6. The US Response: Does the Spiral Model Work?

More than four years after the first revelations of documents pilfered by Edward Snowden a first assessment of the US reactions to national and international upheaval following the disclosures is possible. This chapter will briefly analyze whether the US reactions follow spiral A and will define at which of the five steps the USA can be located at the time of writing. I will conclude with a prospect of how likely it is that the USA will reach rule-consistent behavior with regard to the privacy norm in the foreseeable future.

1) Repression: Since 2001 and 2007, respectively, critical US surveillance procedures are being carried out. Although it was an individual and not an NGO that gave rise to the NSA affair, the connection to an international advocacy network – that is a determent of the spiral framework – was given: Snowden copied NSA documents and took them abroad; moreover, he contacted international journalists in order to arouse attention to the human rights violation. This was necessary, because internal competent authorities did not echo Snowden's concerns. Instead, superiors attacked Snowden to attempt to mute his concerns (Risen 2013). The first article containing information from documents taken by Snowden was published in a foreign newspaper and accused the USA of storing metadata of US citizen’s calls (Greenwald 2013 a).

Hence, in the first place, the Snowden revelations followed the spiral model: An advocator contacted members of the international advocacy network to make human rights violations public and to pressure the state to change its behavior.

2) Denial: The steps of repression and denial coincide and cannot be separated exactly, because the phase of denial began long before the Snowden revelations. Many US practices in cyberspace were already known before the revelations (O’Connel 2012), and rumors about overreaching surveillance practices of US intelligence agencies caused the Director of National Intelligence, James Clapper, as well as the
NSA director, General Keith Alexander, to lie before Congress in early 2012 and early 2013, respectively. Questioned about possible surveillance activities targeting US persons, both denied any such activity (Cate 2015: 30).

According to the spiral model, this denial should strengthen the efforts of the human rights advocates – this did indeed happened. Even though the motivation of Snowden to divulge the surveillance activities dates back to 2007 (Risen 2013), the wrong answer of Alexander to members of Congress was the straw that broke the camel’s back. In one of his first mails to journalist Laura Poitras, Snowden called this a main motivation to come forward: “NSA director Keith Alexander lied to Congress, which I can prove” (2013, cited in Greenberg 2014). Thus, the denial of the surveillance practices by state officials caused even greater pressure by human right advocates.

After the NSA affair had broken out, the USA could no longer deny the truthfulness of the accusations. Nevertheless, they remained in the denial phase for a few months, although they did not deny the most controversial matters of the Snowden leaks: the bulk phone data collection and the existence of PRISM. Instead of denying the practices themselves, the US government denied that these activities could be considered as norm violations. The Obama administration maintained, on the one hand, that the US spying activities on US citizens were legal and transparent (Reilly 2013) and, on the other hand, that in terms of foreign surveillance, US obligations under human rights treaties do not apply beyond US borders including the ICCPR (Fidler 2015 b: 58). Especially the statement on the extraterritorial non-application of the human right to privacy is in line with the tradition of US exceptionalism regarding human rights issues.78

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78 In fact, the argument that human rights obligations are not applying extraterritorially is not made for the first time by the USA. The US government began to express this point of view in 1995 and expanded its use under the Bush administration (Van Schaack 2014: 22ff.). With it, the USA contradicts the doctrinal consensus of the international human rights bodies and advocates that “States owe human rights obligations to all individuals within the authority, power, and control of their agents or instrumentalities” (Van Schaack 2014: 22). As Van Schaack (2014) holds, “this firm stance confirms the United States as a persistent objector to any emerging customary norm” (23).
The US government also engaged in the suppression of the advocacy process. Politicians not only called for sanctions on any country that takes in Snowden (Zengerle 2013), but the US government also threatened allied states, like Germany, which were considering to grant Snowden asylum (Scheer 2015). Furthermore, the US forced down the airplane of Bolivia’s President Evo Morales in Vienna after rumors circulated that Snowden could be on board (Gathmann 2013). Nevertheless, privacy and civil liberties groups were not sanctioned in the USA and could continue their work. Suppression on a broad front, thus, did not happen.

3) Tactical concessions/prescriptive status: One can observe a time span in which the USA moved from the denial status to the phase of tactical concessions. The Obama administration started to enter this phase in August 2013, when the message Obama was conveying changed. Before, he had held the opinion that spying on Americans by the NSA was legal and everything was transparent thanks to the FISC. But in August, President Obama admitted for the first time that citizens might have a reason to worry about the NSA program by stating: “I think there are legitimate concerns people have that technology’s moving so quick that at some point does the technology outpace the laws” (cited in Shapiro 2013). Additionally, Obama established a Presidential review group that was tasked to find a way in which the technical collection capabilities of the USA could be combined with the values of privacy and civil liberties (Shapiro 2013). Furthermore, the Privacy and Civil Liberties Oversight Board (PCLOB) was activated, and it reviewed the intelligence practices. In two reports, it held that the domestic bulk data collection was unconstitutional, whereas the PRISM program was not illegal (Cate 2015: 28 f.).

The moment when the USA totally entered the tactical concessions phase was January 17, 2014. On this day, the Presidential Policy Directive 28 (PPD-28) became effective and granted foreigners the same pri-

Nevertheless, the philosophical roots of this point of view are going deeper and go back to the very establishment of human rights norms in the 1940s when the USA advocated the UDHR only as a statement of aspiration, rather than an approach of binding law. In fact, US governments have held the point of view that nothing can trump US law, and they never expected human rights treaties to be a kind of law. This attitude is commonly known as US exceptionalism (Forsythe 2002: 975ff.).
vacy rights as Americans already had under Executive Order 12333 (The White House 2014). On the same day, President Obama in this directive announced the changes he had made to intelligence policy.

In his speech, President Obama maintained that he had always been skeptical about the surveillance capabilities of the NSA and that he had ordered some changes after taking office. Nevertheless, he did not stop the programs completely, because according to him, there was no evidence that the NSA was using these powers to violate the law. Obama nonetheless defended the necessity of these programs to prevent future attacks on America (Obama 2014: 321 f.). However, he agreed that the programs were never a subject of public discussion, although this is necessary in a democratic country.

And for these reasons, I indicated in a speech at the National Defense University last May that we needed a more robust public discussion about the balance between security and liberty. [...] the task before us now is greater than simply repairing the damage done to our operations or preventing more disclosures from taking place in the future. Instead, we have to make some important decisions about how to protect ourselves and sustain our leadership in the world, while upholding the civil liberties and privacy protections that our ideals and our Constitution require. (Obama 2014: 322)

This paragraph addressed the American people and the domestic surveillance activities of the NSA. Obama stuck to the balance metaphor of privacy and security. However, he accepted the norm of privacy without calling the NSA program a violation of this norm – a typical tactical concession in matters of discourse. And also with regard to the surveillance of foreigners, Obama acknowledged the norm of privacy, although he again upheld the balance metaphor.

Our capabilities help protect not only our nation, but our friends and our allies, as well. But our efforts will only be effective if ordinary citizens in other countries have confidence that the United States respects their privacy, too. [...] In other words, just as we balance security and privacy at home, our global leadership demands that we balance our security requirements against our need to maintain the trust and cooperation among people and leaders around the world. [...] The bottom line is that people around the world, regardless of their nationality, should know that the United States is not spying on ordinary people who don’t threaten our national security, and that we take their privacy concerns into account in our policies and procedures. This applies to foreign leaders as
well. […] Now let me be clear: Our intelligence agencies will continue to
gather information about the intentions of governments – as opposed to
ordinary citizens – around the world, in the same way that the intelli-
gence services of every other nation does. We will not apologize simply
because our services may be more effective. (Obama 2014: 327 f.)

This paragraph also shows a typical tactical concession. Sensing that
the legal arguments brought forward were not helping to get rid of the
privacy advocators, President Obama, after denying that US behavior
violated human right norms now acknowledged reasonable privacy in-
terests of foreign individuals.

However, this speech was not successful in satisfying the claims of
privacy advocates but initiated further critiques – as the spiral model
prescribes it. First of all, the Obama speech as well as PPD-28, is about
privacy interests and privacy concerns that should be taken into account
instead of privacy rights. Hence, the US government still does not ac-
cept privacy as an individual right held by every person vis-à-vis US
intelligence services. Second, the concession made to privacy in both
the speech and the directive apply only after the collection of informa-
tion. The collection is not seen as an intrusion into privacy itself (Fi-
dler 2015 b: 58). Unsurprisingly, PPD-28 was not sufficient enough to
calm the critics.

At least at the domestic level, Obama took further steps. Two
months after he had ordered PPD-28 and defended the bulk collection
of phone data, the US government declared to no longer be collecting
these data. Instead, the intelligence services would demand the data
from the telecommunication companies on behalf of an individual
FISC order. The legislation of Congress was needed to adopt this ap-
proach. It resulted in the USA Freedom Act, signed by President Oba-
ma in June 2015. Among other things, the bill cancelled Section 2015
of the USA Patriot Act and, thus, bulk collection of phone metadata
was no longer allowed (Fidler 2015 a: 331; Cohn & Reitman 2015). On
November 28, 2015, the NSA bulk metadata collection ended officially
(MacAskill 2015).

Although the USA Freedom Act restricted surveillance capabilities
enormously, the law has to be considered as a further tactical conces-
son. Neither did the act change the existence of Section 702 of the
FAA, which is the determinant for the PRISM program that also affects
the Internet privacy of US persons; nor was Executive Order 12333 amended, which is the legal basis for most of the international NSA surveillance activities (Cohn & Reitman 2015). Furthermore, if the Obama administration had not acted, it would have been forced to do so by the Supreme Court ruling ACLU vs. Clapper, which was issued in May 2015 and which declared the bulk metadata collection as incompatible with the Fourth Amendment rights of Americans. Hence, if no further laws will be enacted in the future, the Freedom Act can hardly be taken as a commitment to the human right to privacy, rather as a mere concession made to the advocacy network.

Other scholars may have a different view. As Johnson (2016) remarks, the PPD-28 “took the ‘unprecedented’ step of extending certain privacy protections afforded to U.S. persons to those overseas. […] On the global scale, such an announcement was the first of its kind” (230). And Brown et al. (2017) consider the results of the NSA affair in the following way: Both PPD-28 and the USA Freedom Act contain “clearer rules and greater limits than the equivalent regime of almost all E.U. Member States. […] In the absence of clear and specific rules in other countries, ironically the United States now serves as a baseline for foreign surveillance standards” (463). And Johnson (2016) seconds:

[…] it is no surprise, that the language used in PPD-28 extending certain privacy protections to foreign nationals mirrors the language of the U.N. resolution. […] Firmly placing electronic surveillance within the framework of international human rights law; it begins the discussion of what potential customs and legal restraint might look like, lessening the risk for continued growth of such programs without any serious consideration as to implications on individual rights. With the Obama Administration’s issuance of PPD-28, America is now positioned to lead the debate. (245)

Reading such judgments, one may wonder why the USA are not considered as a state of rule-consistent behavior. But the classification of the USA as a new spearhead of the right to privacy in the digital age – as some of these utterances suggest – cannot hide the fact that the USA, like many European states, does not comply with the right to privacy in international law. Peters (2017) put it very simply: “Both privacy and the confidentiality of correspondence are protected by the Human Rights Covenant, even in the Internet. This means that the 2013 General Assembly Resolution does not articulate new law, not even a new interpretation of the law” (148 f.). Hence, even if the USA created with
the PPD-28 and the Freedom Act more sophisticated privacy rights than those that are in place in European states, this does not automatically make them a rule-consisting state. And the fact that the Snowden revelations triggered an international debate about Internet privacy does not mean that privacy rights had not been valid in the digital world before 2013. The debate about digital privacy rights launched by the UN, (I)NGOs and some liberal states is undoubtedly necessary. But this necessity evolves from the bare fact that many states violated privacy rights in the digital world for years – and not from an alleged gap in the international law.

At least at the domestic level, the USA took further steps to ensure privacy rights of Americans, which partly pushed the USA to the level of prescriptive status. According to the original spiral model, this phase is the one in which the validity of human rights norms is accepted. This results in the ratification of relevant human rights treaties and the adoption of domestic human rights legislation. Moreover, a change should happen in discourse, expressed in the states’ references to human rights norms in public and bureaucratic discourse (Risse et al. 2013). Of course, this definition has to be amended when it comes to the assessment of the behavior of a former rule-consistent state. This means that in the case of the USA, the US government never released the signature of the ICCPR or the UDHR. Nevertheless, prescriptive status can still be observed by enacting laws and orders to bring the behavior of the state in line with existing international human rights laws.

However, further laws are going to be adopted. In April 2016, the House of Representatives unanimously passed the E-mail Privacy Act. The Act would require the government to get a court warrant to access private communications and documents of US citizens stored online at Internet companies (Cope 2016). This would be a step towards prescriptive status. But the bill did not pass the Senate in the 114th Congress and was reintroduced in the 115th Congress and passed the House of Representatives in February 2017. The Senate vote on the bill is remaining at the time of writing (Greenberg 2017).

At the international level, no further steps have been taken to achieve the prescriptive status – although PPD-28 was a very important milestone on this way. In the near future, this is unlikely to hap-
pen. Although this chapter has shown that the spiral model is applicable to former rule-consistent states and that the US behavior in the response to the Snowden revelations follows the approach by Risse et al., two things make it unlikely that the USA will reach the rule-consistent-behavior status with regard to the right to privacy in the near future: the scope conditions and a weak advocacy network. First of all, the USA as a hegemonic power are less materially vulnerable than other states (Sikkink 2013: 162). And even though the sensitivity to human rights norms rose with the inauguration of Obama as US President (Sikkink 2013: 162), the Obama administration has shown only a limited social vulnerability with regard to privacy at the international level. Last but not least, this social vulnerability is weakened by the behavior of other liberal states. As Muižnieks (2015) remarks, many European states facing recent terror attacks have toughened their security laws and weakened their privacy rights since the Snowden disclosures. This does not only weaken the response from liberal states themselves but also from many international human rights bodies like IOs.

Nevertheless, this chapter proved that the advocacy process has influenced the behavior of the USA. Moreover, it has been shown that the response follows the framework of the spiral model. After having analyzed the regress of the privacy norm as well as the reaction to the Snowden disclosures, the next chapter concludes the main findings.