FAA v. Cooper: Bombarding the Privacy Act with the "Canon of Sovereign Immunity"

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I. INTRODUCTION

Privacy is a word we hear frequently in today's technologically advanced society. From Google Maps documenting every street in the nation to smartphones sharing locations automatically, privacy concerns abound. In fact, a recent Consumer Reports study found that over seventy percent of respondents said they were very concerned about the sharing of their personal information.1 Nevertheless, these worries seem to have fallen on deaf ears as displayed by the United States Supreme Court's recent decision, Federal Aviation Administration v. Cooper.2 The Court in Cooper ruled that although sharing confidential records without a citizen's permission violated the Privacy Act of 1974 (Privacy Act),3 it did not result in pecuniary loss and therefore was not

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1. David Butler, Consumer Reports Survey: Most Consumers "Very Concerned" About Online Companies Selling, Sharing Personal Data Without Permission, CONSUMER'S UNION, (Apr. 3, 2012), http://www.consumersunion.org/pub/core_financial_services/018390.html (stating that seventy-one percent of respondents said they were "very concerned about companies selling or sharing their information about them without their permission").
recoverable. This decision, combined with the Court's most recent interpretation of the Privacy Act's civil remedies provision in Doe v. Chao, leaves the Privacy Act powerless to stop government agencies from sharing personal and sensitive information without recourse or consequence.

II. FACTUAL BACKGROUND

Stanmore Cooper had been licensed with the Federal Aviation Administration (FAA) as a private pilot since 1964. In order to fly legally, Cooper, along with all other pilots, was required to have a pilot certificate and medical certificate issued by the FAA. Cooper complied with the requirement until 1985, when he was diagnosed with a human immunodeficiency virus (HIV) infection and started taking antiretroviral medications. Cooper realized that the FAA would not allow him to renew his medical license if he disclosed his HIV-positive status, so he chose not to reapply that year. In 1994, Cooper decided to reapply for his medical certificate without mentioning his HIV-positive status. One year later when his health deteriorated, Cooper applied for disability benefits under the Social Security Act. He supported his application for disability by disclosing his HIV-positive status. Cooper was approved for benefits and collected until 1996 when the antiretroviral medications eased his symptoms. Meanwhile, he continued to renew his medical certificate every two years for the next ten years, still omitting HIV-positive status.

In 2002, the Department of Transportation (DOT), the FAA's parent department, launched a criminal joint investigation entitled "Operation Safe Pilot" in which it cross-referenced a list of pilots in northern California with the SSA's list of individuals receiving benefits. The purpose of this investigation was to identify pilots who may have omitted information, specifically those "claiming a debilitating condition

4. Cooper, 132 S. Ct. at 1456 (holding that "the Privacy Act does not unequivocally authorize an award of damages for mental or emotional distress").
7. Id.; see 14 C.F.R. § 61.3(c)(1) (2012) ("A person may serve as a required pilot flight crewmember of an aircraft only if that person holds the appropriate medical certificate issued under part 67 of this chapter, or other documentation acceptable to the FAA, that is in that person's physical possession or readily accessible in the aircraft.").
9. Id.
12. Id. at 1446-47.
with the SSA and claim[ing] good health to obtain a FAA medical certificate," just as Cooper had done. Based on the report, the FAA determined that it would not have issued a medical certificate to Cooper had the agency known of his condition. The DOT indicted him on three counts of making false statements to a government agency. Cooper pled guilty to one count of making and delivering a false official writing and was sentenced to two years of probation. He also paid a fine of $1,000.

After receiving his sentence, Cooper filed a civil suit in the United States District Court for the Northern District of California, alleging that the FAA, DOT, and SSA violated his rights under § 552a(b) of the Privacy Act by sharing records with one another. He claimed that he suffered from severe emotional distress when the DOT revealed his HIV status. Cooper, notably, did not offer any evidence of pecuniary loss from the invasion of privacy.

The district court granted summary judgment against the government, concluding that the agencies had violated the Privacy Act. On the other hand, the court held that Cooper could not recover damages because he suffered no economic harm. The court recognized the government had violated the Privacy Act; however, it was unsure whether or not the government's violation was intentional or willful. The court also said that the language in the Act, particularly the term "actual damages," was vague and ambiguous. The district court cited a narrow interpretation of the sovereign immunity waiver to support its rationale.

The United States Court of Appeals for the Ninth Circuit applied the United States Supreme Court's underlying doctrine of sovereign immunity in Richlin Security Service Co. v. Chertoff and reversed and

15. Id.; see also 5 U.S.C. § 552a(b) ("No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . ").
17. Cooper, 816 F. Supp. 2d at 791.
18. Id. at 781.
19. Id. at 790.
20. Id.
21. Id. at 791.
22. Id. at 792 (quoting Library of Congress v. Shaw, 478 U.S. 310, 318 (1986)).
remanded the decision. The court of appeals determined that the term "actual damages" changes meaning "with the specific statute in which it is found." The Ninth Circuit considered the "text, purpose, and structure of the Act, as well as how actual damages [have] been construed in other closely analogous federal statutes." Subsequently, it found actual damages to include mental and emotional damages, as other alternatives did not seem "plausibl[e]."

The Supreme Court granted certiorari.

III. LEGAL BACKGROUND

A. The Right to Privacy Before the Privacy Act

When Congress passed the Privacy Act of 1974, the right to privacy had been recognized in America for nearly a century. The recognition of the right to privacy by Justice Warren and Justice Brandeis in their Harvard Law Review article in 1890 was a reaction to the use of new technology (specifically the camera) in the media. The article was written in response to a decision by the Court of Appeals of New York to deny a remedy when someone's picture was used without his consent. Slowly, over the next forty years, state courts and legislatures around the country began to recognize the invasion of privacy as a tort. Finally, by 1934, the right to privacy was generally recognized in the First Restatement of Torts.

The United States Supreme Court has also addressed the right to privacy but within the protections of the Constitution. It first addressed the right to privacy when determining whether a state could prohibit the use of birth control. In Griswold v. Connecticut, Justice Douglas,
authoring the majority opinion, held that although the right to privacy for married couples' use of contraception was not explicitly stated in the bill of rights, it was a protected zone within the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments.\footnote{35}{\textit{Id.} at 484.}

The Court continued to expand the right to privacy in 1971 with its opinion in \textit{Eisenstadt v. Baird}.\footnote{36}{405 U.S. 438 (1972).} \textit{Eisenstadt} dealt with a statute similar to the one in \textit{Griswold} and prevented single individuals from purchasing birth control.\footnote{37}{\textit{Id.} at 441-42.} Strongly affirming the reasoning in \textit{Griswold}, Justice Brennan stated that all individuals, married or single, had a right to be free from "unwarranted governmental intrusion," and limiting the purchase of birth control was a violation of privacy by the government.\footnote{38}{\textit{Id.} at 453.} Then in 1973 the Court decided the controversial case, \textit{Roe v. Wade},\footnote{39}{410 U.S. 113 (1973).} where it recognized that an anti-abortion statute intruded upon a woman's right to privacy.\footnote{40}{\textit{Roe}, 410 U.S. at 153 ("Th[e] right of privacy... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").}

The Court also addressed privacy rights under the Fourth Amendment in \textit{Katz v. United States}.\footnote{41}{389 U.S. 347 (1967).} In \textit{Katz}, the Supreme Court evaluated the constitutional implications of law enforcement's use of electronic equipment to eavesdrop on a citizen's conversations inside a public telephone booth.\footnote{42}{\textit{Id.} at 349.} Justice Stewart, writing for the majority, ruled that such data collection violated privacy rights protected by the Fourth Amendment's unreasonable search and seizure clause.\footnote{43}{\textit{Id.} at 353 ("The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.").} His opinion

Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
explicitly overruled an earlier decision by the Court which held that tapping a phone line did not constitute a search or seizure under the Fourth Amendment.\(^4\)

B. The Privacy Act and Doe v. Chao: The Rise and Fall of the Civil Remedies Provision

The Supreme Court was not the only branch of government concerned with protecting the right to privacy. During the 1970s, both American citizens and Congress were worried about the growing ability of computers to collect information.\(^4\) Watergate and the scandal that surrounded it only fueled this fear.\(^4\) Many Americans worried that the federal government would use computers and other technology to collect private information.\(^4\) This fear led several congressmen to speak out about privacy rights and how such rights should be protected.\(^4\) In light of these concerns, Congress passed the Privacy Act of 1974 as a way to prevent the government from unwanted intrusions into citizens’ personal lives.

44. Id.; see also Olmstead v. United States, 277 U.S. 438 (1928).
46. In the opening remarks when introducing the bill in the Senate, Senator Ervin stated: “If we have learned anything in this last year of Watergate, it is that there must be limits upon 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.” SOURCE BOOK, supra note 45, at 3-4; see Alex Kardon, Damages Under the Privacy Act: Sovereign Immunity and a Call for Legislative Reform, 34 HARV. J.L. & PUB. POLY 705, 707 (2011) (“While the general distrust of the federal government in the aftermath of Watergate created a political climate ripe for passing the Act, concerns about the federal government’s increasing use of computers to collect, store, manipulate, and distribute personal information also played a role in Congress approving the Act.”).
47. In debating the bill, Senator Jackson stated, “The American people are deeply disturbed about evidence that has accumulated in recent years of widespread Government insensitivity and disregard for the rights of individual citizens. Watergate and related scandals have brought to light a callous disregard for the law and for the sanctity of individual rights within the highest circles of government.” SOURCE BOOK, supra note 45, at 800.
48. Senator Huddleston stating: “The individual’s right to privacy has long been recognized by the courts which have consistently protected it from both governmental and nongovernmental intervention.” SOURCE BOOK, supra note 45, at 832. See also supra notes 46-47.
The purpose of the Privacy Act of 1974 is “to provide certain safeguards for an individual against an invasion of personal privacy by requiring federal agencies . . . to . . . be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual’s rights under this Act.” To prevent agencies from revealing information about individuals without their consent, the Privacy Act provides that an agency cannot disclose information without the individuals’ consent except within limited exceptions. To further strengthen the Act, Congress specifically waived sovereign immunity from civil damages after laying out four categories of misconduct.

50. 5 U.S.C. § 552a(b).
51. Id. § 552a(g)(1).
The civil remedies provision—the specific provision contested in Cooper—allows a complainant to recover from the United States “actual damages sustained by the individual.”\textsuperscript{52}

The debate about the meaning of actual damages, specifically whether they are limited to financial loss or incorporate broader losses, is not novel. Courts across the country have addressed the question since 1983, when the United States Court of Appeals for the Fifth Circuit interpreted the provision to include damages for mental suffering.\textsuperscript{53} However, this decision was abrogated by the Court’s most recent interpretation of the Privacy Act preceding Cooper in Doe v. Chao.\textsuperscript{54} In Doe, Justice Souter addressed the only issue presented in the case: whether the plaintiff must prove actual damages to qualify for the minimum recoverable amount of $1,000.\textsuperscript{55} The decision in Doe profoundly affected the ruling in Cooper. One author predicted this outcome, stating that the narrow reading of actual damages in Doe

Whenever any agency (A) makes a determination under subsection (d)(3) of this section not to amend an individual’s record in accordance with his request, or fails to make such review in conformity with that subsection; (B) refuses to comply with an individual request under subsection (d)(1) of this section; (C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or (D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

Id.\textsuperscript{52} Id. § 552a(g)(4)(A). Section 552a(g)(4)(A) states:

In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000 . . .

Id.\textsuperscript{53} Johnson v. Dept’ of Treasury, I.R.S., 700 F.2d 971, 972 (5th Cir. 1983), abrogated by Doe v. Chao, 540 U.S. 614 (2004) (holding that “the term ‘actual damages’ under the Privacy Act does indeed include damages for physical and mental injury for which there is competent evidence in the record, as well as damages for out-of-pocket expenses”).


55. Id. at 616 (“The question before us is whether plaintiffs must prove some actual damages to qualify for a minimum statutory award of $1,000.”).
would prove prophetic for the Court’s decision in Cooper.\footnote{56} Additionally, the Court mentioned the question surrounding the definition “actual damages” in its Doe opinion and noted that although the lower courts were split, that specific question was reserved for a later date.\footnote{57}

C. A Concise History of the Narrow Construction of Sovereign Immunity

To answer the question of what “actual damages” actually means and on which claims Congress intended to waive sovereign immunity, the Court construed the waiver narrowly. Exactly when the idea that waivers of sovereign immunity must be narrowly construed arose is a hotly debated topic in legal academic circles.\footnote{58} But there is little argument that the Supreme Court recognized that waivers of sovereign immunity must be narrowly construed in 1927 in Eastern Transportation Co. v. United States.\footnote{59} The court stated the following: “The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a court enlarge its liability to suit conferred beyond what the language requires.”\footnote{60} By 1931, the Court recognized the idea that the United States could not be sued without its consent was “well established.”\footnote{61}

\footnote{56} Kardon, supra note 46, at 756-57 (“[T]he Court’s methods in Chao point toward a possible decision in favor of the narrow reading of actual damages should the Cooper question reach the Court, a real possibility given the circuit split and Judge O’Scannlain’s strong dissent to the denial of rehearing en banc in Cooper.”).

\footnote{57} Doe, 540 U.S. at 627 n.12.

The Courts of Appeals are divided on the precise definition of actual damages. Compare Fitzpatrick v. IRS, 665 F.2d 327, 331 (C.A.11 1982) (actual damages are restricted to pecuniary loss), with Johnson v. Department of Treasury, IRS, 700 F.2d 971, 972-74 (C.A.5 1983) (actual damages can cover adequately demonstrated mental anxiety even without any out-of-pocket loss). That issue is not before us, however, since the petition for certiorari did not raise it for our review. We assume without deciding that the Fourth Circuit was correct to hold that Doe’s complaints in this case did not rise to the level of alleging actual damages. We do not suggest that out-of-pocket expenses are necessary for recovery of the $1,000 minimum; only that they suffice to qualify under any view of actual damages.


\footnote{59} 272 U.S. 675 (1927).

\footnote{60} Id. at 686.

\footnote{61} United States v. Michel, 282 U.S. 656, 659 (1931) (citing E. Transp. Co., 272 U.S. at 686; Price v. U.S., 174 U.S. 373, 375-76 (1899)) (“But it is also well established that suit may not be maintained against the United States in any case not clearly within the terms
Though a few cases dealt specifically with the narrow construction of sovereign immunity, arguably, the construction fell into disuse until its surprising revival in 1992 with the decision in *United States v. Nordic Village, Inc.* Nordic Village was a bankruptcy case in which Justice Scalia, writing for the majority, held that Chapter 11 of the Bankruptcy Code did not waive sovereign immunity. The Court held that because the language of section 106 of the Bankruptcy Code was ambiguous, Congress's intent was unclear. Specifically, the Court stated the waiver has to be "unequivocally expressed" to be effective. Justice Stevens's dissent argued that Scalia's reasoning was questionable and lamented the fact that the Court overly burdened Congress to be so specific in its lawmakers.

Justice Stevens's dissent was not heeded four years later when the Court used Scalia's narrow approach again in *Lane v. Pena.* In an opinion by Justice O'Connor, citing Nordic Village, the Court opined that "firmly grounded" precedent that "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text." Interestingly, the Court strayed from Scalia's interpretation in its 2002 decision, *Richlin Security Service Co. v. Chertoff.* Richlin, a case concerning the recovery of legal fees under the Equal Access to Justice Act (EAJA), was decided just a few months before *Cooper* was decided in the district court. The unanimous opinion in Richlin considered legislative history, interpretations from previous cases, and policy of the statute by which it consents to be sued.

62. Kardon, supra note 46, at 720 ("In 1989, Professor Cass Sunstein classified narrow construction of federal sovereign immunity waivers as 'obsolete' in his taxonomy of canons.").
64. Id. at 39 ("Neither § 106(c) nor any other provision of law establishes an unequivocal textual waiver of the Government's immunity from a bankruptcy trustee's claims for monetary relief. Since Congress has not empowered a bankruptcy court to order a recovery of money from the United States, the judgment of the Court of Appeals must be reversed.").
65. Id. at 34.
66. Id. at 33 (quoting Irwin v. Dep't of Veteran's Affairs, 498 U.S. 89, 95 (1990)).
67. Id. at 45 (Stevens, J., dissenting) ("[O]ne must ask what valid reason supports a construction of the waiver in § 106(c) that is so 'strict' that the Court will not even examine its legislative history.").
69. Id. at 192.
70. 553 U.S. 571 (2008).
72. Richlin, 553 U.S. at 573.
arguments to clarify the ambiguity of the EAJA, instead of the sovereign immunity canon. In fact, the Court saw "no need . . . to resort to the sovereign immunity canon," stating "[t]he . . . canon is just that—a canon of construction." The case further stated that the canon is simply "a tool for interpreting the law" and that this Court "ha[s] never held that it displaces the other traditional tools of statutory construction."

One further consideration concerning statutory construction is that some scholars believe stare decisis does not apply when judges consider using a canon. Thus, when looking at the different application of the canon of sovereign immunity in Richlin and Nordic Village, the Court could choose to apply either Nordic Village's narrow construction, or the broader construction of Richlin. However, the Court is bound by neither decision.

IV. COURT'S RATIONALE

A. Majority Opinion

Justice Alito first addressed whether sovereign immunity was waived by the Privacy Act's civil remedies provision and how broad that waiver is. Justice Alito quoted Lane v. Pena and United States v. Nordic Village, stating that the waiver of immunity must be "unequivocally expressed" in [the] statutory text. He used the "sovereign immunity canon," stating that if the "traditional tools of statutory construction" do not resolve ambiguity in the statute, other means can be used. However, Justice Alito argued that it is not whether the Privacy Act's civil remedies provision actually waived sovereign immunity, but how broad that waiver is, specifically, the term "actual damages" within the statute. In fact, "actual damages" remains the focus of the opinion,

73. Id. at 589-90.
74. Id.
75. Id. at 589.
76. Sydney Foster, Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?, 96 GEO. L.J. 1863, 1872 (2008) ("Many scholars have asserted in passing that courts do not give doctrines of statutory interpretation stare decisis effect without engaging in any further analysis.").
80. Cooper, 132 S. Ct. at 1448 (quoting Lane, 518 U.S. at 192).
81. Id. (quoting Richlin, 553 U.S. at 589).
82. Id.
as well as interpreting whether Congress meant to include non-pecuniary harm in the waiver of immunity.

Justice Alito used various sources to evaluate what "actual damages" meant because Congress did not define it. He rejected Cooper's argument to use the ordinary meaning of the word actual, citing the United States Court of Appeals for the Ninth Circuit's explanation that "actual damages" is a legal term of art which brings with it a "cluster of ideas." Yet, the "cluster of ideas" was unclear, and after Justice Alito consulted Black's Law Dictionary and found no help, he turned to other cases in which the term had been interpreted.

Justice Alito further recognized that the term had been determined to include non-pecuniary harm. In interpreting both the Fair Housing Act (FHA) and the Fair Credit Reporting Act (FCRA), courts have included damages for mental and emotional distress as "actual damages." He acknowledged, however, that equally as many cases have denied relief for non-pecuniary harm under the term. With this inconclusive support, and the fact that the term has a "chameleon-like quality," Justice Alito considered the context Congress relied upon when using the term.

Justice Alito posited that the context is similar to defamation and privacy torts because such actions are what the Privacy Act was designed to protect. He looked to a past ruling on the Privacy Act,
Doe v. Chao, which stated the civil suit provision was very similar to the common law torts of libel per quod and slander. Those two common law torts require proof of "special damages"—limited to pecuniary loss—to allow "general damages"—non-pecuniary loss. Justice Alito stated that Congress may have relied on that fact when using the term "actual damages" and strengthens his argument by pointing to cases where the terms special and actual have been used interchangeably. He dispelled any doubt by citing an uncodified section of the Privacy Act establishing the Privacy Protection Study Commission, which found that the Privacy Act does not allow liability for general damages and solidified the two terms (special and general damages) as mutually exclusive. He opined that although the United States Supreme Court is not bound by the Commission's results, he found the conclusions of the report to be helpful.

Finally, Justice Alito responded to Cooper's final argument—that by disallowing non-pecuniary results, a person with minor financial loss would recover at least $1,000, while those with significant mental or emotional distress would get nothing, thus leading to an absurd result. Justice Alito denied the validity of this argument and stated there is nothing absurd about putting limits on relief available from the government.

B. Justice Sotomayor's Dissent

Justice Sotomayor focused on "the Act's core purpose" of preventing violations of privacy by the government. She prefaced her opinion with a quip at the majority opinion, countering Justice Alito's rationale with the claim that common sense and the Court's precedent dictates a different result: affirming the Ninth Circuit ruling. She claimed the

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93. Id. at 1451.
94. Id.
95. Id. at 1451-52 (citing Wetzel v. Gulf Oil Corp., 455 F.2d 857, 862 (9th Cir. 1972); Elec. Furnace Corp. v. Deering Milliken Research Corp., 325 F.2d 761, 765 (6th Cir. 1963); M & S Furniture Sales Co. v. Edward J. De Bartolo Corp., 241 A.2d 126, 128 (1968); Clementson v. Minn. Tribune Co., 47 N.W. 781, 781 (Minn. 1891)).
96. Id. at 1452-53.
97. Id.
98. Id. at 1455.
99. Id.
100. Id. at 1456 (Sotomayor, J., dissenting).
101. Id. at 1456.
Court's ruling severely debilitates the act and the ability of people to recover under it.\textsuperscript{102}

Justice Sotomayor began by analyzing the majority's reasoning, stating that even Justice Alito does not find the respondent's argument concerning "actual damages" impossible to believe,\textsuperscript{103} but because the term is ambiguous, the "canon of sovereign immunity" dictates that the term must be narrowly construed.\textsuperscript{104} Instead, Justice Sotomayor turned to \textit{Richlin Security Service v. Chertoff},\textsuperscript{105} which the majority cited, to advocate using the statute's history, text, and context to determine Congress's intent concerning actual damages.\textsuperscript{106} She first stated that the "canon simply cannot bear the weight" Justice Alito gives to it.\textsuperscript{107} Then, citing Justice Stevens's dissent in \textit{United States v. Nordic Village},\textsuperscript{108} Justice Sotomayor stated that the canon of construction is only used when it is convenient for the justices, instead of being used on a consistent, methodical basis.\textsuperscript{109} She warned the Court may have gone too far in this case, "import[ing] immunity" where Congress meant to waive it.\textsuperscript{110}

Justice Sotomayor then began building her own case for interpreting the civil damages provision of the Privacy Act. She agreed with the majority that one must first begin with the language of the statute.\textsuperscript{111} But instead of rejecting the plain meaning, she found it to be "plain enough."\textsuperscript{112} She further claimed that Black's Law Dictionary's definition\textsuperscript{113} was adopted by the Court more than 100 years ago in \textit{Birdsall v. Coolidge},\textsuperscript{114} a case cited by the respondent and rejected by the
majority. She pointed out that the definition used by the Court in 1876 is the same used in current legal dictionaries.

Next, Justice Sotomayor examined the Privacy Act itself to analyze the majority's context argument. Using her primary rationale, she explained that the narrow reading of actual damages is inconsistent with the Privacy Act's main purpose of protecting citizens from an unwanted intrusion by the government. She also noted that the majority's reading creates a “disconnect” between the Privacy Act's remedies and the substantive text. And although she accepted the majority's interpretation of the substantive provisions—mainly that they draw on the torts of privacy and defamation—she believed the Court relied too much on Doe and its decision that the torts parallel the Privacy Act and therefore the remedies should also parallel each other. She accused the majority of essentially rewriting the Privacy Act by interpreting actual damages to mean special damages.

Third, Justice Sotomayor stated that the majority again misinterpreted evidence of congressional intent when it claimed that the reason Congress did not allow “general damages” to be used in the bill meant that it did not want to allow “actual damages” to be recovered. Instead, Justice Sotomayor said the omission of general damages from the bill signals that Congress meant to incorporate all damages under the term “actual damages.”

Finally, Justice Sotomayor concluded her argument with the cornerstone of her opinion—that the majority's reading is inconsistent with the Privacy Act's purpose. She opined that in every statutory interpretation case, one must consider Congress's purpose. She examined the history surrounding the passage of the Privacy Act—the scandal surrounding Watergate and the surveillance of individuals by the government without their knowledge—to determine what Congress intended.
intended. She said that Congress's intent in allowing recovery for the government's intrusion is "unmistakable." She concluded by stating that the Court's blatant disregard for the actual text of the Privacy Act creates a result that allows recovery for a "$5 hit to the pocketbook" but not debilitating mental distress.

V. IMPLICATIONS

A. Disconnect: Inhibiting Recovery for Privacy Violations as Privacy Concerns Grow

In her dissent, Justice Sotomayor introduces what this decision means for the Privacy Act going forward. Using strong language, she says that the remedies provision of the Act is rendered "impotent" by the majority's decision. She is not alone in her opinion. Justice Ginsberg, in her dissent in Doe v. Chao, noted that the Privacy Act violations normally cause fear and anxiety—juries difficult to calculate in monetary figures. But by disallowing recovery for those types of injuries, a complainant is left with limited recourse, if any at all. And as Cooper proves, government agencies will have little reason to respect the privacy rights of citizens, the proof of which has already been shown in the instant case.

However, the erosion of protection under the Privacy Act was not sudden; its power has diminished over the past several years. Since the 2004 decision of Doe, some authors have lamented the inability to recover under the Privacy Act for the types of damages normally incurred from an invasion of privacy claim. One author observed that without the accountability that the Privacy Act's civil remedies provision provides, citizens are "simply unaware of their privacy rights and the existence of records kept" on them. An inability to recover under the Privacy Act would allow agencies to share important...
information, including private blogs, medical records, financial records, and social security numbers, with little fear of recourse from the civil remedies provision.

In the summer session of the 112th Congress, just a few months after the Cooper decision, the U.S. Government Accountability Office (GAO) echoed these concerns in a report to Congress. The report stated that the Privacy Act may be inadequate in its goal to protect citizens' privacy because technology has progressed so much since 1974. It cited previous GAO reports detailing how technologies "such as web logs ("blogs"), social networking websites, video—and multimedia—sharing sites, and 'wikis'" do not fall under the jurisdiction of the Privacy Act as they are not systems of the federal government. The GAO has also issued several recent reports detailing the need for Congress to protect privacy in the realm of social media. Coincidentally, eight agencies had not followed the Privacy Act's requirements in their use of collected information from social media sites, even when the agencies obtained it. For example, the report mentioned that the Department of Homeland Security uses a process called "data mining" to determine hidden patterns to counteract terrorism within the United States. However, as data mining does not constitute "records" as it is defined under the Privacy Act, this collection of personal information is not actionable under the Privacy Act.

Between a combination of advancing technology and the United States Supreme Court's narrow reading of the enforcement provisions, the Privacy Act's power has diminished, even as technology becomes more pervasive and more advanced. In fact, the U.S. government is the largest collector of personal information, with one federal agency

134. Id. at 5.
135. Id.
137. U.S. Gov't Accountability Office, supra note 133, at 5 ("A number of agencies had not updated their privacy policies or conducted PIAs relative to their use of third-party services such as Facebook and Twitter.").
138. Id. at 6-7.
139. Id.
maintaining records on more than 290 million people.\textsuperscript{140} And as Cooper demonstrates, health and medical records are now also threatened, which was recently analyzed by another Supreme Court decision, \textit{National Federation of Independent Business v. Sebelius}.\textsuperscript{141}

\subsection*{B. Privacy Violations and Medical Records}

\textit{Sebelius} was a landmark decision by the Supreme Court. The decision affirmed the constitutionality of several key provisions of the Patient Protection and Affordable Care Act\textsuperscript{142} passed by Congress in 2008.\textsuperscript{143} One law professor noted this problem the week after the opinion was published, stating:

\begin{quote}
Even as the Supreme Court and the nation focused unprecedented attention on the issue of health care and the constitutionality of the landmark Affordable Care Act last week, the Court issued an unrelated ruling with a much more immediate and personal impact on health care, specifically whether the sharing of information by government agencies about an individual's health records violates the Federal Privacy Act.\textsuperscript{144}
\end{quote}

The possibilities of sharing information between agencies, particularly health records, have already been realized in the past two years. In August 2011, the United States Department of Agriculture (USDA) denied a request from Mayor Michael Bloomberg of New York to prevent the use of food stamps when purchasing soft drinks in a controversial experiment.\textsuperscript{145} The mayor's office cited how consumption of sugary drinks has a strong correlation to diabetes and obesity.\textsuperscript{146} The mayor's office further recognized how these conditions are especially prevalent in low-income residents—residents more reliant on food stamps.\textsuperscript{147}

\begin{flushright}
\textsuperscript{140} GOVERNMENTAL ACCOUNTABILITY OFFICE, GAO-03-304, PRIVACY ACT: OMB LEADERSHIP NEEDED TO IMPROVE AGENCY COMPLIANCE 13 (2003) ("The median number of people \ldots maintained in the \ldots system[] of records [is] about 3,500, but this number varied \ldots from 5 people to about 290 million people.").

\textsuperscript{141} 132 S. Ct. 2566 (2012).


\textsuperscript{143} Sebelius, 132 S. Ct. at 2607-09.


\textsuperscript{146} Id.

\textsuperscript{147} Id.
\end{flushright}
The USDA rejected the idea on the basis that the project would be difficult to monitor logistically, but the question remains as to whether these hurdles will disappear as technology grows. Already, with the advent of Electronic Benefit Transfer cards, technology could easily monitor exactly what products were purchased and by whom. That information could then be shared with other government departments, like the SSA, to determine health and dietary patterns and whether someone on the state health plan experienced better or worse health.

C. Privacy Violations and the Social Security Number

This idea may seem far-fetched, but in Cooper, the SSA readily shared its health records with the DOT to determine whether pilots were healthy enough to fly. In fact, the SSA and DOT used another important personal record to cross reference medical records—Cooper's social security number. The social security number is the de facto national identification number, connecting a person's financial information, taxes, medical records, educational records, and other personal information together. It is arguably the most valuable piece of information about a person. The unauthorized disclosure of the social security number, which the SSA and DOT did in Cooper, can lead to another serious problem, identity theft.

Identity theft is a problem for millions of Americans each year. A GAO report found that "as many as 10 million people—or 4.6 percent of the U.S. adult population—discover that they are victims" of identity theft. Additionally, these thefts cost upwards of $50 billion per

148. Id.

149. For more information, see regulations related to the food stamps Electronic Benefits Transfer (EBT) program at 7 C.F.R. § 274.10. For a general overview and advent of EBT, see Kathryn O'Neill Pulliam, Muddying the Water: Electronic Benefits Transfer After the Welfare Reform Act of 1996, 14 GA. ST. U. L. REV. 515, 517 (1998). See also David J. Kennedy, Due Process in a Privatized Welfare System, 64 BROOK. L. REV. 231, 251-52 (1998) (noting that it would be easy for the government to track purchases in the future with the use of EBT cards and the accounts connected with them).

150. See generally Cooper, 816 F. Supp. 2d at 781.

151. Hong, supra note 45, at 107 (“Like it or not, the social security number is the universal identifier for individuals. Because of the widespread use of the social security number as an identifier by the government and private companies, individuals' complete financial, medical, credit, and other vital information is linked to the social security number.”).

152. U.S. GOVT ACCOUNTABILITY OFFICE, GAO-12-961T, IDENTITY THEFT: GOVERNMENTS HAVE ACTED TO PROTECT PERSONALLY IDENTIFIABLE INFORMATION, BUT VULNERABILITIES REMAIN 3 (2009) (“Millions of people become victims of identity theft each year.”).

153. Id.
year. Notably, most of these victims did not suffer monetary harm, but instead suffered from loss of time in dealing with problems associated with identity theft such as “bounced checks, loan denials, credit card application rejections, debt collection harassment, insurance rejections, and the shut-down of utilities.” And as one author has observed, identity theft will only grow as a “majority of government agencies use electronic records containing the social security number.” Under the Cooper decision, recovery would be unavailable for a person who suffered identity theft due to government mismanagement of personal information, including their social security number, for any of the harms listed above.

VI. CONCLUSION

It would seem to most that the only way to remedy the inability to recover for privacy violations between agencies would be to rewrite the Privacy Act to adapt to the rapidly changing world of technology. Congress simply defining actual damages would be enough to broaden recovery under the act from the extremely narrow waiver of sovereign immunity just recognized. And as Alex Kardon pointed out in his evaluation of the current damages provisions under the Privacy Act: “The world has not changed so much since the days of Watergate that the government should once again be given free rein to use personal information with no fear of repercussions . . . .”

Whether Cooper was the death knell of the Privacy Act remains a question for the future, but the decision definitely makes recovery for an invasion of privacy by a government agency extremely difficult, if not impossible. And what is worse, if the government cannot be held accountable for its invasions, what is to stop it from sharing more privileged information in the future? Congress should take heed of the worries of its citizens once more and update the Privacy Act to provide the protections it once did.

S. JACOB CARROLL

154. Id.
155. Hong, supra note 45, at 107-08.
156. Id. at 108.