

Guest Blogger: History's Lesson about Domestic Surveillance

Jonathan Hafetz is Associate Counsel in the Liberty & National Security Project at the Brennan Center for Justice at NYU School of Law. Mr. Hafetz recently filed a friend-of-the-court brief on behalf of leading civil rights organizations in legal challenges to the NSA's domestic surveillance program in Michigan and New York.

The plot thickened in the domestic spying controversy with the recent disclosure that the National Security Agency has been collecting phone call records of tens of millions of Americans. This revelation, by individuals familiar with the program, follows the President's admission in December that the NSA has been eavesdropping without warrants on international calls and emails of individuals with suspected links to terrorism if one party is in the United States.

Whose telephone calls is the NSA listening to? Whose phone records is it subjecting to "data mining" to develop more comprehensive profiles? We do not know the precise targets of secret NSA surveillance since the administration has blocked any congressional investigation into the agency's operational details. To be sure, the President says the NSA investigates only those with "known links" to al Qaeda and other terrorist groups. But history cautions against accepting that explanation at face value.

Throughout the Cold War, presidents of both parties spied on American citizens, and did so with increasing frequency and audacity.

Created by secret presidential directive in 1952, the NSA soon grew into a vast intelligence-gathering machine which spread ever-deeper into Americans' private lives and communications. One NSA program, known as Operation Shamrock, intercepted millions of telegrams to and from the United States. The NSA placed the names of law-abiding American citizens on 'watch lists,' and then disseminated their private communications to other government agencies such as the FBI and CIA.

It's easy now to dismiss these Cold War-era abuses as the product of misguided communist hysteria. But that would obscure the dangers unchecked surveillance poses to free speech and privacy rights today.

The NSA will inevitably view wholly legitimate activity through the lens of national security if permitted to operate in secret and without external checks. The agency's definition of "terrorist threat" will become increasingly elastic, causing it to target an ever-expanding range of lawful activity.

During the 1950s and 60s, the NSA and other agencies looked at the struggle for racial equality in vague, Cold War terms like "subversive activity." National icons like Dr. King -- whom we now think of as American as apple pie -- were considered security threats. Dr. King and other civil rights and anti-war leaders were not only subjected to illegal surveillance, but the information gathered was used to undermine their work.

If history is any guide, today's surveillance dragnet will inescapably sweep in those at the forefront of this generation's civil and human rights struggles. Intelligence agencies, for example, may view legitimate advocacy on behalf of Arab and Muslims in the United States or against the war in Iraq in terms of the administration's amorphous and ubiquitous "war on terrorism." Similarly, journalists and others investigating politically sensitive topics such as abuse at Guantanamo Bay or secret CIA-run prisons are prone to an ever-expanding net of government spying.

Constitutional freedoms have already been chilled by fears that the government is eavesdropping on private conversations. Civil rights organizations worry their outreach and advocacy efforts are being monitored; human rights lawyers avoid talking to clients and witnesses; and journalists and their sources are afraid to communicate with each other.

History not only highlights the dangers of unchecked surveillance; it also points to a solution. In the mid-1970s, the Church Committee conducted a far-reaching Senate investigation into U.S. intelligence agencies, including the NSA. The Committee's fourteen reports helped prompt significant legislative reforms, including the Foreign Intelligence Surveillance Act of 1978, which carefully regulates intelligence-gathering, including of suspected terrorists.

An investigation of this administration's intelligence activities is necessary to vindicate the principles of openness and accountability on which a democratic society depends. Thus far, however, the only people being investigated are the officials who helped make the existence of the secret spying program known to the American public.

In addition, any further surveillance must be conducted in accordance with the statutory framework established by Congress and the Fourth Amendment. The NSA, for example, must obtain a warrant from the Foreign Intelligence Surveillance Court before eavesdropping on telephone calls of American citizens and residents. If current procedures need to be fine-tuned, then any necessary changes must be made by the legislature, not by executive fiat.

Circumventing legal checks ultimately does not protect America's security. Instead, it jeopardizes the country's tradition of constitutional freedoms and commitment to the rule of law.