

**“The 3rd of July”
Civics, Technology, and the Future of the Fourth Amendment**

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MODERATOR: As you know, the theme of our conference this year is *Save the Internet, the Internet Saves*. And most of you may not know to what degree Microsoft is actually working to save the Internet.

So with that in mind, we actually invited the general counsel of Microsoft, Brad Smith, to join us today to share with us what they're doing and have a conversation with us a little bit about what we can do together. So welcome to the stage, Microsoft's General Counsel Brad Smith.

BRAD SMITH: (Applause.) Thank you. It's a real pleasure for me to be here



today. This is an important group that we've been really appreciative to be a part of, to sponsor over the years. I look at all of you in the room today, and I look at this building, and I say this is really the intersection of technology, politics, media, and democracy.

And like all great intersections, it brings people together who are passionate. Great conversations happen here. But more than that, you all take these conversations, you innovate, you contribute, and you advance the public interest, oftentimes through public service and in a variety of other ways as well. So it's a real privilege for me to join you here this morning.

I wanted to talk to you about our perspective on what's going on in the Internet, and I'll build a bit on what you heard yesterday.

I wanted to talk about a day we don't talk about. After all, why should we? I wanted to talk about the 3rd of July. The 3rd of July, you might ask: what the heck happened then?



Well, if you go back in time to Philadelphia and this building, Independence Hall, it was here on the 2nd of July, 1776, that the founding fathers voted for this country to become independent. And it was on the 4th of July, two days later, that they signed the *Declaration of Independence*.



But I think it's important for us to think about what happened on the day in between, the 3rd of July, 1776. On that morning, John Adams got up, and before he went to Independence Hall, he sat down and he wrote a letter. He wrote the letter to his wife, Abigail, who was back in Boston.

He wrote the letter to recall the event that, in his opinion, had started everything that had led to the American Revolution.



In his mind, throughout his life, he always traced that initial event to a specific place, this building in Boston, and to a specific time, 1761. It was to a specific case.



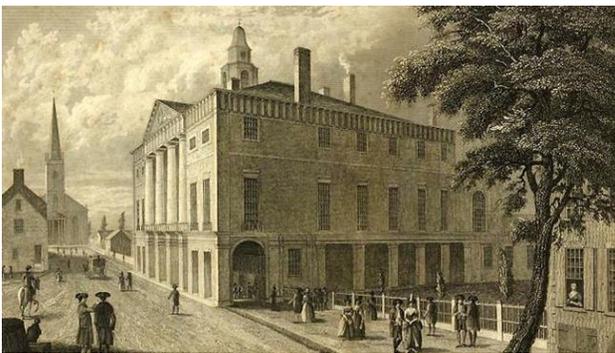
It was a case that was argued in this courtroom by James Otis, who asserted that a general warrant – a warrant that gave the British Government the power to go from house to house to house to house without any probable cause as to what was inside in order to look for customs violations – was

fundamentally unlawful and infringed people's basic liberties.

James Otis argued this case in 1761 and John Adams happened to be a young man, 25 years old, who sat in the audience. And throughout his life, he said that it was that case, that courtroom, that day, and *this issue* that set this country on a course for independence.



It was 13 years after the *Declaration of Independence* that in a different city – this city – on a different intersection, intersection of Wall Street and Nassau Street, that that dream in many ways became a reality. Because the building that stood there then is not the building that stands there now.



It was this building. It was the first capitol in which the first House of Representatives and the first Congress met.



It was 225 years ago this Sunday that James Madison, on June 8th, stood up. He stood up for the entire day and introduced the *Bill of Rights*.

As people questioned why a bill of rights was needed, he took them

back to what had happened in Boston, and the need to protect citizens from searches by the government if people's liberties were going to be preserved.

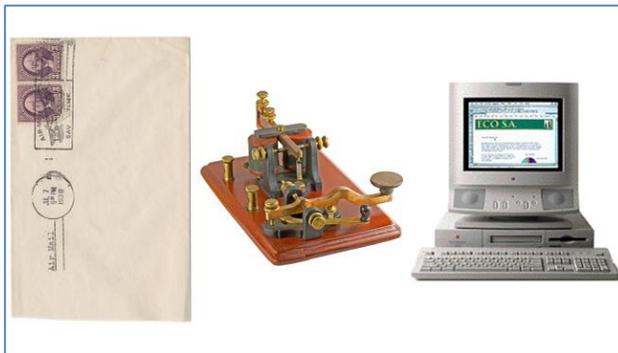


It was because of that day in this city that there emerged the *Bill of Rights* and the Fourth Amendment that as you all know, provides the fundamental protection from search and seizure for people in their persons, their houses, their papers, and effects.

For over two centuries, we've lived under the umbrella of that protection.

Technology has advanced. Benjamin Franklin created the first mail system and

people invented mail fraud, and the government had to investigate it. But the First and Fourth Amendments persevered.

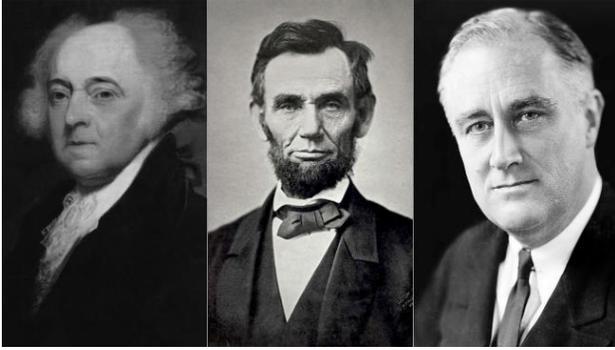


Thomas Morse created, in effect, the software – Morse code – for the telegraph. And guess what?

There emerged wire fraud, and the

government had to investigate that too. And the Fourth Amendment persevered.

And then of course came computing and the Internet. And as soon as the Internet was invented, Internet fraud was certain to follow. The fundamental question for us is how the Fourth Amendment will continue to flourish.



There have been times in our history when things have gone in different directions. Typically in times of war or national emergency, whether it was the Napoleonic War, the Civil War, or World War II.



But one of the amazing things about this country is that there have always been people like you in this room who ensured that when the pendulum swung, it could always swing back.

Even though technology changed the way governments work, in good ways and bad – technology improved people's lives but created new problems as well – we have always found a center of gravity that was true to the country's enduring values.



The last year has been a pretty amazing one. There is no doubt about it. But it has forced us all to step back and, frankly, get smarter, and to think more broadly. I think this time was inevitable because there would inevitably come a moment where the pendulum would have to swing back.

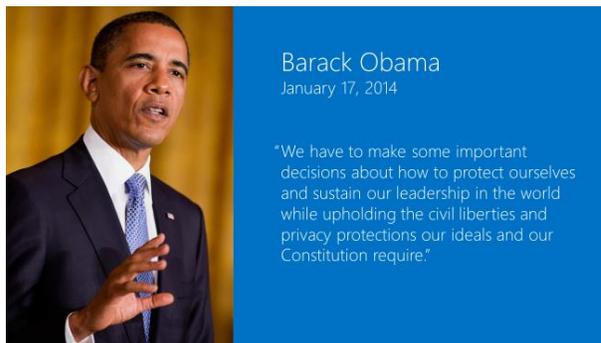


As a company, we joined many others in our industry to increase encryption, to increase transparency, to improve contractual protections for the privacy of our customers. But I think what we found is that there's only so much that we can do by ourselves. And I say that not just

for Microsoft, I say that for the tech sector writ large.



We need government reform. Even though we've taken steps to shield foreign data from the prying eyes of certain governments, we need government reform here at home.



I give credit where I think credit is due. Some important steps have begun to emerge. But so many more steps are needed.



We need to continue to put an end to bulk collection, something that the Senate is debating this very week.



We need to continue to improve transparency beyond the level that we achieved when Microsoft and Google sued the U.S. Government last year. I was responsible for our negotiations. And while we won certain rights when the government settled that case in February, there is more that needs to be done.



We need to reform the FISA court. It is just fundamentally alien to our principles of justice that we have a court where one side gets to tell its story and the other side is never heard. That is the way this court works. It is not the way the court should work as we go forward.



And as we found when we sued the government, even when you get to the courtroom, you don't necessarily get all the information you need to stand up and defend yourself. After all, anybody who's ever been a lawyer, wanted to be a lawyer, watched a TV show about being a lawyer, or met a lawyer,

you can imagine what it is like to try drafting a reply when the government sends you their brief and it looks like this. (Laughter.) That is not justice.



But most importantly, I want to talk about another place, another intersection, and another building where the future of all of these freedoms is going to be decided. It's this intersection at Foley Square in Manhattan.



It's this building, the U.S. Courthouse. This building will join the ranks of the others where these decisions come front and center.

Because we at Microsoft have sued the United States Government a second time over a

search warrant that the government sent to us seeking all of the e-mail content of an Outlook.com customer. Now, if you think back to the general warrant that James Otis stood up in Boston and protested, a warrant that gave the government the ability to go from house to house to house, this warrant would make the British blush.



Because it, in fact, tells Microsoft to go from building to building to building and go from country to country to country throughout the cloud of Microsoft data centers -- over 100 such facilities in over 40 countries. And go wherever we must in order to find and turn over the information that the

government seeks. It is, in a sense, the broadest possible warrant that one literally can imagine in the 21st century.

It puts upside down the fundamental protections that the Fourth Amendment was written by James Madison to preserve.



Not only that, it upends the world, literally speaking, in another very important way. Because in this instance, the building where this data happens to be is this building right here.



And this building isn't even in the United States. It's just outside of Dublin in Ireland.

So the United States Government is asserting that all U.S. companies must take their search warrants and do what the United States Government has always recognized it could never do without invading another country, and that's serve a search warrant in a foreign location.

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Ireland is not Iran. These are countries that have close relationships. These are governments that have close ties. This is a democracy in its own right with laws that protect its own people.



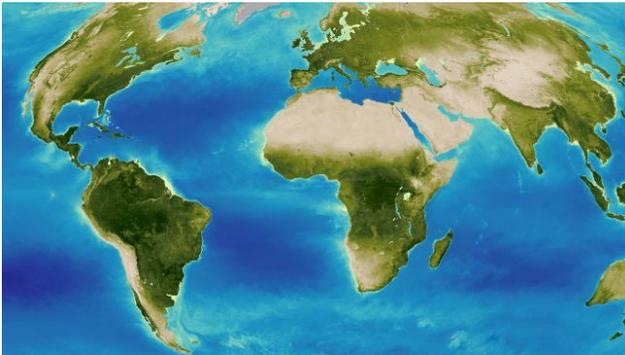
The United States has a treaty with the Irish. It's had it for years. It was amended just in the last 15 years. Law enforcement know how to work with each other. When the Irish want something that is in a data center in the United States, they use this treaty, and that's what the United States expects and demands. Why should any other country expect or demand any less?

The United States has a treaty with the Irish. It's had it for years. It was amended just in the last 15 years. Law enforcement know how to work with each other. When the Irish want something that is in a data center in the United States, they use this treaty, and that's what the United States expects and



The reality is we live in a world where people need to get along. We live in a world where people have fundamental freedoms that need to be protected and preserved. We need to live in a world where governments respect each other's borders, live up to international treaties, and most

importantly, remember the principles that got us started in the first place.



In part, that's about civics. But it's also about the world and the moral authority of the United States.

And as you all know, it's fundamentally about technology.

The important thing about technology, in my opinion, is that it's a tool.



Engineers to me, whether working at Microsoft or anywhere else, on open source, proprietary software, you name it, fundamentally do what they do, in my opinion, because they know what it can do for other people.

It really does have the ability to make people's lives better. Technology is a tool that needs to serve people.

Government is an institution that is founded to serve people.



Fundamentally, what we all need to continue to do together is ensure that technology and government come together in a way that serves people.

Thank you very much. (Applause.)

MODERATOR: Brad, that was great. I've been at PDF for 11 years, and I have to say that's one of the most spirited defenses of democracy that I've ever heard at PDF. Congratulations, that was great.

BRAD SMITH: Thank you.

MODERATOR: So we're going to take some questions from the audiences. So those of you have some, please hold up your index cards and the staff will pick it up and bring it up to me in a second.

Brad, as you were speaking, and showing the pictures of the buildings is really great. But I couldn't help but asking: What do you think caused this massive imbalance? Was it September 11th? Or was it that the technology has become so pervasive that the government doesn't understand or policymakers don't understand how to deal with the technology? Is it the fear of what happened to us? Or is the fear of the technology?

BRAD SMITH: Well, I think it was both things. Clearly, it was a response to 9/11, and all of us can understand why that happened.

And if you put it in the perspective of history, it basically has happened every single time there's been a major war or national emergency akin to what we experienced 13 years ago.

I think that when it comes to technology, it was not a lack of understanding of what technology could do, it was, frankly, an appreciation of what it could do. And if you think about both Washington and London, you know what we know now that people didn't know in 1945, was that early technology, by our standards, early technology, basically breaking codes, reading people's messages was fundamental to both the British and American efforts to win the war.

And so I think that capability didn't go away. Both countries continued to invest in it. And when they dealt with their next national emergency, they looked to it as a tool as part of their arsenal.

MODERATOR: But if we're at a place where our Congress doesn't completely understand how the Internet works, the public may not even understand. Often at an event, I ask people, "When was the last time anybody read a terms of service all the way through before they clicked on the next app that they wanted to download?" And then we have our judicial system where most of the people who run it were trained in an industrial age before the technology was this pervasive. Where do you see us -- how do we get ourselves to a place where we can even actually honestly debate these issues in a fair way where both sides actually understand the dynamics?

BRAD SMITH: Well, it helps if people can understand the technology better. There's no doubt about it, I think that's where a lot of folks in this room help people in government understand how technology works.

I do think that the understanding of technology has risen rapidly, actually, in Congress over the last decade. I do think, though, actually, there's something about this that doesn't really have that much to do with technology. It's about a debate between fundamental values. One must, as one typically needs to in these situations, acknowledge there's two values that are both important: Security and safety and personal liberty.

But the balance went too far, at least in what is a sustainable approach, in my opinion, and it needs to be brought back.

And just as people recognized it wasn't right to intern Japanese Americans just because they happened to be Japanese American, this is a moment when we need to stand up and explain it's not right to collect e-mail just because you can.

MODERATOR: Okay. Our first question from the audience. Isn't there now a fundamental asymmetry, in effect, that companies no longer respect borders in their own business or conduct, but you're asking government to respect borders.

BRAD SMITH: Well, I actually think that companies do respect borders in the sense that we actually don't have that much choice. When you're in a country, you have to obey the law in that country.

We do have the ability to move in a way that countries do not, you know, and so there is an asymmetry there.

But, actually, I would take the question, and the part that I feel I grapple with most every day, is when you work in a company in this day and age, it's something that people may not necessarily perceive – it actually forces you to understand how different people think.

When I was in Berlin three weeks ago, I had to understand why the Germans were so upset about this. I was then in London, I had to understand how the Brits thought about this. Ninety six percent of the people in the world don't live in the United States. And yet, the first response of the White House last summer to the Snowden disclosures was, "Don't worry, people, we only do this to foreigners." (Laughter.)

We have no foreigners. We actually have no foreigners. We have to listen to everybody. So I take the point in the question, but I would also turn it around and say, actually, we're forced to really think hard about how different people think about these issues.

MODERATOR: So this is an interesting one. Given the private sector's role in collecting information, does the term "big brother" need to be redefined?

BRAD SMITH: Well, let me say this: I am one who believes that these questions that are being asked about government also have an appropriate place and should be asked about companies.

And both companies and governments are collecting a lot of data. And there are some in our industry who say, no, one issue is in one corner, and the other issue is in the other corner, and they don't connect. I disagree. I think the questions are the same, the answers may be different. Fundamentally, people should be asking: What can we look for in terms of transparency about our information, whether it's with governments or companies? How do we ensure that we as people, citizens, and communities have real control over when our data is collected and how it's used?

And how do we ensure that there's accountability? Accountability of governments is to courts, accountability by companies is to appropriate regulators and regulation.

And this all needs to be talked about on a global basis because we do need international norms to emerge to address a lot of this.

MODERATOR: So this one is interesting, too. Can you tell us more about what was discussed -- I think in regards to negotiation -- but what was it like negotiating with the U.S.A. or with Google? Is there a difference?

BRAD SMITH: The first thing that is worth knowing is that whenever you have a negotiation with a large organization, it doesn't matter whether it's a big company, doesn't matter whether it's a government, doesn't matter if it's a large NGO that has a big base of members. Frankly, the hardest thing for an institution is to know what it wants.

And in this instance, I really enjoyed working with the folks at Google, Kent Walker, the general counsel. We were able, most of the time, pretty quickly to decide what we wanted. And I was pretty much given the -- I was given the authority -- at Microsoft, so all I had to do was ask for advice and make the decision.

The hardest thing, to be honest, was the number of voices in the U.S. Government. A lot of times, when people don't settle a dispute, you think it's because they couldn't reach an agreement. Sometimes it's because the entity on the other side, frankly, couldn't make up its mind. It's a lot easier to just keep the lawsuit going and figure that the judge will eventually figure it out.

And, you know, you do have different parts of the U.S. Government. Just even in the intelligence and law enforcement community, you have the FBI, you have the NSA. Then you have the State Department. You have the White House that's sort of trying to keep a distance, but in my opinion, I think it's wrong for the White House to keep a distance from legal issues that basically raise constitutional questions.

And the folks at the Department of Justice are sitting here trying to represent a client that has four different heads. So that's the hardest thing about negotiating a resolution when you really get into the trenches on a lot of this stuff.

MODERATOR: So one of our audience members wrote: Great presentation. Great to see where Microsoft is going. Historically, however, Microsoft has not been great in these areas, security and customers and consumers first. Why trust you now? (Laughter.)

BRAD SMITH: Well, it's a fair question. Look, I don't believe that anybody should ever, frankly, just give somebody their trust on the basis of what they say. I think you should watch what people do.

And so judge us by what we do. Yeah, push us to be transparent. I think you all should. I think you should push the whole industry to be transparent and we should work together to push governments to be more transparent because if we're transparent, then you can really judge us by our deeds.

Now, when it comes to technology, we're rolling out encryption. We're creating these transparency centers so, in appropriate ways, people can inspect our code and satisfy themselves that when I say we have no back doors, you can conclude we have no back doors, et cetera.

I will say, hey, we've done one thing that no other company has yet done. We put in our contracts to enterprise customers that if the government comes and seeks their data, we'll litigate and go to court and tell the government they're supposed to go to the customer, not to us, to get the customer's data. And I can tell you that we have never yet lost a case on that point.

And we also put in our contracts with enterprise customers that when data resides exclusively outside the United States, that we believe it is beyond the reach of a U.S. search warrant and we'll go to court to defend that. That's why we're going to Foley Square to do just that.

So judge us by our deeds, and make us work to earn your trust every day. And, you know, give us a break for what happened 14 years ago. (Laughter.)

MODERATOR: So this one has a little bit of a political overtone. It says we keep cutting, cutting, and cutting government. How can we make the case for austerity when it may be so harmful to democracy?

BRAD SMITH: Well, I don't believe that one should make the case for austerity. Actually, if you want to know what we've done as a company, you know, we stood up and, increasingly, argued for more investments in education, more investments in technology, more investments in infrastructure.

I think there's a lot of things that companies shouldn't get out and argue about. There are certain things we know about, there are certain things where we're just

individuals who happen to have views. But we do feel that as a company, we do have a clear point of view about the role that basic research plays in driving innovation; the role that these constitutional protections play in a free society; the role that infrastructure, whether it's sewers or airports or bridges or roads or transit, need to play, frankly, in making innovation possible so that people can come together in cities and innovate.

And, most of all, we're passionate about education, whether it's computer science education in K-12 or universities or education writ large. We're not the austerity company, believe me. We have been big advocates for more investment.

MODERATOR: So, essentially, so the digital divide continues to exist because we don't have enough broadband at the lowest possible cost in enough people's hands. So I'm also a big proponent for education. So if we're going to create a 21st-century educational system or give people the right to be able to participate in the 21st-century educational process, how can you do so with such a poor infrastructure at such a high cost?

BRAD SMITH: Well, we need to invest in the infrastructure. I mean, I think that's what your question basically states.

I do think we have an opportunity to look at infrastructure investments that in some cases may leapfrog technologies that exist today with new technologies that will be both more powerful and cheaper. We look at white spaces or super Wi-Fi technology, and this is something we're investing to deploy in Africa and other places. We need to bring broadband to everyone.

You see a lot of interesting innovation across the industry, and here in the United States a focus on schools as sort of lighthouses for broadband accessibility.

I very much agree. These tools are not useful unless people can access them.

MODERATOR: But just to push on that a little bit. I mean, we had a presentation here yesterday by Susan Crawford who has written a book called *Captive Audience*, you probably know about it. Making a pretty strong case that we have a duopoly between the telcos and the cable companies that the infrastructure is controlled by them.

You know, how a good company, a strong company that wants to see education happen on the 21st-century basis has to enjoin itself into the battle for creating a new infrastructure.

BRAD SMITH: Well, look, we do think hard because we need to get our services to consumers as well. And they won't get to consumers unless they make it through the transmission lines, so to speak, of the Internet architecture in the country.

We as a company have definite views. I definitely have views that I often advocate on behalf of the company about the very question you raise. I've also learned over the years it is probably best to jump into only one controversy a day. So I'll jump into the surveillance controversy today, and leave Net neutrality for a different day.

MODERATOR: So are you coming back next year to talk to us about Net neutrality? (Laughter.)

BRAD SMITH: Yeah, be happy to.

MODERATOR: Okay. So just the last thing because we have to wrap up. This is a community of people who have been working at the intersection of innovation for a while. Where do you think -- if you had to leave one message with this community where they could partner with Microsoft, or you think that they should enjoin with their political leaders or policymakers, what advice would you give us about how to protect our --

BRAD SMITH: Well, we're doing more. Dan'l Lewin, who heads our civic innovation team, is here. We have other folks from his team. This is a priority for us. It's a priority in terms of investment at the top of the company. I think we have been a little late to the party on some of these things.

I would say two things. Look, of course we would love for you all to look for ways that you can use our technologies and work with us. We want to be part of what you're doing. We want to have the opportunity, hopefully, to help you succeed because that's good for you and, obviously, that's good for us too. That's what we're in business to try to do.

And when we look at Microsoft Azure or the Internet of Things, we have grand dreams that we hope that we can work with many people around the world to help pursue.

But second, keep doing what you're doing. I don't mind if you're tough with us. Tell us what we're doing badly. Give us your advice. That's what makes us smarter. Over time, you know, hopefully that makes us better.

So don't be polite, just be direct and we'll look forward to listening to what you have to say.

MODERATOR: So, Brad, thank you very much. If anybody is interested in getting in touch with Microsoft, just reach out to me and we'll put you together with their team. They have been really great partners with us helping us put this conference together and it seems to me, based on your comments, Brad, that the relationship is only going to get stronger as we go further into this. So thank you very much.

BRAD SMITH: All right, thank you. (Applause.)

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