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The USA PATRIOT Act and Punctuated Equilibrium

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Abstract

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MS, Thomas A. Edison State College, 2012

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Abstract

Currently, Title II of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001 appears to be stalled as a result of controversy over the intent and meaning of the law. Proponents of the title advocate the necessity of the act to combat modern terrorism, whereas opponents warn of circumventions of the Fourth Amendment of the U.S. Constitution. Using punctuated equilibrium as the theoretical foundation, the purpose of this case study was to explore the dialogue and legal exchanges between the American Civil Liberties Union and the Department of Justice related to the National Security Agency's metadata collection program. In specific, the study sought to explore the nature of resistance to changes needed to mollify the controversies associated with Title II. Data for this study were acquired through publicly available documents and artifacts including transcripts of Congressional hearings, legal documents, and briefing statements from the US Department of Justice and the American Civil Liberties Union. These data were deductively coded according to the elements of PET and then subjected to thematic analysis. Findings indicate that supporters and opponents of the law are locked in a consistent ideological polarization, with supporters of the law touting the necessity of the authorizations in combatting terrorism and opponents arguing the law violates civil liberties. Neither side of the debate displayed a willingness to compromise or acknowledge the legitimacy of the other viewpoint. Legislators who accept the legitimacy of both researched viewpoints could create positive social change by refining the law to meet national security needs while preserving constitutional protections.

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Table of Contents

List of Tables

Chapter 1: Introduction to the Study

Introduction

The 2013 revelations about National Security Agency (NSA) surveillance programs brought increased attention to the ideological and partisan divide involving Title II of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (U.S.C. § 1861). The basic debate involves striking the correct balance between national security and civil liberties. Many scholars and policy makers view the objectives of security and liberty to be diametrically opposed (Banks, 2010–2011; Bedi, 2014; Berghel, 2014; Simmons, 2013; Xhelili & Crowne, 2012; Yoo, 2014). This qualitative case study examined the polarizing debate about Title II provisions with the goal of identifying common ground between the two sides in an effort help mitigate contentions. Objectively examining the various points of view regarding the law, the chronology of security policies, and legal precedencies could have potentially led to the discovery of refinements to Title II that would make it more palatable to those who currently oppose it.

Background

In the realm of national security policies, currently there is no policy as ideologically or politically polarizing as Title II of the USA PATRIOT Act. Francel (2014), Kris (2014), and Regan (2014) warned of the title's potential for abuse, particularly the circumvention of the Fourth Amendment of the U.S. Constitution. Although many concerns exist regarding Title II provisions, the basic contention is in how the title allows for surveillance (including bulk collection) with Foreign Intelligence

Surveillance Court (FISC) authorizations, which have been determined to have a lesser threshold for probable cause than traditional Fourth Amendment warrant protections (Donohue, 2014). The opposition voices vie that there is no legal justification for circumventing Fourth Amendment protections during domestic criminal proceedings even during times of crisis. The Fourth Amendment was intended to protect U.S. citizens regardless of the state of affairs (Mondale, Stein, & Fahnhorst, 2014). Substantial volumes of academic research support this opposition to Title II of the USA PATRIOT Act.

Due to the polarizing nature of the title, significant amounts of scholarly opinions dismiss the aforementioned concerns about the circumvention of the U.S. Constitution and instead praise the authorities of Title II. Gilbert (2013), Lungren (2012), and Yoo (2014) strongly argued that not only are Title II authorizations essential for protecting modern America, but they are in compliance with all U.S. Constitution protections. Williams (2014) further explained that the courts' warrant preference for surveillance is a relatively recent development in U.S. law and during the first 150 years of the United States it was not common for the courts to demand surveillance evidence to have been obtained using a warrant. Shults (2011) elaborated that the president's constitutional duty to protect the United States would be in jeopardy if the executive's access to FISC authorizations was unreasonably hindered. Supporters of Title II of the USA PATRIOT Act make a strong counterpoint to the previously mentioned and equally compelling opposition views.

Both sides of the debate are compelling, eluding to the validity of both views. Sufficient literature supports each view, but no literature acknowledges the legitimacy of the opposite opinion. Most literature available for this study is either slanted in support of the USA PATRIOT Act or in opposition of the law. The problem with these biases, in the academic examination of the law, is that they ignore the likely truth that the USA PATRIOT Act is both beneficial and imperfect. The articles seem to either fully support or aggressively attack the act due to strongly held preconceived notions and attitudes. Strongly held predetermined beliefs can cause individuals, including scholars and policy makers, to reject information that does not fit into their previously developed line of reasoning or agenda (Druckman & Leeper, 2012). Scholars and legislators should attempt to avoid such attitudes with the USA PATRIOT Act. No truly convincing argument for how or why these differing views need to be diametrically opposed exists.

The academic and legislative goal should be to determine what authorities are needed and how these authorities can be granted without encroaching on civil liberties. The lack of information about areas in which compromise could occur between the sides of the debate creates a literature gap. No peer-reviewed articles were discovered that expressed any common ground between supporters and critics of the USA PATRIOT Act. Such information could be valuable to scholars and policy makers wishing calm the polarizing debate about the law in order to strike an appropriate balance between liberty and security. This study contributed to academia by examining the causes of the perpetual clash with provisions of Title II of the USA PATRIOT Act.

Problem Statement

Ideological polarization routinely peaks and wanes (Jensen, Kaplan, Naidu, & Wilse-Sampson, 2012). Recent decades have demonstrated a significant polarization peak resulting in political gridlock (Fechner, 2014; Kirkland, 2014; Merrill, Grofman, & Brunell, 2014). In U.S. domestic security policies, polarization is most evident with Title II of the USA PATRIOT Act. Title II has always been controversial and continued to be aggressively debated in numerous 2015 court rulings and congressional decisions. Opponents of the act vilify its authorities, due to civil liberty infractions, without recognizing its benefits, whereas supporters only recognize the benefits and dismiss the act's flaws. This polarization has even infiltrated peer-reviewed literature creating a notable lack of literature acknowledging the legitimacy of both views.

The punctuated equilibrium theory (PET) of discontinuous change explained that polarized issues will remain relatively stagnant until external forces cause rapid imperfect change, as demonstrated by the USA PATRIOT Act enactment. Title II is likely both flawed and essential to modern security. Remaining stagnant leaves the imperfections in place, but rapid alteration could erode American citizens' security or liberties. The PET concept of bounded rationality states that stasis periods lack the political will to act, but crisis periods lack the time to make perfect decisions (Tyson, 2007). A case study that qualifies both the concerns and benefits of Title II within the confines of the policy change PET framework could assist policy makers in developing more perfect decisions prior the next exogenous change.

Purpose of the Study

The purpose of this case study was to examine the advantages and contentions of Title II of the USA PATRIOT Act to better understand how PET described bounded rationality prevented incremental policy change from achieving the objectives of the provisions while mitigating the potential for or perception of the circumvention of the Fourth Amendment of the U.S. Constitution.

Research Questions

Central Research Question – Qualitative:

How does the bounded rationality of the PET of public policy change prevent incremental change from achieving the security objectives of Title II of the USA PATRIOT Act of 2001 while addressing concerns of potential circumventions of the Fourth Amendment of the U.S. Constitution?

Subquestion 1 - Qualitative:

How is political and ideological polarization prolonging the stagnation period of the PET of public policy change with the USA PATRIOT Act?

Subquestion 2 - Qualitative:

How does the PET of public policy change explain the enactment and extensions of the USA PATRIOT Act?

Subquestion 3 - Qualitative:

How does Title II of the USA PATRIOT Act affect U.S. law?

Subquestion 4 - Qualitative:

What are the benefits of Title II of the USA PATRIOT Act?

Subquestion 5 - Qualitative:

How is Title II of the USA PATRIOT Act controversial?

Framework

The PET of public policy change, also known as the PET of discontinuous change, asserts that policy changes occur gradually with time through incremental adaptations until an outside source disrupts the status quo forcing immediate, significant change (Sabatier, 2007; Boushey, 2012; Prindle, 2012). This theory implies "there is long-term and relatively incremental policy change followed by an exogenous shock to a policy monopoly resulting in a tipping point oriented toward sharp and explosive policy change" (Givel, 2010, p. 189). National security policies had incrementally evolved since World War II with minor spikes during times of conflict until the disruption caused by the terrorist attack of September 11, 2001, evoked the rapid enactment of the USA PATRIOT Act (Ripberger, 2011; Romano, 2011). Bounded rationality is a concept in decision making in which a decision maker is forced to accept a less than perfect choice, because it is the best possible choice at the time (Tyson, 2007). In the PET, decision makers often exhibit bounded rationality during the incremental stage and during the period of dynamic change (Baumgartner & Jones, 2009; Cairney, 2013). During the incremental period of change, they are often unable to conjure enough influence to elicit change (Baumgartner & Jones, 2009; Cairney, 2013). During the period of dynamic change, they are forced to make choices rapidly without adequate information or options (Baumgartner & Jones, 2009; Cairney, 2013). The PET and bounded rationality might explain the continued controversies with the USA PATRIOT Act.

Evidence of the PET is present from the rapid enactment of the USA PATRIOT Act to its lingering controversies and mild alterations. The terrorist attacks of September 11, 2001, was an exogenous shock to relatively stagnant national security policies. The attacks generated public fear that transformed into unprecedented demand for security policy change. This demand was immediately met by all the macro political institutions including the U.S. Congress and the White House. On October 4, 2001, the first draft of the USA PATRIOT Act made its way to the capital (Baldwin & Koslosky, 2012). In modern American politics, having a draft presented to congress in 3 weeks of its conception is fairly unheard of. The USA PATRIOT Act is arguably one of the most influential national security policies in modern history. The bounded rationality aspect of punctuated equilibrium of policy change would suggest that such a rapidly developed law that significantly alters national security would be both imperfect and beneficial. The PET would also suggest that despite these imperfections, the law is unlikely to change significantly to address these issues.

The stagnant and incremental change periods described in the PET of public policy change are easily identifiable with Title II of the USA PATRIOT Act. A contributing factor to the prolonged lack of refinement is political and ideological polarization causes virtual legislative gridlock (Fechner, 2014; Kirkland, 2014). Throughout history political tensions have come and gone and the current polarized state in American politics is not new or uncommon (Jensen et al., 2012). The fringes of the ideological field have become increasingly popular which has created a barrier between the opposing views that prevents significant political actions (Merrill et al., 2014). This

dissertation asserted that ideological and political polarization is the reason Title II of the USA PATRIOT Act continues to be trapped in the PET described stagnation period despite being in the center of multiple controversies.

Comparing the legislative lifespan of the Title II of the USA PATRIOT Act to the PET of discontinuous change suggested one of 3 possible outcomes to the statute. First, the title could be drastically changed in response to an external jolt such as another terrorist attack or a blatant government overreach that enrages the American voter. If this were to happen, it is likely the kneejerk reaction would have a second order effect of either eliminating the benefits of the current version of the title or increasing the potential for governmental abuses. A second possible outcome for Title II, as predicted through PET, is that political and ideological polarization will keep the law in perpetual stasis. The benefits of the law would remain, but so would its contentions. The third possible outcome is that incremental change could preserve the benefits of the title while eliminating the contentions. Incremental change that forms a more perfect statute should be the goal of policy makers and understanding how such a goal is possible should be an equally important objective to scholars.

The PET of public policy change suggested that an effective incremental change of Title II of the USA PATRIOT Act would require a thorough examination of both sides of the debate. Understanding both sides of the debate could lead to identifying areas in which both sides are willing to compromise if such subjects exist. During the incremental change periods of PET, there is little political motivation. The benefit to this is there is more time to make decisions. The downside is, if there is opposition to change, as is the

case with Title II, the change is easily stalled and there is not enough political will to overcome the obstacles to change. If the proposed change is acceptable to both sides of the dispute it will take much less political capital to achieve the change. A firm grasp of PET's incremental change and the contentions/benefits of Title II is essential to understanding how legislators could refine title to achieve the goals of the law while addressing concerns of potential circumventions of the Fourth Amendment of the U.S. Constitution.

Nature of the Study

The nature of this study was a qualitative case study. Qualitative research is capable of providing a better understanding of how the theory of punctuated equilibrium applies to the USA PATRIOT Act. A qualitative methodology allowed a deeper look at the intricacies of the law than what could be accomplished in a quantitative design (Creswell, 2009; Creswell, 2013; Yin, 2012). Each of the research questions align with a qualitative design of a case study. Case studies analyze the intricacies of a singular object and its subcomponents in a bound setting (Patton, 2002). This study analyzed the NSA's bulk metadata collection program as its primary case. The case is bound by both time and the U.S. legal system. Case studies are commonly used with legal inquires, because the depth of the study can illuminate the pros and cons of practices, which can provide insight into preferred methods (Stacks, 2007). Case studies are done to achieve an in-depth understanding of a phenomenon and its contextual circumstances (Yin, 2014). A case study explores in great detail a single item or groups of items which are bound by and affect a system (Stake, 1995). This case study provided a general overview of the

USA PATRIOT Act and the views of those in support and opposition to the law, but its primary focus was to determine exactly what each group desires in an effort to determine whether common ground exists.

Assumptions

USA PATRIOT Act Assumptions

I made several assumptions involving the USA PATRIOT Act identified. First, I assumed that even thou the NSA bulk metadata collection program theoretically ceased to exist on November 29, 2015, the controversies about Title II have remained. I assumed there are areas in which those who oppose and those who support Title II of the USA PATRIOT Act agree. I also assumed that those who oppose Title II provisions would be satisfied if the potential for the circumvention of the Fourth Amendment was mitigated. I further assumed that those who support the title are not actively looking to circumvent the Fourth Amendment and are instead concerned maintaining Title II authorizations. The most important assumption is: If Title II's objectives could be met without the potential of abuse, both sides of the debate would appeased. I have not found literature supporting any of these assumptions, but congressional and legal developments in late 2015 contributed validity to these assumptions.

Methodology Assumptions

Many of the assumptions with this case study involved the data collection. The first assumption was that subject matter experts would be willing to participate in interviews. However, they were not. The second assumption was that the public relations offices of the American Civil Liberties Union (ACLU) and Department of Justice (DOJ)

would be willing to facilitate an interview process, but they were not. As a result, it was not possible to conduct interviews.

In addition, some assumptions were associated with the analysis of this dissertation. The first assumption was the coding process and extensive self-reflection helped eliminate researcher biases. No study could ever be free of all biases, but I made every effort to mitigate potential validity threats from researcher biases. In addition, I assumed that the qualitative analysis software did not generate any analytical errors. Any errors contributed to the software likely stemmed from operator error. To combat this all computations were checked and verified. Finally, I assumed that the results of this case study were beneficial to broadening an understanding of PET and the USA PATRIOT Act.

Scope and Delimitations

As previously mentioned, the primary focus of this dissertation was to search for areas of mutual agreement between supporters and critics of Title II of the USA PATRIOT Act. Nevertheless, I could not merely review current opinions about the law. First, I needed to examine all national security policies throughout American history to validate the PET of public policy change. Verifying PET is useful in predicting the likelihood of policy change, because national security policy change tends to follow a predictable pattern. The PET pattern provided much of the direction for this study.

The upcoming literature review chapter illustrates that throughout the history of the nation all substantial security policy changes have followed a punctuated lifespan of change. Typically, the national security statutes and policies have erupted onto the

legislative scene rapidly as a direct response to an external stimulus. The resulting policies and procedures have often been pragmatic but also deeply flawed as a consequence of the PET explained bounded rationality associated with political action during compressed timeframes. The policies remained both simultaneously useful and imperfect for varying periods of stagnation. These policies are usually refined in one of two ways, either through incremental change or rapid change in reaction to an exogenous force. Both ways are known to suffer from differing types of bounded rationality. In this dissertation, I assert that more perfect policy changes can be formed during incremental change periods than during shock response changes. Because the bounded rationality of PET explained that the more perfect proposed incremental changes usually lack the political encouragement to overcome the resistance to change, this dissertation sought to identify areas of potential compromise regarding Title II of the USA PATRIOT Act. The PET of discontinuous change provided the pattern analysis foundation from which to base the scope of the study.

The scope of this study needed to include the history of national security policies, legal judgements, and a careful examination of applicable statutes to establish a sound academic foundation. Only after creating such a foundation and substantiating the theoretical framework was it possible to begin to understand the intricacies of the USA PATRIOT Act at the level needed for a case study. Chapter 2 provided the foundation for this case study. The literature review illustrated patterns in national security. Then explained these patterns using the PET of public policy change. This created both the academic foundation and the case boundaries.

The next logical step was to collect and analyze leading arguments on both sides of the USA PATRIOT Act Title II debate. This included congressional testimony and legal debate. The case was bound by focusing on the arguments made by the DOJ and the ACLU. These organizations are the leading voices in support of and opposing Title II of the USA PATRIOT Act. The data collection and analysis of the points made by the contrasting organizations established the studies scope boundaries.

Limitations

The primary limitation to this study is that it is a dissertation rather than a paid study. This limited both the time and resources available for the study. The primary focus of this case study centered upon congressional hearings and legal proceedings between the ACLU and DOJ. Neither organization seemed willing to participate in phone interviews. In addition, the DOJ specified they could not sign any document including a participation agreement. All the inquiries regarding potential interviews were made via phone call or email. The phone calls all led to being told to send an email and most of the emails did not garner a response, if time and resources were not limited the inquires could have been made in person. This might have had better results than the phone calls. The lack of time and resources available somewhat limited the data collection but did not affect the dependability or transferability.

The transferability was limited by the study's structure. The literature review only examined national security policies leading up to and including the USA PATRIOT Act. The theoretical framework of the PET of public policy consistently changing illustrated how major national security policies rapidly evolve in response to an event but are often

considered imperfect and undergo a period of stagnation followed by incremental change which bring the policies into a more acceptable form. In this study, I did not apply the theory to any policy not related to security and thus is limited to national security policies. In addition, the data collection and analysis only researched Title II of the USA PATRIOT Act and because of such the transferability of the analysis is limited to Title provisions.

Significance

Although contentions with the USA PATRIOT Act have not created unprecedented polarization spikes, it has contributed to already increasing political and ideological tensions in the United States. Partisan and ideological polarization has existed since the founding of the nation and routinely punctuated by spikes in polarization severity (Jensen et al., 2012). During the last 50 years there has been shift toward more the extreme views on both sides of the ideological spectrum (Merrill et al., 2014). In November 2013, Gallup polling data cited hyper ideological, partisan politics as the primary reason for congressional and presidential gridlock producing the lowest approval ratings to date (Fechner, 2014; Kirkland, 2014). In this dissertation, I not only contended that debate about the appropriateness of the USA PATRIOT Act reflects the polarization in the American political landscape, but I also deepened it.

As PET explains, rushed legislation typically remains in an imperfect stagnant state until it is incrementally refined into a more acceptable form due to increasing public tensions. Banks and Tauber (2014) and Scheppele (2012) described how the USA PATRIOT Act's rapid enactment led to unnecessarily intrusive security measures.

Kisswani (2011) further illustrated how other western countries took longer to enact new security policies in the wake of the 9/11 attacks, but those policies were less controversial than the USA PATRIOT Act. Bonet (2011) asserted the act was an egregious affront on civil liberties and the U.S. Constitution. Yoo (2014) defended the act by expounding on how and why the act is legal, ethical, and constitutional. These works reveal the philosophical divide widened by the swiftly enacted law.

This dissertation provided an opportunity to examine the USA PATRIOT Act in an effort to assess the potential for narrowing the political and ideological divide. A multitude of divisive academic works and a series of contradictory legal decisions have created a sense that both sides of the debate have valid points. What is lacking is an effective solution to the rift between the competing ideologies. The goal of this dissertation was to identify areas in which the opposing sides could potentially agree upon. This by itself would not be enough to refine the law, but it could contribute to the discussion. Identifying the areas of agreement could facilitate social change by introducing areas of prospective conciliation in an otherwise polarized debate.

Summary

The purpose of this case study was to explore the advantages and contentions associated with the Title II provisions of the USA PATRIOT Act to determine whether the objectives of the provisions could be achieved while eliminating the potential for the circumvention of the Fourth Amendment of the U.S. Constitution. This was accomplished by answering the central research question: How does the bounded rationality of the PET of public policy change prevent incremental change from achieving

the surveillance and information sharing objectives of Title II of the USA PATRIOT Act of 2001 while addressing concerns of potential circumventions of the Fourth Amendment of the U.S. Constitution? The PET of discontinuous change was a valid and effective theoretical framework for conducting this dissertation and answering the central research question. Just as PET was the appropriate theory for the research, the case study design was the correct approach to answering the research questions. Stacks (2007) explained that the case study is ideal for researching law and policies. Before the case study or the theoretical framework could be tested it was necessary to build a strong academic foundation. I thoroughly describe the academic foundation in Chapter 2.

Chapter 2: Literature Review

Introduction

Since its conception, the United States has strived to provide its citizens with freedom and security. A pervasive academic assumption asserts that modern strategies for providing freedom and security are diametrically opposed in a continuous balancing act (Banks, 2010–2011; Bedi, 2014; Berghel, 2014; Simmons, 2013; Xhelili & Crowne, 2012; Yoo, 2014). Throughout the nation's history, this perpetual equipoising between civil liberties and national security has created times in which national security policy debate has become polarizing and contentious (Ripberger, 2011). These contentions typically develop in support of and opposition to the government's response to a traumatic event resulting in one faction championing increased security and an opposing faction fearing civil liberty infringements (United States President's Review Group on Intelligence and Communications Technologies, 2013). National security and civil liberty tensions have spiked in recent years following the September 11, 2001, terrorist attacks and the enactment of several new security policies.

The USA PATRIOT Act of 2001 is both a widely supported and vehemently opposed piece of legislation. The USA PATRIOT Act is a comprehensive collection of amendments to existing law designed grant the government the authorities to conduct more effective investigations (Gilbert, 2013; Witmore-Rich, 2014). Despite the act being drafted and enacted within 45 days of the terrorist attacks, many of the amendments included in the USA PATRIOT Act had been proposed years before but never gained the political traction to be enacted (Bellia, 2011). Immediately following the terrorist attacks

of September 11, 2001, the American public demanded reform and the USA PATRIOT Act received near unanimous support and little debate (Huddy & Feldman, 2011). Since the law's enactment, substantial, often polarizing, debate has occurred due to concern of civil rights infringements (Bellas, 2012; Kisswani, 2011; Scheppele, 2012). Baldwin and Koslosky (2012) explained that much of the civil liberty concern is due to "mission creep" from national security investigations into non-security related investigations. Mission creep has added to the division between those in favor of the law and those who oppose it. Gilbert (2013) and Yoo (2014) dismissed claims of mission creep or of civil rights infringement. This shift from near unanimous support to deeply divided opinions about the law coincides with the popular policy concept, the PET in public policy.

This literary review examined the PET, the history of national security policies affecting civil liberties, surveillance scandals, court decisions, the Church Committee, and both sides of the contentions involving Title II of the USA PATRIOT Act with the goal of developing an academic foundation and exposing literature gaps. A plethora of current literature references these aforementioned topics. True literature gaps are found with the USA PATRIOT Act. Literature focusing on this topic is nearly always biased either for or against the law. There did not seem to be any literature that examined potential common ground between those opposed to the law and those in support of it.

Literature Search Strategy

The literature search strategy for this literature review was straight forward. The primary database used was Thoreau, but I found some articles in Academic Search Complete, and ProQuest Central. Nearly every article was peer reviewed, with the peer-

review verified on Ulrich's Periodicals Directory. Many peer-reviewed articles discovered during the search could not be used due to extraordinary biases. This literature review also heavily relied on laws, court decisions, and various federal government reports.

Punctuated Equilibrium

The PET provided an explanation to how and why security policies tend to go through brief periods of rapid change and long periods of stagnation. The PET of public policy change, also known as the PET of discontinuous change, asserts that policy changes occur gradually with time through incremental adaptations until an outside source disrupts the status quo forcing immediate, significant change (Baumgartner & Jones, 2009; Boushey, 2012; Prindle, 2012; Sabatier, 2007). The PET has been widely accepted in the physical sciences of biology and seismology for decades (Givel, 2010; Prindle, 2012; Sabatier, 2007). Punctuated equilibrium has been an accepted public policy change theory since 1993 (Givel, 2008). Jones and Baumgartner (2012) asserted that their PET model was developed from both physical science and the "bounded rationality" models of the 1950s and 1960s. The concept of bounded rationality is still paramount to PET (Jones & Baumgartner, 2012).

Bounded rationality affects most public policies. Tyson (2007) explained that bounded rationality is decision making in which a decision maker is forced to accept a less than perfect choice, as it is the best available choice at the time. In the PET, decision makers often exhibit bounded rationality during the incremental stage and during the period of dynamic change (Baumgartner & Jones, 2009; Cairney, 2013). During the incremental period of change, they are often unable to conjure enough influence to elicit

change (Baumgartner & Jones, 2009; Cairney, 2013). During the period of dynamic change, they are forced to make choices rapidly without adequate information or options (Baumgartner & Jones, 2009; Cairney, 2013). This imperfect decision making process has been repeatedly demonstrated throughout the history of security policies in the United States and plays a key role in the current debate between the USA PATRIOT Act and civil liberty concerns. In the next section of this literature review, I will examine security policy history.

Security Policy History

Reviewing national security policy history provided a better understanding of the controversies surrounding Title II of the USA PATRIOT Act and illustrated the PET in action. A comprehensive understanding of the USA PATRIOT Act can only be obtained by understanding national security history, the laws, policies, and procedures affected by the USA PATRIOT Act, and the nuances of modern security strategies (O'Brien, 2011). Policy makers study history with the goals of predicting outcomes, avoiding previous mistakes, and gaining a better understanding of present situations (Inboden, 2013). This section showed that U.S. security policies remain relatively unchanged for decades at a time then undergoes rapid imperfect change due to bounded rationality, just as the PET would suggest. Studying the history of national security policy helped identify legal precedence, illuminate previous errors, and possibly predict future outcomes. I began this review by examining the early United States.

Early America

The Founding Fathers faced both security and civil liberty concerns. The Preamble of the U.S. Constitution clearly identified the need to "provide for the common defense" and "secure the Blessings of Liberty" (U.S. Const., pmbl.). President John Adams' Alien and Sedition Acts of 1798 were a series of 4 of the first national security policies to create a clash between liberties and security (Olthof, 2013). President Adams faced naval warfare in the Quasi-war with France abroad and stiff political competition at home (Brookhiser, 2014; Olthof, 2013). The acts essentially gave the president special detention and deportation authorities to quell political dissent (Claeys, 2012; Napolitano, 2014; Olthof, 2013; Plouffe, 2012). The acts were immediately polarizing with both sides of the debate claiming to have constitutional backing (Claeys, 2012; Olthof, 2013). The response to the acts is significant due to its similarities with the current USA PATRIOT Act controversies and because at the time many of the contributors to the U.S. Constitution were still active politicians. The debate helps illustrate the original intent of the U.S. Constitution.

The Alien and Sedition Acts ultimately pitted Adams against the combined political powers of Thomas Jefferson and James Madison. As the primary architect of the U.S. Constitution, a prominent author of the Federalist papers, Secretary of State, and the fourth President of the United States, James Madison's intent to draft a form of government that both provided physical security and protected civil liberties is well documented (Dorn, 2012). As the author of the Declaration of Independence, Secretary of State, Vice President, and the third President of the United States, Thomas Jefferson's

opinion regarding civil liberties was equally well documented. After coming out of a brief retirement in 1797, Jefferson lost the presidential election to his longtime rival, Adams, by a mere 3 electoral votes and by doing so firmly established a partisan divide between the Federalists and Democratic-Republicans (Napolitano, 2014; Olthof, 2013). The partisan divide is significant as it illustrates that the political party polarization was as intense and often more intense than its modern counterparts.

Considering dueling was still an acceptable means of settling political disputes in the late 1700s it is not surprising that political contentions during this era were often less civil than modern politics. Democratic-Republican Representative Matthew Lyon of Vermont and Federalist Representative Roger Griswold of Connecticut drove the Partisan wedge even deeper in 1798 by having a fist fight during a session of congress (Napolitano, 2014; Olthof, 2013). Their physical altercation was not an isolated episode. A month before the fight Lyon spit tobacco on Griswold (Olthof, 2013). These actions did not degrade the standings of these politicians, instead it propelled them into the lime light. Lyon became even more popular and started a magazine to have another platform for expressing his anti-Federalist views (Napolitano, 2014). Adams immediately took issue with Lyon's ideologically biased publication and was not afraid to use his newly acquired authorities to attempt to silence the congressman.

Lyon became the target of the Federalists and a hero to the American public, which was wary of the authorities inherent in the acts. In October 1798 Lyon was indicted on sedition for implying President Adams had gone mad and eventually was sentenced to 4 months in prison by Justice Paterson of the Supreme Court, who was

serving as a Circuit Justice. (Napolitano, 2014). Lyon was not alone in his legal battle. Ten other Democratic-Republicans were convicted of similar antifederalist views, but Federalists were free to engage in similar tactics without fear of prosecution (Plouffe, 2012). Of those sentenced to prison time and or fined most were either members of the newly formed Democratic - Republican Party or members of the press (Napolitano, 2014; Olthof, 2013; Plouffe, 2012). Aurora, a prominent newspaper of the time that was critical of Adams, seemed to draw particular scrutiny under the acts (Olthof, 2013). This clearly partisan bias did not set well with the American public.

The Alien and Sedition Acts cost the Federalists dearly in the polls. The Federalists allowed the acts to sunset so they would expire on Adams last day in office, but this inaction was not enough to secure votes for the party. Lyon won re-election while in prison and was part of a Democratic-Republican sweep in the elections of 1800 (Napolitano, 2014; Olthof, 2013; Plouffe, 2012). Jefferson won the presidency and the Democratic-Republicans took the majority in the Senate (Claeys, 2012; Napolitano, 2014; Olthof, 2013; Plouffe, 2012). The Federalists maintained a majority in the House of Representatives, but not many other significant government positions (Claeys, 2012). Citizens raised funds to pay for fines imposed to many of those convicted under the act (Napolitano, 2014). Jefferson pardoned Lyons and another Democratic-Republican still imprisoned under the acts, dropped all pending fines, and ensured the government returned all fines collected (Claeys, 2012; Olthof, 2013). The constitutionality of the acts was never truly addressed, as the Supreme Court did even not start looking at the constitutionality of legislation until the case of Marbury v Madison in 1803, but the

American public soundly rejected the acts (Olthof, 2013). This is in no small part because of how the acts seemed to clash with the U.S. Constitution.

The debate surrounding the Alien and Sedition Acts, much like current discontent with the USA PATRIOT Act, is twofold with both sides of the controversy having some legitimate constitutional backing making analysis of this early controversy key for identifying legal precedence. From President Adams' and the Federalists' viewpoint, the president is constitutionally obliged to protect the nation due to his role as the commander in chief (Claeys, 2012). This notion was actually somewhat supported by the Federalist Papers, which repeatedly stressed the need for a strong executive to defend against foreign powers (Shults, 2011). Adams held, as did many other Americans, the belief that the last violent throws of the volatile French Revolution could spill into the United States and the only way to avoid insurrection was to suppress the French migrants (Plouffe, 2012). The repeated naval skirmishes between French and U.S. forces gave credence to this threat (Napolitano, 2014). President Washington had been able to mitigate the insurrection threat through his intense popularity and minimized the threat abroad through skilled negotiation, but Adams lacked Washington's skills as a statesman (Olthof, 2013). There was a strong possibility that the U.S. would get drug into increased conflicts with the French.

One of Adams' first moves was to send a delegation to France to negotiate peace talks. The emissaries were confronted with demands for bribes they could not meet and the Marquis de Talleyrand, threatened to invade the United States (Napolitano, 2014). The unstable and corrupt French government not only threatened U.S. foreign interests,

but an influx of French citizens fled to the United States; creating turmoil in American domestic policies (Napolitano, 2014; Olthof, 2013). The Federalists believed that the French influence was certain to result in a constitutional crisis and the acts was were the only chance at preventing such an event (Olthof, 2013). For Federalists and their supporters the threat seemed credible and justified the Alien and Sedition Acts. The similarities with the enactment of the Alien and Sedition Acts due to the credible French threat and the enactment of the USA PATRIOT Act due to the current credible terrorist threat are worth considering, but so are the parallels in the opposition to the acts.

The Democratic-Republicans led by Vice President Jefferson fervently opposed the Alien and Sedition Acts believing it was unconstitutional. Jefferson promptly denounced the acts as being in clear violation of the first amendment (Plouffe, 2012). The use of the acts against unfriendly newspapers reinforced the Democratic-Republican argument that the acts violated the first amendment (Olthof, 2013). Imprisoning sitting congressman, Lyon, for remarks he made in his own publication truly drove the antifederalist views into the American mainstream. State legislatures began developing anti Alien and Sedition Acts legislation to minimize the effects of the laws in their respective states (Claeys, 2012). This made it increasingly difficult for anybody to defend the acts. The laws effectively silenced any meaningful political debate or dissent from the Federalists, but the American populace did not tolerate the First Amendment violations (Claeys, 2012). The importance of this is it set the precedence that even if the executive branch is constitutionally obligated to protect the nation it must do so within the constraints of the U.S. Constitution.

Looking at the Alien and Sedition Acts through the lens of the PET is also beneficial to this study. The exogenous shock to the national security policy came with the French threat of invasion. Initially the public did not believe the threat was credible, but to prove the validity Adams released correspondence with the emissaries with their names changed to "X, Y, and Z" and the event came to be known as the XYZ affair (Napolitano, 2014). The XYZ affair was enough of a disruption to the feeling of security in the country that congress with support of the president drafted and enacted the laws within weeks of the release of the letters. The legislators felt compelled to act rapidly to mitigate the French threat and to gain political party superiority in the developing partisan divide.

The time constraint led to the policy makers working within a bounded rationality. They were expected to act in a limited time window, which did not give the policy makers an opportunity to truly evaluate the situation and develop courses of action that would meet the nation's security needs in a way that was more acceptable to the public. The assumption is that under different conditions the policy makers would have worded the acts in a way in which they were less controversial. Unfortunately the bounded rationality caused congress to produce acts that seemed to be in direct violation of the Bill of Rights. The Sedition Act was the first time in American history political dissent was considered a criminal act (Saito, 2011). The Alien and Sedition Acts were not the last time the national security policy conflicted or appeared to conflict with the constitution.

Habeas Corpus

Title IV of the USA PATRIOT Act does effect habeas corpus proceedings and there is a plethora of academic literature regarding how the act affects habeas corpus, but this literature review is focused on Title II of the act. However, anytime the nation has suspended habeas corpus there has been a public outcry because of concerns of infringement of civil liberties which parallels current contentions about Title II controversies. In addition, studying habeas corpus suspension provides a unique perspective on security and liberty, because habeas corpus and its suspension is explicitly addressed in Article I Section 9 of the U.S. Constitution (U.S. Const. art. , § , cl.). The focus of this section of the literature review will continue the examination of historic security policies and the public's mandate for securing freedoms. This will begin with briefly defining habeas corpus.

Habeas Corpus, the Great Writ of Liberty, is a directive from a standing judge ordering the government to present a prisoner to the court for proceedings to determine the legality of the imprisonment (Loo, 2007). A writ is simply a legally binding command (Federman, 2012). The concept of habeas corpus is believed to have originated in Fourth-century England and was first codified with the British Habeas Corpus Act of 1679 (Loo, 2007). In the United States the privilege of the writ of habeas corpus was originally dependent upon state legislation as the constitution does not specify between federal and state prisoners. Then the Judiciary Act of 1789 clarified the matter, officially making state prisoners a state issue (Federman, 2012).

The first controversy involving habeas corpus occurred shortly after the Alien and Sedition Acts had expired. President Thomas Jefferson sent the army under the command of General James Wilkinson to arrest and detain without privilege of habeas corpus individuals conspiring with Jefferson's former Vice President Aaron Burr to start a conflict with Mexico in an effort to acquire land in Texas. General Wilkinson did as directed and ignored habeas corpus pleas. Eventually Chief Justice John Marshall ordered the prisoners to be released reasoning that only congress not the president has the authority to suspend habeas corpus (Scheppele, 2012). The reason congress and not the president has the authority to suspend habeas corpus is the authorization is only found in Article 1 of the U.S. Constitution placing the issue solely in the legislative domain (Federman, 2012; Scheppele, 2012). Congress is further constrained to only suspend habeas corpus privileges in times of rebellion or invasion (U.S. Const. art. I, § 9, cl. 2). Jefferson tried condemn Burr's actions as rebellion, but even if Jefferson had been able to prove this claim it would have been a moot point as congress had not suspended habeas corpus (Scheppele, 2012). The president simply does not have the authority Jefferson sought.

Jefferson had to react rapidly to Burr's scandalous actions to avoid frivolous conflict with Mexico. It is likely that Jefferson thought he was acting in the best interest of the country. The PET would assert that Jefferson was prompted by Burr's action into making a bounded rationality decision. It was not the perfect decision, but it can be assumed Jefferson thought it was the best course of action at the time. Jefferson acted outside his legal limits, but Chief Justice Marshall reigned in the president. This early

habeas corpus case confirmed that even in times of peril, such as rapidly deescalating a conflict with a foreign state, the government must work within the bound of the constitution.

The next famous incidence of habeas corpus suspension was during the Civil War when President Abraham Lincoln suspended habeas corpus 3 times (Federman, 2012; Mondale et al., 2014; Napolitano, 2014; Scheppele, 2012). Just as Chief Justice Marshall had proclaimed during Jefferson's presidency, the Supreme Court during the Civil War soundly rejected Lincoln's attempts to suspend habeas corpus (Federman, 2012; Loo, 2007; Scheppele, 2012). Lincoln essentially ignored the courts, but after the second time congress passed the Habeas Corpus Act of 1863, which authorized the president to evoke habeas corpus suspensions in areas under military controlled marshal law (Federman, 2012; Scheppele, 2012). This solution still had congress in control of the suspension of habeas corpus and gave President Lincoln the authorities he felt he needed.

President Lincoln led the nation through undoubtedly its darkest hour. The nation was truly dissolving, the casualty toll from the battles were astronomical, and civil unrest plagued both the North and South. If ever there had been a time that the government would have been excused for working outside the constitution it would have been during the Civil War. President Lincoln articulated such a defense for his actions both publically and to congress (Fallon, 2013; Scheppele, 2012). Lincoln suggested that there are times when the law must be circumvented for the greater good (Fallon, 2013). At the time the majority of congress and much of the public supported Lincoln's suspensions of habeas corpus initially and one of the Supreme Court rebuttals did not conclude until after the

Civil War was over (Loo, 2007). The president had considerable support for his actions when he was working under bounded rationality circumstances. The question arises in retrospect, were the actions necessary to save the republic or not?

Alien Immigration Act of 1903

U.S. national security policy went relatively unchanged from the Civil War until World War I, with the exception of the Alien Immigration Act of 1903. From the 1864 through World War II an often violent anarchist movement plagued much of the world (Chamberlain, 2012; Kraut, 2012). The anarchist movement in America can be traced as far back as the Revolutionary War, but it gained significant notoriety with Haymarket Bombing and subsequent riot (Chamberlain, 2012). Anarchists assassinated the French president in 1894, Spain's prime minister in 1897, the Austrian empress in 1898, and the King of Italy in 1900 (Kraut, 2012). In September, 1901 Leon Czolgosz, an anarchist, assassinated President William McKinley (Chamberlain, 2012; Kraut, 2012). The Alien Immigration Act of 1903, known as the Anarchist Exclusion Act, was enacted to expedite deportations and limit immigration of known anarchists (Fox Jr., 2012; Kraut, 2012). The act was the first to officially target political views for deportation purposes (Kraut, 2012). The act also provided the legal precedence for the Espionage Act of 1917, the Internal Security Act of 1950, and the USA PATRIOT Act of 2001 (Fox Jr., 2012; Kraut, 2012). The legal precedence is what makes the study of this act significant to this dissertation. Policy makers, presidents, and the courts often refer to this act when discussing the legal foundation of the other acts.

Sedition Act of 1918

The next major national security policy change was the 1917 Espionage Act and the 1918 Sedition Act, which amended the 1917 act (Napolitano, 2014). In addition, the Trading with the Enemy Act of 1917 which augmented the Espionage Act (Ingram, 2012). Prior to the acts, subversive activities were dealt with solely through treason and theft of government property statutes (Markham, 2014). The acts essentially made it illegal to interfere with the war effort, disclose classified information, or conspire to do either activity (Ingram, 2012). The Sedition Act took a more extreme stance of prohibiting any criticism of the federal government (Saito, 2011). The primary objectives of the laws seem straight forward and prudent, but their implementation made many begin to worry if the 3 acts were in violation of the First Amendment.

The acts drifted from prosecuting those actively trying to subvert the government to targeting political opposition. The acts were designed to prevent subversive activities, but were often used to suppress political dissent to President Woodrow Wilson's foreign policy (Ingram, 2012; Napolitano, 2014). The DOJ conducted a series of warrantless search and seizures in an effort to identify potential German sympathizers, antiwar activists, or political dissidents (Napolitano, 2014). The laws cracked down on antiwar protests and socialist, communist, and anarchist rhetoric (Rosa, 2007). The DOJ even encouraged and offered immunity to vigilante surveillance of potential disloyal parties (Napolitano, 2014). Prosecutors began to actively target private conversations of key voices that were critical of the administration regardless of if the views were ever expressed publically (Ingram, 2012; Kennedy, 2004). Post Masters were required to

screen mail for anti-government correspondence (Napolitano, 2014). Journalists have often been, and continue to be, investigated and threatened with prosecution under the Espionage Act, but to date no journalists have been convicted (Markham, 2014). Between 1917 and 1919, at least 2,200 cases were prosecuted under the 3 acts with many if these cases being settled by the Supreme Court due to First Amendment concerns (Ingram, 2012). Approximately half of those prosecuted were convicted, with approximately 800 convictions coming from the Sedition Act (Kennedy, 2004; Middleton, 2012). The steps taken during the Wilson presidency to suppress opposition were considerably more extreme than those taken during Adams' Alien and Sedition Acts (Kennedy, 2004; Napolitano, 2014). The Sedition Act of 1918, considered the most controversial of the acts, would have a similar fate to that of its 1798 predecessor.

The Sedition Act of 1918, like the Sedition Act of 1798, was contentious and its political popularity quickly faded. Attorney General A. Mitchell Palmer used the Sedition Act as part of the legal basis for prosecuting those who spoke out against the war effort or had radical political views (Middleton, 2012). Palmer's prosecutions became known as the Palmer Raids, which resulted in more than 10,000 arrests, but only enough evidence to facilitate the deportation of 56 people (Cecil, 2015). The opposition to the Palmer Raids led to the development of the ACLU (ACLU website, 2014). One of the primary concerns about the Palmer raids, was the allegations and some evidence of the Federal Bureau of Investigation (FBI) being used to target political opposition (Cecil, 2015). The ACLU and some newspapers brought these concerns to the public with multiple cases reaching the Supreme Court.

The repeated Supreme Court decisions upheld the constitutionality of the acts, but its growing unpopularity sparked a congressional debate (Middleton, 2012). The debate to repeal the Sedition Act began on December 20, 1920 and led to its official repeal on March 3, 1921 (Middleton, 2012; Napolitano, 2014). Even though the act was repealed, Wilson was hesitant to release the prisoners. They remained imprisoned until President Harding and President Coolidge eventually pardoned everyone remaining in prison (Napolitano, 2014). The Sedition Act of 1918's lifespan was nearly identical to that of every other national security policy examined thus far in this review.

The PET explained why these national security policies tend to follow similar paths. There is a natural resistance to any policy change, which prevents adjustments even in the face of complications, but when the demand for change can no longer be restrained by the macro-political bodies rapid, sweeping change occurs (Jones & Baumgartner, 2012). Jensen (2011) explained that the electoral fear politicians have of not acting creates a demand to rush through legislature often results in imperfect statutes that require incremental change or eventual repeal. The Sedition Act had near unanimous support when it was enacted because of the turmoil of World War I, the large scale labor disputes, and the rise of anarchists, communists, and socialists in America (Ingram, 2012; Kennedy, 2004; Middleton, 2012; Napolitano, 2014). The aggregate of these events provided the exogenous shock expected to precede rapid bounded rationality changes in the PET model. The Wilson administration desired more authority in combatting these issues, because of there was tremendous political pressure for them to act immediately. The Sedition Act of 1918 amended the Espionage Act of 1917 past what was politically

acceptable at the time, but this was not immediately realized until a public feared the First Amendment was in danger. This developed into congress being pressured into repealing the law. Following this security policy correction, national security policy went back into a period of equilibrium until the disruption of Japan attacking Pearl Harbor.

Japanese Internment

Pearl Harbor On December 7, 1941 Japanese forces conducted a surprise attack on Pearl Harbor on Oahu, Hawaii killing 2,403 Americans, sinking 2 battleships, damaging 6 others, and destroying a significant percentage of the U.S. military aircraft (Caravaggio, 2014; Rosenberg, 2015; Zimm, 2015). The United States and Japan were engaged in failing negations and war seemed like a real possibility, but most did not expect a surprise attack (Caravaggio, 2014). In retrospect there seemed to have been some evidence that the United States missed vital intelligence that could have thwarted the Japanese attack (Burtness & Ober, 2013; Sales, 2010). The Japanese strategy depended so heavily upon achieving surprise that had the U.S. forces been given enough notice to get planes in the air, Japanese bombers would have been utterly decimated as they did not have significant fighter support (Zimm, 2015). Unfortunately for the United States, the attack was a surprise. The significant damage inflicted by the attack led most Americans to expect immediate follow on Japanese attacks and in actuality, the Japanese commander in charge of the attack wanted to continue attacks, but was denied by his superiors (Caravaggio, 2014). This left the United States in a state of fear.

As the PET and history have demonstrated throughout this literary review, fear generated from a significant event often leads to policy change that is latter considered

deeply flawed. Beginning in 1924 the Federal Bureau of Investigation started collecting information on millions of Americans in the name of national security screening (Saito, 2011). In the months leading up to the Pearl Harbor attack the FBI used this information to generate lists of potentially disloyal Americans of German, Italian, or Japanese heritage and within 3 days following the attack the federal government found and detained these individuals (Saito, 2011; Watkins, 2012). These people were detained under a number of statutes, including a military order from Lieutenant General John L. DeWitt that targeted West Coast Japanese Americans (Saito, 2011). This order was meant to be a short term precaution, but presidential action turned the detention into a more long term affair.

On February 19, 1942 President Franklin Delano Roosevelt issued Executive Order 9066, which allowed for the military internment of 120,000 Japanese Americans (Saito, 2011; Watkins, 2012; Wood, 2014). The bulk of those interned came from California (Wood, 2014). The internment camps were filled and primarily staffed by the U.S. military and the DOJ in conjunction with the War Relocation Authority (Watkins, 2012). What made these detentions different than traditionally accepted confinements is the interned individuals were not suspected of any crime and were imprisoned solely upon their heritage (Saito, 2011; Watkins, 2012; Wood, 2014). This essentially made being of Japanese heritage a punishable offense.

The common belief among several top U.S. officials of the time was for Japanese Americans, heredity and ethnicity outweighed national citizenship (Wood, 2014). Previously mentioned Lieutenant General DeWitt repeatedly and publically claimed that

the war was not with the country of Japan, but was with the Japanese race (Saito, 2011). This claim was not backed by any solid intelligence as there was few cases of seditious activities or leanings by Japanese Americans (Wood, 2014). Despite the lack of empirical evidence, DeWitt's intentions were enthusiastically met by his subordinates. Lieutenant Colonel Karl Bendetsen, who commanded the internment process, stated his belief that internment applied to anybody that had any degree of Japanese heritage (Saito, 2011). His interpretation of President Roosevelt's intent translated into the internment of West Coast first and second generation Japanese Americans (Wood, 2014).

Many of the Japanese Americans detained in the camps were held until the war's end (Saito, 2011; Wood, 2014). Some of those interned were allowed to join the U.S. Army's 442 Regiment, a highly decorated all Japanese American unit (Wood, 2014). This not only provided a way out of the camps, but also the unit's success helped discredit the notion of race over national pride. Eventually the camps were disbanded and gradually the anti-Japanese fervor resided. Decades later the government acknowledged the inappropriateness of the acts. In August 1988 congress and President Reagan enacted the Civil Liberties Act, which officially apologized to the former internees and provided each surviving internee $20,000 (Saito, 2011; Wood, 2014). This was intended to provide some closure to the internment debacle.

The internment provides another example of how a disruptive event can rapidly generate questionable national security policies. In time, the public fear that facilitated these policies dissipates and the policies tend to drift back into a more acceptable equilibrium. Robinson (2014) opined that the PET is a "convincing cognitive

foundation". Policymakers develop procedures for maintaining the status quo, but when an event disrupts the status quo the policymakers' reactions are typically disproportionate to the event in an effort to restore order as fast as possible (Robinson, 2014). The contribution gained by studying the World War II internments is it both establishes the validity of the PET and develops a foundation of historic national security policies. The end of World War II ushered in a rather chaotic period for national security with the Cold War tensions and policies.

Cold War

From 1945 to 1989 was one of the more dangerous periods in world history due to the consistent friction between the communist countries and western democracies. The Cold War tension between the United States and Soviet Union was so great and lasted for so long that during the collapse of the Soviet Union, a prominent Soviet leader, Georgi Arbatov, warned the US that not having a dedicated enemy could be devastating to the United States (Fettweis, 2014). International threats can promote increased bipartisanship and reduce internal political conflicts (Flynn, 2014). Arbatov assumed the United States would become utterly dysfunctional and the North Atlantic Treaty Organization (NATO) would dissolve, but neither of these events happened (Fettweis, 2014). The U.S. has not become dysfunctional, but bipartisanship is not prominent in current American politics. While international threat might bring U.S. politicians together, long term international military conflict, including the current War on Terror, seems to drive them apart (Flynn, 2014). NATO continues to operate around the world in an effort to counter Russian influence (He, 2012). In short Arbatov was wrong and despite the increase in Islamic

terrorism, the United States is much safer now than it was during the Cold War (Fettweis, 2014). The point that the Cold War was even more dangerous than the global terrorism threat is important, because it sets the stage for explaining domestic Cold War security policy.

A common theme with domestic security policies during the Cold War was countering the Red Scare. Communists were targeted under the Sedition Act of 1918 but anarchists and disruptive labor union leaders overshadowed the communist threat (Rosa, 2007). Communist prosecutions significantly ramped up during and following World War II (Wark & Galliher, 2013). The Alien Registration Act of 1940, known as the Smith Act, expedited prosecution, detention, and deportation procedures for migrants expressing communist or seditious views and (Bruce, 2014; Napolitano, 2014; Romano, 2011; Wark & Galliher, 2013). The act received substantial support because it was championed as combatting communism and limiting migrant employment to boost the economy as the positive economic effects had not yet occurred (Bruce, 2014). Many of those initially charged under the act were convicted of actively trying to overthrow the government of the United States during a time of war, which further solidified support for the act (Wark & Galliher, 2013). As many other previous security policies have done the Smith Act drifted from its documented purpose bringing it into a contentious relationship with civil liberties.

In the debate leading up to the Smith Act and following the enactment the ACLU repeatedly protested the Smith Act's vague authorities and potential for abuse (Bruce, 2014). For 16 years, until the courts stopped the prosecutions, the Smith Act was used to

reprimand political advocates for otherwise constitutionally protected speech (Haverty-Stacke, 2013). The FBI used the Smith Act to prosecute attorneys that defended communists that were convicted under the Smith Act, despite the attorneys' lack of connection to communist organizations prior to the defense (Wark & Galliher, 2013). The act also criminalized membership in any communist organization, but only one person was ever imprisoned under this clause of the Smith Act and he was later pardoned by President John F. Kennedy (Napolitano, 2014). The Smith Act set the precedence for greatly expanding domestic national security throughout the Cold War and beyond (Haverty-Stacke, 2013).

The Cold War brought a series of domestic security policies and procedures that, in retrospect, are of questionable constitutionality. The Internal Security Act of 1950, known as the McCarran Act required all communists register with the DOJ and denied visa entry to known communists (Hefner-Babb, 2012; Kraut, 2012). The McCarran Act and the Subversive Activities Control Act of 1950, which passed in conjunction with the McCarran Act, were part of the larger concerted effort to combat a domestic communist threat (Hefner-Babb, 2012). The act brought stiff penalties for failing to comply with the registration. Those convicted of failing to register with the DOJ incurred a fine of $10,000 per day and a possible imprisonment of 5 years per day (Wark & Galliher, 2013). After registering with the DOJ the registered communist would then be required to provide annual financial reports, notifications of change of addresses and membership rosters (Hefner-Babb, 2012). The act was also seen as part of the legal basis for state and federal "loyalty review boards" that conducted investigations of potential communists

(Romano, 2011). These investigations were based upon political ideology rather than suspicion of criminal activity, which creates a clash between security and civil liberties.

A significant difference between the McCarran Act and all the previously examined statutes in this literature review is congress and not the president pushed for the McCarran Act. President Harry S. Truman vetoed the law due to concerns about its constitutionality, but congress overwhelmingly supported the act and easily reversed the veto (Hefner-Babb, 2012). Fallon (2013) articulated that the constitution requires the president to respond to security threats while constraining the actions available to the executive branch. The courts traditionally interpret the First Amendment to the U.S. Constitution as ensuring the freedom to associate with any peaceful political organization (Bedi, 2014). President Truman and Senator McCarran were both Democrats, indicating the veto was probably less about politics and more about substance.

President Truman was likely concerned about criminalizing any peaceful political organization. While there were communist groups that advocated the overthrow of the federal government, there was also a plethora of standing laws to deal with such individuals and groups. The McCarran Act essentially sought to ban support of communist ideology. Government monitoring and suppression of speech has at times generated public support and possibly even short term benefits, but it is in direct violation of the U.S. Constitution and detrimental to the more important American ideals (Hughes, 2012). President Truman seems to have realized it was better to defeat communism through comprehensive debate rather than suppression. Regardless of the reasons President Truman's veto of the new authorities of the McCarran Act represents one of the

few times that the executive branch chose not to pursue the acquisition of new security provisions.

The first half of the 20th century was a turbulent time. There was threat from both World Wars, the initiation of the Korean War, violent anarchist movements, disruptive labor clashes, and 2 bouts of the "Red Scare" leading to the Cold War (Napolitano, 2014; Romano, 2011). Historically periods of crisis tend to lead to security policies reflective of government overreaction (Mondale et al., 2014). Benson and Russel (2015) elaborated that the PET rapidly delivers a substantial policy change relative to the perceived social severity of the preceding event or events (Benson & Russel, 2015). The importance of examining these historic policies when looking at modern policy, such as the USA PATRIOT Act, is it provides historical, theoretical, and procedural policy perspectives. In addition, understanding the aforementioned perceived social severity of the international wars and internal threats of the early to mid-1900s is paramount to understanding modern security and surveillance doctrine.

Surveillance Scandals

The United States' statutory structure is designed to both provide for national security and establish safeguards against undue government intrusions (Baldwin & Koslosky, 2012). This system typically is effective in meeting both goals. There have been instances when retrospective analysis of select U.S. security / surveillance procedures illuminate questionable authorizations (Anderson, 2014; Mondale et al., 2014; United States President's Review Group on Intelligence and Communications Technologies, 2013). Usually these questionable programs are short lived responses to a

crisis. Many of these events occurred in response to political and social turmoil in 20th century America. A cumulative effect of these programs developed through the years resulting in federal agencies and the executive branch conducting surveillance, investigations, and even prosecutions outside the traditional limits of the law (Mondale et al., 2014). Eventually the collective egregious nature of the programs prompted a public outcry and the development of the Foreign Intelligence Surveillance Act (FISA) of 1978 to mitigate these programs. This section of the literature review examined some of the programs and events that led to FISA.

Teapot Dome

After being formed in 1908 the Federal Bureau of Investigation underwent a period of public scrutiny due to a series politically motivated investigations (Waskey, 2012). The bureau's image was further damaged by its involvement in the Palmer Raids, which John Edgar Hoover helped coordinate (Cecil, 2015). Hoover was concerned, as much of America was, that the United States was vulnerable to a socialist, communist, or anarchist insurrection similar to that of the Bolshevik Revolution afflicting Russia at the time (Babic, 2012). Between 1919 and 1920 the bureau used questionable often violent tactics to crack down on "disloyal" parties (Cecil, 2015). The Palmer Raids had a strange effect of bringing the bureau both scorn and praise, because the public feared insurrection and were leery of the bureau's approach.

This situation did not negatively affect Hoover's career. At the time of the raids Hoover was not the widely known public figure he would later become. This anonymity allowed Hoover to later be selected to "reform" the bureau following some controversial

events (Babic, 2012; Cecil, 2015). The bureau did make a concerted effort to address some of the issues that arose from the Palmer Raids (Waskey, 2012). Moreover, the bureau under FBI Chiefs (later called Directors) William J. Flynn, William J. Burns, and Hoover worked to improve the public image of the bureau through reforms, standardizations, and an aggressive media campaign (Babic, 2012; Cecil, 2015). It took several years for the bureau's role to mature and develop into its accepted roles of today. During the first several decades there were some growing pains as the roles were defined.

In the 1920s the FBI's role in the federal government shifted away from the policies that led to the Palmer Raids. With World War I and the first Red Scare coming to an end, the nation began to incrementally shift back into the more traditionally acceptable security versus liberty equilibrium. President Warren G. Harding freed many of those convicted of antiwar activities in an effort to bring normalcy to the country (Waskey, 2012). The ending of first Red Scare did not reduce the importance of the bureau. The reason for this is the Eighteenth Amendment brought in the federally prosecuted alcohol prohibition and the rise of violent gangsters, which made the FBI more important than ever (Babic, 2012). Much of the bureau focused on these tasks and created a generally healthy image for the FBI. Unfortunately the FBI continued to engage in some questionable behavior due to political pressures.

A common fear about the FBI in the early years was that the bureau would be used to target political opposition (Babic, 2012). There were some accusations of this in the early years of the bureau, but the FBI involvement with the Harding Administration's Teapot Dome scandal would truly shock the public. President Harding's administration

could have been seen being highly successful if it were not for some high profile scandals. President Harding was able to reduce the size of government, cut the federal budget in half, promote the free market, lower the unemployment rate, and generally improve the U.S. economy (Folsom, 2012). Unfortunately the president was surrounded by his "Ohio Gang", a group of close friends many of whom exploited the president's trusting nature (Folsom, 2012; Purdy, 2005; Waskey, 2012). The close friends of the president conducted 2 large scale construction kickback schemes which netted them millions of dollars in personal gain and eventual jail time (Folsom, 2012; Purdy, 2005). President Harding's administration was so tarnished by numerous outlandish scandals that many believe his food poisoning death was actually a suicide (Purdy, 2005; Waskey, 2012).

The 2 primary scandals of the administration were similar in that they were perpetrated by Harding's friends who received kickbacks for accepted ridiculously overpriced noncompetitive bids for construction. The first scandal involved President Harding's longtime friend Charles Forbes, whom Harding appoint to be the first head of the newly formed Veteran's Bureau (Folsom, 2012). The second involved Albert Fall, Harding's friend and Secretary of Interior (Purdy, 2005). Forbes received a number of bribes during the construction of overpriced veterans' hospitals (Folsom, 2012). Fall received millions of dollars in bribes during the construction of oil storage facilities and pipelines for the oil reserves of Teapot Dome, Wyoming that were under the control of the Department of Interior (Purdy, 2005; Waskey, 2012). The Veterans' Bureau scandal

was a disgrace for the administration and when the Teapot Dome scandal broke the administration attempted to prevent a similar humiliation.

A bipartisan Senate investigation, led by Republican Senator Robert M. La Follette Sr. and Democratic Senator Thomas J. Walsh, met stiff resistance at every turn (Purdy, 2005; Waskey, 2012). What happened next was inexcusable, illegal, and highly controversial. The Harding Administration elicited the Federal Bureau of Investigation to investigate, intimidate, and harass the senate investigators. Walsh endured break-ins, constant unwarranted surveillance, personal threats, and even his 3 year old daughter was threatened (Purdy, 2005). The bureau's top leadership, including Chief Burns, authorized the surveillances in 1923 (Cecil, 2015). After both senators endured unwarranted break-ins, wire taps, background inquiries, and possibly even threats it became clear to the public that the bureau had drifted into dangerous waters.

Hoover's Surveillances

In the wake of the Teapot Dome scandal J. Edgar Hoover was chosen to lead the Federal Bureau of Investigation, as the bureau faced uncertainties about its proper roles and how to conduct those functions. In 1924 Hoover took the reins of the FBI from Chief Burns (Babic, 2012; Miller, 2012). Hoover was able to transform the bureau's image into the iconic "G-men" in a relatively short period of time. Hoover ensured the bureau put forth an ultra-professional, non-partisan, image through strict conduct and appearance standards (Gage, 2012; Miller, 2012). The new image for the G-men was perfect timing, as the bureau had a new set of public enemies with the rise of gangsters in the 1920s. Hoover influenced the media to produce a number of extremely popular television shows,

comic strips, and books showcasing the bureau taking on the high profile gangsters (Cecil, 2015; Miller, 2012). The FBI's performance, image, and popularity improved tremendously under Hoover's leadership.

Despite successfully fostering a non-partisan image for the bureau as a whole, Hoover became incredibly well connected politically and amassed enough power with his position that he could push political agendas. Throughout Hoover's 5 decades with the bureau, his personal connections with prominent politicians seemed to at times inappropriately influence the bureau's actions and policies (Gage, 2012). Hoover's first years as director were spent developing and expanding the bureau's national influence through increasing its size, training, capabilities, and political connections (Babic, 2012; Brame & Shriver, 2013; Gage, 2012). The first Red Scare established Hoover with the anti-communist sphere of politicians. This undoubtedly aided Hoover in soliciting resources for the growing bureau.

The communist movement did not die out in America with the decline of the first Red Scare, only the hysteria surrounding it did. As World War II neared, the public once again began to take notice of communists in the United States. The second Red Scare brought Hoover new resources, extensive authorities, and connections to prominent members of congress and even presidents (Brame & Shriver, 2013; Gage, 2012). With the passage of the aforementioned Smith Act of 1940 the Hoover gained the authority to investigate anybody he "deemed a threat to national security" (Brame & Shriver, 2013). Hoover maintained this ability for the rest of his life, using it both legitimately and illegally.

Hoover's surveillance capabilities made him an extremely feared and powerful bureaucrat. Hoover conducted surveillance on an untold number of individuals based solely upon Hoover's determination without any probable cause or suspicion of a crime (Brame & Shriver, 2013; Miller, 2012; Richardson, 2015). The surveillances began with the communists with the intent of preventing subversion of those looking to overthrow the government, as the communists did in Russia (Brame & Shriver, 2013). As World War II progressed the bureau began an aggressive counter-intelligence program (COINTELPRO) initiated with the goal of countering the real threat of subversion, which it accomplished in several cases (Brame & Shriver, 2013; Romano, 2011). COINTELPRO was a domestic program that mimicked Office of Strategic Services (OSS) and later Central Intelligence Agency (CIA) "black operations" abroad including "false media stories, bogus leaflets, pamphlets and other publications, forged correspondence, anonymous letters and telephone calls, pressure through employers, landlords and others, tampering with mail and telephone service" (Romano, 2011, p. 173). COINTELPRO operations never resulted in arrests and in 1971 after the program became public knowledge Hoover publically abandoned it, but it was likely just false information (Miller, 2012; Napolitano, 2014). COINTELPRO continued after the war and well into the 1990s, but it is how Hoover used COINTELPRO authorities against the civil rights movement and his political enemies that caused concern (Brame & Shriver, 2013; Miller, 2012; Romano, 2011).

The civil rights movement did contain some groups that sought the violent overthrow of the United States' government (Brame & Shriver, 2013; Phelps, 2012). Part

of how the bureau came to investigate these groups was the fringes of the communist and socialist movements had crossed over into diametrically opposing, violent groups such as the Black Panthers and the Ku Klux Klan (Napolitano, 2014; Phelps, 2012). The FBI was justified in investigating these groups as they were and still do call for violence and subversion of the United States. The more questionable infiltrations occurred with groups like the National Association for the Advancement of Colored People (NAACP) and the Socialist Workers Party (SWP), which did not advocate violence (Phelps, 2012). Hoover's programs targeted violent and nonviolent groups on the political left and right (Greenberg, 2011; Holst, 2007). Hoover believed that much of the civil unrest in the South was due to a communist plot to agitate racial tensions (Phelps, 2012). Hoover notably authorized an extensive investigation of Martin Luther King Jr. out of concerns about his anti-Vietnam views, which Hoover considered to be communist leaning (Miller, 2012; Purdy, 2007). Basically anybody Hoover deemed radical or a political dissent was a potential target.

Worse than how the bureau handled political groups, was how Hoover used the bureau to further his political influence. Hoover made himself indispensable to every president between Franklin Delano Roosevelt and Richard Nixon (Holst, 2007). It is believed that Presidents Harry Truman, John F. Kennedy, and Lyndon Johnson all wanted to fire Hoover, but were afraid that Hoover's investigations of them and their families would be leaked to the public (Miller, 2012). Hoover began the investigations of powerful Americans early in his career, with one of his earliest targets being Eleanor Roosevelt (Holst, 2007). In essence Hoover was untouchable by the end of World War II

and would remain so until his death. Hoover was so connected that President Johnson would waive the mandatory retirement age for Hoover allowing him to remain in charge of the FBI until he died (Miller, 2012). Hoover would be the only director to hold the position for such an extended period of time. Promptly upon his death congress placed a ten year term limit on the position and eventually began congressional investigations into the FBI, something that had been thwarted repeatedly during Hoover's lifetime (Holst, 2007). J. Edgar Hoover amassed more clout than any bureaucrat in American history. While he did amazing things for the FBI and the country, his private surveillance undertakings compromised the integrity of the bureau.

Even now, well past the 50 year expiration of their classification, the FBI refuses to release of millions of files related to these investigations to the national archives despite no ongoing investigations or national security concerns (Richardson, 2015). Regardless of how the records could potentially affect the image of Hoover or the bureau, these records should be transferred to the national archives. It seems some of these records would probably be of historical significance. Any confidential information would be protected under standard national archive policies, so there truly is no valid reason for withholding the files. Withholding information to paint a narrative does not do history justice. Furthermore there is evidence that some of these documents were destroyed by flooding during Hurricane Sandy due to insufficient storage facilities (Richardson, 2015). The refusal to release these records furthers speculation as to how far the bureau went astray with Hoover's private missions.

Watergate

Just a month and a half after Hoover's death, the biggest scandal in the nation's history would transpire and Hoover's longtime friend President Nixon would be at the center of the controversy. On June 17, 1972 5 Nixon campaign workers were arrested while breaking into the Democratic National Committee headquarters at Washington D.C.'s Watergate Hotel in an attempt to adjust existing unwarranted wire taps for better reception (Faulkner & Cheney, 2013; Feldstein, 2014; Gage, 2012). The arrests exposed a conspiracy with origins leading all the way to the President of the United States. The ensuing investigation led to more than 70 convictions for illegal break-ins, wire taps, and numerous other crimes which netted some of the perpetrators 40 years in prison (Faulkner & Cheney, 2013; Feldstein, 2014). Many top White House advisors received jail time (Faulkner & Cheney, 2013). After 2 years of investigation and scandal President Nixon resigned in disgrace (Faulkner & Cheney, 2013; Feldstein, 2014; Gage, 2012).

Despite all of Hoover's previously questionable surveillance choices, in his last several months he did have reservations about the constitutionality of Nixon's pre-Watergate actions. The two had been friends for decades, but Hoover adamantly resisted Nixon's attempts to use the FBI for partisan purposes (Gage, 2012). With COINTELPRO being exposed in 1971 Hoover attempted to limit the bureau's involvement with questionable activities, which conflicted with Nixon's agenda resulting in increasing tensions between the men (Gage, 2012; Miller, 2012). Upon Hoover's death, Nixon attempted to get a more compliant director, but the bureau's leadership would never be truly united behind Nixon's unconstitutional endeavors (Faulkner & Cheney, 2013). In

fact Hoover's protégé, Mark Felt, later FBI Director Felt, would become the famous "Deep Throat", who exposed the Nixon conspiracy (Faulkner & Cheney, 2013; Feldstein, 2014; Gage, 2012). Nixon did not have FBI support and the bureau did investigate the Watergate scandal (Faulkner & Cheney, 2013; Gage, 2012). The CIA did try to delay the bureau's investigation (Gage, 2012). This turned out to be Nixon's undoing, as he taped White House conversations including the one where he prompted the CIA to slow the FBI investigation, which was eventually heard by investigators (Faulkner & Cheney, 2013; Gage, 2012). The Watergate scandal toppled the Nixon presidency.

The events described throughout this section of the literature review illustrated how domestic security practices have, at times, led to abuse. It is vital for scholars and policy makers to understand what has happened and be vigilant against future abuses. Studying the Watergate scandal, Hoover's surveillances, and the Teapot Dome scandal provides clear examples of such abuses. With Watergate as the pinnacle of half a century of questionable practices, the American public was ready for reform. The stage was set for the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, also known as the "Church Committee".

Court Decisions

While examining the history of security policies suggested the validity of the PET and proposed there is an acceptable balance between liberty and security, it did not fully address the legality of the issues. The courts had several significant rulings in the 20th century regarding the legality of security and surveillance policies. It is critical to review these ruling in an effort to fully understand modern surveillance authorities. Since

antiquity it has been common practice when reviewing a statute to refer to previous relevant decisions that form the legal precedence of the statute in question (Strouthes, 2007). This section of the literature review explored some of these rulings in respect to their contribution to the legal precedence involving surveillance cases.

Olmstead v. United States

The first court case with bearing on this study was the 1928 Olmstead v. United States. The basic premise of the case was Olmstead contended that a wiretap should require a warrant or it would be a violation of the Fourth Amendment (Emas & Pallas, 2012; Ferguson, 2014). At the time, wiretaps were a relatively new technology and had yet to be challenged at the Supreme Court level. In the Olmstead investigation a wiretapped recorded conversation was presented as evidence, which led the Olmstead defense to present a case that the incriminating evidence was inadmissible and unconstitutional (Ferguson, 2014; Jones, 2011). When writing for the majority, Chief Justice Taft concluded that the Fourth Amendment did not extend to electronic surveillance if there was not a physical intrusion or seizure (Bedi, 2014; Ferguson, 2014). In 1942 and in 1951 the courts reconfirmed Olmstead ruling with the similar cases of Goldman v. United States and Lee v. United States (Emas & Pallas, 2012). For nearly 4 decades electronic surveillance would not require a warrant if there was not a physical intrusion.

Katz v. United States

In 1967, the Olmstead decision would again be challenged in the Supreme Court. Charles Katz was accused of conducting interstate gambling operations via telephones

booths and the FBI and local police were able use recording devices to obtain incriminating about the case (Emas & Pallas, 2012; Sales, 2010). In all 6 recorded conversations were heard at the trial contributing significantly to the conviction (Emas & Pallas, 2012). The case was appealed until it reached the Supreme Court. The Supreme Court held that the Fourth Amendment requires law enforcement to obtain a warrant prior to conducting electronic surveillance, as the amendment safeguards the person rather than just their property (Bellia, 2011; Ferguson, 2014; Harper, 2014; Howell & Lesemann, 2007). The Supreme Court decision asserted that the intrusion occurred in a constitutionally protected area, as Katz had a reasonable expectation of privacy in the phone booth (Davis, 2014). Katz did not have the expectation of privacy that he would not be seen or photographed, as the booth was predominately clear glass in a public setting, but he could reasonably expect that his conversation would not be heard outside of its intended audience (Emas & Pallas, 2012). Also in 1967 Berger v. New York came to a similar conclusion only with eavesdropping of a house rather than a phone booth (DeVito, 2011). Katz v. United States adequately addressed its reasons for changing the Olmstead procedures for conducting electronic surveillance in criminal cases.

What the Katz decision did not address was domestic security surveillance cases. The courts did not require warrants for domestic security investigations that used electronic surveillance techniques (Francel, 2014; Harper, 2014). Shults (2011) contended that by not tackling domestic national security investigations the Katz decision suggested that the Fourth Amendment argument does not necessarily apply to executive directed surveillance. Shults (2011) further proclaimed that this lack of judgment made

foreign intelligence confusing and ripe for abuse. Whether or not the lack of depth of the decision led to any abuse, the Supreme Court was deciding on a gambling case not a foreign intelligence case.

The Katz and Berger cases provided the exogenous shock the PET suggests is necessary for significant change. A review of literature suggests the 2 similar cases created a public demand for change. Congress adopted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, known as Title III or the Wiretap Act to coincide with the trends established in the Katz and Berger cases (Bellia, 2011). Title III established the warrant requirements for electronic surveillance in criminal cases (Harper, 2014; Jones, 2011). While Title III became the standard for wiretap procedures in criminal cases, it did not apply to domestic security cases (Shults, 2011). This further implies that the Katz, and to a lesser extent the Berger, case was the catalyst for the Title III provision as these cases were criminal cases not domestic security cases. Title III would not remain strictly within the realm of criminal justice for long.

(Keith) United States v. United States District Court for Eastern District of Michigan

The next major court decision involving surveillance procedures would come in 1972 with the famed "Keith" case, named after Judge Damon Keith of the United States District Court for Eastern District of Michigan. In the United States v. United States District Court for Eastern District of Michigan the defendants were accused of plotting to bomb a CIA building in Michigan (Francel, 2014). The prosecution used electronic surveillance without a warrant, but failed to prove a connection to a foreign power (Bellia, 2011). The Supreme Court ultimately ruled that Executive Branch does not have

the authority to conduct surveillance without a warrant unless there is a connection to a foreign power (Harper, 2014; Howell & Lesemann, 2007; Shults, 2011). Furthermore the Keith ruling added to the legal precedence that information gathered for foreign intelligence investigations cannot be used in criminal cases unless a traditional warrant authorized the collection (Baldwin & Koslosky, 2012). This standard remained until the creation of the USA PATRIOT Act.

Church Committee

The Church Committee, in response to numerous scandals, helped reform and shape domestic security policies from the late 1970s until the 2001 terrorist attacks. The committee was formed to investigate executive branch surveillance practices, the US Army surveillance on American citizens, CIA programs on U.S. soil, and even the previous analysis of the assassination of President Kennedy (S. Rep. No. 94-755, 1976). The Church Committee was the most thorough investigation of U.S. intelligence policies and practices in American history (Mondale et al., 2014). There was public pressure for the investigation to be free of political gaming, as a result the committee was well balanced by party and ideology with both Republicans and Democrats carefully selecting members across the political spectrum (Donohue, 2014). The committee was chaired by Senator Frank F. Church (D-ID), with Senator John G. Tower (R-TX) as Vice Chairman (S. Rep. No. 94-755, 1976). Church's committee was an effort to counter the hazards of unfettered government surveillance (Berghel, 2014).

One such moral hazard was President Nixon's Huston Plan, which essentially was a joint CIA, FBI, Internal Revenue Service (IRS), Defense Intelligence Agency (DIA),

and NSA intelligence collection operation that targeted Vietnam War protesters (Mondale et al., 2014; S. Rep. No. 94-755, 1976). In some ways this cooperation could have been seen as a positive step forward as years later the 9/11 Commission would recommend increased cooperation between the agencies (9/11 Commission, 2004). In fact the cooperation between the organizations was used as the justification for the program (S. Rep. No. 94-755, 1976). The problem with Nixon's plan was the military and CIA are not supposed to conduct operations in the United States and the president targeted all those publically opposed to the war rather than just radicals advocating for violence. The Posse Comitatus Act of 1878 prevents the United States military from conducting domestic law enforcement activities (Sales, 2010). The National Security Act of 1947 created the CIA but specifically prohibited the agency from conducting domestic security functions (Donohue, 2014; Sales, 2010). The Church Committee found that the DIA and CIA's involvement with domestic counterintelligence operations was inappropriate and illegal (S. Rep. No. 94-755, 1976). The moral hazard of using the DIA and CIA in domestic programs could have been avoided by limiting their activities to outside the country while still increasing information sharing regarding international pursuits amongst the intelligence community. In addition, the committee found using the IRS to harass organizations based upon their political leanings to be troublesome and clearly not within the service's intended purpose (S. Rep. No. 94-755, 1976). Using the IRS as a political weapon should not have been considered a viable option and demonstrates how far the administration was willing to push the limits of the law.

The worst aspect of the Huston Plan was not with its enactment, but its cancellation. The Huston Plan was soundly and immediately rejected by J. Edgar Hoover, which led to President Nixon revoking the plan within the week of its enactment, but only the FBI actually heeded the revocation (S. Rep. No. 94-755, 1976). Essentially either the other intelligence agencies went rogue or the president covertly authorized the actions in direct violation of the law. The Church Committee believed the latter to be the case (S. Rep. No. 94-755, 1976). Without official authorizations the intelligence community collected on more than 100,000 American citizens due to their opinion on the Vietnam War (Mondale et al., 2014). The Church Committee found these operations to be illegal and egregious, but not uncommon.

The Church Committee found literally volumes of information about questionable to blatantly unconstitutional intelligence activities. The following is a highlight of some of these activities as found in the Church Committee reports:

- The FBI investigated approximately 500,000 U.S. citizens for the purpose of domestic intelligence. Some of these individuals might have been relative to a criminal investigation, but if they were it was pure coincidence. The investigations led to the development a national name index of potential political dissidents.
- The CIA had a similar program which collected on 1.5 million Americans resulting in a computerized index system.

- At least 380,000 first class letters were opened, read, photographed, resealed, and delivered by the postal service in conjunction with the FBI and CIA in 2 unwarranted operations spanning approximately 20 years.
- All international telegraphs were from 1947–1975 were obtained by the NSA through a secret arrangement with the telegraph services.
- From 1969 – 1973 the IRS kept secret files on 11,000 individuals based upon their political affiliations.
- The FBI secretly infiltrated civil and women's rights group with the expressed intent of disrupting the movements from within. For example the bureau had agents in the NAACP for more than 25 years without any evidence of criminal activity.
- Each president from Roosevelt through Nixon conducted flagrantly illegal and progressively worse surveillance of their political opposition. Watergate is a clear example of this, but was not much worse than President Kennedy's action. President Kennedy wiretapped at least one member of congress, a congressional staffer, and other Washington D.C. insiders.
- The military and CIA conducted extensive human experimentation using Lysergic acid diethylamide (LSD) and other destructive drugs for several years with limited controls, goals, or scientific purpose. The CIA continued the experiments for several years with unwitting subjects, no

stated objectives, and limited medical staffing inferring the "experiments" had more sinister motives.

The Church Committee reports are noteworthy in modern domestic security policy administration and this study in that they comprise an exhaustive inquiry into domestic practices and mission creep. More than that, the reports were designed to not only expose abuses but to provide recommendations to prevent future abuses. The United States has had repeated episodes of security policy abuses, which are quickly rectified and forgotten upon exposure, but the Church Committee was the first serious attempt to prevent future abuses (S. Rep. No. 94-755, 1976). The reports generated the political momentum to reform domestic security practices (Mondale et al., 2014). This shows that not only are surveillance authorities susceptible to mission creep but that the American public eventually brings these authorities into a more acceptable role. It is typically not the surveillance procedure that is the problem, but how it is used. With this dissertation examining the allegations of mission creep with the USA PATRIOT Act, the Church Committee reports provided essential historic perspective of previous misuses of domestic security authorities.

Foreign Intelligence Surveillance Act

The domestic security policies, procedures, and practices from World War I until the 1970s was problematic, as demonstrated in the last several sections of this literature review. The PET would assert that these practices were bound to only undergo incremental change until an external force would create the demand for change. The literature examined thus far showed that there were in fact incremental changes through

various policy changes and court decisions. The public became more and more aware of the need for reform due to the coverage of the Katz case, Watergate scandal, and Keith decision. These incremental events spawned the Church Committee which served as the external force needed to reform policy. The reform came as the FISA.

FISA was an ambitious act designed to clarify authorities, reign in abuses, and provide a codified approach to domestic security. FISA was congress' most significant attempt at regulating domestic intelligence gathering (Jones, 2011). FISA was drafted to restrict domestic intelligence gathering, based upon the Church Committee findings (Butler, 2013). FISA's primary functions created a system of checks and balances on the Executive Branch's unilateral surveillance practices (Davis, 2014; Howell & Lesemann, 2007; Sales, 2010; Shults, 2011). The checks and balances are achieved through the FISA court (FISC).

Foreign Intelligence Surveillance Court

The creation of the FISC greatly changed domestic security practices in the United States. Traditional federal courts lack the security clearance requirements related to many domestic security policies. For this reason the U.S. Congress was compelled to create a court with the necessary clearance qualifications and with doing so the FISC was born (United States President's Review Group on Intelligence and Communications Technologies, 2013). The FISC convenes in an undisclosed secure location within the DOJ in Washington D.C. to help maintain a level of secrecy (Pfander, 2013; Ruger, 2007; Walton, 2013). The FISC can authorize the clandestine electronic surveillance of a target for up to a year at a time provided the Attorney General submit an application showing

probable cause that the target is affiliated with a foreign power (Gilbert, 2013). This probable cause does not specifically demand suspicion of nefarious activities, but there is an extensive review process to assess the legality of the surveillance (Francel, 2014; Ruger, 2007; Walton, 2013). In addition, the application must show that the desired foreign intelligence cannot be obtained through traditional investigative techniques (Harper, 2014; Shults, 2011). The application is secretive and submitted without knowledge of the targeted individual (Shults, 2011). The secrecy and access to classified information requires the FISC to be carefully staffed.

The FISC is currently comprised of 11 judges appointed by the Chief Justice of the United States to serve staggered term of 7 years or less (Davis, 2014; Pfander, 2013; Ruger, 2007). Congress changed the number of FISC judges from 7 to 11 in 2002 (Ruger, 2007). Presumably this change was to accommodate an expected increased workload in response to the War on Terror. The judges preside over the FISC for one week at a time with the off duty judges typically assisting with unusual or complex surveillance applications (Walton, 2013). Despite the weekly rotation judges are expected to make well informed, contemplative rulings not quick decisions.

Approval Rate

The literature regarding FISC application rulings was polarizing with literature defending the practice and others excoriating it. The reason for this seems to be the way in which the approval rate is reported. The FISC provides an annual report to congress, which provides the statistical information for the number of FISA applications submitted, approved, and rejected (United States President's Review Group on Intelligence and

Communications Technologies, 2013). These reports show in the FISC's first 20 years it never rejected a submitted application (Ruger, 2007). In all of FISC's history only 11 of the more than 20,000 submitted applications have been rejected (Francel, 2014). This leads many question how critically the FISC judges review these applications and several media outlets routinely refer to the FISA process as a rubber stamp (Francel, 2014; Ruger, 2007; Walton, 2013). The criticism and the statistical information seems solid to those opposed to FISA.

To those who support FISA the criticism of the FISA approval rate and the statistical information backing it does not have sound footing. The FISC procedures start well before the final application is submitted with the requestor and FISC attorneys going back and forth until the application is ready for final submission (Francel, 2014; Walton, 2013). Most, if not all, applications are altered based upon the FISC attorneys' recommendations, which generally make the applications acceptable to the FISC judges (Walton, 2013). The annual report only accounts for applications actually submitted to the FISC judge, meaning the applications that would have been rejected have likely been changed or abandoned (Francel, 2014; Walton, 2013). In addition,, as FISC's Judge Walton (2013) pointed out, from 2008 through 2012, only 5 of 13,593 traditional Title III wiretap applications were rejected. Between the FISC attorneys' guidance making the applications more acceptable to the FISC judges and the FISA approval rate being similar to the traditional wiretap approval rate, the rubber stamp criticism loses validity with those in support of FISA.

FISA Application v. 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. (U.S. Const. amend. IV)

Most of those opposed to FISA claim FISA authorizations violate the Fourth Amendment of the U.S. Constitution. The Supreme Court ruled in Katz v. United States that Fourth Amendment protections applied to electronic searches when it intrudes on a reasonable expectation of privacy (Davis, 2014; Sales, 2010; Shults, 2011). The Katz ruling does not make the leap that Fourth Amendment protections apply in national security cases (Shults, 2011; Yoo, 2014). Thus the electronic surveillance warrant requirement only extends to criminal cases (Banks, 2010; Shults, 2011). Despite the robust deliberation process of FISA authorizations, in the United States v. Cavanagh the Ninth Circuit Court of Appeals ruled that FISC proceedings do not satisfy Fourth Amendment requirements, (*United States v. Cavanagh*, 1986/1987). This creates a controversy when FISA authorized information is used in criminal proceedings.

The Cavanagh ruling raised concerns about the use of FISA materials in criminal cases and strengthened the wall between FISA and criminal proceedings. The Ninth Circuit Court of Appeals declared that "FISA court is not a detached and neutral body, but functions instead as a compliant arm of the government" (*United States v. Cavanagh*, 1986/1987). Rightly or wrongly this ruling combined with the perception of the FISA

approval rate gives the impression that FISA authorized surveillance is akin to the British general warrants of pre-revolutionary America. The general warrant allowed the British to conduct searches and seizures without probable cause of a criminal offense (Mondale et al., 2014; Napolitano, 2014). The Fourth Amendment was specifically designed to prevent such activities through specific warrant requirements (Mondale et al., 2014). Throughout the history of the United States, the courts have preferred specific warrants in the investigation of a crime (Banks, 2010; Williams, 2014). Searches not specifically authorized by warrants have been permitted since the founding of the country, but typically involve reasonable suspicion and a need for immediate search (Williams, 2014). The Cavanagh ruling reaffirmed the courts' preference for traditional warrants rather than FISA authorizations.

There have been controversial instances in which FISA authorized information was used in the prosecution of a U.S. citizen. While investigating the 2004 Madrid train bombings the FBI misidentified fingerprints at the bomb site as belonging to Brandon Mayfield (Rush, 2008). The FBI then used FISA authorizations and National Security Letters (NSL) to conduct various physical and electronic searches / surveillances for the Mayfield case (*Mayfield v. United States*, 2009). Next the FBI detained Mayfield without charge for 2 weeks (Rush, 2008). Ultimately it was discovered that Mayfield's fingerprints did not match those at the site and was not likely involved in any criminal activities (*Mayfield v. United States*, 2009; Rush, 2008). The Ninth Circuit Court of Appeals ruled that Mayfield's Fourth Amendment rights had been violated as the NSLs and FISA authorizations did not meet Fourth Amendment protections (*Mayfield v. United*

States, 2009). Mayfield was awarded $2 million for his troubles (Rush, 2008). The Mayfield case illustrates how FISA authorizations can be problematic when the investigated individual is entitled to the protections of the Fourth Amendment.

Discovery

Another common complaint against FISA authorizations in criminal cases is the lack of discovery. In criminal proceedings throughout the United States since early in the 1900s the prosecution has had to provide the discovery of evidence to prevent the defendant from being blindsided by unexpected evidence during the trial (Heeren, 2014). In FISA cases defendants are not likely to have total access to the prosecutor's evidence against them as its disclosure is always suppressed (Harper, 2014; Howell & Lesemann, 2007). This is especially troublesome if the legality of the FISA authorized surveillance is questioned as the defense counsel is never granted access to FISA materials (Harper, 2014). In the criminal setting FISA obtained information is usually controversial and denying the defense discovery due to security classification creates constitutionality concerns (Butler, 2013). The lack of discovery in criminal cases with FISA authorized surveillance could lead to abuses or at least the perception of abuse as the defendant has less protections than in a traditional warranted surveillance.

This potential for abuses or the appearance of abuses is largely because FISA was not originally drafted to be used in criminal proceedings. Changes to FISA created the prospective contentions. The USA PATRIOT Act contained some of the first and more significant FISA changes. More specifically most of the changes are in Title II of the USA PATRIOT Act. The next section addressed the title.

USA PATRIOT Act – Title II

As mentioned in the introduction of the USA PATRIOT Act was passed during the turbulent weeks following the 2001 terrorist attacks with near unanimous support, but has since been the subject of criticism. On September 24, 2001 the DOJ presented a draft of the requested authorities to the House of Representatives (Gibbons, 2007). The DOJ's requests rapidly gained traction. On October 4, 2001 a draft was introduced to the Senate and one week later received Senate approval (Baldwin & Koslosky, 2012). The final version of the act introduced to congress on October 23, 2001 was passed with 83% of the House of Representatives voting yea on October 24, 2001 and 98% of the Senate voting yea on October 25, 2001 (GovTrack.US website, 2004). President Bush signed the bill into law on October 27, 2001 (H.R. Res. 3162, 2001). By modern standards the statute was enacted exceedingly quickly, but as the PET would explain speed in enactment does not necessarily translate into flawlessness.

The USA PATRIOT Act's enactment is a prime example of the PET in action. The external shock to the system was the September 11, 2001 terrorist attacks. This eliminated the standard ebb and flow of incremental security policy change for the abrupt changes ushered in under the USA PATRIOT Act. The law rapidly fixed many national security vulnerabilities, as demanded by the American public. As with many of the previously mentioned, rapidly enacted national security policies, the legislators faced a serious time crunch. They needed to act quickly to meet the electorate's mandates, which did not give them time to craft the most faultless bill possible. This perfectly represents the bounded rationality of the PET. Since the act became law there have been concerns

about some of the law's faults. Some of these concerns have been soundly rejected or ignored while others have garnered support and lead to amendments to the USA PATRIOT Act. This illustrates the shift back to incremental policy changes.

Among the first to identify the polarizing effects of the USA PATRIOT Act was President Bush. The acronym USA PATRIOT Act is polarizing in that it implies that disagreeing with provisions of the act is unpatriotic (Levinson, 2008). President Bush had pushed for rapid congressional approval of the act, but opposed its name (Baker, 2013; Jones, 2012). The president's opposition to the name was so strong that he considered sending it back for revision, but worried about the political fallout and potential danger of delaying the act (Baker, 2013; Jones, 2012). There was a national sense of urgency at the time that mandated increased security measures (Huddy & Feldman, 2011; Traister, 2013). The terrorist attacks generated a temporary window of opportunity, in which partisan politics subsided allowing congress and the president to come together to strengthen security (Traister, 2013). Rejecting the act based upon its name would have appeared petty and imprudent, because a speedy enactment seemed necessary at the time.

The unifying urgency eventually faded. As the political environment returned to a competitive atmosphere, the USA PATRIOT Act was looked at more critically. Contentions began to emerge about the surveillance aspects of Title II of the law. The next portion of the literature review examined some of the more controversial aspects of Title II. This segment of the literature review built the academic foundation about Title II and illustrated the ideological divide regarding the title.

Section 203: Information Sharing

One of the increased security measures demanded by the public was improved information sharing amongst intelligence and law enforcement agencies. The driving force behind the public's demand for information sharing was primarily for predicting terror attacks (De Goede, Simon, & Hoijtink, 2014). The general premise is that the various information gathering entities might fail to piece together bits of information because they are focused on their agencies' specific missions (Sales, 2010). This is a noble goal, but its practical implementation needs to be carefully monitored for potential mission creep; because while foreign led terrorist attacks are subject to national security law, domestic terrorism is a criminal offense. The Keith ruling prevents information obtained through national security intelligence gathering to be used in criminal cases unless a traditional warrant was used to collect the information (Baldwin & Koslosky, 2012). The legality of any information sharing in criminal cases must be assessed using this precedence.

Striking the appropriate procedures for sharing information amongst agencies has been debated for some time. In the 1980s and 1990s the DOJ conducted limited interagency information sharing in the prosecution of criminal cases (9/11 Commission, 2004). In the 1980s various joint counterterrorism task forces provided platforms for information exchange between local law enforcement and federal authorities (Jones, 2011). By 1995 the DOJ essentially abandoned the practice due to concerns of legality (Sales, 2010). There was a general fear in the department that using information gathered for another criminal or intelligence investigation could be a "career ender", especially if

the information was obtained through FISA authorizations (9/11 Commission, 2004). This fear, combined with the innate secretive nature of any investigation, led prosecutors to avoid providing information to other agencies or using others' information in their cases. In 2001 the federal government would seek to change this tendency.

Section 203 of the USA PATRIOT Act is encourages information sharing amongst government agencies, but has been the center of some debate. As with most contentions involving the USA PATRIOT Act, the controversial authorities does not come solely from Section 203, but rather an amalgamation of sections, laws, policies, and procedures. Sections 203, 504, and 905, as well as, Title II of the Homeland Security Act of 2002 and Title II of the Enhanced Border Security and Visa Entry Reform Act of 2002 all effect post 9/11 interagency information sharing (H.R. Res. 3525, 2002; H.R. Res. 5005, 2002; Martin, 2005; H.R. Res. 3162, 2001). In addition, Executive Order 12333 and the 3 executive orders that amend it, guide the collective information gathering and dissemination operations inside and outside the nation (Exec. Order No. 12333, 1981-2008; United States President's Review Group on Intelligence and Communications Technologies, 2013). Information sharing operations are not exclusively dictated by Section 203 of the USA PATRIOT Act.

While Section 203 is not the sole source of information sharing legislature, its cumulative effects with Section 504 and Section 905 are significant. Section 203 essentially permits and directs law enforcement officials of varying jurisdiction to disclose information pertaining to national security to federal intelligence officials (DeRosa, 2005; H.R. Res. 3162, 2001). Section 504 allows federal intelligence officials

operating under FISC authorizations to coordinate and share information with law enforcement (Martin, 2005; H.R. Res. 3162, 2001). Section 905 requires any information gathered that might pertain to national security must be promptly disclosed to the Director of National Intelligence (H.R. Res. 3162, 2001; Philbin, 2002). In a 2002 DOJ legal counsel opinion, the Deputy Assistant Attorney General explained that sections 203 and 905 have a necessary synergistic effect that authorizes and requires disclosure while safeguarding confidentiality provisions (Philbin, 2002). The combined effects of these 3 sections constitute the USA PATRIOT Act's information sharing properties.

Some people have and continue to question the legality of the USA PATRIOT Act's information sharing properties. In the aforementioned DOJ legal opinion, Philbin (2002) recognized that no law, including the USA PATRIOT Act, is perfect. Martin (2005) argued that Section 203, 504, and 905 created an atmosphere in which the government overstepped its bounds in several ways. The argument is the sections create an environment in which the government disregards privacy, stores investigative information beyond its authorized time period, and bogs down national security operations with insignificant material related to criminal cases (Martin, 2005). Sales (2010) addressed similar concerns of privacy intrusion and "flooding" investigators with inconsequential information. More recently Husain (2014) argued that information sharing generated by the USA PATRIOT Act is appropriate for law enforcement agencies operating with traditional warrants or for intelligence agencies working under FISA, but is absolutely inappropriate for FISA information to be shared for criminal prosecution. Husain (2014) argued that the theoretical wall between domestic and criminal

investigations should be restored to prevent civil liberty offenses. Husain's analysis is backed by some legal precedence.

The legal precedence of FISA cases has included the aforementioned Cavanagh and Mayfield cases, both of which were critical of FISA information in criminal cases, but FISC authorized surveillance has never truly been forbidden in criminal proceedings. In the Cavanagh case, the Ninth Circuit Court of Appeals ruled that FISC authorizations do not meet the same standards as a traditional warrant, which added inherent legal uncertainty to information sharing in criminal cases (Ruger, 2007; Sales, 2010; *United States v. Cavanagh*, 1986/1987). There is a general understanding that Fourth Amendment restricts FISA obtained information in criminal cases (Shults, 2011). While the Cavanagh and Mayfield cases both address the Fourth Amendment concerns never ruling has prevented the use of FISC authorizations in criminal cases (*Mayfield v. United States*, 2009; Rush, 2008; *United States v. Cavanagh*, 1986/1987). Rush (2008) argued that in both instances the Ninth Circuit attacked FISA procedures, but failed to actually rule on the constitutionality of FISA surveillance in criminal proceedings. These legal actions are significant in understanding the legal precedence of FISA in criminal cases, but they do not prevent FISA information from being used to prosecute criminals.

The Ninth Circuit judgments do not prevent prosecutors from using FISA information and as evident by the Cavanagh case, the use of FISC permissions in criminal prosecution precedes the USA PATRIOT Act. In general sections 203 and 905 are designed to eliminate hesitancy in providing information regarding a terrorist threat, discovered during a criminal investigation, to the appropriate federal authority (Kisswani,

2011; H.R. Res. 3162, 2001). As previously mentioned the 9/11 Commission uncovered a reluctance in the law enforcement and intelligence communities to share information, because of a fear of legal or administrative repercussions (9/11 Commission, 2004). Despite this finding there were procedures for information sharing long before the USA PATRIOT Act. Confusing internal policies and misunderstandings of federal statutes is what created the "wall" that prevented the free exchange of information between the law enforcement and intelligence communities (9/11 Commission, 2004; ACLU, 2011). Section 203's effect was not in changing federal law, but removing misconceptions about information sharing (ACLU, 2011; DOJ, 2005). In this way Section 203 is an effective provision. Section 203 removed any doubt that it is legal for agencies to share grand jury, electronic surveillance, and foreign intelligence information.

Critics of the USA PATRIOT Act contend that the sharing of grand jury information can lead to personal liberty abuses. Section 203 (a) provides guidelines for the sharing of grand jury information (H.R. Res. 3162, 2001). Grand juries are law enforcement investigations conducted in secret to determine if criminal charges are warranted (Merkey, 2015). The grand jury process is constitutionally protected by the Fifth Amendment and has been practiced in America since colonial times (Collins, 2002; Merkey, 2015). The main advantage of a grand jury is the subpoena duces tecum. The subpoena duces tecum directs the production of evidence with less or insignificant probable cause (Donohue, 2014). Collins (2002) opined that while sharing grand jury information is beneficial to national security officials, it could also lead to abuses because of the less rigid requirements, secret nature, and lack of congressional oversight. Banks

(2010) noted that critics of Section 203 believe the sharing of grand jury information compromises civil liberties. Martin (2005) and Husain (2014) both contend that information sharing during criminal or potential criminal investigations could lead to political abuse by the Central Intelligence Agency, National Security Agency, or similar federal intelligence entity.

The 9/11 Commission recognized that a substantial information gap existed in the Osama bin Laden case precisely because the FBI's grand jury information could not be paired with the CIA's intelligence (9/11 Commission, 2004). Dahl (2014) observed that bin Laden was tracked down and successfully killed, because of increased interagency information sharing. Sales (2010) explained that sharing bits of information creates a mosaic allowing investigators to develop a clearer picture of the situation. In United States v. Jones and United States v. Maynard the FBI and the District of Columbia Metropolitan Police Department Safe Streets Task Force conducted several types of surveillance which led to convictions of Jones and Maynard in an illegal drug bust (*United States v. Antoine Jones*, 2012; *United States v. Lawrence Maynard*, 2010). The FBI and police tracked the pair in the course of several weeks using wiretaps, direct observation, and Global Positioning Systems (GPS) to establish their daily patterns eventually leading to their arrests and convictions (Kerr, 2012; *United States v. Antoine Jones*, 2012; *United States v. Lawrence Maynard*, 2010). Jones and Maynard appealed their convictions based upon the "mosaic" of the surveillance used against them (Kerr, 2012; *United States v. Antoine Jones*, 2012; *United States v. Lawrence Maynard*, 2010). The mosaic theory asserts that collective, long term surveillance regardless of the level of

intrusion constitutes a search (Kerr, 2012). While the Jones and Maynard case did not truly illustrate the information sharing described in the USA PATRIOT Act it did illustrate how effective the mosaic of surveillance can be.

The literature review of the USA PATRIOT Act information sharing provisions has revealed several key points. First following the terrorist attacks of 2001 the American public demanded increased information sharing (Ripberger, 2011; Sales, 2010). The assumption that FISA had created a wall between the agencies preventing information exchange had been exaggerated (ACLU, 2011; DOJ, 2005). There were ways for interagency information exchange, but confusing policies prevented it (9/11 Commission, 2004). The USA PATRIOT Act clarified and even demanded information exchange (ACLU, 2011; DOJ, 2005). Finally the literature review illustrated a divide a between those that support the information sharing aspects and those that oppose it.

There was a notable literature gap explaining any common between the opposing ideologies. Some of the opposing groups suggest basic reversal of the law, or increased oversight, but any change would need to meet the investigatory requirements of law enforcement and national security. There was not any literature that addressed how information can be shared while mitigating civil liberty concerns. This dissertation will focus on examining the common ground between those in opposition to the USA PATRIOT Act and those who support it. While Section 203 is not the most controversial section in Title II concerns about information sharing seem to contribute to the more contentious sections.

Section 206: Roving Wiretaps

Section 206 is worth briefly mentioning in this literary review, because there has been limited concerns about FISC approved roving wiretaps. Section 206 allows FISA to authorize roving electronic surveillance (H.R. Res. 3162, 2001). A roving (multipoint) wiretap order targets a person rather than a specific electronic device in an effort to track foreign agents as they cycle through communication devices (DOJ, 2005). Prior to the adoption of Section 206 spies or terrorists, trained in tradecraft, understood simply changing phones would thwart surveillance (Mueller, 2005). Multipoint electronic surveillance has been part of criminal investigations since 1986. Section 106 (d) of the Electronic Communications Privacy Act (ECPA) of 1986 allows criminal investigators to apply for an order attached to a specific person allowing them to wiretap any device the person uses (H.R. Res. 3778, 1986).

Despite the long standing practice of roving wiretaps in criminal investigations the ACLU and others have expressed some concerns about granting this authority to intelligence agencies. The ACLU contends the secrecy of FISC authorizations, unlike those of traditional courts, does not facilitate adequate judicial oversight of multipoint surveillance (ACLU, 2011). The claim implies there is a potential for intelligence agencies to abuse this authorization. In addition, the ACLU (2011) asserted that the provision could be read to require neither a specific name nor device. This could be troubling, if found to be accurate, as it could be used to justify sweeping surveillance of broad sections of the population.

Some political leaders have opposed the concept of roving wiretaps in foreign intelligence. One of the earliest opponents to the practice was U.S. Representative Jan Schakowsky, Chief Deputy Whip. The congresswoman voted against the USA PATRIOT Act in 2001 in part due to the roving wiretap provision. Then she voted against the extension of the provision in 2005 (Congresswoman Jan Schakowsky website, 2005). Representative Schakowsky urged Congress to allow the practice of roving wiretaps to expire and warned against the potential erosion of civil liberties due to the USA PATRIOT Act. In her words the "Sweeping and unnecessary federal surveillance and unchecked law enforcement powers undermine the rights that are the cornerstone of our democracy" (Congresswoman Jan Schakowsky website, 2005, para. 10).

It is difficult to determine the validity of these arguments given the secretive nature of foreign intelligence surveillance. It is easy; however, to realize the importance of roving wiretaps to national security agencies. Without this authorization a spy or foreign terrorist could merely use multiple phone to avoid electronic surveillance. There needs to be a pragmatic approach to electronic surveillance of foreign threats, but the approach must not unjustly erode civil liberties. Like Section 203, there is a split between those opposed to the authority and those in support of it, but unlike Section 203 there is little recent scholarly research on Section 206. On June 1, 2015 Section 206 technically expired as a second order effect of Senator Rand Paul's procedural delay of the renewal of Section 215 (Kelly, 2015). The section was inactive for slightly more than 24 hours prior to it getting re-enacted in the USA FREEDOM Act of 2015 (H.R. Res. 2048, 2015). The bulk of academic work mentioning the section is more than 5 years old and when

combined with the secretive nature of foreign intelligence surveillance, the legitimacy of the concerns cannot be qualified in this dissertation.

Section 213: Delayed Notice

Section 213, much like Section 206, was somewhat controversial at first, but has not raised much concern recently. Section 213 allows for the delayed notification of the execution of warrants in both criminal and foreign intelligence cases (H.R. Res. 3162, 2001). The section allows for investigators to petition the courts for authorization to conduct surreptitious searches or seizures (Witmore-Rich, 2014; Xhelili & Crowne, 2012). The DOJ has benefitted the most from the section. Section 213 searches have been used in various crimes such as child pornography, drug trafficking, etc. and is not limited to international terrorism (DOJ website, 2013). Approximately 75% of the delayed notice authorizations were used in drug trafficking investigations (Witmore-Rich, 2014). The success of the section has been overshadowed at time by controversy.

The contentions began early in the life of the USA PATRIOT Act. A 2005 Center Survey Research & Analysis (CSRA) survey found that 71% of Americans opposed the sneak and peak provision (Herman, 2006). There were a variety of reasons for the opposition. First many were concerned because the delayed notification is primarily used in routine criminal investigations with only one percent of authorizations having a connection to terrorism (Witmore-Rich, 2014). Next the length of notification delay and scope of the search or seizure is rather vague and subject to change on a case by case basis (Herman, 2006). Finally the provision limits the likelihood that the suspect is able to observe the search or seizure going against American and English law dating back to

the Magna Carta (Whitehead & Aden, 2002; Witmore-Rich, 2014). Despite these arguments there has been little recent attention paid to the subject in the public, political, or academic realms. The relevance of reviewing the literature pertaining to this section is to help build a better overall understanding of Title II of the USA PATRIOT Act.

Section 215: Access to Records

Unlike Section 206 or Section 213, Section 215 has received political, academic, and media attention in the past couple years. Section 215 amends the FISA to grant the FBI access to "any tangible things" relevant to an international terrorism or foreign intelligence investigation (H.R. Res. 3162, 2001). Davis (2014) opined that the change from "business record" to "any tangible things" broadly expanded the government's investigative authorities by granting new accesses. Yoo (2014) explained that the tangible things clause of Section 215 is part of the legal basis for the bulk metadata collection programs revealed by Edward Snowden in June 2013. Section 215 programmatic surveillance practices are further sanctioned by the FISA Amendments Act of 2008 and the FISA Amendment Acts Reauthorization Act of 2012 (Anderson, 2014; Banks, 2010; Gilbert, 2013). Since the Snowden controversies Section 215 has been repeatedly in the public eye, but the contentions did not begin with Snowden's June 2013 leaks.

In fact Section 215 was almost immediately considered contentious by some. Early in the section's existence, opponents raised concerns that investigators accessing library records could infringe upon library users' privacy rights (Matz, 2008). Whitehead and Aden (2002) argued Section 215 gave investigators secret access to any record without probable cause and little oversight. Whitehead and Aden were not alone in these

concerns. By September 2003 the public outcry for privacy in libraries led to the DOJ declassifying statistical information about the section, which had reportedly never been used at the time (Herman, 2006). The public apprehension of potential Section 215 abuses eventually led to the section being amended.

The *USA PATRIOT Improvement and Reauthorization Act* of 2005 addressed the procedures for applying for, approving, and conducting Section 215 searches (Matz, 2008). The major change from the act was the requirement of "a statement of facts showing that there are reasonable grounds to believe that the tangible objects sought are relevant" (H.R. Res. 3199, 2005). This change in conjunction with other amendments positively affected public opinion about the section. Theissen (2012) opined that the amendments of 2005 and 2006 clarified the law and resolved much of the legal concerns. Judging by a relative lack of scholarly work regarding Section 215 between 2006 and 2013, as well as some praise of the *USA PATRIOT Improvement and Reauthorization Act* of 2005, it seems the amendments quelled some of the early contentions about the section.

As previously mentioned, the general acceptance of the section was short lived. The 2013 Snowden leaks led to the public disclosure of multiple NSA domestic surveillance programs authorized under Section 215 (Banks & Tauber, 2014). Section 215 of the FISA allows the government to store bulk telephony metadata such as phone numbers and time stamps (United States President's Review Group on Intelligence and Communications Technologies, 2013). The various NSA programs seemed to have ran somewhat consistently between 2006 and 2013 with FISC authorizing bulk metadata

collection at least 34 times covering all major telecommunication service providers (Donohue, 2014). Most of this bulk collection was consolidated into a single database essentially spanning 5 years' worth of U.S. cell phone activities (Davis, 2014). The revelation of the bulk collection led many to wonder how such a large amount of data could possibly be relevant to any investigation (McGowan, 2014). There is some credibility to this assertion.

The main contention with Section 215 authorized bulk collections is its questionable legality. Barnett (2015), Berghel (2014), Davis (2014), Kris (2014), McGowan (2014), and Regan (2014) raised concerns that any bulk collection should be considered a search without probable cause; thus, violating Fourth Amendment protections. The primary concern is the overwhelming majority of call data collected was of innocent people making innocent calls, which could not be relevant to any investigation (Barnett, 2015; Kris, 2014; Regan, 2014). Regan (2014) further claimed bulk collection could potentially be used to monitor and punish dissenting, constitutionally protected, voices in the United States. Davis (2014) warned that the NSA's bulk collection creates a moral hazard as the secrecy of database could lead to rampant abuse without fear of retribution. McGowan (2014) asserted the metadata collection program is an illegal, unwarranted invasion of privacy. Kris (2014) additionally pointed out that Section 215 is specifically written to authorize FBI collection procedures not NSA collections, which should limit 215 authorizations strictly to the FBI. On May 7, 2015 the 2nd Circuit Court of Appeals in New York ruled the programmatic surveillance practices should be considered an overextension of the law,

but did not rule on the constitutionality of the program and instead noted Section 215 would undergo congressional review in June 2015 (Mills, 2015; De Vogue, 2015). In June 2015 Senator Rand Paul utilized a procedural maneuver to ensure Section 215 would expire. The culmination of these issues raises serious concerns about bulk collection.

Despite these concerns there are also many voices in support of the bulk collection procedures. Gilbert (2013), Mastracci (2014), Walton (2013), and Yoo (2014) contended that bulk collection authorized by Section 215 is legal. Mastracci (2014) opined that bulk metadata collection does not constitute a search, does not violate Fourth Amendment protections, and is essential for counterterrorism operations. Yoo (2014) articulated that Section 215 is not unique in American legal history, because its authorizations are basically the same as a grand jury subpoena. Walton (2013) explained the extensive legal considerations that goes into authorizing the now somewhat routine bulk collection authorizations. Gilbert (2013) explained that prior to the USA PATRIOT Act metadata collection crossing state lines could require several different warrants, but now the same collection can be achieved by a single authorization. The single authorization is more practical and allows investigators to focus more time on the investigation (Gilbert, 2013). With the Gilbert article it is important point out the article was published before the Snowden leaks. The Gilbert, Mastracci, Walton, and Yoo works create a sense of dismissal of Section 215 apprehensions.

Other scholars that seemingly oppose Section 215 and / or bulk metadata collection have also acknowledged an existing legal precedence for the procedures. Bedi

(2014), Davis (2014), McGowan (2014), and the United States President's Review Group on Intelligence and Communications Technologies (2013) recognized the Third Party Doctrine provides the legal precedence for Section 215 bulk collections. The Third Party Doctrine states that any record or information voluntarily given to a third party no longer is subject to the same constitutional protections as if the records were maintained by the individual (Bedi, 2014; Davis, 2014; Yoo, 2014). The Third Party Doctrine was established through the court cases of United States v. Miller and Smith v. Maryland, as well as the Right to Financial Privacy Act of 1978 (United States President's Review Group on Intelligence and Communications Technologies, 2013). Xhelili & Crowne (2012) argued information voluntarily presented to a third party could then collected by the government, as was the case in United States v. Miller. The Miller case dealt with bank records being seized while the Smith case dealt with phone records being seized in an investigation (United States President's Review Group on Intelligence and Communications Technologies, 2013). The Smith case is of particular importance, because its 1979 Supreme Court ruling determined there was no reasonable expectation of privacy with metadata (McGowan, 2014). This has provided more than 3.5 decades of legal precedence involving metadata collection, albeit never on the scale of the current NSA collections.

Critics allege the effectiveness of the NSA database authorized by Section 215 does not justify its size and scope of collection. The NSA metadata database is presumably the largest surveillance related database in the world containing call information on billions of calls (Regan, 2014). Despite capturing a portion of cellphone

metadata in the United States the Director of National Intelligence (DNI) explained the database has been used less than 300 times (Davis, 2014). Morrison (2014) argued that data mining on the scale of the NSA's bulk metadata collection is likely frivolous, because it wastes limited resources and increases the proverbial "haystack". There seems to be truth to the belief that the practice of bulk metadata is ineffective, but do to the secretive nature of the NSA it is difficult to determine the true effectiveness of the program.

The importance of Section 215 in this literature review is it illustrated the rift between those who support the section and those who oppose it. The benefits of Section 215 all involve the practical applications of the section. The contentions tend to center on the legality of the section and the NSA metadata collection. Some claim the NSA metadata collection is impractical, but this is difficult to truly judge as the NSA doesn't typically publish the results of investigations. Even the courts are divided on the legality of the section. Judge Leon of the District Court for the District of Columbia held in Klayman v. Obama, that the bulk collection of telephony metadata violates the Fourth Amendment (Davis, 2014). Then just 11 days later in *American Civil Liberties Union v. Clapper*, Judge Pauley ruled the bulk collection is not even a search (Davis, 2014). The facts, opinions, and analysis gathered from these articles left a literature gap of how the benefits of the section can be achieved while mitigating the controversies.

Section 218: Significant Purpose

Section 218 is one of the smallest sections of the USA PATRIOT Act, but it has at times been the center of some contention. Section 218 amends sections 104 and 303 of

the FISA by striking ‘‘the purpose’’ and inserting ‘‘a significant purpose’’ (H.R. Res. 3162, 2001). This simple change in wording expanded FISA authorizations to be available for non-foreign intelligence related cases, perhaps even including common law enforcement investigations (Francel, 2014; Sales, 2010). The term “significant” was added as a compromise between the legislators wanting the amendment to read “a purpose” and those opposed to the amendment all together (Glick, 2010). The conflict between the 2 sides basically centered on whether it was appropriate for FISA authorizations to be used in criminal investigations.

While there has not been many recent scholarly works regarding Section 218, there is still a divide between those whom embrace the section and those whom oppose it. Francel (2014) contended that FISA was created with the intent purpose of preventing secret investigations to be used in common criminal proceeding and Section 218 alters the original intent of the law. Glick (2010) dismissed similar assertions stating that the section does not violate any statute and is a practical solution for both intelligence agencies and law enforcement. For the purpose of this literature review, Section 218 furthers the divide between USA PATRIOT Act support and opposition. It also illustrated how the Title II sections of the USA PATRIOT Act are interconnected. For example theoretically an intelligence investigator could obtain a FISA authorization for a roving wiretap with delayed notification through Sections 206, 213, and 218, then share the information with a criminal prosecutor through Section 203. These observations made Section 218 important to this dissertation.

Summary of Literature

Punctuated Equilibrium

The PET provided the theoretical framework for this dissertation. A comprehensive understanding of the theory was essential, because PET was clearly illustrated with each of the national security policies examined in the literature review. The Givel (2010) description of PET was the most coherent of all the literature reviewed for this dissertation. PET is "long-term and relatively incremental policy change followed by an exogenous shock to a policy monopoly resulting in a tipping point oriented toward sharp and explosive policy change" (Givel, 2010, p. 189). The reviewed literature regarding PET provided a basic understanding of the theory, but reviewing security policies throughout America's history validated the theory.

Security Policy History

Reviewing U.S. national security policy was necessary for this dissertation in many ways. First it legitimizes PET by showing a consistent pattern of security policies remaining stagnant for long periods of time then rapidly and dramatically changing during episodes of crisis. Following the crisis, incremental changes typically bring the policy back to more equilibrium between civil liberties and security. Examining the ebb and flow of security strategies indicated that controversy, partisan politics, and ideological polarization is nothing new to national security policies. In addition, the historical review provided insight into the original intent of several statutes, policies, and procedures. The early American security policy history was particularly valuable as it demonstrated the Founding Fathers' vision of balancing national security with personal

freedoms. Finally history confirms that U.S. national security policies occasionally lead to abuses.

Surveillance Scandals

Exploring historic surveillance abuses was as essential to understanding the development of current national security policies as PET and previous security practices. The various FBI and Watergate scandals contributed to national security discussions by providing concrete examples of what the American populace would not tolerate. They each demonstrated how access to unconstrained surveillance assets has a tendency of leading to corruption. Time and time again surveillance has been used for personal political gain. Modern national security debates often look for the potential for abuse in an effort to avoid mistakes of the past. Often the debate spills into the courtroom.

Court Decisions

The Olmstead, Katz, and Keith court decisions were also paramount to the development of modern national security policies. Among the most important aspects of understanding any law is establishing firm legal precedence by reflecting upon previous decisions (Strouthes, 2007). The Olmstead ruling briefly established the notion that electronic surveillance did not constitute a search and was thus not subject to Fourth Amendment protections (Bedi, 2014; Ferguson, 2014). The Katz ruling reversed the Olmstead decision, but only in criminal cases (Francel, 2014; Harper, 2014). The Keith decision established the notion that surveillance must have either a direct connection to a foreign power or be authorized by a warrant (Harper, 2014; Howell & Lesemann, 2007;

Shults, 2011). These court cases and the others examined in this literature review shaped not only the law, but the public opinion about how surveillance should be conducted.

Church Committee

The Church Committee investigated, exposed, and provided suggestions for eliminating numerous questionable surveillance practices and policies (Berghel, 2014). Never before or since has there been such a comprehensive, objective, and public examination of U.S. surveillance operations (Mondale et al., 2014). No literature review involving modern surveillance policies would be complete without exploring the Church Committee Reports. The reports chronicled several decades of surveillance practices and developed recommendations based upon these findings (S. Rep. No. 94-755, 1976). These recommendations ultimately led to the FISA.

FISA / USA PATRIOT Act

The FISA is as important to this dissertation as the USA PATRIOT Act of 2001. FISA was established to constrain the federal government's domestic surveillance procedures (Butler, 2013). As described in the FISA section of this literature review, FISA created a theoretical wall between domestic and foreign investigations. This wall has been considered both a positive development for civil liberties and a negative development for national security concerns (Francel, 2014; Yoo, 2014). Much of Title II of the USA PATRIOT Act is designed to strike a balance in the FISA wall between security and liberty concerns (Gilbert, 2013; Harper, 2014). These amendments to FISA are at the center of USA PATRIOT Act controversies and there is adequate literature both

in support and opposition to the amendments. There was, however; a literature gap regarding any common ground between the sides of the debate.

Chapter 3: Research Method

Introduction

The purpose of this case study was to examine the advantages and contentions of Title II of the USA PATRIOT Act to better understand how PET described bounded rationality prevented incremental policy change from achieving the objectives of the provisions while mitigating the potential for or perception of the circumvention of the Fourth Amendment of the U.S. Constitution. In Chapter 4, I reaffirm the research questions and explain the central concept, research design, and methodology. After providing an in-depth look at how I conducted the study, I address trustworthiness and ethical concerns associated with the study. All studies have some issues of trustworthiness and ethical considerations. In this chapter, I identify these matters and plans for combatting the potential problems.

Research Design and Rationale

Central Research Question – Qualitative:

How does the bounded rationality of the PET of public policy change prevent incremental change from achieving the security objectives of Title II of the USA PATRIOT Act of 2001 while addressing concerns of potential circumventions of the Fourth Amendment of the U.S. Constitution?

Subquestion 1 - Qualitative:

How is political and ideological polarization prolonging the stagnation period of the PET of public policy change with the USA PATRIOT Act?

Subquestion 2 - Qualitative:

How does the PET of public policy change explain the enactment and extensions of the USA PATRIOT Act?

Subquestion 3 - Qualitative:

How does Title II of the USA PATRIOT Act affect U.S. law?

Subquestion 4 - Qualitative:

What are the benefits of Title II of the USA PATRIOT Act?

Subquestion 5 - Qualitative:

How is Title II of the USA PATRIOT Act controversial?

Central Concept

The central concept of this study centered on the division between those that support Title II of the USA PATRIOT Act and those that oppose it. This dissertation proposed it might be able meet the surveillance and information sharing objectives of the Title II provisions while mitigating the risk of circumventing Fourth Amendment protections. There have been, as I described in the literature review, repeated controversies related to Title II. It was essential to examine these contentions in the literature review to develop the academic foundation of the research. In the literature review, I pinpointed a literature gap involving how the differing factions agree or any potential for compromise. This dissertation contributed to filling this important gap.

Research Design

This dissertation was a case study. Case studies provide an in depth, contextual examination of a specific facet of a subject (Stake, 1995; Yin, 2012). The case study

approach is a preferred method of examining a law or policy, because of the depth of the analysis allows the researcher to truly examine the effectiveness of given strategies (Stacks, 2007). This is exactly what this dissertation hoped to accomplish; examine competing strategies and look for areas of compromise. More specifically, I used a holistic, single-case study to accomplish that goal. A holistic, single-case study, as defined by Yin (2014), is a study that concentrates on a lone unit of analysis without embedded subunits. The unit of analysis for this research was Title II of the USA PATRIOT Act.

There are several reasons this study focused only on Title II. First, of all the controversies associated with the USA PATRIOT Act, none better illustrated the dissention between supporters and critics of the title. This provided a comprehensive answer to the central research question and subquestions. Second, the disagreement about Title II is a current point of contention. During this dissertation, a May 2015 court ruling soundly pushed the topic back to Congress (De Vogue, 2015; Mills, 2015). The House of Representatives renewed the act, but the Senate failed to vote in time to confirm the renewal allowing Section 215 and others to expire (Kelly, 2015). The expiration did not last, as congress reauthorized Section 215 the next day with the passage of the USA FREEDOM Act.

The bulk metadata collection first authorized by Section 215 and recently the USA FREEDOM Act is an excellent example of Title II controversy. Much of the latest data collected and analyzed in this dissertation focused on the bulk metadata program. In addition, the bulk collection was a continuous endeavor that was reauthorized several

times per year to collect from each of the communication carriers, which explains why the analysis contained a disproportionate focus on the bulk metadata collection program. Finally most other controversies involving the USA PATRIOT Act are linked to a web of other laws or there is some disagreement about what actually authorizes the controversial action, but the government has been clear that Section 215 is the authority for the NSA's bulk collection efforts. Information about other controversial programs, policies, and even potential programs, including roving wiretaps, library record collections, and information sharing also contributed to the data analysis. These simple reasons make Title II an excellent case for determining if the objectives could be met without potentially violating Fourth Amendment protections.

In addition to having a well-defined unit of analysis, case studies must be clearly bounded (Putney, 2010; Stake, 1995; Yin, 2012). Time is a common boundary for most case studies (Yin, 2014). Title II of the USA PATRIOT Act is clearly bounded by time as the act came into existence in 2001. In addition to this chronological boundary there is another time related boundary is found in the study's theoretical framework.

The PET of public policy change in itself provides limited construct boundaries, but this case study is looking for information that could potentially be used in the specific incremental change period of PET. Yin (2014) opined that case boundaries are often "fuzzy", however; a sound theoretical framework can assist in defining the boundaries. The PET incremental change period has a unique style of bounded rationality with a high resistance to change and low political capital (Baumgartner & Jones, 2009; Boushey, 2012; Prindle, 2012; Sabatier, 2007). Any data deemed to be useful to this case study

would need to lower the resistance threshold while increasing political motivation for change. This creates a clearly defined boundary. Limiting the data to information directly related to the incremental change process creates a substantial boundary. This is not the most significant boundary for this particular case.

The most significant boundary for this case is its central focus on examining potential legislative refinement of data mining and information sharing. These 2 activities comprise most of Title II of the USA PATRIOT Act. The synergistic effects of data mining and information sharing is at the center of most of the contentions with Title II. Focusing on these 2 specific activities established an effective boundary for this case study. This is essential for the practicality of the study as it narrowed the emphasis to a manageable topic.

The second most important boundary for this case study was, as defined by the central research question, the specificity of achieving the security goals of Title II without circumventing the Fourth Amendment of the U.S. Constitution. This greatly narrowed the focus of the case study as the bulk of Title II focuses on data mining and information sharing. Scholars and policy makers have identified multiple potential conflicts between the USA PATRIOT Act and the constitution. The boundary of only addressing the Fourth Amendment limited the size and scope of the study without diminishing its significance. The constitution is not the only legal boundary for this study.

The case was also bound by Title II of USA PATRIOT Act, FISA, and the procedures of FISC. It is important to note that many scholars might argue that some programs attributed to Title II of the USA PATRIOT Act, including the NSA

programmatic operate outside the letter of the law. Barnett (2015), Berghel (2014), Kris (2014), McGowan (2014), and Regan (2014) argued that the bulk collections violate Fourth Amendment protections, because the lack of probable cause makes the collection an unreasonable search. Other scholars acknowledge the Third Party Doctrine, which essentially states that any information voluntarily turned over to a third party loses its privacy protections thus making the bulk metadata collection legal (Bedi, 2014; Davis, 2014; Xhelili & Crowne, 2012; Yoo, 2014). Kris (2014) further observed if taken literally, Section 215 only applies to the FBI not the NSA, making the collections illegal. As described in the literature review, the courts have issued conflicting decisions about the legality of surveillance practice (Davis, 2014). Despite the concerns of legality the program remains. For the purpose of this case study the NSA programmatic surveillance program is bound by the legal system.

Case studies are all also bounded by participation and sampling criteria (Miles, Huberman, & Saldaña, 2014). The draft sampling plan for this dissertation contemplated drawing data from a wide variety of civil liberty organizations that oppose Title II of the USA PATRIOT Act and multiple government organizations that benefit from the increased authorities of the title. While this would have generated an overabundance of information for the case study, it simply was not practical due to time and resource considerations. To narrow the scope of the study the sampling will be limited to the ACLU and DOJ. The ACLU is the leading opponent of the USA PATRIOT Act and the DOJ has been the most vocal governmental supporter of the statute. This created a boundary of membership in the ACLU or DOJ. The bounds of this case study are defined

by the numerous aforementioned boundaries. It is essential in a case study to understand how it is bounded (Putney, 2010; Stake, 1995; Yin, 2012).

The next step in the case study was linking the data to propositions. Linking the data to propositions is accomplished by using analytical techniques to foreshadow the outcomes of the data enquiry (Yin, 2014). The proposition in this particular case was that, there is a possibility to meet the surveillance and information sharing objectives of the Title II provisions without the risk of violating Fourth Amendment protections, which would ultimately lead to security/liberty equilibrium. The literature review produced repeated circumstances in which a threat to national security generated an aggressive, rapid response that garnered overwhelming, but short lived, support. In each case following the abrupt response, incremental changes restored the balance between security and liberty to a more socially accepted level. This ebb and flow of security policy validated conceptual framework of the PET of public policy change. This made relying on the theoretical proposition strategy a viable option for this case study.

Using the PET as the foundation for the theoretical proposition strategy in linking the data to the proposition lent credibility, validity, and reliability to this research. Valid theoretical constructs and propositions can be generalized and identified across time and space (Patton, 2002). Throughout American security policy history, PET is easily identifiable and consistently evident suggesting the theory is sound. This established a predictable pattern in regard to security policy lifespans and the aforementioned USA PATRIOT Act Title II proposition. If the policy cycle follows this pattern with the USA

PATRIOT Act, public tensions will continue to mount until incremental change makes the law more tolerable to the American public.

As the review of historic security policies and PET demonstrated, security policies and laws incrementally change either through legislative compromise or imbalances in partisan / ideological political control. Due to the current divisive nature of the USA PATRIOT Act, even changes in partisan control of the legislative and executive branches would not likely produce enough of an ideological shift to substantially affect the law. Barring any significant threat to security or clear cut example of substantial abuses of the authorities, Title II of the USA PATRIOT Act is unlikely to change in the near future. This case study sought signs that compromise is possible. Using the patterns established throughout security policy history, PET, and data collected through policy review, and document examination provided the basis for predicting the near future of the law. The stability of the USA PATRIOT Act, despite the simmering debate about the law, made searching for incremental change key to using PET in a theoretical proposition strategy.

As mentioned earlier, the theoretical proposition strategy linked the data to the proposition. The theoretical proposition strategy took the theory used to develop the research design, research questions, and general concept into the analysis phase by organizing the data evaluation procedures and establishing contextual conditions (Yin, 2014). The data for this project was organized into the general categories of *in support of* and *in opposition to* Title II of the USA PATRIOT Act based upon the ACLU and DOJ

perspective on the law. Any commonly shared viewpoints would have been considered potential areas of compromise, but only if the contextual conditions were met.

The contextual conditions for the proposition were as follows: 1.The polarization surrounding the USA PATRIOT Act remains general gridlock. 2. No credible threats to national security emerge. 3. No flagrant abuses of USA PATRIOT Act Title II authorities are revealed to the public. 4. The USA PATRIOT Act follows a path similar to what is described in PET. If these four contextual conditions remain it will become increasingly likely the USA PATRIOT Act will undergo additional refinement through incremental change. If there had been evidence of areas of compromise and the contextual conditions were met it would be likely the incremental change will involve compromise.

Role of the Researcher

I conducted the data collection and analysis from thousands of pages of legal documents and congressional hearings. All of the data is unclassified and available in the public domain. I have no conflicting interests or power relationships involved with the data collection. The data focused solely on ACLU and DOJ public interactions. I do not and never have worked with or for any of the organizations involved in the interview process, which could have adversely affected the analysis.

I do not have strong biases about the USA PATRIOT Act, as it does not affect my career or personal life in any facet. I believe there is credibility to both the argument for and against the Title II provisions of the USA PATRIOT Act. I hoped the study would reveal some areas of potential compromise between the opposing sides, but did not find any strong evidence of this and realize this is unlikely as the division between the sides of

the debate is significant. This dissertation was never meant to heal the rift between the ACLU and DOJ over the USA PATRIOT Act. It was, however; designed to contribute to the discussion about the rift, which it does.

Methodology

Participants

This case study used policies, testimonials, and relevant legal documents to collect data for the case study. The primary data was the spoken or written words of members of the DOJ and the ACLU. These organizations contain leading experts that clearly articulated the supporting and opposing views of Title II of the USA PATRIOT Act. The DOJ was selected because of the department's direct knowledge of USA PATRIOT Act Title II authorities and the organization is the leading voice in support of the law. The ACLU was selected because many leading opposition voices have emerged from this organization.

Sampling

In qualitative research there are no regulations governing sample sizes for the various approaches, as it is dependent only upon answering the research questions to the satisfaction of the researcher (Patton, 2002). In a case study the participants are purposefully selected (Patton, 2007). This case purposefully selected data related to the DOJ and ACLU for the reasons previously mentioned. This case study purposefully selected data that fully and accurately expressed the DOJ and ACLU viewpoints. The bulk of the data was from the records of members of the ACLU and DOJ in congressional testimony and legal proceedings.

Instrumentation

This case study used congressional hearings and legal arguments made in a court of law as the primary sources of data. The reputability of the sources is well known and accepted. Congressional testimony and court arguments are typically carefully articulated lines of reasoning, especially in such high profile topics as national security and civil liberties. These arguments were made in front of members of congress, judges, and even Supreme Court Justices. These were the best sources of data available at the time of collection. There is a likelihood for additional Supreme Court proceedings regarding at least one of the ongoing legal clashes over Title II authorities between the ACLU and DOJ, but as of now there are no superior sources of information on this topic.

Data Collection

As previously mentioned, the data collection for this case study focused on ACLU and DOJ exchanges about the contentions and benefits of Title II of the USA PATRIOT Act on the floor of congress and in numerous court cases. This study examined thousands of pages of debate between the ACLU and DOJ in congressional hearings. This resulted in more than 1200 pages of coded references. The criteria for using the congressional testimony in this study was simple. First the witness needed to officially represent the ACLU or DOJ. Second the testimony needed to contribute to answering the study's research questions. The data from the congressional hearings was vital to answering the research questions and the earlier hearings formed the foundations for both the ACLU and DOJ arguments that have since been repeated in several legal battles.

This study also examined thousands of pages of legal documents and oral arguments between the DOJ and ACLU over Title II authorizations. This resulted in more than 1,500 pages of coded material. Much like the congressional testimony these documents needed to either record a member of the ACLU's or DOJ's spoken words about Title II or directly expressed their respective organization's viewpoints on the subject. Furthermore the documents needed to assist in answering the research questions. One notable circumstance with the legal material was that often verbatim material ended up in multiple court proceedings as many of the cases were concurrent and virtually identical with simply different plaintiffs and defendants. In many cases the same attorneys contributed to multiple cases and submitted the same materials to different courts with only a change of name. In these instances the duplicate material was discarded for the purposes of this study.

A number of non-official documents including blogs and organizational posts were also considered and reviewed for this study, but ultimately these materials were not as useful to the study as the highly refined answers to congressional inquiries or legal arguments. Out of these sources only one ACLU speech and no additional DOJ material made it to data analysis. In addition, the data collection process examined thousands of pages of data in 99 Freedom Of Information Act (FOIA) obtained documents, although many of these documents proved irrelevant to answering the study's research questions and were also discarded.

Data Analysis

Due to the reliability and validity of the PET of public policy change the logic model technique of data analysis was appropriate for this dissertation. The logic model technique is a form of deductive qualitative analysis that involves generating a paradigm of expected outcomes based upon previously verified and consistent cause and effect patterns in the theoretical framework (Yin, 2014). Deductive analysis begins analysis by first looking at theory then narrowing down to specific data to see how the data results compare to the expected results (Trochim, 2006). Deductive analysis involves discovering patterns through the use of a preexisting organizational framework (Patton, 2002). This case study analyzed data using predictive coding schemes derived from the previously established PET patterns.

The literature review of this study demonstrated how all major national security policies in American history have followed the PET framework. The consistency of PET, in regard to political and ideological polarization, made it possible to predict themes in the data prior to collection. The deductive approach to analysis and coding consists of establishing codes and predicted outcomes prior to collection (Miles, Huberman, & Saldaña, 2014). Yin (2014) opined that in the theoretical proposition strategy guides every aspect of the dissertation including the questioning and expected results. Studying PET led to the development of the predictive coding used in this study. The logic model complemented the theoretical proposition strategy described in the research design.

The logic model for this case study effectively narrowed the analysis down to a single pattern matching variable seeking any crossover between those who support or

oppose Title II of the USA PATRIOT Act. The basis of the predetermined framework was the categories of *in support of* and *in opposition to* Title II of the USA PATRIOT Act based upon the interviewees' perspective on the law. This is precisely what was also used to link the data to the proposition with the theoretical proposition strategy. The deductive analysis was used to search for common ground between critic and supporters of Title II of the USA PATRIOT Act. By deducing that data from advocates of the title would be in the *in support of* category and critics of the title would be in the *in opposition to* category any anomalies outside this pattern might represent common ground. This formed the framework for coding scheme.

By applying the PET framework to Title II of the USA PATRIOT Act it appeared the statute has entered the stagnant change period. The hallmark of this stage is long periods of the policy only undergoing limited incremental change (Jones & Baumgartner, 2012). Generating a logic model based upon PET and the USA PATRIOT Act the incremental or stagnant change stage revealed opposing viewpoints with little or no room for compromise. The literature review has already illustrated the polarizing nature of the USA PATRIOT Act, but it has not revealed if there is any possibility of compromise. The logic model technique in this case predicted the leading voice of support (DOJ) and opposition (ACLU) would have strongly differing views. This case study searched for any instance that did not fit the prediction.

It was expected, due to the polarity of opinion about Title II of the USA PATRIOT Act, that each of the following categories would have at least 2 trends emerge from the data with one supporting the title and one critical of the title: Information

Sharing, Roving Surveillance, Metadata Collection, Significant Purpose Clause, and Delayed Notice Searches, Appropriateness of FISC Authorizations. The coding categories must be evaluated by their internal homogeneity and their external heterogeneity (Patton, 2002). In other words the data needed to be judged by how well they belong in their respective categories and how different the categories are. The categories mentioned provide distinct separation for the data and generated 12 coding sets. Following the logic model for PET during this stage in the USA PATRIOT Act's lifespan, it was predicted the following categories will be agreed upon by the ACLU and DOJ: USA PATRIOT Act could not have existed without the September 11, 2001 terrorist attacks, Title II is polarizing, Title II will not significantly change in the near future, compromise is unlikely, and change won't happen unless their side scores a decisive legal victory. This would have added another 5 – 10 coding categories depending upon the data results, but during analysis it became apparent that only the "USA PATRIOT Act could not have existed without the September 11, 2001 terrorist attacks" was relevant to the study. Miles, Huberman, & Saldaña, (2014) suggested that deductive coding should have between 12 and 50 codes annotated in a precise and logical structure. This study had 12 predetermined codes.

To better identify the crossover between supporters and critics of the law this study employed the QSR NVivo 10 software. The QSR NVivo 10 qualitative research coding software is a computer program that provides some advantages over hand coding when dealing with large volumes of qualitative data. The process of coding is used to populate a database in qualitative research in an effort to lend quantitative properties to

qualitative research, which is often subjective and not readily available for numerical analysis (Miles, Huberman, & Saldaña, 2014). The QSR NVivo 10 organizes data to decrease biases and errors during numerical analysis. The software did not eliminate the need for researcher input and analysis, but did aid in these tasks. Yin (2012) opined that currently there is no computer algorithm that adequately analyzes narrative data. The auto-coding function in this software struggled with accurately coding the data and all data was manually coded and uploaded in the program. The biggest benefit of the software was that the program provided an excellent organizational system for the vast amounts of data analyzed in this case study. The program also offered a variety of outputs. For this study all software generated products were manually verified to further the validity of the analysis.

Trustworthiness

Credibility (Internal Validity)

The internal validity, or credibility, of this case study should be assessed by carefully examining the theoretical framework, literature review, interviews, data analysis, and the researcher. Credibility is the degree of which the findings of a study make sense and produce an authentic account of the situation (Miles, Huberman, & Saldaña, 2014). With all qualitative studies, internal validity is a determination of the trustworthiness of the research as substantiated through the empirical evidence and previous findings (Rudestam & Newton, 2007). The credibility of this dissertation will likely be judged by standards similar to those described by Rudestam and Newton in 2007 as well as the standards of Miles, Huberman, and Saldaña in 2014. This section of

Chapter 3 evaluated the credibility of the theoretical framework, literature review, interviews, data analysis, and the researcher by looking at the authenticity of the subjects using the available empirical and historic data.

The theoretical framework in this case study was intertwined in all aspects of the study. Maxwell (2013) explained that the root of credibility concerns with theoretical frameworks generally stem from the underuse of an acceptable theory or from uncritical acceptance of a theory. The PET of public policy change has been widely accepted in academia for more than 2 decades (Givel, 2008). This lends to the credibility of the theory, but it was still important to validate PET for use in the study. Patton (2002) rationalized that for a theory to be a valid theoretical framework it must provide an accurate interpretation of the particular situation across time and space. The literature review examined several contentious national security policies throughout American history. The examination of each policy displayed the PET pattern of rapid change in response to an event, followed by stagnation and incremental change until equilibrium between liberty and security was reached. The literature review confirmed PET was a valid option for the theoretical framework of this case study.

Examining PET patterns in the literature review supports the use of the theory, but was not enough to mitigate the credibility risk of underusing the theory. To help eliminate the credibility risk, the PET was used in the data analysis as the foundation for the theoretical proposition strategy. The decision to use the theoretical proposition strategy was made after the literature review illustrated a consistency in security policies to follow the PET pattern. There was growing evidence that Section 215 of the USA

PATRIOT Act is on the precipice of incremental change designed to restore equilibrium between liberties and security. Using the PET pattern it was possible to predict general coding categories from both sides of the USA PATRIOT Act debate. The prediction in this case study was that there will be some overlap between the opposing sides and eventually an incremental change will develop from this common ground that will restore equilibrium and effectively end the debate. The prediction was derived from analysis of the reviewed literature.

The literature review also contributed to the credibility of a study. Yin (2014) asserted that credible case studies need a literature review that examines relevant topics to a point of saturation. Chapter 2 explored PET, pertinent security policies, surveillance scandals, applicable court decisions, the Church Committee, FISA, and of course, Title II of the USA PATRIOT Act. While reaching saturation is subjective, the literature review seems to provide a robust academic foundation that offers adequate information for understanding PET patterns in security policy history, historic surveillance abuses, relevant legal proceedings, and current points of contention with Title II. In addition, this literature review exhausted multiple scholarly databases of suitable peer reviewed articles.

To be considered a suitable article for this study the articles had to meet several requirements. First the articles had to contribute to the knowledge base of the study. With few exceptions, for current news articles, all the articles were peer reviewed. Unfortunately the peer review did not eliminate extraordinarily biased literature. Several articles could not be used, because, despite their peer review, they were steeped in

propaganda style talking points and void of useful information. The articles that did qualify, usually still had a noticeable agenda. To combat this a conscious effort was made to use articles both for and against the USA PATRIOT Act making it possible to express both sides of the debate. In addition, government reports, legal decisions, and U.S. laws were reviewed to fill gaps left by the articles. The extensiveness of the literature review added to the study's credibility.

My research credibility was not as strong as that of the theory or literature review, but should not significantly affect the case study's overall credibility. The primary credibility concern was my lack of research experience, as this was only the second time I have conducted true academic research, with the first time being my Master's Degree capstone. To mitigate this risk to credibility I have read nearly a dozen works that explain the inner workings of case studies. In addition to the Creswell, Patton, Maxwell, Rudestam, and Newton books that are mandatory in the Walden University curriculum; I have also looked to the works of experts in case study methodology. This additional research has included multiple articles and books from Stacks, Stake, Yin, Miles, Huberman, and Saldaña. With each aspect of this dissertation I referenced these books to ensure my plans and actions have been in line with the aforementioned case study experts.

Another common credibility concern with regard to the researcher is the researcher's biases (Patton, 2002). To combat this internal validity challenge I chose a topic that I find interesting and significant, but don't really have any predetermined assumptions about. The USA PATRIOT Act does not affect my career or daily life in any

noticeable way. Throughout the literature review I became hyperaware of the deeply polarizing nature of the debate that swirls around the USA PATRIOT Act. Most peer reviewed articles on the subject display some biases either for or against the law. By reviewing hundreds of articles looking at both content and predispositions has made me more aware of my own biases. While nobody is capable of being truly free of partiality, I do not hold strong feeling for or against the USA PATRIOT Act. Ultimately this relative impartialness contributed significantly to the credibility of this case study and even fill a niche mostly ignored by other studies on the subject.

Transferability (External Validity)

Case studies generate considerable amounts of information about a specific case, but the information does not necessarily only apply to that particular case. The more easily the results of a study can be applied to a related topic, the greater the transferability the study has (Miles, Huberman, & Saldaña, 2014). Yin (2014) suggested that single-case studies should be well grounded in theory and theoretical proposition to increase the external validity. The primary purpose of theory is not just to explain a phenomenon, but to build a framework of knowledge upon which to expound upon an explanation (Reynolds, 2007). A sound theory crosses time and space (Patton, 2002). The PET was not only the theoretical framework and basis for the theoretical proposition strategy in this case study, but it was also a sound theory with extensive empirical evidence of its suitability throughout key policy changes in history.

Using PET for the theoretical framework and proposition strategy added to the transferability of the study. The pattern described in the PET of public policy change was

consistently illustrated in the literature review. Despite actively looking for instances when the pattern did not match, none were found. This means it is likely that the theoretic proposition strategy used in the examination of Title II of the USA PATRIOT Act can not only be used for pattern recognition and predictive purposes for the single case, but could also be adapted for similar security policies. There have been numerous contentious security policies enacted since 2001. Researching these laws under a similar PET framework could help the search for areas of compromise, which would ultimately help usher in equilibrium between security and liberty. Following Yin's 2014 advice about using theory to promote transferability should be beneficial to this case study or any other single case study.

After clearly linking the single case to an acceptable theory, it was then necessary to present all new data with an abundance of "thick description". Thick description is accurately capturing perceptions of the various participants (Stake, 1995). Using an interview guide, digital recording devices, and transcription should make it easier to effectively portray the interviewees' opinions in a manner worthy of being pronounced "thick description". The more articulate the description of the data is, the better other researchers are able to determine if the case is similar enough to their case to consider using the same strategies or methodologies (Miles, Huberman, & Saldaña, 2014). A goal of this dissertation is to provide a thick description that is useful to other researchers.

Dependability

This section addressed dependability concerns with this case study. Dependability is the consistency and stability of the study (Miles, Huberman, & Saldaña, 2014). Yin

(2014) further addressed dependability as being the process that mitigates errors and reduces biases in research. Maxwell (2013) suggested the best way to create a consistent and stable study is to identify the threats to validity and draft a strategy aimed at those specific threats. The most significant threat to errors and biases in this holistic single-case study came from the data analysis. Repetitive examination of the results helped mitigate data analysis errors.

Dependability confirmation is obtained through rigorous auditing (Creswell, 2013; Miles, Huberman, & Saldaña, 2014). This includes the data analysis process. Yin (2014) explained that an evaluation of the analysis process must demonstrate how all the evidence, regardless of how it affects the study's proposition, was explored. To help illustrate how all data has been examined for this study, the results of the analysis made special mention of any data that falls outside expected results or was significantly different than similar data. In addition, the codebook, notes, and all source are available to further the dependability of the case study.

There were a few errors that were identified upon further review of the data, but none of these errors would have significantly affected the results of the study. A reoccurring error that was caught during the analysis was on a few occasions statements from non-ACLU or non-DOJ participants in the legal proceedings were attributed to the ACLU or DOJ. This error occurred because in some of the legal documents it was difficult to ascertain when the shifted to a third party. This problem was quickly identified and rectified. With each legal document the participating attorneys and their respective organizational affiliation was identified either on the first page of the

document or the last. By simply printing off the listed affiliation it was easy to identify each attorney's affiliation during the oral arguments and thus eliminate the potential for that error.

Confirmability

Confirmability is the degree of which a study is free from the burden of researcher biases or how differently the results would be if the research was conducted by a different researcher (Miles, Huberman, & Saldaña, 2014). Basically if identical procedures were performed by different researchers in parallel studies the differences in the results due to researcher biases illustrates confirmability. Fortunately confirmability can be strengthened through methods used to diminish threats to other trustworthiness aspects. Chronicling the data collection and analysis with thick description, illustrating how all evidence affected the study, and being vigilant for researcher biases all reduce threats to confirmability (Miles, Huberman, & Saldaña, 2014; Patton, 2002). As previously explained each of these techniques were employed to bolster the trustworthiness of this case study.

Of these techniques reflexivity is among the most effective way to reduce researcher biases (Miles, Huberman, & Saldaña, 2014; Patton, 2002; Yin, 2014). Reflexivity is consciously being attentive to the perspectives of the participants and the researcher (Patton, 2002). To accomplish this I continuously assessed myself and the data collection and analysis procedures for potential biases. It is especially important to monitor the influence of my preexisting attitudes and opinions when conducting the data analysis. The main evidence I have that I kept my biases in check was that I truly desired

to find a significant potential area of compromise between the 2 groups and even though such findings eluded this dissertation I did not skew the data to illustrate an area of potential compromise. For example I believe the USA FREEDOM Act amendments to Title II of the USA PATRIOT Act should be palatable for both organizations, but the evidence suggests that the compromise does not please either group, so I mentioned the changes without inferring it was an acceptable compromise.

Ethical Procedures

IRB Ethics Planning Worksheet / NIH Certification / IRB Approval

Prior to conducting this dissertation I completed both the Walden University Institutional Review Board (IRB) ethics planning worksheet and the National Institutes of Health (NIH) human research protections certification. These items are mandatory for IRB approval to collect data. The ethics planning worksheet included a proposal to conduct telephone interviews, but ultimately that method of data collection was not used and instead publically available records were used instead. The overall ethical risk for this dissertation was minimal. The IRB application was approved on November 16, 2015. The IRB ethics planning worksheet is available in Appendix A and my NIH certificate is available in Appendix B.

Summary of Chapter 3

Chapter 3 has presented the plan for this study. The chapter has described in detail the research methodology of this study. The central concept of this study centered on the division between those that support Title II of the USA PATRIOT Act and those that oppose it. An examination of this central concept drove the research to answer the

question: How does the bounded rationality of the PET of public policy change prevent incremental change from achieving the surveillance and information sharing objectives of Title II of the USA PATRIOT Act of 2001 while addressing concerns of potential circumventions of the Fourth Amendment of the U.S. Constitution? The methodology was designed to adequately answer this question while mitigating issues of trustworthiness and ethical risks. For each ethical concern or trustworthiness issue, Chapter 3 provided a plan to address the problem. With the IRB approval and acceptance of the proposal, I was approved by Walden University to conduct research starting in November 2015.

Chapter 4: Results

Introduction

The data that I examined in this case study provided ample information to answer all the research questions to a point of saturation. In Chapter 4, I will explain how I collected and analyzed the data. The data collection relied heavily on numerous congressional testimonies and volumes of legal material developed in a multitude of court cases. All the data directly represent either DOJ or ACLU viewpoints. As I previously explained, these organizations were purposefully selected as they are the leading voice of support for Title II authorities and the leading voice of opposition respectively. Due to the consistency of the PET of public policy change, the logic model technique's predictive coding was a logical choice for the data analysis. The results from the predictive coding were as I expected, showing that bounded rationality caused by ideological polarization is preventing incremental change from achieving the security objectives of Title II while mitigating constitutional concerns.

Purpose

The purpose of this case study was to examine the advantages and contentions of Title II of the USA PATRIOT Act to better understand how PET described bounded rationality prevented incremental policy change from achieving the objectives of the provisions while mitigating the potential for or perception of the circumvention of the Fourth Amendment of the U.S. Constitution.

Central Research Question – Qualitative:

How does the bounded rationality of the PET of public policy change prevent incremental change from achieving the security objectives of Title II of the USA PATRIOT Act of 2001 while addressing concerns of potential circumventions of the Fourth Amendment of the U.S. Constitution?

Subquestion 1 - Qualitative:

How is political and ideological polarization prolonging the stagnation period of the PET of public policy change with the USA PATRIOT Act?

Subquestion 2 - Qualitative:

How does the PET of public policy change explain the enactment and extensions of the USA PATRIOT Act?

Subquestion 3 - Qualitative:

How does Title II of the USA PATRIOT Act affect U.S. law?

Subquestion 4 - Qualitative:

What are the benefits of Title II of the USA PATRIOT Act?

Subquestion 5 - Qualitative:

How is Title II of the USA PATRIOT Act controversial?

Chapter Organization

This chapter begins with a description of the political, legal, and ideological contentions peaking between the ACLU and the DOJ during the time of the data collection. I will illustrate the demographic identification of the data sources. Next, I will explain in detail the data collection methods. Following the data collection methods, I

will dissect the data analysis (logic model technique with predictive coding) procedures including the results and evidence of trustworthiness. I end the chapter with a summary of its contents.

Data Collection Setting

Origins of Contentions

Understanding the setting for this data collection it is important to review the strife between the ACLU and the DOJ. The current friction between the ACLU and DOJ over national security surveillance, especially bulk collection of non-content data, began in 2001 and has had incremental spikes in recent months, as the subject of bulk collection has continued to make headlines. The federal government enacted a series of data collection programs within weeks of the September 11, 2001 terrorist attacks designed to reform intelligence operations related to national security (Gonzales, 2015). Almost immediately the ACLU took issue with Section 215 of the USA PATRIOT Act. By 2005 the ACLU was engaged in a legal battle over the potential collection of library records by the DOJ (Oder, 2005). This case, Doe v. Gonzales, would be the first of many surveillance related litigations brought by the ACLU.

In midst of this initial legal battle, which ended with the DOJ dropping the specifically opposed collection, the New York Times exposed the controversial Terrorist Surveillance Program (TSP). The TSP was an NSA, CIA, and DOJ bulk international communication collection program (Gonzales, 2015). The ACLU claimed to have suffered injury due to chilled communication caused by the TSP violating their First and Fourth Amendment rights (Wong, 2006). The ACLU eventually lost the case and was

denied a Supreme Court appeal, but the TSP was ended due to constitutional concerns (Gonzales, 2015; Hughes, 2012). Even with the ending of TSP neither bulk collection nor the ACLU's opposition truly subsided.

While TSP was stopped, a series of acts were used as the justification and authorization of the bulk collection of telephone and internet non-content information. The bulk collection was authorized by FISA Section 402 in 2004, FISA Section 501 in 2005, then the Protect America Act of 2007, the FISA Amendments Act of 2008, the FISA Amendment Acts Reauthorization Act of 2012, Section 215 of the USA PATRIOT Act, and FISA Section 702 (Anderson, 2014; Banks, 2010; Gilbert, 2013; Office of Director of National Intelligence [ODNI], 2013). As of November 30, 2015, the USA FREEDOM Act is the source for NSA metadata monitoring, but now rather than the government maintaining the metadata the communication carriers maintain the data (H.R. Res. 2048, 2015). The changes to the bulk data programs, brought about by the USA FREEDOM Act, appears to be a compromise by the government and a win for the ACLU. Somewhat surprisingly, the ACLU has not embraced the changes. Alex Abdo, Staff Attorney in the ACLU's Speech, Privacy and Technology Project, described the USA FREEDOM Act's changes as a "symbolic victory" (Duncan, 2015).

Recent and On Going Legal Battles

There is some reluctance from the DOJ and ACLU to participate in a study involving national security, which could be due to the fact that the ACLU and DOJ are engaged in several high profile court cases. These court battles have amplified in intensity and frequency during the past 2.5 years. This is in part because of the publicity

of Edward Snowden's unauthorized disclosure of various national security programs including bulk metadata collection. Most of the lawsuits have involved bulk data collection or Freedom Of Information Act (FOIA) requests related to bulk data collection, but not all of these cases were in response to Snowden's exposure of data collection programs.

Amnesty International v. Blair (later Clapper) began prior to the Snowden releases and focused upon the potential for the FISA Amendment Act of 2008 to authorize bulk collections that could infringe upon First and Fourth Amendments protections. The Supreme Court decided the ACLU and Amnesty International did not have standing, as there was not concrete proof of injury (*Clapper, Director of National Intelligence, et al. v. Amnesty International USA et al.*, 2012).

Shortly after the Snowden leak, Larry E. Klayman, in conjunction with the ACLU, sued the federal government over the constitutionality of the bulk phone and internet collections. Klayman v. Obama (actually 3 sequential cases) claimed that the bulk collections authorized under Section 215 of the USA PATRIOT Act violated First and Fourth Amendment protections (Klayman, 2015). In a series of court actions from August through November 2015, the D.C. Circuit Court declared Klayman, et al. did have standing due to the speculative nature of their claims (Whitaker, 2015). This case is currently back at the district court level. Klayman v. Obama, like many national security related court battles, is likely to last several years. Klayman is not the only current case between the ACLU and DOJ regarding bulk metadata collection.

Anna Smith, with legal assistance from the ACLU, Electronic Frontier Foundation (EFF), and the Smith + Malek law firm, filed a claim against the government similar to Klayman's claims (Electronic Frontier Foundation website, 2015). Smith asserted the amount of information collected, presumably including hers, constituted an unwarranted virtual search due to the potentially rich and revealing description that could be attained through the analysis of the data (Smith IV, 2015). The DOJ countered by stressing that the Section 215 authorized collections have been repeatedly reviewed by congress and the courts and have been found to be constitutional, but even if it were unconstitutional Smith's case would no longer have standing, because the USA FREEDOM Act now expressly authorizes the analysis of metadata (Whitaker, 2015). Smith like Klayman continues to be played out in the courts and likely contributes to the ACLU's and DOJ's hesitance to be interviewed about the USA PATRIOT Act. The Smith and Klayman cases are not the only cases still clinging to life in the legal system.

2015 was an interesting year for another relatively long lasting court battle, ACLU v. Clapper. On May 7, 2015 the Second Circuit Court of Appeals held that the NSA metadata bulk collection program exceeded the authorities of Section 215 of the USA PATRIOT Act (Dunn, Eisenberg, Jaffer, Abdo, & Toomey, 2015). This ruling effected both the Klayman and Smith cases, but not significantly. All 3 cases were basically put on hold as Section 215 was set to expire less than a month after the ruling and the courts expected congress to settle the issue (De Vogue, 2015; Mills, 2015). This eventually led to the USA FREEDOM Act and questioning the legal standing of the plaintiffs in each case.

The 3 cases are likely to have similar outcomes. They have had a history of following parallel trajectories. There was one seemingly major difference in December 2013 when the courts declared in Klayman v. Obama that the bulk data collection violated the Fourth Amendment, but days later in ACLU v. Clapper stated there was not a search and did not violate the Fourth Amendment (Davis, 2014). Even this apparent drastic difference faded and the cases quickly aligned once more. The advantage the closeness of these cases present to this study is they provide the ACLU and DOJ platforms to clearly express and perfect their arguments for and against the surveillance programs once authorized by Section 215 of the USA PATRIOT Act.

Demographics

This study examined the works of the 2 most prominent voices regarding the USA PATRIOT Act. As previously described the ACLU has been the leading opponent of the USA PATRIOT Act and the DOJ has been the leading voice in support of the law. The ACLU is a nonpartisan, nonprofit, civil rights organization with more than 1 million members (ACLU website, 2014). While the ACLU performs a multitude of functions it is best known for its legal services. The ACLU appears to be rather selective of whom represents the organization on the national stage, as a very select number of ACLU attorneys ever participate in the high profile engagements. Typically the leading attorneys in a specific field handle all the congressional hearings and complex court cases. In this study, many of the ACLU attorneys were repeatedly the authors or orators in legal proceedings, debate, or testimony. Jameel Jaffer, Alex Abdo, and Patrick Toomey were commonly the originators of sources coded in the data collection.

This study used a somewhat wider selection of DOJ representatives than that of the ACLU's representation, but this was somewhat expected and easy to explain. The primary cause of this difference is, in many of the congressional hearings high level officials testified rather than DOJ attorneys. The various court cases examined in this study illustrated that the DOJ handled its representation much like the ACLU with a select group of top level attorneys articulating the DOJ's view. Works of staff attorneys Douglas N. Letter, H. Thomas Byron III, Henry C. Whitaker, and Benjamin C. Mizer accounted for a significant amount of the data collected in this study. As mentioned before the advantage of having a limited amount of high level professionals articulate an organization's views is that viewpoint comes across clearly and consistently. Both the DOJ and ACLU accomplished this by having the same people repeatedly engaged in the legal debates.

Data Collection

Congressional Hearings

The data collection for this case study began with an examination of the numerous congressional hearings in which the ACLU and DOJ debated the USA PATRIOT Act. This study coded the transcripts of 8 such congressional hearings and 2 additional Oversight of the Federal Bureau of Investigation hearings that had particular relevance to the study. The 1,240 pages of these transcripts yielded 600 references relatively equally split between the ACLU and DOJ. These hearings were essential to both organizations in forming their respective viewpoints on Title II of the USA PATRIOT Act. The themes developed in the hearings changed little through the years.

Many of the talking points used in even the earliest of hearings was repeated in later hearings and numerous court battles throughout the years. Due to this fact, starting with the hearings provided an effective platform for refining the coding references. All changes to the coding were developed while coding the hearings. The repetitive nature of the arguments made by the ACLU and DOJ aided the study. This allowed the same arguments to be consistently coded, which generated a clear and concise representation of the ACLU's and DOJ's views on Title II of the USA PATRIOT Act. It also facilitated the answering of the research questions to the point of saturation.

Responses to Congressional Inquires

The ACLU has a Freedom Of Information Act collection which contains approximately a hundred works related to Section 215 of the USA PATRIOT Act including the 2 responses to congressional inquiries coded in this study. Both of these letters were penned by Assistant Attorney General, Ronald Weich as he represented the DOJ in a congressional review. Mr. Weich was the Assistant Attorney General from 2009-2012 (DOJ website, 2013). It is important to note these letters, one written in 2009 and one in 2011, were both authored before the Snowden leaks. This demonstrates both that there were concerns about Section 215 prior to public knowledge about the NSA metadata collection program and that the DOJ has consistently valued aspects of the provision. In this study these letters only generated 32 references to 4 codes, but the references clearly articulated the DOJ's views. In addition, the Assistant Attorney General used at least one of these letters repeatedly just changing the names of the

addressed member of Congress. The letter was only coded once as not to skew the study findings.

Human Rights Hearing

The ACLU has regularly been a leading public voice of concern about the balance of surveillance and liberty. One such public petition by the ACLU came when Alex Abdo, one of the primary ACLU staff attorneys, testified before the Inter-American Commission on Human Rights on October 28, 2013. Mr. Abdo's testimony was valuable to this study because this it demonstrated the organization's consistency in expressing its concerns in multiple forums, as this hearing does not share the magnitude of legal cases or congressional hearings. The testimony was consistent with other coded ACLU sources and provided a total of 18 references. This testimony was the only non-legally binding deposition used in this study.

Amnesty v. Blair (Clapper)

Amnesty v. Blair (Clapper) was crucial to the data collection for the case study. While many of the available legal documents for this (and all the court cases) were not applicable to the study, there were still ten documents that contributed 410 coded pages and 325 references. The arguments used by the ACLU and DOJ in this case mimicked the arguments used in the congressional hearings and other court proceedings.

ACLU v. Clapper, Klayman v. Obama, Smith v. Obama, ACLU v. FBI

The ACLU v. Clapper case was equally as important to this case study as Amnesty v. Clapper was. The legal documents presented in this case contributed 360 coded pages and 548 references. Again the arguments presented by both sides changed

little in this case, but there was one difference in both sides of the debate. Since ACLU v. Clapper was in response to the Edward Snowden leaks, the ACLU arguments changed from the theoretical potential of abuse from USA PATRIOT Act authorities to declaring the bulk metadata collection program was an abuse. This in turn caused the DOJ to change their argument from declaring there was no evidence of abuse to explaining how the program authorized under Section 215 was constitutional. This also played out in the court case's doppelganger cases of Klayman v. Obama and Smith v. Obama.

ACLU v. Clapper, Klayman v. Obama, and Smith v. Obama are all such similar cases that their outcomes seem destined to be intertwined. Whenever a significant development occurs in one of the cases the other two often must explain or defend the happenings. This has led to the arguments being carefully and consistently articulated to ensure all the attorneys are in unison. In fact many of the attorneys participate in all 3 cases. This has been beneficial to the case study presenting clearly definable viewpoints for both organizations.

Much like ACLU v. Clapper, the cases of Smith v. Obama, Klayman v. Obama, and ACLU v. FBI all express these viewpoints. Smith v. Obama documents provided 7 source documents to this study. From these 7 documents there were 499 coded pages and 197 code references. Klayman v. Obama did not start out as an ACLU case, so most of the documents related to this litigation were outside the parameters of the data collection, but there were 5 source documents that met the data collection criteria. The 5 sources provided 237 pages, which generated 94 code references. ACLU v. FBI is a supporting legal battle directed by the ACLU to prompt the FBI to deliver on a number of Freedom

of Information Act requests. This case only produced one legal document applicable to this case study, but in its 33 pages were 93 code references.

How Data Were Recorded

To better identify the crossover between supporters and critics of the law this study utilized QSR NVivo 10 software. The QSR NVivo 10 organizes data to decrease biases and errors during numerical analysis. The software did not eliminate the need for researcher input and analysis, but did aid in these tasks. QSR NVivo 10 has an auto coding function, but it was unable to accurately delineate between the ACLU and DOJ nor consistently determine the correct code to use for the specific passages. For these reasons I deductively coded the approximately 3,000 pages of data using a predictive coding strategy of a logic model technique based upon the consistent finding of the PET of public policy change. This is explained in further detail in the Data Analysis section of this chapter. In addition, I manually extracted the subthemes from the coding by moving each code onto a word document for ease of printing and analysis. QSR NVivo 10 was very helpful in organizing the 45 sources of data. The software increased the efficiency, reliability, and credibility of this study.

Variations from Original Data Collection Plan

The most significant variation from the original data collection plan was the inability to conduct the telephone interviews. The original plan called for telephone interviews with 5 members of the ACLU and 5 members of the DOJ. The DOJ was willing to allow one interview, but was not willing to sign any document including Walden University's mandatory consent form. The ACLU never responded to any

emailed request, but I did not pursue it further, because of the inability to interview the DOJ. Initially this seemed to be an impassable obstacle to continuing the study.

The original plan had always called for examining and coding congressional hearings and court cases prior to conducting the interviews. I decided to begin this coding process and wait 2 months before re-approaching the DOJ and ACLU. During the months of coding the congressional hearings it became clear that the interviews would be less necessary than originally thought, as both sides of the argument changed little in the last decade. I contacted the DOJ again a couple months after initially being told only one interview and no signing consent forms. This time I received an email back from the DOJ that did not specify only one interview, but did state that 5 interviews was very unlikely. The email reiterated that the interviewee was not allowed to sign any forms. This only seemed like a moderate set back the second time around, because by this point in the data collection it appeared there was a chance of answering all the research questions to a point of saturation without the interviews.

Due to the lack of interviews, the court case documents coded in this study became paramount in answering the research questions. Every source related to the court cases echoed the arguments made in congressional testimony and confirmed each organization's stance on Title II of the USA PATRIOT Act. The combination of the congressional hearings and court cases answered the research questions to the point of saturation. This was fortunate as the inability to conduct the interviews could have derailed the case study, had the legal battles and congressional inquiries not answered the questions. With 3 current court cases involving the ACLU and DOJ debating the

contentions and merits of the USA PATRIOT Act playing out at the time of the data collection, I was able to obtain current relevant information. The arguments made in the legal proceedings essentially answered the questions I would have asked in the interviews. Ironically I believe the 3 ongoing lawsuits contributed to the reluctance of the organizations to participate in the interviews, but their legal arguments sufficed to answer the research questions.

Data Analysis

Logic Model Technique / Coding Process

The reliability and validity of the PET of public policy change made the logic model technique of data analysis an appropriate choice for this dissertation. The logic model technique is a form of deductive qualitative analysis that involves generating a paradigm of expected outcomes based upon previously verified and consistent cause and effect patterns in the theoretical framework (Yin, 2014). Deductive analysis begins analysis by first looking at theory then narrowing down to specific data to see how the data results compare to the expected results (Trochim, 2006). Deductive analysis involves discovering patterns through the use of a preexisting organizational framework (Patton, 2002). This case study analyzed data using predictive coding schemes derived from the previously established PET patterns. The predetermined codes were:

ACLU Opposition to FISA (FAA)	DOJ Support of FISA (FAA)
ACLU Opposition to Section 203	DOJ Support of Section 203
ACLU Opposition to Section 206	DOJ Support of Section 206
ACLU Opposition to Section 215	DOJ Support of Section 215

ACLU Opposition to Section 218 DOJ Support of Section 218

ACLU & DOJ: USA PATRIOT ACT enacted due to 9/11

The coding process for this dissertation was designed to highlight that the current policy stagnation of Title II is aligned with the bounded rationality element of the PET of discontinuous change. The PET illustrates how stagnation occurs when bounded rationality prevents the forces of change from overcoming the resistance to this change (Baumgartner & Jones, 2009; Boushey, 2012; Prindle, 2012; Sabatier, 2007). The literature review demonstrated with previous national security policies that political and ideological polarization contributed to the bounded rationality. This dissertation's logic model technique used predictive coding analysis to illustrate the seemingly complete polarization between the leading support and opposition voices to Title II of the USA PATRIOT Act.

The USA PATRIOT Act has been supported and opposed equally by both major U.S. political parties, so for the purpose of this dissertation political polarization was not a significant factor. Ideological polarization appeared to be the dominant contributing factor to the bounded rationality surrounding Title II. Ideologically, the DOJ (made up of both Democrats and Republicans) seems to be collectively in favor of Title II authorities because of the benefits to security operations. Ideologically, the ACLU (made up of both Democrats and Republicans) seems to be collectively opposed to Title II authorizations due to civil liberty concerns. By focusing on the more contentious sections of Title II, it was possible to use predictive analysis to deduce how these 2 organizations would respond to the various Title II authorities. This allowed for a predictive coding scheme in

which the ACLU would always publically oppose Title II and the DOJ would always publically support the title. Any significant deviation would have illustrated areas of potential compromise, but none were found with this data.

The sections selected for the predictive codes were developed by reviewing Title II of the USA PATRIOT Act to deduce which areas of debate would likely illustrate the ideological division between the ACLU and DOJ. Ideological polarization is a contributing factor to the PET described, bounded rationality that has prevented meaningful incremental policy change with Title II of the USA PATRIOT Act. One of the most easily identifiable points of contention between the DOJ and ACLU is how the title has affected FISA. It was expected that the data would show that the ACLU generally objects to how Title II of the USA PATRIOT Act affects FISA, while the DOJ supports the changes. The FISA codes were expected to be infiltrate all the Title II debates, regardless of which specific provision was being argued.

As expected FISA was mentioned extensively throughout various debates about Title II, but the codes about specific Title II sections were equally as important. These codes not only show elements of bounded rationality, but also explain the specific benefits and contentions of the title, answering Research Subquestions 3 through 5. Although several sections of Title II have been controversial at times, Sections 203, 206, 215, and 218 have consistently been debated by the DOJ and ACLU. By selecting these codes it was possible to chronicle the arguments in the course of nearly 15 years. The other sections of the title simply do not have enough associated data to adequately identify the elements of bounded rationality preventing effective incremental change.

Following the typical tract of the PET of public policy change, it was expected that the DOJ and ACLU would be completely locked in opposition.

The exception to this is the last set of codes (USA PATRIOT ACT enacted due to 9/11) which assumed both organizations would agree that the USA PATRIOT Act could not have been implemented if it were not in response to the September 11, 2001 terrorist attacks. For this particular code it was expected that the DOJ would state that the USA PATRIOT Act was designed to correct security deficiencies that contributed to the attacks. It was also expected that the ACLU would state that Americans would not have tolerated the passage of the act except for during the distress of the attacks. This code was designed to further anchor the logic model technique to the PET of public policy change. The foundation of PET is that rapid and dramatic change occurs due to a shocking event that spurs action. This dissertation asserts that the 2001 terrorist attack was that outside event that generated the USA PATRIOT Act's momentum and put the law on the PET pathway.

During the coding process I paid particular attention to any instance in which the ACLU supported Title II authorities or the DOJ opposed the authorities. There was very little substantial Title II support by the ACLU or DOJ opposition to the authorities. In an April 2004, hearing before the Committee on the Judiciary United States Senate, Dani Eyer, representing the ACLU, expressed limited support of Section 203 of the USA PATRIOT Act. Ms. Eyer explained that she understood why the wall between criminal and national security investigations should a "little less substantial" (*Preventing and responding to acts of terrorism: A review of current law*, 2004). While this was not a

definitive showing of support, it was the only example found of the ACLU supporting Section 203.

In the same hearing Ms. Eyer also stated the ACLU was not in favor of "doing away with" the roving wiretap provision. This was the only example found of the ACLU lending any support to Section 206 of the USA PATRIOT Act. Clearly this, like the Section 203 support, was a somewhat trivial expression. I believe Ms. Eyer's support was to show that she was open to pragmatic national security solutions as long as they did not interfere with civil liberties. I also believe that these 2 instances in which the ACLU seemed to sway from what was expected by the PET of public policy change were not indicative of any significant potential for compromise between the DOJ and ACLU. Neither of these notions of support were very substantive and given they were the only illustrations of ACLU support of these provisions, it is unlikely this represents an area of compromise for the organization.

There were also 5 instances in 2 separate congressional hearing in which the DOJ expressed some opposition to Section 215 of the USA PATRIOT Act. This is not to say there is any sign of compromise in the 5 instances. Four of the accounts expressed concern that Section 215 was too time consuming or difficult to use. These seemingly opposing viewpoints were really a way of defending against the ACLU's presumption that the FBI used Section 215 to avoid the rigors of a warrant or subpoena. The final instance of opposition to Section 215 was the DOJ stating they were not opposed to the language of Section 215 being clarified in an amendment if it helped with the renewal process. This brief line in the testimony could be seen as admission that the section's

authorities are not clearly defined, but I believe it is more a testament to the DOJ understanding that they do not write law, but rather work within the confines of the written law.

Throughout this study I did not find any other instance in which either the DOJ or the ACLU expressed views that were inconsistent with what was expected. This lends credibility to study as it demonstrates that the logic model based on the PET of public policy change is sound. The few discrepant cases had little effect on the study due to their lack of consistency and intensity. If any of the discrepancies had been routinely repeated or if any of them had been a strong showing of support or opposition it would have represented an area of possible compromise between the organizations. The ACLU and DOJ have both repeatedly and consistently expressed their official viewpoints and as predicted using the PET of public policy change these viewpoints are locked in opposition with little chance for change unless acted upon by an outside force.

Code: ACLU Opposition to FISA (FAA)

The code "ACLU Opposition to FISA (FAA)" refers to the ACLU's general opposition to the changes to FISA brought about by Title II of the USA PATRIOT Act of 2001 and the FISA Amendments Act (FAA) of 2008. The ACLU's opposition to current FISA and FISC operations was one of the most prevalently discussed issues found in this case study. This particular code was found 323 times in 20 different sources. Most of the sources were from congressional hearings after 2008 related to the USA PATRIOT Act and FAA or from the recent court cases between the ACLU and DOJ.

The main theme discovered in this code stemmed from the USA PATRIOT Act Section 215's bulk collection programs. The ACLU often argued against the legality of the FISC authorizations of bulk collections. Approximately 249 (77%) of the 323 coded references related in some way to FISC's role with bulk collection authorizations. Section 215 was specifically mentioned 13 times. Bulk collections were specifically mentioned another 8 times and dragnet surveillance was mentioned 14 times. The ACLU also contended that the FISC bulk collection permissions violated the U.S. Constitution with explicitly expressed concerns of Fourth Amendment infringements 11 times and First Amendment violations 12 times. General constitutionality concerns related to large scale surveillance were raised 36 times. Similar ACLU themes were discovered repeatedly throughout the study.

Code: DOJ Support of FISA (FAA)

The code "DOJ Support of FISA (FAA)" refers to the DOJ's general approval of FISA and FISC changes brought about by Title II of the USA PATRIOT Act and the FISA Amendments Act of 2008. This code was important to the study because it chronicled the DOJ's rebuttal to the ACLU's claims about the post - USA PATRIOT Act FISA system and explained some of the benefits of FISA to the DOJ. This particular code was found 191 times in 25 different sources. All but one of these sources came after the FISA Amendments Act of 2008. Much like the code "ACLU Opposition to FISA (FAA)", sources for "DOJ Support of FISA (FAA)" primarily stem from recent court cases, but a few of the sources are congressional testimony.

Again like the code "ACLU Opposition to FISA (FAA)", the main theme discovered in this code stemmed from the USA PATRIOT Act Section 215's bulk collection programs. The DOJ repeatedly touted the legality of the FISC authorizations of bulk collections and the oversite the FISC brought to the metadata program. This code mentioned Section 215 a total of 67 times. It referred to the general constitutionality of the bulk collection program 12 times. It specifically referred to the Fourth Amendment 13 times, often using the phrase "consistent with the Fourth Amendment". In addition, there was one example of the DOJ citing Judge Batchelder's explanation of subjective chill from a First Amendment violation and applying that to the ACLU's argument against mass collection to suggest the ACLU had not suffered under the program (West, Bharara, Letter, & Lenerz, 2010). Many of the DOJ related themes discovered in this study were refutation of ACLU claims.

Code: ACLU Opposition to Section 203

Section 203 of the USA PATRIOT Act is an effort to mitigate barriers to information sharing between criminal investigations and national security investigations (H.R. Res. 3162, 2001). The so called "wall" between criminal and national security investigations was a contributing factor to terrorists being able to carry out the September 11, 2001 attacks (9/11 Commission, 2004). The literature review identified the potential for Section 203 to circumvent the Fourth Amendment by funneling information into criminal proceedings without warrant or even probable cause (Martin, 2005; Husain 2014). Due to this identified theme in the literature review, it was expected that there

would be substantial evidence of the ACLU opposing the section, but this was not the case.

This code was not found as much as expected prior to the data collection. The "ACLU Opposition to Section 203" code was only found 8 times in 5 different sources. Five of the referenced excerpts explained the potential for abuse of information sharing if Fourth Amendment protections were circumvented. The remaining 3 references (all from the same source) were related to how information from a FISC authorized investigation of Brandon Mayfield under Section 218 authorities was ultimately shared under Section 203 leading to Mayfield's detention (*USA PATRIOT Act: Hearings before the Select Committee on Intelligence of the United States Senate*, 2005). Generally the evidence of ACLU opposition to Section 203 was inconsequential in both frequency and intensity.

Code: DOJ Support of Section 203

The DOJ's support of Section 203 was much more robust than the ACLU's opposition of the provision. This code was referenced 78 times from 7 sources. The references in this code were somewhat generalized and there was not a dominate theme in this code. Fifteen of the references were generally related to the value of information sharing. Ten references explained the use of Section 203 leading to the prosecution of various crimes related to terrorism. The 9/11 Commission's results and the September 11, 2001 terrorist attacks were represented in 9 references in this code. Five of the references explained how the combination of Section 218 and Section 203 were beneficial to national security. Despite not having a definitive theme with this code the number references and sources combined with the ACLU's lack of opposition demonstrates that

Section 203 might be somewhat less controversial than what the much of the literature about the section seemed to suggest.

Code: ACLU Opposition to Section 206

Section 206 authorizes roving wiretaps in national security investigations (H.R. Res. 3162, 2001). The ACLU has expressed opposition to this provision. In 5 separate sources the ACLU's opposition to Section 206 was coded 24 times. The dominate theme expressed in this code is the ACLU contends the national security roving wiretap procedures should mimic the criminal investigation roving wiretap procedures. Nearly all the references alluded to differences between the criminal and national security roving wiretap procedures. The primary difference according to the ACLU is Section 206 allows the roving wiretap to not target a specific person. In other words, the roving wiretap theoretically is not tied to a person or a communication device allowing for vague wiretap authorizations. It is also worth noting in a few sources Section 206 was referred to as a "general warrant" similar to the general warrants that prompted the Founding Fathers to draft the Fourth Amendment. These particular claims were not made by the ACLU and were not coded, because of this.

The 24 instances that were coded in this code illustrates the ACLU's opposition to Section 206. In 5 of the coded references, the ACLU specifically calls for Section 206 to be more in line with criminal roving wiretap codes. In 3 of the code's references, Section 206 is said to authorize "John Doe" wiretaps. Two of the codes express concern about innocent conversations being intercepted. In addition, there are 2 examples of the ACLU claiming Section 206 violates the Fourth Amendment and one claim that the provision

violates the First Amendment. The ACLU's opposition to Section 206 is clearly defined in the data gathered in this study.

Code: DOJ Support of Section 206

The DOJ's defense of Section 206 is slightly more vigorous than the ACLU's opposition, but this is expected as the DOJ had to defend against several entities not just the ACLU. This code gathered 50 references from 4 sources. The basic theme that emerged from this coded data is that the Section 206 roving wiretap is essentially the same as a criminal wiretap that has been used since 1986. This code contains 7 detailed mentions of Section 206 wiretaps being similar in scope and practice to criminal investigation roving wiretaps. There are 14 mentions disputing the claims that roving wiretaps are not tied to a specific person. The DOJ explains that the FISC requires the target to be "is in fact a foreign power or an agent of a foreign power (*USA PATRIOT Act: Hearings before the Select Committee on Intelligence of the United States Senate*, 2005). In a letter to Senator Feinstein the DOJ also explained "the "roving" authority is only available when the Government is able to provide specific information that the target may engage in counter-surveillance activity" (Weich, 2009). This counter-surveillance requirement was mentioned in at least one other reference in this code. These references seem to effectively counter most of the opposing ACLU claims.

In addition, there are 2 citations that explain the origins of the criminal investigation wiretaps. These citations illustrate that in 1986 the roving wiretap procedures were established as part of the War on Drugs campaign because drug dealers were changing phones to defeat wiretaps and that terrorists and spies use the same

tradecraft. The general theme revealed here is that if a tool can be used to thwart common criminals it should also be legal in terrorist and spy investigations. There were 18 mentions of Section 206 roving wiretaps being used to defeat terror plots, which lend some credibility to the aforementioned theme. Furthermore Section 206 was not mentioned in any sources dated after 2011, possibly indicating that the controversies around the provision have faded. To truly determine if it has faded would require an exhaustive search of data that extended beyond the ACLU and DOJ.

Code: ACLU Opposition to Section 215

Section 215 amended the FISA to grant the FBI access to "any tangible things" relevant to an international terrorism or foreign intelligence investigation (H.R. Res. 3162, 2001). This has been the most controversial aspect of the USA PATRIOT Act beginning with the concerns that all U.S. library records would be seized and continuing into late 2015 with Section 215 being the legal authority to the NSA's bulk metadata program. This was the most cited ACLU code in this study. It was also the most recent and relevant ACLU code, because the ACLU is actively engaged in 3 high profile legal battles with the DOJ over Section 215. This code was referenced 424 times throughout 22 sources. Five of the sources were within 6 months of the data collection.

The dominate theme found with this code is the ACLU's contention that the NSA's bulk metadata collection violates First and Fourth Amendment protections and creates an unreasonable communication chill. The ACLU referred to the NSA program as bulk, blanket, mass, or dragnet surveillance 79 times throughout this code. Eighty-five citations described the program as unconstitutional or in violation of First and Fourth

Amendments. Seven other references asserted the program is an invasion or "gross invasion" of privacy. Another 16 coded mentions claimed the program is unreasonable. Twelve coded sections stated the program chilled free speech. Thirteen citations explained that the collection of metadata should constitute a search and thus deserves Fourth Amendment protections. The ACLU described the program as warrantless twelve times throughout this code.

The ACLU made other effective arguments such as when the ACLU stated "the record is clear that the government need not collect Plaintiffs' call records in order to obtain the call records of suspected terrorists and their contacts" (Dunn et al., 2015, p. 15). This simple statement is a cornerstone of any argument against Section 215 collections. The reason for the outrage with the metadata collection is it captured millions of records that had nothing to do with terror investigations. This argument from the ACLU was echoed by politicians from both parties and much of the public. On November 29, 2015 the NSA bulk collection program was altered to require communication carriers to retain the metadata and now the NSA only acquires records specific to national security investigations (Duncan, 2015). This compromise would seemingly negate the argument against the metadata collection as it is no longer mass collection.

Throughout this code the ACLU referred to the NSA program as exceeding the legal authorities of Section 215. In this code the U.S. Congress was mentioned 56 times with 24 of those times explaining that the bulk metadata program is beyond Section 215's original intent. The most powerful representation of this claim came from 2 citations in

which the ACLU quoted Section 215's author, Senator Jim Sensenbrenner, as stating the program was an abuse of that law (Jaffer et al., 2013). The collective data composed in the 424 coded references illustrated the ACLU's comprehensive and consistent argument against Section 215. This prompted the DOJ to generate an equally strong and reliable rebuttal.

Code: DOJ Support of Section 215

The DOJ's support of Section 215 is as solid as the ACLU's opposition. This was the most used code in this study. This code was discovered 617 times in 19 sources. Seven of the 19 sources were within 6 months of the onset of the data collection. This demonstrates how relevant and current this topic remains. Twenty-eight of the references were derived from a 2005 document, which illustrates the longevity of the contentions. Due to the nature of the congressional hearings and lawsuits in which the DOJ has had to defend Section 215 authorities since shortly after the provision's conception.

The theme expressed with this code is the polar opposite to the ACLU opposition to Section 215 code. The theme is a 2 prong confutation of the ACLU's claims with the first prong addressing the legality of Section 215 and the second discrediting ACLU claims as speculative. First 132 of the coded references refuted the claims that Section 215 or the NSA's metadata program under that section violated the U.S. Constitution or any of its amendments. Approximately 80 of the codes were repudiating the claim that Section 215 violated the Fourth Amendment. The code contained 27 explanations of why the collection of records under Section 215 is not a search under Fourth Amendment standards. Seven additional references explained that even if the Section 215 collections

were a search, they would be permitted due to the government's "special needs". Approximately 40 other citations suggested the collection of metadata or other records under Section 215 was reasonable under Fourth Amendment standards. This study also found 7 instances in which the DOJ argued the legality of Section 215 collections by touting that 14 separate federal judges had authorized the collections on 34 separate occasions. This code also contains 125 DOJ mentions of congress' authorization, knowledge, or oversite of Section 215 collections. The DOJ took great care to repeatedly address the legality of Section 215.

The important point the DOJ's 2 prong defense was that the ACLU's claims were mostly speculative, because there was no evidence that any of their communications had been queried even if their metadata had been collected. The DOJ used the word speculative 19 times in this code when describing ACLU claims. On 3 separate entries the DOJ stated there was "no evidence" of a chilling effect. In legal documents containing this code, the DOJ questioned the ACLU's standing 32 times. This dismissive legal approach has had mixed results in the courts, as each of the legal scuffles between the ACLU and DOJ have had victories and defeats by both organizations with the 3 current cases seemingly locked in perpetual appeal.

Code: ACLU Opposition to Section 218

Section 218 of the USA PATRIOT Act amended sections 104 and 303 of the FISA by striking ''the purpose'' and inserting ''a significant purpose'' (H.R. Res. 3162, 2001). This syntactic variation created a potential for FISA authorizations to be used for non-foreign intelligence related cases, perhaps even including common law enforcement

investigations (Francel, 2014; Sales, 2010). The theme that emerged from this code is best described by the coded reference that states "The danger of section 218's lower standard is that the government will cut corners in criminal cases" (*USA PATRIOT Act: Hearings before the Select Committee on Intelligence of the United States Senate*, 2005). This concept appears in virtually all the coded references of this code. In addition, there are 3 mentions of potential Fourth Amendment violations and 11 assertions that Section 218 led to civil liberties violations in the Mayfield case. This code has a limited number of references due in part because Section 218 has not recently been indicted in public controversies like Section 215 has, but the consistency of the argument adequately explains the ACLU's stance on Section 218.

Code: DOJ Support of Section 218

The code "DOJ Support of Section 218" chronicled the DOJ's effort to have the provision extended beyond its original sunset by disputing the critics of the section and touting its successes. Throughout this code are examples of the DOJ crediting the cumulative effects of Sections 218 and 203. The basic theme is that the combination of the 2 sections helped mitigate the organizational cultures that led to a hypothetical wall that prevented criminal and national security investigations from cooperating. This code referred to the "wall" 8 times and Section 203 9 times. There were also 4 mentions of the 9/11 Commission's recommendation that a lack of information sharing led to the September 11, 2001 terrorist attacks. There were 7 coded references to Section 218's information sharing properties. This code also revealed the DOJ's assertion that the section was fundamental to the disruption of the Portland Seven and the Virginia Jihad

terrorist plots. Much like the previous code this code reveals a reliable, well-articulated organizational viewpoint about Section 218.

Code: ACLU - USA PATRIOT ACT enacted due to 9/11

The code "ACLU – USA PATRIOT Act enacted due to 9/11" was developed as part of the predictive logic model to illustrate the validity of the PET of public policy change. The purpose of this code was to demonstrate that the ACLU would contend that the USA PATRIOT Act would not have been enacted if not due to the terrorist attack of September 11, 2001. Precisely as predicted the ACLU repeatedly mentioned the events of 9/11 as the catalyst for the USA PATRIOT Act. This code contains 13 examples from 5 sources that attest to this notion. Many of the examples clearly state the act was in response to the attacks, while others allude to it. All 13 coded references clearly articulate that the USA PATRIOT Act was a reaction to the terrorist attack.

Code: DOJ - USA PATRIOT ACT enacted due to 9/11

Like the code "ACLU – USA PATRIOT Act enacted due to 9/11", the code "DOJ – USA PATRIOT Act enacted due to 9/11" was developed as part of the predictive logic model to illustrate the validity of PET to this study. Also like the previous code, this code gave credibility to the notion that the DOJ would consider the USA PATRIOT Act to be a response to the 9/11 attacks. This code was used 18 times in 5 sources. The DOJ was not as specific as the ACLU in this context, but it did allude to the USA PATRIOT Act as correcting pre-9/11 deficiencies. Both of these codes will be further discussed in the results section of this chapter when discussing the research questions. See Table 1 for a summary of code occurrence.

Table 1

Summary of Code Occurrence

Code	Number of occurrences	Number of sources
ACLU Opposition to FISA	323	20
DOJ Support of FISA	191	25
ACLU Opposition to Section 203	8	5
DOJ Support of Section 203	78	7
ACLU Opposition to Section 206	206	24
DOJ Support of Section 206	50	4
ACLU Opposition to Section 215	424	22
DOJ Support of Section 215	617	19
ACLU Opposition to Section 218	27	5
DOJ Support of Section 218	42	2
ACLU Act enacted due to 9/11	13	5
DOJ Act enacted due to 9/11	18	5

Evidence of Trustworthiness

Credibility (Internal Validity)

The credibility strategy described in Chapter 3 focused on 3 main aspects, the theoretical framework, literature review, and researcher biases. In qualitative studies credibility is highly influenced by the results of previous studies (Rudestam & Newton, 2007). To capitalize on this aspect of qualitative research the literature review and the theoretical framework were examined to a point of saturation. To add to the credibility of

this study I read and analyzed hundreds of articles and books related to U.S. national security policies and the PET of public policy change. The continuous search for new material related to national security and PET not only kept the study relevant and credible, but was absolutely necessary in keeping up with the ever changing legal actions between the ACLU and DOJ. Fortunately the recent developments with Title II of the USA PATRIOT Act, like the historic policies before it, followed the PET cycle.

The theoretical framework provided by the PET of public policy change is a key component to the internal validity of this study. It was essential to validate this theory to the study. The PET of public policy change has been a widely accepted theory for several years (Givel, 2010; Prindle, 2012; Sabatier, 2007). Ripberger (2011) and Romano (2011) explained that there is a natural ebb and flow to national security policies with spikes in contentious policies following major events. This supports PET. The literature review in this study examined national security policies and programs from the founding of the United States through modern times. This examination revealed national security policy throughout American history has consistently followed a basic PET cycle of stagnation, incremental change, and rapid change following significant events.

This study is fundamentally dependent on the PET (PET) of public policy change applying to Title II of the USA PATRIOT Act. Both the literature review and the data analysis suggest that the USA PATRIOT Act was enacted as a direct response to the terrorist attacks of 2001. For several years following its enactment Title II of the USA PATRIOT Act remained largely stagnant. In 2015 Title II of the USA PATRIOT Act was repeatedly on the verge of incremental change. While most of these changes failed to

fully manifest, there were some significant changes to certain Title II authorities. The evidence provided by the lifecycle of Title II of the USA PATRIOT Act indicates that thus far the law has followed a PET pattern.

Reviewing U.S. national security policies throughout American history was essential not just to understanding and validating PET, it was also necessary to develop perspective about the USA PATRIOT Act. To fully appreciate the nuances of a law it is important to comprehend the historic policies relevant to the USA PATRIOT Act (O'Brien, 2011). The literature review chronicled major national security policies, legal decisions, and even security related scandals leading up to and including the USA PATRIOT Act. This revealed a consistent trend of security policies and even abuses following PET, but it also explained legal precedence, traditional policy standards, historic abuses of authority, and the original intent of various laws. All of these concepts were critical to developing a credible understanding of the USA PATRIOT Act and its related controversies. The literature review provided a sound foundation for the study and is nearly as important to the credibility of this work as the theoretical framework.

The next most important aspect related to the credibility of this study was mitigating my biases about the USA PATRIOT Act. The USA PATRIOT Act is a very polarizing subject, but by consistently evaluating my personal beliefs and actively trying to understand both sides of the debate I found myself maintaining a neutral opinion about the law. By having an open mind I was able to see that the USA PATRIOT Act is an imperfect but useful law. I never developed strong opinions for or against the law. Even after the data analysis, I contend that both sides of the debate have valid arguments. In

addition, as stated in Chapter 3, the USA PATRIOT Act does not have any direct effect on my life. I am neither a member of the ACLU or the DOJ. This has allowed me to mitigate biases throughout the case study.

Transferability (External Validity)

Transferability is the capacity of study's structure to be applied to a similar subject matter (Miles, Huberman, & Saldaña, 2014). Yin (2014) suggested that the theoretical basis is essential to external validity. Much like the study's internal validity, the external validity of this case study is enhanced by the integration of the theoretical framework throughout the study. As repeatedly observed and mentioned throughout each chapter of the dissertation, the PET of public policy has been extraordinarily consistent throughout American national security policy history including the USA PATRIOT Act. Using PET as the theoretical framework this study could easily be transferred to a study of a different title of the USA PATRIOT Act or even a different law altogether. In addition, the case study could also be transferred to other groups that oppose and support Title II of the USA PATRIOT Act. For example, this study format could be applied to Electronic Frontier Foundation rather than the ACLU and the Office of Director of National Intelligence rather than the DOJ.

The general application of the PET framework developed in this case study would likely yield similar results in any controversial national security policy throughout U.S. history. The most basic element of the policy lifecycles have shown that even the most controversial of security policies have similar origins and conclusions. Major changes to security policies tend to stem from a significant event that jolts the public and by

extension the lawmakers into action. The bounded rationality of the situations have historically generated imperfect laws, policies, or procedures. However, in the past once these imperfect conditions were established there was a period of stagnation in which the opposing and supporting forces were engaged in a gridlock induced stagnation. With the historic examples, as pressure has mounted, the entrenched legislators have accomplished limited incremental change until the law is either no longer controversial or another outside source prompted dramatic change. This consistency has added credibility and transferability to the case study.

Dependability

Dependability is the reduction in errors and biases in a study (Miles, Huberman, & Saldaña, 2014, Yin 2014). This case study utilized a logic model technique of deductive analysis which predicted results based upon historic evidence and the use of theory. As discussed in the credibility and transferability sections of this chapter, both the history of national security policies and the PET have been constant. This consistency made it possible to accurately predict the views of both the DOJ and ACLU in regards to Title II of the USA PATRIOT Act.

While there were a few instances, mentioned previously in this chapter, when statements of certain members of either the ACLU or DOJ differed slightly from the predicted results, the overwhelming majority of the data collected and analyzed was exactly as predicted. The DOJ generally supported Title II of the USA PATRIOT Act, while the ACLU generally opposed the authorities. This is consistent with PET and the historic references discussed earlier. There was a direct and consistent effort to look for

any instance in which the DOJ opposed Title II or the ACLU supported Title II. Even the examples of unexpected results laid forth in the data analysis section of the chapter were not compelling, scarce, and genuinely unimportant. They were included in the study primarily to demonstrate the effort to find data that fell outside expected results.

Confirmability

Confirmability is the degree of which a study is free from the burden of researcher biases or how differently the results would be if the research was conducted by a different researcher (Miles, Huberman, & Saldaña, 2014). The theoretical framework and logic model technique used in this study mitigated the potential for researcher biases to significantly affect the results of the study. The codes were all predetermined based upon assumptions made from an understanding of PET. There was never a need to alter or add codes to meet unanticipated trends or inconsistent information in the data collection or analysis. This study could as previously mentioned be readily transferred to a related topic and it could also be confirmed by a different researcher due to the reliability of the theory and the simplicity of the study's structure.

A central objective of the study was to develop a thick description of both sides of the debate about Title II of the USA PATRIOT Act. If another researcher were to analyze the same documents using the same predetermined codes the results would necessarily be similar. This is not due to anything other than the consistency of the period of stagnation described in the PET theory. During this period the political or ideological polarization unifies arguments in both directions. A different researcher would have similar results, because the DOJ and ACLU arguments were consistent throughout thousands of pages of

court proceedings and congressional hearings. With greater than a decade of debate about Title II neither organization strayed from their original viewpoints.

Research Results

Central Research Question

How does the bounded rationality of the PET of public policy change prevent incremental change from achieving the security objectives of Title II of the USA PATRIOT Act of 2001 while addressing concerns of potential circumventions of the Fourth Amendment of the U.S. Constitution?

The bounded rationality aspect of PET suggests the incremental Title II changes have been insufficient to achieve the surveillance and information sharing goals while mitigating Fourth Amendment concerns because ideological polarization prevents effective political action. The results of this study illustrated that in the politically and ideologically polarizing debate about Title II of the USA PATRIOT Act there is little room for compromise between the opposing viewpoints with each side posing convincing arguments, but neither side willing to accept the other's opinion. In addition, the opposing viewpoints are correspondingly well thought out and persuasive. The natural divide between 2 equally compelling arguments is akin to having twins on opposing sides of a tug of war competition. As the data analysis and literature review have illustrated the argument between the 2 groups has remained constant but after years of debate there has not been a definitive court decision, policy change, legislative amendment, or procedural adjustment.

To explain the results of the Central Research Question it is useful to break the question into its key elements. To begin with it is essential to determine if there is evidence that Title II of the USA PATRIOT Act is an imperfect policy developed under the stress of bounded rationality. For this research question the bounded rationality effects both the enactment of the law and the extended period of policy change stagnation the USA PATRIOT Act has had. During the period of dynamic change, lawmakers were forced to make choices rapidly without extensive debate due to the public fear of a follow on terrorist attacks. This resulted in the enactment of the USA PATRIOT Act. This assertion will be more thoroughly explained later in this section of Chapter 4. During the incremental period of change, the legislators were locked in a political and ideological stalemate as neither those opposed to the law or those supporting the law were able to conjure enough influence to elicit change.

To meet the criteria of bounded rationality the law would need to have been hastily enacted resulting in a useful yet problematic policy. The primary evidence that the law was enacted in haste comes from the timing of the enactment. The law was drafted, debated, and enacted within 45 days of the September 11th attacks (Bellia, 2011). This is a rapid enactment for even a minor bill and is astonishingly swift for a bill as far reaching as the USA PATRIOT Act. As previously mentioned, the data analyzed in this case study suggests that both the ACLU and DOJ contribute the quick passage of the law to the September 11th attacks. In addition, the law itself mentions the attacks 25 times in its text. The evidence clearly demonstrates that the law was in response to the terrorist attacks.

The next step is to determine if the law was affected by bounded rationality during its creation. The data analysis suggests that the law was negatively affected by the forces of bounded rationality. First while the act garnered very limited debate between September 11, 2001 and its passage that October, almost immediately after its passage the debate grew in frequency and intensity. This case study focused on congressional hearings and court cases from 2004 through 2015. The number of high level debates suggest the law is imperfect. When the suggested imperfection is combined with the rapid enactment it seems that the law was impaired by bounded rationality during its creation. The fact that the argument has lasted more than a decade suggests that bounded rationality has restrained legislators from achieving adequate incremental change that satisfies both sides of the debate.

It was important to address the bounded rationality of Title II of the USA PATRIOT Act as it is paramount to designing a logic model technique based upon the PET of public policy change. For the strategy to be an effective analysis tool the title needed to display evidence of bounded rationality in its genesis and its period of stagnation. The data indicates this is the case. The bounded rationality and PET created the foundation of the Central Research Question, but confirming the presence of bounded rationality was a small part of the data analysis regarding the question. The main objective of the question is to evaluate both sides of the controversies surrounding Title II and to look for any possibility of overcoming the bounded rationality caused stagnation.

The focal point of the controversies has stemmed from changes to surveillance and information sharing. The contentious changes came in many forms with the ways in

which Title II of the USA PATRIOT Act modified the FISA at the forefront of several of the controversies. As described in the literature review, FISA was designed to dramatically reform national security policies and procedures following the numerous unsettling discoveries of the Church Committee. Originally FISA was meant to create oversite of national security investigations and prevent the broadened authorities of the intelligence agencies from being applied to U.S. citizens. The events of September 11, 2001 changed FISA's role.

The 9/11 Commission (2004) asserted that the failure to prevent the 2001 attacks was due in part to the "wall" between criminal and national security investigations. The data analysis in this case study suggested that the DOJ firmly supports the 9/11 Commission's observation. During an FBI oversight hearing Director Mueller stated "If we learned one thing on September 11th and one thing only, it was the need to share intelligence and gather intelligence to identify persons who would kill American citizens, whether it be here domestically or overseas" (Oversight of the Federal Bureau of Investigation, 2012). In a 2004 congressional hearing James B. Comey, Jr., Deputy Attorney General, explained "The PATRIOT Act also did something radical, something earth shattering, something breathtaking that nobody talks about. The PATRIOT Act broke down the wall that separated intelligence investigators tracking terrorists from criminal investigators tracking terrorists" (*Preventing and responding to acts of terrorism: A review of current law*, 2004). The Deputy Attorney General went on to explain that prior to the USA PATRIOT Act criminal and national security investigations working out of the same building and focused on the same suspects could not collaborate

in any meaningful way. In the data collected in this case study, the DOJ generally expressed disapproval of the pre-9/11 barriers to information sharing and approval of the ways in which the USA PATRIOT Act mitigated these obstacles.

This was a common theme throughout the data analysis as members of the DOJ mentioned the wall or information sharing approximately 50 times. This number of mentions would have been higher, but the DOJ often submitted identical letters and testimony to multiple entities. When duplicate documents were found addressed to different members of congress or hearing the duplicates were not added to the data collection. Typically when the DOJ mentioned the wall it was to state that the wall made America less safe. Typically when the DOJ addressed information sharing it was to explain how it was making the nation safer. When the DOJ cited the wall, information sharing, or FISA the focus was nearly always about terrorism or terrorists.

By contrast the ACLU responses in this study tended to warn about the dangers of broadened authorities. The ACLU was particularly concerned with the potential for Fourth Amendment violations if national security investigations shared FISA authorized evidence with criminal prosecutors. In a letter submitted as testimony in a 2011 congressional hearing the ACLU remarked "The Patriot Act vastly – and unconstitutionally – expanded the government's authority to pry into people's private lives with little or no evidence of wrongdoing. This overbroad authority unnecessarily and improperly infringes on Fourth Amendment protections against unreasonable search and seizures" (Permanent provisions of the PATRIOT Act, 2011). In previous congressional testimony the ACLU claimed "now the government can—for what are

primarily criminal searches—evade the Fourth Amendment's constraints of probable cause of crime and notice to the person whose property is being searched" (*USA PATRIOT Act: Hearings before the Select Committee on Intelligence of the United States Senate*, 2005).

The ACLU's concern about the Fourth Amendment was the dominate theme for the organization noted in this study. There were 72 ACLU mentions of potential Fourth Amendment violations. The majority of the Fourth Amendment references came after the Snowden leaks. Approximately 69% of the ACLU's discussion about the Fourth Amendment were directly related to Section 215 bulk collections. Prior to the Snowden revelations the ACLU's Fourth Amendment claims either referred to the Mayfield case or were theoretical in nature. In addition, with the Mayfield references the Fourth Amendment concerns always accompanied a First Amendment claim as well. After the exposure of the bulk metadata collection program, the claims nearly always asserted that the program was an example of Fourth Amendment violations.

This study found that the DOJ consistently defended constitutionality of Title II of the USA PATRIOT Act. This study found that the DOJ mentions of the Fourth Amendment were rebuttals to claims against the constitutionality of USA PATRIOT Act programs rather than spontaneous proclamations. For this reason the DOJ references to the Fourth Amendment spiked after the admission of the bulk collection programs. This study found 86 DOJ mentions of the Fourth Amendment following the 2013 leaks. Nearly all of the coded references involving the DOJ and the Fourth Amendment are examples of the DOJ dismissing the claims of the ACLU or another organization.

A leading DOJ rebuttal centered on the Third Party Doctrine. As mentioned in the literature review, the Third Party Doctrine, established through the court cases of United States v. Miller and Smith v. Maryland, states that the assumption of privacy is lost anytime documents are held by third party organization (United States President's Review Group on Intelligence and Communications Technologies, 2013). The DOJ asserted "the Smith Court reaffirmed the established principle that 'a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties'" (Delery et al., 2014, p. 43). The Smith v. Maryland case was crucial to the DOJ's defense of bulk collections authorized by Section 215. The DOJ mentioned the case 49 times. This particular reference was related to bulk metadata collections, as most of the references were, but the argument applies to any record held by any public company.

In regard to the central research question, this back and forth of debate between the ACLU and DOJ illustrates that the 2 organizations are locked in a rigid ideological dispute. Neither side is likely to be satisfied with the outcome of any compromise. This notion is evident in the numerous appeals to any legal decision in the previous and current court cases surrounding the Title II surveillance and information sharing. The data analysis did not show any sign that either side wanted any compromise. The DOJ generally argued Title II of the USA PATRIOT Act should remain as is, while the ACLU suggested Sections 203, 206, 215, and 218 should at a minimum be amended. As previously mentioned both sides claimed to have constitutional back and both made

logical, articulate arguments for their opinion. Neither side seemed willing to concede to the other's points.

Another prime example of sides being locked in ideological polarization came from a significant event related to Title II USA PATRIOT Act that occurred during the course of this case study. In the summer of 2015, Section 215 was allowed expire, just to be renewed the next day with the USA FREEDOM Act (Kelly, 2015; Whitaker, 2015). The USA FREEDOM Act could have been seen somewhat as a compromise in that it ended the most controversial aspect of Section 215 to date, the bulk metadata collection by the NSA. The ACLU assessed the change as only a symbolic victory since Section 215 remained intact (Duncan, 2015). At first glance it seems that the ACLU should consider the changes to be a significant victory. They argued against the federal government collected the bulk metadata of innocent Americans and the bulk metadata collection was stopped. Technically that should be considered a victory, but ACLU point about it being a "symbolic victory" also seems valid because the legal mechanism for bulk collection is still in place.

In addition, Section 215 isn't necessarily limited metadata records and could in theory be used to gather medical records, emails, financial statements, etc. The ACLU has consistently argued against Section 215 authorities. The ACLU assertions of Section 215 improprieties began long before the bulk metadata program was revealed. In a 2004 congressional hearing the ACLU stated that the inefficiency of Section 215 programs plus its potential for abuse "should prompt further review of Section 215 to find the balance between its efficacy and the problems of perception that it creates, which could at

least be mitigated by a restriction of its use to those for whom there is individualized suspicion" (*Preventing and responding to acts of terrorism: A review of current law*, 2004). This explains why the ACLU would consider the USA FREEDOM Act's changes to the metadata program to be symbolic. The organization wants to ensure all Section 215 authorities, many of which might be unknown to the public, are legally bound to individual suspicion not broad surveillance.

By using the PET of public policy change to predict the life cycle of Title II of the USA PATRIOT Act the results of this study suggested Title II authorizations will likely remain relatively unchanged until an external development shocks the equilibrium of the debate. This study illustrated that throughout the politically and ideologically polarizing dispute regarding Title II, the USA PATRIOT Act has been locked in stagnation with only limited incremental change. The bounded rationality of PET explained that the incremental changes were insufficient to achieve the surveillance and information sharing goals of Title II while mitigating Fourth Amendment. In addition, the changes that have occurred have not affected the controversies surrounding Title II of the USA PATRIOT Act. The evidence analyzed in this case study suggested that it is unlikely either side of the debate is currently willing to accept any compromise. The conclusion that developed from the data analysis is that Title II of the USA PATRIOT Act is expected to remain in perpetual stasis with periods of limited incremental change unless an outside event generates significant public enthusiasm for one side of the debate or the other.

Subquestion 1

How is political and ideological polarization prolonging the stagnation period of the PET of public policy change with the USA PATRIOT Act?

As explained above, the debate about Title II of the USA PATRIOT Act has developed 2 uncompromising points of view with relatively equally persuasive arguments. This study focused upon the views of the ACLU and DOJ, but these viewpoints are representative of the American populace and the U.S. political leaders. Examining the strife between the DOJ and ACLU provides insight into the political and ideological divide about the USA PATRIOT Act that exists throughout U.S. politics. By realizing lawmakers are somewhat evenly split amongst those that generally side with the ACLU's opinion and those that typically side with the DOJ's assertions it is apparent why the law has remained relatively stagnant since 2001. The 2 views effectively cancel each other out.

Throughout more than a decade of debate about Title II of the USA PATRIOT Act, the ACLU has remained steadfast that there are "provisions of the PATRIOT Act that violate the Constitution and civil liberties" (*Permanent provisions of the PATRIOT Act*, 2011). Many of the ACLU's concerns have focused on how the USA PATRIOT Act changed the FISA system. The ACLU claimed the broadened use of FISA authorities due to the USA PATRIOT Act "exacerbated other constitutional problems with the statute under both the First Amendment and the Fourth Amendment" (*USA PATRIOT Act: Hearings before the Select Committee on Intelligence of the United States Senate*, 2005). The ACLU claimed the FISA authorizations do not meet the same rigorous standards as

criminal investigation authorizations. The ACLU claimed that the FISC, due to the USA PATRIOT Act and FAA, no longer protects the Fourth Amendment and "is simply to issue advisory opinions blessing in advance the vaguest of parameters, under which the government is then free to conduct surveillance for up to one year" (Jaffer et al., 2012, p. 8). This study found very limited instances of the ACLU ever altering their message about Title II of the USA PATRIOT Act.

The DOJ has been equally unwavering in its defense of Title II authorities. At no point in this study was any information uncovered that suggested that the DOJ even slightly questioned the constitutionality of any Title II authority. In fact in with each mention of the U.S. Constitution by the DOJ was to explain how a particular program or authority was constitutional. The DOJ also aggressively defended how the USA PATRIOT Act affected FISA and FISA authorizations. The DOJ stated "the FISA Court are far from a rubber stamp; instead, they review all of our pleadings thoroughly, they question us, and they do not approve an order until they are satisfied that we have met all statutory and constitutional requirements" (*Strengthening privacy rights and national security: Oversight of FISA surveillance programs*, 2013). The DOJ repeated similar statements throughout this study's data.

The DOJ's argument and the ACLU's argument genuinely negate each other. Applying the debate findings between the ACLU and DOJ to the broader stage of American legal and political interactions it is clear that ideological polarization has prolonged the stagnation period for the USA PATRIOT Act. As mentioned with the central research question, the results of this study suggest that Title II of the act will

remain basically unchanged unless a significant event sways public opinion about the law. This outcome is not surprising. A review of PET illustrates that this is often the case with national security policies.

Subquestion 2

How does the PET of public policy change explain the enactment and extensions of the USA PATRIOT Act?

The PET of public policy change asserts that dramatic policies changes often stem from a significant event and these changes are negatively affected by bounded rationality. As previously mentioned, the USA PATRIOT Act was a direct response to the September 11, 2001 terrorist attacks. Both the ACLU and DOJ repeatedly alluded to this fact. The DOJ suggested the law was necessary to combat terrorism in the modern age. The DOJ supported this affirmation with the findings from the 9/11 Commission. The ACLU also accredited the passage of the law to the terrorist attack, but implied the law was imperfect because it was rushed. "The Act was the product of an extraordinary time just after September 11 in which Congress and the administration were working quickly, under pressure, to give law enforcement and intelligence agencies new surveillance powers" (*Preventing and responding to acts of terrorism: A review of current law*, 2004). This ACLU comment illustrates bounded rationality in action, as does the fact that the sunset provisions of the law have been repeatedly reaffirmed. While this study did to find any direct statement mentioning the reenactments of the provisions being due to bounded rationality, it does fit with the presumption that the law is stuck in a period of stagnation. Even the sections that recently expired in 2015, were immediately reinstated the next day.

Letting provisions actually expire would be a significant change and significant change does not occur in stagnant periods in PET.

Subquestion 3

How does Title II of the USA PATRIOT Act affect U.S. law?

The significant portions of Title II of the USA PATRIOT Act for this study affect U.S. law in the following ways:

- Section 203 promotes information sharing amongst criminal and national security investigations.
- Section 206 allows for roving wiretaps in national security investigations.
- Section 215 grants access to any type of record deemed necessary to a national security investigation.
- Section 218 broadens the authority of the FISC by allowing FISA authorizations to be used in any investigation when the significant purpose of the investigation is security related.

Subquestion 4

What are the benefits of Title II of the USA PATRIOT Act?

The results of this study illustrated that the DOJ considered many of the Title II provisions to be beneficial. In regard to the information sharing changes brought about by Section 203 the DOJ stated "I think beginning with the PATRIOT Act, removing the wall, we have made great steps to make sure that that information is shared" (*Oversight of the Federal Bureau of Investigation*, 2012). In reference to the roving wiretaps of Section 206 the DOJ stated "Section 206 now gives us the authority in terrorism

investigations to use the tools we had used in a wide range of criminal cases, including drug and racketeering cases, since 1986" (*Preventing and responding to acts of terrorism: A review of current law*, 2004). The DOJ also adamantly defended Section 215 of the act with "the government has provided examples in which the Section 215 program provided timely and valuable assistance to ongoing counter-terrorism investigations" (Branda, Olson, Letter, Byron III, & Whitaker, 2014, p. 67). Finally with Section 218 the DOJ touted "the successful use of section 218, including investigation of the Portland Seven and the Virginia Jihad" (*USA PATRIOT Act: Hearings before the Select Committee on Intelligence of the United States Senate*, 2005). The data analysis identified hundreds of examples of the DOJ praising a benefit of Title II of the USA PATRIOT Act.

Subquestion 5

How is Title II of the USA PATRIOT Act controversial?

The data analysis also identified hundreds of examples of the ACLU expressing concern about a provision of Title II of the USA PATRIOT Act. In regard to Section 203 the ACLU was most concerned with how and what information is shared. The ACLU warned "little is known about the breadth of use or the distribution of our personal information" (*Reauthorization of the Patriot Act*, 2011). Concerning Section 206 the ACLU argued "that roving wiretaps should have the same Fourth Amendment warrant requirements as Title III criminal wiretaps" (*Permanent provisions of the PATRIOT Act*, 2011). The data analysis identified Fourth Amendment concerns as a primary ACLU theme that transcended each coding category. Since its enactment Section 215 has been one of the most controversial aspects of the USA PATRIOT Act. The ACLU alleged it

"has uncovered serious and unconstitutional chilling effects of section 215 on the exercise of basic freedoms" (*USA PATRIOT Act: Hearings before the Select Committee on Intelligence of the United States Senate*, 2005). Finally with Section 218 the ACLU explained "This seemingly minor change allows the government to use FISA to circumvent the basic protections of the Fourth Amendment, even where criminal prosecution is the government's primary purpose for conducting the search or surveillance" (*Reauthorization of the Patriot Act*, 2011). These ACLU quotes provide an insight into the controversies of Title II of the USA PATRIOT Act.

Summary

The data analysis answered the research questions to a point of saturation acceptable for this case study. The logic model technique based, upon the reliable findings of the PET, yielded the results expected in the predictive pattern. The PET bounded rationality suggested that incremental changes to Title II would be insufficient to achieve the surveillance and information sharing goals while mitigating Fourth Amendment concerns due to ideological polarization preventing effective political action. The data analysis provided evidence that this prediction was accurate. The incremental Title II changes have been insufficient to achieve the surveillance and information sharing goals while mitigating Fourth Amendment concerns because ideological polarization prevents effective political action, as the logic model suggested.

The DOJ and ACLU viewpoints were representative of the leading voices for and against Title II of the USA PATRIOT Act. Throughout the data collection and analysis neither party ever significantly changed their opinions. Ultimately this amounted to more

than 10 years of consistent debate. Even when important developments occurred, such as the Snowden releases, both organizations remained steadfast on their arguments. The data lends evidence to the probability that Title II will remain controversial until a significant outside event spurs political motivation either for or against the act. This probability is expected under the PET of public policy change.

The study does not conclude with mere mention of the consistency of the ACLU and DOJ arguments. Nor does it end with the effectiveness of PET in the logic model. It is still necessary to report the interpretations of the findings and limitations of the study. This case study also has recommendations and implications based upon insight acquired through the course of the study. These items will all be addressed in Chapter 5.

Chapter 5: Discussion, Conclusions, and Recommendations

Introduction

This chapter is designed to further explain the findings of the study, limitations of the study, recommendations for further studies, and potential implications of this study. The primary finding of the study was that provisions of the USA PATRIOT Act are in a prolonged state of imperfection brought about by consistent ideological polarization as demonstrated by the leading voices of support and opposition to the law. This study substantiated the consistency of the PET of public policy change with national security policies, but its transferability is limited to national security policy. A key recommendation for further study is to examine USA FREEDOM Act of 2015 under a similar PET of public policy change theoretical framework. This could shed additional light on ideological polarization and add validation to the framework. Because the data and analysis presented in these 5 chapters is part of a dissertation, the potential implication of the study is somewhat limited, but it does contribute to the base of academic knowledge. Everything mentioned in this paragraph is further explained in the chapter.

Purpose

The purpose of this case study was to examine the advantages and contentions of Title II of the USA PATRIOT Act to better understand how PET described bounded rationality prevented incremental policy change from achieving the objectives of the provisions while mitigating the potential for or perception of the circumvention of the Fourth Amendment of the U.S. Constitution.

Key Findings

The key findings from this case study are as follows:

- Title II of the USA PATRIOT Act has been and continues to be in the PET's stage of imperfect stagnation prolonged by ideological polarization contributing to bounded rationality.
- There was no credible evidence of potential incremental changes that could satisfy the surveillance and information sharing goals of Title II while mitigating Fourth Amendment concerns.
- The ACLU and DOJ viewpoints are unwaveringly polar opposites. This study did not find any indication of the organizations being willing to compromise on Title II provisions.
- The primary ACLU concern found in this study was a concern that Title II authorizations might have the potential for circumventing the Fourth Amendment.
- The DOJ aggressively disputed the ACLU constitutionality claims, relying heavily upon the Third Party Doctrine and legal precedence.

Interpretation of the Findings

The literature review illustrated that most major U.S. national security policies followed a life cycle that fit the PET of public policy change. This case study demonstrated that Title II of the USA PATRIOT Act is currently in the stagnant stage of punctuated equilibrium. During this stage, incremental change has only a limited effect on the policy. The findings showed years of ideologically polarized debate with no

acceptance of opposing views by either side of the argument. Polarizing disagreement is a key component to the sluggish period of change described in PET and has been a factor in preventing substantial incremental change. During the course of the data collection and analysis there was almost a significant incremental change with Section 215 being allowed to expire, but within 24 hours the provision was reinstated. The voices for and against Title II provisions effectively cancel each other out. The arguments on both sides are convincing enough to have created a political and ideological rift that prevents legislators from having the political capital or motivation to allow effective change.

During the literature review it became apparent that the DOJ and ACLU are the most vocal supporting and opposing voices respectfully. Specifically the literature review revealed that much of the controversy surrounding Title II of the USA PATRIOT Act centered on Fourth Amendment concerns. Using PET as the theoretical framework for a logic model data analysis technique, the primary prediction that developed was that the ACLU and DOJ would consistently differ on Fourth Amendment concerns. The data analysis discovered that this prediction held true throughout thousands of pages of debate in the span of more than 1 decade. The DOJ solidly defended the constitutionality of Title II. The ACLU repeatedly questioned the constitutionality of Title II. As explained in Chapter 4, there is little evidence of either organization recognizing the legitimacy of the other's arguments.

Limitations of the Study

The transferability of this case study was restricted by the case boundaries. This study verified the consistency of the PET of public policy change with national security

policies only. Applying the findings to other facets of public policy would require additional scrutiny of the theory as it is feasible that the theoretical framework would not be as reliable with other public policies. The validity of the theory would need to be tested against specific types of public policy. For example a study of national healthcare policies could use this case study as a general testament to the consistency of PET, but could not be used in place of assessing the theory against national healthcare policy life cycles.

Similarly the data collection and data analysis were strictly limited to Title II of the USA PATRIOT Act. This particular logic model based upon PET was adequate and accurate for this case study, but it's unproven outside Title II. It is possible if the logic model technique was applied to a similar law or even other titles of the USA PATRIOT Act it might not yield the same results. Thus the results must be limited to Title II of the USA PATRIOT Act. A study of a similar law could help confirm the transferability of this case study.

Recommendations

A potential follow on study that could help validate both the theoretical framework and the logic model technique could be a study of the USA FREEDOM Act of 2015. The USA FREEDOM Act is similar to the USA PATRIOT Act in function. In addition, the law is starting to develop some controversy as it reinstated Section 215 of the USA PATRIOT Act. Presumably the DOJ would support the law and the ACLU would generally oppose provisions of the act. If this outcome held true with a study of the

USA FREEDOM Act it would help validate the logic model technique and theoretical framework set forth in this study.

Implications

The social change implication this case study hoped to achieve was to identify areas of potential compromise in the current, often contentious, debate regarding the balance between national security surveillance and civil liberties. This study did not identify any indication of potential compromise. The debate is simply too polarizing. As repeatedly expressed neither side of the argument ever made any significant willingness to negotiation. This dissertation will not affect the ongoing legal, political, and ideological clashes between the ACLU and the DOJ, but it does add to the base of knowledge about the processes that are keeping the organizations locked in debate about Title II of the USA PATRIOT Act.

Scholars and legislators alike, could benefit from understanding the processes explained in the PET of public policy change, as they relate to Title II controversies. The implication that this dissertation achieved was to identify that both the ACLU and DOJ made valid points and that it is essential to consider opposing views in legislation. In issues of public policy and administration it is imperative to make decisions based upon facts not ideology. Administrations are inhibited by the policy life cycle illustrated in PET. As a result, national security policies often undergo a period of controversial stagnation and understanding the reasons why could reduce tensions with imperfect policies.

Throughout American history bitter political, legal, and ideological stalemates have prevented meaningful security policy changes. This is primarily is due to the polarizing nature of national security arguments and the both the incremental changes and the punctuated modifications are constrained by bounded rationality. The policies are seldom if ever going to be acceptable to both sides of the debate until incremental policy alterations eventually quell the contentions. The implication is that both sides should attempt to work past their ideological and political differences and instead focus on the valid aspects of their opponent's argument. It is unlikely that any controversial provision that remains in contempt is without fault or benefit, for it were it would be amended, reaffirmed, or canceled without issue.

The prime example of this is with Section 215. Security agencies need to be able to access records related to international terrorists, but equally as important is innocent U.S. citizens should not have to have their records seized. Both sides made a valid argument in their respective regards. Eventually the Section 215 metadata program made it through its stagnation period and was transformed into an acceptable option under the USA FREEDOM Act. While this act did not mitigate the broader concerns about Section 215 it did meet the metadata collection and the civil liberty goals of both the DOJ and ACLU. The take away from this event for policy makers should be that examining both sides of an issue can lead to an acceptable arrangement without compromising principles.

Conclusion

Title II of the USA PATRIOT Act is in a state of imperfect and often contentious stagnation. The title has both clearly identifiable national security benefits and civil

liberty problems. The PET of public policy change can be used to explain that the law is currently held in this state due to bounded rationality. The bounded rationality has been created by polarizing opinions about the title making it difficult for either side of the debate being able to garner enough political capital to overcome the resistance being generated by the other side. Currently there are no meaningful indications that Title II will be amended to reduce contentions in the near future unless in response to an outside force.

This case study came to this conclusion by examining more than a decade's worth of public debate between the leading voice of support for the law and its leading voice of opposition. The DOJ has been the leading voice of support for the USA PATRIOT Act and the ACLU has been the leading voice of opposition to the law. Both organizations have presented effective well-articulated arguments expressing their concerns and praises of Title II of the USA PATRIOT Act in the halls of congress, all levels of the courts, and equally as important in the halls of public opinion. This dissertation contended that both organizations have valid points, but data collection and analysis revealed that neither side is likely to accept the other's views as such. In conclusion ideological polarization will keep Title II of the USA PATRIOT Act in imperfect stagnation due to the bounded rationality explained in conjunction with the PET of public policy change.

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Appendix A: IRB Ethics Planning Worksheet

The following is the IRB Ethics Planning Worksheet. The results of this worksheet suggest this case study will have a low level of ethical risk. Originally this case study had considered using interviews with members of the ACLU and DOJ. I received IRB approval to do so, but there was resistance from the organizations to contribute to this study. Instead all data were collected from publically available sources, which greatly reduced any ethical considerations with the study.

The first 13 questions apply to all studies (even when the researcher is not interacting with participants to collect new data).	
	Answer each question below with yes, no, or N/A.
1. Has each data collection step been articulated in the method section of the proposal?	***yes***
2. Will the research procedures ensure privacy during data collection?	***yes***
3. Will data be stored securely?	***yes***
4. Will the data be stored for at least 5 years?	***yes***
5. If participants' names or contact info will be recorded in the research records, are they absolutely necessary?	*yes*
6. Do the research procedures and analysis/write up plans include all possible measures to ensure that participant identities are not directly or indirectly disclosed?	***yes***
7. Have confidentiality agreements been signed by anyone who may view data that that contains identifiers? (e.g., transcriber, translator)	***yes***
8. Has the researcher articulated a specific plan for sharing results with the participants and community stakeholders?	***yes***
9. Have all potential psychological, relationship, legal, economic/professional, physical, and other risks been fully acknowledged and described? (If IRB staff judges the magnitude or probability of risks to be greater than minimal, then the researcher will be asked to submit the long form ethics application in addition to this self-check.)	***yes***
10. Have the above risks been minimized as much as possible? Are	***yes***

measures in place to provide participants with reasonable protection from loss of privacy, distress, psychological harm, economic loss, damage to professional reputation, and physical harm?	
11. Has the researcher proactively managed any potential conflicts of interest?	***yes***
12. Are the research risks and burdens reasonable, in consideration of the new knowledge that this research design can offer?	***yes***
13. Is the research site willing to provide a Letter of Cooperation granting permission for all relevant data access, access to participants, facility use, and/or use of personnel time for research purposes? (Note that some research sites will only release data if a more formal Data Use Agreement is in place, often in addition to a Letter of Cooperation.)	***yes***
The remaining questions only apply to studies that involve recruiting participants to collect new data.	
14. Is participant recruitment coordinated in a manner that is non-coercive? Coercive elements include: recruiting in a group setting, extravagant compensation, recruiting individuals in a context of their treatment or evaluation, etc. A researcher must disclose here whether/how the researcher may already be known to the participants and explain how perceptions of coerced research participation will be minimized.	***yes***
15. If vulnerable individuals will be specifically sought out as participants, is such targeted recruitment justified by a research design that will specifically benefit that vulnerable group at large? To specifically recruit vulnerable individuals as participants, the researcher will need to submit a long form ethics application in addition to this self-check.	***N/A***
16. If vulnerable adults might happen to be included (without the researcher's knowledge), would their inclusion be justified?	***N/A***
17. If anyone would be excluded from participating, is their exclusion justified? Is their exclusion handled respectfully and without stigma?	***yes***
18. If the research procedures might reveal criminal activity or child/elder abuse that necessitates reporting, are there suitable procedures in place for managing this?	***N/A***
19. If the research procedures might reveal or create an acute psychological state that necessitates referral, are there suitable procedures in place to manage this?	***N/A***
20. Does the research design ensure that all participants can potentially benefit equally from the research?	***N/A***

21. Applicable for student researchers: Will this researcher be appropriately qualified and supervised in all data collection procedures?	***yes***
22. If an existing survey or other data collection tool will be used, has the researcher appropriately complied with the requirements for legal usage?	***N/A***
Questions 23-40 pertain to the process of ensuring that potential participants make an informed decision about the study, in accordance with the ethical principle of "respect for persons**."**	
23. Do the informed consent procedures provide adequate time to review the study information and ask questions before giving consent?	***yes***
24. Will informed consent be appropriately documented?	***yes***
25. Is the consent form written using language that will be understandable to the potential participants?	***yes***
26. Does the consent form explain the sample's inclusion criteria in such a way that the participants can understand how/why THEY are being asked to participate?	***yes***
27. Does the consent form include an understandable explanation of the research purpose?	***yes***
28. Does the consent form include an understandable description of the data collection procedures?	***yes***
29. Does the consent form include an estimate of the time commitment for participation?	***yes***
30. Does the consent form clearly state that participation is voluntary?	***yes***
31. Does the consent form convey that the participant has the right to decline or discontinue participation at any time? When the researcher is already known to the participant, the consent form must include written assurance that declining or discontinuing will not negatively impact the participant's relationship with the researcher or (if applicable) the participant's access to services.	***yes***
32. Does the consent form include a description of reasonably foreseeable risks or discomforts?	***yes***
33. Does the consent form include a description of anticipated benefits to participants and/or others?	***yes***
34. Does the consent form describe any thank you gift(s), compensation, or reimbursement (for travel costs, etc.) or lack thereof?	***yes***
35. Does the consent form describe how privacy will be maintained?	***yes***

36. Does the consent form disclose all potential conflicts of interest?	***yes***
37. Does the consent document preserve the participant's legal rights?	***yes***
38. Does the consent form explain how the participant can contact the researcher and the university's Research Participant Advocate? (USA number 001-612-312-1210 or email address irb@waldenu.edu).	***yes***
39. Does the consent form include a statement that the participant should keep/print a copy of the consent form?	***yes***
40. If any aspect of the study is experimental (unproven), is that stated in the consent form?	***N/A***

Appendix B: NIH Certificate

The following is a copy of my current National Institutes of Health (NIH) human research protections certification. This certification is valid for 5 years from its issue date.

Certificate of Completion

The National Institutes of Health (NIH) Office of Extramural Research certifies that **Michael Sanders** successfully completed the NIH Web-based training course "Protecting Human Research Participants".

Date of completion: 06/01/2015

Certification Number: 1773868

Appendix C: IRB Approval

Notification of Approval to Conduct Research - Michael Sanders

Inbox x

IRB <irb@waldenu.edu> 11/16/15

to me, Mark

Dear Mr. Sanders,

Thank you for the clarification regarding your recruitment procedures. This email serves as your notification that Walden University has approved BOTH your dissertation proposal and your application to the Institutional Review Board. As such, you are approved by Walden University to conduct research.

Congratulations!

Libby Munson
Research Ethics Support Specialist, Office of Research Ethics and Compliance

Leilani Endicott
IRB Chair, Walden University

Information about the Walden University Institutional Review Board, including instructions for application, may be found at this link: http://academicguides.waldenu.edu/researchcenter/orec