REINING IN THE STATE: CIVIL SOCIETY, CONGRESS, AND THE MOVEMENT TO DEMOCRATIZE THE NATIONAL SECURITY STATE, 1970-1978

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ABSTRACT

This dissertation explores the battle to democratize the national security state, 1970-1978. It examines the neo-progressive movement to institutionalize a new domestic policy regime, in an attempt to force government transparency, protect individual privacy from state intrusion, and create new judicial and legislative checks on domestic security operations. It proceeds chronologically, first outlining the state's overwhelming response to the domestic unrest of the 1960s. During this period, the Department of Justice developed new capacities to better predict urban unrest, growing a computerized databank that contained millions of dossiers on dissenting Americans and the Department of Defense greatly expanded existing capacities, applying cold war counterinsurgency and counterintelligence techniques developed abroad to the problems of protests and riots at home. The remainder of the dissertation examines how the state's secret response to unrest and disorder became public in the early 1970s. It traces the development of a loose coalition of reformers who challenged domestic security policy and coordinated legislative and litigative strategies to check executive power.

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INTRODUCTION

In June of 1977 American Civil Liberties Union attorney John Shattuck, a 1968 graduate of Yale Law School, was on the road. He woke up early and put on his brown suit, left the hotel room and drove down a busy street to the community center on Main where he parked his car. A few cast furtive glances at the young man as he entered the room, then quickly returned to whispered conversations. Shattuck unpacked the pamphlets and brochures from his worn briefcase, placing one, "Litigation Under the Amended Freedom of Information Act," in the center of the table. When his powerful baritone voice echoed through the room, people quickly took their seats. Shattuck began by describing the goals of the Campaign to Stop Government Spying--to offer legal advice to victims of government surveillance, to teach them how to use new laws like the Privacy Act and the Freedom of Information Act revisions to obtain copies of their files. A few in the audience scribbled on notepads. Shattuck had conducted dozens of meetings like this around the country in the last year. The seminars represented the triumph of a movement, started in 1970, to democratize the national security state.

In 1977, the House Committee on Government Operations published the first of its kind guide on how to request records from federal agencies. Nearly 50,000 copies of this guide were printed and distributed by men like Shattuck to American citizens from 1977 to 1986. Members of Congress, the House Committee on Government Operations, the Congressional Research Service, and other federal agencies distributed thousands

more. The guide was so widely used that one congressional committee describes as one of the "most widely read congressional committee reports in history."[1] The popularity of the FOIA law speaks to a critical under-historicized aspect of democratic practice in the American polity.

During the 1970s a loose coalition of reformers like Shattuck, operating largely outside of partisan electoral politics, fought to restrain the federal government's wide-scale efforts to curtail civil liberties and to surveil the American public. Political historians have yet to explore how these neo-progressive reformers, deeply informed by the politics of the 1960s, instigated sweeping institutional reform. Forging an extensive knowledge network, they worked to develop capacities, formulate policies, and implement new institutional forms in the national security state. They institutionalized a more democratic domestic security policy regime and developed political and legal tools that enabled Americans to challenge state power.

Neo-progressives aimed to democratize the national security state by forcing government transparency, controlling government surveillance programs, and reinvigorating judicial and legislative oversight of the executive branch. These reformers, like their early twentieth century progressive counterparts, believed in the power of institutions to mediate change in American life. During the 1970s, neo-progressives stood apart from the radical left and the anti-government right—rather than overthrow or demolish American political institutions, neo-progressives sought to reform them. Their

[1] House of Representatives, "A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records," 109th Cong., 1st sess., <http://www.fas.org/sgp/foia/citizen.html>.

efforts to improve citizens' access to government information, at a moment when the United States economy was transforming from a manufacturing base to an information base, proved prescient.[2]

This dissertation explores the movement to rein in the national security state. The story begins with the explosion of domestic security capacities in the 1960s and 1970s. American presidents Lyndon B. Johnson and Richard M. Nixon responded to an era of social change movements, radical politics, and urban disorders by vastly expanding the capacity of the federal government's domestic security apparatus. Using new databank technologies federal agencies watched, wiretapped, and spied on broad segments of the American population. By the mid-1970s the Departments of the Army and Justice alone maintained some 400 databanks containing nearly 200 million files on individuals and organizations in the United States, capacities that rivaled the Federal Bureau of Investigation (FBI).[3]

The rise of a vast and powerful national security state in the United States was a relatively new development in American history. The surprise attack at Pearl Harbor had been a wake-up call, writes historian Douglas Stuart, confirming for national security planners that the state's "procedures for monitoring and managing foreign affairs were fundamentally flawed." In the immediate aftermath of World War II, at the advent of the

[2] On the progressive era, see Alan Dawley *Struggle for Justice: Social Responsibility and the Liberal State*, (Cambridge, MA: The Belknap Press of Harvard University Press, 1991); John Milton Cooper, Jr., *Pivotal Decades: The United States, 1900-1920* (New York: W.W. Norton & Co., 1990); Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America*, (Oxford: Oxford University Press, 2003); Robert Wiebe, *The Search for Order, 1877-1920*, (New York: Hill and Wang, 1967).

[3] Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, *Federal Data Banks and Constitutional Rights*, 93rd cong., 2d sess., 1974, xlix.

Cold War, planners began to centralize foreign policy making within the executive branch and ensure that intelligence gathering and sharing were more systematically integrated into the American state. Policymakers institutionalized the national security apparatus in 1947 with the National Security Act. The statute created the Central Intelligence Agency (CIA) and the National Security Council (NSC), and unified the armed services under one administrative office within the new Department of Defense. These capacities greatly enhanced the power of the president to conduct foreign policy.[4] Historians have thoroughly examined the capacities and growth of the national security state in the mid-twentieth century. And a rich literature has also developed that explores the role of the FBI in domestic security operations.[5] However, relatively little scholarly work has detailed the central role the Department of Defense and the Department of Justice (other than the FBI) played in domestic security operations, especially in the sixties era.

In the 1960s national security managers responded to civil disorder of all kinds by vastly expanding existing surveillance programs and intelligence gathering capacities of the national security state. Relying on the institutional capacities developed to fight the communist menace at home and abroad—counterintelligence and counterinsurgency—and using new computer technologies, agencies within the Department of Defense and

[4] Douglas T. Stuart, *Creating the National Security State: A History of the Law that Transformed America*, (Princeton: Princeton University Press, 2008), 43.

[5] David Garrow, *The FBI and Martin Luther King, Jr.: From "Solo" to Memphis*, (New York: W.W. Norton & Co., 1981); Kenneth O'Reilly, *Hoover and the un-Americans: The FBI, HUAC, and the Red Menace*, (Philadelphia: Temple University Press, 1983); Richard Gid Powers, *Broken: The Troubled Past and Uncertain Future of the FBI*, (New York: Free Press, 2004); Alan Theoharis, *The FBI and American Democracy: A Brief Critical History*, (Lawrence: University Press of Kansas, 2004), and *Chasing Spies: How the FBI failed in Counterintelligence but Promoted the Politics of McCarthyism in the Cold War Years*, (Chicago: Ivan R. Dee, 2002).

the Justice Department massively expanded their capacities to spy on American citizens. This capacity – and the use of that capacity – was developed by both Democratic and Republican administrations in response to a rapid succession of unparalleled domestic crises, riots, and mass protests.

New technologies, especially computers and databanks, allowed national security managers to respond to these crises in new ways. Computers made the collection, storage and retrieval of vast quantities of data (in this case intelligence) possible as never before. Computers facilitated the easy exchange of data among other agencies. The rise of the computer and its databank, funded as it was by government contracts, enabled national security managers to use counterintelligence methods as never before.[6] Rarely did national elites worry how the implementation of these capacities might undermine constitutional protections. Few possessed a profound appreciation for constitutional law or civil liberties. They were, for the most part, technocrats with a powerful trust in the use of technology and institutional capacity to solve social problems. A few recognized the potential constitutional conflicts of broad domestic surveillance operations, but envisioned the programs as punctuated responses to immediate problems to be discontinued when social order returned.

Historians have largely neglected the contests over domestic security policy in the 1970s because, in exploring the controversies of the "long" American Sixties, they have too often relied on a simplistic narrative dyad of government officials and elected

[6] Martin Campbell-Kelly and William Aspray, *Computer: A History of the Information Machine*, 2d edition, (Cambridge, MA: Westview Press, 2004).

officials versus protest movement radicals. Few scholars have attempted to write a more sophisticated and nuanced analysis of the role civil society played in American political development, in general, and particularly in the 1960s and 1970s. By foregrounding the role of civil society in the battles over the scope and reach of the domestic national security state in the immediate post-1960s, I mean to focus attention on those who deliberate politics outside the state apparatus, including state and non-state actors, organizations and associations, the media, and the polity. This dissertation places civil society at the center of public policymaking. Though recent works by scholars such as Elisabeth Clemens, Steve Gillon, Brian Balogh, and Glenda Gilmore have done much to broaden our understanding of the role individuals, organizations, and associations have played in leveraging political power at the local, state, and national levels, the role of civil society in American political development remains under-explored.[7]

Neo-progressive reformers and the movement they led are critical to understanding the political capacity of civil society in late twentieth century America. The neo-progressives who promoted policy reform in the 1970s took advantage of structural shifts in the national consensus—promulgated by divisive foreign and domestic policies of the 1960s era—to create new political opportunity and forge new tools to

[7] Elisabeth Clemens, *The People's Lobby: Organizational Innovation and the Rise of Interest Group Politics in the United States, 1890-1925*, (Chicago: University of Chicago Press, 1997); Steve Gillon, *Politics and Vision: The ADA and American Liberalism, 1947-1985*, (New York: Oxford University Press, 1987); Brian Balogh, *Chain Reaction: Expert Debate and Public Participation in American Commercial Nuclear Power, 1945-1975* (New York: Cambridge University Press, 1991); Glenda Gilmore, *Gender and Jim Crow: Women and the Politics of White Supremacy in North Carolina, 1896-1920*, (Chapel Hill: The University of North Carolina Press, 1996); Stephen R. Ortiz, "Rethinking the Bonus March: Federal Bonus Policy, the Veterans of Foreign Wars, and the Origins of a Protest Movement," *Journal of Policy History*, vol 18, no 3, 2006, 275-303; David Waldstreicher, *In the Midst of Perpetual Fetes: The Making of American Nationalism, 1776-1820*, (Chapel Hill: University of North Carolina Press, 1997).

strengthen the power of civil society in a democratic framework. By shifting our gaze away from state institutions and street protests, and refocusing on the "public sphere" where contentious politics take place, we can better understand the negotiations among state and society, institutions and the polity, in late twentieth century America.

While civil society has at times been a powerful site of political possibility, its ability to develop repertoires, capacities, and forms to promulgate political change is a process grounded in a historical context. It is the historical contingency of the political capacity of civil society that scholars of American politics have too often overlooked. In the case of the movement to reform the national security state, the relative success of reformers was contingent upon the failed policies and programs of the late 1960s. Neo-progressive reformers leveraged political opportunity in the twin crises of the Vietnam War and Watergate, took advantage of a resurgent investigative journalism (what I call neo-muckraking journalism), and drew upon the capacities of a coterie of public advocacy groups.

The political capacity of civil society is more than the aggregate of political activists. Jurgen Habermas' *The Structural Transformation of the Public Sphere*, a historical investigation of the political capacity of the bourgeois public sphere, pushed scholars to evaluate political change through the lens of a historically contingent civil society.[8] This dissertation pays careful attention to the historical context that laid bare myriad political opportunities which savvy state and non-state actors alike leveraged to

[8] Craig Calhoun, ed., *Habermas and the Public Sphere*, (Cambridge, MA: The MIT Press, 1992). See also, Jurgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, (Cambridge: MIT Press, 1989).

reform institutions. It traces the process of movements and the procedures of reformers, while grounding these actions in the realm of historic possibility.[9]

Remarkably little work has been done in analyzing how reformers, muckraking journalists, and activists worked to rein-in the national security state in the late 1960s and 1970s era. Historians have inadequately explained the politics of the immediate post-1960s era, and political capacity and development of civil society in the 1970s era is especially underdeveloped as a historical subject. In part this inadequacy reflects the relative paucity of general scholarship on the era. The Seventies have languished, as historian Bruce Schulman writes, as "the sickly, neglected, disappointing stepsister to that brash, bruising blockbuster of a decade"—the Sixties.[10] Scholars tend to treat the era as a transitional decade when the power of the New Deal liberal coalition waned and a conservative political agenda gained traction with the American electorate.[11] Influenced by Arthur Schlesinger's groundbreaking work *The Imperial Presidency* (1973), many scholars characterize American post-Watergate politics as a congressional resurgence. These accounts suggest that the political battles of the decade are best typified by the legislative branch's efforts to reassert its prerogatives and challenge the so-called

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[9] Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics*, Second edition, (New York: Cambridge University Press, 2002).

[10] Bruce J. Schulman, *The Seventies: The Great Shift in American Culture, Society, and Politics*, (Cambridge, MA: Da Capo Press, 2001), 1.

[11] Steve Fraser and Gary Gerstle, eds., *The Rise and Fall of the New Deal Order, 1930-1980,* (Princeton: Princeton University Press, 1989); Edward Berkowitz, *Something Happened: A Political and Cultural Overview of the Seventies,* (New York: Columbia University Press, 2006); Bruce Schulman and Julian Zelizer, eds., *Rightward Bound: Making American Conservative in the 1970s*, (Cambridge, MA: Harvrd University Press, 2008).

imperial presidency.[12] Other scholars see the period as the first decade of "diminishing democracy," as Americans withdrew from national associations that had organized American socio-political life for nearly two centuries.[13] All these accounts share one common narrative approach—the public sphere was declining in 1970s America.

The neo-progressive reform movement grew out of the tumultuous politics of the sixties. The turbulent events of the late 1960s—the increasingly unpopular war in Vietnam, the limitations of the War on Poverty, the assassinations of Robert Kennedy and Martin Luther King, Jr., the urban riots and campus protests throughout the decade—seriously undermined the U.S. public's belief in the competency of national political figures and government institutions to solve the nation's problems.[14] The citizenry's alienation also fostered a wave of individual and organizational efforts to reform and rein-in state power. This is what historians have failed to see.

The contentious politics of the 1960s created fissures and opened up new political opportunities for neo-progressive reformers of the 1970s era – a group that included a new breed of investigative journalists, "good government" activists, government whistleblowers, "process-oriented" elected officials, and public interest groups – to

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[12] Arthur M. Schlesinger, *The Imperial Presidency*, (Boston: Houghton Mifflin, 1973). See also Thomas E. Cronin, "A Resurgent Congress and the Imperial Presidency," *Political Science Quarterly*, Vol. 95, No. 2 (Summer, 1980), 209-237; Theodore J. Lowi, "Presidential Power: Restoring the Balance," *Political Science Quarterly*, Vol. 100, No. 2 (Summer, 1985), 185-213; Sidney M. Milkis, "The Presidency, Democratic Reform, and Constitutional Change," *PS: Political Science and Politics* (Summer 1987), 628-636.

[13] Theda Skocpol, *Diminished Democracy: From Membership to Management in American Civic Life*, (Norman: University of Oklahoma Press, 2003); Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community*, (New York: Simon & Schuster, 2000).

[14] See David Farber's introductory essay, "The Torch had Fallen," in Beth Bailey and David Farber, eds., *America in the Seventies*, (Lawrence: University of Kansas Press, 2004).

challenge state power.[15] Deeply informed by the Movement's "revolt against the establishment," neo-progressives saw opportunities to rein-in state power embedded in the instability that the turbulent politics of the Sixties helped to create. Political instability, as sociologist Doug McAdam argues, tends to destroy "any semblance of a political status quo, thus encouraging collective action by *all* groups sufficiently organized to contest the structuring of a new political order."[16] In the 1970s neo-progressives took advantage of these structural shifts and battled to force institutional change through democratic forms. They envisioned their movement to reform the national security state as fundamental to restoring participatory democracy. Reformers battled to make the processes of the state's most powerful institutions consistent with democratic principles.[17]

Even as the historical processes of the 1960s laid the state bare to neo-progressive challenge, national security managers expanded the domestic security capacities of the state. Throughout the 1960s, activists suspected that they were targets of government surveillance programs. Radicals joked half-heartedly about the "plain clothes"

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[15] Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics*. Second edition, (New York: Cambridge University Press), 2002.

[16] Terry Anderson, *The Movement and the Sixties: Protest in America from Greensboro to Wounded Knee,* (Oxford: Oxford University Press, 1995), preface; Doug McAdam, *Political Process and the Development of Black Insurgency, 1930-1970,* (Chicago: University of Chicago Press, 1982), 42.

[17] Historian James Kloppenberg has argued that American political development has been punctuated by "the deep disagreements over procedures as well as principles." Kloppenberg, "From Hartz to Tocqueville," in Jacobs, et. al., eds., *The Democratic Experiment*, 351.

government agent in the crowd who "took names," a phrase popularized by folk singer Bob Dylan in his 1965 hit "Subterranean Homesick Blues."[18]

Just as the social processes of the 1960s promoted political instability, so too did institutional processes. Mainstream media played a pivotal role in the movement for national security reform in the 1970s. Though some radicals at the time believed the mass media had circumscribed the political power of the Movement by structuring the discursive frames of public debate,[19] the mass media, both in print and television, played a crucial role in sparking debate about national security policy and institutional reform in the 1970s. Historians of the late twentieth century have not adequately historicized the political capacity of the news media and its influence on the political process.[20]

The divisive political climate of the 1960s created opportunities for a generation of investigative journalists to challenge the political status quo. In the postwar period, the state maintained a policy monopoly on national security issues. As a consequence, explains political scientist Barthlomew Sparrow, the Washington press corps had "little option but to report the news on terms favorable to the people and organizations providing the news."[21] The Vietnam War, however, deeply divided political elites over

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[18] Bob Dylan, "Subterranean Homesick Blues," original release Mar 1965, Columbia Records. "Subterranean Homesick Blues" was Dylan's first Top 40 Billboard Hot 100 hit.

[19] Todd Gitlin, *The Whole World is Watching: Mass Media in the Making and Unmaking of the New Left,* (Berkeley: University of California Press, 2003).

[20] Some notable exceptions include David Greenberg, *Nixon's Shadow: The History of an Image,* (New York: W.W. Norton, 2003); Donald Ritchie, *Reporting from Washington: The History of the Washington Press Corps,* (New York: Oxford University Press, 2005); David Halberstam, *The Powers That Be,* (New York: Alfred A. Knopf, 1979).

[21] Barthlomew Sparrow, *Uncertain Guardians: The News Media as a Political Institution,* (Baltimore: The Johns Hopkins University Press, 1999), 65-66.

national security policy and the role of the state. Mass media leveraged the shattered consensus, gaining access to previously inaccessible arenas of public policy debate. Sixties political battles ruptured any consensus among elected officials on Capitol Hill or in the White House, creating sites of political opportunity for neo-muckrakers to investigate where policy monopoly had previously made such investigation impossible.

The mainstream media responded to the perceived institutional failures of the 1960s by creating new institutional forms both in print and television through which neo-muckrakers could publicize their stories. NBC's *First Tuesday*, CBS' *60 Minutes*, and the *Washington Monthly* offered forums for journalists who wanted to organize in-depth investigations of the nation's most powerful institutions and people. Editors and publishers welcomed insider accounts, and whistleblowers took advantage of these new forms to level criticism at national elites and reveal institutional failure. The media played a fundamental role in the early 1970s in spurring opinion formation and driving public debate about the challenges that the national security state posed to democratic practice.

New institutional forms offered reformers opportunity to publicize state abuses and institutional failures. When government surveillance programs became public knowledge in 1970 advocacy organizations worked to manage discourse and debate to ensure policy reform. By the early 1970s these organizations relied on an expansive repertoire of tools to formulate public policy and drive institutional reform. Public advocacy groups proliferated in the 1960s, a response to the institutional failures of the

state. Some former Washington insiders, such as Common Cause founder John Gardner, had become disillusioned by the failure of elected and appointed officials and the institutions they ran. Organizations such as the American Civil Liberties Union had a long history of public advocacy but experienced a boon in membership and foundation support in this period. These organizations drew on the playbook of established "public interest groups," employing the traditional tactics of legislation drafting, lobbying elected officials, and cultivating public opinion.[22]

In the late 1960s and early 1970s, advocacy groups like the ACLU added jurisprudential strategies to their repertoire, seeking to force challenges to national security policy from the bench. In the words of John Shattuck, an architect of the ACLU civil liability program, "The threat of a civil suit should in some respects be a more powerful deterrent against illegal official conduct than the threat of criminal prosecution."[23] Though not always successful in court, these jurisprudential programs did force security managers to consider the legal repercussions of national security policies that could potentially infringe upon the civil liberties of American citizens.

In the 1970s the ACLU developed and implemented an aggressive program of civil litigation. Specifically, the organization targeted top-level officials in the national security state who approved programs to spy on American citizens. The ACLU's

[22] Elisabeth Clemens, *The People's Lobby*. For a brief treatment of public advocacy organization's and their role in institutional reform of Congress, see Julian Zelizer, *On Capitol Hill: The Struggle to Reform Congress and its Consequences, 1948-2000,* (Cambridge: Cambridge University Press, 2004), 100. Zelizer underestimates the power of these groups to fundamentally drive reform in the 1970s.

[23] John Shattuck, "A Program for Civil Liability," 4 Nov 1975, ACLUP, box 696, fol 3, PPP, DRBSC, PUL.

litigation strategy was two-fold, in the words of executive director Aryeh Neier: "to stop political surveillance of dissenters," and to compel the government, through the courts, "to reveal information that it tries to keep secret."[24] Civil lawsuits granted the organization access to classified information in the discovery phase. This strategy was not new to the ACLU. But what was new, in the wake of the divisive public debates about American foreign policy in the Vietnam era, was the connection that challengers to the national security apparatus made between the government's penchant for secrecy in foreign policymaking and the unchecked power of national security institutions. Ultimately, challenging national security policy through the courts had two long-term consequences for the American state and the democratic experience. First, though the rulings as often protected the executive branch's prerogatives on national security issues as undermined them, a few cases such as *United States v. United States District Court* and *Halperin v. Kissinger*, established a judicial role in what had traditionally been an area of public policy reserved only to the executive branch. Second, and perhaps with more immediate impact on the lives of average citizens, litigation strategies emboldened citizens to continue to dissent from government policies. In Neier's words, though the litigation was not "an external remedy for an interference with the political process; it has functioned as an integral part of the political process in mitigating the effects of interference."[25] Neo-progressives developed a powerful deterrent to First Amendment rights violations. Elected and appointed officials, consequently, would take more care

[24] Aryeh Neier, *Only Judgment: The Limits of Litigation in Social Change*, (Middletown, CT: Wesleyan University Press, 1982), 154.

[25] Neier, *Only Judgment*, 160.

when authorizing security policies that could potentially violate the constitutional rights of American citizens.

In addition to new forms, public advocacy groups drew upon well-established lobbying practices to institutionalize reform. From its early days, the neo-progressive movement worked closely with like-minded elected officials in the legislative branch. Reformers relied on congressional hearings and investigations to arouse public interest in national security reform. Claims of spying and surveillance piqued public interest, but the theatrical production of congressional hearings, which many Americans consumed via television, legitimated these claims. The structured arena of congressional politics helped Americans connect and sympathize with victims of government surveillance.[26]

Using sophisticated legal and jurisprudential strategies, neo-progressives worked closely with allies in Congress to challenge executive prerogative on issues of national security. Some reformers focused on managing deliberative politics. Knowing that policy change would only come through the imposition of new legal and institutional structures, they sought to ignite public discourse and shape public debate. Through conference planning, letter to editor campaigns, and newsletters, they plotted a public relations campaign to shape public opinion in favor of national security reform. On some occasions, the media aided these efforts with new exposés offering further evidence of the extra-democratic processes of the national security state. At other times reformers masterfully manipulated media coverage so as to further public debate in terms favorable

[26] John L. Brooke, "Reason and Passion in the Public Sphere: Habermas and the Cultural Historians," *Journal of Interdisciplinary History*, 29:1 (Summer, 1998), 43-67.

to their reform proposals. Through the process of discourse and debate in the public sphere, the media, public interest groups, government activists and reformers worked to mediate change through institutional structures. Watershed legislative reforms in the 1970s, I argue, offer evidence of what historian John Brooke has called "the continuous process of deliberation bubbling up from society."[27] Neo-progressives managed the passage of four statutes which reformed democratic practice in the United States: the Freedom of Information Act revisions and the Privacy Act of 1974, the establishment of permanent congressional intelligence oversight committees in 1976 and 1977, and the passage in 1978 of the Foreign Intelligence Surveillance Act.

These legislative successes speak to the determination on the part of neo-progressives to "rein in" the national security state, rather than overturn it. Since the nation's founding, in the words of historians Julian Zelizer and Meg Jacobs, Americans have struggled to "endow a central government with legitimacy and authority."[28] In the 1970s reformers battled to construct new institutional forms and capacities atop existing institutions.[29] Working within existing structures, neo-progressives sought to leverage the decentralized American state, distributing oversight of the national security apparatus among the three branches of government. To do so, they developed new state capacities

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[27] John L. Brooke, "Reason and Passion in the Public Sphere: Habermas and the Cultural Historians," *Journal of Interdisciplinary History*, xxix: I (Summer, 1998), 61.

[28] Jacobs and Zelizer, "The Democratic Experiment: New Directions in American Political History," in Jacobs, Novak, Zelizer, eds., *The Democratic Experiment*, 9.

[29] Stephen Skowronek examines statebuilding in the progressive era and argues that the new state that emerged at the turn of the century was built over the top of existing structures and forms. See *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*, (Cambridge: Cambridge University Press, 1982).

to manage constitutional checks and balances: bureaucracies within bureaucracies to process FOIA requests, new congressional committees to oversee domestic and foreign intelligence programs, and a new national security court. As James Morone has observed about American democracy, "the search for more direct democracy builds up the bureaucracy." Neo-progressives built up the state in order to restrain state power.[30]

Massive legislative reform would not have been possible without bi-partisan support. In the 1970s the legislative branch was itself an institution in transition. Congress sought to reclaim powers that many legislators believed had been co-opted by the executive and judicial branches. Historian Julian Zelizer recognizes that elected officials in both parties struggled to legitimize the legislative branch in the eyes of the American polity in the 1970s, instituting far-reaching internal reforms, and that understanding is critical. But Zelizer underplays the role of public interest groups in forcing this reform.[31] Using the resources of public advocacy organizations like the Center for National Security Studies, neo-progressives exploited a historic opportunity when both political parties had been discredited in the eyes of the American public, to push for national security reform legislation. President Lyndon Johnson's failed policies in Vietnam and his inability to successfully combat civil disorder undermined the strength of the Democratic Party at the national level in the late 1960s. Johnson's policies helped catapult the Republicans into the White House in 1968 with the election of Richard Nixon. Nixon's resignation from office over the Watergate scandal burdened the

[30] James Morone, *The Democratic Wish: Popular Participation and the Limits of American Government*, (New Haven: Yale University Press, 1998), 1.

[31] Julian Zelizer, *On Capitol Hill: The Struggle to Reform Congress and its Consequences, 1948-2000*, (Cambridge: Cambridge University Press, 2004).

Republican Party with regaining the public's trust. The polity's disillusionment with both parties created political opportunity for neo-progressives who built short-term bipartisan support for wide-ranging policy reform.

Though brief, this nonpartisan political moment offered an opportunity for neo-progressives to stake out common ground in their quest for national security policy regime change. What united all reformers of this era—Democrats and Republicans, conservatives and liberals, civil libertarians and law and order proponents—was the concern that state institutions failed to solve national problems. Across the political spectrum, elected officials located the roots of institutional failure in different places, but they all agreed on that one point. This uneasy alliance meant that the success of the movement to democratize the national security state would be dependent on the ability of reformers to stake out common legislative ground and political purpose, while downplaying ideological difference.

Indeed, conservatives and liberals agreed on the principle of institutional reform, though ideological differences often complicated the reform process. Conservatives denounced the burgeoning power of the executive branch as a violation of the separation of powers, and as evidence of a tyrannical executive. Federalism had served southern interests for centuries, and their opposition to a strong central state was rooted in the understanding that a powerful national government threatened to undermine local traditions, especially slavery and later institutionalized inequality.[32] But conservatives also drew on contemporary examples to support their opposition to the burgeoning power

[32] Robin Einhorn, *American Taxation, American Slavery*, (Chicago: The University of Chicago Press, 2006).

of the national security state. They pointed to Soviet style totalitarianism as an example of state power run amok. Dissent, they argued, was a founding principle of the United States and a keystone of American democracy that appealed to peoples around the world. The state must impose law and order, they reasoned, while also tending to the fundamental tenets of American democracy—especially the right to privacy.

Like conservatives, liberals opposed state domestic spy programs on constitutional grounds. But their objections were not rooted in a fundamental aversion to state power. Though they charged national security managers with blatant disregard for American constitutional rights—dissent, freedom of association, personal privacy—they worried more about how this state power undermined civil society's role in exercising democratic controls over government programs. The national security state's natural tendency toward secrecy, they argued, deprived citizens of their fundamental right to know what their government was doing. Without knowledge, deprived of access to information, they believed that democratic practice would suffer. Liberals wanted to legitimize national security practice by democratizing the national security state.

Under this expansive ideological tent, neo-progressives gathered a loose, bipartisan national political coalition. The movement included civil libertarians at the ACLU, conservatives like Senator Sam Ervin (D-NC) and Representative Barry Goldwater, Jr. (R-CA), liberals like Senator Edward Kennedy (D-MA) and moderates like Representative William Moorhead (D-PA), privacy advocates such as Professors Arthur Miller and Samuel Dash, radicals like the Citizens' Commission to Investigate the FBI, reporters, former NSC staffers and former Army counterintelligence agents. A few

opposed "big government" because they worried that new technologies like the computer and databank could translate into a nightmare not unlike George Orwell's *1984.* Others believed that "good government" could solve the nation's problems, but objected to the extraordinary power maintained by extra-democratic government institutions like the FBI and CIA. Nonetheless, all agreed that aspects of the national security state needed to be brought in line with democratic practice.

Neo-progressives developed new tools to challenge state power on issues of national security. The American state is "exceptional," both in terms of its permeability to the pressure of public interest groups, and because, in comparison with western European nations, it is relatively weak and decentralized. Though elected officials have centralized and greatly expanded state power in the last century, the American state remains, in the words of Theda Skocpol, "fragmented, dispersed, and everywhere permeated by organized societal interests."[33] A rich literature details the myriad ways in which public interest groups have influenced statebuilding and American political development.[34] But scholars have largely overlooked the less accessible side of the American state—the national security apparatus.

Is the state, as Skocpol suggests, a realm easily captured by civil society, or is the state a relatively autonomous actor which civil society can only episodically and partially

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[33] Theda Skocpol, "Bringing the State Back In: Strategies of Analysis in Current Research," in Peter Evans, Dietrich Rueschemeyer, and Theda Skocpol, eds., *Bringing the State Back In*, (Cambridge: Cambridge University Press, 1985), 12.

[34] Frank Baumgartner and Bryan Jones, *Agendas and Instability in American Politics*, (Chicago: The University of Chicago Press, 1993); Brian Balogh, *Chain Reaction: Expert Debate and Public Participation in American Commercial Nuclear Power, 1945-1975* (New York: Cambridge University Press, 1991).

control? Political scientists have long debated these questions.[35] From a historian's perspective Skocpol's model of the American state as a weak, fragmented, and easily influenced force fails to account for the ways in which state power and the power of public interest groups have changed over time.

During the mid-twentieth century, due in large part to the exigencies of the Cold War, the American state had taken on a new and immensely more powerful guise: the "national security state." As J. P. Nettl explains in describing this national security state, "Whatever the state may or may not be internally, … there have in the past been few challenges to both its sovereignty *and* its autonomy in 'foreign affairs.'"[36] Operating within this autonomy, cold war national security managers rarely had to negotiate the political obstacles encountered by their counterparts outside the national security apparatus. Historically, and especially since the onset of the cold war, Americans in the twentieth century had little input in American foreign policy outside of electoral politics. One former National Security Council staffer, Morton Halperin, explained in his book *Top Secret*, the public assumes "that considerations of national security justify a measure of secrecy in military and diplomatic affairs." [37] Since its institutionalization in the late

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[35] Political scientists have largely supported the argument that civil society acts as a constraint on the state. The most notable works include E.E. Schattschneider's *The Semi-Sovereign People* (New York: Holt, Rinehart and Winston, 1960); James Q. Wilson, *Political Organizations*, (New York: Basic Books, 1973); Theodore J. Lowi, "American Business, Public Policy, Case Studies, and Political Theory," *World Politics*, 16 (1964), 685-714. One notable exception, Eric Nordlinger, argues for the autonomy of state action in his book, *On the Autonomy of the Democratic State*, (Cambridge, MA: Harvard University Press, 1981).

[36] J.P. Nettl, "The State as a Conceptual Variable," *World Politics* 20 (1968), 563-564.

[37] Morton Halperin and Daniel Hoffman, *Top Secret: National Security and the Right to Know*, (Washington, D.C.: New Republic Books, 1977), 1.

1940s, the national security state had largely resisted political pressures from traditional public interest groups. This cold war consensus held even as national security managers turned state capacities on domestic problems, and especially the multiple crises of the late 1960s. Revelations of the state's unchecked domestic surveillance programs united neo-progressives who challenged the power of the executive on issues of national security. Neo-progressives created new institutional forms to challenge this apparatus in the 1970s. They institutionalized points of access where civil society could deliberate the domestic applications of the national security state.

At a methodological level, this dissertation locates civil society as a key loci for political change in late twentieth century America. Historians of 1960s and 1970s America have too often adhered to a bifurcated approach to American political development. Policy historians like Hugh Davis Graham and Irvin Bernstein see the executive branch as a primary driving force, crediting Presidents John F. Kennedy and Lyndon B. Johnson with sweeping legislation aimed at nationalizing social and racial equality. For these close observers, political change took shape in the halls of the West Wing or on Capitol Hill.[38] Others have devoted their attention to the protests and demonstrations of activist organizations. By these accounts the street heat generated by radicals forced political change from the bottom-up.[39] A few have worked to integrate

[38] Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy*, (New York: Oxford University Press, 1990); Irvin Bernstein, *Guns or Butter: The Presidency of Lyndon Johnson*, (New York: Oxford University Press, 1996).

[39] Taylor Branch, *Parting the Waters: America in the King Years, 1954-1963*, (New York: Simon & Schuster, 1989); *Pillar of Fire: America in the King Years, 1963-1965*, (New York: Simon & Schuster, 1999); *At Canaan's Edge: American in the King Years, 1965-1968*, (New York: Simon & Schuster, 2006); Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy*, (Princeton: Princeton

these narratives, suggesting how both elites and dissenters played vital roles in constructing a new national political culture, especially in regard to 1960s era civil rights legislation. [40]

These approaches exemplify the academy's own "ambivalence" about a powerful American state. This ambivalence is evident in the ways in which recent historical approaches have worked to "bring the state back in" to traditional stories of American political development. Historians Meg Jacobs, William Novak and Julian Zelizer, in their critically important edited work, *The Democratic Experiment*, offer promising new approaches to the development of political history, especially integrating institutional histories of public policymaking with sociocultural approaches. By integrating the non-elite perspective, these historians have incorporated important new methodologies for understanding the processes and forms of political history and public policy development.[41] And yet, political historians still battle to define where the base of power lies in American political development. In his own major works, Zelizer finds the roots of political change anchored in institutions. His most recent work, *On Capitol Hill,* sees Congress as the fulcrum of twentieth century political change. Zelizer consistently underplays the role of civil society, particularly advocacy groups like Common Cause

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University Press, 2000); and Charles Payne, *I've Got the Light of Freedom: The Organizing Tradition and the Mississippi Freedom Struggle*, (Berkeley: University of California Press, 1995).

[40] David Farber, *The Age of Great Dreams: America in the 1960s,* (New York: Hill & Wang, 1994); Ronald Formisano, *Boston Against Busing: Race, Class and Ethnicity in the 1960s and 1970s,* (Chapel Hill: University of North Carolina Press, 1991); John Dittmer, *Local People: The Struggle for Civil Rights in Mississippi*, (Urbana: University of Illinois Press, 1994); and Bruce Shulman, *The Seventies: The Great Shift in American Culture, Society, and Politics,* (New York: Free Press, 2001).

[41] Meg Jacobs, William Novak and Julian Zelizer, *The Democratic Experiment: New Directions in American Political History*, (Princeton: Princeton University Press, 2003), 1-19.

and new media forms like C-SPAN and cable television's Cable News Network, which he treats as tertiary players in political change.[42]

In contrast, civil society plays a central role in Meg Jacobs' careful study of twentieth century consumer politics. *Pocketbook Politics,* she argues, was the organizing principle that supported the political triumph of New Deal-style liberalism. The story of twentieth century America, according to her account, is punctuated by consumer demands for affordable goods and foodstuffs, and battles to maintain the purchasing power of the middle class. In Jacobs' story, non-state actors exert tremendous influence over the state. Jacobs offers a compelling new narrative for explaining twentieth century statebuilding and the rise of decline of New Deal-style liberalism, though her argument weakens considerably as the middle class consumer-labor coalition wanes in the post World War II era.[43]

Neither state-centered approaches, such as Zelizer's, nor bottom-up accounts like Jacobs', adequately explain American political development in the twentieth century. The state and civil society interact in a world of structured, historically contingent norms. This dissertation aims to reframe the question driving the study of American political development. Instead of asking where power is located, this dissertation explores the

[42] Julian Zelizer, *Taxing America: Wilbur D. Mills, Congress, and the State, 1945-1975*, (Cambridge: Cambridge University Press, 1998); *On Capitol Hill: The Struggle to Reform Congress and its Consequences, 1948-2000*, (Cambridge: Cambridge University Press, 2004); *The American Congress: The Building of Democracy*, (Boston: Houghton Mifflin Co, 2004).

[43] Meg Jacobs, *Pocketbook Politics: Economic Citizenship in Twentieth-Century America*, (Princeton: Princeton University Press, 2005).

factors that at times enable and at times inhibit power exercised among democratic actors in the United States.

Chapters 1 and 2 examine the state's response to the explosive civil unrest of the late 1960s. Years of urban unrest and street heat prompted national security managers, at the request of President Lyndon Johnson, to turn the capacities of the national security state on American citizens. Attorney General Ramsey Clark expanded the Justice Department's intelligence gathering apparatus, encouraging the collection of information about anyone who might be pose a threat to the domestic security of the nation, particularly African Americans residing in urban ghettos. Desperate to know more about what was going on in black urban communities, and lacking institutional capacities for gathering such information, Clark relied on off-the-shelf security solutions—vacuuming up intelligence from any federal agency with records on urban residents. During the same period, Hoover expanded the FBI's COINTELPRO programs—an aggressive campaign to destroy the communist party—to disrupt the civil rights movement, the New Left, and the anti-war movement. Hoover's agents employed covert actions against dissenting Americans without the express approval of elected officials.

The long, hot summer of 1967 proved to be extraordinarily violent and destructive in America's cities. In particular, the revolts in Detroit and Newark resulted in dozens of deaths, hundreds of arrests, and millions of dollars in property damage. Advised that other metropolitan areas would likely succumb to upheaval, President Johnson tasked the Department of Defense under Secretary Robert McNamara with mounting a military response to disorder. Cold war national security planners applied available institutional

forms--counterintelligence methods developed to fight Cold War communists in Berlin, Saigon and Seoul--to combat the problems of social upheaval and disorder. Counterintelligence officers, trained in communist hotspots, were ill prepared to comprehend the complex social and cultural factors that triggered the tumultuous events of the late sixties in the United States. They had little patience for constitutional protections such as First Amendment rights to dissent and freedom of association. Consequently, their methods violated the rights of thousands of American citizens.

Even as the state responded to crises with extra-legal programs, Americans developed new institutional forms to challenge these state-directed programs . The perceived policy failures of the executive branch in the 1960s—especially the Johnson administration's "credibility gap," on the Vietnam War—spurred a new generation of editors and journalists in print and television media to focus their investigative lens on powerful federal institutions and the officials who ran them.[44]

In 1970 a former Army counterintelligence officer published a whistleblower account of the Army's domestic surveillance program in a new magazine, *The Washington Monthly*, that had been founded by a veteran Washington insider, Charles Peters to uncover just such abuses of power. Chapter 3 explores how this officer's story catalyzed a broad-based movement for domestic security reform. Public interest groups, like the ACLU, had been searching unsuccessfully for irrefutable evidence of government spying. The officer's expose convinced victims of Army spying to serve as plaintiffs in a lawsuit against the government. Conservative Senator Sam Ervin (D-NC), the Senate's

[44] Leonard Downie, *The New Muckrackers*, (Washington: New Republic Book Co., 1976).

constitutional expert, turned his subcommittee's investigative capacities on the army program. Rather than focusing exclusively on the army's program to monitor dissent, Ervin examined the federal government's use of computer technology and its potential to undermine individual privacy rights. Ervin's hearings revealed that many government agencies collected personal information about American citizens. Most did so without the express authorization of Congress. Ervin worked to maximize press coverage and spur deliberative debate about the issues among the public. Americans from around the country wrote Ervin. One citizen in Massachusetts articulated a common concern: "If a nation's government, charged since its earliest beginnings with protecting the rights of privacy, free speech, assembly, becomes a serious menace to those very freedoms, then who, who will protect our civil liberties?"[45]

The following year the Nixon administration sued the *New York Times* to halt publication of the "Pentagon Papers," the Department of Defense's internal document set that provided a frank and unflattering assessment of the U.S. military effort in Vietnam. The White House claimed that, by publishing the documents the newspaper endangered national security. To neo-progressives, the army's program of surveillance and the effort to enjoin the *Times* were two sides of the same coin: national security policy was not amenable to the democratic process of checks and balances. The national security state, they reasoned, needed more transparency.

Chapter four explores how the issue of transparency, especially regarding national security policy, catalyzed a broader movement. Before the events at the Watergate office

[45] Anonymous to Senator Sam Ervin, 1 Mar 1971, in *Federal Data Banks, Computers and the Bill of Rights*, 1522.

complex roiled the American electorate and Congress, the national media, key elected officials in Congress, and public interest groups like the ACLU demanded greater public disclosure of federal agencies and programs. The Watergate scandal, following so closely on so many other revealed abuses of government power, proved a watershed for the neo-progressive reform movement. The event itself prompted broad debate in the public sphere about the problems of executive power, the need for greater transparency in domestic security policy and more careful oversight of the activities of various agencies—especially the FBI and CIA—within the national security state.

Neo-progressive reformers faced a serious policy challenge—how to overcome the secrecy of national security institutions in order to propose policy reform. Aryeh Neier established the Center for National Security Studies (CNSS) in 1974 to explore these policy problems. CNSS attracted former government insiders and "good government" activists who brought their own expertise to bear on the issues of national security policy. Americans and their elected officials had favored expansive executive power in the realm of national security for decades. Reformers found it impossible to evaluate these policies because the national security state operated outside the system of checks and balances. Through personal relationships and professional contacts neo-progressives developed "knowledge networks," individuals who could provide legislators with valuable insight into an otherwise opaque realm of public policy. Congress drew on these knowledge networks when it began the difficult legal work of writing statutes to reform national security policy.

Watergate severely weakened the office of the president and provided impetus for Congress to reassert its oversight functions, particularly regarding the transparency of national security programs and policies.. Chapter five explores how, in the wake of Watergate, Congress institutionalized a new repertory that broadened people's ability to access government information. The Freedom of Information Act revisions gave the media and the public a powerful tool of discovery, enabling them to request information from government agencies with greater ease. The Privacy Act created a new mechanism for citizens to petition the government for access to their individual records and to dispute the material held therein.

Neo-progressives hailed these new laws as major victories for the American people. They continued to fight, however, to democratize national security agencies. The congressional Watergate investigation revealed that the executive branch had misused intelligence agencies, especially the FBI and CIA, to intimidate political adversaries. Congress responded by mandating investigatory committees chaired by Frank Church (D-ID) in the Senate and Otis Pike (D-NY) in the House. The Church and Pike hearings were carefully orchestrated media events, in which witnesses offered lurid accounts of intelligence abuses including efforts to assassinate foreign leaders, covert operations to disrupt democratically elected governments, and programs to spy on Americans who dissented from government policy. It became increasingly clear to many citizens that the national security state needed greater oversight. Chapter six places the creation of permanent congressional intelligence oversight committees in the context of a longer neo-progressive movement. The reform movement culminated with the passage of the

first bill to restrict wiretapping and surveillance of American citizens on home soil, the Foreign Intelligence Surveillance Act.

In the late 1970s, when the cold war began to heat up, the neo-progressive movement for national security reform lost power. But the legislative legacy of this movement transformed Americans' relationship to their State.

CHAPTER 1
'WHAT'S GOING ON IN THE BLACK COMMUNITY?': RAMSEY CLARK AND THE JUSTICE DEPARTMENT'S RESPONSE TO URBAN DISORDER, 1967-1968

The soldiers came out of the trucks prepared, as their officers had instructed, for insurrection. In their pockets were situation maps plotting power plants, radio and television stations, and federal armories. These locations were likely targets, they were told. Protect them first. Detroit, America's one-time "arsenal of democracy," looked like a war zone. Smoke billowed out of storefronts; cars lay helplessly overturned in the streets. In the distance, gunfire sounded. But where were the revolutionaries? The guerillas and insurgents? The ones who wanted to overthrow the government?

The soldiers' situation maps, it turned out, were useless. The rioters were not threatening power plants or attacking federal armories. The six o'clock news later revealed that the real action was at the liquor, appliance, and furniture stores. This wasn't a war after all. It seemed the looters, arsonists, and vandals were trying to tell the nation something. But what, America's government officials, desperately wanted to know, were they trying to say?[1]

[1] This is adapted from Christopher H. Pyle's article, "CONUS Intelligence: The Army Watches Civilian Politics," *Washington Monthly* 12 no. 1 (January 1970), 7-8. Pyle describes the reaction of some National Guard officers and troops to urban disorder in Detroit, Michigan during the summer of 1967. In the late 1960s liberals often justified surveillance programs as a logical step in the federal government's effort to head-off urban disorder. As this narrative suggests, the intelligence gathered under this vastly expanded domestic surveillance apparatus was often inaccurate and rarely useful.

The summer of 1967 burned hot and violent. Urban rioting in more than seventy American cities prompted one journalist to dub it the "summer of bloodshed and pillage." Watching the cities smolder on the evening news, Americans worried that the nation was descending into a state of lawlessness. The Republican Coordinating Committee proclaimed a national crisis. Americans, asserted the committee, were being denied the "most basic of civil rights," to be "safe on the streets and in their homes from riots and violence." President Lyndon Johnson's "man on the ground" in Detroit predicted that other U.S. cities were likely to burn that summer.[2]

Wars on the streets of American cities bore striking resemblance, in the minds of some Americans, to the war being waged in the villages of Vietnam. Journalist and beltway insider James Reston wrote, "next to finding a solution to the war in Vietnam, the war in the cities at home is the most important issue before the nation."[3] Could cold war liberals manage to "allay poverty, widen opportunity, eradicate racism, make its cities habitable and its law uniformly just" while simultaneously fighting the communist

[2] "The Paradox of Power," *Time Magazine*, 5 Jan 1968, <http://www.time.com/time/printout/0,88816,712057,00.html> (25 June 2007); Republican Coordinating Committee, "G.O.P. Statement on Keeping Order," *New York Times*, 25 July 1967, 20; Final Report of Cyrus R. Vance, Special Assistant to the Secretary of Defense, Concerning the Detroit Riots, July 23 through August 2, 1967;" Undated Misc.; 49; Series 4 Subject Files (SF); Interdivisional Information Unit (and Successor Units (IDIU); General Records of the Department of Justice, Record Group 60 (RG 60); National Archives, College Park, Maryland (NACP).

[3] James Reston, "Washington: A Time to Change," *NYT*, 23 Dec 1966, 24.

enemy abroad?[4] Like Reston, many Americans wondered if there were limits to what the United States could accomplish. By late 1967, indeed, liberalism seemed "in crisis."[5]

During this time of political demonstrations, rising street crime, and urban disorder, the nation's top law enforcement officer, Attorney General Ramsey Clark, attracted, like a lightning rod, furious public criticism. Critics saw him as "something of an old-fashioned liberal in a time of increasing anxiety." Clark's "consistent concern for civil liberties," argued one prominent elected official, made him "psychologically unsuited to the job of law enforcement."[6] One astute observer claimed that Clark's weak position on issues of "law and order"—an increasingly critical political issue in the late 1960s—"made his opponents' flesh crawl.[7]" The mass media portrayed Clark as unable and unwilling to combat urban disorder. Political partisans fueled this attack and castigated Clark and the entire Johnson administration, not only for failing to quell the riots more quickly and more brutally, but also for failing to foresee them. Conservatives in both parties believed that the government needed far greater power in order to squash the radicals and agitators who, they argued, planned, instigated and led the riots—and other acts of public disorder.

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[4] "The Paradox of Power," *Time Magazine*, 5 Jan 1968, <http://www.time.com/time/printout/0,88816,712057,00.html> (25 June 2007).

[5] Michael Flamm, *Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s*, (New York: Columbia University Press, 2005).

[6] "The Ramsey Clark Issue," *Time Magazine*, <http://www.time.com/time/printout/0,88816,902460,00.html> (25 June 2007).

[7] Fred P. Graham, "Clark: Target on the Law and Order Issue," *NYT*, 20 Oct 1968, E13.

Partisanship aside, Attorney General Clark thought that his critics were at least partially right; the Justice Department did not have the right tools to predict and prepare for urban disorder. And he believed that he had a duty to find those tools because he knew that the Justice Department lacked the institutional resources to combat such riots. In the wake of violent upheaval in Detroit, Michigan, and Newark, New Jersey in the summer of 1967, Clark reevaluated the intelligence capacities of the Justice Department. Clark believed that the administration's inadequate response to urban disorder stemmed, in no small part, from a lack of quality intelligence about "what's going on in the black community."[8] An able administrator, Clark conceived of a new unit within the Justice Department, the Interdivisional Information Unit (IDIU), to enable the state to more accurately to predict where and when civil disturbances—specifically urban upheaval—might occur. One Justice Department official later recalled, the IDIU was the answer to the Justice Department's "concern that local police did not have 'any useful intelligence or knowledge about ghettos [and] about black communities in the big cities.'"[9]

In the late 1960s the IDIU legitimized surreptitious intelligence-gathering activities of various federal, state, and local agencies. Clark reasoned, as did many of his colleagues, that if bureaucrats had access to more data—intelligence about those who rioted, and where and when—the state could more readily anticipate urban unrest and communicate more efficiently and effectively to local and state law enforcement tasked with maintaining law and order. In the context of urban upheaval, these methods targeted

[8] Select Senate Committee to Study Governmental Operations with Respect to Intelligence Activities, *Notes on Intelligence Activities and the Rights of Americans*, 94th cong., 2d sess., 1976, 495.

[9] Fred Vinson testimony before the Select Senate Committee to Study Governmental Operations with Respect to Intelligence Activities, in ibid., 494.

black ghetto inhabitants. An ardent proponent of individual rights, Clark recognized that powerful state interests could abuse such an apparatus. Housing the intelligence clearinghouse under his direct watch, Clark believed he could protect civil liberties while still tackling wars in the streets. As a further precaution, Clark, in 1967, personally banned the use of all wiretapping and electronic surveillance at the federal level.

Dissatisfied with Clark's leadership of the Justice Department and the Johnson administration's general response to lawlessness, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968. Seeking to empower local and state law enforcement agents to fight crime, conservatives, led by Senator John McClellan (D-MO), inserted a provision (otherwise known as Title III) to legalize wiretapping and electronic surveillance. Title III vastly expanded the power of the state to intrude—legally—into the private lives of individuals, in the name of law and order. Under the Omnibus Act the IDIU acquired extraordinary new capacities, connected to a vast network of local and state intelligence operations. When Richard Nixon took power in January 1969, he would authorize his administration to use these new capacities with almost no limits.

In 1961, when Ramsey Clark joined President John F. Kennedy's administration, no one would have predicted his meteoric fall in public approval only six years later. Everyone knew him as the son of Tom Clark, an Associate Supreme Court Justice, and

Harry S. Truman's former Attorney General.[10] For a tall, lanky youth that most people identified as "low key," young Ramsey Clark moved fast.[11] Even before graduating high school in 1945, he rushed to join the Marine Corps. After serving on missions to Moscow, Budapest, Vienna and Berlin, he was demobilized and returned home to study law and history at the University of Texas. He graduated in only two years. After marrying Georgia Welch, his UT sweetheart, Clark moved the family to Chicago where he earned a master's degree in history and a law degree at the University of Chicago. Two years later the young Clark joined his father's practice in Dallas where he worked for ten years as a corporate lawyer.[12]

Through his father's contacts in Washington (it was House Speaker Sam Rayburn who passed Ramsey's name along to Robert Kennedy), Clark joined President John F. Kennedy's "best and brightest." Though his connections secured his position, Clark proved a skilled administrator. Only thirty-four years old, Clark headed the Lands Division, the least glamorous of all the Justice Department posts.[13] "Ram" (as his wife Georgia liked to call him) didn't mind. As with his studies, Clark threw himself into his work, quickly earning a reputation in the beltway as a "penny-pinching administrator and

[10] Tom Clark served as Attorney General from 1945-1949. The elder Clark was a rabid anti-communist. He initiated the Attorney General's "subversives list," a catalogue of organizations identified as potential threats to national security.

[11] Fred Graham, "Low-key and Liberal," *NYT*, 2 Apr 1967, 234; "A Low Key Legal Chief: William Ramsey Clark," *NYT*, 1 Mar 1967, 24.

[12] See Department of Justice memo, undated; Personal Papers of Ramsey Clark (PPRC); Box 76, Clark, Ramsey, biographical; Lyndon Baines Johnson Library (LBJL); 2.

[13] The Lands Division in the Justice Department oversees all of the federal government's land acquisitions, as well as any issues related to Native American land claims.

an unruffled solid thinker." Clark was a "natural New Frontiersman," moving quickly into the Attorney General's inner-circle of advisors.[14] He proved such an able and trustworthy team player that Robert Kennedy selected him as the administration's "man on the ground" during the most explosive of early civil rights standoffs in the South; first, at the University of Mississippi in 1962, and later during the Birmingham, Alabama riots in 1963. Throughout the tumultuous summer of 1963, Clark remained Kennedy's informal contact with southern officials, offering advice on how schools could be peacefully desegregated. These events proved transformative for young Clark; he became a committed advocate for racial equality.[15]

Even as the White House focused its efforts on engineering peaceful settlements to racial standoffs in the South, northern cities began to smolder. In 1964 the Johnson White House experienced its first hint of trouble to come when Rochester, Harlem, and Bedford Stuyvesant, New York, erupted in violence, burning and looting. The following summer, the black ghetto of Watts, in Los Angeles, California erupted. Ramsey Clark, like most Americans, watched in disbelief.[16]

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[14] "Clark Solid Thinker Who Gets Job Done," *LA Times*, 26 Aug 1965, p.3. Clark's reputation was well deserved. In three years he reduced the division's backlog by half and saved $1 million in administrative costs and standardization procedures. See Department of Justice memo, undated; PPRC, Box 76, Clark, Ramsey, biographical; LBJL; 2.

[15] "Texan on Rights Front: William Ramsey Clark," *NYT*, 23 Mar 1965, 29; "Clark Heads Study Group," *NYT*, 26 Aug 1965, 21.

[16] Clark OH Interview III, 3/21/69, by Harri Baker, LBJL, 1.

A seasoned arbiter of civil rights crises and a trusted aide to President Johnson, Clark headed up the presidential task force to Watts.[17] On the president's orders he was to identify the causes of urban upheaval and coordinate federal aid and relief efforts with state and local officials. Always conscientious and curious, Clark went beyond the president's initial mandate. This experience on the ground in the South during desegregation and voting rights drives taught him to distrust local institutions and their vision of local problems. Hoping to identify the roots of the uprising from the residents themselves, Clark's team spent hours meeting with "every type of ghetto group and organization." Clark personally attended small gatherings of "completely unorganized" folks in churches, parks, at people's homes, in youth centers, wherever people were congregating, "to see what they were thinking, how they analyzed the riots and the cause of the riots."[18]

Clark inserted the perspective of Watts residents in a lengthy section titled, "Community Attitudes." Explaining to President Johnson his decision to include their perspective, Clark wrote that residents' voices "reflect attitudes … [that] do much to explain behavior in the community." With much emotion and some urgency, African Americans articulated the root cause of black frustration and alienation. They described

[17] President John Kennedy pioneered the presidential task force as a tool for formulating dynamic policy solutions based on the expert advice of individuals both inside and outside federal government. Lyndon Johnson relied heavily on task forces to inform his Great Society policy programs. Johnson, however, insisted that all task force participants refrain from discussing or divulging their recommendations publicly. This system allowed Johnson political maneuverability; if he found task force recommendations politically unfeasible or ill advised, the President could simply put it in a drawer. See Norman C. Thomas and Harold L. Wolman, "The Presidency and Policy Formulation: The Task Force Device," *Public Administration Review*, Vol. 29, No. 5 (Sep.-Oct., 1969), p. 460, 465.

[18] Ramsey Clark OH III, 3/21/69, by Harri Baker, LBJL, 3-4, 13.

how powerful structural forces limited economic opportunity and circumscribed individual access to the bounty of post-war cornucopia. Identifying the "burdens borne by those who live outside the circle of today's prosperity, outside looking in," African Americans bemoaned the institutional structures that denied them the same economic opportunities to prosper as their white counterparts.[19] High rates of unemployment and only marginal access to a "menial" job market undermined African American efforts to exit the vicious cycle of poverty.[20]

Federal welfare and poverty programs could not and would not solve the problems of the ghetto, residents insisted, "if the people in the depressed areas [did not] participate in the planning and execution" of those programs. Underscoring the need for community participation in the rebuilding of their communities by rejecting federal and state paternalism, these residents envisioned organic, grassroots efforts to address community problems. Residents demanded that local government do more to "help the people help themselves." But they distrusted the "white power structure" and its "false promises" that denied them the ability to "participate in planning or in action" in their own community and "rammed" welfare relief "down [their] throats." The riots, for some blacks, were a way to articulate their frustrations to officials in Los Angeles: "A lot of us

[19] See Thomas Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit*, (Princeton: Princeton University Press, 1996).

[20] "Report of the President's Task Force on the Los Angeles Riots, August 11-15, 1965," 17 Sept, 1965; PPRC, Box 76, Watts, August 1965; LBJL, 16-22.

are beginning to feel that riots are … the only way to talk to [officials] downtown." The sense of alienation from white society reverberated throughout the black community.[21]

Clark identified "the preservation of law and order" as both a national and local priority. But he remained personally committed to the need to improve the socio-economic conditions of black urban ghettos to decrease the likelihood of future urban disorders. Articulating recommendations echoed by later presidential commissions, the task force identified "the problems which exploded into violence in Los Angeles" as, fundamentally, issues "of how human beings treat one another, not only through the institutions of their society, but individually."[22]

Clark thought that the report offered the president the opportunity to reaffirm the liberal commitment (embodied in the social welfare programs of the War on Poverty) to attack institutional forces that structured inequality. Clark personally believed that only powerful federal institutions had the capacity to address these deep, systemic problems. President Johnson, however, was under fire for failing to reaffirm "law and order." The political challenge for the administration was to balance liberal calls for social justice with conservative demands for social order.[23] The president considered the report "unpleasant" and believed that it emphasized that inner city blacks were "very angry people." Consistent with his stance that urban disorder was best handled at the local level, Johnson thought it best to allow the judgments of Governor Pat Brown's appointed

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[21] Ibid.

[22] Ibid., 2.

[23] Flamm, *Law and Order*, 66.

commission, headed by former CIA Director John McCone, to stand as the final assessment of the riot. As Clark remembered, the McCone investigation and report had the advantage of coming from "homefolks," without the "coloration of a bunch of feds." For all these reasons President Johnson put the "Report of the President's Task Force on the Los Angeles Riots" in a drawer, never to take it out again.[24]

Johnson's decision to hold back on the report proved a point of "continuing frustration" to a number of people in the Justice Department, Clark later recalled. Not dissuaded, Clark pushed forward, determined to use the limited resources of the Justice Department to aid the inner-city poor. Meetings with Watts residents left Clark with a lasting impression: the urban poor needed "jobs first." He reasoned that Justice should tackle employment discrimination, a program that moved slowly but, with measurable results. Clark's recollection of the Justice Department's efforts to tackle discrimination in employment—both as a result of Watts report and as a relative success—underscored his faith in liberalism, in the power of the federal government, to solve social problems.[25]

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[24] Ramsey Clark OH III, 3/21/69, by Harri Baker, LBJL, 4. Publicly, the Johnson administration praised California Governor Pat Brown's appointment (announced within days of the postponed release of the president's task force report) of the commission to study the causes of the Watts riot chaired by L.A. resident and former CIA Director, John McCone. As a local commission, McCone could potentially tell the harsh truth of race relations and systemic institutional inequality in the United States free from the taint of federal imposition into a local problem. And yet, the McCone commission, as a local investigatory body, had political considerations of its own, namely, not to be too critical of existing local and state institutions in California. As a consequence, the commission report largely reaffirmed the need for greater law and order, excluded voices from the Watts community, and relied on top-down solutions to local problems. Governor's Commission on the Los Angeles Riots, "Violence in the City—An End or a Beginning?" (Los Angeles: 1965).

[25] Ramsey Clark OH III, 3/21/69, by Harri Baker, LBJL, 5. For a less optimistic assessment of the Justice Department's efforts to litigate employment practices, see Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy*, (New York: Oxford University Press, 1990), 236-7. Civil rights historian Hugh Davis Graham has argued that the Justice Department always lacked the capacity to handle employment discrimination lawsuits. President Johnson, Graham concludes, assigned

Clark's trust in federal institutions informed his views on urban crime and disorder; both were legitimate responses to institutional failures. Crime, Clark believed, was a natural response to rapid social changes that had beset urban centers. These changes produced opportunities for some, but not all, of the nation's citizens. In a speech he gave to the Washington D.C. Bar Association, Clark identified the urban ghettos as pockets of the disadvantaged cut off from an "affluent and technologically advanced society." Respect for the law had to reside "within the hearts of the people" and "short of a police state, crime in the streets can be significantly and permanently reduced only by attacking its occurrence, not its causes." Government, according to Clark, had a central role to play in crime reduction, "provid[ing] a moral example and leadership" by eliminating "poverty … ignorance [and] unequal opportunity." Reducing crime and urban disorder, Clark believed, was only possible if the federal government made a "continuous conscious effort toward equal opportunity for all, toward decent conditions of living and toward just laws."[26]

In the late 1960s increasing numbers of white Americans found the liberal approach, so paradigmatically articulated by Clark, to national problems of poverty and inequality, to be unpersuasive. According to polls, far more Americans saw the nation's major domestic problems to be increased criminality, not inequality, and violence in the

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top priority to other issues of inequality including "voting rights, school desegregation, local defiance, and intimidation."

[26] Ramsey Clark, "D.C. Bar Law Day speech," 30 April 1965; PPRC, box 76, speech material; LBJL; 1-7; Ramsey Clark, *Crime in America: Observations on its Nature, Causes, Prevention and Control*, (New York: Simon and Schuster, 1970), 19, 29.

streets, not poverty.[27] Mass protests, the increasingly unpopular war in Vietnam, the frequency of urban riots, and rising crime rates made the American public more skeptical about liberal politicians focus on injustice as the underlying cause of public disorder and liberals' big government anti-poverty programs as the means to solve the nation's problems. When President Johnson appointed Clark Acting Attorney General in 1966, many on Capitol Hill considered him an able bureaucrat but not tough enough to attack the lawlessness that so infuriated the voting public. Voracious critics called Clark a "cream puff," questioning his masculinity and underscoring criticism that the Johnson administration was "soft on crime."[28] His tall, thin frame, youthful appearance, Hollywood looks (a face "something like Gary Cooper"), and "casual and unflappable demeanor" made him an easy target.[29] Careful observers found Clark at once "folksy, informal, and naïve."[30] To many Americans, he did not embody "law and order."

Though he was the quintessential bureaucrat, Clark was also a man who guarded his status as an "outsider." One astute journalist recalled that Clark was "so unpretentious that some [in Washington] mistake his diffidence for disinterest." He refused to buy a tuxedo, for years moving among Washington's elite in a plain black suit. Clark preferred

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[27] A September 1968 Harris poll reported that 81% of Americans polled agreed with the statement, "law and order has broken down in this country." Eighty-four percent agreed with the statement that, "a strong President can make a big difference in directly preserving law and order." Fifty-nine percent of those polled found the causes of breakdown in law and order attributable to "Negroes who starts riots;" fifty-six percent identified "Communists" as a cause. See "81% in a Poll See Law Breakdown," *NYT* 10 Sep 1968, 31.

[28] Fred P. Graham, "Clark: Target on the Law and Order Issue," *NYT*, 20 Oct 1968, E13.

[29] Victor Navasky, "Wrong Guy for the Wrong Post at the Wrong Time?" *Saturday Evening Post*, 16 Dec 1967, no. 25, 74.

[30] "A Low Key Legal Chief," *NYT*, 1 Mar 1967, 24.

chips and chili to fine dining, insisted on flying coach for government business, and wrote his own speeches. A voracious reader, he believed television to be a "waste of time." The Clark family did not purchase a television until 1966, and then only for the sake of Clark's thirteen-year-old son, Tom. Clark shunned the privileges of his office, refusing the chauffeured limousine that came with his cabinet-level appointment. He drove himself and White House aide and long-time friend Barefoot Sanders to the office every day in his 1949 Oldsmobile convertible. There Clark's workspace reflected his preference for simplicity over grandeur; he turned the "spacious, mahogany-paneled, red-carpeted" office favored by his predecessors into a meeting room. He claimed a small, dark office tucked way in the back as his own.[31]

Ramsey Clark was not the type of man many Americans would have chosen to tackle civil disorder. But President Johnson trusted Clark could do the job. And in 1966 the trouble just kept on coming. While mass protests against the Vietnam War had yet to emerge, 1966 was the year of Black Power. Stokely Carmichael, the new head of the Student Non-Violent Coordinating Committee, publicly embodied the shift from a peaceful civil rights movement led by Reverend Martin Luther King, Jr. to a more militant, violent movement among African Americans, particularly those in the urban ghettos.[32] Frustrated by slow progress, Carmichael called for black-run institutions to solve black problems. Blacks, Carmichael reasoned, needed to wrest power from white

[31] "A Low Key Legal Chief," *NYT*, 1 Mar 1967, 24; Fred Graham, "Low-Key and Liberal," *NYT*,, 2 Apr 1967, 31.

[32] For the context of the rise of Black Power in the 1960s, see Terry H. Anderson, *The Movement and the Sixties: Protest in American from Greensboro to Wounded Knee*, (New York: Oxford University Press, 1995), 154-8.

institutions and elected officials. That struggle, he and many other Black power advocates believed, would not come without violence, without blood running in the streets.[33] In 1966, for the third summer in a row, black Americans revolted in cities across the nation with thousands arrested, hundreds injured, and seven dead.

If Clark wanted to know more about what was going on in the urban ghettos of America, the Federal Bureau of Investigation (FBI),) should have been a good place to start acquiring information. Nevertheless, Clark was well aware that under the direction of J. Edgar Hoover, the FBI was far from an objective source of information on racial issues in the United States. The Bureau had been fighting its own private war against African Americans' struggle for justice and equality in the United States since the early twentieth century, often at the behest of officials in the White House and Justice Department. J. Edgar Hoover, FBI Director from 1919 to 1974, personally believed in racial segregation and racial inequality. The FBI, however, was not merely an institution operating under the direction of one racist. As historian David Garrow has convincingly argued, "The Bureau functioned not simply as a weapon of one disturbed man, not as an institutional protecting its own organizational interests, but as the representative, at time rather irrational representative, of American cultural values that found much about [the civil rights movements] to be frightening and repugnant."[34]

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[33] Gene Roberts, "Why the Cry for Black Power?" *NYT*, 3 July 1966, 89.

[34] David Garrow, *The FBI and Martin Luther King, Jr.: From "Solo" to Memphis*, (New York: W.W. Norton & Co., 1981), 212-213. Garrow explores how a culture of paranoia informed the American public throughout the twentieth century, and how various FBI operations, which analysts have long attributed to one man, Director J. Edgar Hoover, including COINTELPRO in the 1960s, were merely reflections of greater societal trends and fears. See especially chapter six, "The Radical Challenge of Martin King."

From the beginning the FBI (and especially Director Hoover) opposed the civil rights movement and viewed African American calls for greater social and economic equality as evidence of communist influence and subversion. When Martin Luther King, Jr. became the leader of the movement in the early 1960s, his relationship with a former Communist Party member, Stanley Levinson, confirmed Hoover's suspicions. William Sullivan, fourth in command at the Bureau and head of the Domestic Intelligence Division, authored an analysis in 1963 linking communism to the movement. In 1964 the Bureau established a special desk within the Intelligence Division to look into potential communist influence in "racial matters." It set up elaborate wiretaps on home telephones and planted bugs in the hotel rooms of prominent movement leaders, most notably Martin Luther King, Jr. Hoover personally loathed King, calling him a "burrhead" and "a tom cat with obsessive degenerate sexual urges."[35] In the early 1960s the Bureau and its director enjoyed the tacit, if not explicit, approval of their efforts to link communism to the civil rights movement from prominent elected and appointed officials, most notably Attorney General Robert Kennedy and President Lyndon Johnson.

Though the Bureau worked often outside the direct supervision of the Attorney General, Hoover passed information regarding the connection between communism and the civil rights movement to many agencies and institutions in the executive branch including Justice, the Department of Defense, and the CIA. The Justice Department was aware of the FBI intelligence gathering on civil rights matters, as it was being routed

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[35] Garrow, *The FBI and Martin Luther King, Jr.*, 106-107.

through its Civil Rights Division. Hoover frequently regaled anyone who would listen with lurid details about the Reverend King's sex life, details gathered from bugs planted in King's hotel rooms.[36] Ramsey Clark often heard these accounts from Hoover himself.. He loathed Hoover's penchant for such tasteless voyeurism.

By all accounts the Department of Justice generally, and the attorney general specifically, offered "little guidance for FBI intelligence investigations" on matters related to race and civil rights. Robert Kennedy approved the King wiretaps, for example. In 1965 Kennedy's successor attorney general, Nicholas Katzenbach, attempted to curb the Bureau's autonomy by ordering Hoover to obtain approval prior to planting wiretaps and bugs. But the Bureau continued to surveil Dr. King without prior approval. Hoover claimed their usefulness in determining the extent to which the communists were influencing the movement. Even when there was no evidence of communist influence on civil rights groups, Katzenbach continued to approve wiretaps on organizations like the Southern Christian Leadership Conference.[37]

Clark was determined to run his Justice Department differently. As deputy attorney general, Clark observed how the FBI and Hoover used anti-communist rhetoric to support the continued surveillance of Martin Luther King and the movement. He grew to believe that attorneys general had not always been "sufficiently critical" in approving wiretaps and authorizing electronic surveillance, in the name of national security.[38] Clark

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[36] Ibid., 165.

[37] *Notes on Intelligence Activities and the Rights of Americans*, 476-483; Garrow, *The FBI and Martin Luther King, Jr*, 138, 148.

[38] Ramsey Clark OH V, 6/3/69, by Harri Baker, LBJL, 2-3.

publicly claimed that some FBI bugs and wiretaps had been "a waste of time"[39]. He believed that the Bureau and Hoover overused the rubric of "national security" in order to justify surreptitious and extra-legal behavior. Surreptitiousness was contagious, Clark argued, and "police tactics" like bugs and wiretaps "against political enemies or unpopular persons" was "intolerable."[40]

Clark's resistance to the "traditional" methods employed by FBI agents to obtain intelligence inevitably produced a strained relationship with his powerful and famous subordinate. Hoover made it clear to his underlings that he did not like or trust Clark, calling him a "bull butterfly."[41] Clark did his best to restrict Hoover's agency from continuing its surreptitious practices. In 1967 he rejected Hoover's request to continue wiretaps of the SCLC office in Atlanta, arguing that the director failed to present adequate evidence that the organization was a "direct threat to the national security."[42]

For all of these reasons Clark did not want to rely directly on the FBI for intelligence on militant Black activists or urban conditions. He chose to circumvent

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[39] "Curbing Electronic Snoopers," *NYT*, 28 Nov 1966, 38.

[40] Clark, *Crime in America*, 293.

[41] Transcript, Cartha D. "Deke" DeLoach Oral History Interview I, 1/11/91, Michael L. Gillette, Internet Copy, LBJL, 20. On one occasion, President Johnson requested Director Hoover to place a wiretap on the South Vietnamese embassy. Hoover demurred, and told the President to request authorization directly from Attorney General Ramsey Clark, implying that Clark would not approve the tap unless the request came directly from the president.

[42] Garrow, *The FBI and Martin Luther King, Jr*, 184. Clark's restrictions on Hoover's wiretapping infuriated the director. PPRC, Box 76, Watts, August 1965; LBJL LBJ Library, NSF, Agency file, box 29, Federal Bureau of Investigation, "Telephone Surveillance Denied by the Attorney General," March 1968, three page memo listing the requests that Clark has denied to the director. He is definitely not happy. Includes Stokely Carmichael, SNCC, SCLC, SDS and MOBE.

Hoover's agency in the summer of 1966 by developing an ad-hoc intelligence clearinghouse within the Justice Department. The so-called "Summer Project" consisted of law school interns who culled intelligence from the FBI and other sources—including newspapers and United States attorneys general—for information that might help the White House better anticipate urban flashpoints.[43] The Summer Project was Clark's immediate answer to the problem of urban disorder.

Historically, the executive branch had employed military capacities since the nation's founding to put down civil disorder. In 1786 farmers in western Massachusetts led an armed revolt against crushing debt and taxation. Shay's rebellion created the impetus for national leaders to reconsider the weak Articles of Confederation and eventually to lay the foundation for the development of a strong central government. In the 1790s the Whiskey Rebellion, led by farmers in Western Pennsylvania, drove President George Washington to mobilize the new national Army to put down the domestic disturbance. This was the first use of the resources of the federal government to maintain domestic peace and security. The federal government again called upon the Army to put down domestic unrest in the battle over the plains during the 19th century. The Army helped quell domestic unrest in the Indian Wars, on the border with Mexico, and during domestic insurrections including Bleeding Kansas and the Mormon War. Infamously, President Herbert Hoover ordered General Douglas MacArthur to use Army troops to disperse the Bonus Army encampments from Washington D.C. in 1932.[44] These

[43] *Notes on Intelligence Activities and the Rights of Americans*, 498.

[44] Leonard Richards, *Shay's Rebellion: The American Revolution's Final Battle*, (Philadelphia: University of Pennsylvania Press, 2002); Joan Jensen, *Army Surveillance in America, 1775-1980*, (New

domestic security capacities were very much a part of the state's response to unrest by the mid 1960s.

Clark further enhanced the Department of Justice's capacities to respond to disorder by utilizing computer technologies which enabled the bureaucracy to maintain vast quantities of domestic intelligence. In the aftermath of World War II, as the government's wartime technology needs declined, entrepreneurial engineers searched for new markets for their products. They recognized the federal government's acute need to process and collate mountains of data that the state now collected on its citizens. The Census Bureau purchased one of these new data management systems, a UNIVAC (Universal Automatic Computer), the first machine to use magnetic tape storage rather than punch cards, in 1946. Market forces propelled rapid growth in this field throughout the 1950s and 1960s as the industry worked to meet the demands of large-scale grocers and retailers and the burgeoning airline industry. Major advances in the speed and size of computers in the 1950s and 1960s, driven by "the introduction of integrated circuit electronics [which] reduced the cost of computer power by a factor of one hundred," made rapid advances in computer technology possible. In 1959 International Business Machines (IBM) marketed a computer system, Model 1401, revolutionizing the way that corporations and government agencies collected, gathered, and managed information.

During the Johnson administration, expansive federal initiatives, such as the War on Poverty, and new social welfare programs such as Medicaid and Medicare, required

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Haven: Yale University Press, 1991). See also Durwood Ball, *Army Regulars on the Western Frontier, 1848-1861*, (Norman: University of Oklahoma Press, 2001).

the government to collect and maintain data on millions of Americans. As institutional demand for data management solutions grew exponentially, IBM's profits soared—from $1.8 billion in sales in 1960 to $7.2 billion by the end of the decade. Computer solutions made Clark's IDIU both possible and practicable.[45]

As useful as these new technologies were, computers could not save Clark's Summer Project from being swamped by the multiple crises that rocked the nation during the summer of 1967. During that long, hot summer, more than 100 cities experienced riots. The violence and destruction in Detroit was so acute that Michigan Governor George Romney requested federal assistance from President Johnson, who reluctantly deployed the Army--the first time federal troops had been used to stop riots since the Detroit race riots of 1943. The civil disorders seemed to rage out of control. Cyrus Vance, special assistant to the secretary of defense, coordinated White House policy on the ground. Vance believed the system of coordination and communication between state and local officials and the White House exacerbated an already chaotic situation. The administration, he urged, needed to develop "a method of identifying the volume of riot-connected activity, the trends in such activity, the critical areas, and the deviations from normal patterns," so the federal government could make a "determination as to whether the situation is beyond the control of local and state enforcement agencies."[46]

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[45] Martin Campbell-Kelly and William Aspray, *Computer: A History of the Information Machine*, 2d edition, (Cambridge, MA: Westview Press, 2004), 95-102, 117, 198.

[46] "Final Report of Cyrus R. Vance, Special Assistant to the Secretary of Defense, Concerning the Detroit Riots, July 23 through August 2, 1967;" Undated Misc.; 49, 50; SF; IDIU; RG 60; NACP; Transcript, Cyrus R. Vance Oral History Interview I, 11/3/69, by Paige E. Mulhollan, Internet Copy, LBJL.

Clark quickly realized that the Justice Department's small intelligence clearinghouse was inadequate to meet the administration's needs. Attorneys were "trained to think in terms of due process and deliberation" and were ill-equipped to respond to White House demands for information in times of crisis. Clark reasoned Justice needed to expand further its institutional capacity in order to best prepare the president for another Detroit.[47] Clark demanded the development of a "systematic means … of compiling and analyzing … information" related to the perpetrators of, and participants in, urban unrest. Clark emphasized the need to make better use of intelligence from agencies outside the FBI, and to review more thoroughly FBI data.[48]

On the recommendation of Assistant Attorney General John Doar, Clark established the Interdivisional Information Unit (IDIU) in December 1967. The IDIU would act as a "single intelligence unit to analyze … information … about certain persons and groups who make the urban ghetto their base of operation." The FBI alone, Doar urged, could not meet the department's needs. This was partly a problem of capacity; the agency employed only forty African American agents out of six thousand, making counterintelligence work in these communities difficult, if not impossible. But one large data source remained wholly untapped: the databases maintained by Great Society social welfare programs. Doar urged that social welfare agencies could prove invaluable sources of information about ghetto residents and their activities. For example, the "intelligence unit of the Internal Revenue Service…[a] unit under the direction of

[47] Ramsey Clark OH II, 2/11/69, 14.

[48] Attorney General Ramsey Clark to Assistant Attorney General James P. Turner, November 9, 1967; 1971; Incoming and Outgoing Correspondence (IOC), 1970-72; IDIU; RG 60; NACP.

John Olszewski, had by far the best knowledge of the Negro areas in Detroit…" Doar conceded that obtaining intelligence from social welfare agencies was a "sensitive," if not potentially explosive, matter. Young lawyers working for the agency should be encouraged, Doar suggested, "to move about" so that "they become familiar with urban areas." Persons in this position must exercise "discretion" and "must like and respect Negroes as individuals, be in tune with them and have a feeling of sympathy and understanding for their situation." [49] But the "factual information" that federal agencies like Neighborhood Legal Services could provide far outweighed any concerns for individual rights and privacy that Justice may have had. War on Poverty databases, Doar believed, would offer invaluable information about black inner-city residents.[50]

His respect for individual rights aside, Clark agreed. In the wake of the Newark and Detroit riots Clark stated that the federal government needed to establish an "intelligence system" in the black ghetto. The Justice Department, Clark explained to majors and police chiefs at a conference on the prevention of civil disorder, was a bit overwhelmed by the riots. He called the urban riot, "vaster, much more obscure, fluid, uncoordinated, loose, difficult to identify—and it's black." The problem of coordinating and obtaining intelligence about the black community was, Clark stated plainly, "the

[49] Assistant Attorney General John Doar to Attorney General Ramsey Clark, "Memorandum for the Attorney General," September 27, 1967, PPRC, box 72, DC Planning for Riots, 1967-68; LBJL.

[50] Memorandum for the Under Secretary of the Army composed by Robert E. Jordan, III, Acting General Counsel, Department of the Army, January 10, 1968, cited in U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on Constitutional Rights, *Federal Data Banks, Computers and the Bill of Rights: Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary.* 92nd Cong., 1st ses., 23, 24, 25 February and 2, 3, 4, 9, 10, 11, 15, 17 March 1971, 1278.

toughest we've had. Ordinary police intelligence won't do it. This is not like [identifying] hustlers or cons."[51]

Probably Clark also appreciated that the IDIU would allow the Justice Department to rely less on Hoover's FBI for intelligence.[52] Aware that Hoover would undoubtedly object to encroachment on his bureaucratic territory, Clark carved out a role for the FBI, even when the IDIU itself undercut some of the agency's traditional analytical responsibilities. The Department of Justice and the FBI, Clark wrote Hoover, "have not heretofore had to deal with the possibility of an organized pattern of violence, constituting a violation of federal law, by a group of persons who make the urban ghetto their base of operation and whose activities may not have been regularly monitored by existing intelligence sources." The Bureau, Clark urged, should locate black informants within black nationalist organizations, SNCC, and other "less publicized groups" to identify those who might be involved in instigating riots.[53] The FBI, unbeknownst to Clark, was already engaged in these activities, and had been for years.[54] Clark's letter

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[51] To the Attorney General from Cliff Sessions, Director of Public Information, 20 Jan 1968, Conference on Prevention and Control of Civil Disorder, "A rough reconstruction of the highlights of your remarks to the police chiefs and mayors at Arlie House January 19th," box 18, fol Speech Material, PPRC, LBJL, 4.

[52] Clark placed the IDIU under the command of the assistant attorney general of the Internal Security Division, a unit charged with the investigation and prosecution of all cases affecting national security including espionage and sabotage. This is a significant move as it formally linked domestic unrest and civil disorder with those who managed national security issues. Attorney General Ramsey Clark to Assistant Attorney General J. Walter Yeagley, December 18, 1967; 1971; IOC, 1970-72; IDIU; RG 60; NACP.

[53] Attorney General Ramsey Clark to FBI Director J. Edgar Hoover, September 14, 1967, quoted in *Notes on Intelligence Activities and the Rights of Americans*, 493.

[54] Cathy Perkus, *Cointelpro: The FBI's Secret War on Political Freedom*, (New York: Monad Press, 1975); and Kenneth O'Reilly, *Racial Matters.*

suggests how ignorant the attorney general remained of the programs initiated under Hoover, specifically COINTELPRO.[55] The creation of the IDIU allowed Clark to establish an alternative intelligence source and analytic team to the FBI. The IDIU created bureaucratic competition with the FBI based on the opposing political viewpoints of two powerful administrators, Hoover and Clark.

Unlike COINTELPRO, the IDIU has escaped public scrutiny. Its Communication Center—a "situation room" for coordinating response to civil disturbance and urban disorder—connected the Justice Department with the White House Situation Room, the Army's Directorate for Civil Disturbances for Operations and Planning, the US Attorney for Washington D.C., and a number of police departments throughout the District of Columbia.[56] The Center also maintained telephone contact with the Army's emergency Centrex system that was linked with several civil disturbance command posts throughout the United States.[57] US attorneys general proved an invaluable resource. Scattered about the country, federal agents worked closely with local and state government and law enforcement. Any disturbances within their district were immediately reported to the Communication Center. If a situation provoked concern, the US attorney, or assistant, took a position in the command post of the state or local police, and relayed information

[55] COINTELPRO (Counterintelligence Program) was the acronym for the FBI's program to neutralize political dissent in the United States. The program remained secret through 1971 when it was uncovered by a radical organization called the Citizen's Commission to Investigate the FBI. I describe the tactics of COINTELPRO agents as well as the public exposure of this organization in further detail in chapter three.

[56] See chapter two for a history of the Army's Directorate for Civil Disturbances at the Pentagon.

[57] Assistant Attorney General Will R. Wilson, Criminal Division to Attorney General John N. Mitchell, March 4, 1969; 1969, p.1; IOC, 1967-69; IDIU; RG 60; NACP.

at least on an hourly basis directly to the Communications Center at the IDIU in Washington. The Center, at that point in constant contact with the Army authorities, would advise the US Attorney via telephone of federal plans for intervention.[58]

The IDIU's analysis team processed and organized incoming data into easily retrievable paper and computerized dossiers.[59] Subject files included brief biographies, known affiliations, and descriptions of personal political views. Mr. Andrew Benjamin Haynes' dossier, for example, a Black Power advocate residing in Portland, Oregon, included his known former organizational affiliations, and his support for "tactical violence" to achieve civil rights goals and racial equality.[60] Such reports were meant to meet the immediate goals of the IDIU and the Center—analyzing and organizing intelligence for the purpose of keeping the Attorney General and other officials informed in the event action must be taken by a federal agency to put down a civil disturbance.

Along with data management, the IDIU vastly improved communications among federal, state, and local law enforcement. Using the latest in computer technology and opening new lines of communication with state and local officials, Clark hoped to eliminate the need for federal intervention in times of civil unrest. Taking Cyrus Vance's recommendation, Clark arranged more formal relations with local police officials through the IDIU. Specifically, he encouraged local police departments to set up "intelligence

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[58] Will Wilson, Assistant Attorney General to Mitchell, March 4, 1969; 1969, p.1-4; IOC, 1967-69; IDIU; RG 60; NACP.

[59] *Notes on Intelligence Activities and the Rights of Americans*, 501.

[60] Kevin T. Maroney, Chief, Interdivision Information Unit, Fred Vinson, Jr., Assistant Attorney General, Criminal Division, January 6, 1969; 1969, p. 1; IOC, 1967-1969; IDIU; RG 60; NACP.

units" of "undercover police personnel and informants" and "draw on 'community leaders, agencies, and organizations in the ghetto.'" These squads would then pass intelligence up the chain to the Communication Center at the IDIU. Without establishing a system of checks and balances or even parameters for intelligence gathering, Clark encouraged the development of a vast surveillance apparatus.[61] Sponsoring a five-day training program for mayors and chiefs of police from across the nation in January 1968, Clark heralded a new federal effort to coordinate with local and state agencies, and he stressed the importance of the Communication Center as central to the administration's new civil disorder prevention efforts.[62] The Communication Center, Clark assured the assembled chiefs, would ameliorate the problem of "overwhelming existing communication and emergency networks." To bolster communication efforts Clark offered new radio equipment. The IDIU's Communication Center, claimed Clark, was the best answer for local agencies that encountered civil disorders.[63]

Indicating Clark's own uncertainty about what he was creating, even as he developed capacities within the Department of Justice to gather intelligence from local, state, and federal agencies (with no legal framework for determining how such information was obtained), Clark adamantly opposed congressional efforts to legalize wiretapping and surveillance. The Johnson administration had learned to be sensitive

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[61] *Notes on Intelligence Activities and the Rights of Americans*, 494.

[62] Memo for the Under Secretary of the Army composed by Jordan, January 10, 1968, cited in *Federal Data Banks, Computers and the Bill of Rights*, 1278-9.

[63] James T. Devine, Chief, Interdivision Information Section to Wilson, March 13, 1969; 1969, p. 1-5; IOC, 1967-1969; IDIU; RG 60; NACP.

about this issue since a 1964 congressional inquiry revealed that hundreds of executive agencies used various forms of wiretapping and surveillance (without the attorney general's prior authorization) to gather information on American citizens. Civil libertarians on Capitol Hill had opposed such widespread surveillance, particularly because it went unchecked by the executive branch The House committee investigation revealed that the IRS' internal training program taught new agents how to wiretap and place bugs (among other things) in order to "ferret out" tax evaders. One Senator warned that IRS techniques were:

> not [the] occasional action of an overzealous agent, but … the logical and reasonable consequence of [the IRS'] well-defined program which begins in the special school on wiretapping and bugging, which graduates approximately 30 agents each year, and upon graduation the agent receives a wiretap kit, including burglar tools for illegal breaking and entry, as well as other electronic equipment necessary for the performance of these duties.[64]

In 1965 President Johnson forbade all executive agencies from wiretapping and surveillance without prior approval by the attorney general, *except in national security cases*. The president personally opposed all wiretaps, but then attorney general Nicholas Katzenbach advised that a total ban (including national security cases) was "neither

[64] Senator Edward Long (D-MO) prompted Johnson's executive order when, as chairman of the Judiciary Committee's subcommittee on Administrative Practice and Procedure, he submitted a questionnaire to all federal agencies (with the exception of those agencies within the so-called national security community) in February of 1964 about individual privacy practices. Long was surprised to find that, according to agency responses, many participated in a variety of constitutionally questionable surveillance and wiretap activities. For the congressional debate on the findings of Long's subcommittee, see *Congressional Record*, 2 Feb 1967, 2365.

desirable nor politically practicable." As a follow-up to his memo, the president ordered an executive level study of the use of such devices.[65]

Indeed, technological advances had made wiretapping and electronic surveillance prolific throughout American society by the late 1960s. As one journalist noted, studies made "alarmingly evident how easy it is to invade the privacy of any home, office or hotel room …Listening devices are now so cheap, so simple to come by and so eerily effective that anyone with an itch to eavesdrop can indulge it, no matter how frivolous or evil the motive."[66] As acting attorney general, Clark called for a sweeping review of all department cases. He declared that the Justice Department would not "proceed with any investigation or case which includes evidence illegally obtained." Any information obtained through illegal wiretaps or electronic wiretapping, Clark declared, must be "purged [until the Department of Justice is] in a position to assure [itself] and the court that there is no taint or unfairness."[67] When the Senate confirmed Ramsey Clark as attorney general in March of 1967, he issued a sweeping ban on wiretapping that went far beyond the President's own 1965 directive.[68] Clark thought wiretaps and electronic

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[65] See President Johnson's "Memorandum for the Heads of Executive Departments and Agencies," 30 June 1965, LBJ Legislation EX LE/IT box 79, LE/JL, LBJL, outlining the administration's new policy on electronic eavesdropping and wiretapping. Johnson was "strongly opposed to the interception of telephone conversation as a general investigative technique," though he recognized that such devices might be "sometimes essential in protecting our national security." Johnson's memo required all agencies to register their equipment with the Department of Justice, and to report on the number of wiretaps "currently authorized and the reasons for them."

[66] "Curbing Electronic Snoopers," *New York Times*, 28 Nov 1966, 38.

[67] Fred P. Graham, "U.S. Reviews Cases in Bugging Quest," *NYT*, 1 Dec 1966, 1.

[68] Fred P. Graham, "A Sweeping Ban on Wiretapping Set for U.S. Aides," *NYT*, 7 Jul 1967, 1; "Text of Ramsey Clark Memorandum on Wiretaps," *NYT*, 7 Jul 1967, 16; Victor Navasky, "Wrong Guy for the Wrong Post at the Wrong Time?" *Saturday Evening Post*, 16 Dec, 1967, no. 25, 75.

monitoring "inefficient" tools for law enforcement ("It takes twenty-seven men to install one of those things and monitor it") and "insidious." Republicans blasted Clark's wiretap ban and questioned "the authority of the Attorney General to meddle in this fashion in the purely investigative affairs of other departments."[69] Others criticized the apparent paradox of the Attorney General's approval of wiretapping in national security cases as "tantamount to a concession that wire interception and eavesdropping are essential weapons of detection against elaborate, organized criminal conspiracies."[70] Yet even as Clark banned the use of such devices at the executive level, the IDIU encouraged state and local officials to provide intelligence, without regard for how that intelligence was obtained.

Clark's opposition to unchecked wiretapping and surveillance pitted him against conservatives in Congress over key components of the proposed omnibus crime bill in 1968. Senator John McClellan (D-AR), a conservative law and order proponent, attached Title III, a statute to legalize wiretapping and electronic surveillance for law enforcement purposes, to the administration's crime bill. Many legislators and law enforcement officials believed that identifying criminals and gathering much needed intelligence about their activities should be a continuous right granted to those on the front lines of the war on crime. President Johnson's former attorney general, Nicholas Katzenbach, had supported Senator John McClellan's bill to broaden the president's restrictions on

[69] "G.O.P. Scores Clark for Bugging Curb," *NYT*, 28 Aug 1967, 22.

[70] New York District Attorney Frank Hogan quoted in Tom Wicker, "In the Nation: Is Wiretapping Worth It?" *NYT*, 11 Jul 1967, 36. On President Johnson's own antipathy to wiretaps and surveillance, see Flamm, *The Politics of Law and Order*, 137, n65.

electronic surveillance to include use in criminal matters including "murder, extortion, kidnapping, and serious narcotics offenses." Katzenbach believed surveillance "an essential law enforcement tool."[71] In the House, Minority Leader Gerald Ford (R-MI) co-sponsored wiretapping legislation. Taking up the recommendations approved by the Judicial Conference of the U.S. (which included chief justices from federal district courts and top judges from some district courts), Ford and his colleagues crafted legislation to legalize court-approved wiretapping for law enforcement purposes. The Association of Federal Investigators, the National Association of Attorneys General, and the National District Attorneys Association supported the legislation.[72]

Clark strenuously opposed Title III. When the Omnibus Safe Streets and Crime Control Act of 1968 passed the House and Senate, he complained that Congress had passed a "bad bill" that "barely resembles [what] we sent the Congress with such high hopes and ardent pleas." The bill did not offer a thoughtful approach to law and order, Clark insisted, but instead reflected "the fears, frustration and politics of the times" and failed to address "the urgent need to professionalize police, coordinate criminal justice and effectively protect the public." Clark found congressional supporters of the bill

> there is a profound and tragic moral in the fact that Congressional forces that favor wiretapping generally oppose professionalization of police, prisoner rehabilitation and research. They want to ignore any relationship between crime and slums, racism, poverty or mental health. To them, poverty is just an excuse; "bad people" commit crime. The elements of racism in the insistent political

[71] Joe Califano and Lee White to the President, 9 Feb 1966; LBJ Legislation EX LE/IT box 79, LE/JL; LBJL. In the memo margin President Johnson scribbled, "I like this best" next to the option for a complete ban on wiretaps.

[72] Jerry Ford, "Your Washington Review," 4 Oct 1967; Ford Congressional Papers, Box D2, fold: Ford Newsletters, Jul-Dec 1967; Gerald R. Ford Library (GRFL).

> demand for law and order also become manifest when the same leaders oppose enforcement of civil rights.[73]

Outlining several components of the bill that he found most insidious, he reserved Title III—authorizing wiretapping and electronic surveillance—for his vitriol. Clark warned the president that the bill would allow

> Thousands of local and state officials … to tap for nearly any serious crime for 30 days with unlimited 10-day extensions possible. Forty-eight hour surveillance can be undertaken without a court order. This first federal authorization could set a trend that would destroy privacy and liberty in the difficult years ahead.[74]

Clark urged President Johnson to consider a "right and courageous" veto. He hoped such action would compel Congress to revisit the more egregious portions of the bill, with the added bonus that it would send a message to the American public and "increase confidence among youth, minorities and others in our government, [in] our laws and our national purpose." From a strictly legal perspective, Clark realized that Title III was not unconstitutional. But he worried that it opened the door for unconstitutional practices. Recognizing that a veto was politically impossible given the public's call for "law and order" measures, the attorney general urged Johnson to encourage the repeal of Title III in a signing statement.[75]

Clark was not alone in his principled opposition to the bill. White House aide Harry McPherson also voiced reservations, calling Title III "extremely dangerous" and

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[73] Clark, *Crime in America*, 294-5.

[74] Attorney General to the President, 14 June 1968; reports on enrolled legislation box 63, P.L. 90-351 HR 5037 6/19/68; LBJL. The irony is that Clark himself had encouraged implicitly the extra-legal use of such devices by state and local law enforcement when he endorsed the development of so-called "Red Squads."

[75] Ibid.

worrying that it had the potential to "turn any given town or state into a little soviet." McPherson warned the president that the Omnibus Safe Streets and Crime Control Act would be, "the worst bill you will have signed since you took office." Though he knew the president had little political room to maneuver, he urged Johnson to "blast" the "obnoxious" provisions of the bill, especially Title III.[76] Taking McPherson's advice, President Johnson signed the bill and noted his objections to Title III in a signing statement. Congress had taken, the President noted, the "unwise and potentially dangerous" step of authorizing wiretapping and electronic eavesdropping by local, state and federal officials in "an almost unlimited variety of situations."[77]

The passage of Title III haunted Clark right through his last days in office. In January of 1969, weeks before Richard Nixon would be sworn in as the thirty-seventh president of the United States, Clark reflected on the legacy of his Justice Department in a conversation with journalist Fred Graham of the *New York Times.* He spoke of many things, but Clark made clear that nothing troubled him as did the legacy of Title III. He voiced his concerns in Orwellian language, and pondered the likelihood of government spying:

> We can trap ourselves, we can become the captive of our technology, and we can alter the meaning of the individual in a mass society. … We have seen, of course, immense technological advances in our lives. The years ahead will see much faster advances. If we create today traditions of spying on people when they do not know it, it may not be too far distant when a person can hardly think, much less speak his mind to any other person, without fear of police of someone else

[76] McPherson to the President, 14 June 1968; reports on enrolled legislation box 63, P.L. 90-351 HR 5037 6/19/68; LBJL.

[77] "Safe Streets Act Signing Statement," 19 June 1968; presidential papers, Legislation box 80, LE/JL 3 1/1/68-6/19/68; LBJL.

> knowing his thoughts or words. That has the most far-reaching implications in terms of the individual in mass society. It will be hard enough in the years ahead for the individual to be himself, to secure some little sense of privacy and individual integrity because of the massiveness of our number, because of population explosion, because of urbanization. Electronic surveillance is not necessary law enforcement. It is a peril to freedom.[78]

Clark still held firm in his belief that technology could and should advance modern society. Presciently, he recognized that new technologies made surveillance not only more prolific but also more effective. Clark's concerns, however earnest, suggest an effort on his part to write the administration's response to urban disorder out of the historical record. Clark himself was an active proponent of intelligence gathering and used the latest in computer technologies to implement a nationwide catalogue of dossiers that, intentionally or not, included persons with no connection to urban riots. Even as Clark blasted surveillance as a threat to civil liberties, the use of these modern technologies was an almost inevitable, if unforeseen, consequence of a liberal state apparatus that strove to solve myriad problems through the technocratic management of volumes of data.

Clark's legacy as attorney general was mixed and paradoxical. A committed liberal, Clark battled over how best to approach the issue of urban disorder in the late 1960s. Committed to federal support for racial and economic justice, Clark believed the state must eliminate poverty before tackling other issues, including urban unrest. He firmly believed that only the federal government had the capacity and the will to deliver the American Dream to all its citizens, black and white. During his last days with the

[78] Fred P. Graham, "Clark Against Easing Rules for School Desegregation," *NYT*, 7 Jan 1969, 1.

Johnson administration, Attorney General Ramsey Clark continued to emphasize federal social welfare programs as the best remedy against violence and civil disorder.[79] Speaking at one of his last public engagements as the nation's top law enforcement officer, Clark recounted the "milestones of his tenure" with an "emphasis … on 'economic and legal justice'" and no mention of law and order successes.[80]

And yet, Clark's trust in the power of the state to solve the nation's greatest problems informed his decision to establish a new agency within the Department of Justice to gather intelligence on urban African American residents. The IDIU was a logical manifestation of liberal conviction that the state could ameliorate society's ills if managed by technocrats drawing on the latest technologies and gathering all the necessary information. Well-informed technocrats, Clark believed, could make well-informed decisions in the best interest of the nation and its citizens.

The unintended consequence of this unflagging faith in government and those who managed it lent legitimacy to "ends over means" practices of various agencies at the local, state, and federal level. Asked by the attorney general to provide intelligence on urban ghetto dwellers (without regard for how such data was obtained), agencies renewed their efforts to gather intelligence on American citizens. At the close of the Johnson administration in January of 1969, the Department of Justice presided over a grand intelligence clearinghouse with extraordinary new capacities for data collection and

[79] "Cabinet Meeting notes," 03/13/68; Cabinet Papers, Box 13, Cabinet Meeting, 3/13/68; Presidential Papers, LBJL.

[80] Fred P. Graham, "Clark: Target on the Law and Order Issue," *NYT*, 20 Oct 1968, E13.

retrieval. The administration of President Richard Nixon, less concerned with protecting individual rights, would rapidly turn this apparatus on its political foes.

CHAPTER 2
CONTAINING DISSENT: THE PENTAGON'S RESPONSE TO URBAN DISORDER AND MASS PROTEST

The whir of the helicopter blades overhead drowned out the loud speaker, effectively silencing the young long-haired man. The appearance of the four massive helicopters circling low over the protest evoked confusion among the activists. Confusion turned to panic as protestors recognized long telephoto lens jutting from open doors and windows on either side of the low-flying choppers. Dozens of protesters began to run.

About 40 of the protesters, however, did not panic; several even gazed up admiringly at the circling birds. These "activists" displayed no surprise or dismay at the sight of helicopters overhead. While young fresh faces, beards, unkempt and loose-fitting clothing suggested that they too were anti-war protestors, they were not. They were Army counterintelligence officers. Like the men in the helicopters hovering overhead, they were gathering information for their government. They were spying on civilians exercising their constitutionally protected rights.[1]

[1] I have adapted this account from a report of military surveillance compiled for congressional hearings in 1971. This story was widely reported by the media, by members of Congress, and by civil libertarians as evidence of the excesses of government surveillance. The ratio of activists to undercover agents varies across several accounts, though it remains clear that the number of agents present were nearly equally to the number of activists Senator Sam J. Ervin, Jr. "Address before the Philadelphia Bar Association," 26 March 1971; Sam J. Ervin Papers, Subgroup A: Senate Records #3847A (SJEPA), Subject files, box 3847, fol. 13856, Privacy: Army Data Banks, Southern Historical Collection (SHC), Wilson Library (WL), University of North Carolina at Chapel Hill (UNCCH).

In December of 1966 *New York Times* associate editor and Washington insider James Reston predicted that disorder in American cities would be the most important issue of 1967. The "strongest man available" to wage the "war at home," declared Reston, was "undoubtedly [Secretary of Defense Robert] McNamara."[2] Following three summers of increasingly volatile and unpredictable civil unrest, many Americans like Reston had become frustrated with the Johnson administration's inability to impose law and order on the streets. Reston reasoned that only the nation's most powerful institution—the Pentagon—could bring the United States back from the brink of civil war.[3]

In 1967 President Johnson ordered McNamara and the Department of Defense to assume more of the burden of managing and executing the administration's civil disturbance strategy. The president's decision to mobilize the U.S. Army to put down the Detroit uprising in July proved the catalyst for this shift.[4] Heeding Deputy Defense Secretary Cyrus Vance's warning that Detroit was just the beginning of a summer of violent upheaval in the nation's cities, the Department of Defense spearheaded strategic planning and intelligence gathering in the wake of Detroit to better anticipate disorder in American cities.[5]

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[2]James Reston, "Washington: A Time to Change," *NYT*, 23 Dec 1966, 24.

[3]"Low-Key and Liberal," Fred Graham, *NYT*, 2 Apr 1976, 234.

[4] For political reasons, President Johnson reluctantly deployed the Army and National Guard only after it became clear that the Republican governor of Michigan, George Romney, could not manage the situation. See Flamm, *Law and Order*, 91-92.

[5] "Final Report of Cyrus R. Vance, Special Assistant to the Secretary of Defense, Concerning the Detroit Riots, July 23 through August 2, 1967;" Undated Misc.; p.49; Series 4 Subject Files (SF);

Throughout the nation's history the U.S. government had called upon the Army to control domestic disturbances and quell political dissent. Although the 1878 Posse Comitatus Act prohibited the use of the military in law enforcement capacities unless expressly authorized by Congress, the federal government had liberally interpreted the law throughout the twentieth century.[6] Infamously, President Herbert Hoover ordered General Douglas MacArthur to use Army troops to disperse the Bonus Army encampments from Washington D.C. in 1932. The Army stood at the ready in the 1940s as labor strikes erupted around the country, prepared to move in and quell political unrest. When southern opposition to desegregation threatened to become violent, President Eisenhower called on the Army to protect black students at Little Rock High School in Arkansas in 1956. Given the extraordinary circumstances of the Sixties, presidential administrations frequently ignored or overlooked the restrictions on the use of the military to enforce the rule of law.[7] In the decade's early years this institutional response was confined mainly to racial violence in the South related to civil rights protests and struggles for racial equality. Army troops served as backup to federal marshals and National Guard forces in Oxford, Mississippi in 1962 and 1963, and Tuscaloosa and

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Interdivisional Information Unit (and Successor Units (IDIU); General Records of the Department of Justice, Record Group 60 (RG 60); National Archives, College Park, Maryland (NACP).

[6] Linda J. Demaine and Brian Rosen, "Process Dangers of Military Involvement in Civil Law Enforcement: Rectifying the Posse Comitatus Act," 9 *New York University Journal of Legislation and Public Policy*, 166 (2005-2006), 170n3.

[7] See Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945-1992*, (Washington, D.C.: Center for Military History, United States Army, 2005).

Huntsville, Alabama in 1963. The army watched over Martin Luther King, Jr.'s civil rights march from Selma to Montgomery, Alabama in 1965.[8]

When the White House tasked the Pentagon with developing a plan to combat riots, McNamara believed the Army well-suited for domestic riot control. As historian Michael Flamm explains, "Army units also had considerable minority representation and fire discipline, in sharp contrast to the virtually all-white National Guard whose indiscriminate discharge of weapons had inflated casualty rates so dramatically in Newark and Detroit."[9] When called upon by the president, McNamara was confident, the Pentagon had the capacity to use military troops to maintain order. Though the Army initially resisted the Kerner commission's recommendation to establish intelligence units (as potentially unconstitutional), McNamara was especially concerned that the Pentagon did not have the intelligence it needed to assess the root causes of urban unrest and especially dissent. McNamara tasked his deputy, ardent cold warrior Paul Nitze, with developing the Army's civil disturbance plan. Nitze, taking the recommendations of the Department of the Army Civil Disturbance Plan, proposed expanding the Army's existing intelligence-gathering capacities to better anticipate urban upheaval.[10] Following the

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[8] Statement of Robert F. Froehlke, Assistant Secretary of Defense, *Federal Data Banks, Computers, and the Bill of Rights*, 377; Ben A. Franklin, "Field Commanders in Alabama Linked by 'Hot Line' to Pentagon," *NYT*, 22 Mar 1965, 1; Sheips, *The Role of Federal Military Forces in Domestic Disorders*, 102-165.

[9] Flamm, *Law and Order*, 115-116; Scheips, *The Role of Federal Military Forces in Domestic Disorders*, 217.

[10] Paul Nitze, *From Hiroshima to Glasnost: At the Center of Decision—a Memoir*, (New York: Grove Weidenfeld, 1989), 269; Department of Defense, *Department of Defense Directive 3025.12*, by Paul H. Nitze, Deputy Secretary of Defense, June 8, 1968, cited in *Federal Data Banks, Computers and the Bill of Rights*, 1272-78; Scheips, *The Role of Federal Military Forces in Domestic Disorders*, 224-229.

Detroit riots, the Army implemented Nitze's plan, developing a vast domestic surveillance program. "Repatriating" intelligence officers and agents who had served abroad, the Army tasked thousands of agents in the United States with gathering intelligence to better predict social upheaval. These agents applied cold war counterintelligence methods honed in Berlin, Saigon, and Seoul— use of spies, disinformation campaigns and electronic and technological surveillance —on Americans who dissented from the foreign and domestic policies of the United States government.[11] These counterintelligence tools represented just a small portion of the American state's cold war security capacities.[12]

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[11] Army intelligence agents who monitored domestic politics in the late 1960s and 1970s had varied backgrounds. But most of those who blew the whistle on this program in the early seventies had been agents abroad before serving in the United States. See Ralph Stein testimony and statement in *Federal Data Banks, Computers and the Bill of Rights,* 244-276. Stein, for example, had served with distinction as a counterintelligence agent in Korea before being assigned to the Army's domestic Counterintelligence Analysis Branch in 1967. In 1971 Senator Sam Ervin presided over hearings to investigate the collection of computerized data on American citizens. Specifically, he wanted to know more about the Army's domestic political surveillance program. Responding to Ervin's request, the Army performed an internal review, and these documents came to be known as the "The Chronology and Supporting Documents of the Chief of Staff, Army, Task Force Prepared January-April 1971." The author currently has a pending FOIA request submitted to the Department of the Army for access to these documents.

[12] Following World War II national security planners like Paul Nitze believed that the imperatives of a bipolar geopolitical world required a bureaucratic structure to manage national security. Congress and the Truman administration institutionalized a national security state with the National Security Act of 1947. The bill developed new institutional capacities to enable the executive branch to more efficiently and effectively formulate foreign policy. See Michael Hogan, *Cross of Iron: Harry S. Truman and the Origins of the National Security State, 1945-1954,* (New York: Cambridge University Press, 2000); Melvyn Leffler, *A Preponderance of Power: National Security, the Truman Administration, and the Cold War*, (Stanford: Stanford University Press, 1992); Charles E. Neu, "The Rise of the National Security Bureaucracy," in *The New American State: Bureaucracies and Policies since World War II*, ed. Louis Galambos (Baltimore: The Johns Hopkins University Press, 1987), 86-87. Even in the context of the emerging cold war and what one historian has called a powerful "ideology of national security," the bureaucratization and cost of the national security state was highly contentious, threatening to undermine American political traditions like antistatism and antimilitarism. In 1947 President Truman faced powerful political opposition to his plan to institutionalize this new national security regime. Both conservatives and national security planners argued that Truman's plans could produce a "garrison state" which historian Michael Hogan has called a "metaphor to describe a society dominated by military institutions, a military economy, and a military mentality." Hogan, *Cross of Iron*, 10-14, 18; see also Aaron L. Friedberg, *In the Shadow of the Garrison State: America's Anti-Statism and Its Cold War Grand Strategy,* (Princeton: Princeton University Press,

Historically, the Army had a long history as an enforcer of domestic stability. Like the FBI, in the 1960s the Army's domestic organizational imperative—to establish law and order—led officers and agents to blur the distinction between lawful dissent carried out by American citizens and unlawful, insurrectionary activities planned by foreign communist foes of the United States. Top-level security officials like FBI Director J. Edgar Hoover explicitly blurred this distinction in public pronouncements and inter-governmental correspondence. In Hoover's view American youth were exposed to "more extremists and radicals than ever before" in the nation's history. Subversives who

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2000), 56-58. Nearly all this opposition, however, disintegrated in 1949. That year China "went red" and the Soviet Union successfully exploded its first atomic bomb. Looking out over a geopolitical landscape that seemed more menacing than ever, Paul Nitze, the new director of the State Department's Policy Planning Staff, took the lead in writing the document known as NSC-68. Arguing that the Soviet Union was "animated by a new fanatic faith" and that it would stop at nothing to "impose its absolute authority over the rest of the world," Nitze and his staff emphasized the need for American military preparedness to confront the communist menace. In particular, Nitze urged the development of "a comprehensive program that integrated civilian and military resources and obliterated the line between citizen and soldier, peace and war." See Hogan, *Cross of Iron*, 10-14, 18. North Korea's invasion of the south in 1950 drew the United States into war eroded Truman's reservations over approving NSC-68. The prospect of a total struggle against international communism led to accelerated state building during the Truman administration, especially of the national security state. Critics and supporters alike worried about how the cold war national security regime would influence American culture and society. Fear of Soviet global dominance and the real possibility of nuclear annihilation fostered a great sense of insecurity among the American public and elected and appointed officials, triggering a red scare. The state fanned the flames of anxiety in the late 1940s and early 1950s. The FBI aggressively pursued communists and sympathizers and the House Committee on Un-American Activities (HUAC) created a climate of fear and suspicion that permeated every corner of American society. President Truman introduced a loyalty program for federal employees. Attendant fears of communism led to purges in Hollywood and academe. When Senator Joe McCarthy declared that he had evidence of widespread subversion within the federal government in early 1950, he was riding a groundswell of public fear spurred by the U.S. government. James T. Patterson, *Grand Expectations: The United States, 1945-1974*, (New York: Oxford University Press, 1996), 165-205. On McCarthyism, see Jeff Broadwater's *Eisenhower and the Anti-communist Crusade*, (Chapel Hill: University of North Carolina Press, 1992); Richard M. Fried, *Nightmare in Red: The McCarthy Era in Perspective*, (New York: Oxford University Press, 1990); Ellen Schrecker, *No Ivory Tower: McCarthyism and the Universities*, (New York: Oxford University Press, 1986); David Oshinsky, *A Conspiracy so Immense: The World of Joe McCarthy*, (New York: Free Press, 1983), and *Senator Joe McCarthy and the American Labor Movement*, (Columbia, MO: University of Missouri Press, 1976); Robert Griffith, *The Politics of Fear: Joseph R. McCarthy and the Senate*, (Lexington: University of Kentucky Press, 1970) and *The Specter: Original Essays on the Cold War and the Origins of McCarthyism*, (New York: New Viewpoints, 1974).

dealt in "bigotry, hate and falsehoods," Hoover warned, had the sole purpose of "turn[ing] young Americans against their country." Security officials like Hoover viewed dissent as an avowal "to overthrow the existing order." Even if radicals were not reds, he argued, they were dupes of the international communist conspiracy who were aiding and abetting communists by challenging authority and weakening the American state. This worldview led some domestic security experts to conflate the Soviet-led communist threat to the American way of life with the lawful, if disorderly, conduct of racial justice radicals and anti-war protestors.[13]

As a result, U.S. cold war counterintelligence programs worked to root out all subversive forces and destroy their ability to foment disorder. On an institutional level the Army's domestic surveillance program did not distinguish, as Frank Donner has written, among "opponents of the status quo."[14] Many commanding officers and counterintelligence agents perceived dissent in the United States as a subversive threat because they believed that such dissent weakened the United States during a time of war—both cold and hot—and so served the interests of the United States' enemies. As a result, officials in the Pentagon and other agencies enthusiastically developed the capacity to surveil, disrupt, harass, and persecute lawful, constitutionally protected political dissent on American soil.

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[13] "Message from the Director," *FBI Law Enforcement* Bulletin, Oct 1968 vol. 37, no. 10, 1; "Message from the Director," *FBI Law Enforcement* Bulletin, Sept 1968 vol. 37, no. 9, 1.

[14] Frank Donner, *The Age of Surveillance: The Aims and Methods of America's Political Intelligence System*, (New York: Alfred A. Knopf, 1980), 289.

President Lyndon Johnson arrived reluctantly at the decision to commit Army paratroopers to the urban revolt in Detroit in 1967. Believing firmly that "primary responsibility" for controlling civil disorder "remained with state and local officials," he based his decision more on political calculation than personal commitment.[15] As a man with perhaps unparalleled political acumen, Johnson was eager to deflect the Republican Party's effort to paint the Democrats as soft on crime before the upcoming presidential election. Republican critiques struck a chord with many Americans, who believed that the president should act more vigorously to halt urban violence. "Widespread rioting and violent civil disorder have grown to a national crisis since the present Administration took office," Republicans declared. "Today no one is safe on the streets, in his home or in his property." The country, they warned, was "rapidly approaching a state of anarchy." Republicans blamed the president who, they argued, opposed legislation aimed at restoring "law and order." Johnson's "pleasant platitudes and statements of good intentions," the GOP charged, were wholly insufficient to address "the critical state of the nation."[16]

Defense Secretary Robert Strange McNamara headed up the effort to use the Defense department to control disorder. He was well prepared to oversee such an effort. Kennedy tapped the "whiz kid," with a name "almost unknown to most Americans," to preside over the nation's burgeoning cold war military establishment because of his

[15] John Herbers, "Johnson Accused by G.O.P. in Rioting," *NYT*, 25 July 1967, 20. See also, Flamm, *Law and Order*, 88-94.

[16] "G.O.P. Statement on Keeping Order", statement approved by the Republican Coordinating Committee, *NYT*, 25 Jul 1967, 20. Flamm, *Law and Order*.

background in management. McNamara brought a keen eye for efficiency and management to the Pentagon. His work was cut out for him, because running the cold war defense bureaucracy was, the *Times* reported, "as big and tough a job as can be found in the Government below the Presidency itself." His experience in business administration made him the top candidate to assume "the burden of directing and administering the gigantic department responsible for the defense of the United States."[17]

McNamara's past service for the federal government, as well as his fifteen years improving Ford Motor's bottom line, earned him his place on the short list for the top job at the Department of Defense.[18] During World War II, working under the direction of Charles Thornton, McNamara and a small group of highly talented young men streamlined data flow to make American air power, then a nascent but blossoming force, a more effective weapon for the Allied forces. Based on this experience McNamara came

[17] "Secretary of Defense," *NYT*, 14 Dec 1960, 38.

[18] The media adored Kennedy's "best and brightest," and none more so than McNamara. Mass media marveled at the man who willingly forewent, at age 44, millions in potential earnings at Ford to serve his country. See Morrie S. Helitzer, "How Do Business Men Do in Washington?" *New York Times*, 7 May 1961, SM37. Demonstrating the integrity that had distinguished him throughout his life, McNamara divested himself of his stocks at Ford and gave up his stock options, which media estimates claimed would net him a potential profit of three million or more. See Damon Stetson, "McNamara is New as a Millionaire," *NYT*, 14 Dec 1960, 31. Perhaps one of the explanations for the media's fascination with Kennedy's team was their bipartisan political affiliation. McNamara, famously, was a registered Republican. He was known in Detroit as a "nonconformist, eschewing clubbiness, reading philosophy, [and] supporting Democrats." See Russell Baker, "Twelve Men Close to Kennedy: Close Because of Important Jobs," *NYT*, 22 Jan 1961, SM6. McNamara remained elusive on his political affiliation. He said that most people assumed he was a Republican because he had registered as one at age twenty-one in California. This was not out of political conviction, he writes, but for no other good reason than his father was a registered Republican. At Ford Motor, Co., executives actively supported and solicited campaign contributions from their top executives for the Republican Party. McNamara found this system distasteful and refused to politically pressure executives in his division. Rather, he encouraged them to contribute—as he would—to either party. Robert S. McNamara, *In Retrospect: the Tragedy and Lessons of Vietnam*, with Brian VanDeMark, (New York: Random House, 1995), 12, 15. Biographical accounts of Robert McNamara include Paul Hendrickson, *The Living and the Dead: Robert McNamara and Five Lives of a Lost War*, (New York: Alfred Knopf, 1996); Deborah Shapley, *Promise and Power: The Life and Times of Robert McNamara*, (Boston: Little, Brown, 1993).

to believe that intelligently applied data could solve the toughest bureaucratic problems. Following the war the Ford Corporation hired Thornton and his team of "whiz kids" to bring efficiency to the auto company's bottom line. The team did not disappoint and rose rapidly through the executive ranks of the company.[19]

He had been a "phenomenon" in Detroit but many top defense experts believed that McNamara faced an "impossible job" in Washington D.C.—to "bring efficiency to a $40 billion military establishment beset by jealousies and political pressures while maintaining American military superiority."[20] McNamara went right to work, promising to make "big decisions" and break with past practices after a careful "study and analysis" of Pentagon programs. Speaking before the annual Associated Press luncheon in one of his first public appearances as secretary, McNamara outlined his plans to "eliminate waste, duplication and unjustifiable expenditure" while still maintaining American defense superiority. This was a formidable task, considering that spending for the American defense establishment represented more than half of the federal budget.[21] McNamara believed the challenges of the Department of Defense could be solved by making the bureaucracy more efficient.

Tasked by President Johnson to coordinate the state's response to urban unrest, McNamara drew upon existing institutional forms. Urban experts within the Department

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[19] Robert S. McNamara, *In Retrospect*, 5-13.

[20] Russell Baker, "Twelve Men Close to Kennedy: Close Because of Important Jobs," *NYT*, 22 Jan 1961, SM6.

[21] McNamara, *In Retrospect*, 23; "Text of Speech by McNamara Outlining Changes in Policies on National Defense," *NYT*, 25 Apr 1961, 29.

of Defense had, since the early years of the cold war, worked closely with officials and organizations in American cities to combat unrest and eliminate subversive elements. Defense intellectuals relied on "command, control, computers, intelligence, surveillance, and reconnaissance," according to historian Jennifer Light, already "essential components in military planners' decision-making arsenals," to solve the nation's urban problems . In this historical context, national security managers, as well as President Johnson, cast the urban crises of the late 1960s as national security crises. Light argues that even the administration's efforts to attack social inequality—the Great Society and the wars on poverty and crime—were interpreted by defense intellectuals as efforts to construct an urban bulwark against subversion and communist infiltration. During the Kennedy and Johnson administrations national security planners moved easily from positions within the defense establishment to assume powerful roles as domestic policymakers. Adam Yarmolinsky, special assistant to the secretary of defense, assumed the position of deputy director of Johnson's Task Force on Poverty. Joseph Califano, who served as assistant to the Secretary of Defense, later became the president's special assistant for domestic policy. These defense intellectuals applied their security management skills to the problems of domestic policy and civil disorder.[22]

Secretary McNamara was determined to enhance institutional capacities in order to better respond to urban disorder. To reduce waste and duplication, Secretary McNamara established an intelligence clearinghouse at Fort Holabird. Known as CONUS

[22] Light, *Warfare to Welfare*, 166-169, 170. For a very thoughtful examination of the strategic planning in the late 1960s and early 1970s related to urban challenges and military solutions see Part III, "The Urban Crisis as National Security Crisis."

Intelligence Branch (CONUS Intel), this computerized hub linked eight military intelligence groups around the country, centralizing control for army intelligence under the Army Intelligence Command.[23] Fort Holabird directed its groups to collect urban intelligence in the event that the president deployed federal troops. Intelligence groups passed their information through the Counterintelligence Analysis Branch (CIAB) operating out of the office of the Army's assistant chief of staff for intelligence, Lieutenant General William P. Yarborough.[24]

Affectionately known as "Big Y" for the way he signed memoranda, Yarborough came from a family of intelligence experts. His father had been an Army colonel and intelligence officer. After World War II, Yarborough commanded counterintelligence and psychological warfare operations in Stuttgart, Germany, and in 1961 he took command of the Army Special Warfare Center and Special Warfare School at Fort Bragg, North Carolina. As director of Army intelligence and the CONUS Intel program in the late 1960s, Yarborough's approach to civil disorder in the United States was deeply informed by his training in cold war counterintelligence methods. In Germany he had personally directed and participated in counterinsurgency programs against foreign foes. He approached his task at head of CONUS Intel with the fervent belief that "outside influences were aiding and abetting" Americans who practiced their constitutionally protected right to protest. He could not believe that the spontaneous eruption of dissent,

[23] Continental United States. Pyle, "CONUS Intelligence," 6. Army intelligence operations in the United States prior to 1965 were primarily focused on issues related to routine security clearances. See Richard Halloran, "Army Spied on 18,000 Civilians in 2-Year Operation," *NYT*, 18 Jan 1971, 1.

[24] Halloran, "Army Spied on 18,000 Civilians in 2-Year Operation," *NYT*, 18 Jan 1971, 1.

revolution, and mass protest in the United States could be possible without the funding and organizational capacities of the international communist movement.[25]

Yarborough's insistence upon the communist backing of rioters and protestors pointed CONUS Intel resources to the wrong targets. Consequently, the Army failed to predict the explosion of violence and disorder in Newark, New Jersey in July 1967. McNamara believed that multiple civil disturbances were likely to follow Newark. In this case, the president would like need to mobilize the Army to augment the National Guard. He directed the Army to establish an early civil disturbance warning network, linking the Army's 300 nationwide domestic intelligence officers with CONUS Intel at Fort Holabird.[26]

When Detroit erupted in violence, burning and looting a few weeks after Newark, Yarborough told his staff to "get out your counterinsurgency manuals. We have an insurgency on our hands." Yarborough's cold war counterintelligence training left the lieutenant colonel ill prepared to distinguish civil disorder in the United States from insurgency abroad. As one officer later recalled, "There we were, plotting power plants, radio stations, and armories on the situation maps when we should have been locating the liquor and color-television stores instead."[27] Indeed, Detroit revealed the weaknesses of

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[25] Adam Bernstein, "Lt. Gen. William Yarborough Dies," *WP*, 8 Dec 2005, B05, quote is Yarborough's own words; Halloran, "Army Spied on 18,000 Civilians in 2-Year Operation," *NYT*, 18 Jan 1971, 1.

[26] Pyle, *Military Surveillance of Civilian Politics, 1967-1970* (New York: Garland Publishing, 1986), 36-45. *Military Surveillance* is Pyle's dissertation which earned him a doctorate in political science from Columbia University. The manuscript is based on information he obtained while interviewing some forty-eight former Army intelligence and counterintelligence agents, 1970-1972. See chapter three regarding Pyle's work with congress to restrict military surveillance of domestic politics.

[27] Cited in Pyle, "CONUS Intelligence," *WM*, vol. 1, no. 12, 8.

Yarborough's strategy, based as it was on the precepts of cold war counterinsurgency methods. Institutionally, the Army relied on a language and strategy for fighting international foes – real insurgents – rather than understanding the nature of domestic problems. Army counterintelligence officers lacked the skill set and experience to assess and respond to the domestic troubles of 1960s America. Besides being rather ridiculous in practice, the army's program of domestic surveillance made the violation of constitutional rights of thousands of American targets unavoidable collateral damage.[28]

After the Army's failure to predict the urban uprisings of 1967, McNamara and Nitze reevaluated the Pentagon's institutional capacities. Given the right information, McNamara and Nitze believed they could adequately respond to future disturbances. Nitze focused on expanding the Army's existing intelligence capacities. National security planners remained unwavering in their conviction that international agitators backed civil disorder in the U.S. In an effort to identify these elements, the Army expanded CONUS Intel efforts to include dissidents in general and anti-war protestors in particular.[29]

Across the executive branch officials ordered domestic security agencies to find the link between the international communist movement and those who fomented disorder in the United States. As the radical Black Power movement became more vocal

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[28] Pyle, *Military Surveillance*, 36-45.

[29] J. Walter Yeagley, Assistant Attorney General, Internal Security Division, to Ramsey Clark, Attorney General, 27 Oct 1967, "International Aspects of Pentagon Demonstration," PPRC; box 115, Pentagon Demonstrations; LBJL. The body of the report consists entirely of radio broadcasts out of Vietnam. Yeagley notes that neither the broadcasts nor a review of files "proved very helpful" in establishing a firm connection between international communist forces (especially those in Vietnam) with anti-war protests at home. This report suggests how carefully the federal government monitored the anti-war forces in its effort to link American dissidents with international agents.

in its opposition to the Vietnam War, intelligence experts linked international and domestic movements. Black Panther Bobby Seale called on urban blacks to take up arms against their own country, predicting that as "the aggression of the racist American government escalates in Vietnam, the police agencies of America [will] escalate the repression of black people throughout the ghettos."[30] Seale was right, in part. U.S. security agencies responded to domestic unrest by using the off-the-shelf institutional tools that had been developed for international efforts, like the war in Vietnam. Historian Michael Flamm documents the Pentagon's close collaboration with state and local police. When McNamara took over the administration's response to civil disorder, the Marines trained local and state police in counterinsurgency techniques and guerrilla warfare. The administration encouraged Army personnel to go into police work after retirement. State and local police borrowed from the Pentagon's war toolkit, but more than that, they were literally the recipients of the Johnson administration's guns and butter programs. Flamm writes that the Department of Defense distributed weapons to state and local police through the Law Enforcement Assistance Administration, including "electronic movement sensors, armored troop carriers, and sophisticated scout helicopters."[31]

Anti-war protestors declared an implicit connection between the U.S. government's policies in Vietnam and the urban revolt at home. At a press conference in August of 1967 announcing plans to march on Washington, the National Mobilization Committee to End the War in Vietnam (Mobe) claimed that there was "*only one*

[30] Bobby Seale quoted in Anderson, *The Movement and the Sixties*, 176-77.

[31] Flamm, *Law and Order*, 119.

struggle—for self-determination—and we support it in Vietnam and in black America." These public pronouncements, explicitly connecting U.S. foreign policy to the social unrest, seemed to some top-level national security planners evidence of the links between international movements and domestic unrest. Army intelligence agents infiltrated the March on the Pentagon in the fall of 1967. President Johnson and other top officials came down hard on senior Army officers in the wake of the protest—catching what one called "undiluted hell"—for failing to accurately predict the number of protestors and their intended plans.[32]

These consecutive "failures" on the part of Army intelligence prompted a seemingly paradoxical response from national security planners. Even as CONUS Intel expanded its intelligence capacities, gathering intelligence from local and state police, the FBI, and Secret Service, the Army outlined restrictions for intelligence operations. CONUS agents worked with local and state police, gathering intelligence about possible "agitators." Recognizing the potential danger to civil liberties if the Army began to broadly sweep up intelligence, the Army authored guidelines to restrict some counterintelligence activity. Counterintelligence officers, according to the new regulations, would not "directly … obtain civil disturbance information" unless authorized by Army headquarters. Neither would Army personnel participate in so-called

[32] Froehlke statement cited in *Federal Data Banks, Computers, and the Bill of Rights*, 377; Mobe, "Confront the Warmakers Oct 21-22: Press Statement Issued Aug. 28," (emphasis in original) cited in Charles DeBenedetti and Charles Chatfield, *An American Ordeal: the Antiwar Movement of the Vietnam Era*, (Syracuse, Syracuse University Press, 1990), 188; Halloran, "Army Spied on 18,000 Civilians in 2-Year Operation," *NYT*, 18 Jan 1971, 1.

"covert operations" unless authorized with the prior approval of the Assistant Chief of Staff of the Army for Intelligence.[33]

The new restrictions, however, were only as effective as Yarborough would require them to be. He was not personally inclined to restrict anything; in fact, he encouraged, and in some cases ordered, CIAB analysts to find evidence to support his theory that subversive elements in the United States conspired with international agents to coordinate urban violence and civil disorder. In spite of their best efforts, analysts located no such evidence. Nevertheless, Yarborough remained resolute in his conviction that fifth column elements existed in the ghetto, and he assured his analysts that they would eventually find proof that the rioters "were tied in with each other—they were trained in Havana or Peking or some damned place."[34] This intelligence was gathered along with intelligence from the FBI and the Secret Service and sent back to Fort Holabird. Officers fed this raw data into the new computer system and created the "compendium." This desktop "encyclopedia" included the names of people and organizations of interest—including their political beliefs and affiliations—which the Army distributed among federal agencies.[35]

According to one former agent who often prepared reports for the lieutenant colonel, Yarborough had "a deep and abiding interest in groups in [the United States] engaged in dissident activity." He demanded weekly intelligence briefings about a variety

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[33] Froehlke statement cited in *Federal Data Banks, Computers, and the Bill of Rights*, 2382-3.

[34] Pyle, *Military Surveillance*, 47.

[35] Halloran, "Army Spied on 18,000 Civilians in 2-Year Operation," *NYT*, 18 Jan 1971, 1; Pyle, *Military Surveillance*, 69-70.

of organizations and expected the analysts to find material to support his suspicion that New Left and civil rights organizations were "engaged in unlawful activity, civil disturbance activity." Though his analysts were rarely able to corroborate his theories, they nonetheless felt obliged to produce charts and graphs, financial records, leadership, and history of the organization to satiate the General's predispositions.[36]

Yarborough was not alone in his obsession with ferreting out "subversive forces" in the United States. Some intelligence agents liked to play "James Angleton."[37] Many found infiltrating civil rights groups and trailing peace and anti-war activists much more engaging work than attending to the boring tasks of routine security clearances. Absent clearly defined intelligence protocol from the defense secretary, Army intelligence officers used cold war era procedures for compiling information about so-called subversive forces. The Army's own intelligence collection plan so broadly defined "subversive activities" that, as one counterintelligence officer later recalled, it "implied

[36] Stein testimony cited in *Federal Data Banks, Computers, and the Bill of Rights,* 251. Ralph Stein was a former sergeant in counterintelligence in the U.S. Army. He contacted Pyle shortly after Pyle published his account of Army surveillance in the *WM;* Stein was also troubled by what he had observed as a counterintelligence officer at CIAB. When Senator Sam Ervin hired Pyle to interview former intelligence agents, Pyle recruited Stein to do the leg work. During nine months, Stein traveled around the country interviewing dozens of former Army domestic intelligence agents. Though the bulk of Stein's testimony at the Ervin hearings was based on his own personal experience at CIAB, he also recounted stories based on interviews conducted for the committee. The Army replaced Yarborough in 1968 with Major General Joseph A. McChristian, who had been in charge of military intelligence in Vietnam. McChristian recalled he tried to scale back Army domestic intelligence operations, believing that it took too much time away from other military intelligence tasks. The Department of Justice objected, claiming it relied on the intelligence the Army could provide. See Richard Halloran, "Army Spied on 18,000 Civilians in 2-Year Operation," *NYT*, 18 Jan 1971, 1.

[37] Angleton was the CIA's counterintelligence chief from 1954-1975. See Tom Mangold, *Cold Warrior: James Jesus Angleton, the CIA's Master Spy Hunter,* (New York: Touchstone Books, 1992); Michael Holzman, *James Jesus Angleton, the CIA, and the Craft of Counterintelligence,* (Amherst: University of Massachusetts Press, 2008).

that the Army viewed litigation, sit-ins, voter registration drives, and mass rallies as subversive activities warranting surveillance by Army agents."[38]

Regional and local commanding officers rarely distinguished between those who exercised First Amendment rights and those who advocated violence or committed crimes. When the Army charged intelligence officers with identifying "subversive activities" in preparation for civil disturbance outbreaks in the summer of 1968, institutional guidelines identified "dissident elements" as civil rights movements, anti-Vietnam and anti-draft movements, and "subversive and conspiratorial" organizations such as the peace movement and the Progressive Labor Party, the Student Non-Violent Coordinating Committee, and the Revolutionary Action Movement. The only "friendly forces" identified were U.S. military agencies including USCONARC, CONUS, and the US Army Intelligence Command![39]

In an age of data banks and computers, the Army's broad application of the term subversive had potentially devastating consequences for targeted individuals. CIAB blacklists were officially meant "to keep track of people who might cause trouble for the Army," but neither civilian nor military officers established guidelines for analyzing the accuracy of collected data. Consequently the very existence of a file within the Army's compendium or computer data bank suggested subversive activity. The sharing of data—

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[38] Pyle, *Military Surveillance*, 118-9; "Spying: They've Probably Got You On the List," *NYT*, 27 Dec 1970, 124.

[39] Annex B (Intelligence) to Department of the Army Civil Disturbance Plan (U), 1 Feb 1968, cited in *Federal Data Banks, Computers, and the Bill of Rights,* 1119-1121. For an example of a report see "Counterintelligence Research Project: Student Non-Violent Coordinating Committee," published by Department of the Army, Office of the Assistant Chief of Staff for Intelligence, 10 Oct 1967; NSF, box 5, civil rights and anti-war personalities; LBJL.

accurate or not—across executive agencies could leave an indelible black mark on individuals who neither knew of the existence of their record, nor had any recourse to challenge the validity of the information held therein. In past decades the label of communist or sympathizer in the United States could have devastating consequences for one's economic stability, family, and professional life. The CIAB's computerized intelligence reports proved popular with many government agencies, including the FBI, the Justice Department, and state and local police departments. One insider claimed that CONUS Intel "created addicts for this stuff [intelligence] all over the Government." Several volumes included intelligence taken verbatim from the Alabama Department of Public Safety and included white supremacist condemnation of civil rights leaders and organizations as "criminals and degenerates."[40]

Top Army brass acknowledged the grey area of domestic intelligence work. The Army conceded that an "overwhelming majority" of anti-war and civil rights movement participants were "sincere Americans." Nevertheless, to identify the "small but virulent number" who aimed to "tear American apart," the Army encouraged broad surveillance and intelligence collection. To mollify critics, Army commanding officers surely underscored that the program was a provisional response to social upheaval. They

[40] It is difficult to ascertain whether the files maintained and shared by the Army had a deleterious effect on any one person. However, congressional investigations in the early 1970s revealed that federal agencies maintained hundreds of computer databanks containing personal information about hundreds of thousands of Americans. Until the Privacy Act of 1974, no statute governed the way in which personal information was gathered, exchanged between agencies, or maintained. For a discussion of the Privacy Act, see chapter five. For the proliferation of federal databanks, see *Federal Data Banks and Constitutional Rights: A Study of Data Systems on Individuals Maintained by Agencies of the United States Government*. Halloran, "Army Spied on 18,000 Civilians in 2-Year Operation," *NYT*, 18 Jan 1971, 1; Pyle, *Military Surveillance*, 72-3; Ben A. Franklin, "Surveillance of Citizens Stirs Debate," *NYT*, 27 Dec 1970, 1; Franklin, "Federal Computers Amass Files on Suspect Citizens, Many Among Hundreds of Thousands Listed Have no Criminal Records—Critics See Invasion of Privacy," *NYT*, 28 Jun 1970, 1.

undoubtedly envisioned a swift return to the Army's more traditional domestic intelligence role when law and order had been reestablished. Perhaps this reassured some that their mission to identify "the well springs of violence and the heart and nerve causes of chaos" was a reasonable task given the social upheaval of the late sixties. Army intelligence commanders believed they would be remiss if they allowed "the professional violence purveyors" to perpetuate "law breaking, social disintegration, chaos, violence, destruction, insurrection, revolution" to take place on their watch on American soil.[41]

Some Army counterintelligence agents shared Yarborough's views of civil disorder. This group, as one former analyst recalled, tended to see a "communist behind every bush." This cold war mentality led some to collect what one counter-intelligence officer called "social intelligence." One such report observed a protest by welfare mothers who were "sick and tired of not having enough money to feed their children." Such "intelligence" met none of the Army's informational needs pertaining to civil disturbances. As one former agent recalled, the Army's needs were "simple": "They had to know about the physical geography of the city; they had to know what was happening on the ground at the moment [of briefing], and what they could expect to encounter in the way of resources when they arrived on the scene."[42]

Most Army counterintelligence agents expressed little appreciation for the complicated social and cultural tensions in the United States in the Sixties. "The

[41] Vasco J. Fenili, Acting Deputy Assistant Chief of Staff for Intelligence (for William P. Yarborough, Assistant Chief of Staff for Intelligence), "Department of the Army Civil Disturbance Information Collection Plan," 2 May 1968, cited in *Federal Data Banks, Computers, and the Bill of Rights,* 1122-23.

[42] Stein testimony cited in *Federal Data Banks, Computers, and the Bill of Rights,* 247, 249.

professional soldier," observed one CIAB agent, "is trained for war. He is steeped in a tradition which emphasizes force as the final arbiter and instills a moral code which, however well suited to the exigencies of warfare and military service it might be, has little relevance to the process of understanding and solving our complex social and urban problems." Men like Yarborough were lost in the domestic realm. Intelligence agents had varied socio-economic backgrounds, and many were trained for missions abroad and cycled into domestic service after their overseas missions. One officer commanded a tank unit in Vietnam and had little or no experience in intelligence work. Yet his domestic intelligence assignment required him to be "conversant with radical activities." One graduate of the U.S. Military Academy who had served in an infantry unit worked the racial desk for the CIAB. Though he was capable and intelligent, the assignment left him with a "sense of being at sea, of not really being able to reconcile his background training with this kind of duty which, he felt, was inappropriate for the Army to be involved in the first place."[43]

Most domestic counterintelligence agents were steeped in an institutional cold war culture that encouraged them to see "conspiracy" as the "key to understanding events." Most had spent their adult lives overseas and were not familiar or even acquainted with domestic life in the United States. Like Yarborough, many "approached civil disturbance problems with the conspiratorial theory and the inclination to gather all the data they could amass" to prove their theory. Army agents frequently briefed CIA liaison officers on "subjects" of interest. At the request of the director of security for the

[43] Stein testimony cited in *Federal Data Banks, Computers, and the Bill of Rights,* 254, 257, 251-52.

CIA, one former Army intelligence officer thoroughly investigated *Ramparts*, a New Left magazine. Much to the chagrin of his Army superiors, the officer could not establish a link between the magazine and foreign financiers, or "Comintern backing," as one Army official called it. The CIA and his Army superiors were furious and told the officer he had "essentially failed" in his assignment.[44]

No one was above suspicion. In Illinois, the 113th Military Intelligence Group put Senator Adlai Stevenson, III, Congressman Abner Mikva, and federal circuit court judge Otto Kerner on its watchlist. Army counterintelligence made Stevenson a target when he was photographed with Jesse Jackson, then head of the Southern Christian Leadership Conference's "Operation Breadbasket." Like Mikva, Stevenson came under scrutiny too for his anti-Vietnam war views. The Army created a file on Kerner after the National Advisory Commission on Civil Disorders, which he chaired, published its final report in 1968. Ironically, the Kerner report found no evidence of conspiracy with foreign agents in its examination of the urban uprisings of 1967.[45]

Not all Army counterintelligence agents were comfortable playing the James Angleton role. Some communicated their concerns about Army counterintelligence methods to their civilian and military superiors. The Army assigned Agent Oliver Peirce, trained in counterintelligence methods from December of 1968 through April of 1969 at the U.S. Army Intelligence School at Fort Holabird, to the 5th Military Intelligence

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[44] Stein testimony cited in *Federal Data Banks, Computers, and the Bill of Rights*, 254, 257, 251-52.

[45] *Uncle Sam is Watching You: Highlights from the Hearings of the Senate Subcommittee on Constitutional Rights*, (Washington, D.C.: Public Affairs Press, 1971), 119-120.

Detachment at Fort Carson, Colorado. He was ordered to infiltrate the Young Adult Project (YAP), an umbrella organization for a loose affiliation of groups of the Pikes Peak Council of Churches. Peirce's commanding officer explained that one of YAP's founders was a former member of SDS and had been active in the anti-war movement. This "radical" might use YAP to "influence soldiers from Fort Carson against the Army, [and] against the war."[46]

Peirce's commanding officer instructed him to collect any information he could obtain about the "civilian young adult members of this project" as well as identify any military personnel who attended meetings or visited the project center. Peirce watched this group and attended meetings from June through November of 1969. He witnessed nothing to indicate that YAP promoted violence or was "disloyal" to the U.S. government. Peirce believed his intelligence work was redundant; he was one of many counterintelligence officers who had infiltrated local and regional peace movement organizations. When he hinted to his superior that his "intelligence" was useless, Peirce was instructed to continue attending meetings. He was later dismayed to find that, despite all evidence to the contrary, his commanding officer included YAP on an Army chart of "extremist" political groups in Colorado, a distinction it shared with the local branch of SDS.[47]

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[46] Testimony of Oliver A. Peirce cited in *Federal Data Banks, Computers, and the Bill of Rights*, 305-7.

[47] Testimony of Oliver A. Peirce cited in *Federal Data Banks, Computers, and the Bill of Rights*, 305-7, 309.

Peirce's experience was the norm.[48] Department of Defense intelligence guidelines for domestic surveillance granted Army intelligence sweeping authority in the name of establishing law and order. Local and regional intelligence officers and agents interpreted this mandate broadly. The Army assigned one intelligence agent to White, South Dakota, after a local college party got a little out-of-hand. The police quelled the disturbance quite handily, but Army intelligence decided to investigate in order to be sure that another drunken brawl would not go "undiscovered." Because the Army had such resources, and because it had been tasked with predicting domestic civil disturbance, its agents and commanders were more likely to go far beyond their duty of preparing the Army for federal troop commitment. In effect, recalled one officer, Army counterintelligence agents spent time "chaperoning college students … taking part in their discussions and monitoring their private lives"—a waste of Army intelligence resources.[49]

In spite of the disconnect between the Department of Defense intelligence needs and the work of Army agents on the ground, institutional imperatives continued to promote useless, and in some cases, extra-constitutional surveillance practices. Presidential commission findings bolstered the cold war counterintelligence, counterinsurgency approach of national security elites to the twin problems of protest and urban revolt. In 1968 President Johnson's Kerner Commission issued its long-awaited

[48] Senator Sam Ervin investigated the Army's surveillance program in 1971 following Pyle's article in the *Washington Monthly*. His subcommittee report was published in two volumes, *Federal Data Banks, Computers, and the Bill of Rights*. See also chapter three.

[49] Stein testimony cited in *Federal Data Banks, Computers, and the Bill of Rights,* 255.

report on civil disorder. The commission recommended the creation of an intelligence unit "to gather, evaluate, analyze, and disseminate information on potential as well as actual disorders." The commission recommended the use of "undercover police personnel and informants," to gather intelligence, but also "community leaders, agencies, and organization in the ghetto."[50] Intelligence, the commission affirmed, was at the heart of any institutional effort to combat undesirable political and social behavior—at home or abroad. In effect, presidential commissions promoted the use of institutional techniques, expanded in the cold war, and applied at home. Civil servants cited the commission's recommendations to justify the development and expansion of domestic intelligence programs including the Interdivisional Information Unit within the Department of Justice and the Army's CONUS Intel.[51]

It was in this context of expanding state power in the name of law and order that the presidential campaign of 1968 unfolded. Republican Richard Nixon took up the theme as his banner issue. According to historian Michael Flamm's persuasive account, Nixon's electoral victory reflected a "growing sense among whites that liberal programs could not prevent social disorder, which in turn reinforced the growing popularity of 'law

[50] *Report of the National Advisory Commission on Civil Disorders* (New York: Bantam, 1968), 487.

[51] Pyle, *Military Surveillance*, 27. Assistant Secretary of Defense Robert F. Froehlke cited the Kerner Commission's findings in testimony before Senator Sam Ervin's Constitutional Rights Subcommittee in 1971 in defense of the Army's civilian surveillance program. Specifically he noted the Commission's recommendation that the Army be prepared to "provide aid to cities" where federal troops were committed for civil disorder. Froehlke also noted the Commission's observation that lack of "accurate information" before and after disorders posed problems for law enforcement agents and their response planning. See *Federal Data Banks, Computers, and the Bill of Rights*, 379-80.

and order.'"[52] The Nixon campaign capitalized on a fear haunting many Americans—unabated lawlessness in the streets of America. Nixon's triumph over liberal Hubert Humphrey in 1968 suggested an electoral mandate to use any means necessary to impose law and order.

A second component of Nixon's campaign (and one far less politicized) was a pledge to reform big government. During a 1969 televised address on federalism, Nixon declared that as president he would curb state growth and roll-back some Great Society programs. Though the administration did restrict the state in the realm of social welfare (though much less than his campaign would have suggested), Nixon officials expanded the powers of the domestic security state, enhancing and redefining the role of the Department of Justice's Interdivisional Information Unit.[53] Nixon's Attorney General, John Mitchell restructured the IDIU to improve coordination with local police and law officials to predict violence and effectively quash it. In March 1969 the deputy attorney general established an Interdepartmental Intelligence Evaluation Committee to review the intelligence collected by the IDIU and prepare a report about areas with a potential for civil disorder. The new intelligence committee included representatives from the Department of Justice's Criminal Division, FBI, Internal Security Division, and the Community Relations Service, and the Department of the Army. The Committee's first

[52] Michael Flamm, "The Politics of 'Law and Order,'" in David Farber, Jeff Roche, eds. *The Conservative Sixties* (New York: Peter Lang, 2003), 143.

[53] See chapter one for the history of the IDIU within the Department of Justice. Timothy Conlan closely examines Nixon's New Federalism in *From New Federalism to Devolution: Twenty-Five Years of Intergovernmental Reform* (Washington, D.C.: Brookings Institute Press, 1998). Conlan argues that New Federalism emerged as a response to the administrative dysfunctions and implementation failures of Lyndon Johnson's Great Society programs and signified the emergence of conservative ideology as well as the break up of liberal political coalitions established during President Franklin Roosevelt's New Deal era.

assignment was to identify locations where civil disorder seemed likely on the first anniversary of Martin Luther King, Jr.'s assassination.[54]

The Nixon administration may have found justification for its domestic security policy in the Kerner Commission report. But a second commission headed by former Republican president Dwight Eisenhower's brother, Johns Hopkins University's Emeritus President Dr. Milton Eisenhower, offered a more complicated assessment of disorder. Released in December 1969, the report of the National Advisory Commission on Civil Disorders took the long view of recent protest movements and violence as a new expression of an old American tradition. Violent civil disorder—including events like the Whiskey Rebellion, "bleeding Kansas," the violence the Ku Klux Klan perpetuated against freedmen during Reconstruction, and the growth of organized labor—concluded the report, "runs through the American experience." To prevent and control group violence American political institutions should aim to make violence as a political means to an end "both unnecessary and unrewarding." To do so, American institutions should make every attempt to address perceived social and political injustices throughout society.[55]

The Eisenhower commission conceded that violence was inevitable and recommended that the federal government should counteract disorder "firmly, fairly, and

[54] James T. Devine, Chief, Interdivision Information Section to Will Wilson, Assistant Attorney General, March 19, 1969; 1969; 1-2; Incoming and Outgoing Correspondence (IOC), 1967-69; IDIU; RG 60; NACP.

[55] National Commission on the Causes and Prevention of Violence, *Commission Statement on Group Violence*, December 1969; Commission on Violence and Civil Disturbance, p. 1-2; Subject Files (SF); IDIU; RG 60; NACP. For a thoughtful biography of Eisenhower's career, see Stephen E. Ambrose and Richard H. Immerman, *Milton S. Eisenhower, Educational Statesman*, (Baltimore: The Johns Hopkins University Press, 1983).

within the law." The challenge lay in striking a balance between protecting lawful expressions of dissent and establishing an appropriate federal, state and local response to violent upheaval. The best method for controlling group violence, urged the commission, was "prompt, prudent deployment of well-trained law enforcement personnel [who] can extinguish a civil disorder in its incipiency." Furthermore, the report urged "police departments throughout the nation to improve their methods of anticipating, preventing, and controlling" group violence.[56] The commission's report offered something for everyone. On the one hand, it called for a better government effort to eliminate the causes of social disorder and political unrest. On the other, it called for the expansion and enhancement of local domestic intelligence operations to better predict unrest. Notably, the report did not call for a federal role in law enforcement.

Even as the commission implicitly approved of expanded state action in response to social upheaval, it noted "society's failure to afford full protection" to those who wished to express their freedom of speech as a probable explanation for recent unrest. Consequently, the commission recommended that the president propose legislation to allow courts to issue injunctions (requested by the attorney general or citizens) "against the threatened or actual interference by any person," with First Amendment rights including "freedom of speech, freedom of the press, peaceful assembly and petition for redress of grievances."[57]

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[56] National Commission on the Causes and Prevention of Violence, *Commission Statement on Group Violence*, 11.

[57] National Commission on the Causes and Prevention of Violence, *Commission Statement on Group Violence*, 11 (italics original).

The commission's recommendations underscored a historically contentious constitutional issue. How could the state at once enhance and expand the powers of federal, state, and local law enforcement while respecting the First and Fourth Amendment guarantees of freedom of speech and individual privacy? To address inequities in the United States, wrote the commission, democratic institutions must reflect the racial and cultural diversification of the society they represent. "For speech, petition and assembly to be effective, they must be heard and seen." Claiming that media groups offered fewer and fewer perspectives to represent the "growing size and diversity of the nation," the commission grappled with how to encourage the press to report more frequently about the societal problems of underrepresented minority groups.: "Private and governmental institutions," should "encourage the development of competing news media and discourage increased concentration of control over existing media." Recalling Thomas Jefferson's observation that American institutions must be flexible and keep pace with the human mind, the report cautioned, "Today the pace of change has become far more rapid than when Jefferson wrote, and the need for adapting our institutions to the changing environment has become greater still." The commission thus offered a somewhat contradictory approach to the problem of urban disorder—simultaneously recognizing the democratic right to protest while advocating enhanced and better coordinated law enforcement. Both the Johnson and Nixon administrations struggled over these contradictions.[58]

[58] National Commission on the Causes and Prevention of Violence, *Commission Statement on Group Violence*, 13-14, 16.

The proliferation of domestic surveillance and counterintelligence operations in the late 1960s raised fundamental questions about the vitality of constitutionally protected civil liberties in cold war America. Appointed officials within the Justice Department, like Attorney General Ramsey Clark, worried over the long-term repercussions of legal surveillance on the health of American democracy. But First Amendment rights were fleetingly, if ever, a consideration of top officials in the Department of Defense. Rather, they applied institutional capacities developed to combat insurgents and subversives abroad to civil rights battles, urban uprisings, and mass protest. The Department of Defense was ill equipped to differentiate legitimate political protest from "disorder," and was not inclined to make constitutional protections an institutional priority. In cold war terms, threats, even if uncertain or unproven, must be identified. The possible social and political consequences of intelligence gathering—violating constitutionally guaranteed rights to freedom of speech and privacy, for example—were not top priorities for some civilian and military leaders.

In the last half-century historians of American foreign relations have developed a rich literature that explores how domestic imperatives (economic growth and the spread of democracy, for example) have driven American foreign policy. Revisionists such as William Appleman Williams and the succeeding generations of scholars he influenced challenged the field of U.S. foreign relations. Of their many contributions to the field of the history of foreign relations, Williams's "Wisconsin School" and its sympathizers

argued that cold war containment ideology was rooted in domestic politics.[59] Historians of American foreign relations would do well to consider how the instruments of American foreign policy have been applied domestically.[60] During the 1960s, the state responded to social disorder and civil unrest in the U.S. with tools, strategies, and capacities developed to fight a global war against communism.

The Army proved a powerful force in American political and social life throughout the Sixties. But by the end of the decade cracks had begun to appear in the previously impenetrable wall of the national security state. Some Army agents and officers believed that government surveillance programs to monitor dissent violated the Constitution and undermined the very freedoms that the state claimed to protect. Most worried quietly over these contradictions. But the waves of discontent that rolled through American society in the 1960s suggested that some found it increasingly difficult to reconcile the rhetoric of cold war America with the practice of its most powerful institutions. A few Army agents and officers decided to challenge these contradictions openly. Their revelations created a public outcry and launched a congressional inquiry into the domestic applications of national security capacities.

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[59] William Appleman Williams, *The Tragedy of American Diplomacy*, (New York: W.W. Norton and Company, 1959); Thomas J. McCormick, *America's Half Century: United States Foreign Policy in the Cold War and After*, (Baltimore: The Johns Hopkins University Press, 1989); Gabriel Kolko, *The Politics of War*: the World and United States Foreign Policy, 1943-1945, (New York: Random House, 1968); Gar Alperovitz, *Atomic Diplomacy: Hiroshima and Potsdam: the Use of the Atomic Bomb and American Confrontation with Soviet Power*, (New York: Simon and Schuster, 1965); Walter LaFeber, *America, Russia and the Cold War, 1955-1966*, (New York: Wiley, 1967).

[60] Walter LaFeber's *The American Age* is a notable exception, see *The American Age: United States Foreign Policy at Home and Abroad Since 1750*, (New York: W.W. Norton, 1989).

CHAPTER 3
SENATOR SAM, OR: HOW LIBERALS LEARNED TO STOP WORRYING AND LOVE A SOUTHERN SEGREGATIONIST

As a former Army officer and instructor in counterintelligence, Christopher Pyle knew when he was being tailed. He also knew that a well-trained counterintelligence agent would likely try black-bag tactics in order to get as much information as possible on his target. For all these reasons, the retired Army Captain proceeded with his investigation very carefully. In order to protect his own research—taped interviews, personal papers, and hand-written notes—from prying eyes, he built a wooden box and secured it with a heavy-duty padlock. Determined not to let the "watchers" know about his sources or the extent to which his story revealed their tactics, he endeavored to carry the box with him wherever he went. This led to some comical results. Each and every time he left his one bedroom walkup near Columbia University, he lugged the heavy box with him. He made the box to fit perfectly in the trunk of his Volkswagen Beetle. It was an exhaustive regime, however, even for a young man such as himself. As an extra precaution, he recruited a buddy and former counterintelligence officer to follow him with a telephoto lens camera, instructing him to snap a picture of any suspicious person on the street. All this effort, he reasoned, to make public the Army's secret program of domestic surveillance.[1]

[1] This account is drawn from the author's interview with former Army Captain Christopher Pyle, 26 June 2007, audio recording (in Scott's possession).

The urban riots, anti-war protests, and civil unrest throughout the 1960s prompted an immediate, often violent, reaction from "the Establishment." Within the Manichean framework of an American Cold War political culture that posited a bi-polar world divided between good and evil, those who dissented from the foreign and domestic policies of the United States frequently found themselves targets of local, state, and federal law enforcement and intelligence agencies.[2] Had they known of these secret surveillance programs, a majority of Americans likely would have supported them. Weary of civil unrest, urban revolts, and protests, an overwhelming majority of Americans polled in 1970—seventy-six percent—said they did not support the First Amendment right to assemble and dissent from government policies. Blaming the press for sensationalizing protests and fomenting disorder, a majority did not even support the freedom of the press.[3]

Though such intolerance for dissent and disorder was widespread, it was not uncontested. During 1970-71 a coordinated movement of political activists, citizen groups, and members of Congress emerged to confront the national security regime, and to fight to bring it under democratic scrutiny.[4] Taking cues from a broad array of sixties radicals who had been calling for greater transparency and accountability in national

[2] Michael Flamm, *The Politics of Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s*, (New York: Columbia University Press, 2005).

[3] "Most in Poll Favor Limiting Freedoms," *NYT*, 16 Apr 1970, 37.

[4] Political scientist Patrick McGuinn calls policy regimes a "set of ideas, interests, and institutions that structures governmental activity in a particular issue area … that tends to quite durable over time." "Swing Issues and Policy Regimes: Federal Education Policy and the Politics of Policy Change," *Journal of Policy History*, vol. 18, no. 2, 2006, 206.

politics, a loose coalition of non-state actors, working closely with Congress and through the courts, battled to check executive power and to protect the public's "right to know."

These reformers took advantage of structural ruptures in the Cold War political consensus that the contentious politics of the 1960s helped to create.[5] Beginning in 1970 journalists, whistleblowers, "good government" activists, and powerful public advocacy groups seized political opportunities to challenge and investigate the domestic security operations of the United States government. Working closely with reform-minded elected officials in Congress, their efforts to promote institutional reform culminated in a series of congressional hearings on government surveillance, privacy, executive privilege, and freedom of the press in 1971.

At issue was a fundamental question about the state of American democracy: Did citizens in Cold War America have a "right to know" about the operations of their government? Reformers in the 1970s, like many sixties radicals, assumed that the Establishment was inherently flawed. The political culture of the 1960s created fertile soil for the movement to rein in the state. During the first major anti-Vietnam war rally in 1965, the president of Students for a Democratic Society (SDS), Paul Potter, denounced the Vietnam War as "symptom of a deeper malaise" in American society. Potter declared that "faceless and terrible bureaucracies" were largely responsible for the immoral war in Vietnam. Identify "the system," Potter urged his audience, "For it is only when that system is changed and brought under control that there can be any hope for stopping the

[5] Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics*," 2d. ed. (New York: Cambridge University Press, 1998).

forces" of injustice and reviving democratic practice in the United States.[6]

And like their radical predecessors these reformers were determined to restructure the relationship between government and polity by delivering greater power to the people.[7] But to do so, they meant not to overthrow America's political institutions but to reform them. One-time president of SDS Todd Gitlin explained that radicals intended to wrest control from America's most powerful institutions and return power to the people. "Participatory democracy," he later wrote, "meant inserting yourself where the social rules said you didn't belong." The movement was a "revolt against all formal boundaries and qualifications, which it saw as rationalizations for illegitimate or tedious power."[8] Only through greater citizen participation in the politics of everyday life, radicals argued, could the polity overcome the hegemonic power of state institutions. Informed by the democratic esprit de corps of the civil rights movement, New Left movement radicals in the 1960s aimed to challenge the system by reinvigorating democratic practice. Neo-progressives sought to empower the polity by reining in state power.

As militancy and polarization increased during the late 1960s and early 1970s, and social and political problems seemed to many to be more intractable, Americans became increasingly cynical about their leaders and their ability to solve the nation's greatest problems. While some political activists and reformers responded to such feelings of hopelessness and cynicism by turning their backs on politics and looking to

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6 Paul Potter, "Name the System" speech, 17 Apr 1965, <http://www.sdsrebels.com/potter.htm> (11 March 2008).

7 Terry Anderson, *The Movement and the Sixties: Protest in America from Greensboro to Wounded Knee*, (New York: Oxford University Press, 1995), preface.

8 Todd Gitlin, *The Sixties: Years of Hope, Days of Rage*, (New York: Bantam Books, 1987), 134.

more personal remedies to societal crises, others struggled to find new solutions to the political crises they witnessed. Scholars have, as yet, failed to explore how the citizenry's distrust of and anger with their government resulted in a large-scale and largely successful campaign to limit the power and reach of the national security state.[9]

Charles Peters was at the forefront of the loosely affiliated network of people and organizations that refused to give in to alienation, dead-end radicalization, or political burn-out. Peters had not spent the 1960s as a political radical, but he had been deeply enmeshed in the liberal reform movement of the era. As chief evaluator for the new Peace Corps program 1963-1967 under Director Sergeant Shriver, Peters observed troubling trends in the culture of state institutions. Bureaucrats shielded the inner-workings of their organizations from public scrutiny for fear that any criticism might expose them to unwanted budgetary reductions in the next fiscal cycle. Career civil servants jealously guarded their positions. Risk-averse, they avoided actions that might threaten their own advancement, especially criticizing institutional processes. Peters decided in 1968 that the best way to fight these governmental failures was from the outside. Like other presidential appointees, Peters' frustration with the political status quo suggested a splintering of consensus among political elites about the best ways to approach the multiple crises that gripped the nation in the late 1960s. He left the federal civil service

[9] In 1971 Herbert Marcuse, the famous Frankfurt School philosopher, social critic, and darling of the New Left, called for a "long march through the institutions." Disappointed with the pace of "revolution" in the United States, he called for mass resistance coupled with "anything and everything that promises to break the information monopoly of the establishment." Marcuse denounced parliamentary politics, but recognized the legitimacy of "going into the institutions learning how to do the jobs, educating yourself and others on the job." See Herbert Marcuse, "The Movement in a New Era of Repression," *Collected Papers of Herbert Marcuse*, ed. Douglas Kellner, vol. 3, *The New Left and the 1960s* (London: Routledge, 2005), 151-2.

determined to shed light on opaque, ineffective institutions and the officials he believed were responsible for their democratic and policy failures. The *Washington Monthly* (*The Monthly*) would be his torch.[10]

In 1969 Peters published the first issue of *The Monthly,* a political magazine, he said, that would examine "Washington [D.C.] the way that an anthropologist looks at a South Sea Island." The magazine would explore "the institutional imperatives that govern what organizations and the individuals who work for them do."[11] Using New Left-like rhetoric, Peters and his young assistant editor Taylor Branch promised to be "serious critic[s] of those people and institutions" that wielded "tremendous power over every American."[12]

The bureaucrats and government appointees who ran the federal government, Peters believed, would not willingly submit to greater transparency. The success of the magazine, he recognized, depended upon the investigative talents of the writers he could attract to the magazine and the connections those writers—and he—had or could develop within the federal establishment. Peters made the *WM* an exciting place to work, and the magazine attracted a rising cadre of journalists, many of whom had cut their teeth reporting the political culture of mass movements.[13] As participants in, and observers of,

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[10] Charles Peters, *Tilting at Windmills: an Autobiography*, (Reading, MA: Addison-Wesley Publishing Co., Inc., 1988); Charles Peters, interview by the author, 16 August 2007, audio recording (in Scott's possession).

[11] Peters, *Tilting at Windmills*, 143.

[12] Peters and Timothy J. Adams, eds., *Inside the System: A Washington Monthly Reader*, (New York: Praeger Publishers, 1970).

[13] Bestselling authors and renowned journalists and editors who got their start at the *WM* include: Jonathan Alter, senior editor and columnist at *Newsweek*; Amy Sullivan, senior editor at *Time Magazine*;

sixties street heat, these young men and women came to question (in their articles and in their personal politics) the legitimacy and authority of government officials. The *WM's* focus on the inner-workings of the establishment reflected a larger popular movement to examine the efficacy of the nation's institutions and its powerful managers. Though the magazine had a rather modest circulation in its first years of around 23,000 subscriptions, the *WM* attracted the attention of all the right people. Peters skillfully mediated between a contentious movement culture and established political and media elites. *Time* magazine, a stalwart of the mass media establishment, called *WM* "must reading at the White House, on Capitol Hill and elsewhere in Government." I.F. Stone, a long-time critic of the establishment, called Peters' style "responsible," and claimed the magazine "doesn't go in for half-assed hysterics."[14]

As a former insider who maintained close contact with insiders, Peters gained instant credibility among some of the nation's most influential pundits. By enlisting whistleblowers—insiders who divulge wrongdoing within an organization in hopes of stopping it—to inform the magazine's reporting, Peters legitimated critiques of the establishment and ignited fierce public policy debates.[15] The neo-muckrakers who published in the *WM* further justified American cynicism about their elected officials. But much more, they provided an outlet through which a network of reformers could

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Joshua Green, senior editor of *The Atlantic Monthly*; Timothy Noah, senior writer for Slate magazine; Taylor Branch, author and journalist; Katherine Boo, Pulitzer Prize winner and staff writer for *The New Yorker*; and James Fallows, national correspondent for the *Atlantic Monthly*.

[14] "Low-Keyed Muckrakers," *Time Magazine*, 29 Mar 1971, <http://www.time.com/time/magazine/article/0,9171,944315,00.html> (12 March 2008).

[15] Charles Peters and Taylor Branch, *Blowing the Whistle: Dissent in the Public Interest*, (New York: Praeger Publishers, 1972).

legitimately challenge the failures of the political status quo and offer solutions.

The *WM* was one of many new non-radical, essentially mainstream media forms in the late 1960s and early 70s to challenge the political status quo and ignite public debate about democratic practice and governance in the United States. Experimenting with more in-depth coverage of the biggest national stories, CBS created its immediately popular newsmagazine *60 Minutes* in 1968. NBC followed in 1970 with *First Tuesday*. The newspaper of record, the *New York Times*, created its first opinion-editorial page (Op-Ed) in 1970. The paper's editors wanted to devote more space to "stimulating new thought and provoking new discussion on public problems."[16] This rising cadre of neo-muckrakers, driven by the political polarization and challenges to political legitimacy of the Sixties era, created vocal and far-reaching outlets through which reformers could challenge the political and governmental status quo. Politically savvy, these well-placed, reform-minded citizens believed that formal political change would only come by establishing networks with powerful elected officials.

Adept at taking the pulse of the American electorate, Congress did not need polls to know that, by the late 1960s, Americans had grown deeply distrustful of political institutions, and especially their elected representatives.[17] Driven by a sense of self-preservation, bolstered by a national political culture that favored reform, and encouraged by a new cadre of public advocacy groups such as Common Cause, prominent

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[16] "Op. Ed. Page," *NYT*, 21 Sep 1970, 42.

[17] Julian Zelizer, *On Capitol Hill: The Struggle to Reform Congress and its Consequences, 1948-2000*, (New York: Cambridge University Press, 2004), 99-100; Frederik Logevall, "The Vietnam War," in Julian Zelizer, ed., *The American Congress: The Building of Democracy*, (Boston: Houghton Mifflin Co., 2004), 595.

Republicans and Democrats favored institutional reform. Seeking to avoid direct confrontation with Lyndon Johnson, the Democrat-led Congress increased its capacity to confront the president on matters traditionally reserved to the legislative branch. Senate Majority Leader Mike Mansfield encouraged committee chairs to flex their oversight muscles. But the opacity of agencies and bureaucracies within the executive branch continued to frustrate formal inquiry, especially on the issue of the war in Vietnam. Aiming to force greater transparency, reformers introduced legislation to institutionalize transparency in the executive branch. The Freedom of Information Act became effective on July 4, 1967. FOIA would later prove a powerful tool to the growing congressional reform movement to challenge executive power and the national security state.[18]

Congress moved simultaneously to check the slow aggrandizement of institutional power by the executive and judicial branches. In 1966 Senate leaders Mike Mansfield (D-MT) and Everett Dirksen (R-IL) co-sponsored a resolution establishing the Separation of Powers subcommittee within the Committee on the Judiciary. Conservative Democrat of North Carolina, Senator Sam Ervin, Jr., chaired. The subcommittee would investigate how, over time, the executive and judicial branches of government had slowly assumed powers traditionally reserved to the legislative branch.[19]

Congressional efforts to reform the establishment were bolstered by a plethora of public interest groups in the late 1960s and early 1970s. Ralph Nader and his "Raiders,"

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[18] For a brief history of FOIA, see chapter four.

19 Sam J. Ervin, Jr., "Separation of Powers: Judicial Independence," *Law and Contemporary Problems*, vol. 35, no. 1, Judicial Ethics (Winter, 1970), p. 122, note 59; Lawrence Baskir, interview by author, 11 September 2007, audio recording (in Scott's possession). Baskir served as chief counsel on the Separation of Powers subcommittee from 1966-1969, and Constitutional Rights subcommittee, 1969-1973.

and Common Cause, working alone or in concert with older reform-minded groups such as the League of Women Voters and Americans for Democratic Action, proved adept at generating public support for institutional reform with vigorous public relations campaigns. Common Cause founder and Washington insider John Gardner claimed his organization represented "the interest of the individual" in the face of "vast and complex institutions that dominate our national life today." Gardner envisioned Common Cause as the embodiment of "a true 'citizens' lobby'" that would bring "pressure to bear" on important issues before Congress.[20]

One of these powerful public advocacy groups was the American Civil Liberties Union. Founded in 1920 during the first Red Scare, the ACLU promoted itself as a civil liberties bulwark, willing to protect the rights of all Americans, "regardless of the views they espouse." By the late 1960s the organization had become a forceful voice for institutional change and in particular, a vocal critic of the ever-expanding power of the executive branch. The protest movements of the 1960s proved a public relations boon for the organization as it represented the free speech rights of radicals, college kids, and dissenters. But trials were costly, and the ACLU's tradition of relying on pro bono legal representation soon proved inadequate. The organization needed full-time attorneys dedicated to advancing rights jurisprudence to be effective. Taking advantage of new tax codes, the ACLU established a foundation in 1967. Philanthropic support and burgeoning

[20] Direct Mail samples; November 1970; Common Cause Records (CCR), box 119, fol. "computer letter B"; Public Policy Papers (PPP), Department of Rare Books and Special Collections (DRBSC), Princeton University Library (PUL). Common Cause's main focus was institutional reform in order to rebalance power in Washington away from interest group politics to empower individuals who did not have access to the levers of power. For a brief assessment of the impact of public interest groups on institutional reform in the late sixties and early seventies, see Zelizer, *On Capitol Hill*, 100-103.

membership rolls helped the organization to develop research and legal capacities in the late sixties to advance a rights agenda.[21]

Aryeh Neier was one of the young lions who charted a legislative strategy and litigation rights agenda for the organization during this transitional decade. A German born Jew whose family escaped the Nazi regime, Neier was in his early thirties when he joined the ACLU as field director in 1963. He was a lifelong leftist, a member of the Student League for Industrial Democracy (SLID) at Cornell University who later served as its president. At the young age of 21, Neier became the director of LID, SLID's parent organization. He focused his efforts on reviving the flagging student organization, giving it a new, catchy name: Students for a Democratic Society. But Neier quickly became disillusioned with SDS. A self-described "anti-Soviet" anti-communist, Neier was appalled by the group's ideological "Port Huron Statement" for its claims that "Soviet repression and the invasion of Hungary were defensive actions in response to Cold War aggression for which the United States bore prime responsibility." He also found the concept of "participatory democracy" hard to swallow—calling it "justification for demagogy."[22]

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[21] Aryeh Neier, *Taking Liberties: Four Decades in the Struggle for Rights*, (New York: Public Affairs, 2003), 113. John de J. Pemberton, Jr., Executive Director, to Dr. Henry Steele Commager, 14 Feb 1967, American Civil Liberties Union Papers (ACLUP), box 379, fol. 4, PPP, DRBSC, PUL. Originally named the Baldwin Foundation in honor of the ACLU founder Roger Baldwin, it was renamed in 1970 as the ACLU Foundation. "Summary of Major Activities of ACLU departments, June 30,1969 to June 30, 1970," ACLUP; box 24, fol 3; PPP, DRBSC, PUL. Individual membership in the organization tripled from 50,000 in 1960 to more than 150,000 in 1970. ACLU income (from non-profit organizations like the Ford Foundation and membership dues) outpaced this trend: $3,041,000 in 1970 up from $468,000 in 1960. Nearly 25,000 of the ACLU's new members—almost one third—joined during the 1968-1970 period. See also Samuel Walker, *In Defense of American Liberties: A History of the ACLU*, (New York: Oxford University press, 1990), 262.

[22] Aryeh Neier, *Taking Liberties*, xvii-xxi.

Neier's own politics in this period defies easy classification. He opposed all forms of oppression and maintained a healthy skepticism of all ideology. He invited socialists like Norman Thomas to speak at the inaugural SDS meeting, and served on the member of the LID board with socialist Michael Harrington. While he found the SDS form of anti-anticommunism abhorrent, he also came to oppose LID's drift to the right. Under the influence of Trotskyite Max Shachtman, the organization adopted a decidedly hawkish stance on the war in Vietnam. Neier found himself ideologically adrift. Though he lacked a law degree, the ACLU liked his politics and community organizing experience and hired him to serve as national field director in 1963. Neier rose quickly to become Executive Director in 1970, and under his leadership the ACLU became the preeminent voice for individuals' "rights" throughout the decade. Presiding over a great expansion of the organization's mission, Neier's aggressive program made some older civil libertarians uneasy. But he charged ahead, determined to keep the ACLU relevant to the needs of a changing time.[23]

When Neier joined the organization in 1963, the New York State chapter, NYCLU, was struggling to develop a program to combat alleged police brutality against protestors and dissidents. Such violence against protestors was not new to the 1960s. Since the organization's founding in the 1920s, ACLU lawyers had defended victims of government repression, especially during the Red Scare. But the police abuse of the 1960s reached unprecedented levels of violence.

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[23] Neier, *Taking Liberties*, xxi.

Metropolitan police responded to the violent civil disorder that rent the sixties decade—first urban unrest, and later mass protests—with undue force and brutality. The NYCLU pursued police brutality as its flagship civil liberties issue, but Neier quickly realized that the affiliate lacked the necessary resources to litigate against such abuses.[24] Neier turned to the ACLU Foundation for funds. Under the newly created Police Practices Project, attorneys worked full-time to amass data for litigation.[25] Neier himself was arrested during one peaceful protest as he attempted to observe police treatment of protestors. The national office became a data bank of sorts on issues of police surveillance, brutality, and abuse. Compelled to act in the name of protecting the First Amendment right to protest, the Foundation intensified its efforts to gather data in the latter part of the decade. Seeking new funding from the Stern Family Fund, the ACLU expanded the project to include political surveillance. Neier turned the project over to two extraordinarily capable men: Yale Law Professor Frank Donner and ACLU Legal Director Mel Wulf. Calling "political surveillance by government agents" a "spreading cancer," the ACLU embarked on a project with a two-pronged approach to documenting political surveillance: "a litigative program and a series of publications." The project's immediate problem was obtaining "accurate and reliable data" that offered concrete evidence of surveillance of "dissident groups and activities by undercover agents,

[24] The ACLU is a decentralized organization; members are affiliated with a local (typically state) chapter and with the national organization. In 1963, ACLU Executive Director John Pemberton hired Neier as field director to assist the state affiliates in expanding their rights programs and to establish affiliates where none existed. Neier excelled at this work; the number of affiliate offices nearly doubled from 29 in 1960 to 48 by 1970. See "Summary of Major Activities of ACLU departments, June 30,1969 to June 30, 1970," ACLUP, box 24, fol. 3; PPP, DRBSC, PUL.

[25] Neier, *Taking Liberties*, 20-25.

photography, planted informers and infiltrators, compilation of political files and dossiers, electronic eavesdropping."[26] Neier encouraged state affiliates to pass along any information they obtained on police practices and surveillance. These reports included vital information about municipal and state police, infiltration of protest meetings, and organizations associated with political dissent.[27]

Neier envisioned a litigation program to challenge First Amendment violations based on techniques successfully developed and employed by civil rights groups in the 1950s and 1960s. This "public interest litigation" would be more effective, Neier believed, than all the civil rights demonstrations or government programs combined. By bringing cases before courts, Neier hoped to force public policy development on issues of surveillance and individual privacy. The ACLU would join other public interest groups like the NAACP that were forming a "public interest" bar to advance the interests of various groups throughout civil society.[28]

Neier thought Donner perfectly suited to organizing the research that would be required to support the litigation strategy. The Yale professor had made the pursuit of justice for dissenters his professional focus. A civil rights attorney, Donner had collected materials "dealing with official attacks on nonconformity" since the late 1940s. Donner,

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[26] "ACLU Activity Report," September-December, 1970; ACLUP, box 24, fol. 4; PPP; DRBSC; PUL; 3-4; To Frank Donner from Eleanor H. Norton, assistant legal director, 17 sept 1969; and Eleanor Norton to David Hunter, Executive Director, Stern Family Fund, 31 Dec 1969; ACLUP, box 382, fol. 8; PPP; DRBSC; PUL. The final product of this research was published by Frank Donner, *The Age of Surveillance: The Aims and Methods of America's Political Intelligence System*, (New York, 1980).

[27] "ACLU Activity Report," September-December, 1970; ACLUP, box 24, fol. 4; PPP; DRBSC; PUL; 3-4.

[28] Neier describes this strategy in detail in his book *Only Judgment: The Limits of Litigation in Social Change*, (Middletown, CT: Wesleyan University Press, 1982).

who as one colleague fondly remembered, "looked like a disheveled Tom Edison but wrote like Tom Paine," worked as a trial consultant and later wrote appellate briefs for a number of lawsuits filed as sedition cases under the Smith Act. It was here that Donner became curious about government surveillance practices, as he recalled, "the government's case in all of these trials was uniformly based on an assortment of secret political intelligence practices." His legal support for alleged communists made him a target and Donner was brought before a congressional committee in the 1950s. Since then he had been an "unrelenting critic of the hunters."[29]

Since the onset of the Cold War, the national security state had proven impenetrable to public scrutiny. But Donner had an idea. During the 1968 Democratic National Convention Chicago Mayor Richard Daley had his police geared up to shut down and even beat down the radicals who descended upon his city. One of Donner's friends represented some of the protestors in Chicago. In connection with a lawsuit to obtain parade permits for the demonstrations, he subpoenaed documents of the Chicago Red Squad, a secret municipal intelligence unit within the Chicago police department. These documents showed that the Squad indiscriminately gathered dossiers on anyone who applied for permits. This technique inspired Donner. He explained to the ACLU Board that "When information uncovering such clearly unconstitutional dossier-gathering can be gotten only through lawsuits, litigation should be seen as indispensable to the

[29] "Frank Donner," *The Nation*, 5 July 1993, 4; Donner, *The Age of Surveillance*, xi. Congress passed the Smith Act in 1940, which made it illegal for anyone to advocate the overthrow of the government by force or violence.

research-gathering arm of the project."[30]

Donner's good fortune with the Chicago Red Squad was a breakthrough, but it was not easily replicated. Though student protesters and political radicals often claimed to be the targets of government surveillance, the ACLU had a hard time uncovering proof of it. Particularly at the federal level, evidence that the executive branch authorized widespread surveillance of political dissidents had proven to be nearly impossible to gather. Then, dramatically, in 1970, the ACLU found its proof.

In January of 1970 former Army Captain Christopher Pyle published a carefully researched account of the U.S. Army's secret program to monitor domestic politics in the *Washington Monthly*. Offering shocking details of the Army's three-year-old program to watch dissidents, Pyle charged the Army with maintaining a coast-to-coast operation of one thousand plainclothes officers who spied on individuals and organizations critical of the domestic and foreign policies of the U.S. government.[31]

Pyle's own background made his whistleblower account difficult to dismiss; he was not a radical. A graduate of Bowdoin College, he taught at the Intelligence School in Fort Holabird, just outside Baltimore, Maryland. On a student's recommendation Pyle took a personal tour of the Army's CONUS[32] Intelligence Section, where he learned first-hand of the Army's domestic surveillance program. The millions of computerized

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[30] "Project for the Protection of Dissent," p. 11, December 1969; ACLUP, box 382, fol. 8; PPP; DRBSC; PUL.

[31] Christopher H. Pyle, "CONUS Intelligence: The Army Watches Civilian Politics," *WM* 1, no. 12 (January 1970): 4-16. Pyle won the Polk and Hillman awards for investigative journalism in 1971 and 1970.

[32] Continental United States.

dossiers that the Army maintained on political dissidents and organizations, Pyle argued, had all the trappings of a police state. When he left the Army in 1969 to pursue a law degree and Ph.D in political science at Columbia University, he was determined to make the Army's secret program public. His mentor, Professor Alan F. Westin, a prominent New York attorney, civil libertarian, and head of the ACLU Privacy Committee, encouraged him to write an article detailing the Army's program Pyle submitted it to the *New York Times,* which rejected it. Charles Peters did not. [33]

Pyle's article fit the *Washington Monthly*'s mission perfectly. Determined that his magazine would challenge powerful institutions, Charles Peters believed the Army an irresistible target. The cloak of "national security" had kept the Army's surveillance program secret from the American public and Congress for five years, until Pyle's exposé in the *Washington Monthly*. His account electrified Capitol Hill. Congressmen fired off angry letters to the Pentagon demanding to know more about the Army's political surveillance program. Sam Ervin, the Senate's expert on the Constitution and a long-time defender of First Amendment rights, believed that secret surveillance programs chilled dissent. Determined to know the extent of government surveillance, and rebuffed by the Army and Pentagon in his attempts to obtain further information about the problem on "national security" grounds, Ervin pursued his only remaining option. He would use his Constitutional Rights subcommittee as a bully pulpit from which to investigate the legality of the executive branch's domestic surveillance programs. Ervin faced one of the

[33] Pyle first proposed his Army surveillance article to the *Times*, but the editorial department passed, saying the story rated no more than a sidebar to a "Big Brother" piece. Pyle interview.

greatest political challenges of his long career in public service: to penetrate the dark recesses of the national security state.

From Ervin's vantage point in the early 1970s, the civil disorder and public protest generated by the crises of the sixties offered a testing ground for American democracy. He personally despised the Black Panthers, the Weatherman faction of SDS, and all those who advocated violence as a means of political change. However, Ervin vocally supported their First Amendment rights, claiming, "those people have the same right to freedom of speech … that I have."[34] Pyle's account troubled Ervin; it suggested that some agencies within the U.S. government embraced the rhetoric of national security as justification for political surveillance of dissenters.

Senator Sam (as his staffers liked to call him) is best remembered for his role as chair of the Senate Select Committee on Presidential Campaign Activities (also known as the Watergate Committee) in 1974. Through their television sets, millions of Americans came to respect and trust the rotund southerner with the heavy jowls, thick black eyebrows, and grandfatherly demeanor. Even as he pressed former White House staff and appointed officials on their less-than-respectable activities, his thick southern drawl and his frequent interjections with a homespun yarns of southern wisdom ("the constitution should be taken like mountain whisky—undiluted and untaxed") reassured Americans, as one later wrote, "that there were still people in Washington with moral bearings solidly

[34] Robert Sherrill, "Big Brother Watching You? See Sam Ervin," *Playboy Magazine*, Feb. 1972, 150.

fixed."[35] Before Watergate fame, however, many Americans viewed Ervin with more ambivalence.

Sam Ervin grew up in a world of white supremacy and racial inequality. Born in 1896, the year the Supreme Court's *Plessy v. Ferguson* ruling upheld the constitutionality of racial segregation under the guise of "separate but equal," Sam Jr. grew up in the small town of Morganton, North Carolina. At his father's knee young Sam learned two irrefutable truths: government was the antithesis of individual liberty and freedom, and the U.S. Constitution was, like the Bible, immutable.[36] Determined to become an attorney like his father, Sam Jr. attended the University of North Carolina in 1913, where he excelled in history, literature, and law. A popular student (voted senior class vice-president, most popular, and "best egg") Sam also excelled in his studies, attending law school while finishing his bachelor's degree.[37]

Before he had the opportunity to take the bar exam, the country went to war. An Army infantryman, Ervin served during the first world war on the French front where he was twice wounded and well-decorated, earning a Purple Heart, a Silver Star, and a

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[35] Kurt Andersen, "Not Quite Just a Country Lawyer," *Time*, 6 May 1985; John Herbers, "Senator Ervin Thinks the Constitution Should Be Taken Like Mountain Whisky—Undiluted and Untaxed," *NYT Magazine*, 15 Nov 1970, 51.

[36] Historian Robin Einhorn has argued that the so-called anti-statism (indeed coming as it does from southern slaveholders who worried that a strong government would take away their peculiar institution) is not an American democratic tradition. Rather, she convincingly demonstrates that in the early Republic, governments were stronger and more democratic where slavery did not exist. In slave societies, governments were not only weak, but also far more aristocratic (and thereby less democratic). In other words, American democracy has not gone hand-in-hand with American anti-statism. What we need to do, as historians, Einhorn argues, is cast away the Jeffersonian myth that government is the primary threat to individual liberty and freedom. See Einhorn, *American Taxation, American Slavery*, (Chicago: University of Chicago Press, 2006).

[37] Karl Campbell, *Senator Sam Ervin, Last of the Founding Fathers*, (Chapel Hill: University of North Carolina Press, 2007), 30-31.

Distinguished Service Cross. When he returned to North Carolina in 1919, he easily passed the state bar exam. Then, for reasons he never fully explained, young Sam enrolled at Harvard Law School.[38]

Ervin took courses from many keen legal minds during his tenure at Harvard, though none proved quite so influential to his career in public office as Zechariah Chafee.[39] As the Red Scare gripped the country in the wake of the Bolshevik Revolution, Professor Chafee refused to succumb to red fever. He deplored President Wilson's assault on freedom of speech and Attorney General A. Mitchell Palmer's anti-communist witch hunts. As a legal scholar, he sought a rational approach to free speech that would balance the nation's need for security with the Bill of Rights. In 1919, the year that Sam Ervin enrolled at Harvard, Chafee published an article expounding the virtues of free speech in times of war. One of the greatest outlets for free speech, according to Chafee, was a free press. Chafee's teachings left deep impression on Ervin's young mind; as a U.S. Senator he remained a vocal proponent of First Amendment rights.[40]

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[38] Sam Ervin, Jr., *Preserving the Constitution: The Autobiography of Senator Sam J. Ervin, Jr.*, (Charlottesville, VA: The Michie Company, 1984), 14-15, 29-30. In his autobiography, Ervin never adequately explains his decision to attend Harvard Law *after* passing the NC bar exam. He did take his courses backward, starting with third year courses and then second year, etc. He claimed to take the courses backward because he believed his sweetheart in North Carolina, Margaret Bell, who had many suitors, would not wait three years. This seems to be another of Ervin's folksy stories: Margaret was purposefully making Ervin wait believing that he would marry her only if she played him right. What seems apparent from Ervin's decision to attend Harvard is that he harbored big dreams for his professional career. He probably believed a degree from an Ivy League school would significantly improve his career opportunities back home in North Carolina.

[39] Dick Dabney, *A Good Man: The Life of Sam J. Ervin,* (Boston: Houghton Mifflin Co., 1976), 83-85.

[40] Donald L. Smith, *Zechariah Chafee, Jr.: Defender of Liberty and Law*, (Cambridge, MA: Harvard University Press, 1986), 88-9, 95-6; Zechariah Chafee, Jr., "Freedom of Speech in War Time," *Harvard Law Review*, vol. 32, no. 8 (June 1919), 934.

After Harvard young Ervin easily ascended the political hierarchy in North Carolina. He served three terms in the state legislature, and was appointed to the Burke County Criminal Court and the North Carolina Superior Court.[41] In 1946 Ervin went to Washington to fill a seat in the House of Representatives left vacant by his own brother's suicide. In 1954 the governor appointed Ervin to serve in the U.S. Senate following the unexpected death of Senator Clyde Hoey. Ervin held that seat until his retirement from public life twenty years later.

Before Watergate whitewashed his record, Ervin was best known in his home state and nationally for his virulent opposition to the civil rights movement.[42] But as one journalist astutely observed, Ervin was "no Cotton Ed Smith." Another close observer recalled that Ervin "took pains to disassociate himself from the anti-Negro racism apparent in many of those who share his distaste for civil rights laws." In fact, he bristled at the suggestion that his opposition to civil rights stemmed from anything other than a true understanding of the Constitution. When pressed on his strident opposition to the

[41] Ervin's legal philosophies informed his politics early on in his career. During a floor debate of a bill in 1925 that would prohibit the teaching of evolution in public schools, Ervin boldly and eloquently denounced the measure. The First Amendment extended to the protection of religious belief, Ervin argued. Though he did not subscribe to the theories of evolution himself (Ervin was a Calvinist), he could not tolerate the imposition of a majority's belief on a minority. Here, Ervin clearly articulated his constitutional libertarianism. Ervin's understanding of, and appreciation for, the law and the Constitution rested on two fundamental ideologies: a fervent belief in maximizing individual rights over the rights of a group or majority; and the belief that government seeks power and tends toward tyranny. To Ervin, the Constitution of the United States acted as the keystone, binding these two ideals together. He firmly believed in the immutability of the Constitution as articulated by the founders.

[42] In 1954, when Senator Sam arrived in Washington, one man threatened the tranquility of the gentleman's club: Joe McCarthy. Lyndon Johnson, the Senate Majority Leader, appointed Ervin to a bipartisan select committee to investigate McCarthy's wild accusations about communist infiltration in the highest offices of government. Ervin's appointment, in spite of his lack of experience, lent jurisprudential credibility to the committee. His work on the North Carolina State Supreme Court made him a considerable expert on the constitution in the Senate chambers. Robert Caro, *Master of the Senate: The Years of Lyndon Johnson*, (New York: Alfred A. Knopf, 2004), 553-4.

civil rights movement, Ervin argued that his advocacy of equal civil liberties for *all* Americans and his opposition to "special civil rights for Americans of minority races" were totally compatible with the equal protection clause of the 14th Amendment. Ervin proffered that civil rights bills effectively stole rights from some (whites and presumably white southerners) to deliver unto others.[43] While Ervin may well have believed what he said, he certainly did nothing to oppose Jim Crow laws and Black disenfranchisement. This behavior is hard to square with his principled claim that he believed in limited government because he believed in maximal individual freedom for every American. Whatever else he was, Ervin was a southern politician who courted the votes of white supremacists.

When Ervin entered the Senate in the 1950s, southern Democrats held the most powerful committee and subcommittee chairs, an arrangement that would continue until institutional reforms forced change in 1970.[44] As a former justice of the Superior Court in his home state, Ervin's fluency in constitutional jurisprudence made him a natural for assignment to the Senate Judiciary Committee. In 1961 he secured the chair of the Constitutional Rights Subcommittee (CRSC). From these positions Ervin quickly became the bane of the civil rights movement in the early 1960s, infamous for his one-man

[43] Herbers, "Senator Ervin Thinks the Constitution Should Be Taken Like Mountain Whisky—Undiluted and Untaxed," *NYT Magazine*, 51; James K. Batten, "Claghorn or Statesman? Sam J. Ervin Just Won't Fit in a Mold," *The Charlotte Observer*, 2 Apr 1967, 5B; Sam Ervin, Jr., "Speaking Freely" a program of WNBC television (transcript), interviewed by Edwin Newman, taped on 8 Dec 1970, aired 19 Dec 1970; Sam J. Ervin Papers Subgroup A (SJEPA): Senate Records #3847A; box 362, fol 13913; Southern Historical Collection (SHC); Wilson Library (WL); University of North Carolina at Chapel Hill (UNCCH); 11.

[44] See Zelizer, *On Capitol Hill*.

filibusters that stymied omnibus civil rights legislation of Presidents John F. Kennedy and Lyndon B. Johnson.[45]

Throughout the 1960s, even as he opposed civil rights legislation, Ervin advanced a legislative agenda to expand and protect the rights of federal employees and a wide range of disadvantaged Americans—the mentally ill, the physically and mentally handicapped, criminal defendants, and Native Americans. Because of his position on a number of issues related to individual rights and the First Amendment, Ervin enjoyed an amicable relationship with the ACLU, strained as it was at times by his opposition to the civil rights movement.

As the nation focused on the battle over racial equality, Senator Ervin turned his subcommittee resources on exploring issues dearest to his own heart, specifically violations of First Amendment rights. In the era of burgeoning social welfare programs, Ervin worried over the executive branch's unchecked accumulation of personal data and worked to become a relative expert in the field of computer technology and databanks.

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[45] Regarding the substance of Ervin's opposition, see Hugh Davis Graham's *The Civil Rights Era: Origins and Development of National Policy*, (New York: Oxford University Press, 1990), 94-95. Graham suggests that Ervin's opposition to the Kennedy administration's proposed Federal Employment Practice Committee stemmed from his concern for tyranny by the executive branch, unchecked by constitutional restraints and the legislative branch. Ervin did not fall back on the 10th Amendment clause that defined the rights of states in a federalist system, a tactic southern colleagues like John O. Eastland invoked to oppose civil rights legislation. Instead, Ervin framed his opposition to the civil rights omnibus bill of 1963 in terms consistent with his constitutional libertarian philosophy, a pattern that Ervin would consistently employ throughout his career to oppose civil rights legislation. Graham is critical of Ervin's concern for the prospect of federal tyranny in this particular field of law and social justice; he argues that there was no evidence of past abuse to warrant such concern. But Graham's criticism, in line with other historical assessments of the roots of Ervin's opposition, fails to take the Senator's personal philosophy seriously. Instead, Graham believes his opposition rests on a conveniently articulated rejection of a powerful executive branch.

Could the computer, as some suggested, make a person's life story available to Washington bureaucrats, "at the push of a button"[46]?

As computer technology and capacity developed along with a growing suspicious of Big Brother during the 1960s, Americans worried that a large government could create a real-life Orwellian nightmare for its citizens by harnessing the power of computers and databanks. This concern played out in political debates over the creation of a National Data Center. The controversy began in 1965 when the Bureau of the Budget recommended to President Johnson that all statistical information be gathered in one central location. Measuring the success of the War on Poverty, many social scientists argued, required analyzing mountains of data about the lives of millions of recipients of federal aid programs. The White House appointed a commission, and the final report recommended the creation of a national data clearinghouse. The goal was innocent enough, to give "both governmental and academic analysts a much sharper view of the nation's problems and possibilities." The data center, officials agreed, would not maintain dossiers on individuals, but would apply the latest computer technologies to the purpose of national social and cultural advancement.[47]

But the public and the media were not so easily convinced. The computerization of everyday life threatened individuality, many thought. The rise of multiuniversities epitomized this social change. Students were "computerized," identified for all intents

[46] "A Government Watch on 200 Million Americans?" *U.S. News and World Report*, 16 May 1966, 56.

[47] Vance Packard, "Don't Tell it to the Computer: 'Bureaucratic efficiency could put us in chains of plastic tape,'" *NYT Magazine*, 8 Jan 1967, 236.

and purposes with their IBM cards. One student newspaper reported that a new student had a lot to learn at college, most especially "not to fold, spindle or mutilate his IBM card." The prevalence of these new technologies aroused strong public sentiment against the depersonalizing effects of modern society, the loss of individual freedom, and the threat to personal privacy that a computerized, data-driven world posed.[48] Popular journalist and social commentator (and author of *Naked Society* and *Hidden Persuaders*), Vance Packard, neatly summarized this sentiment with a warning: "bureaucratic efficiency could put us in chains of plastic tape—don't tell it to the computer." The ACLU and a score of newspaper editors and privacy experts ardently opposed such a powerful data bank. In the wrong hands, they cautioned, the accumulation and storage of personal data on millions of Americans posed a threat to individual privacy rights.[49]

Director Stanley Kubrick's film *2001: A Space Odyssey* offered the perfect allegory to the dilemma computer technology posed to modern society. Released in 1968, the film portrays a highly stylized account of a futuristic manned mission to Jupiter. It explores the complicated relationship between the human astronauts on board and HAL 9000, a super computer that controls ship operations. In the *coup de théatre*, HAL incorrectly diagnoses a problem on board ship. The conflict between man and machine becomes acute when the astronauts consider shutting HAL down. HAL reads their lips,

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[48] The *Daily Californian*, quoted in Terry Anderson, *The Movement and the Sixties: Protest in America from Greensboro to Wounded Knee*, 97; *Federal Data Banks and Constitutional Rights*, committee print, part III of *Federal Data Banks, Computers and the Bill of Rights*, vol. 1, xi.

[49] Vance Packard, "Don't Tell it to the Computer: 'Bureaucratic efficiency could put us in chains of plastic tape,'" 8 Jan 1967, *NYT Magazine;* "To Preserve Privacy," *NYT*, 9 Aug 1966, 36; "A.C.L.U. Scores Plan for Data Centers," *NYT*, 17 Aug 1966, 15; "A Government Watch on 200 Million Americans?" *U.S. News & World Report*, 16 May 1966, 56-59.

discovers their plot, and decides to kill the astronauts to save the mission. He easily dispenses with one, but the other, realizing HAL's motives (almost too late), begins to disconnect HAL's consciousness, one circuit at a time. The end of HAL's "life," represented by the blackening of the glowing eye, symbolizes the triumph of man over machine. Kubrick penetrates the simultaneous fear and wonder that many Americans, like Ervin, had for computers and technology in a nuclear age. HAL represents both the computer's great promise to the progress of the human condition (he does, after all, adroitly operate the ship), and the potential hazards to humankind. In the end the astronaut emerges triumphant. But Kubrick left the audience to ask: can humans outsmart computers every time?[50]

Ervin had spent a good deal of his recent Senate career pondering these issues. Since the mid-1960s he had focused much of his subcommittee's capacities on establishing legislative controls for the use and sharing of personal information in databanks maintained by government agencies and bureaucracies. In response to thousands of letters he received from concerned citizens, his subcommittee issued a formal questionnaire to hundreds of government agencies requesting information about the collection, storage and sharing of statistical data. Ervin pursued strong legislation to check the proliferation of government databanks, because he believed that computers encouraged surveillance, created a climate of apprehension and a "fear of snoopers." Like

[50] Stanley Kubrick, *2001: A Space Odyssey* (1968).

New Leftists, Senator Sam believed in the dehumanizing social effects of computer technology.[51]

It was in the context of this swirling public debate over computer technology and privacy that Ervin prepared to chair hearings of the Constitutional Rights subcommittee to investigate Pyle's account of Army surveillance of civilian politics. Ervin was not interested in the short-term scandal the Army hearings might engender. Instead he leveraged the public's interests in the sensational Army story to explore broader public policy issues related to computers, government databanks, and personal privacy. Echoing the rhetoric of New Leftists, Ervin called for a democratic revival, stating that Americans must have the ability to "express their views on the wisdom and course of governmental policies." A healthy democracy, he insisted, depended upon active civic participation and "policies themselves must be the product of the people's views." Ervin would offer his subcommittee dais as a forum to "help elected officials determine how to use constitutional tools to meet the demands of the modern age." [52] In so doing, he offered a direct challenge to the constitutionality of secret government security programs and promised to deliver a public forum for citizens to debate national security policies.

Like most elected officials in Washington D.C., Ervin gauged public opinion on critical national policy issues through the steady stream of constituent mail that came through his office. Ervin, again like many elected officials, demanded his staff respond

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51 Sam J. Ervin, "Computers and Individual Privacy," Address before Wharton School of Finance and Commerce, Conference on Management, Science and Information Systems, University of Pennsylvania, 6 Nov 1969; SJEP, 3847A, box 359, fol. 13856; SHC; WL; UNCCH.

52 Announcement of hearings on federal data banks, computers and the Bill of Rights, 8 Sept, 1970; SJEPA; 3847A; section 1, fol. 9339; SHC; WL; UNCCH.

promptly to all letters, usually within twenty-four hours.[53] Ervin was energized by the overwhelming public support he received for his investigations of domestic intelligence operations from citizens around the country. In their letters to the senator, Americans explained that they had lost their faith in national leaders and that they feared the government's unchecked power and habitual secrecy. Many firmly believed in the immutability of the rights articulated in the Constitution and compared their government's surveillance techniques to those of the despised Soviet Union. Some argued that government agencies that thwarted the right to dissent brought the nation dangerously close to a "police state." Surveillance of dissenters, they argued, violated the basic constitutional rights of all Americans.[54]

Letter writers overwhelmingly supported Ervin's call for greater transparency and broader civic participation in issues of national import. A few called for more thorough investigations of the nation's domestic security apparatus. One noted, presciently, that the Army's domestic surveillance program was likely just the tip of the iceberg, a point that would prove accurate in subsequent investigations over the next two years. Many letter-

[53] From the nation's founding Congress recognized the importance of public opinion and debate generated by communication between legislators and their constituents. In 1789 the legislative branch promoted this relationship with the franking privilege, allowing elected officials to use only their signature as "postage" through U.S. mail. The privilege ensured a steady exchange of ideas and opinions through the post, and constituent mail became, over the centuries, a normative and vital aspect of American democratic practice.

[54] Senator Ervin and his staff included a selection of citizen letters he received on the topic of surveillance in the published hearing records, *Federal Data Banks, Computers and the Bill of Rights*, 2063-2085. In general, historians have underutilized constituent mail, and letters to Congress more generally, as primary sources. This is unfortunate as elected officials typically take this correspondence very seriously. Historian David Thelen's book is an exception; he examines constituent letters to elected officials during the Iran-Contra hearings. See *Becoming Citizens in the Age of Television*: *How Americans Challenged the Media and Seized Initiative during the Iran-Contra Debate*, (Chicago: University of Chicago Press, 1996).

writers believed that further investigation would reveal, "Big Brother is watching over many more of us than we would have guessed." Some Americans expressed certainty that FBI activities violated civil liberties and called for public investigation of the nation's top law enforcement agency. Many recognized the need for institutions to take appropriate measures to halt the bombings and "terrorist activities" that tore at the fabric of American society. But one stressed the irony of Army tactics: "How can we, except in the name of law and decency, reason with them [bomb throwers], when the government is also engaged in activities which are questionably lawful and hardly decent?"[55]

Many Americans questioned the Cold War framework that pitted American democracy and freedom against communism and slavery. Their rhetoric echoed the New Left's critique of the Cold War dichotomy of "us" versus "them," suggesting that protest movement culture informed the political rhetoric of the 1970s. Some warned that the tactics of the national security state would prove America's downfall in the battle to win the hearts and minds of non-aligned people in the newly liberated Third World. The United States, one wrote, "will most definitely lose the ideological victory both at home and abroad if by our own actions we prove to the world that a democratic and free society is unworkable. … The politics of manipulation, fear and distrust are extremely dangerous and pose a distinct threat to a free society." Hundreds of Americans pleaded with Ervin to force the state to make intelligence dossiers public. Many underscored the Orwellian themes of the Army's program. As one concerned Texan wrote: "On the national level—

[55] Name withheld to Senator Ervin, California, 17 Dec 1971, cited in *Federal Data Banks, Computers and the Bill of Rights,* 2064.

this [Army surveillance program] sounds more like *1984* than the USA … on the personal level: how do I know I'm not in someone's file?" [56] For Senator Ervin, these letters confirmed that the American public yearned for public debate and greater transparency in government, especially regarding the nation's security apparatus.

Editors around the country decried surveillance of civilians by the United States military. Congress should immediately "curb those activities," wrote one southern journalist. Failure to "at least to put some proper safeguards on [such activities] will leave lawmakers and the chief executive resembling at best, silent accomplices in repression."[57] The government's need to maintain "internal security" was real, wrote another, but intelligence gathering was the job of "civilian law-enforcement and investigatory agencies, not the Army."[58] The Army's questionable domestic activities, wrote another, required Congress to take back "its traditional control of the purse strings" that had been "surrendered to the executive branch of the government."[59]

The public outcry reassured Senator Ervin and his subcommittee staff that Americans would support their agenda. They leaned heavily on Chris Pyle to gather information on government databanks and surveillance programs. They found in Pyle an able and diligent researcher. Young, ambitious, and meticulous in his research

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[56] Names withheld to Hon. Sam Ervin, Jr., California, 18 April 1971 cited in *Federal Data Banks, Computers and the Bill of Rights*., 1523-4; 1521-2.

[57] Author unknown, "Ervin and the Snoopers," *Raleigh (North Carolina) News and Observer*, date unknown, cited in *Federal Data Banks, Computers and the Bill of Rights*, 1616-17.

[58] Author unknown, *NYT*, "The Army's Indiscretion," 1 April 1970, cited in *Federal Data Banks, Computers and the Bill of Rights*, 1615-16.

[59] Author unknown, *Boston Globe*, "Army Still Spying on Civilians," 20 May 1970, cited in *Federal Data Banks, Computers and the Bill of Rights*, 1630-31.

techniques, Pyle desperately wanted to see Congress pass legislation to prevent the government from intruding into the lives of its citizens in violation of the First Amendment.[60] Driven by a conviction that nothing short of congressional legislation could save the reputation of his beloved Army, Pyle encouraged congressional leaders to exercise their "power of inquiry" because few Americans or even congressional leaders knew the extent to which the domestic intelligence community had grown.

The Nixon administration refused to cooperate with Ervin's numerous requests for information. On national security grounds the Army (and later the Pentagon) refused to supply the subcommittee with any information the Army's program. The Army assured the Senator that intelligence gathering was a necessary response to urban disorder and civil unrest, and since 1967 "ha[d] been a subject of constant attention and refinement in order to narrow the Army's actions to only those which are absolutely necessary." The Army denied Pyle's accusation that it "watch[ed] civilian politics." Army legal counsel justified the establishment of the CONUS program without prior congressional approval or oversight by referring to President Eisenhower's Executive Order 10450. Under Secretary of the Army, Thaddeus Beal, assured Ervin that the "operation or establishment of any computer data banks concerning civilians or civilian activity [was prohibited] unless the specific data bank is approved by the Chief of Staff and the Secretary of the Army." Congress had virtually no authority over such matters, argued Beal, and "Subcommittee and other interested Committees of the Congress will be

[60] A staffer on Ervin's subcommittee heard about Pyle's story from his English neighbor who was then in the process of applying for American citizenship. When challenged by the Englishman to defend the Army's program in terms congruent with the Constitution, the staffer brought the problem to Senator Ervin. See Baskir, "Reflections on the Senate Investigation of Army Surveillance," note 9, 621-22.

informed" of domestic intelligence activities at the discretion of Army officials.[61]

But lofty legal justifications failed to temper the public outcry, and the Army's programs became a political problem for the Nixon administration. Secretary of Defense Melvin Laird closed the Army's database at Ft. Holabird in February 1970, because, in the words of one official, "the information in the computer was not useful in view of the Army's limited civil disturbance mission."[62] Nixon officials hoped the public would soon lose interest in the story, and Ervin's hearings would prove nothing more than a side-show event.[63]

The administration's stalling techniques forced Ervin's hand; he postponed the hearings until February of 1971. Staffers worried that a delay would prove disastrous if the public lost interest. Through Alan Westin, Pyle's mentor at Columbia and the chair of the ACLU's national committee on privacy, Pyle met the ACLU's Mel Wulf. Wulf was ecstatic: this was the case that the Legal Director of the ACLU Foundation's Privacy Project had been waiting for—irrefutable evidence that an institution secretly monitored civilian political behavior. When the *Washington Monthly* syndicated Pyle's article, and edited versions came out in the nation's largest regional papers, Pyle's phone rang off the hook.[64] Some former Army intelligence officers, like Pyle, were disquieted by their

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[61] Beal to Ervin, March 20, 1970 cited in *Federal Data Banks, Computers and the Bill of Rights*, 1052-3.

[62] Thaddeus R. Beal, Under Secretary of the Army, to Ervin, March 20, 1970 cited in *Federal Data Banks, Computers and the Bill of Rights*, 1051-2.

[63] Pyle interview; Baskir interview; Baskir, "Reflections on the Senate Hearing of Army Surveillance."

[64] Pyle interview. The *Boston Globe*, *Miami Herald*, and the *San Francisco Chronicle* were just a few of the regional newspapers to carry Pyle's article.

activities in the Army. These former insiders offered crucial evidence of surveillance techniques and protocols that Army officials had refused to supply to Ervin's subcommittee. This was the evidence that Pyle (and Ervin's committee) needed to proceed with a congressional investigation. For the next nine months, in preparation for the hearings, Pyle and a former counterintelligence agent, Ralph Stein, traveled across the country collecting testimony to inform Ervin's committee (all travel was paid by the subcommittee). Pyle diligently investigated the Army's program for both professional and personal reasons. He thought the program dangerous to the credibility of the institution. Second, he had decided to write his doctoral thesis for Columbia on the Army's program and its implications for democracy. A former insider, Pyle maintained contact with other Army intelligence agents inside CONUS.

The ACLU solicited Pyle's assistance, and his research ultimately helped to advance the legislative and litigation strategies of Donner and Wulf. Pyle's work effectively advanced the "discovery" phase for organization's legal team. Donner carefully catalogued the testimony of former Army agents, collected by Pyle. Wulf's legal team used this evidence as the basis for a number of lawsuits pursued on behalf of victims of Army surveillance.[65] The basis of the ACLU's litigation strategy, securing evidence, also advanced the organization's legislative strategy. Pyle, acting as liaison, passed crucial information to Ervin's subcommittee. Rather than remaining stonewalled by the Pentagon's refusal to discuss the details of its programs, Ervin's staff arranged a

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[65] "ACLU Activity Report, Dec 70-Feb 71," prepared by Aryeh Neier and Alan Reitman; ACLUP; box 25, fol 1; PPP; DRBSC; PUL. See chapter four.

witness list that called heavily upon the information obtained during ACLU discovery. As one staffer recalled, a subcommittee's "regular diet of legislative responsibilities" sapped the attention of congressmen and their staff. The ACLU, flush with talent and the resources to pursue an investigative and litigation strategy, proved a crucial ally to Ervin's congressional investigation in the nascent effort to reform the national security state.[66]

Ervin's witness list reflected the ACLU's profound influence on the proceedings. Privacy experts and former intelligence officers, civil libertarians, and attorneys, all were in some way affiliated with the organization, either as members, or plaintiffs, or expert witnesses in ACLU lawsuits against the government. In exchange for delivering their professional network connections, the hearings ensured that the political debate would bolster public support for a broad legislative agenda to curb surveillance in cases and protect First Amendment rights.

Senator Ervin recognized the political risks of challenging the constitutionality of the nation's most secret (and in some cases most revered) institutions. Though Ervin himself was politically invulnerable in his home state of North Carolina, many of his congressional colleagues whose support would prove crucial to a real investigation (and the resulting legislation), did not have the same political cover. For this reason Ervin instructed his subcommittee staff to investigate only those agencies for which they had irrefutable evidence of constitutionally questionable activities. The FBI, for example, remained off limits to subcommittee investigation. One false accusation, Ervin reasoned,

[66] Baskir interview.

would discredit the investigation and derail the reform effort.[67] They had to get it right the first time; they were not likely to have a second opportunity.

Delaying the hearings offered congressional staffers, including Pyle, time to gather more evidence of Army surveillance. But the delay also threatened to test the public's interest in the story and incline the media to feel that the story had "played out." Staffers carefully managed the flow of information they received from government agencies and Chris Pyle to the public. Historically, congressional investigations could be, in the crudest sense, "a form of entertainment" that allowed legislators to compete in the crowded arena of politics and political events "for the voters' attention." Well-managed investigative hearings allowed Congress the opportunity to combat the reality "that a president cutting a cake has more news value for the media of communication then almost anything a congressman does in his non-investigative capacities."[68] The media, eager to charge ahead with a sensational story, maintained close contact with the committee. In exchange for insider scoops journalists like the *New York Times'* Richard Halloran offered staffers information obtained from anonymous agency insiders. This cooperation helped maintain and assure public interest in government surveillance.

The ACLU proved indispensable to piquing the media's interest in Ervin's hearings. For months Mel Wulf orchestrated a media campaign in New York, pushing the *Times* and the *Times Sunday Magazine* to investigate the government's use of surveillance and computers and the privacy implications. Like Progressive era reformers,

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[67] Baskir interview.

[68] Francis E. Rourke, "Congressional Use of Publicity," in Robert O. Blanchard, ed., *Congress and the News Media*, (New York: Hastings House, 1974), 128-131.

Wulf recognized the centrality of the press to his efforts to usher the issue into the public sphere. The more public debate on the issue, Wulf reasoned, the greater the pressure on democratic institutions to respond. His efforts demonstrated how a new iteration of seventies reformers sought to strengthen ties with a burgeoning group of neo-muckrakers. In his letters to the editor of the *Times*, Wulf called for an immediate cessation of government surveillance, or he expounded on the role of the courts in defining a legal right to privacy in the age of the super computer.[69]

The ACLU and Ervin's subcommittee rightly worried that Americans would turn their historically short attention spans elsewhere. Two events, both beyond the control of subcommittee staff, kept the issues of surveillance and privacy alive. In December 1970 NBC aired a program that breathed new life into the story of government surveillance of civilian politics. The news journal *First Tuesday* broadcast a dramatic exposé of the Army's program. It featured interviews with former Army intelligence officers as well as privacy experts and elected officials like Senator Ervin, who eloquently articulated their concerns about unchecked executive power and privacy. Television proved to be a more powerful medium than newspapers. One Ervin staffer remembered, the program "conveyed to the public the story on Army surveillance in a way that made it immediate and hard-hitting."[70]

Former Army intelligence officer John O'Brien watched the *First Tuesday* report. Encouraged that Washington was ready to listen to his story, he wrote to NBC and to

[69] Melvin Wulf, "Military Spying on Civilians," Letters to the Editor *NYT*, 3 Jan 1971, E10; Aryeh Neier, "Welfare Without Privacy," Letters to the Editor *NYT*, 20 Jan 1971, 34. For ACLU public relations strategy leading up to the hearings, see ACLUP; Box 1097, fol. 13, PPP, DRBSC, PUL.

[70] Baskir, "Reflections on the Senate Hearing of Army Surveillance," 623.

elected officials who figured prominently in the NBC documentary, including Senator Ervin. Recounting his years with the 113th Military Intelligence Group in Evanston, Illinois, O'Brien claimed that he personally observed Army spy operations that went beyond watching radicals and dissidents. O'Brien asserted that his intelligence group had maintained "subversive files," on prominent elected officials. In addition, his unit kept hundreds of files on any organization or individual that spoke out against the Vietnam War or that opposed any domestic policies of the Nixon administration.

When the news media got wind of O'Brien's accusations, Ervin's staff worried that O'Brien's story would turn the otherwise carefully scripted hearings into a media circus. As Pyle remembered, the intelligence operations of the 113th differed dramatically from the operational missions of any other regional Army CONUS program. Ervin and Pyle had misgivings about the accuracy of O'Brien's account and his personal motivations. Did he aim to discredit the proceedings with an inaccurate story? Did he want to be a star? If his story could not be corroborated, the whole investigation could be discredited before the hearings even commenced. Pyle immediately flew to Chicago and spent four long hours interrogating O'Brien, whose account withstood Pyle's considerable interrogatory abilities.[71] It likewise withstood the intense scrutiny of the press and government agencies. Breathing a collective sigh of relief, and pleased over the revived public interest in the subcommittee's hearings, staffers moved forward with hearing preparations.

[71] *Federal Data Banks, Computers and the Bill of Rights*, 100-102; Ben A. Franklin, "Surveillance of Citizens Stirs Debate," *NYT*, 27 Dec 1970, 1; Pyle interview; Baskir interview; Baskir, "Reflections on the Senate Hearing of Army Surveillance," 623-624. Pyle recalls that O'Brien's story sent up a red flag to Ervin staffers. O'Brien's account did not mesh with the accounts gleaned from dozens of other interviews.

The subcommittee staff tackled hearing preparations like the stage crew for a Broadway show. They aimed to impress the audience—the American people. The performers—subcommittee members as well as witnesses—must immediately command the respect of their audience. A poor performance might mean bad press and waning public interest. All of these things could adversely affect the subcommittee's bottom-line: garnering public and congressional support for a particular legislative agenda. Preparations began by distributing a press release to the Senate press gallery. Subcommittee staffers handled the media cautiously, both needing their attention and dreading it at the same time. Ervin stressed the importance of obtaining the whole picture of government surveillance and data management. The media's tendency to focus on sensational stories—such as O'Brien's account—could on the one hand derail long-term legislative aims. On the other hand, if the hearings failed to capture and sustain media interest, Ervin's legislative aims would never gain the much-needed support of the public and his congressional colleagues.[72]

Ervin's staff set the ideal stage, opening the hearings in February 1971 in the Senate's grand Caucus Room. To head off a media frenzy that focused exclusively on the Army's surveillance program, subcommittee staff packed the first day of testimony with ACLU privacy experts and legal counsel, and professors who would focus on privacy concerns in the age of technology. Ervin himself proved an adept dramatist. In the opening act he expounded the virtues of privacy as a constitutional right. Leaning over the grand wooden dais, peering down over his thick-rimmed reading glasses, Ervin

[72] Baskir interview; and Baskir, "Reflections on the Senate Investigation of Army Surveillance."

hefted, in one hand, a thick, hardbound eleven-pound Bible. In his other hand Ervin held aloft between extended thumb and forefinger a perfect two-inch square of microfilm, which he explained, contained the same 1200 pages of text! Computer technology, Ervin thundered, now makes the storage of information infinite. "Someone remarked," Ervin recalled, "that this meant the Constitution could be reduced to the size of a pinhead." Senator Sam chortled. "Maybe that was what they had done in the executive branch because some of those officials could not see it with their naked eyes." This dramatic opening act reminded the public of Ervin's primary concern: the unfettered growth of government databanks and the threat new technologies posed, if unchecked, to individual privacy. The *New York Times* ran a front-page story of the hearings.[73]

The ACLU's hand-picked privacy experts led off the hearings with dramatic testimony. They contended that most Americans "were only vaguely aware of the extent to which they are watched" by government agencies. Government intelligence gathering was virtually unchecked. The nation was traveling headlong, cautioned one witness, "toward a 'dossier dictatorship.'" Harvard Law Professor Arthur Miller, author of *Assault on Privacy*, stole the show, detailing how, "intruders in society, aided by modern science" through the use of microphones, electronic eavesdropping, and "cameras equipped with esoteric optical devices," have "destroyed many of our traditional bastions of privacy." Miller described the dossier of the average American, complete with information about credit history, past employment, and tax returns. These files, warned

[73] Richard Halloran, "Senators Hear of Threat of a Dossier Dictatorship," *NYT*, 24 Feb 1971, 1; Baskir interview.

Miller, "can tell a great deal about his activities, movements, habits, and association when collated and analyzed." Typically, agencies maintained personal information to "achieve socially-desirable objectives." But, Miller continued, without "effective restraints" on the federal government, there are no safeguards to "insure that individuals are protected against the misuse of the burgeoning databanks." Ervin steered Miller's testimony to the real crux of the information-gathering problem. Collection was only one part of the problem. Without effective restraints on information sharing between government agencies, argued Miller, personal data may be "bandied about in some subterranean information exchange network." [74]

Ervin pushed further. What kind of effect, he wanted to know, could unchecked government surveillance and dossier-gathering have on a citizen's constitutionally protected political behavior? Dr. Jerry Rosenberg, a psychologist and the author of *Death of Privacy*, testified that computer technologies and dossier databanks maintained by the federal government would likely cause Americans to "clam up" and "hide." Already aware of this "Orwellian nightmare," Rosenberg claimed that student unrest was largely the result of a perceived loss of individual privacy.[75] Chris Pyle debated the constitutional problems that unchecked government surveillance posed to a democratic society. He cautioned that unchecked surveillance may have a psychological, "chilling" effect on the American polity—if people believe they are being watched, they are less likely to enter the public domain and voice their opinion. In a clever twist on President Nixon's "silent

[74] Miller testimony cited in *Federal Data Banks, Computers and the Bill of Rights*, 8-40.

[75] Rosenberg testimony cited in *Federal Data Banks, Computers and the Bill of Rights*, 69-84.

majority," Senator Ervin warned that dossier building and surveillance created a "silent American." This man "refrains from any public controversy and from any political activity. … He has been frightened out of his great birthright—the right to speak his mind."[76]

Over nine days of testimony Senator Sam presided over a lively media event. The caucus room offered an outstanding forum for the Senator and the ACLU to present their case to the public (through the filter of media) and to legislators on issues of First Amendment rights and privacy.[77] Counterintelligence officers revealed that they had spied on congressmen, as well as state and local elected officials; they had posed as dissenters at anti-war meetings; and they had in some cases fomented violence. They admitted that they had monitored the legal political activity of millions of law-abiding American citizens.[78] When asked why they decided to speak publicly about their previous work with the Army, many echoed the sentiments of former Special Agent Richard Allen Kasson. Troubled by the Army's extra-legal activities, Kasson believed the Army's missions and programs ought to be brought fully in line with the Bill of Rights.[79] The hearings underscored two major problems: the executive's unwillingness to share information with Congress, and the White House's lack of concern for broader First Amendment rights.

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[76] Ervin cited in *Federal Data Banks, Computers and the Bill of Rights*, 89.

[77] "ACLU Activity Report," September-December, 1970; ACLUP, box 24, fol. 4; PPP; DRBSC: PUL; 4.

[78] *Federal Data Banks, Computers and the Bill of Rights*.

[79] Affidavit of Richard Allen Kasson, *Tatum v. Laird* file, ACLUP, box 1728, fol. tatum v. laird 1965-1971, PPP; DRBSC: PUL.

Not all Americans were satisfied with the scope of Ervin's subcommittee investigation. Movement activists, many of whom had faced years of government surveillance and attacks on their civil liberties, believed that Ervin had only touched the surface of the problem. By focusing so narrowly on the Army program, they thought, Congress failed to demonstrate the magnitude of the problem.[80] One radical organization with an ironic handle took action into its own hands. On March 8, 1971, the Citizens' Commission to Investigate the FBI burgled the Bureau's regional office in Media, Pennsylvania. Stealing more than one thousand top-secret dossiers, the group mailed copies to the *Times* and the *Post*, and to three congressmen, including Democratic Senator George McGovern (ND). The stolen files revealed what many radicals had long suspected—that the FBI also engaged in massive domestic surveillance of non-violent, lawful political dissent. One memorandum from FBI Director J. Edgar Hoover encouraged FBI agents to harass dissenters to "enhance the paranoia endemic in these circles and … get the point across there is an FBI agent behind every mailbox." The files offered proof that one of the nation's most revered domestic security and law enforcement agencies ran roughshod over the First Amendment rights of many Americans.

Little is formally known about the members of the Citizens' Commission. The

[80] These critics had a point, though they failed to take into consideration the political risks associated with challenging America's most revered institutions like the FBI. Though Ervin and his staff privately suspected the FBI of engaging in illegal activities, publicly they handled FBI Director J. Edgar Hoover and his agency with kid gloves. Indeed, Senator Ervin enjoyed amiable relations with Hoover, regularly exchanging pleasantries. But in the early 1970s the FBI and the CIA remained politically off-limits to congressional inquiry or oversight. The bold (and illegal) actions of one organization in 1971, however, deeply undermined the public trust that the FBI had so long enjoyed. Baskir interview and Samuel J. Ervin, Jr. FBI file, copy in the author's possession.

identity of the burglars was never discovered (much to the embarrassment of the FBI). The office location of Media, PA was no coincidence. Media, ten miles southwest of Philadelphia and bordering on Swarthmore, was a small hotbed of antiwar activity in the 1960s and early seventies. Following the Cambodia bombing, the Street Messenger Community Project was formed, joining an already large contingent of Quaker peace activists in the area. Demonstrators were well aware of the FBI field office in their midst. And the office was neither well-guarded nor difficult to access.[81] The organization's stated goals, however, suggested a growing restlessness in the United States with politics as usual. The group hoped, not only to "correct the more gross violations of constitutional rights by the FBI," but also to "contribute to the movement for fundamental constructive change" in society.[82] Like the writers and editors at the *WM* and attorneys at the ACLU, this organization was determined to challenge the political status quo, albeit using more radical and direct tactics.

Attorney General John N. Mitchell issued a plea to the media not to publicize the story when the Justice Department got word of the burglary. "Disclosure of national defense information," Mitchell claimed, "could endanger the United States and give aid to foreign governments whose interests might be inimical to those of the United States." *Post* editors, ignoring pleas for self-censorship, ran the story front-page, above the fold,

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[81] Donald Janson, "F.B.I. File Theft Stirs Anger and Joy Among Residents of Media, PA," *NYT* 29 March 1971, 20; see also Richard Gid Powers, *Secrecy and Power: The Life of J. Edgar Hoover*, (New York: The Free Press, 1986), 464-465.

[82] "From the Citizens' Commission to Investigate the F.B.I.," *Win Magazine*, (March 1 & 15, 1972), vol 8, no 4 & 5, 8. Win magazine received one of the packets of copied FBI files from the Citizens' Commission and published the bulk of the files in their March 1972 edition. The magazine, based in New York, was an underground paper with the subtitle: "Peace and freedom through nonviolent action."

on March 24, 1971. The *Times* followed with a page-one story the next day.[83] The *Post's* decision, motivated in part by professional determination to "out-scoop" the *Times,* was both politically courageous and financially risky; the newspaper was on the eve of a $35 million public stock offering.[84] Explaining their decision to publicize the files in an editorial, *Post* editors condemned the government's domestic security methods as appropriate tools "for the secret police of the Soviet Union but wholly inconsonant" with American democracy. Calling the FBI's program to monitor political dissent dangerous to democracy, the *Post* editors believed it was their professional duty to inform the American public about the state's activities, especially when those activities violated the basic constitutional rights of many Americans.[85] *Times* editors similarly condemned the administration's "policies of paranoia" and wondered of the FBI's activities, "who watches the watchmen?" Without condoning the tactics of the Citizens Commission to Investigate the FBI, the *Times* condemned the FBI for "incursions into political surveillance which far exceed legitimate efforts to protect the national interest."[86] Though Ervin and his staff denounced the tactics of the radical organization (to avoid the

[83] "Mitchell Issues Plea on F.B.I. Files, Asks Press Not to Publish Data on Stolen Papers," *NYT*, 24 March, 1971, 24; "Stolen Documents Describe FBI Surveillance Activities," *WP*, 24 March 1971, p. A1, A11; "F.B.I. Files Tell of Surveillance of Students, Blacks, War Foes," *NYT*, 25 March 1971, p. 1, 33.

[84] In his memoirs *Post* managing editor Ben Bradlee recalls that *Post* editors got word that the *Times* was working on a "blockbuster" story, an exclusive, in early spring of 1971. This story, of course, was the Pentagon Papers. Though he does not mention his decision to publish the Media, PA files in his book, his desire to compete with the *Times'* then unidentified "blockbuster" story perhaps drove the editors at the *Post* to take editorial risks they would not have otherwise considered. See Ben Bradlee, *A Good Life: Newspapering and Other Adventures*, (New York: Simon & Schuster, 1995), 310, 314.

[85] "What is the FBI Up To?" *WP*, 25 Mar 1971, A20.

[86] "Policies of Paranoia," *NYT*, 29 Mar 1971, p. 32.

appearance of collaborating with radicals), the dossiers, as part of the public domain, proved useful in later congressional inquiries.[87]

Washington Post executive editor Ben Bradlee's editorial decision, risky though it was, underscored the ferocious competition among powerful news organizations for the next big scoop, the next exposé. Structural forces opened wide opportunities for courageous media outlets, like the *Washington Post*, to challenge the federal government in unprecedented ways. CBS News was the next mainstream media organization to offer a direct challenge to powerful national institutions.

While the country buzzed over Ervin's hearings, CBS aired a special documentary titled, *The Selling of the Pentagon*. Splicing a hard-hitting exposé with what historian Beth Bailey has called, "the credibility of network news (no irony intended) and all the most persuasive techniques of documentary filmmaking," the program carefully examined how the Pentagon used its public relations budget. Trusted CBS journalist Roger Mudd reported that the Pentagon used a portion of its public relations monies (perhaps $190 million) to fund a domestic propaganda program, including speaking tours and films, to bolster public support for the war in Vietnam.[88] Saddled with the debacle in Vietnam, forced to explain its domestic surveillance program to an incredulous Congress and the American public, *The Selling of the Pentagon* followed on the heels of a series of public relations disasters for the nation's most powerful national security institution.

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[87] Baskir interview.

[88] Beth Bailey, " The Army in the Marketplace: Recruiting an All-Volunteer Force," *The Journal of American History*, vol. 94, no. 1, June 2007, 71-72; *The Selling of the Pentagon*, prod. CBS News, Peter Davis, Perry Wolf, written by Peter Davis, reporter Roger Mudd (CBS, 23 Feb 1971), transcript in Columbia Broadcast System, Inc., *From Subpoena to Recommittal* (New York, 1971).

The Nixon administration responded rabidly to the documentary. Vice President Spiro Agnew, the administration's media watchdog, embarked on a personal campaign to soil the image of the American news establishment in general, and CBS in particular, with the American public. He called the documentary "clever propaganda," proffered by CBS "to discredit" the U.S. defense establishment. In an ironic twist Agnew argued that the *Selling of the Pentagon* belied "the widening credibility gap that exists between the national newsmedia and the American public." CBS President Frank Stanton fought back, arguing that the establishment's disagreement with the media was a "vivid example of the traditional conflict between Government and the free press." Stanton stood by the accuracy of the *Selling of the Pentagon* documentary.[89] A subcommittee of the House Commerce Committee subpoenaed materials relating to the making of the documentary, questioning whether the documentary "accurately" depicted the Pentagon's public relations program. The Nixon administration without apology attacked the very notion of freedom of the press, of government transparency, and of a people's "right to know," claiming that national security always trumped such democratic concerns.

The executive branch under both Democratic and Republican presidents had been waging this battle with ferocity since the onset of the Cold War. In the early 1950s the association for journalism professionals, Sigma Delta Chi, responded by spearheading a movement for legislation guaranteeing the right to inspect public records. Also in the early 50s, the American Society of Newspaper Editors commissioned a legal study of

[89] "C.B.S. is Challenged by Agnew to Admit 'Errors' in 3 TV Films," *NYT*, 21 Mar 1971, 30; James M. McNaughton, "Agnew Criticizes C.B.S. Over a TV documentary," *NYT*, 29 Mar 1971, 79.

government transparency by Professor of Law Dr. Harold L. Cross. Cross examined the legal framework of the public's "right to know" at the state and federal level. He traced jurisprudential strategies to promote government transparency and concluded that, in the context of the Cold War, government agencies had rarely recognized a citizen's "right to know."[90] Sixties protest movements revived a movement for greater government transparency. But apart from the ambiguous constitutional requirements that the president inform the people "from time to time" (state of the union address) and the publication of legislative proceedings, the public's "right to know" remained legally undefined by congressional statute or by federal court rulings.[91]

The media's claim to information and a public's right to know was already at a head when a spectacular event put the issue at the nation's center stage. Daniel Ellsberg was another establishment insider turned critic. During his time as a staffer at the Pentagon in the 1960s, he had gone from hawkish support for the Vietnam War to resolute opposition to it. In early 1971 he approached another establishment critic, a journalist at the *Times*, with a story that he promised would be big. He had a copy of what came to be popularly called "The Pentagon Papers." The Papers were documents compiled under the direction of then Secretary of Defense Robert S. McNamara detailing the history of U.S. policymaking process in Vietnam. Ellsberg wanted the *Times* assurance it would use the information and not bow to White House pressure to keep it

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[90] Harold Cross, *A People's Right to Know: Legal Access to Public Records and Proceedings,"* (New York: Columbia University Press, 1953).

[91] Professor Paul Fisher of the Freedom of Information Center at the University of Missouri School of Journalism to Alan Reitman, ACLU, ACLUP, 4 May 1967; box 749, fol. 6; PPP; DRBSC; PUL.

under wraps. Though the report made some editors and the *Times* legal counsel nervous, the newspaper decided to publish excerpts. The report included evidence that the Pentagon had expanded the war into Cambodia and Laos but kept this information hidden from the American public. Overall the report underscored the duplicity of both the Johnson and Nixon administrations and widened the credibility gap between government officials and the American polity.

The Nixon administration enjoined the paper to halt publication.[92] The ACLU joined the *Times* legal team in *New York Times v. United States,* entering amicus curiae brief (a "friend of the court" opinion presented by a third party). Attorneys for the *Times* agreed to halt publication of the documents if the White House could offer evidence that publication endangered the nation's security. But as the ACLU concluded, such a standard "ignores the public's right to know information which will help shape its views on public policy questions."[93] The Supreme Court decided in favor of the *Times*. The ruling undercut executive claims to absolute authority in national security matters, and, according to one journalist, offered "dramatic evidence that Government officials … do not possess some mysterious high wisdom … one could make the case that the outside public exhibits more good sense."[94] But the ACLU did not see a resounding legal victory; the justices remained deeply divided on how much "freedom" to grant the press under the First Amendment. In other words, the ACLU failed to convince the court to consider the

[92] David Halberstam, *The Powers That Be,* (New York: Alfred Knopf, 1979), 565-70.

[93] "Annual Report, July 1970-June 1971," ACLUP; box 1881, fol 2; PPP; DRBSC; PUL; 18. For the editorial decision to publish the Pentagon Papers, see Halberstam, *The Powers That Be*, 565-78.

[94] Richard Hudson, "Let's Declassify," *NYT*, 1 Jul 1971, 47.

larger First Amendment issues at stake. Instead, the court offered a narrow interpretation: the government had failed, in this instance, to provide evidence that such publication would leave the nation vulnerable either at home or abroad.[95]

From 1970-1971 an unlikely coalition created a public framework for institutional reform. Senator Ervin's committee, the ACLU, the Citizens' Commission to Investigate the FBI, the *WM*, NBC, and CBS worked to make government surveillance and the suppression of civil liberties headline news. In spite of tremendous gains, however, ACLU Executive Director Aryeh Neier predicted a long, hard battle ahead when he reflected on his organization's progress at the close of 1971. The Ervin Senate hearings on surveillance, privacy and data banks ignited much needed public debate on critical constitutional issues. Ultimately, the Army buckled under political pressure and discontinued its program—a temporary victory. The challenge remained, Neier added, to create a legal framework to strictly limit government surveillance. And while some issues, like privacy, seemed poised for legislative resolution, others such as executive privilege, government transparency, and rampant disregard for the Bill of Rights, remained untouched. The public's "right to know," argued Aryeh, was stymied by the administration's "widespread use of classifications and 'executive privilege'" to keep material in the possession of the federal executive department." The Pentagon Papers case highlighted, according to Neier, the need for an expanded ACLU "program of

[95] Max Frankel, "Court Decision: Presses Roll—But the Conflict Remains," *NYT*, 4 Jul 1971, E1.

legislative and litigative action to challenge secrecy in government."[96] From 1972-1973 the organization would continue to recruit allies and develop networks to challenge the national security regime.

[96] "ACLU mailings, Sept-Dec 1971;" ACLUP, box 25, fol. 3; PPP; DRBSC; PUL.

CHAPTER 4
"A PROLOGUE TO A FARCE OR A TRAGEDY"[1]: CHALLENGING EXECUTIVE POWER, 1971-1973

When William Roth ran for the U.S. senate in Delaware in 1966 his constituents told him they wanted more information about federal programs—who qualifies and what kind of assistance is available. Just put me in the Senate, he'd say, and I'll get all the information you need. When the newly elected senator from the northeast arrived in Washington in early 1967, he and his staff got right to work. Roth wanted to catalogue all the federal domestic assistance programs and send the list back home to his constituents. He thought it would take a month or so. He was already thinking how this might help his reelection campaign in five years.

Nothing went as Roth planned. Among the many rejections he received from federal agencies to his request for information, the Office of Economic Opportunity was the strangest. The OEO denied his request for a copy of its telephone directory. This information, the agency wrote the senator, was "confidential." Roth faced similar rejections from other agencies. His requests for information were met with "resistance and subterfuge, and frequently with outright opposition or refusal." Welcome to Washington, Senator.[2]

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[1]James Madison to W.T. Barry, 4 Aug 1822.

[2] This account is adapted from Senator William V. Roth, Jr.'s (D-DE) testimony the Subcommittee on the Separation of Powers of the Committee on the Judiciary, 92nd cong, 1st sess., "Executive Privilege: the Withholding of Information by the Executive," July 27, 28, 29; Aug 4, 5, 1971, 227-240.

When the Army announced plans to dismantle its domestic surveillance program in a letter to congressional critics in 1970, many heralded the move as a major victory for First Amendment rights in the U.S. But a loosely affiliated network of reformers remained dissatisfied. Even if the dossiers were destroyed (which they were not), the larger issue of executive power remained unresolved. The Nixon administration refused to cooperate with congressional inquiries into domestic surveillance programs or produce documents in legal proceedings about the program, claiming "executive privilege."[3]

Frustrated by the opacity of the Nixon administration, Congress fought back. Believing that they were witnessing a historic perversion of democratic practice in the United States, Senator Sam Ervin and Congressman William Moorhead (D-PA) consulted allies, conducted hearings and proposed legislative reforms to address exigencies of executive power. Their efforts were part of a larger legislative movement to reaffirm democratic checks and balances. They viewed the trampling of First Amendment rights as a consequence of the burgeoning, unchecked power of the executive branch. Using the investigative tools available to them and working closely with the news media and powerful interest groups, Ervin and Moorhead led a small cohort to publicly debate the role and power of the executive over the state, including the role of the press in a democratic government, the limits of "executive privilege," "freedom of the press," and

[3] Despite Army pronouncements that its domestic surveillance program had been discontinued and its dossiers destroyed, anonymous sources within CONUS Intel reported that surveillance continued unabated. See "U.S. Held Unable to Destroy All Army Data on Civilians," *NYT*, 29 May 1972, 20; Christopher Pyle, "CONUS Revisited: The Army Covers Up," *Washington Monthly*, July 1970, vol 2, no 5, 49-58; and Pyle "Spies Without Masters: The Army Still Watches Civilian Politics," *The Civil Liberties Review*, Summer 1974, 38-49.

the public's "right to know."

Ervin and Moorhead received support from a small coterie of public interest groups like the ACLU and Common Cause, and the news media. All had actively promoted greater transparency in the executive branch since the late 1960s. The public's "right to know," these organizations believed, was a basic tenet of American democracy and the lack of transparency of the modern American state severely restricted democratic practice. Presidential administrations had always tended toward secrecy. But critics claimed that the Nixon administration in particular abused the "national security" claim in order to restrict the flow of information to the American public. The Freedom of Information Act of 1967, a law that Congress intended would throw back the curtains on the executive branch, critics argued, had failed to expose the state to public scrutiny. News organizations that dared to peek under the state's dark cloak and reveal what they saw were targeted—"enemies"—for public condemnation and intimidation by the administration. Some administration critics viewed the attack on the press as yet another effort to subvert the First Amendment. Reformers sought to protect freedom of the press as a vital component of American democracy. Civil libertarians, and national security and congressional reformers united to debate freedom of the press, government transparency, and executive power during this period.

While some moved to check executive power through legislative inquiry, others worked through the court system. The ACLU sought to carve out a role for the judicial branch in defining the limits of executive power in the realm of national security in the cold war period. In *Tatum v. Laird* the ACLU contested the constitutional legality of the

Army's surveillance program, arguing that it "chilled" First Amendment rights of free speech. *United States v. United States District Court* disputed the executive's claim of "inherent power" to wiretap citizens without court approval. At stake was the very definition of "executive privilege" itself. How far outside the bounds of the constitution could the president legally act to ensure "national security?" Who or what constituted a threat to the nation? Answers to these questions struck at the heart of American cold war culture that had defined the relationship between citizen and state for decades.

When neo-muckraking journalists Carl Bernstein and Bob Woodward doggedly pursued the story of the break-in at the Watergate hotel and office complex in June 1972 they were caught up in a tide of swirling public debate about executive power. In the traditional grand narrative of recent American history, the Watergate scandal has taken on gigantic proportions. Historians have called it a "watershed" event credited with a congressional reassertion of checks and balances. They exaggerate. Though important, Watergate was but one event among many that underscored the exigencies of executive power. Watergate did weaken the hegemonic state. In this sense, it helped fracture agreement among elites and create political opportunities for a nascent reform movement to unite on issues such as the right to privacy, freedom of speech, and government transparency.[4]

[4] The traditional narrative of Watergate began with Arthur M. Schlesinger, Jr.'s *Imperial Presidency* (Boston: Houghton Mifflin, 1973) where he argued that the executive branch had obtained extraordinary powers in the postwar era and that Watergate was the inevitable consequence of this political development. Recent works by Bruce Schulman, *The Seventies: The Great Shift in American Culture, Society, and Politics*, (New York: Da Capo Press, 2001) and Edward Berkowitz, *Something Happened: A Political and Cultural Overview of the Seventies*, (New York: Columbia University Press, 2006) acknowledge that incredible power had become concentrated in the executive branch, but suggest that

In 1971 CBS White House correspondent Daniel Schorr was not a neo-muckraker. He wasn't even an investigative journalist. That's why the Nixon administration's decision to single him out as an "enemy" made little sense. Schorr came to television late in his career, and always considered himself a "journalist *in* television [rather] than a journalist *of* television." This distinction stemmed from his background as a foreign correspondent where he felt compelled to give "shape" to the news to make it more palatable for the American domestic audience. Homely, with a thick voice, Schorr was uncomfortable with "the stagecraft, image-making and slogan-selling to which television seemed so susceptible." Reporting from behind the Soviet Union's Iron Curtain in the 1940s and early 1950s, he developed a penchant (as much out of a sense of professional survival as personal curiosity) for information that was difficult to access, for news that the establishment wanted to withhold from the public.[5]

When Schorr joined CBS television news in the late 1950s he found that presidential administrations didn't much like the "shape" that he gave to his stories. Schorr was a non-partisan offender. He turned the same critical eye on Democrats and Republicans. Administrations on both sides of the aisle viewed him as a gadfly. Every administration expressed its disapproval in its own way—President Johnson, for example, derided him as a "prize son-of-a-bitch." But at least on the surface Schorr and the administrations he covered maintained a civil, if strained, relationship. Unbeknownst to

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Watergate was more the result of Richard Nixon's own foibles than an institutional failure. These works do not consider the growing movement for institutional reform culminating *before* the Watergate scandal.

[5] After World War II Schorr covered Eastern Europe for print and radio agencies including the *New York Times*, *Christian Science Monitor*, *Time*, *Newsweek*, and CBS. See Schorr, *Clearing the Air*, (Boston: Houghton Mifflin Company, 1977), 1-9, 91-2.

Schorr, however, his relationship with the Nixon administration became anything but cordial. Sometime in 1971 White House staffers added him to their infamous "enemies list."[6]

One morning, after a typical dispute with the White House over his reporting, an FBI agent greeted Schorr at his CBS office. The agent claimed the White House was vetting Schorr for a position. Which position, Schorr wanted to know. The agent couldn't say. For a brief moment Schorr fancied that his excellence in reporting had finally brought him not only the admiration, but the approval of White House officials. He imagined how his skills could be put to use by the executive branch. But Schorr had to be honest with himself. He had been no friend to this, nor any, presidential administration. And the mystery job seemed suspicious (especially coming as it did after another row with the White House). For the remainder of the day Schorr answered bewildered phone calls from friends, family, and associates who had also been contacted by the FBI. The investigation was embarrassing and potentially damaging to his career. The formal inquiry made his colleagues, his sources, and most importantly, his supervisors, nervous. He finally asked the FBI to suspend the inquiry—he didn't want a government job. The

[6] President Johnson made his dislike for Schorr's reporting on Great Society programs known in no uncertain terms. Johnson called the reporter at his home late one night and denounced him as "a prize son-of-a-bitch." It would be difficult to pinpoint exactly when the Nixon administration made an "enemy" of Schorr. In March 1971, a little more than two years into the administration, Schorr reported that the newly appointed NASA administrator expressed doubt to President Nixon about the efficacy of the Anti-Ballistic Missile system (ABM). Schorr's broadcast aired when just as the administrator was up for confirmation and the ABM was being considered for new funding. Nixon denounced Schorr, calling his story a "lie." The administration grew to so dislike the report, that Schorr became the brunt of some ugly jokes inside the Nixon White House. Nixon and his staff, it seemed, took a "siege mentality" with those who criticized their programs rather than attempt to sway journalists to their way of thinking. Their displeasure with certain journalists manifested in what Schorr would later call "secretive in-group humor," such as adding the middle initial "P" to the names of some reporters. The "p" stood for "prick." See Schorr, *Clearing the Air*, 66-7, 70-1. On Nixon's development of the "enemies list" see Kutler, *The Wars of Watergate*, 104.

White House clumsily admitted that it had never considered him for a position. Nixon had ordered the name check to intimidate the reporter.[7]

Presidential administrations had battled an adversarial press since the nation's founding. The Jefferson administration had gone so far in 1798 to enact the Sedition Act that forbid unfavorable and malicious reporting about the government and members of Congress.[8] But Nixon's decision to use the national security apparatus to intimidate a critic into silence was a particularly heavy-handed technique. The Schorr episode was but one of the Nixon administration's efforts to intimidate the news media: the administration sued the *New York Times* to halt the publication of the "Pentagon Papers;" turned vice president Spiro Agnew loose on CBS news for airing an investigative report critical of the Defense Department's public relations work (*The Selling of the Pentagon*); and sought subpoenas for journalists who refused to reveal their sources.[9]

Some viewed the administration's attacks on the press as evidence that the president and his staff preferred secrecy to open government. ACLU Executive Director Aryeh Neier suspected that the White House aimed to punish the media for doing its

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[7] Schorr, *Clearing the Air*, 67, 70-73 and Kutler, *Wars of Watergate*, 180. Schorr was involved in another imbroglio over his reporting in 1976 on issues related to national security that ultimately led to his dismissal from CBS. See chapter six.

[8] The Sedition Act of 1798 criminalized the publication of anything false, scandalous or malicious that might defame the government, including members of Congress. See Joanne B. Freeman, "Explaining the Unexplainable: the Cultural Context of the Sedition Act," in Jabobs, Novak and Zelizer, eds., *The Democratic Experiment*, 20-49.

[9] For a discussion of the "Pentagon Papers" trial, see chapter three. On the historic relationship between the news media and presidential administrations in the twentieth century see Timothy Crouse, *The Boys on the Bus*, (New York: Random House, 1973); David Halberstam, *The Powers That Be*, (New York: Knopf, 1979); and Donald Ritchie, *Reporting from Washington: the History of the Washington Press Corps*, (New York: Oxford University Press, 2005). On the Nixon administration's relationship with the media see David Greenberg, *Nixon's Shadow: The History of an Image*, (New York: W.W. Norton & Co., 2003; and Kutler, *Wars of Watergate*, 161-184.

job—informing the public about affairs of government. Neier believed that the administration's preference for secrecy made the role of the media more important than ever.[10] The ACLU called upon its ally in congress, Senator Sam Ervin and his subcommittee on Constitutional Rights, to investigate.

Ervin himself was no friend of the administration. Though the conservative southern Democrat and Richard Nixon were both "law and order" men, Ervin's steadfast support for First Amendment rights made him a vocal critic of the administration's tactics.[11] The senator appreciated the historically contentious relationship between the executive branch and the press, but the Schorr case seemed to Ervin an unconscionable abuse of power. Little did he know the extent to which Nixon and his aides were willing to use intelligence agencies against the president's so-called "enemies." Fearing the erosion of the concept of a free press, and determined to "reexamine and reemphasize First Amendment principles," Ervin gaveled hearings on freedom of the press to order in late September 1971. Schorr testified as a star witness.[12]

Ervin's staff worked assiduously to maximize press coverage by packing the hearings with media darlings. The nation's most trusted television journalist, CBS news anchor Walter Cronkite, told his audience that Congress should write legislation to

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[10] Neier to Board of Directors, "Priorities for 1972," ACLUP, box 25, fol. 3, PPP, DRBSC, PUL.

[11] Ervin voted with Nixon sixty percent of the time during the president's first term. Ervin took a tough stand on crime and civil disorder, positions on which he and the president agreed. But Ervin was opposed to the methods the president proposed to fight crime. He called Nixon's omnibus crime bill "a garbage pail of some of the most repressive, nearsighted, intolerant, unfair, and vindictive legislation that the Senate has ever been presented." See Karl E. Campbell, *Senator Sam Ervin, Last of the Founding Fathers*, (Chapel Hill, NC: The University of North Carolina Press, 2007), 210-220.

[12] Hearing before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, *Freedom of the Press*, 92nd cong., 1st and 2d sess., 1971-1972, 1-4.

protect the free press. Cronkite described a media troubled by government secrecy and harassed by elected officials. Cronkite acknowledged the "immense power" of the news media (for which he certainly felt a little proud), but dismissed administration claims of bias. Offering his "personal assurance" as proof, Cronkite denied that "political or ideological consideration" ever determined the making of the news.[13]

One of the men responsible for the publication of the "Pentagon Papers," *Times* Executive Vice President Harding Bancroft, also minced no words. He claimed that the Nixon administration's efforts to silence the media amounted to intimidation. The enjoinment of the *Times* set an ugly precedent and cast a "chilling effect" over the news industry. "A reporter who, in the past, routinely checked his facts with Government officials might well think twice before doing so, always fearful that by revealing his knowledge he will put into motion the Government censorship machine." The greatest challenge faced by the media was the over-classification of information, and Bancroft urged congress to reexamine the Freedom of Information Act's efficacy. Hailed in 1966 as a bill that would ensure the "people's right to know," the Freedom of Information Act, according to Bancroft, had not "deterred Government bureaucrats from routinely denying proper informational requests." Since journalists did not have the luxury of "enter[ing] into prolonged negotiations, or litigation with the agency in question," these delaying tactics killed stories.[14]

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[13] Cronkite testimony in *Freedom of the Press*, 77-106.

[14] Testimony of Harding F. Bancroft, Executive Vice President of the New York Times, Co., *Freedom of the Press*, 18-22; Wolfgang Saxon, "Harding Bancroft, 81, Executive At The Times and Diplomat, Dies," *NYT*, 7 Feb 1992, cited 11 Sept 2008: <http://query.nytimes.com/gst/fullpage.html?res=9E0CE2D8113AF934A35751C0A964958260>.

Congressman William Moorhead, a Democrat from Pittsburgh, followed the freedom of the press hearings closely. As chairman of the subcommittee on Foreign Operations and Government Information he had a professional and personal interest in challenging the opacity of the executive branch. Like many of his colleagues, Moorhead had grown increasingly frustrated with the executive branch's failure to comply with the basic principles of FOIA. He wondered why the law failed to work as its architects had originally envisioned.

As the expert in the House of Representatives on government information policy, he knew that the Freedom of Information Act of 1967 was an institutional revolution. The statute was the brainchild of Congressman John Moss (D-CA).[15] Moss was known among his colleagues as a rather "dull" and "plodding" man. But on one issue—open government—he had earned the reputation as a tenacious bulldog. Moss' personal battle for greater executive transparency began with the Eisenhower administration in the late 1950s. When the White House fired so-called "communists" on the federal payroll, the congressman demanded that the Civil Service Commission provide evidence of their membership with the communist party on a case-by-case basis. The commission refused, citing executive privilege.[16] These seemed like Gestapo tactics to Moss. The congressman authored an amendment to the 1789 "housekeeping statute" that granted

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[15] President Johnson signed FOIA legislation in 1966 and the law became effective in 1967. For the purposes of this dissertation, I will refer to the act as FOIA of 1967. See Bruce Schulman's essay, "Restraining the Imperial Presidency: Congress and Watergate," in Julian Zelizer, ed., *The American Congress: The Building of Democracy*, (Boston: Houghton Mifflin Co., 2004), 638-649. Schulman, like other historians, claims Watergate was the impetus behind congressional challenges to expansive executive power in the late twentieth century..

[16] Robert McG. Thomas, Jr., "John E. Moss, 84, is Dead; Father of Anti-Secrecy Law," *NYT* 6 Dec 1997, D15.

federal agencies the power to keep and file records. The Moss bill added one sentence to the original statute, forbidding federal agencies from withholding records and information from the public.[17]

It was a small triumph for the bulldog: a largely toothless bill that lacked enforcement mechanisms. But it was a crack in the otherwise impenetrable wall of the executive branch. For eight long years Moss worked diligently to gain support for a tougher bill. The Johnson administration's "credibility gap," particularly regarding the war in Vietnam, strengthened Moss' calls for greater transparency in the executive branch. The Freedom of Information Act granted citizens new tools for gaining unprecedented access to the official government. The bill required that the executive branch make "matters of official record" available to the general public. Any person could demand access to government information, for any reason. However, facing outright opposition from all federal agencies, Moss and his colleagues in Congress accepted some major compromises. In the final bill, the legislative branch conceded nine exemptions to the White House: information relating to national security and defense, trade secrets, and personnel and medical files. Still, FOIA established a legal framework for the exchange of information between civil society and executive level agencies. For the first time in the nation's history, executive agencies assumed the burden of proof for the withholding of information from the public. The bill specifically forbade the

[17] *Freedom of Information Act and Amendments of 1974* (P.L. 93-502), source book: Legislative History, Texts, and other Documents; Committee on Government Operations, U.S. House of Representatives, Subcommittee on Government Information and Individual Rights, Committee on the Judiciary, U.S. Senate, Subcommittee on Administrative Practice and Procedure (Washington, D.C.: GPO, 1975).

withholding of any information from the legislative branch.[18]

A lugubrious President Johnson signed the bill on July 4, 1966, not at a public ceremony as his aides recommended, but in the quiet chambers of the Oval Office. In the midst of waging an increasingly unpopular war in Southeast Asia and battling crime and disorder in the nation's streets, the last thing the White House needed was a flood of FOIA requests. Johnson and his aides had fought Congress to ensure the final bill contained exemptions for national security. He had no intention of letting information about government policies in Vietnam enter the public domain, unless that information came from a White House "communication specialist."[19]

Despite the nine exemptions, proponents of greater government transparency lauded FOIA. The Freedom of Information Committee of Sigma Delta Chi, a national organization of professional journalists that had aggressively lobbied congress on transparency issues, heralded the bill as a great triumph in the history of journalism. One astute observer called the passage of FOIA a "watershed event" that "reversed the philosophy of releasing Government information." But careful observers in the ACLU cautioned that without an administrative "watchdog" the flow of information was likely

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[18] *Administration of the Freedom of Information Act*, 2-3.

[19] Not everyone in the Johnson administration detested the bill. Attorney General Ramsey Clark embraced it. In his memo outlining comprehensive guidelines for executive agency compliance, Clark declared "nothing so diminishes democracy as secrecy." He instructed all agencies to proceed on the basic assumption that disclosure was the rule, not the exception; that everyone have access to information; that the burden of withholding information fall on the agencies themselves; that those denied access to information be allowed the opportunity, through the courts, to seek relief; and "that there be a change in Government policy and attitude" regarding basic access to information. Clark noted with satisfaction that FOIA promised to bring greater administrative efficiency "in better records management; in seeking the adoption of better methods of search, retrieval, and copying; and in making sure that documentary classification is not stretched beyond the limits of demonstrable need." *Administration of the Freedom of Information Act*, 5-6.

to be hindered by "exercise of executive powers" especially in areas of national security.[20]

By the early 1970s the euphoria following the passage of FOIA had dissipated. The Nixon administration's attacks on the press, so eloquently described by respected members of the media at the Ervin hearings, prompted Congressman Moorhead to investigate. Transparency, he concluded, remained the exception, not the rule. Now chairman of the government operations subcommittee, Moorhead was determined to revise FOIA to make it relevant.

Architects of FOIA had envisioned it as an institutional and organizational revolution—a democratic tool for institutionalizing a new process of information transfer from the dark recesses of the executive branch to the public squares of American society. But as FOI practitioners revealed in Moorhead's hearings, the law had failed to make government more transparent or more accountable to the American polity. With few exceptions, current and former government officials, representatives of print and broadcast media, public interest groups, and attorneys echoed one assessment of FOIA as "fine in principle and purpose but poor in practical terms."[21]

The hearings exposed the degree to which executive agencies reluctantly responded to FOIA requests, claiming civil servants had to "balance the Government's

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[20] "Newsmen Accuse Administration of Attempt to Impose Secrecy," *NYT*, 1 Nov 1965, 24; Professor Paul Fisher of the Freedom of Information Center at the University of Missouri School of Journalism to Alan Reitman, 4 may 1967, ACLUP, box 749, fol. 6; "Weekly Bulletin 2278" 24 Oct 1966; ACLUP, box 749, fol. 7, PPP, DRBSC, PUL; Attorney General Ramsey Clark, "Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act," cited in *Administration of the Freedom of Information Act*, 64; and Wozencraft testimony cited in ibid.

[21] "Federal Files: Freedom of Information…" *WP*, 20 Nov 1974, A26.

rights against the people's rights [to know]."[22] Requestors described cases of bureaucratic "foot-dragging" suggesting "widespread reluctance of the bureaucracy to honor the public's legal right to know." A study of the first four years of FOIA conducted by the Congressional Research Service revealed the time for response varied widely from agency to agency: the Small Business Administration took an average of eight days to respond to requests, while the Federal Trade Commission took an average of sixty-nine days. It took a staggering fifty days, on average, for requestors to receive a response to an appeal. For these reasons, the report noted, journalists had "made little use" of FOIA. Agencies employed techniques to dissuade requests, including charging excessive copy fees. Critics complained that government agencies overused the nine exempt categories to avoid complying with FOIA requests.[23]

Moorhead's subcommittee hearings offered a forum for an emerging knowledge network of organizations and individuals—the ACLU, Common Cause, and the American Bar Association—to collaborate on issues related to government transparency and executive power. Common Cause proposed reinforcing the statutory provisions of the law by requiring each federal agency to publish an annual report of FOIA requests, rejections, and approvals. Because attorney fees often dissuaded requestors from mounting legal challenges to top-secret classifications, the American Bar Association

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[22] *Administration of the Freedom of Information Act: An Evaluation of Government Information Programs Under the Act, 1967-1972,* (New York, 1973), 7; the mere announcement of hearings prompted some agencies, including the Environmental Protection Agency, the Department of the Army, and the Department of Health, Education and Welfare (to name a few) to revise their in-house regulations.

[23] *Administration of the Freedom of Information Act,* 6, 8; Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles,* (Washington, 1974), 8, 15, 23, 27.

urged Congress to require agencies to pay legal fees for successful plaintiffs. These organizations vociferously supported a citizen's "right to know" and challenged broad claims to executive privilege employed by both Democratic and Republican presidential administrations. More importantly, this network worked closely with congressional allies to author legislative amendments to the 1967 FOIA Act.[24]

During the course of an otherwise thorough congressional inquiry, Moorhead did not challenge the law's exemptions relating to national security. Even if he personally believed such exemptions illegitimate and undemocratic, Moorhead probably recognized that these agencies were beyond legislative oversight. At least for the time being, the congressman was content to leave issues related to national security outside the scope of his inquiry.

Senator Ervin had demonstrated a similar reluctance to challenge the extra-democratic security agencies when he investigated the Army's domestic surveillance program in 1971. But the administration's stonewalling tactics—either explicitly denying requests or delaying so that information was no longer relevant or classifications applied that preclude use of the data provided—had effectively halted Ervin's inquiry.[25] Ervin

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[24] Chairman Moorhead held hearings in 1972 and 1973 to evaluate the 1967 FOIA statute and develop recommendations for reforms. See *Administration of the Freedom of Information Act*, and Congress, House, Committee on Government Operations, *Freedom of Information Act: Hearings before a Subcommittee of the Committee on Government Operations*, 93rd Cong., 1st sess., May 1973.

[25] The administration's refusal to cooperate with Senator Ervin's inquiry into the army's domestic surveillance practices prompted the senator to investigate the use of executive privilege. For details about this program, see chapter three. During the course of Ervin's hearings on *Data Banks, Computers and the Bill of Rights*, Ervin's committee requested that certain army generals be present for questioning. Ervin assured army staff that the generals would not be called on to testify. But their presence would prevent the government from sending someone who was not knowledgeable and then claiming they couldn't answer questions. Ervin's requests were refused. After the hearings were concluded, the Department of Defense refused to declassify Ervin's committee report because it contained information obtained from Army

wondered about the executive's repeated claims of executive privilege: "How can a government be responsive to the people if it will not answer the people's questions, explain its actions, and describe its policies to the only national body directly responsible to the people?"[26] Ervin warned, "when the people do not know what their government is doing, those who govern are not accountable for their actions—and accountability is basic to the democratic system."[27]

Clashes over access to information had defined the relationship between the legislative and executive branches since the nation's founding. Presidents had routinely asserted that communication with White House aides and cabinet members was privileged.[28] President Dwight D. Eisenhower expanded this concept to cover virtually anyone employed in the executive branch in a showdown with Senator Joe McCarthy in 1954. When McCarthy charged that the U.S. Army employed communists and sympathizers and demanded information about high-level White House meetings,

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intelligence printouts. Ervin had omitted names to protect individual privacy rights, but Defense would not approve it. These instances infuriated Ervin. Hearing before the Subcommittee on the Separation of Powers of the Committee on the Judiciary, 92nd cong, 1st sess., "Executive Privilege: the Withholding of Information by the Executive" July 27, 28, 29; Aug 4, 5, 1971, 5-6.

[26] Opening statement of Senator Sam Ervin, 1 Feb 1972, *Freedom of the Press*, 415.

[27] Hearing before the Subcommittee on the Separation of Powers of the Committee on the Judiciary, 92nd cong, 1st sess., "Executive Privilege: the Withholding of Information by the Executive" July 27, 28, 29; Aug 4, 5, 1971, 4.

[28] The earliest known claim of executive privilege came in 1792 when the House created a committee to investigate the military blunders of General St. Clair. Initially, President George Washington and his cabinet refused to comply with House demands for information including papers and records that may be of interest to the investigation. Eventually, however, Washington acquiesced and delivered papers to Congress. See Samuel Archibald and Harold Relyea, "The Present Limits of 'Executive Privilege," a study prepared under the guidance of the House Foreign Operations and Government Information Subcommittee by the Library of Congress Congressional Research Service, 20 Mar 1973; Bella Abzug Papers (BAP), box 518, fol Presidency, U.S.; Executive Privilege; Rare Book and Manuscript Library (RBML), Columbia University (CU), 2-4.

Eisenhower instructed his Secretary of Defense not to cooperate with the Senator's committee. The president asserted that only with the assurance of total confidentiality could his aides offer their most candid advice.[29] As one historian noted, before Eisenhower's claim "the historic rule had been disclosure [to Congress], with exceptions; the new rule was denial, with exceptions."[30] Presidents Kennedy and Johnson had invoked the privilege infrequently. While President Johnson claimed to "cooperate completely with the Congress in making available to it all information possible," many congressmen were frustrated by the opacity of federal agencies, especially regarding information about the war in Vietnam. President Nixon had promised that executive privilege would be narrowly construed and not "asserted without specific Presidential approval." Nixon also claimed that his administration would be "dedicated to insuring a free flow of information to the Congress and news media—and thus, to the citizens." [31]

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[29] Jeff Broadwater, *Eisenhower and the Anti-Communist Crusade,* (Chapel Hill: The University of North Carolina Press, 1992), 151-157; James Patterson, *Grand Expectations: The United States, 1945-1974*, (New York: Oxford University Press, 1996), 267-8. Ironically, given the its position in the 1970s on executive privilege, the *New York Times* condemned committee efforts to gain access to top-level information. An editorial on the McCarthy-Army hearings asserted that, "the [Sub] committee [on Investigations] has no more right to know the details of what went on in these inner Administration counsels than the Administration would have the right to know what went on in an executive session of a committee of Congress." "Unnecessary Suspense," *NYT*, 18 May 1954, 28.

[30] Arthur M. Schlesinger, Jr., *The Imperial Presidency*, (Boston: Houghton Mifflin Company, 1973), 155-159.

[31] President John F. Kennedy promised Congress that only he, and not his advisors, would invoke the claim of executive privilege. President Lyndon B. Johnson followed Kennedy's lead. The claim of executive privilege was infrequently used during both the Kennedy and Johnson administrations as a consequence of this policy. See John Moss, Chairman, Foreign Operations and Government Information Subcommittee, House of Representatives to President Lyndon Johnson, 31 Mar 1965; and Lyndon Johnson to Chairman Moss, 2 Apr 1965; PPRC; box 88, fol Executive Privilege; LBJL; President Nixon to John E. Moss, House of Representatives, 7 Apr 1969; Kenneth Lazarus Papers, box 1, fol: Executive Privilege, Presidential Powers, succession, etc. (2); GRFL.

Senator Ervin was determined that Nixon would be the last president to broadly apply executive privilege. Using his power as chairman of the Separation of Powers subcommittee (created in 1967 as a congressional response to perceived infringements on legislative prerogatives by the executive and judicial branches), he declared he would investigate "conflicting principles: the alleged power of the President to withhold information, the disclosure of which he feels would impede the performance of his constitutional responsibilities; the power of the legislative branch to obtain information in order to legislate wisely and effectively; and the basic right of the taxpaying public to know what its Government is doing."[32]

Ervin was particularly troubled by the administration's policies regarding disclosure of its wiretapping and surveillance practices. A colleague on his constitutional rights subcommittee and chair of the administrative practices subcommittee, Edward Kennedy (D-MA), had been battling the Department of Justice for months on the issue. Kennedy was curious about the consequences of the provisions of the Omnibus Crime Control Act. The bill allowed the executive branch to use court-approved wiretaps to combat crime. It also legalized the use of warrantless wiretaps if the reason for doing so fell in one of five national security related categories. Though the administration publicly stated "that it fully complies with the 1968 Congressional standards before installing any tap or bug without a court order," Kennedy had his doubts (he also harbored presidential ambitions and undoubtedly believed that challenging President Nixon was a politically

[32] Hearing before the Subcommittee on the Separation of Powers of the Committee on the Judiciary, 92nd cong, 1st sess., "Executive Privilege: the Withholding of Information by the Executive" July 27, 28, 29; Aug 4, 5, 1971, 1.

savvy move.).[33] He asked Justice for details about warrantless wiretaps currently on the books—under which of the five categories did each wiretap fall? Assistant Attorney General Robert Mardian told the senator that he could not categorize the wiretaps "exclusively under a single criterion." However, he assured Kennedy that each wiretap met "one or more of the criteria itemized" by law.[34] When pressed for a categorical breakdown of wiretaps from 1968-1970, Mardian replied, "*no such categorization exists*." Mardian explained that the procedure for obtaining a wiretap was simple: the FBI director asks the Attorney General and the Attorney General approves or denies the request "acting for the President of the United States."[35] Kennedy was appalled, not only for the casual manner in which the department handled wiretap approval procedures, but also by the lack of transparency on the part of the administration related to a very sensitive issue.

[33] For release to Sunday papers, 19 Dec 1971, text of letter by Senator Edward M. Kennedy to members of administrative practice subcommittee regarding non-court ordered electronic surveillance; 17 Dec 1971, ACLUP, box 1092, fol. 7, PPP, DRBSC, PUL. The Omnibus Crime Control and Safe Streets Act of 1968 allowed the executive branch five categories for exemption from judicial warrant approval in cases related to national security. These exemptions included: 1) protecting the nation against actual or potential attack or other hostile acts of a foreign power; 2) obtaining foreign intelligence information; 3) protecting national security information against foreign intelligence activities; 4) protecting against the overthrow of the government by force or other unlawful means; 5) protecting against other clear and present danger to the structure or existence of Government.

[34] Mardian to Kennedy, 1 Mar 1971, ACLUP, box 1092, fol. 7, PPP, DRBSC, PUL. When he joined the Justice Department in 1970, Mardian was assigned to revive the Internal Security Division. Mardian's division was in charge of wiretapping administration critics, including public officials and members of the media. In 1972 Mardian served as legal counsel for President Nixon's Committee to Reelect the President. He fervently denied any involvement in the Watergate break-in and cover-up. He was convicted of conspiracy though the charges were later dropped and he never served time. See Patricia Sullivan, "Robert Mardian, Attorney Caught up in Watergate Scandal," *WP*, 21 July 2006, B07.

[35] Kennedy to Mardian, 12 March 1971; Mardian to Kennedy, 23 March 1971; author's emphasis; ACLUP, box 1092, fol. 7, PPP, DRBSC, PUL.

In truth, the legislative branch was partly to blame for the abuse of executive power. Ervin admitted to colleagues that, "the shifting of power to the Executive has resulted from [a congressional] failure to assert [its] constitutional powers." Nixon's reorganization plan of 1970—approved by congress—allowed the president to consolidate his domestic and foreign policy planning staff within the corridors of the West Wing (John Erhlichman ran the domestic council and Henry Kissinger headed up the National Security Council). Under the plan Nixon doubled the number of White House aides, all of whom were protected from testifying before congress by the cloak of "executive privilege."[36] This consolidation of power and expansion of staff led some senators to complain that the White House had "access to information which the Congress cannot possibly match." It was no wonder, noted one senator, that when added to the "hydraheaded monster" of "executive privilege," the legislative branch had a difficult time gaining access to information necessary to perform both its legislative and investigatory duties. Ervin worried "that the steady increase of Executive power has come close to creating a 'government of men, not of laws.'"[37]

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[36] Richard Nixon, "Reorganization Plan No. 2 of 1970," 12 Mar 1970, *Public Administration Review*, Vol. 30, No. 6 (Nov. - Dec., 1970), 611-619. James Reston, "Washington: A 'Small' Staff in an 'Open' Administration?" *NYT* 17 Jun 1970, 46. For a detailed discussion of the development of Nixon's Domestic Council, see chapter five. This issue became acute early in the Nixon administration when the president decided to put congressional relations regarding foreign policy under the direction of National Security Advisor Henry Kissinger. This reshuffling almost guaranteed that congress would have trouble gaining access to information related to Vietnam policymaking because, since World War II, the president had claimed that his personal staff was not subject under the constitution to questioning by Congress. See James Reston, "Mr. Nixon's First Whiff of Trouble," *NYT*, 9 Feb 1969, E12. In spite of campaign pledges to shrink the federal government, Nixon's plan doubled the number of White House staff.

[37] Hearing before the Subcommittee on the Separation of Powers of the Committee on the Judiciary, 92nd cong, 1st sess., "Executive Privilege: the Withholding of Information by the Executive" July 27, 28, 29; Aug 4, 5, 1971, 3, 381-91.

For all Ervin's lofty talk about constitutional imperatives, protecting civil liberties and the fundamental tenants of democracy, and doing the work of the "people," political considerations underscored the legislative movement to challenge executive power. Ervin himself had faced his first formidable political challenge in 1968 when a young "modernizer" considered challenging him in the primary. Polls had Ervin and Terry Sanford, former North Carolina governor, in a dead-heat. Sanford decided not to run, only because the match-up promised to deeply divide the state party. Though Ervin played naïve, he was not obtuse. The once powerful grip that his generation held on party politics in his home state was weakening. Surely Ervin was looking to regain the trust and confidence of his constituents back home.[38]

The strengthening of congressional resolve to challenge executive power and privilege in the early seventies suggests that, given the right set of circumstances, some of the nation's most powerful elected officials were ready to lay an unprecedented challenge at the president's feet. But legislative politics move slowly and some outside of Congress were unwilling to wait for Ervin or other sympathetic congressmen—they took their challenges to the courts.

The ACLU was the organization best prepared, financially and administratively,

[38] Campbell, *Senator Sam Ervin*, 210-213. Certainly for a Democratic-controlled congress challenging the power of a Republican president made political sense. Ervin had a powerful ally in Senator William Fulbright (D-AR). As chairman of the widely respected Senate Foreign Relations committee, Fulbright was indignant at Nixon's lack of cooperation with Congress on even the most mundane of foreign policy programs. The Pentagon Papers revealed to Fulbright how inconsequential the legislative branch seemed to be from the perspective of the White House. He concluded that the report revealed in stark detail the "almost total exclusion of Congress from the policymaking process." How could congress be relevant and fulfill its constitutional duties, if secrecy was the rule, rather than the exception, Fulbright wondered. Hearing before the Subcommittee on the Separation of Powers of the Committee on the Judiciary, 92nd cong, 1st sess., "Executive Privilege: the Withholding of Information by the Executive" July 27, 28, 29; Aug 4, 5, 1971, 23.

to legally challenge executive power. Under Aryeh Neier's direction, the ACLU had taken an aggressive stance in its approach to pursuing a more democratic government. Shortly after Christopher Pyle published his tell-all about Army domestic surveillance in the *Washington Monthly*, a mutual friend introduced him to ACLU Legal Director Mel Wulf. Neier and Wulf wanted to challenge the constitutionality of domestic surveillance programs but lacked the hard evidence to bring a successful lawsuit. Pyle volunteered to gather evidence against the Army's surveillance program. All they needed was a plaintiff.

Wulf persuaded Arlo Tatum, executive director of the Central Committee for Conscientious Objectors in Philadelphia (one of the organizations identified in Pyle's article as a CONUS surveillance target), to sue Secretary of Defense Melvin Laird in Federal District Court. The ACLU charged that the Army's program violated Tatum's First Amendment right to free speech. ACLU Legal Director since 1962, Melvin Wulf had seen the organization at its worst and was enjoying the direction it was taking in the early 1970s in defense of First Amendment rights. Under Aryeh Neier's direction the organization was moving beyond its traditional legal strategy of submitting amicus curiae. By the early 1970s ACLU attorneys submitted amicus only when they could not get their "hands on the cases," about ten percent of the time.[39]

Wulf had reason to be optimistic that the federal court would decide in his client's favor. Since the late 1950s the courts had cautiously guarded a legal right to privacy, and protected First Amendment activities like the right to free speech and association. In the

[39] Melvin Wulf, interview by the author, 4 April 2008, audio recording (in Scott's possession). Marlise James, "Mel Wulf and the New ACLU," in *The People's Lawyers*, (New York: Holt, Rinehart and Winston, 1973), 24-31; "Court Asked to Bar Amy Dossier Suit," *New York Times*, 4 Jan 1972, 22. Eighty-five percent of the organization's cases were amicus briefs in 1962. By 1965, under Wulf's direction, the organization litigated about half its cases directly.

case of *NAACP v. Alabama* (1958), the liberal Warren court ruled against the state of Alabama when it sued the NAACP for access to its membership rosters. The First Amendment, wrote the Court, guaranteed the constitutional right to privacy of one's association. Two years later the Court overturned a California statute prohibiting the distribution of anonymous political leaflets. In *Talley v. California* (1960) the Court recognized the historical significance of anonymous political activity; the First Amendment granted citizens political anonymity as protection from government scrutiny. In the cases of *Griswold v. Connecticut* (1965) and *Stanley v. Georgia* (1969), the Court recognized a zone of privacy around certain very personal activities. Even the more conservative Burger court, in *Wisconsin v. Constantineau* (1971), struck down a state law permitting law enforcement officials to publicize lists of local alcoholics. The court declared that a government could not affix "a badge of infamy" to a person without offering the individual an opportunity to challenge the accuracy of such information. These five cases evinced new jurisprudential protection of certain private, political activity from government scrutiny, protecting a right to privacy especially when related to political activities protected by the First Amendment.[40]

The ACLU filed suit in Federal District Court in Washington D.C. Suspecting that the Army would attempt a cover-up by destroying the dossiers, Wulf filed a preliminary injunction to have the files delivered to the court. The Army called for the case to be dismissed, arguing that evidence did not exist that anyone's rights had been violated.

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[40] *NAACP v. Alabama*, 357 U.S. 449 (1958); *Talley v. California*, 362 U.S. 60 (1960); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

Judge George Hart, Jr., a graduate of the Virginia Military Academy, presided over the case. Hart demonstrated little patience for the ACLU's case and quickly dismissed it.[41]

When the ACLU appealed to the Supreme Court, the Nixon administration asked the court to dismiss the case, claiming that the legislative and executive branches acted as sufficient "checks" on military intelligence (ironic given the Nixon administration's repeated failure to cooperate with Senator Ervin's inquiry). The Court complied, dismissing the case. Justice William Rehnquist cast the tie-breaking vote in the 5-4 ruling. The very fact that plaintiff Tatum filed a lawsuit against the Army's surveillance program, wrote Nixon appointee Chief Justice Warren Burger for the majority, suggested that his First Amendment right to free speech had not been chilled—a catch-22. The court noted that the judicial branch did not wish to play the role of "continuing monitors of the wisdom and soundness of executive action." [42]

As director of the Justice Department's Office of Legal Counsel, Rehnquist had testified before Ervin's hearings on *Federal Data Banks, Computers and the Bill of Rights* in 1971. He asserted that the president alone had the "inherent power" to conduct surveillance and that neither legislative nor judicial review of executive surveillance programs was necessary because "'self restraint' by the president sufficed." According to

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[41] Campbell, *Last of the Founding Fathers*, 256. Professor of Law Geoffrey R. Stone defines the potential hazards of the chilling effect in *Perilous Times, Free Speech in Wartime: From the Sedition Act of 1798 to the War on Terrorism*, (New York: W.W. Norton and Co., 2004). Stone writes, "free speech is fragile. The direct benefit to any particular person of expressing a dissenting view is relatively slight. Unless she is a person of unusual power and influence, her individual voice is unlikely to have much immediate impact on public opinion or government policy. But the cost to her of being imprisoned for her speech is potentially staggering. Thus, she is easily 'chilled' in her willingness to sign a petition, march in a rally, or speak on a soapbox if doing so risks criminal prosecution" (10).

[42] "Court Asked to Bar Army Dossier Suit," *New York Times*, 4 Jan 1972, 22.

Rehnquist, dissenters had no constitutionally protected rights against the executive branch collection of data on their political beliefs.[43]

Infuriated by Rehnquist's participation in the case, the ACLU filed a motion to have the justice retroactively recused (a tie vote would have upheld the decision of the lower court). Neier and Ervin argued that Rehnquist "had been so closely related to the subject matter of *Laird* as to render impartiality highly unlikely."[44] Rehnquist conceded that questioning his objectivity in the case was reasonable, but refused to consider his own recusal.[45]

Though the *Tatum* decision initially struck a devastating blow to the ACLU's litigative challenge to executive power, another landmark case was winding its way

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[43] Neier, *Taking Liberties*, 96; Richard Halloran, "Aide to Mitchell Opposes Any Curb on Surveillance," *NYT*, 10 Mar 1971, 1.

[44] "Justice Rehnquist's Decision to Participate in *Laird v.* Tatum," *Columbia Law Review*, vol 73, no 1, (Jan., 1973), 106-124.

[45] Neier, *Taking Liberties*, 97-8. Rehnquist was, arguably, Nixon's greatest legacy. His appointment to the Supreme Court in 1971 assured a conservative majority on the nation's highest court. The Nixon court, led by Chief Justice Burger (a Nixon appointee) was decidedly the most conservative court to preside over the country for decades. Burger himself worked to turn back the clock on the liberal Warren court, and Rehnquist proved an able ally in his efforts. Rehnquist took a very narrow interpretation of the Fourteenth Amendment. A reconstruction amendment, the court had often used it to elucidate basic freedoms for many groups of Americans. But Rehnquist believed that liberals had taken it too far, especially when they applied it to protecting various groups in society, including criminals, communists, and women. As one careful researcher observed, Rehnquist "flatly stat[ed]that the Court had no business reflecting society's changing and expanding values. He seemed prepared to turn the clock back a century." The Supreme Court, the nation's highest court, is arguably the least democratic of the state's highest bodies. As one careful observer noted, "the Court has developed [over the centuries] certain traditions and rules, largely unwritten, that are designed to preserve the secrecy of its deliberations." Few works have penetrated the deep, dark recesses of the nation's highest court. It was a couple of neo-muckraking journalists who first breached this impenetrable wall of secrecy and tradition in the 1970s. See Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court*, (New York: Simon and Schuster, 1979), 1, 221. Fred P. Graham, "Court Bars Trial of Army Over Civilian Surveillance," *New York Times*, 27 Jun 1972, 1, 24; *Tatum v. Laird*, 408 U.S. 1 (1972). Senator Ervin argued the case before the Supreme Court. The ACLU hoped that Ervin's celebrity status might influence the court. Ervin was delighted to have the opportunity to speak before the court, the first time in his long career in law; Baskir interview, Wulf interview, Pyle interview.

through the court system. In 1971 the Nixon administration sued radical members of the White Panther Party for bombing the Ann Arbor, Michigan office of the CIA. During the course of the trial government agents conceded that they had wiretapped the phone line of a defendant without a court warrant. When challenged by the plaintiffs to justify the wiretaps, Attorney General John Mitchell articulated what came to be known as the Mitchell Doctrine. He claimed, "the government had the right to conduct wiretaps and electronic surveillance" without court warrant in any case "that [the government] deems a 'national security' case." Mitchell believed the president drew such power from his constitutionally protected right to wage war and his duty to protect the country. He also relied upon a broad interpretation of the Omnibus Crime Control Act of 1968 that granted the executive the power of unrestricted wiretapping authority in "national security" cases. At stake was the Nixon administration's claim that the White Panthers constituted a threat to "national security."[46]

Federal District Court Justice Damon Keith presided over the case. A Johnson appointee and a graduate of Howard University Law School, Keith considered himself an ardent defender of the Constitution. As a student at Howard Keith observed Thurgood Marshall, then an attorney for the National Association for the Advancement of Colored People, practice his landmark civil rights cases before a "mock" Supreme Court. He later claimed these sessions instilled in him an abiding interest in seeing the Constitution

[46] Fred P. Graham, "White House view of Wiretap Right Denied on Appeal," *NYT*, 9 Apr 1971, 1; John Kifner, "A Chicago Retrial Tied to Wiretaps: U.S. Must Decide Whether to Disclose Secret Data," *NYT*, 23 Nov 1972, 21. For greater detail about the historical context of the Omnibus Crime Control Act of 1968, see chapter one.

protected.[47]

Keith ruled for the plaintiffs, ordering the government to disclose the information it obtained by the wiretap or drop the case against the White Panthers. The judge rejected Attorney General Mitchell's implicit claim "that a dissident domestic organization is akin to an unfriendly foreign power and must be dealt with in the same fashion." Such claims undercut the "very constitutional privileges and immunities that are inherent in United States citizenship," that is, the right to receive equal justice before the law. Keith insisted, "The executive branch of our government cannot be given the power or the opportunity to investigate and prosecute criminal violations because certain accused persons espouse views which are inconsistent with our present form of government." Especially in times of great social unrest, "it is often difficult for the established and contented members of our society to tolerate, much less try to understand, the contemporary challenges to our existing form of government." In the most politically contentious times democracy must be defended. If, as the government would have it, "'attempts of domestic organizations to attack and subvert the existing structure of the Government'" are seen as criminal behavior, Keith argued, then dissent is effectively silenced.[48] The Nixon administration

[47] For a brief history of the development of Howard University's prestigious law program, see Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality*, (New York: Alfred A. Knopf, 2004), 123-131. Agis Salpukas, "The Judge in Wiretapping Case: Damon Jerome Keith," *NYT*, 20 Jun 1972, 23. Keith continues to make headlines with legal decisions that limit the power of the executive branch in cases related to national security. In 2002 Keith, in *Detroit Free Press v. Ashcroft*, held that the George W. Bush administration's secret deportation hearings were unconstitutional. See Bob Herbert, "Secrecy is our Enemy," *NYT*, 2 Sept 2002, A15. Herbert called Keith a "national hero" for denying the Bush administration the right to conduct terrorism deportation hearings in secret.

[48] Keith's ruling cited in "Amicus Curiae filed on behalf of the ACLU to the US court of appeals, 6th circuit," ACLUP, box 1791, fol. *U.S. v. United States District Court for East Michigan*, PPP, DRBSC,

immediately appealed the decision to the Supreme Court, certain that the conservative Burger court would uphold the administration's broad definition of "national security."

The Keith decision (as it came to be known) severely undercut the prerogatives the executive branch had enjoyed for decades in the realm of national security. Civil libertarians—ecstatic over the ruling—worried that the "Nixon court" would overturn it. Wulf solicited like-minded organizations to submit amicus briefs, urging that they too had a vested interest in the outcome of the case because "Electronic surveillance unchecked by judicial scrutiny can be directed against any organization whose activities at any time displease the government." The Attorney General's broad claim to the right to electronic surveillance if "certain individuals or groups pose such a danger to the internal security of the United States" meant that any person or organization could become a target of surveillance and wiretapping. In such cases, the administration asserted, "the Fourth Amendment does not require the additional safeguard of a prior warrant." Wulf raised the specter of the McCarthy era witch-hunts, arguing that the administration sought to "discredit dissent against its policies by branding legitimate dissent as an attack upon the internal security of the nation." The administration's approach to domestic security, argued Wulf, circumvented all the protections afforded by the Fourth Amendment. Such unconstitutional activity, conducted under the broad banner of executive privilege in the interest of national security, would have significant and long-term repercussions for civil liberties in the United States if upheld by the Supreme Court. The ACLU closed its appeal with the ominous words of Pastor Niemoller, intimating that those who kept quiet

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PUL; "Decisions," *Time*, 8 Feb 1971, <http://www.time.com/time/magazine/article/0,9171,909822,00.html>, cited on 30 May 2008.

about injustice were destined to become victims themselves.[49]

In the amicus brief submitted to the court, the ACLU rejected out-of-hand the administration's broad claims to power in the name of national security: "Ignoring our traditions of limited delegated power, checks and balances, and clear Fourth and First Amendment restraints, the Government demands the right to apply the most penetrating and unlimited electronic spying devices on all individuals and groups who, in the Attorney General's eyes, appear 'dangerous.'" This concept, argued the organization, threatened the very fabric of American democracy: "No nation can survive such [absolute] power and remain free; no democracy can function where its prerequisites, dissent and free association, are so jeopardized; no society dedicated to the rule of law can tolerate so huge an official exemption from 'those wise restraints that make men free' without teaching its people that the rule of law is merely official rhetoric to keep dissenters in line." These words were enough to give even the most ardent proponent of law and order pause, as they raised the specter of totalitarianism at a time when the United States remained locked in a geopolitical struggle to contain the spread of communism.[50]

Surveillance, the ACLU argued, "is inevitably surreptitious." As the government's case against the White Panthers demonstrated, such practices would rarely,

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[49] Melvin Wulf to George Meany, President, AFL-CIO, 14 Oct 1971," ACLUP, box 1791, fol. *U.S. v. United States District Court for East Michigan*, PPP, DRBSC, PUL. The success of the ACLU's amicus strategy is difficult to quantify. However, it was successful enough in the 1960s to prompt law professor Fred Inbau to create a counterweight. Called the Americans for Effective Law Enforcement, Inbau's organization authored amicus briefs in defense of law and order and on behalf of law enforcement agencies. In 1971 Attorney General John Mitchell formally endorsed the organization. See Fred Graham, "A Counterweight to A.C.L.U. Thrives," *NYT*, 22 Feb 1971, 26.

[50] "Amicus Curiae filed on behalf of the ACLU to the US court of appeals, 6th circuit," ACLUP, box 1791, fol. *U.S. v. United States District Court for East Michigan*, PPP, DRBSC, PUL, 1-8.

if ever, be made public. Checks and balances could hardly be maintained with such practices conducted in secret. "Since the Attorney General does not include reports of such eavesdropping in his annual reports to Congress under 18 U.S.C. 2519, no one outside the Executive branch will know what electronic eavesdropping is taking place under this power." From the organization's point of view, the administration behaved as though there was "no limit to who can be eavesdropped upon." When pressed, the Nixon administration fell back on claims of "inherent presidential power." This claim was without legal grounding, argued the organization, and "sounds much like 'Big Brother knows best.'"[51]

The president defined his legal position as derived from the constitutional authority based on the President's position as commander-in-chief and chief executive, asserting that "such power is necessary because judicial scrutiny would seriously compromise national security."[52] But with Congress reticent to check presidential power on these issues, the ACLU was determined that the judicial branch should exercise some prerogative. Precedent was decidedly in the ACLU's favor. In 1952, facing a strike at the nation's steel mills, President Harry Truman issued an executive order commanding his Secretary of Commerce to seize and operate most of the nation's mills to prevent a work stoppage. The president claimed the power in the interest of national security; Americans were fighting the Korean War. The Supreme Court denied such broad executive powers

[51] "Amicus Curiae filed on behalf of the ACLU to the US court of appeals, 6th circuit," ACLUP, box 1791, fol. *U.S. v. United States District Court for East Michigan*, PPP, DRBSC, PUL, 1-8.

[52] "Amicus Curiae filed on behalf of the ACLU to the US court of appeals, 6th circuit," ACLUP, box 1791, fol. *U.S. v. United States District Court for East Michigan*, PPP, DRBSC, PUL, 12-23.

in its *Youngstown Sheet & Tube Co. v. Sawyer* decision.[53]

In spite of legal precedent, the ACLU was acutely aware that times had changed. The organization harbored scant hope that the conservative Burger court would restrict the power of the president on issues of national security. The Court shocked civil libertarians when it unanimously upheld the Keith decision in 1972 (Justice Rehnquist abstained from judgment on the case.).

Writing for the majority, Justice Lewis Powell, Jr. (a Nixon appointee) argued that the "Fourth Amendment [against 'unreasonable searches and seizures'] cannot properly be guaranteed if domestic surveillances may be conducted solely within the discretion of the executive branch." Constitutionally guaranteed rights were constants, not to be cast aside at the whim of the White House. The Court rejected the executive's claim that it was constitutionally entitled to engage in electronic surveillance of American citizens without complying with the requirements of the Fourth Amendment "to protect the nation from attempts . . . to attack and subvert the existing structure of the Government." Even in national security investigations, the President had no constitutional authority to conduct electronic surveillance of American citizens on American soil without a judicially issued search warrant based on a finding of probable cause.[54]

The court conceded that special times called for a special federal response. "At a

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[53] *Youngstown Sheet & Tube Co. v. Sawyer* (343 U.S. 579) (1952); "Amicus Curiae filed on behalf of the ACLU to the US court of appeals, 6th circuit," ACLUP, box 1791, fol. *U.S. v. United States District Court for East Michigan*, PPP, DRBSC, PUL, 12-23; 343 U.S. 579 (1952).

[54] *United States v. United States District Court*, 407 U.S. 297 (1972); "High Court Curbs U.S. Wiretapping Aimed at Radicals," *New York Times*, 20 Jun 1972, 1.

time of worldwide ferment and when civil disorders in this country are more prevalent" the court recognized the government's desire to maintain law and order. However, the administration's claim that issues related to domestic security were "too subtle and complex" for judicial review seemed self-serving. Judicial review of wiretap requests were a "justified" inconvenience to the executive branch. In free societies, the court urged, the public must be reassured that "indiscriminate wiretapping and bugging of law-abiding citizens cannot occur." Without careful checks on the system, wrote Powell, "targets of official surveillance may be those suspected of unorthodoxy in their political beliefs." Upholding the Keith decision, the court delivered a stunning rejection of unfettered executive power in the name of national security.[55]

Powerful members of the media, still angry over from the executive's attack on the press, lauded the court ruling. *New York Times* editors called the decision a "rebuke to those ideologues of the executive branch" that fall back on the "inherent powers" of the executive branch as justification for unconstitutional behavior. The ruling, editors declared, "completely demolished" the attorney general's claim that any effort to restrict those inherent powers in terms of wiretapping left the nation vulnerable and in danger: "The Court was not persuaded by a system of constitutional safeguards dependent on the Attorney General's, or even the President's, infallibility or, as Mr. Mitchell put it, on the 'self-discipline of the executive branch.'" The *Times* congratulated the court for recognizing that a "blank check of official powers is the prelude to their abuse."[56]

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[55] John P. MacKenzie, "Court Curbs Wiretapping of Radicals," *WP*, 20 June 1972, A1.

[56] "The Restraint of Law," *NYT*, 20 June 1972, 38.

Still, as the *Washington Post* noted on its editorial page, the ruling was not a total victory for civil libertarians. Though it offered a "sharp slap" at unchecked executive power, the court opinion did not repudiate the "constitutional basis of the President's domestic security role." Rather, the court encouraged the administration to protect domestic security "in a manner compatible with the Fourth Amendment."[57]

The Nixon administration feigned indifference to the ruling. At a press conference on domestic policy Nixon stated defiantly that the decision did not "rule out wiretapping" if the administration made a "connection between the activity that is under surveillance and a foreign government."[58] Privately, however, the White House worried over the long-term repercussions of the decision, and how it restricted presidential power on issues related to national security. Arthur Kinoy, the crusading civil liberties attorney who successfully argued the Keith decision before the Supreme Court, later claimed that the break-in at the Democratic National Committee headquarters at the Watergate office complex was a mission to remove the wiretap devices from DNC headquarters. Someone privy to the court's decision with ties to the administration (Rehnquist, perhaps?) had alerted the White House staff of the likely decision. The Plumbers then scrambled to remove the wiretaps before the court issued its ruling banning the president's broad claims to wiretap without warrant.[59]

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[57] "The Court and Electronic Surveillances," *WP*, 20 Jun 1972, 18.

[58] "Transcript of the President's News Conference Emphasizing Domestic Policy," *NYT*, 23 Jun 1972, 14.

[59] See Kutler, *The Wars of Watergate*, 201-202. This seems a plausible theory to explain this third break-in. Others claim that White House aides learned that the DNC possessed information related to a call girl operation (with Democratic clientele as well as White House officials).

Watergate, as a scandal, was precipitated by the decision, taken early in the Nixon administration, to use modern tools of surveillance against its political enemies. In the cold war climate that fostered suspicion and barely tolerated dissent, Nixon and his aides, products as well as producers of this political culture, used the most expeditious route for achieving their aims. Their determination to blacken the records of their critics, as the case of Daniel Schorr suggests, and their belief that they could use the tools of the presidency for such deeds, exemplified the problems of executive privilege, the ambiguity of the term "national security," and the degree to which secrecy had undermined the democratic experience in the United States by the 1970s.

The Watergate debacle is well known. In short it goes like this: Following the publication of the "Pentagon Papers" in 1971, top White House aides, including the president's domestic policy advisor, John Ehrlichman, created a "plumbers unit." The Plumbers were authorized by the president's Committee to Re-elect the President (CREEP, for short) to "plug leaks." To discredit Daniel Ellsberg, an author of the "Pentagon Papers" and the man who leaked the report to the *Times*, the Plumbers broke into his psychiatrist's office looking for information that they could use to discredit Ellsberg. These same men performed the Watergate break-in—a mission that had nothing to do with national security and everything to do with politics. The Plumbers broke into the Democratic national headquarters in the Watergate hotel and office complex in Washington, D.C. to plant bugs on office phones. The break-in was another instance of "dirty tricks" and "black bag jobs" that CREEP had authorized to discredit Nixon's

Democratic opponents in the 1972 presidential race.[60]

Washington metro police arrested the plumbers after they bumbled the break-in. They did not fit the profile of ordinary burglars: one carried an address book with a telephone number for "W.H." Five men were Cuban émigrés and two were former CIA employees. As if that wasn't bizarre enough, this odd lot carried more than $2000 in cash and high-end surveillance equipment. Two days after the Watergate break-in the Supreme Court announced the *U.S. v. U.S. District Court* (Keith decision) ruling.

DNC Chairman Larry O'Brien accused the administration of backing the break-in. Eager to clear the president's good name, FBI Acting Director L. Patrick Gray (who owed his position to Nixon) pressed his agents to get to the bottom of the case. When they did, the money found with the Plumbers traced back to CREEP. Nixon instructed his chief of staff, H.R. Haldeman, to coordinate a cover-up, with the CIA taking the fall. Haldeman called in favors with CIA Director Richard Helms, asking him to put pressure on the FBI to limit its investigations. Helms and his staff warned Gray that his investigation might have national security implications. Meanwhile, Nixon instructed Gray to continue to aggressively investigate the break-in. Determined to demonstrate his loyalty, Gray kept the White House apprised of his investigation. White House counsel John Dean sat with FBI agents who conducted interviews of White House staff. Gray had FBI reports of the investigation delivered to Dean at the White House. CREEP officials and those involved in the burglary destroyed files before FBI investigators could lay

[60] Keith W. Olson, *Watergate: The Presidential Scandal that Shook America*, Lawrence: University of Kansas Press, 2003. Rick Perlstein carefully details some of the more heinous "black bag" jobs and "dirty tricks" and their consequences in *Nixonland: The Rise of a President and the Fracturing of America*, (New York: Scribner, 2008), 628-637.

hands on them. White House aides lied to investigators, or gave them information that proved inconsequential or irrelevant. All this evasion was encouraged and in some cases orchestrated by officials at the highest levels of government. The cover-up reached all the way up to the president himself.[61]

Over the next few months, as more evidence linked the Plumbers to the president's re-election committee via a money trail, the White House became obsessed with keeping the seven men, now awaiting trial in Washington, D.C., quiet. The men wanted their "commitments" to be honored. Nixon and his staff managed to keep the whole affair out of the presidential campaign and pull off a landslide victory (CREEP worked full-time implementing a strategy to keep the Democratic Party deeply divided which certainly helped to keep the press focused on anything but the Watergate story). But the Watergate mess—thanks to the reporting of Woodward and Bernstein—continued to bite at the administration's heels. The two tenacious journalists uncovered more evidence in the months following the election that Watergate was just the tip of a large iceberg of presidential impropriety. At their trial, the Plumbers claimed their act had been done out a sense of patriotism, for fear that a McGovern win would make the country vulnerable to communism. Even when the jury convicted the men, Judge John Sirica, an Eisenhower appointee, expressed doubt about the "facts" that the burglars offered, and hoped that the new Senate select committee would quickly uncover the real story.[62]

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[61] Kutler, *Wars of Watergate*, 209-210, 218-222.

[62] On CREEP's "dirty tricks," see Perlstein, *Nixonland*, 607-719 and Ervin, *The Whole Truth*, 248-252.

Majority Leader Mike Mansfield (MT) nominated Senator Ervin to head the new Select Committee on Presidential Campaign Activities (hereafter, Watergate committee). Republicans remained divided on the committee, some calling for an investigation into previous elections and calling the process deeply partisan. Though Republicans were reluctant to investigate one of their own, Ervin's reputation as a fair man, a constitutional "expert," and a conservative in his own party helped pull through a unanimous vote on the committee (77-0). As historian Stanley Kutler argues, "What the Republican finally voted for was more an expression of faith in Senator Ervin than of any real desire for a Select Committee."[63]

Many historians have written about the Watergate committee and its findings. Some have suggested rightly that Ervin leant legitimacy to an investigation that might otherwise have been dismissed as partisan. Ervin did bridge the partisan divide. But more than that, Ervin was deeply invested in issues surrounding the executive's domestic security overreach. For years he and a small army of committee staffers (from the Constitutional Rights and Separation of Powers subcommittees) had coordinated investigations delving into executive power, domestic surveillance, and personal privacy. Ervin was the nucleus of a burgeoning network of experts on these issues. Ervin exploited these connections when he staffed the Watergate committee. It was because of his own reputation that he was able to persuade Sam Dash, a professor of law at Georgetown University and a former district attorney for the city of Philadelphia, to serve

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[63] Kutler, *Wars of Watergate*, 255-257.

as chief counsel. As Ervin recalled, Dash "had made a profound study of surreptitious activities and written *The Eavesdroppers*, an excellent treatise on the subject."[64] *The Eavesdroppers* explored the policies in ten states regarding law enforcement and the use of wiretaps in order to "be better able to formulate policies and opinions on the delicate question of individual privacy."[65] Ervin staffed the newly formed committee with his own subcommittee staff. They possessed finely tuned skills in the art of publicity and media relations. By 1973 when the committee began its inquiry, this one-time ardent southern segregationist and leading foe of the ERA (whose views on many issues so offended some Americans) had the media and, therefore, the public eating out of his hand. His staff had cultivated media contacts at some of the nation's most powerful print and television news organizations. They knew how to leak information and how to use this information to pique public interest in topics that otherwise might generate little attention. When they earned the attention of the national media, they knew how to exploit it. Ervin's staff was practiced at the art of staging hearings to maximize press coverage and maintain public interest. It's perhaps no coincidence that Ervin chose the Senate Caucus Room to stage the Watergate hearings—a room that he had so successfully used in the past to garner public attention to the Army surveillance program. Ervin and his

[64] Sam Ervin, *The Whole Truth: The Watergate Conspiracy*, (New York: Random House, 1980), 23.

[65] Samuel Dash, Robert Schwartz and Robert Knowlton, *The Eavesdroppers*, (New Brunswick, NJ: Rutgers University Press, 1959), 7.

staff brought these skills in media manipulation to bear on the Watergate hearings.[66]

Three days before the sentencing of the Watergate burglars the case blew wide open. James McCord, one of the defendants, delivered a note to the judge's chambers. He claimed that the defendants were being pressured to remain silent, that the CIA was not involved in the break-in, and that the Plumbers had perjured themselves in court. McCord wanted to speak to the judge, a request with which Sirica eagerly complied. In spite of White House knowledge of the letter, the payments to silence the Plumbers continued. Determined to get to the bottom of the story Sirica imposed maximum sentences on the defendants, urging them to cooperate with the grand jury and the newly appointed Watergate committee. He suggested that he might take such cooperation into consideration when making the final sentencing.[67]

No doubt President Nixon realized that his administration teetered on the brink of political catastrophe. This is the only plausible explanation for his decision to declare the protection of individual privacy rights a top legislative priority in his January 1974 State of the Union address. The following month, Nixon devoted a public radio address entirely to the privacy issue. "At no time in the past has our Government known so much about so many of its individual citizens," Nixon declared. "This new knowledge brings with it an awesome potential for harm as well as good – and an equally awesome responsibility on those who have that knowledge." Nixon fretted (insincerely) that

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[66] Kutler, *Wars of Watergate,* 346; Campbell, *Last of the Founding Fathers*, 276-277. Campbell persuasively argues that Ervin's hearings on Army surveillance offered a "rehearsal" for his work on the Watergate committee.

[67] Kutler, *Wars of Watergate,* 260-262.

government records often held inaccurate, and damaging, information about American citizens. These individual files could potentially result "in the withholding of credit or jobs" for no good reason. Most Americans did not know what kind of information the government retained, and had no means to find out. Nixon's concerns over privacy echoed those of many elected officials—including civil libertarian Sam Ervin. These earnest reformers had been clamoring for greater privacy protections, especially from state surveillance programs. Nixon explained the issue as though he had just discovered it. In all, it seemed a lame attempt to champion the issue to protect himself from forthcoming criticism. The *Post* was not afraid to call a spade a spade. Editors declared the president's concerns for privacy disingenuous: "To date Mr. Nixon has shown little concern for anybody's privacy except his own."[68]

To demonstrate his resolve Nixon appointed a Domestic Council Committee on the Right of Privacy (DCCRP). The presidential committee, he promised, would not be just "another research group" but something poised for "high-level action." He pledged to investigate how the government collects data and protects it, and to explore how citizens can gain access to records and how to safeguard personal information. After careful research, his committee would offer policy solutions, propose regulations, executive actions, and legislation where necessary.[69] Nixon put Vice President Gerald R. Ford in

[68] "Privacy: The Issue and the Agenda," *WP*, 23 Jan 1974, A24.

[69] "Address by the President on the American Right of Privacy," live on nationwide radio, 23 Feb 1974, Ford Vice Presidential Papers, Office of Legal Counsel, box 83, fol: DCCRP, Mar 24-June 14, 1974, GRFL.

charge of the DCCRP.[70] Nixon's Domestic Council functioned, as one former staffer recalled it, as a "key institutional innovation" of the administration. Part of the executive reorganization of 1970, the council offered the administration a way to prioritize domestic issues, including legislation, budget, personnel and policy. The council took the pressure off of presidential advisors and streamlined the process of evaluation and management of policy issues that could otherwise overwhelm the White House on any given day.[71] In early 1974 privacy rose to the top of the council's short list of items of great political importance.

Critics found the president's embrace of the privacy issue laughable given that the administration had been charged with spying, illegal surveillance, and political dirty tricks. Senator Ervin might have explained to the president that his DCCRP was unnecessary. Ervin had explored privacy issues for more than four years. In fact, the growing public unease about government computers and personal dossiers was the result of Ervin's excellent publicity work. Nixon staffers had learned about the debate from the ACLU's widely-read publication, *The Privacy Report*. The magazine circulated among

[70] On 11 October 1973 Vice President Spiro Agnew resigned from office in the face of criminal charges of extortion, tax evasion, and bribery. Nixon nominated House minority leader Gerald R. Ford (MI) as vice president, the first person to be nominated under the 25th Amendment to the Constitution. Ford took the oath of office on 6 Dec 1973.

[71] Raymond J. Waldmann, "The Domestic Council: Innovation in Presidential Government," *Public Administration Review*, vol 36, no 3, (May-Jun, 1976), 260. John Ehrlichman headed up the domestic council in 1970. As Waldmann notes, council staffers were young (most under 30) and not very experienced in politics. Ehrlichman remembers that his staff included a "small but militant staff of like-minded conservative thinkers," a hold-over from Arthur Burns. He treated the council as a place where all the facts and viewpoints for a particular issue could be assembled and presented—Ehrlichman implied that he did not believe the council should function as a conservative advocacy group within the West Wing. Other administration aides, especially Pat Buchanan, did not agree. See Ehrlichman, *Witness to Power: The Nixon Years*, (New York: Simon and Schuster, 1982), 82-84.

academics, White House staff, elected officials, those in the computer industry, journalists and editors, and civil libertarians in the public at large. It had done much to awaken powerful politicians and non-state actors to the issue.[72]

Democrats refused to allow this president to co-opt the issue of privacy. Speaking for the majority, Senator Philip Hart (MI) ridiculed Nixon's sudden concern for individual privacy. If the president really wanted to protect citizens, Hart argued, he should order "everyone in his Administration to refrain from political spying of any kind." The DCCRP would be just window dressing, Hart argued, "rather than a broad program of action."[73]

Watergate hung like a rotting albatross around the neck of the Republican Party, and no elected officials could escape the stench. Some Republicans hoped privacy could help strengthen the image of the party among the electorate before the upcoming mid-term elections. In the House Barry Goldwater, Jr. (R-CA) vociferously urged the development of privacy legislation. Goldwater had been a privacy advocate for years, and in 1974 he stumped for his party to embrace the issue as public policy. Goldwater sought to link the privacy issue with conservative values in an article he penned for the ACLU's monthly journal, *The Civil Liberties Review*. He wrote, "Privacy is an essential element

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[72] Memorandum from Sharon Biederman to Aryeh Neier, re: "The Privacy Report," undated, ACLUP, box 683, fol. 8; PPP, DRBSC, PUL. Nixon's radio address inspired the ACLU to work up a "blueprint" for executive and legislative branch action on the issue of privacy. Sensing a political opportunity in the making, got to work drafting legislation that would protect privacy in two primary areas. First, the passage of laws to safeguard a citizens' right to political privacy from the state: surveillance, wiretapping, and political dissent. Second, the ACLU hoped to legislate how data could be collected, held and distributed by government data banks and computers. "Memorandum: A Program to Safeguard Individual Privacy," Hope Eastman, Associate Director, undated, ACLUP, box 683, fol. 5; PPP, DRBSC, PUL.

[73] Lesley Oelsner, "Hart Says Administration Undermines Privacy Right," *NYT*, 3 Mar 1974, 40.

of every individual's right to life, liberty, and the pursuit of happiness." In this sense, the issue of privacy was essentially "conservative." For years, reformers like Senator Ervin had seen the Privacy Act as a long-term legislative goal. As a self-proclaimed "citizen legislator," Goldwater called for congress to pass privacy legislation before the fall elections.[74]

Amid a bipartisan debate about surveillance and privacy, the White House desperately tried to cover-up its ties to the Watergate break-in. McCord's decision to trade his secrets for leniency and the Senate's new special committee caused the White House to panic. Nixon settled on a strategy to limit the scope of congressional inquiry: his current and former staff would claim executive privilege and refuse to testify publicly before Congress. Watergate historian Stanley Kutler notes: "The control of information and access to it were at the heart of the Administration's strategy."[75]

Nixon's decision to claim executive privilege in response to Watergate investigators' queries forced a constitutional crisis of unprecedented proportions. This was not the first time that Nixon had claimed the privilege to avoid cooperating with an investigation headed by Senator Ervin. But with public opinion turning in his favor, Ervin determined it would be the president's last. Laying all his political capital on the line, Ervin appealed directly to the American public, denouncing the president's claim of executive privilege as "poppycock." Such a privilege could never be extended to cover criminal behavior, the senator proclaimed. He threatened to authorize the arrest of White

[74] Barry M. Goldwater, Jr., "Bipartisan Privacy," *The Civil Liberties Review*, (Summer, 1974), 74-78.

[75] Kutler, *Wars of Watergate*, 348.

House aides who failed to cooperate with his committee.[76]

Nixon's polling numbers were sinking precipitously and he was the first to blink in the confrontation over executive privilege and allowed his aides to testify. The testimony of his former staff shocked the American people as they learned that the campaign of "dirty tricks" had been approved, if not planned, by the president's top advisors. White House counsel John Dean testified that the president himself approved of the Watergate cover-up and even participated in some planning. But proof of the president's direct involvement was hard to come by.

Then someone slipped up. Alexander Butterfield, an assistant to the president, told committee staff in a private meeting that President Nixon had installed, in the words of Senator Ervin: "voice-activated eavesdropping devices" in the Oval Office, the Executive Office Building, and the Cabinet Room. Ervin and the special prosecutor requested access to White House tapes, especially conversations between John Dean and the president. When Nixon refused, the Watergate committee issued subpoenas to compel the president to release the tapes. Again Nixon refused, citing executive privilege and separation of powers.

The Watergate committee took the unprecedented step of suing the president in the Federal District Court of Washington, D.C. to gain access to the tapes. Ervin denounced the president's position as "incompatible with the doctrine of the separation of powers of Government. … the select committee is exercising the constitutional power of the Senate to conduct the investigation, and the doctrine of the separation of powers of

[76] Ervin, *The Whole Truth*, 66-67; Campbell, *The Last of the Founding Fathers*, 285.

Government requires the President to recognize this and to refrain from obstructing the committee." Even if Nixon possessed "autocratic power" as he claimed, the Constitution certainly did not "obligate him to hinder the search for truth or forbid him voluntarily to make the tapes and memorandums available to the committee."[77]

In another unprecedented move Judge Sirica ordered Nixon to produce the tapes for the court. The judge would review them *in camera* (in judge's chambers) to respect the president's claims to executive privilege. To this generous offer Nixon proposed supplying transcripts and tapes (prepared by the president himself) to Senator John Stennis (D-MI). Stennis would listen to the tapes to verify that the president's summaries were accurate. The special prosecutor rejected this plan. A furious Nixon ordered him fired. When his attorney general refused, Nixon fired the attorney general. By the end of the "Saturday Night Massacre" of October 20, 1973, the president had fired one special prosecutor and the two top officials in the justice department. The president closed the office of Special Prosecutor, returned the investigation to the Department of Justice, and sealed all files to prevent their removal.

Surprised by the public backlash against his actions, Nixon ordered his new attorney general to appoint a new special prosecutor. The battle for access to the tapes continued, with the new prosecutor Leon Jaworski appealing to the Supreme Court. In July 1974 the Supreme Court ruled in *United States v. Nixon* that the president must turn over the tapes and that executive privilege would not protect presidential aides who may have committed a crime from prosecution. Nixon stubbornly offered transcripts of the

[77] Ervin *The Whole Truth*, 187-218.

tapes to Jaworski instead. The House of Representatives adopted three articles of impeachment which the Senate seemed likely to approve. Before Congress had the chance to follow-through, Nixon resigned on August 8, 1974.[78]

Watergate had dragged on for nearly two years. The scandal devastated the White House, stripping away the dignity of the executive branch. Watergate left in its wake abundant opportunity for political reformers. The ACLU hoped to use Watergate as a prism through which Americans could come to see the issues of political surveillance, government secrecy, and executive power as related and inherently damaging to the democratic process.

In a 1973 mailing to members, the ACLU identified two interrelated political problems that the Watergate scandal exposed. First, the "creation of a governmental surveillance apparatus to monitor lawful political activities" undermined First Amendment rights of free speech and association. Second, the episode revealed the administration's battle to "prevent the dissemination of information to the general public," beginning with the "Pentagon Papers," in the name of "national security." The extent to which the executive branch was willing to go, admonished the ACLU, to bury "the origins of the most controversial and divisive enterprise" of the century—the war in Vietnam—undermined the democratic process. Democracy thrives, asserted the ACLU, when citizens have access to the information they need to make informed decisions. The abuse of "national security" as a pretext for government secrecy hindered the "informed exercise of political judgment" and undermined "the basic commitment to this nation of

[78] Ervin *The Whole Truth*, 229-239.

free trade of ideas."[79]

As the ACLU's efforts to capitalize on the Watergate scandal suggest, the scandal proved a boon for reformers. It helped to garner public support for substantive policy reform on issues of government transparency, privacy, and domestic security policy. It severely weakened the power of the executive branch at a time when reformers were aggressively pursuing broad-based reform of the nation's most powerful (and least transparent) agencies and institutions. To some reformers Watergate was not evidence of aberrant behavior. As ACLU attorneys saw it, the scandal seemed a predictable outcome of a powerful, unchecked "governmental surveillance apparatus" to monitor "lawful political activity."[80]

Watergate was in some ways an aberration attributable to Nixon's own psychological insecurities. But to blame the man is to overlook what the episode of Watergate revealed about the breakdown and failures of American institutions to protect key civil liberties and democratic practices in the cold war era. Watergate exemplified those issues that had begun to unify neo-muckrakers, Republicans and Democrats in Congress, whistleblowers and former bureaucratic insiders like Charles Peters, and organizations like the ACLU. Focusing narrowly on the Watergate incident obfuscates the larger citizens' movement already underway in the period before the scandal exploded onto the national scene. Watergate catalyzed a loose coalition of unlikely allies who aggressively pursued legislation aimed at restricting state power. In 1974 reformers

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[79] "Draft Statement on Watergate and Civil Liberties," 25 June 1973; ACLUP, box 27, fol. 5; PPP, DRBSC, PUL; 1-3.

[80] Ibid., 1-2.

passed the Freedom of Information Act revisions and the Privacy Act. Ensuing debates about abusive and unchecked power further strengthened the broad coalition fighting to restrain the national security state.

CHAPTER 5
REASSERTING FIRST PRINCIPLES: TRANSPARENCY AND PRIVACY POST-WATERGATE, 1974-1975

Deposing a former president was risky business, even if that president had resigned from office in disgrace. It seemed remarkable to the young ACLU attorney to be sitting so near the man once considered the most powerful in the world. Now all that separated him from Nixon was a small folding card table. How the mighty had fallen, he mused.

The former president entered the room late and sat down, flanked on either side by attorneys from the Department of Justice. A lot was at stake today, Shattuck thought. Nixon's own admissions could determine whether or not the former president could be held liable in a civil suit filed by his client, Morton Halperin. Did the president authorize illegal wiretaps of Halperin's home telephone in order to stop so-called "leaks"?

Shattuck smiled, thinking how remarkable this journey had been. Only five years before he had been hired by the ACLU to lead civil cases against local, state, and federal surveillance practices. Now he was deposing the former president.[1]

[1] ACLU legal counsel John Shattuck deposed former President Nixon in January 1976 regarding his role in authorizing illegal wiretaps of civil servants during his first term. This account is drawn from John Shattuck and Alan Westin, "The Second Deposing of Richard Nixon," *Civil Liberties Review*, June/July 1976; and the author's interview with John Shattuck, 8 November 2007, audio recording (in Scott's possession); Peter Kihss, "Promoted in A.C.L.U.: John Howard Francis Shattuck," *NYT*, 6 Sep 1976, 7.

In the wake of Watergate revelations Senator Sam Ervin and Representative William Moorhead led a broad coalition of Republicans and Democrats to enforce government transparency and to protect individual privacy. Following Richard Nixon's resignation, Congress passed two historic pieces of legislation creating a new statutory framework governing the flow of information between the executive branch and civil society. These laws formed the foundation of a new domestic security policy regime.

The first major legislation was the Freedom of Information Act (FOIA) revisions, passed in 1974. This new law required agencies—including the FBI and CIA—to respond to requests promptly and placed the onus on institutions to justify withholding of classified materials in federal court. The *Washington Post* called the new rules "reasonable" and noted that they would likely result in "more prompt and extensive disclosure of information," another journalist predicted that the new law would offer the media and the American public a "genuine tool of discovery."[2]

The second bill, the Privacy Act, signed into law in 1974, was the darling of both conservatives and liberals. Since revelations in 1970 that the government maintained millions of dossiers on its citizens, legislators and their constituents had worried over government invasions of privacy. The new law aimed to balance the government's need for information with an individual's "right to privacy," creating mechanisms that restricted the sharing and distribution of personal information among executive-level

[2] "New Battles Over Secrecy and Privacy," *WP*, 18 Aug 1974, C6. Thomas Powers, "The American Police State," *NYT*, 9 Jan 1977, 238.

agencies. The Privacy Act allowed individuals to access personal files maintained by federal agencies and correct inaccurate information contained therein.[3]

Public interest groups seized upon these new tools to probe the deepest recesses of the national security state—for so long a labyrinth of secrecy operating outside democratic processes. The ACLU launched a campaign to encourage journalists, scholars, and individuals to file requests for information related to national security programs. The material successfully obtained through FOIA requests confirmed what many Americans already suspected: some agencies within the U.S. government operated outside democratic oversight and checks and balances.

The ACLU's organizational success was due, in part, to the strategy it established in the early 1970s to pursue reform through both litigation and legislation. Increasingly the organization relied on the expertise of a carefully cultivated network of current and former Washington insiders, elected officials, and powerful media interests to see its policy goals realized. The ACLU created new organizations with resources devoted exclusively to pursuing domestic security policy reform. The success of these organizations depended upon the input of professional critics—individuals who had once worked for these agencies, and therefore, were uniquely positioned to critique what one journalist called the "shadowland" of the security state.[4] Professional critics lent

[3] See *Legislative History of the Privacy Act of 1974, S. 3418 (Public Law 93-579): Source Book on Privacy*, Committee on Government Operations, United States Senate and the Committee on Government Operations, House of Representatives, Subcommittee on Government Information and Individual Rights, 94th Cong., 2d sess., 1976, Joint Committee Print.

[4] NYT 18 sep 1975, 40. Notable works by professional critics include Victor Marchetti and John Marks, *The CIA and the Cult of Intelligence*, (New York, 1974); Robert L. Borosage and John Marks, eds.,

legitimacy to the reform effort and brought much needed expertise to complicated jurisprudential and legislative strategies to reform national security institutions.

The Watergate scandals prompted year-long House and Senate investigations into the nation's intelligence agencies. Scholars have credited these congressional committees, chaired respectively by Senator Frank Church (D-ID) and Congressman Otis Pike (D-NY), with exposing the abuses of national intelligence agencies.[5] Public advocacy groups played a central role in national security policy reform. Congress tapped the human resources of organizations like the ACLU, the Committee for Public Justice, and the Center for National Security Studies (CNSS). Drawing on the expertise of professional critics like Halperin these organizations promoted public debate about the abuses of the national security apparatus before congressional committees made such abuses popular.

Morton Halperin had never considered himself a radical. With a doctorate from Yale in government, which he parlayed into a promising career in civil service with the Department of Defense, he belonged to the establishment. He was stunned in 1971 to

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The CIA File, (New York, 1976); and Morton Halperin, Jerry Berman, Robert Borosage, and Christine Marwick, *The Lawless State: The Crimes of the U.S. Intelligence Agencies*, (New York, 1977).

[5] Participants in congressional intelligence inquiries were more likely to see Congress as the driving agent behind national security reform. See Loch Johnson, *A Season of Inquiry: The Senate Intelligence Investigation*, (Lexington, 1985). Historians have placed institutional reforms in a broader context of congressional-executive tussles for power, but rarely examine civil society's role in this reform effort. See Rhodri Jeffreys-Jones, *Cloak and Dollar: A History of American Secret Intelligence*, (New Haven, 2003), 225-27. Like Johnson, Jeffreys-Jones emphasizes the congressional role, but does not acknowledge the contributions of public advocacy groups in promoting institutional reform.

learn that he had been the target of an FBI wiretap ordered by his former boss, National Security Advisor (and later Secretary of State), Henry Kissinger.[6]

It happened like this: While serving as deputy assistant secretary of defense for the Johnson administration, Halperin worked closely with Leslie Gelb to compile the Vietnam assessment known as the "Pentagon Papers." In 1969 Halperin joined the National Security Council staff. It wasn't long before his boss, Henry Kissinger, began to suspect NSC staff of leaking information about the secret bombing of Cambodia to the press.[7] Through FBI Director J. Edgar Hoover, Kissinger arranged a wiretap on Halperin's home telephone. Making no secret of his disillusionment with the administration's expansion of the war into Laos and Cambodia, Halperin left the administration and joined the Brookings Institute.[8]

Halperin became a vocal critic of the Nixon administration in 1971 when it attempted to halt the publication of the "Pentagon Papers" documents, which, Halperin claimed, "contained nothing which would cause serious injury to national security." When the Supreme Court ruled in favor of the *Times*, the administration sued the man responsible for leaking the report, former NSC staffer and Halperin's friend, Daniel Ellsberg. At Ellsberg's trial the prosecution submitted evidence acquired through a

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[6] Morton H. Halperin, "Where I'm At," *First Principles. National Security and Civil Liberties*, Sept. 75, 1, no. 1, 15-16; John Shattuck and Alan Westin, "The Second Deposing of Richard Nixon," *Civil Liberties Review*, June/July 1976. See also *Kissinger v. Halperin*, 452 U.S. 713 (1981).

[7] On 9 May 1969 the *New York Times* announced the secret bombing of Cambodia. See William Beecher, "Raids in Cambodia by U.S. Unprotested," 1.

[8] Morton H. Halperin, "Where I'm At," *First Principles. National Security and Civil Liberties*, Sept. 75, 1, no. 1, 15-16; John Shattuck and Alan Westin, "The Second Deposing of Richard Nixon," *Civil Liberties Review*, June/July 1976. See also *Kissinger v. Halperin*, 452 U.S. 713 (1981).

wiretap on Halperin's home telephone. Because the evidence was obtained illegally, the judge dismissed the criminal trial.[9] Acting FBI Director William Ruckelshaus was forced to publicly admit that the White House had wiretapped a former NSC staffer's home telephone for twenty-one months.[10] Incensed over the invasion of his privacy, Halperin arranged a meeting with the local ACLU to discuss his legal options. John Shattuck, the legal director of the organization's Washington, D.C. office, encouraged him to sue the officials who had tapped him.[11]

Halperin turned to the ACLU for legal advice because the organization had earned a reputation for successfully challenging expansive executive power, particularly in the area of wiretapping and surveillance practices. Part of the ACLU's success lay in its decision in 1971 to broaden its power base by partnering with new interest groups. These organizations helped the ACLU expand its knowledge base, as well as reach broader audiences. One affiliation, the Committee for Public Justice (founded in 1971), brought big Hollywood names (Marlon Brando, Candace Bergen, and Warren Beatty, to name a few) together with Washington insiders who advocated institutional reform (former

[9] The Organized Crime Act of 1970 required disclosure of any surveillance by the attorney general to the defendant in any proceeding. The Department of Justice violated this law with the Halperin wiretap by not informing Ellsberg at his trial that he had been overheard on the wiretap.

[10] R.W. Apple, Jr., "Kissinger Hints He Saw Results of the Wiretap on Halperin," *NYT*, 13 May 1973, 48. J. Edgar Hoover passed away on 2 May 1972. Apparently, the director had been so uncomfortable with the Kissinger wiretaps that he kept the records separate from other domestic intelligence gathered by the agency, first in his own office, and later in his deputy's. Upon Hoover's death the White House retrieved the records; Ruckelshaus conceded that he found the wiretap transcripts in John Erlichman's safe at the White House. See Powers, *Broken*, 282. The tap remained on Halperin's phone, allegedly, because he became a consultant for Senator Edmund Muskie's presidential bid.

[11] Morton H. Halperin, "Where I'm At," *First Principles. National Security and Civil Liberties*, Sept. 75, 1, no. 1, 15-16; John Shattuck and Alan Westin, "The Second Deposing of Richard Nixon," *Civil Liberties Review*, June/July 1976. See also *Kissinger v. Halperin*, 452 U.S. 713 (1981).

Attorney General Ramsey Clark, former aide to Secretary of Defense Robert McNamara, Adam Yarmolinsky, and Roger Wilkins, former assistant attorney general, and committee chairman) to speak out on select issues. ACLU executives hoped celebrities might garner public interest on a whole range of democratic issues, and "unite individuals from different segments of society who are concerned about the current situation in the country and who have not, in many instances, hitherto spoken out."[12]

Spurred on by the battle over the publication of the Pentagon Papers, the committee organized a conference on government secrecy. Invitees included historians, journalists, attorneys, public officials and scientists. As planning unfolded, *Post* reporters broke the Watergate story and Committee Director Stephen Gillers expanded the original program to include discussion of the country's secret national security government. As Gillers saw it, Watergate revealed that secrecy was not an "appendage to the constitutional system; it is a whole separate system, and it involves actions as well as information." The challenge for reformers, Gillers believed, lay in integrating these two "systems." [13]

Morton Halperin proved a persuasive advocate for reform. Since his initial contact with the ACLU, Halperin had becoming increasingly strident in his opposition to expansive executive power in the name of national security. As a former NSC staffer he

[12] Norman Dorsen to Edgar Bernhard, Esq. 7 Jan 1971., ACLUP, box 1981 fol. 19, PPP, DRBSC, PUL. Members of note included by late 1971: Ramsey Clark, Marlon Brando, Candice Bergen, Art Schlesinger, Jr., James Vorenberg, C. Vann Woodward, Adam Yarmolinsky, Warren Beatty, Hodding Carter III, Roger Wilkins (chairman), and Lillian Hellman.

[13] Stephen Gillers, "Secret Government and What to Do About It: Conference Report," *The Civil Liberties Review*, Winter/Spring 1974, 69. A graduate of New York University Law School, Gillers was the director of the Committee for Public Justice and did most of the conference organizing. The Committee for Public Justice published proceedings in an edited volume: Norman Dorsen and Stephen Gillers, eds., *None of Your Business: Government Secrecy in America*, (New York: Viking Press, 1974).

offered expertise that few, if any, elected officials could claim on issues related to the inner-workings of the national security apparatus. National security intellectuals like Halperin, Daniel Ellsberg, and other conference attendees bridged the divide between congressional efforts to reassert checks and balances over the executive branch and the movement among civil libertarians and other interests groups to develop broad policy reform in the areas of secrecy, classification, surveillance, and privacy. These professionals had a unique perspective of the tensions inherent in the relationship between an open democratic society and extra-democratic security agencies tasked with maintaining the nation's security.

Personally, Halperin believed that the secret national security government was corrupting the constitutional system. Without transparency there could be no effective oversight. Without oversight the founding fathers' vision of carefully balanced power between the three branches of government could not exist. As he explained to conference attendees, neither the judicial nor legislative branches imposed adequate checks and balances over the national security apparatus. The legislative branch had been reluctant to challenge executive power in the realm of national security. The secrecy that blanketed national security agencies and their activities discouraged congressional oversight; elected officials had nothing to gain politically by exerting traditional oversight functions. Denied the ability to keep their constituents apprised of their activities, politicians could not rally public support for institutional reform. The problem was one of incentive: executive secrecy made congressional investigations virtually impossible. The subcommittee of the House Appropriations committee in charge of CIA oversight,

Halperin noted, had a secret membership—even congressmen did not want their participation known! If elected officials cannot publicize their duties, then they cannot be leveraged as political assets and oversight is not worth their time.[14]

Attendees did not expect to solve the problems of secret government over the course of a two-day conference. Few agreed on the appropriate level of oversight or transparency that was needed. Most, however, believed that compromise could, and should, be found to make government more transparent.[15] Many advocated for legislation to define formally the limits of the national security government's power. Such reform could only come from within the halls of Congress and attendees left the conference less than optimistic that Congress would move swiftly on the issues of government transparency.[16]

Watergate proved a powerful motivator to many on Capitol Hill. For years the public had grown increasingly distrustful of their elected officials and institutions. The political scandal of the century exacerbated this trend.[17] Democrats hoped that the public would punish the Republican Party in the 1974 midterm elections, delivering their party an overwhelming majority in both houses of Congress. In a post-Watergate age even popular incumbents like seven-term congressman William Moorhead worried cynical

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[14] Morton Halperin, "Covert Intelligence and Operations," in Dorsen and Gillers, eds., *None of Your Business: Government Secrecy in America*, 117.

[15] Dorsen and Gillers, eds., *None of Your Business.*

[16] Gillers, "Secret Government," *CLR*, Winter/Spring 1974, 70.

[17] Trust in public officials had been declining since the late 1960s. See Hazel Erskine, "The Polls: Presidential Power," *Public Opinion Quarterly*, Vol. 37, No. 3 (Autumn, 1973), pp. 488-503; Hazel Erskine, "The Polls: Corruption in government," *Public Opinion Quarterly*, Vol. 37, No. 4 (Winter 1973/1974), 628-44.

voters would implicate them as part of the Washington status quo. In 1974 Moorhead lamented, gone were the days when the average American voter "was occasionally willing to give a governmental official the benefit of the doubt in the performance of his duties." Given the recent problems of Vietnam, a lackluster economy, social upheaval, and the failure of institutions to solve these problems, "government officials no longer enjoy the good will of their fellow citizens … we often have two strikes against us before we ever get into the batter's box."[18] Watergate created, Moorhead believed, a public "crisis in confidence in government"—a problem of epic proportions, even greater than the energy crisis.[19]

Nevertheless in times of crisis industrious politicians like Moorhead saw political opportunity. After years of futilely sponsoring laws about privacy and transparency, Moorhead believed that 1974 might be the right year. As *Times* editors noted, the year was marked by "an impressive array of legislators, administrators and citizens experts" who "have reached general accords on several basic principles to govern" the operation and maintenance of federal data banks.[20] These principles included the acknowledgement that all federal information should be accessible to the public, and that citizens should have access to files to review them for accuracy. With bipartisan support, Moorhead moved to enhance government transparency and protect individual privacy.

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[18] Remarks by Representative William S. Moorhead for the Pittsburgh Federal Executive Board, on the subject of "Government Secrecy and Credibility," Pittsburgh, PA, 28 June 1974; Box 20, fold 267, William S. Moorhead Papers (WSMP) Manuscripts and Archives, Yale University Library (MAYUL).

[19] Remarks of William Moorhead before the Department of Justice Freedom of Information Symposium, 29 Nov 1973, box 20, fol: 264, WSMP, MAYUL.

[20] "…And the Right to Privacy," *NYT*, 20 Nov 1974, A26.

Moorhead's single-minded resolve on these issues belied his otherwise quiet demeanor in the capitol and reputation as a "nice guy" who "did not "make waves."[21] In the seven years since Congress first enacted freedom of information legislation, it had not, in Moorhead's opinion, created a "fully informed public in a democratic society." Testimony to the committee given by journalists and organizations proved Moorhead's point; bureaucrats had failed overwhelmingly to comply with the principles of FOIA. Bolstered by this testimony, the congressman worked up revisions to the original statute. The "widespread use of government secrecy" to hide information from "the press, the American public, and their elected representatives in Congress," Moorhead believed, threatened the health of democracy. The overuse of the "nation's security classification system" allowed the executive to "withhold vast amounts of information needed by Congress to carry out [its] Constitutional responsibilities."[22]

Moorhead's FOIA revisions addressed two complaints commonly expressed by FOIA requestors. First, agency response time had historically been sluggish—taking many months (and occasionally years). The new bill would require an agency to respond within ten working days, twenty for an appeal, with a possible ten-day extension. A second problem was the executive branch's penchant for overclassifying documents. Moorhead had avoided challenging national security information in the past, but the Watergate scandal laid bare the ability of the state to abuse the "national security" label

[21] "W. Moorhead, congressman for 22 years," *Pittsburgh Post-Gazette*, 4 Aug 1987, 16. For a detailed analysis of Moorhead's investigation of the original FOIA legislation, see chapter four.

[22] "Remarks by Representative William S. Moorhead, Chairman, House Foreign Operations and Government Information Subcommittee, at the Annual Conference of Sigma Delta Chi, Region 4, on the subject of "A Free New Media," William Penn Hotel, Pittsburgh, PA, 14 Apr 1973, 5; Box 20, fold 263, WSMP, MAYUL.

in order to operate outside the law. Moorhead's revisions still allowed exemptions for classified documents, but empowered federal district court judges to examine documents *in camera* (in the privacy of judge's chambers) to determine whether the documents were legitimately exempt from disclosure under one of nine categories. This marked a departure from past policies that had granted the executive branch the power to make the final decision. It set an important precedent, giving courts a role to play in ascertaining what information could and could not be made public in the name of national security and challenged long-held beliefs about executive branch prerogatives and presidential authority. Files related to law enforcement (including the FBI and CIA) could be withheld only if the agency offered proof that their release would interfere with criminal proceedings.[23]

To improve oversight of FOIA compliance, Moorhead's legislation required government agencies to publish annual reports on FOIA requests, including the number of refusals and the reasons for them, judicial appeals, and the individual responsible for each denial. If an agency employee was found by a court to have acted capriciously in withholding information, the law empowered the Civil Service Commission to impose disciplinary action. The bill also required the attorney general to publish an annual report of all the freedom of information cases resulting from the act and the fees and penalties associated with them.[24] The Nixon administration virulently opposed FOIA revisions. White House counsel, staff, and the NSC urged a presidential veto. They reasoned that

[23] *Congress and the Nation*, vol IV, (Washington: Congressional Quarterly Service, 1974), 805-806.

[24] *Congress and the Nation*, vol IV, (Washington: Congressional Quarterly Service, 1974), 805-806.

the White House would then load a revised bill with "objectionable features" to sustain a veto in the Senate.[25]

If passed FOIA revision legislation promised to solve one of the most urgent issues of civil libertarians—lack of government transparency.[26] But ACLU leaders had long warned that secrecy was only one part of a larger problem—the power of the executive branch to impinge upon the privacy of individuals. To deflect criticism and salvage his party, President Richard Nixon announced he would make privacy legislation a priority in early 1974. Republicans had seized upon the privacy issue as a rallying point to refocus legislative priorities and redeem their party in the minds of the American people. The House Republican Research Committee named the privacy issue a top legislative issue for the year, and the House Republican Task Force on Privacy denounced government surveillance as "repugnant," recommended legislation to prohibit "unauthorized surveillance," and called for further clarification on existing legislation. The committee welcomed the courts recent move to "circumscribe unauthorized wiretaps," and it supported wiretaps and surveillance in national security cases if agencies could convince a court of "probable cause." To fend off criticism that privacy

[25] "FOIAA H.R. 12471," Ken Cole to President Nixon, 2 July 1974; William Timmons files; Box 4; Freedom of Information Act Veto (1); GRFL.

[26] Ironically, legislative reformers touted transparency as a fundamental principle of a democratic republic, but Congress maintained its own secret advisory agency. The Congressional Research Service was one of these secret legislative tools. In 1914 Congress established the Legislative Reference Service in the Library of Congress as a veritable think tank for legislative purposes. In 1970, as part of the Legislative Reorganization Act, Congress renamed the LRS the Congressional Research Service and expanded its purpose. Funded with taxpayer money, CRS reports are confidential and do not circulate in the public domain. A few citizens groups have joined in an effort to make as many CRS reports available to the American public as possible using the tools of the internet. Called Open CRS, this consortium of public interest groups publishes recent reports and encourages those who have reports to make them public via internet technologies. At the time of this writing, users may search through nearly 15,000 reports available at <http://opencrs.com/collections.php>.

protections hindered law enforcement and weakened national security, Republicans assured the public that privacy protections need not "lessen the capability of the government to protect and defend the American people."[27]

Republicans shared concerns with civil libertarians about the federal government's collection and use of personal information. Government databanks held vast quantities of personal information, and "individual[s] possess inadequate remedies for the correction" of data abuses. Data inaccuracies were likely to go unreported "simply because the individual involved did not know of the data being collected about him." The misuse of a wide range of personal information including the social security number, personal financial information, consumer credit reports, school, juvenile and arrest records, and personal medical records worried Republicans that "George Orwell's 1984 may become a reality in 1976." [28]

The Republican Task Force recommended legislation to address these issues. An early ally in their effort was predictably conservative Democrat Senator Sam Ervin. No one had been a more ardent defender of privacy legislation than Ervin. Since his first investigations into government databanks in the 1960s, the senator had tried unsuccessfully to pass privacy legislation.[29] In 1974, after years of meticulous research and probing into the federal government's databank systems, Ervin's Subcommittee on

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[27] House Republican Research Committee, "Recommendation of the House Republican Task Force on Privacy," 21 Aug 1974; Frederick Lynn May files, box 27, fol: Background (1); 3; GRFL.

[28] Ibid., 9-10.

[29] Ervin first attempted to pass privacy legislation for federal employees in 1967. In each successive congress, a version of his privacy billed passed the Senate, but never made it out of committee in the House. Watergate changed that. See *Legislative History of the Privacy Act of 1974*, 297-299.

Constitutional Rights published a comprehensive report examining the federal government's data bank system. The report offered robust evidence of the government's reliance on computer data banks to maintain personal information on millions of its citizens. Ervin's staff identified some 858 data banks maintained by 54 federal agencies with records totaling some 1.25 billion. Most disturbing to lawmakers was the committee's finding that a majority of executive level data banks existed without congressional authorization. As a consequence, most elected officials (and therefore their constituents) knew little, if anything, about the information contained in those files and had no legal means to access them. The report concluded that, though many agencies promised the confidentiality of their records, executive databanks frequently exchanged data.[30]

Ervin and the ACLU had long been allies on the issue of privacy. Like Ervin, the organization had made privacy legislation a top priority since the early 1970s. The ACLU had long opposed the "computerization of manual record systems of personal information by government and commercial bodies unless proper standards and safeguards for privacy and due process are first provided." ACLU attorneys recommended that all Americans be granted access to their government records, allowed to contest the accuracy of those records, and authorized to place explanatory information in their file. They likewise proposed that criminal convictions be expunged if trials did not result in convictions. The First Amendment, urged the Board of Directors, was "so fundamental as

[30] *Federal Data Banks and Constitutional Rights: A Study of Data Systems on Individuals Maintained by Agencies of the United States Government*, Summary and Conclusions Prepared by the Staff of the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, (Washington: U.S. Government Printing Office, 1974). Committee print.

to preclude completely the collection of information" about constitutionally protected activities, like the right to dissent, "however compelling the interest which the government may seek to assert."[31]

In the wake of Watergate this pro-privacy triumvirate—conservatives, liberals, and civil libertarians—joined together to support Ervin and Moorhead's bill, the Privacy Act of 1974. The Act required all federal agencies to register their databanks, to allow citizens to petition to review dossiers, and to correct erroneous information held in their personal files. According to the final version of the bill, the onus to ensure the accuracy of data rests with the individual, not the federal government. Though privacy advocates supported this landmark legislation, the ACLU remained frustrated by amendments exempting FBI and CIA files from the new rules.[32] Republican co-sponsors of privacy legislation, like Representative Barry Goldwater, Jr., balked at efforts to make law enforcement and national security agencies subject to the legislation. Goldwater feared that public inquiry would lead to the emasculation of the nation's security apparatus.[33] Conservatives like Goldwater straddled two seemingly incompatible ideological principles related to privacy rights—the fervent belief in the need for a large national security apparatus on the one hand, and an aversion to Big Government on the other. As his father, Senator Barry Goldwater, had explained in his 1960 *Conscience of a Conservative*, the United States needed an expansive national security apparatus to fight

[31] Board of Directors ACLU Priorities for 1972, ACLUP, box 24, fol. 6, 12-18, PPP, DRBSC, PUL.

[32] "A.C.L.U. Official Criticizes Ford on Privacy Bills," *New York Times*, 8 Jan 1975, p. 23.

[33] *Legislative History of the Privacy Act of 1974*, Joint Committee Print, Committee on Government Operations, United States Senate and the Committee on Government Operations, House of Representatives, Subcommittee on Government Information and Individual Rights, (Washington, D.C.: GPO, 1976).

the "Soviet menace," even as Big Government threatened to be "chief instrument for thwarting man's liberty."[34]

In tandem, FOIA revisions and the Privacy Act offered a new legal framework for the collection and exchange of information in a postmodern democracy. For elected officials like Moorhead and Ervin, and public interest groups like the ACLU, these bills represented years of advocacy and investigation. Though Congress was eager to vote on the groundbreaking legislation, elected officials waited to see what a disgraced and besieged President Nixon would do. When Nixon resigned on 9 August 1974, he left his successor Gerald Ford (himself the House Minority Leader only nine months before) to battle over the finer points of transparency and privacy legislation.[35]

Like Nixon, President Ford adamantly opposed the FOIA revisions bill. But a close examination of his public record made many dismiss his objections as disingenuous and politically driven. During the Johnson administration, Congressman Ford and many of his Republican and Democratic colleagues had clamored for greater transparency in the executive branch, particularly regarding the war in Vietnam. To his constituents back in Michigan Ford had championed the people's right to know and warned of the "mushrooming growth of Government secrecy." He supported the first Freedom of Information Act and boasted that Republicans strongly supported a bill to protect "the right of the public to essential information." Though the bill would not solve all problems

[34] Barry Goldwater, *The Conscience of a Conservative*, (New York: Hillman Books, 1960), 16-17, 88, 114.

of government secrecy, Ford believed the 1966 FOIA would be "a great improvement over present policies."[36]

National media outlets, overwhelmingly supportive of proposed FOIA revisions, challenged the new president to stay true to his past support for greater transparency. The *New York Times* reminded Ford that he had once called the executive branch's efforts to deny information to the legislative branch and the American public an espousal of "some power akin to the divine right of kings." The *Post* called the legislation a harbinger for the "future of openness in government," and predicted it would be an "effective servant of the public's right to know." It reminded the president that the bill was "in tune with [President Ford's] recent appeals for openness" and promised FOIA revisions would help to "reduce public mistrust of government."[37]

Ted Kennedy and William Moorhead, the floor sponsors of FOIA revisions in the Senate and House, respectively, gave the new president time to consider the bill and to recommend any necessary changes before they put it to a vote.[38] Ford's staff (many of

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[36] Jerry Ford, "Your Washington Review," 29 June 1966; Ford Congressional Papers, Box D2, fold: Ford Newsletters, June-Oct 1966; "Regarding Freedom of Information Bill," Congressman Gerald Ford News Release, 20 Jun 1966; Ford Congressional Papers, D6, fold: Credibility Gap 1966, 1967; GRFL.

[37] "A Selection of Comments Made by Ford on Various Issues and Individuals," *NYT*, 9 Aug 1974, 9; "Amending the Information Act," *WP*, 5 Oct 1974, A18; "A Regrettable Veto," *WP*, 21 Oct 1974, A22; "New Battles Over Secrecy and Privacy," *WP*, 18 Aug 1974, C6.

[38] William Moorhead and Edward Kennedy to President Gerald Ford, 13 Aug 1974; William Timmons files; Box 4; Freedom of Information Act Veto (1); GRFL. Moorhead's committee had waited to vote on FOIA revisions until after the Supreme Court ruled in *U.S. v. Nixon*. The 24 July 1974 decision did recognize the constitutional basis for executive privilege—finding that the executive branch did have the need for some confidentiality in its decision making—but it also recognized the need for a balance of powers. As one scholar writes, the justices found that executive privilege would not be "'significantly diminished if the President produced the tapes for an *in camera* scrutiny by the judiciary." See Kutler, *Wars of Watergate*, 514. The case established the ground rules for use of executive privilege that were not inconsistent with Moorhead's bill. William Moorhead and John Erlenborn to President Ford, 13 Aug 1974, William Timmons files, box 4, fol: Freedom of Information Act Veto (1), GRFL.

whom were holdovers from the Nixon administration) recognized how politically unpopular a veto of FOIA revisions would be to the American public. In a post-Watergate political climate, better to be against "motherhood," one quipped, than against the concept of "freedom of information." Nevertheless, they advised Ford to veto the "obnoxious" bill.[39] Nixon's staff, apparently still harboring animosity toward the "liberal" mass media, dismissed the bill as another piece of legislation crafted for special interests. One White House aide allegedly complained, "who gives a damn [about a veto] besides the *Washington Post* and the *New York Times*?" But this was precisely the point. As one *Post* editorial explained, FOIA revisions would be a powerful tool for a democratic government. The new FOIA bill, the paper wrote, "goes to the heart of what a free society is all about." If it was special interest legislation, the editors wrote sarcastically, it was intended to "assist the very special interest of the American people in being better informed about the processes and practices of their government." [40] The new administration seemed oblivious to this important point.

Ford assured Kennedy and Moorhead that he supported the "spirit" of the bill. But he urged them to compromise with the White House on a few key provisions. The administration objected to the burden, in both time and dollars, the new rules would impose on executive agencies. Forcing agencies to defend their classification of documents in a court of law—paragraph-by-paragraph—would force civil servants to

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[39] "Reasonable Freedom of Information Bill Needed," Author unknown, Philip Buchen files; Box 17; Freedom of Information Legislation (3); GRFL; William Timmons to Alex Haig, 13 Aug 1974; William Timmons files; Box 4; Freedom of Information Act Veto (1); GRFL.

[40] Martin Arnold, "Ford Vetoes Effort to Improve Access," *NYT*, 18 Oct 1974, 16; "Federal Files: Freedom of Information," *WP*, 20 Nov 1974, A26.

scour thousands of pages of documents. "More flexible criteria" should dictate agency responses, Ford urged, so as "not to dilute the primary responsibilities of these law enforcement activities." The president considered the imposed agency response times unrealistic for an expansive bureaucracy.[41]

In addition to imposing unrealistic burdens on the bureaucracy, Ford argued, compliance with the new law would endanger the nation's security. The president trotted out old tropes, warning that, "military or intelligence secrets and diplomatic relations could be adversely affected" by FOIA revisions. The president opposed judicial review of top-secret classified documents. This provision, he claimed, afforded judges the opportunity to make a judgment in "sensitive and complex areas where they have no particular expertise." Declaring the bill "unconstitutional and unworkable" in its current form, the president vetoed it.[42]

Following as it did on the heels of Ford's most controversial decision as president—the full pardon of his predecessor Richard Nixon for crimes he may have committed as president—the president was not endearing himself to the American public.[43] Juxtaposed with the pardon, the presidential veto suggested to Americans that Ford was not interested in being a different kind of president. The *Post* underscored this sentiment, writing that the FOIA veto undermined the "spirit of the kind of relationship

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[41] President Gerald R. Ford, 17 Oct 1974, To the House of Representatives, Legislation Case Files 1974-1976, box 9, fol: H.R. 12471 (1), GRFL.

[42] Ibid.

[43] Ford pardoned Nixon for all crimes he had or may have committed while serving as president on 8 September 1974. On Ford's pardon, see Joan Hoff, *Nixon Reconsidered*, (New York: BasicBooks, 1994), 322-328; and Kutler, *Wars of Watergate*, 553-573.

between government and the public that Mr. Ford assured the Congress he wanted" when he took office. Ford's veto, wrote the editors at the *LA Times*, was based on the "alarmist view" that the courts would use the bill to reveal national secrets and endanger national security. The president seemed ignorant of congressional intent of FOIA revisions: "to stop the abuse of classifying information that by any rational standard cannot be remotely connected to national security."[44] As Congress mulled over the president's veto, Attorney General William Saxbe publicly acknowledged the FBI's top-secret domestic spying operation, COINTELPRO. It could not have come at a worse time for the beleaguered president.

The attorney general was the victim of events beyond his control. In 1971 NBC television news journalist Carl Stern had filed a FOIA request for documents relating to the FBI's COINTELPRO-New Left program.[45] Started in the 1960s by Director Hoover, the program was, according to one historian, the "Bureau's covert war" against the New Left radical student movement. Hoover initiated the program in the mid-sixties after the Johnson administration requested information about the anti-war movement. The program broke with bureau guidelines that had until then required all domestic targets to have a connection with an international movement. Then Attorney General Richard

[44] "A Regrettable Veto," *WP*, 21 Oct 1974, A22; "Ford's Alarmist View on Secrecy," *LA Times*, 21 Oct 1974, part II, 6.

[45] Stern's request was directly related to the Media, PA break-in by the Citizens' Commission to Investigate the FBI. As historian Richard Gid Powers writes, before this incident the agency had never been subject to public scrutiny, and this "luxury" had allowed Director Hoover to develop programs that clearly abused the power of the agency. Without the burglary at the Media office, the American public would not have known about the existence of the COINTELPRO-New Left program. The burglary opened up these secret programs for public scrutiny and enabled investigative journalists like Stern to file FOIA requests and publicly expose the programs. See Powers, *Secrecy and Power*, 464-466. For a detailed discussion of the Media, PA break-in, see chapter three.

Kleindeist denied the Stern's request, and the journalist sued the Department of Justice in federal district court under the original FOIA. The court ordered the Justice Department to release documents to Stern in December of 1973. Receiving only some of the documents he requested, Stern filed a follow-up request with FBI Director Clarence Kelley in 1974. Kelley denied it, and Stern appealed to his boss, Attorney General William Saxbe. Considering Stern's request, Saxbe came across some COINTELPRO materials that concerned him. He ordered his assistant attorney general, Henry Petersen, to conduct an internal review. When he read Petersen's report months later, Saxbe decided to preempt a sensational news story by going public and emphasizing the positive, rather than negative, aspects of FBI domestic surveillance activity under Director J. Edgar Hoover. On 18 November 1974, Saxbe released the report. He underscored that only one percent of the COINTELPRO programs had been illegal.[46]

Saxbe's attempt to spin unlawful FBI activities failed miserably. Rather than congratulate the attorney general for his candor, elected officials used the episode to rally support to override the presidential veto of FOIA revisions. Stern's three-year odyssey to obtain records of extra-legal FBI activity only firmed up the legislative branch's resolve to provide the media and other interested parties with better tools to investigate the executive branch. Three days after Saxbe disclosed the Petersen report, Congress

[46] Richard Gid Powers, *Broken: The Troubled Past and Uncertain Future of the FBI*, (New York: Free Press, 2004), 276-277, 306-309; John M. Crewdson, "Saxbe Says Top Officials Had Some Knowledge of F.B.I.'s Drive to Disrupt Various Political Groups," *NYT*, 19 Nov 1974, 27.

overrode the president's veto, and the Freedom of Information Act revisions became law.[47]

Ford and his staff learned the hard way that the American public and Congress were increasingly skeptical of the executive branch's claims of secrecy in the name of national security. Conservative columnist Joseph Kraft bemoaned the declining respect that many Americans held for the concept of "national security." Only years before, Kraft observed, the term "national security" had "conferred a kind of grace" on those "conscientious Americans" who "labored diligently in thankless tasks all over the world." Political leaders who pursued the nation's national security interests "were almost automatically deemed 'responsible.'" Watergate and Vietnam had broken that sacred trust. Now, Kraft lamented, "National security has become a term of scorn and secret operations an object of automatic suspicion."[48] As former State Department and CIA staffer Arthur Cox put it, Watergate and Vietnam had revealed the "myths" of national security--too often used as a cover to deceive the American people. The public had learned that "countless lies [had been] perpetrated under cover of a vast system of executive secrecy, justified on grounds of protecting our national security."[49]

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[47] "Federal Files: Freedom of Information …," *WP*, 20 Nov 1974, A26; Richard Gid Powers, *Broken: The Troubled Past and Uncertain Future of the FBI*, (New York: Free Press, 2004), 306-309; John M. Crewdson, "Saxbe Says Top Officials Had Some Knowledge of F.B.I.'s Drive to Disrupt Various Political Groups," *NYT*, 19 Nov 1974, 27.

[48] Joseph Kraft, "Developing a 'Gullibility Gap,'" *WP* 23 Jan 1975, A23.

[49] Arthur Macy Cox, *The Myths of National Security: The Peril of Secret Government*, (Boston, Beacon Press, 1975), 1. Cox worked in the State Department during the Truman Administration and later served in the CIA as a Soviet specialist.

President Ford hoped that affixing his signature to the Privacy Act of 1974 would help him shore up flagging public support. As vice president Ford had chaired the Domestic Council Committee on the Right of Privacy. Though he did not believe privacy was a constitutionally guaranteed right, he sympathized with citizens concerned about privacy violations at the hands of big institutions: "People feel threatened by big information systems just as they are troubled by the growth of big government, big business, big unions, and by big institutions generally. Anxiety is experienced because big systems and big organizations seem inhuman in that they appear not to respect a person as an individual but treat him as just another unit in a broad category of persons."[50] Berkeley Free Speech radical Mario Savio could not have said it better.

With the passage of FOIA revisions and the Privacy Act, the Ford administration hoped that Congress had exorcised the ghosts of Watergate, and the constitutional crisis between the legislative and executive branches had been averted. The ACLU, however, like many organizations, believed that Watergate introduced constitutional issues that had not been adequately examined. In 1974 the ACLU Foundation, with financial assistance for the Fund for Peace, founded the Center for National Security Studies (CNSS) to focus exclusively on the problems of extra-democratic agencies, specifically the national security state.

The ACLU chose a Washington attorney formerly with the Institute for Policy Studies, Robert Borosage, to lead the organization. In a statement to the press Borosage explained that CNSS would investigate the national security state to ensure that its

[50] Ford speech at the National Computer Conference, 9 May 1974, box 116, fol: speeches national computer conference, Vice Presidential papers, GRFL.

capacities are not "employed to subvert our democracy at home." CNSS conferences would explore "the ominous growth of state power which has developed, both at home and abroad, under the banner of 'national security.'" Through public forums, CNSS hoped to promote "a public re-appraisal of the purposes and policies of our national security institutions" including the CIA, NSC, military establishment, FBI, and Law Enforcement Assistance Administration. For a quarter-century Americans "witnessed the alarming growth of national security institutions, and the expansion of Executive power and prerogative." CNSS projects would fight the assumption that "matters of 'national security' are above the limits of the law, and beyond the control of the Congress or the people." In the aftermath of the twin crises of Watergate and Vietnam, the powers of the executive branch and the national security institutions remained unchecked. CNSS pledged to "help foster public consideration of national security issues" by working with citizens and other groups to "expose policies decided in secret to public discussion and questioning. Only if citizens demand a restructuring of these institutions" can Americans be certain "that these institutions do not become a permanent threat to the liberties and security they claim to protect."[51]

In the mid-seventies former security insiders like Halperin, as well as attorneys and journalists, joined CNSS. United by a belief that Vietnam and Watergate stood as

[51] "Conference on the Central Intelligence Agency and Covert Activities," 5 Sep 1974; "Center for National Security Studies, 1974," ACLU Foundation Project Files 1964-1978; box 630, folder 6; PPP, DRBSC, PUL. CNSS sponsored a range of projects in 1974 including: Militarism in the Community, Intelligence and Covert Actions, Law Enforcement Assistance Administration, Study on Classification and Secrecy, American Police and Military Aid Abroad, National Security and the Constitution, Citizen's Project on National Security. Halperin was one of ten full-time staffers. In addition to its own research interests, the center also sponsored independent projects, including journalist Neil Sheehan's study of America's involvement in Vietnam.

"shameful monuments to the widely shared assumption that matters of 'national security' are above the limits of the law, and beyond the control of the Congress or the people," they used their connections in the establishment and the media to "provide a constant voice against a military definition of security" and redefine security needs with greater attention to constitutionally-protected civil liberties. In the post-Watergate crisis atmosphere, many staffers saw endless legislative possibilities. The CNSS office in Washington D.C. attracted a growing network of professional critics that could "contribute to a public re-appraisal of the purposes and policies of our national security institutions." Through conference sponsorship, assemblies, and public meetings CNSS staff strove to foster "broad public debate" on national security issues. The staffers aimed to develop alternative policy proposals so that institutions might be more accountable to Congress and the people.[52]

In September 1974 CNSS sponsored its first conference on "The CIA and Covert Action." Senators Philip Hart (D-MI) and Edward Brooke (R-MA) hosted the event at the new Senate Office Building. Present and former CIA staff, national security intellectuals, scholars, and elected officials gathered to debate the purpose and future of the CIA. Panels included discussion of the agency's efforts to destabilize Chile and surreptitious and covert operations both in the United States and abroad. Participants questioned the

[52] "Conference on the Central Intelligence Agency and Covert Activities", 5 sep 1974, ACLUP, box 630, folder 6: PPP, DRBSC, PUL. The CNSS was funded by grants from the Abelard Foundation, Field Foundation, Stern Foundation, and sponsored by the Fund for Peace. Halperin served as Director of the Project on National Security and Civil Liberties, a joint project of the ACLU and Center for National Security Studies, which allowed him to join his experience working in the national security apparatus with his desire to protect civil liberties; "Center for National Security Studies, 1974," ACLU Foundation Project Files 1964-1978; box 630, folder 6, PPP, DRBSC, PUL.

legal and political implications of the CIA's existence, underscoring the problems of a secret agency within a democratic society.[53] Most participants were critical of the agency and its power. But CIA Director William Colby defended the agency and its function, took audience questions, and debated policy with conference organizers in a public forum. No CIA director had ever before participated in an open debate about the nature of the nation's most powerful intelligence agency and a cornerstone of the national security state.[54]

Colby challenged recent efforts to force greater transparency within the nation's national security apparatus. He argued that secrecy was not incompatible with democratic practice:

> Our military forces must be responsive to our public, but our public does not demand that our war plans be published. Our judicial system must meet the public's standards of justice, but our judicial conferences and grand-jury proceedings are not conducted in public. It is even necessary for the Congress to conduct some of its business in executive session, while remaining accountable to the voters for the legislation it passes.

Colby maintained that the CIA could be more transparent to the American public, but that a compromise must be found that respected "legitimate public inquiry" and protected "the necessary secrecy of the sources and methods of our intelligence, which would dry up if publicized." Colby proposed more robust congressional oversight of the agency. He saw

[53] On 11 September 1973 the democratically elected socialist government in Chile was overthrown in a coup d'état (opposition forces were armed and funded by the CIA). President Salvador Allende was murdered. The coup brought an abrupt end to the longest democratic government in Latin America and ushered in the regime of totalitarian General Augusto Pinochet. See Lubna Qureshi, *Nixon, Kissinger and Allende: U.S. Involvement in the 1973 Coup in Chile*, (Lanham, MD: Lexington Books, 2008).

[54] Conference proceedings were published in an edited volume, Robert L. Borosage and John Marks, eds., *The CIA File*, (New York: Grossman Publishers, 1976). The volume included the text of William Colby's talk as well as the question and answer period which followed.

recent disclosures of the agency's "bad secrets" by journalists and scholars as "an essential part" of the democratic process. Colby himself had been involved in de-classifying materials. But he cautioned that some secrets needed to be maintained, and he proposed new laws to criminalize the publication of "good secrets." Who should determine what constitutes legitimately classified materials, asked one conference attendee. Judges should determine the appropriateness of classification, Colby answered.[55]

The CNSS conference reflected an ongoing debate in Washington about the role of intelligence and law enforcement agencies within the United States. Just a week after the conference, and with the CIA under increasingly intense scrutiny, Seymour Hersh, a Pulitzer Prize-winning journalist, published in the *New York Times* a carefully researched account of CIA efforts to depose Chile's democratically elected president, Salvadore Allende, in the early 1970s.[56] Hersh's account suggested that the Nixon administration lied repeatedly to Congress about its role in destabilizing the Allende government. Democratic Majority Leader Mike Mansfield moved to exert greater control over the CIA by investigating the intelligence community (something he had been trying to do for a decade). Liberals in the House and Senate introduced legislation to ban all covert activity.

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[55] Colby, "The View From Langley: Address to the Fund for Peace Conference on the CIA and Covert Action," in Borosage and Marks, eds., *The CIA File*, 181-213.

[56] CIA Director William Colby testified before the House Armed Services Committee in April 1974 detailing that the CIA had distributed some $3 million in 1964 to ensure Allende's defeat. "Destabilizing Chile," Borosage and Marks in Borosage and Marks, eds., *The CIA File*, 79; Seymour Hersh, "Kissinger Called Chile Strategist," *NYT*, 15 Sep 1974, 1.

Though the bills did not pass, they suggested an extraordinary increase in congressional sensitivity to intelligence abuses.[57]

Then came the proverbial nail in the CIA coffin. En route to the family's annual holiday ski vacation in Vail, Colorado, President Ford opened his Sunday *Times* to find a shocking front-page exposé about the CIA by Seymour Hersh. According to anonymous government insiders, the CIA had "conducted a massive, illegal domestic intelligence operation during the Nixon administration against the antiwar movement and other dissident groups" in violation of the agency's charter. The 1947 National Security Act strictly forbid the agency from any "police, subpoena, law enforcement powers or internal security functions" on American soil. Hersh contended that the agency maintained some 10,000 files on American citizens.[58]

From Vail Ford telephoned CIA Director William Colby, who had known about the story for a few days. Was it true, the president wanted to know? Colby assured him

[57] In his comprehensive study of the relationship between the CIA and Congress, political scientist David Barrett argues that congressional oversight of the CIA has not been consistently passive, but has been historically contingent on a number of factors, including "much publicized intelligence 'failures'" which led to public discontent and increased questioning in Congress about agency performance. Barrett's study covers the agency's first two decades. I agree that congressional oversight has changed over time. But the oversight that elected officials like Mansfield aimed to exert in the 1970s was not based on poor performance. What drove Mansfield and his allies was a prevalent belief that the activities of the agency were incompatible with the tenets of modern democratic government. See Barret, *The CIA and Congress: The Untold Story from Truman to Kennedy*, (Lawrence: University of Kansas Press, 2005), 459-461. See also, Olmstead, *Challenging the Secret Government*, 45-46; Johnson, *A Season of Inquiry*, 10. One legislative achievement of this period was the passage of the Hughes-Ryan amendment to the Foreign Assistance Act. This act increased CIA oversight by the legislative branch. Previously, the CIA had only reported to four congressional committees. The new legislation expanded this requirement to six, including Mansfield's own Senate Foreign Relations Committee, and the House Foreign Affairs Committee. Hughes-Ryan also required the president to brief these committees when covert action was required (generally thought to be within 48 hours).

[58] Seymour Hersh, "Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years," *NYT*, 22 Dec 1974, 1. Seymour Hersh gained international recognition for his investigative reporting in 1969 when he published the story of the My Lai massacre and the Pentagon's cover up during the Vietnam War, which earned him a Pulitzer Prize.

that the agency was not currently involved in any "improper activity." Though some agents had participated in "improper actions" in the past, they were the exception rather than the rule. The director assured Ford that all questionable programs had been terminated. In a briefing to the president, Colby showed Ford the "Family Jewels," a report detailing all CIA illegal activities, many on domestic soil. Colby acknowledged that some agents were "recruited or inserted" into dissident groups in the United States "to establish their credentials to collect foreign intelligence overseas." Any information that these agents collected in the course of their training ("by–product information" as Colby called it) had been passed on to the FBI.[59]

Ford's aides, especially chief of staff Donald Rumsfeld and press secretary Ron Nessen, worried that Hersh's account had the potential to become a second Watergate. The president, they observed, did not seem to appreciate the gravity of the situation. But Ford's aides misread him. Ford had long been an ardent defender of the CIA and its covert and intelligence analysis activities. He had served on the House Intelligence Oversight Subcommittee of the House Appropriations Committee, where he ardently defended the agency and denounced those who tried to "expose" CIA activities. In Ford's experience the agency had always managed to deflect criticism, and Ford did not believe that one *Times* article warranted much concern.[60]

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[59] "Colby Report," William Colby to President, 24 Dec 1974, James E. Connor files 1974-77; box 56, fold: Colby Report; GRFL; Ron Nessen, *It Sure Looks Different from the Inside*, (New York: Playboy Press, 1978), 54-57. The "family jewels" report contains hundreds of pages detailing CIA activities dating from 1959 thought to violate the CIA's charter, the National Security Act of 1947. The whole document is available at the National Security Archives: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB222/index.htm>, (16 November 2008).

[60] Olmsted, *Challenging the Secret Government*, 47-49.

Ford's top advisors did not share the president's confidence in the agency's ability to defend itself before an assertive post-Watergate Congress.[61] At the urging of Deputy Chief of Staff Richard Cheney, the president appointed a blue-ribbon commission on 4 January 1975 to investigate CIA domestic intelligence abuses. Headed by Vice President Nelson Rockefeller, the Commission on CIA Activities within the United States was widely denounced as a not-so-subtle effort to stymie congressional inquiry. The ACLU declared that the commission seemed designed to "avoid a full public review [rather] than to facilitate one." In the wake of Watergate the American public, the media, and Congress were not willing to be duped again. An inside job would not suffice.[62] The executive branch had proven incapable of investigating and regulating itself. If Congress wanted to know what the extent of CIA impropriety had been, it would have to investigate the national security agency itself. The Senate created the Select Committee to Study Governmental Operations with Respect to Intelligence Activities in January of 1975, and the House followed suite a few weeks later.

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[61] What press secretary Ron Nessen took as Ford's confidence in the intelligence agencies to defend themselves was actually his absolute opposition to investigating and publicizing the work of the intelligence agencies. Ford was not an intellectual; he did not ponder the constitutional issues related to the secret activities of the domestic and international security state. In his recollection of the Hersh article and his decision to appoint a Blue Ribbon presidential commission to investigate alleged abuses, Ford denounced the investigations as inherently political (Frank Church was a presidential candidate) and the result of overzealous staff members who pushed for continued investigations! In Ford's mind one did not question those agencies that served to protect the national security—period. See Ford, *A Time to Heal: The Autobiography of Gerald Ford*, (New York: Harper and Row, 1979), 265-267.

[62] John Herbers, "Ford C.I.A. Panel: Departure from Tradition," *NYT* 8 Jan 1975, 25. Ford's critics noted that the president did not appoint anyone to the commission who was known to be a critical of U.S. intelligence operations. Olmsted, *Challenging the Secret Government*, 49-58. Americans were right to be skeptical of the executive branch's ability to police itself. On January 10 the Army announced that had "found" dossiers on political dissenters that were supposed to have been destroyed in 1971 in the wake of Senator Ervin's investigation into domestic spying by the U.S. Army. "Spying Data Retained by Army, Failure to Destroy Files Probed," *WP*, 11 Jan 1975, A2.

As Congress began its intelligence investigations, public advocacy groups focused on making FOIA an effective tool for the public and media to use to challenge secret government. When Congress passed the FOIA revisions in 1974, the national media praised the act but noted that to be effective the media would have to use it. The original FOIA, commented *Post* editors, was "useful to those with the perseverance to keep pushing" for information. But as the Stern case demonstrated, even the most tenacious reporters faced years of litigation and missed deadlines. The new law solved many of these problems, but only civil society would determine its success: "Learning how government business is done is the business of the media, and [FOIA revisions] could help," observed the *Post*.[63]

The Center for National Security Studies pooled resources to jumpstart the effort to make FOIA a practical tool. Teaming up with ACLU attorneys, CNSS staffers created the Project on Freedom of Information and the National Security, a program to educate the American public about their rights as citizens in the context of new transparency laws. The project aimed "to secure the release of information needed for an informed public debate on matters of national defense and foreign policy." Using educational tools, like a published pamphlet explaining how FOIA revisions worked, the project held public meetings in the Northeast corridor to advise scholars, journalists, and interested citizens how to properly request information from the government. Meeting topics included basic information such as where to mail FOIA requests (including the addresses of Department of Defense, State Department, CIA, and NSC are listed) as well as practical information

[63] "Amending the Information Act," *WP*, 5 Oct 1974, A18.

such as who might be expected to pay the attorney fees if the request goes to court (the agency that refused the request must pay, if the court decides in favor of the plaintiff). The project even offered requestors a sample FOIA request letter to use as a template.[64]

The project's training sessions bore fruit, and FOIA requests poured in to federal agencies. In 1973 the FBI received an average of five requests per week. The total number of requests in 1974 was up a bit--447 total requests. Following the FOIA revisions the Bureau received 705 requests in the first three months of 1975. Meeting these requests, Attorney General Edward Levi complained, meant dispersing some 700,000 pages of agency files. This estimate did not include one request that would compel the disclosure of some 3 million pages on the Communist Party. Levi chastised those who complained that FOIA did not go far enough and that the government still maintained too much secrecy.[65]

Indeed, the Department of Justice bore the brunt of the administrative burden created by the FOIA revisions. Attorney General Levi believed that Congress had largely overreacted to the crimes of Watergate with the FOIA revisions. As Levi saw it, power had been a corruptive force in the White House since long before Richard Nixon moved into the White House, and many well-intentioned people in various executive agencies had abused power. Levi believed that Congress had oversimplified the transparency issues, pitting the "people's right to know" against the "President's personal prerogative."

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[64] "The Freedom of Information Act and National Security Information," Project on Freedom of Information and the National Security, Feb 1975, Kenneth A. Lazarus files, 1974-77, box 25, fol. LE 8 Freedom of Information Act (2), GRFL [JF05].

[65] Address by Edward Levi, Attorney General before the Association of the Bar of the City of New York, 28 April 1975, Philip Buchen files, box 24, fold: Justice – Levi, Edward: speeches, GRFL.

The issue, as Levi saw it, was far more complicated. The problem was striking a balance between "a real need for confidentiality and its limitations in the public interest for the protection of the people of our country." The nation's top law enforcement officer did not believe that democracy or the First Amendment offered every citizen the right of access to all government information. Levi worried that the "complete disclosure" compelled by FOIA "would render impossible the effective operation of government." "Some confidentiality is a matter of practical necessity," Levi argued; "Successful democracies," must "achieve an accommodation among competing values."[66]

Levi made the argument, as had other administration officials like William Colby, that all branches of government maintained some level of secrecy in conducting their affairs. The Supreme Court justices confer in private. Some aspects of executive branch decision-making could not be effectively framed in the context of open public debate. Levi's defense of secrecy was the basis for claims of executive privilege that had been used for decades: "much as we are used to regarding government as an automaton—a faceless, mechanical creature—government is composed of human beings acting in concert, and much of its effectiveness depends upon the candor, courage and compassion of those individual citizens who compose it." [67]

Under Levi's leadership the Department of Justice formulated a legal defense to support its claim that some executive agencies would be exempt from the terms of the

[66] Address by Edward Levi, Attorney General before the Association of the Bar of the City of New York, 28 April 1975, Philip Buchen files, box 24, fold: Justice – Levi, Edward: speeches, GRFL.

[67] Address by Edward Levi, Attorney General before the Association of the Bar of the City of New York, 28 April 1975, Philip Buchen files, box 24, fold: Justice – Levi, Edward: speeches, GRFL.

FOIA revisions. Assistant Attorney General Antonin Scalia (later nominated to the Supreme Court by President Ronald Reagan) explained to the White House counsel's office, "generally speaking the components of the White House Office, in the traditional or budgetary sense, are not 'agencies.'" The White House was most eager to exempt the foreign and domestic policy bodies that reported to the president—the NSC and Domestic Council—from FOIA. Since the new law did not clearly define which executive level agencies were subject to its terms, Scalia recommended that the "concept of a separate 'White House Office' should be fostered and strengthened in as many ways as possible," even down to organizational charts that indicate the existence of such a unit separate and apart from the rest of the Executive Office. He concluded, "Judicial acceptance of such a functional division can greatly simplify our FIA problems with respect to the Executive Office."[68]

The ACLU found the administration's wait-and-see approach to be entirely inadequate. The organization demanded that the White House contact all Americans who have been targets of national surveillance programs "now admitted to be unconstitutional, illegal, or, at the least, violations of the charters of the intelligence organizations." Americans should be reminded, the organizations urged, that they can request their dossiers through FOIA and privacy laws and that "possible violation of their constitutional rights might entitle them to civil remedies in the federal court system." The ACLU prodded the administration to contact all victims of mail opening programs

[68] Memorandum for Buchen from Antonin Scalia, Assistant Attorney General, "Re: Applicability of the Freedom of Information Act to the White House Office," 26 Feb 1975, Philip Buchen files, box 17, fol Freedom of Information-General (2), GRFL.

conducted by the CIA and the FBI; the NSA monitoring of international communications; burglaries committed in the course of CHAOS, COINTELPRO programs and IRS special services staff; and warrantless surveillance.[69]

The White House had no intention of soliciting FOIA requests. It had already determined it would stand firm against the demands of the congressional intelligence committee investigations chaired by Frank Church in the Senate and Otis Pike in the House.[70] Only a few months into the so-called "Year of Intelligence," the Rockefeller Commission released its report on the CIA's domestic programs. The report detailed twenty-eight years of activities by CIA, some of which, the commission concluded, were "plainly unlawful and constituted improper invasions upon the rights of Americans." Some of the most controversial of the activities detailed including letter-opening programs; giving narcotics to unsuspecting people to test the effectiveness for intelligence purposes; Operation CHAOS, a program in the late 1960s and early 1970s that gathered intelligence on law-abiding citizens exercising their First Amendment right

[69] Aryeh Neier, Executive Director, ACLU, Robert Borosage, Director, CNSS, David Cohen, President, Common Cause, Stephen Schlossberg, General Counsel, United Automobile Workers, Leon Shull, National Director Americans for Democratic Action, Ray Calamaro, Executive Director, Committee for Public Justice, Richard Barnet and Marcus Raskin, Co-Directors, Institute for Policy Studies, Morton Halperin, Director, Project on National Security and Civil Liberties to Honorable Gerald R. Ford, Philip Buchen files 1974-77, box 17, fol: Freedom of Information – Requests (3), GRFL.

[70] Majority Leader Mike Mansfield wanted Philip Hart to chair the committee but the Senator's failing health forced him to decline the offer. Frank Church let his own interest be known in no uncertain terms and when Hart declined the offer Mansfield extended it to Church. Loch, *Season of Inquiry*, 13-15; Olmsted, *Challenging the Secret Government*, 49-58. Choosing a chairman in the House proved very tricky. House leadership appointed Lucien Nedzi, a proponent of greater intelligence oversight who had chaired the House Armed Services committee since 1971. But when Nedzi blocked efforts by more radical members of the committee to publicize CIA scandals and ban covert actions, they called for his resignation. Ultimately, Nedzi resigned. The investigations had always had less support in the House, and the committee languished for months as the House leadership tried to work out a compromise. Finally, it settled on the reconstitution of the committee with new membership under chairman Otis Pike. See Olmsted, *Challenging the Secret Government*, 112-117.

to protest; and wiretapping, breaking and entering, and tax record inspection.[71] The press praised the commission's work, citing the candor and thoroughness of the report.[72]

Over the next five months, congressional hearings expanded on the Rockefeller report, revealing that American intelligence agencies had consistently operated outside the bounds of democratic checks and balances since the early years of the Cold War. The CIA had participated in covert operations in countries around the world. It had directly interfered in internal politics of foreign countries to ensure the ascendancy of leaders more suitable to American interests. The agency had concocted elaborate (and occasionally ridiculous) schemes to assassinate foreign leaders like Cuban President Fidel Castro. Senate staff decided early on that "only dramatic facts lead to changes." By highlighting intelligence abuses, it was thought, Congress could "achieve fundamental, statutory improvements." This approach, as one staffer remembered it, was "less historical than abuse oriented." Committee chair Senator Frank Church made the most of

[71] Rockefeller promised to deliver a comprehensive report to the public. But in the end, the Commission decided to withhold the section about a CIA program to assassinate foreign leaders. President Ford delayed publication until he could determine if it was fit for public consumption. To a cynical public, the president seemed to have something to hide. The public and the media roundly denounced the delay, forcing the president to publish the report (though without the section on assassinations). Two weeks later, the Commission on the Organization of the Government for the Conduct of Foreign Policy released its report. Known as the Murphy Commission for its chairperson Robert Murphy, the commission studied many activities related to the conduct of foreign policy, including the intelligence agencies. It identified a central flaw within the intelligence community: agencies with different missions and lines of command contributed to the overzealous collection of intelligence, an over-reliance on technology not because it was useful, but because it was permissible, and operations that went outside the bounds of the Constitution. The final report suggested that there was room for improvement in the intelligence communities, but noted agencies' opposition to it. Mark Lowenthal, "Intelligence Community: Reform and Reorganization," Issue Brief IB76039, The Library of Congress Congressional Research Service, Major Issues System, updated, 12/10/1980; 2 (copy in author's possession).

[72] Cited in Nessen, *It Sure Looks Different*, 64-65; Olmsted, *Challenging the Secret Government*, 83-85; Commission on CIA Activities within the United States, *Report to the President by the Commission on CIA Activities within the United States, June 1975*, (Washington, D.C.: GPO, 1975).

these sensational stories to achieve maximum media coverage.[73] Lurid accounts of CIA operations abroad at once captivated and revolted the American public. As one scholar observed, the focus on the sensational may have diverted valuable time and resources from a "more systemic analyses of the intelligence community."[74]

But Americans were fascinated by congressional hearings too because they revealed stories of previously unknown intelligence abuses. The National Security Agency operated completely outside of congressional oversight for decades. With the full cooperation of telecommunication companies, the agency had monitored international telegrams since 1947. The agency terminated Operation SHAMROCK in 1975 probably to avoid its discovery by the Church committee. Under Operation MINARET, begun in the late 1960s, the agency compiled a watchlist of dissenters, deserters, and anyone participating in civil disturbances, including notable individuals like Joan Baez, Dr. Martin Luther King, Jr., and Jane Fonda, which it distributed to the Army and other government agencies.[75]

For all the new abuses uncovered, the hearings and investigations also filled in details about abuses that had been publicized years earlier by radicals, whistleblowers,

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[73] Johnson, *A Season of Inquiry*, 34, 42.

[74] To be fair, some staffers proposed making the Church committee's first priority "to document and analyze the legislative and organizational history and practice of the CIA." The committee did include this information in its final report, but it did focus its public hearings on the more sensational, "newsworthy" accounts. Olmsted, *Challenging the Secret Government*, 85; Johnson, *A Season of Inquiry*, 33-35, 54-56.

[75] James Bamford, *Body of Secrets: Anatomy of the Ultra-Secret National Security Agency*, (New York: Doubleday, 2001), 435-440; 428-429. Famously, the NSA refused to cooperate with Church committee investigators until the *Times* broke a story alleging the NSA eavesdropped on the electronic conversations of American citizens. The agency decided it needed to respond to the charges and offered to meet with Church committee investigators. See Bamford, *Body of Secrets*,435.

and neo-muckrakers. The FBI's COINTELPRO programs had first been reported by the *Washington Post* in 1971 after the burglary by radical activists at the Media, Pennsylvania field office.[76] FBI Director J. Edgar Hoover's program to discredit Dr. Martin Luther King, Jr., had been revealed in the late 1960s, reported in the *New York Times*, and covered in detail at a conference sponsored by the Committee for Public Justice in 1971.[77] The hearings offered proof that claims made and documented by radicals, dissidents, scholars, and neo-muckrakers since the late 1960s were valid.[78]

As 1975 came to a close, congressional committees wrapped up their investigations and began the long and arduous task of writing final reports and recommendations. Staffers at the Center for National Security Studies worried that, as with past investigations, the American public and the mass media's interest in the topic would decline precipitously in the aftermath of the hearings. Decades of abuse spoke to the fundamental problems of the state—power and secrecy had proven very good friends to Republican and Democratic presidents alike. The administration was likely to propose in-house reform. If Congress failed to act quickly with legislation, the moment for legislation would likely pass, and the agencies would maintain the status quo.

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[76] See chapter three.

[77] "F.B.I. Says Kennedy Approved Wiretap on Dr. King's Phone," 19 Jun 1969, 25; on the Committee for Public Justice, see chapter three, and also Gillers and Watters, eds., *Investigating the FBI*.

[78] There were some exceptions. Loch Johnson, one of the investigators for the Church committee, later recalled that some of the early "whistleblowers" to intelligence abuses liked to show off. One man contacted the committee, insisting he had information about the Army's domestic intelligence program. He convinced a committee staffer to meet him in a distant locale. The staffer was very disappointed to discover, when he arrived for the meeting, that the man had no new information to provide beyond what was part of the public record from the Ervin hearings (detailed in chapter three). The man had called the staffer out in order to show off to his golfing buddies and that he was a celebrity who warranted a visit by a Church committee staffer. See Johnson, *Season of Inquiry*, 33.

CNSS endeavored to maintain momentum for legislative reform with a conference and publications to promote public debate. Determined to go beyond the media sound bytes of "rogue elephants" and exploding cigars, the organization hoped to spur conversations about "the conflicts that are inherent in trying to maintain both a democratic government and powerful secret intelligence agencies." Conference attendees debated methods for preventing further abuses by the national intelligence agencies in early November 1975.[79] CNSS intended the conference to serve as a forum for legislating intelligence reform. Panelists were invited to answer questions to that end: should the United States retain a bureaucracy for covert action? What guidelines should be placed upon the CIA in the United States? What is the role of domestic intelligence? What is the proper mix of legislation and executive directives for reforming the intelligence agencies? What can legislative oversight accomplish? These were the fundamental questions that formed the basis for discussion, and supporters and critics of the intelligence agencies were invited to propose a statutory framework for national security policy. The event proceeded on the basic assumption that "the system of secrecy which surrounds intelligence agencies has been used to protect abuses of power and illegal actions as effectively and with as much conviction as it protects the small amount of information which is actually vital to the national security."[80]

[79] Christine M. Marwick, "Controlling the Intelligence Agencies: A Report on the Conference Held November 3 and 4, 1975," *First Principles*, Dec 1975, 3. CNSS co-sponsored the event with the ACLU Foundation, Americans for Democratic Action, the Committee for Public Justice, Common Cause, the Institute for Policy Studies, and the United Automobile Workers of America.

[80] Ibid.

For some supporters that assumption was inherently false, and it became clear early on that national security reform remained a highly contentious concept. Critics and supporters of the U.S. intelligence agencies were often far apart in their approaches to reform. The panel exploring the role of domestic intelligence was typical. Former Attorney General Ramsey Clark believed that reform legislation must first aim to protect constitutional rights of American citizens. Clark cautioned that past legislation to control electronic surveillance—the Omnibus Crime Control Act of 1968—had not been successful. No judge had denied a government application for a wiretap warrant. New legislation, Clark urged, must outline permissible investigative procedures. Clark proposed establishing a review board, comprised of members of traditionally targeted communities, to review cases where domestic intelligence practices are contested. Mary Lawton, the Deputy Assistant Attorney General and Chairperson of the Justice Department Task Force on the FBI, fervently disagreed with Clark's recommendations. She cautioned the nation against overreacting to past mistakes by outlawing the use of legitimate procedures to protect national security. Any legislation, according to Lawton, must first protect the needs of the domestic intelligence agencies.[81]

Most representatives of the intelligence agencies, like former CIA general counsel Lawrence Houston, expressed their satisfaction with the status quo. They fell back on a frequently used defense that the past was the past, the agencies had changed, and that further inquiry or reform would hinder the ability of national security agents and

[81] "What is the Role of Domestic Intelligence," *First Principles: National Security and Civil Liberties*, Dec 1975, 9-10. Clark had played a central role in opposing Title III of the Omnibus Crime Control Act in 1968 because he feared that agencies were likely to abuse their power to wiretap without a warrant. See chapter one.

institutions to do their jobs. The so-called "abuses of the intelligence agencies," Houston observed, were once seen as justifiable actions in the context of the times. The cultural climate of the nation had changed, and Houston believed that agencies would respond effectively with some in-house cleaning. In congressional testimony, FBI officials had similarly denied the culpability of agencies and officials in promulgating illegal programs. During the course of Church Committee investigations, William Sullivan, director of the FBI's Intelligence Division for many years declared, "Never once did I hear anybody, including myself, raise the question: 'Is this course of action which we have agreed upon lawful, is it legal, is it ethical or moral? We never gave any thought to this line of reasoning, because we were just naturally pragmatists." One FBI official confessed that he never heard anyone voice concern about the constitutionality or legality of the COINTELPRO programs.[82]

The chairman of the Church Committee's Domestic Intelligence Task Force, Senator Walter Mondale (D-MN), listened incredulously to these statements. From the lowest level agents to the top of the intelligence hierarchy, those in the intelligence field had systematically ignored the Constitution and violated the civil liberties of the American people. In some cases, the agencies themselves had shaped public opinion to justify and legitimize misdeeds.[83] Intelligence officials seemed to suggest that

[82] Walter Mondale, Dennison College Foreign Policy Symposium, 3 Oct 1975, Senatorial Files, speech text files, box 7, fol: Dennison College, WFM papers, MHS. Senator Mondale chaired the Church committee's Domestic Intelligence Task Force.

[83] On the FBI's public relation efforts, see Richard Gid Powers, *G-Men: Hoover's FBI in American Popular Culture*, (Carbondale: Southern Illinois University Press, 1983); on the CIA, see Hugh Wilford, *The Mighty Wurlitzer: How the CIA Played America*, (Cambridge: Harvard University Press, 2008).

unconstitutional programs represented the will of the people. Mondale warned: "When popular opinion brands a group un-American and subversive merely because of its political views, all too often the FBI has responded to public expectations." As he knew only too well, Congress did not have the political will to fight popular opinion. Congress had allowed these programs to develop without oversight because elected officials had only a limited interest in protecting constitutional rights. They much more readily responded to voter fears. Mondale called for charter legislation to protect intelligence agencies from "political pressures and hysteria."[84]

In 1973 when CIA chief James Schlesinger asked employees of the CIA to apprise him of programs that might be illegal or in violation of the agency's charter, he received hundreds of leads. Schlesinger compiled these programs in a report known as the "the Family Jewels," evidence that agency staff understood that they sometimes operated outside legal channels and recognized that some agency programs were, if not unconstitutional, certainly questionable. Despite overwhelming evidence that agencies had conceived of and carried out programs of questionable constitutionality for decades, these supporters continued to caution against legislative overreach. As their appearance at the CNSS conference suggested, supporters of the intelligence agencies would fight to maintain the autonomy and extra-legality of national security institutions.

Morton Halperin believed that a well-informed public would pressure their elected officials to reform the national security state. He wanted to flood the public domain with persuasive information that would catalyze a latent public movement for

[84] "Statement of Walter Mondale, Wednesday, November 19, 1975, Before the Senate Select Committee Hearings on the FBI," box 3, fol. CIA-FBI groups, 6; MHS.

reform. Relying on evidence gathered from the public record, including records and documents from court proceedings, newspapers, and FOIA requests, the CNSS published a short report (185 pages including bibliography) in late 1975 as a "background and framework for public understanding of how our intelligence agencies have operated beyond the law and the Constitution and contributes to the debate about the need for fundamental reform of the intelligence agencies." The report had none of the political considerations or limitations that Church and Pike congressional committees faced in compiling their final reports.[85] Much of this information had been part of the public domain since the Ervin Committee hearings into Army surveillance practices in 1971.[86]

In the mid-seventies, on the issue of national security reform, organizations like the ACLU and CNSS played a central role both in working with and pressuring congressional investigators. These organizations had the resources, staff, and professional skills to make informed contributions to the national debate. The final battle for reform would be waged on the floor of the House and Senate. But public debates, such as the CNSS conference, offered nonpartisan forums where complex issues could be debated and dissenting voices heard. In these subtle ways, public interest groups, working alongside congressional investigators, provided elected officials with substantive resources and information needed for legislative reform. They also worked to keep public

[85] A case in point: The Ford administration tried to suppress the Church committee's assassination report. The Church committee members seemed willing to allow Ford to decide on this issue and Church threatened to resign. When the committee turned the issue over to the Senate to decide, the august body seemed reticent to approve the publication, even as they were not committed to blocking it. This was largely due to political considerations. See Olmsted, *Challenging the Secret Government*, 105-106.

[86] Jerry J. Berman and Morton H. Halperin, eds., *The Abuses of the Intelligence Agencies*, A Report by the Center for National Security Studies, (Washington, D.C.: The Center for National Security Studies, 1975), preface.

interest in policy issues alive. Scholarly works offer detailed accounts of the "Year of Intelligence" from the perspective of congressional committee insiders and the media. However, these accounts overlook the significant contributions to public policy development made by public interest groups in the late twentieth century.[87]

The work of organizations like the Center for National Security Studies and the ACLU operated on many levels, and contributed to the development of capstone legislative reforms that will be examined in detail in chapter six. The committee reports spawned dozens of civil lawsuits for First Amendment violations, many of which were litigated by ACLU attorneys. These initiatives offer a more complex picture of policy reform than examinations of congressional hearings alone would allow.

The ACLU's carefully cultivated policy network had become a powerful force on Capitol Hill by the mid-1970s. National security reform would be one of the centerpieces of the 1976 presidential contest. Public interest groups demanded that the lessons of the past be remembered when institutionalizing a new national security policy. From 1976-1978 reformers institutionalized the final pieces of this new policy regime, the establishment of permanent congressional oversight committees and the Foreign Intelligence Surveillance Act.

[87] Many excellent, thorough accounts chronicle these investigations. See especially Loch Johnson, *A Season of Inquiry;* and Kathryn S. Olmsted, *Challenging the Secret Government.*

CHAPTER 6
UNDER THE RULE OF LAW: CONGRESSIONAL OVERSIGHT AND THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

The room buzzed with excitement. After years of suspecting that state and local police infiltrated groups and disrupted peaceful meetings, reformers finally had the evidence to support their suspicions. The Information Digest, *a super secret intelligence newsletter distributed nationally to an underground red squad network, offered hard proof that Michigan state and local police had infiltrated anti-war, civil rights, and New Left groups for years, spying on individuals and organizations and then distributing their "intelligence" through a national network.*

The newly formed Michigan Coalition to End Government Spying got the word out through an emerging network of concerned citizens that these files would now be available through Freedom of Information Act requests. The news sparked a new FOIA movement. Former participants of the movement met regularly, organizing seminars to discuss political surveillance and protesting to local officials about these extra-legal activities. Using the Freedom of Information Act, they read their own files. At monthly meetings they all agreed: never again. [1]

[1] This account is drawn from newsletters, newspaper articles, and various meetings minutes found in the Michigan Coalition to End Government Spying vertical file, Michigan State University Special Collections, American Radicalism Vertical File. See especially Joe Scales, "Secret Newsletter Found in State Files," *The State News: Michigan University's Independent Voice*, 14 Feb 1977, 1; and "Political Spying Topic of Seminar," *The Detroit News*, 9 Jun 1977, 8B.

In 1976 the Center for National Security Studies insisted that the programs perpetrated on citizens in the name of national security were "not isolated incidents of zealous agents exceeding their authority in the field," but instead "ongoing, bureaucratic programs, often continuing over decades, and ordered and approved at the highest level of the executive branch of government." Former NSC staffer Morton Halperin declared these extra-legal programs the "deformed offspring of the modern presidency, an expression of the powers claimed by presidents in the area of national security."[2] ACLU Executive Director Aryeh Neier predicted that revelations of gross constitutional violations by intelligence agencies could mark "the beginning of the end for the national security state." He predicted, "Now that Americans are informed of the shabby things done in the name of national security, perhaps they will put an end to them. Perhaps."[3]

Neier's healthy skepticism about the prospects of broad-based domestic security reform reflected the harsh economic reality of the nation's bicentennial year. Salacious details of extra-illegal acts had riveted the nation during the year of intelligence. But as the committees turned to the quiet work of report writing, Americans focused attention on their economic woes. A *Times* front-page feature about the state of the union at the beginning of its third century offered grim prognostics for the year.[4]

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[2] Morton Halperin, Jerry Berman, Robert Borosage, Christine Marwick, *The Lawless State: The Crimes of the U.S. Intelligence Agencies*, A report by the Center for National Security Studies, (New York: Penguin Books, 1976), 4.

[3] Aryeh Neier, "Annual Report, 1975," Annual report, ACLUP box 1881, fold 6: 1975, PPP, DRBSC, PUL.

[4] "Charting the Course of the Third Century," *NYT*, 4 Jan 1976, NES27. Of course, the economic decline was relative. Americans still enjoyed one of the highest standards of living in the world. See David Farber, *Taken Hostage: The Iran Hostage Crisis and America's First Encounter with Radical Islam*, (Princeton: Princeton University Press, 2006), 18-22.

Worried that the sinking economy would doom the movement for intelligence reform by stalling legislative momentum, ACLU and CNSS staff ratcheted up their rhetoric and redoubled their efforts to continue public debate on national security policy reform. They developed new capacities to reach the public and its leaders with publications and a series of conferences.[5] Neier refocused the ACLU's efforts, pressuring congressional allies to pass legislation that would restrict warrantless surveillance and reform national intelligence agencies. He believed that the publication of the Pike and Church committees' final reports would further catalyze a legislative commitment to reining in the state.

The movement for domestic security reform had drawn upon bipartisan support for years. Liberals and conservatives overwhelmingly supported greater congressional oversight of intelligence agencies. As the Republican Policy Committee explained in its statement of support for greater oversight, what divided the parties was "not *whether* Congress should intensify its until now somewhat relaxed oversight of government intelligence, but rather *how* this task should be accomplished."[6] Democrats and

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[5] The Center for National Security Studies launched a monthly publication, *First Principles,* in September 1975. With a newsletter style format the publication promised to follow "the many turns and twists taken in the conflict between expansive claims of national security and civil liberties. We hope to contribute to a return to First Principles—the necessary and vital right of a full and informed public participation in government—by increasing public awareness of continuing threats and of opportunities to improve the situation." The newsletter style publication (sixteen pages total) included information about a host of national security issues including CNSS initiatives (conferences), pending court cases related to national security, new publications, and opinion. See the first issue, *First Principles: National Security and Civil Liberties*, (Sept. 1975), vol. 1, no. 1.

[6] "Congressional Oversight of Intelligence Agencies," Statement #3, Republican Policy Committee of the House of Representatives, 17 Feb 1975, Congressional Relations Office, Box 13, fol Intelligence – General, GRFL.

Republicans split along party lines when it came to the question of how statutory reform of national intelligence agencies ought to be implemented. Liberals called for statutes restricting domestic surveillance and supported agency charters to define carefully the legal parameters of intelligence activities and programs. Ardent civil libertarians called for the total abolishment of intelligence agencies. They argued that covert agencies were incompatible with democratic practice. Republicans pointed to the failures of the congressional committees to prevent leaks and suggested that Congress couldn't be trusted with the oversight of the nation's secrets or security.

Both Republicans and Democrats could agree with a *Los Angeles Times'* assessment that "The United States has to have a Central Intelligence Agency." The challenge lay in constructing a statutory framework that would allow institutions like the CIA to function within the parameters of a democratic, constitutional government. Clearly, wrote the *LA Times*, the "intelligence community is too secret" and needs to be "brought under closer control by both the President and Congress."[7]

From 1976-1978 activists labored arduously to realize legislative reform. Political opportunities they had so successfully exploited in the past were few and far between. The drama of intelligence activities was fading, and the media was losing interest. Economic stories of hardship, corporations shedding jobs, and spiraling inflation stole the headlines. But twin shocks of a CIA agent's assassination in Athens and "leaks" from the House intelligence inquiry gave ammunition to a small coterie who opposed domestic

[7] "Thinking about the CIA," *LA Times*, 10 Aug 1975, part VI, 2.

security reform.[8] In his state of the union address on January 19, 1976, President Ford blamed Congress for "crippling" American intelligence agencies and encouraging adversaries "to attempt new adventures while our own ability to monitor events and to influence events short of military action is undermined."[9] The president's rhetoric in a presidential election year spoke to the increasingly partisan nature of the debate over intelligence reform. All these factors hindered the progress of the movement for security reform.

These political challenges frustrated the work of a loose coalition of reformers. In 1976 their policy agenda included legislation to establish congressional intelligence oversight committees, a statute to restrict the executive's domestic wiretapping and surveillance authority, and charters for the intelligence agencies. Reformers realized two of these legislative goals by the close of 95th Congress in 1978. The creation of permanent intelligence oversight committees in the House and Senate (1976-1977) and the 1978 Foreign Intelligence Surveillance Act codified a new national security regime.

[8] In the last months of 1975 Congress worked to wrap up the investigations and begin the arduous task of compiling reports and making recommendations for policy reform. In December 1975 CIA agent Richard Welch was shot and killed in Athens, Greece outside his home as he returned from a party. Welch had not been particularly deliberate about concealing his identity—he inhabited the same home as his predecessors even after being warned to find a new residence. But these details were lost in the madness of the media hype. The tragedy of the event prompted Congress to generate legislation to criminalize the disclosure of the names of intelligence operatives. The *Post* eulogized Welch as an American hero, and claimed his death was the result of critics who were out to permanently damage the agency. Perhaps the *Post* was merely trying to deflect criticism that the media was ultimately to blame for Welch's death. Neomuckraking media stories, like Hersh's exposé, these arguments went, contributed to the congressional investigations into the agencies and the exposure of the CIA's dirty laundry.

[9] Quote from state of the union address, 1976, cited in "President Ford '76 Factbook," 8 Sep 1976, Richard Cheney files, 1974-1977, box 18, fol President Ford '76 Factbook, GRFL.

The founders might have appreciated the irony. Amid national and local celebrations commemorating two hundred years of democratic government, the legislative and executive branches remained deadlocked in a constitutional battle. The congressional inquiry into the nation's intelligence agencies generated endless clashes between the White House and Congress over access to classified information. In the shadow of the assassination of CIA agent Richard Welch in Athens in December 1975--which critics blamed on the proliferation of national security leaks--the committees hunkered down to draft final reports and write policy recommendations before their mandates expired in February 1976. The politics of a presidential election year further undermined the legitimacy of the final reports. Rumors circulated that Senator Church, eager to launch his presidential bid, pushed staffers to conclude the investigation and publish the report. The House faced other political challenges. Demoralized by continuous squabbling with the executive branch, the House Intelligence committee struggled to protect its credibility by issuing a report that didn't pull any punches. Over White House objections the committee voted to publish the report in its entirety, including material the CIA claimed threatened national security.[10]

As the House readied the report for printing, *Times* journalist John Crewdson, who had seen a copy, published several articles about it. The White House condemned the committee for "leaking" the report to the *Times*, claiming it violated prior security agreements with the administration. Ford's press secretary declared that the episode

[10] As a sign of the further deterioration of relations between the executive branch and the House committee, the CIA protested that portions of the report contained classified information. Publication of such material, it argued, violated prior White House agreements. Taylor Branch, "The Trial of the C.I.A.," *NYT*, 12 Sept 1976, 209; Olmsted, *Challenging the Secret Government*, 157-158.

underscored the House's cavalier approach to protecting national security and state secrets. The scandal further weakened support for Pike's scandal-ridden committee on Capitol Hill, and the House voted 2-to-1 not to release the report.[11]

But for an extraordinary course of events, the Pike report might have been permanently relegated to a dusty drawer in the chairman's office. Crewdson wasn't the only journalist with access to the unpublished report; someone leaked a copy to CBS investigative journalist Daniel Schorr. Schorr had earned a reputation for fearlessly challenging authority (much to the chagrin of his employers at CBS news). When he learned of the House decision to suppress the report, realizing he was the only journalist who possessed a copy of it, he concluded that he would not "be the sole person responsible for suppressing it." He offered CBS news the scoop, but his superiors seemed reluctant. Schorr wanted to move fast. Through some connections he located a publisher, the New York *Village Voice*. He decided to keep his own involvement secret and arranged for publication proceeds to go directly to the First Amendment advocacy group, the Reporters' Committee for Freedom of the Press.[12]

Journalists quickly traced the *Village Voice's* source back to Schorr. The backlash was immediate, and the condemnation from Schorr's colleagues was surprisingly vitriolic. The *Times* accused him of "selling secrets," performing an "offensive element

[11] John Crewdson, "Secrecy is Cited: A Year's Investigation Uncovered a Number of Irregularities," *NYT*, 49. Crewdson had briefly been allowed access to a copy of the report, but Schorr was the only journalist who possessed a copy. Pike needed an extension on the original resolution that created the select committee in order to have time to publish the final report. The committee voted for an extension, but only with presidential approval of the report. Schorr, *Clearing the Air*, 191-194; Olmsted, *Challenging the Secret Government*, 158-161.

[12] Schorr, *Clearing the Air*, 179-207.

of commercialization wrapped in a mantle of high constitutional purpose," and "laundering" proceeds through the Reporters' Committee. Schorr charged the *Times* with hypocrisy, noting it had profited handsomely from its decision to publish the "Pentagon Papers." What the paper objected to, Schorr argued, was that he had not sold "secrets in the customary, or *Times* way."[13]

Schorr's tussle with the *Times* suggested a shifting ethos among the nation's top editorial staffs. CBS, exhibiting none of the journalistic bravery that it demonstrated when it weathered the relentless attacks of Vice President Spiro Agnew for its "Selling the Pentagon" documentary, quietly secured Schorr's resignation.[14] Only a few years before the *Times* and CBS news had adamantly defended the public's right to know, challenging elected officials and powerful institutions with investigative reports of the highest caliber.[15]

The administration pounced on the "scandal," eager, as Schorr later recalled, to "shift the issue from *what* had gotten out to *how* it had gotten out." The House Ethics Committee launched a seven-month inquiry into the leak. Schorr was subpoenaed and

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[13] Schorr, *Clearing the Air*, 205; "Congress and Mr. Schorr," *NYT*, 22 Feb 1976, E14; "Selling Secrets," *NYT*, 15 Feb 1976, E12; "Overkill on the Hill," *NYT*, 25 Feb 1976, 36; Schorr, "Letters to the Editor," *NYT*, 22 Feb 1976, E12.

[14] See chapter three.

[15] "Congress and Mr. Schorr," *NYT*, 22 Feb 1976, E14; Olmsted, *Challenging the Secret Government*, 161-164; Schorr, *Clearing the Air*, 217-222. Three national reporters, Anthony Lewis, William Safire, and Tom Wicker of the *Times*, defended Schorr in print. Lewis wrote, "Whatever faults there may have been in the handling of the business, Mr. Schorr violated no visible law, disclosed nothing that in essence is not common in Washington. That he should be pilloried while nothing is done about C.I.A. and F.B.I. officials who grossly abused their power and told flagrant lies indicates the present mood in Washington." See Lewis, "The Politics of Secrecy," *NYT*, 26 Feb 1976, 30; Safire, "Bill Paley's Big Secret," *NYT*, 1 Mar 1976, 18; Wicker, "Defending Dan Schorr," *NYT*, 24 Feb 1976, 35.

pressed to identify his source.[16] With the media feeding like sharks on one of their own, they paid scant attention to the substance of the Pike report.

The Center for National Security Studies, frustrated that the Pike committee recommendations were being swamped by a process story, carefully summarized the more than 300 page report for a general audience. The Pike committee report presented a painstakingly detailed account of the CIA's many intelligence blunders. It chastised the agency for "repeated intelligence failures," citing as evidence its inability to predict the 1968 Tet Offensive, the Soviet invasion of Czechoslovakia in 1968, and the 1973 Yom Kippur war. For these failures and other transgressions, most especially the illegal spying on millions of Americans, the Pike report offered a laundry list of recommendations. These ranged from radical demands for total budget disclosure of intelligence agencies to congressional notification of covert activities to the abolishment of assassinations and paramilitary activities to presidential reports on all covert operations in writing to Congress. The Pike committee also recommended limiting the FBI director's term to eight years (no more J. Edgar Hoovers) and replacing the bureau's Internal Security Branch with a new division limited strictly to observing the activities of foreign-directed groups and persons. The final report called for some limitations on covert operations, though it stopped short of recommending charter legislation. Finally, the report recommended creating a permanent intelligence oversight committee with the power to declassify intelligence by a majority vote, transferring the NSA to civilian control, and

[16] Schorr offers details of this episode in his memoirs. See *Clearing the Air*, 237-258.

establishing statutory definitions to limit the agency's interception of overseas conversations.[17]

The Schorr scandal lent legitimacy to the less sensational Church committee report. In spite of its more subdued tone, the Senate report issued in May 1976 offered further evidence that intelligence agencies had acted for decades outside the law and in violation of constitutionally protected rights. The committee called for charters outlining the appropriate functions of the agencies and the establishment of a mechanism for controlling and monitoring these activities.[18]

The Welch assassination and the Schorr scandal created political opportunity for opponents of reform to appeal to the public in defense of intelligence agencies. President Ford was an ardent defender of the intelligence community with no interest in legislative reform. He proposed legislation to criminalize leaks and punish anyone with "authorized access to intelligence secrets" who publicly disclosed that information in order to protect "intelligence sources and methods." To stave off legislative reforms that might severely curtail the power of the executive branch, the president issued an executive order. The order legitimized most extra-legal intelligence activities including domestic surveillance of persons "reasonably believed to be acting on behalf of a foreign power or engaging in

[17] Christine M. Marwick, "Reforming the Intelligence Agencies: Proposals of the American Civil Liberties Union, the Ford Administration, the House Select Committee on Intelligence," *FP*, Mar 1976, v. 1, no. 7; 8-9, 12-13; Olmsted, *Challenging the Secret Government*, 163.

[18] Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Intelligence Activities and the Rights of Americans*, 94th Cong., 2d sess., (Washington: GPO, 1976). Taylor Branch, former editor of the *Washington Monthly*, was curious about the tone of the report. In a fine example of investigative journalism, Branch wrote an insightful account of the CIA's successful effort to "outfox Congressional investigators" and ultimately avoid reform of its most precious covert operations. See Branch, "The Trial of the C.I.A.," *NYT*, 12 Sep 1976, 209.

international terrorist or narcotics activities."[19] The Ford EO allowed the FBI broad counterintelligence authority in the United States, especially regarding "subversive" people or organizations. It also expanded executive powers to surveil and wiretap with the attorney general's approval—in other words, the status quo. Intelligence collected and retained by the FBI could be disseminated to other intelligence agencies. The order allowed the National Security Agency to continue its policy of unrestricted eavesdropping on overseas communications. Ford did pursue ostensible reorganization of the intelligence community by creating an intelligence oversight board; enlarging and renaming the 40 Committee (now called the Operations Advisory Group); and developing a National Security Council committee, chaired by the CIA Director George H. W. Bush, responsible for the central coordination of national intelligence. As oversight, the president unrealistically proposed that employees relay "questionable activities" to "appropriate authorities."[20]

Critics dismissed the president's order as window dressing, a poorly concealed attempt to protect executive prerogative in national security matters, "rather than spreading that responsibility among a number of institutions" including congressional oversight committees. CNSS charged that Ford legitimized "virtually everything which

[19] Ford issued Executive Order 11905 in February; see "Text of Ford Plan on Intelligence Units and Excerpts From His Executive Order," *NYT*, 19 Feb 1976, 30. On the political use of executive orders, see Christopher J. Deering and Forrest Maltzman, "The Politics of Executive Orders: Legislative Constraints on Presidential Power," *Political Research Quarterly*, vol. 52, no. 4 (Dec 1999), 767-783; and Kenneth R. Mayer, "Executive Orders and Presidential Power," *The Journal of Politics*, vol. 61, no. 2, (May, 1999), 445-466. The best overview of congressional efforts to oversee the intelligence community in the 1970s and beyond is Frank Smist, Jr.'s *Congress Oversees the United States Intelligence Community, 1947-1989*, (Knoxville: University of Tennessee Pres, 1990).

[20] "President Gerald R. Ford's Executive Order 11905: United States Foreign Intelligence Activities," 18 Feb 1976, <http://www.ford.utexas.edu/LIBRARY/speeches/760110e.htm> 19 Dec 2008; Johnson, *Season of Inquiry*, 195.

the intelligence investigations had meant to repudiate through disclosure," while parading the new rules as "tough new restrictions." The organization accused the president of "reshuffling" institutions rather than proposing real change. Years of congressional investigations into surveillance practices of various agencies—including the Army, the FBI, the IRS, and the CIA—CNSS recalled, was irrefutable proof that self-regulation was no solution at all. CNSS scoffed at the notion that "an official with knowledge of abuses is told to go through channels within the hierarchy which spawned those abuses." This had proved an ineffective remedy in the past.[21]

CNSS accused the administration of using the order as a ruse for expanding executive powers and legitimizing past extra-legal practices. The order allowed for the collection of domestic intelligence on people or groups that "pose a clear threat to intelligence agency facilities or personnel." This was the same rationale, CNSS recalled, that justified CIA's CHAOS program and led to agents infiltrating anti-war groups in the 1960s. The surveillance of persons "reasonably believed to be acting on behalf of a foreign power" was permitted under the new rules, though this reasoning had led to First Amendment violations by the Army's CONUS program, FBI's COINTELPRO, and the CIA in the 1960s. Past experiences had shown that agents continued domestic surveillance programs even when evidence of foreign influence among targeted groups could not be found. The president's new rules ignored the history of intelligence abuses

[21] Christine M. Marwick, "Reforming the Intelligence Agencies: Proposals of the American Civil Liberties Union, the Ford Administration, the House Select Committee on Intelligence," *FP*, Mar 1976, v. 1, no. 7; 8, 10.

and effectively "expand[ed] executive branch authority to reflect its broad view of its constitutional mandate whenever it claims overriding 'national security' interests."[22]

CNSS's criticism was not unfounded. Presidents often issued executive orders to forestall legislative action. In this case Ford's order was a poorly disguised effort by the administration to appear in favor of reform while actually doing little in the way of pursuing it. Executive orders were subject to the whim of each new administration; real reform must come from the legislative branch. As CNSS persuasively argued, rarely did the executive branch voluntarily "decrease its own powers in order to protect other institutions of the society." Nothing short of "systematic restrictions" on intelligence techniques, urged CNSS, would suffice because "the executive branch has a clear record of expanding any ambiguity or latitude into a broad authorization for executive power; anything less than the strictest reaffirmation of the Bill of Rights will lead to fresh abuses of power by secret agencies."[23]

While CNSS found much in the Pike committee final report to work with, the ACLU believed that congressional recommendations did not do enough fundamentally to alter the institutional structures of the national security state. Eager to realize substantive reforms after years of carefully coordinating costly litigation and legislative campaigns, the ACLU proposed sweeping legislative reform: drastically reduce secrecy with new classification rules; statutorily define all intelligence agencies through new charters; legislate to limit surveillance, wiretapping and other techniques; and create permanent

[22] Christine M. Marwick, "Reforming the Intelligence Agencies," 8, 10.

[23] Christine M. Marwick, "Reforming the Intelligence Agencies," 9, 10.

congressional oversight capacities.[24] Appalled by the president's executive order that seemed to legitimate some of CIA's domestic activities, the ACLU called for the agency to be renamed the Foreign Intelligence Agency and for all domestic intelligence operations and covert action to be forbidden. The ACLU wanted the FBI stripped it of its intelligence capacities and restricted to investigating criminal matters. Furthermore, the ACLU proposed that all intelligence procedures violating the Fourth Amendment, including wiretaps and other electronic surveillance, mail covers as well as inquiries into phone and bank records (unless a warrant showing probably cause could be obtained), be strictly forbidden. The ACLU wanted to prohibit the NSA from intercepting any communications by Americans.[25]

The *New York Times* soft-pedaled the president's proposal, praising the administration for initiating "the beginning of a process that the Congress must now continue."[26] Speaking for the Center for National Security Studies, Morton Halperin charged that the president's order amounted to a "fraud" that "confirms the authority of the intelligence agencies to conduct surveillance activities directed at lawful activities of American citizens." He accused the administration of excluding "critics" from the "drafting process," and he claimed the order had been effectively written by the agencies themselves. Halperin denounced the order as a presidential "pardon" for the nation's

[24] "Controlling the Intelligence Agencies," 12 Dec 1975, ACLUP, box 392, fol: intelligence no 11; PPP, DRBSC, PUL.

[25] Christine M. Marwick, "Reforming the Intelligence Agencies: Proposals of the American Civil Liberties Union, the Ford Administration, the House Select Committee on Intelligence," *FP*, Mar 1976, v. 1, no. 7; 12-13.

[26] "Reforming the C.I.A.," *NYT*, 20 Feb 1976, 31.

intelligence agencies--not only did the president allow unconstitutional behavior to go unpunished, but the order "granted these very agencies a new license to spy on Americans."[27]

Surely the president hoped the executive order bought the White House some time with Congress. He could do nothing, however, to control the judicial branch. Since the late 1960s the judicial branch had begun slowly to restrain the executive's inherent authority to impinge upon First and Fourth Amendment rights in national security cases. Especially after Watergate the courts had been increasingly skeptical of the government's often-employed defense to trust the executive's discretion. For decades presidents and their attorneys general had found legal justification for the use of warrantless wiretaps in national security cases by referring to the executive's constitutional duty to conduct foreign affairs. Though some decisions, like *Keith,* had challenged this claim, the courts preferred statutory definition to lawmaking from the bench.

But three recent rulings in the federal circuit court had advanced a judicial interpretation of the president's constitutional power to wiretap without a warrant. In 1973 the Fifth Circuit granted the executive unfettered power to wiretap in cases related to national security. In *United States v. Brown*, the black radical H. Rap Brown challenged the legality of the Nixon administration's warrantless wiretaps on his phone. Reviewing the government's wiretap records *in camera,* the judge ruled that they contained nothing that violated Brown's Fourth Amendment rights and declared the wiretap lawful under the president's "inherent power to protect national security in the

[27] Morton Halperin, "Point of View: The Fraud Plan," *FP*, Mar 1976, v. 1, no. 7; 15-16.

context of foreign affairs."[28] The following year the Third Circuit reached a similar conclusion about the power of the executive to conduct warrantless surveillance in the case of national security and foreign intelligence. In *United States v. Butenko* the defendant's conversations had been overheard on a federal wiretap targeting a Soviet citizen suspected of espionage who worked in the Soviet mission to the United Nations. The court found the wiretap did not violate the Constitution based on the 1934 Communications Act, which allowed foreign intelligence gathering as an exception to the warrant rule. In this case, however, the judge noted that warrantless wiretaps were permissible only if one of the targets was directly involved with a foreign government.[29]

These decisions dealt a temporary blow to the ACLU's litigation team. But in 1973 a District of Columbia circuit court ruling offered hope for a new strategy. In *Zweibon v. Mitchell* sixteen members of the Jewish Defense League brought a civil action lawsuit against Attorney General John Mitchell and nine FBI agents for installing warrantless wiretaps at its New York headquarters. Mitchell maintained that the wiretaps were vital to protect American national security interests because the League organized anti-Soviet demonstrations and harassed Soviet diplomats. These actions had a direct impact on foreign relations, the attorney general argued, because its activities made Americans more vulnerable to retaliation from the Soviet Union. Using the legal precedents set by the *Brown* and *Butenko* decisions, Mitchell called the warrantless

[28] 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974).

[29] 494 F.2d 593 (3d Cir.) (en banc) (5-4 decision), *cert. denied sub nom*. Ivanov v. United States, 419 U.S. 881 (1974).

wiretaps defensible based on the president's constitutional authority to conduct foreign relations.

The court ruled in favor of the Jewish Defense League. Eight judges issued five separate opinions. The plurality opinion (signed by three judges) found the wiretap unconstitutional because the League was neither a foreign government nor a foreign agent. In a second opinion two justices declared the wiretap violated Title III of the Omnibus Crime Control Act of 1968, which restricted the executive's authority to wiretap without a warrant to criminal and national security cases. The judges' failure to reach a consensus on the ruling underscored the weakness of the ACLU's long-term litigation strategy to restrict executive surveillance practices. Such definitions would have to come from Congress.[30]

The Ford administration adamantly opposed legislative efforts to restrict executive power and fought to protect its prerogatives by instituting internal reforms. Attorney General Edward Levi vowed to implement tougher wiretapping and surveillance standards in the Department of Justice. In an address to the American Bar Association he pledged to "develop public guidelines governing electronic surveillance and other activities," especially those of the FBI.[31] Reformers denounced these promises as more of the same. "The public record of abuse places a heavy burden of proof upon the Executive

[30] *Zweibon v. Mitchell*, 363 F. Supp. 936, 942 (D.D.C. 1973); Philip A. Lacovara, "Presidential Power to Gather Intelligence: The Tension between Article II and Amendment IV," *Law and Contemporary Problems*, vol. 14, no. 3, Presidential Power: Part 2 (Summer 1976), 106-131.

[31] "Mr. Levi's Initiative," *NYT*, 17 Aug 1975, 166. Levi instituted guidelines in 1976 that allowed the agency to initiate "preliminary investigations" if a group was thought to be "engaged in activities which involve or will involve the violation of federal law." See Powers, *Broken*, 314.

to show that it is both legitimate and necessary to allow the FBI to continue intelligence investigations aimed at American citizens," wrote ACLU counsel Jerry Berman. "Given the intrusions into individual and associational privacy that are inherent in intelligence gathering, this burden of proof is a difficult one to substantiate."[32]

Levi's proposals strengthened congressional resolve on surveillance and wiretapping restrictions among a coterie of liberal Democrats. In 1975 they introduced the Foreign Intelligence Surveillance Act. The bill required the executive branch to obtain warrants before initiating domestic surveillance in foreign intelligence cases. The bill required the executive branch to report to the Administrative Office of the U.S. Courts and to the Committee on the Judiciary in the House and Senate details of the proceedings and the names and locations of all the intercepted communications. Levi denounced the bill as a bald effort to undermine the president's inherent constitutional duty to protect the nation and conduct its foreign affairs. The Fourth Amendment, the attorney general argued, did not extend to people outside the U.S. or to foreign powers. He accused civil libertarians of corrupting the original intent of the Fourth Amendment, envisioned by the founders as a means to protect individual privacy not to "compel exposure of the government." The American public, Levi urged, must trust its leaders to exercise discretion so that "public interest may be served."[33]

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[32] Jerry J. Berman, "The Case for a Legislated FBI Charter," *FP*, June 1976, v. 1, no. 10, 5-6. In 1994 Berman founded the Center for Democracy and Technology, where he currently serves as Chair of the Board.

[33] Address by Edward Levi before the Association of the Bar of the City of New York, 28 April 1975, Philip Buchen files, box 24, fold: Justice – Levi, Edward: speeches, GRFL.

The administration introduced its own federal wiretapping legislation in 1976. The *Times* quickly condemned the bill. "Among its more glaring defects," the paper opined, is that the bill "permits electronic surveillance even if no evidence had been presented that a crime has been or is about to be committed." By approving the legislation, the newspaper wrote, the Judiciary Committee "gave the intelligence community the benefits of doubt, as if nothing had been learned during the past half decade."[34] Co-sponsors Ted Kennedy and Charles Mathias (R-MD) dismissed the criticism. After more than five years of congressional inquiry into abuses, they proffered, this legislation was the first to protect Americans from "the unchecked power of the President to engage in foreign intelligence electronic surveillances," a major accomplishment considering that "the personal attitudes of executive-branch officials remain the only governing standard for such operations." Though the bill did not include all that reformers had hoped for, Kennedy and Mathias stressed that it was more important to "adopt legislation that will receive executive assent" than to let another year pass without limiting "the executive's present unfettered freedom to tap and bug in the foreign intelligence area."[35]

The ACLU and CNSS virulently opposed the Kennedy-Mathias bill because it rested on the legal assumption that wiretaps were compatible with the protections of the Fourth Amendment. ACLU counsel John Shattuck argued that the courts were still debating this issue, but from the organization's perspective electronic surveillance was an

[34] "Burglaries, Lies and Oversight," *NYT* 2 Jul 1976, A26.

[35] Edward M. Kennedy and Charles Mathias, Jr., "Letters to the Editor, Intelligence: To Check Executive Power," *NYT*, 22 Jul 1976, 30.

unreasonable search and seizure that should require a warrant. Second, the bill assumed that any cases related to national security offered a legal exception to Fourth Amendment protections and separation of powers. But the Supreme Court had ruled in several cases, *Keith* and more recently *Zweibon,* that there could be no national security exceptions to the Bill of Rights. Speaking on behalf of CNSS, Halperin worried about the loose definitions in the bill. He argued that the administration had intentionally defined "electronic surveillance" narrowly to apply only to wire transmissions. Information passed via transatlantic cable, information routed through Canada, or picked up through microwave transmission, would not be subject to the new law.[36]

The administration's bill created a secret court to review electronic surveillance warrant applications. The FISA court proved a divisive issue among public interest groups. Halperin supported the FISA court because he believed it depoliticized surveillance by taking the authorization out of the hands of the Attorney General and the FBI director. Halperin pushed to require attorneys general to sign affidavits certifying that their warrant application was legitimate. Halperin recommended that FISA judges be drawn from the DC circuit where they were likely to be more "sensitive and aware of the considerations that go into both sides of these issues." At Halperin's insistence the Justice Department conceded to adding a civil damages provision to the bill as a penalty to

[36] Statement of Mr. John Shattuck, American Civil Liberties Union, and Mr. Morton Halperin, American Civil Liberties Union, *Foreign Intelligence Surveillance Act of 1976,* Hearing before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary US Senate 94 con, 2d sess., on s. 743, s. 1888 and s. 3197, March 29, 30, 1976 Washington GPO 1976, 27-41.

federal officers who violated its provisions.[37] The ACLU broke with Halperin and CNSS and adamantly opposed the court. Though some "touted" the bill as reform because it required judicial warrants for wiretapping, the organization believed that warrants would rarely be denied. "Instead of providing real reform," wrote the frustrated Washington branch, "liberals and the Administration" conspired to support a "bill that essentially attempted to legitimate the illegitimate."[38]

Former Church committee staff director F.A.O. Schwartz cautioned legislators to carefully define the terms in the bill, especially "foreign agent" and "foreign intelligence." Experience showed, Schwartz explained, that "over and over again, people have wrapped themselves in the mantle of national security" in order to violate laws. The wiretapping of Martin Luther King, Jr. would be permissible under current definitions, Schwartz warned, because of the minister's association with former members of the communist party. As one justice argued in *Zweibon*, the government can easily define dissidents as foreign agents. Likewise, the bill loosely defined "foreign intelligence" as information "deemed essential … to the security," or "to the conduct of the affairs of the United States." Such a definition, cautioned Schwartz, "includes everything under the sun."[39]

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[37] Statement of Mr. John Shattuck, American Civil Liberties Union, and Mr. Morton Halperin, American Civil Liberties Union, *Foreign Intelligence Surveillance Act of 1976*, 27-41.

[38] "Civil liberties and the 94th congress, Washington report by the Washington Office Staff," 8 Oct 1976, ACLUP, box 392, fold 13, Washington DC Office, 1976, PPP, DRBSC, PUL; Pyle interview.

[39] Statement of Herman Schwartz, Professor, Law School, State University of New York at Buffalo, *Foreign Intelligence Surveillance Act of 1976*, 44-55.

Constitutional experts from both sides of the aisle favored the bill. Professor Herbert Wechsler of Columbia University disagreed with Halperin's claims that "foreign intelligence" and "foreign agents" ought to be more carefully defined. To do so, he argued, would effectively tie the hands of government officials who aimed to protect national security. Professor Philip Heymann of Harvard Law, a long-time advocate for legislation to restrict surveillance, had reservations about this bill. In spite of its weaknesses, nevertheless, he called on Congress to take advantage of this opportunity and pass the bill immediately.[40]

The FISA bill proved too complicated and politically divisive for a straight up-or-down vote. *Times* columnist Tom Wicker predicted that if passed it would "give legislative sanction to intelligence surveillance techniques. And it might well be used as a model for the future—to make intelligence break-ins legal, for example." In an election year most legislators tried to avoid contentious issues. Civil libertarians, anxious as they were to have this particularly ambiguous area of executive power legally defined, believed that a Carter administration would be more sympathetic to their cause.[41]

Legislators did agree, however, on the need for better congressional oversight of intelligence agencies. The creation of permanent intelligence oversight committees faced little opposition, either from the administration or on Capitol Hill. Most elected officials couldn't deny former CIA director John McCone's claim that Congress had at least tacitly approved extra-legal intelligence operations. If, as recent investigations would

[40] Herbert Wechsler to John L. McLellan 26 Mar 1976, printed in *Foreign Intelligence Surveillance Act of 1976*, 143-144; Statement of Professor Philip Heymann, Harvard Law School, 55-59.

[41] Tom Wicker, "No Rush for New Tap Law," *NYT*, 23 Jul 1976, 15.

have it, operations established and followed by five presidents "now do not fit the philosophy of our Government," McCone worried how reforming the national security apparatus would weaken the United States in its battle against communism. He urged congress to act swiftly to establish "a consensus of opinion, concerning the policies of this country."[42]

Senior intelligence officials, too, understood that times had changed on Capitol Hill. Bureau programs once approved at the highest levels, when examined in a contemporary context, were condemned for violating individual rights. Former CIA Director Richard Helms, when asked at a Senate hearing if he believed that Congress had failed in its oversight duties responded, "I do not know. You know, Senator, as well as I do, that tempers change, times change, public attitudes change."[43] Helms' reluctance to condemn Congress reflected the unwillingness on the part of many intelligence officials to admit that some intelligence practices had indeed been extra-legal. Testifying before Congress, FBI Director Clarence Kelley granted that Congress' renewed interest in oversight was a natural by-product of the Watergate era. He granted that the "year of intelligence" had revealed "issues" that "needed to be resolved," but he insisted that the bureau had itself addressed those issues with a thorough internal review. Kelley had

[42] Testimony of John McCone, *Oversight of U.S. Government Intelligence Functions,* 187-202.

[43] Testimony of Clark Clifford and testimony of Richard Helms, *Oversight of U.S. Government Intelligence Functions*, Hearings before the Committee on Government Operations United States Senate, 94th cong, 2nd sess., 218; 224.

himself approved a plan to reduce the bureau's domestic caseload by sixty-four percent.[44] He opposed any bill that would allow "direct congressional access to FBI information," proposing instead that all FBI directors be "fully accountable to an oversight committee through sworn testimony." When Republican Illinois Senator Charles Percy challenged Kelley, insinuating that the FBI's recent caseload reduction was probably due to the realization that "so many programs were illegal," Kelley replied curtly, "I do not recall any [terminated domestic programs] that would meet that classification."[45]

Kelley's decision to reduce sharply the bureau's domestic intelligence programs reflected a growing understanding in Washington, following the Church and Pike committee investigations, that extra-legal domestic spying programs were products of a political culture that had not only permitted constitutional violations but in some cases also encouraged them. Clark Clifford, a principal author of the National Security Act of 1947 and an advisor to Truman, Kennedy, and Johnson (and his Secretary of Defense), insisted that this political culture needed to be changed. In Senate hearings on congressional oversight of the intelligence community, Clifford urged Congress to rein in executive branch excesses. For too long, he argued, Congress had failed to oversee the national intelligence agencies: "The CIA has been badly used. The FBI has been badly used. Their actions in the past were not always in accordance with the laws and the Constitution of the United States. These organizations were not established to go out and

[44] In response to the Church Committee revelations, Kelley reorganized the bureau. He transferred domestic intelligence investigations to a new division that "operated under more restrictive guidelines." See Powers, *Broken*, 314.

[45] Testimony of Richard Helms and testimony of Clarence Kelley, *Oversight of U.S. Government Intelligence Functions*, 281; 171-187.

destroy American citizens, and they were being used for that function. …The congressional function must be to prevent that activity, because it goes to the heart of our constitutional system."[46]

Public interest groups like the ACLU and CNSS agreed with Clifford's assessment that tacit congressional approval had encouraged first the development and then the continuation of intelligence abuses. Only intensive legislative oversight, they argued, could rectify this problem. But these organizations refused to support the assessment of former and present intelligence officials that careful examination of extra-constitutional activities of intelligence agencies weakened or endangered national security. Morton Halperin urged elected officials to push for legislation that would require greater transparency. Intelligence abuses, he declared, were the predictable outcome of too much secrecy. "Even when the motive for secrecy is … that release will harm national security, often no attention is given to the importance of public debate. The executive branch does not balance the public's right to know and the Congress' right to the information against its perception of the national security needs for secrecy," Halperin argued. Pointing to three incidents of intelligence failures that the Church committee revealed over White House objections, Halperin insisted, that the national security interests were not the reason that the administration wished to keep the information secret. The assassination report, the report on Chile, and the report on the domestic abuses of the CIA involving COINTELPRO, especially the activities directed toward Martin Luther King, revealed nothing that harmed the nation's security. Rather,

[46] Testimony of Clark Clifford, *Oversight of U.S. Government Intelligence Functions*, Hearings before the Committee on Government Operations United States Senate, 94th cong, 2nd sess., 224.

Halperin claimed, the administration "looks at the national security need for secrecy or its own bureaucratic interests in secrecy or the President's political interests in secrecy, and says we will keep this information secret because it is in our interest to do so." The administration's desire to hide this information from the public was too often a poorly disguised effort "to avoid embarrassment" and "not to have to defend unpopular policies" as opposed to "balance the public's right to know against the general requirements of national security."[47]

The Church and Pike committee investigations broadened support for greater congressional oversight of intelligence agencies. But in their well-intended efforts to maximize press coverage, both committees had focused on the most controversial of the extra-legal programs, most of which were operations conducted by foreign intelligence agencies. Many of the abuses perpetrated by domestic agencies had been "discovered" and examined in some detail before 1975. The unintended consequences of this focus became apparent at the hearings to consider permanent intelligence oversight committees. Testimony reflected the nation's preoccupation with the skullduggery of the CIA and NSC, arguably the agencies least susceptible to democratic pressures. With the exception of FBI Director Clarence Kelley, most witnesses testified on the subject of foreign intelligence abuses. CNSS's Morton Halperin worried that the hearings were moving in the wrong direction, away from a forceful reform of domestic spying by the FBI, the Army, and other agencies. Influenced by his association with the ACLU and his own

[47] Halperin, "Point of View," *FP*, June 1976, v. 1, no. 10, 15-16; Testimony of Morton Halperin, *Oversight of U.S. Government Intelligence Functions*, Hearings before the Committee on Government Operations United States Senate, 94th cong, 2nd sess., 275-277; 322-323.

experience as the victim of domestic intelligence abuse, Halperin insisted oversight must include "domestic intelligence" of the FBI, in addition to overseas programs operated by the CIA and the Pentagon. The majority of past abuses, Halperin reminded the committee, had occurred at the overlap between foreign and domestic intelligence.[48]

At least one Senator was troubled by the myopic focus on foreign intelligence abuses. Senator Gaylord Nelson (D-WI) thought that the Senate had devoted too little time to the problems of domestic intelligence abuses and oversight. Concerned with how this process might translate to oversight when the permanent intelligence oversight committee was formed, Nelson urged his colleagues to establish two committees, one for domestic and another for foreign oversight. "Domestic surveillance oversight does not involve difficult political, foreign policy, and military security problems," Nelson argued. Domestic intelligence operations must adhere to constitutional protections guaranteed by the Bill of Rights and Nelson believed the First and Fourth Amendments offered "guidelines" for domestic intelligence activities. Domestic intelligence oversight, Nelson urged, was rather simple and did not require the security clearance standards that covert operations do. The Constitution is not enough to protect Americans at home from overzealous agents and institutions. President Nixon had run rough-shod over the Fourth Amendment, justifying warrantless wiretaps by claiming they were used for "national security." What Watergate revealed, in full detail, was that presidents could abuse that power against "anything that threatened him. For this reason, you cannot have any exceptions at all—either a warrant requirement or to the requirement that surveillance be

[48] Testimony of Morton Halperin, *Oversight of U.S. Government Intelligence Functions*, 275-277.

reported to the oversight committee."[49] Nelson's pleas, however, fell on deaf ears. Government Operations Chairman Abraham Ribicoff (D-CT), under pressure to send a bill to the Rules Committee in less than one month, dismissed Nelson's proposal as unfeasible.[50]

The intelligence community, demoralized by all the negative publicity and the rapid turnover at the top, supported greater oversight. No doubt stung by the recent bad publicity, key members of the community were eager to avoid embarrassment in the future by spreading responsibility (through disclosure) around a bit. They urged Congress to pass legislation sooner rather than later. President of the Association of Retired Intelligence Officers, David Atlee Phillips, speaking for the members of his organization, supported greater congressional oversight. He adamantly disagreed, however, with claims that recent revelations revealed an unhealthy democracy. Ignoring years of congressional investigations and reports that detailed unconstitutional use of national security capacities both at home and abroad, the former CIA covert operative blamed Nixon's "disposition … to use intelligence resources improperly." Watergate and other scandals, Phillips claimed, did not seriously threaten "the survival of our form of government nor any of its institutions." Intelligence officers, he declared, supported better congressional oversight because they "want others to share the responsibility, to take some of the heat after the

[49] Nelson had proposed legislation to oversee domestic intelligence operations in 1971, 1973, and 1975. They had never successfully been reported out of the Judiciary Committee. Testimony of Gaylord Nelson, *Oversight of U.S. Government Intelligence Functions*, 279.

[50] Abraham Ribicoff, *Oversight of U.S. Government Intelligence Functions*, 281-82.

fact, especially when that heat is applied 15 or 20 years later."[51] Phillips' testimony revealed that some members of the intelligence community absolved themselves of any responsibility for past transgressions. Instead, it blamed the president who used agencies for his own dirty tricks. This revisionism ignored the much longer history of programs like CHAOS, developed at the agency level (with tacit White House approval) before Nixon was president.

Congressional support for intelligence reform had begun to cleave along partisan lines over the shape that reform should take. Conservatives claimed to support greater oversight but vocally opposed the demands of their liberal colleagues for full public disclosure of intelligence activities. Senator Barry Goldwater conceded that his Senate Armed Services Committee had largely failed to exercise effective oversight, but he insisted that most committee members did not want to know about sensitive operations. "Revelation of this information might damage the Nation," Goldwater asserted, and senators "felt the constant danger of ourselves talking about it at inopportune times. Therefore, we would be better serving our country by not hearing it." On principle the senator did not believe the public had a right to know about all programs of the U.S. intelligence agencies, especially covert action. He was concerned that the creation of yet

[51] Phillips is a fascinating character. A former CIA agent who participated in both the 1954 operation that overthrew the Guatemalan government and the 1961 Bay of Pigs fiasco, he saw that the intelligence community had a "public relations problem" in the wake of Watergate. Taking cues from public advocacy organizations like the ACLU that aimed to shape public opinion, Phillips founded the Association of Retired Intelligence Officers in 1974. Testimony of David Atlee Phillips, *Oversight of U.S. Government Intelligence Functions*, 105-115. For more about the ARIO, see Jean M. White, "Intelligence Gathering: Insiders Meet on the Outside," *WP*, 18 Sep 1976, B1. Also see Phillips, *The Night Watch: 25 Years of Peculiar Service*, (New York: Atheneum, 1977).

another oversight committee increased the likelihood of national security leaks, like the recent Pike committee fiasco.[52]

Senators John Tower (R-TX) and Strom Thurmond (R-SC) opposed the new oversight committee. Tower supported the president's proposal to criminalize disclosures and urged his Senate colleagues that any reorganization of the intelligence community should be directed from the executive branch, not imposed by Congress. U.S. intelligence agencies, Tower remarked, performed at a "distinct disadvantage" to their counterparts like the KGB (Soviet internal security force) because they operated in an "open society." He believed that greater congressional oversight would further burden agencies that were the "linchpin" of the national security state. Senator Thurmond worried that greater oversight would inevitably lead to leaks. Intelligence, Thurmond argued, "is a very delicate commodity. If you have a good intelligence force which can keep a secret, it can be most valuable." If intelligence is leaked, Thurmond warned, "it is not worth the time and the effort that it takes to gather it."[53]

Despite the concerns voiced by conservatives, the Senate established the Senate Select Committee on Intelligence (SSCI) in May 1976 and the House followed in 1977 with the House Permanent Select Committee on Intelligence (HPSCI). *Times* columnist James Reston lauded the congressional reform as irrefutable evidence that congress and the nation were committed to greater transparency. By acknowledging a legislative role in the conduct of intelligence operations, Reston claimed, congressional oversight

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[52] Testimony of Senator Barry Goldwater, *Oversight of U.S. Government Intelligence Functions,* 333-346.

[53] Testimony of Senator John Tower, *Oversight of U.S. Government Intelligence Functions,* 45-48; testimony of Senator Strom Thurmond, *Oversight of U.S. Government Intelligence Functions,* 368-371.

challenged the executive branch's long-standing contention that "intelligence operations could not be effective in a disorderly world if they were subjected to the normal constitutional legislative and financial controls of the Congress."[54]

Democratic presidential candidate Jimmy Carter cheered the new committees from the campaign trail. At least some people thought he did. It was hard to pin Carter down on any one issue—conservatives believed the candidate reflected their views, liberals thought he was their candidate. Carter seemed to offer everything to everyone and, therefore, nothing to anyone. One thing all Americans were certain about—this candidate would not be another Nixon. "I will never lie to you," Carter repeated at campaign stops around the country. The relatively obscure former Georgia governor campaigned as the antithesis of Tricky Dick and the man who pardoned him, President Ford. He promised to restore Americans' faith in their government, though exactly how he would do that remained unclear. Untarnished by the scandals of recent years, Carter had a powerful advantage over incumbent Gerald Ford. As historian Bruce Schulman explains, Carter "rode the wave of post-Watergate fears of the imperial presidency" right into the White House.[55]

Carter chose as his running mate the liberal and consummate Washington insider, Senator Walter Mondale. At first glance Mondale seemed an unlikely pick for the "outsider" candidate. He was the protégé of Minnesota senator, former vice president,

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[54] James Reston, "Money and Secrecy," *NYT*, 21 May 1976, 22.

[55] James T. Wooten, "The Well-planned Enigma of Jimmy Carter," *NYT*, 6 June 1976, 195; David Rosenbaum, "Carter's Position on Issues Designed for Wide Appeal," *NYT*, 11 Jun 1976, 45; Bruce J. Schulman, *The Seventies*, 122.

and one-time presidential candidate, Hubert Humphrey. As a college student Mondale organized for Humphrey and Truman. He came to Washington to work for Students for Democratic Action, the student arm of the liberal vanguard, Americans for Democratic Action. He later returned to Minnesota, earned a law degree, married a fellow Macalester alumna, and started a law practice. There he worked on several statewide campaigns and was rewarded for his hard work by being appointed attorney general in 1960 (the youngest state attorney general in the nation) and to a Senate seat in 1964 when Humphrey became President Johnson's vice president.[56] He had also served on the Church committee.

Carter saw in the young Senator not only the Washington experience that he lacked but also a fierce commitment to reaffirming checks and balances in constitutional government.[57] The *Times* lauded Carter's vice presidential choice, calling the senator a "major figure from Capitol Hill" who was likely to bring a "healthy Congressional view of the office [of the presidency]" to the administration.[58] In fact, Mondale was a recent convert to the movement for national security reform. Throughout the 1960s he believed, like many other Americans, that the consolidation of power in the executive branch was a necessary development to protect the national interest in a dangerous world. By the early

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[56] Steve Gillon, *The Democrats' Dilemma: Walter F. Mondale and the Liberal Legacy*, (New York: Columbia University Press, 1992), 85.

[57] Carter was easy to critique once he gained office and quickly became bogged down in battles with Congress. But his meteoric rise to the presidency suggested that he was an able politician. For his troubles when he moved to the White House, see James Fallows, "The Passionless Presidency: The Trouble with Jimmy Carter's Administration," *The Atlantic Monthly,* (May 1979), accessed online: <http://www.theatlantic.com/unbound/flashbks/pres/fallpass.htm>.

[58] "Mr. Carter's Choice," *NYT*, 16 Jul 1976, 16. In 1974 Mondale briefly entertained the idea of a presidential bid but dropped out the same year, claiming he had neither the desire nor the stamina to run for the nation's highest office.

1970s, however, after the twin disasters of Vietnam and Watergate, Mondale began to see the "imperial presidency" as a threat to democracy. Though he did not wish to see a "weak President," he had come to believe that Congress needed to make the executive branch "act within the constitutional parameters of that power." His work on the Church had spurred the young senator to become outspoken critic of intelligence abuses.

Mondale conceded that proposals to reform the intelligence community would be useless and ineffective if a better system of checks and balances was not implemented; he supported permanent congressional oversight committees in both chambers of congress. He thought litigation was a powerful deterrent to the imperial presidency and supported a citizens' right to sue the federal government and any officials who violated the constitutional rights of American citizens. He called for the attorney general to have a stronger role in managing the FBI and other intelligence agencies. He firmly believed that top-level officials should be directly responsible for the conduct of their agencies. This would prevent future abuses from being dismissed as aberrations—no one could again claim that they didn't know what their subordinates were doing. As the Church and Pike committee investigations showed, extra-constitutional activities had often been approved by word of mouth. Mondale called for all new intelligence programs to be approved in writing by a department's legal counsel, firmly stating that such a program would be compatible with Constitutional protections. Only a statutory framework, Mondale reckoned, would prevent the emergence of such abuses in the future. He called for

charters for the CIA, FBI, and other intelligence agencies to halt constitutional violations.[59]

Though Carter flip-flopped on the issue of how he would correct intelligence abuses (he supported greater government transparency, except in the case of "narrowly defined national security matters," he would not use the CIA to "overthrow the government or change the policies of other nations," but he supported covert operations in "some circumstances"), his vice presidential pick adamantly supported major intelligence reform on the campaign trail.[60] Mondale believed that Americans wanted a candidate with a "respect for the law and a willingness to accept defeat if need be rather than break or subvert" it, and a president who maintained a "fundamental respect for the civil liberties of the people guaranteed under the Bill of Rights." Mondale firmly believed the Constitution did not provide any "constitutional authority for the President or any intelligence agency to violate the law" and he was deeply committed to overhauling the intelligence community.[61] Mondale promised that, if elected, Carter would support these broad reforms.

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[59] Walter Mondale, *The Accountability of Power: Toward a Responsible Presidency*, (New York: David McKay Company, Inc., 1975), vii-xv; Walter Mondale, Dennison College Foreign Policy Symposium, 3 Oct 1975, Senatorial Files, speech text files, box 7, fol: Dennison College, WFM papers, MHS; Linda Charlton, "Mondale Says Ford Has Failed to Heed Watergate Lessons," *NYT*, 6 Oct 1976, 89.

[60] James T. Wooten, "The Well-planned Enigma of Jimmy Carter," *NYT*, 6 June 1976, 195; David Rosenbaum, "Carter's Position on Issues Designed for Wide Appeal," *NYT*, 11 Jun 1976, 45.

[61] Walter Mondale, "The Presidency," *NYT*, 16 Jul 1976, 17. Like most vice presidential candidates Mondale assumed the position of the attack dog on the campaign trail. He offered scathing criticism of President Ford's pardon of Nixon and claimed that Ford was out of touch with the American people, who wanted to see the former president stand before a court of law like every other American. The pardon, Mondale stated, "made a mockery of the notion that in America, there is no sovereign who stands above the law." Linda Charlton, "Mondale Says Ford Has Failed to Heed Watergate Lessons," *NYT*, 6 Oct 1976, 89.

Halperin and the CNSS staff had reason to celebrate in December of 1976.[62] Not only had their candidate Carter and the ardent intelligence reformer Mondale won the presidential election, but also the courts seemed poised to enter a new era of forcing executive accountability for constitutional rights violations. In December federal district court Justice John Lewis held former President Nixon and other top level officials libel for civil damages for maintaining a nearly two year-long wiretap on Halperin's home phone. Lewis found that "there can be no serious contention that the Fourth Amendment's independent requirement of reasonableness is suspended in the area of national security searches and seizures." The judge ruled that every citizen, including elected and appointed officials in the nation's highest offices, can be "accountable for personal misconduct." Recent legal precedents, the judge concluded, "indicate that government officials are not immune from suit for alleged illegalities committed in office."[63] The judge ordered the defendants to pay damages to Halperin, in the amount of one dollar each. The case offered many legal firsts: it was the first suit brought against a president for his official conduct while in office to be found in favor of the plaintiff. Nixon was the first president ordered to give a deposition about his activities while in office. The lawsuit also made Nixon the first president to be held liable for damages in

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[62] Transparency advocates had further reason to celebrate. In September 1976 President Ford signed the Government in the Sunshine Act into law. This bill required some 50 federal agencies to give advance notice of scheduled meetings and make the meetings open to the public. The bill also amended FOIA, narrowing the number of agencies that could legally withhold information from the public. For a history of this legislation, see *Government in the Sunshine Act Source Book: Legislative History, Texts, and other Documents*, Committees on Government Operations, U.S. Senate and House of Representatives, 94th Cong., 2d Sess. (Washington, D.C.: GPO, 1976).

[63] Halperin v. Kissinger civil action no 1187-73 (D.D.C.), ruling issued on Dec 16 1976. First Principles, "In the Courts," Jan 77, vol. 2, no. 5, 14. See *United States v. Nixon*, 418 U.S. 683 (1974).

spite of various immunity defense claims available to high officials. Finally, Nixon was the first president in the nation's history ordered to pay damages to a plaintiff.[64]

With the legislative and judicial branches playing an increasingly assertive role in checking the power of the executive and protecting civil liberties, the ACLU and CNSS believed that Jimmy Carter's inauguration signaled a new era of executive level restraints on the national security state. Halperin personally believed that CNSS had a friend in the White House and hoped that access to Carter's domestic policy team would lead to much-needed legislative reform. Some of Halperin's former colleagues had joined the new administration, signaling the new president's willingness to maintain open dialogue with public interest groups. Halperin gushed, "The very fact of access [to policymakers] is new. Where Levi refused to even meet with [CNSS] on the national security wiretap bill or the domestic intelligence guidelines, there is now ready access."[65]

If public interest groups were optimistic about the new President, the U.S. intelligence agencies regarded the Carter administration with more than a little trepidation. The recent shake-ups and rapid turnover of top-level appointments left the agencies demoralized and worried over the prospect of more change.[66] Legislative

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[64] Morton Halperin, "'My' Wiretap Lawsuit," *FP* (Sept 77), vol 3, no 1, 15-16. The Halperin lawsuit has more historical significance than the list of "firsts" noted here. The plaintiff was granted discovery when the lawsuit was first brought in 1973, and the ACLU successfully produced documents and depositions that helped the organization learn a lot about FBI procedures for conducting national security wiretaps. The organization passed this information along to the House Judiciary committee when it considered Nixon's impeachment in 1974. This evidence played a crucial role in the continuing debate about national security wiretap legislation.

[65] Halperin, "The Carter Administration: In the Mood for Reform?" *FP*, (Apr 1977), vol 2, no., 8, 15-16.

[66]David Binder, "U.S. Intelligence Officials Apprehensive of New Shake-Ups Under Carter," *NYT*, 13 Dec 1976, 43.

reform, however, required the administration to work closely with congressional allies. Immediately, Carter got off on the wrong foot with the Democratic-controlled Congress. Mondale observed that Carter's self-proclaimed "outsider" status did not sit well with consummate "insiders" on Capitol Hill. Believing he claimed the moral high ground, Carter refused to compromise, lectured leaders on the Hill when they disagreed with him on policy, and refused to consult with his own party on legislative initiatives. His behavior prompted Mondale to proclaim that his boss had the "coldest political nose of any politician I ever met."[67] Carter's attitude further committed congressional leaders to reasserting their constitutional role in Washington. In one of its first assertions of will, Congress met Carter's nominee for Director of Central Intelligence, Kennedy's former aide Theodore ("Ted") Sorensen, with such fierce opposition that Sorensen withdrew his name.[68]

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[67] Gillon, *The Democrats' Dilemma*, 190-193. Most scholarly accounts support Mondale's view of Carter's strained relationship with Congress. Whether those problems stemmed from personal antagonisms (Carter and House Speaker Tip O'Neill did not get along) or from ideological differences (liberals abhorred Carter's fiscal conservatism, opposing his efforts to balance the federal budget and reform entitlement programs), the problems were real, and they hindered the administration from advancing many of the policy initiatives that Carter believed in. See Berkowitz, *Something Happened*, 112-114. For an alternate perspective, see Jon R. Bond and Richard Fleisher, "Carter and Congress: Presidential Style, Party Politics, and Legislative Success," in *The Presidency and Domestic Policies of Jimmy Carter*, 287-297. Bond and Fleisher argue that Carter's troubles in 1977-78 have colored the way that scholars perceive the remainder of his term in office, when relations improved considerably.

[68] Hedrick Smith, "Assertion of Will by Congress: Republicans were Against Sorensen Ideologically and Democrats Feared Bitter and Divisive Fight," *NYT*, 18 Jan 1977, 15; James Reston, "The Question of Judgment," *NYT* 19 Jan 1977, 23. Liberals like Senator Joseph Biden opposed Sorensen as the nominee because he had admitted at Daniel Ellsberg's trial to taking several cartons of classified paperwork from the White House (which he later used to help him write his book). Biden called Sorensen, "political dynamite" because Sorensen's use of classified information "embodied a philosophy of liberal release of material that ran counter to the views" of members of the new Senate Intelligence Committee. Morton Halperin noted that many rumors circulated about why Sorenson faced such fierce opposition. He believed that the episode reflected how far the movement had to go to defeat the secrecy system. See "Point of View: The Sorensen Debacle," *First Principles*, Feb 77, vol. 2, no. 6, 15-16. Carter's next choice, retired Navy Admiral Stansfield Turner, proved much less amicable to reform than Halperin and others hoped. During his

Even without the political blunders, Carter faced formidable challenges when he arrived in Washington. Stagflation--slow growth, high unemployment, and roaring inflation--plagued the American economy. Carter's first policy initiatives included welfare reform, energy policy, and combating inflation. Not surprisingly, national security reform did not rank among Carter's top legislative priorities.[69] Halperin denounced the new administration for getting "caught up in the crisis of the day" and for allowing senior staff like NSC advisor Zbigniew Brzezinski, who favored secrecy over transparency, to stymie reform. Halperin fervently believed in the persuasive political abilities of Vice President Walter Mondale: "What is needed is strong leadership from the top to set in motion the mechanism to produce comprehensive legislation to bring the intelligence agencies under the Constitution. The logical man to lead such an effort is the Vice President."[70]

Never content to sit and wait for change to happen, Halperin exerted as much pressure on the Carter administration as possible. In February 1977 he co-authored a book denouncing secrecy and government classification systems. He warned that Carter's

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confirmation hearings Turner declared further intelligence reform unnecessary. He revived President Ford's effort to punish "leakers," promising to submit legislation to criminalize leaks of intelligence sources and methods. See Halperin, "The Carter Administration: In the Mood for Reform?" *FP*, (Apr 1977), vol 2, no., 8, 15-16.

[69] James Patterson, *Restless Giant: The United States from Watergate to* Bush v. *Gore*, (New York: Oxford University Press), 111; W. Carl Biven, *Jimmy Carter's Economy: Policy in an Age of Limits*, (Chapel Hill: The University of North Carolina Press, 2002), 2. When Carter took office nearly forty percent of all Americans ranked unemployment the most pressing concern faced by the nation. See Bruce Schulman, "Slouching Toward the Supply Side: Jimmy Carter and the New American Political Economy," in Gary M. Fink and Hugh Davis Graham, *The Carter Presidency: Policy Choices in the Post-New Deal Era*, (Lawrence: University of Kansas Press, 1998), 54.

[70] Halperin, "The Carter Administration: In the Mood for Reform?" *FP*, (Apr 1977), vol 2, no. 8, 15-16.

campaign commitment to "openness" was likely facing stiff opposition from executive level agencies. The bureaucracy always has a vested interest in the status quo and, Halperin wrote, "fears the new because of its uncertain impact on power relations." He predicted that institutions would continue to claim "dire consequences" if the executive continued to trend toward transparency and accountability. What Washington needed, urged Halperin, was "nothing less than a radical change in perspective" in order to ensure that "whatever is needed for public debate … be made public."[71] But who would lead this radical change in perspective?

Perhaps to fulfill campaign promises, or perhaps out of a personal commitment to protecting civil liberties, Mondale had been quietly working on a bill to restrict executive level surveillance and wiretapping. In April he began the arduous task of convincing his former colleagues on the Hill to support the administration's wiretap legislation. The FISA bill tested Mondale's considerable political skills, not only because Carter's insolence had spurred congressional blacklash, but also because congressional leaders were leery of accepting a bill written by the administration. Senators Edward Kennedy and Birch Bayh (D-IN) opposed the administration's first bill, tying it up in committee where it languished. Mondale convinced Carter to compromise, accept Kennedy's revisions, and reintroduce the revised legislation.[72]

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[71] Morton Halperin and Daniel Hoffman, *Top Secret: National Security and the Right to Know*, (Washington, D.C.: New Republic Books, 1977), 103, 104, 106.

[72] Carter also presented his national energy policy bill (NEP) in April. A massive and complicated piece of legislation (it included some 113 separate proposals), the administration drafted it in secret, foisted the finished product on Congress and demanded that the House and Senate act quickly. Congress rebelled and broke the bill up in pieces which lobbyists quickly devoured. See Schulman, *The Seventies*, 126-127. Carter assigned Mondale a unique role as vice president—he traveled around the world as a kind of

The Foreign Intelligence Surveillance Act of 1978 reflected years of compromises between Congress, two presidential administrations, and public interest groups like the ACLU. The bill established a new court, the Foreign Intelligence Surveillance Court, comprised of seven district court judges appointed by the Chief Justice of the Supreme Court. The statute required the executive branch to submit surveillance requests to the court, and judges had the right to see all evidence supporting the request. Three judges (serving overlapping terms) reviewed requested that were denied. The bill allowed the executive branch broad latitude in special cases. In the event that a request was time-sensitive—if the administration believed court proceedings might compromise intelligence—the attorney general could waive the warrant requirement. No warrants were required for communications between foreign entities. Following a congressional declaration of war the executive branch could waive the application procedure for the first fifteen days. Most important, the statute excluded wiretapping except through the express authority of the law, denying the executive's legal authority to invoke a broadly construed "inherent power" as justification for warrantless surveillance.[73]

Even as they cheered the passage of FISA, many reformers hoped it was just the "first piece of charter legislation for the intelligence community." Some close observers noted that the battle to enact FISA had taken a toll on the public and its supporters in

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"goodwill ambassador," assuring American allies abroad of the administration's intention to "pursue an activist foreign policy and underscored the theme of cooperation and consultation." See Gillon, *The Democrats' Dilemma*, 217-249.

[73] *Foreign Intelligence Surveillance Act of 1978*, Hearings before the Subcommittee on Intelligence and the Rights of Americans of the Select Committee on Intelligence of the United States Senate, 95th cong., 2d sess., on S. 1566, (Washington: U.S. GPO, 1978), 2-3; Anthony Lewis, "On Bills to Control Wiretapping; the Infighting Goes On and On," *NYT* 8 May 1977, 130; "The Foreign Intelligence Surveillance Act: Legislating a Judicial Role in National Security Surveillance," *Michigan Law Review*, Vol. 78, No. 7 (Jun., 1980), 1129-1135.

Congress. Passing the FISA bill, moaned Indiana senator Birch Bayh, had been "like trying to run in sorghum molasses in January." He wondered gloomily, "How many of our colleagues and how many citizens will have said, well, [Congress has] done enough already" to protect civil liberties?[74]

Indeed, if there had once been a broad-based impetus for national security reform among elected officials, it was quickly dissipating. A second piece of security reform legislation did not fare as well. Working closely with a few committed reformers in the House and Senate, CNSS helped draft CIA charter legislation. In April of 1977 the draft charter was making the rounds in the Senate. Though reformers like Halperin had viewed Mondale as an influential proponent of reform within the administration, Mondale had a change of heart. In fact, he crafted the strategy that assured charter legislation would never pass the House or Senate. With the support of CIA Director Stansfield Turner, Mondale urged the president to consult with the Senate Intelligence Committee and "endorse the principle of intelligence legislation," but ask Congress to delay consideration of the charter until after the administration received internal reviews and recommendations on intelligence activities. Mondale urged Carter to "dispel any suggestions that the Administration is opposed to legislative charters, to assure the Congress that you want to work with it, and to head off premature efforts by the congress to force the Administration's hand on the substance of such legislation." Carter approved. Mondale recognized political benefits of supporting charter legislation given Carter's campaign rhetoric, but wavered on the real benefits of broad-based intelligence reform.

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[74] Senator Walter Huddleston (D-KY), 19 July 1977, *Foreign Intelligence Surveillance Act of 1978*, 4; and Senator Birch Bayh (D-IN), *Foreign Intelligence Surveillance Act of 1978*, 19.

Convinced by the national security team that legislation might tie the hands of the executive branch, Mondale took pains to avoid putting the White House in the "difficult position of seeming to be opposed to intelligence legislation."[75]

Mondale's plan worked brilliantly. The administration successfully stalled the legislation through 1978, going back and forth with Congress over the language and tone of the bill. Carter's willingness to postpone intelligence charter legislation suggested, according to Hahn, "a level of political sophistication and intelligence unmatched in his performances in other policy initiatives." Carter came to appreciate the institutional perspective of national security and executive prerogative. He had initially supported a legislative charter for the CIA, but faced with foreign policy challenges, he came to favor executive order reforms and Congress eventually conceded to his demands.[76]

In November 1979 Iranians stormed the American Embassy and took sixty-six Americans hostage. Carter quietly asked Congress to postpone introducing charter legislation until the following year.[77] The next year the Soviets invaded Afghanistan and the cold war heated up once again. Facing the reality of these ongoing crises, the impetus for intelligence reform rapidly dissolved. The administration convinced Congress to pass

[75] Vice President and Director of Central Intelligence to President, "Foreign Intelligence Strategy with the Congress," 14 Apr 1977, box 2, fol Intelligence, WFM papers, Materials received from Carter Library, MHS; Hahn, Peter Hahn, "Jimmy Carter and the Central Intelligence Agency," in Herbert D. Rosenbaum and Alexej Ugrinsky, eds., *The Presidency and Domestic Policies of Jimmy Carter,"* (Westport, CT: Greenwood Press, 1994), 337-345.

[76] Hahn, "Jimmy Carter and the Central Intelligence Agency," 323-351.

[77] For the domestic reaction to the Iranian revolution and the subsequent hostage crisis, see Farber, *Taken Hostage.*

a watered down bill that, as one scholar argues, "legislatively institutionalized a system of lax congressional oversight of the CIA."[78]

The movement to restrict intelligence abuses of the FBI never received the public support that the CIA charter briefly did. This was an unintended consequence of the Church and Pike committee's overwhelming focus on abuses by the foreign intelligence community. People attributed the abuses of the bureau to the perverse proclivities of its long-time director J. Edgar Hoover. One *Times* journalist who specialized in intelligence matters penned an opinion that was widely shared on Capitol Hill: "A lot of what is now labeled wrong about the bureau's methods was an outgrowth of the personality and attitude of J. Edgar Hoover. …It was Hoover who urged his agents to discredit Dr. King and who authorized the tricks and turns of cointel[pro]."[79] Following nearly a decade of airing the agency's dirty laundry, many felt satisfied that FBI's ghosts had been sufficiently exorcised. In the aftermath of the Church and Pike investigations, directors like Clarence Kelley worked assiduously to assure the public and Congress that a new atmosphere of accountability governed FBI activities.

Morton Halperin cheered FISA. "The clearest victory in the [FISA] law is that it lays to rest the claims of inherent presidential power to conduct warrantless national

[78] Hahn, "Jimmy Carter and the Central Intelligence Agency," 342-344. Congress passed the Intelligence Oversight Act of 1980 which repealed the Hughes-Ryan Amendment of 1974, reducing the number of committees that received intelligence briefings to the two intelligence committees in the House and Senate, allowing the White House to delay notifying Congress of covert operations, and containing virtually none of the charter restrictions envisioned by reformers in the wake of the Church and Pike investigations.

[79] Nicholas M. Horrock, "Polishing Up the F.B.I.'s Reputation," *NYT*, 23 Nov 1975, 200.

security wiretaps." From the beginning of the movement in the early 1970s, reformers had struggled to find legal and legislative challenges to inherent executive authority, especially in the realm of national security. In large part, their movement had made enormous strides in improving government transparency and protecting individual privacy. By the late 1970s the legislative impetus for reform foundered in the Senate and the House. But the ACLU and CNSS did not abandon their efforts to challenge executive power. They did develop strategies to challenge that power in new ways.[80]

The FOIA Act of 1974 offered public interest groups and private citizens new tools to uncover state abuses. Though the process of FOIA was slow, by the late 1970s it had begun to yield fruit. CNSS organized community-based workshops to teach interested citizens how to use FOIA to gain information about surveillance practices from national agencies. In Chicago, the organization sponsored a conference to teach local litigators how to sue state and local governments for access to individual dossiers using the examples of successful ACLU lawsuits against municipal red squads. Chicago's Better Government Association published a litigation manual and drew up plans to develop a "library" to hold all the documents that became available as a result of lawsuits.[81]

The ACLU's litigation campaign continued to uncover abuses by the executive branch. But in the late 1970s the organization faced two public relations disasters that undermined its credibility as a civil liberties bulwark. Ironically, documents obtained

[80] Morton Halperin, "Point of View," *FP* (Nov 1978), vol 4, no 3, 15-16.

[81] "In the News," *FP*, (Feb 1977), vol 2, no 6, 14.

through a FOIA request revealed that the FBI had paid informers working within the organization in the 1950s. The organization also faced public criticism in 1977 when it defended the rights of Nazis to demonstrate in Skokie, Illinois. Both episodes and the negative publicity they generated led some ACLU members to cancel their memberships. This added to an already declining membership precipitated by Jimmy Carter's presidency. As Neier remembers, "the ACLU thrives institutionally on adversity." Nixon had been good for the ACLU's membership drives; Carter was bad.[82] Similarly, the economic crisis further decreased membership. The organization's robust litigation and legislative strategies had depended on revenue from annual memberships as well as funding from foundations since the 1960s.[83] Fewer annual memberships forced the organization to reprioritize and scale back on some of its programs in the late seventies.

The political strength of the movement to challenge executive power had dissipated markedly by the late 1970s. Senator Sam Ervin retired in 1974 following the passage of the Privacy Act. Ervin had been very successful at garnering bipartisan support for legislation to enhance government transparency and protect individual

[82] Neier, *Taking Liberties*, 121. Neier recalls that Skokie had only a short-term adverse impact on the ACLU's finances. Ronald Reagan's election as president boosted membership.

[83] The ACLU's membership peaked in 1975 at 275,000 members, and annual dues totaling $4 million. Aryeh Neier, "Annual Report, 1975," Annual report, ACLUP, box 1881, fold 6: 1975; PPP, DRBSC, PUL. Political scientists have extensively explored the issue of public interest group funding. Two camps have emerged. One group argues that public interests groups rely primarily on patrons for their financial stability, while another finds that membership is key to the longevity of interest groups and their financial success. See Anthony J. Nownes and Allan J. Cigler, "Public Interest Groups and the Road to Survival," *Polity*, Vol. 27, No. 3 (Spring, 1995), pp. 379-404; and Jack L. Walker, "The Origins and Maintenance of Interest Groups in America," *The American Political Science Review*, Vol. 77, No. 2 (Jun., 1983), pp. 390-406. Nownes and Cigler's work argues the latter, and offers the most compelling evidence to explain the ACLU's declining activity in the late 1970s. Decreased membership shrunk the coffers from which the organization drew its funds to pay for its legislative and litigation campaigns.

privacy. Perceived by many of his colleagues to be an expert on constitutional issues, he had often been the movement's most fervent and outspoken ally on Capitol Hill. In 1978 Aryeh Neier left the ACLU to work as a human rights advocate. Having developed successful litigation and legislative strategies Neier took institutional knowledge, as well as many personal connections, with him when he left the organization.[84] In his book *Reforms at Risk*, political scientist Erik Patashnik argues that so-called "coalition leaders" who do the work of writing legislation and defending it, who forge the political compromises necessary to see legislation passed, who monitor the long term policy implementation, are vital to the long-term success of policy agendas. When so-called "coalition leaders," like Senator Ervin and Aryeh Neier "lose their ability to shape the agenda," it can have deleterious effects on policy reform.[85]

Perhaps more deleterious for the reform effort, however, was the increasing ideological and partisan fate of this reform movement. By the late 1970s conservative opposition to intelligence reform and domestic security checks and balances hardened. In the early 1980s President Ronald Reagan rolled back the restrictions on the FBI, instructing Attorney General William French Smith to broaden surveillance of domestic groups who posed a threat to internal security. As justification for relaxing Watergate era restrictions, Smith cited FBI agents' reluctance to investigate domestic organizations

[84] In 1978 Neier went to work for Helsinki Watch, an organization established to "protest repression against dissenters in the Soviet Union." This organization became Human Rights Watch in the mid-1980s. See Neier, *Taking Liberties*, 149-173.

[85] Eric Patashnik, *Reforms at Risk: What Happens* After *Major Policy Changes are Enacted*, (Princeton: Princeton University Press, 2008), 156.

because of concerns over "personal liability."[86] During the last thirty years conservatives in the executive and legislative branches worked to amend domestic security reform, demanding greater control and power over agencies tasked with ferreting out dissident and dangerous citizens.

The issues at stake for reformers—executive power, insufficient checks and balances, invasion of privacy, and lack of transparency—were not unique to the 1970s. These issues continue to structure public debates and define our political battles today. Colleagues often challenge my "triumphant" account of the movement to reform the domestic security state. Surely, they argue, in the wake of revelations that the administration of George W. Bush has circumvented and later revised FISA, has stonewalled FOIA, and has shown little regard for the Privacy Act, I must rethink my assessment of the movement for domestic security reform. The purpose of this dissertation, however, is not to debate these contemporary problems, but to put contemporary debates in historical context.

Contemporary debates eerily echo the past. This much is certainly true. The Bush administration's decision to circumvent the FISA court and wiretap Americans at home without a warrant might have gone undiscovered but for one whistleblower who grew uneasy about the Justice Department's handling of this special program. Eventually, he called the *New York Times*. The *Times* decided, somewhat cautiously, to publish the story in spite of the administration's contention that to do so would threaten national security.[87]

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[86] Robert Pears, "U.S. Agents Get Wider Latitude in Investigations," *NYT*, 8 Mar 1983, A1.

[87] Thomas Tamm blew the whistle on Bush's warrantless wiretapping program in 2004 and the *Times* printed the story in 2005. Tamm himself has only recently gone "public" as the whistleblower. See Michael Isikoff, "The Fed Who Blew the Whistle," *Newsweek*, 22 Dec 2008, 40.

This recent account reminds us that the legal framework reformers established in the 1970s is important. For this structure reformers can claim credit, and also deserve the gratitude of the American polity. But structures are only as good as those citizens and institutions willing to use them and demand that government obey them. When the nation feels threatened, as in the years after September 11th, that desire and willingness can dissipate—and understandably so. Historians can only offer the lessons of the past as a warning. Certainly the task remains to bring some of the issues that I have explored here into the twenty-first century.

The movement for national security reform that ignited public debate in the 1970s did not begin or end then. The relative success of a loose coalition of good government activists, neo-muckrakers, elected officials, and public interest groups underscores the contingencies that made the development of this domestic security policy regime possible. The Freedom of Information Act revisions and the Privacy Act of 1974 created a framework that governed the flow of information between state and polity. The establishment of permanent congressional intelligence oversight committees in 1976 reinvigorated Congressional oversight of the CIA and other federal intelligence agencies. The Foreign Intelligence Surveillance Act of 1978 established a new role for the judiciary in the process of domestic surveillance and wiretapping. This legislative watershed restrained the ability of the president and, more generally, the executive branch of the federal government, from operating independently of democratic oversight and running roughshod over the civil liberties of the American citizenry.

BIBLIOGRAPHY

ARCHIVES

Bella Abzug Papers, Columbia University, New York, NY
American Civil Liberties Union Archives, Princeton University, Princeton, NJ
American Friends Service Committee Archives, National Office, Philadelphia, PA
Common Cause papers, Princeton University, Princeton, NJ
Sam J. Ervin, Jr. Papers, University of North Carolina, Chapel Hill, NC
Gerald R. Ford Presidential Library & Museum, Ann Arbor, MI
Lyndon Baines Johnson Library & Museum, Austin, TX
Walter F. Mondale Papers, Minnesota Historical Society, St. Paul, MN
William Moorhead Papers, Yale University, New Haven, CT
General Records of the Department of Justice, National Archives II, College Park, MD
Records of Select Congressional Committees, 1923-88, National Archives I, Washington D.C.

NEWSPAPERS

Los Angeles Times
New York Times
Washington Post

MAGAZINES

Newsweek
Saturday Evening Post
Time
U.S. News and World Report
Washington Monthly

ORAL INTERVIEWS:

Lawrence M. Baskir
Norman Dorsen
Aryeh Neier
Charles Peters
Christopher Pyle
John Shattuck

BOOKS and ARTICLES:

Alexander, Jeffrey C. *The Civil Sphere.* New York: Oxford University Press, 2006.

Alperovitz, Gar. *Atomic Diplomacy: Hiroshima and Potsdam: the Use of the Atomic Bomb and American Confrontation with Soviet Power.* New York: Simon and Schuster, 1965.

Ambrose, Stephen and Richard Immerman. *Milton S. Eisenhower, Educational Statesman*. Baltimore: The Johns Hopkins University Press, 1983.

Anderson, Terry. *The Movement and the Sixties: Protest in America from Greensboro to Wounded Knee*. New York: Oxford University Press, 1995.

Ashby, LeRoy. *Fighting the Odds: The Life of Senator Frank Church*. Pullman: Washington State University Press, 1994.

Bailey, Beth. "The Army in the Marketplace: Recruiting an All-Volunteer Force," *The Journal of American History* 94, no. 1, (June 2007): 47-74.

Bailey, Beth and David Farber, eds. *America in the Seventies*. Lawrence: University of Kansas Press, 2004.

Ball, Durwood. *Army Regulars on the Western Frontier, 1848-1861*. Norman: University of Oklahoma Press, 2001.

Balogh, Brian. *Chain Reaction: Expert Debate and Public Participation in American Commercial Nuclear Power, 1945-1975.* New York: Cambridge University Press, 1991.

Bamford, James. *Body of Secrets: Anatomy of the Ultra-Secret National Security Agency*. New York: Doubleday, 2001.

Barret, David. *The CIA and Congress: The Untold Story from Truman to Kennedy*. Lawrence: University of Kansas Press, 2005.

Baumgartner, Frank and Bryan Jones. *Agendas and Instability in American Politics*. Chicago: The University of Chicago Press, 1993.

Belknap, Michal R. *The Supreme Court under Earl Warren, 1953-1969.* Columbia, S.C.: University of South Carolina Press, 2005.

Berkowitz, Edward. *Something Happened: A Political and Cultural Overview of the Seventies.* New York: Columbia University Press, 2006.

Berman, Jerry J. and Morton H. Halperin, eds. *The Abuses of the Intelligence Agencies,* A Report by the Center for National Security Studies. Washington, D.C.: The Center for National Security Studies, 1975.

Bernstein, Irving. *Guns or Butter: The Presidency of Lyndon Johnson*. New York: Oxford University Press, 1996.

Blanchard, Robert O. ed. *Congress and the News Media*. New York: Hastings House, 1974.

Blum, Richard H., ed. *Surveillance and Espionage in a Free Society: A Report by the Planning Group on Intelligence and Security to the Policy Council of the Democratic National Committee.* New York: Praeger Publishers, 1972.

Borosage, Robert L. and John Marks, eds. *The CIA File*. New York: Grossman Publishers, 1976.

Bradlee, Ben. *A Good Life: Newspapering and Other Adventures*. New York: Simon & Schuster, 1995.

Branch, Taylor. *Parting the Waters: America in the King Years, 1954-1963.* New York: Simon & Schuster, 1989.

_____. *Pillar of Fire: America in the King Years, 1963-1965*. New York: Simon & Schuster, 1999.

_____. *At Canaan's Edge: America in the King Years, 1965-1968.* New York: Simon & Schuster, 2006.

Bradlee, Ben. *A Good Life: Newspapering and Other Adventures.* New York: Simon & Schuster, 1995.

Broadwater, Jeff. *Eisenhower and the Anti-communist Crusade*. Chapel Hill: The University of North Carolina Press, 1992.

Brooke, John L. "Reason and Passion in the Public Sphere: Habermas and the Cultural Historians." *Journal of Interdisciplinary History* 29, no. 1 (1998): 43-67.

Calhoun, Craig, ed. *Habermas and the Public Sphere,* Cambridge: MIT Press, 1992.

Campbell, Karl. *Senator Sam Ervin, Last of the Founding Fathers.* Chapel Hill: University of North Carolina Press, 2007.

Campbell-Kelly, Martin and William Aspray. *Computer: A History of the Information Machine*, 2d edition. Cambridge, MA: Westview Press, 2004.

Clancy, Paul. *Just a Country Lawyer: A Biography of Senator Sam Ervin.* Bloomington: Indiana University Press, 1974.

Clark, Ramsey. *Crime in America: Observations on its Nature, Causes, Prevention and Control.* New York: Simon & Schuster, 1970.

Clemens, Elisabeth. *The People's Lobby: Organizational Innovation and the Rise of Interest Group Politics in the United States, 1890-1925.* Chicago: University of Chicago Press, 1997.

Columbia Human Rights Law Review Symposium. *Surveillance, Dataveillance and Personal Freedoms.* Fair Lawn, NJ: R. E. Burdick, Inc., 1973.

Conlan, Timothy. *From New Federalism to Devolution: Twenty-Five Years of Intergovernmental Reform* Washington, D.C.: Brookings Institute Press, 1998.

Cooper, Jr., John Milton. *Pivotal Decades: The United States, 1900-1920*. New York: W.W. Norton & Co., 1990.

Cox, Arthur Macy. *The Myths of National Security: The Peril of Secret Government*. Boston, Beacon Press, 1975.

Cronin, Thomas E. "A Resurgent Congress and the Imperial Presidency." *Political Science Quarterly* 95, no. 2 (Summer, 1980), 209-237.

Cross, Harold. *A People's Right to Know: Legal Access to Public Records and Proceedings.* New York: Columbia University Press, 1953.

Crouse, Timothy. *The Boys on the Bus.* New York: Random House, 1972.

Dash, Samuel. *Chief Counsel: Inside the Ervin Committee—the Untold Story of Watergate.* New York: Random House, 1976.

_____. *The Eavesdroppers.* New York: Da Capo Press, 1971.

Dawley, Alan. *Struggle for Justice: Social Responsibility and the Liberal State*. (Cambridge, MA: The Belknap Press of Harvard University Press, 1991).

Deering, Christopher J. and Forrest Maltzman. "The Politics of Executive Orders: Legislative Constraints on Presidential Power." *Political Research Quarterly* 52, no. 4 (Dec 1999): 767-783.

Demaine, Linda J. and Brian Rosen. "Process Dangers of Military Involvement in Civil

Law Enforcement: Rectifying the Posse Comitatus Act." *New York University Journal of Legislation and Public Policy* 9 (2005-2006): 167-250.

Dittmer, John. *Local People: The Struggle for Civil Rights in Mississippi*. Urbana: University of Illinois Press, 1994.

Dorsen, Norman and Stephen Gillers, eds., *None of Your Business: Government Secrecy in America.* New York: Viking Press, 1974.

Downie, Leonard. *The New Muckrakers.* Washington D.C.: New Republic Book Co., 1976.

Dudziak, Mary. *Cold War Civil Rights: Race and the Image of American Democracy*. Princeton: Princeton University Press, 2002.

Erskine, Hazel. "The Polls: Corruption in Government." *Public Opinion Quarterly* 37, no. 4 (Winter 1973/1974): 628-44.

_____. "The Polls: Presidential Power." *Public Opinion Quarterly* 37, no. 3 (Autumn, 1973): 488-503.

Ervin, Sam, Jr. *Preserving the Constitution: The Autobiography of Sam Ervin*. Charlottesville, VA: The Michie Company, 1984.

_____. *The Whole Truth: Watergate*. New York: Random House, 1980.

Evans, Peter, Dietrich Rueschemeyer, and Theda Skocpol, eds. *Bringing the State Back In*. Cambridge: Cambridge University Press, 1985.

Farber, David. *The Age of Great Dreams: America in the 1960s*. New York: Hill and Wang, 1994.

_____. *Chicago '68*. Chicago: The University of Chicago Press, 1988.

Fink, Gary M. and Hugh Davis Graham. *The Carter Presidency: Policy Choices in the Post-New Deal Era*. Lawrence: University of Kansas Press, 1998.

Flamm, Michael. *Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s.* New York: Columbia University Press, 2005.

Ford, Gerald. *A Time to Heal: The Autobiography of Gerald Ford*. New York: Harper and Row, 1979.

"The Foreign Intelligence Surveillance Act: Legislating a Judicial Role in National

Security Surveillance." *Michigan Law Review* 78, no. 7 (Jun., 1980): 1129-1135.

Fordham, Benjamin. *Building the Cold War Consensus: The Political Economy of U.S. National Security Policy, 1949-51.* Ann Arbor: The University of Michigan Press, 1998.

Fraser, Steve and Gary Gerstle, eds. *The Rise and Fall of the New Deal Order, 1930-1980.* Princeton: Princeton University Press, 1989.

Fried, Richard M. *Nightmare in Red: The McCarthy Era in Perspective*. New York: Oxford University Press, 1990.

Fullinwider, Robert K., ed. *Civil Society, Democracy, and Civic Renewal*. Lanham, MD: Rowman & Littlefield Publishers, Inc., 1999.

Galambos, Louis, ed. *The New American State: Bureaucracies and Policies since World War II*. Baltimore: The Johns Hopkins University Press, 1987.

Garrow, David. *The FBI and Martin Luther King, Jr.: From "Solo" to Memphis*. New York: W.W. Norton, 1981.

Gestrich, Andreas. "The Public Sphere and the Habermas Debate." *German History* 24, no. 3 (2006): 413-430.

Gillon, Steve. *The Democrats' Dilemma: Walter F. Mondale and the Liberal Legacy*. New York: Columbia University Press, 1992.

_____. *Politics and Vision: The ADA and American Liberalism, 1947-1985.* New York: Oxford University Press, 1987.

Gilmore, Glenda. *Gender and Jim Crow: Women and the Politics of White Supremacy in North Carolina, 1896-1920.* Chapel Hill: The University of North Carolina Press, 1996.

Gitlin, Todd. *The Sixties: Years of Hope, Days of Rage*. New York: Bantam Books, 1987.

_____. *The Whole World is Watching: Mass Media in the Making and Unmaking of the New Left*. Berkeley: University of California Press, 2003.

Goldwater, Barry. *The Conscience of a Conservative*. New York: Hillman Books, 1960.

Graham, Hugh Davis. *The Civil Rights Era: Origins and Development of National Policy*. New York: Oxford University Press, 1990.

Greenberg, David. *Nixon's Shadow: The History of an Image.* New York: W.W. Norton, 2003.

Griffith, Robert. *The Politics of Fear: Joseph R. McCarthy and the Senate*. Lexington: University Press of Kentucky, 1970.

Griffith, Robert. *The Specter: Original Essays on the Cold War and the Origins of McCarthyism.* New York: New Viewpoints, 1974.

Halberstam, David. *The Powers That Be.* New York: Alfred A. Knopf, 1979.

Halperin, Morton, and Daniel Hoffman. *Top Secret: National Security and the Right to Know*. Washington, D.C.: New Republic Books, 1977.

Halperin, Morton, Jerry Berman, Robert Borosage, and Christine Marwick. *The Lawless State: The Crimes of the U.S. Intelligence Agencies*. New York, 1977.

Heclo, Hugh. *A Government of Strangers: Executive Politics in Washington*. Washington DC: The Brookings Institute, 1977.

Hendrickson, Paul. *The Living and the Dead: Robert McNamara and Five Lives of a Lost War*, (New York: Alfred Knopf, 1996).

Hoff, Joan. *Nixon Reconsidered*. New York: BasicBooks, 1994.

Hogan, Michael J. *A Cross of Iron: Harry S. Truman and the Origins of the National Security State, 1945-1954.* Cambridge: Cambridge University Press, 1998.

Holzman, Michael. *James Jesus Angleton, the CIA, and the Craft of Counterintelligence*. Amherst: University of Massachusetts Press, 2008.

Jacobs, Meg, William J. Novak, and Julian E. Zelizer, eds. *The Democratic Experiment: New Directions in American Political History*. Princeton: Princeton University Press, 2003.

Jeffreys-Jones, Rhodri. *Cloak and Dollar: A History of American Secret Intelligence.* New Haven: Yale University Press, 2002.

Jensen, Joan. *Army Surveillance in America, 1775-1980*, (New Haven: Yale University Press, 1991).

Johnson, Loch. "Congressional Supervision of America's Secret Agencies: The Experience and Legacy of the Church Committee." *Public Administration Review* 64, no. 1 (2004): 3-14.

_____. *A Season of Inquiry: The Senate Intelligence Investigation*. Lexington: The University Press of Kentucky, 1985.

Johnson, Robert David. *Congress and the Cold War*. New York: Cambridge University Press, 2006.

"Justice Rehnquist's Decision to Participate in *Laird v.* Tatum." *Columbia Law Review* 73, no. 1, (Jan., 1973): 106-124.

Keller, William W. *The Liberals and J. Edgar Hoover: Rise and Fall of a Domestic Intelligence State.* Princeton: Princeton University Press, 1989.

Kluger, Richard. *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality*. New York: Alfred A. Knopf, 2004.

Kolko, Gabriel. *The Politics of War*: the World and United States Foreign Policy, 1943-1945. New York: Random House, 1968.

Kutula, Judy. *The American Civil Liberties Union and the Making of Modern Liberalism, 1930-1960.* Chapel Hill: The University of North Carolina Press, 2006.

Lacovara, Philip A. "Presidential Power to Gather Intelligence: The Tension between Article II and Amendment IV." *Law and Contemporary Problems* 14 no. 3, (Summer 1976): 106-131.

LaFeber, Walter. *America, Russia and the Cold War, 1955-1966*. New York: Wiley, 1967.

Leffler, Melvyn. *A Preponderance of Power: National Security, the Truman Administration and the Cold War.* Stanford: Stanford University Press, 1992.

Light, Jennifer. *Warfare to Welfare: Defense Intellectuals and Urban Problems in Cold War America*. Baltimore: The Johns Hopkins University Press, 2003.

Lowi, Theodore J. "American Business, Public Policy, Case Studies, and Political Theory." *World Politics* 16 (1964): 685-714.

_____. "Presidential Power: Restoring the Balance." *Political Science Quarterly* 100, no. 2 (Summer, 1985), 185-213.

_____. *The Personal President: Power Invested, Promise Unfulfilled.* Ithaca: Cornell University Press, 1986.

MacPherson, Myra. *"All Governments Lie": The Life and Times of Rebel Journalist I.F. Stone*. New York: Scribner, 2006.

Mangold, Tom. *Cold Warrior: James Jesus Angleton, the CIA's Master Spy Hunter*. New York: Touchstone Books, 1992.

Marchetti, Victor and John Marks. *The CIA and the Cult of Intelligence*. New York, 1974.

Mayer, Kenneth R. "Executive Orders and Presidential Power." *The Journal of Politics* 61, no. 2 (May, 1999): 445-466.

McAuliffe, Mary. *Crisis on the Left: Cold War Politics and American Liberals, 1947-1954*. Amherst: University of Massachusetts Press, 1978.

McCormick, Thomas J. *America's Half Century: United States Foreign Policy in the Cold War and After*. Baltimore: The Johns Hopkins University Press, 1989.

McGerr, Michael. *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America*. Oxford: Oxford University Press, 2003.

McNamara, Robert S. *In Retrospect: the Tragedy and Lessons of Vietnam*, with Brian VanDeMark. New York: Random House, 1995.

Milkis, Sidney M. "The Presidency, Democratic Reform, and Constitutional Change." *PS: Political Science and Politics* (Summer 1987): 628-636.

Milkis, Sidney and Michael Nelson. *The American Presidency: Origins and Development, 1776-1993*. Washington DC: Congressional Quarterly Press, 1994.

Miller, Arthur. *The Assault on Privacy: Computers, Data Banks, and Dossiers.* Ann Arbor: University of Michigan Press, 1971.

Mondale, Walter. *The Accountability of Power: Toward a Responsible Presidency*. New York: David McKay Company, Inc., 1975.

Morone, James. *The Democratic Wish: Popular Participation and the Limits of American Government.* New York: BasicBooks, 1990.

Neier, Aryeh. *Only Judgment: The Limits of Litigation in Social Change*. Middletown, CT: Wesleyan University Press, 1982.

_____. *Taking Liberties: Four Decades in the Struggle for Rights*. New York: Public Affairs, 2003.

Nessen, Ron. *It Sure Looks Different from the Inside*. New York: Playboy Press, 1978.

Nettl, J.P. "The State as a Conceptual Variable," *World Politics* 20 (1968), 563-564.

Neustadt, Richard. *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*. New York: Free Press, 1991.

Newton, Jim. *Justice for All: Earl Warren and the Nation He Made.* New York: Penguin Group, 2006.

Nettl, J.P. "The State as a Conceptual Variable." *World Politics* 20 (1968): 563-564.

Nitze, Paul. *From Hiroshima to Glasnost: At the Center of Decision—a Memoir*. New York: Grove Weidenfeld, 1989.

Nordlinger, Eric. *On the Autonomy of the Democratic State* Cambridge, MA: Harvard University Press, 1981.

Nownes, Anthony J. and Allan J. Cigler. "Public Interest Groups and the Road to Survival." *Polity* 27, no. 3 (Spring, 1995): 379-404.

Olmsted, Kathryn S. *Challenging the Secret Government: The Post-Watergate Investigations of the CIA and FBI.* Chapel Hill: The University of North Carolina Press, 1996.

Olson, Keith. *Watergate: The Presidential Scandal that Shook America*. Lawrence: University of Kansas Press, 2003.

Ortiz, Stephen R. "Rethinking the Bonus March: Federal Bonus Policy, the Veterans of Foreign Wars, and the Origins of a Protest Movement." *Journal of Policy History* 18 no 3, (2006): 275-303.

Oshinsky, David. *A Conspiracy so Immense: The World of Joe McCarthy*. New York: Free Press, 1983.

_____. *Senator Joe McCarthy and the American Labor Movement*. Columbia, MO: University of Missouri Press, 1976.

Pasley, Jeffrey, Andrew Robertson and David Waldstreicher, eds. *Beyond the Founders: New Approaches to the Political History of the Early American Republic.* Chapel Hill: The University of North Carolina Press, 2004.

Patashnik, Eric. *Reforms at Risk: What Happens* After *Major Policy Changes are*

Enacted. Princeton: Princeton University Press, 2008.

Patterson, James T. *Grand Expectations: The United States, 1945-1974*. New York: Oxford University Press, 1996.

Payne, Charles. *I've Got the Light of Freedom: The Organizing Tradition and the Mississippi Freedom Struggle*. Berkeley: University of California Press, 1995.

Perkus, Cathy. *Cointelpro: The FBI's Secret War on Political Freedom.* New York: Monad Press, 1975.

Perlstein, Rick. *Nixonland: The Rise of a President and the Fracturing of America*. New York: Scribner, 2008.

Peters, Charles. *Tilting at Windmills: an Autobiography*. Reading, MA: Addison-Wesley Publishing Co., Inc., 1988.

Peters, Charles, and Timothy J. Adams, eds., *Inside the System: A Washington Monthly Reader*. New York: Praeger Publishers, 1970.

Peters, Charles, and Taylor Branch, *Blowing the Whistle: Dissent in the Public Interest*, New York: Praeger Publishers, 1972.

Powe, Jr., Lucas A. *The Warren Court and American Politics*. Cambridge, MA: Belknap Press of Harvard University Press, 2000.

Powers, Richard Gid. *Broken: The Troubled Past and Uncertain Future of the FBI*. New York: The Free Press, 2004.

_____. *G-Men: Hoover's FBI in American Popular Culture*. Carbondale: Southern Illinois University Press, 1983.

_____. *Secrecy and Power: The Life of J. Edgar Hoover*. New York: The Free Press, 1987.

Putnam, Robert. *Bowling Alone: The Collapse and Revival of American Community.* New York: Simon & Schuster, 2000.

Pyle, Christopher. *Military Surveillance of Civilian Politics, 1967-1970*. New York: Garland Publishing, Inc., 1986.

Richards, Leonard. *Shay's Rebellion: The American Revolution's Final Battle*. Philadelphia: University of Pennsylvania Press, 2002.

Ripley, Randell and James Lindsay. *Congress Resurgent: Foreign and Defense Policy on Capitol Hill*. Ann Arbor: University of Michigan Press, 1993.

Ritchie, Donald. *Reporting from Washington: The History of the Washington Press Corps*. New York: Oxford University Press, 2005.

Rosenbaum, Herbert D. and Alexej Ugrinsky, eds. *The Presidency and Domestic Policies of Jimmy Carter*. Westport, CT: Greenwood Press, 1994.

Schattschneider, E.E. *The Semi-Sovereign People*. New York: Holt, Rinehart and Winston, 1960.

Scheips, Paul. *The Role of Federal Military Forces in Domestic Disorders, 1945-1992*. Washington, D.C.: Center for Military History, United States Army, 2005.

Schlesinger, Arthur. *The Imperial Presidency*. Boston: Houghton Mifflin, 1973.

Schorr, Daniel. *Clearing the Air*. Boston: Houghton Mifflin Company, 1977.

Schrecker, Ellen. *No Ivory Tower: McCarthyism and the Universities*. New York: Oxford University Press, 1986.

Schulman, Bruce. *The Seventies: The Great Shift in American Culture, Society, and Politics*. New York: Free Press, 2001.

Schulman, Bruce and Julian Zelizer, eds. *Rightward Bound: Making American Conservative in the 1970s*. Cambridge, MA: Harvard University Press, 2008.

Shapley, Deborah. *Promise and Power: The Life and Times of Robert McNamara*. Boston: Little, Brown, 1993.

Skocpol, Theda. *Diminished Democracy: From Membership to Management in American Life*. Norman: University of Oklahoma Press, 2003.

Skowronek, Stephen. *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*. New York: Cambridge University Press, 1982.

Smist, Jr., Frank. *Congress Oversees the United States Intelligence Community, 1947-1989*. Knoxville: The University of Tennessee Press, 1990.

Sparrow, Barthlomew. *Uncertain Guardians: The News Media as a Political Institution*. Baltimore: The Johns Hopkins University Press, 1999.

Stone, Geoffrey R. *Perilous Times, Free Speech in Wartime: From the Sedition Act of 1798 to the War on Terrorism*. New York: W.W. Norton and Co., 2004.

Sundquist, James. *The Decline and Resurgence of Congress*. Washington D.C.: Brookings Institution Press, 1982.

Tarrow, Sidney. *Power in Movement: Social Movements and Contentious Politics*, 2d ed. New York: Cambridge University Press, 1998.

Thelen, David. *Becoming Citizens in the Age of Television: How Americans Challenged the Media and Seized Political Initiative during the Iran-Contra Debate*. Chicago: The University of Chicago Press, 1996.

Theoharis, Athan, ed. *Beyond the Hiss Case: The FBI, Congress, and the Cold War*. Philadelphia: Temple University Press, 1982.

_____. *The FBI and American Democracy: A Brief Critical History*. Lawrence: University of Kansas Press, 2004.

_____. *Spying on Americans: Political Surveillance from Hoover to the Huston Plan.* Philadelphia: Temple University Press, 1978.

Uncle Sam is Watching You: Highlights from the Hearings of the Senate Subcommittee on Constitutional Rights. Introduction by Alan Barth. Washington, D.C.: Public Affairs Press, 1971.

Ungar, Sanford J. *FBI*. Boston: Little, Brown and Company, 1975.

Wabun, Wind. ed. *The People's Lawyers*. New York: Holt, Rinehart and Winston, 1973.

Waldstreicher, David. *In the Midst of Perpetual Fetes: The Making of American Nationalism, 1776-1820.* Chapel Hill: University of North Carolina Press, 1997.

Walker, Jack L. "The Origins and Maintenance of Interest Groups in America." *The American Political Science Review* 77, no. 2 (Jun., 1983): 390-406.

Walker, Samuel. *In Defense of American Liberties: A History of the ACLU*. New York: Oxford University Press, 1991.

Watters, Pat and Stephen Gillers. eds. *Investigating the FBI*. Garden City: Doubleday & Co., 1973.

Wiebe, Robert. *The Search for Order, 1877-1920*. New York: Hill and Wang, 1967.

Wilford, Hugh. *The Mighty Wurlitzer: How the CIA Played America*. Cambridge: Harvard University Press, 2008.

Williams, William Appleman. *The Tragedy of American Diplomacy*. New York: W.W. Norton and Company, 1959.

Wilson, James Q. *Political Organizations*. New York: Basic Books, 1973.

Zelizer, Julian. *On Capitol Hill: The Struggle to Reform Congress and its Consequences, 1948-2000.* New York: Cambridge University Press, 2004.

_____. ed. *The American Congress*: *The Building of Democracy*. Boston: Houghton Mifflin, 2004.

GOVERNMENT PUBLICATIONS

Commission on CIA Activities within the United States. *Report to the President by the Commission on CIA Activities within the United States, June 1975*. Washington, D.C.: GPO, 1975.

U.S. Congress. House. Committee on Government Operations, Subcommittee on Government Information and Individual Rights. Senate. Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure. *Freedom of Information Act and Amendments of 1974*. 94th Cong., 1st sess., 1975. Joint Committee Print.

U.S. Congress. Senate. Committee on Government Operations, United States Senate. Committee on Government Operations, Subcommittee on Government Information and Individual Rights, House of Representatives. *Legislative History of the Privacy Act of 1974, S. 3418 (Public Law 93-579): Source Book on Privacy*, 94th Cong., 2d sess., 1976. Joint Committee Print.

U.S. Congress. Senate. Committee on the Judiciary. *Foreign Intelligence Surveillance Act of 1976, Hearing before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary.* 94th cong., 2d sess., 1976.

U.S. Congress. Senate. Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure. *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*. 1974.

U.S. Congress. Senate. Committee on the Judiciary, Subcommittee on Constitutional Rights, *Federal Data Banks, Computers and the Bill of Rights: Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary.* 92nd Cong., 1st sess., 1972.

U.S. Congress. Senate. Committee on the Judiciary, Subcommittee on Constitutional Rights. *Federal data banks and constitutional rights : a study of data systems on individuals maintained by agencies of the United States government.* Prepared by the staff of the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, as part III of the subcommittee's study of Federal data banks, computers, and the Bill of Rights. 1974.

U.S. Congress. Senate. *Oversight of U.S. Government Intelligence Functions*, Hearings before the Committee on Government Operations, 94th cong, 2nd sess., 1976.

U.S. Congress. Senate. Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Intelligence Activities and the Rights of Americans*, 94th Cong., 2d sess., 1976.

U.S. Congress. Senate. Subcommittee on Intelligence and the Rights of Americans of the Select Committee on Intelligence. *Foreign Intelligence Surveillance Act of 1978: Hearings before the Subcommittee on Intelligence and the Rights of Americans.* 95th cong., 2d sess., 1978.