

The Right to be Left Alone. America's Domestic Spy Apparatus

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*Every move you make
And every vow you break
Every smile you fake
Every claim you stake
I'll be watching you.*

— “Every Breath You Take,” Song by The Police

The Fourth Amendment to the U.S. Constitution guarantees the right to privacy. Like other amendments in the Bill of Rights, it doesn't create the right; it limits government interference with it. Last week, President Joe Biden misquoted the late Justice Antonin Scalia suggesting that Justice Scalia believed that the Bill of Rights creates rights. As Justice Scalia wrote, referring to the right to keep and bear arms but reflecting his view on the origins of all personal liberty, the Bill of Rights secures rights, it doesn't create them; it secures them from the government.

Those who drafted the Bill of Rights recognized that human rights are pre-political. They precede the existence of the government. They come from our humanity, and, in the case of privacy, they are reinforced by our ownership or legal occupancy of property.

The idea that rights come from our humanity is called Natural Law theory, which was first articulated by Aristotle in 360 B.C. The natural law teaches that there are aspects of human existence and thus areas of human behavior that are not subject to the government. Aristotle's views would later be refined by Cicero, codified by Aquinas, explained by John Locke, and woven into Anglo-American jurisprudence by British jurists and American revolutionaries and constitutional framers.

Thus, our rights to think as we wish, to say what we think, to publish what we say, to worship or not, to associate or not, to defend ourselves from crazies and tyrants, to own

property, and to be left alone are all hard-wired into our human natures by God, the uncaused cause. Nature is the means through which God passes along His gifts to us. We come about by a biological act of nature, every step of which was ordained by God. His greatest gift to us is life, and He tied that gift to free will. Just as He is perfectly free, so are we.

In exercising our free wills, we employ rights. Rights are claims against the whole world. They don't require approval of a government or neighbors or colleagues. The same rights exist in everyone no matter their place of birth, and each person exercises them as she or he sees fit. The government should only come into the picture when someone violates another's natural rights. So, if someone builds a house in your backyard, you can knock it down and expel the builders or you can ask the government to do so.

Suppose the builders haven't consented to the existence of the government? That does not absolve them. Though government is only moral and legal in a society in which all persons have consented to it — this is Thomas Jefferson's "consent of the governed" argument in the Declaration of Independence — the only exception to actual consent is the use of government to remedy a violation of natural rights.

Professor Murray Rothbard examined all this under his non-aggression principle (NAP): Initiating or threatening force or deception against a person or his rights is always morally illicit. This applies to all aggression, even — and especially — from the government. The folks building a house in your backyard have either used force or deception to get there. Both violate your natural rights and the NAP.

Now, back to the Fourth Amendment and privacy. In a famous dissent in 1928, which two generations later became the law of the land, the late Justice Louis Brandeis argued that government surveillance constitutes a search under the Fourth Amendment and thus, per the express language of the amendment, cannot be conducted by the government without a warrant issued by a judge. He famously called privacy the right most valued by civilized persons and described it as "the right to be let alone."

Today, this is the most violated of personal rights; not by judges signing search warrants for surveillance, but by government officials — local, state and federal — ignoring and evading the natural right to privacy and pretending that the Fourth Amendment does not apply to them. The linchpin of the amendment is the judicial determination of the existence of probable cause — meaning that it is more likely than not that a crime has been committed, and that there is evidence of that crime in the place to be searched and in the things to be seized.

Today, the feds, and this has been picked up and mimicked by local and state police, have told themselves that so long as they are not looking for evidence of crimes, they needn't follow the Fourth Amendment.

Today, the government rarely bothers to obtain a search warrant for surveillance because it is cumbersome to do so and because it is so easy to surveil folks on a massive scale without one.

Today, the National Security Administration — America's 60,000-person strong domestic spying apparatus — captures every keystroke on every desktop and mobile device, and every conversation on every landline and mobile device, and all data transmitted into, out of

or within the United States.

Moreover, you'd be hard-pressed to find a geographic area that is not covered by police using hardware that tracks the movement and use of mobile phones. When Edward Snowden passed on to journalists the facts of massive warrantless spying in the Bush and Obama administrations, he had the journalists put their mobile devices where his was — in his refrigerator, as anywhere else would have alerted his former colleagues of their collective whereabouts.

The government spends hundreds of billions of dollars annually just to watch and follow us. Who authorized this? Why do we tolerate a society where we have hired a government to secure our rights and instead it engages in aggression against them?

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