

NSA surveillance erodes Fourth Amendment protections and democratic process

By Peter S. Fosl and James H. Miller

Edward Snowden's release of National Security Agency (NSA) documents at great personal risk has ignited one of the most vigorous debates about civil liberties this country has seen in decades.

It's been a remarkable conversation, too, as it's also revealed substantial common ground across the political spectrum concerning privacy, due process, and limited government.

Both leftists (such as Cornel West and Harvard's Lawrence Lessig) and conservatives (including Ron Paul and Peggy Noonan) have raised objections to the indiscriminate surveillance programs indicated by Snowden's disclosures. Sen. Rand Paul has even joined the ACLU in a lawsuit against the NSA.

And rightly so, as Snowden's brave and disciplined leak seems to confirm the existence of what he characterizes as "the largest program of suspicionless surveillance in human history."

Opponents to this surveillance, including those who will gather in Louisville for a "Restore the Fourth" rally (July 4th, noon to 1pm, outside Metro Hall, 527 W. Jefferson St.), have advanced two general criticisms.

First, the federal government seems to be engaged in a massive violation of the Fourth Amendment, which guarantees that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause...."

Unlike similar programs—such as the NSA's WWII and Cold War surveillance operation, code-named Venona, which monitored cables between the USSR and its operatives in the US—data is now being collected from virtually all of us, as if we were all suspected enemy agents.

Secondly, whether or not the NSA's surveillance is ultimately found to be justifiable, the manner in which it has come into existence itself displays a profound erosion of transparent and accountable government.

That the government could secretly construct and implement surveillance programs on the scale of Prism and Stellar Wind—with almost no public debate, with Congress largely remaining uninformed, and with only the flimsiest judicial and executive restraints—is simply inconsistent with our ideals of democracy. Without courageous whistleblowers such as Snowden, Thomas Tamm, Thomas Drake, and William Binney, we might still be in the dark.

The government argues that it's just collecting phone and Internet data but not using it or even examining it, except in cases where rigorous protective procedures are

followed. But who would not consider it a violation for the state to copy secretly all of one's personal and business papers or record what goes on in his or her home simply on the post-factum promise that it won't be used unless a warrant is issued?

And what assurance do we have that the NSA's internal safeguards are adequate or will be followed? The USA PATRIOT Act and the 2008 FISA amendments diminished judicial and Congressional oversight of domestic surveillance. What we know of the NSA's internal protections is not inspiring (see the *Guardian*, 20 Jun 13). Our privacy seems to rest largely on the discretion of unknown NSA analysts.

History, however, shows that unaccountable government agents cannot be trusted with that kind of power. The FBI illegally tapped MLK's phone and then used what it learned to threaten him. The Church Commission documented how those in the security services, in COINTELPRO for instance, monitored and tried to subvert legal dissent.

There's nothing new in this. Because "writs of assistance" issued by British colonial governments functioned in practice as unlimited search warrants, US founders understood the importance of adding the Fourth Amendment to the Constitution.

Some Americans simply shrug their shoulders and declare: "Well, why worry? I haven't done anything wrong." They don't seem to grasp that once the state possesses data of this sort, it no longer matters whether citizens think they've committed a crime. That judgment, until a jury decides otherwise, has now been ceded to a relatively unchecked government—and McCarthyism clearly showed us that government enthusiasts will readily conflate the innocent with the guilty.

Of course, the terrorism trump card has been played by both the Bush and Obama administrations. Surveillance, they say, makes us safer.

That's an issue worth discussing, but it's not for the NSA or the President to decide it for us in secret. We the people ought to decide after a thorough and well-informed debate. That debate must include an acknowledgement that real security also requires protecting ourselves from the very same government that's trying to protect us from non-state terror.

Perhaps even more importantly, Americans must ponder whether security should always trump liberty and due process. We are reluctant to think so. Security must be balanced against liberty and justice, and the hard truth may be that living in a free and just society means accepting some degree of vulnerability. It is, in any case, for us, not the NSA, to determine how that balance should be struck.

Peter S. Fosl is Professor of Philosophy and former director of the Liberty, Security, and Justice program at Transylvania University, www.PeterFosl.us. James H. Miller is a journalism teacher at duPont Manual High School and media critic for WFPL.org.