speaker and listener, bring to the interaction" (Balzacq 2005, 172).

[22] Interesting for review is also the response provided by Rita Taurek, who explains that as Wæver was aware of Austin's work, his choice for the illocutionary act was intended and can be justified by the secondary plan that the intersubjective nature holds in comparison to the primary role of the securitizing actor (Taureck 2006, 19-21).

[23] For these scholars, especially Didier Bigo (2002) the securitization goes way beyond mere speech-acts that enable extraordinary and exceptional measures. Thus, using the example of immigration and its consequent securitization, Bigo argues that a securitization process involves constructing security through routinized practices and applying it to different issues.

[24] According to Didier Bigo the securitization of immigration "emerges from the correlation between some successful speech acts of political leaders, the mobilization they create for and against some groups of people, and the specific field of security professionals (which, in the West, and despite many differences, now tend to unite policemen, gendarmes, intelligence services, military people, providers of technology of surveillance and experts on risk assessments). It also comes from a range of administrative practices such as population profiling, risk assessment, statistical calculation, category creation, proactive preparation, and what may be termed a specific *habitus* of the "security professional" with its ethos of secrecy and concern for the management of fear or unease " (Bigo 2002, 65-66).

[25] Huysmans defines it as a 'dualistic constructivism' because "while their understanding of security is radically constructivist – there is no reference made to real existential threats existing regardless of the definitional practices – their interpretation of social relations in general is not" (Huysmans 1998, 492).

particular issue. These scholars agree on an integration of visual securitization in further research on securitization (Williams 2003; Möller 2007; Hansen 2011; Balzacq 2005; McDonald 2008; Campbell and Shapiro 2007)[26].

Questions arise such as: 'what power does the media holds in a securitization process?' Hence, Williams proposes an analysis of how meaning is processed through images, what the impact of these images on an audience is, and how they work as communicative action (Williams 2003, 527). Integrating and exploring the impact of visual securitization within a strategic approach to this theory is the proposal by Thierry Balzacq (Balzacq 2005, 179).

However, as McDonald states a difficulty may arise from this attempt to integrate visual securitization within a securitization framework. His view is that, while the classical application of the latter has mainly concentrated on the role of political leaders and elites in the construction of a threat, the application of images, and other forms of visual securitization may defy it, since the "key securitizing actors are artists and the media" (McDonald 2008, 569).

Albeit, under the framework of securitization it is reasoned that anything can become a referent object; the theory is conceptualized with an underlying 'deep' conception of security, where the majority of securitization's analysis is centred on the role of the state (Floyd 2007; McDonald 2008). Some critics point to a certain theoretical state-centrism inflamed by realist influences (Wyn Jones 1999; Booth 1991; Knudsen 2001). Rita Floyd identifies two reasons for this criticism: firstly, because in the early works on securitization Wæver states that "the concept of security belongs to the state" (Wæver 1995, 49) and only later[27] acknowledges the integration of other referent objects, such as the individual; secondly, in spite of referring to other referent objects, much of Copenhagen School's analysis is still concerned with the role of state in security (Floyd 2007, 41).

As a major proponent of the individual as a referent object of security, Ken Booth criticizes the fact that securitization does not focus on "real people in real places" (Booth 1995, 123). Ken Booth and Wyn Jones not only criticize the state-centric character of the theory, but they also propose a form of dealing with it: focusing on the

[26] For more information about visual securitization, consult: "Special Issue on Securitization, Militarization and Visual Culture in the Worlds of Post-9/11." 2007. *Security Dialogue* 38(2).
[27] See: Barry Buzan et al. 1998. *Security: A New Framework for Analysis.* Colorado: Lynne Rienner Publishers.

individual, particularly on human emancipation[28] (Booth 1991; Wyn Jones 1999). Besides, according to them the focus of securitization on an 'institutional voice' (elites) marginalizes the power of the audience (McDonald 2008). Floyd, on the other hand, states that critiques of state-centrism, surrounding securitization, do not correspond to reality. As a matter of fact, according to this scholar:

> the reason for the focus on the state is that most securitizations are still performed by state actors, as these – unlike most other securitizing actors – have the capabilities to make securitizations happen (Floyd 2007, 41)[29].

Besides this strand of debate, the normative inferences of securitization are also discussed among academics. One of the most debated questions regarding the securitization theory concerns the normative implication of a tendency towards desecuritization. The framework of securitization:

> ignores the central importance of the way in which security (as a normative goal or expression of core values) is understood in particular contexts. It also suggests that security acquires content only through representations of danger and threat. Such a framework encourages a conceptualization of security politics as inherently negative and reactionary (McDonald 2008, 565).

Ole Wæver imposed desecuritization (displacing issues from the security realm) as a normative necessity. Securitization was constructed as a negative state in which extraordinary measures were predominant and set above 'normal' politics – which are governed by the established rules: "politics according to the rules as they exist" – (Wæver 1995; Buzan et al. 1998). This negative connotation was also prevalent in the subsequent works. However, besides the short definition of what comprises desecuritization, not much is additionally referred with regard to it.

Rita Floyd asserts that this notable preference for desecuritization is biased and even limited, as there can be positive and negative securitizations[30]. On the other hand, Claudia Aradau (2004) characterizes securitization as a negative process, due to its extraordinary mode of politics that allows for the pacing of decision-making processes. Wyn Jones also refers to this normative gap stating that securitization fails in justifying why some outcomes are more desirable than others (Wyn Jones 2005, 218).

[28] According to Booth security may be understood as emancipation: "emancipation is the freeing of people (as individuals and groups) from those physical and human constraints which stop them carrying out what they would freely choose to do. War and the threat of war is one of those constraints, together with poverty, poor education, political oppression and so on. Security and emancipation are two sides of the same coin. Emancipation, not power or order, produces true security. Emancipation, theoretically, is security" (Booth 1991, 319).

[29] This statement goes hand in hand with the idea that in spite of securitization not being theoretically state-centric, it may have state-centric evidences in its outcomes (Buzan and Wæver 2003, 71).

[30] A positive securitization, according to this scholar, "can be judged according to an agent-neutral value" (Floyd 2007, 44).

Additionally, Charret identifies and underscores a normative dilemma within the securitization theory:

> how to write and analyze securitization processes without replicating dominant and exclusionary modes of approaching security resulting in negative securitization processes (Charret 2009, 11)[31].

The author claims that, in spite of the intentional avoidance by securitization theorists to establish normative criteria in order to evaluate securitization, criticism has increased. This is due to the normative implications that unavoidably appear as a consequence of researching securitization (Charret 2009, 14)[32]. Jeff Huysmans also states that speaking and writing security "is never innocent" (Huysmans 2002, 47). Tadjbakhsh and Chenoy refer to the danger - inherent to a lack of normative criteria in securitization – of certain benefits, such as the securitization of new issues, which may be granted to institutions responsible for security (Tadjbakhsh and Chenoy 2007, 79).

Finally, the last line of criticism focuses mainly on the dichotomy between exceptionalism and 'normal' politics and the theoretical problems that this divergence generates. This debate is intrinsically connected to the previous one, because it also has a normative inference. In fact, critics highlight that securitization implies the use of exceptional and urgent measures to deal with a security issue, which involves breaking away from politicization – or 'normal politics' – which is out of the security realm (Buzan et al. 1998; Watson 2011; Charret 2009; Aradau 2004). Thus, for the Copenhagen School, and especially in the case of the securitization theory, the inconvenient features of the securitization process remain with its outcome:

> failure to deal with issues as 'normal' politics. Ideally, politics should be able to unfold according to routine procedures without this extraordinary elevation of specific threats (Buzan et al. 1998, 29).

This *fixated form* that delineates securitization is acknowledged by Wæver who claims that "also securitization theory itself suffers: this fixation of form becomes the essential blind spot that every theory has"[33] (Wæver 2011, 469). This implicit

[31] The negative securitization processes are those which stem from structural and symbolic unchallenged power relations "as well as social or political processes of exclusion" (Charret 2009, 11).

[32] Interesting for review are also some of the responses given to close this normative implication: the discursive-ethical response of Williams and Wyn Jones and the consequentialist response of Rita Floyd (that combines securitization with human security). Consult: Catherine Charrett. 2009. *A Critical Application of Securitization Theory: Overcoming the Normative Dilemma of Writing Security*. Barcelona: Institut Català Internacional per la Pau; Rita Floyd. 2007. "Human Security and the Copenhagen School's Securitization Approach: Conceptualizing Human Security as a Securitizing Move." *Human Security Journal* 5: 38-49; Michael C. Williams. 2003. "Words, Images, Enemies: Securitization and International Politics." *International Studies Quaterly* (47):511-531; R. Wyn Jones. 1999. *Security, Strategy, and Critical Theory*. Boulder, CO: Lynne Rienner.

[33] However, in spite of recognizing securitization's handicap, Wæver denotes that "even a blind spot brings insight, because only through clearly defined operations does anything emerge with clarity; even the limit of a concept is more informative than the lack

connection between successful securitization and exceptional measures is also pointed out by some academics, who claim that this form of security construction invokes a 'politics of exceptionalism' (Aradau 2004; Abrahamsen 2005; Vuori 2008; Huysmans 2006).

It is precisely due to this connection to exceptionality that the securitization theory proves to be relevant when analysing security construction in the USA in a post- 9/11 period, as is proposed in the course of this dissertation. The *Patriot Act* and FAA were accepted and introduced in accordance with the securitization process that had been initiated. Indeed:

> the events of 11 September 2001 are a prototypical security event precisely because they were immediately politicized as an exceptional and global threat to the United States and the Western world more generally. They led to urgent introduction of emergency legislation that reinforced powers of the executive to the disadvantage of the legislative powers, a rhetoric of a 'war on terrorism', and to the large-scale use of military power. In that sense it confirmed what Wæver (1995) identified as the central characteristic of the national security tradition: the articulation of existential threats that are framed in the language of war and that legitimate the introduction of exceptional policies (Huysmans 2006, 5)[34].

Hence, some authors question the adequacy and ethical legitimacy of adopting exceptional measures, as opposed to liberal-democratic measures, which sometimes disregard civil liberties and human rights in order to maintain security (Bigo and Tsoukala 2008; Huysmans 2006; Fako 2012; Abrahamsen 2005). In spite of not explicitly making a distinction between 'normal' and exceptional politics, it is generally accepted that the first coadunates with the liberal-democratic context (Vuori 2008; Wilkinson 2007; Roe 2012).

This is some of the criticism revolving around the securitization theory, though much more may be pointed out. However, temporal determination restricts the ability to dissect each one, so that those presented are specifically related to this case study[35] [36].

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of any clear distinction. It is the very attempt at analysis through the concept of securitization that establishes what is distinct in new practices that do not immediately conform to normal patterns" (Wæver 2011, 469-470).

[34] For more details, see: Chapter II.

[35] In order to find more information about securitization and its debate, access: Claudia Aradau. 2004. "Security and the Democratic Scene: Desecuritization and Emancipation." *Journal of International Relations and Development* 7: 388-413; Abrahamsen. 2005. "Blair's Africa: The Politics of Securitization and Fear," *Alternatives: Global, Local, Political* 30(1): 55-80; J.A. Vuori. 2008. "Illocutionary Logic and Strands of Securitization: Applying the Theory of Securitization to the Study of Non-Democratic Political Orders." *European Journal of International Relations* 14(1):65-99; Bill McSweeney. 1996. "Identity and Security: Buzan and the Copenhagen School." *Review of International Studies* 22:81-93; Lene Hansen. 2000. "The Little Mermaid's Silent Security Dilemma and the Absence of Gender in the Copenhagen School." *Millennium - Journal of International Studies* 29(2):285-306; C. Wilkinson. 2007. "The Copenhagen School on tour in Kyrgystan: Is securitization theory useable outside Europe?" *Security Dialogue* 38(1): 5–25.

[36] Also recommended is an analysis of the response given by Wæver and Buzan to some critics: "some inevitable negative effects of any securitization – the logic of necessity, the narrowing of choice, the empowerment of a smaller elite – are always highlighted whenever this theory is used. The 'preference' for desecuritization is not of the 'political stance' type, but an effect produced by the kinds of analysis that securitization theory spurs: it fosters critical attention to the costs of securitization but allows for the possibility that the securitization might help society to deal with important challenges through focusing and mobilizing attention and

3. Human Security

3.1 Origins of Human Security

After a journey throughout securitization literature, one should now delve into the human security debate. In contrast to the Copenhagen School, the human security paradigm is sturdily normative (Edwards and Ferstman 2009; McSwenney 1999; Booth 1991).[37] This paradigm emerged in a post-Cold War context in which academics were searching for a deeper and wider concept of security. Despite the conceptual dichotomy that characterizes this theory, a consensus is reached when talking about its focus: the individual (Kerr 2011; Owen and Liotta 2006; Tadjbakhsh and Chenoy 2007; McDonald 2002).

Besides, human security has introduced new answers to the 'old' questions[38] that frame the field of security studies. In addition to changing the focus from the state to the individual (security from whom), human security also concentrated on different values – personal freedom and individual safety, instead of sovereignty and territorial integrity – and on more threats. This paradigm encompasses new direct threats posed by non-state actors and states, as well as indirect threats (such as environmental or economic). It also relies on preferable primary means of dealing with security issues: development, sanctions and respect for human rights (Bajpai 2000; Tadjbakhsh and Chenoy 2007; Tadjbakhsh 2009) (Figure 4).

Despite presenting an alternative to a state-centred approach to security, based on realist and neo-realist principles and focusing on national security, human security does not reject or substitute the state. It continues to be primarily responsible for providing security to its individuals. As a matter of fact, according to the human security paradigm both the state and individual are 'mutually supportive', or even different sides of the same coin, and:

> it means that human security is complementing the notion of national or international security by focusing it more on the human component (and not on critical infrastructures,

resources" (Wæver 2011, 469). Consult: Barry Buzan and Ole Wæver. 1997. "Slippery? Contradictory? Sociologically Untenable? The Copenhagen School Replies." *Review of International Studies* 23(2):241-250; Ole Wæver. 2011. "Politics, Security, Theory." *Security Dialogue* 42(4-5):465-480.

[37] The roots of human security construction may also be found in the work of Ken Booth, a proponent of the Welsh School and an advocate of an individual-centered approach to security. For more information consult: Ken Booth. 1991. "Security and Emancipation." *Review of International Studies* 17(4): 313-326; Bill McSwenney. 1999. "Security, Identity and Interests: A Sociology of International Relations." Cambridge: Cambridge University Press.

[38] The questions security for whom; of what values; from what threats and by what means were introduced by Baldwin (Baldwin 1997, 13-16).

institutions or territory) (Prezelj 2008, 11; Axworthy 2004; Heinbecker 2000; Tadjbakhsh and Chenoy 2007).

Figure 3 – Comparing National Security and Human Security

National Security and Human Security

	National Security	*Human Security*
Security for whom	Primarily the state	Primarily the individual
Security of what values	Territorial integrity and national independence	Personal safety and individual freedom
Security from what threats	Direct threats from other states	Direct threats from states and non-state actors + indirect threats
Security by what means	• Force as the primary instrument of security, to be used unilaterally for a state's own safety • Balance of power is important; power is equated with military capabilities • Cooperation between states is tenuous beyond alliance relations • Norms and institutions are of limited value, particularly in the security/military sphere	• Force as a secondary instrument, to be used primarily for cosmopolitan ends and collectively; sanctions, human development and humane governance as key instruments of individual-centred security • Balance of power is of limited utility; soft power is increasingly important • Cooperation between states, international organizations and NGOs can be effective and sustained • Norms and institutions matter; democratization and representativeness in institutions enhance their effectiveness

(Bajpai, 2000).

It is relevant to assert that human security has been contributing to a shift in paradigm, even though it does not unite a conceptual consensus[39]: firstly because it proposes an ethical rupture with traditional state-centric approaches (it centres on the individual, shifting the security priority to him as its primary and fundamental goal); and secondly, due to a methodological modification (once it states that through the security of the individual, state and regional security may be achieved). Moreover, it constitutes an innovation in the field of security studies, as it considers the introduction of new actors, new ethical values and new frameworks of analysis. Moreover, and as Thomas Kuhn claims, to be considered a theory, a paradigm must be better than its competitors, but it "need not explain all the facts with which it can be confronted, thus making research possible" (Kuhn 1962; Tadjbakhsh 2009; Fukuda-Parr and Messineo 2012; Tadjbakhsh and Chenoy 2007).

Despite some occasional references to the concept, and the idea behind it[40], it was through the Human Development Report of the United Nations (UNHDR) in 1994 that it became internationally recognized and instrumentalized (Paris 2011; Glasius 2008;

[39] See: Chapter I, Section 3.1.

[40] There is a historical genesis behind the concept of human security, thus the idea of the individual as a center of reference to security had been introduced earlier in the Universal Declaration of Human Rights, and also in the Brandt Commission's Report on Common Security (1981). In order to deepen this specific question, check: Shahrbanou Tadjbakhsh and M. Chenoy. 2007.*Human Security: Concepts and Implications*. New York: Routledge.

Bellamy and McDonald 2002; Thomas and Tow 2002; Hampson 2008). Nevertheless, its conceptualization has attracted both academic and policy attention and has been responsible for thousands of pages of articles, books, reports and many other publications[41] (Glasius 2008).

3.2 Critical Debate Surrounding Human Security

From its emergence as a concept promoted by the UN, particularly through the 1994 UNHDR and its policy application by the so-called middle-powers (Canada, Norway and Japan) to its theoretical utility, much has been debated with regard to human security. In order to comprehend this paradigm, one must refer to one of the main points of criticism that revolve around it: its conceptual dichotomy (Parr and Messineo 2011; Oberleitner 2002; Thakur 2004; Owen 2004; Buzan 2004; Bajpai 2003; Behringer 2005).

In fact, concerning human security: "everyone is for it, but few people have a clear idea of what it means" (Paris 2001, 88). Many expressions have been used to characterize it: "an holistic paradigm" (Acharya 2004), "a malleable concept" (Christie, 2010), "a paradigm shift and bridging concept" (Glasius 2008), "a dog that didn't bark" (Chandler 2008), or even "a reductionist, idealist notion that adds no analytical value" (Buzan 2004). Two main conceptualizations[42] of human security have centred the debate: a broad and a narrow.

Broad approach – This was introduced by Mahbub Ul Haq, in the UNDPR of 1994, where Human Security was defined as being a combination of both 'freedom from fear'- political violence- and 'freedom from want'[43] – social-economic and development threats -, founding what is entitled as the broad concept of human security. This definition states that human security is intrinsically connected to human

[41] Some of the cornerstones related to this concept, besides the UNDP report, are: the Lysøen Declaration signed by Canada and Norway on May 1998 (partnership for action on human security), the formation of the Human Security Network (composed of thirteen governments committed to developing foreign policies that respect human security principles) on September 1998, the report Human Security Now 2003, that introduced the debate of the 'responsibility to protect' (from the Commission on Human Security); and finally, the years of 2004 and 2005, when human security became a topic of reform in UN and EU agendas.

[42] These are the most debated conceptualizations; however there are others, such as the threshold definition, advocated firstly by Taylor Owen (2004), which has been gaining proponents. For Owen it would be "a hybrid definition, one that requires sacrifice on the part of both broad and narrow proponents. Instead of being pre-chosen, threats would be included on the basis of their actual severity. All would be considered, but only those that surpass a threshold of severity would be labeled threats to human security" (Owen 2004, 383). Another definition proposed is the human rights based approach to human security by Fen Osler Hampson(2002), and also by Persaud (2008). Consult: Fen Osler Hampson. 2008. "Human Security." In *Security Studies: An Introduction*, ed. Paul Williams, 229-243. New York. Routledge; Santhosh Persaud. 2008. "How Should the Human Rights Community Strategically Position Itself towards the Concept of Human Security?" *HUMSEC Journal* 2:27-48.

[43] The UNHDR returns to Roosevelt's definition and articulation of 'freedom from fear/freedom from want' to determine the two main components of human security (Roosevelt 1941). Annual Address to Congress of 1941 on the ''Four Freedoms.'' Available at: http://www.fdrlibrary.marist.edu/pdfs/fftext.pdf.

development. According to this report human security encompasses a great diversity of threats that may affect human life, dignity and well-being, being described as:

> a child who did not die, a disease that did not spread, a job that was not cut, an ethic tension that did not explode in violence, a dissident who was not silenced (UNHDR 1994:22).

It determines threats according to seven categories: economics, food, health, environment, politics, community and personal security[44]. Other reports and publications can also be located within the broad school: the Human Security Report of the Commission on Human Security by Sadako Ogata and Amartya Sen (2003)[45], the Japanese definition of human security which focus mainly on the 'freedom from want' and development spheres[46], or even the UNHDR 2005 (Tadjbakhsh and Chenoy 2007). This broad approach of human security introduced by the UNHDR gathered enough approval and became the dominant conceptualization in both academic and policy areas. Most broad definitions tend to add or omit threats to those highlighted in the UNHDR conception. On the academic side proponents of the broad concept often interlink human security with development, economic and social globalization and human rights[47] (Acharya 2004; McDonald 2002; Glasius 2008; Benedek 2007; Tadjbakhsh and Chenoy 2007; Tadjbakhsh 2009; Bajpai, 2003, 2004; Leaning, 2004; Alkire, 2004; Thakur, 2004; Winslow and Eriksen 2004; King and Muray 2002)[48].

Narrow approach – The divergence between these definitions resides mainly in the nature of threats. The 'narrow school' advances a stricter definition and prefers to concentrate on threats rising from political violence. The main proponents of the 'narrow school' were mostly governments interested in applying the concept as a foreign policy tool (Canada, Switzerland, Norway) (Persaud 2008). In fact, Canada[49] was responsible for one of the first narrow conceptualizations of human security, in

[44] For a complete description of what these categories include, check: UNHDR, 1994; Tadjbakhsh, Shahrbanou and Anuradha M. Chenoy. 2007. *Human Security: Concepts and Implications*. New York: Routledge.
[45] This report furthered the conceptualization debate by stating that human security is meant to protect the "vital core of all human lives in ways that enhance human freedoms and human fulfillment" (Human Security Now 2003, 4).
[46] The Japanese definition states that human security is the "preservation and protection of the life and dignity of individual human beings. Japan holds the view, as do many other countries, that human security can be ensured only when the individual is confident of a life free of fear and free of want" (Takasu 2000).
[47] The correlation between human security and development, human rights and conflict resolution is not consensual and has been increasingly debated. While some authors propose an integration of these areas in the framework of human security, others prefer to keep it separated. Consult: Shahrbanou Tadjbakhsh and Anuradha M. Chenoy. 2007. *Human Security: Concepts and Implications*. New York: Routledge.
[48] King and Muray, as well as, Bajpai propose a narrower definition of human security within its broad conceptualization, which is interesting for review. While King and Muray propose to measure the years of human security, Bajpai tries to construct a Human Security Audit. Look into: King, Gary and Christopher J.L. Murray. 2002. "Rethinking Human Security." *Political Science Quaterly* 116(4):585-610; Kanti Bajpai. 2003. "The Idea of Human Security." *International Studies* 40(3):195-228.
[49] According to Canada's Foreign Ministry "human security means freedom from pervasive threats to people's rights, safety or lives" in Foreign Ministry website. Available at: http://www.dfait-maeci.gc.ca/foreignp/humansecurity/menu-e.asp.

order to adapt it as a foreign policy tool. This narrow conceptualization focused mainly on the 'freedom from fear' scope of human security, emphasized the protection of individuals from violence and respect for human rights, and criticized the lack of policy precision and utility of a broad conceptualization (Prezelj 2008; Shinoda 2004; Fukuda-Parr and Messineo 2012). From the Canadian narrow conceptualization another definition emerged, which has been correlated with human security: the responsibility to protect (R2P)[50]. Moreover, the Human Security Report advanced by Andrew Mack also finds a place within the narrow school as it centres on "any form of political violence" (Mack 2005, 1). On the academic side, the support for a narrow definition is also evident in authors such as Macfarlane, Khong (2006) and Krause, who claim that a:

> broad vision of human security is ultimately nothing more than a shopping list; it involves slapping the label of human security on a wide range of issues that have no necessary link. At a certain point, human security becomes a loose synonym for 'bad things that can happen (Krause 2004, 367).

Besides the conceptual criticism surrounding human security three strands of added criticism can also be identified: one that concerns the analytical utility of the theory; a second critique pertaining to the operational applicability of human security and a third critique regarding its political and normative implications. In relation to criticism directed at the theoretical utility of human security, it is intrinsically related to the critiques regarding conceptual dichotomy (Krause and Williams 1997; Hatalay and Nossal 2004; Krause 2004; Thomas and Tow 2002). Barry Buzan, one of the main critics of human security as a paradigm, states that "it proliferates concepts without adding analytical value" (Buzan 2004, 369)[51].

In order to justify their position, the critics, claim that the conceptual broadness of human security, with a holistic set of threats, is responsible for the lack of analytical utility. Roland Paris points out that the ambiguity of the concept renders a negative academic and policy usefulness (Paris 2004). Thomas and Tow also proposed correlating the concept with a continuing centrality of the state as a referent object.[52] Nevertheless, proponents of human security have reject this proposition, stating that it would undermine the innovative character of this concept, which presents a departure

[50] Responsibility to Protect consists of "the role of the international community in humanitarian interventions in countries where the states, weak or predator, cannot or does not protect individuals" (Tadjbakhsh 2009). For more information about the correlation of human security and Responsibility to Protect, consult: Shahrbanou Tadjbakhsh and Anuradha M. Chenoy. 2007. *Human Security: Concepts and Implications*. New York: Routledge.

[51] A point of view rejected by Andrew Mack, who claims the realist incapability to deal with new international problems and actors in international relations (Mack 2005).

[52] According to them "if the term 'human security' were defined more narrowly, it would accrue greater analytical and policy value" (Thomas and Tow 2002, 178).

from the militarist approach to security (Bellamy and McDonald 2002, 373)[53]. Among the proponents of human security, the analytical criticism comes from the narrow advocates, who focus on the broad conceptualization of the concept, and for whom:

> any definition that conflates dependent and independent variables renders causal analysis virtually impossible. A concept that aspires to explain almost everything in reality explains nothing (Mack 2005, 367; Macfarlane and Khong 2006).

For the narrow supporters, any added conceptual value is lost in broadening the concept to an utopian number of threats, because studying causal relations requires an analytical separation that cannot be found within the 'broad school'. Furthermore, its political salience is also diminished (MacFarlane and Khong 2006). Besides, according to the partisans of a broad agenda, it is precisely this holistic and all-encompassing conception that brings an innovative character to human security and allows for an interdisciplinary approach - including development, human rights and conflict resolution[54] - (Acharya 2004; Bellamy and McDonald 2002).

The second strand of criticism focuses on implementation and operationalization difficulties. In fact, numerous scholars criticize the difficulty of applying the *rhetoric* of human security to the realm of *praxis*. Hence, the problems are related to placing a normative framework within a security theory[55], prioritizing different threats and lacking effective measurement. In justifying this inherent difficulty, academics refer to its lack of focus (breadth) and definition (Prezelj 2008; Tadjbakhsh and Chenoy 2007; Paris 2001). As claimed:

> trying to ensure that ordinary people are safe from threats to their well-being may be an 'honourable' goal, but it involves a potentially extensive and expansive foreign policy agenda. Without some means of limiting the scope of whose safety is to be protected, any government that embraces the human security agenda faces a daunting challenge: To which of the vast range of threats to the safety of ordinary people should it respond? And what tools of statecraft should be used, and under what circumstances? (Hataley and Nossal 2004, 7).

Hence, attempting to coordinate the human security agenda with its political operationalization may alter its scope, its capabilities and emancipatory characteristics

[53] For more detailed information regarding Thomas and Tow propositions and the response given by Bellamy and McDonald, consult: Nicholas Thomas and William T. Tow. 2002. "The Utility of Human Security: Sovereignty and Humanitarian Intervention." *Security Dialogue* 33(2):177-192; Alex Bellamy and Matt McDonald. 2002. "'The Utility of Human Security': Which Humans? What Security? A Reply to Thomas & Tow." *Security Dialogue* 33(3):373-377.

[54] The lack of definition and delimitation of which impact and relation human security shares with development, human rights and conflict resolution/intervention are also debated and do not gather consensus.

[55] Using the example of Timor and focusing on the limits of human security, Hataley and Nossal demonstrate that in spite of adapting human security as a foreign policy tool, Canada has not applied it to the context of the violent conflict in East Timor. Thus, these academics focus on the implementation of human security and its controversies (Hataley and Nossal 2004). This case study is also interesting for review: Hataley, T. S and Kim Richard Nossal. 2004. "The Limits of the Human Security Agenda: The Case of Canada's Response to the Timor Crisis." *Global Change, Peace & Security* 16(1):5-17.

(Bellamy and McDonald 2002, 375). In the domain of the policy and normative implications, criticism focuses firstly on challenging the role of the state and state sovereignty, and secondly, on the normative dominion. The main criticism is that human security contributes to a North-South or East-West[56] divide and focuses on the universalism of human security that only considers Western values and principles, ignoring the diversity of values around the globe (Tadjbakhsh 2009; Tadjbakhsh and Chenoy 2007; Acharya 2001). Thus:

> the so-called southern countries, especially the G77 group, express its criticisms against the human security paradigm, fearing it as a tool for the West to impose its values and order and for big powers to justify their interventions abroad (Tadjbakhsh and Chenoy 2007, 35).

Henceforth, several academics have also stated that human security has been used mainly by middle-power states, such as Canada and Japan as a tool to achieve state interests and improve their middlepowermanship[57] (Suhrke 1999; Persaud 2008; McDonald 2002; Behringer 2005; Fukuda-Parr and Messioneo 2012; Christie 2010). Finally, and going back to policy implications, Krause, Buzan, MacFarlane and Mack[58] (2005) criticize the danger of the over-securitization[59] of issues - turning everything into a security threat ends up in turning nothing into a priority. Krause highlights the possible consequences and (lack of) utility of securitizing issues such as development and human rights.

3.3 Operationalization of Human Security

After an in-depth analysis of human security literature, it is relevant to determine which conceptualization will be used as a reference for this case study. Thus, human security will be analysed through the 'narrow' approach lenses, focusing on "freedom from fear". There are two main reasons for this choice: firstly, it does not ignore the potentialities of including non-violent human security threats, but is simply a matter of utilitarianism, pragmatism and analytical application (to find causal-hypotheses), due to the fact that this case study essentially focuses on the disrespect for civil and political

[56] In order to deepen this issue, see: Amitav Acharya. 2001. "Human Security: East versus West." *International Journal* 56(3): 442-460.
[57] Middlepowermanship consists of trying to adopt a multilateral position and good governance solutions to deal with international issues.
[58] For more information consult: What is Human Security: Comments by 21 authors (2004).
[59] Securitizing here means bringing issues into the realm of security.

human rights, which is adequatedly covered by this definition[60]; secondly, because the development and 'freedom from want' has not been granted a position of relevance, since the focus lies in the US, considered one of the most developed countries in the world. Thus, a contextual definition of human security was conceptualized, once it offer a solution to the concept's deficiencies deriving from its holism, that is to say, its weak descriptive and causal power.

> They [contextual definitions] also permit the focus of the research to be redirected towards the development of issue-specific micro theories and, thus, they additionally provide a solution to the problem of constructing a comprehensive human security theory with concurrent utility for all relevant disciplines. In this regard, it would presumably be possible to see contextual definitions serving as launching pads for the development of human security specialized/contextual theories (for problems such as poverty, post-conflict reconstruction or migration) and progressively proceed, in a phased approach, to the construction of a general theory (Tzifakis 2011, 363).

Despite being a narrow conceptualization, it does not concentrate solely on the military and physical component of violence, but also on its immaterial component, which in this specific case, will rely on the disrespect for individuals' civil and political rights of individuals by a government. Spijkers defines freedom from fear as " the right of the individual to be protected against violence committed against him or her by his or her own government" (Spijkers 2007, 11). On the other hand, Canada defined human security as a "freedom from pervasive threats to people's rights, safety or lives". The conceptualization proposed combines these two definitions, due to the fact that they are complementary and because adding Spijkers definition of 'freedom from fear' averts the attempt made by the Canadian definition to focus on external – beyond borders - threats to human security, and thus avoid a policy adjustment that may blur the academic aim of this dissertation.

Therefore, for the purpose of this dissertation, *human security is interpreted as the freedom from material violence – physical threats to life and safety, such as torture, killing or terrorism – and immaterial violence – disrespect for civil and political rights, such as right to privacy, to freedom of thought or to a fair trial - by his/her government or other states* (Table 1).

[60] As Benedek states "in terms of human rights, the freedom from fear mainly corresponds to the civil and political rights and the freedom from want can be equalled to economic, social and cultural rights" (Benedek 2007, 32).

Table 1 – Human Security Operationalization [61]

Security for whom (referent object)	*Individual* (+ State - responsible for individual's security).
Security for which values	Individual's life, personal freedoms and human rights.
Security from what (threats)	*Violence:* -Material violence – Physical abuses and threats to life and safety; -Immaterial Violence – Disrespect for civil and political rights.
Security by what means (strategies)	Promotion of public safety and human rights, conflict prevention; multilateralism (state and non-state actors); good governance; use of military force only as secondary.

(Adapted from Tadjbakhsh and Chenoy 2007).

3.4 Human Security and Human Rights in the Context of the War on Terror

The conceptualization of human security may be responsible for some questions in the reader's mind: Why is the human security theory applied to this specific case study, since the USA does not even consider it as a foreign policy tool?; what is the correlation between human security and human rights and civil liberties?, or even why does the immaterial component of human security only focus on civil and political rights? These are some questions that will be dealt with next.

Why is human security theory applied to this specific case study, since the USA does not even consider it as a foreign policy tool?

One of the primary aims of this case study is to demonstrate why human security was harmed by the intensification of terrorism securitization in a post-9/11 context. In fact, in spite of not being used, referred or even discussed by American elites and state

[61] Human security as conceptualized in this dissertation.

representatives[62] (Liotta 2002), human security has been harmed by counter-terrorist measures. It represents an alternative paradigm, acknowledged by many, whose departure from the state-centric focus to an individual emphasis is much needed to adequately frame the war against terrorism. Hence,

> human security has been introduced because our contemporary world needs comprehensive approaches to security (and that) need remains unchanged (Shinoda 2004, 20).

In fact, the focus and return to a characteristically realist state-centric security paradigm by the USA (Liotta 2002; Gilmore 2011; Buzan 2006) on the War on Terror has contributed to a limitation and disrespect for human rights, and consequently of human security, only justified by a securitization of terrorism. Thus, the counter-terrorist strategies adopted by the USA have rejected the application of the human security paradigm, which ended up exacerbating threats to individuals and individual insecurity in the counterterrorism context (Ferstman 2009; McDonald 2002).

After the 9/11 attacks a demand is expressed not only for state security, but also for a focus on the individual through the consideration of human security as a security paradigm. Hence, as Liotta warned there must be a convergence of national security and human security. Otherwise an:

> excessive focus on one aspect of security at the expense or detriment of the other may well cause us to be 'boomeranged' by a poor balancing of ends and means in a changing security environment (Liotta 2002, 487).

Besides, the framework of human security allows for a convergence of a people-centred approach of relevance to state-security relevance (Ambrosetti 2008, 441; Prezelj 2008; Heinbecker 2000; Tadjbakhsh and Chenoy 2007). Here expressed is the fact that human security can be used to rethink counterterrorism strategies and approaches (Ferstman 2009, 558) since, through its application human rights may not be subverted to overriding national security concerns[63].

What is the correlation between human security and human rights and civil liberties?

[62] In fact, "human security has not gained ground in countries like the United States. This especially applies to the post-9-11 social environment in the US. With the expanded interest in military affairs, human security tended to be understood as an even more unclear notion, if not irrelevant" (Shinoda 2004, 20). Besides, as Liotta states "the reality for the USA, post-11 September 2001, is that there is a foreground focus on two specific issues: the war on terrorism and homeland security. At the same time, there is also a backdrop of critical uncertainties, which, if ignored, can equally 'boomerang' and create ugly short-term and long-term outcomes" (Liotta 2002, 484).

[63] See: Chapter II, Section 3.1.1.

Human security and human rights are two intrinsically correlated concepts[64]. While human rights law is concerned with individual security[65], human security also depends on respecting human rights. Numerous academics have been attempting to figure out and characterize this relationship (Oberleitner 2002; Ramcharan 2002; Prezelj 2008; Tadjbakhsh and Chenoy 2007; Alkire 2003; Persaud 2008; Almqvist 2005; Benedek 2007).

For the purpose of this dissertation, civil liberties are defined as those fundamental civil rights and freedoms, such as freedom of religion, the right to privacy and freedom of association. In other words, it is considered a synonym for civil and political rights, which constitute the first generation of human rights, and which were internationally institutionalized and legalized by the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (ICCPR 1961). In this particular case study, the term used will be civil liberties, in order to differentiate the international human rights granted, for instance by the ICPCR, from the civil rights of American citizens guaranteed by the American Constitution, as well as the civil rights granted by European legal tools. Civil liberties emerged in order to impede governmental restraint, protecting citizens from governmental abuses of power.

As Benedek explains:

> human rights are also a matter of human security. Addressing the root causes of violations requires a structural as well as preventive approach. For this purpose, the rule of law and human rights are of key importance to human security (Benedek 2007, 43).

Moreover, human security presupposes a correlation of individual, national and international levels of security. Thus, achieving a multi-level security, the respect for human rights is compulsory (Ramcharan 2002; Buzan 1983).

The concept of human rights resulted from a long-term evolution of philosophical, legal, political and social thinking[66]. The conceptualization of human rights has been debated at length, but it may be summed up as "basic rights grounded in the dignity of each human being" (Tadjbakhsh and Chenoy 2007, 124). The concept is

[64] Jessica Almqvist. 2005. "Rethinking Security and Human Rights in the Struggle Against Terrorism." Paper Presented at the *ESIL Forum in the Workshop on 'Human Rights under Threat'*; Bertrand Ramcharan. 2001. Document Prepared for The Workshop on Relationship between Human Rights and Human Security, San Jose, Costa Rica, 2 December. Available at: http://www.unocha.org/humansecurity/chs/activities/outreach/ramcharan.pdf; Alkire, Sabina. 2003. "A Conceptual Framework for Human Security." *Centre for Research on Inequality, Human Security and Ethnicity* (2):1-50.

[65] As it is stated in article 3 of the Universal Declaration of Human Rights: ''Everyone has the right to life, liberty and the security of person'' (UDHR 1948).

[66] For detailed information about the evolution of the concept throughout the centuries, see: Vijapur, Abdulrahim P. 2009. "The Concept of Human Rights: National and International Perspectives." *International Politics*, 2(IV):1-35; Vasak, Karel. 1982. *The International Dimensions of Human Rights.* Paris: UNESCO; Callaway, Rhonda L. and Julie Harrelson-Stephens. 2007. *Exploring International Human Rights: Essential Readings.* Boulder, CO: Lynne Rienner Publishers.

profoundly normative-based, since its foundations rest on morals and values. The first official instrument of international human rights, which appeared mostly in response to the human rights abuses of the Second World War, was the Universal Declaration of Human Rights (UDHR) adopted on December 10th 1948, which defined fundamental civil, political, economic, social and cultural rights for individuals[67] (this encompassed the first and second generations of human rights) (Tadjbakhsh and Cheboy 2007; Callaway and Harrelson-Stephens, 2007). As the UDHR was not legally binding, despite being considered soft-law, its determinations were then applied to international treaties[68]. A series of international treaties in the post-1948 period have conferred a legal form to human rights.

Nevertheless, the respect for and granting of human rights has not only become a fundamental condition for the rule of law and democracy at an international level, but it is also a matter of national concern. Thereafter, numerous states have included human rights and civil liberties dispositions in their constitutions and other legal documents.

Three generations of human rights can be identified (Vasak 1977; Callaway and Harrelson-Stephens 2007; Vijapur 2009):

1-First Generation – focusing on civil and political rights (for instance, the right to life, to privacy, to liberty or to take part in elections);

2-Second Genaration – Economic, social and cultural rights (such as, the right to work or to social security);

3-Third Generation – 'Solidarity rights' (the post-Cold War period), such as development, collective and environmental rights.

Human rights emerged in order to face violations of human dignity while, on the other hand, human security surfaced to face the national security justifications used for curtailing human rights (Tadjbakhsh and Chenoy 2007, 126). The disrespect for fundamental human rights[69] is the main responsible for human insecurity (Hampson et al. 2002, 18). Tadjbakhsh and Chenoy are also proponents of mutual reinforcement

[67] This declaration includes "several clusters of rights: first, personal rights (right of life, recognizable before the law, protection against cruel of degrading forms of punishment, protection against racial, ethnic, sexual or religious discrimination); second, legal rights (access to legal remedies for violations of basic rights, right of due process, including fair and impartial public trials, protection against arbitrary arrest, detention, exile); third, civil liberties (freedom of thought, conscience, religion); fourth, subsistence rights (food, basic standards of health and well-being); fifth, economic rights (right to work, rest, leisure, social security); and finally, political rights (the right to take part in elections and participate in government)" (Tadjbakhsh and Chenoy 2007, 124).

[68] Among them are the International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, both from 1966. The combination of international Covenants with the UDHR, constitute the so-called International Bill of Human Rights.

[69] In this dissertation, and considering its narrow conceptualization of human security, fundamental human rights are composed of civil and political rights.

between human security and human rights. Furthermore, Oberleitner claims that these two concepts are 'porcupines in love' because, in spite of its common concerns and values - personal freedom and security - their relation is complex and worthy of further research (Oberleitner 2005).

There are several similarities and divergences between the two concepts which can be pointed out. On the one hand, both share the same referent object (individual), the same values (personal freedom and safety) and a moral/normative foundation. However, on the other hand they are also divergent:

> where human rights give entitlements and impose obligations, human security rests on feasibility and choice. Where human rights protect from rights abuse, human security protects from threats. Where human rights do not allow for a hierarchy and call for indivisibility, human security allows for prioritisation. While the two concepts may join forces to advance common goals, they should be well aware that they do so in different ways (Oberleitner 2005, 596).

Besides, some complementary features may emerge from the conciliation of both concepts. The institutionalized normative ground of human rights can be useful for the implementation and practical operation of human security. In fact, given that human security is a recent concept and paradigm, the delimitation of human rights can help its institutionalization. However, a challenge arises from this complementarity:

> the more human rights are integrated as a normative backbone into human security, the clearer and more practical the concept becomes, while at the same time its distinctive character as a new approach to ensuring human dignity wanes and gives way to a repackaged form of human rights. The challenge for human security, then, is to avoid both: losing distinctiveness by posing as human rights and losing its action-oriented character by referring to all harms imaginable (Oberleitner 2005, 598).

On the other hand, considering the respect for human rights as fundamental for human security may also contribute to avoid the attempts of national interests to overlap human rights (Liotta 2002; Oberleitner 2002). Despite the relevance of human rights to human security, the latter can not be reduced to them. Firstly, human security has an analytical utility, despite some criticism about its explanatory capability. Thus, human security:

> provides the framework for analysis of interconnections and causal links between different threats and weakenesses (…) explores the terrain before and beyond human rights: using a language identifying threats, it highlights the insecurities that arise when human rights are lacking and beyond human rights to emancipation (Tadjbakhsh and Chenoy 2007, 126-127).

Secondly, while human rights define and impose duties and obligations on others, human security has a responsibility to protect both states and citizens and has a preventive character. The latter identifies specific threats and measures in order to deal with them. Otherwise, the structural characteristics inherent to International Human Rights Law cannot deal with threats, such as terrorism or organised crime. Finally, human security also heightens the capacity of countering threats, with the inclusion of non-state actors in the provision of security (Oberleitner 2005; Tadjbakhsh and Chenoy 2007).

There are also some negative arguments presented by scholars, when considering the complementary relation between both concepts. Human security may contribute to securitizing human rights and prioritizing some rights over others (for instance, prioritizing the right to life in comparison with the right to privacy) (Buzan 2004; Oberleitner 2005). However, it must be stated that policy manipulation (Paris 2001) may always occur, not only through the framework of human rights , but also that of human security.

Why does the immaterial component of human security only focus on civil and political rights?

Finally, regarding the last question, of focusing on the so-called first generation of rights, two reasons are presented: firstly, because a narrow definition (which focus on civil and political rights) of human security is adopted in this case study, and secondly, due to the analytical focus of this particular case study, which will exclusively focus on the disrespect for civil and political rights[70].

4. Terrorism, the War on Terror and Surveillance

Subsequently it is relevant to present and operationalize the structural concepts that will guide this case study, and which serve as an analytical point of reference and instrument. These are: terrorism, counter-terrorism and the War on Terror (or the Global War on Terrorism 'GWoT'), and surveillance.

[70] It becomes relevant to explicit that the relevance of cultural, social, economic, development or even environmental rights is not ignored. However, in order to properly operationalize and find causal hypotheses within this case study it was necessary to make analytical choices. Moreover, it deals with the fact that "within each community, people are affected differently according to their entitlements, aspirations, wealth, capacities" (Tadjbakhsh and Chenoy 2007, 242).

Terrorism

The concept of terrorism has been highly contested and debated. In fact, it is controversial; firstly, because what is considered to be an act of terrorism for some, may not be for others[71]; and secondly, because it lacks a consensual and internationally recognized definition (Hoffman 2006; Freedman 2002; Forst 2009). Regarding this dissertation, the definition adopted is proposed by Bruce Hoffman, due to its complexity and suitability. According to him, terrorism is:

> ineluctably political in aims and motives; violent - or, equally important, threatens violence; designed to have far-reaching psychological repercussions beyond the immediate victim or target; conducted by an organization with an identifiable chain of command or conspiratorial cell structure (whose members wear no uniform or identifying insignia); and perpetrated by a subnational group or non-state entity (Hoffman 2006).

Terrorism has been a matter of interest and a 'fringe subject' in diverse fields for many decades: as international relations, political science, criminal justice and public policy. However, after 9/11, it gained a new and elevated category and dimension. For numerous scholars, the 9/11 attacks represented a transition to a 'super' (Freedman 2002) or 'new' terrorism, due to its innovative characteristics: its unprecedented and diffuse organization, the ability to gather unparalleled financial support, deterritorialization, and the strategic use of violence (Field 2009; Spencer 2006).

As Klaus Dodds points out, groups and terrorist networks, such as Al Qa'eda represent a geopolitical international challenge, since their diffusion and deterritorialization makes it difficult to retort (Dodds 2005, 199). This innovative character of terrorism presented in 2001 was responsible for a change in counterterrorist responses, which are measures adopted by states to impede terrorism.

[71] As numerous scholars state "one man's terrorist is another man's freedom fighter".

War on Terror

Firstly, immediately after the attacks the US President, George W. Bush, proclaimed the beginning of a 'war on terror'[72], headed by the USA. The War on Terror can be understood as the conflict established by USA's military force, and that of its allies, against the contemporary terrorism which emerged after the 9/11 attacks (Duarte 2011, 2). It dominated debates on security, since it was based on military responses instead of traditional counterterrorist measures, which were mostly based on policing and intelligence (Rogers 2008).

Other counterterrorist measures, of a legislative character, were adopted by the USA, such as the PATRIOT Act and the FAA. An exceptional nature embodies these measures because, when centring on national security interests they permitted the violation of human rights (Golder and Williams 2006, 44). They can be integrated in a proliferation of anti-terrorist measures adopted by states, since 9/11, which "seriously curtail fundamental and inviolable human rights" (Almqvist 2005, 1).

Surveillance

Contemporary terrorism presents unique and particular features: a transnational field of operation, fluidity, the actors' anonymity, the uncertainty and immediacy of the attacks that are capable of huge destruction (Duarte 2011, 1). The fight against such unpredictable threats led to a new security paradigm particularly in the US that focused on prevention. In agreement with Lobo-Fernandes:

> clearly, the attacks have greatly questioned the existing intelligence structures and guidelines, and led to the creation of new surveillance processes and mechanisms" (Lobo-Fernandes Interview 2014).

In fact, surveillance[73] became a major tool in constructing a preventive understanding of security (Lattimer 2013; Mohanan 2012, 285). Pursuant to Caspar Bowden, terrorism was used as a rationale to justify an alteration in the framework of surveillance (Bowden Interview 2014). As Luís Lobo-Fernandes highlights:

> September 11 has provided a unique opportunity to legislate and implement new provisions and measures that allow the American Administration to act preventively and almost

[72] In a public address on the 20th of September, George W. Bush declared that "our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated" (Bush 2001)
[73] For more details regarding surveillance and its dynamics, consult: Kirstie Ball, Kevin Haggerty and David Lyon. 2012. *Routledge Handbook of Surveillance Studies.* New York: Routledge.

> without limits inside the country, which, in turn, have raised serious concerns regarding privacy and personal liberty (Lobo-Fernandes Interview 2014).

Surveillance can be described differently depending on the perspectives, but for the purpose of this dissertation one selected the definition presented by William Bloss:

> police activity of gathering information on individuals. First, it includes human and technological gazing where officials watch the physical movements and activities of persons. Second, surveillance involves the acquisition of personal data. This includes the collection of biographical, biometric, or transactional data on individuals harvested from personal communications, electronic transactions, identifiers, records, or other documents (Bloss 2007, 209).

The state is one of the main agents of surveillance using data collection infrastructures in order to analyse and control individuals (Ball, Haggerty and Lyon 2012, 16). Although, surveillance was clearly intensified after 2001, it is relevant to highlight that surveillance is not a novelty in state practices, nor is it exclusively dependent upon technological development, even though the latter has altered its scale and reach (Bigo 2012, 282; Mohanan 2012, 285). Governmental demand and access to individuals' data had been escalating in the years before the terrorist attacks of 9/11. However, in the period after 9/11, increased concerns over national security heightened the government's will to gather personal information[74], particularly privately held data[75] (Rubinstein, Nojeim and Lee 2014, 96).

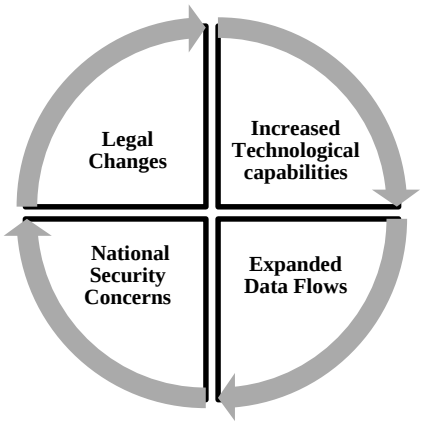
The combination of legal changes to boost surveillance tools and capabilities, increased technological capabilities, expanded data flows and increased national security concerns, have all contributed to a paradigm change from targeted to mass surveillance (Irion 2014; Bloss 2007). While surveillance had traditionally been particularized and applied only under probable cause, the environment of security – prompted by the terrorist attacks and the securitization of terrorism – contributed to the exponential increase of mass surveillance. As Kristina Irion highlights: "preemptive and systemic surveillance exceeds qualitatively and quantitatively the situation of targeted surveillance" (Irion 2014, 4).

Both the PATRIOT Act and the FAA, introduced provisions (section 215 and section 702) that legitimized and prompted the capacity for mass surveillance.

[74] According to William Bloss: "earlier campaigns such as the "war on drugs" provided the initial impetus for these changes" (Bloss 2007, 210).

[75] There are two possible ways of accessing privately held data, through 'frontdoor' access and 'backdoor' access. For more information, consult: Ira Rubinstein, Gregory Nojeim and Ronald Lee. 2014. "Systematic Government Access to Personal Data: A Comparative Analysis." *International Data Privacy Law* 4(2):96-119.

Figure 5 – Factors Contributing for a Surveillance Paradigm Change: From Targeted to Mass Surveillance



A relevant aspect is that in the context of the War on Terror, and due to the transnational character of a threat such as terrorism, a governmental and public tendency of blurring the external and internal aspects of security[76] emerged, which also had an influential impact on surveillance. According to José Pureza the "invocation of a state of exception is the rhetorical basis, and legitimates this approach of externalizing surveillance capabilities" (Pureza Interview 2014).

As Andrew Neal highlighted, a number of powers, previously reserved for foreign enemies, were applied to US citizens (Neal Interview 2014). Besides, even though the US government focused on domestic surveillance, it also used domestic legislative documents – and relied on its favoured position as an international centre of technological services – in order to massively gather intelligence information from foreign individuals living outside the US[77].

The increase of surveillance capabilities combined with the secrecy that involves its processes, as well as the new trend to apply surveillance massively, have significantly altered the relationship between surveillance and privacy[78] (Bloss 2007; Guzik 2009). A relevant and debated fact is the broad notion of suspicion associated with terrorism and its combination with this enhanced surveillance capabilities. In fact,

[76] For more information, consult: Didier Bigo. 2006. "Internal and External Aspects of Security." *European Security* 15(4): 385-404.
[77] See: Chapter IV.
[78] For more details regarding the surveillance before and after 9/11, see: Willam Bloss. 2007. "Escalating U.S. Police Surveillance after 9/11: an Examination of Causes and Effects." *Surveillance & Society* 4(3): 208-228; Kristina Irrion.2014. "Accountability unchained: Bulk Data Retention, Preemptive Surveillance, and Transatlantic Data Protection." In *Visions of Privacy in a Modern Age*, ed. M. Rotenberg, J. Horwitz, and J. Scott. Washington D.C.: EPIC; Keith Guzik. 2009. "Discrimination by Design: Predictive Data Mining as Security Practice in the United States' 'War on Terrorism'." *Surveillance & Society* 7(1):1-17.

one of the main concerns associated with these surveillance capabilities is associated with the potential ability to apply it to cases not related with terrorism[79].

Finally, for the aim of this dissertation, a particularly important aspect is that the growing governmental focus on surveillance and the enhancement of surveillance capabilities, justified by the exceptionality that embraces terrorism, has contributed to the enactment of extraordinary legislative documents that hinder civil liberties and, subsequently human security.

5. Final Considerations

The combination of the operational concepts with the theoretical approaches presented will permit an analytical scrutinity of the impact of terrorism's securitization on human security. Securitization has great analytical potential when one attempts to comprehend what is defined and constructed as a security issue. Thus, its applicability allows the researcher to apprehend who securitizes, what is securitized, which are the referent objects of the securitization, who securitizes, on what issues (threats), for whom (referent objects) and, also "why, with what results, and not least, under what conditions (i.e. what explains when securitization is successful)" (Buzan et al. 1998, 32).

Thus, due to the complexity of this case study it is assumed that these issues will be best apprehended through the combination of securitization with human security. This assumption emerges from the fact that securitization impacts can disturb and affect individuals' security, whose dimension is only captured by a human security framework. In fact, while securitization is about how something becomes a security issue, human security allows for a perception concerning the consequences of securitization. Hence, the analytical utility of human security allows us to determine which threats (for the individual) emerge from the exceptional application of the PATRIOT Act and FAA and contribute to human insecurity. As Tadjbakhsh and Chenoy claim:

> when states justify curbs on dissent, use secret surveillance, arbitrary detention, and torture in emergencies, human security contests national security considerations by showing the diversity amongst people on the issue of security and by contrasting people's security with state security (Tadjbakhsh and Chenoy 2007, 133).

[79] For instance, the use of surveillance capabilities for international business espionage or direct access to individuals's preferences, be they political, religious, commercial, or other.

Additionally, human security encumbers and reduces the ability to justify the violations of human rights with national interests and sovereignty, limiting the use of the 'shadow of law' to permit the disrespect for human rights. In keeping with what was previously stated, human rights and human security are strictly correlated, so that disrespecting the first has a profoundly negative impact on the latter: "human security requires not only the absence of violent conflict, but also respect for human rights and fundamental freedoms" (Ruddock 2004, 1). Nevertheless, the impact of the securitization of terrorism can only be grasped through the combined analytical and methodological effort of both human security and securitization. An awareness of this impact, which disrespects human rights and subsequently human security, is required as it can end up promoting terrorism.

To conclude, a balance has not yet been found between security and civil liberties; however, human security has the potential to balance individual interests with national security, since it "refers to providing security within the limitations of a respect for human rights" (Prezelj 2008, 25).

CHAPTER II. SECURITIZATION AND TERRORISM AFTER 9/11: CONSEQUENTIAL DIALECTICS

1. Introduction

After 9/11, terrorism gained a leading role on the security agenda not only, but most particularly, of the US. After a brief analysis of the theoretical contours of the securitization theory, one intends to practically demonstrate the occurrence of a securitization[80] process concerning terrorism after the events of September 2001. The terrorist attacks that occurred on the morning of September 11th 2001 were a catalyst for new counterterrorist measures in the United States of America (Etzioni 2004; Northhouse 2006; Cole 2002). However, for the introduction of these measures as well as a rhetoric of war[81] to deal with terrorism, it was necessary to establish a previous social construction of this phenomenon as a major threat to national security. This was attempted through a securitization move accepted by the audience: the US citizens. In agreement with Fischer, it is relevant to highlight that terrorism is 'always already' securitized. Nevertheless, the way this securitization develops encompasses diverse consequences depending on the construction of threats and referents (Fischer 2012, 299).

Indeed, immediately after the terrorist attacks a political discourse emerged to securitize terrorism as an existential threat to US national security[82]. Thirteen years later, national security doctrine and rationale continues to be stated in order to justify exceptional counterterrorist measures and surveillance, like those initiated in the post-9/11 period. In a second moment, though not so explicitly, after the end of Bush's Presidential term of office, the Obama Administration continued the work initiated by the previous administration as the securitizing actor. It is important to highlight that the securitization of terrorism was prolonged during the Obama Administration, since it is this continuation that justifies the maintenance of the previously introduced exceptional measures: the PATRIOT Act and the FAA.

According to Bill Calcutt secrecy has played a substantial role in perpetuating governmental policies that undermine civil liberties, as:

> the secrecy that invariably surrounds national security makes it virtually impossible for the community to determine whether counter-terrorism actions are justified and proportionate

[80] It is relevant to highlight that terrorism has been on the security agendas for a long time. However, the post-9/11 period is marked by an intensification of the securitization process. See: Chapter I.
[81] The US moved from a doctrine of deterrence to deal to with terrorism to a doctrine of active defence.
[82] See: George W. Bush. President Bush Addresses the Nation (September 20, 2001). Available at: http://www.presidentialrhetoric.com/speeches/09.20.01.html.

> to a real (rather than exaggerated) threat, and to hold elected representatives to account (Calcutt 2014, 1).

The purpose of this chapter is to demonstrate the intensification of terrorism securitization in the US, by demonstrating the existence of a securitization trilogy – composed of securitization actors, speech-act and audience (Buzan et al. 1998; Stritzel 2007), as well as its impact on the re-emergence of two established dialectics of international relations: national security vs. liberty and state of exception vs. normality. Moreover, one also intends to demonstrate that this process of securitization prompted exceptional anti-terrorist measures, particularly focusing on and analysing two legislative documents that relied on the enhancement of surveillance capabilities, which constitutes the main focus of this dissertation: the PATRIOT Act and the FAA.

2. Securitization Process

As stated above, the securitization process is not static, but is rather an intersubjective process between securitization actors and their audience[83]. While the first group introduces a discourse of security which identifies an existential threat, the latter is responsible for recognizing and authorizing that discourse (Buzan et al. 1998). A process of securitization is marked by several features: prioritization, urgency, exceptionality and extraordinary measures, because it is associated to a rationale of:

> if we do not tackle this problem, everything else will be irrelevant because we will not be here or will not be free to handle it in our own way (Buzan et al. 1998, 24).

For a securitization process to occur successfully, an essential trilogy is required: the securitizing actor, the speech-act and the audience (Stritzel 2007). This trilogy is easily identified in the securitization of terrorism immediately after September 11 of 2001. As Wæver highlights, the characterizing features of security issues are:

> urgency; state power claiming the legitimate use of extraordinary measures; a threat seen as potentially undercutting sovereignty, thereby preventing the political 'we' from dealing with any other questions (Wæver 1995, 51).

The securitization actors are both the US administrations of Bush and Barack Obama. In fact, while the first initiated and institutionalized the intensification of the securitization process, the latter perpetuated a speech-act that securitizes terrorism and

[83] See: Chapter I.

the majority of its counterterrorist measures. The speech-act was constructed through political discourses responsible for the construction of terrorism as an existential threat, whose development severely impends on national security. Finally, the audience is composed mainly by the US citizens. The intent of securitizing terrorism as global threat was also aimed and initiated in order to be accepted by an international audience, though this particularity will not be analysed in this dissertation.

Table 2 – Securitization of Terrorism Trilogy

Securitization Trilogy	**Terrorism Case**
Securitization Actors	US Administrations: Bush and Obama.
Speech Act	Terrorism as an existential national security threat.
Audience	US Citizens.

A securitization theory intends to answer the following questions: "when, under what conditions who securitizes what issue" (Buzan and Wæver 2003, 71). Below, is a presentation of the several questions that the securitization theory answers when using its theoretical focus to analyse the process of securitization of terrorism after 9/11.

Table 3 – Terrorism Securitization Process

Speech Act(s) (How?)	**Actors (Who?)**	**Existential Threat**	**Referent Objects (For What?)**	**Extraordinary measures (With what results?)**	**Audience (For Whom?)**
Political discourses	US administration members	Terrorism	National Security; US democratic values; Freedom;	Enhancement of surveillance: PATRIOT Act FAA	US citizens

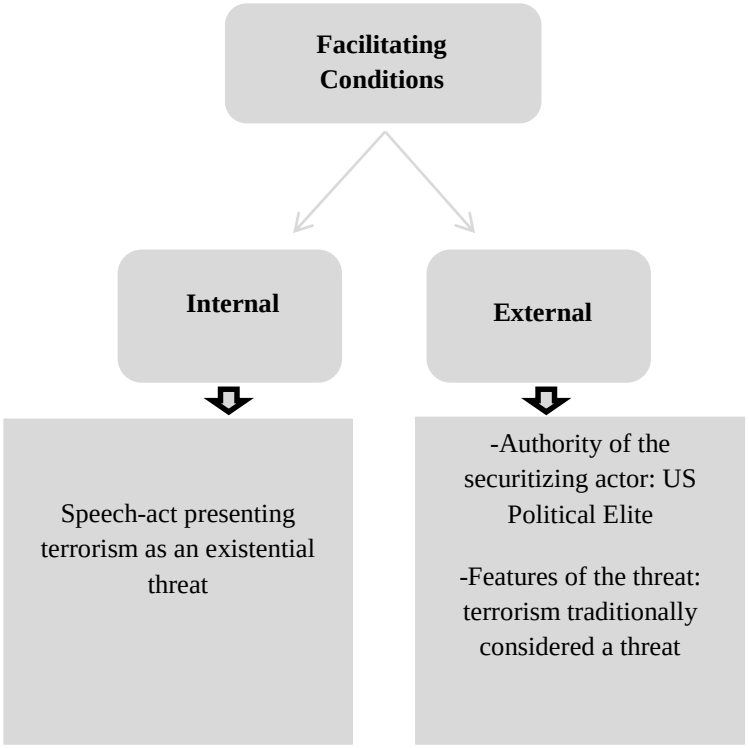
(Adapted from Crick 2012).

However, this process is limited by the existence of 'facilitating conditions' and acceptance by the audience[84]. The conditions that impel this process also play an

[84] See: Chapter I.

essential role in its success (Buzan et al. 1998; Stritzel 2007; Balzacq 2005; Balzacq 2010; McDonald 2008). In the process of the securitization of terrorism in the US the facilitating conditions are well defined and have promoted the development of the securitizing move towards a securitization process.

Figure 6 – Facilitating Conditions for the Securitization of Terrorism



Regarding the internal conditions which deal with the speech-act, these were well established immediately after the terrorist attacks. The US political elites moulded a speech embedded in the grammar of security (Neal 2009). On the other hand, external conditions were also met. Concerning the authority of the securitizing actor, it was the highest state representatives who introduced the speech-act on terrorism[85], particularly the Administration members, such as the President, the Attorney-General and others. Moreover, concerning the features of threat that may tend to be considered threatening, terrorism also met this requirement for successful securitization to occur.

It is widely acknowledged that terrorism is a global threat to security (Coşkun 2012, 41). Besides, before 9/11, terrorist attacks on US soil or against the US were becoming more and more recurrent. Even though, they caused a reduced number of

[85] See: Chapter II, Section 2.1.

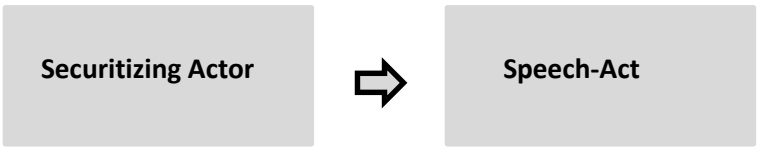
casualties, they undoubtedly created a context of fear within the US government. In fact, terrorism was on a significant course of escalation about to grow into a transnational force[86] (Reza 2014, 2-3). Thus, September 11 emerged in a context of alert, thus contributing to the emergence of this threat as one of the most existential ever.

2.1 Securitization Actors and Speech-Act

Immediately after the terrorist attacks, the political discourse in the US was inflamed with words such as 'terrorism', 'War on Terror' or 'enemies of democracy'. The US political elite affirmed itself as a securitizing actor. Even though, anyone can be a securitizing actor, the actor's authority enhances his ability to launch into a speech-act act capable of determining that something is a security issue. Thus, those figures who possess cultural capital through their authority, position or expertise are more likely to make legitimate claims of security than those who do not (Buzan et al. 1998).

It was exactly what occurred in the US, when the Bush Administration representatives identified the existence of an existential threat that required exceptional powers. Regarding the securitizing actors, and immediately after the 9/11 attacks, when the Bush Administration launched a securitization move, it was accepted and became a securitization process.

Figure 7 – Securitizing Actor and Speech- Act Correlation



The speech-act is the discursive representation of an issue as being an existential threat to security (Buzan et al. 1998). Henceforth, it is possible to analyse how securitization proceeds through an analysis of official statements and laws (Mutimer 2007, 11). By examining the US official discourse this section will analyse the occurrence of a securitizing move and its institutionalization[87]. In accordance with Faye Donnelly, the Bush Administration's securitizing move was much more compounded than usual (Donnelly 2013, 66). Only a few days after the biggest terrorist attack on US

[86] For more information regarding the evolution of terrorism before 9/11, consult: Anika Reza. 2014. "The Threat of Global Terrorism: United States Policies towards Terrorism Before and After September 11, 2001." Available at: http://georgewbushlibrary.smu.edu/~/media/GWBL/Files/PDFs/Anika%20Reza%20Paper.ashx.
[87] See: Appendix 1.

soil, the President declared a war against terrorism as a response to the so-called 'act of war' perpetrated by the 'enemies of freedom'[88] (Bush 2001). Terrorism materialized as one of the gravest threats to national security, which became the referent object of this securitization process:

> the world before 9/11 looks different than the world after 9/11, especially in terms of how we think about national security and what's needed to defend America (Cheney 2002).

In addition, John Ashcroft, the Attorney General, stated that "defending our nation and its citizens against terrorist attacks is now our first and overriding priority" (Ashcroft 2001[89]). One of the first features of the political discourse was the need to demonstrate that the world had changed and a new strategy was urgently required, as is visible in the discourse of US elites:

> In the world we have entered, the only path to safety is the path of action. And this nation will act (Bush 2002).

> If the United States could have preempted 9/11, we would have, no question. Should we be able to prevent another, much more devastating attack, we will, no question. This nation will not live at the mercy of terrorists or terror regimes (Cheney 2001).

Furthermore, the need to speak of security emerged in order to alter the rules of 'normal' politics and to introduce extraordinary measures that could face this threat, even though some civil liberties were left behind during this pursuit for more security. In fact, George W. Bush acknowledged that: "[w]e believe in democracy and rule of law and the Constitution. But we're under attack" (Bush 2001[90]).

Thus, as became explicit in the National Security Strategy of 2002 – one of the main tools for the delineation of the new strategy, – which became known as the Bush Doctrine[91] – in order to defeat this threat, the US should use every available tool: better intelligence, homeland security, military power or law enforcement (NSS 2002).

The discourse also focused on the dichotomy of 'us vs. them' or 'good vs. evil'. According to David Baker and Byron Price the use of the term 'us' increases a sense of national union and boosts the fear of what is beyond this unity (Baker and Price,

[88] "On September the 11th, enemies of freedom committed an act of war against our country". George W. Bush. Address to the Nation. September 20, 2001. Available at: http://www.presidentialrhetoric.com/speeches/09.20.01.html.
[89] John Ashcroft. Testimony of Attorney General John Ashcroft to the Senate Committee on the Judiciary (December 6, 2001). Available at: http://www.justice.gov/archive/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.htm.
[90] President George W. Bush, Remarks by the President and Prime Minister Kjell Magne Bondevik of Norway in Photo Opportunity (Dec. 5, 2001). Transcript available at: www.whitehouse.gov/news/releases/2001/12/20011205-11.html.
[91] For more information, consult: Robert Jervis. 2003. "Understanding the Bush Doctrine." *Political Science Quaterly* 118(3):365-388.

2010:536). After 9/11, terrorism became the exponential expression of 'evil' that could not deal with the 'good': US democracy and respect for freedoms.

Several official statements encouraged a quick response to the terrorist attacks or otherwise terrorism would harm national security. In fact, according to the then Secretary of Defence Donald Rumsfeld terrorism had given rise to the conclusion that there are 'unknown unknowns' that demand prevention.

The extraordinary measures that derived from this process of securitization and which will be analysed in this dissertation – the PATRIOT Act and FAA – were both introduced during the George W. Bush Presidency. However, their application and further development was continued during the Presidency of Barack Obama. In fact, as Trevor McCrisken highlighted after pondering ten years of the War on Terror:

> ten years after the terrorist attacks on New York and Washington DC of 11September 2001, the United States remains embroiled in a long-term struggle with what George W. Bush termed the existential threat of international terrorism (McCrisken 2011, 781).

Terrorism continues to play a leading and irreversible role in the global security agenda, and particularly in the US. In accordance with this author, even though Barack Obama presented an intention to moving away from Bush's excesses[92], at the beginning of his term as President, the reality is that policy and practice have altered his rhetoric (McCrisken 2011, 782). While at the beginning of his presidency, Barack Obama tried to avoid placing counterterrorism at the centre of his policy[93] and evaded the use of the term War on Terror, ensuing developments have continually contributed to a continuation of counterterrorism as a main threat to national security. In fact, as is visible in the application of the NSA surveillance programs, as well as other policies[94] adopted by the Obama Administration, these have refined governmental surveillance tools (Lobo-Fernandes Interview 2014).

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[92] The utilization of Guantánamo Bay to deter suspects of terrorism and practices of torture was mainly and extensively criticized by Barack Obama. The closure of this detention facility and prohibition of torture were some of the first decisions made by the new President through the passage of executive orders. However, thirteen years after this prison is still active. For more information, see: Charlie Savage. Amid Hunger Strike, Obama Renews Push to Close Cuba Prison. New York Times (April 30, 2013). Available at: http://www.nytimes.com/2013/05/01/us/guantanamo-adds-medical-staff-amid-hunger-strike.html?pagewanted=all. The Barack Obama Administration introduced other controversial issues: the enactment of the National Defense Authorization Bill, which authorized the indefinite detention of terror suspects or his policy for the Unmanned Aerial Vehicles. For more information, consult: Hilde Restad. 2012. "The War on Terror from Bush to Obama: On Power and Path Dependency." *Norwegian Institute of International Affairs* Working Paper 798.
Available at: http://www.nupi.no/content/download/290879/1013019/version/2/file/NUPI-WP-798-Restad-2.pdf; Council on Foreign Relations. 2013. *Reforming US Drone Strike Policies*. Available at: http://www.cfr.org/wars-and-warfare/reforming-us-drone-strike-policies/p29736; Ulrike Franke. 2014. "Review Essays: Drones, Drone Strikes, and US Policy: The Politics of Unmanned Aerial Vehicles." *Parameters* 44(1):121-130.

[93] As is visible in the National Security Strategy of 2010: "terrorism is one of many threats that are more consequential in a global age. The gravest danger to the American people and global security continues to come from weapons of mass destruction, particularly nuclear weapons" (NSS 2010).

[94] *Supra note* 92.

An interesting point of view is pointed out by Andrew Neal regarding the main difference between George W. Bush and Barack Obama's Administrations' policies on terrorism:

> the difference for me is that George W. Bush was trying to win the argument publicly, whereas Barack Obama seems to have decided to do things more secretly. (…) For George W. Bush, it was as important to win the ideological war as it was to actually defeat the enemy materially. It is quite clear that there is not that much difference in policy (Neal Interview 2014).

Luís Lobo-Fernandes, Susan Herman and José Manuel Pureza also believe that the differences between both administrations are not significant: they rely mostly on a slightly diverse rhetoric, but have similar practices, particularly concerning surveillance and civil liberties (Lobo-Fernandes Interview 2014; Pureza Interview, 2014; Herman Interview 2014).

The Snowden disclosures on June 2013 brought the issue of terrorism and its impacts on civil liberties to the forefront once again. When faced with this, Barack Obama stated:

> my assessment and my team's assessment was that they help us prevent terrorist attacks. And the modest encroachments on privacy that are involved in getting phone numbers or duration without a name attached and not looking at content — that on, you know, net, it was worth us doing. But I think it's important to recognize that *you can't have a hundred percent security and also then have a hundred percent privacy and zero inconvenience.* You know, we're going to have to make some choices as a society (emphasis added) (Obama 2013[95]).

Regarding the political discourse on terrorism, the differences between George W. Bush and Barack Obama[96] were not as intensified, as was expected at the beginning of 2009. In fact, there is a continuation of a securitization of terrorism through the prioritization of security and a sense of exceptionalism in dealing with terrorism that has justified extraordinary measures.

2.2 Extraordinary measures: PATRIOT Act and Foreign Intelligence Surveillance Amendment Act[97]

[95] Barack Obama. Statement by the President (June 07, 2013). Available at: http://www.whitehouse.gov/the-press-office/2013/06/07/statement-president.

[96] For more information on the similarities between Barack Obama and George W. Bush when dealing with terrorism, see: Trevor McCrisken. 2011. "Ten Years On Obama's War on Terrorism in Rhetoric and Practice." *International Affairs* 87(4):781-801; Hilde Restad. 2012. "*The War on Terror from Bush to Obama: On Power and Path Dependency." Norwegian Institute of International Affairs* Working Paper 798. Available at: http://www.nupi.no/content/download/290879/1013019/version/2/file/NUPI-WP-798-Restad-2.pdf.

[97] See: Appendix 2.

A securitization process involves an intersubjective construction of an existential threat conjugated with an environment of urgency that requires the use and application of extraordinary measures to counter the threat (Charret 2009; Buzan et al. 1998). The process of securitization of terrorism has contributed to a significant amount of extraordinary measures. An interesting point of view was shared by Susan Herman when questioned whether US political discourse relied on the threat of terrorism to justify exceptional measures:

> there are two explanations, probably equally true. One is that those with the responsibility to protect Americans against terrorism sincerely believed that having additional surveillance tools would make it easier for them to do this job. The other is that it is a natural tendency for those in power to aggrandize their power, and to dismiss the argument that they cannot be trusted to wield too much power (Susan Herman Interview 2014).

As domestic law continues to be one of the main tools that states have at their disposal to fight terrorism, the US relied upon that instrument. As a matter of fact:

> counterterrorism policies can thus be understood as an attempt to engender a new disciplinary order and be recognized as a reassertion of state power intended to provide this order (Charret 2009, 27).

Concerning this dissertation, the focus will rely upon two legislative measures that emerged in the post-9/11 period in order to counter terrorism: the PATRIOT Act and the FAA. Indeed, the edified exceptionality of terrorism served as the justification for the enactment of legal tools that aimed – among other things, but of particular interest to this dissertation – at the enhancement of surveillance. Thus, the abovementioned legal documents are highlighted from the legislative output of the securitization process.

2.2.1 Contextualization

Contextualizing the appearance of these extraordinary pieces of legislation, it is nevertheless important to highlight that they emerged in a particular context of counterterrorism and of:

> the most serious attacks in American soil since Pearl Harbor, which brought about a fundamental adjustment in the US strategic doctrine, historically based on deterrence. This significant change was justified by the inability to deter or contain irrational attacks, when the perpetrators themselves are willing to die or commit suicide in the act. As it is usually the case, when deterrence fails, states turn to active defense, i.e., they may opt for preventive or preemptive actions (Lobo-Fernandes Interview 2014).

Currently, and in agreement with Lobo-Fernandes the arrival of suicidal neo-terrorism has overturned the ability to deter attacks through the threat of future sanction,

which has required a qualitative reformulation of the doctrine strategy that forces preventive measures (Lobo-Fernandes 2014, 363).

In fact, these exceptional measures emerged not only in an environment of the revitalization of national security,[98] prompted by the securitization process initiated in September 2001, but also in a context of strategic reform. The attacks and the uncertainty of terrorism demanded a strategic change in the U.S. policy agenda catapulting the prevention of other terrorist attacks to the forefront (Heyman and Ridge 2006, 15; Duffy 2005). Moreover, in agreement with Richard Falk – which focus on the PATRIOT Act, but applying his argument also to the enactment of the FAA:

> such legislation would have been impossible to enact in the absence of the post-9/11 climate of fear and anger, an atmosphere that has been sustained by periodic alarms uttered by high officials (Falk 2007, 35-36).

The PATRIOT Act, particularly, and later the FAA, are connected to a reformed strategic doctrine that relied mainly on three features: prevention of future attacks; increased executive power, particularly Presidential powers; and a war paradigm[99] to deal with terrorism (Heyman and Ridge 2006, 15; Duffy 2005). However, it is crucial to highlight that the application of a strategy of prevention in the War on Terror has no place or recognition in the international law, thus giving these preventive actions an illegitimate character[100] (Lobo-Fernandes 2014, 363).

2.2.2 The PATRIOT Act and The Foreign Intelligence Surveillance Amendment Act

The PATRIOT Act[101] was enacted in October 2001, in order to strengthen security measures and legal tools against terrorism. The purpose of increasing surveillances tools, manifested after the 9/11, was quickly addressed by the passage in Congress of the PATRIOT Act only six weeks after the terrorist attacks on US soil. The

[98] See: Chapter II, Section 3.1.1.

[99] The use of a framework of war to deal with terrorism was one of the most debated strategic choices made by the US. Indeed, terrorism had traditionally been dealt with as a criminal offence and not as an act of war. However, the characteristics of de-territorialisation, uncertainty, and the scale of terrorism presented by the attacks of September 2001 were used as a justification for the use of military force. The legitimacy and recognition of this war by international law as well as it undetermined timeframe has been greatly questioned by some scholars. For more information consult: José Manuel Pureza. 2005. "O Tempo da Guerra Eterna." *JANUS*. Available at: http://janusonline.pt/conjuntura/conj_2005_4_1_9_b.html; Laurie Blank. 2012. "The Consequences of a War Paradigm for Counterrorism: What Impact on Basic Rights and Values?" *Georgia Law Review* 46:719-741; Glenn M. Sulmasy. 2014. "The Law of Armed Conflict in the Global War on Terror: International Lawyers Fighting the Last War." *Notre Dame Journal of Law, Ethics & Public Policy* 19(1): 309-316.

[100] For more information, consult: Luis Lobo-Fernandes. 2014. "Onze de Setembro." In *Enciclopédia de Relações Internacionais*, ed. Nuno Mendes and Francisco Coutinho, 361-364. Alfragide: D.Quixote.

[101] This legislative document is composed of ten titles, which are decomposed into 1016 sections and 342 pages. It is thus an extensive document that not only introduces new legal provisions, but also amends other legislative bills.

pressure for a rapid passage of this law[102] is pointed out as a flaw by critics, since it did not allow for the deliberation and discussion of some controversial provisions (Cassel 2004; Robison 2010; Strossen 2005; Rackow 2002; Cole and Dempsey 2002). In an attempt to control the application of these provisions, some of them were scheduled to expire on December 31, 2005[103].

This was the first concrete anti-terrorist domestic measure in the US in the post-9/11 period. The PATRIOT Act reorganizes some sensible domains concerning civil liberties, as it alters surveillance norms. Caspar Bowden highlights that several provisions introduced by this legislative act had been previously thought (Bowden Interview, 2014). Moreover, it introduces and reinforces federal crimes, enhances domestic security, removes obstacles to terrorism investigation, improves the protection of U.S. borders and tightens the oversight of finance activities, such as money laundering, thus encumbering terrorism financing (Abdolian and Takooshian 2003).

Of particular relevance for this case study is Title II[104]. The second title of the PATRIOT Act is composed of twenty-five sections. Even though, only one section of this title will be scrutinized within this dissertation – section 215 – it is relevant to comprehend its legislative framework. This particular title focuses on augmenting the ability to undertake surveillance and reinforce the power of security agencies (law enforcement and intelligence) by improving cooperation, data sharing and the capacity of decision on judiciary procedures between them. Its most debated provisions alter intelligence and criminal law. The renovated surveillance powers institutionalized by the second title of the PATRIOT Act impose radical transformations on the way government can monitor and investigate citizens, which potentially abrogates their civil liberties (Seabra 2007, 115; Öztürk 2010).

The most recurrent criticism[105] regarding the PATRIOT Act as a whole focuses mainly on its direct impact on the civil liberties[106] of US citizens and also on its application, which depart from normal procedures, in criminal matters that have nothing

[102] For more information about the process of enactment of this law, see: David Cole and James Dempsey. 2002. *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*. New York: The New Press; Rafael Seabra. 2007. "George W. Bush e a Coalização Conservadora: Da Política Externa após os Atentados de 11 de Setembro de 2001 ao PATRIOT Act." Master Dissertation. Universidade Federal Fluminense.

[103] Evolution of the PATRIOT Act reauthorizations, see: Infra note (chapter III)

[104] Title II: Enhanced Surveillance Procedures.

[105] Some of the most prominent critics of the PATRIOT Act are recognized institutions, such as: America Library Association, Electronic Privacy Information Center, Lawyers Committee for Human Rights, National Security Archive, Constitution Project, Human Rights Watch and Center for National Security Studies.

[106] Several provisions of the legislative document have been debated since its enactment, such as sections 203(authority to share criminal investigative information), section 213 (authority for delaying notice of the execution of a warrant) or section 206 (authorizing roving wiretaps).

to do with terrorism cases[107] (Anderson 2006, 3). The PATRIOT Act opened a precedent to the gradually significant increase of surveillance as an essential tool for the maintenance of national security. As stated by William Bloss, the PATRIOT Act has become the "cornerstone of U.S. federal statutes that have expanded police surveillance authority after the 9/11 attacks" (Bloss 2007, 217). Actually, it introduced expressive amendments to previous statutes. The PATRIOT ACT, and particularly its section 215, amended a particular legislative bill passed in 1978: the Foreign Intelligence Surveillance Act of 1978.

The Foreign Intelligence Surveillance Act of 1978 was enacted in order to avoid the past governmental excesses of spying on US citizens[108]. It was introduced to protect US citizens from the use of foreign intelligence collection process in order to construct a criminal accusation[109]. Thus, it enhanced surveillance powers regarding foreign intelligence, and restricted the ability to apply these to U.S. Citizens. Its main purpose was to gather foreign intelligence information[110].

More specifically, it comprises a number of procedures that rule the surveillance of foreign powers or the agents of foreign powers[111]. It operates through a special court:

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[107] See: Eric Lichtblau. 2003. "*US Uses Terror Law to Pursue Crimes From Drugs to Swindling*." *The New Times*. Available at: http://www.nytimes.com/2003/09/28/us/us-uses-terror-law-to-pursue-crimes-from-drugs-to-swindling.html.

[108] For more information about the previous governmental excesses that led to the enactment of FISA in 1978, consult: Stephanie Blum. 2009. "What Really is at Stake with the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform." *Public Interest Law Journal* 18:269:314.

[109] Thus, domestic intelligence is governed by another legal tool: the Title III of the US Code.

[110] According to FISA, foreign intelligence information encompasses:
"(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—
(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
(B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or
(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or
(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to—
(A) the national defense or the security of the United States; or
(B) the conduct of the foreign affairs of the United States" (50 U.S.C. § 1801). Available at: http://www.law.cornell.edu/uscode/text/50/1801.

[111] According to FISA, foreign powers are not limited to governments, so that it includes:
" (1) a foreign government or any component thereof, whether or not recognized by the United States;
(2) a faction of a foreign nation or nations, not substantially composed of United States persons;
(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;
(4) a group engaged in international terrorism or activities in preparation therefor;
(5) a foreign-based political organization, not substantially composed of United States persons;
(6) an entity that is directed and controlled by a foreign government or governments; or
(7) an entity not substantially composed of United States persons that is engaged in the international proliferation of weapons of mass destruction.
Besides, agents of foreign powers may be:
"(1) any person other than a United States person, who—
(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section;
(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities;
(C) engages in international terrorism or activities in preparation therefore;
(D) engages in the international proliferation of weapons of mass destruction, or activities in preparation therefor; or

the Foreign Intelligence Surveillance Court (FISC)[112], composed of eleven judges[113] and responsible for issuing warrants for this type of surveillance. The main purpose of the amendments introduced by the PATRIOT Act in 2001 was to alter its scope in order to improve governmental authority to exercise surveillance activities (Rackow 2002; Cole and Dempsey 2002). One of the most debated novelties introduced by the PATRIOT Act was the concept of 'significant purpose'. Previously, FISA allowed searches only when the primary purpose was to gather foreign intelligence information. Nevertheless, with the alterations presented by the PATRIOT Act, this restriction is relaxed and it permits searches when there is only a 'significant purpose' (Blum 2009, 281).

The significant amendments to FISA, promulgated by the application of the PATRIOT Act initiated a precedent to further spy legal tools, particularly those established in the former FISA. This pattern of extending surveillance, especially by amending FISA, initiated and endorsed by the PATRIOT Act, contributed to the drafting of another piece of legislation, whose purpose was to focus on continuingly deepen the focus and scope of the application of intelligence tools: the Foreign Intelligence Surveillance Amendment Act of 2008. Hence:

> in spite of its influence in current U.S. Law, the Patriot Act is not the only federal legislation that has enhanced police surveillance and search capabilities (Bloss 2007, 217).

Even after the introductions and legal relaxations concerning surveillance introduced by the PATRIOT Act, the Bush Administration felt that FISA was not suitable for a post-9/11 context of counterterrorism. In fact, FISC was rejecting or altering more FISA warrants than ever before[114]. In an attempt to foster the ability to

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(E) engages in the international proliferation of weapons of mass destruction, or activities in preparation therefor for or on behalf of a foreign power; or (2) any person who—
(A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;
(B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;
(C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power;
(D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or
(E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C)" (50 U.S.C. § 1801). Available at: http://www.law.cornell.edu/uscode/text/50/1801.

[112] It is important to highlight that FISC judicial authority is embedded in secrecy, once it "allows no spectators, keeps most proceedings secret, and hears only the government side of a case" (Etzioni, 2004:52).

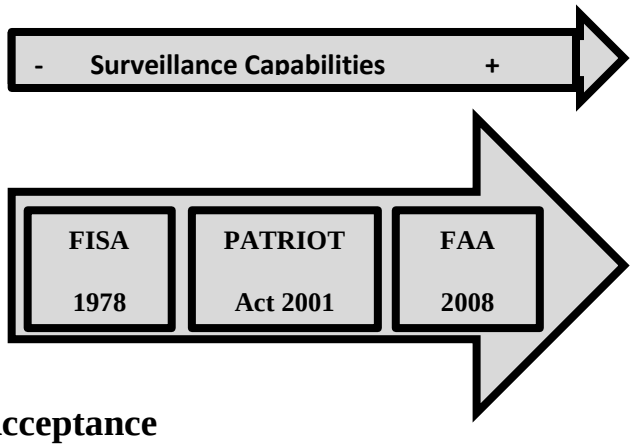
[113] Section 208 increases the number of judges from 7 to 11 members (PATRIOT Act Section 208, 2001).

[114] Citing Stephanie Blum is relevant: "between 1978 and September 11, 2001, attorney generals issued forty-seven emergency authorizations under FISA. In the first eighteen months after 9/11, the attorney general issued more than 170 emergency authorizations. Furthermore, the FISC rejected and modified more FISA warrants in 2003 and 2004 than even before in its history. The FISA 'judges modified 179 of the 5645 requests for court-ordered surveillance and rejected or deferred at least six [warrant requests] – the first outright rejections in the court's history' during the Bush Administration. This history supports the proposition that complying with FISA caused some perceived obstacles for the Bush administration" (Blum 2009, 290).

gather intelligence information without warrants and reforming FISA, the Protect America Act was enacted in August 2007. However, due to its controversial provisions, it only persisted until February 2008[115]. The FAA was thus introduced by the Bush Administration on July 9, 2008.

This legislation was passed in to modernize the FISA 1978 and surfaced in order to wrap up the debate on warrantless wiretapping[116] and to replace the Protect America Act. Hence, it focuses on allowing intelligence officials to have a faster access and monitoring of communications. This piece of legislation is controversial in the US, as its provisions may have a direct impact on US citizens' civil liberties[117]. Due to its impact on foreign citizens, one of the most debated sections in this legislative document on this side of the Atlantic is the section 702, which relates to 'procedures for targeting certain persons outside of the United States other than United States persons' (Hoboken, Arnbak and Eijk 2013, 7). In 2012, this legislative document was reauthorized until 2017[118].

Figure 8 – Chronological Evolution of Surveillance Legal Tools



2.3 Audience Acceptance

The audience's acceptance of a security speech-act is an essential feature for the securitization process to be considered successful. The securitization framework does

[115] For more details regarding the Protect America Act, consult: Stephanie Blum. 2009. "What Really is at Stake with the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform." *Public Interest Law Journal* 18:269:314; Juan Valdivieso. 2008. "Protect America Act." *Harvard Journal on Legislation* 45:581-600.

[116] *Infra note* 224.

[117] For more details, see: James Jaffer. 2014. *Privacy and Civil Liberties Oversight Board Public Hearing on Section 702 of the FISA Amendments Act.* Available at: http://www.pclob.gov/Library/20140319-Testimony-Jaffer.pdf; *Privacy and Civil Liberties Oversight Board*. 2014. "Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act." Available at: http://www.pclob.gov/All%20Documents/Report%20on%20the%20Section%20702%20Program/PCLOB-Section-702-Report-PRE-RELEASE.pdf.

[118] For more information, see: Mark Rumold. 2013. "A New Year, a New FISA Amendments Act Reauthorization, But the Same Old Secret Law." *Electronic Frontier Foundation* (January 10). Available at: https://www.eff.org/deeplinks/2013/01/new-year-new-fisa-amendments-act-reauthorization-same-old-secret-law.

not present an analytical formula to verify the audience's acceptance of securitization[119]. However, by relying on statistical research studies, the US citizens' acceptance of terrorism as an existential threat is evident, as well as their subsequent recognition of the necessity for extraordinary counterterrorist measures to deal with it. As José Manuel Pureza states, the strength of normalizing exceptionality is a result of the public dissemination and acceptance of what previously was a political rhetoric reserved to political elites (Pureza Interview 2014).

The securitization of terrorism was well accepted and became established through the enactment of exceptional measures, which would not have been allowed in periods of 'normal' politics[120]. The acceptance of such measures by Congress immediately denoted that the political discourses of security were being recognized as such. On the other hand, the public sphere also accepted and authorized a state of exception to deal with what had been portrayed as an existential threat: terrorism. What several authors call the 'politics of fear' or the 'politics of insecurity'[121] also generated an important impact on acceptance by US citizens. As Michael Williams highlights:

> fear within liberalism is thus often closely associated with a politics of extremity and enmity, and is seen as having close – and perhaps even constitutive – connections to securitization (Williams 2011, 454).

In fact, public's perceptions of the terrorist threat and the likelihood of future attacks is a primary factor for public approval. Immediately after the terrorist attacks, Vice-President Dick Cheney stated that further terrorist attacks were not a matter of if, but when[122]. This fear of imminent terrorist attacks creates a society that is on constant alert (Baker and Price 2010, 540). Moreover, this permanent sensation of fear enhances unrest among US citizens, who become more susceptible to accepting exceptional measures and increased governmental powers in order to maintain security. During the immediacy of the terrorist attacks, public acceptance of the need for exceptional measures was high[123], even though those could curb civil liberties. Over the years, a

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[119] See: Chapter I.

[120] See section below: State of Exception vs. Normality.

[121] See: Mary Cardaras. 2013. *Fear, Power and Politics: The Recipe for War in Iraq after 9/11*. Plymouth: Lexington Books; Jeff Huysmans. 2006. *The Politics of Insecurity: Fear, Migration and Asylum in the EU*. New York: Routledge; Michael Williams. 2011. "Securitization and the Liberalism of Fear." *Security Dialogue* 42(4-5): 453- 463.

[122] See: Jeff Zeleny. 2002. "Cheney: Attacks `almost a certainty'." *Chicago Tribune*, May 22. Available at: http://articles.chicagotribune.com/2002-05-20/news/0205200204_1_20th-hijacker-intelligence-vice-president-dick-cheney.

[123] "More than two-thirds of Americans believe that the government should be granted wide privileges in deciding what information to post on government agency Web sites and what information to keep off government sites for fear it will help terrorists. Some 69% of Americans say the government should do everything it can to keep information out of terrorists' hands, even if that means the public will be deprived of information it needs or wants". For more details, see: Susannah Fox, Lee Rainie and Mary Madden. 2002. "One year later: September 11 and the Internet. Pew Internet Project Survey Analysis." Pew Internet, September 5. Available at: http://www.pewinternet.org/2002/09/05/one-year-later-september-11-and-the-internet/; Alan Westin. 2006. "How the Public Sees the Security-versus-Liberty Debate." In *Protecting What Matters: Technology, Security and Liberty since 9/11*, ed. Clayton Northouse. Washington D.C.: Brookings Institution Press and Computer Ethics Institute.

slight alteration has been verified[124], particularly after the revelation of the NSA's secret surveillance programs.

The Snowden disclosures on June 2013[125] contributed to a slight shift in public perception, changing the focus to the restriction of civil liberties, instead of the necessity demanded by national security. However, as the securitization discourse was maintained over this course of time, the audience has remained receptive to some privacy restrictions when dealing with terrorism. This, despite beinh more critical about encroachments on their civil liberties. Hence, in recent research[126] undertaken by the Pew Research Center, one of the main conclusions reached was that 62% of the interviewees supported the government's investigation of terrorist threats even if this investigation had some impact on personal privacy.

3. Dialectics Prompted by Securitization

The securitization of terrorism and a proliferation of speeches and statements on the danger it represented for the US nation in the post-9/11 period, rapidly contributed to an acceptance of extraordinary antiterrorist measures. These policies centred on counterterrorism, and its subsequent consequences and impacts on civil liberties contributed to a re-emergence of traditional dialectics in the field of international relations: national security vs. liberty and exceptionalism vs. normality.

The debates concerning these dialectics acquired a new interest in a context of the War on Terror, where governmental surveillance tools and capabilities were gaining an exponential dimension and leading to questions regarding the limits of governmental intrusion on personal lives. In fact, as Andrew Neal states, an important question emerged in the post-9/11 context "how can the sovereign state make exceptions to liberty in the name of liberty, or exceptions to the law in the name of the law?" (Neal 2009, 1).

3.1 National security vs. Liberty

[124] See: Figure 17.
[125] See: Chapter III and Chapter IV.
[126] For more information, see: Pew Research Center and Washington Post Survey. 2013. "Public Says Investigate Terrorism, Even If It Intrudes on Privacy: Majority Views NSA Phone Tracking as Acceptable Anti-Terror Tactic." Available at:http://www.people-press.org/files/legacy-pdf/06-10-13%20PRC%20WP%20Surveillance%20Release.pdf.

The debate of national security versus liberty has a recurrent history, not only but particularly in the US. Reaching a maximum scale, the revitalization of national security concerns during the War on Terror led to the re-emergence of this historical debate. The US counterterrorist response was anchored on a revitalization of realism's presumptions and was mostly focused on militaristic security policies (Williams, 2008; Wilson, 2005). As a matter of fact, terrorism was perceived as a national security threat that could only be defeated through a commitment to security policies focused on a state-centric paradigm (Williams 2008; Liotta 2002; Gilmore 2011; Buzan 2006). The application of a framework of war to deal with this existential threat emerged[127]. Thus, this refocusing on national security had a direct impact on human rights and civil liberties established on international treaties and also on the American Constitution itself. Thereafter, it is relevant to analyse more deeply the correlation between the revitalization of the national security paradigm and its impact on human rights and civil liberties.

3.1.1 Revitalization[128] of National Security after 9/11

Debating the relevance of balancing civil liberties and human rights with security[129] is not unknown to Americans[130] (Seabra 2007; Lobel 2002). In spite of a long tradition of defence of fundamental rights and values within its domestic and external policies, as well as an international recognition of this positioning, this issue is usually restricted to rhetoric rather than practice in periods of emergency (Prieto 2009, 5). In fact, in times of crisis and war, this issue arises, as a reaffirmation of the need to focus on the security of the state, and its territorial integrity emerges in detriment of another important commitment: liberty[131]. This point of view has long been debated and criticized by civil liberties' advocates and legal academics. The founding fathers of the

[127] Several authors contest the use of a strategy of war to deal with terrorism. Andrew Neal states:
"I am more persuaded that it [terrorism] should be dealt through the regular criminal law and I think that the US administration believes the same thing these days. I think the Obama Administration would prefer to take terrorists through courts in New York rather than in Guantanamo bay. There is an argument amongst lawyers that terrorism is different from regular crime because it has a political intent. If a crime has been committed: murder, conspiracy to murder, and so on, I think treating it separately from regular criminal offenses will inevitably cause all sort of political definitional problems" (Neal Interview 2014). Besides, Maria Assunção Pereira also claims that international terrorism must be dealt through the International Criminal Law and National Criminal Law (Pereira Interview 2014).
[128] The revitalization of national security is referred here as a re-awakening of this paradigm, that though not forgotten, it gained a greater dimension and character once a War on Terror had been initiated.
[129] There are several expressions to define this balancing, such as 'Freedom vs. Security' (Benjamin Franklin) and 'Liberty vs. Security'.
[130] See: Chapter IV.
[131] The (subjective) value behind liberty is the freedom of control or restraint. It usually refers to the Civil Liberties instituted within the US Bill of Rights.

United States of America intended to protect what they believed to be fundamentally inalienable rights, such as liberty, freedom of speech and the right to privacy.

In spite of the demarcated tradition of liberty and fundamental rights within the American society, the reality is that these basic rights have been repeatedly compromised in periods of crisis, when national security overlaps liberties and rights[132]. In fact, the security studies in the US are mostly focused on a national security paradigm (Huysmans, 1998). The USA has a long realist tradition of focusing on the states's interests, as the referent object of security. It is the interest of national security that guides the domestic and foreign policy decisions and policy-making. Therefore, after the 9/11 episodes, US domestic and foreign policy refocused and re-dimensioned the interests of national security.

National security revolves around the realist theory of International Relations. In accordance to realism, policies are used by states to achieve power in the International System, marked by anarchy, where they compete for their national interests. According to Wolfers, national interests are subjectively defined as a:

> direction of policy which can be distinguished from several others which may present themselves as alternatives. It indicated that the policy is designed to promote demands which are ascribed to the nation rather than to individuals, sub-national groups, or mankind and a whole. It emphasizes that the policy subordinates other interests to those of the nation. But beyond this it has very little meaning (Wolfers 1952, 481).

Regarding national interest, the author believes it is intrinsically connected to the concept of national security. When national interest is integrated within the discourse of a state representative, unless explicitly denied, it is assumed that priority should be given to security, in particular to the state's security (Wolfers 1952). Thus, the symbol of national security[133] suggests a focus on achieving safety through national power and is usually integrated in the discourses of those who prefer to rely on power rather than on international cooperation[134]. Bearing this definition in mind, it is easy to identify it with the positioning of the Bush Administration in the years following the 9/11 attacks.

The rhetoric of national security was repeatedly used to justify exceptional and extraordinary measures (for instance, the rupture of civil liberties and rights, and the use

[132] For further information and historical examples of liberty compromised by security interests, see: Clayton Northhouse. "Providing Security and Protecting Liberty." *In Protecting What Matters:Technology, Security, and Liberty Since 9/11*, ed. Clayton Northhouse, 3-18. Washington, D.C.: Brookings Institution Press; William Rehnquist. 2005. "Inter Arma Silent Leges." In *Civil Liberties vs. National Security in a Post 9/11 World*, ed. M.Katherine B. Darmer, Robert M. Baird and Stuart E Rosenbaum, 23-30. New York: Prometheus Books

[133] To which the author refers as an 'ambiguous symbol' (Wolfers 1952).

[134] National security was about the state being protected from military threats from other states. It traditionally emphasized military threats and responses (Terrif et al. 1999; Caldwell and Williams 2012).

of force) (Rehnquist 2005). Since the 9/11 terrorist attacks, the USA has been witnessing a predominance of speeches on national security that claim a trade-off between national security and civil liberties, in other words more security requires a sacrifice of liberty. In fact, this has resulted in a:

> blurring of issues involving state security (where military forces have traditionally proven the best form of protection) and issues involving 'human security' (in which instruments and agencies other than the military may prove the primary means of protection) (Liotta 2002, 474).

One of the main tools of strategic guidance for national security in the USA is the NSA. In its 2002 version one is able to perceive the edification of terrorism as a prioritized threat to national security:

> defending our Nation against its enemies is the first and fundamental commitment of the Federal Government. Today, that task has changed dramatically. (…)Now, shadowy networks of individuals can bring great chaos and suffering to our shores for less than it costs to purchase a single tank. Terrorists are organized to penetrate open societies and to turn the power of modern technologies against us" (…) The enemy is terrorism—premeditated, politically motivated violence perpetrated against innocents (NSS 2002).

The national security rhetoric was thus used by the administration to justify numerous exceptional measures that would otherwise not have been accepted. However,

> national security should not be idealized. It works to silence opposition and has given power holders many opportunities to exploit 'threats' for domestic purposes, to claim a right to handle something with less democratic control and constraint (Buzan et al. 1998, 29).

After September 11, the prioritization of national security also contributed to governmental reorganization, with the creation of a new department: the Homeland Security Department, founded in 2002[135]. The aim of this new department is to prevent future terrorist attacks, reduce vulnerability to terrorist attacks, assist the recovery of an attack and minimize its damages (Homeland Security Act 2002, 2142).

3.1.2 National Security vs. Liberty: A Unique Relationship

After 9/11, these alterations – prompted by a revitalization of national security issues which had a direct effect upon new legislative measures (such as the PATRIOT Act and later the FAA) - brought a question to the forefront: Will individuals tolerate human rights and civil liberties restrictions in order to achieve more national security

[135] Only a week after the terrorist attacks, and under Gerorge W. Bush's Administration, a new office that merged twenty-two agencies – the Office of Homeland Security – was created by an Executive Order, a tool that allowed for rapid action. However, only in November 2002 did the Congress passed the bill that enacted this new Department.

(Davis and Silver 2002)? Besides, the beginning of a War on Terror contributed to the emergence of a complex issue that had to be dealt with: a choice between state power and the respect for civil liberties. Notwithstanding, in the USA the choice somehow tended to downgrade the norms in place to protect fundamental rights (Öztürk 2010, 111) in a rationale of ends justifying the means. Hence, since security and liberty are interdependent, a ready exchange of liberty for security must be dealt with very cautiously, as there is no security without liberty (Cole, 2002), and neither is there liberty without security. Thus, both exceptional measures have re-enacted a long-lasting discussion about the unsteadiness between security and liberty.

Technological development combined with legal authorities that foster governmental access to individuals' data has contributed to an enhancement of surveillance which emerged as a major tool of prevention and an erosion of privacy protection. In spite of the gradual implementation of new and more intrusive technological tools to help public authorities, the most astounding developments emerged after September 11. Some technological developments in surveillance techniques are undoubtedly relevant and necessary. Nevertheless, a combination of public safety interests and individual's rights is also crucial (Etzioni 2004, 45).

Debating National Security and Liberty

Indeed, domestic counterterrorism policies have been generating discussion:

> Detention[136] and surveillance policies have provided skirmish after skirmish, in which both sides have dug in their heels and accused their counterparts of all manner of transgressions, from being soft on terror to being lawless, from putting America at risk to trampling the constitution (Prieto 2009, 2).

As Lobo-Fernandes highlights, on the post-9/11 period:

> there are different perceptions of amplitude and scale of future threats. The different reading of the scale, frequency and probability of these threats' occurrence generates diverse orientations. Those who believe that these threats have a bigger probability defend stronger measures (Lobo-Fernandes Interview 2014).

Two positions can be traced in this debate:

a) In order to achieve more security, some liberty sacrifices are required:

[136] Title II – enhanced surveillance procedures - does not refer to detention, however new norms regarding detention rules have been enacted by section 412 of the PATRIOT Act and also by another legislative anti-terrorist and post-9/11 measure: the Military Order (2001). For more information consult: Anthea Roberts. 2004. "Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11." *European Journal of International Law* 15(4):721-749; David Cole. 2002. "Enemy Aliens." *Georgetown University Law Center* 54(953): 953-1004. The reasons behind the harsh criticism of these two measures centre on the disrespect for some fundamental human rights, such as the right to a fair public trial.

Administration representatives focused on the importance of diminishing some liberties in order to achieve more security. One of the most controversial sentences was proffered by John Ashcroft, who stated in the hearings about the PATRIOT Act[137] that:

> we need honest, reasoned debate; not fearmongering. (…) To those who pit Americans against immigrants, and citizens against non-citizens; to those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists - for they erode our national unity and diminish our resolve (Ashcroft 2001).

Regarding the PATRIOT Act, Jon Kyl[138] also asserts its relevance and necessity[139]. Many of the extensions of the laws on surveillance passed by the PATRIOT Act were part of a list of laws that law enforcement had previously proposed but which the Congress had rejected[140].

Viet Dihn also asserts his point of view in favour of measures that prioritize national security when faced with liberty. In accordance with this author, liberty and security are interrelated. However, freedom means not only freedom from restraint, but also freedom from fear. As one of the main terrorism tools is propagating fear, according to him the American government is committed:

> to protect Americans not just against unwarranted governmental intrusion, but also against the incapacitating fear that terrorists seek to engender (…) The overriding goal is to prevent and disrupt terrorist activity by questioning, investigating, and arresting those who violate the law and threaten our national security. In doing so, we take care not to discharge fully our responsibility to uphold the laws and Constitution of the United States (Dihn 2004, 106-107).

Demonstrating that thirteen years after the terrorist attacks the dichotomy between liberty and security continues to be a centrepiece, Barack Obama more recently stated that:

> it's important to recognize that you can't have 100 per cent security and also then have 100 per cent privacy and zero inconvenience (Obama 2013[141]).

Thus, regarding the NSA surveillance programs, the current President of the US recognized them as 'modest encroachments on privacy'[142]. Similarly, Richard Posner also states that the need to increase security does impose a problem of balance;

[137] Due to the debate concerning civil liberties in a post-9/11 period, a Senate Judiciary Committee convened a series of hearings about the actions of the Department of Justice after 9/11: Hearings on DOJ Oversight: Preserving our Freedoms while Defending against Terrorism. Available at: http://www.gpo.gov/fdsys/pkg/CHRG-107shrg81998/html/CHRG-107shrg81998.htm
[138] Senator of the United States of America.
[139] "The PATRIOT Act was a tailored and very necessary response to the events of September 11 and has shown itself an essential tool in the ongoing fight against terrorism. Indeed, it is something that this country should have done years ago" (Kyl 2006, 138).
[140] See Jon Kyl. 2006. "Why You Should Like the PATRIOT Act." In *Protecting What Matters: Technology, Security, and Liberty since 9/11*, ed. Clayton Northhouse, 138-159; Amitai Etzioni. 2004. *How Patriotic is The Patriot Act*. New York: Routledge.
[141] In his first statements regarding the Snowden revelation of two secret surveillance programs.
[142] For more details, see: Dave Boyer. 2013. "Obama: Massive Seizures 'Modest Encroachments'." *The Washington Times*, June 7. Available at: http://www.washingtontimes.com/news/2013/jun/7/obama-massive-seizures-modest-encroachments/.

nonetheless, bearing in mind the risk for survival, the benefits of more security will exceed the costs of a reduced liberty (Posner 2001). David Resnick also advocates the necessity, brought about by the terrorist attacks of 2001, of reconsidering the balance between liberty and security and allowing it to tend towards security. In accordance with this scholar, we would all prefer to have uttermost security and at the same time be entirely free, yet the liberal political tradition had made it clear that we should sacrifice some liberty in exchange for security[143].

b) The increase in security is only diminishing liberty:

Another point of view is advanced mainly by civil liberties institutions and scholars opposed to the reduction of fundamental rights in detriment of security, focusing on the fact that the increase in security measures is only affecting individuals' liberties and is not producing real security benefits. One of the prevalent concerns among civil libertarians is the fact that legislative measures that increase security may grant authorities an extended license, since authorities are not perfect in determining who is or is not a terrorist suspect (Hardin 2004, 83). Referring to the increase of surveillance, Jan Stanley and Barry Steinhardt claim that

> privacy and liberty are at risk. A combination of lightning-fast technological innovation and the erosion of privacy protections threatens to transform Big Brother from an oft-cited but remote threat into a very real part of American life (Stanley and Steinhardt 2004, 54).

Moreover, some scholars argue that the sacrifice of any established privacy rights will only diminish freedom and will not contribute to more security.

The relationship between national security and liberty was greatly shaken by the events of September 11. A revitalization of national security's concerns and its priority over traditionally granted protections to individuals' rights have contributed to some governmental excesses. While in some areas it is clear that the extension of governmental powers has undoubtedly disrespected fundamental rights, such as in cases of torture and the detention of foreign suspected terrorists in Guantanamo Bay, some doubts persist in other areas, such as the extension of surveillance. Bearing in mind the human security theoretical framework, the point of view shared within this dissertation is that surveillance excesses have also contributed to a violation of some fundamental rights, such as those of privacy. The point of view of some civil libertarians, who claim

[143] "Todos preferiríamos, ao mesmo tempo, estar maximamente seguros e ser perfeitamente livres, mas a tradição do pensamento político liberal torna claro que devemos sacrificar alguma da nossa liberdade em troca de segurança" (Resnick 2004, 109).

that security is only diminishing liberty, may be exaggerated yet, the reality is that in this particular context of the US after 9/11, and focusing on the enhancement of surveillance some governmental excesses have been regulated and legitimated through law. Besides, when focusing on the human security framework it is possible to verify that sometimes an increase in security, may not directly contribute to it, since it may hinder another sphere of security: its immaterial component.

Numerous scholars and legal specialists criticize the great surveillance powers gathered by the government (Schulhofer 2004; Parenti 2004; Feingold 2006; Neier 2004; Almqvist 2005; Davis and Silver 2002). According to these authors overlapping security is not the most adequate response to fight terrorism and states abrogation of civil liberties do not contribute to safety (Neier 2004; Martin 2001). Moreover, bearing in mind the human security framework that encompasses this dissertation, the relationship between security and liberty is not a trade-off, and a decrease in liberty does not directly produce an enhancement in security. National security and liberty share an interdependent relationship. However, their interdependence presents *sui generis* features.

A good explanation of this relationship is provided by Benjamin Wittes, who categorizes it as a 'hostile symbiosis', in which:

> one adjustment to one partner in the symbiosis may aid both, may harm both, may advantage one with respect to the other. It may cause the relationship to adjust, to reformulate, or to dissolve (Wittes 2011, 19).

In fact, even though a counterterrorism context demands strategic improvements, the reality is that:

> one can sacrifice liberty without gaining much in the way of additional security, (…) sacrifices of liberty can also often have negative effects on security(…) I believe that in this particular context (US) sacrifices to liberty are hindering security. One may also safeguard security through freedom (Donohue 2008, 30).

Nevertheless, is also important to reiterate that "not all increases in government security powers are privacy- and liberty-eroding" (Wittes 2011, 11).

Debates regarding liberty and security usually lead to a zero-sum discussion that focuses on diminishing security to improve liberty or otherwise diminish liberty to enhance security. The reality is that the interdependence between both contributes to a much more difficult relationship. Bearing in mind the human security framework, it is visible that severe encroachments on liberty so as to increase security will tend to have a

reverse effect of affecting human security too, since the latter is not circumscribed to physical protection, but also to the immaterial component of respect for fundamental civil and political rights. In the Senate Judiciary Committee's *Hearings on the Department of Justice Oversight: Preserving our Freedoms while Defending against Terrorism* Kate Martin[144] stated that:

> our national security must and can be protected without undermining the fundamental rights of individuals guaranteed by the Bill of Rights. In our work on matters ranging from national security surveillance to intelligence oversight, we begin with the premise that both national security interests and civil liberties protections must be taken seriously and that by doing so, solutions to apparent conflicts can often be found without compromising either (Martin 2001).

As David Cole and James Dempsey highlight, while some counterterrorism measures are justified and are not a threat to civil liberties, others may be counterproductive in this fight against terrorism (Cole and Dempsey 2002). In the particular context of counterterrorism observed in this dissertation – of exacerbated national security concerns and subsequent surveillance extensions in the US – it seems clear that some security measures extrapolated the limits of liberty, ending up encroaching on human security.

3.2 State of Exception vs. Normality

> Since September 11th 2001, the 'exception' has become central to political discourse and practice. Many policy-makers and commentators have sought to define 9/11 as an exceptional event that brought about an exceptional set of circumstances, which in turn both require and justify exceptional responses (Neal 2009, 7).

National security priority and concerns contributed to the emergence and justification of a state of exception in the US. Three days after the September 11 terrorist attacks, the President of the United States, George W. Bush, by virtue of his powers, declared a state of emergency:

> Now, therefore, I, George W. BUSH, President of the United States of America, by virtue of the authority vested in me as President by the Constitution and the laws of the United States, I hereby declare that the national emergency has existed since September 11,2001 (Declaration National Emergency 2001).

[144] Director of the Center for National Security Studies.

Thirteen years later, this state of emergency has been continuously reauthorized[145]. According to Maria Assunção Pereira, the state of exception:

> must have a limited temporal character. That does not seem to be happening in the US. Being from 2001 until 2015 in a state of exception seems too much (Pereira Interview 2014).

Traditionally, the proclamation of a state of emergency appears as an official statement made of the urgency surrounding a specific threat and demanding the application of exceptional measures. In fact, the same occurred in the US immediately after the attacks. As Kim Scheppelle states:

> these pronouncements were later followed by a series of (…) legal changes (…) that would enable the United States to conduct both a domestic and a foreign operation to combat international terrorism (Scheppele 2004, 1002).

Thus, according to American rationale, the extraordinary nature of terrorism presented by the attacks perpetrated on US soil required the emergence of exceptional measures that would ensure the national security. Both the PATRIOT Act and the FAA, appear as evident tools for the state of exception initiated in the context of the War on Terror.

Just as antagonist points of view rose between national security and liberty, different positions regarding the legislative alterations introduced after 9/11, different positions also appeared with regard to legislative alterations introduced after 9/11 concerning the need for exceptional measures to deal with terrorism. Several authors have analysed the use of a state of exception to deal with terrorism, concluding that its application has hindered some of the fundamental rights of individuals, which have subsequently led to the dichotomy of liberal democracies spreading 'illiberal practices'[146].

This concept has been debated and has attracted the attention of political theorists and jurists over centuries, due to a fragile limbo between its necessity and legitimacy and its abuses and consequences. Its main impact usually consists of suspending the juridical order, outlawing constitutional principles, and subsequently damaging

[145] See: Ned Resnikoff. 2013. "Obama Quietly Extends Post-9/11 State of National Emergency." *MNBC*, September 11. Available at: http://www.msnbc.com/all/obama-quietly-extends-post-911-state.

[146] See: Didier Bigo and Anastasia Tsoukala. 2008. *Terror, Liberty, Insecurity: Illiberal practices of liberal regimes*. New York: Routledge; Andrew Neal. 2012. "Terrorism, Lawmaking, and Democratic Politics: Legislators as Security Actors." *Terrorism and Political Violence* 24:357-374; Kim Scheppele. 2004. "Law in a Time of Emergency: States of Exception and the Temptations of 9/11." *Journal of Constitutional Law* 6(5): 1001-1083; Claudia Aradau and Rens van Munster. 2009. "Exceptionalism and the 'War on Terror'." *British Journal of Criminology 49: 686-701;* Oren Gross.2003. "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional*?" Yale Law Journal* 112:1011-1134.

fundamental rights, as well as granting privileges to the executive power over the remaining powers: the judicial and legislative.

The aim of this section is, firstly, to briefly analyse the scholar's approaches to the state of exception. One also intends to demonstrate how the War on Terror context has been favourable to the normalization and legal institutionalization of exceptional antiterrorist measures. Moreover, this section will briefly demonstrate how the securitization approach to exceptionalism, in this particular case, may help to deconstruct political discourses of exceptionality and thus favour a respect for civil liberties.

3.2.1 Conceptual Operationalization and Approaches

A "state of exception", exceptionalism, "state of emergency", "*état de siege*" or "reason of state"[147] is declared when a state is faced with a threat to its national security, which demands actions beyond 'normal' politics. According to the Copenhagen School, the 'normal' politics consist of normal democratic procedures. Thus, as securitization leads the issues 'beyond normal politics' it means that those issues are beyond public debate and embedded in a politics of emergency. In fact, during a state of exception:

> a state is confronted by a mortal threat and responds by doing things that would never be justifiable in normal times, given the working principles of that state. The state of exception uses justifications that only work in extremis, when the state is facing a challenge so severe that it must violate its own principles to save itself (Scheppele 2004, 1003).

In this dissertation, a state of exception is perceived as a state in which policies and actions extrapolate normality, particularly constitutional guarantees. In the sense of regular liberalism, it is what 'normal' politics is not (Roe 2012, 251; Zwitter 2013; Sanders 2008; Humphreys 2006; Lazar 2009). There are some particular features that may be deduced from a state of exception (Neocleous 2008; Neal 2006):

- a strong executive power;
- swiftness of decisions;
- existential necessity for a suspension of law;
- suspension of civil liberties;

[147] There are numerous terms used to refer to states of emergency. According to Andrej Zwitter two reasons may be pointed out for this proliferation of terms: firstly, because different legislations use diverse terms, and secondly, due to the lack of a precise legal definition in many other legislations. Despite, the variety of terms, some regularities may be inferred (Zwitter 2013, 2).

On the other hand, normality is composed of routine procedures of liberal democratic states, where conventional mechanisms, debate and deliberation define policymaking (Roe 2012, 251). Liberal democracies may be distinguished by several practices: separation of powers, preservation of civil liberties, a constant debate about public policy and the maintenance of the rule of law (Neal 2006, 206; Lazar 2009, 2). Thus, the main characteristic of this state of emergency is the exceptionality that characterizes the state's legal and political responses to the emergency threat. When referring to the concept of a state of exception and its tradition, two authors are unavoidable: Carl Schmitt and, more recently, Giorgio Agamben. Both authors present a rather divergent interpretation of exceptionalism. Thus, besides the securitization approach to the exception[148] analysed previously, it is relevant to consider the approaches of both authors.

Carl Schmitt attempted to rigorously theorize the conundrums of exceptionalism. Both the state of emergency (*Ernstfall*) and the concept of a state of exception (*Ausnahmezustand*) are relevant for his theory, which emerges as a critique of modern liberalism (Sanders 2012, 37). According to Schmitt, exception is determined by the sovereign[149], which leads to the comprehension of the nature of the political, since it contributes to the realization of where the sovereignty is vested in. Hence:

> the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception. In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition (Schmitt 1985, 15).

Therefore, the state of exception is a political choice. However, this choice is moulded by a metaphysical necessity (threat) that legitimates exceptional practices (Neal 2009, 77). Accordingly, in his view exception and rule are mutually dependent. The exception occurs when the sovereign identifies a threat that cannot be solved through the normal rules, then requiring the extrapolation of the law. While norms must be applied in normal contexts, when an exception emerges norms are suspended. The main feature of the state of exception is an:

> unlimited authority, which means the suspension of the entire existing order. In such situations it is clear that the state remains, whereas law recedes. Because the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind (Schmitt 1985, 12).

[148] See: Chapter I.
[149] "Soverän ist, wer über den Ausnahmezustand entscheidt" (Schmitt 1985).

As Nomi Lazar highlights, for Schmitt law is a 'situational law' (Lazar 2009, 40) In fact, the interpretation of exception is that rules are not applied in real crisis, but only in normal situations. Thus, in a crisis marked by emergency and urgency, the exceptional powers do not disrespect rights or the rule of law, because they are not effective during those particular times (Lazar 2009, 3).

Thus, according to this scholar the state of exception is not beyond the legality because, even though the decision of the sovereign is extra-legal, it has 'the force of law' (Humphreys 2006, 680). Therefore, according to Schmitt, the state of exception is amoral and resides between the juridical and the political. The particularities of an emergency cannot be foreseen, thus showing that a liberal constitution cannot address them all. It is exactly here that Schmitt criticizes liberalism: according to him, the liberal focus on norms and the rule of law, with diverse spheres of jurisdictional authority, is conflicting with what is necessary when facing an exception (Schmitt 1922).

Relying upon the work of Carl Schmitt, Giorgio Agamben presents criticism of this. According to the latter, the state of exception is a manifestation of modern politics where the exception became the rule. Hence, the dialectic between norm and exception has disappeared (Agamben 2005; Huysmans 2008, 172; Neal 2009, 79). Actually:

> the state of exception tends increasingly to appear as the dominant paradigm of government in contemporary politics. This transformation of a provisional and exceptional measure into a technique of government threatens radically to alter – in fact, has already palpably altered – the structure and meaning of the traditional distinction between constitutional forms. Indeed from this perspective, the state of exception appears as the threshold of indeterminacy between democracy and absolutism (Agamben 2005, 3).

The state of exception has become a permanent feature of modern political life. Moreover, the exception is outside the law and must be understood on political, and not on juridico-constitutional grounds. Thus, "the state of exception appears as the legal form of what cannot have legal form" (Agamben 2005, 1).

The permanence of the exception framework also contributed to an imagined state of exception (*état de siége fictif*) instead of effective threats (*état de siége effectif*) (Silva 2013, 7). Influenced by Hannah Arendt, Walter Benjamin and Foucault's bio-political understanding, he states that the result of this permanent state of exception reduces individuals to *homo sacer*[150] and their lives to a *bare life*[151] (Agamben 2005; Silva 2013). In consonance with this author, the Jews were the maximum exponent of this

[150] A figure of Roman law, it describes an individual who was banned. His life could be taken by anyone, however he could not be sacrificed in a religious ritual (Agamben 1995, 47)
[151] "A life that lacks value and is constantly subjected to violence" (Sanders 2008, 5).

homo sacer or *bare life* condition in Nazi concentration camps. The camp ruins juridical protection; inside it, the distinctions between exception/rule and inside/outside disappear (Agamben 2005 Sanders 2012, 43). The scholar compares this Nazi *lager* to the American policy after 9/11, mostly with reference to the indefinite detention of foreign suspects of terrorism[152] introduced by the PATRIOT Act (Agamben 2005, 4; Silva 2013, 8; Sanders 2012, 43).

3.2.2 Normalization of Exceptionalism in the US After 9/11

Knee-jerk legislation has been assuming as the most appropriate and effective response to terrorist attacks (Neal 2012a, 358). However, the consequences of US counterterrorist legislation for civil liberties, and consequently for human security during the post-9/11 period has been responsible for an insurgence of diverse opinions regarding its impact[153]. As was stated above[154], the securitization of terrorism contributed to an emergence of exceptional counterterrorist measures – more particularly for this dissertation the PATRIOT Act and the FAA – that have jeopardised not only US citizens', but also European citizens' civil liberties through an expansion of surveillance capabilities.

Several authors analysed the state of exception initiated in the US after the terrorist attacks of 2001. Thus, a magnificent resurgence of interest in the work of Carl Schmitt and Giorgio Agamben has emerged so as to comprehend the conundrums of exceptionality[155]. In a post-9/11 context, several authors have been advocating a continuation of the rule of law in times of emergency, criticizing the attempt to call for exception in a liberal tradition[156]. Bearing in mind the focus of this dissertation and its

[152] Section 412 of the PATRIOT Act. For more information on this section and its impact, see: Jennifer Y Brazeal. 2004. "Discrimination in the new Millennium: Terrorizing Middle-Easterners, Retraction of Civil Liberties and the USA Patriot Act." Michigan State University College of Law. *King Scholar Senior Seminar Papers.*1-27; Joan Fitzpatrick. 2003. "Speaking Law to Power: The War against Terrorism and Human Rights." *European Journal of International Law* 14(2): 241-264; David Cole. 2002. "Enemy Aliens." *Georgetown University Law Center* 54(953): 953-1004.

[153] Andrew Neal highlights that even though politicians recognize that knee-jerk legislations are often problematic – the fact is that they do exist. Thus, it is a 'symbolic politics' that surfaces, as "politicians need to be seen doing something" (Neal Interview 2014).

[154] See: Chapter II, Sections 2.1. and 2.2.

[155] See: Andrew Neal. 2006. "Foucault in Guantánamo: Towards an Archaeology of the Exception." *Security Dialogue* 37(1): 31-46; Andrew Neal. 2009. *Exceptionalism and the Politics of Counterterrorism: Liberty, Security and the War on Terror*. New York: Taylor and Francis; Jef Huysmans. 2008. "The Jargon of Exception – On Schmitt, Agamben and the Absence of Political Society." *International Political Sociology* 2: 165-183; Claudia Aradau and Rens van Munster. 2009. "Exceptionalism and the 'War on Terror'." *British Journal of Criminology 49: 686-701;* Didier Bigo and Anastasia Tsoukala. 2008. *Terror, Liberty, Insecurity : Illiberal practices of liberal regimes*. New York: Routledge; Kim Scheppele. 2004. "Law in a Time of Emergency: States of Exception and the Temptations of 9/11." *Journal of Constitutional Law* 6(5): 1001-1083; Stephen Humphreys. 2006. "Legalizing Lawlessness: On Giorgio Agamben's State of Exception." *The European Journal of International Law* 17(3):677-687;

[156] For more information, consult: David Dyzenhaus. 2006. *The Constitution of Law: Legality in a time of Emergency*. New York: Cambridge University Press; Oren Gross. 2003. "Chaos and Rules Should Responses to Violent Crises Always Be Constitutional?" *The Yale Law Journal* 112:1011-1134; William Scheuerman. 2006. Emergency Powers and the Rule of Law after 9/11. *Journal of Political Philosophy* 14(1):61-84; Viktor Ramraj. 2008. *Emergencies and the Limits of Legality*. Cambridge: Cambridge University Press.

analytic constraints, the numerous positions of scholars regarding the state of exception formulated in a context of War on Terror will not be fully scrutinized. Thus, the emphasis will be placed on one of the most debated issues, due to its potential impact: the danger of institutionalizing the exceptional legislative measures, such as the PATRIOT Act and FAA, in US policy. As Andrew Neal stated, during the post-9/11 period it became increasingly difficult to distinguish between normal and exception. However, "it seems important from a critical point of view to insist that certain things are still exceptional", thus they may be criticized and overcome (Neal Interview 2014).

Actually, the US counterterrorist policy focused not explicitly on derogating from particular legal tools but, otherwise on forming what David Dyzenhaus calls 'grey zones'[157]. In accordance to this author, these consist of legal spaces:

> in which there are some legal constraints on executive action – it is not a lawless void – but the constraints are so insubstantial that they pretty much permit government to do as it pleases (Dyzenhaus 2006, 42).

Rebecca Sanders highlights that the period of War on Terror, has not been a period devoid of law; on the contrary, it has seen a proliferation of policy-making (Sanders 2012, 345) from the PATRIOT Act, through the Military Order, the Protect America Act, the FAA, and many others. On the other hand, this scholar states that the US adopted a strategy of 'plausible legality'[158], which allowed for a transformation of 'law as constraint' into the interpretation of 'law as permit' (Sanders 2012, 336). In agreement with Sanders, the proliferation of 'plausible legality' will contribute to the weakening of legal and normative frameworks (Sanders 2012, 334).

In fact, the War on Terror has blurred the distinction between norm and rule. Notwithstanding, the main problem is that it was the legal and political processes themselves – which dealt with emergencies through law – that contributed to this blurring (Neal 2012a; Sanders 2012; Roach 2008).

Focusing on the usage of exceptional measures to deal with terrorism, Michael Ignatieff stated that necessity may demand actions that "will stray from democracy's own foundational commitments to dignity". However, in the end, society will make the best choice of choosing the "lesser evil" of sacrificing some civil liberties, as long as it

[157] Other scholars also refer to 'grey holes' in legislation. See: Kent Roach. 2008. Ordinary Laws for Emergencies and Democratic Derogations from Rights. In *Emergencies and the Limits of Legality*, ed. Viktor Ramraj. Cambridge: Cambridge University Press.

[158] Strategies of plausible legality within legal systems – where law becomes more flexible within a context of exceptionality. Thus, during this state of exception, the law is not suspended, but there is a reconstruction of the law so it can comply with practices that disrespect civil liberties (Sanders 2012) . Pursuant to this scholar the reasons behind this strategy are: the desire to keep a liberal tradition image and the aim to circumvent human rights with legal compliance (Sanders 2012, 329).

is temporal (Ignatieff 2004, 8). Nevertheless, in the midst of the War on Terror, the blurring between exception and norm is even more intensified due to the temporality of this exceptionalism, since the end of the War on Terror seems to be nowhere in sight in the near future[159]. Susan Herman states that: "the War on Terror has no logical end, unlike conventional wars. And so the threat can be regarded as never ending" (Herman Interview 2014).

The ability to perpetuate exceptionalism through juridical measures has been intensively debated, as exceptions are supposed to be temporary and rare (Fiala 2006). In fact, thirteen years after the attacks, with a new presidency and constantly embedded in a long-term war against terrorism, the state of exception initiated in September, 2001 has been continuously renewed[160]. Temporary legal amendments in a context of exception have traditionally tended to become normalized (Gross 2003, 1090; Neal 2012b). Besides, Kim Scheppele highlights the fact that:

> Bush administration response to 9/11 in both domestic and foreign policy is not what one would typically expect of a true emergency; namely, quick responses that violate the constitutional order followed by a progressive normalization. (…) The greater abuses have come as 9/11 recedes and executive policy has turned toward larger and larger constitutional exceptions, with the active acquiescence so far of both Congress and the courts" (Scheppele 2004, 1003).

The International Commission of Jurists has already recognized that anti-terrorist extraordinary measures are seeping into the normal functioning of the state. Thus, that may produce great consequences for the respect for human rights, the rule of law and the justice system (International Commission of Jurists 2009, 6). Moreover, in the course of the interviews undertaken within the scope of this dissertation, there was a common the perception that the exceptional measures introduced in the context of the War on Terror were becoming normalized and institutionalized in the US juridical system (Lobo-Fernandes Interview 2014; Neal Interview 2014; Pureza Interview 2014; Herman Interview 2014; Pereira Interview 2014).

An important potential impact of this normalization of exceptionalism is extended by the combination of capability[161] and vague notions of suspicion[162] (Neal Interview

[159] When it seemed that it was close to an end – as the Obama Administration had repeatedly stated – the intensification of ISIS (Islamic State of Iraq and Syria – a terrorist group) actions in the course of 2014 revived the conflict. For more details, consult: Mark Lander. 2014. "Obama, in Speech on ISIS, Promises Sustained Effort to Rout Militants." *New York Times*, September 11. Available at: http://www.nytimes.com/2014/09/11/world/middleeast/obama-speech-isis.html?_r=0.

[160] The last renewal of the state of national emergency regarding terrorism, within the United States of America, occurred in January 21, 2014. See: Letter - Continuation of the National Emergency with Respect to Terrorists Who Threaten to Disrupt the Middle East Peace Process. Available at: http://www.whitehouse.gov/the-press-office/2014/01/21/letter-continuation-national-emergency-respect-terrorists-who-threaten-d.

[161] Technological and legal capabilities.

2014). Didier Bigo also shares an interesting point of view concerning the potential impact on democracy of a perpetuation of exceptional measures:

> a simple view is that security protects democracy. If democracy is attacked, its political systems take exceptional and emergency measures to ensure its survival. Another view is that this rhetoric is even more dangerous than the danger it deems to combat. Security, when it forms exceptional measures beyond the realm of normal politics and the rule of law, paves the way for the destruction of democracy and its perversion into a permanent state of emergency, and everyday state of exception without end (Bigo 2012, 277).

This growing tendency to normalize exceptional measures, facilitated by the undetermined temporality of the War on Terror, has an extended potential impact on civil liberties of individuals. In fact, these exceptional measures allow for the encroachment on fundamental rights[163], whose disrespect may be indefinitely prolonged until the dissipation of the terrorist threat. Notwithstanding, it is aggravated by the fact that the terrorist threat does not seem possible to exterminate.

According to Kent Roach:

> the enactment of permanent grey hole legislation and secret illegalities committed and pardoned by the executive power so far represented a much greater threat to rights and the rule of law[164] in the post 9/11 world than explicit and democratic derogations from rights (Roach 2008, 257).

3.2.3 Analytical Relevance of (De)Securitization

After analysing the potentiality of the normalization of exceptional measures introduced in a rationale of counterterrorism, it is important to highlight the relevance of the securitization theory in order to deconstruct the discourse of exceptionality, and thus avoid the usage of a strategy of 'plausible legality' to hinder the disrespect for civil liberties.

In agreement with Barry Buzan, bearing in mind that terrorism is a long-term conundrum, an unprecedented democratic sophistication and commitment will be required in order to deal with it as it currently presents. (Buzan 2006, 1117). Contrary to the approaches of Schmitt and Agamben to the state of exception, the securitization theory considers an important factor: the audience. Even though Agamben proposes an interesting approach to the state of exception – he focuses particularly on the evolution

[162] "Suspicion is always very broad, political and tends to be directed as much towards foreigners or activists on the left as it is to potential terrorists" (Neal Interview 2014).
[163] See: Chapter III and Chapter IV.
[164] There is a co-constitutive relationship between democracy, the rule of law and fundamental rights. Thus, the damage of one produces consequences for the others (Carrera, Guild and Hernanz 2013). For more information: See: Chapter IV.

of the US case after September 11, analyses its counterterrorist strategies as an expression of a stronger concentration of power on the executive branch of government, as well as the suppression of civil liberties in the name of security – he ignores the role of society in the state of exception. In fact, the exception approach by both Carl Schmitt and Giorgio Agamben not only disregards the role of the audience, but also the social context[165] (Silva 2013, 9).

The securitization theory also deconstructs the inevitability of the state of exception through the perception of a discursive construction of the exceptionalism: "something is a security problem when the elites declare it to be so" (Wæver 1995, 54). This interpretation opens the door to the deconstruction of the security discourse and to the contestation of a state of exception that hinders civil liberties. For some authors the securitization theory may not be the perfect solution to the deconstruction of the political discourse on exceptionalism, because it focuses excessively on the speech-act and on the state[166]. However, compared with the approaches by Giorgio Agamben and Carl Schmitt, and bearing in mind all its inherent limitations[167], analysing the state of exception in the US through the securitization lenses, which focuses on the audience and the social context, seems to be more adequate so as to allow for a deconstruction of the exceptionality discourses.

According to Clara Eroukhmanoff, securitization has been a comprehensive theoretical instrument to review the exceptionalism that emerged on the War on Terror (Eroukhmanoff 2013, 3). Although, Andrew Neal does not consider securitization theory the best alternative[168] to contradict the state of exception, he also recognizes the necessity of:

> an appropriate mode of critique for analysing the discourses, structures, principles, objects, concepts and subject positions involved in the deployment and legitimations of practices and discourses of exceptionalism – the entire constellation or discursive formation of the exception and exceptionalism (Neal 2009, 98).

The normative perspective of securitization, which reveals a bias for desecuritization,[169] may play a leading role and contribute to the deconstruction of an

[165] For more information, consult: Marta Silva. 2013. "A Guerra ao Terror como Excepção? Os perigos da Marginalização da Sociedade no Discurso de Emergência e a Alternativa da Securitização."
[166] Wyn Jones 1999; Booth 1991; Knudsen 2001. See: Chapter I.
[167] Particularly, securitization's weak normative analysis. See: Chapter I.
[168] According to him, the securitization theory proves that Schmitt is right in his considerations of the limits of liberal democracy. Thus, "in search of a more rigorous critique to the politics of exception I turn to the work of Michel Foucault" (Neal 2009, 4). For more details, see: Andrew Neal. 2010. *Exceptionalism and the Politics of Counterterrorism: Liberty, Security and the War on Terror*. New York: Routledge.
[169] See: Chapter I.

increasingly normalized state of exception within US policy. According to Jeff Huysmans, de-securitization relates to the deconstruction of insecurity (Huysmans 2006, 125). Ole Wæver introduced this concept, as treating an issue through security may not be the most adequate approach (Wæver 1995, 57). In fact, approaching terrorism through security seems wholly inadequate: firstly, as terrorism seems to be a long-term phenomenon, and security is usually applied in short-term and, secondly, the distinction 'us vs. them' that is encouraged by security, may potentially create further gaps and potentiate terrorism (Huysmans 2006, 126 *apud* Deudney 1990, 467). As Jeff Huysmans states, the importance of de-securitization emerges since:

> security studies tend to re-iterate and reinforce securitization because they pre-dispose the interpreter to use a security lens for reading political and social situations (Huysmans 2006, 126).

In the particular context of exceptional US policy-making after September 11, in order to avoid a routine and normalized encroachment on civil liberties one must critically analyse the political discourses of exceptionality. As Marta Silva highlights, only deconstruction paves the way to the possibility of contestation, to the non-naturalization of the exception framework, to a greater focus on the popular manifestation that goes beyond the elite and to adopt a critical posture regarding the response to terrorist attacks (Silva 2013 apud Jabri 2006, 151; Neal 2002, 17; Grondin 2011, 263).

4. Final Considerations

Immediately after the 9/11 attacks, the US political elites launched a securitization move using a discourse based on emergency, prioritization and extraordinary measures. In order for a securitization move to become a successful securitization process, it should meet a conjunct of 'facilitating conditions' and be accepted by an audience. A conclusion that may be drawn from this chapter is that terrorism was prioritized as a major existential threat to national security. In fact, on the securitization of terrorism the 'facilitating conditions' were met and the targeted audience – the U.S. citizens - accepted and authorized the extraordinary measures that derive from the exceptionality of the threat that requires and legitimizes breaking the rules.

Another conclusion is that two particularly exceptional measures emerged as a consequence of this securitization process: the PATRIOT Act and the FAA. Both these

legislative measures intend especially to enhance surveillance capabilities in order to heighten security. However, this increase of security prioritization has a direct effect upon civil liberties that are encroached by some of its provisions.

The impact on civil liberties conceived by this securitization process was also responsible for the emergence of debates regarding two long-established dialectics: the dichotomies of national security vs. liberty, and the state of exception vs. normality. Regarding the first, throughout this chapter it was perceived that the discussion between national security and liberty mostly tends to lead to a zero-sum conclusion. In fact, there is a manifest tendency within the US, on both the sides of the government and civil society to perceive this relation as a trade-off. The tendency to understand the relationship between both parties as a trade-off has not contributed to an adequate consensus. In fact, the relation is one of 'hostile symbiosis', whose adjustments of one to the other may produce diverse outcomes, and not necessarily increase one at the expense of the other. Nevertheless, and focusing on this particular case, it is perceivable that the national security concerns behind the enactment of the PATRIOT Act and the FAA and its increased surveillance tools potentially have a greatly negative effect upon civil liberties.

On the other hand, concerning the relationship between a state of exception and normality, the securitization of terrorism has also contributed to a turbulent debate once again due to the potential impact it may have on civil liberties. As securitization processes allow for the enactment of exceptional measures to deal with existential threats, 'normal' politics rules were disregarded after 9/11. Beyond the immediate impact on individuals rights, the securitization of terrorism associated with a lack of temporal limitation and a tendency to create a 'plausible legality' – legitimating exceptions through the amendment of former legislative documents – presents a greater consequence, since it tends to normalize the exceptional norms.

Finally, considering this particular case-study it became clear that the act of prolonging exceptional measures embedded in a 'plausible legality,' which materialized firstly in the PATRIOT Act and later in the FAA, has proved itself. The PATRIOT Act has continuously been reauthorized since 2001, and the same has occurred with the FAA since 2008.

CHAPTER III. PATRIOT ACT AND FOREIGN INTELLIGENCE AMENDMENT ACT: DOMESTIC SURVEILLANCE IMPACT ON CONSTITUTIONAL GUARANTEES

1. Introduction

Immediately after the terrorist attacks, in a context of the War on Terror, new enhanced surveillance provisions were passed and enacted. After analysing the construction of a securitization process around terrorism and the subsequent emergence of exceptional measures, particularly surveillance measures, in the previous chapter, as well as comprehending the scope of the PATRIOT Act and the FAA, this chapter intends to analyse the domestic impact of those on civil liberties. In a context of terrorism securitization,[170] combined with a growing tendency towards the 'technologization of security' and an increase of surveillance in order to improve national security, more intrusive surveillance tools emerged (Moraes 2014; Bowden 2013; Rubinstein, Nojeim and Lee 2013). In fact, the 9/11 attacks expressively altered the framework of surveillance within the US[171].

The culmination of this escalation of surveillance occurred when on June 2013 Edward Snowden revealed the existence of extensive NSA surveillance programs authorized by US legislative measures[172]. Actually, before those revelations:

> most American citizens believed that these surveillance programs weren't directed to them, and if they had done nothing wrong they had nothing to fear. I think that has changed a bit, since the Snowden revelations, in the sense that Americans now realize that they can be under surveillance (Neal Interview 2014).

While the US government asserted the need for these programs to keep the nation safer[173], among civil libertarians these disclosures prompted "fears of an Orwellian Big-Brother security establishment" or fears of the institutionalization of a surveillance society (Quirck and Bendix 2013, 2; Stanley and Steinhardt 2004, 53).

Both section 215 (PATRIOT Act) and section 702 (FAA) analysed in this chapter serve as the legal basis for the application of surveillance programs that may seriously injure civil liberties. These programs were conspicuous due to the massive secrecy that surrounded them (Greene and Rodriguez 2014, 5).

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[170] See: Chapter II

[171] See: Chapter I.

[172] For more details concerning the disclosures of Edward Snowden and surveillance programs, see: Chapter III, Section 3.1.

[173] Obama stated that after 9/11: "across the political spectrum, Americans recognized that we had to adapt to a world in which a bomb could be built in a basement, and our electric grid could be shut down by operators an ocean away. (…)So we demanded that our intelligence community improve its capabilities, and that law enforcement change practices to focus more on preventing attacks before they happen than prosecuting terrorists after an attack. It is hard to overstate the transformation America's intelligence community had to go through after 9/11. (…)*And taken together, these efforts have prevented multiple attacks and saved innocent lives -- not just here in the United States, but around the globe*" (emphasis added) (Obama, 2014). For more information, consult: Transcript of Obama's Speech on NSA Phone Surveillance. 2014. *New York Times*, January 17. Available At: http://www.nytimes.com/2014/01/18/us/politics/obamas-speech-on-nsa-phone-surveillance.html?_r=0&module=ArrowsNav&contentCollection=Politics&action=keypress&region=FixedLeft&pgtype=article.

In fact, in a counterterrorist environment, extensive surveillance emerged as an useful tool for the government. Thus, two legislative documents that extended surveillance were particularly discussed: the USA PATRIOT Act[174] and the Foreign Amendments Surveillance Act[175]. The aim of this chapter is to focus on the US domestic surveillance policies – enhanced mainly for antiterrorism purposes – and on its impact on human security, through the disrespect of civil liberties. It relies upon the examination of the two specific sections and their impact. In the US, the constitutional legality of both has been extensively debated.

2. Civil Liberties in the US

Centuries had lapsed before civil rights and liberties were fully established in America and Europe. Civil liberties:

> are somehow an interface within a society between the state and the individual, where people create an area of freedom from the coercive power of the state (Öztürk 2010, 127).

One of the early documents that initiated the legal application of civil rights was the eighteenth-century US Constitution (1797) and its first ten Amendments (December 15, 1791), which became known as the Bill of Rights. Thereafter, the United States of America has had a long tradition of abiding to these fundamental freedoms and rights throughout its history. However, in spite of this tradition, times of emergency and war have demonstrated that national security and emergency overlap with constitutional order. In fact, as stated by Szumarska, balancing civil rights and national security has always been a challenge for US Presidents (Szumarska 2008, 1).

Episodes of disrespect for civil liberties were recurrent during the Lincoln – the civil war – or Roosevelt – World War II – mandates, as well as in other periods of American history. In fact, as Francis Biddle[176] captures in a single sentence: "the Constitution has not greatly bothered any wartime President". Presidents, such as Franklin Roosevelt, Lincoln or Wilson pushed their powers further in the past[177]. As a matter of fact, the founders of the US Constitution discussed the impact that emergencies and crises could have on constitutional principles. James Madison and

[174] USA PATRIOT Act stands for: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act [hereinafter referred as PATRIOT Act].
[175] See: Chapter II.
[176] Attorney General during the Franklin Roosevelt Administration,
[177] See: Rehnquist, William. 2004. "Inter Arma Silent Leges." In *Civil Liberties vs. National Security in a Post 9/11 World*, ed. Katherine Darmer, Robert Baird and Stuart Rosenbaum, 23-30. New York: Prometheus Books.

Alexander Hamilton[178] advocated the prevalence of constitutional law even in times of crisis. On the other hand, Thomas Jefferson stated that:

> the laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means (Jefferson 1810).

History has granted added powers to the Executive Branch in times of war[179]; however, the President himself may, through his action, push this power even further. Therefore, in the post-9/11 period and after the declaration of an unconventional war, the Bush administration institutionalized anti-terrorist measures that were not fully compatible with the American Bill of Rights.

The PATRIOT Act is one of the most controversial anti-terrorist bills adopted, as its provisions had a profound and visible effect on U.S. citizens' liberties (Cassel 2004; Portela 2007; Neier 2004; Schulhofer 2004). As stated in the previous chapter, this anti-terrorist legislative measure, which had focused on the expansion of surveillance powers, opened a precedent for other piece of legislation that further enhanced government's capabilities to spy on individuals: the Foreign Intelligence Surveillance Amendment Act of 2008[180].

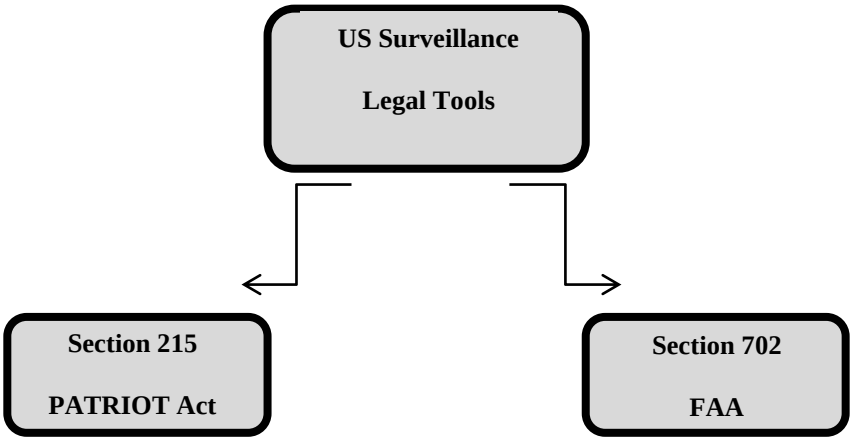
For the purpose of this subchapter, the analysis will focus solely on section 215 pertaining to this legislation and on section 702 of the FAA.

3. Domestic Surveillance Tools: Section 215 and Section 702 Impact on Civil Liberties

According to what was previously described, the post-9/11 period fostered the proliferation of extended surveillance authorities and powers. Through the enactment of the PATRIOT Act, a precedent was opened in order to legalize surveillance extensions. One of the main provisions – section 215 - introduced in this legislative document, significantly broadened the NSA's legal authority to conduct domestic surveillance. Later, the insertion of section 702 in the Foreign Amendments Surveillance Act furthered this ability.

[178] For more information, see: Baker, Thomas. 2002. "Civil Rights and Civil Liberties in a Crisis: A Few Pages of History." *Nevada Law Journal* 3(1):21-28.
[179] *Ibid.*
[180] For more information concerning the PATRIOT Act and the FAA, consult: Chapter II.

Figure 9 – Domestic Legal Tools for Surveillance



Regarding the impact of section 215 and section 702 on the civil liberties of American citizens, these provisions will be analysed in comparison with the rights guaranteed by the Bill of Rights. One can thus comprehend how its dispositions may affect some of the most essential civil rights. The sections under analysis are the most controversial, owing to their impact on civil liberties. As a matter of fact, these provisions particularly infringe on civil rights protected by the First and Fourth Amendments (Cassel 2004).

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

3.1 Surveillance under Section 215[181]

In the particular case of Section 215, two periods may be highlighted and distinguished with regard to surveillance impact. The first period, from 2001 to 2013, and the second period from 2013 until now. Section 215 of the PATRIOT Act is one of

[181] Section 215: Access to Records and Other Items under the Foreign Intelligence Surveillance Act.

the most controversial sections within the PATRIOT Act. In a first moment, it spurred debate and controversy among librarians and booksellers. Later, the debate intensified after the disclosure of the NSA Bulk Collection of Telephony Metadata program that was legally justified by its application.

From 2001 to 2013

Section 215 amends the FISA of 1978[182] and relaxes some of its early provisions, allowing the government to issue orders to obtain records of "any tangible things (including books, records, papers, documents, and other items)" by certifying before the FISC that these are important to "protect against international terrorism or clandestine intelligence activities"[183] (PATRIOT Act, Section 215).

Thus, the collection of these items is allowed when the investigation pursues foreign intelligence information[184] that does not correlate to a US citizen. However, if the information sought is related to a US citizen, it may be collected only if it is relevant[185]: for preventing terrorism or foreign espionage without disrespecting the protections granted by the First Amendment. This relevance standard is one of the most debated concepts, since its interpretation encompasses almost all of the US citizens' telephone metadata, depriving the word 'relevant' of its meaning and allowing for an extremely broad standard.

While the FBI could previously only apply for a FISC warrant to access 'business records'[186], the government has extended this authority by eliminating limits on the types of business in question. Thus, the FBI can have access to any records about anyone[187] from any entity that holds these records, as long as it specifies that these records will be used in a terrorist investigation. In other words, this section has given:

> the FBI access to specific categories of records in intelligence investigations, and created a massive catch-all provision, giving the FBI the ability to compel anyone to disclose any record or tangible thing that the FBI claims is relevant to an investigation of international

[182] This section "replaces former Sec. 501 through Sec. 503 in title V of FISA with new Sec. 501 and Sec. 502 of FISA" (Amendments to the Foreign Intelligence Surveillance Act). Available at: https://www.fas.org/sgp/crs/intel/m071906.pdf.
[183] Previously, law enforcement agents requiring an order to access records had to present to FISC "specific articulable facts giving reason to believe that the subject of an investigation was a foreign power or the agent of a foreign power" (DeRosa 2005).
[184] *Supra note* 110.
[185] This relevance standard was introduced in 2006.
[186] Previously it was FISA section 501 – later amended by section 215 – which limited the records for foreign intelligence investigation, common carriers, public accommodation providers, vehicle rental agencies, and physical storage facility operators (Doyle 2002, 11).
[187] With the introduction of this section, the records that can be obtained are not limited to foreign powers agents, but it can affect innocent U.S. Citizens, due to the collection of data pertaining to individuals who are not suspected of any crime (Chang 2001; Cole and Dempsey 2002). If a U.S. citizen is the target of the investigation, this cannot rely solely "upon the basis of activities protected by the first amendment to the Constitution of the United States" (PATRIOT Act, Section 215).

> terrorism or 'clandestine intelligence activities,' even if the record does not pertain to a suspect spy or international terrorist (Cole and Dempsey 2002, 167).

Concerning the oversight of the application of section 215, its mechanisms consist of: minimization procedures (to restrict the holding of US citizens' data); a court revision (FISC) for reauthorization every 90 days and a review by the House and Senate Permanent Select Committees on Intelligence.

The surveillance authority enhanced by this section has numerous implications with regard to civil liberties of U.S. citizens, and more particularly concerning the right to privacy. While prior to the passage of the PATRIOT Act, law enforcement agents could have access to the records of a suspect of a foreign power, afterwards these agents could access all the records (US citizens' records included) of, for instance, a library, hospital or telephone company, based on the justification that this is relevant in preventing international terrorism or clandestine intelligence (Northouse 2006, 15; Cassel 2004).

This section was vigorously debated and criticized, particularly by the American Library Association, due to the potential use of book records to investigate someone, which was perceived as influencing and diminishing US citizens' intellectual freedom.

Proponents of this section, such as Jon Kyl, criticize this point of view, stating that this measure does not specify that an agent may use book records to obtain a court order for surveillance. In accordance with this author, orders will only be given for "tangible things" to obtain foreign intelligence information, which is – as he claims – restrictive. Additionally, federal agents had already used an authority similar to section 215 – the grand jury subpoena[188] – in order to obtain records from bookstores. The author also highlights that some book records may be relevant for terrorism investigations, for instance in the case when a bomber uses a book giving instruction on how to build a detonator (Kyn, 2006:146-147). Furthermore, McCarthy also defends the application and utility of this section. According to this author, it legally clarifies a situation that in practice was already being used (McCarthy 2005; Portela 2007).

However, the influence this section may potentially have on the civil liberties of US citizens is clear. The indiscriminate access to data, such as phone records, of individuals who are not suspects of terrorism or clandestine intelligence harms their right to privacy, most particularly the requirement of 'probable cause' imposed by the

[188] "A subpoena is a written order to compel an individual to give testimony on a particular subject, often before a court, but sometimes in other proceedings (such as a Congressional inquiry). Failure to comply with such an order to appear may be punishable as contempt". See: Legal Information Institute. Available at: http://www.law.cornell.edu/wex/subpoena.

4th Amendment. As Cole and Dempsey stated this re-dimensioned authority of surveillance under FISA will result in an extended collection of data pertaining to individuals who are not suspected of wrongdoing (Cole and Dempsey 2002, 167).

Likewise, an expanded authority under FISA can also impact upon the 1st Amendment civil rights, as the orders for accessing records are provided by FISC, and its activities are carried out with great amount of secrecy. Consequently, recipients of a search order will not be authorized to tell others about these orders, even in cases when there is no need for secrecy:

> no person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section (PATRIOT Act, Section 215).

Peter Swire also condemns this impact on freedom of speech, due to the 'gag rule', which is the silence rule (Swire 2005).

This section also facilitates the subjection of US Citizens to FISA provisions, as long as they are perceived as a foreign agent, which could happen if they were suspected of having connections with foreign powers, governments or organizations, or even when they are legitimate employees of a foreign organization (Schulhofer 2004, 94; Seabra 2007, 129). Section 215 enhances government authority for surveillance, lessens judicial revision and extends of law enforcement powers. Even though this law was scheduled to expire on December 31, 2005, posterior reauthorizations have been enacted[189]. It is now scheduled to expire on June 1, 2015.

From 2013 until now: Bulk Collection of Telephony Metadata Program

In the particular case of section 215, the years have shown that concerns regarding civil liberties were not simple considerations, but that in fact, this had been affected by governmental action. On June 6, 2013 the British newspaper *The Guardian*[190] published

[189] In July 2005 two project laws for reauthorization acts emerged: one was proposed by the House of representatives and the other was proposed by the Senate. There were differences between both projects, so that on December 8, 2005 a Conference Committee released a report that represented a compromise between the two previous laws proposed by the House of Representatives and the Senate.
A separate legislative document introduced by the Senate, the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006 included civil liberties guarantees that were not included in the Conference Report. Thus, the combination of the conference report with the Senate improvement act produced the: USA PATRIOT Improvement and Reauthorization Act of 2005. Concerning section 215, it introduced some alterations to increase control and supervision in order to protect civil liberties, and extended its sunset to December 31, 2009 (Yeh and Doyle 2006).
On February 27, 2010 Barack Obama signed an extension of these provisions for another year. Moreover, on May 19, 2011 the PATRIOT Act Sunsets Extension Act of 2011 extended the sunset clause until June 1, 2015.
[190] See: Glenn Greenwald. 2013. "NSA Collecting Phone Records of Millions of Verizon Customers Daily." *The Guardian*. June 6. Available at: http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order.

an article that relied upon the unauthorized disclosures of secret governmental documents by Edward Snowden. This article revealed the existence of a NSA secret program, which had allowed this agency and the FBI to access individuals' telephone records, since 2006[191]. The Guardian published a secret FISC order (pursuant to section 215 of the PATRIOT Act) that compelled a telecommunications' company – Verizon – to provide the NSA with daily access to telephony metadata created by this company for communications[192].

After this disclosure, it became known that this was not the only specific telecommunication company to be supplying users' metadata to the NSA, but that other similar telephone companies were also beavering in the same way. Indeed, after the revelation of the Bulk Collection of Telephony Metadata Program, attentions inevitably focused on the usage of this section's authority to collect an inestimable number of phone records. This was authorized by a FISC order[193] (renewed approximately every 90 days)[194] pursuant to Section 215 of the PATRIOT Act.

In fact, according to this secret program, NSA could access the records collected by telephone companies after a telephone call. These records include call' details which are designated as 'telephony metadata[195]'. However, this does not include the content of the telephone communication itself. Metadata:

> consists of the transactional information that phone companies retain in their systems for a period of time in the ordinary course of business for billing purposes and that appears on typical phone bills. It includes only data fields showing which phone numbers called which numbers and the time and duration of the calls (Bradbury 2013, 2).

This telephone record collection program allowed the NSA to access communications made "(i) between the United States and abroad; or (ii) wholly within the United States, including local telephone"[196]. Thus, through this bulk collection program, the US government has access to national and international call records carried out *to* and *from* its territory. As previously stated, these records are kept for a

[191] The Court first authorized this program on May 2006. Since then it was renewed thirty-four times by FISC judges (Donohue 2013, 2).
[192] See: Verizon Order. In Re Application of the FBI for an Order Requiring the Production of Tangible Things from Verizon Bus. Network Servs., Inc. on Behalf of MCI Commc'n Servs., Inc. d/b/a Verizon Bus. Servs. Available at: http://bit.ly/11FY393.
[193] In the disclosure of this program The Guardian published the FISC order that allowed the NSA to access the records of Verizon, a US telecommunications company. See: *In Re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From Verizon Business Network Services, Inc. on Behalf of MCI Communication Services, Inc. D/B/A Verizon Business Services*.
[194] Approximately every 90 days the FISC must reauthorize the collection of records by passing a new order that will allow for its implementation for another ninety days (PCLOB 2014a, 23)
[195] 'Metadata' is usually kept by telephone companies for a certain period of time (PCLOB 2014a).
[196] See *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From Verizon Business Network Services, Inc. On Behalf of MCI Communication Services, Inc. D/B/A Verizon Business Services.*

period of five years, and the surveillance order is reviewed by FISC judges every 90 days.

The government's justification for the acquisition of metadata is two-fold: firstly, it is the preservation and collection of data in one database that will permit an analysis of historical connections, in order to facilitate investigations (Bradbury 2013, 2-3). Secondly, metadata is not as intrusive as the content of calls[197]. However, more recently, scholars[198] have claimed that metadata can also be extremely invasive and can produce high negative impact on individual's privacy. Actually:

> metadata can now yield startling insights about individuals and groups, particularly when collected in large quantities across the population. It is no longer safe to assume that this "summary" or "non-content" information is less revealing or less sensitive than the content it describes. Just by using new technologies such as smart phones and social media, we leave rich and revealing trails of metadata as we move through daily life (Felten 2013, 2).

The scope of this program is extremely broad, since:

> the database is queried by way of 'selectors'[199], such as telephone numbers, for which there is a 'reasonable articulable suspicion' of a link to terrorism. The database is queried to identify every call made to and from the selector, and then as a second 'hop', every call made to or from those numbers. Prior to January 2014, the analysis was carried out to a third 'hop' as well (Greene and Rodriguez 2014, 8).

The three 'hops'[200] system continually allowed the US authorities to access millions of calls[201] (Figure 10).

The most dangerous feature of metadata is that the large collection of little bits of information can produce and reveal data equivalent to content, such as what our closest relationships are or the structure and members of organizations.

While, section 215 introduces an amendment to FISA, it should be applied only for the purposes of foreign intelligence. However, according to the government, the inclusion and analysis of entirely domestic calls, is justified because:

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[197] "They are not looking at people's names, and they're not looking at content" (Obama 2014). See: Spencer Ackerman and James Ball. "NSA Performed Warrantless Searches on Americans' Calls and Emails – Clapper." The Guardian, April 1. Available at: http://www.theguardian.com/world/2014/apr/01/nsa-surveillance-loophole-americans-data.

[198] For more details, see: Stanford Students Show that Phone Record Surveillance Can Yield Vast Amounts of Information. Available in: http://news.stanford.edu/news/2014/march/nsa-phone-surveillance-031214.html; Edward Felten. 2013. "Written Testimony of Edward W. Felten Professor of Computer Science and Public Affairs." Princeton University at *United States Senate, Committee on the Judiciary Hearing on Continued Oversight of the Foreign Intelligence Surveillance Act*. Available at: http://www.cs.princeton.edu/~felten/testimony-2013-10-02.pdf.

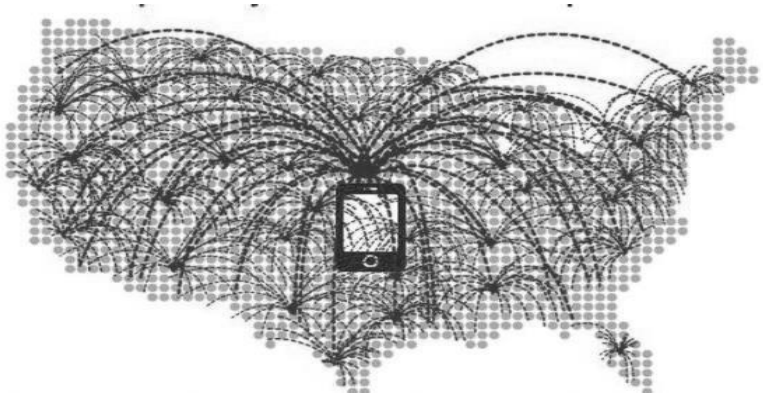
[199] "A selector must be a specific communications facility that is assessed to be used by the target, such as the target's email address or telephone number" (PCLOB 2014b, 32)

[200] On January 17, 2014 the US Administration proposed the reduction of the metadata access from three 'hops' to two 'hops'. This proposal was authorized by the FISC on February 5, 2014. For more information, consult: The Administration's Proposal for Ending the Section 215 Bulk Telephony Metadata Program. Available in: http://www.whitehouse.gov/the-press-office/2014/03/27/fact-sheet-administration-s-proposal-ending-section-215-bulk-telephony-m.

[201] For more information, see: Guardian US Interactive Team. 2014. "Three Degrees of Separation: Breaking Down the NSA's 'hops' Surveillance Method." *The Guardian*, October 28. Available at: http://www.theguardian.com/world/interactive/2013/oct/28/nsa-files-decoded-hops.

> the most analytically significant terrorist-related communications are those with one end in the United States or those that are purely domestic, because those communications are particularly likely to identify suspects in the United States—whose activities may include planning attacks against the homeland (Section 215 White Paper 2013, 3)[202].

Figure 10 – Three 'Hops' Range



(American Civil Liberties Union Site [203]).

The most dangerous feature of metadata is that the large collection of little bits of information can produce and reveal data equivalent to content, such as what our closest relationships are or the structure and members of organizations. While, section 215 introduces an amendment to FISA, it should be applied only for the purposes of foreign intelligence. However, according to the government, the inclusion and analysis of entirely domestic calls, is justified because:

> the most analytically significant terrorist-related communications are those with one end in the United States or those that are purely domestic, because those communications are particularly likely to identify suspects in the United States—whose activities may include planning attacks against the homeland (Section 215 White Paper 2013, 3)[204].

Under this program, NSA has access to all call' details generated by certain telephone companies, which must provide this information to the NSA daily, until the expiry of the court order and are not authorized to disclose this sharing of data[205] to

[202] See Administration White Paper: Bulk Collection of Telephony Metadata under Section 215 of the USA PATRIOT Act [hereinafter 'Section 215 White Paper']. Available at: https://www.documentcloud.org/documents/750211-administration-white-paper-section-215.html.

[203] American Civil Liberties Union. Available at: http://www.slate.com/blogs/future_tense/2013/09/04/three_hops_gif_aclu_infographic_shows_how_nsa_s_surveillance_spreads_exponentially.html.

[204] See Administration White Paper: Bulk Collection of Telephony Metadata under Section 215 of the USA PATRIOT Act [hereinafter 'Section 215 White Paper']. Available at: https://www.documentcloud.org/documents/750211-administration-white-paper-section-215.html.

[205] See *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From Verizon Business Network Services, Inc. On Behalf of MCI Communication Services, Inc. D/B/A Verizon Business Services (April 04 2013).* Available at*:* http://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order.

anyone. After collecting these 'metadata', NSA retains the information in a centralized database, in order to permit future searches (Pell and Soghoian 2013, 137).

After the media's public disclosure of this secret program, the administration released a White Paper[206] on August 9 2013, explaining its aim, relevance and legal basis. According to this document:

> the Foreign Intelligence Surveillance Court ("the FISC" or "the Court") authorizes this program under the "business records" provision of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1861, enacted as section 215 of the USA PATRIOT Act (Section 215) (Section 215 White Paper 2013, 2).

In fact, this bulk collection of 'telephony metadata' program is presented as a fundamental counterterrorist tool, that:

> is important to the Government because, by analyzing it, the Government can determine whether known or suspected terrorist operatives have been in contact with other persons who may be engaged in terrorist activities, including persons and activities within the United States (Section 215 White Paper 2013, 2).

Another governmental justification used was based on the fact that the computerized collection of communications data did not consist of surveillance, since human eyes had never looked at it (Greene and Rodriguez 2014, 15). In spite of governmental justification for the application of this program, civil liberties groups, the public and legal specialists (such as the American Civil Liberties Union; Donohue 2013; PCLOB 2014a) have criticised the impact that this program has had on US citizens' fundamental right to privacy. The impact of the section 215 program on civil liberties granted by the US Constitution may be divided into two[207]:

Constitutional Impact on Fourth Amendment Protections

Several scholars and civil society organizations[208] have criticized the indiscriminate bulk collection of metadata, stating that it is not compatible with the constitutional prohibition of 'unreasonable searches'. In fact:

> since the metadata program collects this information in bulk, it necessarily gathers information from United States citizens with no connection to foreign intelligence or international terrorism (Whitehead, McKusick and Butschek 2014, 16).

[206] See*: Supra note* 203.
[207] Other scholars highlight the disrespect for other Constitutional provisions. However, due to an analytical restriction the aim of this dissertation is to focus on the provisions most affected: the First and Fourth Amendments.
[208] See: American Civil Liberties Union. *Reform the Patriot Act Section 215*. Available at: https://www.aclu.org/free-speech-national-security-technology-and-liberty/reform-patriot-act-section-215; Laura Donohue. 2013. "Bulk Metadata Collection: Statutory and Constitutional Considerations." *Harvard Journal of Law and Public Policy* 37:757-900; Electronic Frontier Foundation. "Section 215 of the PATRIOT Act: The Illegal and Unconstitutional Use." Available at: https://www.eff.org/files/filenode/215_one_pager_f_adv.pdf.

Thus, without proper limitations, the NSA bulk telephony metadata program violates the protection granted by the Fourth Amendment.

On the other hand, advocates[209] of the constitutionality of this application of section 215 state that the bulk collection of metadata may not be considered a search[210], as the data is not collected directly from an individual, but from telephone companies. In fact, according to US jurisprudence, the US citizen is protected by the Fourth Amendment if the individual has a 'reasonable expectation of privacy'. This, expectation is limited by what is known as the 'third-party doctrine', according to which once an individual shares information with a third party, he loses privacy protections[211].

Several lawsuits[212] were filed in US courts after the Snowden disclosures questioning the constitutionality of the section 215 program under the Fourth Amendment. Interesting is that even the courts' decisions have been divergent. While in the case ACLU v. Clapper, the court determined that the bulk collection program was not a 'search' and thus was not violating the Fourth Amendment obligations, in the case Klayman v. Obama, the judge Richard Leon recognized the bulk collection of metadata as a search and considered that "surely, such a program infringes on 'that degree of privacy' that the Founders enshrined in the fourth amendment"[213].

The Constitutional Impact on First Amendment Protections

Another constitutional impact of this application of section 215 lies with First Amendment protection. In fact, the exercise of freedom of speech and the association of individuals who are developing their work in sensitive areas will have fewer reasons to trust the confidentiality of their relationships, because phone call patterns can be extremely revealing.

[209] See: Steven Bradbury. 2013. "Understanding the NSA Programs: Bulk Acquisition of Telephone Metadata under Section 215 and Foreign-targeted Collection under Section 702." *Lawfare Research Paper Series* 1(3):1-18; John Yoo. 2013. "The Legality of the National Security Agency's Bulk Data Surveillance Programs." Available at: http://moritzlaw.osu.edu/students/groups/is/files/2013/11/Yoo-Article.pdf.

[210] It is relevant to comprehend that a warrant based on a probable cause is required before conducting a search. However, the warrant is not required when the government does not proceed to a search (Whitehead, McKusick and Butschek 2014, 18).

[211] For more details, see: Edward Liu, Andrew Nolan and Richard Thompson II. 2014. "Overview of Constitutional Challenges to NSA Collection Activities and Recent Developments." *Congressional Research Service*. Available at: http://fas.org/sgp/crs/intel/R43459.pdf.

[212] For a description of the lawsuits filed, see: John Whitehead, Douglas McKusick, Adam Butschek. 2014. "The Founding Fathers and the Fourth Amendment's Historic Protections Against Government Surveillance: A Historic Analysis of the Fourth Amendment's Reasonable Expectations of Privacy Standards as It Relates to the NSA's surveillance Activities." A Publication for *The Rutherford Institute.* Available at: https://www.rutherford.org/files_images/general/2014_Historic_4th_Amendment-NSA_Metadata1.pdf.

[213] For more information, consult: Klayman v. Obama. (December 16, 2014). Available at: http://online.wsj.com/public/resources/documents/JudgeLeonNSAopinion12162013.pdf; New York Times. *Federal Judge's Ruling on NSA Lawsuit.* Available at: http://www.nytimes.com/interactive/2013/12/17/us/politics/17nsa-ruling.html?_r=0.

Two expert groups have already concluded that the section 215 program has an impact on civil liberties. The Review Group on Intelligence and Communications Technologies [hereinafter RGICT] created by the President on August 27, 2013, recommended numerous reforms to surveillance programs in its final report (December 12, 2013). Thus, the expert group defend that:

> congress should end such storage and transition to a system in which such metadata is held privately for the government to query when necessary for national security purposes (…) creates potential risks to public trust, personal privacy, and civil liberty (RGICT 2013, 17).

More recently, a report[214] by the Privacy and Civil Liberties Oversight Board[215], January 23, 2014, has also denoted after a deep analysis of this program that its appliance "shifts the balance of power between the state and its citizens" (PCLOB 2014a, 12). While some advocates of this program claim that even though some privacy might be at risk, national security interests override it, the reality is that the application of the program has not produced such a significant result on security (Donohue 2013, 65). In fact, the independent board concludes that this program pursuant to section 215, has not only raised concerns regarding the constitutional rights granted by the First and Fourth Amendment[216], but it has also not been crucial to the safeguard of national security from terrorism, as was stated previously (PCLOB 2014a, 12). Besides, it also concludes that section 215 does not provide a legal basis for this program, thus exceeding its statutory authority. One of the reasons for this statement resides in the fact that the section explicitly allows the FBI to obtain records for use in its investigations; however it does not mention nor authorize the collection of records by the NSA[217] (Herman Interview 2014).

One interesting point regarding this section is highlighted. Once FISA was enacted in 1978, in order to enhance the power of the NSA on the gathering of foreign intelligence, it also imposed restrictions that intended to prevent intelligence agencies from applying this expanded surveillance on U.S. citizens. However, as imposed by this

[214] See: *Privacy and Civil Liberties Oversight Board*. 2014. "Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court." Available at: http://www.pclob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf.

[215] An independent bipartisan agency within the Executive Branch, which was established in 2007 by the Implementing Recommendations of the 9/11 Commission Act of 2007.

[216] Regarding the First Amendment , the board's report states that "the bulk collection of telephone records can be expected to have a chilling effect on the free exercise of speech and association, because individuals and groups engaged in sensitive or controversial work have less reason to trust in the confidentiality of their relationships as revealed by their calling patterns". On the other hand, concerning Fourth Amendment rights, and particularly the right to privacy, "when the government collects all of a person's telephone records, storing them for five years in a government database that is subject to high-speed digital searching and analysis, the privacy implications go far beyond what can be revealed by the metadata of a single telephone call" (PCLOB 2014a, 12).

[217] For more information, see: *Privacy and Civil Liberties Oversight Board*. 2014. "Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court." Available at: http://www.pclob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf.

section, FISA amendments have reduced these restrictions (Donohue 2013, 91), thus favoring the application of enhanced surveillance procedures on U.S. citizens and disregarding their civil liberties.

On January 17, 2014 and after numerous domestic pressures, Barack Obama made a public statement ordering a transition that will terminate the section 215 program as it previously existed[218]. The aim is to restrict the ability of the NSA to access phone records by maintaining the 'telephony metadata' on telecommunications companies, and only accessing this when necessary. Besides, another reform requires a court approval each time an intelligence agency wants to access call details' records, except in cases of emergencies.

To sum up, the technological developments at the disposal of governments combined with new legal authorities for surveillance have changed some of previous conceptions of privacy. The real impact of section 215 authority on constitutional guarantees, particularly those of First and Fourth amendment protection, seems undeniable.

3.2 Surveillance under Section 702[219]

Section 702 was introduced in 2008 by the Foreign Amendments Surveillance Act[220]. The latter introduces a new title – title VII – to the former FISA from which this provision emerges. The main purpose of this section is to collect foreign intelligence information – derived from the surveillance of electronic communications – from non-U.S. persons 'reasonably believed' to be located outside of the US. In fact, through its application the US government is able to access a great amount of foreign intelligence data quickly and effectively like never before.

Thus, this section allows the Attorney General and the DNI (Director of National Intelligence) to approve the targeting of non-US persons outside the US territory. Once authorized, this collection of data may be protracted for a period of up to one year. However:

[218] Press Release, The White House. 2014. "Office of the Press Secretary, Presidential Policy Directive/PPD-28," January 17. Available at: http://www.lawfareblog.com/wp-content/uploads/2014/01/2014sigint.mem_.ppd_.rel_.pdf; Statement from DNI Clapper on Ending the Section 215 Bulk Telephony Metadata Program (March 27, 2014). Available at: http://www.dni.gov/index.php/newsroom/ic-in-the-news/206-ic-n-the-news-2014/1033-statement-from-dni-clapper-on-ending-the-section-215-bulk-telephony-metadata-program.

[219] Section 702: Procedures for targeting certain persons outside the United States other than United States persons.

[220] This title VII was reauthorized by the FAA Modernization and Reform Act of 2012 until September, 2015. For more information on the evolution of the FAA from 2008 until its reauthorization, see: Edward Liu. 2013. Reauthorization of the FISA Amendments Act. Available at: http://fas.org/sgp/crs/intel/R42725.pdf.

> before obtaining an order authorizing surveillance under the Act, the Attorney General and DNI must provide to the FISC a written certification attesting that the FISC has approved, or that the government has submitted for approval, 'targeting procedures' and 'minimization procedures' (Jaffer 2014, 4).

Thus, both 'minimization' and 'targeting' procedures need to be subjected to judicial review (FISC). Nevertheless, the role of FISC is constrained (Jaffer 2014, 5; Liu, Nolan and Thompson 2014, 11). Moreover, according to Caspar Bowden the lack of an adversarial challenge to the governments' view, creates a situation in which "the FISC's mindset has become simply bending over backwards to find a legal interpretation which fulfills the government's wishes" (Bowden Interview 2014).

Actually, the FISC:

> does not review or approve the government targeting decisions. Nor does review or approve the list of 'facilities' the government proposes to monitor (…) The FISC reviews only the general procedures that the government proposes to use in carrying out its surveillance (Jaffer 2014, 5).

One novelty introduced is that the targeting may occur without individualized court orders[221]. In fact, this was proved by the recently published Transparency Report, in which it is shown that a unique warrant allowed the surveillance of approximately 89.000 targets.

Table 4 – Number of Targets Affected by Section 702 Orders During 2013

Legal Authority	Annual Number of Orders	Estimated Number of Targets Affected
Section 702	1	89,138

(Adapted from Transparency Report of 2013[222]).

Moreover, unlike in FISA, the surveillance carried out under section 702 of the FAA is neither based on probable cause nor on individualized suspicion. While the FISC's previous requirement to find a probable cause existed in order to consider that the specific target of the surveillance was a foreign power or an agent of a foreign

[221] According to Steven Bradbury this was justified, since "in the new world of packet-switched Internet Communications and international fiber-optic cables, FISA's original regime on individualized court orders for foreign intelligence surveillance conducted on facilities in the United States became cumbersome, because it now required case-by-case court approvals for the surveillance of international communications that were previously exempt from FISA coverage". (…) After the 9/11 attacks, "the imperative of conducting fast, flexible, and broad-scale signals intelligence of international communications in order to detect and prevent a follow-on attack on the U.S. homeland in the immediate wake of 9/11 proved to be incompatible with the traditional FISA procedures for individualized court orders and the cumbersome approval process then in place" (Bradbury 2013, 16-17).

[222] *Office of the Director of National Intelligence*. 2014. "Statistical Transparency Report Regarding use of National Security Authorities Annual Statistics for Calendar Year 2013," June 6. Available at: http://www.dni.gov/files/tp/National_Security_Authorities_Transparency_Report_CY2013.pdf.

power, with the FAA enactment the target may be any foreigner located abroad, as long as the purpose of the surveillance is the collection of 'foreign intelligence information' (Jaffer 2014, 5).

Section 702 is also subjected to some limitations. It:

> **(1)** may not intentionally target any person known at the time of acquisition to be located in the United States;
>
> **(2)** may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States;
>
> **(3)** may not intentionally target a United States person reasonably believed to be located outside the United States;
>
> **(4)** may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States; and
>
> **(5)** shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States[223] (Section 702 FAA 2008).

While US persons may not be targeted under this section, their communications may be collected incidentally, for instance (PCLOB 2014b, 6):

-when a US citizens communicates with a foreign target;

-when two foreign targets discuss a US citizen;

The US government may retain and use these communications regarding US citizens if they are subjected to 'minimization' and 'targeting' procedures. Besides, if a US communication is accidentally intercepted (due to a technological failure) the data must be destroyed (PCLOB 2014b, 6).

PRISM Program

The mass collection of telephone and Internet communications under section 702 is undertaken through two disclosed programs: PRISM and Upstream. In this dissertation, only the first program will be briefly analysed, since it is the most debated and consequential of both[224]. This section 702 program is extremely complex: it involves multiple agencies, collects numerous types of data, for multiple purposes (PCLOB 2014b, 7).

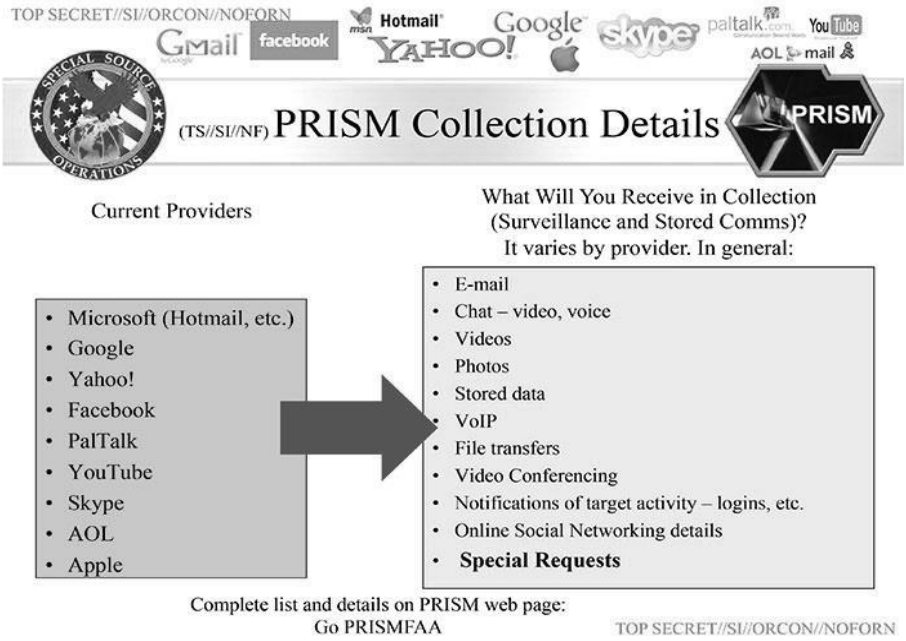
PRISM was one of the many NSA surveillance programs disclosed by Edward Snowden. In fact, this surveillance program emerged as an evolution of a secret

[223] 50 U.S. Code § 1881a (b).

[224] "According to a partially declassified 2011 opinion from the FISC, NSA collected 250 million Internet communications per year under this program. Of these communications, 91% were acquired 'directly from Internet Service Providers,' referred to as 'PRISM collection.' The other 9% were acquired through what NSA calls 'upstream collection'" (Liu, Nolan and Thompson II 2014, 10).

program of 'warrantless wiretapping' [225] initiated after the 9/11 attacks. Its legal basis is that of section 702 of the FAA as officially recognized[226] on June 7, 2013 by the Director of National Intelligence – James Clapper. This program allows for the access to the communication' data content collected and stored (e-mail, videos, photos, social network communications, and others) by Internet service providers, such as Facebook, Google, Microsoft, Yahoo, and other US companies (Bigo et al. 2013; Bradbury 2013; Hoboken, Arnbak and Eijk 2013; Greene and Rodriguez 2014).

Figure 11 – PRISM Collection Details



(NSA PRISM Program Slides[227]).

[225] A secret program initiated immediately after the 9/11 attacks and publicly revealed in 2005. This program, also known as the Terrorist Surveillance Program endowed the NSA and other intelligence authorities with the ability to conduct mass surveillance without court orders, and consequently without oversight. The Terrorist Surveillance Program was part of the broader President's Surveillance Program. Actually, the NSA spying programs were not a novelty when the Snowden disclosures entered the public sphere, because the application of secret surveillance programs had been repeatedly revealed since 2005. Between 2005 and 2008 the U.S. government moved some of these 'warrantless wiretapping' program projects to the authority of the Foreign Intelligence Surveillance Act, through the Protect America Act (2007), and later the Foreign Intelligence Surveillance Amendment Act (2008). In order to fully comprehend the evolution of the NSA spying programs, consult: James Risen and Eric Lichtblau. 2005. "Bush Lets U.S. Spy on Callers without Courts." *The New York Times*, December 16. Available at: http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all&_r=0; *Electronic Frontier Foundation*.; "Timeline of NSA Domestic Spying." Available at: https://www.eff.org/nsa-spying/timeline; Alex Sinha. 2013. "NSA Surveillance since 9/11 and the Human Right to Privacy." *Loyola Law Review* 59:861-945. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2327806.

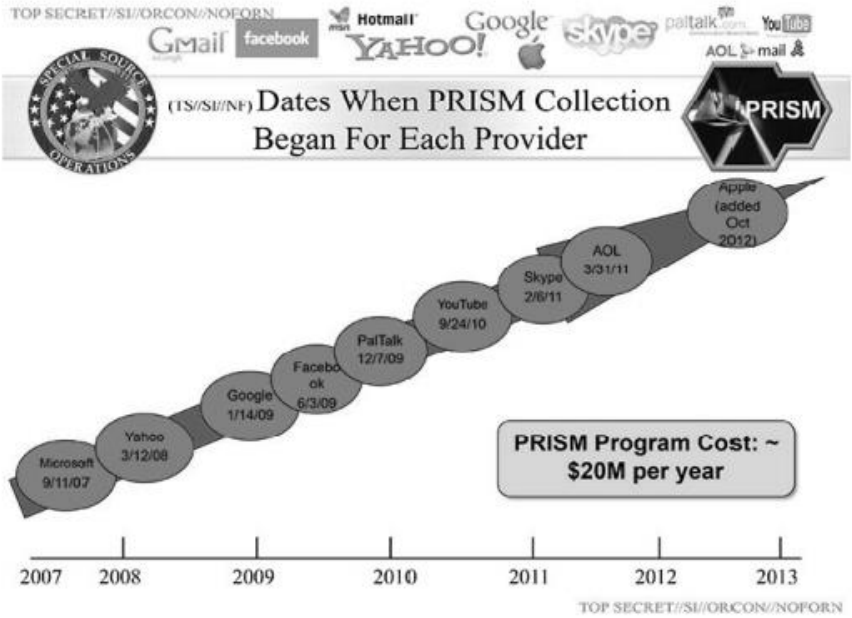
[226] *Director of National Intelligence.* 2013. "DNI Statement on Activities Authorized under Section 702 of FISA," June 06. Available at: http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/869-dni-statement-on-activities-authorized-under-section-702-of-fisa.

[227] To access all the slides, consult: NSA PRISM Program Slides. 2013. *The Guardian*, November 1. Available at: http://www.theguardian.com/world/interactive/2013/nov/01/prism-slides-nsa-document.

In fact, in spite of Snowden's revelations of a vast array of surveillance programs, PRISM was the most debated, as its application has a more profound impact on EU citizens' fundamental rights than any other program. Hence, through the continuous evolution of available surveillance tools intensified in the post 9/11 period, the US has developed the ability to access these service' users' data. The scope of PRISM is extremely broad mostly due to its connection to cloud computing[228], which permits access to expanded databases. In fact, PRISM has only been supported by the reliance on cloud computing (Bigo, Boulet, et al. 2013, 2).

The domestic impact of the application of section 702 has also been extensively debated. In fact, in spite of being a provision introduced for the collection of foreign intelligence from foreign citizens located geographically outside the US, the reality is that the data which may incidentally be collected from US citizens has raised some constitutional concerns. Within the US, the debate has focused on the scrutiny of US citizens' domestic and international communications. Several lawsuits have been presented against this section, alleging that this authority violates the Fourth Amendment's prohibition against 'unreasonable searches'.

Figure 12 – Dates for the Beginning of PRISM Collection



(NSA PRISM Program Slides).

[228] See: Chapter IV, Section 3.

Actually, the impact of this section on US citizens' constitutional guarantees may be summed up as disrespect for the prohibition of 'unreasonable searches'.

The operation of PRISM may lead to US citizens having their communications spied on, even though they are not a target (PCLOB 2014b, 87). In spite of being protected by 'minimization' and 'targeting' procedures, these have been insufficient when filtering a US citizen's communications data[229]. This may happen when a US citizen communicates by telephone or Internet with a foreign target. This is called incidental collection. The government is at the moment incapable of assessing the scope of the incidental collection of US citizens' data under PRISM (PCLOB 2014b, 10). Indeed, according to The Constitution Project, its breadth and collection can be as expansive and intrusive to US citizens as the bulk collection of metadata[230].

In fact, while the aim of this program, as well as that of surveillance program under section 215 of the PATRIOT Act, is the collection of foreign intelligence information, intelligence officials argue that it is impossible to find targets without firstly analyzing domestic data (Kalanges 2014, 646). Andrew Soltani highlights the impact of data storage on the civil liberties[231]:

> data that is collected "incidentally" can be retained if the collector can't conclusively prove it IS American communication. This creates a giant cache of data being stored without any evidence that it's necessary or useful to national security. Once data is collected and stored there are few limitations on how it is shared among the intelligence community (Soltani 2014, 9).

There are also other situations in which the US citizens' data may be affected and collected by PRISM. It is important to highlight that the NSA has two methods of collecting data from particular targets:

> to/from communications collection, in which the target is the sender or receiver of the Internet communications; and "about" communications collection, in which the target is only mentioned in communications between non-targets (Liu, Nolan and Thompson II 2014, 10).

The latter has potential impact on the privacy rights of US citizens, since through its inclusion there is a greater risk of a collection of purely domestic communications.

[229] In fact, recently released documents have shown that these procedures have not fully protected US citizens from having their communications spied on. Consult: The Constitution Project. 2014. Statement for the Privacy and Civil Liberties Oversight Board Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act. Available at: http://www.constitutionproject.org/wp-content/uploads/2014/04/Comments-of-The-Constitution-Project-to-the-PCLOB-filed-4-11-14.pdf.

[230] Consult: *Supra note* 224.

[231] For more information, consult: Andrew Soltani. 2014. "Testimony for the Privacy and Civil Liberties Oversight Board Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act." Available at: http://www.regulations.gov/#!documentDetail;D=PCLOB-2013-0005-0023.

Thus, the collection of incidental and 'about' communications from innocent US citizens is perceived to be a disrespect for the constitutional protection against warrantless 'unreasonable searches and seizures'. Although warrantless searches are prohibited under the Fourth Amendment, there are some strict exceptions[232] to this general rule.

Advocates of the section 702 program[233] state that a warrant is not required for purposes of foreign intelligence surveillance (Bradbury 2013, 13). However, what is unclear is whether the section 702 program falls under this exception[234]. Besides, the need for stricter surveillance capabilities is also claimed, even though some may hinder civil liberties, as the purposes of national security and public safety are of higher interest (Yoo 2013).

In a recent report released by the PCLOB concerning section 702 and its applicability, the constitutionality and statutory legality of the provision was confirmed in its fundamental core: foreign intelligence collection. However, with regard to the impact it has on US citizens the experts are aware that:

> certain aspects of the Section 702 program push the program close to the line of constitutional reasonableness. Such aspects include the unknown and potentially large scope of the incidental collection of U.S. persons' communications, the use of "about" collection to acquire Internet communications that are neither to nor from the target of surveillance (PCLOB 2014b, 9).

Notwithstanding this position, the PCLOB group of independent experts did not recommend an end to section 702 programs. It merely proposed the resolution of this particular issue: the impact on US citizens[235] (PCLOB 2014b, 97).

In sum, the indirect impact that PRISM, as well as other surveillance programs under section 702, have on US citizens' constitutional guarantees significantly shakes the individual's trust on the governmental protection of their security. Actually, one year after the disclosures, when questioned whether they approved or disapproved NSA surveillance programs (under section 215 and section 702), most of the interviewees disapproved[236]. National security concerns are valid in a counterterrorism environment; however the scale at which surveillance programs are operated to protect national

[232] "While wiretapping and other forms of domestic electronic surveillance generally require a warrant, the Supreme Court has left open the question of whether "safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security" and "the activities of foreign powers" (PCLOB 2014b, 90).
[233] For more information, consult: *Supra note* 220; Julian G. Ku. 2014. "Testimony for the Privacy and Civil Liberties Oversight Board Report." Available at: http://www.pclob.gov/Library/20140319-Testimony-Ku.pdf.
[234] For more details, see: Privacy and Civil Liberties Oversight Board.
[235] Somehow the report ignores the transnational impact of this program.
[236] See: Appendix 5.

security are infringing upon other realms of security[237]. Thus, the proper protections and oversight mechanisms, such as FISC[238], are proving to be incapable of controlling some surveillance excesses and errors.

4. Evolution of Domestic Surveillance

Debates regarding the reform of surveillance were initiated in the US after the revelations by Edward Snowden. A huge flood of information, both from Edward Snowden as well as from official sources, compressed the public sphere, which struggled to strike a balance between national security and civil liberties' concerns. What seems clear is that US civil society found that the government was extrapolating its surveillance capabilities and excessively intruding on individuals' personal lives.

The existence of mass surveillance programs was not a novelty – in December 2005 the Terrorist Surveillance Program[239] and its warrantless wiretapping had been revealed by The New York Times. However, the scope of Snowden's revelations, combined with technological developments which allowed for greater spying capacity, created higher public awareness. According to Gen. Alexander [at the time Director of the NSA] the NSA intended to collect the maximum amount of data, as "you need the haystack to find the needle[240]". Several debates and two PCLOB reports later, the main solution that arose was a proposed reform of surveillance, particularly FISA provisions[241]. In fact, FISA legislation:

> is built on an understanding of technology that is nearly four decades old. The threat environment has changed. New surveillance techniques carry with them different implications for privacy and civil liberties (Donohue 2014, 1).

Only six months after the disclosure of the mass surveillance programs, on January 17, 2014, Obama announced a Presidential Policy Directive 28 (PPD-28)[242] in

[237] See: Chapter I.
[238] Questions have arisen about "whether the FISC has a sufficient understanding of the technologies used, or has sufficient resources to conduct the oversight required of it" (Greene and Rodriguez, 2014:18).
[239]See: *Supra note 224*.
[240] Consult: David Sanger and Thom Shanker. 2013. "N.S.A. Director Firmly Defends Surveillance Efforts ." *The New York Times*, October 12. Available at: http://www.nytimes.com/2013/10/13/us/nsa-director-gives-firm-and-broad-defense-of-surveillance-efforts.html?pagewanted=1&_r=1&adxnnl=1&adxnnlx=1382122945-WpRyJJJJNFl/fff41n9lpw.
[241] For details, consult: Tyler Anderson. 2014. "Towards Institutional Reform of Intelligence Surveillance: A Proposal to Amend the Foreign Intelligence Surveillance Act." *Harvard Law School*. Available at: http://www3.law.harvard.edu/journals/hlpr/files/2014/08/HLP202.pdf.
[242] For more information, consult: Presidential Policy Directive - Signals Intelligence Activities. *The White House*. Available at: http://www.whitehouse.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities; *Lawfare Blog*. 2014. "Remarks of President Barack Obama: Results of our Signals Intelligence Review", January 17. Available at: http://www.lawfareblog.com/2014/01/text-of-the-presidents-remarks-on-nsa-and-surveillance/#.UtmMeCco7sM; Josh Keller, Alicia

order to diminish the NSA domestic bulk collection of personal data and to introduce plans and strategies to deal with intelligence excesses. Moreover, this summer, debates emerged and were introduced by the Senate regarding the introduction of a new bill – the USA FREEDOM Act of 2014, which among other measures would restrict the bulk collection of telephone metadata, reform FISC and impose shorter sunset provisions[243].

The future of domestic surveillance continues to be marked by uncertainty. In his January 17 speech, Barack Obama highlighted the importance of intelligence activities in order to disrupt national security threats[244]. Yet, concerns regarding national security' and civil liberties' remain divergent when it comes to surveillance programs.

5. Final Considerations

The potential impact of these two provisions on the civil liberties instituted under the Bill of Rights, specifically concerning the First and Fourth Amendments poses a serious threat to the human security of U.S. citizens. In fact, the sections analysed do not respect some of the principles guaranteed in the US Constitution, which causes an immaterial violence that culminates in human insecurity. Thus, a concluding remark is that in order to increase domestic security, through the enactment of enhanced surveillance tools, some civil liberties were infringed; these have ended up encroaching human security, by fostering immaterial violence.

Besides, it is also perceivable that it is not solely the application of these provisions that abrogates US citizens' civil rights and freedoms, but also its combination with a lack of 'checks and balances' that have traditionally restrained abuse, such as a stricter role of FISC on oversight. Moreover, the expansion of exceptions[245] - previously only applied to foreign intelligence – and their internal application, jeopardised citizens' privacy. In addition to diminish accountability procedures, these measures were also imposed in an environment of secrecy that has moulded the context of the War on Terror (Seabra 2007; Leone 2003).

Parlapiano, David Sanger and Charlie Savage. 2014. "Obama's Changes to Government Surveillance." *The New York Times*, January 17. Available at: http://www.nytimes.com/interactive/2014/01/17/us/nsa-changes-graphic.html.

[243] For more information concerning this bill, see: The USA FREEDOM ACT. Available at: https://www.leahy.senate.gov/download/usa-freedom-act-two-pager-final; Cindy Cohn and Nadia Kayyali. 2014. "Understanding the New USA FREEDOM Act: Questions, Concerns, and EFF's Decision to Support the Bill." *Electronic Frontier Foundation*, August 27. Available at: https://www.eff.org/deeplinks/2014/08/understanding-new-usa-freedom-act-questions-concerns-and-effs-decision-support.

[244] "As a President who looks at intelligence every morning, I also can't help but be reminded that America must be vigilant in the face of threats" (Obama 2014).

[245] For understanding the emergence of exceptional measures, consult: Chapter II.

The accumulation of powers by the Executive Branch did not correlate with an increase in constitutional control by the courts and Congress. Conversely, these measures have diluted the traditional framework of supervision and balance, by neglecting some of the procedures required for control (Seabra 2007; Schulhofer 2004).

Amitai Etzioni also highlights the relevance of accountability – exercised by courts, Congress and the public – by claiming that "deficient accountability opens the door to government abuses of power" (Etzioni 2004, 66). According to this scholar, new measures – which emerged in order to face new technologies – cannot be neglected, but their accountability may be rethought and adjusted. In fact:

> courts (…) have been reluctant to judge the actual legality of the government's surveillance practices even when the practices do not seem to be authorized by the laws (Herman Interview 2014).

Maria Pereira also highlights the impact of the growing executive power upon the separation of powers and the courts' oversight ability (Pereira Interview 2014). One solution may be the reform of accountability and the imposition of the checks and balances which were affected. In fact, some reforms are being set out and governmental awareness seems to be growing regarding this impact. Nevertheless, there is yet a long path to follow. Thus, only time will show how this situation will continually evolve.

CHAPTER IV. PATRIOT ACT AND FOREIGN INTELLIGENCE AMENDMENT ACT: TRANSNATIONAL SURVEILLANCE IMPACT ON EU CITIZENS' CIVIL LIBERTIES

1. Introduction

> It is not even the question of espionage activities between different governments. It is the question of the nature, the scale, and the depth of surveillance that can be tolerated in and between democracies (Bowden 2013, 9).

The emergence of a War on Terror after the 9/11 attacks rocked the delicate international compromise that democracies do not spy massively on one another and that surveillance must be subjected to oversight. These alterations, arising from a counterterrorist context, led to the creation in the US, and also to a lesser extent in the EU, of secret surveillance programs that made use of the most developed technologies in order to access as much data as possible (Bigo et al. 2013, 13). A cumulative fissure between privacy and contemporary surveillance systems has been emerging (Joergensen 2014, 1). The focus of this subchapter is that of the transnationalization of US surveillance practices and how it affects European citizens' civil liberties. Relying upon section 215 of the PATRIOT Act and section 702 of the FAA[246], one intends to analyse how these domestic legislative provisions were extraterritorially applied, thus affecting EU citizens.

Even though, surveillance measures emerged in order to enhance national security[247] in a context of terrorism securitization and exceptionality, their application had a direct impact upon civil liberties. The aim of this chapter is to demonstrate that this applicability encroached upon the immaterial component of human security, which is associated with civil and political rights[248].

As stated above, these documents, and particularly these two provisions, served as the legal basis for the application of surveillance programs. In spite of focusing on the US transnational surveillance practices, this dissertation does not ignore the fact that EU member states have also developed and implemented transnational surveillance programs, and inclusively spied on other EU member-states[249].

[246] For an analysis of these provisions, see: Chapter III.
[247] See: Chapter II.
[248] For further details, see: Chapter I.
[249] In order to comprehend and analyze the existence of EU transnational mass surveillance programs, their incompatibility with EU law and the principle of 'sincere cooperation' between member-states consult: Didier Bigo et al. 2013. "National Programmes for Mass Surveillance." Study prepared for the *European Parliament's Committee on Civil Liberties, Justice and Home Affairs*. Available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493032/IPOL-LIBE_ET(2013)493032_EN.pdf. Besides, the cooperation between the US's NSA and the UK's GCHQ authorities is also an interesting fact. Consult: Julian Borger. 2013. "GCHQ and European Spy Agencies Worked Together on Mass Surveillance." *The Guardian*, November 1. Available at: http://www.theguardian.com/uk-news/2013/nov/01/gchq-europe-spy-agencies-mass-surveillance-snowden; Nick Hopkins. 2013.

At the same time that technological developments enabled the emergence of modernized terrorism, increasingly dependent upon computer networks, it also allowed for the development of an increasingly digitalized counterterrorism, relying upon recent technological innovations. One of the main technological improvements that contributed to the enhancement of transnational surveillance was undoubtedly cloud computing[250]. Hence, transnational surveillance was enhanced by FISA's new powers combined with cloud computing. Recently revealed programs of surveillance demonstrated this issue and brought it to the forefront of public international discussion (Rubinstein, Nojeim and Lee 2014).

The scope of the extraterritorial application of surveillance tools is only now being uncovered. Actually, the Snowden disclosures are only the tip of the iceberg, since the majority of these programs are enveloped by a blanket of secrecy. Mass surveillance as undertaken by the US presents two main features – it is undetermined and non-targeted[251] – which has generated debates regarding its necessity, proportionality and legitimacy[252] (Greene and Rodriguez 2014, 4). After Snowden's revelations, not only was public awareness raised, but the collateral damages imposed by systematic transnational surveillance became well defined too. Its development and implementation may hinder some democratic established principles:

- Rule of law. The concept of rule of law, although widely debated and with several variations depending on each country's definition, is broadly perceived as a fundamental pillar of pluralist and constitutional democracies. Its respect is essential for the protection of fundamental rights. In order to maintain the rule of law some of its central characteristics must be respected (Reding 2013):

- Equality before the law. All persons should be equal before courts and tribunals.

- Due Process. All legal rights that a person detains must be respected by the state.

NSA and GCGQ – Too Close for Comfort." *The Guardian*, August 1. Available at: http://www.theguardian.com/commentisfree/2013/aug/01/nsa-gchq-cooperation-too-close-comfort; Bigo, Boulet et al. 2013. "Mass Surveillance of Personal Data by EU Member States and Its Compatibility with EU Law." Report prepared for *European Parliament's Committee on Civil Liberties, Justice and Home Affairs.* Available at: http://www.ceps.eu/book/mass-surveillance-personal-data-eu-member-states-and-its-compatibility-eu-law.

[250] See: Section Cloud Computing: A Booster for Transnational Surveillance.

[251] In a study undertaken by the Washington Post it was revealed that most of individuals surveyed were not intended targets. See: Barton Gellman, Julie Tate and Ashkan Soltani. 2014"In NSA-Intercepted Data, Those Not Targeted Far Outnumber The Foreigners Who Are." *Washington Post*, July 5. Available in: http://www.washingtonpost.com/world/national-security/in-nsa-intercepted-data-those-not-targeted-far-outnumber-the-foreigners-who-are/2014/07/05/8139adf8-045a-11e4-8572-4b1b969b6322_story.html.

[252] For more details, see: David Greene and Katitza Rodriguez. 2014. "NSA Mass Surveillance Programs: Unnecessary and Disproportionate." *Electronic Frontier Foundation*. Available at: https://www.eff.org/files/2014/05/29/unnecessary_and_disproportionate.pdf.

- Law sustained by an independent judiciary. An independent and impartial court must be responsible for sustaining the law.

After the surveillance disclosures, it was obvious that these principles were not being fully respected by the US government. Discrimination between US citizens and foreigners and the compatibility of the FISC secret approval of surveillance orders with rule of law principles are being extensively discussed.

- Fundamental rights, particularly, privacy. Despite hindering several principles, it is undoubtedly the foreign citizens' right to privacy, – particularly for this dissertation, of EU citizens – that is most affected by such indiscriminate systems of surveillance.

- Oversight of intelligence and national security activities. This is essential in democratic contexts in order to prevent governmental excesses. In fact, when governmental access to communications happens within a national security investigation, standards for oversight and control are substantially dropped (Rubinstein, Nojeim and Lee, 2014:2).

-Transparency. An environment of secrecy surrounds intelligence activities, especially surveillance programs, as was made clear after Snowden' revelations. According to Leslie Harris, this excessive secrecy that shrouds intelligence surveillance must be lifted, at least in a way that protects national security. The FISC's significant legal interpretations should be made available to the public with any necessary deletions to protect national security (Harris 2013, 13).

This lack of transparency hinders the ability to acknowledge the number of individuals affected by these secret activities and programs and to impede governmental excesses. Besides, since legislation concerning surveillance is particularly vague, secret government interpretations of its provisions emerge (Rubinstein, Nojeim and Lee 2014, 3). An interesting point of view is shared by Stephen Walt: "once a secret surveillance system exists, it is only a matter of time before someone abuses it for selfish ends" (Walt 2013).

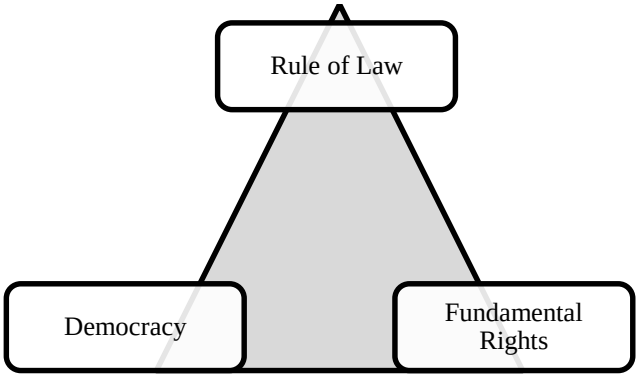
These surveillance programs are not compatible with democratic standards as they compromise the fundamental rights of individuals. Actually, relying upon the study of Sergio Carrera, Elspeth Guild and Nicholas Hernanz – which determines the existence of a co-constitutive relationship between rule of law, democracy and fundamental rights in the EU – it is possible to highlight that the impact of the US transnational surveillance of EU citizens on fundamental rights, especially privacy, also has a direct

negative effect on the democracy and rule of law within the EU (Carrera, Guild and Hernanz 2013)[253].

> The legal tensions between large-scale surveillance and democratic rule of law with fundamental rights endanger the security of the Union and that of its citizens, and unleash insecurity for the Union as a whole (Bigo et. al. 2013, 35).

Mass surveillance targeted at EU citizens through US domestic legislation is thus producing a profound impact on the human security of these individuals[254].

Figure 43 – Triangular Relationship between Rule of Law, Democracy and Fundamental Rights



(Adapted from Carrera, Guild and Hernanz 2013).

2. Models of Privacy Regulation

Before analysing the development of transnational surveillance and the extraterritorial application of US legislation, it is important to comprehend the existence of the non-symmetrical interpretations of privacy and the different regulation models of privacy between the USA and the EU. The concept of privacy is non-consensual and highly debated. Thus, regulation models of privacy throughout the world also present divergences (Bygrave, 2013: 7). There are two predominant models of regulation on the

[253] For more details, see: Sergio Carrera, Elspeth Guild and Nicholas Hernanz. 2012. "The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism." *Center for European Policy Studies.* Available at: http://www.ceps.be/book/triangular-relationship-between-fundamental-rights-democracy-and-rule-law-eu-towards-eu-copenha

[254] See: Chapter I.

international sphere: the European and the American model, whose characteristics although similar in principles, have quite different application methods[255].

In fact, there are divergences that emerge from legal statutes of data protection and privacy. While the USA prefers lax or broad legislative documents, favouring a sectorial legislation focused on a particular area of privacy (separate laws that regulate health, commercial, financial or communication privacy individually), the EU member-states have a preference for all-encompassing legislation which is broader and stricter, such as the European Directive on Data Protection of 1995 (Bygrave 2013; Stratford 1998; Rubinstein, Nojeim and Lee 2014).

According to António Vitorino there are:

> two distinct cultures. The EU has a system preferably based on legal provisions and public entities, such as the National Data Protection Authorities, with particular competences. The US has a more flexible model (Vitorino Interview 2014).

According to Lee Bygrave, these distinctions have alighted on the interpretation of privacy. On the one hand, within the USA, the perception of privacy relies upon the freedom from governmental intrusion on the individual's life. The right to privacy is not explicit in the American Constitution, though it is inferred mainly from the Fourth Amendment, since the courts have interpreted it as a fundamental right of all citizens (Ducat 2004). On the other hand, the right to privacy is explicitly contemplated in European legal frameworks (EU Charter of Fundamental Rights, European Convention on Human Rights, EU Data Protection Directive and also in national constitutions). Within the European Union, privacy is strictly connected to dignity and personal honour; it is not only a fundamental value to the individual, but also to society at large, as it contributes to the maintenance of democracy and pluralism (Whitman 2004; Bygrave 2013).

Although, there are several distinctions in the framework models that regulate data protection, the aim is not to establish normative comparisons[256]. Notwithstanding the European tendency to regulate those fundamental rights through omnibus and comprehensive legislation, it does not impede the United States to be more sensitive

[255] For more information regarding the development of privacy as a concept, as well as concerning the similarities and differences between the American privacy regulation model and the European one, see: Lee Bygrave. 2013. "Transatlantic Tensions on Data Privacy." *Transworld* Working Paper 19:1-21.

[256] Concerning the differences in privacy perceptions an interesting argument is shared by Peter Margulies, for whom "A European law on privacy and national security surveillance does not diverge significantly from U.S. law. The European Court of Human Rights (ECHR) has upheld provisions in both British and German law that permit the bulk surveillance of communications of foreign nationals abroad based on very broad substantive criteria, including national security, "serious criminal offences," and economic threats, as long as officials query bulk data with identifiers linked to those criteria.11 Strikingly, the ECHR has understood that more detailed specification of conduct allowing for surveillance would trigger a costly trade-off, as wrongdoers "adapt" their behavior to avoid surveillance and slip underneath the radar" (Margulies 2014, 2139).

when dealing with other questions of fundamental rights, such as the issues related to freedom of expression (Hoboken, Arnbak and Eijk 2013, 3). One of the provisions of the EU Data Protection Directive[257] prohibits the international transfer of data when the receiving country does not present adequate levels of data protection[258]. Despite the EU's recognition of the inadequacy of the US' data protection principles, harmonization efforts were launched and *ad hoc* policies emerged in order to establish satisfactory data transfers between the transatlantic partners (Schwartz 2013). There are several transatlantic agreements for data sharing, such as the Safe Harbour Agreement, the Mutual Legal Assistance Treaty (law enforcement information sharing), the Model Contractual Clauses and the Binding Corporate Rules (Schwartz 2013, 1967; Brown 2014, 4). The transatlantic parties have also been trying to establish a data protection umbrella agreement, although the divergences have not yet allowed for a consensus (Brown 2014, 4).

3. Cloud Computing: A Booster for Transnational Surveillance

In the post-9/11 context there was a growing governmental demand for privately held data (Rubinstein, Nojeim and Lee 2014, 1). The increasing concentration and focus on security, combined with technological developments, has originated an unparalleled governmental ability and capacity to know almost everything about individuals. As a matter of fact:

> while previously it required considerable efforts and physical proximity to spy on a person, the technology of today allows such action on a scale and depth impossible before (Moraes 2013, 73).

At this unprecedented scale of transnational surveillance cloud computing plays an important role. When it comes to cloud computing, one sentence is extremely relevant: currently, the law is unable to control technological governmental abuses. The potentialities of cloud computing for mass surveillance were immediately used by governmental authorities in a context of terrorism securitization. Cloud computing

[257] Article 25 (1) EU Data Protection Directive 95/46/EC: "The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection."

presents many dangers for human security[259], as its development and impact on civil liberties are not being legally controlled. Besides, it is not only legal frameworks, but also technical mechanisms (such as encryption) that are currently incapable of dealing with transnational surveillance through the cloud (Hoboken and Rubinstein 2014, 489). According to Caspar Bowden:

> one of the main confusions is when the people think of the cloud as simply a place for data storage. They don't appreciate that the key economic differentiator of cloud computing is the ability to harness processing power, not only storing the data, but computing with the data. (…) The difference with the cloud computing is potentially that all European data is now at risk (Bowden Interview 2014).

In fact, the emergence of cloud computing exponentially raised and eased governmental ability to access this data, which places cloud computing in a prominent position when referring to transnational surveillance (Rubinstein, Nojeim and Lee 2014, 4). Many benefits arise from the international use of cloud services, such as cheaper and more instant communication and easier sharing of data. However, its risks are also well known. In a study developed by ENISA in 2009, the benefits and, particularly, the risks of cloud services were analysed from the consumer's perspective. Actually, the conclusions of this study showed the intensity of the risks stating for example that the change of jurisdiction and data protection risks were high[260].

Firstly, it is fundamental to define cloud computing, which is a:

> technical arrangement under which users store their data on remote servers under the control of other parties, and rely on software applications stored and perhaps executed elsewhere, rather than on their own computers (Svantesson and Clarke 2010, 391).

Cloud computing requires data transfers from servers and databases located anywhere in the World. These transfers are known as trans-border data flows, since they are not hampered by national borders (Vega 2012, 67). Governmental access to cloud data is obtained by the direct enforcement of third-country authorities, dependent upon their own legal norms, and without any resort to international legal tools and agreements. In other words, in the USA, intelligence or national security agencies may require of FISC a section 702 (FAA) order, for instance, and then use it to withdraw foreign citizens' data from cloud companies. Thus, the access of the US government to EU citizens' data does not rely upon internationally established agreements on legal cooperation, such as the Mutual Legal Assistance (Moraes 2014, 24).

[259] See: Chapter I.
[260] For more information, consult: Daniele Catteddu and Giles Hogben. 2009. *Cloud Computing: Benefits, Risks and Recommendations for Information Security*. Report prepared for *European Network and Information Security Agency*.

In effect, companies have always tended to cooperate with government, but also

> felt a business need and sense of responsibility to protect their customers' personal data and have diligently sought to balance those interests" (Rubinstein, Nojeim and Lee 2014, 4).

However, what is being witnessed nowadays is that US-based companies do not hesitate in providing users' data to US intelligence agencies[261], because the criminal repercussions of not providing it would be greater (Interview Bowden 2014).

One of the most astonishing features of transnational surveillance related to cloud computing is that through section 215 (PATRIOT Act) or section 702 (FAA), foreign citizens' data, which is collected and stored at US-based Companies ,may be accessed, whenever these companies headquarters are located. Thus, even though an EU citizen data is stored on a European branch of an US cloud company, the US ability's to access this information is not diminished. Thus, one of the main negative effects of cloud computing is that within the cloud jurisdiction gets cloudy.

The USA assumes that it can use its legal tools to access data from any cloud server in the world, as long as the Cloud provider is subjected to US jurisdiction. There are three situations in which US jurisdiction is applied (Hoboken, Arnbak and Eijk 2013, 8)

-US companies in Foreign Countries

-Foreign-based subsidiaries of US companies

-Foreign-based companies with a presence in US

Hence, this positioning may cause conflicts of jurisdiction, since the US law may contradict other countries laws. At the same time, the cloud industry has somehow been trapped in the middle of these jurisdictional conflicts (Hoboken and Rubinstein 2014, 493). The great dilemma in the cloud industry is:

> how globally operating systems can ensure that data of an individual or organization in 'country T' (the targeted country) can be secured from disproportionate access by a government agency in 'country A' (the accessing country) (Hoboken and Rubinstein 2014, 489).

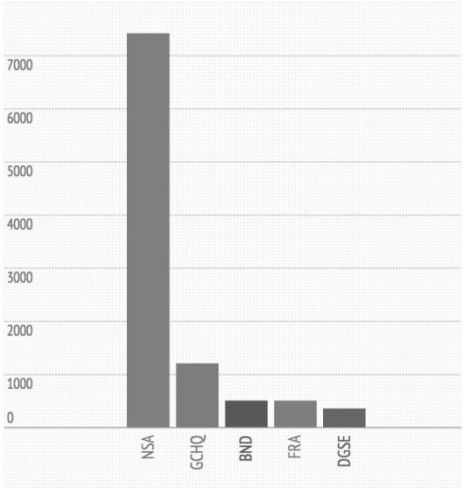
One important question may be formulated: Why can cloud computing have such a negative impact upon EU citizens?

The answer to this question resides in the geo-localization of the majority of cloud providers, and the use made by the USA of all available tools to access data worldwide.

[261] Caspar Bowden also alerts to the fact that many of the biggest companies may not yet have encrypted "the links between their data centers and it can be called an inexcusable negligence" (Bowden Interview 2014).This lack of encryption makes data transferred between a cloud company data centers much more vulnerable to governmental access.

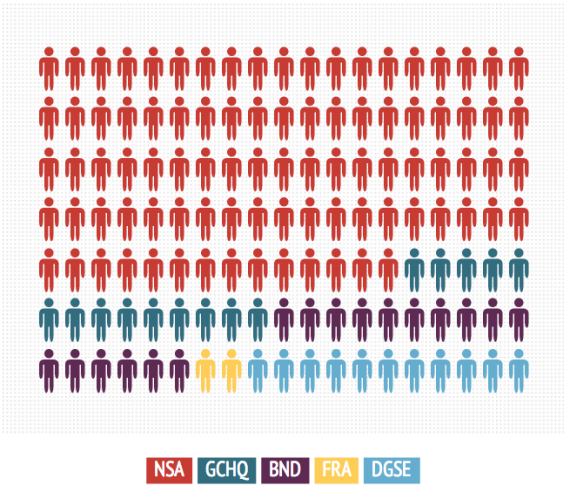
If one compares the manpower and budget of US intelligence agencies, with those of the United Kingdom, France, Sweden and Germany, the US-superiority on both counts is clearly superior.

Figure 14 – Intelligence Agencies' Budget



(Bigo et al. 2013).

Figure 15 – Intelligence Agencies' Manpower

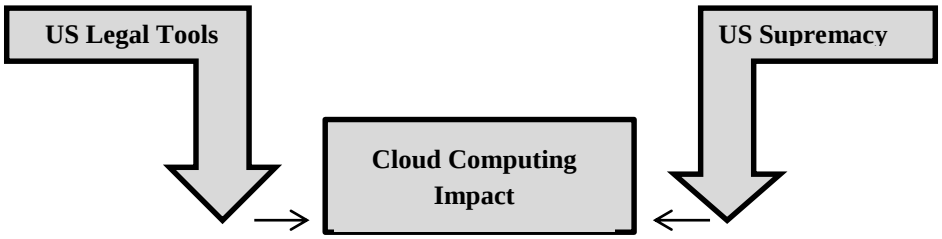


(Bigo et al. 2013).

Thus, most of the largest cloud providers (with a great global distribution and extremely vast databases) are located on US soil, and are thus under US jurisdiction

(Google, Microsoft, Amazon). Moreover, the fact is that the US is using all the legal instruments available to access this information (Schwartz 2013; Bowden 2013; Harris 2013, 3).

Figure 16 – Features Contributing to the Impact of Cloud Computing



4. Transnational Surveillance Impact on EU Citizens' Civil Liberties

Edward Snowden's revelations in the summer of 2013[262] clearly shook the confidence and balance in transatlantic relations (Moraes 2014, 24). Since June 2013, the leak of thousands of classified documents, pertaining to highly sensitive U.S. surveillance activities and revealed by the former NSA contractor Edward Snowden, has greatly intensified discussions of privacy, trust, and freedom in relation to the use of global computing and communication services (Hoboken and Rubinstein 2014, 488).

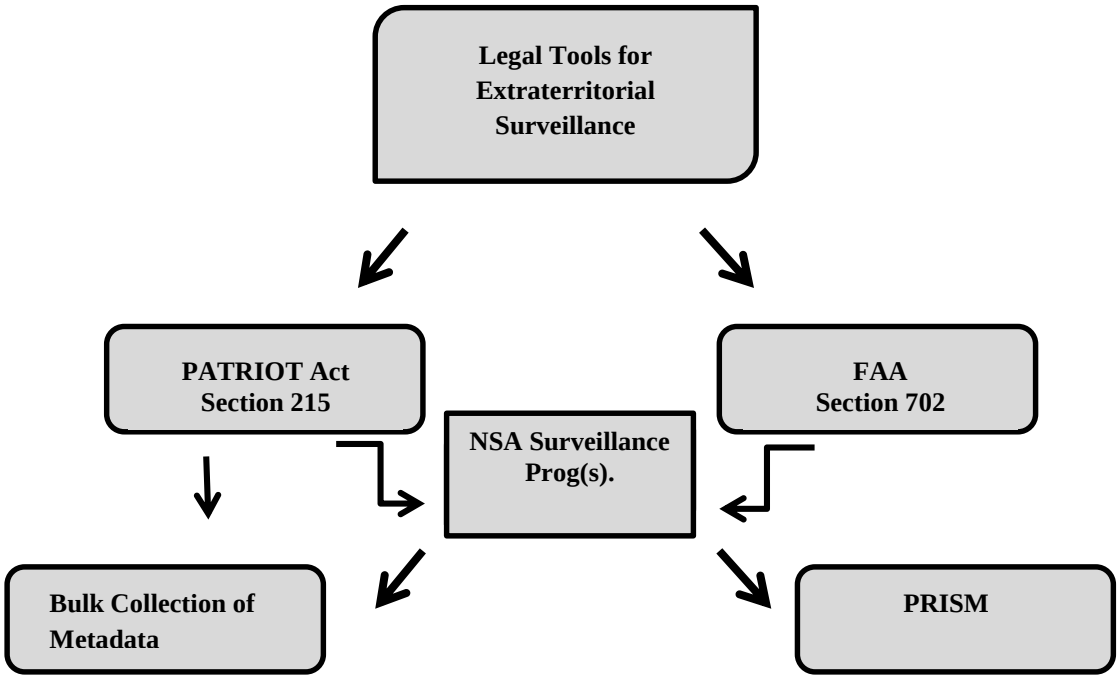
According to Edward Snowden, the NSA developed numerous surveillance programs that permitted the mass collection of personal data[263]. Two legal authorities serve as bases – not only, but particularly – for the collection of foreigners' personal data by US Intelligence agencies: Section 702 (FAA) and section 215 (PATRIOT Act). Both Section 215 and Section 702 were described in the previous subchapter concerning the internal impact they had upon American constitutional guarantees. However, in this subchapter the aim is to analyse its extraterritorial effects.

[262] For more details, consult: "Verizon Forced to Hand Over Telephone Data – Full Court Ruling." 2013. *The Guardian*, June 06. Available at: http://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order; Glenn Greenwald. 2013. "NSA Collecting Phone Records of Millions of Verizon Customers Daily." *The Guardian*, June 06. Available at: http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order.
[263] See: Chapter III.

The disclosure of the surveillance programs, applied worldwide and authorized by US legal tools, had an immediate impact on EU-US relations. As Andrew Neal states:

> what has become clear is that the status of being an ally of America is no different from being an enemy of America. This is one of the things that members of the European Parliament realized in the debate on data transfers to the US. Being German or British is no different from being Pakistani or Iraqi as far as the NSA is concerned (Neal Interview 2014).

Figure 17 – US Legal Tools for Transnational Surveillance and its Subsequent Surveillance Programs



Even though an immediate US response emerged, stating that the programs had an utmost purpose – to protect national security and consequently prevent future terrorist attacks, and were lawful[264] because they were operating under the oversight of the Foreign Intelligence Surveillance Court –, European official reaction[265] was one of surprise and rejection (Wright and Kreissl 2013, 7). In a communication to the

[264] See: *Supra note* 173.

[265] In most of the EU member-states, the official reaction was one of astonishment. However, the probla existence of NSA surveillance programs and the risks of cloud computing were not completely unknown. In fact, several authors had repeatedly warned against the potential usage of US legislation to authorize the transnational collection of data. For more information, consult: Didier Bigo et al. 2012. "Fighting Cybercrime and Protecting Privacy in the Cloud." Study Prepared for the *European Parliament's Committee on Civil Liberties, Justice and Home Affairs*. Available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462509/IPOL-LIBE_ET(2012)462509_EN.pdf.

European Parliament, the EU commission stated that the "mass surveillance of private communications, be it of citizens, enterprises or political leaders, is unacceptable" [266].

One of the most astonishing facts was that the US authorities had been accessing EU citizens' personal data through the surveillance of communications (particularly phone calls and Internet communications) without the consent of these communication services' users. The revelation of the programs emerged in a period of transition within the EU, as a data protection reform has been in the process of negotiation since 2012. On January 25, 2012 the European Commission proposed a reform of the data protection[267] rules introduced in 1995. This reform will give rise to a new regulation and a new directive. It intends to further enforce online data protection rights and, at the same time, favour EU digital economy.

The revelation of surveillance programs had a great impact upon the transatlantic relationship (Hoboken and Rubinstein 2014, 494; Moraes 2014, 7). It:

-shattered confidence among transatlantic partners;

-revealed the fragility of fundamental rights and data protection in a world of transnational surveillance and transborder data flows;

-has complicated current trade negotiations (Transatlantic Trade and Investment Partnership);

-reiterated the need to reform EU Data Protection;

-brought to the forefront the possibility of the extraterritorial application of legislative documents;

-endangered the Safe Harbour;

-revealed the fragility of oversight mechanisms, both at the national and European level;

After Snowden revelations, immediate concerns from numerous EU members and from the European Union were expressed[268] and, within the European Parliament, proposals for suspending US-EU agreements, such as the Safe Harbour or the Mutual

[266] For more information, consult: Communication from the Commission to the European Parliament and the Council Rebuilding Trust in EU-US Data Flows (November 27, 2013). Available at: http://ec.europa.eu/justice/data-protection/files/com_2013_846_en.pdf.

[267] This reform was approved by EU Parliament on March 12, 2014. For more information regarding the data protection reform, consult: EU MEMO. Progress on EU Data Protection Reform Now Irreversible Following European Parliament Vote (March 12, 2014). Available at: http://europa.eu/rapid/press-release_MEMO-14-186_pt.htm; *Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of such Data (General Data Protection Regulation)* (January 25, 2012). Available at: http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf.

[268] For descriptive information regarding the European responses to the NSA surveillance disclosures, see: David Wright and Reinhard Kreissl. 2013. "European Responses to the Snowden Revelations: A Discussion Paper." Available at: http://irissproject.eu/wp-content/uploads/2013/12/IRISS_European-responses-to-the-Snowden-revelations_18-Dec-2013_Final.pdf.

Legal Assistance Agreement also arose[269]. The most relevant negative effects of the extraterritorial application of US legislation – in particular section 215 PATRIOT Act and section 702 of FAA – which most directly affects EU citizens' fundamental rights, and subsequently their human security[270], may be summed up in three points:

1- Non-Recognition of EU citizens' right to privacy[271]

One of the main effects of the enhancement of surveillance capabilities resides in the focus it attributes to non-US persons, who do not live within the USA (approximately 95% of the remaining world population). The targets of both section 215 and section 702 are foreign individuals. Therefore, the surveillance of these individuals relies upon the interception of their communications *to* or *from* the USA[272].

The first Presidential reaction to the disclosure of the surveillance programs reiterated that the spying focus was directed at foreign citizens:

> now, with respect to the Internet and emails, this does not apply to U.S. citizens, and it does not apply to people living in the United States. And again, in this instance, not only is Congress fully apprised of it, but what is also true is that the FISA Court has to authorize it (Obama 2013)[273].

Since these legislative documents – the PATRIOT Act and FAA - were indeed enacted, a double standard emerged[274]: on the one hand, US citizens are protected by constitutional provisions (especially the First and Fourth Amendment) and 'targeting' and 'minimization' procedures; on the other hand, foreign citizens are not protected by these provisions (Hoboken, Arnabak and Eijk 2013, 8). Besides, both EU citizens, as well as all non-US persons, do not benefit from any 'targeting' or 'minimization' procedures established for the application of section 702 to the US collection of data. While the former is designed to ensure that US citizens are not a target of section 702

[269] Consult: "US NSA: Stop Mass Surveillance Now or Face Consequences, MEPs Say" (March 12, 2014). Available at: http://www.europarl.europa.eu/news/en/news-room/content/20140307ipr38203/html/US-NSA-stop-mass-surveillance-now-or-face-consequences-MEPs-say;

[270] For more details concerning the correlation between human rights and human security, consult: Chapter I.

[271] Regarding what Caspar Bowden entitles 'discrimination by nationality' the author claims that "in European data protection law you can't have special protection for different nationalities on the national law"; he highlights the particular case of the UK, which is a "different kind of antinomy, because the UK obviously is a member of the Five Eyes Alliance." Thus, "on the one hand you have the UK law statute where no distinction by nationality is made; yet, as a member of the Five Eyes, the UK is excluding the Five Eyes's nationals" (Bowden Interview 2014).

[272] Communications established through US-based companies, such as Facebook, Google, Microsoft, and many others.

[273] Barack Obama. "Statement by the President" (June 7, 2013). Available at: http://www.whitehouse.gov/the-press-office/2013/06/07/statement-president.

[274] This emerges as one of the main differences between the US and EU; while US legal frameworks do not protect foreigners as data subjects, the EU legal system recognizes the right to data protection for any third-country citizen (Bigo, Boulet, et al. 2013:5).

surveillance, the latter is intended to minimize the impact of this section upon the privacy of US citizens[275]. For that reason:

> for each program (…) the US takes the position that any protections against surveillance, such as the 'minimization' steps taken after the collection, are aimed at protecting the rights of US persons only, whose information may be collected as a by-product of the collection of information from non-US persons (Greene and Rodriguez 2014, 6).

Nevertheless, the most relevant problem, from a European perspective is that European citizens are exempt from any Fourth Amendment protection, which directly denies the recognition of their right to privacy (Harris 2013). The non-application of the Fourth Amendment protection to foreign citizens located overseas seems to have been well defined since 1990, when the Supreme Court[276] confirmed this point. Reiterating this positioning, Gen. Hayden – the former NSA director – stated that "the Fourth Amendment is not an international treaty[277]."

Even though there is the possibility of US citizens' civil liberties being disrespected by the application of these two sections[278], the reality is that this group of individuals are increasingly protected due to the constitutional ban on 'unreasonable searches and seizures'. Moreover, another main impact on EU citizens' right to privacy derives from the extremely broad concept of foreign intelligence information[279], which could potentially encompass anything[280] (Bowden 2013, 20).

2- Disrespect for European Legal Frameworks on Data Protection

The European Union has one of the most protective systems of data protection, grounded upon EU legal instruments, and oversighted by the European Court of Human Rights and the Court of Justice of the European Union (CJEU) (Boillat and Kjaerum 2014). Thus, correlating with the non-recognition of EU citizens' right to privacy, and

[275] For more information, see: National Security Agency, Civil Liberties and Privacy Office Report: NSA's Implementation of Foreign Intelligence Surveillance Act Section 702 (April 16, 2014). Available at: http://www.nsa.gov/public_info/_files/speeches_testimonies/NSAImplementationofFISA70216Apr2014.FINAL.pdf.

[276] Supreme Court on the case *Verdugo v. Urquidez* (1990). Available at: https://supreme.justia.com/cases/federal/us/494/259/case.html.

[277] Lindsey Boerma. 2013. "Former NSA, CIA Director 'The United States does Conduct Espionage.'" *CBS News*, June 30. Available at: http://www.cbsnews.com/news/former-nsa-cia-director-the-united-states-does-conduct-espionage/.

[278] See: Chapter III.

[279] *Supra note* 110.

[280] Regarding this wide-ranging definition, some doubts have been raised as to whether it may be used to undertake economic or political espionage. When questioned if foreign intelligence may include economic relevant activities, the answer is that the US is not carrying out industrial espionage. For more information, consult: Director of National Intelligence. 2013. "James Clapper Statement on Allegations of Economic Espionage." Available at: http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/926-statement-by-director-of-national-intelligence-james-r-clapper-on-allegations-of-economic-espionage; Caspar Bowden. 2013. "The US National Security Agency (NSA) Surveillance Programmes (PRISM) and Foreign Intelligence Surveillance Act (FISA) activities." Study prepared for *European Parliament's Committee on Civil Liberties, Justice and Home Affairs.* Available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/briefingnote_/briefingnote_en.pdf.

through the collection and processing of its citizens' data, the US extraterritorial application of section 702 and section 215 is in a position of direct disrespect of European legal frameworks.

One of the negative effects of the transnational application of these legal surveillance tools is the loss of sovereignty over the information stored by IT companies. In fact, as stated in a policy brief prepared by numerous authors[281] to the Center of European Policy Studies, one of the main controversies concerning PRISM relies upon the fact that through its application, the US accesses EU citizens' data without the knowledge and consent of individuals and European institutions. This both demonstrates a lack of European control over their citizens' data, as well as the European incapability of protecting their citizens' civil liberties, especially the right to protection of personal data.

According to the EU Charter of Fundamental Rights (ECFR) and the European Convention of Human Rights (ECHR) two fundamental rights are recognized: the right to respect for private and family life[282] (Article 7 ECFR/ Article 8 ECHR) and the right to the protection of personal data[283] (Article 8 ECFR).These two rights are not being granted through the application of surveillance programs, as is the case of the Bulk Telephony Metadata Collection and PRISM programs. The main EU legal instrument concerning data protection is the EU Data Protection Directive (1995). The Directive determines "the rules for data protection in the private and public sector based on the principles of purpose limitation, data minimisation, and the rights of the data subject (Joergensen 2014, 3).

This legal document emerged in 1995, in order to harmonize the large variety of national data protection laws and thus allow for a free data movement within the EU. The collection of EU citizens' data without their consent directly disrespects their legal right. Article 2 of the EU Data Protection Directive also determines that the individual must give his consent for the use of personal data. Consent:

> must have been given unambiguously. Consent may either be given explicitly or implied by acting in a way which leaves no doubt that the data subject agrees to the processing of his or her data (Boillat and Kjaerum 2014, 55).

[281] Didier Bigo, Gertjan Boulet, Caspar Bowden, Sergio Carrera, Elspeth Guild, Nicholas Hernanz, Paul de Hert, Julien Jeandesboz and Amandine Scherrer.
[282] "Everyone has the right to respect for his or her private and family life, home and communications" (ECFR Article 7).
[283] "1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority" (ECFR, Article 8).

However, as previously stated, the US collection of EU data through US surveillance programs was undertaken secretly and without the acknowledgement of EU citizens – who, according to EU law, are the first owners of their personal data, – thus disrespecting this provision (Bigo, Boulet, et al. 2013, 4). Surveillance programs, such as PRISM and the bulk telephony metadata collection programs, undertaken by US authorities defy:

> data protection and take away the ownership of that data from the hands of European citizens and residents as data subjects towards distant territories and foreign authorities (Bigo, Boulet, et al. 2013).

Therefore, the post-Snowden period revealed a European unease regarding the ability of US law to permit access to European data in a way that overrules the European data protection standards. The European Court on Human Rights has recurrently stated that intelligence agencies and national security authorities must comply with the fundamental rights established in the European Convention on Human Rights (Moraes 2014, 72). This external interference with one of the most fundamental and protected rights within the EU have led EU institutions and member-states to rethink their trust in the US. Nevertheless, these surveillance disclosures contributed to an increased public awareness of internal divergences among EU member-states, regarding the regulation of communications surveillance.

Indeed, some European legal frameworks are marked by legal 'grey areas' that are incapable of responding to these new challenges, not only because some EU states claim that this is a matter of national security[284], but also because existing oversight mechanisms, such as the National Data Protection authorities, proved to be incapable of acting upon and monitoring the excesses of intelligence services (Bigo et al. 2013, 4).

3- Disrespect for EU/US Legal Agreements

Finally, another negative impact of the US Surveillance programs application was the disrespect for international data transfer agreements between transatlantic partners. After the enactment of the EU Data Protection Directive in 1995 and the subsequent EU

[284] After the revelation of the compliance between the GCHQ and the NSA on surveillance programs the UK stated that its intelligence developments and programs were a matter of national security, and so it was not within the EU's competence. In this regard, a relevant point of view is raised: "even if intelligence activities are said to remain within the scope of member states' exclusive competences in the EU legal system, this does not necessarily means that member states' surveillance programs are entirely outside the remits of the EU's intervention. Both the European Convention on Human Rights and the EU Charter of Fundamental Rights could play a significant role here, especially given the fact that, from a legal point of view, EU surveillance programs are incompatible with minimum democratic rule-of-law standards and compromise the security and fundamental human rights of citizens and residents in the EU. (…) a lack of action at EU level would profoundly undermine the trust and confidence that EU citizens have in the European institutions" (Bigo et al. 2013, 6).

recognition of a lack of adequate US data protection principles, agreements were established between the EU and the US in order to allow the transfer of data. One of these was the Safe Harbor Agreement (2000), whose aim is to implement a process through which US companies may respect and apply EU data protection directive principles. Hence, if a US company declares (through an official written contract) its adherence to Safe Harbor's principles, the European controller may export its data to that company.

Many other agreements emerged to establish data transfers, such as the Binding Corporate Rules or the Model Contractual Clauses[285]. Non-European companies adopted these instruments as compliance benchmarks (Schwartz 2013, 1983). Nevertheless, the application of surveillance programs, as well as the secrecy that surrounds both section 702 and section 215 warrants hinders the fulfilment of and respect for the principles established in these agreements. Thus, US companies are faced with jurisdictional conflicts. Besides:

> which law they choose to obey will be governed by the penalties applicable and exigencies of the situation, and in practice the predominant allegiances of the company management (Bowden 2013, 23).

As Caspar Bowden highlights, US companies will always tend to preferably respect US surveillance orders, since the penalties will always have greater effects than those applied by the EU (Bowden Interview 2013). Nevertheless, one cannot ignore that public awareness also plays an important role, as companies do not want to lose their customers.

A debate over the legitimacy of the extraterritorial application of data protection laws has materialized with regard to the EU Data Protection Directive. In a draft report for the European Parliament, Claude Moraes recalled that "all companies providing services in the EU must, without exception, comply with the EU law and are liable for any breaches" (Moraes 2014, 4). However, some authors perceive this to be an extraterritorial application of the EU data privacy law. Using the example of the EU proposal for a new regulation, Svantesson asserts that this new regulation:

> with its potential for penalties of up to 2 per cent of an offending enterprise's annual worldwide turnover, looks likely to apply also to any non-EU enterprise that processes data about persons residing in the EU under certain circumstances. This means that the EU law,

[285] Other instruments to meet the Directive's adequacy test. Consult: Caspar Bowden. 2013. The US National Security Agency (NSA) Surveillance Programmes (PRISM) and Foreign Intelligence Surveillance Act (FISA) Activities and their Impact on EU citizens' Fundamental Rights. European Parliament's Committee on Civil Liberties, Justice and Home Affairs Report; Paul Schwartz. 2013. "The EU-U.S. Privacy Collision: A Turn to Institutions and Procedures." *Harvard Law Review* 126:1966-2009.

> with its potential for heavy fines and wide extraterritorial scope, is likely to directly affect businesses around the world (Svantesson 2013, 278).

As it seems impossible for companies to adhere to all national data privacy laws simultaneously, the author thus proposes what seems to be a possible solution: a 'layered approach' to extraterritoriality[286].

5. International Law Regulation

One of the most debated questions regarding transnational surveillance is that of the role played by International Law. Can International Law regulate this trans-border surveillance? Is the USA, and other countries which apply transnational surveillance programs, disrespecting International Law, particularly the International Covenant on Civil and Political Rights[287]?

Due to analytical restrictions, one will focus solely on the possible application of Article 17 of the International Covenant on Civil and Political Rights (hereinafter ICCPR) to solve this transatlantic dispute. Essentially, a main feature of the current globalized and digitalized world marked by transborder data flows is that jurisdiction becomes difficult to respect (Vega 2012). In spite of the turbulence these revelations created on this side of the Atlantic, the reality is that the extraterritorial application of US legislation and its impact on EU citizens' civil liberties has barely been addressed or discussed within the USA[288]. Even NGOs in the US have only touched slightly on this issue[289]. Actually:

> the impact of spying abroad through FISA's new power on the interests on privacy and confidentiality of foreigners *is bit of a non-issue in U.S politics*. There is no one in U.S. Congress that urges electronic surveillance of foreigners to be out under stricter conditions. Even American civil liberty groups tend to use arguments that heavily rely on the interests of U.S citizens or residents (emphasis added) (Hoboken, Arnbak and Eijk 2013, 22).

Even the recently released PCLOB report on section 702 recognizes that privacy is a human right established in the ICCPR (Art 17); however, it states that the legal and

[286] For more information, see: Dan Svantesson. 2013. "A 'Layered Approach' to the Extraterritoriality of Data Privacy Laws." *International Data Privacy Law* 3(4):278-286.
[287] The Universal Declaration of Human Rights is not referred to in this dissertation, since it is not legally binding.
[288] Nevertheless, there are also American authors who focus on the impact of surveillance on foreigners. See: David Cole. 2013. "We Are All Foreigners: NSA Spying and the Rights of Others." Available at: http://justsecurity.org/2013/10/29/foreigners-nsa-spying-rights/; Jennifer Granick. 2013. "Foreigners and the Review Group Report: Part 2." Available at: http://justsecurity.org/4838/foreigners-review-group-report-part-2/.
[289] See, Jameel Jaffer. 2014. Submission of Jameel Jaffer (American Civil Liberties Union) to the Privacy and Civil Liberties Oversight Board Public Hearing on Section 702 of the FISA Amendments Act. Available at: http://www.pclob.gov/Library/20140319-Testimony-Jaffer.pdf.

political issues raised by the US treatment of foreigners are difficult to solve (PCLOB 2014b, 9). Regarding international law, privacy is a right recognized by the ICCPR, which is an international human rights treaty ratified by the U.S. Senate. Yet, the dilemma surrounding international human rights law is whether the ICCPR's right to privacy applies to surveillance undertaken for national security purposes, particularly when surveillance targets foreign individuals located in foreign territories. This question had not yet been addressed by the parties of this treaty, though it hit the headlines after the Snowden revelations. Hence, it is relevant to understand the scope of article 17, which provides that:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks (ICCPR 1966)

In relation to the territorial scope of a State's obligation under this treaty, Article 2 determines that it must "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant." Notwithstanding, according to the Human Rights Committee this article also implies an extraterritorial effect. Thus, the state also has an obligation to protect individuals who are under its control regardless of the territory (Svantesson 2013). In relation to surveillance revelations and their impact upon the transatlantic relationship, two distinct positions can be identified:

On the one hand, the US insists it has no legal obligation to respect the right to privacy of foreigners outside its territory[290]. The main justification is the pursuit of national security interests. Several US authors defend this position, stating that the US must only apply these international protections within its own territory. Eric Posner states that, according to the traditional US perception that the ICCPR protects individuals from their own government abuses and not from actions perpetuated by foreign governments to foreign individuals, the US extraterritorial application of surveillance programs is thus not governed by the ICCPR (Posner 2014, 2). Craig Forcese also states that transnational surveillance cannot be ruled by the international

[290] See: US Department of State. Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights (2005). Available at: http://www.state.gov/j/drl/rls/55504.htm#annex1.

human rights law[291]. An interesting point of view, which is also a middle ground, is proposed by Peter Margulies. According to this scholar, US surveillance abroad is not in violation of the ICCPR; however, the US should continue to harmonize security and privacy and also foster to requirements to minimize the surveillance of foreigners' communications[292] (Margulies 2014).

Moreover, Amitai Etzioni states that since spying has been recurrent within the international community – even though it is not diplomatic to submit allies and friends to surveillance –PRISM should not be perceived as a violation of international law. Thus:

> extending surveillance to the phones of national leaders may have been a tactical error, nonetheless it seems that no legal or normative codes were violated in the process (Etzioni 2014, 24)

On the other hand, there is an increasing perception, not only but particularly in the EU, that the international human rights law applies extraterritorially and should be respected in order to abide by these international obligations. Thus, the authors advocating this perception consider that the USA, as well as any other State who applies transnational surveillance programs that impact on foreign citizens' right to privacy, is violating its binding commitments under the ICCPR [293](Scheinin 2013, 3). In compliance with this, the UN Human Rights Committee[294] reiterated in a report the US's obligation to protect human rights in its extraterritorial actions, regardless of the individuals' location or nationality[295] (Human Rights Committee 2014; Greene and Rodriguez 2014, 21).

Although there is no consensus as to the extraterritorial effect of the ICCPR, when considering transnational data flows, international diplomacy and the increase in transborder data transfers will most certainly contribute to an international agreement on this point. It seems improbable that the right to privacy will continue to fall under the auspices of a digital age. Thus, new technological developments combined with

[291] For more information, see: Craig Forcese. 2011. "Spies without Borders: International Law and Intelligence Collection." *Journal of National Security Law and Policy* 5:179-210. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1873983.
[292] For further details, see: Peter Margulies. 2014. "The NSA in Global Perspective: Surveillance, Human Rights, and International Counterterrorism." *Fordham Law Review* 82(5):2137-2167.
[293] For more details, consult: Martin Scheinin. 2013. Statement for the LIBE Committee Inquiry on Electronic Mass Surveillance of EU Citizens. Available at: http://www.europarl.europa.eu/document/activities/cont/201310/20131017ATT72929/20131017ATT72929EN.pdf
[294] One of the most important UN bodies, whose purpose is to monitor the implementation of the ICCPR by state parties.
[295] "The State party should: take all necessary measures to ensure that its surveillance activities, both within and outside the United States, conform to its obligations under the Covenant, including article 17". For further information, consult: Human Rights Committee. 2014. "Concluding Observations on the Fourth Periodic Report of the United States of America". Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fUSA%2fCO%2f4&Lang=en.

gradually intrusive surveillance programs demand a prompt international human rights law response, which does not ignore 'online' rights.

6. Evolution: An Undefined Future

The leak of numerous secret documents in the summer of 2013 generated an extremely significant media and political response and coverage. However, while these revelations brought some new discoveries to the fore, the existence of NSA surveillance programs or the possible impact that digital data transfers could have on EU citizens were not a surprising fact[296]. What seems clear is that the US exceeded the limits, and its actions resulted in a breach of trust between allies (Vitorino Interview 2014; Lobo-Fernandes Interview 2014).

Previously, a secret program called ECHELON[297] had been a matter of scrutiny by the European Parliament. Thus, the existence of the technical means to gather massive amounts of data was not new (Greene and Rodriguez 2014, 6). Recent developments have shown that lessons were not learned from ECHELON, since the resulting political reaction and parliamentary inquiry produced very little practical impact and development. Actually:

> with ECHELON begins a long story of intensification of means, mechanisms and proceedings - through which intelligence services collect data without control, in principle for national security reasons – that is progressively broadened to the societal security on the fight against terrorism (Vitorino Interview 2014).

Interesting is that even though the EU institutions and Member-states were aware of the possible existence of these programs, inertia prevailed. According to Pureza, this reveals the complete inability of institutions such as the National Data protection Authorities. Indeed:

> the lack of means and the diplomatic delicacy legitimate inaction and show that these organisms are not adequate for what is nowadays essential (Pureza Interview 2014).

Moreover, Lobo-Fernandes interestingly points out that this inertia continued due to the fact that there is a hierarchy of interests within States. Thus, the protection of data

[296] *Supra note* 264.
[297] A global system used for intercepting private and commercial communications. For more information, see: European Parliament Report on the Existence of a Global System for the Interception of Private and Commercial Communications (ECHELON interception system) (July 11, 2001). Available at: http://www.europarl.europa.eu/comparl/tempcom/echelon/pdf/rapport_echelon_en.pdf.

that follows legality and individual protection principles in democratic societies does not prevail over issues that States believe to be related to security and sovereignty (Lobo-Fernandes Interview 2014). What differentiated these disclosures was the scale and depth of the NSA ability to spy on innocent ordinary individuals (Wright and Kreissl 2014, 6; Bowden 2013).

A number of responses to transnational surveillance immediately appeared. Within the EU, there was a proliferation of statements, reports, briefing papers and recommendations. Similarly, in the US reports and recommendations emerged in order to diminish the continuous bulk collection of data. The cloud industry, as well as numerous companies providing internet services, addressed public concerns with an increase in encryption efforts[298]. According to Caspar Bowden, an equality of rights is necessary for the survival of the Internet. Thus, it "is simply that a justification for the application of surveillance has to be objective" (Bowden Interview 2014).

Within the EU, the perception is that the:

> American authorities have directly circumvented the 'rules of the game' in international relations, which require faithful cooperation (Bigo et al. 2013, 3).

The debates have intensified mainly due to the impact that the section 702 and section 215 programs had on EU citizens' civil liberties. However, in spite of a unified initial response and pressure directed at the US to modify its surveillance standards, one year later little has been altered. In fact, after one year "Europe is not speaking as much with one voice as it was in the immediate reactions to the early Snowden stories" (Kerry 2014, 6).

It is these different internal positions, and the perception that intelligence activities are a national security concern, compounded by unwillingness on the part of member-states[299], that are delaying a decision concerning the reform of data protection (Thimm 2014, 4). The different internal positions regarding surveillance relate mostly to a proximity or lack of proximity with the philosophy of American security policies (Pureza Interview 2014). Moreover, the internal problems that the EU is facing, particularly that of an economic crisis, have also been responsible for the relegation of extraterritorial surveillance to a secondary status (Lobo-Fernandes Interview 2014).

[298] The NSA surveillance's costs to the Cloud Industry seems extremely significant, thus imposing some pressure on cloud companies. In fact, "the U.S. cloud computing industry stands to lose $22 to $35 billion over the next three years as a result of the recent revelations about the NSA's electronic surveillance programs" (Castro 2013, 1). For more on the potential impact of US surveillance on Cloud industry, see: Daniel Castro. 2013. "How Much Will PRISM Cost the U.S. Cloud Computing Industry?" *The Information Technology and Innovation Foundation*. Available at: http://www2.itif.org/2013-cloud-computing-costs.pdf.

[299] The delayed decision on the reform of data protection was also affected by the Commission elections.

Regarding the EU's internal divergences, these are mostly related to an alignment with US security policy philosophy (Pureza Interview 2014).

In agreement with Lobo-Fernandes:

> regarding the potential impact of these revelations [spying on EU citizens and governments] on the overall relationship between the EU and the USA, and particularly the impact on some agreements being negotiated[300], such as the Transatlantic Trade and Investment Partnership it is likely that they may produce some declarations of discontent on the EU side; however, in my view, they will not determine the main direction and future of the on-going transatlantic initiatives (Lobo-Fernandes Interview 2014).

António Vitorino claims that some impacts may emerge, particularly those related to mutual confidence between allies, but only indirectly, since these surveillance excesses are not directed exclusively at the EU, but also affect the US internally (Vitorino Interview 2014).

Some solutions have been proposed on the EU side of the Atlantic (Bowden 2013; Bigo, Boulet et al. 2013; Carrera, Guild and Parkin 2014; Moraes 2014):

-the conclusion of the data protection reform, including more stringent provisions[301] regarding the protection of personal data in transfers to the US and a reform of the Data Protection Authorities (for instance, an increase in technical expertise);

-the creation of a European Cloud that would diminish both the international transfers for US cloud providers as well as the vulnerability of EU citizens' data;

-the establishment of an international treaty between the US and EU, that would harmonize EU and US data protection standards;

-the increase in protection for whistle-blowers (guarantees of asylum and immunity);

- the application of pressure on the US to guarantee equal privacy safeguards for US citizens and foreigners.

[300] José Manuel Pureza points out that what may be disturbing is not the harm to future agreements, but the fact that "much more important than what is publicly known about surveillance programs is what those surveillance programs acknowledge without our consent. On this level, the political and juridical configuration of transatlantic relations – namely the frame of the Partnership currently being negotiated – will be greatly affected by this knowledge and will tend to consecrate elements of surveillance policies that are beyond the limit of the rule of law" (Pureza Interview 2014).

[301] In the first EU Commission's proposal for a new regulation, there was an article that prohibited third-countries from accessing EU personal data through a non-European court order or administrative authority without the consent of a Data Protection Authority. Nevertheless, this article, also known as the 'anti-FISA clause', was extremely lobbied against and later withdrawn from the regulation. Thus, the reintroduction of Artº 42 was one of the proposals. However, Caspar Bowden does not favor this reintroduction since according to him "it is doubtful that this measure would be effective, because compliance would expose the leadership of US companies to charges of espionage" (Bowden 2013, 30).

On the other hand, in the US, the President[302] granted a change in governmental surveillance and focused on the privacy rights of individuals regardless of their nationality (Margulies 2014, 2137). In the Presidential Policy Directive (PPD)[303], which reiterates the relevance of intelligence for national security purposes, mostly in a counterterrorism environment, it is also stated that:

> our signals intelligence activities must take into account that all persons should be treated with dignity and respect, regardless of their nationality or wherever they might reside, and that all persons have legitimate privacy interests in the handling of their personal information (PPD-28 2014, 1).

Thus, according to this directive, some measures affecting EU citizens would be implemented: an end to the monitoring of US close friends and allies, imposing limits on the bulk collection of data and developing new privacy safeguards for foreign citizens. Even though this constitutes a first step towards a greater respect for foreign citizens' rights and more restrictive surveillance activities, the reality is that the majority of these policy alterations continue to have derogations whenever there is a compelling national security purpose at hand. Moreover, as previously stated, the discussion of the transnational impact of these surveillance programs continues to be a secondary issue[304] in the USA.

Caspar Bowden highlights the lack of European citizens' awareness for the consequences of transnational surveillance:

> still there is a knowledge gap in European public awareness. People specialized in this might think that this story has been very widely reported, but in fact no. (…) European public opinion probably doesn't understand the full gravity of what has emerged (Bowden Interview 2014).

US surveillance capabilities far exceed those of European states, which may also constitute an impediment to a common solution. Therefore, according to Eric Posner, in the case of the US, the costs of undertaking transnational surveillance may not be able to surpass its benefits (Posner 2014, 3). Nevertheless, it seems irrefutable that this is a political issue to be solved at an intergovernmental level. In fact, in the intelligence

[302] Based on the recommendations presented by the Presidents Review Group on Intelligence and Communications Technologies. See: The President's Review Group on Intelligence and Communications Technologies. 2013. *Liberty and Security in a Changing World.* Available at: http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

[303] See: *Supra note* 241.

[304] The relegation of this impact to a secondary status is visible in the two reports prepared by the Privacy and Civil Liberties Oversight Board, where little attention is focused on it. See: *Privacy and Civil Liberties Oversight Board*. 2014 a). "Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court." Available at: http://www.pclob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf; *Privacy and Civil Liberties Oversight Board*. 2014 b). "Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act." Available at: http://www.pclob.gov/All%20Documents/Report%20on%20the%20Section%20702%20Program/PCLOB-Section-702-Report-PRE-RELEASE.pdf.

field, as well as concerning its relationship with the US, Europe does not seem prepared to alter the status quo (Thimm 2014, 1). However, the US cannot also afford a direct confrontation and diplomatic turbulence with the EU, which is one of its closest allies. As José Manuel Pureza states, the European ability to pressure the US "is not a question of European singularity, but of loyalty to its rule of law matrix and to the demand of self-restrain in the relation between State and individuals" (Pureza Interview 2014).

In accordance with António Vitorino, in order to circumvent this transatlantic problem of trust "there must be sharing, not only of data, but also an agreement about who are the targets and what is intended to achieve" (Vitorino Interview 2014). Supranational resolution and monitoring may constitute the proper solutions for the reconfiguration of surveillance, enabled by tremendous technological development. As Sergio Carrera affirms:

> routine, unauthorized, and mass capture of data for strategic surveillance has taken us beyond the traditional post 9/11 debate about the balance between 'security versus privacy'. It puts the very nature of open societies and democratic rule of law at risk and constitutes a systematic and persistent breach of the Union's values; if the EU is seen as ineffective in protecting those principles and its citizens, its very credibility will be called into question (Carrera, Guild and Parkin 2014, 4).

The reality is that in a globalized world, where transatlantic trade-offs represent a huge percentage for both the EU and US economies, neither of these states can afford a transatlantic data war (Kerry 2014, 17). As Andrew Neal, claims:

> ultimately these problems will always be overcome somehow. The US and the EU have too strong financial and cultural ties. Even though, these will cause political problems, they will be overcome, because it is in both of their interests (Neal Interview 2014).

However, the prolongation of a bulk transnational access to EU citizens' data, which interferes with their fundamental rights and impacts on human security is not sustainable either.

7. Final considerations

Surveillance is not explicitly prohibited or sanctioned under international law. However, although it has been tolerated, it has not been greeted between nations. Recent enhanced US surveillance capabilities have exacerbated the traditional tone with which international community faced foreign intelligence. A conclusion that may be drawn from this chapter is that the extension of surveillance powers in the US prompted by the

PATRIOT Act and subsequently by the FAA, contributed to the edification of surveillance programs, whose intrusion affects foreign citizens' civil liberties on a scale that had never been witnessed before. The combination of technological developments on data storage, as well as the emergence of cloud computing services (mostly based in the US territory) – with the extensive surveillance powers enacted by the previously cited legal documents – culminated in the emergence of NSA programs which enabled a massive collection of individuals' data. That this activity was mainly targeted at foreign citizens who were not located in US territory was a fact revealed by Edward Snowden during the last year.

One interesting point of view is the one shared by José Manuel Pureza:

> the US ability [to collect EU data] is not the problem; the problem is what you do with that ability. From this point of view, it is evident that the prevention of terrorist attacks is being used as an argument for the illegitimate acquisition of data, which allows positions of pressure within international political and economic game (Pureza Interview 2014).

Hence, the concluding remark of this chapter is that both US surveillance legal tools – section 215 and section 702 – have clearly had a direct impact on fundamental EU rights, particularly those of privacy, through the imposition of a double standard – that do not recognize Fourth Amendment protections to foreign citizens. Besides, it also disrespected European legal frameworks – European Convention on Human Rights and EU Charter of Fundamental Rights – and have relegated EU-US agreements on data transfers. Bearing in mind, the human security framework adopted in this dissertation[305] it is evident that this impact on civil liberties hinders the human security of these individuals, since their civil and political rights are not being respected fully.

The disclosure of the existence of two legal tools, – section 215 (PATRIOT Act) and section 702 (FAA) – which permitted transnational surveillance, had a tremendous impact on EU civil society. After European public consciousness of the direct impact that those programs had on civil liberties, particularly privacy, it becomes imperative that the EU establish some limits on the extraterritorial application of US surveillance legal tools, as well as foster its citizens' protection and guarantees. Otherwise, the civil and political rights of EU citizens, enshrined in EU legal frameworks, will continually be disregarded thus hindering their human security. Some solution suggestions were advanced in the EU as well as in the US, though to a lesser extent. However, the need to

[305] See: Chapter I.

combine various solutions has become evident. If not, only one reflex of this transatlantic dilemma will be dealt with.

Finally, a solution will not be reached by a reform of the European data protection, nor by the recognition of the foreigner's right to privacy in the US legal framework, but rather through a combination of different interests and the cessation of both parties to diminish transnational surveillance impact on civil liberties. The ultimate question remains whether the US will actually yield, since the transatlantic relationship is still marked by asymmetry, with the balance pending towards the US (Lobo-Fernandes Interview 2014).

CONCLUSION

The 9/11 terrorist attacks ushered in security concerns worldwide. Within the US, the case study of this dissertation, those security concerns contributed to a restructuration of surveillance, in order to increase its governmental agencies powers and its surveillance capabilities and tools. This structural reform was mainly based upon exceptional legislative documents, whose enactment legitimized and justified new surveillance abilities. The PATRIOT Act and the FAA emerged as two of these extraordinary exceptional legislation measures aimed at countering terrorism and improving national security. Two provisions of these legal tools – section 215 of the PATRIOT Act and section 702 of the FAA – have had special impact on civil liberties, as they have enhanced surveillance beyond the protection of fundamental rights granted by legal frameworks, not only within the US, but also outside its territorial scope[306]. Bearing in mind the human security framework, as presented and operationalized in this dissertation, as well as its correlation with respect for human rights and civil liberties, it is clear that the impact on civil liberties directly contributes to the insecurity of individuals. Hence, this construction of terrorism as an existential security issue combined with the intrinsic securitization proposition of hindering 'normal politics' in order to protect security and democracy in a context of urgency and exceptionality resulted in the enactment of exceptional measures such as the PATRIOT Act and FAA. Moreover, and bearing in mind that the focus of this dissertation focused on the impact of surveillance enhancement, two particular provisions of these legal tools concerning surveillance emerge as a proof that individuals' civil liberties are being harmed.

On the Research Questions and Hypotheses

How did terrorism securitization, and its subsequent application of the PATRIOT Act and FAA, contribute to human insecurity in the post-9/11 period?

After a deep analysis of this case-study, and bearing in mind the theoretical model presented in the first chapter, there are sufficient elements to state that the hypothesis advanced is confirmed. In order to understand how this hypothesis is confirmed and using a gradient system, the confirmation of the secondary research questions hypothesis (How did securitization contributed to the enactment of the PATRIOT Act and FAA?; How do the PATRIOT Act and the FAA disrespect US citizens' civil liberties?; How do the PATRIOT Act and the FAA disrespect EU citizens' civil

[306] See: Appendix 3.

liberties?) play a relevant role. As a matter of fact, the three hypotheses were corroborated in the course of this dissertation. By focusing firstly on how the securitization contributed to the application of the PATRIOT Act and the FAA, it is clear that the exceptionality and urgency of dealing with a security issue, particularly terrorism, according to the securitization theory, has allowed for the emergence of exceptional measures such as the PATRIOT Act and FAA. The occurrence of a securitization of the terrorism process is confirmed within this dissertation through the evidence that the essential trilogy of securitization has been verified in the US after September 11: a securitizing speech-act, the construction of terrorism as an existential threat; the emergence of securitizing actors – the US administrations; and an acceptance by the audience – the US citizens.

Only an exceptional context constructed through a security speech-act and propagated by political elites – in other words only an intensification of a securitization process focused on terrorism – could have contributed to the audience's acceptance of such extraordinary measures. As has become clear, the PATRIOT Act emerged as the first legal expression of the state of exception formulated after September 11. Nevertheless, its application opened a precedent, particularly regarding surveillance, to continuously heighten surveillance capabilities, which materialized in the passage of the FAA in 2008.

Concerning the secondary research question the hypothesis is also confirmed. The PATRIOT Act and the FAA – particular its sections 215 and 702 – disrespect US citizens' civil liberties as their provisions do not coadunate nor respect the fundamental rights grated on the US constitution. The First Amendment and Fourth Amendment's protections, intrinsically connected to privacy, are severely encroached through its application. The domestic surveillance impact is severely expanded by the application of the previously secret NSA's Surveillance Programs. The bulk collection of telephony metadata program has been widely debated due to its disrespect for 'unreasonable searches' criterion and freedom of expression guarantee. On the other hand, PRISM domestic surveillance has a major impact due to its incidental collection of US citizens' data.

Regarding the impact of these legislative documents upon the civil liberties of Europeans, through the disrespect for European legal guarantees of data protection and privacy and the disrespect for EU-US agreements of data transfers, it is also confirmed. The development of cloud computing and the US companies hegemony on the

provision of these services have been contributing to an exquisite US governmental access to a great amount of national and international data. The introduction of the two legal sections discussed above facilitates the governmental access to the data stored within these services (section 702) and within other communication services, such as telephone companies (section 215). The disclosure of PRISM and the bulk collection of telephony metadata program uncovered the tip of the iceberg regarding transnational surveillance. Nevertheless, the impact on EU citizens' civil liberties is clear in three moments: the US legal tools' non-recognition of foreigners' right to privacy, focusing here particularly in the EU citizens; the disrespect for the right to respect for private and family life (Article 7 ECFR/ Article 8 ECHR), and the right to the protection of personal data[307] (Article 8 ECFR); and the non-compliance of EU-US legal agreements on data transfers, such as the Safe Harbour.

At least, after analyzing the confirmation of the secondary questions, it is stringent to conclude the confirmation of the main research question hypothesis. Applying the securitization and human security theoretical frameworks, it became evident that an intensification of the securitization of terrorism emerged after September 2001, thus contributing to the materialization of the extraordinary PATRIOT Act and FAA. The enactment of these legislative measures allowed the application of two provisions – section 215 and section 702, respectively – that infringe on fundamental rights, particularly the privacy right through the justification of intrusive surveillance programs, granted on previously established legal tools, such as the US Constitution and the abovementioned European legal tools. Hence, both provisions seriously curtail civil liberties.

Thus, reckoning that human rights, as well as civil liberties, which are a particular segment of it, and human security are intrinsically related concepts, as observed in the course of this dissertation, the disrespect of the first has serious consequences on the latter by causing immaterial violence and hence contributing to the exacerbation of individual insecurity in the counterterrorism context (Ferstman 2009; McDonald 2002). Whether these provisions enhance national security or not, is not a matter of analysis of this dissertation, and it would require another line of research. However, it demonstrates

[307] "1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority" (ECFR, Article 8).

that using a human security theoretical basis, the disrespect for civil liberties diminishes the security of the individual, through the increase of immaterial violence.

On the Theoretical and Practical Contributions and Implications

This dissertation aimed at introducing three main contributions. *The combination of two distinct theoretical approaches* showed that security issues may be analysed through numerous prisms allowing a deeper understanding of its interrelations and effects. Thus, in this particular case-study, combining the normative dimension of the human security framework and the analytical dimension of the securitization theory allows to decipher the normative impact of intensified securitization of terrorism.

Draw attention to the impact of counterterrorist exceptional measures – specifically those focused on surveillance – on the human security framework is the first contribution. Thus, it aimed at exposing an interesting and worth of attention antinomy that emerges in this particular case-study: the increase of security has hindered human security. In fact, the national security concerns ushered by terrorist attacks were responsible for an increase of security measures, particularly focused on the enhancement of surveillance. As exposed on the operationalization of human security, it is interpreted as the freedom from material violence – physical threats to life and safety, such as torture, killing or terrorism – and immaterial violence – disrespect for civil and political rights, such as right to privacy, to freedom of thought or to a fair trial - by his/her government or other states. Thus, as became clear within this dissertation, *the increase of security measures may have contributed to strengthen the freedom from material violence, but it also contributed to an encroachment upon the immaterial component through the disrespect for civil liberties.*

Other theoretical contribution of this dissertation relied upon *the comprehension of the impact that exceptionality may have upon legislation*. The combination of a character of exceptionality associated with the securitization process and the attempt to justify it through legislation may help to perpetuate measures that hinder the human security, as was verified in the US case. The potentiality of a perpetuation of exceptional measures that disrespect civil liberties, and subsequently human security, require a deeper theoretical and empirical analysis that must not be limited to this case-study. The exceptional legislative measures addressed within this dissertation are an example of the *temporal prolongation of exceptionality*.

As for the practical implications this dissertation highlights that a balance has not yet been found in times of emergency, such as the War on Terror, between security and civil liberties. However, human security has a potential to balance individual interests with national security, as it "refers to providing security within the limitations of respect for human rights" (Prezelj 2008, 25).

Besides, it also shows the stringent necessity of dealing with exceptional measures, once in a world where the end of a war against terrorism does not seem to be nearby, the continuous prolongation of exceptional measures seems obvious. The scope and consequences of this problem require a prompt response. The enhancement of surveillance, its transnational scope and extraterritorial application also demand a swift political solution, not only within the US, but particularly on the European side. Otherwise, as verified along this dissertation, encroachments upon civil liberties will remain as a normal feature. The current developments, such as the disclosure of mass surveillance programs, require new responses that, though not restricting totally surveillance, respect individuals' right to privacy. The necessity of a European response seems evident. Otherwise, the EU will not be able to maintain the respect for its principles of rule of law, nor protect its citizens from external intrusions on their civil rights.

This dissertation may not be exclusively reduced to positive aspects. Concerning the limitations faced, the most evident relates to the limitations of the theoretical frameworks. In fact, through the application of this theoretical model the case-study was faced with the inherent limitations of both theories. Bearing in mind the proliferation of human security definitions, it is recognized a certain daring in the contextual operationalization of human security that complies with this particular context, but may not be applicable to other case-studies. Moreover, the combination of two theoretical approaches may also present some limitations, since the analytical restriction of a dissertation may not coadunate with the necessary depth required for each theory.

Besides, it is acknowledged that, even though there is a constant attempt to maintain an academic impartiality with regard to the dichotomy that encompasses this dissertation – security vs. liberty -, the application of the human security framework as delineated may ultimately overlap.

Conclusively, some research hints may be pointed out to future research within this field. How human security may contribute to putty the normative lack of securitization would render an interesting analysis that fosters the combination of

security approaches. As became clear, security has various facets, and a blending of its diverse theoretical approaches may render positive solutions to ingrained phenomenon. Moreover, an analysis of the impact of surveillance beyond terrorism is also a pertinent research question. The surveillance measures that emerged after September 11 seem not to be limited to spying terrorist suspects. The potential use of these measures for other motives, such as business espionage may contribute to a deepened understanding of the scope of surveillance nowadays. Additionally, a profounder theoretical analysis to the tendency of normalizing and perpetuating exceptional measures is also an interesting point of review, due to its actual impact upon democracy, rule of law and fundamental rights.

APPENDIX

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1. Us Administration Members Political Discourse Concerning Terrorism

Author	Speech	Date	Context of the Speech
President George W. Bush	"Today, our nation saw evil -- the very worst of human nature -- and we responded with the best of America." (…) "This is a day when all Americans from every walk of life unite in our resolve for justice and peace. America has stood down enemies before, and we will do so this time. None of us will ever forget this day, yet we go forward to defend freedom and all that is good and just in our world."	September 11, 2001	Address to the Nation.
President George W. Bush	"On September the 11th, enemies of freedom committed an act of war against our country."	September 20, 2001	Address to the Nation.
President George W. Bush	"[W]e believe in democracy and rule of law and the Constitution. But we're under attack."	December 5, 2001	Remarks by the President and Prime Minister Kjell Magne Bondevik of Norway.
President George W. Bush	"The attacks of September the 11th horrified our nation. And amid the grief came new fears and urgent questions." (…) "So in the early days and weeks after 9/11, I directed our government's senior national security officials to do everything in their power, within our laws, to prevent another attack."	September 6, 2006	President Bush's Speech on Terrorism from the White House.
Vice-President Dick Cheney	"The world before 9/11 looks different than the world after 9/11, especially in terms of how we think about national security and what's needed to defend America."	September 8, 2002	Interview on the NBC News.
Attorney-General John Ashcroft	"Defending our nation and its citizens against terrorist attacks is now our first and overriding priority."	December 6, 2001	Testimony to the Senate Committee on the Judiciary.
Secretary of Defence Donald Rumsfeld	"This threat is not theoretical; it is real. It is dangerous. If we do not prepare promptly to counter it, we could well experience attacks in our countries that could make the events of September 11 seem modest by comparison" (…) "The message is that there are no "knowns." There are thing we know that we know. There are known unknowns. That is to say there are things that we now know we don't know. But there are also unknown unknowns. There are things we don't know we don't know."	June 6, 2002	Press Conference at NATO Headquarters.
President George W. Bush	"Those who despise human freedom will attack it on every continent. Those who seek missiles and terrible weapons are also familiar with the map of Europe."	May 23, 2002	Visit to Berlin.
President Barack Obama	"We know that this threat will be with us for a long time, and that we must use all elements of our power to defeat it." (…) "But I believe with every fiber of my being that in the long run we	May 21, 2009	Remarks by the president on National Security.

	also cannot keep this country safe unless we enlist the power of our most fundamental values. The documents that we hold in this very hall -- the Declaration of Independence, the Constitution, the Bill of Rights -- these are not simply words written into aging parchment. They are the foundation of liberty and justice in this country, and a light that shines for all who seek freedom, fairness, equality, and dignity around the world."		
President Barack Obama	"Now make no mistake: our nation is still threatened by terrorists. From Benghazi to Boston, we have been tragically reminded of that truth. We must recognize, however, that the threat has shifted and evolved from the one that came to our shores on 9/11. With a decade of experience to draw from, now is the time to ask ourselves hard questions – about the nature of today's threats, and how we should confront them." (…) "Much of our best counter-terrorism cooperation results in the gathering and sharing of intelligence; the arrest and prosecution of terrorists."	May 23, 2013	President Barack Obama's speech at National Defense University.
President Barack Obama	"My assessment and my team's assessment was that they help us prevent terrorist attacks. And the modest encroachments on privacy that are involved in getting phone numbers or duration without a name attached and not looking at content — that on, you know, net, it was worth us doing. But I think it's important to recognize that you can't have a hundred percent security and also then have a hundred percent privacy and zero inconvenience. *You know, we're going to have to make some choices as a society*" (emphasis added).	June 7, 2013	Statement by the President.
Attorney General Eric Holder	"The Constitution's guarantee of due process is ironclad, and it is essential, but … it does not require judicial approval before the president may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war, even if that individual happens to be a U.S. citizen."	May 1, 2012	Speech at Northwestern School of Law.
Secretary of Defense Chuck Hagel	"During the course of my remarks today, Department of Defense systems will have been scanned by adversaries around 50,000 times."(…) "Our nation confronts the proliferation of destructive malware and a new reality of steady, ongoing, and aggressive efforts to probe, access, or disrupt public and private networks, and the industrial control systems that manage our water, energy, and food supplies."	March 28, 2014	Retirement Ceremony for General Keith Alexander.

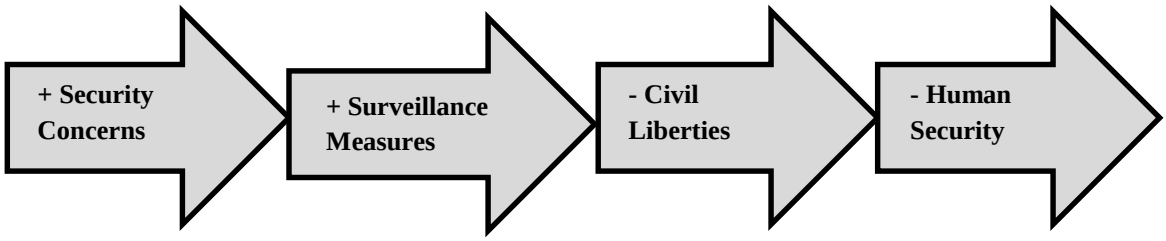
2. Synthesis of the Analysis of the Legislative Measures

Legal Document	Enactment Year	Description	Aim	Scope of Surveillance	Amendments	Analysed Section
PATRIOT Act	2001 Under Bush Administration.	Extraordinary measure to prevent future terrorist attacks.	Expand governmental ability to investigate terrorism and surveillance capabilities.	Domestic and Transnational.	Introduced amendments to previous statutes, such as the ECPA and FISA.	Section 215: Extends the governmental ability to access business records. Legally justifies the application of the NSA's bulk collection of telephony metadata program.
Foreign Intelligence Surveillance Amendments Act	2008 Under Bush Administration.	Extraordinary measure that enhances surveillance capabilities introduced on the PATRIOT Act.	Close the debate on 'warrantless wiretapping' and enhance intelligence agencies access to individuals' communications.	Domestic and Transnational.	Introduced further amendments to FISA.	Section 702 Expands the governmental access to foreign intelligence information through electronic surveillance, particularly focusing on non-US persons. Legally justifies NSA surveillance program: PRISM.

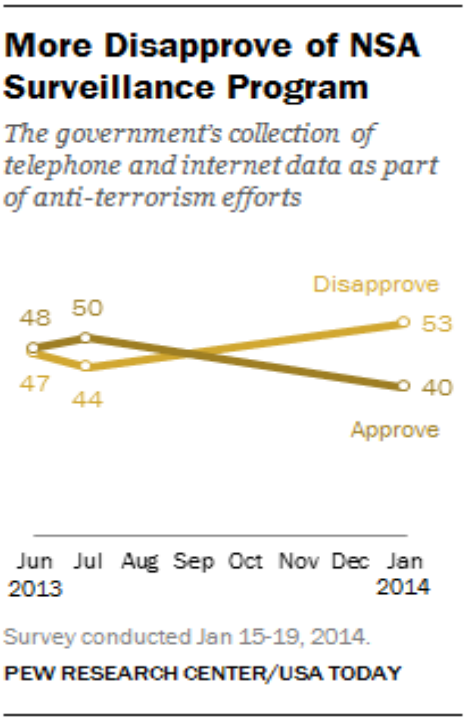
3. Conclusion's Table

Challenges to Human Security	Civil Right Affected	Security Justification
Section 215 PATRIOT Act – Bulk collection of telephony metadata	US Citizens: Fourth Amendment First Amendment EU Citizens: Right to Privacy	More access to business records is crucial to investigate terrorism; Clarifies a situation that was previously put in practice; Metadata access is not as intrusive as content access; Metadata allows creation of databases that permit analysis of connections;
Section 702 FAA – PRISM	US Citizens: Fourth Amendment EU Citizens: Right to Privacy	In order to enhance security, some privacy sacrifices are required; US citizens rights are protected by minimization and targeting procedures; US Constitution rights do not apply to foreigners;

4. Surveillance's Impact on Human Security



5. More Disapprove of NSA Surveillance Program



(Pew Research Center 2013).

6. Interviews' Data

Name	Date	Sector	Type of Interview	Interview's Guide
Caspar Bowden	June 17, 2014	Civil Society – Former Chief Privacy Adviser at Microsoft	Video-conference	I
Susan Herman	June 16, 2014	Civil Society – President American Civil Liberties Union	E-mail	II
António Vitorino	June 20, 2014	Politics	Video-conference	III
Andrew Neal	June 16, 2014	Academic	Video-conference	IV
Luís Lobo-Fernandes	June 25, 2014	Academic	Video-conference	V
José Manuel Pureza	July 1, 2014	Academic	Video-conference	VI
Maria Assunção Pereira	June 6, 2014	Academic	In-person	VII

7. Interview' Guides

I. Caspar Bowden

1- How would you describe surveillance nowadays? Is it proportional to the threat presented by terrorism or does it go too far?

2- What are the main differences in terms of privacy protection between the USA and EU?

3- Do you think the PATRIOT Act opened a precedent for more intrusive and exceptional legislation, such as the FAA?

5- How is data collected through surveillance programs processed? What happens to that data and how can it be used against EU citizens?

6- Do you believe formal distinctions between ally-enemy are being deconstructed?

7- Do you believe civil society and their pressure could be the final boost to increase privacy?

8- Despite minimization and targeting procedures, do you believe US citizens are free of having their privacy harmed by the FAA?

9- Before the scandal of Edward Snowden, there were authors adverting for the extraterritorial impact that American legislation could have on EU.

Why do you believe there was so much of inertia before political debate about FAA rose in the EU?

10- Do you believe cloud companies are truly worried or compromised on respecting civil liberties?

11- In Lausanne Congress you said that "potentially all EU data is at risk". Were you also referring to commercial data?

12- In Lausanne Congress you referred that you are not in favor of bringing back Article 42 to the data protection regulation, because US corporations would ignore them. What would be the other solutions?

13- An EU cloud would not raise the same type of problems, but restricted to the EU?

14- Do you believe EU may exert sufficient international pressure to solve this conundrum?

15- Do you still believe that the main solution stands of changing the US Law?

16- What do you believe to be the most dangerous: surveillance capabilities, or the suspect targeting specifications?

II. Susan Herman

1- What do you believe to be the major threat to Americans' civil liberties since 9/11 terrorist attacks: terrorism or antiterrorist legislation, such as the PATRIOT Act? Can you identify differences in the approaches to civil liberties between George W. Bush and Barack Obama administrations?
2- Do you believe that the U.S. political discourse post-9/11 relied on the threat of terrorism, in order to justify certain exceptional measures, such as the Title II of the PATRIOT Act? If yes, Why?
3- How would you describe the legal data protection/privacy protections of US citizens and non-citizens? Are they adequate or insufficient? Why?
4- Regarding the Title II (Enhanced Surveillance Procedures) of the PATRIOT Act only two provisions (206 and 215) have not yet become permanent. Do you believe emergency measures are becoming institutionalized/normalized? If yes: What may be the social and legal consequences of this institutionalization?
5- Authors such as David Dyzenhaus and Rebecca Sanders refer to the formation of 'grey zones' or strategies of 'plausible legality', respectively, within legal systems – where law becomes more flexible within a context of exceptionality. Thus, during an emergency state, law is not suspended, but there is a reconstruction of law so it can comply with practices that disrespect civil liberties. Do you believe US Rule of Law is becoming less restrictive in a context of the War on Terror?
6- Concerning the recent disclosure of the US surveillance program PRISM, does the minimization and targeting procedures used to avoid its application on US citizens grant their protection, or may this program have an impact on constitutional rights?
7- Do you believe PRISM is infringing upon EU citizens civil liberties, or is it a case of necessity?

III. António Vitorino [Interview conducted in Portuguese]

1- What is your positioning regarding the use of surveillance programs nowadays? Do you believe these are proportional on a counterterrorism context?
2- Do you believe there are significant data protection differences between the EU and the US?
3- What are the main consequences of the NSA's utilization of mass surveillance programs for the EU and its citizens?
4- As an European citizen, and a national and international prominent figure, what is your opinion regarding the US capability to access European data?
5- Bearing in mind the US application of intrusive surveillance programs, do you think the term 'allies' applies to the relationship between the EU and US?
6- The public awareness of these programs may hinder or retract the transatlantic relations?
7- Some researches had previously alerted to the possible utilization of US legislation to collect European citizens' data. What are the reasons for the political inertia in the face of such a problem?
8- The schism and divergences among European member-states may constitute a hindrance to the resolution of this situation?
9- Do you believe the EU may exert sufficient international pressure to solve this conundrum?

IV. Andrew Neal

1- Bearing in mind your exposition in the book *Exceptionalism and the War on Terror: The Politics of Liberty and Security after 9/11*, why do you claim that distinctions such as norm/exception, security/politics and security/liberty help to perpetuate exceptionalism?
2- In the same book you refer that we should not let Schmitt win the argument. Do you believe that terrorism should not be dealt as an exception?
3- Do you believe a securitization process occurred in the USA associated to the terrorist attacks of 9/11?

4- Do you consider that there are differences between George W. Bush and Barack Obama Administrations? What are the main differences?

5- In the USA, the post-9-11 security/political context is filled with speeches of exception and necessary exceptional measures to deal with it. What were the main consequences of this exceptionalism?

6- What are the main differences between George W. Bush and Barack Obama regarding surveillance and data protection?

7- To what extent has the War on Terror altered the distinctions between internal and external security?

8- Do you believe internal divergences within the EU member states may burden the achievement of a solution for this external interference?

9- What are the reasons for the temporal extension of knee-jerk legislation?

10- Do you believe a normalization of legislative exceptionalism is arising?

11- Do you believe US exceptional legislation, such as the PATRIOT Act and FISAA 2008, may impact upon EU citizens' rights? As an European citizen, how do you feel about it?

12- To what extent can this interference hinder the relationship between US and EU?

V. Luís Lobo-Fernandes [Interview conducted in Portuguese]

1- Do you believe that a process of securitization was developed in the context of the terrorist attacks of 9/11?

2- Do you consider that there are differences between George W. Bush and Barack Obama Administrations? What are the main differences?

3- In the US the political-security context after 9/11 denotes a recurrent utilization of exceptional discourses and references to the necessity of exceptional measures to deal with terrorism. What are the main consequences of this exceptionalism?

4- Do you consider that there is a normalization of exceptionalism? What are the potential risks of this normalization?

5- What is your positioning regarding the use of surveillance programs nowadays? Do you believe these are proportional on a counterterrorism context?

6- Do you believe there are differences between George W. Bush and Barack Obama regarding surveillance and data protection?

7- As a European citizen, and a national and international prominent figure, what is your opinion regarding the US capability to access European data?
8- The public awareness of these programs may hinder or retract the transatlantic relations?
9- Some researches had previously alerted to the possible utilization of US legislation to collect European citizens' data. What are the reasons for the political inertia in the face of such a problem?
11- The schisms and divergences among European member-states may constitute a hindrance to the solving of this situation?
12- Do you believe the EU may exert sufficient international pressure to solve this conundrum?

VI. José Manuel Pureza [Interview conducted in Portuguese]

1-Do you believe that a process of securitization was developed in the context of the terrorist attacks of 9/11?
2- Do you consider that there are differences between George W. Bush and Barack Obama Administrations? What are the main differences?
3- Do you consider that there is a normalization of exceptionalism? What are the potential risks of this normalization?
4- Do you believe there are differences between George W. Bush and Barack Obama regarding surveillance and data protection?
5- As a European citizen, and a national and international prominent figure, what is your opinion regarding the US capability to access European data?
6- The public awareness of these programs may hinder or retract the transatlantic relations?
7- Some researches had previously alerted to the possible utilization of US legislation to collect European citizens' data. What are the reasons for the political inertia in the face of such a problem?
8- The schisms and divergences among European member-states may constitute a hindrance to the solving of this situation?
9- Do you believe EU may exert sufficient international pressure to solve this conundrum?

VII. **Maria Assunção Pereira** [Interview conducted in Portuguese]

1- According to the International Law, is it legitimate to characterize counterterrorist operations as war?

2- The utilization of a war paradigm may impact upon the juridical order?

3- There is a debate concerning legal positioning of exceptionalism: some authors believe it stands within the juridical order, and others claim it is outside of the legal order. What is your opinion concerning this debate?

4- Is the perpetuation of a state of emergency lawful?

5- May the exceptional measures affect the Rule of Law and the Constitutional order? How?

6- Do you believe there are significant data protection differences between the EU and the US?

7- What may be the consequences of the extraterritorial application of domestic laws?

8- The article 12 of the Universal Declaration of Human Rights could be used by the EU to arrogate the US respect for the right to privacy?

9- As a European citizen, what is your opinion regarding the US capability to disrespect EU citizens' right to privacy?

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