

SNOWDEN: UNHINGED OR VIRTUOUS? THE “RIGHT” TO PRIVACY AND THE DEBATE OVER THE UNITED STATES GOVERNMENT’S CONTROL OVER ITS CYBERSPACE

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Abstract

“What Kind of Legislation? The Controversy over the United States Government's Control over its Cyberspace”

This research oscillates around a critical issue in the United States, that is, in the name of anti-terrorism the state utilises sophisticated surveillance machinery to protect its citizens’ while at the same time promising to protect their civil liberties. Of course this political discourse lends itself to an important debate internationally, but in this research it will be more narrowly discussed on the current debate being held in the United States. At the core of the debate is on the constitutionality of state actions¹ in a valiant effort to protect its people, and hence the nation-state, from its enemies. The most salient case, is that of Edward Snowden revealing the U.S. government’s abuses of this surveillance machinery. Snowden claims the U.S. government (and its Allies) acted criminally by aiding and abetting its own agents to collect information on its populace in the absence of lawful means (i.e. proper warrants). Although this case is far from its legal conclusion (Snowden, as of this writing, is still in asylum in Russia), it has brought a range of legal and ethical questions on democratic states’ cyber-intelligence gathering. This research will discuss the demands of cyber-intelligence reforms put forth by Edward Snowden and whether these demands are in fact practical in modern, high-technology societies such as the United States.

The debate of states’ use of surveillance in the name of security is not strange to American society or even to ancient city-states. For many, the lineage of surveillance can be traced back to antiquity² while for others an emphasis on the visual represents the very essence of modernity³. According to Fussey⁴ “while the development of administrative surveillance has been viewed not simply as a mere feature of modernity, but an enabling mechanism that has facilitated its development.” Despite its long history in civilised society, the very existence of surveillance has been viewed by many as a social problem due its ease of abuse by government and its agents.

¹ In the United States, there are several Amendments that constitute an American citizen’s right to privacy. The First Amendment which is held upon privacy beliefs – “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” The Third Amendment which states privacy within the home – “No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.” Lastly, the Fourth Amendment which holds privacy of the citizen and their possession – “The 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.”

² R. Sennet. *The Conscience of the Eye: The Design and Social Life of Cities*. W.W. Norton, New York, 1990.

³ M. Heidegger. *The Question Concerning Technology*, in: *The Question Concerning Technology and Other Essays*. Harper and Row, New York, 1977, p. 3– 35.

⁴ P. Fussey. (2008) “Beyond Liberty, Beyond Security: The Politics of Public Surveillance.” *British Politics*, vol. 3, no.1, 2008, p. 120–135.

Several scholars⁵ have suggested that one way of explaining this is that while surveillance has always been present, it has not always been a mechanism of control. Current public discourse on surveillance in Western societies, including the U.S. and the UK, is about the encroaching nature of this form of social control.

Over the last several decades, most Western societies have seen a tremendous advancement in technology far beyond the simplicity of CCTV's and the tremendous expansion in the actual use of surveillance. With computerisation, surveillance is becoming more subtle and intense spreading from material space to cyberspace. Scholars have argued⁶ that the real 'superpanopticon' exists in electronic environments – in the 'worldwide web of surveillance.' Most individuals in Western nations have taken for granted that they observed, monitored, classified and controlled in almost every aspect of their public lives. Thus, surveillance practices "pervade all societal sectors that stretch 'well beyond the state'; surveillance is a fact of modern life and not intrinsically anti-social or repressive"⁷. According to Lyon⁸, then, surveillance societies are defined by their double-edged character; surveillance technologies can be used to provide benefits, empower consumers and workers and enable the promotion of citizenship rights⁹. Traditionally, privacy has been used as a counterpoint to resisting and challenging surveillance but others argue a post-privacy¹⁰ challenge to surveillance exists that addresses the latter as a social question to do with power¹¹.

This research examines what is perhaps the most commented upon and certainly the least visible form of technological surveillance in modern society—that of cyber-surveillance. The examination of the cyber-surveillance debate here seeks to go beyond the dichotomy of 'liberty vs. security'¹² but to how open the United States government should be about its cyber-intelligence capabilities and how these apparatuses are possibly infringing upon its citizens' freedoms. This debate is hardly new, however, the freshness of the controversy stems from legislation introduced in response to 9/11; Homeland Security Act (HSA) of 2002 and Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA). Most recently as of this writing, the discourse surrounding cyber-intelligence gathering¹³, includes the controversial Cybersecurity Information Sharing Act and the Cyber Intelligence Sharing and Protection Act¹⁴. Each piece of legislation exacerbates three issues in the United States: reduced privacy; increased government secrecy; strengthened government protection of special interests¹⁵.

⁵ *Ibidem*

⁶ D. Lyon. *Surveillance Society: Monitoring Everyday Life*. Open University Press, Buckingham, 2001, p. 171.

⁷ *Ibidem*, p. 30-31.

⁸ *Ibidem*, p. 31.

⁹ Lyon's point here is that surveillance can also be less concerned with 'care' and more with 'control.' Surveillance plays a coordinating role in aiding an individual's passage through the shopping mall, customs or the workplace. This coordination process is more and more being defined by a risk calculus, which is increasingly taking on an amoral character – less concerned with inclusiveness and questions of justice.

¹⁰ Power and surveillance have a complex social relationship; not always to be characterised in oppressive terms in that 'few people feel constrained, let alone controlled, by surveillance regimes' (See Lyon, *Op. ed.*, p. 7). However, surveillance effects 'life chances and social destinies' in forming a kind of 'superpanopticon' (See Lyon, *Op. ed.*, p. 151) whereby surveillance societies can only be understood in recognizing how ideologies and beliefs 'underpin' the work of organizations and, therefore how they use surveillance technologies.

¹¹ *Ibidem*, p. 150.

¹² P. Fussey. *op. cit.*, p. 120–135.

¹³ Other such debates, on intelligence gathering, can be seen in the discourse surrounding ID cards (in particular for illegal immigrants) and even public camera surveillance.

¹⁴ Both laws would similarly provide for the sharing of certain cyber threat intelligence and information (i.e. Internet traffic information) between the U.S. government and technology and manufacturing companies.

¹⁵ N. Talanian (2008). "The 'War on Terror' and The Constitution," Retrieved from: http://www.constitutioncampaign.org/toolkit/war_on_terror.pdf