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Remarks at Preview to Traprock Peace Center Press Conference

‘Putting the Brakes on Domestic Spying’

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Sunny Miller and her organizing committee have asked me to explain how the domestic intelligence apparatus now being created to combat terrorism compares to the apparatus created to uncover Communists and to disrupt the civil rights and anti-war movements of the 1960s. How to monitor and restrain this apparatus will be discussed at the conference. Today, I would like to stress how the new apparatus threatens democracy and the rule of law through its capacity to silence or evade critics.

My background

My acquaintance with these issues is not just academic. Before I became a professor I was a captain in Army intelligence, and in that capacity learned about the military's efforts to spy on the civil rights and anti-war movements of the 1960s. Most Americans have forgotten about that spying now, but in the 1960s the military had over 1,500 plainclothes agents, working out of some 300 offices nationwide, watching on every demonstration of 20 people or more. They also kept files on the lawful political activities of millions of Americans, including even a few members of

Congress.

I disclosed the Army's spying in 1970, and then recruited 125 Army agents to tell what they knew of it to Congress, the courts, and the press. In the process, I became not only a whistleblower, but an investigative journalist, the organizer of litigation for the ACLU, and an investigator for two Senate committees: Senator Sam J. Ervin's Judiciary Subcommittee on Constitutional Rights and Senator Frank Church's Select Committee on Intelligence.

To make a long story short, there were lots of articles, hearings, lawsuits, and TV documentaries, and in the end, the military was forced to end the surveillance, destroy its data banks, and even abolish the U.S. Army Intelligence Command. Although we didn't know it at the time, my disclosures began the series of scandals that historians now call "Watergate."

It is not my purpose to reminisce about such matters now, but rather to say a few words about the domestic intelligence apparatus now being created in response to the September 11 attacks, and to suggest how an investigation like mine, carried out for the press, Congress, and the ACLU, would be more difficult to pull off today. In that way, perhaps I can illustrate why I believe that the new intelligence apparatus is far more dangerous to liberty, democracy, and our constitutional system of checks and balances than anything we encountered 30 years ago, in the age of J. Edgar Hoover.

The new apparatus

The first thing you should know about the new domestic intelligence apparatus is that it dwarfs anything we encountered in the age of Watergate. The main difference is technology. What used to take J. Edgar Hoover's gumshoes weeks of door-knocking can now be accessed by computer in a nanosecond.

Second, the number of government agencies with this capability has grown exponentially since September 11. After the reforms of 1976, and before September 11, there was just the FBI and the police, and most of what they focused on was criminal activity. Today there are dozens

of agencies-- U.S. and foreign – linked together by fiber optic cables for the purposes of sharing information (and, of course, misinformation) about suspected terrorists. Today they don't start with criminal investigations. They track down every rumor and every suspicion, including those triggered by a person's political or religious beliefs or associations.

Since September 11, the military has returned to domestic intelligence in a big way, not through plainclothes agents but through the mining of commercial and government data banks. "Data mining" is the name of the game, and every agency with a computer can play it. Your privacy and mine has never been more threatened.

Let me give you just one example. Under the direction of former admiral John Poindexter, the Pentagon's "total awareness information system" is attempting correlate information on suspected terrorists by simultaneously searching all sorts of records systems, including the airline industry's huge files on travelers, the State Department's massive files on persons who have been issued visas, and the records of credit card companies, e-mail servers, medical insurance records, and even Google.

The idea is to be able to produce a detailed profile on anyone suspected of terrorism – or of associating with terrorists. Of course, once the system is in place, it will have other uses as well, should public officials again fear their critics.

Impact on our capacity to check abuses

And this is what I want to focus on this afternoon. Imagine that you, like me, stumble across serious abuses of this new investigative and surveillance power. Perhaps it is a new "enemies list," like the one the Nixon administration used to target critics for punitive tax audits. Or a system of "opposition research," like the Watergate burglary, or an effort to defame a critic, like Daniel Ellsberg, by burglarizing the office of his psychiatrist. Image that you are a whistleblower, a journalist, a congressional staffer, or an attorney with the ACLU – all roles I

played in attacking the Army's spying. You want to investigate and expose the abuses you have uncovered. What are your chances of success – before the system cracks down on you?

I would say: Not good, and certainly much worse than when I was on the road.

Think about what the government is likely to do when it finds out what you are doing. My first article about the Army's spying prompted a flood of Congressional queries to the military, which responded by setting up a 50-man "damage control" unit in the cavernous "domestic war room" down in the Pentagon's basement. Their job was to answer, and discredit, every critical story that surfaced in the press.

Even so, it was four months before the Army realized that mine was the hidden hand behind all those embarrassing stories about its domestic spying. General Yarborough, the assistant chief of staff for intelligence, wanted me investigated, because he suspected I was getting my money from the "Chi Coms," (when it should have been obvious that I was going to graduate school on the GI bill.) Today he would assume you are working for al Qaeda.

The Army did ask my mailman to monitor my incoming mail. That was pretty silly. As one of their intelligence officers I knew better than to trust the privacy of the U.S. mail. I had sensitive mail sent in double envelopes, well-taped over washable ink scribbling – to the apartments of friends. You could do the same.

But you would probably hear from some your sources, at least initially, by e-mail.

Under the so-called Patriot Act, the government can access your e-mail simply by demanding it. You might also communicate with your sources by telephone. In 1970, the number of wiretaps was limited by the unpleasant necessity to climbing telephone poles or crouching in roach-infested basements with a set of earphones. Today the FBI can arrange for the phone company to intercept your phone line at a central switching facility and send your calls down a dedicated phone line to a computer search engine programmed to sort messages by key words.

In 1970, the government's authority to conduct wiretaps and bugs was significantly limited by law. Back then, the Fourth Amendment's guarantee against unreasonable searches still retained some potency. No longer. Under the Patriot Act, government agents can request an easy-to-get pseudo-warrant to tap your phone or bug your home or office from the super secret Foreign Intelligence Surveillance Court, without showing probable cause to believe that the target of its tap had committed a crime, and that evidence of his crime – or criminal conspiracy – might be found on the phone to be tapped.

Indeed, the agents would not have to target you at all, and thus trigger judicial curiosity about why a journalist or Congressional staffer or attorney was being tapped. They could get a pseudo-warrant to tap someone else and all the phones the suspect might use, and tap all those other phones, including yours, without having to go back to the court for specific authority.

Back in 1970, the government had to report what it overheard on taps and bugs back to regular courts. Not so with the FISA court. In any case, the volumes of intercepts today makes judicial oversight impossible. Your best bet might be to use wireless phones, and buy a new one every week under assumed names.

In 1970, I could drive just about anywhere in my blue Volkswagen, confident that the government would not be able to track me short of assigning a chase car, which was too expensive – and conspicuous. Today it can track you by your credit card purchases of gasoline, and by your use of EZ passes at toll booths. Again, you can get around that sort of surveillance, but it is more difficult.

Back in 1970, I worried that the government might burglarize my apartment to steal my documents or identify my confidential sources. It was a reasonable worry, as we later discovered the FBI conducted hundreds of illegal entries, which it called "black bag jobs."

Today, the government would not have to enter your place illegally. The Patriot Act

allows “sneak and peek” searches under pseudo-warrants issued by the FISA court. Unlike traditional searches carried out pursuant to Fourth Amendment or common law warrants, the government’s men do not have to leave a copy of the warrant behind, along with an inventory of the things they seized. So, if you come home to find your laptop missing, there is no way to find out that the government took it – unless, in the unlikely event it offers evidence taken from your computer in court.

In 1970, I could be fairly confident that my confidential sources would not be secretly arrested by the government and made to disappear. No longer. As you know, the Bush administration believes that the president’s war power authorizes him to make people disappear by the simple expedient of labeling them “enemy combatants.” Under the Patriot II Act, which the Bush administration will introduce after the next terrorist attack, the government would be authorized to arrest people in secret and not reveal who it is holding, even in response to Freedom of Information Act requests from family, reporters, or lawyers.

But we don’t have to wait for the Patriot II Act to pass. The Bush administration has already detained over 1,200 persons, without criminal charges, on the pretext that they have violated some minor immigration law, but really for the purpose of interrogating them about possible terrorist connections – even when it has utterly no evidence of such connections, and is really engaging in ethnic or religious profiling.

We used to think that violated the Fourth Amendment’s ban on unreasonable seizures.

We used to think that the Fourth Amendment protected all persons, not just citizens. It still may, as a matter of law. But the Bush administration, supported by Congress, thinks differently, and the courts so far have not challenged those assertions of arbitrary power.

Many of the 1,200 detainees were seized preemptorily, locked up as if they were murderers or terrorists, denied the opportunity for weeks to contact family or attorneys.

When their wives asked the federal prison in Brooklyn if their husbands were inside, the receptionist said no. But they were.

Back in 1970, some people wanted me prosecuted for espionage or treason because I had given information about domestic spying to Congress, the courts, and the press. If that happened, however, I had a reasonable expectation that I would be tried in a civilian federal court, with all the constitutional and legal protections that entailed.

Today, you can't be so sure. The administration claims we are at "war" and that anyone suspected of working for al Qaeda is an "enemy combatant." As we know from the Padilla and al Marri cases, you don't have to have seen combat, or served in a combat unit, to be labeled an "enemy combatant," taken away from the civilian courts, dumped in a military brig in South Carolina, denied legal counsel, and held indefinitely without trial.

Worse, the Bush administration claims that should it choose to label you an "enemy combatant," it can try you before a special military tribunal rigged to assure your conviction, and even execution, on minimal and dubious evidence.

But suppose you don't get arrested. Only your sources are seized and spirited away in the night. The Bush administration won't tell you where they are, so you ask a congressional committee to find out. But that may not work, either, because the Justice Department is refusing to supply such information to the House and Senate Judiciary Committees.

But let's say you persist and, like me, develop sources in every unit of the agency you are investigating. The government may claim that you have information useful to a grand jury convened by one of its prosecutors to investigate terrorists. It can call you before the grand jury and, under a grant of immunity from prosecution for self-incriminating statements, make you disclose your confidential sources – or go to jail.

But, under the Patriot Act, the government doesn't have to bludgeon you with a grand

jury, as it did Daniel Ellsberg's teen-aged son and numerous anti-war activists. It can arrest and hold you for a month or so simply by claiming that you are a "material witness" to your sources' alleged crimes. Or, it can obtain a court order requiring you to produce any "tangible thing," including, apparently, your spiral-bound notebooks and laptop computer. It can also subpoena TV film, if its alleged purpose is to facilitate some aspect of an investigation of foreign intelligence or international terrorism. So, if you are doing a TV documentary, you may suddenly find yourself without your best film footage, including those parts you promised to keep confidential.

Now, suppose that as part of your investigation you buy some books, or borrow them from a library. The government can subpoena those records too, and forbid the librarian or bookseller from telling you.

For your investigation to succeed, you will probably need to find an insider like me who is willing to blow the whistle on unconstitutional or illegal activity. Unfortunately, since 1970, the government has beefed up its system of non-disclosure pledges, and backed them with criminal penalties. The Bush administration has even invented a new category of "homeland security information" which, although not formally classified, can't be disclosed without penalties. So your chances of finding whistleblowers are less today than mine were in 1970.

In my case, I could at least count on former agents who had served just two years in the military as reservists or draftees. No longer. We have a professional army, and career intelligence agents, and career law enforcement officials. Their organizational loyalties tend to exceed their fidelity to the Constitution.

But, for the fun of it, let's say that you are successful. The government is inefficient, and you are invited to testify about the illegal activity before a Congressional committee. That damage control unit is going to be sorely tempted to try to discredit you. In my case, the Army put me down for a tax audit – one of the privileges of being put on the president's "enemies" list.

Army colonels also told congressional staffers, quite falsely, that I had fathered illegitimate children. Petty stuff, I know, but imagine what they could do to your reputation by clever computer work.

Conclusion

I could go on, but you get the idea. Today, we have a domestic intelligence bureaucracy that can do a lot of harm to those who challenge its legitimacy or usefulness. Our capacity to subject the system to oversight, or bring it to heel, is very weak, especially while both the White House and Congress are controlled by the same political party.

It would be comforting to say that we are in this predicament because bad people have seized power in Washington. But, truth be known, the new intelligence apparatus enjoy the support of an unwitting public and docile members of Congress who unwisely assume that the new domestic intelligence apparatus will only be used against A-rabs.

We need to combat that misperception, which is what the conference is all about. I hope you will find the time to attend.

