

Ronald Reagan's Executive Order 12333: End-Running the Fourth Amendment; "Legalizing" Police State Surveillance

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Historians of the Constitutional Era of the United States (1789-2001, RIP) will recall the [Fourth Amendment](#) to the Constitution, the one that used to protect Americans against unreasonable and unwarranted searches.

The Supreme Court had generally held that searches required a warrant. That warrant could be issued only after law enforcement showed they had "probable cause." That in turn had been [defined](#) by the Court to require a high standard of proof, "a fair probability that contraband or evidence of a crime will be found in a particular place."

The basic idea for more or less over 200 years: unless the government has a good, legal reason to look into your business, it couldn't. As communications changed, the Fourth evolved to assert extend those same rights of privacy to phone calls, emails and texts, the same rules applying there as to physical searches.

That was Then

It was a good run. The Bill of Rights was designed to protect the people from their government. If the First Amendment's right to speak out publicly was the people's wall of security, then the Fourth Amendment's right to privacy was its buttress. It was once thought that the government should neither be able to stop citizens from speaking nor peer into their lives. Folks, as our president now refers to us, should not have to fear the Knock on the Door in either their homes or The Homeland writ large.

In Post-Constitutional America (2001-Present), the government has taken a bloody box cutter to the original copy of the Constitution and thrown the Fourth Amendment in the garbage. The NSA revelations of Edward Snowden are, in that sense, not just a shock to the conscience but to the concept of privacy itself: Our government spies on us. All of us. Without suspicion. Without warrants. Without probable cause. Without restraint.

The government also invades our privacy in multiple other ways, all built around end-runs of the Fourth Amendment, clever wordplay, legal hacks and simple twisting of words. Thus you get illegally obtained information recycled into material usable in court via what is called [parallel construction](#). You have the creation of "[Constitution Free](#)" zones at the U.S. border. The Department of Justice created a Post-Constitutional interpretation of the Fourth Amendment that allows it to access millions of records of Americans using only [subpoenas](#), not search warrants, to grab folks' emails by searching one web server instead of millions of individual homes. Under a twist of an old "[privacy law](#)," doctors disclose your medical

records to the NSA without your permission or knowledge. SWAT raids by local police designed to [break into African-American businesses](#) on harassment expeditions are also now OK.

The Center of It All: Executive Order 12333

The most egregious example of such word-twisting and sleazy legal manipulations to morph illegal government spying under the Fourth Amendment into topsy-turvy quasi-legal spying is the use of [Executive Order 12333](#), E.O. 12333, what the spooks call “twelve triple three.” The Order dates from 1981, signed by Ronald Reagan to buff up what his predecessors limited in response to overzealous law enforcement activities. The Gipper would be mighty proud that his perhaps most lasting accomplishment was legalizing surveillance of every American citizen.

Back to today. Despite all the secret FISA court decisions and as yet uncovered legal memos, most collection of U.S. domestic communications and data is done under [E.O. 12333, section 2.3 paragraph C](#).

Specifically, the one sentence that the government believes allows them to bypass the Fourth Amendment says the intelligence community can “collect, retain, or disseminate information concerning United States persons” if that information is “obtained in the course of a lawful foreign intelligence, counterintelligence, international narcotics or international terrorism investigation.”

So, the work-around for the Fourth Amendment is as follows: NSA collects massive amounts of data on foreigners, often by hoovering up every fragment of electronic stuff flowing around the U.S. it can. So, while purportedly looking for a single terrorist email enroute to Yemen (“the needle”), the NSA collects every single email from Google, Yahoo and Microsoft (“the haystack.”) Thus, any American’s emails caught in that net are considered to have been collected “incidentally” to the goal of finding that one terrorist email. The NSA claims that the Executive Order thus makes its mass-scale violations of the Fourth Amendment legal.

[Tom Drake](#), perhaps the best-known NSA whistleblower prior to Edward Snowden, put it in simpler terms: “12333 is now being used as the [legal justification](#) for everything.”

Oh and hey reformers: Executive Orders by one president stay in force until another president changes or negates them. We could have one at work today written by George Washington. What that also means is that Congress, should they regain consciousness, can’t change an E.O. Congress could in theory pass a law making the contents of an E.O. invalid, but that presumes someone in Congress knows the order exists and what it says. Many E.O.’s are classified and if they are not, such as 12333, the legal documents behind them and FISA interpretations of them, likely are.

Snowden Knew

Again, as a historical note, executive orders– basically dictates from the president– once did not trump the Constitution. However, in Post-Constitutional America, they do.

As for this realization we have come upon, E.O. 12333, well, we’re all behind the curve. Edward Snowden, while still at NSA, wrote a now-famous [email](#) to the spy agency’s legal

advisor, asking specifically whether an Executive Order has more legal force than an actual law passed by Congress, or indeed the Constitution itself. The NSA's answer was a bit convoluted, but said in a [pinch](#) the Constitution wins (wink wink), even while acting as if the opposite is true.

As General Michael Hayden, then head of the NSA, said in a [blistering blast](#) of Newspeak, "I am convinced that we are lawful because what it is we're doing is reasonable."

Ask Obama This Question

So let's make it simple: Journalists with access to the president, ask this question directly: Why is E.O. 12333 being used today, interpreted by the FISA court or any other means, stating that the NSA's surveillance of U.S. citizens is "reasonable," and thus no warrant is required for the surveillance to continue and remain constitutional under the Fourth Amendment?

Of course getting an answer out of Obama will not happen. After all, he is the Constitutional law professor who studied the document the same way a burglar learns about an alarm system. TO BREAK IT BETTER.

BONUS: The stuff above is real amateur-level writing on E.O. 12333. When you are ready to dig in deep, get over to [Marcy Wheeler's blog](#). She is the smartest person working in journalism today on the subject. My debt to her is hereby acknowledged.

Peter Van Buren writes about current events at his [blog](#). His book, Ghosts of Tom Joad: A Story of the #99Percent, is available now [from Amazon](#).

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