

# Spying and Lying in 21st Century America

By Col. Daniel Smith, U.S. Army (Ret.) | January 25, 2006

*“Most people just don’t understand how pervasive government surveillance is. If you place an international phone call, the odds that the [U.S.] National Security Agency is looking are very good. If it goes by oceanic fiber-optic cable, they are listening to it. If it goes by satellite, they are listening to it. If it is a radio broadcast or a cell phone conversation, in principle, they could listen to it. Frankly, they can get what they want.”*

John Pike (U.S. military analyst)

John Pike made that observation in late February 2002, a mere five months after nearly 3,000 individuals were killed by the explosive force of fuel-laden jets plowing into the World Trade Center and the subsequent collapse of the Twin Towers.

But more than buildings were brought down that September 11. Historical protections of speech, assembly, protest, and privacy enjoyed by U.S. citizens and legal residents (“U.S. persons”), also came under attack as a stampeded Congress, goaded by a panicked and paranoid administration, abdicated its constitutional role—rather, its constitutional *duty*—to prevent the undue concentration of power in the Chief Executive. The immediate result was the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorists Act of 2001”—better known by its acronym, USA PATRIOT Act.

This law, as has become more and more clear over the last three months, was but the initial move by the Bush administration in what has become an extended and coordinated attack on the civil liberties of U.S. persons in the name of national security and—ironically—in the name of bringing democracy and civil liberties to Iraq.

The extent of this frontal assault suggests the depth of the ideological aversion of many Bush advisers

and confidants to the underlying principles on which the entire American democratic experiment rests. These include protecting the rights of all citizens, especially those of various minorities, against an overbearing majority; providing basic services and infrastructure on an equitable basis; and being responsive to the concerns and safety of the people. In short, it seems that key administration figures and confidants have difficulty with the proposition that “government of the people and for the people” refers to all the people.

## A Bit of History

The very structure of government outlined in the Constitution reflects another principle that was quite real in the American colonies in the 1700s: skepticism of executive power, whether king or president, which the Founding Fathers distrusted. After 9/11, in part due to the uncertainty of possible additional attacks, skepticism among today’s electorate all but disappeared—regrettably but understandably. But what should have been a short-term reaction—akin to what triggers the “fight or flight” instinct—was prolonged and so magnified by administration rhetoric and “alerts” that the public failed to reclaim its role as the ultimate arbiter of the balance between freedom and security which is at the heart of the social contract.



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Instead, those occupying positions of power blithely claimed that only by invading and restricting traditional civil liberties would they be able to efficiently safeguard constitutional liberties from foreign foes. They remain fond of citing Lincoln's justification for suspending *habeas corpus* during the Civil War—that the suspension is necessary to provide for the public safety (what today we call “national security”)—without going to Congress, which alone under the Constitution can suspend *habeas corpus* during rebellion or invasion, or to the courts. Administration advocates conveniently ignore Chief Justice Roger Taney's *Ex parte Merryman* (1861) which notes previous Supreme Court opinions that only Congress has the power to suspend *habeas corpus* for reasons of “public safety” (Chief Justice John Marshall) and this power includes the exclusive “right to judge whether the exigency had arisen” (Justice Joseph Story). Advocates also failed to reveal the extent to which they would go themselves to undercut the safeguards provided in the Constitution and in law.

The apparent disdain in which at least some advisers appear to hold individual rights and an active civil society may stem from the inefficiencies these concepts introduce into the art and practice of truly effective government. Look at the background of key administration figures. Most have extensive experience in business where efficiency can be the difference between success and failure. (Pundits not infrequently compare the Bush style of political governance to corporate governance.) Some have extensive connections to the military, not as high-ranking career officers but as Pentagon civilians at or near the top of the ladder where responsiveness to their preferences and direction is rapid if not automatic—and invariably “gung-ho.”

Unfortunately for civil liberties and democracy, efficient government is more characteristic of unchecked (or minimally checked) power. At the extremes, such power becomes tyranny, whose trademark activities include spying on citizens

because the tyrant dare not trust anyone. Indeed, tyranny thrives on the fear and distrust created when ostensible external threats to national survival (e.g., al-Qaida) are declared to have an unknowable number of tentacles deep within society, waiting to strike at an opportune time.

(Ironically, in mid-18th century colonial America, resentment over the suppression of the civil rights of the colonists as *British citizens* was initially directed at Parliament, not the crown—witness “no taxation without representation.” And Benjamin Franklin, as late as June 1775, well after blood ran at Lexington from “the shot heard 'round the world,” seemed to have had more regard for and trust in the British monarchy than in the British Parliament.)

## The Patriot Act

The United States is still far from the extreme of tyranny. Nonetheless, many observers find highly problematic the administration's drive to permanently extend (unless some future Congress countermands the pending legislation) the curtailment of civil liberties by the USA PATRIOT Act. What this all-out effort suggests is that government now sees threats everywhere and, in so doing, has lost its footing in the real world. Having painted itself into a psychological corner, unsure of its information and its ability to collect information and interpret what is collected, the Bush administration pounded Congress throughout December with rhetorical imperatives (“Congress must ...”) and apocalyptic predictions of disaster should the United States go unprotected by the Act for even one day. In the end, Congress extended the Act by five weeks (until February 3, 2006) and the president, who had adamantly declared he would never approve a short-term extension, signed the legislation.

Publicly, the USA PATRIOT Act remained the focus and justification for government's intrusion into daily activities of citizens and others who are

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in the United States legally. What most in Congress, let alone the public, didn't know until the last few weeks is the extent to which the administration stretched its new powers through self-serving and *secret* administrative rulings, advisory memos and opinions from the Attorney General's office, and legal interpretations of statutes from the White House Counsel. Not satisfied with these "justifications," the White House decided to reorganize—and in the process expand—domestic intelligence and counter-intelligence activities wherever possible by as many agencies as possible within the "spook" world.

The public face of this expansion is the "Intelligence Reform and Terrorism Prevention Act of 2004" (PL 108-458). Among other provisions, the law increases the number of individuals engaged in collecting and analyzing information—what is known as Human Intelligence or HUMINT. (One estimate is that 4,000 agents were added just to the military programs.) This was an almost inevitable response to the virtually unanimous conclusion of all post- 9/11 enquiries that HUMINT capabilities had severely atrophied. Structural changes were also made, chief among which was the creation of a new "intelligence czar"—the Director of National Intelligence. In terms of process, the bureaucratic "wall" purposefully erected in the 1970s after the last bout of illegal spying to separate domestic criminal investigations and foreign intelligence collection was also eliminated as joint counter-terror analysis centers staffed by FBI, CIA, and military analysts were created.

Given the revelations about widespread abuse of detainees in Iraq and Afghanistan, the rolling litany of justifications for invading and occupying Iraq, and the practice of "rendition" (transporting a suspect to a third country where prisoners have been known to be tortured), that the White House and its allies maintained such a supercharged "anti-terror" atmosphere for more than three years should

have been a red flag for Congress that something was amiss.

### Army Spying

With barely a ripple of congressional "oversight," those newly empowered must have thought almost any practice would be permitted. After all, the president and most other officials insisted that in the much-changed post-9/11 world the old rules and the old legal signposts were completely outdated and had to be rewritten.

The problem? The White House and the Pentagon didn't want to wait for the rules to be changed. In fact, as chronicled by the *New York Times* (December 11), NBC Nightly News (December 13), and the *Los Angeles Times*, U.S. Army counter-intelligence agents undertook a nation-wide program to infiltrate organizations the military deemed potential "threats" to military personnel and bases.

Of course, this is not the first time the military has engaged in domestic spying. Successive U.S. administrations in the 1960s and 1970s exhibited profound distrust, even disdain, for those who challenged government by exercising the civil and political rights provided in the Constitution. Impassioned Vietnam War protestors and civil rights advocates believed they could force changes in government policy and practice if they but persisted in mass civil disobedience. Fearing the same outcomes, officials secretly tasked intelligence agencies normally focused on external enemies—the Pentagon and the CIA—to gather, record, and exchange information with U.S. law enforcement agencies about "U.S. persons" (citizens and legal residents) participating in anti-Washington events anywhere in the country. By the time the illegal Army snooping ended in 1971, it had records on more than 100,000 civilians.

Although Christopher Pyle of the *New York Times* broke the story of the secret spying in 1970, official

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enquiries did not begin until 1974. The first, “The President’s Commission on CIA Activities within the United States” (also known as the Rockefeller Commission after its chairperson, Vice President Nelson Rockefeller), looked at the role of the CIA in domestic spying and other secret domestic programs (e.g., the MKUltra Project involving psychological experiments on humans). Many observers at the time regarded the 1975 report as a whitewash of the CIA’s directorate of operations. The next year, Senator Frank Church led a new and much broader enquiry into the activities of the CIA and the Pentagon and their interactions, including the sharing of information with local law enforcement agents. Reforms were put in place that barred the CIA and the Pentagon from spying on and maintaining records on U.S. persons residing in the United States.

The Army’s current activities appear to be less extensive, but that may be simply because the media obtained evidence much more quickly. This came in the form of a 400-page dossier of 1,519 “suspicious” organizations or activities the Army labeled “threats.” To date, NBC Nightly News, which has a copy of the report, has released only eight pages. However, included in the gatherings “penetrated” by Army counter-intelligence agents was a November 2004 planning session of locally known, non-confrontational, part-time counter-recruiting activists who openly gathered in the Quaker Meeting House in Lake Worth, Florida.

Reports from the Army’s field agents are sent to a central Counter-Intelligence Fusion Unit (CIFU) established outside Washington, DC in 2004. Its size and budget are not known. Information from field agents arrive as “TALON” (Threat and Local Observation Notice) reports usually classified “secret” no matter what “information” they might have. Generally, what is “classified” is the fact that the military is spying on citizens who are doing nothing more than exercising First and Fourth Amendment rights. Two days after the story broke,

the Pentagon promised to “review” the TALON database.

Lest we forget, TALON is not the first post-9/11 attempt to expand human intelligence collection inside the United States. In 2002, Attorney-General John Ashcroft’s Justice Department tried to initiate a “Terrorism Information and Prevention System” (Operation TIPS). This program would have used civilians such as electric and gas meter readers and postal employees to report “unusual” activities in a neighborhood. Attacked for its similarities to communist “neighborhood block” watch groups like Cuba’s Committees for the Defense of the Revolution (CDRs), which the State Department criticizes in its annual human rights reports, the scheme collapsed when the postal service refused to participate.

Undeterred, the Pentagon announced in 2002 the launch of its *Total Information Awareness* (TIA) data mining project to “recreate” the lives of every terrorist in order to preempt future attacks. As criticism of this new assault on privacy and civil liberties mounted, the Pentagon re-titled the project “*Terrorism Information Awareness*.” Either way, since anyone theoretically might be a terrorist, TIA potentially applied to everything done by everyone alive.

Nor has the administration been at all reticent about supplementing human agents with electronic collection programs. Shortly after 9/11, the government began monitoring Muslim business, family, and even religious sites for “excessive radiation emissions” in at least six major U.S. cities. The problem was—and remains—that the FBI neither obtained court approval nor had probable cause for invading the privacy of offices and homes.

Some in Congress are calling for expanding the use of military assets in domestic spying. As recorded in the Congressional Record (May 21, 2002), Congressman Curt Weldon proposed creating a

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National Operations and Analysis Hub (NOAH) within the Army's Intelligence and Security Command. Linking 28 federal agencies, NOAH would be a national-level intelligence "fusion" center that would develop and offer alternative courses of action for policy-makers to consider. Left unstated are what controls would be imposed and who would decide what options to forward to decision-makers.

### NSA Eavesdropping

As invasive as these practices have been, the spying program that has caused such uproar in legal and judicial circles is the presidentially-directed warrantless interception by the National Security Agency (NSA) of electronic communications involving "people with known links to al-Qaida and related terrorist organizations." Citing still secret internal—and therefore undoubtedly highly biased—administration legal opinions, Bush declared he was empowered by the Constitution, statute, and legal precedent to order the surveillance without seeking warrants from the Foreign Intelligence Surveillance Court. Although few outside the administration agree, Bush has remained defiant—which makes one wonder what super-secret unknown exists behind the NSA program.

Like the CIA, the NSA and its predecessor military service communications intercept organizations that have a history of violating laws. For example, although the Communications Act of 1934 prohibits anyone from intercepting and revealing private radio transmissions, the Army Security Agency did just that in the 1960s—and continued to do so even when it was told by the Federal Communication Commission that its activity was illegal. According to Frank Bamberg, who has written about the NSA from the "insider's" perspective, Cold War programs such as "Shamrock" and "Minaret" produced copies of telegrams sent from or to the United States and tracked "persons of interest."

More recently many governments, especially in Europe, have become concerned about "Echelon," a worldwide electronic intercept network which includes NSA and its equivalents in the U.K., Canada, Australia, and New Zealand. Using computers programmed to spot pre-determined words, phrases, names, and locations, these agencies are able to examine mountains of data and find possible high-value messages. And the fact that five nations are involved also enables the NSA to "plausibly deny" it is eavesdropping illegally on conversations because a request to another country to conduct the intercept allows the NSA technically to remain within the law.

While the domestic collection of information by the Army had come under close scrutiny by the Church Committee, its final report omitted consideration of "the monitoring of international communications by the National Security Agency." A Justice Department investigation of NSA practices, although not returning indictments, impelled Congress in 1978 to pass the Foreign Intelligence Surveillance Act (FISA) which specifies when warrantless intercepts of electronic conversations or data transfers are permitted. The Act created the secret Foreign Intelligence Surveillance Court, which approves requests for eavesdropping for national security reasons, and a Foreign Intelligence Appeals Court. The latter has never heard a case, while the former has approved more than 18,745 applications. More telling about the use of the FISA Court by the Bush White House is the report that, since 2001, the Court has felt obliged to modify 179 of 5,645 warrant applications and defer or reject six more. By comparison, only two applications were modified between 1978-2000 and none were turned down.

Under FISA, following a declaration of war by Congress, the president may initiate warrantless electronic surveillance for 15 days. In other cases, warrantless national security electronic surveillance can be maintained for 72 hours. Under all other

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circumstances or at the end of these time periods, authorities must have in hand a FISA court warrant. But since early 2002, these timelines and requirements have not been followed by virtue of a presidential directive. Once again, Bush asserted that a president possesses in wartime “inherent powers” under the Constitution to circumvent traditional, “slow-moving” legal processes. He also claims that the “Authorization for the Use of Military Force” (AUMF) resolution, passed by Congress right after the attacks of 9/11, gave him wide latitude for action as it authorized him “to use all necessary and appropriate force against those nations, organizations, or persons” implicated in the attacks.

Many if not most legal experts outside the administration reject this presidential interpretation as stretching congressional intent. The constitutional “inherent power” has generally been interpreted as limited to the president’s commander in chief function which is germane to military forces and battlefield situations outside the homeland. Nonetheless, Bush has allowed eavesdropping on conversations beginning and ending in the United States as well as electronic intercepts of communications originating, passing through, or terminating in the United States, far from any “battlefield” as that term is normally understood. Moreover, the FISA statute itself specifies that the Act is “the exclusive means by which electronic surveillance ... may be conducted” and makes no exceptions.

When asked why the administration chose to rely on presidential *dictate* rather than seek legislative remedies, Attorney-General Alberto Gonzales, who at the time was White House Counsel, replied: “We were advised that that [obtaining a legislated change to the Foreign Intelligence Surveillance Act] would be difficult, if not impossible.”

FISA is not the only law the Bush administration has flouted. In the 2003 UN debate prior to Security Council consideration of a resolution

authorizing the use of force against Saddam Hussein, the United States and UK intercepted communications from other Council members. UN officials have long assumed that their offices are bugged and their communications routinely intercepted by the United States, but in this instance it was quite evident that the United States was violating treaty provisions (and hence U.S. law) against spying on UN officials and UN delegations.

Media reports that have not been challenged by the NSA indicate other “irregularities” if not full-blown violations of law. As a high-level State Department official in the first Bush term, John Bolton, now serving as U.S. ambassador to the UN, received “raw” (unanalyzed) intercepts of conversations of U.S. government officials and private citizens opposed to going to war with Iraq. To hide the intercepts, the collection effort was reportedly run as an exercise. In accordance with the law, NSA destroyed its records when the “exercise” ended, but this was after copies had been provided to Bolton and other key pro-war supporters.

Other reports describe a NSA practice of attaching persistent “cookies” to enquiries by those who log on to the agency’s unclassified website. Attaching “cookies” is not a problem as long as they are temporary. Permanent ones would allow the NSA to follow any subsequent web surfing by a person who had visited NSA on the web—a clear case of invading privacy. An Agency spokesperson called the practice a “mistake.”

## Lying

As pervasive as is the government’s disregard of the Constitution, laws, and treaties, and the expressed intent of Congress with respect to civil rights, the administration has also engaged in manipulating and even creating news under cover of “information warfare.”

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One of the first indications of what was to come was the uproar over the Pentagon's Office of Strategic Influence. Created in February 2002 to bolster the U.S. image abroad, the Office suffered a fatal image blow itself when word leaked that it would provide false news items to foreign media. Secretary of Defense Rumsfeld closed the operation quickly, all the while protesting that there were no plans to manipulate news stories.

Meanwhile, the White House was trumpeting the explosion of independent media outlets in Afghanistan and Iraq. At the same time, as outlined in an October 30, 2003 Defense Department directive entitled "Information Operations Roadmap," the U.S. Army's 4th Psychological Operations Group located at Fort Bragg, North Carolina were busy churning out positive "news" stories (i.e., propaganda) about coalition activities that were sent to non-U.S. media outlets worldwide—but without revealing the source. At the same time, the Pentagon hired U.S. public relations firms to "help" foreign governments relay U.S.-friendly messages, help which not infrequently included paying newspapers \$40 to \$2,000 to run the stories or foreign journalists to write stories from information given them. Separately, the U.S. Agency for International Development has been funding the operation of 30 radio stations in Afghanistan. And all this was in addition to the officially acknowledged radio and television stations run by U.S. and other coalition authorities in Iraq and Afghanistan.

On the battlefield, deception and propaganda are tools available to commanders to confuse the enemy, perhaps induce surrender, and warn or reassure civilian noncombatants. And while it is legal to disseminate propaganda abroad, it is illegal to do so at home. The Pentagon insists that it has strict guidelines in play that will prevent any false reports it sends to foreign media from being subsequently picked up by U.S. outlets. (Of course, U.S. allies

might not be pleased to learn news has been manipulated, especially if the "news" is false.)

Such assurances give little comfort, especially following revelations that Bush administration officials sent videos to U.S. television outlets extolling domestic policies without making clear that the videos' source was the government. According to the Government Accountability Office, omitting attribution to the source changes the message from one of fact to propaganda, which by law cannot be distributed inside the United States.

Other instances of misrepresentations by various administration representatives are not hard to find. Criticism of the wars in Afghanistan and Iraq would undercut troop morale, according to Bush. Yet a 2005 year-end survey by the *Military Times* found that "four years of combat have done little to dent the morale of the professional military." The president also has repeatedly asserted that Congress sees the same intelligence he gets. The bi-partisan Congressional Research Service states that "the president, and a small number of ... Cabinet-level officials ... in contrast to Members of Congress, have access to a far greater overall volume of intelligence and to more sensitive intelligence information."

## Conclusion

Just as the constitutionality of the 1970s War Powers Act has never been tested, it seems unlikely that the president's expansive claim that the congressional AUMF resolution empowered him to redefine the boundaries of executive action vis-à-vis the two other branches of government will be challenged. Congress did err in leaving to the president the right to determine who around the globe was in any way a participant in 9/11 and bring them to justice. However, neither the AUMF nor other resolutions circumscribe the 1978 FISA statute which Congress clearly intended to remain in force during conflicts. Similarly, the president's declaration in

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the signing statement, issued when he signed legislation containing the McCain anti-torture amendment, that he would view the requirements within the context of *his* powers as commander in chief tries to end-run the prohibitions against torture or degrading and inhumane treatment of detainees regardless of their “war” status.

To its credit, the judiciary is now acting as a brake on administration actions justified as within the “inherent powers” of the commander in chief function. One member of the FISA panel resigned from the secret court to protest administration actions. Moreover, at least with regard to the anti-torture legislation and FISA, since the Supreme Court ruled in 1952 that presidential power to act unilaterally is, in the words of Justice Robert Jackson, “at its lowest ebb” in light of “the expressed or implied will of Congress”—new revelations that either statute has been ignored willfully just might drive the “war powers” issue to the Supreme Court. As Justice Jackson wrote in the 1952 decision, “There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries, and its inhabitants.”

In 1975, the Rockefeller Commission Report stated: “The individual liberties of American citizens depend on government observance of the law ... the mere invocation of the ‘national security’ does not grant unlimited power to the government.” Just over thirty years later, in January 2006, responding to questions at his confirmation hearings for a position on the Supreme Court, Judge Samuel Alito strongly affirmed that no one, president or Supreme Court justice, is above or outside the law. Freedom rests on the principle of the rule of law and equality before the law. So when government, fearing the citizenry in the exercise of their constitutional rights, ignores its duty to safeguard those rights and even undercuts them, despotism looms in the future and democracy becomes an endangered species.

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