



Celebrating the 100th Anniversary of Louis D. Brandeis' Appointment to the U.S. Supreme Court

Privacy Imperiled What Would Brandeis Make of the NSA & Edward Snowden?

Shane Harris*

As a journalist who has covered government and corporate surveillance for nearly fifteen years, “the right to privacy” is a term that I hear routinely invoked. And many of the people who use it, whether they’re privacy advocates or national security officials, seem to assume that Americans have naturally, always been afforded legal protections from intrusive inspection of their ostensibly private communications.

But I don’t know that most people could say where the term and the concept of a right to privacy originated. I suppose that’s a measure of how significant Louis Brandeis and Samuel Warren’s article, “The Right to Privacy,” actually was, and how prescient. Like great novelists, the authors of the article seem to have expressed a truth that was already there, inside our minds, and one that we can’t imagine never existed, even if we couldn’t name it. Their then-radical assertions seem so obvious now that they’ve faded into the wallpaper.

And that’s too bad, because there’s much in this 125-year old essay that is still useful and instructive in our present debate about privacy rights. Indeed, their insights are astoundingly durable. The authors had the good sense to understand that technologies evolve, and that laws can and should evolve along with them. This is a core tenet of

today's debate over how to restrict U.S. intelligence and law enforcement surveillance of potential terrorists, and it is one deployed by people on all sides of the argument.

Brandeis and Warren weren't intimidated by technology. Were they alive today, they would probably marvel at the invention of the Internet. (Who doesn't?) But they would also have understood that the right to privacy could be applied to this new, pervasive—and invasive—technology, just as they applied it to new, instant cameras in the hands of journalists in the 1890s.

It's the way that technology disrupts the contours of private life that so profoundly concerns the authors. I'm sure they would quickly grasp the unnerving capability that search engines give even not-very-talented snoops to make public that which was intended to be intimate, to make the obscure discoverable.

It's in that spirit that I decided to consider two questions: In light of their article, and the value they place on the right to privacy, if Brandeis and Warren were alive today what would they have to say about surveillance by the U.S. National Security Agency? And what would they have to say about Edward Snowden, the former NSA contractor who revealed so much about that agency's operations?

I emphasize at the outset: I'm not a Brandeis scholar. Or a Warren scholar for that matter. But I do have a certain expertise on the nature and operations of the NSA, having written about them in hundreds of magazine and news articles and two books. I won't try and read into Brandeis's mind—and I will from here on focus on Brandeis as the chief author. But I will take key passages from this seminal essay that, I think, stand the test of time and feel especially relevant to the two questions I posed—two questions that are at the heart of our current national debate over the right to privacy in 2016.

But before I do that, I feel compelled, perhaps out of some professional devotion and camaraderie, to defend the particular group of people that prompted Brandeis to argue the right to privacy in the first place. Namely, people like me. Journalists. And nosy ones at that.

Brandeis evinced little patience in his essay for practitioners that many of my peers would describe as aggressive, relentless, and fearless, even if we might turn up our noses at the salacious, “yellow” work they were cranking out. Yet these reporters exhibited the same brand of tenaciousness that we applaud today in reporters who expose corruption, official abuse, and injustice. We give them awards for their work.

But Brandeis writes of a meddlesome press that seems to have lost its professional and societal moorings: “The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery.” I wonder what Brandeis would say about the online tabloid *TMZ*, but that’s a subject for another essay.

Yet Brandeis doesn’t limit his critique to journalists, nor are they really the object of it. He’s more concerned with the way they use the tools of their trade, and of the extraordinary power of those tools. “Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right ‘to be let alone,’” Brandeis writes. “Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”

Brandeis has put his finger on a threat that we still feel today from technology, one that creeps into the corners of our everyday lives, not necessarily welcome or invited. Some of this technology we enable. (Hello, Facebook?) Much of it, though, is passive. Google—or its algorithms—pitch us ads based on what we write in our emails. We live with the inescapable sensation that we are being watched—if not exactly by someone, then by something. And we worry that that what we read, write, or say in private is being turned into grist for some commercial, or perhaps official purposes without our clear consent.

Now, Brandeis goes on to write that public figures, such as elected officials, shouldn't be exempt from public scrutiny, namely at the hands of the press. And he's certainly not arguing that there's no place for an aggressive and free press to root out facts that some might prefer to keep to themselves. Rather, it's the invasiveness of the technology more than the person wielding it that really seems to distress him.

I'm fascinated that rowdy, pain-in-the-neck reporters provided Brandeis with the object lesson to write one of the most important and resilient essays on the nature of privacy. And I'm fascinated by it because the people in my industry wield tremendous authority—social and legal—to enter uninvited the daily comings and goings of all kinds of people, notable or otherwise.

So do government authorities. And like the journalists of Brandeis's day, they are equipped with very powerful technology.

We know best Brandeis's views on the government's invasion of privacy from his dissent in *Olmstead*, where we see Brandeis once again measuring the evolution of technology and, along with it, the government's capability to spy:

“When the Fourth and Fifth Amendment were adopted, ‘the form that evil had theretofore taken,’ had been necessarily simple,” Brandeis writes, alluding to the Supreme Court's decision in *Weems v. United States*. “Force and violence were then the only means known to man by which a Government could directly effect self-incrimination. . . . But ‘time works changes, brings into existence new conditions and purposes.’ Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.”

These words could have been written today by a jurist wary of the far-reaching surveillance capabilities of the NSA, which has, pursuant to legal authorities, demanded private communications from a number of large American technology companies,

including Google, Facebook, Microsoft, and Yahoo, and has, pursuant to executive authority, taken that information without consent from companies in their overseas data centers or on submarine cables.

Judge Richard Leon, in his recent ruling against NSA surveillance in *Klayman v. Obama*, invokes Brandeis when he writes, “The Court’s vigilance in upholding the Constitution against encroachment is, of course, especially strong in the context of the Fourth Amendment,” and the amendment, Leon says, rests on the principle of recognizing what Brandeis called “the right to be let alone.”

I don’t mean to compare Leon to Brandeis, but only to make the point that the latter’s thinking is still bearing directly on a case involving powerful technological capability in the hands of an intrusive power.

Whether Brandeis would find certain NSA surveillance operations unconstitutional, I’m not qualified to judge. And that matter has come before the courts and surely will again, perhaps the Supreme Court if it decides to reconsider whether Fourth Amendment protections should be applied to phone records and other so-called metadata. Justice Sonia Sotomayor has already indicated she thinks the Court should take up this question.

But having read Brandeis’s dissent in *Olmstead*, and having absorbed his thoughts in “The Right to Privacy,” which gives us his intellectual blueprint, I feel safe in concluding that Brandeis would be profoundly disturbed by the burgeoning, global information-gathering behemoth that is today’s NSA. That’s not to say he’d think it was illegal or should be banished. But analogous to his concerns about nineteenth-century journalists, I think Brandeis would be unsettled, not so much by today’s legally enforced effort to find and deter terrorists, but by the technological enterprise we’ve constructed to do that work.

I’ve long held, and written, that the *potential* for abuse posed by NSA surveillance is greater than any legal violations that the agency has committed. It’s not that I think the agency has never abused its authority. Nor do I support or condone all the agency has done under law. But we don’t live in a world in which large numbers of people are spied on for their political beliefs, or in which people are rounded up or arrested based simply on what they said, read, or wrote. We’ve been down that road before. And if we traveled

it again, NSA's capabilities would enable violations of civil liberties on a mass scale. We must guard against that.

I suspect Brandeis would agree with this argument, and perhaps would have emphasized that it's the job of the law to restrict those awesome technical forces that reside in our nation's biggest intelligence agency.

Brandeis clearly understood the power of government surveillance to deprive people of their rights. But he also beautifully expressed the corrosive effects that surveillance has on society.

Early in his essay, Brandeis writes passionately about the need for people to claim some small private space in his modern world, and you can just feel that space getting smaller as the technology of the day crowds it:

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Brandeis isn't just concerned with the people who are the direct objects of scrutiny. He thinks the whole business of gossip peddling (or what we might call today, "information gathering,") is insidious:

Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts.

It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people.”

Brandeis couldn't have known it then, but he's actually offering an often-argued critique of the NSA and its penchant for gobbling up as many digital fragments of intelligence as its gargantuan databases can hold. There, too, is a vicious circle of demand and supply, perhaps most succinctly captured by former NSA Director Keith Alexander's stated approach to global surveillance: “Collect it all.”

I know Brandeis is bemoaning in these passages the unseemly, tawdry press that makes us all feel dirty for reading it. (That press, by the way, is flourishing today.) But he's also pointing to the persistent nature of that press—that surveillance—and the ill effects it has on all of us. In the footnotes, he mentions a famous case of the day, a stage actress who was surreptitiously photographed from the audience in mid-performance. It's as if that actress stands in for all of us, anxiously waiting for someone in the dark to snatch our image without our permission.

Even if you aren't the direct subject of surveillance—and most of us aren't—the pain you feel by knowing your emails or phone calls might be scooped up and scrutinized is significant. This is known as the “chilling effect.” You behave differently because you know someone might be watching you. Brandeis is warning us of that chill, and trying to banish it with the law.

Yet the chill persists. One of the first cases brought against NSA surveillance, in 2006, was by journalists and lawyers who argued that they had to curtail their contacts with foreign sources and clients, because those people could be the subject of warrantless phone surveillance by the NSA, and in turn, the journalists and lawyers could be monitored, too.

This isn't an academic point. Just think about how many times you may have wondered, as you sent an off-color text or an intemperate email, “Is someone collecting this?” Maybe you've thought that and not adjusted your behavior at all. But I doubt that the thought has never crossed your mind. And once implanted, that thought, and the anxiety it creates, is not easy to clear away.

In polls, the American public is usually about evenly split between those who say they're mostly comfortable with broad, government surveillance of electronic communications, and those who object to it. These are admittedly clumsy polls, because you have to ask a lot of nuanced questions to understand what really bothers people. For instance, you might feel comforted knowing that the government needs a warrant to listen to *your* phone call, whereas it can tap the phone of a foreign person pretty much when it wants. But then how would you feel about the government maintaining a database of all the times that you made a phone call, which number you called, and how long you spoke? That's just what it's been doing from the days after the 9/11 attacks until late 2015. Knowing this, you might tilt towards the camp that does harbor objections to surveillance.

But if, generally speaking, half of all Americans have some degree of misgivings about a national surveillance apparatus that has the technical and legal ability to monitor their communications, that means millions of people worry about their government's ability to intrude in their private life. And I think Brandeis would say this is a big problem.

I'm confident that Brandeis would acknowledge the government's interest in reading some emails, in targeting some individuals for scrutiny. And to be sure, the NSA is a regulated enterprise that's only allowed to target the contents of non-U.S. persons' communications with a warrant.

But in the sweeping up of non-U.S. persons' emails, text messages, and other communications, U.S. persons' information is inevitably gathered and stored. Even if it's never examined, I think Brandeis would, at the least, recognize that this capability, were it turned deliberately on innocent Americans, could lay bare all that was whispered in the closet, the bedroom, and the chat room.

Now, there's a reason we know so much about the NSA's capabilities. Part of the credit goes to investigative journalists, who have, over the years, managed to pry loose details of the inner workings. Much of what we know about the legal rationale for surveillance flows from a series of investigative reports in 2006 and 2007, ignited by a

New York Times front-page article on the NSA's so-called warrantless wiretapping program, or Stellar Wind. Some top members of the George W. Bush administration, including the attorney general and his deputy, the director of the FBI, and the head of the Justice Department's Office of Legal Counsel, believed a key part of this program was illegal, and they were preparing to resign over it.

More articles and books on the NSA followed, culminating in a public debate about reforms to the Foreign Intelligence Surveillance Act, which Congress took up and that resulted in a significant legal expansion to how the agency spies and who it is allowed to monitor.

We weren't lacking information about the NSA and how it spies. But in 2013, former NSA contractor Edward Snowden exposed more information about the agency's operations than anyone before him, through a cache of classified agency documents that he gave to at least three journalists. Snowden ignited a global debate about surveillance and privacy unlike any the world has seen so far in the twenty-first century.

Brandeis would have welcomed the debate. This is the man who, after all, wrote in *Olmstead* what has to be one of the most quoted warnings about the perils of government overreach:

Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Brandeis wasn't just ready for a debate; he was leading it. But would he have supported the means by which that debate came about? What would he have thought of what Snowden did?

Let's remember how Brandeis felt about journalists. If he was disturbed by a press that exposed the inner workings of private lives, do we really think he would have no

problem at all with a press that exposed the inner workings of classified intelligence operations? I can't imagine Brandeis having boundless confidence in the ability of the press to decide which secrets were fit to print and which ones should stay hidden. Journalism is, after all, an industry that feeds on gossip and salacious detail, in Brandeis' opinion. Were he alive today, he would accuse many of us of chasing clicks with exaggerated facts and baited headlines. And judging by some of the articles that have been written about NSA operations, he would have a fair point.

I can't say that Brandeis would lump Snowden, the leaker, in with the people who willingly received and published the information he took. He was smarter than that. Unlike some law enforcement officials in the Obama administration, and the Bush administration before it, who thought journalists who publish classified information about intelligence operations should be prosecuted under the Espionage Act, I think Brandeis would have recognized the incredible threat that would pose to the freedom of the press and the First Amendment.

But I can't shake the idea that Brandeis would have been troubled by Snowden's decision to let journalists decide which secrets to expose. And that he would worry that the mass distribution of articles via the Internet and social media, and the blood-curdling headlines that attend them, would unsettle and confuse those citizens whom he described as "easy of comprehension," "the ignorant and thoughtless" who can't discern the relative importance of information that has real value versus idle gossip meant to titillate or, in the case of the NSA, to scare.

Indeed, many current intelligence officials feel this way. In conversations with me, and in their public remarks, they've criticized much of the reporting on Snowden's leaks as overblown, tendentious, and deliberately overlooking mitigating information contained in some of the very documents that Snowden disclosed.

For instance, he gave journalists a lengthy set of highly technical "minimization" procedures that the NSA uses to determine who it can monitor, and what information about U.S. persons it cannot examine or keep. That document and others describe a massive surveillance apparatus that is arguably the most regulated on the planet, and that

stands in contrast to other Western nations with highly developed technical intelligence capabilities, including the United Kingdom, which makes little distinction between foreign and domestic intelligence, and where journalists can be thrown in prison for reporting on classified government operations.

But, many intelligence officials have complained: to read the press, you'd think the NSA is an unchained, digital dog, roaming wildly through the Internet, seizing on every piece of data it can find. Those officials primarily blame journalists for what they view as that popular misconception.

Maybe I'm too defensive, but I think Brandeis would judge harshly a lot of the reporting that's been done on the NSA, even if he were shaken to his core by the spying powers that those journalists exposed. And to the extent that Snowden was the source for these journalists, I think he might judge him harshly too. Maybe even as he applauded his actions, which of course sparked the debate.

I return to Brandeis's writing in *Olmstead* that "crime is contagious." In that case, government agents had clearly broken wire-tapping laws. There was no real argument about that. But in the case of NSA surveillance, nearly everything the agency has done is legal. (Though some unlawful operations were made legal after the fact.) The thrust of the debate—notable court cases aside—hasn't been about whether NSA broke the law so much as what the law should allow the NSA to do.

Would Brandeis say Snowden committed a crime by taking classified secrets from the agency and giving them to journalists? I have to conclude that he would. One can praise Snowden for starting a necessary debate and adding to our collective knowledge about surveillance, and still recognize that he broke the law to relay these secrets. Snowden himself has said that he's willing to serve time in prison, if it means that he can return to the United States from his residence in Russia.

Anyone with as much respect for the law as Brandeis would have to see Snowden as a law-breaker. What intrigues me more, though, is a question that I can't really answer:

Would Brandeis have seen Snowden as someone who “breeds contempt for law,” and who “invites every man to become a law unto himself”? Would he see Snowden as a man who “invites anarchy”?

I can’t say. But I think Brandeis, no simple mind, would have been able to separate the leaks from the leaker, the debate from the instigator.

There’s a quote I came across years ago reporting on press leaks, the provenance of which I’ve since forgotten. But it stuck with me. In effect, the speaker was congratulating someone for spilling secrets, but recognizing that he had to be punished.

“Give him a medal, then throw him in jail.”

Brandeis didn’t say it. But I think he might have agreed with the sentiment.

***Shane Harris** is a senior intelligence and national security correspondent for the Daily Beast and an Arizona State University Future of War fellow at the New America Foundation. His first book, *The Watchers: The Rise of America’s Surveillance State*, won the New York Public Library’s 2011 Helen Bernstein Book Award for Excellence in Journalism and was named one of the best books of 2010 by the *Economist*.

[This paper may not be cited or reproduced without permission of the author.]