

The Perils of Inspection: Smuggling, Globalism, and the Right to Privacy

Andrew Wender Cohen
Syracuse University

The paper locates the development of the federal right to privacy in late nineteenth-century debates over American engagement with the world. Given the extraordinary attention legal historians devote to the Constitutional protections against unlawful searches and privilege against self-incrimination, it is surprising how little we know about the context for the Gilded-age construction of privacy as an element of citizenship, namely the regulation of international trade, the collection of tariffs, and the interdiction of smugglers.

Before the Civil War, the US Supreme Court heard many import seizure cases, but plaintiffs increasingly challenged the Constitutionality of the Customs confiscations after 1861, when Republican officials not only passed high tariffs, but also enacted stringent enforcement laws empowering officials to inspect travelers, arrest merchants, and impound whole shipments. These statutes embodied the economic nationalism of the period, which deprecated global trade as a threat to labor's full participation in the revived republic. Because the objects of inspection were generally either foreigners, or citizens tainted by their association with parts of the world deemed aristocratic, immoral, and uncivilized, the majority of Americans endorsed broad federal powers.

As Reconstruction gave way to the so-called Gilded Age, however, increasing global trade solidified an alliance between Southerners hostile to the federal government, wealthy travelers aggrieved by the indignity of inspection, and large corporations like Phelps, Dodge, & Co. interested in expanding America's economic reach abroad. This alliance began using smuggling cases to resist U.S. authority and invalidate federal powers assumed after the Civil War, initiating a broader retrenchment characterized by the *Civil Rights Cases* (1883).

This was especially noticeable in the case, *Boyd v. United States* (1886). Among Constitutional scholars, *Boyd* is known as a crucial precedent in the history of modern civil liberties, setting the legal limits on federal investigatory power. As John Witt has argued, it also constitutionalized the privilege against self-incrimination, referenced in the Fifth Amendment, but previously justified by reference to common law. Yet, the decision in *Boyd* was very much a product of a particular time, place, and politics. A wealthy importer of French glass repeatedly charged with violating tariff laws, Edward A. Boyd spent over a decade at the center of debates over the authority of federal officers to inspect and seize foreign imports. To Protectionists, Boyd was an elite smuggler, who had undermined the basis for a shared prosperity by illicitly trading with Europe. By contrast, Boyd's untimely death from tuberculosis, contracted in the penitentiary, made him a martyr for free traders, who saw him as a successful businessman broken by a repressive system.

The paper thus suggests that the modern right to privacy traces itself neither to the Constitution of 1789, nor to the twentieth-century rhetoric of Justice Brandeis, but rather to the Gilded-age clash between the anxieties of domestic producers and the global ambitions of the merchant class, between advocates and opponents of federal power. Though part of the court's retreat from Reconstruction, the development of a right to privacy in the 1880s actually depended upon a newly cosmopolitan notion of citizenship, which safeguarded the autonomy of those crossing national borders.