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Proposal to Amend the United States Privacy Act to Extend Its Protections to Foreign Nationals and Non-Resident Aliens

I. Introduction

In 1974 Congress enacted the Privacy Act\(^1\) to control the government’s collection and distribution of information about individuals and to allow individuals to review and challenge personal data. The Privacy Act works as a counterpart to the Freedom of Information Act (“FOIA”),\(^2\) which allows public access to government information with the general goal of opening the files of United States government agencies to everyone.\(^3\) Together, the two acts encourage the legitimate use of accurate personal information and bolster individual autonomy with respect to the federal government.

This Note examines a troubling anomaly between the two acts. While the FOIA grants anyone, including foreigners, general access to the files of federal agencies, the Privacy Act protects only United States citizens and permanent residents, excluding nonresident aliens (“aliens”) and foreign nationals (“foreigners”) from its protection. Although in practice aliens and foreigners have gained access to their personal files by resort to the FOIA, exclusion from the Privacy Act remains significant since the latter provides numerous protections that the FOIA does not.\(^4\) Exclusion from the Privacy Act denies aliens and foreigners the ability to challenge errors in personal files kept by the government. More importantly, the Privacy Act limits the government’s data collection to necessary information and regulates the maintenance and dissemination of that information to other federal agencies. While the FOIA and the Privacy Act are interrelated, this Note argues that their protections are not substitutes for each other and that aliens and foreigners should receive the protection of the Privacy Act.

This Note also compares U.S. privacy law to its counterpart data protection legislation in other countries, arguing that the Privacy Act

\(^{3}\) See infra note 22 and accompanying text.
\(^{4}\) See infra notes 112-119 and accompanying text.

should be expanded to protect aliens and foreigners so as to conform to European laws. In general, European data protection acts protect foreigners as well as their citizens. Also, these data protection acts require equivalent levels of privacy protection in other countries where information about their citizens may be transferred. Potentially, the Privacy Act's exclusion of foreigners could result in other countries restricting their flow of international information to the United States. Transborder restriction of the flow of data could be detrimental to United States commercial interests. Only by amending the Privacy Act can the United States ensure the unrestricted flow of international information and promote the ideal that the collection, maintenance, dissemination, review, and correction of information gathered by government agencies should be controlled to protect all persons subject to such data collection.

II. Historical Overview of the Privacy Act

A. General Purpose of the Privacy Act and Its Relation to the FOIA

1. The Privacy Act

The Privacy Act was enacted in response to the Watergate crisis of 1974. In particular, public concern mirrored technological advances enhancing the government's ability to compile, retrieve, analyze, and disseminate data. Congress explicitly recognized that the misuse of personal information threatened an individual's fundamental right to

5. See infra note 127.

6. Section 2 of the Public Law containing the Privacy Act states Congress' intentions in passing the Act:

The privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies. The increasing use of computers and sophisticated information technology, while essential to the official operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use or dissemination of personal information. Pub. L. No. 93-579, § 2(a), 88 Stat. 1896, 1897 (1974).

"The Privacy Act was broadly conceived as a protector of personal privacy against government misuse of information." J. FRANKLIN & R. BOUCHARD, GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 2-17 (1986).

Sen. Ervin, upon introducing S. 3418, stated:

It seems that now . . . the appetite of government and private organizations for information about individuals threatens to usurp the right to privacy which I have long felt to be among the most basic of our civil liberties as a free people. . . . [T]here must be limits on what the Government can know about each of its citizens. Each time we give up a bit of information about ourselves to the Government, we give up some of our freedom. . . . Stripped of our privacy, we lose our rights and privileges.


8. Id. See also Note, Privacy Act of 1974, 1976 WASH. U.L.Q. 667, 669-70 (1976). A 1974 study of 54 federal agencies stated that 858 computerized data banks con-
due process and other legal protections. Misuse could also affect an individual's ability to secure employment, insurance, and credit.

The Privacy Act provides that individuals may review and challenge agency records about themselves. Individuals may sue for damages in response to intentional acts which violate the individual's rights under the Act.

The Privacy Act requires government agencies to provide adequate safeguards to prevent misuse of personal information. They must insure that information is accurate and current for its intended use, and they must obtain an individual's consent before using records for any purpose other than that for which the information was originally obtained. Every agency maintaining a system of records must retain only such information about an individual necessary to accomplish the purpose of the agency as required by statute or presidential order.

The Privacy Act requires agencies to collect information, to the greatest extent possible, directly from the individual when the information may adversely affect that individual's rights, benefits, and privileges.

1989 Privacy Act

A list of proposed questions for the 1970 Census included questions on religious affiliation, registration and voting records, physical and mental handicaps, and union membership. After much controversy and Congressional hearings, these questions were omitted, but questions on the number of divorces, number of babies women had, rent paid, value of houses owned, and earnings were retained. Id. at 1306.

10. Id. at § 2(a)(3).
14. Id. at § 552a(e)(6).
15. Id. at § 552a(e)(1).
under federal programs. Agencies must provide to each individual from whom it requests data the following information: the authority for the information request; whether disclosure is mandatory or voluntary; the principal purpose(s) for which the information is intended to be used; the routine uses of the information; and the consequences to the individual, if any, of non-compliance with the information request. An agency is exempt from the Privacy Act's requirements only where there is some important public policy need for the exemption as specified by the Act.

Clearly, the scope of the Privacy Act goes well beyond mere access to agency records. Though non-resident aliens and foreign nationals may gain access to agency records about themselves through the FOIA, they nevertheless may be deprived of the basic privacy protections of the Privacy Act. A review of the FOIA will show that it does not provide any of the Privacy Act protections except access to information. The provisions of one, therefore, are an imperfect substitute for the other.

2. The Freedom of Information Act

Enacted in 1966, the FOIA provides that any person has a right of access to federal agency records except records that are specifically exempt. The FOIA seeks to promote the democratic ideals of an open government and an informed citizenry without infringing upon personal privacy, national security, or the effectiveness of the criminal investigation system. In contrast to the Privacy Act, the FOIA applies to aliens and

16. Id. at § 552a(e)(2).
17. Id. at § 552a(e)(3).
18. The Privacy Act contains general and specific exemptions. 5 U.S.C. § 552a(j) and (k) (1982). The general exemptions allow the affected agencies to exempt themselves from most of the Act's record-keeping and access requirements. The general exemptions cover the C.I.A. and agencies whose principal function is criminal law enforcement, such as the F.B.I. and D.E.A. 5 U.S.C. § 552a(j) (1982). The specific exemptions allow agencies to deny individuals access to or the ability to require amendments to their records, and relieves the agency of the duty to maintain only relevant and necessary information. The specific exemptions cover classified records, law enforcement investigatory matters other than within the general exemption, Secret Service records, statistical records, investigatory materials used solely for determining qualification for federal service, test material used solely to determine qualification/promotion for federal civilian work, and evaluation material used to determine promotion in the armed services. 5 U.S.C. § 552(k) (1982).
19. At issue in this discussion are privacy interests relating to government information-handling and the individual's desire to maintain anonymity with regard to personal, identifying details. A useful definition [of privacy concerning information practices], therefore, is one in which a number of writers have concurred: the right of privacy is the right to control the flow of information concerning the details of one's individuality—one's physical and individual characteristics, knowledge, capabilities, beliefs, and opinions.

Note, Government Information and the Rights of Citizens, supra note 8, at 1225. See id. at 1225 n.1525 for references to definitions of privacy.
20. See infra notes 112-117 and accompanying text.
21. See infra notes 24-28 and accompanying text.
22. J. FRANKLIN & R. BOUCHARD, supra note 6, at 1-11.
foreigners as well as U.S. citizens.\textsuperscript{23}

Under the FOIA, all federal agency records are available to the public upon request unless specifically exempt from disclosure.\textsuperscript{24} A person does not have to state a reason for his or her request.\textsuperscript{25} The exemptions of the FOIA are exclusive;\textsuperscript{26} however, an agency may choose to disclose information exempt from the FOIA.\textsuperscript{27} The major exemptions include classified defense or foreign policy information, information specifically exempted from disclosure by statute, confidential business information, personnel files, and law enforcement investigatory records.\textsuperscript{28}

Though the purposes of the two acts are complementary, their interaction may conflict.\textsuperscript{29} While the FOIA provides for access to information by anyone, the Privacy Act restricts dissemination of information. The FOIA specifically exempts, from required disclosure, materials "which would constitute a clearly unwarranted invasion of per-

\textsuperscript{[T]here is no single attribute more fundamental to a democratic society than the free flow of information. . . . There is another side of the issue, however, which deserves equal respect and examination—the right of individuals to maintain personal privacy. . . . [I]nvansion of the sanctity of a person's privacy will be as destructive of a society's freedom and liberty as will the foreclosure of information about the acts of government in such a society."


The longstanding tension between governmental information needs and the desire of individuals to withhold personal, identifying details about their lives has heightened in the last several decades due to: (1) increasing government-individual contact resulting from increasing government regulations and services; (2) acceptance of the theory that behavior patterns can be predicted if enough information is collected and analyzed, leading to increasing demands for information in a wider range of areas; and (3) the computer explosion has increased the ease of data acquisition, decreased the need to limit data retention, and increased intra- and inter-agency transfer of information.

Together, these three phenomena have created a spiraling demand for information and have left us threatened with the emergence of a 'dossier society.'

\textit{Id.} at 1222-23.

\begin{itemize}
\item \textsuperscript{23} A FOIA request can be made by "any person," 5 U.S.C. § 552a(3), as defined in 5 U.S.C. § 551(2), which includes foreign citizens and governments. J. Franklin & R. Bouchard, supra note 6, at 1-18.
\item \textsuperscript{24} 5 U.S.C. § 552(a)(3). See also J. Franklin & R. Bouchard, supra note 6, at 1-11.
\item \textsuperscript{25} J. Franklin & R. Bouchard, supra note 6, at 1-19.
\item \textsuperscript{26} \textit{Id.} at 1-12. See 5 U.S.C. § 552(c) (1982). "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." \textit{Id.} (emphasis added).
\item \textsuperscript{27} J. Franklin & R. Bouchard, supra note 6, at 1-12. See Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979) (an agency may choose to disclose information even though it is exempt from the disclosure requirements of the FOIA).
\item \textsuperscript{28} 5 U.S.C. § 552(b) (1982).
\item \textsuperscript{29} "There is a tension between the sometimes complementary and sometimes conflicting objectives of . . . the public's right to know, . . . personal privacy . . . and the effective discharge of public business. . . ." Edelstein, Openness in Government: A New Era, 34 Fed. Bar J. 279, 281 (1975).
\end{itemize}
sonal privacy," This language suggests that in some circumstances the protection of personal privacy may override the FOIA’s goal of providing public access to information collected by the government. Because the Privacy Act excludes foreigners and aliens, they must resort to the FOIA to obtain information about themselves. The legislative history of the Privacy Act provides only a brief explanation of why this anomaly exists between the two acts.

B. The Legislative History of the Privacy Act

While the later enacted Privacy Act explicitly excludes nonresident aliens and foreign nationals, the FOIA protections extend to these persons. The Privacy Act defines an “individual” as “a citizen of the United States or an alien lawfully admitted for permanent residence,” and a “record” as any information about an individual. Therefore the Privacy Act allows only citizens and permanent residents to gain access to agency records containing information about themselves. In contrast, the FOIA applies to any “person,” defined to include foreign citizens and foreign governments, as well as corporations, partnerships, and associations.

Senator Ervin introduced the privacy bill in the Senate on May 1, 1974. The Senate bill originally provided protection for foreigners as

31. Id. at § 552a(a)(2).
32. The Privacy Act defines a “record” as:
   any item, collection, or grouping of information about an individual that is
   maintained by an agency, including, but not limited to his education, financial
   transactions, medical history, and criminal or employment history and
   that contains his name, or the identifying number, symbol, or other identifying
   particular assigned to the individual, such as finger or voice print or a
   photograph.
   Id. at § 552a(a)(4).
33. Id. at § 552a(d)(1).
34. Id. at § 552a(d)(3).
of Justice, 596 F. Supp. 423, 427 n.4 (S.D.N.Y. 1984). While nonresident aliens and
foreign nationals are not within the scope of the Privacy Act, they have considerable
access to a broader category of records under the FOIA than they would through the
36. S. 3418, 93d Cong., 2d Sess. (1974), reprinted in SOURCEBOOK, supra note 6, at
9-28. The bill was much broader in scope than the Privacy Act as finally enacted.
The initial Senate bill would have established a Federal Privacy Board to oversee the
collection and disclosure of information concerning individuals and to provide infor-
mation management systems. Id. at 9. In a compromise with the House of Repre-
sentatives, the Senate eliminated the Privacy Board and rendered the Privacy Act less
helpful to individuals, especially in light of the Act’s ineffective judicial remedies pro-
vision. Supra note 8, at 718.

The failure to provide for an independent commission to aid in the enforce-
ment of the Act was inexcusable. The Act places responsibility for assuring agency compliance almost exclusively upon the individual, but gives him neither the tools nor the incentive to do so.

No one, however, wants to repeat the experience of the Freedom of Informa-
tion Act in holding out rights to individuals but providing them with only
a costly and cumbersome mechanism of a judicial remedy. Therefore we
The bill applied to "data subjects" rather than "individuals" and defined a data subject as "an individual about who [sic] personal information is indexed or may be located . . . in any information system." After undergoing extensive revision, the bill emerged from the Senate Committee on Government Operations applying only to U.S. citizens and permanent residents. The record of the Committee mark-up session, prior to the Senate vote on the bill, does not mention the change.

The only explanation for the Privacy Act's restrictive definition of individual is found in the Committee Report accompanying the Senate bill:

The term "individual" means a citizen of the United States or an alien lawfully admitted throughout permanent residence. This term is used instead of the term "person" throughout the bill in order to ... exempt [from] the coverage of the bill intelligence files and data banks devoted solely to foreign nationals or maintained by the State Department, the Central Intelligence Agency and other agencies for the purpose of dealing with nonresident aliens and people in other countries.

Interpreting the above language, the Office of Management and Budget ("OMB") Guidelines on the Privacy Act state that files solely related to nonresident aliens are not covered by any portion of the Act. In addition, in records systems which cover both citizens and aliens, only that portion relating to citizens or permanent residents is protected. How-

would amend the bill to provide for the establishment of an administrative body to mediate conflicts between agencies and individuals, to investigate complaints, hold hearings, and make findings of fact . . . Only by providing a separate administrative agency with authority for implementing legislation and coordinating the privacy programs of the various Federal agencies can we be assured of unified effective enforcement of the rights guaranteed by this bill.


Any Federal agency, State or local government, or other organization maintaining an information system that includes personal information shall . . . afford any data subject of a foreign nationality, whether residing in the United States or not, the same rights under this Act as are afforded to citizens of the United States.

*Id.*

The legislative history fails to explain why the bill initially included foreigners. The ultimate revision of the Act to exclude foreigners is only very briefly explained. See *infra* note 42 and accompanying text.


38. *Sourcebook*, *infra* note 6, at 25.

39. Mark-Up Session on S. 3418, Aug. 20, 1974 *reprinted in Sourcebook, infra* note 6, at 43 (refers to the Committee taking up Confidential Committee Print No. 5).

40. *Sourcebook*, *infra* note 6, at 145.

41. Mark-Up Session on S. 3418, reprinted in *Sourcebook, infra* note 6, at 29-96.

ever, the Guidelines do encourage agencies to treat such systems as if they were, in their entirety, covered by the Act.43

Representative Moorhead introduced a substantially different privacy bill shortly after the Senate bill was introduced.44 The House bill defined an individual as a citizen or lawfully permanent resident.45 The Report of the House Committee on Government Operations states only that the House Privacy Act "would not affect any . . . foreign nationals."46

The Senate and House versions differed both in structure and in content.47 Rather than working out these differences in a formal conference, Congress was determined to pass some form of privacy legislation before the end of the session.48 Therefore, the leading congressional proponents of the bills met informally to draft a compromise bill. President Ford signed the Privacy Act into law on December 31, 1974.49

C. Judicial Interpretation of "Individuals" Protected by the Privacy Act

There is little judicial interpretation of the meaning, scope, or application of the Privacy Act. Courts have generally considered the Act as clearly defining an "individual."50 In Raven v. Panama Canal Co.,51 the Fifth Circuit held that a Panamanian citizen was not an individual under the Privacy Act and therefore could not compel access to information.

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43. OMB Privacy Act Guidance, reprinted in Hearings, supra note 36, at 352.
44. Sourcebook, supra note 6, at 239-57.
45. Id. at 241-42.
46. Id. at 304.
47. While the Senate version created a permanent Privacy Protection Commission, the House bill did not. The compromise was a temporary Privacy Protection Study Commission. Another difference was that the Senate bill restricted agency releases of information more tightly than the House bill, which permitted dissemination if it was a routine use of the data by the agency. Again, the House version was followed. There where further compromises on the relevance and accuracy of the file information, and the scope of judicial review available to individuals. In general, the less stringent House bill was adopted. J. Franklin & R. Bouchard, supra note 6, at 2-16.
48. While the Watergate scandal prompted passage of the Privacy Act, impeachment hearings also preoccupied the Senate and left little time for legislation until the closing months of the 93d Congress. Congress did not seriously consider privacy legislation until four months before adjournment. The Senate and House bills were not passed until late November. The 93d Congress considered several bills concerning personal privacy, indicating Congress's strong reaction to the illegal wiretapping and surveillance aspects of Watergate. J. Franklin & R. Bouchard, supra note 6, at 2-18 to 2-22.

Professor Flaherty states: "The compromise was a product of pressures on Congressional time, the desire to pass some privacy legislation in the wake of the Watergate affair, the desire to honor Senator Ervin in his last term, resistance to the creation of more bureaucracies, and the risk of a Presidential veto." Hearings, supra note 36, at 196.
49. J. Franklin & R. Bouchard, supra note 6, at 2-17.
50. See infra notes 51-57 and accompanying text.
51. 583 F.2d 169 (5th Cir. 1978).
about herself. The court stated that Congress' different treatment of aliens and citizens did not violate the Equal Protection Clause because a legitimate distinction exists between those groups. Raven referred to Stone v. Export-Import Bank of United States, an FOIA case which, in dicta, distinguished the FOIA's broad definition of person from the Privacy Act's narrower definition of individual. Both courts cited legislative history to demonstrate a congressional intent to exclude foreign nationals and resident aliens from the protection of the Privacy Act.

D. Congressional Review of the Privacy Act

In June, 1983, the House Government Operations Committee ("the Committee") held the first hearings on the oversight of the Privacy Act since the Act became effective. These hearings followed shortly after the introduction of several House bills aimed at limiting public access to government records. The Committee was particularly concerned with the possibility of restrictions on international data flow. Such restrictions, it was feared, might result in United States companies losing business opportunities in the lucrative markets for data processing and information services because other countries would view United States privacy law as deficient.

The Committee addressed the international implications of recent

52. Id. at 170.
53. Id. at 171 (referring to Matthews v. Diaz, 426 U.S. 67, 78-79 (1976)). The court also held that the equal protection clause does not require extension of all Privacy Act rights to Panamanian employees of the Canal Zone. Raven, 583 F.2d at 171.
54. 552 F.2d 132 (5th Cir. 1977).
55. Id. at 136-37.
56. See supra note 42 and accompanying text.
57. Raven v. Panama Canal Co., 583 F.2d 169, 171 (5th Cir. 1978). See also Florida Medical Ass'n v. Dept. of Health, Ed. and Welfare, 479 F. Supp. 1291, 1307 (M.D. Fl. 1979). In a more recent FOIA case, Doherty v. United States Dept. of Justice, 596 F. Supp. 423 (S.D.N.Y. 1984), the district court implied that Congress offered little reason to distinguish the different treatment of foreigners in FOIA from that of the Privacy Act. Id. at 426 ("Upon comparing the text of the FOIA with the text of the Privacy Act, this Court believes that the Congress, for whatever reasons of its own, was aware of the difference between the terms 'person' and 'citizen,' and intentionally chose the former for the FOIA and the latter for the Privacy Act.") (emphasis added). Id.
58. Hearings, supra note 36.
60. Hearings, supra note 36, at 1-4 ("Other countries that have recently found the need to enact laws protecting privacy have done so through comprehensive data protection laws. Some of these nations are now reluctant to send information outside of their own borders if the legal protections afforded the information will be diminished. As a result United States companies may find that they are shut out of lucrative markets for data processing and information services because of a perception that U.S. privacy laws are inadequate."). Id. at 4. The Committee noted that the Privacy Act's record-keeping requirements have had a much greater impact than the Act's access provisions, which largely duplicate those of the FOIA. Id. at 3.
attempts to exclude foreign nationals from the FOIA. The Committee Report stated that the Privacy Act's exclusion of foreign nationals is insignificant since those people can use the FOIA to obtain records about themselves. The Committee, however, also recognized that if the FOIA were restricted in the same way as the Privacy Act, foreign nationals would have no access to government information about themselves. The Committee therefore found that restricting the FOIA without correspondingly expanding the Privacy Act "would be received negatively abroad and could result in a reciprocal loss of rights [to] United States citizens." The Committee recommended that efforts to constrict the FOIA should be reconsidered.

Apparently, the sponsors of the bills to restrict the FOIA had not considered international reaction to an FOIA amendment denying foreigners the Act's protection. The Committee contacted the Office of Management and Budget, the agency designated to oversee the Privacy Act, which admitted that none of the agencies it contacted had considered the political implications abroad. OMB informed the Committee that if the FOIA was amended to restrict use by aliens and foreigners, then the United States Trade Representative and the State Department

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61. See S. Rep. No. 690, 97th Cong., 2d Sess. (1982) to accompany S. 1790. "The bill would limit the use of FOIA to 'U.S. Persons,' " but the paragraph describing the regulatory impact of the bill states that the amendment will "improve personal privacy protections for every individual about whom the Government maintains information." Id. at 2. The Report does not provide any explanation for the reasons behind the proposed restriction to U.S. persons.


63. Christopher DeMuth, Administrator of OMB's Office of Information and Regulatory Affairs, testified at the Oversight Hearings that in a three year span, agencies received over two million Privacy Act requests from individuals for access to their records, of which 96 percent were granted. Hearings, supra note 36, at 73.

64. Hearings, supra note 36, at 32-33.


66. Id.

67. Id. at 37.

68. Id. at 33. "There is no indication that, when the Reagan Administration proposed amending the Freedom of Information Act, it gave any consideration to the international consequences of cutting off the ability of foreigners to use the law to protect privacy interests." Id.


The OMB answered the Subcommittee's questions:

QUESTION: Foreigners have no access and correction rights under the Privacy Act. However foreigners may seek access to records under the Freedom of Information Act. The Reagan Administration has proposed legislation that would deny foreigners the use of the FOIA. Has anyone in the Administration considered how such a change in the FOIA might be received in Europe? If so, please provide documentation.

ANSWER: None of the agencies we contacted indicated that the subject had received specific consideration, but both the Office of the U.S. Trade Representative and the Department of State suggested that such an exclusion might be received negatively.

Hearings, supra note 36, Appendix 8, at 600 (emphasis added).
favoring extending the Privacy Act to aliens and foreigners. Such an expansion of the Privacy Act would bring it more in line with European data protection acts.

III. Comparison of the Privacy Act to Data Protection Legislation in Other Countries

A. General Purpose and the Council of European Data Protection Convention

In Europe, data protection acts confer protections and serve purposes similar to the United States Privacy Act. In general, European data protection laws allow foreign citizens to access, inspect, and challenge data bases. The Council of European Data Protection Convention ("the Convention") requires member States to provide persons residing abroad with both access rights to personal information and assistance in the exercise of those rights.

The Convention requires comprehensive national data protection laws as a prerequisite to ratification. Because the United States data protection laws do not meet European standards, the United States is ineligible to join the Convention at this time. Moreover, the Convention authorizes party nations to restrict transborder data flows to non-

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71. Hearings, supra note 36, Appendix 8.
73. Hearings, supra note 36, at 251. Swedish, West German and British laws protect foreign citizens. Only Canada denies data protection to foreigners. Id.
74. The Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, is an international agreement whose purpose "is to strengthen data protection, i.e. the legal protection of individuals with regard to automatic processing of personal information relating to them." COUNCIL OF EUROPE EXPLANATORY REPORT ON THE CONVENTION FOR THE PROTECTION OF INDIVIDUALS WITH REGARD TO AUTOMATIC PROCESSING DATA 5 (1981) [hereinafter COUNCIL OF EUROPE EXPLANATORY REPORT]. The Convention binds ratifying countries and requires comprehensive national data protection laws as a prerequisite to ratification. It contains provisions authorizing ratifying countries to restrict transborder data flows to non-member nations. YUROW, Data Protection, in TOWARD A LAW OF GLOBAL COMMUNICATIONS NETWORKS 241 (A. Branscomb ed. 1986) [hereinafter YUROW].
75. COUNCIL OF EUROPE EXPLANATORY REPORT, supra note 74, art. 8, at 32.
76. Id. art. 14, at 35.
77. Id. art. 4, at 31.
78. See infra notes 133-35 and accompanying text.
party countries.  

B. Differences Between United States and Foreign Privacy Laws

United States privacy laws operate differently than European data protection laws in several ways. First, European laws fully cover both the public and private sectors, whereas United States privacy laws only partially cover each sector. The Privacy Act only applies to the federal public sector. Other statutes cover a few specialized areas of the United States private sector, such as consumer credit, educational, and financial institutions.

Second, in Europe, strong, centralized data protection commissions manage and enforce data protection laws; the United States has no independent, central authority. OMB provides minimal oversight of the Privacy Act and Congress requires the President to submit annual compliance reports. Agencies responsible for the substantive regulation of the private sector, such as the Federal Trade Commission, the Federal Reserve System, and the Department of Education, enforce privacy statutes in these private areas.

Third, European laws generally protect all persons regardless of citizenship or nationality, subject to certain exceptions such as national security. The Austrian Data Protection Act, for example, defines the persons protected by the act as “persons or personal companies.” France protects the right of access of “[a]nyone who can prove his identity.” Sweden’s Data Act defines personal information as “informa-

79. Council of Europe Explanatory Report, supra note 74, art. 12.3.b, at 34. See also Yurow, supra note 74, at 239-40.
80. Yurow, supra note 74, at 239-40.
81. Id. at 240-41.
85. Yurow, supra note 74, at 240.
86. Section 6 of the Public Law, known as the Privacy Act, which was not codified, provides: “OMB shall develop guidelines and requirements for the use of agencies in implementing [the Act] ...; and provide continuous assistance to and oversight of the implementation of the provisions ... by agencies.” Privacy Act, Pub. L. No. 93-579, at 6 (1982). See also 5 U.S.C. § 552a(o), (p) (1982). “The President shall annually submit to ... [Congress] a report describing the actions of the Director of OMB; ... the exercise of individual rights of access; ... identifying changes in or additions to systems of records; ... such other information concerning administration of this section as may be necessary or useful to the Congress.” 5 U.S.C. § 552a(p) (1982).
88. Id. at 67, 76.
90. French Draft Law on Informatics and Liberties, Article 27 (1976), reprinted in Data Protection Legislation, supra note 89, at 65. The French Draft Law was
tion concerning an individual,” with “individual” meaning any person.91

By defining their scope in terms of any person, European acts protect foreign nationals as well as citizens.92 In contrast, the Privacy Act only applies to United States citizens and permanent residents,93 although United States private sector laws extend to all persons.94

C. Similarities Between United States and Foreign Privacy Laws

Despite the differences noted above, several aspects of European legislation are similar to the American Privacy Act.95 First, like the Privacy Act,96 European data protection acts provide much more than just individual access to personal information; they provide ways for individuals to challenge and amend personal data. For example, the French data act creates “the right to question the departments or bodies responsible for carrying out the various categories of automatic data processing . . . with a view to ascertain whether the personal [datum] being processed covers him and, if it does, obtaining a copy of it.”97

Second, the European acts limit the kinds of organizations that can collect personal data and how they can collect it.98 Third, personal data

enacted in 1978. Act 78-17 of 6 Jan., 1978 on Data Processing, Data Files and Individual Liberties (France).
92. Turn, supra note 87, at 76.
93. Id. The Canadian Privacy Act, R.S.C. ch. 119, § 2 (1983), and Access to Information Act, id. § I, also give rights of information access only to citizens and permanent residents. Id. §§ 1.4(1), 2.12(1). See also DATA PROTECTION LEGISLATION, supra note 89; Skelly, Data Protection Legislation in Canada, in 3 YEARBOOK OF LAW COMPUTERS & TECHNOLOGY 79, 90 (C. Arnold ed. 1987). But discussions at the parliamentary committee considering the legislation indicated that Canada would grant foreigners information access rights on a reciprocal basis with other countries. H.R. REP. No. 455, supra note 62, at 33. The Canadian Privacy Act provides that the right of access may be extended by regulation to non-citizens. R.S.C. ch. 111 § 2.12(3) (1983). See also DATA PROTECTION LEGISLATION, supra note 89, at 90. Because the Act created a Privacy Commissioner whose tasks are similar to the centralized European data protection boards, see Hearings, supra note 36, at 211, it is less critical that Canada extend its Privacy Act to all persons.
94. This demonstrates the anomaly of the Privacy Act’s limited scope of protection. See Fair Credit Reporting Act, Pub. L. No. 91-508, § 603(b) (1970) (“The term ‘person’ means an individual”).

In some ways, United States privacy law is broader than its European equivalents. United States law covers manual and automated record-keeping systems whereas European laws protect only automated data. See Turn, supra note 87, at 76. Moreover, in the United States, many state constitutions provide further privacy protection.
95. Turn, supra note 87, at 71. They both promote the principles that were first outlined in a U.S. H.E.W. committee report and augmented by the Privacy Protection Study Commission and the Council of Europe’s resolutions on privacy rights. Id. at 71 nn.7-9.
96. See supra notes 7-20 and accompanying text.
97. Act 78-17 of 6 Jan. 1978 on Data Processing, Data Files and Individual Liberties § 27 (France).
98. Turn, supra note 87, at 71-76.
can only be used for those purposes for which the government collected it, unless prior knowledge or consent of the person is obtained.\textsuperscript{99} Fourth, record keeping organizations are restricted as to when they may disclose personal data, and they must conform to legally enforceable confidentiality obligations. Additionally, these organizations must account for their record-keeping policies, practices, and systems, and they must develop information management policies to ensure that personal data is current and accurate. They must also implement precautions to prevent misuse of the data.\textsuperscript{100}

IV. Analysis

A. The Privacy Act's Exclusion of Foreigners for All Purposes Is Overbroad

The original Senate bill underlying the Privacy Act applied to foreigners as well as citizens.\textsuperscript{101} The only explanation in the legislative history for limiting the final Act's protections to citizens and permanent residents was to "exempt [from] the coverage of the bill intelligence files and data banks devoted solely to foreign nationals or maintained by the State Department, the Central Intelligence Agency and other organizations for the purpose of dealing with nonresident aliens and people in other countries."\textsuperscript{102} This narrow explanation does not support the final Act's broad exclusion of all foreigners from Privacy Act access rights. Congress could have drafted the Privacy Act so as to cover legitimate Congressional foreign policy and national security concerns yet avoid a blanket exclusion of all foreigners and aliens.

Since the legislative history specifically refers to intelligence files and data banks maintained by the Central Intelligence Agency ("CIA") and the State Department, it appears that Congress' main reason for excluding foreigners concerned national security. Such factors, however, are dealt with specifically in other sections of the Privacy Act. For example, record systems maintained by the CIA are generally exempt from the Act.\textsuperscript{103} Classified "national defense and foreign policy" materials are similarly exempt from many of the Privacy Act's requirements.\textsuperscript{104} These explicit national security exemptions distinguish between foreigners and citizens. Blanket preclusion of foreigners from all Privacy Act protection, therefore, unnecessarily excludes foreigners

\textsuperscript{99} See generally supra notes 36-41 and accompanying text.
\textsuperscript{101} See 2 B. Braverman & F. Chetwynd, Information Law 820 (1985).
without achieving any increase in national security.105

An example of a potential problem for aliens not receiving the protections of the Privacy Act is raised by Congress' consideration, in connection with the recent Immigration Act, of a requirement that all persons in the United States carry an identification card.106 The card, designed to prevent the employment of illegal aliens, would be backed up by a national personal information databank covering all persons legally in the United States.107 Such a system carries significant risks of misuse, since police and other government agencies could use stored information to conduct investigations beyond the scope of investigating illegal employment, including numerous inquiries concerning persons legally in the United States. Nonresident aliens would be especially susceptible to abuse since they have no rights under the Privacy Act. In sum, competing national concerns, such as security, are adequately protected without excluding foreigners from Privacy Act coverage.

B. The FOIA Is Not an Adequate Substitute for the Privacy Act

Foreigners' current ability to obtain access to agency files about themselves through the FOIA does not compensate for exclusion from Privacy Act protection. The two acts promote different goals and subsequently provide fundamentally different protections.108 The FOIA's goals are to create an open government, promote an informed people, and prevent government corruption.109 Since these objectives extend to all persons affected by government operations, the FOIA provides everyone with access to non-exempt agency files for any purpose.110 The underlying principle is that, except for specific instances of overriding national interest, the government should have nothing to hide from anyone.111

In contrast, the Privacy Act deals with information that people have provided about themselves which the government has collected. Failure

105. The Privacy Act's legislative history also indicates that neither the OMB nor the State Department opposed certain extensions of the Privacy Act to foreigners. During the 1983 House Oversight Hearings on the Privacy Act, questions arose about the potential impact of proposed amendments to deny foreigners all rights under the FOIA. See H. R. Rep. No. 455, supra note 62, at 32. The OMB testified that it had not considered whether such amendments would deprive foreigners of any right to access government files. See supra note 70. The OMB also stated that if the FOIA was so amended, the State Department would favor extending the Privacy Act to foreigners; OMB stated that it would not oppose such an extension. See H.R. Rep. No. 455, supra note 62, at 33. See also Hearings, supra note 36, at 600.

106. Hearings, supra note 36, at 266 (Statement of John Shatuck, National Legislation Director of the ACLU).

107. Id.


109. See supra note 22 and accompanying text.

110. See supra text accompanying note 24.

111. See supra notes 21-28 and accompanying text.
to protect all persons from the misuse of personal data runs contrary to the ideal of privacy protection. When the United States government collects personal data from aliens or foreigners, or requires them to provide personal data to receive government benefits to which they are entitled, the government ought to have a reciprocal duty to protect such data under its laws.

As detailed above,\textsuperscript{112} the Privacy Act provides many rights and protections beyond mere access to files about oneself. At present, foreigners can obtain their personal data in agency files, but they have no means of challenging the information. Foreigners are also denied the Privacy Act's protection against agencies' misuse of file information by applying it to purposes other than those for which it was collected.\textsuperscript{113} If an agency's use of the personal data injures a foreigner, he or she is deprived of the Act's remedial measures.\textsuperscript{114} Without an independent central authority overseeing agency use of data, exclusion from the Privacy Act's protections leaves foreigners dependent on the irrebuttable good will and accuracy of the bureaucracy.

Recent proposals to exclude foreigners from the FOIA\textsuperscript{115} increase the need for amending the Privacy Act. The possibility of totally depriving foreign nationals and nonresident aliens of all rights to agency information should be avoided by expanding the Privacy Act.

The Privacy Act is intended to be a comprehensive statement of federal confidentiality policy. Consequently, it should not force persons to resort to the FOIA to achieve its objectives. The Act's exclusion of nonresident aliens contradicts the spirit of the Act that privacy is a "personal and fundamental right protected by the Constitution."\textsuperscript{116} While aliens do not receive the full protection of constitutional rights, they are not uniformly deprived of all constitutional protections.\textsuperscript{117} The Privacy Act
was intended to expand privacy law to address a new problem.\textsuperscript{118} Therefore, the issue of whether the Privacy Act should be extended to aliens and foreigners does not depend on whether they have a constitutional right to privacy. Moreover, even though the Constitution does not require foreigners to be protected under the Privacy Act,\textsuperscript{119} there is no reason to distinguish between citizens and foreigners for this aspect of a statutorily created right to privacy. Singling out foreigners does not serve any government interest that is not already adequately addressed by the Privacy Act’s specific exemptions.

C. International Implications

The processing of personal data should be considered at the international level. International agreements on data flow are needed because data processing is increasingly international in scope.\textsuperscript{120} As the international community becomes more interdependent, the need for harmoni-

\begin{footnotesize}
\textsuperscript{118} R. Aldrich, Privacy Protection Law in the United States (U.S. Dept. of Commerce, NTIA Report 82-98 (1982)), reprinted in Hearings, supra note 36, at 481, 490. \textit{See supra} notes 8-10 and accompanying text.
\textsuperscript{119} \textit{See supra} note 117 and accompanying text.
\end{footnotesize}
ous information-handling rules becomes greater.\textsuperscript{121} Nations are becoming more dependent on recorded personal information for organizational decisions affecting the rights, privileges, and benefits of millions of people.\textsuperscript{122} Accordingly, the United States Privacy Act should be expanded to resemble European data protection acts. An international consensus on fundamental principles for protecting personal data would decrease the reasons for regulating the export of data and thereby decrease the costs of international data transfers.\textsuperscript{123} Restrictions on information flows can prohibitively increase the cost of doing business or limit technological development.\textsuperscript{124} United States companies are information-dependent and can be harmed by other countries creating information barriers.\textsuperscript{125}

European nations are concerned that the United States provides less data protection to foreigners than other countries.\textsuperscript{126} At the Privacy Act Oversight Hearings, Ronald Plessner, former general counsel to the Privacy Protection Study Commission, stated: "[Many foreign] countries . . . require that other countries to whom information about their subjects may be transferred have equivalent levels of privacy protection. The Privacy Act of 1974 is not generally seen as satisfying these requirements for equivalent protection because non-citizens or resident aliens are excluded from its protections."\textsuperscript{127} Another witness stated that foreign

\begin{footnotes}
\item[121] Metz, \textit{Privacy Legislation: Yesterday, Today and Tomorrow}, 34 FED. BAR J. 311, 315 (1975). The U.S. is a signatory nation to the OECD Guidelines which state: Recognizing . . . that automatic processing and transborder flows of personal data create new forms of relationships among countries and require the development of compatible rules and practices; that transborder flows of personal data contribute to economic and social development . . . . Determined to advance the free flow of information between Member countries . . . . Recommends [t]hat Member countries endeavour to remove or avoid creating, in the name of privacy protection, unjustified obstacles to transborder flows of personal data.
\item[122] See also Bing, Forsberg & Nygaard. \textit{Legal Problems Related to Transborder Data Flows}, in \textit{AN EXPLORATION OF LEGAL ISSUES IN INFORMATION AND COMMUNICATION TECHNOLOGIES} 81-82 (Organization for Economic Cooperation and Development Information Computer Communication Policy Series No. 8, 1983).
\item[124] Metz, \textit{supra} note 121.
\item[125] \textit{Organization for Economic Cooperation and Development Guidelines on Protection of Privacy and Transborder Flows of Personal Data} 11, 18 (1980). Also, nations have a common interest in not tolerating areas where national regulations on data processing can easily be circumvented. The concern is having personal data re-exported to a country with inferior data protection. \textit{Id}.
\item[126] \textit{See H.R. REP. No. 455, supra} note 62, at 30-31.
\item[127] \textit{Id.}
\item[128] \textit{Hearings, supra} note 36, at 248 (Statement of R. Plessner).
\item[129] \textit{Id.} at 247 (emphasis added). In developing these issues at the hearings, Plessner stated: The interaction of the Privacy Act and the Freedom of Information Act also creates an interesting situation in connection with foreign data information acts. . . . Transborder data flow is of great concern to . . . companies. Many foreign countries have established data protection acts whose basic tenants [sic] is the ability of individuals to see and copy records maintained in sys-
nations would view any U.S. actions constricting existing protection to foreigners—such as restricting the FOIA—as a form of discrimination.\textsuperscript{128} If other nations sense a lack of comity on the part of the United States, they may restrict their protection of U.S. citizens' privacy rights. United States economic interests would be best served if Congress extends the Privacy Act to foreigners.\textsuperscript{129}

National governments commonly transfer personal data for their own administrative purposes, usually to obtain information not domestically available. International data transfers involving health data, law enforcement, social welfare, and commercial regulation are common.\textsuperscript{130} These transfers may be hindered if the country's privacy law is inconsistent with the laws of other countries.\textsuperscript{131} As noted above,\textsuperscript{132} foreign countries may restrict the flow of this important information to the United States since the Privacy Act does not protect personal data about foreigners.

Another reason to expand the Privacy Act is so that it will conform to the purpose of the Council of Europe Data Protection Convention ("Convention") "to secure in the territory of each party for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with respect to automatic processing of personal data relating to him ('data protection')."\textsuperscript{133} The Convention was developed in close cooperation with OECD and the non-European member countries of OECD, including the United States.\textsuperscript{134} Article 23 of the Convention allows the Council of

\begin{itemize}
\item Id. at 247-48 (emphasis added).
\item 128. Hearings, supra note 36, at 251 (Statement of Professor Flaherty).
\item 130. Id. at 8.
\item 131. Id. at 8 n.17.
\item 132. See supra notes 126-29 and accompanying text.
\item 133. COUNCIL OF EUROPE EXPLANATORY REPORT, supra note 74, art. 1, at 29 (emphasis added).
\item 134. Id. at 27. The U.S. was represented by an observer on the Council of Europe's committee. Id. at 9.
\end{itemize}
Europe to invite non-members to join the Convention.\textsuperscript{135} In order for the United States to join the Convention, it must amend its Privacy Act to conform to the Convention's provisions regarding foreigners.

The United States can benefit from becoming a party nation to the Council of Europe's Data Protection Convention. The Convention's goal is to facilitate data transfers by harmonizing often conflicting national data protection laws.\textsuperscript{136} The United States should strive to meet the requirements of the Convention as it authorizes signatory nations to restrict transborder data flows to non-signatory countries.\textsuperscript{137} The Convention holds the promise of eventually resolving data protection problems between nations. Uniform data handling practices would protect personal data and promote international trade in data and data processing services.\textsuperscript{138}

The Council of Europe has strongly urged the United States to increase legal safeguards for foreigners concerning personal information or face the prospect of European restrictions on the flow of personal data to the United States.\textsuperscript{139} The United States Government responded that United States law provides adequate safeguards for personal privacy.\textsuperscript{140} Because information and data processing have become economic commodities,\textsuperscript{141} United States privacy law must meet generally accepted international standards to promote U.S. trade in these areas. United States international trade in these areas amounts to annual exports in excess of $30 billion as of 1983.\textsuperscript{142} Statistics are not available concerning what percentage of this trade is covered by federal privacy law,\textsuperscript{143} but even a relatively small percentage would result in a significant total value. Since the United States is the world leader in trade, much of which trade consists of or depends on data flows, any restrictions on data transfers will affect United States business interests more than those of other nations.\textsuperscript{144} Expansion of the Privacy Act would increase the opportunity for more data flow to the United States and would benefit United States business.

V. Conclusion

The Privacy Act is the primary United States statute protecting the confidentiality of information collected by the federal government. In order to equally protect everyone affected by government data collection and to promote the ideal of open government in the United States and

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  \item \textsuperscript{135} Id. art. 23.1, at 39.
  \item \textsuperscript{136} Comment, supra note 120, at 603.
  \item \textsuperscript{137} Yurow, supra note 74, at 241.
  \item \textsuperscript{138} Grossman, supra note 129, at 31.
  \item \textsuperscript{139} Hearings, supra note 36, at 272 (Statement of John Shattuck).
  \item \textsuperscript{140} Id.
  \item \textsuperscript{141} Comment, supra note 120, at 601.
  \item \textsuperscript{142} Hearings, supra note 36, Appendix 8, at 599.
  \item \textsuperscript{143} Id. at 599-600.
  \item \textsuperscript{144} Comment, supra note 120, at 604.
\end{itemize}
abroad, foreign nationals and nonresident aliens should be treated the same as United States citizens under the Privacy Act. This expansion of the Privacy Act would bring it more in line with European data protection and would promote the flow of transborder data and benefit United States commercial interests.

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