

The Rights of the People: How Our Search for Safety Invades Our Liberties, by David K. Shipler

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By his own admission, David Shipler is not a lawyer. Neither am I. That makes for an evenly matched bout. *The Rights of the People* is an odd book. Shipler, as a journalist, seems more comfortable with anecdotes than with addressing the sweeping subject of civil liberties' ill health in post-9/11 America. Any argument, however, is buried underneath the affronted tone of a partisan polemic. Somewhere, in the midst of this muddled mayhem, is the premise that the judiciary branch's lassitude has allowed constitutional protections to be undermined.

Shipler's argument is done no favors by a book that repeatedly demands its readers to stomach what reeks of a score-settling screed, en route to the (specious) substantiation of his thesis. For instance, he blasts that,

I don't think that my bank and the phone company are the same as the FBI. In my mind there is a difference between the private sector and the state. When I push buttons on my phone, I recognize that the phone company's switching equipment has to work for me, but I don't expect the numbers I call to show up on the computer screens of government agencies.

Given his lack of legal credentials, I frankly do not care about Mr. Shipler's sense of personal violation. Furthermore, as other authors covering the national security beat have pointed out, intelligence community (IC) agencies are drowning in data. In 2008 James Bamford, who has made a career of demystifying the National Security Agency (NSA), sometimes, one might guess, to that agency's mystification, pointed out that despite decades of research, NSA has still not perfected the capability to effectively spot key words or phrases in voice telephone conversations.¹ Shipler is quite the narcissist to believe that his numbers are popping up on the computer screens of government agencies. He also seems unable to restrain

partisan non sequiturs. Despite the national security thrust of the book, Shipler suddenly veers into the politicization of science, calling out the Bush administration for “censoring studies on global warming, stacking committees and research programs to achieve desired results, and putting conservative social policy ahead of scientists’ recommendations on certain regulations.” Regardless of one’s view on this issue, this editorial Tourette syndrome betrays a lack of authorial self-control.

Beyond its erratic tone, the book is an unhappy marriage of authorial approach and subject. Shipler is at his (relative) best when in journalistic mode. His account of time spent with Washington, DC’s Metropolitan Police Department is the most compelling section. However, extrapolating national-level trends from a handful of accounts makes his Cassandra cries sound suspiciously like quackery. This is especially so since the incidents that he discusses, with such self-righteousness, are outliers—*anomalies* that resulted in outrage specifically because they were miscarriages of justice that drew scrutiny. Episodes such as the erroneous association of Brandon Mayfield with the Madrid train bombings are not erosions of civil liberties; they are evidence that the system is self-correcting. (The challenge is for decision makers to learn from these mistakes and change accordingly, if for no reason more basic than self-preservation—to avoid future, embarrassing, possibly career-ending gaffes.) The indictment, as discussed by Shipler, of individuals who were responsible for the first terrorist prosecution after 9/11 on charges of conspiracy, obstruction of justice, and making false statements, demonstrates the enduring nature of disincentives for playing fast and loose with the legal system.

Although Shipler interprets these missteps as ominous harbingers of some Orwellian dystopia, there is a less sinister explanation, to which he alludes but never clearly acknowledges—the perpetually dynamic interaction between evolving national security challenges and the implements at Washington’s disposal to address these. For instance, Foreign Intelligence Surveillance Act (FISA) statutes did not account for the technological evolution that resulted in communications between two individuals, both located abroad, passing through the United States. Shipler acknowledges that solutions to unanticipated changes can be slow in coming, stating that the American judicial system “has always been slow to catch up with technology.” In addition to the changing nature of threat actors, the United States’ perception of its role in the world necessitates, from time to time, the

need for new approaches to national security. The modern IC was the result of trauma suffered by a surprise attack and was forged in the Cold War world with a stable (if often fraught) geopolitical order. However, in the current, volatile international *milieu* it is essential for the United States to maintain an informational advantage in order to shape the long-term economic and military realignments that will inevitably emerge. Unforeseen realities require previously unanticipated capabilities.

The national security environment that Shipler's arguments suggest should exist would be highly unbalanced, with the U.S. population at a disadvantage. He is, in essence, asking the U.S. government to tie its own hands in not using the most current tools available, even as our competitors and adversaries do so without compunction. The U.S. government is already a late adopter of innovation, despite the efforts of entities such as the Defense Advanced Research Projects Agency and Intelligence Advanced Research Projects Activity. This is already a deficiency in sore need of eradication, not a virtue warranting emulation.

Intelligence history demonstrates that opportunities for obtaining (via collection) or creating (via covert action) exist within the domestic environment. One need look no further than the FBI's source, codenamed SOLO, a U.S. person who provided key intelligence that helped Washington identify and exploit the Sino-Soviet split.² In addition to positive foreign intelligence, the Bureau's collection against foreign intelligence activities targeting the United States can help to understand foreign actors' capabilities or lack thereof. Effecting outcomes also rely on awareness of entities within the United States. The CIA demonstrated this through the use of American-based entities for influence purposes during the Cold War.³ Joint CIA/FBI operations in the early 1980s, directed at providing the Soviets with compromised technology, also required knowledge of the entities that could be used as channels for passage.⁴

One step removed from collection is the identification of resources that can be called upon as necessary. The IC must maintain a comprehensive awareness of the domestic environment in order to use persons or organizations that may have unique access to foreign targets. The Bureau demonstrated the value of such knowledge in its ability to furnish special agents, dispatched throughout Latin America during World War II, with nonofficial cover that enhanced their access as intelligence collectors.⁵ In a rapidly moving world, the

presence of reliable resources must be ascertained, even before they are needed, in order to use them in a timely fashion.

Furthermore, it is essential that Washington maintain intelligence on the internal developments, positive or negative, that can impact the United States' elements of national power. These include both those domestic issues that drain resources away from the ability to promote and protect our interests abroad as well as those developments that can leap U.S. borders and produce negative outcomes abroad.

The likelihood that the incidents that Shipler finds so disconcerting are indicators of the always-messy process of adaptation rather than of a slide in civil liberties oblivion is demonstrated by the robust debate over the implements of national security. The healthy discussion about FISA legislation not only in Congress but also in academic circles and the press illustrates that informed debate is alive and well (for those willing to participate).⁶ Furthermore, the executive branch has sought to openly address new realities as demonstrated by the fact that anyone can access the Attorney General's Guidelines for Domestic FBI Operations and the FBI's Domestic Investigations and Operations Guide online.⁷

Time after time, Shipler summons the specter of intelligence collection as wreaking havoc on the lives of Americans. Perhaps inevitably he invokes the activities of the House Un-American Activities Committee and the blacklists that resulted. He also cites instances of individuals, initially of interest because of possible connections to terrorism, who were jailed on immigration violations. He seems to assume that information automatically results in action, rather than simply awareness to facilitate better-informed decision making. By seeing the potential for all collection to end in abuse, Shipler apparently views intelligence collection as a slippery slope. Shipler leaves the reader wondering if he wants anything less than to maim the IC's capabilities.

Whether he realizes it or not, Shipler's argument would render American intelligence blind to challenges and opportunities with a nexus to the homeland. His argument is dismissive of the intelligence tools of "indications and warning," identifying phenomena that are associated with patterns of behavior. He claims that the concept of "totality of circumstances" is "a brand of profiling, ostensibly one based on geography and crime rates but producing targets by race and class." Furthermore, he seems to disapprove of efforts to identify psychological "tells." However, none of these items are prosecutable in their own right—they are items of intelligence, meant to help more

accurately direct limited resources to obtaining the greatest return on investment.

Shipler's text does suggest, however inadvertently, a need to reconsider how decision makers think about intelligence. His umbrage seems fueled by a system that conflates intelligence collection and investigations, in which collection is always meant to result in enforcement action. However, there is a need for an informational advantage that does not drive tactical responses—whether those responses are arrests or declarations of persona non grata (domestically) or covert actions abroad. As an FBI analyst, responsible for mentoring more junior colleagues, I have cautioned, on numerous occasions, against using “evidence” synonymously with “indicators”—evidence builds cases; indicators facilitate forecasting.

Part of reassuring the American public is ensuring that law enforcement remains reactive. The NYPD, LAPD, and other departments should not have intelligence (as opposed to investigative) functions. Their mission is to bring malefactors to justice. They certainly should not be operating overseas, as the NYPD does, threatening to confuse foreign governments about who speaks for the United States and creating inefficiencies by duplicating the role that the federal government maintains through FBI legal attaches and other executive branch agency liaison representation.

Conceptually delineating (and aligning agencies' responsibilities accordingly) intelligence and investigations should not entail reestablishing the “wall” of the pre-9/11 FBI. (Such a move would not only create de jure barriers to effective intelligence but also create de facto obstacles of overly cautious interpretation of guidelines, as demonstrated by instances of failure in the sharing of information internally. The nadir of this culture was described by Lawrence Wright, author of *The Looming Tower*.)⁸ However, leads generated through intelligence collection should be established via traditional criminal investigations that can be transparently presented in a court of law. This would mollify Shipler and those who hold his views, since his concern is that the accused cannot challenge the basis of a warrant if “information is obtained secretly through methods expanded since September 11, 2001.” With the courts' role restored by the openness of prosecution, it will be more difficult for Shipler and his ilk to bemoan the system's failure and sympathize with malefactors.

The imbalance between the capabilities of nefarious actors that are operating within America and the U.S. government's ability to address the challenge posed by these actors is part of a broader, conceptual approach to the intelligence mission within the domestic

environment. State and nonstate actors that threaten U.S. interests will likely seek to acquire information or capabilities in furtherance of this. Consequently, they will, in some fashion, be forced to gain ingress (physically or virtually) to this country. As a controlled area, the domestic environment provides a controlled environment, an optimal setting for gaining access to those actors, which affords the U.S. government insights into the most pertinent facets (those directed against the United States) of a threat. Shutting these capabilities down denies Washington valuable opportunities by locking it out of its own backyard.

Ultimately, Shipler is disingenuous (or, more charitably, conflicted) about the purpose of his text. Although his ostensible focus is the judicial branch's permissiveness in the erosion of civil liberties, his penultimate sentence calls on readers to "push back hard to maintain [their] constitutional liberties," "empower the powerless," and "recognize that the rights of the lowliest criminal are not his alone." If this is ultimately a populist tract dressed up to read like a hand-wringing study of one branch of government's descent into the morass of laziness, Shipler is playing fast and loose, to the detriment of productive public discourse, about the issues. The American people are capable of reasonably considering serious intelligence policy issues. As a RAND Corporation report noted, the "public is more willing to accept specific security measures when polling questions refer to concrete policies than when questions use abstract terms such as 'giving up civil liberties.'"⁹ In eschewing the former approach to the issue, in favor of the histrionic latter, Shipler stoops to sensationalistic fear mongering.

Perhaps Shipler's gravest sin, however, is politicizing a discussion that is too important to become a partisan football. While time and again he returns to bemoaning the actions of the Bush administration, one wonders how he would respond to the revelation of President Obama's "kill list."¹⁰ Shipler must come to terms with the reality that both Republican and Democratic administrations must deal with difficult national security decisions. Such choices are made even more difficult when a president must account not only for the impact of the decision on the country's best interest but also on his vulnerability vis-à-vis the opposing party. Unfortunately for the American public, Shipler's ultimately forgettable, bludgeoning broadside of a book contributes only to this troubling trend.

All opinions expressed in this article are those of the author and do not represent those of the FBI or any other U.S. government entity.

Notes

1. James Bamford, *The Shadow Factory: The Ultra-Secret NSA from 9/11 to the Eavesdropping on America* (New York: Anchor Books, 2008), 322.
2. John Barron, *Operation SOLO: The FBI's Man in the Kremlin* (Washington, DC: Regnery, 1996).
3. Hugh Wilford, *The Mighty Wurlitzer: How the CIA Played America* (Cambridge, MA: Harvard University Press, 2008).
4. Gus W. Weiss, "Duping the Soviets: The Farewell Dossier," *Studies in Intelligence* 39, no. 15 (1996): 121–26, <https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol39no5/pdf/v39i5a14p.pdf> (accessed July 10, 2012).
5. Raymond Batvinis, *The Origins of FBI Counterintelligence* (Lawrence: University Press of Kansas, 2009), chapter 10.
6. David Kris, Brookings Institution, "Modernizing the Foreign Intelligence Surveillance Act: A Working Paper of the Series on Counterterrorism and American Statutory Law," http://www.brookings.edu/~media/research/files/papers/2007/11/15%20nationalsecurity%20kris/1115_nationalsecurity_kris.pdf (accessed July 10, 2012).
7. The following links are provided in an effort to dispel the gloom that Shipler has conjured; see <http://www.justice.gov/ag/readingroom/guidelines.pdf> for the AG Guidelines and <http://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/fbi-domestic-investigations-and-operations-guide-diog-2011-version> for the Domestic Investigations and Operations Guide (both URLs accessed July 10, 2012).
8. Lawrence Wright, *The Looming Tower: Al Qaeda and the Road to 9/11* (New York: Vintage Books, 2007); Lawrence Wright, "The Agent: Did the C.I.A. Stop an F.B.I. Detective from Preventing 9/11?" *The New Yorker*, July 10, 2006, http://www.newyorker.com/archive/2006/07/10/060710fa_fact_wright (accessed July 10, 2012).
9. Brian Jackson, *The Challenge of Domestic Intelligence in a Free Society* (Santa Monica, CA: The RAND Corporation, 2009), http://www.rand.org/pubs/monographs/2009/RAND_MG804.pdf (accessed July 10, 2012), 91.
10. Jo Becker and Scott Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will," *New York Times*, May 29, 2012, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all> (accessed July 10, 2012).

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