

“FULLY & FREELY”: Secret Communications and the Chilling Effect in the Colonial through Early Constitutional United States

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The historical consensus suggests that our modern understanding of the “right to privacy,” a concept that moves beyond property considerations, was born out of Justice Louis Brandeis’s seminal 1890 Harvard Law Review article appropriately titled “The Right to Privacy.” The use of secret communications over the full course of the colonial through early constitutional United States, however, reflects an American consideration of privacy that at times broke with the European laws and norms of the day and demonstrates a sanctity of private correspondence more closely aligned with post-Brandeis conceptions. This paper examines the contexts and prevalence of secret communications during this period to reveal their importance in the early development of the American experiment.

Introduction

The historical consensus suggests that our modern understanding of the “right to privacy,” a concept that moves beyond property considerations, was born out of Justice Louis Brandeis’s seminal 1890 *Harvard Law Review* article appropriately titled “The Right to Privacy.” In the study of legal traditions of privacy, this article marks the dividing line between the “BCE” and “CE” of privacy rights in the United States, with Brandeis’s contention that the common law extended beyond property to protect other informational privacy concerns. While viewing the legal incarnations of privacy rights through this lens may be beneficial, it obscures prior conceptions of informational privacy in the United States. A deeper look into the use of secret communications paired with the writings and actions of leading figures of pre-Revolutionary, Revolutionary, and post-Revolutionary American society demonstrates a commitment to both the sanctity of private correspondence between individuals and an implicit understanding of the chilling effect of surveillance.

A chilling effect, in modern parlance, refers to the suppression of speech or action not through direct intervention, but rather through the indirect fear of social or legal reprisals. The mere possibility of surveillance may prevent one from speaking openly or wholly developing complex or controversial beliefs. While contemporary interpretations find chilling effects on speech that constitute threats to free speech, the phrase was not present in the legal and political discourse within the early United States. Nevertheless, the historical record indicates both a recognition of the chilling effect posed by unwanted surveillance and active measures to thwart surveillance by both public and private entities.

Times of peace, revolution, and nation building offered vastly different contexts for understanding private communication; throughout each of these phases, the freedom of thought and expression that accompanies security of communication was a major factor that influenced American activities. Framed another way, there

existed a concern for protection against the social, political, and legal costs that accompany unwanted disclosure of information and identity. The primary methods of securing communications were writing pseudonymously, securing the means of transport, and securing the contents of the communication. Despite the changing face of potential intruders, both public and private, the principle of creating a sphere of privacy to surround one's opinions and dealings was present in this early history of the United States. Public and private citizens alike made use of secret communications to overcome the chilling effect of prying eyes and enjoy the experience of being able to write "fully & freely."¹

Historical works covering the use of secret communications in this era tend to approach the topic from several angles. These monographs include broader works on American privacy, specific works regarding privacy-related law and policy, and works related to the history of intelligence. First are the broader, American-centric works on privacy. In this context, historians generally appear to be in agreement on the widespread use, acceptance, and importance of secret communications during this period. The second approach made frames an originalist position for modern privacy-related law and policy. Again, the works in this category generally seem to agree, as those who seek to defend constitutional protections for secret communications would look to this era to support their arguments. Third, secret communications of this era are addressed by historians of espionage and intelligence. These sources tend not to make broad claims on the potential legal or social ramifications of secret communications of this era but are useful for understanding the technical methods by which communications were kept secret.²

The first class of historical scholarship, the broader works on privacy, approaches this specific era only marginally, more often focusing on the modern post-Brandeis era of American privacy. Chief among these is Alan Westin's *Privacy and Freedom*. The text covers a host of issues related to privacy, with a clear bend to those most relevant to the United States in the 1970s. There is, however, less attention given to secret communications in the "pre-technological era." When Westin does address secret communications of that era, he argues they were valued both legally and socially by the founders of the United States. While the previous four sections of his book detailed various other aspects of privacy considerations, Westin was sure to include considerations of the originalist legal position to justify his policy proposals. His overall approach, therefore, is a hybrid between the "broader" historical and the more focused "privacy-related law and policy" approaches. Two other relevant "broader" works are Robert Ellis Smith's *Ben Franklin's Web Site* and Frederick S. Lane's *American Privacy*. The former draws on the pre-19th century chapter of Westin's *Privacy and Freedom*, demonstrating an evolution in the historiography by supplementing Westin's earlier work with more specific examples, uses, and protections of secret communications than originally offered in Westin's work. The relevant chapter in Lane's work is in the same spirit as Smith's and Westin's works, with each author merely choosing to highlight different quotes or aspects of secret communications.

The second class of work, related to privacy-related law and policy, is perfectly represented in John A. Fraser, III's article in the *Virginia Journal of Law and Technology*, "The Use of Encrypted, Coded and Secret Communications is an 'Ancient Liberty' Protected by the United States Constitution." Fraser's article makes

¹ Thomas Jefferson, *From Thomas Jefferson to John Taylor, 26 November 1798*. Letter. From Founders Online, *Jefferson Papers*.

² See particularly Alan Westin, Robert Ellis Smith, Frederick S. Lane, John A. Fraser, III, and G. J. A. O'Toole.

no pretense of providing a neutral history. Instead, Fraser uses historical research to provide a constitutional and legal justification for modern encryption protections. This journal article tackles the issue of secret communications in this era head-on, providing a more in-depth, well-sourced look than the relevant portions of the broader works. Approaches within this class of work are usually tied into considerations of constitutional law, which requires them to focus more closely on this era and the actions and beliefs of the Founding Fathers.

The final category of approach is the intelligence approach. This category is not useful for determining historical beliefs regarding secret communications; however, it is a helpful aid for understanding prominent methods of securing communications. During this era, ciphers were the most widespread and well-understood means of obfuscating written messages, and historians of espionage and intelligence (such as G. J. A. O’Toole) do well to address how these ciphers worked and were used. O’Toole’s *Honorable Treachery* focuses on revolutionary rather than civilian contexts for ciphers, invisible ink, and other forms of secret communications, but the technologies and methods were effectively the same.

Overall, each class of approach accomplishes its intended purpose from a historiographic perspective. Within each, authors produce works that are similar to or expand on the contributions of previous scholars, but there appears to be little to no viewpoint conflict between them regarding the nature and significance of encrypted communications during this period. The specific topic of secret communications and the chilling effect during the transition from the colonial to constitutional era, however, requires a synthesis of the historical, legal, and technical implications found throughout existing historical scholarship and in several primary source materials from the period. This paper seeks to adapt elements of the prior historical scholarship with archival letters, entries, and an early federal trial to establish the use of secret communications in various contexts as an ever-present and valued element of this early transitional period of United States history.

Prelude to Revolution: Mails, Committees, and Colonial Secrecy (1700s-1774)

In the decades leading up to the revolution, the crop of Americans who would become leaders of the movement displayed early deference to secret communications in their words and actions. Benjamin Franklin, in both an official and private capacity, showed interest in and understanding of privacy concerns, whereas several of his colonial counterparts took advantage of the tools and tactics of the day to conceal their identities or the contents of their writings. As it became clear that collective action was needed against the British, the colonists were quick to form “Committees of Correspondence.” These private correspondence networks circumvented official mail services and were designed to secretly and efficiently exercise control over colonial affairs. This early period reveals the groundwork of secret communications that would prove indispensable in the War for Independence.

Ben Franklin’s actions in the pre-Revolutionary era demonstrated care for secret communications. First was his decision to print George Fisher’s *The American Instructor*, which contained lessons and instructions on writing in cipher to obscure messages.³ This text served as an American example of a long list of existing British works on ciphers and demonstrated both a knowledge of and appreciation for ciphers in colonial American society. Beyond his actions as a private printer, Benjamin Franklin’s tenure as Deputy Postmaster General reflected a deeper commitment to

³ John A. Fraser, III, “The Use of Encrypted, Coded and Secret Communications is an ‘Ancient Liberty’ Protected by the United States Constitution,” *Virginia Journal of Law and Technology* 2 (1997).

private communications. He went far beyond existing postal standards, introducing new reforms and regulations intended to secure couriers' packages from unwanted snooping and theft. These regulations included "instructing postmasters to keep their post offices separate from their homes, to make sure that no unauthorized individuals handled the mail, to seal the mail for each town in a bag, to only unseal the bag upon reaching the destination town, and to request proof of identification before delivery."⁴

While the administrative realities of mid-eighteenth-century colonial America inhibited the effectiveness of these reforms, it is reasonable to suspect these were not empty actions from Franklin, a man who often wrote pseudonymously in his letters and publications. Indeed, Franklin understood the value of trust in the postal service, as he himself later felt his letters were viewed by "some prying persons."⁵ Franklin's measures, especially clamping down on infidelities in transportation of communications, represented a departure from the widespread British and European practice of private mail snooping and are indicative of a developing American view on the matter, which remained pertinent in the post-Revolutionary United States.⁶

The American colonists were no strangers to the need for self-censorship along with anonymous, pseudonymous, and ciphered writing as a means of avoiding the unscrupulous practices of their government and fellow colonists. Despite Franklin's best efforts and the letter of the law, the colonial postal system was notoriously insecure, and colonists reacted accordingly through self-censorship in letters. In an episode demonstrative of the knowledge and proliferation of ciphers, Boston physician Oliver Noyes practiced self-censorship in a letter, writing: "I'll say no more on this head, but When I have the Pleasure to See you again, shall Inform you of many Things, too tedious for a Letter and which perhaps may fall into Ill hands, for I know there are many at Boston who dont [*sic*] Scruple to Open and Persons letters, but they are well known here."⁷

Matters of business, politics, and conviction were issues warranting protection, but worthy too were more personal and perhaps embarrassing episodes. For instance, a young Thomas Jefferson devised a code by which to communicate with his college friend (and future politician) John Page about Jefferson's failures to woo a love-interest.⁸ Even in matters of the heart, the possibility of unwanted disclosure compelled the need to communicate secretly, a phenomenon with which many can empathize. The public embarrassment from the unwanted disclosure of this juvenile example could have tainted the reputation and public standing of the youthful Thomas Jefferson before he could stake his claim on history.

Censorship and ciphers were useless, however, when one needed to communicate with the public in a manner that kept their identity detached from the content of the communications. This was done both to protect against backlash and to ensure an unbiased take on the materials pending publication. Importantly, pseudonymous writing allowed for the discussion of contentious subjects in the public sphere. Samuel Adams, Richard Henry Lee, Benjamin Rush, and others published using pseudonyms in the years leading up to 1776 to avoid punishment under harsh

⁴ Frederick S. Lane, *American Privacy: The 400-Year History of Our Most Contested Right* (Boston: Beacon Press, 2009), 8.

⁵ Smith, Robert Ellis, *Ben Franklin's Website: Privacy and Curiosity from Plymouth Rock to the Internet* (Providence: Privacy Journal, 2004), 49.

⁶ Fraser, III, "The Use of Encrypted, Coded and Secret Communications is an 'Ancient Liberty' Protected by the United States Constitution."

⁷ Lane, *American Privacy: The 400-Year History of Our Most Contested Right*, 8.

⁸ Fraser, III, "The Use of Encrypted, Coded and Secret Communications is an 'Ancient Liberty' Protected by the United States Constitution."

English laws against seditious libel.⁹ Without the legal insulation provided by the pseudonyms, the sort of words needed to enflame the colonists to revolt may have been chilled to the point of impotence or exclusion. The “principle of Seventeenth-Century English licensing laws” reflected this possibility from a position of suppression, “[requiring] books and pamphlets to bear the name of the author and printer.”¹⁰ It is therefore both fitting and unsurprising that the First Amendment, borne out of this revolution, would protect pseudonymous writing as a sacrosanct extension of freedom of the press, once more breaking with the European tradition as the American one continued to develop.

Frustration with actions of the British Empire compelled some colonists to communicate about the sorts of matters which would have resulted in punishment under the aforementioned seditious libel laws. The standard postal network was insecure and composing every letter with a cipher secure enough to fool the authorities was far too inefficient to be reasonable. The way to achieve security, therefore, was to create a parallel correspondence infrastructure composed of trusted members and couriers. The courier networks established by and for the Committees of Correspondence provided the logistical backbone for revolutionary growth, with similar Committees eventually existing in every colony.¹¹ Soon these Committees were functioning as a sort of “shadow government,” overseeing various functions, including the organization of the First Continental Congress.¹² Without the concerted effort to secure their communications, it is fair to suggest these colonists would have failed to instigate and manage the chain of events that culminated in the drafting of the Declaration of Independence. Because the law chilled speech, the law was actively circumvented in the interest of free expression.

Secret Communications of the Revolution: Private, Diplomatic, and Military Correspondence (1775-1783)

With the advent of the War for Independence, the security of communications for the Americans involved in the Revolution took on a new importance and purpose. Those caught facilitating or participating in open, armed rebellion against the British Empire would face severe consequences. Communicators had to be hypervigilant. Couples, including John and Abigail Adams, were forced to speak cryptically through trusted networks and ciphers. Securing external support for the Revolution was a top concern predicated on establishing and securing channels of communication across the Atlantic to sympathetic European figures and powers. In the conduct of the war itself, it was crucial for the underdog Americans to win the intelligence game, both by securing their own intelligence networks and successfully penetrating or disrupting those of the British. As such, the activities practiced before the revolution were expanded with increased vigor and import in this life or death enterprise.

Throughout the War for Independence, it was common for those actively implicated to communicate with loved ones on matters of life and the Revolution. For instance, correspondence between John and Abigail Adams was frequently secured by couriers, ciphers, and pseudonyms. James Lovell, America’s “One-Man National Security Agency,” provided ciphers for the couple to use in their letters, but the availability of ciphers alone did not guarantee their use.¹³ In one letter to Lovell,

⁹ Smith, *Ben Franklin’s Website: Privacy and Curiosity from Plymouth Rock to the Internet*, 41-42.

¹⁰ Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1967), 331.

¹¹ Fraser, III, “The Use of Encrypted, Coded and Secret Communications is an ‘Ancient Liberty’ Protected by the United States Constitution.”

¹² G. J. A. O’Toole, *Honorable Treachery: A History of U.S. Intelligence, Espionage, and Covert Action from the American Revolution to the CIA* (New York: Grove Press, 2014), 10.

¹³ “The American Revolution’s One-Man National Security Agency,” National Security Agency.

Abigail Adams was appreciative of the cipher he provided, but believed she would likely never use it. She thought herself to have a “miserable proficiency” in the use of ciphers and insisted that she would rather speak plainly with those closest to her.¹⁴ Her husband, John, was “no[t] adept” in the use of ciphers either.¹⁵ However, Abigail humorously speculated that John’s writing was enigmatic to everyone besides his correspondents anyway. She signed the letter pseudonymously as “Portia,” indicative of the sorts of pseudonyms the couple utilized.¹⁶ Abigail’s letter to Lovell serves as a reminder of the inefficiency of ciphers and how, even in the face of severe consequences, such inefficiency at times discouraged or even prevented those in the most acute danger from employing their concealing capabilities.

To effectively conduct their revolution, many Americans went abroad to establish diplomatic ties and seek out foreign support. In order to coordinate official action, correspondence had to be maintained and secured to avoid revealing sensitive information to foreign powers. Americans abroad used similar security measures in some of their private correspondence across the pond. In his article “The Use of Encrypted, Coded and Secret Communications is an ‘Ancient Liberty’ Protected by the United States Constitution,” John A. Fraser, III compiled a list of Founding Fathers who used ciphers for private correspondence abroad during this period, including John Adams, Thomas Jefferson, John Jay, Benjamin Franklin, Robert R. Livingstone, Henry Laurens, his son John Laurens, and the following Lee brothers: William, Arthur, and Richard Henry.¹⁷ The trio of Lee brothers proved to be of specific interest in Fraser’s article, as they were prolific users of effective ciphers that “remained unbroken until the 1920s.”¹⁸ Arthur Lee’s transatlantic correspondences were “repeatedly stolen or reviewed in transit by British espionage officers,” but the Lee brothers succeeded in their efforts to thwart foreign intelligence gathering of their private thoughts.¹⁹ Complex encryption was paramount to avoid the chilling effect of surveillance and enable the brothers to speak openly with one another.

The British Empire was nearly always better equipped than the rebelling colonists; their only limitation was how many men and materials the crown distributed to the counter-cause. Additionally, the American revolutionaries faced the considerable threat of the colonial Loyalists. To compensate for these distinct disadvantages, the revolutionaries were forced to engage in espionage and counterespionage, which relied in part on the use of ciphers, codes, and secret networks. The Continental Congress authorized the creation of the “Committee of Secret Correspondence” in November 1775 “for the sole purpose of Corresponding with our friends in Great Britain, Ireland, and other parts of the world.”²⁰ To fulfill that purpose, the committee needed to protect its communications from the invasive British eye, often relying on codes and ciphers to accomplish the task.

While ciphers existed that were unbreakable at the time, they were not always readily usable by either side in the War for Independence. The vulnerability of some ciphers and codes made possible the counterintelligence practice of cryptanalysis to break those vulnerable encryptions and ferret out traitors. In a reversal of the usual

¹⁴ Abigail Adams, *Abigail Adams to James Lovell, 11 June 1780*. Letter. From Founders Online, *Adams Papers*.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Fraser, III, “The Use of Encrypted, Coded and Secret Communications is an ‘Ancient Liberty’ Protected by the United States Constitution.”

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ O’Toole, *Honorable Treachery: A History of U.S. Intelligence, Espionage, and Covert Action from the American Revolution to the CIA*, 10.

role, the Americans in rebellion against the British crown were tasked with thwarting the same methods of securing communications that they themselves used. In *Honorable Treachery*, G. J. A. O’Toole uses Benjamin Church’s treachery as an illustration. A ciphered letter from Church bound for the British made its way to George Washington and the Continental Congress. Based on the suspicious circumstances surrounding the destination and transit of the letter, Samuel West, Elbridge Gerry, and Elisha Porter worked to decode the monoalphabetic substitution (“one of the easiest ciphers to solve”) and revealed Church’s betrayal.²¹ Unfortunately and ironically for Benjamin Church, a chilling effect suppressing his speech would have prevented his imprisonment, banishment, and early demise—his boat for the West Indies was presumably lost at sea.

Secret communications and the sanctity of private correspondence were valued, but not without exception. In the war time environment, the Americans had few qualms with cracking the ciphers and infiltrating the communication networks of their suspected enemies, both foreign and domestic. Given the extraordinary circumstances of the conflict, though, this behavior should be considered not contradictory, but necessary.

Constitutional Concerns: The Importance of Informational Secrecy in the Creation of America’s Governing Document (1784-1788)

Soon after peace and independence were secured, the difficulties and failures of the Articles of Confederation made plain the need for changes to the central governing structure of the new country. Unfortunately, there was no clear direction or agreement among American leaders for the correct course of action. Conflicts on representation, slavery, and federal authority over the states and populace made compromise difficult to the point of impossible in the court of public opinion. The formative sessions of the United States Constitution were shrouded in secrecy, the ensuing public discourse was rife with pseudonymous writing, and the framers of the Bill of Rights made sure to keep secure some of their discussions of the matter.

Many of the delegates to the convention intended from the outset to craft a new governing document rather than reform the Articles of Confederation. To do so openly, however, would have invoked a level of scrutiny poised to derail the constitutional project by chilling the speech and compromise necessary to produce such a document. In *Privacy and Freedom*, Alan Westin briefly discusses the presence and necessity of strict secrecy in the formation of the constitution, writing: “though opponents of the constitution denounced the “secret conclave,” historians agree that a constitution would probably never have been issued if the convention’s work had been publicized at the time.”²² Westin points out that those running and participating in the convention—recognizing that public scrutiny could create a chilling effect on speech—swore secrecy, published no reports, and kept the proceedings behind closed doors.²³ As Benjamin Hawkins reported to Thomas Jefferson in 1787, “such an injunction of Secrecy...[was] necessary to preserve the fullest freedom of discussion and to prevent misconceptions and misconstructions without doors.”²⁴

In the fight for ratification of the new constitution, the most convincing and comprehensive arguments for and against the document were often published under pseudonyms like “Cato” and “Caesar.” The most famous collection of essays from

²¹ *Ibid.*, 15.

²² Westin, *Privacy and Freedom*, 334.

²³ *Ibid.*, 334.

²⁴ Benjamin Hawkins, *To Thomas Jefferson from Benjamin Hawkins, 9 June 1787*. Letter. From Founders Online, *Jefferson Papers*.

this period, the Federalist Papers, was drafted by a trio of American political leaders using the moniker “Publius.” While discerning readers could reasonably guess at the identities of the authors, the pseudonym offered a degree of separation and deniability, which effectively detached the author’s words from their identity, thus removing any reputational baggage the author carried, and preventing public backlash. For the purposes of contemporaneous debate on critical matters, the temporary secrecy of identity in communication with the public at large was an interest of both the federalists and the anti-federalists. The identities of the authors of the Federalist Papers are well-established, but the authorship of some anti-federalist essays remains unclear, illustrating the effectiveness of pseudonyms in shielding an author wishing to make secret their involvement in communications with the public.²⁵

The inclusion of the Bill of Rights was a critical portion of the debate surrounding the constitution, and its tenets were partially developed through overseas communications between Jefferson and Madison. Both men took measures to encrypt their communications regarding the Bill of Rights, which included early versions of the eventual First Amendment. In that specific case, they only partially ciphered the letter, specifically choosing to conceal the information related to what would be the centerpiece of the Bill of Rights.²⁶ If the political opposition or the press could have acquired early, unpolished versions of constitutional guarantees, it is no stretch to suggest they could have whipped up a fervor against them and tanked the whole affair. Methods like ciphers countered the possible chilling effect on the formation of the very constitutional rights that justices under the new federal court system would later find protected those same methods.

The New Republic: Political, Technical, and Legal Considerations of Secret Communications (1789-1833)

As the new constitutional system birthed intense political rivalries and public scrutiny, several of America’s leaders felt it necessary to take measures to secure their private correspondences for fear that they be obtained by a bad-faith actor seeking to discredit or otherwise humiliate them. In a step above the rest, Thomas Jefferson took particular interest in the means of securing correspondence while illuminating the connection between secrecy and expression. As the constitution’s judicial branch began operating in earnest, it too recognized both the legitimacy and importance of secret communications in American society.

Secret communications in the constitutional era were necessary to protect openness of communication not only from government tyranny, but also public backlash. The excesses of the French Revolution left a poor taste in the mouths of many Americans. Jefferson, Madison, and others who were opposed to the Federalist Party and associated with that unpopular revolution needed a renewed sense of security for their non-official communications. Thomas Jefferson and James Madison wrote extensively in cipher in their effort to organize an effective opposition to the Federalist Party, affording them the opportunity to more openly discuss stances on controversial topics without rousing public anger.²⁷ Once the Democratic-Republican Party was established and partisan vitriol ruled the political discourse, it became necessary for other public figures to conceal their private writings. On the Federalist side, Alexander Hamilton made use of ciphers when corresponding with relatives and

²⁵ Smith, *Ben Franklin’s Website: Privacy and Curiosity from Plymouth Rock to the Internet*, 41.

²⁶ Fraser, III, “The Use of Encrypted, Coded and Secret Communications is an ‘Ancient Liberty’ Protected by the United States Constitution.”

²⁷ *Ibid.*

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associates,²⁸ once stating in a letter to Rufus King that he would withhold certain information from their correspondence until the arrival of a cipher by which to secure it.²⁹ As one author put it, they had “built security fences to protect their correspondence from political rivals and American postal officials.”³⁰

George Washington’s ciphered communications with Henry Innes of Kentucky is another stand-out case. Legislators in Kentucky had been threatening secession, and Henry Innes sought to oppose that effort with Washington’s help.³¹ John A. Fraser, III best captured its significance in the following statement:

“Perhaps the most compelling demonstration of the protection provided by encryption to freedom of thought and developing ideas (those not yet ready for the public eye) is the use made by George Washington and Henry Innes in opposing the Kentucky Resolves. As a private citizen, Washington wanted to act privately and confidentially to instruct and assist Innes in his efforts to undermine the majority in the Kentucky legislature, and he did not want the glare of publicity to surround his correspondence with Innes.”³²

As in the previous decades, pseudonymous writing continued in prevalence in political discourse. As Alan Westin noted in *Privacy and Freedom*, “One historian has estimated that between 1789 and 1809, six Presidents, fifteen Cabinet members, twenty Senators, and thirty-four Congressmen published unsigned political writings or writings under pen names.”³³ However, the practice was certainly not limited to American political leaders. In *Ben Franklin’s Web Site*, Robert Ellis Smith documents a heated exchange between two brothers from Rhode Island on the issue of slavery.³⁴ Reflective of the controversy and public interest in the matter, they chose to publish pseudonymous letters attacking each other and their respective positions rather than debate amongst themselves. Entertainingly, one of the brothers wrote under a second pseudonym to project the idea that he had external support.

In the decades following the introduction of the U.S. Constitution, Thomas Jefferson wrote on several occasions about the importance of informational privacy and the failure of the status quo to protect it. Of note is a 1789 letter penned by Jefferson, in which he hesitates to respond in full to the political queries of the recipient. His justification is worth quoting at length:

“[B]ut I owe you a political letter. [Y]et the infidelities of the post office and the circumstances of the times are against my writing fully & freely, whilst my own dispositions are as much against writing mysteries, innuendos & half confidences. I know not which mortifies me most, that I should fear to write what I think, or my country bear such a state of things.”³⁵

Jefferson’s fear is precisely what is caused by the chilling effect. The fact that one of the most powerful and influential Americans was both aware of and affected by the mere prospect of unwanted disclosure illustrates the pervasiveness of the issue.

²⁸ Alexander Hamilton, *Description of a Cipher*, [23 May 1803]. Document. From Founders Online, *Hamilton Papers*.

²⁹ Fraser, III, “The Use of Encrypted, Coded and Secret Communications is an ‘Ancient Liberty’ Protected by the United States Constitution.”

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ Westin, *Privacy and Freedom*, 331.

³⁴ Smith, *Ben Franklin’s Website: Privacy and Curiosity from Plymouth Rock to the Internet*, 42.

³⁵ Jefferson, *From Thomas Jefferson to John Taylor*, 26 November 1798.

Unsurprisingly, Jefferson did not send this letter through the postal service but instead through a trusted courier to ensure its safe delivery.

In the first year of his presidency, Thomas Jefferson received a letter from American mathematician Robert Patterson regarding the development of a new method of enciphering materials. In it, Patterson revealed the necessary attributes of a “perfect cypher,” which were as follows:

- “1. It should be equally adapted to all languages.
2. It should be easily learned & retained in memory.
3. It should be written and read with facility & dispatch.
4. (Which is the most essential property) it should be absolutely inscrutable to all unacquainted with the particular key or secret for decyphering.”³⁶

These lofty properties made no mention of official versus private use, as ciphers were widely used in both capacities, but did place a premium on security over efficiency. The imperfect security of ciphers at the time was the chief concern because secret writing obviously lost its value if it was not truly secure.

Ironically, Patterson also provided a perfect instance of the flaw of ciphers. Despite his intention to develop an easy-to-use cipher, Patterson made several errors when transposing it which would have frustrated the intended recipient with the correct key.³⁷ He also did not cipher the letter with some other method, instead preferring to send it with his trusted courier. In the effort against unwanted surveillance or privacy invasion at the dawn of the nineteenth century, ciphers were useful but clumsy tools. They were used as an additional method of security rather than as the default, often outclassed by methods of securing the transportation of information rather than the information itself. Patterson’s work and letter demonstrate an early attempt to use mathematical concepts and patterns to flawlessly encipher text, a precursor to the more complicated methods of encryption to follow. Jefferson himself, meanwhile, developed a remarkably complex wheel cipher³⁸ that was a century ahead of its time, variants of which were used well into the twentieth century.³⁹

Secret communications also prompted consideration in the new legal framework for the United States, notably during a portion of the Burr treason trial in 1807. Chief Justice John Marshall wrote an opinion during the trial concerning the countervailing interests of the state to produce a witness capable of deciphering an encoded message and the witness’s right to protect himself from self-incrimination. Chief Justice Marshall argued both countervailing interests were legitimate and must be reasonably considered. If a direct answer to a question may or may not incriminate a witness, it is up to the witness to declare under oath the answer would lead to self-incrimination; upon so doing, the court would no longer be able to pursue the line of inquiry or testimony. In this case, however, the court was of the opinion that no direct evidence of a crime could be produced against the witness based on whether or not the witness merely had knowledge of the cipher. Thus, the witness ought to answer the question.

³⁶ Robert Patterson, *To Thomas Jefferson from Robert Patterson, 19 December 1801*. Letter. From Founders Online, *Jefferson Papers*.

³⁷ *Ibid.*

³⁸ Thomas Jefferson, *Description of a Wheel Cipher [before 22 March 1802]*. Document. From Founders Online, *Jefferson Papers*.

³⁹ Fraser, III, “The Use of Encrypted, Coded and Secret Communications is an ‘Ancient Liberty’ Protected by the United States Constitution.”

This opinion provided a legal context for the use of private communications in the case of high treason and ruled that, if the contents of those communications would implicate a person in a crime, the person could not be compelled to speak to the contents or how to decipher them.⁴⁰ This opinion, while seemingly relatively unknown, carries with it incredible grounds for precedent from the first Chief Justice of the U.S. Supreme Court. The top legal authority in the country recognized twenty years after the drafting of the Constitution that it protected both a person’s ability to write secretly using a cipher and the ability of one who had not written the ciphered text to refuse to decipher it if they could be subject to criminal penalty due to its contents.

A little more than two decades after Chief Justice Marshall’s opinion in *Burr v. United States*, Justice Joseph Story addressed constitutional considerations of privacy in his 1833 *Commentaries on the Constitution of the United States*. The main thrust of his arguments regarding privacy seem rooted in the idea that “a man’s house shall be his own castle,” but in an analysis of the First Amendment, Justice Story stated its guarantees intentionally function to secure the rights of “private sentiment” and “private judgement.”⁴¹ The First Amendment’s protections explicitly extended beyond the grounds of one’s castle, and the functional expression of private sentiment and private judgement requires mediums of communication or exercise to be realized. Whether in its departure from invasive European postal traditions, its further departure from English norms in its protections for pseudonymous and anonymous publishing, or its legal legitimization of methods for secret writing in the crime of treason, an American legal justification for secret communication had developed from constitutional protections fixed in the First and Fifth Amendments—separate from the property protections generally associated with the Third and Fourth.

Secret Communications as a Ubiquitous Facet of the American Experiment

The period covering the actions of pre-Stamp Act Benjamin Franklin through the *Commentaries* of Justice Joseph Story represents an arc spanning from a time before serious considerations of independence to the early interpretations of the system that independence built. The ubiquity of secret communications over the full course of that arc in a variety of contexts reflects an American consideration of privacy that at times broke with the European laws and norms of the day. Furthermore, this consideration was bipartisan. Adams and Jefferson were fierce political opponents, but each recognized the value of concealment. Adams stated thusly:

“There are Times when and Persons to whom, I am not obliged to tell what are my Principles and Opinions in Politicks or Religion ... This Kind of Dissimulation, which is no more than Concealment, Secrecy, and Reserve, or in other Words, Prudence and Discretion, is a necessary Branch of Wisdom, and so far from being immoral and unlawful...is a Duty and a Virtue.”⁴²

Jefferson, in a letter to Elias Glover, wrote:

⁴⁰ United States v. Burr, 25 F. Cas. 38 (1807).

⁴¹ Westin, *Privacy and Freedom*, 331.

⁴² Smith, *Ben Franklin’s Website: Privacy and Curiosity from Plymouth Rock to the Internet*, 29.

“...the general principles of law & reason... render correspondences even between private individuals sacredly secret...”⁴³

Despite the technological realities of the time, an expectation of perfect security was present. By Robert Patterson’s own admission, he believed he had developed a cipher system that would “defy the united ingenuity of the whole human race” to “the end of time.”⁴⁴ The text he enciphered was the opening passages of the Declaration of Independence. Whether this choice of text was symbolically deliberate or chosen merely because of Jefferson’s intimate familiarity, associating what Patterson believed to be the pinnacle of encryption with the document that launched the American experiment fits well with the notion of an American tradition of secret communications.

Patterson’s cipher, pseudonymous publications, postal reforms, etc. were each concerned with protecting against unwanted disclosure of information or identity. The contexts in which Americans employed those protective actions exceeded those with civil or criminal penalty, demonstrating a sanctity of private correspondence beyond the punishable. This sanctity extended from the earliest rumblings of American identity, to the war that won American independence, throughout every phase of the drafting, debating, and ratification of the constitution that would firmly establish the United States, and into the early political and legal tradition of the new constitutional republic. Secrecy was valued for the freedom it offered to engage in unbridled self-expression in the face of suppressive social, political, and legal forces—the freedom to think, write, and communicate “fully and freely” unbound from the chilling effect.

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⁴³ Thomas Jefferson, *Jefferson to Elias Glover, 13 January 1810*. Letter. From Founders Online, *Jefferson Papers*.

⁴⁴ Patterson, *To Thomas Jefferson from Robert Patterson, 19 December 1801*.

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