

By Ray McGovern

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Barring a last-minute frantic call from the White House, CBS's "Face the Nation" will interview whistleblowers Thomas Drake (ex-senior executive at the National Security Agency) and Jesselyn Radack (ex-ethics adviser at the Justice Department). Michael Hayden, who headed the NSA and CIA and now is a chief NSA defender on CNN and Fox News, will also be interviewed this Sunday.

It was a high privilege for me to join Drake, Radack and FBI whistleblower Coleen Rowley on a visit to Edward Snowden in Russia on Oct. 9. Never have I been in the company of persons who are such incorruptible straight-arrow patriots. Not so, sadly, Michael Hayden.



Retired Gen. Michael Hayden, former director of the CIA and the NSA.

Given how these network interviews go, however, Hayden will probably be introduced as the patriot he isn't. Here is a more fact-based introduction that I would urge the moderator, CBS's Major Garrett, to use:

"Let me also welcome former Gen. Michael Hayden. Gen. Hayden was the first director of NSA to violate his oath to the U.S. Constitution by acquiescing in the Bush administration's order to violate the Fourth Amendment, which, until then, had served as the 'First Commandment' at NSA.

"On May 8, 2006, former NSA Director Adm. Bobby Ray Inman stated publicly that what Hayden did was in clear violation of the Foreign Intelligence Surveillance Act (FISA). Another former NSA director, Army Gen. William Odom, told an interviewer on Jan. 4, 2006, that Hayden 'should have been court-martialed.'

"This sad reality was known to CBS and our mainstream media colleagues before Hayden was confirmed as CIA director on May 18, 2006, but we were successful in deep-sixing it, keeping it out of the public debate.

"We also are grateful to both the Bush and the Obama administrations for making it possible to have Gen. Hayden with us in the studio here today rather than having to speak with him via Skype from a federal prison where he assuredly belongs for his eavesdropping crimes at NSA. Hayden and the enabling giant telecoms escaped accountability via the Bush-pushed 2006 law holding all harmless for these violations of law.

"As for President Obama, had he not decided to 'look forward and not backward' and thus avoid prosecuting Bush administration criminals, Hayden might be locked away today for

crimes against the Constitution and international law. As CIA director, he was a staunch defender of 'enhanced interrogation techniques,' including waterboarding.

"Gen. Hayden also has been one of the harshest critics of Edward Snowden, hinting broadly that Snowden should be put on the President's Kill List, a motion that was immediately seconded by House Intelligence Chair Mike Rogers. So, our thanks to Presidents Bush and Obama for enabling Gen. Hayden's presence here today, and thanks also for the rest of you for being here this morning."

Less Forthcoming

My guess is that Garrett's actual introduction will be a lot less forthright – and he will then give Hayden plenty of space to hurl as many stones at Edward Snowden as Hayden wishes, as Hayden did last July when he was writing as a "CNN Terrorism Analyst."

Hayden lumped Snowden together with despicable characters like CIA's Aldrich Ames, Robert Hanssen of the FBI and others who spied for the U.S.S.R. Hayden threw in Revolutionary War turncoat Benedict Arnold for good measure.

Hayden disparaged Pvt. Bradley Manning, too, for leaking evidence of U.S. war crimes in Iraq and Afghanistan. Then, Hayden [added](#), "Snowden is in a class by himself." But it is Michael Hayden who is truly in a class by himself.

Hayden was the first NSA director to betray the country's trust by ordering wholesale violation of what was once the First Commandment at NSA: "Thou Shalt Not Eavesdrop on Americans Without a Court Warrant." Not to mention playing fast and loose with the Foreign Intelligence Surveillance Act of 1978 and the Fourth Amendment to the Constitution.

While Hayden has implicitly offered a second-grader kind of excuse for his law-breaking, that President George W. Bush and Vice President Dick Cheney "made me do it," that does not let Hayden off the hook. Hayden also [lectured a press conference](#) on Jan. 23, 2006, about his detailed knowledge of the Fourth Amendment, insisting that it does not require a showing of

“probable cause” before a warrant is issued for searches and seizures.

“Believe me, if there’s any amendment to the Constitution that employees of the National Security Agency are familiar with it’s the Fourth,” Hayden said in denying that there was a “probable cause” standard in the amendment. “It is a reasonableness standard in the Fourth Amendment.”

Given Hayden’s ignorance of this important constraint against government abuse, I have found it helpful to read the one-sentence Fourth Amendment during TV and radio interviews to provide necessary context against which viewers/listeners can gauge how the revelations about NSA operations comport, or do not, with the strictures in the amendment. Thankfully, the language is pretty straightforward and specific:

“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.”

Extraordinary Criticism

Hayden’s cavalier attitude toward ignoring the rights of American citizens even prompted passionate disapproval from two of Hayden’s predecessors who are not normally given to criticizing the performance of their successors. Yet, former NSA directors Odom and Inman spoke out strongly after the revelations in the Dec. 16, 2005 *New York Times* article, “Bush Lets U.S. Spy on Callers Without Courts,” by journalists James Risen and Eric Lichtblau.

Risen had ferreted out explosive information on eavesdropping (and other highly questionable operations) several months before the 2004 presidential election, disclosures that would have given American voters some important information regarding whether Bush deserved reelection or not.

But the *Times*, in its wisdom, acquiesced to the Bush administration's demands that the story be spiked – not because the article was inaccurate, but precisely because it was so accurate, and embarrassing. The White House gave the *Times* the familiar warning that disclosure would “damage national security.”

But as 2005 drew to an end, the newspaper could wait no longer, since Risen's book, *State of War: The Secret History of the CIA and the Bush Administration*, was already in galley and about to be published. The book contained, literally, chapter and verse on the illegal activity authorized by NSA Director Hayden at the behest of Bush and Cheney.

When the *Times* finally published the story in December 2005, the Bush administration scrambled to defend the warrantless eavesdropping, a demonstrably gross violation of FISA expressly forbidding eavesdropping on Americans without a court warrant. The White House immediately asked Hayden, then Deputy Director of National Intelligence, to play point man with the media, helping hapless Attorney General Alberto Gonzales defend the indefensible.

Hayden's perfidy was too much for Gen. Odom, who had been NSA Director from 1985 to 1988. Odom was seething as he prepared to be interviewed on Jan. 4, 2006, by George Kenney, a former Foreign Service officer and now producer of “Electronic Politics.” Odom blurted out, “Hayden should have been court-martialed.” And President Bush “should be impeached,” added the general with equal fury.

Odom ruled out discussing, during the interview itself, the warrantless eavesdropping revealed by the *New York Times* three weeks earlier. In a memorandum about the conversation, Kenney opined that Odom appeared so angry that he realized that if he started discussing the still-classified issue, he would not be able to control himself.

Why was Gen. Odom so angry? Because he, like all uniformed officers (as well as many civilian officials), took an oath to support and defend the Constitution of the United States against all enemies, foreign and domestic; because he took that oath seriously; and because he had done his damndest to ensure that all NSA employees strictly observed the prohibition against eavesdropping on Americans without a warrant.

Also deeply disappointed was former NSA Director Bobby Ray Inman, who led NSA from 1977 to 1981 and actually played a key role in helping shape the FISA law of 1978. (Before he retired, Inman had achieved virtual sainthood in Official Washington as one of the country's most respected intelligence managers, although he was known for looking the other way – or as he put it, “pulling up my socks” – when the powers-that-be were spinning the facts or exceeding their legal powers.)

Hayden's Record

From the Bush/Cheney White House perspective, Hayden had performed quite well working with the supine mainstream media to defend the Bush/Cheney illegal eavesdropping programs. For services performed, Hayden was nominated on May 8, 2006, reportedly at Cheney's urging, to replace CIA Director Porter Goss, who retired abruptly on May 5 after just seven controversial months as director.

So the nomination of Hayden to lead the CIA was very much on the minds of Inman, Risen and others who gathered for a public discussion at the New York Public Library that same afternoon, May 8, 2006. Participants were brought up short when Inman took strong issue with Hayden's flouting of FISA:

“There clearly was a line in the FISA statutes which says you couldn't do this,” said Inman, who went on to call specific attention to an “extra sentence put in the bill that said, ‘You can't do anything that is not authorized by this bill.’”

Inman spoke proudly of the earlier ethos at NSA, where “it was deeply ingrained that you operate within the law and you get the law changed if you need to.” Risen quipped about how easy it would have been to amend the FISA statute after the 9/11 attacks when the American people were demanding revenge: “In October 2001, you could have set up guillotines on the public streets of America.”

Attorney General Gonzales, however, knew that there were still institutional obstacles to the NSA figuratively decapitating the Fourth Amendment. At a press conference on Dec. 19, 2005, three days after the Risen/Lichtblau disclosures in the *New York Times*, Gonzales was asked why the administration did not seek new legislation to enable it to conduct the eavesdropping

program legally. He responded:

“We have had discussions with Congress in the past – certain members of Congress – as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible.”

This was not the only hint at the time that the surveillance program was so huge in scope and so intrusive that even a servile Congress, typically reluctant to turn down any project labeled “anti-terrorist,” would not have blessed it. Really, could even a doormat Congress be expected to approve “Collect Everything?”

Inman's Reversal

By happenstance, I found myself with a front-row seat watching how honor among these thieves played out, i.e., how the Washington Establishment generals and admirals cover for one other.

Admiral Inman's remarks at the New York Public Library had been written up by Steve Clemons in his blog, The Washington Note. Worse still for Hayden, DemocracyNow's Amy Goodman showed video clips of Inman's undisguised criticism of Gen. Hayden on the morning of May 17, 2006, less than a week before the Senate Intelligence Committee took up Hayden's nomination to be CIA director. Something needed to be done ... and quickly.

Specifically, Inman needed to be called to atone for his unspeakable sin of candor – the more so since he enjoyed quasi-sainthood on both sides of the aisle in Congress. So there I sat on May 17 in the anteroom of the CNN/New York studio of Lou Dobbs, who wanted to talk to me about [my mini-debate](#) two weeks earlier with then-Defense Secretary Donald Rumsfeld on Iraq.

Into the waiting room rushed a breathless Bobby Ray Inman. I am then told that he has just been given part of my time, since he needed to discuss the nomination of Michael Hayden to head the CIA. I had read Steve Clemons's blog and was well aware of Inman's remarks on May

8, 2006.

As he rushed to don a borrowed tie, I had just enough time to give him an atta-boy for his honesty at the library and to express the hope he would stay on message with Lou Dobbs. Naïve me!

Watching the monitor I saw Admiral Inman give his highest recommendation for Gen. Hayden as supremely qualified to head the CIA. That, I thought to myself, is how the system works. Hayden's nomination sailed through the Senate Intelligence Committee on May 23 by a vote of 12 to 3 and the full Senate on May 26 by 78 to 15.

A whiff of conscience showed through during Hayden's nomination hearing to become CIA director, though, when he flubbed the answer to what was supposed to be a soft, fat pitch from Bush administration loyalist, Sen. Kit Bond, R-Missouri, then vice-chair of the Senate intelligence overlook committee:

"Did you believe that your primary responsibility as director of NSA was to execute a program that your NSA lawyers, the Justice Department lawyers, and White House officials all told you was legal, and that you were ordered to carry it out by the President of the United States?"

Instead of the simple "Yes" that had been scripted, Hayden paused and spoke rather poignantly — and revealingly: "I had to make this personal decision in early October 2001, and it was a personal decision ... I could not not do this."

Why should it have been such an enormous personal decision whether or not to obey a White House order? No one asked Hayden, but it requires no particular acuity to figure it out. This is a military officer who, like the rest of us, swore to support and defend the Constitution of the United States against all enemies, foreign and domestic; a military man well aware that one must not obey an unlawful order; and an NSA director totally familiar with the FISA restrictions. That, it seems clear, is why Hayden found it a difficult personal decision.

Knowing the Law

No American, save perhaps Admiral Inman and Gen. Odom, knew the FISA law better than Hayden. Nonetheless, in his testimony, Hayden conceded that he did not even require a written legal opinion from NSA lawyers as to whether the new, post-9/11 comprehensive surveillance program – to be implemented without court warrants, without “probable cause,” and without adequate consultation in Congress – could pass the smell test.

Hayden said he sought an oral opinion from then-NSA general counsel Robert L. Deitz, whom Hayden later brought over to CIA as a “trusted aide” to CIA Director Hayden! (In the fall of 2007, Hayden launched Deitz on an investigation of the CIA’s own statutory Inspector General who had made the mistake of being too diligent in investigating abuses like torture.)

Interestingly, Hayden did not pass the smell test for Sen. Barack Obama, D-Illinois, who took a principled stand against his nomination and voted against it the following day. In his brief but typically eloquent [one-minute speech](#) on the Senate floor, Sen. Obama was harshly critical of both Hayden and President George W. Bush. Obama insisted that “President Bush is not above the law; no president is above the law.” His words did not ring as hollow then as they do now in retrospect.

To his credit, I suppose, President-elect Obama did get rid of Hayden – for cause, as I tried to explain in “[What’s CIA Director Hayden Hidin’](#)” on Jan. 15, 2009. I ended that article with the following expression of good riddance: “The sooner Hayden is gone (likely to join the Fawning Corporate Media channels as an expert commentator, and to warm some seats on defense-industry corporate boards) the better. His credentials would appear good for that kind of work.”