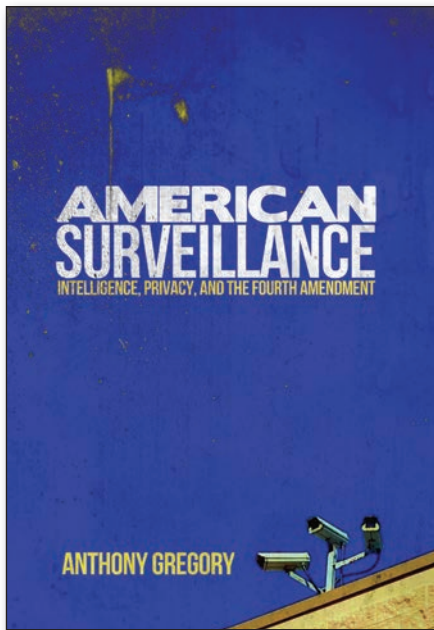


AMERICAN SURVEILLANCE

Intelligence, Privacy, and the Fourth Amendment

BY ANTHONY GREGORY

Book Highlights



280 Pages | 6 x 9 | Index
Hardcover | \$44.95
ISBN: 978-0-29930-880-3

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- **Privacy advocates make a strategic mistake when they ignore the complex relationship between domestic surveillance and U.S. foreign policy objectives.** The relationship itself can be gleaned by looking at most of the core targets of domestic surveillance: potential terrorists motivated by revenge for U.S. policies abroad; enemy agents of nation-states deemed hostile to American interests; and domestic political opponents of U.S. military interventions. The failure of privacy advocates to deal with the symbiotic relationship between domestic surveillance and foreign policy virtually guarantees that any surveillance reforms would be—at most—only temporary. On the other hand, both supporters and critics imagine a “Total Information” regime that confronts many practical limits.
- **For precursors of the modern surveillance state, we should look back more than a century in American history.** After the U.S. takeover of the Philippines from Spain in 1898, America found itself facing a Filipino insurgence movement. To thwart revolution, the U.S. military developed an elaborate intelligence program, recruiting Filipinos to compile dossiers on suspected rebels. Its surveillance methods were then exported to the U.S. homeland, where they were soon used against suspected “anarchists” and opponents of U.S. entry into World War I. The tools, methods, and scope of domestic surveillance were then further expanded, especially in conjunction with World War II, the Cold War, and the so-called War on Terror.
- **Reining in the American surveillance state has often faced short-term difficulties.** The mid-1970s Church Committee investigations successfully ushered in reforms that curtailed egregious abuses, but recent efforts to curtail mass domestic electronic spying have been modest at best. Replacing the occupant of the White House hasn’t worked. The 2013 revelations that the National Security Agency (NSA) collected—without specific warrants—mass records of domestic phone calls, emails, and Internet searches demonstrated that the Obama administration was no less inclined to intrude on Americans’ privacy than was its predecessor. Congress has also disappointed: Witness, for example, its measure to replace the NSA’s archiving of private communications data with mandates for businesses to archive data for later access by the NSA.
- **The Constitution’s strongest restriction against government intrusions—the Fourth Amendment’s provision against “unreasonable searches and seizures”—has been limited in effectiveness.** The Supreme Court over the years has granted the government more and more “special needs” exemptions. One reason may be that conservatives and liberals have become more deferential to state authority. Another factor is the Amendment itself: its wording is highly ambiguous and open to interpretation. It’s unclear, for example, how it was meant to be applied in cases when the government monitors individuals by using technologies that the Founders hadn’t anticipated.
- **Those who fear that George Orwell’s fictional *1984* could become America’s reality must look beyond the NSA.** The U.S. government’s domestic spying apparatus has become so powerful and resilient that Congress may have little if any ability to curtail unnecessary privacy violations over the long run. Even if domestic surveillance were abolished immediately at the federal level, state and local law enforcement would sooner or later develop the capability to pry deeply into the private lives of ordinary people. Thus the “land of the free” appears to be transforming into a virtual “fish bowl,” and people act like they’re being watched whether or not they are actually “persons of interest.”

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In *American Surveillance: Intelligence, Privacy, and the Fourth Amendment*, award-winning legal scholar **Anthony Gregory** (author, *The Power of Habeas Corpus in America: From the King’s Prerogative to the War on Terror*) offers a tour de force that makes sense of esoteric scholarship from disparate academic fields and allows us—perhaps for the first time—to understand the hidden forces that have forged the surveillance state. In so doing, Gregory enables us not only to grasp the deeper meanings behind recent headlines, but also to see the enormity of the challenge facing civil libertarians who seek robust privacy protections from government intrusions.

History of Intelligence and Surveillance

No one can fully comprehend recent domestic surveillance abuses or understand the strengths and weaknesses of reform proposals without understanding the origins and development of the American surveillance state. Gregory provides this essential context in chapters 1 to 5, highlighting the inflection points in the history of U.S. intelligence gathering at home and abroad.

Until the dawn of the twentieth century, Gregory explains, U.S. surveillance and intelligence gathering mainly looked inward. During the War of Independence, the American revolutionaries recruited spies, launched covert operations, opened private mail, and ran counterintelligence operations against the British secret service. After the revolution ended, government surveillance continued.

By the 1790s, federal spending on intelligence accounted for one dollar for every eight in the national budget. The nineteenth-century emphasis ranged from securing the western frontier to enforcing slavery. Domestic surveillance reached new levels during the Civil War, with the addition of telegraph wiretaps, observation balloons, the recruitment of Pinkerton detectives, and the infiltration of pro-Confederate groups.

Clandestine operations were blessed by court decisions that set important precedents authorizing increased government secrecy and surveillance powers. In the decades after the war, these powers aided the national government’s occupation of the South, the prosecution of the Indian Wars on the western frontier, the monitoring of labor activists, and the enforcement of the Chinese Exclusion Act.

Although these campaigns were sometimes very sophisticated, the end of the Spanish-American War and the dawn of the twentieth century marked a definite turning point. The focal point was Spain’s former colonies, especially the Philippine Islands, which were now in U.S. possession.

In order to suppress the Filipino independence movement, the U.S. authorities ran counterinsurgency operations utilizing hundreds of Filipino recruits to build and manage dossiers of suspected rebels. The campaign, directed by Ralph H. Van Deman, the chief of army intelligence, bore new methods that were soon exported back to the U.S. homeland.

America’s new domestic intelligence capabilities initially targeted suspected labor agitators and anarchists (President McKinley’s assassin had proclaimed anarchism); they also served ordinary law enforcement. Their rapid growth prompted President Teddy Roosevelt in 1908 to establish the Bureau of Investigation, a small precursor of things to come.

Domestic intelligence gathering took another major step with U.S. entry into the First World War. The newly created Alien Enemy Bureau, run by a young and energetic J. Edgar Hoover, monitored immigrants and deported German foreign nationals. The Military Intelligence Division, General Van Deman’s agency, rose in stature within the military bureaucracy.

Following the war, domestic surveillance suffered criticisms and was pulled back, although it continued under presidents Harding and Coolidge. In 1928, the Supreme Court upheld the constitutionality of wiretapping, and throughout the 1930s domestic intelligence gathering increased, with J. Edgar Hoover building dossiers (sometimes through illegal means) on suspected communists, Nazi sympathizers, and critics of President Franklin Delano Roosevelt.

U.S. intelligence efforts in Japan failed to prevent Pearl Harbor, but scholars have attributed this to having too much information rather than too little. In both theaters of the war, signal intelligence (SIGINT) led to important successes, but Roosevelt preferred human intelligence (HUMINT), although he was ignoring its findings when he ordered Japanese-American internment.

Months after Roosevelt’s passing, Hoover named several high-ranking government officials as agents of Soviet espionage, including members of the OSS, a precursor

Synopsis

Edward Snowden, a computer expert and government contractor (and former CIA employee), made international headlines in 2013 after sending members of the press thousands of classified documents revealing official duplicity regarding U.S. government electronic surveillance—disclosures of domestic mass data-collection programs that some believe clearly broke the law. The ensuing media firestorm has prompted Americans across the political spectrum to worry that, if left unchecked, mass domestic spying will make “the land of the free” become the land of the fearful.

To understand how America reached this point—and to see where it is headed—requires delving into several disciplines: surveillance and intelligence history, legal history, constitutional jurisprudence, and more. Unfortunately, scholars have generally stayed within their narrow subspecialties and have failed to integrate these findings and interpret them for a general audience.

to the CIA. The revelations strengthened the FBI director's influence and helped set the stage for the spy-versus-spy intrigues of the Cold War.

It is here that the story begins to sound increasingly familiar, as Gregory references many well-known intelligence triumphs and tragedies from the 1940s through the 1970s—the Rosenberg trial, Alger Hiss, the National Security Act, the CIA's troubles during the Korean War, Senator Joseph McCarthy, HUAC, COINTELPRO, the Bay of Pigs, surveillance of Vietnam War protestors, and more. Yet Gregory helpfully informs this narrative with topics rarely discussed in popular works, such as the growing separation of foreign and domestic intelligence gathering—a distinction in law if not always in fact.

By the time Gregory brings us to the post-9/11 era—with its revelations of weak intelligence coordination, agency reshufflings, the USA PATRIOT ACT, Admiral Poindexter's pursuit of techno-omniscience, FBI monitoring of peace activists, discussions of FISA-court “rubber stamping,” metadata versus content, PRISM, XKEYSCORE, public-private surveillance “partnerships,” NSA eavesdropping on U.S. allies, NSA intelligence-sharing to benefit U.S. companies, and NSA spying on members of Congress—he has well prepared readers for what they might see (or think they see) in the U.S. intelligence community's wilderness of mirrors.

The American surveillance state is the culmination mostly of responses to events of national importance and especially to foreign-policy developments. But how, *legally speaking*, did it arise? The answer, Gregory explains in chapters 6 to 8, is buried in the thicket of Fourth Amendment jurisprudence.

Law and Leviathan

The Fourth Amendment signaled a radical conceptualization of privacy. It enshrined an idealized version of the venerable doctrine that “a man's home is his castle.” It also set forth specific requirements for permissible searches and seizures—a reflection of disdain for general warrants (“writs of assistance”) issued under British colonial rule. But imprecise wording left the amendment's full meaning and application open to interpretation.

The Supreme Court saw little need to visit the issues until the late nineteenth century, when a case involving postal privacy (*Ex parte Jackson*, 1878) reached the docket.

The Court ruled that government inspection of the mail (whether to intercept illicit sexual material or shady lottery offerings) was proscribed by the Fourth Amendment's specific-warrant clause.

The Court did not, however, strike down government monitoring of telegraph lines, in part because this medium was not physical property belonging to the surveilled parties. Thus, although the NSA's warrantless wiretapping would not occur until many decades later, an astute observer of the courts might have foreseen that major exemptions to Fourth Amendment protections would be forthcoming.

Throughout the twentieth century and into the twenty-first, the Supreme Court decided numerous cases bearing on the Fourth Amendment, including *Katz v. United States* (1967), *Smith v. Maryland* (1979), *United States v. Jacobsen* (1984), and *Kyllo v. United States* (2001), among others. Characterized at the case level by ad hoc reasoning, collectively they advanced the surveillance state two steps forward, one step back.

The Court has especially upheld surveillance when certain “special needs” (whose numbers have grown) are supposedly at stake, most especially claims of national security. Thus, Fourth Amendment privacy guarantees, Gregory argues, are “a mirage.”

But even under a strict-privacy standard, the Fourth Amendment would be hard to enforce. If the courts were to discourage violations by excluding evidence obtained from “unreasonable” searches and seizures (the controversial “exclusionary rule”) or by imposing penalties on the violators, other privacy exemptions would remain.

Warrantless searches are permissible during “hot pursuit” of criminal suspects; for various regulatory compliance inspections; for students in school; for probationers and parolees suspected of violations; for many public employees; and for people at the border. In addition, Gregory explains, technological advancements have muddied the very meaning of “search” and “unreasonable,” and will likely muddy them further.

Privacy and Civilization

At the heart of controversies surrounding the surveillance state lie questions of privacy—of its meaning, scope, and priority. Conservatives, liberals, and libertarians (and their permutations and subgroups) have given conflicting answers. But the issues are thornier than an ideological analysis would

suggest, as Gregory explains in chapter 9, which, together with the concluding chapter, constitutes the most philosophical and thought-provoking section of the book.

Even if public policy were somehow to reflect a consensus that domestic surveillance is an unacceptable violation of Fourth Amendment protections, privacy would still be vulnerable to data collection, by commercial enterprises and by ordinary people able to capture others' personal information via mobile devices. The prospect raises troubling questions. The complexities suggest that, ultimately, effective privacy protection requires more than formal restrictions on governments: an unwavering privacy ethos must prevail in the culture at large.

To Gregory the consequences of the culture's prevailing attitudes cannot be overstated. “I can only surmise that what is at stake is the kind of civilization we have,” he writes.



About the Author

ANTHONY GREGORY is a Research Fellow at the Independent Institute and the author of the Independent book, *The Power of Habeas Corpus in America: From the King's Prerogative to the War on Terror* (Cambridge University Press, 2013), winner of both the PROSE Award for Best Book in Law and Legal Studies (awarded by the Association of American Publishers) and the Silver Medal IPPY Award for Best Book in Political/Economic/Legal/Media (awarded by Independent Publisher).

He is also the author of *What Price War? Afghanistan, Iraq, and the Costs of Conflict*, and his articles have appeared in *The Atlantic*, *Washington Times*, *Bloomberg Business Week*, *Christian Science Monitor*, *San Diego Union Tribune*, *Dallas Morning News*, *Huffington Post*, *The Daily Caller*, *American Conservative*, *Counterpunch*, *Human Events*, *Reason*, *Antiwar.com*, *The Independent Review*, and *Journal of Libertarian Studies*.

Praise for *American Surveillance*

“The systematic and flagrant violations by government agencies of the privacy rights of Americans have reached unprecedented and disturbing levels. The authoritative and auspicious book *American Surveillance* now tackles the critical national security, constitutional, and civil liberties issues involved in the most profound way. Those who want to protect and defend liberty, peace, and justice, and who want to take the debate to the highest level, will find this book indispensable.”

—**Daniel Ellsberg**, Ph.D., whistleblower who released *The Pentagon Papers*; former Special Assistant to the Assistant Secretary of Defense for International Security Affairs, U.S. Department of Defense; former Strategic Analyst, RAND Corporation

“A cogent synthesis of the history of American surveillance and of its conflict with the right to privacy enshrined in the federal Constitution. Thoroughly researched and eloquent, *American Surveillance* traces government surveillance from colonial times to beyond 9/11.” —**William J. Cuddihy**, author, *The Fourth Amendment: Origins and Original Meaning, 602-1791*

“The very best and well documented history of government surveillance in America from 1775 until the present, *American Surveillance* is extremely important—especially in light of the recent exposure of the extent of blatant, Fourth-Amendment violations. This exceptional book should be widely read and serve as a wake-up call for all Americans to put a stop to any administration’s reckless, lawless and unconstitutional infringements of privacy.”

—**Nat Hentoff**, columnist and author, *Free Speech for Me—But Not for Thee; Living the Bill of Rights*

“Anthony Gregory’s well-researched and timely book significantly expands our understanding of the impact of U.S. foreign intelligence and domestic surveillance operations on privacy rights and the nation’s major policy decisions. His thoughtful study both comprehensively surveys U.S. foreign intelligence and domestic surveillance operations from the American Revolution through the post-9/11 era and perceptively assesses conflicting conceptions of privacy and Fourth Amendment rights. A must read, *American Surveillance* is a major contribution to the current debate over the proper balance between liberty and security interests.”

—**Athan G. Theoharis**, Professor of History Emeritus, Marquette University; author, *A Culture of Secrecy: The Government versus the People’s Right to Know* and *Abuse of Power: How Cold War Surveillance and Secrecy Policy Shaped the Response to 9/11*

“*American Surveillance* provides an essential overview of major turning points in the growth of the American intelligence apparatus as well as in public attitudes toward national security and privacy. Anthony Gregory convincingly argues that the historical connections between domestic and foreign surveillance programs—which evolved in tandem to shape our cultural norms surrounding privacy as well as Fourth Amendment jurisprudence—are key to understanding how the U.S. surveillance regime functions today. By identifying privacy advocates’ challenges in changing legal and cultural norms, as well as pointing out how legal cases alone may not be enough to curb the surveillance state, Gregory adds an invaluable perspective to existing scholarship on American surveillance law.”

—**Cindy Cohn**, Executive Director, Electronic Frontier Foundation

“*American Surveillance* is an accurate and insightful examination of the delicate balance between the requirements of national security and the Constitution—an issue more critically important than ever in an unsettled time of threats to America from without and within.”

—**Ernest W. Volkman**, author, *Secret Intelligence: The Inside Story of America’s Espionage Empire* (with Blaine Baggett)

“The Fourth Amendment has been virtually repealed in the U.S. today. We would be wise to study how we got to this point and how we might get our privacy back. *American Surveillance* is an excellent place to start that journey.”

—**Ron Paul, M.D.**, former U.S. Congressman; former Chairman, Subcommittee on Domestic Monetary Policy and Technology, U.S. House of Representatives; author, *Swords into Plowshares: A Life in Wartime and a Future of Peace and Prosperity*

“Great books are beautifully written and uncompromisingly honest. They satisfy the reader while simultaneously fueling intellectual curiosity and practical action. The best of them leave you with more questions than answers, and a sense of urgency. In *American Surveillance*, Anthony Gregory has written a great book. His fascinating review of the shifts and accretions of American law and culture is filled with historical surprises and 21st century shocks, so beneficial in an era of gross American ahistoricity and cultural acquiescence to the technological state. Every flag-waving patriot, every dissenter, every judge and police officer, every small town mayor and every president should read *American Surveillance*. We have work to do!”

—**Lt. Col. Karen U. Kwiatkowski**, (Ret.), former Chief, System Acquisition and Communications and Information, Signals Intelligence and Information Security Acquisition Branches, Air Force Cryptologic Office, National Security Agency

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