Ian Mitchell's Law-related
BOOK RECOMMENDATIONS

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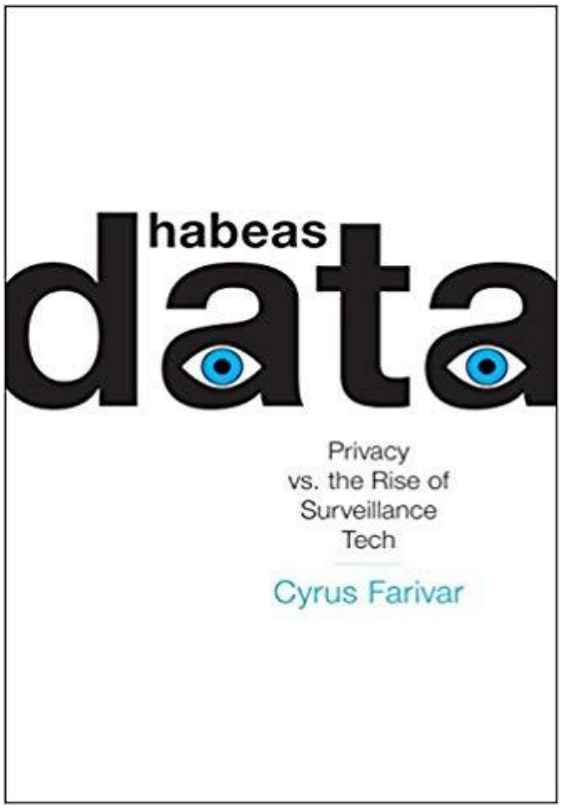

HABEAS DATA:
Privacy vs. the Rise of Surveillance Tech

Author: Cyrus Farivar

Publication info: Melville House, 2018
(*available on Amazon, click on cover image for link*)

Descriptor: The critical role of conservative judges in upholding personal privacy in the USA today

Reviewer: Ian Mitchell, 7 November 2018

Reason to read: There is one overwhelmingly important point made in this book, much of the rest of which is jobbing journalese (though interesting if you are concerned about the interaction of surveillance technology and privacy law). The super-important point arises out of two privacy cases which got to the United States Supreme Court, and in which *conservative* justices made decisions about which modishly populist politicians and administrators would probably never have made. Sadly, only under the American system of legal-political relations do judges have the freedom to mould the law in the image of society generally rather than of the elite class which controls the levers of political power. Britain still adheres to the doubtful—if useful—post-1688 theory of the sovereignty of parliament.

Main talking points: The two cases are:

1. *US v. Jones* (2012): Antoine Jones was a suspected Washington-area drug dealer. The FBI strapped a GPS tracking device to his car without a warrant and recorded his movements for a month, after which he was arrested and charged. In court, a pattern of movement was described: house, stash, customer; house, stash, customer, and so on. Without the GPS this would have been impossible to establish. A hung jury failed to convict, so he was retried and found guilty and sentenced to life in prison—on the basis of the GPS evidence. He appealed but was not satisfied with the performance of three lawyers who represented him so, without any tertiary education, much less legal training, Jones started to represent himself. For five years he fought to get his case into the Supreme Court on the basis that to attach a GPS tracker to a vehicle and monitor it over an extended period amounts to a "search" under the Fourth Amendment and therefore requires a warrant from a court. The FBI had no such warrant. (They had actually

obtained one, but did not affix the tracker until the day after the warrant expired.) Nobody would recognise this within the court system until Jones's case, with the help of a fourth lawyer, reached the Supreme Court. Within minutes of starting oral argument, the Chief Justice, John Roberts, stepped in with questions which clearly indicted that he thought warrantless searches of this sort were unconstitutional. Others followed suit. Eventually Justice Antonin Scalia wrote the opinion of the Court in which, by 9-0 they found against the FBI (though they differed on why and what the legal-technical consequences were). This was the kind of victory only possible in a legal system in which a panel of the most senior and respected judges are in a position to challenge and, if necessary, reverse the actions of other branches of government. (pp. 149-161)

2. *Riley v California* (2014): This was a different case on, essentially, the same subject: warrantless searches. David Leon Riley, a suspected gangster, was stopped in San Diego for defective licence plates on his car and searched. His phone was seized and "searched", and found to contain all sorts of incriminating evidence of his gang-related activities, including videos of street fights in which he had been involved. On the basis of that, he was charged with being involved in a gang-based shooting, convicted, and sentenced to life imprisonment. He of course appealed, but no court in California would exonerate him. Eventually, five years his arrest, his case came before the Supreme Court. The government argued that searching a phone was no different from searching a person's wallet and pockets, which is routine after arrest. Riley's lawyer said that searching someone's cell phone is more akin to an unlimited search of their house and files, which everyone accepts needs a warrant. The Chief Justice, John Roberts, said in his Opinion, "Modern cell phones hold for many Americans 'the privacies of life'. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." He came down heavily on Riley's side. He "lambasted" the government's claim that searching a cell phone was much the same as searching a suspect or his car. He added: "Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant." (p. 208) Once again, the Court found 9-0 against the government. As in the Jones case, protection from Big Government required a *conservative* Court—Roberts was appointed by the hardly libertarian president, George W. Bush. (pp. 198-211)

Thought(s) provoked: It is the judges alone who, in societies run by power-hungry politicians, and faceless civil servants, are able to bring higher considerations of justice to bear on the actions of government. In late medieval England this was done by the Court of Equity. But that gradually sank into the absurdity that Charles Dickens satirised so effectively in the first pages of *Bleak House*. Later in the nineteenth century the legal and the equitable aspects of the English court system were unified. In Scotland there was such a distinction, so there has been no equivalent "reform". It is still open to judges here to invoke equitable principles when arriving at their Opinions, though that rarely happens. Perhaps that is why the so-called "Scottish government" seems to take such a dim view of judges and appears to be subtly trying to undermine them. They are helped by in this by the populist press which portrays them as English-style toffs and grandees who strain at the leash whenever they hear the Tory horn blow. Nothing could be further from the truth. Incidentally, it was partly to try to dispel this damaging impression that I wrote *The Justice Factory.*

Incidental interest: Not a lot.

Surprising points: Nothing much beyond details of modern communications technology.

Negative issue(s): Not enough analysis of the larger constitutional issues—too much semi-breathless journalistic "story telling". If this a "marketing" technique, it is to me a counter-productive one.

Style: Written as if the author went to "journalism school". The prose smells of the suburbs.

Publishing quality: No index.

Smile(s): None, except the report of the active citizen's law group in San Francisco which describes itself as a "do-ocracy: if you want something done: do it yourself." (p. 222)

Author: Cyrus Farivar is the business editor of a technical magazine.

Link(s): Nothing worthwhile about the author, but here is a fascinating link to the main star of the story, Chief Justice of the US Supreme Court, John G. Roberts. He is seen discussing the original source of liberty against government in the English-speaking world, namely Magna Carta, and what it means to Americans today. With him is the former Lord Chief Justice of England and Wales, Lord Judge. He presents the British view of this foundational text about "*right* and justice" and the principle that the king is *not* above the law. https://www.youtube.com/watch?v=45Y7bN7ZwaY

Overall recommendation level: MODERATE

About the reviewer: Ian Mitchell is the author of four books, including *Isles of the West* and *The Justice Factory*. He is writing a multi-volume study of Russian and Western constitutional history to be called *Russia and the Rule of Law*. He lives in Campbeltown and can be contacted at ianbookrec@gmail.com.
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