

# **Doing the Homeland's Business**

Social Media, Surveillance, and Redefining Citizenship

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## PRIVATE, NOT ANONYMOUS

## ANONYMOUS, NOT PRIVATE



In discussions of modern surveillance, **privacy** and **anonymity** are often conflated, but denote different concepts. We have two different words *because* **anonymity** is a specific and distinctly meaningful *type* of **privacy** in our literary, political, and legal tradition.

Privacy is “**freedom from observation**” while anonymity is “**freedom from identification.**”

The distinction is non-trivial, especially where the customs and legalities surrounding “posting online” or “using a chatroom” efface distinctions between publishing, speaking loudly in a loud bar, or leaving a flyer on a cafe bulletin board.

# THE "PENTAGON PAPERS"

# CHARLES PONZI WITH CANE

**The Washington Post**  
Times Herald  
SATURDAY, JUNE 19, 1971  
Phone 223-6000  
104 Pages—6 Sections  
Amusements C 7 Gardens E21  
City Life B 1 Obituaries B 4  
Classified P 1 Real Estate E 1  
Comics D10 Religion D 1  
Crossword C 4 Sports D 1  
Editorials A20 Style C 6  
Financial D 4 TV/Radio C 6

## Says Lull Move

and the Vietnam...  
...and the Vietnam...  
...and the Vietnam...

## U.S. Court Bars Future Vietnam Articles in Post

Times Case Judgment Due Today  
Reverses Lower Court Decision

## Congressmen Move to Get War History

Senate Gets Approval



When one thinks about the uses of **privacy**, one might favor that of a journalist working on a scoop about some abuse of power, or disfavor that of a criminal scheming up a robbery.

A **journalist** on the trail of a big story might, at times, have difficulty concealing his or her excitement, but may be very serious about keeping their information **private** until publication.

A **criminal** might make a show about spending money on a diamond tie clip or a cane with a golden handle, but may also be motivated to keep the exact source of their wealth **private**.

## WHAT THE FOUNDING FATHERS THOUGHT ABOUT **PRIVACY**

The US Constitution provides no **explicit** right to **privacy**.

Neither the Framers nor any later Congress has committed to providing an “inalienable” right to **privacy**.

The closest (and most widely discussed) analog of an explicit right to **privacy** in the US can be found in the Bill of Rights:

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

- *US Constitution*, Amendment IV (1791)

## EARLY “RIGHTS SPEAK” IN THE US POLITICAL TRADITION

Alexander Hamilton was especially mistrustful of enumerating the “**rights**” of citizens, as this might provide a “pretext” for certain parties to claim “more than were granted.”

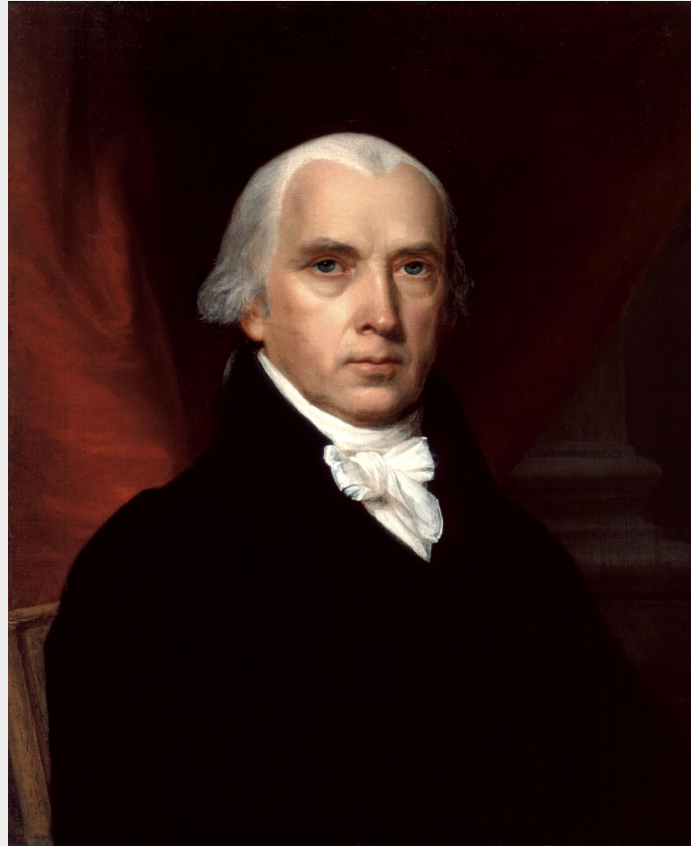
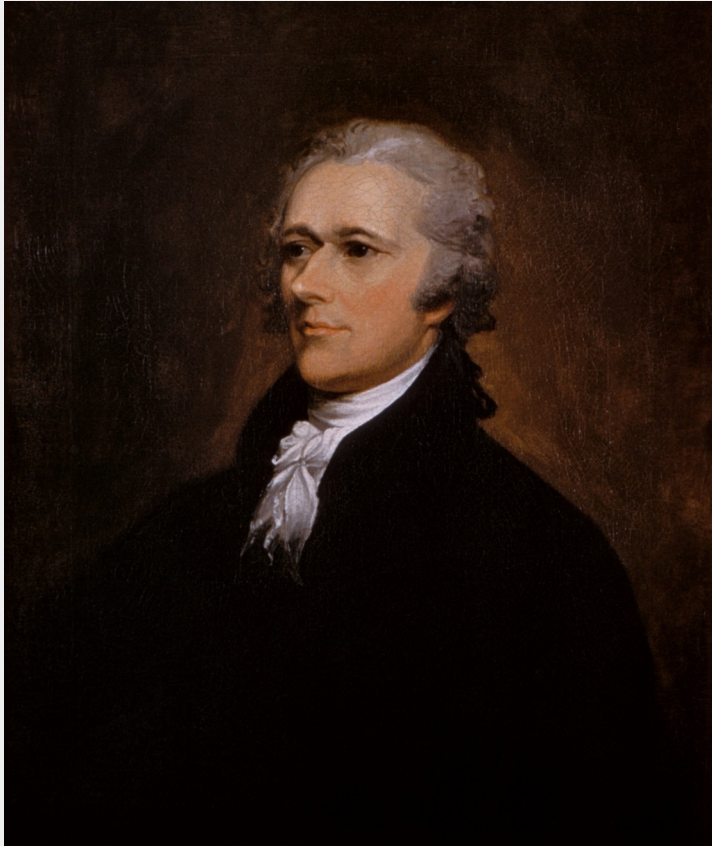
It has been several times truly remarked that bills of **rights** are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince...

... a minute detail of particular **rights** is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns...

I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be **dangerous**. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.

- **Publius** (Alexander Hamilton), *The Federalist* (1788) no. 84

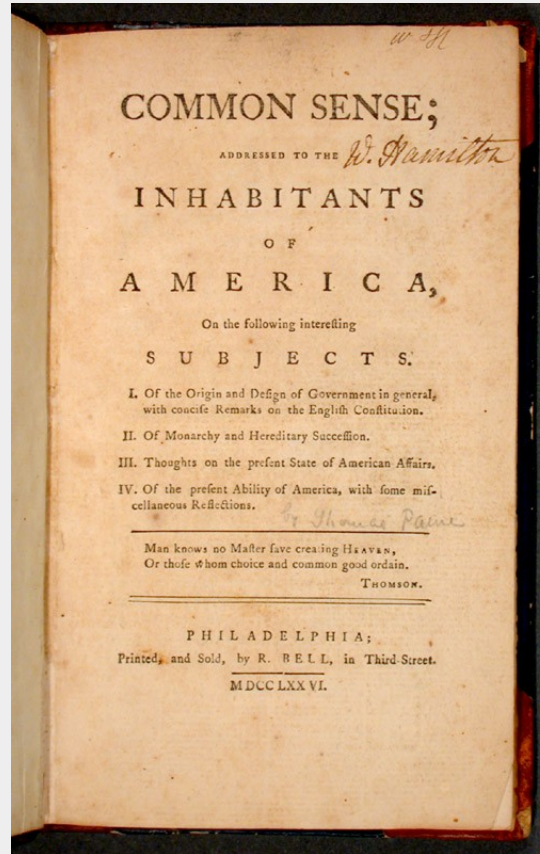
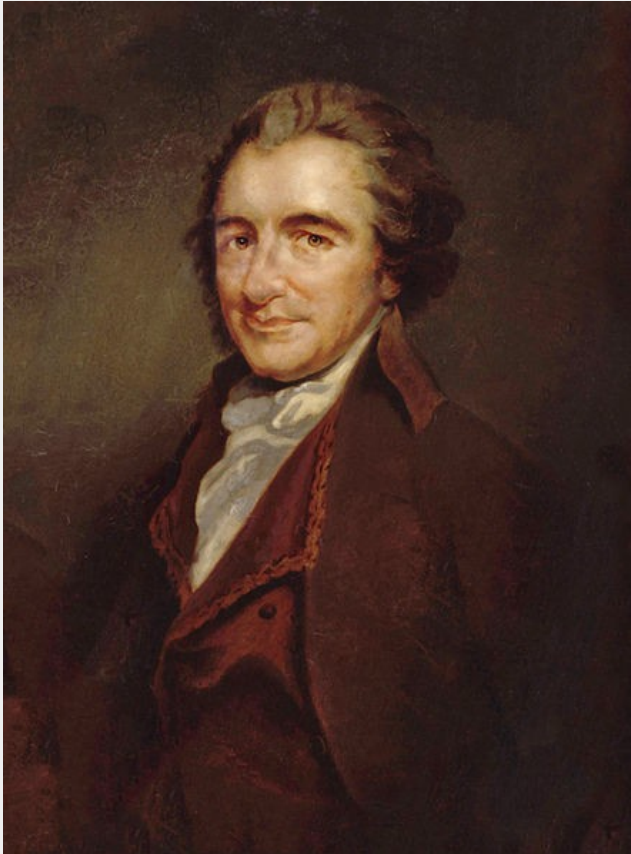
## ENTER: ANONYMOUS



US Founding Fathers Alexander **Hamilton**, James **Madison**, and John **Jay** shared the **anonymous** pen name “**Publius**” when they authored the *Federalist Papers* – agitating against the new, post-colonial government of the Articles of Confederation.

After a **private** meeting in Philadelphia with the “the sole and express purpose of revising the Articles of Confederation and reporting to Congress,” the Framers drafted a whole new government and began to agitate for its adoption.

## THOMAS PAINE, ANONYMOUS



**Anonymity**, as a specific type of **privacy**, has a long history in the Western political tradition – especially where individuals advocate positions that oppose formal authority.

While the American Revolutionary Bourgeoisie exploited **anonymity** to oppose first the Crown and then the Articles of Confederation, anonymity in the Western political tradition is intimately connected with the breakdown of European feudalism and the subsequent development of modern notions of **citizenship**.

## MODERN US CITIZENSHIP WASN'T BORN IN ATHENS



Modern notions of citizenship are not derived from Athenian notions of Democracy, but grew over time out of attempts by European peasants to obtain formal rights during feudalism.

In this historical movement, **anonymity** served as an essential political tool for land-bound serfs seeking to escape their economic servitude.



## MODERN CITIZENSHIP BEGAN WITH MEDIEVAL CITIES

After the Roman Empire collapsed, peasants coalesced around Feudal estates. The couple hundred peasants living on each estate lived there together for generations (with local variations in manorial custom). There was no life off the estate, little **privacy**, no possibility of **anonymity**, and no notion of social mobility:

In having a distinct, unchangeable, and unquestionable place in the social world from the moment of birth ... a person was identical with his role in society; he was a peasant, an artisan, a knight, and not an individual who happened to have this occupation. **The social order was conceived as a natural order...**

- Erich Fromm, *Escape from Freedom* (1941), ch. II

When trade resumed between Northern Europe and the Mediterranean, land-bound serfs left the estates for the **anonymity** of cities and work. These **anonymous** serfs could claim free status, as there was neither kin nor clan nor lord to challenge their claim.

the origins of city populations should be sought ... in the immigrant population which trade brought to them ... men from the whole surrounding territory were drawn to the nascent city in search of a profession..."

- Henri Pirenne, *Medieval Cities* (1925), ch. VI

## CITIES EMERGED FROM THE BREAKDOWN OF FEUDALISM

Modern cities grew up around fortified military encampments called “burgs.” All the economic activity occurred on the periphery of the burg – in the sub-burgs. As city populations increased around trade and the need to import systematically organized labor, residents and merchants began to agitate for political reforms.

The disturbances which followed the assassination of Count Charles the Good, in 1127, permitted the burghers to realize in full their political program.

The charter granted to [the town of] St. Omer in 1127 may be considered as the point of departure of **the political program of the burghers** of Flanders.

It recognized the city as a distinct legal territory, provided with a special law common to all inhabitants ... **Freedom**, of old, used to be **the monopoly of a privileged class**. By means of the cities it again took its place in society as **a natural attribute of every citizen**.

Hereafter, it was enough to reside on city soil to acquire it [freedom]. Every serf **who had lived for a year and a day within the city limits** had it by definite right: the statute of limitations abolished all rights which his lord had exercised over his person and chattels. **Birth meant little**.

## CITIZENSHIP CREATES AN ABSTRACT, **ANONYMOUS** PERSON

As a principle, formal equality before the law requires that individuals are treated as abstract, **anonymous** persons. This is a way to guarantee an individual's rights won't be infringed upon due to the free exercise of citizenship. The principle says laws ought not treat individuals differently based on qualities like sex, age, religion, or race. *To be treated equally in ways means to be regarded **anonymously**.*

“They [commonwealths] are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at Court, and the countryman at plough.”

- John Locke, *Second Treatise on Civil Government* (1690), ch XI, paragraph 142.

The modern custom of granting “privileges and immunities” to individuals based *solely on citizenship* derives from the political struggles of Feudal serfs who exploited **anonymity**.

**All** persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.

- *US Constitution*, 14th Amendment (1868)

## PRIVACY PROTECTIONS & ELECTRONIC COMMUNICATIONS

In the modern era, laws like the **Foreign Intelligence Surveillance Act (1978)**, aimed to preserve privacy in the wake of abuses by the US intelligence agencies, where warrantless surveillance was used to maintain entrenched policy positions.

Policy makers in the US sought to use intelligence law to regulate the beliefs and actions of citizens – not just as a mass or in some other abstract way, but also as **specific, motivated individuals** – in order to maintain a variety of interwoven policy objectives.

In 1972, *The Washington Post* revealed that President Nixon's White House was **spying on and sabotaging political opponents**.

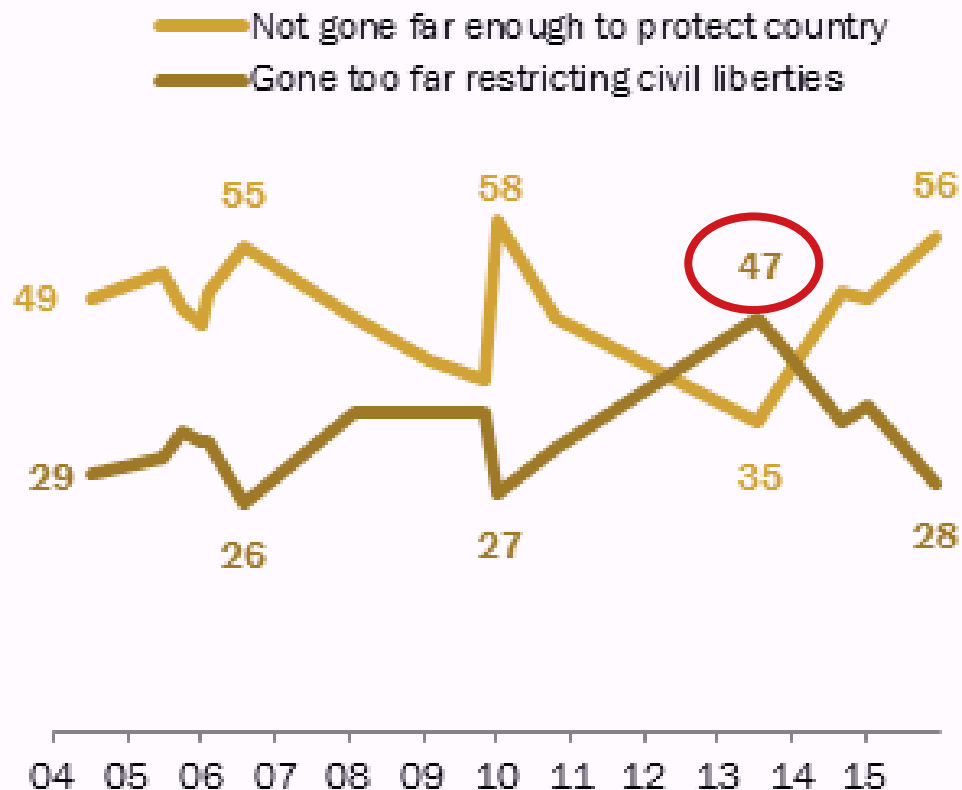
Two years later, *The New York Times* reported that the Central Intelligence Agency (CIA), on President Lyndon Johnson's orders, had conducted a massive intelligence operation against **critics of the Vietnam War, other domestic dissidents, and journalists** the administration considered unfriendly. A series of other CIA abuses -- covert operations to overthrow foreign governments, plots to assassinate foreign leaders, secret drug experiments on unsuspecting victims, and the illegal opening of mail sent by Americans -- came to light.

- Elizabeth Goitein and Faiza Patel, Brennan Center for Justice, "What When Wrong with the FISA Court" (2015)

## PRIVACY & ELECTRONIC COMMUNICATIONS AFTER 911

### Public's shifting concerns on security and civil liberties

*Bigger concern about govt anti-terrorism policies? (%)*



Source: Survey conducted Dec. 8-13, 2015.  
Don't know responses not shown.

PEW RESEARCH CENTER

Where ordinary Americans are confronted with the real or perceived demands of **public safety** due to **terrorism**, only about 30% of Americans are concerned about the impact of surveillance on civil liberties.

After the events of September 11, 2001, Americans accepted many new forms of government surveillance, including:

- electronic communications content
- electronic communications metadata
- financial and credit card transactions using the SWIFT network
- library lending
- bodies in airports
- “open source” intelligence on social media and online publishing

Many forms of electronic surveillance take place **with little oversight** through **private** contractors like **Edward Snowden**.

# PRIVACY & ELECTRONIC COMMUNICATIONS AFTER 911



## COMPLIANCE GUIDE FOR LAW ENFORCEMENT

### VII. COST REIMBURSEMENT POLICY

Federal law (See 18 U.S.C. § 2706) requires law enforcement to reimburse providers like Yahoo! for costs incurred responding to subpoena requests, court orders, or search warrants. Yahoo! generally requests reimbursement when responding to legal process, except that Yahoo! maintains an exception to this policy for cases involving the abduction or exploitation of children. Yahoo! may waive reimbursement in specific cases or recognize additional exceptions to this policy in the future.

Yahoo! will seek reimbursement based on the actual time expended by Yahoo!'s compliance staff in complying with the request. The average costs related to compliance matters are listed below for your convenience. These estimates are neither a ceiling nor a floor but represent the average costs of typical searches. Time spent may vary considerably based on the wording of the request and the information available about the user. These time estimates are also based on narrowly tailored requests that do not require extensive searches in multiple databases. These estimates are not price quotes, budgets, or guarantees and should not be used for budgeting purposes. Yahoo! reserves the right to adjust its estimates and reimbursement charges as necessary.

- Basic subscriber records: approx. \$20 for the first ID, \$10 per ID thereafter
- Basic Group Information (including information about moderators): approx. \$20 for a group with a single moderator
- Contents of subscriber accounts, including email: approx. \$30-\$40 per user
- Contents of Groups: approx. \$40 - \$80 per group

Yahoo's "compliance guide for law enforcement" was leaked in 2010, along with similar guides for many communications platforms, providing fee schedules for subpoenas, warrants, and court orders. Available online at <https://cryptome.org/isp-spy/yahoo-spy.pdf>

Organizations.

(U) The scope of collection permitted under the Presidential Authorizations varied over time. In stages between July 2004 and January 2007, NSA ceased PSP collection activities under Presidential authorization and resumed them under four separate court orders issued in accordance with the Foreign Intelligence Surveillance Act of 1978 as amended (FISA).<sup>2</sup>

### (U) The Presidential Authorizations

~~(TS//STLW//SI//OC/NF)~~ The Authorization documents that contained the terms under which NSA executed special Presidential authority were addressed to the Secretary of Defense and were titled "Presidential Authorization for Specified Electronic Surveillance Activities during a Limited Period to Detect and Prevent Acts of Terrorism within the United States." The first Authorization consisted of eight paragraphs, and all but one subsequent Authorization consisted of nine. There were 43 Authorizations, two modifications, and one document described as

### ~~(TS//SI//NF)~~ Changes to Authorization Language on Electronic Surveillance

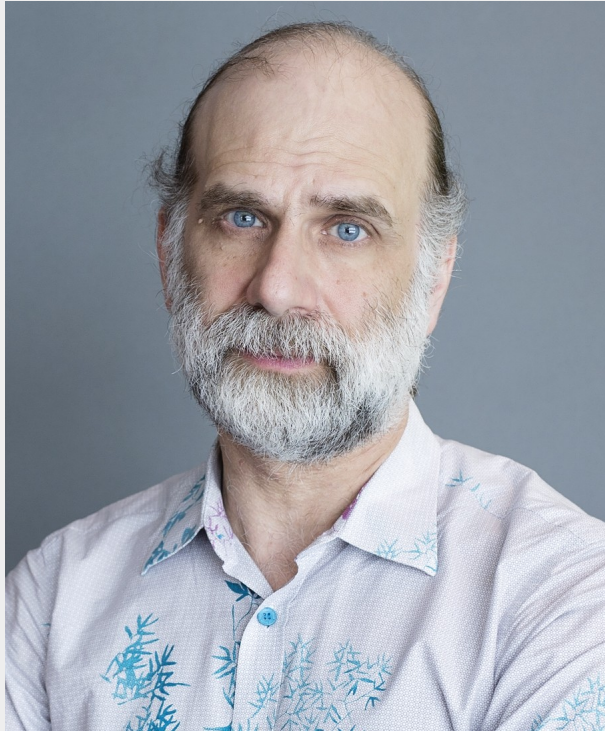
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Version/Date	Description of Changes to Authorization Language
First Authorization 4 October 2001	Authorized NSA to acquire the content and associated metadata of telephony and Internet communications including wire and cable communications carried into or out of the United States for which there was probable cause to believe that one of the communicants was <del>(b)(7), (b)(3)</del> that one communicant was engaged in or preparing for acts of international terrorism. <sup>2</sup> This was the only version of the Authorization to use the term "probable cause."  Version 1 also authorized the acquisition of telephony and Internet metadata for communications with at least one communicant outside the United States or for which no communicant was known to be a citizen of the United States.

Inspector General's 2011 report on legal rationale for post-911 mass surveillance of Americans.

## BRUCE SCHNEIER

Cryptographer, fellow at Berkman Center for Internet & Society, Harvard Law School

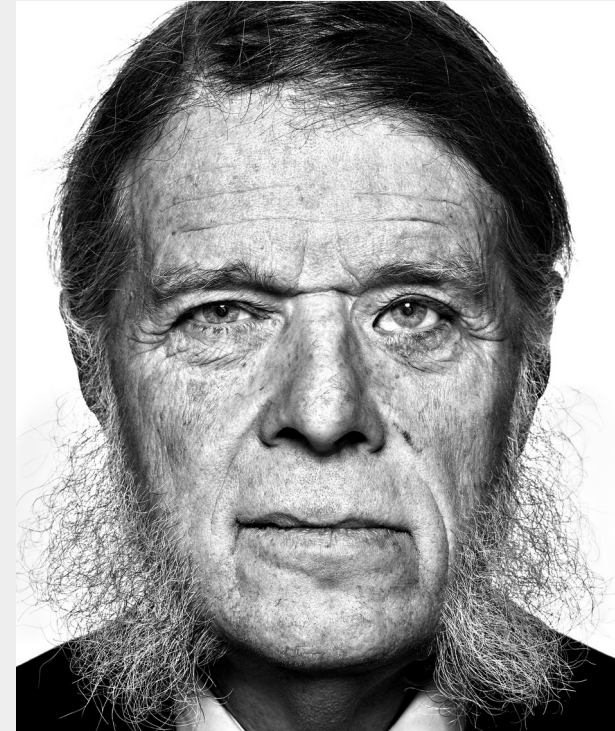


**Surveillance is the business model of the internet.** Everyone is under constant surveillance by many companies, ranging from social networks like Facebook to cellphone providers. This data is collected, compiled, analyzed, and used to try to sell us stuff... **We're the product, not the customer.**

-- Interview with Liz Mineo, Harvard Gazette, "On internet privacy, be very afraid" (24 August, 2017)

## DAN GEER

Chief Information Security Officer at In-Q-Tel, the CIA's venture capital firm



**Your digital exhaust is unique hence it identifies.** Pooling everyone's digital exhaust also characterizes how you differ from normal. Suppose that observed data does kill both **privacy as impossible-to-observe** and **privacy as impossible-to-identify**, then what might be an alternative?

-- Dan Geer, RSA Conference, "We Are All Intelligence Officers Now" (28 February, 2014)

## SURVEILLANCE AS A PHILOSOPHY OF CONTROL



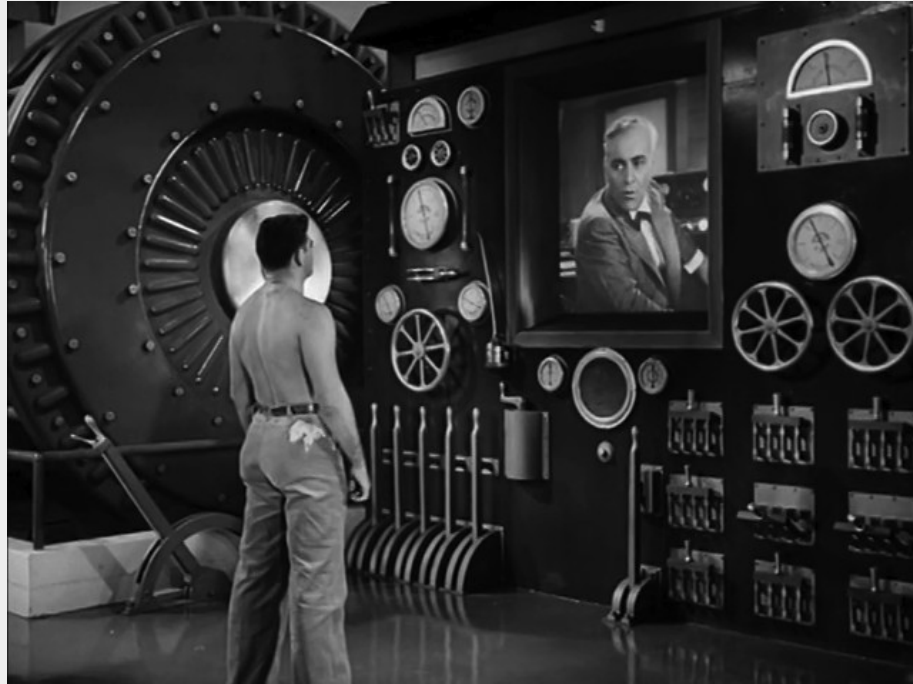
Surveillance isn't a passive, potential threat, but an active form of social control.

In George Orwell's *1984*, the model for the surveillance society is based on Jeremy Bentham's panopticon, a novel prison design where the guards monopolize **privacy**.

The panopticon was proposed in 1787, involving a central guard tower with narrow slits where guards observe many cells arranged in a circular pattern. No inmate is certain when or whether they are actually being watched, so inmates are incentivised to discipline themselves at all times.



## SURVEILLANCE AS A PHILOSOPHY OF CONTROL



Charlie Chaplin, *Modern Times* (1936)



George Lucas, *THX-1138* (1971)

There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to.

**You had to live -- did live, from habit that became instinct--in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.**

-- George Orwell, *1984* (1949)

## SURVEILLANCE AS A PHILOSOPHY OF CONTROL



Two stills from Terry Gilliam, *Brazil* (1985)

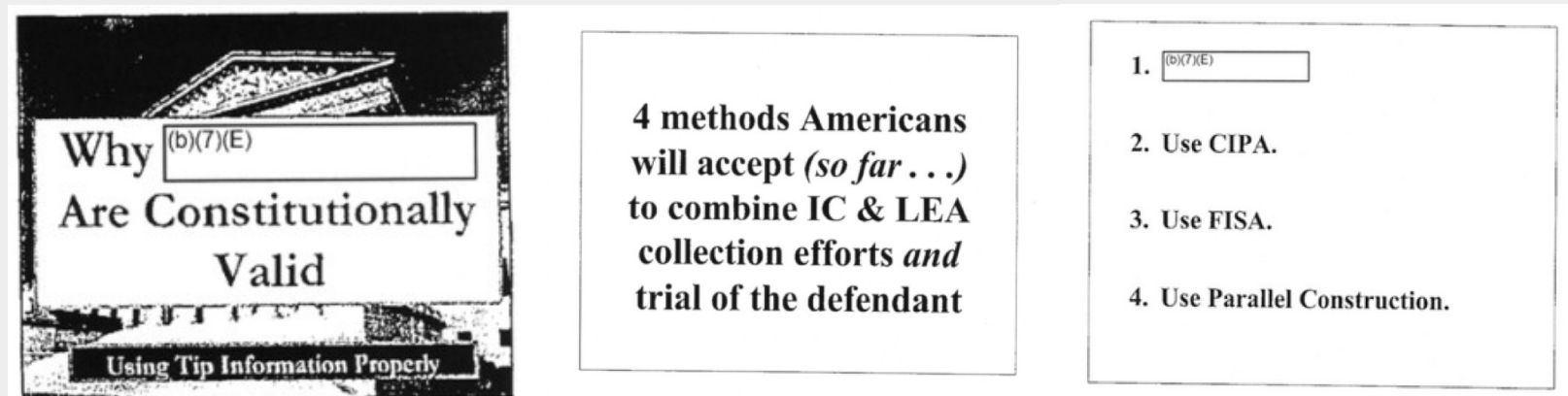
Hence the major effect of the Panopticon: **to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power...**

So... that the surveillance is permanent in its effects, even if it is discontinuous in its action; that the perfection of power should tend to render its actual exercise unnecessary; that this architectural apparatus should be a machine for creating and sustaining a power relation independent of the person who exercises it; in short, that the inmates should be caught up in a power situation of which they are themselves the bearers.

-- Michel Foucault, *Discipline and Punish* (1975)

## ISSUES BEYOND THE 4TH AMENDMENT

As the legal rationale for electronic surveillance has changed since 911, the circumstances whereby intelligence was passed to law enforcement created problems for cases brought to trial.



DEA FOIA request advocating “parallel construction” to safely use “intelligence community” data for law enforcement.

During discovery, lawyers working with evidence obtained through warrantless surveillance began using a technique called “parallel construction” to protect “sources and methods.” Effectively a form of “intelligence laundering,” the technique involves government lawyers “making up a fake story and an alternative investigatory trail” for trial.

This has unclear implications for the 6th Amendment right to a “speedy and public trial” and for the right for one “to be confronted with the witnesses against” oneself.

## CHANGING THE CONSTITUTION'S RELATIONSHIP TO CITIZENSHIP

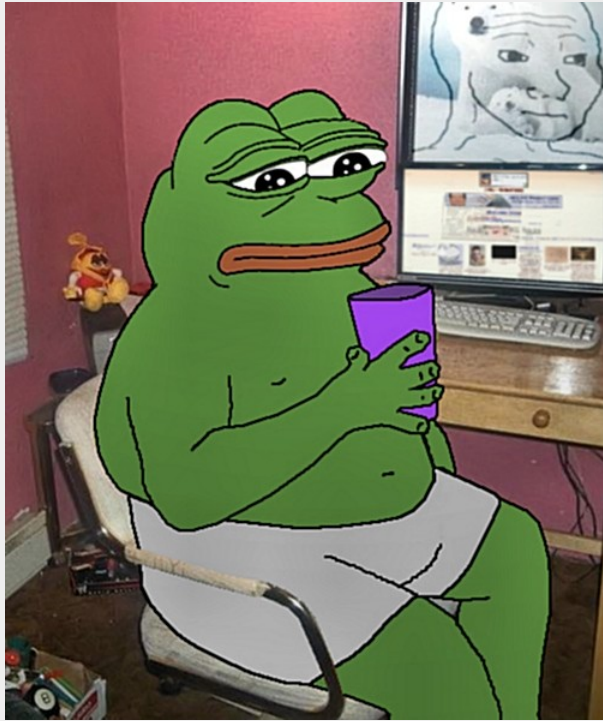
In the absence of real **privacy** and **anonymity** online, the **possibility of retroactive surveillance** raises complex issues with 5th Amendment protections against self-incrimination.

Should somebody at some point arouse suspicion for whatever reason – an accusation, a policy change, or an executive order – that individual's personal history can be examined as if that individual had been actively monitored for years.

These **5th Amendment** protections are the basis of the **Miranda Rights**, or, "**the right to remain silent**" upon arrest.

If the "**open source intelligence**" one provides on a social media platform is used by law enforcement, one may effectively be compelled to bear witness against oneself or one's spouse without even knowing about it – or consenting to it.

## FREE SPEECH IF YOU DARE: EVERY "NETIZEN" GETS A VOICE ONLINE



Internet "memes" involving Pepe the Frog (left), appropriated by the alt-right (center) and re-spun as Eris Discordia (right)

In 2011, a United Nations Special Rapporteur issued a report describing internet access in terms of rights.

Although "**surveillance is the business model of the internet**" and surveillance poses a challenge to citizenship's roots in **anonymity**, we are frequently told that "**the web is an incredible democratizer**" (Steve Jobs, quoted in *Wired*, vol. 4.02, Feb. 1996).

If citizenship is rooted in **anonymity**, surveillance online will cause citizenship to change.

## ORGANIZE ON A WIRETAP, SURRENDER THE ELEMENT OF SURPRISE



The “Twitter Revolutions” of the second decade of the 21st Century inspired Americans with “the democratizing power of the internet”

If democracy, the “privileges and immunities” of citizenship, and economic development are supposed to magically follow the commercial internet, we must come to terms with the failure of the commercial internet’s promise during the Twitter-branded Arab Spring.

As of Spring 2020, Tunisian emergency powers remain in effect; Egypt’s emergency powers remain in effect following their “Twitter revolution,” military coup, and theocratic rule; Syria remains in a state of civil war following a “Twitter revolution;” and so on.

In the US, the #Occupy movement gave way to President Trump and “fake news.”

## **CITIZENSHIP UNDER SURVEILLANCE**

Ubiquitous surveillance combined with long-term data storage means that social media maintains dossier-style records of an individual's activities, preferences, and social network over time.

The legal rationale for domestic surveillance collection has moved away from 4th Amendment protections, now relying on an amended FISA, executive orders, and the PATRIOT Act, allowing for a variety of subpoenas to be issued absent probable cause or judicial oversight.

This state of affairs has profound implications for how we perceive the relationship between the Constitution and basic concepts like citizenship.

**While social media promises freedom and personal expression, there is little evidence to support this belief.**

**At the same time, the privacy and anonymity we surrender online is changing the nature of citizenship.**