

The Fourth Amendment

Michael Sean Winters | Jun. 14, 2013 Distinctly Catholic

The editors at NCR have penned a thoughtful editorial on the subject of government surveillance. It raises concerns that I share. Yet, in the end, I find myself in fundamental disagreement with its general assessment of the situation which is far too easy on Mr. Edward Snowden and far too suspicious of the federal government.

The Fourth Amendment to the Constitution sets the limits on government's ability to disturb us in pursuit of its activities. It reads simply:

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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The first thing that jumps out, and the focal point of most jurisprudence on the Fourth Amendment, is the phrase "unreasonable searches and seizures." Long is the list of court decisions tweaking the meaning of "unreasonable." But, in the case of government surveillance of the internet and phone records, what is being "seized"? It should be obvious to anyone who has used the internet, that you are entering public space. When I make my plane reservations for my family's annual trip to Puerto Rico, I am soon besieged with special deals and offers for hotels, kayak trips, mountain climbing guides, restaurants, and the like from companies I have never heard of and which know nothing about me but the fact that I am headed to Puerto Rico. I did not tell them this in any direct way. They found it on the internet.

Of course, a tour company cannot put me in jail, although the ability of Wal-Mart, which also examines the cookies in your computer, to lower wages, close small businesses and disrupt communities is only scarcely less frightening to me than the prospect of jail. And the Constitution puts limits on governments, not companies, in this Amendment. Still, if you carry with you a confidence in your own privacy when you make a cell phone call or get on-line, your confidence is misplaced.

The editors seem taken with Mr. Snowden. Despite his lack of education, he "came off sometimes eloquently" and, "While Pfc. Bradley Manning is being tried for indiscriminately dumping secret documents to Wikileaks, Snowden was concerned that the reporting be prudent, not endanger anyone and not provide information that would aid enemies of the United States. Time will tell how all of that is evaluated." Actually, we do not need much time to evaluate this: How would this contractor, hired because of his computer skills, be able to assess whether or not his reporting is prudent, or whether it will endanger anyone, or if it will aid our enemies? This young man is no Daniel Ellsberg.

I hope the feds capture Mr. Snowden and haul him before a court of law and that a jury of his peers convicts him and sends him to jail for a long time. He arrogated to himself the right to decide what the public should know, and he is plainly not in a position to consider the consequences of his actions. Certainly, his dark threat that he could expose every CIA agent in the world is not the kind of threat that comes from someone who is

unimpressed with his own significance or especially committed to non-reckless behavior.

Nor do I share the editors concerns about the secrecy of the FISA court. Of course it operates in secrecy. Of course only the government appears before it. "In war, truth is such a precious commodity, she must always be attended by a bodyguard of lies," Churchill said of Britain's various, and often successful, efforts to deceive the Nazis during World War II. Where there is secrecy, there is the potential for abuse, to be sure. One of the principal ways such abuse is avoided and the Constitution is defended in the U.S. is through the separation of powers. In this case, an actual court gets to decide when and how the government can act on any of the meta-data it mines. The members of that court tend to be veterans and, so, unlikely to have been appointed by the incumbent president. If there is a judge in the room, I am reasonably confident the Constitution is being looked after.

Congressional oversight is problematic and operates under strict limits. Let us be serious, in its current dysfunction, would anyone want Congress more involved in prosecuting the war on terror? If Congress, and not the executive, took the lead, I don't like our chances. Nonetheless, the members of the relevant committees were briefed on the data mining and defend it, on both sides of the aisle.

To be clear, the editors make their case thoughtfully and without excessive rhetoric. If you have been watching Fox recently, you know that such thoughtfulness has been somewhat lacking. To them, this entire data mining issue, is just more evidence of Obama's tyrannical ambition, and they have been quick to link it to other "scandals," as if 501 (c) 4s with the name "Tea Party" were going to be dragged before the FISA court and sentenced to provide security to our consulate in Benghazi. Or something like that. IF NCR's editors demonstrated a healthy skepticism, the Amen Corner on the right is being reckless. We should not grant them a heckler's veto over our own suspicions, to be sure, but I do think we have to go out of our way to make sure we are not adding fuel to their fire.

Finally, every time I think of the prospect of some bit of data that should not be known to the government, somehow becoming known, or some area of constitutional privacy intruded upon, even if unintentionally, I bring to my mind the picture of the young man in London, boasting about his exploit, his hands still covered in the blood of a young soldier he had just killed with a meat cleaver. We do not yet know if this assailant was "self-radicalized" like the young men who bombed the Boston Marathon. Obviously, our purportedly intrusive data mining did not catch them? A single evil actor can kill and maim dozens of people ? but not thousands. If the Tsarnaevs in Boston, or the murderers in London aimed to kill thousands, they would need to communicate and coordinate in ways this surveillance program would likely detect. Just so, I am glad the U.S. government is doing it and I hope the swift arraignment and prosecution of Mr. Snowden will deter others from his reckless act.

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