



# human rights

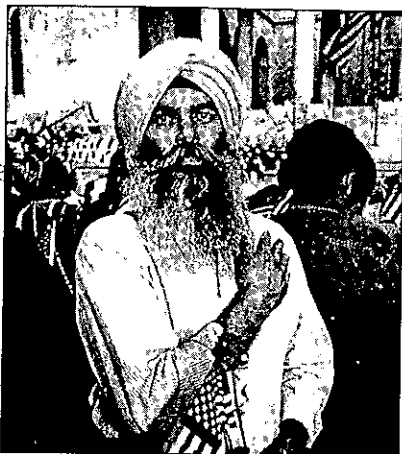
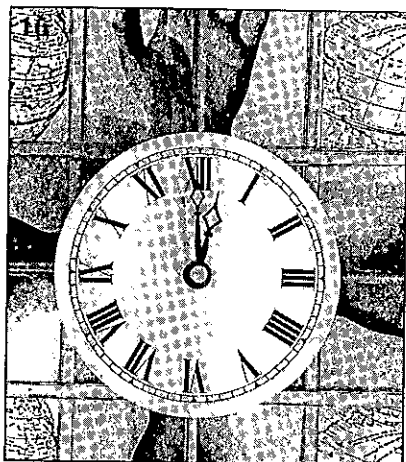


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# Intelligence, Terrorism, and Civil Liberties

By Kate Martin

History has repeatedly demonstrated the dangers of allowing governments to secretly collect intelligence on their own people. When government authority extends beyond law enforcement—investigating criminal activity—it has inevitably been followed by abuses. A key lesson learned from the domestic intelligence abuses before the mid-1970s was the necessity for a wall between law enforcement and intelligence in order to protect civil liberties. Careful lines were drawn between law enforcement activities and the previously unchecked secret intelligence agencies to meet the demands of both national security interests and civil liberties.

Terrorist crimes, however, do not fit neatly into the pigeonholes of law enforcement versus intelligence, criminal versus foreign policy matters. Intelligence is an essential tool in combating terrorism and recent events have made only too clear that greater coordination is needed between the intelligence community and the FBI and other law enforcement agencies.

While the terrible attacks of September 11 dramatized the problem of coordination between the CIA and the FBI, the Bush administration's response has been simply to tear down the walls between law enforcement and intelligence activities. This war against terrorism may be the first where intelligence is described as the most important weapon, not in support of battlefield operations in Afghanistan, but inside the United States targeted against Americans.

But what has been missing is any analysis or public discussion of whether the CIA's expanded domestic presence will be an effective counterterrorism measure and if such an expanded role is needed, how to build in safeguards against the recurrence of past abuses.

## Distinctions Between Intelligence and Law Enforcement

Secret intelligence agencies, necessary as they are, pose great danger to civil liberties and democracy. By necessity, these agencies must operate in secret, making it difficult to subject them to external oversight. Spying and covert activities overseas by definition violate the laws of the countries in which they occur. The result has been a history of political spying, unlawful disruption and surveillance on the domestic front, and covert actions abroad that for decades, disastrously undermined the building of democratic regimes and the rule of law.

When Congress created the CIA in the 1947 National Security Act (NSA), it drew the lines very sharply between the agency and the FBI in order to protect civil liberties. Thus, it prohibited the CIA from exercising any "police, subpoena, law-enforcement powers, or internal security functions." But by the early 1970s, as documented by the Senate "Church Committee" investigation, both the CIA and the FBI had embarked on a massive illegal program of political spying and disruption of the civil rights and anti-war movements, to name but a few. In the words of the Church Committee, the intelligence agencies had "adopt[ed] tactics unworthy of a democracy, and occasionally reminiscent of the tactics of totalitarian regimes. We have seen a consistent pattern in which programs initiated with limited goals, such as preventing criminal violence or identifying foreign spies, were expanded to what witnesses have characterized as 'vacuum cleaners,' sweeping in information about lawful activities of American citizens. . . . Unsavory and vicious tactics have been employed including anonymous attempts to break up marriages, disrupt meetings, ostracize persons from their professions,

and provoke target groups into rivalries that might result in deaths. Intelligence agencies have served the political and personal objectives of presidents and other high officials." Overseas, the CIA had acted not only to collect intelligence, but also as the president's secret weapon to carry out covert actions ranging from illegal assassinations to overthrowing democratically elected governments.

The Church Committee found that the CIA had operated with no congressional oversight. Subsequent events show the difficulty of ensuring accountability of secret agencies. Even after enactment of the Intelligence Oversight Act of 1980 requiring the CIA to keep the oversight committees fully and completely informed of its activities, it continued to operate outside the confines of the law. The Reagan White House, for example, used the CIA to end-run legal limits on U.S. support for the Nicaraguan Contras, and CIA officials then lied to Congress about those activities.

One of the key reforms of the 1970s, in addition to the creation of the congressional oversight committees, was the attempt to enforce the original intent of the National Security Act: to create a wall between law enforcement and intelligence agencies and to eject the CIA from domestic activities. That wall has been most visible in the statutory authorities for eavesdropping: Title III governs wiretapping in the investigation of crimes and the 1978 Foreign Intelligence Surveillance Act (FISA) governs wiretapping of agents of a foreign power inside the United States for the purpose of gathering foreign intelligence. The distinction is also mirrored in the Attorney General Guidelines first promulgated by Edward Levi, which in the absence of any statutory charter for FBI investigations, set out the rules for Bureau activities. Those guidelines provide one set of rules for criminal investigations and another for gathering foreign intelligence relating to espionage or international terrorism inside the United States. The rules for gathering foreign intelligence allow the government much wider latitude to gather

information about Americans and keep it secret than are allowed under the criminal investigation rules.

Perhaps the most important protection against domestic abuses by the CIA, however, resides not so much in the Attorney General Guidelines, which have since been weakened, but in the different functions assigned to the CIA and the FBI. The CIA has been confined to gathering foreign intelligence abroad regarding the intentions and capabilities of foreign powers for use by government policymakers. The FBI has been responsible for law enforcement and for counterintelli-

concerning the standards for investigation and the protection of intelligence sources and methods consistent with the requirements of due process. Terrorism investigations also stand at the intersection of First and Fourth Amendment concerns. It is crucial to distinguish between those engaged in criminal terrorist activity and those who may share the religious or political beliefs or the ethnic backgrounds of the terrorists, but do not engage in criminal activity.

Since the early 1990s, lawyers from the Department of Justice (DOJ), FBI, and CIA have worked to reconcile protection

Security Act of 1947 to assign the CIA law enforcement responsibilities, for the first time authorizing the CIA to undertake the illegal collection of information overseas for the sole purpose of making a criminal case against a foreigner in a U.S. court. Then in 2000, Congress granted blanket immunity to intelligence officials to violate certain U.S. criminal laws applying to overseas conduct. In none of these cases was there any consideration of the effect that expanding intelligence authorities in these ways would have on promoting the rule of law or respect for human rights.

None of these changes, however, is comparable to the seismic shift in responsibilities between law enforcement and intelligence agencies that has occurred since the September 11 attacks. Most disturbingly, the Bush administration pushed these changes through with no opportunity for careful analysis and public dialogue—the very things needed to find solutions that will be both effective against terrorism and protect constitutional rights.

#### The Patriot Act

The new anti-terrorism law, the USA Patriot Act (Patriot Act), first expanded the secret surveillance authorities under FISA. Although some changes might have been reasonable to meet recent technological developments, the Patriot Act turned the premise of FISA upside down and eliminated the constitutionally mandated requirement that these extraordinary powers be used only for foreign intelligence purposes, not when the government is seeking to make a criminal case. It then put the director of central intelligence in charge of identifying which Americans to target for these wiretaps and secret searches.

In addition, the Patriot Act requires the Attorney General to turn over to the director of central intelligence all “foreign intelligence information” obtained in any criminal investigation, including grand jury information and wiretap intercepts. The need for law enforcement and intelligence agencies to cooperate and exchange information on terrorism is clear; however, this mandatory

### Terrorism is both a law enforcement and intelligence matter.

gence activities inside the United States, both counterespionage and the conduct of international terrorism investigations.

This difference in functions has been mirrored in the difference in agency methods. The CIA acts overseas and in secret, those activities are frequently illegal, and it collects information without considering individual privacy, Miranda rights, or evidence admissibility requirements. It is tasked not just with collecting information, but also with covert disruption and prevention. The agency gives the highest priority to protection of its sources and methods. In contrast, the FBI’s law enforcement efforts involve the collection of information for use as evidence at trial, and its methods and informants are quite likely to be publicly identified. Perhaps most significantly, and unlike intelligence agencies, law enforcement agencies must *always* operate within the law.

#### Terrorism—A Law Enforcement and Intelligence Issue

Terrorism, like espionage and to a lesser extent international narcotics trafficking, is both a law enforcement and intelligence matter. Individuals like Osama bin Laden, while under indictment for the embassy bombings in East Africa, have acted in ways that fit more easily into traditional notions of state rather than individual power. As such, terrorism poses difficult analytical problems

of intelligence sources and methods with constitutional requirements in criminal prosecutions. The DOJ proudly declared that it had fully respected constitutional requirements in convicting the foreign terrorist Fawaz Yunis, after initially luring him into international waters so that he could be captured for trial in the U.S. The need for reconciling law enforcement requirements and intelligence concerns has increased as Congress has expanded the extraterritorial reach of the U.S. criminal code (without, however, ensuring that constitutional protections accompanied the expansion of U.S. police power).

But instead of carefully considering how to use intelligence while respecting the rule of law, Congress has simply expanded intelligence authorities without enacting safeguards to protect against abuses. In 1994, Congress, in an amendment to FISA, authorized “black bag jobs”—secret searches of Americans’ homes and offices—for intelligence purposes, in violation of Fourth Amendment requirements of knock and notice. The 1996 Anti-Terrorism Act allowed the use of secret evidence to deport individuals on the theory that the need to protect intelligence information outweighs an individual’s basic due process right to see the evidence against him. Also, in 1996, with virtually no public comment except by the Center for National Security Studies, Congress amended the National

sharing is not limited to information related to international terrorism. Instead, the Act requires the DOJ to give the CIA *all* information relating to any foreigner or to any American's contacts or activities involving any foreign government or organization, without setting any standards or safeguards for using the information. During congressional consideration of the bill, there was no discussion of the existing authority outlined in detailed memoranda by the DOJ's Office of Legal Counsel, which already permitted sharing of grand jury information with the intelligence community in carefully defined circumstances where it is clearly needed. Finally, the Patriot Act simply expanded the definition of terrorism, instead of carefully defining those criminal acts of international terrorism, where the CIA could be usefully involved.

#### **Intelligence Instead of Law Enforcement**

Within days of the Patriot Act's enactment, the administration undertook a series of steps that taken together suggest a deliberate decision to abandon the law enforcement paradigm for government investigations of individuals in the United States and to substitute an intelligence paradigm that seeks to secretly gather all information that might turn out to be useful. There is now reason to worry that the intelligence notion of covert disruption—as distinct from

criminal investigation—will again be applied to individuals and groups inside the United States.

The administration has consistently justified its anti-terrorism measures as an intelligence operation designed to prevent further attacks not to prosecute criminal violations. They have argued that the secret arrests of hundreds of individuals without probable cause and their indefinite detention when charged only with minor immigration violations are an essential piece of a larger intelligence "mosaic." The DOJ has similarly defended its new policy of eavesdropping on the attorney-client communications of detainees as necessary to obtain intelligence information that would not be used in criminal proceedings against the detainee. Additionally, one of the key justifications for the president's extraordinary order authorizing secret military detention and trial of aliens arrested in the United States is the need to protect intelligence sources and methods.

These changes have been made with no public discussion of whether this fundamental shift to an intelligence rather than law enforcement model will in fact be effective in the fight against terrorism. It is not obvious that a dragnet approach to detaining individuals or an intelligence effort to collect all information, relevant or not, will be as effective as a focused law enforcement investigation aimed at identifying, surveilling, and arresting

those involved in criminal activity.

We need to be concerned that means and ends have been turned on their head. Intelligence is no longer seen as an important means of protecting liberty and the rule of law, but rather protection of intelligence methods has come to be the justification for limiting liberty and the rule of law. It is crucial that we begin a public discussion about how intelligence can safeguard our lives and liberty without sacrificing our fundamental rights. We must start with the recognition that now that the CIA is involved in the hunt for individuals to be brought to justice, it must plan for the disclosure of its information in court. We must examine whether the need for intelligence outweighs fundamental privacy rights. We have examples in the past, FISA among them that show that it is possible to reconcile the requirements of secrecy and accountability and civil liberties by taking seriously each of these interests. No less is required if in the long run we expect to be successful in the fight against terrorists who care nothing for either human liberty or individual rights.

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## **USA Patriot Act**

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of foreign intelligence information is "a significant purpose" rather than "the purpose" of an investigation. Section 218 is an important tool for counterterrorism but, since probable cause is not required under FISA, it also raises the possibility that U.S. citizens who are not terrorists could have their homes searched and communications monitored without probable cause. Therefore, section 218 deserves special attention when it expires in four years.

#### **Conclusion**

Many of the electronic surveillance provisions in the Patriot Act faced serious opposition prior to September 11 from a coalition of privacy advocates, computer users, and elements of high-tech industry. The events of September 11 convinced many in that coalition and overwhelming majorities in Congress that law enforcement and national security officials need new legal tools to fight terrorism. But we should not forget what gave rise to the original opposition—many aspects of the bill increase the opportunity for law enforcement and the intelligence community to return to an era where they monitored and sometimes harassed individuals

who were merely exercising their First Amendment rights. Nothing that occurred on September 11 mandates that we return to such an era. If anything, the events of September 11 should redouble our resolve to protect the rights we as Americans cherish. Therefore, as the new powers granted under the Patriot Act begin to be exercised, we should not only feel more confident that our country has the tools to be safe but we should be ever vigilant that these new tools are not abused.

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