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# The Ford Administration, the National Security Agency, and the “Year of Intelligence”: Constructing a New Legal Framework for Intelligence

**Abstract:** In the mid-1970s, Congress and the judiciary moved to regulate the National Security Agency (NSA) at a moment when such regulation might have restricted the growth of electronic surveillance. The Ford administration played a crucial role in preventing that from happening. It did so by controlling the flow of intelligence information to Congress and by establishing a flexible new legal framework for intelligence based on broad executive orders, narrow legislation, and legal opinions written by executive branch lawyers. This framework fostered a perception of legality that headed off calls for comprehensive legislation governing intelligence. The Ford administration’s actions protected NSA from meaningful regulation, preserved the growth of electronic surveillance, and sustained executive branch preeminence in national security affairs. The episode proved formative for the Ford administration officials involved—including Dick Cheney, Donald Rumsfeld, and Antonin Scalia—and solidified the central role of executive branch lawyers in national security policymaking.

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In the mid-1970s, Antonin Scalia found himself playing the unexpected role of intelligence policymaker. Congress had launched a series of investigations in response to public allegations of misconduct by American intelligence agencies, and President Gerald Ford and his senior advisers turned to Scalia—then head of the Office of Legal Counsel in the Justice Department—and other executive branch lawyers for help defending the intelligence community. “Needless to say,” Scalia recalled later, “I did not feel this was an area in which I possessed a whole lot of expertise.”<sup>1</sup> Nevertheless, Scalia and other executive branch lawyers became key players in intelligence policymaking during this period. White House officials valued Scalia’s counsel so highly that they tried to get him a security pass so he could access the White House more easily.<sup>2</sup> In late 1975 and early 1976, Scalia was at the White House nearly every day plotting strategy and tactics with members of the White House and National Security Council staffs, other executive branch lawyers, and representatives of the intelligence community.<sup>3</sup> One of their top priorities was to shield the then little-known National Security Agency (NSA) and electronic surveillance from congressional and judicial regulation.<sup>4</sup>

NSA’s rapidly-improving ability to use electronic surveillance to collect enormous quantities of information and to mine that information using computers had made it into one of the most valuable components of the intelligence community. However, those same capabilities made the agency vulnerable to regulation in the political and social climate of the mid-1970s. The Watergate scandal and the Vietnam War had heightened distrust of the executive branch and the intelligence community and the public had grown worried about the potential abuse of the electronic surveillance and data-mining techniques that formed the basis of NSA’s growing power.<sup>5</sup> In response, Congress and the judiciary moved to regulate NSA and electronic surveillance in ways that might have slowed or halted the agency’s data-driven rise to power.

The Ford administration, led by members of the White House staff like Dick Cheney and Donald Rumsfeld and executive branch lawyers like Scalia, played a crucial role in preventing that from happening. To an extent greater than is generally understood, the current state of the law and politics of intelligence, the leading role played by executive branch lawyers in national security policymaking, and NSA’s position at the pinnacle of power reflect the enduring influence of the Ford administration’s actions. Three moves were

decisive. First, Ford administration officials took steps to control congressional investigators' access to classified information about intelligence activities. This, along with other delaying tactics, had the double effect of slowing the congressional inquiries and complicating efforts to develop legislation governing the intelligence community. Second, the Ford administration used the time it bought itself to develop and issue a comprehensive intelligence executive order that met the perceived need for intelligence reform on the executive branch and intelligence community's terms. Finally, the Ford administration proposed narrowly tailored electronic surveillance legislation that not only headed off imminent judicial intervention but also provided legal cover for crucial pieces of NSA's activities on terms favorable to the executive branch and the intelligence community.

The Ford administration's actions established a hybrid legal framework for intelligence based on broad executive orders, narrow legislation, and legal opinions written by executive branch lawyers. This new framework provided the cover of law but was more flexible than statute alone. It fostered a perception of legality that headed off calls for comprehensive legislation governing intelligence activities, protected NSA from meaningful regulation, preserved the growth of electronic surveillance, and coupled the intelligence community more tightly to the White House. Along with the precedent-setting boundaries the Ford administration established for congressional access to information about intelligence activities, this new legal framework sustained executive branch preeminence in national security affairs. The intelligence community traded some of its long-standing bureaucratic autonomy for this executive branch political and legal top cover, thereby ensuring that it retained a large degree of autonomy from the legislative and judicial branches of government.

The process of achieving these enduring changes was not without friction. From the beginning, there were disagreements between the White House staff and the National Security Council staff about how to handle what the *New York Times* called the "Year of Intelligence."<sup>6</sup> Those who considered themselves national security professionals resented the increasing involvement of both the White House staff and executive branch lawyers in intelligence matters. One consequence was that the administration's management of intelligence issues was disjointed at times. Indeed, it was not until Congress and the judiciary were poised to regulate NSA that administration officials largely resolved their differences and proceeded to carry the day. The career trajectories of the Ford administration officials most closely involved in navigating the crisis—including Dick Cheney, Robert McFarlane, Donald

Rumsfeld, Antonin Scalia, Brent Scowcroft, and Laurence Silberman—further ensured that the precedents they set in the 1970s influenced policy and law for decades. Their improbable success not only in protecting NSA and preserving the growth of electronic surveillance but also in sustaining executive branch preeminence in national security affairs warrants a reevaluation of the Ford administration’s place in history.<sup>7</sup>

Despite the priority the Ford administration placed on protecting NSA and electronic surveillance from regulation and the enduring consequences of the administration’s success, scholars have said little about the administration’s efforts in those areas and even less about the central role played by executive branch lawyers.<sup>8</sup> These shortcomings reflect trends in the literature. Within US history generally and the history of intelligence specifically, the Central Intelligence Agency (CIA) and the Federal Bureau of Investigation (FBI) have received far more attention than NSA.<sup>9</sup> Important technological aspects of NSA’s history remain largely disconnected from the political, social, and legal histories of the period.<sup>10</sup> In scholarly writings on policymaking across disciplines and fields, there has also been an over-focus on Congress at the expense of the executive branch and a tendency to downplay executive orders and executive branch legislative proposals.<sup>11</sup>

These general biases have been exacerbated in this case by the fact that for decades far more information has been available about the work of the high-profile congressional intelligence committees led by Sen. Frank Church (D-ID) and Rep. Otis Pike (D-NY) than about what happened inside the executive branch and NSA. The reports of both committees were available to the public almost immediately and provided much more information about CIA and FBI than about NSA. Church Committee staffers—most notably Loch Johnson—have also written prolifically about their experiences.<sup>12</sup> By contrast, the executive branch officials who were most closely involved in managing the crisis have written and said far less about their actions, and most information from inside the executive branch and NSA about how they handled the crisis remained classified for decades.<sup>13</sup> The result is that previous authors had to rely largely on the reports of the congressional intelligence investigative committees and the recollections of participants rather than the documentary record from the executive branch and NSA.<sup>14</sup> Reliance on that source base coupled with the broader tendencies to focus on CIA, FBI, and Congress has led historians to understate the importance of the Year of Intelligence and the Ford administration more broadly.<sup>15</sup>

A full accounting of what happened during the Year of Intelligence must consider the recollections of participants and the congressional reports

alongside documents from within the executive branch and the intelligence community. Crucial details about the Ford administration's maneuvering to protect NSA and preserve electronic surveillance have become visible in recent years thanks to the Remote Archive Capture Program, which has provided insight into important but otherwise closed collections at the Gerald R. Ford Presidential Library, and to the declassification of documents from within the intelligence community.<sup>16</sup> This article builds on the strong but fragmented foundations laid by previous authors by using these recently declassified documents to show how the Ford administration constructed a new legal framework for intelligence that not only protected NSA from meaningful regulation and preserved the growth of electronic surveillance but that also sustained executive branch preeminence in national security affairs.

#### THE NATIONAL SECURITY AGENCY'S DATA-DRIVEN RISE TO POWER

NSA's leading role in electronic surveillance, large-scale use of computers, and partnerships with private companies are more familiar now than in the mid-1970s when the organization was little known outside the intelligence community.<sup>17</sup> Even within the intelligence community, few people knew of NSA's involvement in warrantless domestic electronic surveillance. Fewer still knew of the agency's partnerships with private companies or the uses to which computers were being put at the agency's Fort Meade headquarters. Outside the intelligence community, hardly anyone in government knew anything about NSA. Only two congressional staffers had sufficient security clearances to peer inside NSA, and they focused on budgetary matters.<sup>18</sup> This secrecy was by design. The government viewed signals intelligence, the collection of information derived from communications and electronic and electromagnetic emanations, as especially sensitive.<sup>19</sup> Since signals intelligence was one of NSA's chief responsibilities, NSA's activities received close to the highest level of secrecy that it was possible for the government to maintain.<sup>20</sup> This high level of secrecy and NSA's unique bureaucratic position as both a military organization and an intelligence agency enabled the agency to operate with a large degree of autonomy.

For the first decade of its existence, NSA operated in the shadow of the higher-profile CIA. The balance of power between the agencies began to change in the 1960s as NSA's ability to collect and process ever-larger quantities of information grew alongside advances in computing and changing communications technologies.<sup>21</sup> In the 1960s, NSA had expanded its use of computers beyond cryptanalysis and was making progress in its efforts to "mechanize" the

entire signals intelligence process.<sup>22</sup> NSA had also come to rely on bulk electronic surveillance of international commercial communications by targeting particular circuits and collecting all the traffic that transited them, including that of Americans.<sup>23</sup> NSA’s growing collection and processing capabilities endeared it to policymakers, many of whom preferred NSA’s ability to collect verbatim communications to CIA’s reliance on a human source to describe something overheard. The growth of diffuse threats such as international terrorism also increased policymakers’ appetite for new techniques that could enable large-scale monitoring of potential threats. NSA’s ascent generated grumbling at CIA about “NSA’s new feeling of importance” but looked permanent.<sup>24</sup>

However, NSA’s increasing dependence on bulk collection and computer processing made the agency vulnerable to regulation amid growing public unease about the privacy implications of computers and data bases. According to a 1971 public opinion survey, 53 percent of respondents worried that computers “might be used to destroy individual freedoms” and 58 percent of respondents expected that “computers will in the future be used to keep people under surveillance.”<sup>25</sup> Electronic surveillance had come under intense public, congressional, and judicial scrutiny in the early 1970s, but NSA’s leading role in it had not come to light.<sup>26</sup>

The fact that many of NSA’s activities were extralegal—in the sense that they had little or no statutory basis—added to NSA’s vulnerability.<sup>27</sup> President Truman created NSA in 1952 simply by signing a memorandum.<sup>28</sup> Although the name implied something more substantial, the National Security Agency Act of 1959 was little more than an administrative measure in which Congress exempted NSA from some civil service regulations.<sup>29</sup> For statutory cover for some of its operations, NSA relied on a vague caveat in the Omnibus Crime Control and Safe Streets Act of 1968, which read: “Nothing contained in this chapter or in section 605 of the Communications Act of 1934 . . . shall limit the constitutional power of the President to take such measures as he deems necessary to . . . obtain foreign intelligence information deemed essential to the security of the United States.”<sup>30</sup> The closest thing the agency had to a charter was a classified National Security Council Intelligence Directive that gave NSA broad latitude to conduct its operations.<sup>31</sup> NSA officials believed that together this patchwork of authorities provided sufficient legal foundation for the agency’s operations.<sup>32</sup> Although Ford administration officials believed that “legally NSA is spotless,” they worried that this thin legal foundation would not stand up to scrutiny in the political and social climate of the 1970s and that if the agency’s activities were exposed, Congress and/or the judiciary would feel compelled to regulate NSA.<sup>33</sup>

## THE FORD ADMINISTRATION'S INITIAL SCRAMBLE TO PROTECT THE INTELLIGENCE COMMUNITY

On December 22, 1974, the morning of President Ford's departure for a Christmas ski holiday in Vail, Colorado, journalist Seymour Hersh published an explosive article in the *New York Times* alleging that the CIA had spied illegally on Americans.<sup>34</sup> The article set off a scramble within the administration and the national security establishment that at first had little to do with NSA. Almost immediately, differences of opinion surfaced between the White House staff led by Donald Rumsfeld and Dick Cheney and the National Security Council staff led by Henry Kissinger about how to handle the crisis. The National Security Council staff preferred a passive approach in the hope that the story would fade quickly, while White House staff wanted both to get out in front of what they perceived to be a real crisis and to seize an opportunity to demonstrate presidential leadership. The White House staff's assertiveness led to recurring friction with the National Security Council staff, which considered intelligence matters its domain and resisted White House staff efforts to control the administration's response to the intelligence crisis.

Since the story laid some of the misdeeds at his doorstep, National Security Advisor and Secretary of State Henry Kissinger moved fastest to shape the administration's response. In phone calls and memos on December 23, Kissinger argued for a cautious approach.<sup>35</sup> However, as the potential scale of the controversy became apparent, the newly reorganized White House staff, led by Rumsfeld and Cheney, sought to take control of the situation.<sup>36</sup> Rumsfeld told Kissinger to obtain a full accounting from CIA Director William Colby and directed the National Security Council staff to route anything related to the crisis through Cheney at the White House and then to Rumsfeld himself in Colorado.<sup>37</sup>

While they waited for Colby's report, White House staffers in Colorado and Washington, D.C., tried to hash out a strategy for dealing with the crisis. Consensus developed quickly on the need for rapid and decisive executive action. Rumsfeld argued that the president "should learn the lessons of Watergate and should not make the same mistake of failing to act strongly and quickly on allegations of misconduct by the CIA."<sup>38</sup> On December 24, Ford's Counselor Jack Marsh sent the president a memo through Cheney and Rumsfeld recommending creation of a "Blue Ribbon Panel" to investigate the allegations and make recommendations to improve safeguards and increase the effectiveness of the intelligence community.<sup>39</sup>

Kissinger was not excited about the idea initially.<sup>40</sup> However, after reviewing Colby's report and seeing which way the winds were blowing within

the administration, Kissinger endorsed the idea and began trying to shape the scope and membership of the panel, including in a telephone conversation with Rumsfeld on the afternoon of December 24.<sup>41</sup> In that call, Rumsfeld and Kissinger alluded to the potential misdeeds of other intelligence organizations, naming the FBI, and noted with relief that so far no one appeared to be looking into them.<sup>42</sup>

Cheney used the days around Christmas to gather his thoughts about how to handle the crisis and then flew to Colorado to present them to Ford.<sup>43</sup> Cheney's handwritten notes from those days show a keen sensitivity to how the current political and social environment would affect the crisis. He began by noting that the debate over intelligence activities "will take place w/in the context of Watergate, the [Daniel] Ellsberg [Pentagon Papers] case, the Huston Plan [for increased surveillance of domestic dissidents], etc."<sup>44</sup> Cheney then outlined three options: to "endorse" the Colby Report; to "stay neutral" on the Colby Report; or to take "independent action." Cheney felt that the first option was too "defensive," and that second option was "basically a 'do nothing' posture."<sup>45</sup> Cheney believed that the administration needed to be proactive in managing the situation. He therefore advocated the third option because, among other reasons, "it offers the best prospect for heading off Congressional efforts to further encroach on the executive branch" and "it clearly demonstrates presidential leadership and a willingness to accept the responsibility for putting our own house in order."<sup>46</sup>

On January 4, 1975, President Ford issued Executive Order 11828 creating a Commission on CIA Activities within the United States and tasked his vice president, Nelson Rockefeller, with leading it.<sup>47</sup> As the name made clear, Ford's executive order gave the commission a narrow mandate focused on the allegations of potentially unlawful domestic CIA activities.<sup>48</sup> Although White House and National Security Council officials largely succeeded in keeping NSA out of the Rockefeller Commission's inquiry, they worried that congressional investigations risked dragging NSA into the spotlight and that exposure would create pressure for regulation. These fears came to life on January 27, 1975, when the Senate created a select committee to investigate the entirety of the intelligence community, including NSA.<sup>49</sup> The broad scope of the investigation alarmed the intelligence community and the White House and National Security Council staffs and temporarily reduced friction between the groups about how to respond. Concerns about NSA featured prominently in conversations among Ford administration officials in meetings in February. "We don't want NSA to be looked at," Kissinger told his colleagues on February 1.<sup>50</sup> NSA "could be charged with listening to Americans," CIA Director Colby added.<sup>51</sup> Kissinger



noted on several occasions that “the President would invoke executive privilege” to protect the agency.<sup>52</sup> The conversations made clear that Ford administration officials were desperate to protect NSA from public exposure and regulation. Kissinger reiterated the stakes in a follow-up meeting a few weeks later: “My worry is not that they will find illegalities in NSA, but that in the process of finding out about illegalities they will unravel NSA activities. In the process of giving us a clean bill of health [they] could destroy us.”<sup>53</sup>

### CONTROLLING CONGRESSIONAL ACCESS TO INFORMATION ABOUT INTELLIGENCE ACTIVITIES

Both White House and National Security Council officials agreed that the top priority was to control the flow of information about NSA and covert action to Congress.<sup>54</sup> The CIA domestic misdeeds that launched the congressional inquiries were in the past. By contrast, potentially controversial NSA operations were ongoing and seen as providing crucial intelligence, and covert action remained a useful tool for presidents. On February 21, Ford met with Kissinger, Rumsfeld, Marsh, and Deputy National Security Advisor Brent Scowcroft to discuss how the administration should manage the congressional investigations. Rumsfeld argued that “we need a focal point here” to run “a damage-limiting operation for the President.”<sup>55</sup> The group offered the job to Deputy Attorney General Laurence Silberman, who had impressed them with the discretion with which he had been working with the intelligence community to assess its legal vulnerabilities.<sup>56</sup> Silberman declined but recommended James Wilderotter, one of his assistants who had been working on intelligence issues.<sup>57</sup> The question became whether Wilderotter would report to the White House staff or to the National Security Council staff.

Continued bureaucratic battling between the White House staff and the National Security Council staff over who should lead the administration’s response delayed establishment of a focal point. But because both staffs agreed on the need to control the flow of information to Congress, Ford deflected Sen. Frank Church’s (D-ID) repeated requests for direct access to intelligence files in a March 5, 1975, meeting with Church and John Tower (R-TX), the heads of the Senate committee tasked with investigating the allegations of intelligence abuses.<sup>58</sup> A series of foreign-policy setbacks in March and April—most notably the fall of Cambodia and South Vietnam—consumed much of the National Security Council staff’s attention and created an opening for the White House staff to assert control over the administration’s handling of the intelligence crisis. With the likely candidates occupied or unwilling to put their

future careers or reputations at risk by serving as the White House focal point for lightning-rod intelligence issues, Ford put longtime friend and White House Counsel Philip Buchen—who had also handled Ford's controversial pardon of Richard Nixon—in charge.<sup>59</sup> Wilderotter went to work for Buchen on the White House staff as Associate Counsel to the President.

Working with the intelligence community, Ford administration officials and executive branch lawyers established procedures whereby congressional investigators would submit lists of documents they wished to see, the intelligence agencies would send the documents to the White House for review, and White House and National Security Council staffers would decide whether the documents would be shown to the congressional investigators and, if so, with what degree of redaction.<sup>60</sup> Antonin Scalia was closely involved in negotiating the ground rules for this process.<sup>61</sup> Wilderotter and National Security Council staffer Robert McFarlane did much of the yeoman's work, reviewing documents requested by the congressional investigators and making recommendations to their bosses about whether and in what form the documents could be released.<sup>62</sup>

This arrangement limited the ability of congressional investigators to discover information and would have presented difficulties even outside the world of compartmented secrecy. Within that world, congressional investigators faced an almost impossible challenge. They could not turn over rocks that they did not know existed; they had to have some idea of what they were looking for and know what information to request, and then the intelligence community and the White House would decide how much of the information to release and under what conditions.<sup>63</sup> The arrangement infuriated some would-be overseers in Congress, but they could do little about it. Because congressional intelligence oversight was in its infancy, the procedures that the Ford administration established for congressional access to intelligence information set an important and enduring precedent. This seemingly minor bit of process minutiae solidified the executive branch's national security information advantage over Congress and helped to preserve a high degree of autonomy for the intelligence community. These outcomes illustrate that control over information is both one of the keys to the executive branch's preeminence in national security affairs and ranks alongside other factors scholars have identified as sources of bureaucratic autonomy.<sup>64</sup>

For some members of the White House staff, simply controlling the flow of information to Congress was not enough. They felt that the White House needed to be more proactive in shaping the outcomes of the crisis and that if the president did not continue to exercise leadership on intelligence issues the

other branches of government would fill the void.<sup>65</sup> There had been powerful examples in the recent past—the Soviet downing of a U-2 spy plane during the Eisenhower administration, the failed Bay of Pigs invasion during the Kennedy administration, and all manner of activities during the Nixon administration—that showed that the conduct of intelligence activities had both political and legal ramifications. White House staffers seem to have concluded that the president’s political advisors and executive branch lawyers needed to be more involved in intelligence, rather than leaving intelligence to the national security professionals. At the end of March 1975, Cheney suggested that Buchen pursue “a Presidential initiative for newly defining and controlling the respective functions at the different agencies engaged in foreign intelligence operations and covert activities.”<sup>66</sup>

Thus began the development of what would become the first-ever consolidated intelligence executive order. However, development of the executive order got held up in the lingering disagreement between the White House staff and the National Security Council staff about how to manage the Year of Intelligence and about who should be in charge. In both cases, the National Security Council staff, comprised in part by detailees from the intelligence community who saw themselves as national security professionals, felt that the status quo was sufficient. Members of the White House staff disagreed. This bureaucratic dispute played out in an endless series of revisions to what was supposed to be a joint memorandum to the president outlining the administration’s plan for dealing with the intelligence crisis. White House staff would add a section recommending creation of an intelligence policy group under Buchen or Marsh, only for the National Security Council staff to strike that text.<sup>67</sup> Despite repeated prodding from the president, the White House staff and its National Security Council staff counterparts could not agree on a path forward.<sup>68</sup>

## THE THREAT TO NSA GALVANIZES THE FORD ADMINISTRATION’S RESPONSE

The emergence of a serious threat to NSA helped to break the bureaucratic impasse between the White House and National Security Council staffs and galvanized the Ford administration’s efforts to shape the outcomes of the Year of Intelligence. NSA’s troubles began when the Church Committee assigned staffers to investigate the agency. Although the investigators faced great difficulties peeling back the layers of secrecy, by May 1975 they had uncovered two programs of questionable legality and had learned that the agency was

engaged in warrantless domestic electronic surveillance.<sup>69</sup> The first program was a bulk collection effort called "Shamrock," through which NSA had for decades obtained copies of international telegrams without warrants from the communications companies that transmitted them. Although the focus of the program was on the diplomatic-message traffic of foreign countries, the telegrams of American citizens were included in NSA's take.<sup>70</sup> NSA had long since supplemented Shamrock with an updated version of the program, known inside NSA as "New Shamrock," that obviated the need for cooperation with the communications companies by simply tapping their lines directly.<sup>71</sup> When the congressional investigators discovered the old Shamrock program, NSA promptly shut it down.<sup>72</sup>

The second program was called "Minaret" and had more subtle but arguably farther reaching implications for the future of surveillance and privacy. Established in 1962 and formalized in 1969, Minaret had grown by the early 1970s into a "watch list" of more than a thousand persons and entities that the White House and a range of other government entities wanted NSA to monitor. The list included a large number of American citizens, including political dissidents, and the agency used computers to search for "selectors" in the information collected in bulk under programs like Shamrock and the agency's monitoring of international commercial communications.<sup>73</sup> The presence of Americans on the watch list raised obvious legal questions about the infringement of their rights. When Lew Allen became NSA director in 1973 and learned of Minaret, he shut it down because he doubted it was legal.<sup>74</sup> Taken together, Shamrock, Minaret, and NSA's progress in using computers to mechanize signals intelligence constituted the type of large-scale surveillance that a majority of Americans feared but that was central to NSA's growing power.<sup>75</sup> The executive branch and the intelligence community were desperate to keep the pieces of this full picture from being assembled lest Congress regulate the bulk collection and computer-processing capabilities that were making NSA ever more valuable.

As congressional investigators tried to make sense of their discoveries, a series of leaks about NSA activities over the summer of 1975 helped to drive the investigations forward. In late July the *New York Daily News* reported many details of the "old" Shamrock operation.<sup>76</sup> In August and September the *New York Times* and *Newsweek* published additional articles that provided greater detail on NSA's electronic surveillance operations.<sup>77</sup> Several historians and former intelligence officials have implied or argued explicitly that congressional staffers leaked information about NSA to the media to drive the investigations forward.<sup>78</sup> Without confirming such a strategy, Church Committee

staffer Britt Snider acknowledged that although the leaks were “a source of considerable consternation for the Committee as well as NSA,” they “had the salutary effect . . . of breaking the bureaucratic logjam that had stymied us. With the allegations now a matter of public record, NSA wanted to explain its side of the story.”<sup>79</sup>

Throughout the congressional investigations, the Ford administration and NSA had repeatedly underscored the agency’s importance and the need to preserve and protect its operations. As Snider recalled, from the beginning “implicitly the message came through: ‘Whatever you do, kids, don’t screw this up—it’s important to the country.’”<sup>80</sup> The public revelations about NSA’s activities led the administration to send the message more explicitly and, at times, in ways that smacked of desperation. The administration sent small groups of senior officials to beseech members of Congress not to discuss NSA matters in public shortly before open hearings dealing with NSA were scheduled to commence.<sup>81</sup> President Ford called Sen. Church personally to lobby against open Senate hearings on NSA and sent Attorney General Edward Levi to repeat the appeal in person.<sup>82</sup> These efforts gained the administration partial if temporary reprieves.<sup>83</sup> When the Pike Committee decided without permission from the executive branch or NSA to declassify material that contained four words that referred to NSA activity, the administration sent Assistant Attorney General Rex Lee before the Pike Committee the next day to inform them that the executive branch considered the transgression so grave that it would no longer provide classified materials and was recalling all classified material provided to the committee up to that point.<sup>84</sup>

The mounting threat to NSA created a shared sense of urgency within both the White House and National Security Council staffs and galvanized the administration’s response to the intelligence crisis in ways that the historical allegations against CIA—with the exception of covert action—and FBI did not. National Security Council staffer Robert McFarlane wrote a memo to Deputy National Security Advisor Brent Scowcroft on September 21, 1975, arguing that the administration needed “to go to the mat” to protect NSA because its activities were “the most sensitive operations in the Intelligence Community.”<sup>85</sup> The shared sense of crisis aided the White House staff’s final and successful push to persuade Ford to create an Intelligence Coordinating Group (ICG) within the White House staff tasked with proactively shaping the outcomes of the Year of Intelligence. On September 19, 1975, Ford appointed Jack Marsh head of the new ICG, with the State Department, Department of Defense, Office of Management and Budget, CIA, and White House Counsel’s office also represented.<sup>86</sup> Eager to get the crisis under control, the president

directed the ICG to "meet daily to review problems, discuss strategy, agree on assignments and prepare issues for my decision."<sup>87</sup>

One of the ICG's first tasks was to negotiate the formal public revelation of NSA activities. Both the Church Committee and a House Subcommittee chaired by Rep. Bella Abzug (D-NY) had asked NSA Director Allen to testify in October. The Ford administration had greater confidence in the Church Committee's willingness to protect NSA and worked with it to stage-manage a careful reveal of a narrow slice of NSA's activities while trying to sabotage Abzug's effort. In a meeting with his advisors on October 27, 1975, Ford gave the final approval for Allen to testify in open session before the Church Committee. Ford and his advisors believed that partnerships between the intelligence community and the private sector had to be protected lest companies cease cooperation with the government out of fear of public or legal reprisals, so Ford directed Allen to focus on Minaret and not to discuss Shamrock.<sup>88</sup> However, the Ford administration and NSA agreed to work with the committee to review its Shamrock report to ensure that if/when the committee decided to release it publicly it did as little damage as possible to NSA's operations.<sup>89</sup>

Allen appeared before the Church Committee on October 29, 1975. There were both encouraging and ominous signs at the hearing. On the positive side, the hearing made clear that the Ford administration and NSA had succeeded in conveying the agency's importance. Church began by noting that "the value of [NSA's] work to our national security has been and will continue to be inestimable."<sup>90</sup> In carefully scripted testimony, Allen described the origins and functions of NSA as well as the authorities under which the agency operated, citing prominent examples of the importance of signals intelligence to the nation's security. He then summarized the Minaret "watch list" activity and fielded questions.<sup>91</sup> Senator Walter Mondale (D-MN) prefaced his questioning by noting that "I consider your Agency and your work to be possibly the single most important source of intelligence for this Nation."<sup>92</sup>

Worryingly for NSA and the executive branch, however, both Mondale and Senator Richard Schweiker (R-PA) raised concerns about NSA's technical capability to intercept purely domestic information and the absence of any statute governing such interception.<sup>93</sup> Mondale added that NSA's "most impressive capacity which works so often for the purposes of defending this country and informing it . . . also scares me in terms of its possible abuse."<sup>94</sup> Senator Gary Hart (D-CO) expressed concern about the level of bureaucratic autonomy with which NSA officials below the director level appeared to operate in the past, alluding to former Deputy Director Louis Tordella.<sup>95</sup> The takeaway was that a number of the senators thought NSA needed a legislative charter.

At the same time, Congress and the courts were moving to outlaw NSA's use of warrantless electronic surveillance. Even before the leaks and congressional hearings of 1975, the executive branch and intelligence community's long-standing use of warrantless electronic surveillance had come under intense congressional and judicial scrutiny, with both Congress and the courts expressing growing unease with the practice in the early 1970s.<sup>96</sup> In its 1972 *Keith* ruling, the Supreme Court declared warrantless electronic surveillance for domestic security purposes illegal, but it did not address warrantless electronic surveillance for foreign intelligence purposes.<sup>97</sup> Executive branch lawyers maneuvered to defend and preserve the practice. In 1973, Scalia drafted a legal opinion that facilitated the use of trespassory microphones without a warrant.<sup>98</sup> The following year, Attorney General William Saxbe defended warrantless electronic surveillance before Congress.<sup>99</sup> However, Saxbe felt his position was growing tenuous and in late 1974 sought renewed guidelines from the president on the authorization of warrantless electronic surveillance. Three days before Seymour Hersh's *New York Times* article in December 1974 threw the executive branch and intelligence community into crisis, President Ford provided updated guidelines and delegated authority for warrantless electronic surveillance to Saxbe.<sup>100</sup>

Based on evolving jurisprudence, however, new Attorney General Edward Levi began advocating for a revised approach to the issue not long after he replaced Saxbe. While awaiting updated guidance, Levi inserted himself into NSA's "New Shamrock" operation—in which NSA was using warrantless electronic surveillance to obtain message traffic from cable companies without their cooperation—in ways that traditional national security policymakers resented.<sup>101</sup> Rather than providing blanket approval, Levi began reviewing individual cases and granting only ninety-day approvals.<sup>102</sup> Levi, National Security Council staffer Robert McFarlane noted, objected to the "excessive authority granted to NSA for collecting information from Americans both in this country and abroad."<sup>103</sup> Scowcroft described the situation as "a mess" and told Kissinger that "we need to rethink this whole issue . . . in light of the new Attorney General's fastidiousness."<sup>104</sup> In a letter to the president in June 1975, Levi cited the recent ruling in *Zweibon v. Mitchell* that electronic surveillance conducted inside the United States required a warrant in nearly all instances as further evidence of the inadequacy of the president's guidance on the conduct of warrantless electronic surveillance.<sup>105</sup> The Abzug Subcommittee knew of NSA's "New Shamrock" activity and was trying to make the public aware of the potential privacy issues raised by this example of ongoing warrantless electronic surveillance inside the United States.<sup>106</sup> Congress and the courts were on the cusp of regulating NSA.

The Ford administration took several additional steps that helped to prevent Congress and the courts from clipping NSA’s wings. The first was to finish development of a comprehensive intelligence executive order. The second was to propose narrowly tailored electronic surveillance legislation. Executive branch lawyers played a crucial role in both efforts, solidifying their recent emergence as influential national security policymakers. A general desire following Watergate to ensure that intelligence activities could be documented as lawful had increased demand for executive branch lawyers’ input.<sup>107</sup> Before the 1970s, NSA’s in-house lawyers played almost no role in policy and operational matters.<sup>108</sup> It was not until the congressional intelligence investigations gained steam that NSA’s leaders began turning to their General Counsel’s office.<sup>109</sup> The Justice Department’s involvement in intelligence also grew during the Year of Intelligence. Deputy Attorney General Laurence Silberman helped the Ford administration navigate the first few months of the crisis. Office of Legal Counsel head Antonin Scalia was intimately involved thereafter. Along with other executive branch lawyers, he was instrumental in controlling the flow of information to Congress, drafting guidelines and providing timely legal opinions that justified the invocation of executive privilege to stonewall Abzug.<sup>110</sup> Of equal or greater long-term significance, executive branch lawyers’ work on the intelligence executive order and electronic surveillance legislative proposal helped the Ford administration construct a new legal framework for intelligence that consolidated executive branch preeminence in national security affairs.

#### HEADING OFF CONGRESS: EXECUTIVE ORDER 11905

President Ford issued Executive Order 11905, the first comprehensive intelligence executive order, on February 18, 1976.<sup>111</sup> The order has been poorly understood and, as a result, its impact has been understated.<sup>112</sup> The fact of the order, the way it came to be, and its implementation had lasting consequences. At the most basic level, the fact of the order undercut—as White House staffers hoped it would—congressional efforts to regulate the intelligence community. The order established charters for components of the intelligence community, including NSA, which had not had them previously, thereby weakening one of Congress’s main arguments in favor of comprehensive intelligence reform legislation.<sup>113</sup> The overall tone of the order conveyed the importance and sensitivity of the intelligence community, reinforcing a theme that the Ford administration had sounded throughout the Year of Intelligence and had emphasized most strongly with regard to NSA.<sup>114</sup> The order placed a further



burden on Congress to establish that sweeping intelligence reform legislation remained necessary and would not weaken this vital area of governmental activity. Congress never did pass comprehensive intelligence-reform legislation providing statutory charters for all components of the intelligence community.<sup>115</sup> Instead, Executive Order 11905 formed the cornerstone of a new legal framework for intelligence and established the precedent that subsequent administrations would follow in their management of the intelligence community.<sup>116</sup>

The way that the order came to be mattered, too. The fact that White House staff initiated development of the order and led the drafting process marked a shift in the role of the president's political advisors in intelligence policymaking and set a precedent that endured. While the leaders of the intelligence agencies had largely accepted greater White House staff involvement in intelligence matters, their subordinates did not always welcome the change. Commenting on a draft background paper for the president prepared by White House staffer Michael Raoul-Duval in early December 1975, senior CIA official Scott Breckinridge wrote: "If I were the President, I would hope that I would be better advised about the problems than this paper does in its present form."<sup>117</sup> Jack Marsh, Duval's boss on the White House staff, was sensitive to the issue. In comments on a subsequent draft of the memo for the president on intelligence issues written by Duval, Marsh wrote, "I believe this section should be summarized. It is not clear and I believe argumentative. It is my view that this type of discussion is likely to draw attack and may account for the charge by the professionals that in effect is the work of amateurs [*sic*]."<sup>118</sup> Through the Intelligence Coordinating Group, Marsh orchestrated a process that allowed the intelligence community to shape most of the substance of the executive order, but it was the White House staff that produced an order where many national security professionals preferred not to have one. The fact that executive branch lawyers like Scalia helped to write the order solidified their increased role in intelligence policymaking.<sup>119</sup>

The order also initiated an implementation process that led to lasting changes within the intelligence community. When assessing the impact of an executive order, it is necessary to look not only at its text but also at its implementation in affected departments and agencies. An order whose wording may seem ineffectual can become quite consequential in implementation. Although the order enabled the executive branch and intelligence community to continue making their own rules, they did not return to the status quo ante. Instead, the order solidified the Ford administration's effort to tie the intelligence community more tightly to the White House and to establish a new

legal framework governing intelligence activities. The order established an Intelligence Oversight Board (IOB) reporting to the president and the attorney general whose main purpose was to ensure the "legality" and "propriety" of intelligence activities.<sup>120</sup> It was in response to the order that NSA developed and promulgated United States Signals Intelligence Directive (USSID) 18, which set the parameters for NSA's activities for decades.<sup>121</sup> Also important were the intense bureaucratic fights between the CIA and the Department of Defense (DoD) that took place in the process of implementing the executive order.<sup>122</sup> These battles, which DoD largely won, solidified the shifting balance of power away from the CIA and toward DoD-owned components of the intelligence community like NSA.<sup>123</sup>

### HEADING OFF THE COURTS: THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA)

Executive Order 11905 left the sensitive issue of warrantless electronic surveillance in the United States unaddressed. The courts remained poised to outlaw the practice and Congress was working on legislation that would limit NSA's ability to collect information in bulk inside the United States. To neutralize that double threat, executive branch lawyers led by Attorney General Edward Levi suggested that the administration propose narrowly tailored electronic surveillance legislation favorable to the executive branch and intelligence community.<sup>124</sup> In addition to preventing the other branches of government from tying the executive branch's hands, part of Levi's rationale for seeking tailored electronic surveillance legislation was the need to help "overcome the erroneous public suspicion that covert and indiscriminate electronic surveillance abounds within the United States."<sup>125</sup> Although traditional national security policymakers opposed Levi's push for electronic surveillance legislation, his ultimate success in narrowing the scope of electronic surveillance legislation and in heading off judicial intervention provided a template for how to play Congress and the courts off each other to preserve executive branch preeminence in national security affairs.<sup>126</sup> The use of a tailored executive branch legislative proposal emerged as another piece in a new legal framework for intelligence.

Just as they had resisted development of an intelligence executive order initially, traditional national security policymakers at first opposed developing electronic surveillance legislation because they did not want to cede any of their autonomy to executive branch lawyers, Congress, or the courts. In a meeting with the president on October 13, 1975, Secretary of Defense James

Schlesinger argued that “the Attorney General should not be the one to approve NSA surveillance” and complained that he was “worried about the Attorney General being the highest intelligence officer for these purposes.”<sup>127</sup> Kissinger and Scowcroft opposed Levi’s legislative proposal, with Kissinger arguing that “it would be a mistake to surrender the President’s constitutional authority” to conduct certain types of warrantless electronic surveillance.<sup>128</sup> Key White House staffers backed Levi, however, because they saw the political value in the legal cover that the attorney general was trying to provide.<sup>129</sup>

By the time that Ford signed Executive Order 11905 in February 1976, Levi had persuaded the president that electronic surveillance legislation was both necessary and inevitable and that it would be to the administration’s advantage to supply a draft to Congress rather than leaving Congress to draft something on its own.<sup>130</sup> Ford sent Congress a message the same day saying that he looked forward to working with them to establish “a procedure for undertaking electronic surveillance for foreign intelligence purposes.”<sup>131</sup> Ford met with congressional leaders on March 23, 1976, to seek their support for electronic surveillance legislation drafted by Levi’s Justice Department.<sup>132</sup> Over the next several months, Levi and members of his staff, including Scalia, worked with the senators involved in drafting what would in revised form become the Foreign Intelligence Surveillance Act (FISA).<sup>133</sup>

Although Congress did not pass FISA until 1978, after Ford left office, the fact that Congress and the executive branch were working together to develop electronic surveillance legislation appears to have led the courts to stop short of outlawing warrantless electronic surveillance altogether. This element of judicial restraint can be seen in the United States Court of Appeals, District of Columbia Circuit ruling in a case argued and decided toward the end of 1976. The ruling was the result of a months-long tussle between Rep. John Moss (D-CA), who had picked up where Rep. Abzug had left off, and the Ford administration over the involvement of companies in government electronic surveillance activities, particularly those not involving warrants.<sup>134</sup> On June 22, 1976, Moss’s House subcommittee issued a subpoena to AT&T seeking copies of all “request letters” sent by the government to AT&T requesting its assistance in conducting warrantless surveillance. AT&T was willing to comply with the request, so the government filed suit in District Court to prevent AT&T from releasing the requested documents. The government succeeded in obtaining an injunction against AT&T that would prevent it from complying with the Moss Subcommittee’s subpoena. Moss appealed the decision. In its ruling, the appeals court sought “to avoid a possibly unnecessary constitutional decision” and recommended that the executive and legislative branches

continue negotiations to try to resolve their differences “without requiring a judicial resolution of a head-on confrontation.”<sup>135</sup>

Although the White House was not thrilled with the ruling—Buchen lamented in an early January 1977 memorandum summarizing it that “the opinion fails to resolve the ultimate question”—it represented a surprisingly good outcome for the Ford administration, and a fitting end to its brief but eventful tenure in office.<sup>136</sup> Ford administration officials had used executive action to play the other two branches of government off one another and secured the outcome they wanted. Like Executive Order 11905, the extensive participation of the executive branch and intelligence community in the drafting of FISA allowed them to reform on their own terms while still cultivating a perception of legality around intelligence activities. The collaborative rather than adversarial way that the special court created by FISA has operated has made it a mostly congenial forum for the executive branch and intelligence community to obtain legal cover for surveillances previously conducted without warrants.<sup>137</sup> For Ford administration officials like Cheney, McFarlane, Rumsfeld, and Scowcroft who went on to influential further government careers, the episode provided a template for how to play Congress and the courts off one another and showed that fostering a perception of legality was, at least in the case of intelligence, sufficient to preserve executive branch preeminence in national security affairs.

The Ford administration’s electronic surveillance legislative proposal provided the clearest example of the newly important role of executive branch lawyers in national security policymaking. Not everyone in the administration welcomed this development. The traditional leaders of the national security establishment—the secretary of state, CIA director, secretary of defense, and national security advisor—vented their unhappiness with the ascendant Justice Department at the final National Security Council meeting of the Ford administration. The subject of the meeting was the semiannual review of the intelligence community. With neither Levi nor anyone else from the Justice Department present, Kissinger declared that “the Justice Department’s role today is a threat to national security.”<sup>138</sup> To the evident frustration of the traditional leaders of the national security establishment, the Justice Department had secured an influential role for lawyers in national security policymaking during the Year of Intelligence, establishing a new status quo that would endure.<sup>139</sup> In the short term, traditional national security policymakers chafed at the increased involvement of executive branch lawyers because it decreased their autonomy. However, faced with the choice of ceding some autonomy to executive branch lawyers on the one hand or to Congress

or the judiciary on the other, they preferred the former. In the long term, they embraced the legal cover that the involvement of executive branch lawyers in intelligence provided.

## REASSESSING THE FORD ADMINISTRATION

Two assumptions underpin the conventional wisdom about what happened in the United States in the mid-1970s and how the events of those years shaped future developments. The first is that post-Watergate and post-Vietnam political backlash weakened the executive branch and the intelligence community. At first glance, that is what seemed to happen. Congress passed the War Powers Resolution, established committees focused on intelligence oversight, and passed the Foreign Intelligence Surveillance Act, three measures that seemed to signal—and that have led some historians to conclude that there was—a reining in of the intelligence community and an end to executive branch preeminence in national security affairs.<sup>140</sup> With the passage of several decades, however, it is clear that these measures amounted to little. The second prevailing assumption is that the Ford administration was, at best, an inconsequential “interregnum” in American history or, at worst, a joke.<sup>141</sup> A careful examination of the how the Ford administration protected the National Security Agency (NSA) during the Year of Intelligence and a tallying of the enduring consequences of its actions shows that it was anything but.

Despite early disagreements between the White House staff and the National Security Council staff over who should lead the response to the Year of Intelligence, the Ford administration acted quickly to control the flow of intelligence information to congressional investigators. Because this crucial step coincided with the birth of congressional intelligence oversight, the precedent that the Ford administration established for executive branch control over what information about intelligence activities Congress can see and under what conditions carried great weight and has to a large degree endured, along with the resulting challenges for congressional intelligence oversight. The Senate’s effort in the late 2000s to investigate the CIA’s detention and interrogation program provides a telling example. In that instance, the CIA decided what information to provide, provided it uncollated at a CIA facility rather than delivering it to Senate offices, monitored the Senate investigators’ work, and in several cases removed documents that had been provided previously.<sup>142</sup> By controlling congressional access to information about intelligence activities, the Ford administration sustained the information advantage that was a key to both the executive branch’s preeminence

in national security affairs and to the intelligence community’s bureaucratic autonomy.

Even more consequentially, the Ford administration headed off congressional and judicial regulation of NSA and electronic surveillance by establishing a hybrid legal framework for intelligence that provided the cover of law but that was more flexible than statutory law alone. Based on broad executive orders, narrow legislation, and legal opinions written by executive branch lawyers, this framework fostered a perception of legality that deflected calls for comprehensive new intelligence laws. The vital role played by executive branch lawyers in developing this new legal framework cemented their emergence as leading players in decisions about intelligence policy and operations. Their increased influence was not universally welcomed within the national security establishment, but it has endured—a fact that makes the shift arguably more important than the contemporaneous emergence of congressional intelligence oversight, which has proved more limited than its advocates hoped.<sup>143</sup> The crucial role played by executive branch lawyers in establishing the legality of counterterrorism programs like the warrantless NSA bulk collection and data-mining effort initiated during the George W. Bush administration and the lethal operations of both the Bush and Obama administrations illustrate the lasting importance of this shift.<sup>144</sup>

The Year of Intelligence was a formative experience for the officials who led the Ford administration’s response. The subsequent career trajectories of many of these officials—including Dick Cheney, Robert McFarlane, Donald Rumsfeld, Antonin Scalia, Brent Scowcroft, and Laurence Silberman—further ensured that the precedents they set influenced policy and law for decades. McFarlane and Scowcroft served as national security advisors in the Reagan and George H. W. Bush administrations, respectively. Scalia and Silberman remained influential on intelligence policy and law from important positions in the judiciary. Cheney defended executive branch preeminence in national security affairs from his seat representing Wyoming in Congress in the 1980s before becoming vice president in the George W. Bush administration. There, Cheney and Rumsfeld relied upon the flexible legal framework for intelligence activities that they had helped to construct in the Ford administration. The actions these officials took during the Ford administration and afterward redefined the law and politics of intelligence.

The Year of Intelligence was also a crucial moment in NSA’s history and, by extension, the history of data mining and privacy. During the crisis, the Ford administration and NSA developed the winning argument that NSA was too important to regulate.<sup>145</sup> The basis for this argument was that since the

computerization of signals intelligence and changes in communications technologies had made large-scale information collection and processing possible, there was the risk that a threat could slip through if NSA was not allowed to collect and process as much information as possible. For the politicians who would bear the blame for any resulting harm to the country, such a risk was not worth taking. By claiming a more formal oversight role for itself during the Year of Intelligence, Congress accepted some political responsibility for NSA's actions. Like the executive branch, Congress preferred to err on the side of letting NSA do too much rather than risk being blamed for NSA doing too little. Congress therefore passed on the opportunity to place meaningful limits on NSA's growing capabilities at a moment when such limits might have moved NSA away from bulk collection and data mining. Instead, NSA continued down the path toward total information awareness, to the benefit perhaps of policymakers and the intelligence community but with consequences for society with which we continue to reckon.

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## NOTES

1. Scalia speech, "International Conference on the Administration of Justice and National Security in Democracies," Ottawa, Canada, 12 June 2007, quoted in Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (New York, 2007), 30.

2. Letter from Rod (Hills) to Phil (Buchen), 29 April 1975, Edward Schmults Files, Box 11 (Counsel's Office-Admin.) (1), Gerald R. Ford Presidential Library (hereafter "Ford Library"), cited in James Michael Strine, "The Office of Legal Counsel: Legal Professionals in a Political System," Ph.D. diss. (The Johns Hopkins University, 1992), 81. On Scalia's value to the Ford White House, see also Bruce Allen Murphy, *Scalia: A Court of One* (New York, 2014), 70–78.

3. Savage, *Takeover*, 30.

4. Memorandum of Conversation, Kissinger, Schlesinger, Colby, Philip Areeda, Laurence Silberman, Martin Hoffman, "Investigation of Allegations of Domestic CIA Activities," 20 February 1975, Ford Library, <http://www.fordlibrarymuseum.gov/library/document/0314/1552958.pdf>.

5. Alan Westin articulated many of these concerns in his groundbreaking 1967 book, *Privacy and Freedom* (New York, 1967).

6. "Year of Intelligence," *New York Times*, 8 February 1975, <https://www.nytimes.com/1975/02/08/archives/year-of-intelligence.html>.

7. Such a reevaluation began in the years during and after the George W. Bush presidency, when keen observers and both critics and admirers of Cheney, Rumsfeld, and Scalia noted that their service in the Ford administration was a formative experience. This

article not only adds to the case for reassessing the Ford administration based on the experiences of these influential historical actors but also goes beyond the existing literature by arguing that the actual steps that these officials took were consequential at the time and had lasting impact. On service in the Ford administration as a formative experience, see, for example, John Prados, *The Family Jewels: The CIA, Secrecy, and Presidential Power* (Austin, 2013), chap. 2 and 277–79; Savage, *Takeover*, chap. 2; Stephen F. Hayes, *Cheney: The Untold Story of America’s Most Powerful and Controversial Vice President* (New York, 2007), 82–90; Lou Dubose, *Vice: Dick Cheney and the Hijacking of the American Presidency* (New York, 2006), chap. 2; Scott Shane, “Recent Flexing of Presidential Powers Had Personal Roots in Ford White House,” *New York Times*, 30 December 2006, <https://www.nytimes.com/2006/12/30/washington/30roots.html>; Adam Liptak, “Cheney’s To-Do Lists, Then and Now,” *New York Times*, 11 February 2007, <https://www.nytimes.com/2007/02/11/weekinreview/11liptak.html>; and, most recently, Adam McKay’s film about Cheney, *Vice*.

8. James Bamford and Thomas Johnson provide the best accounts of how the crisis unfolded for NSA, but they do not explore the Ford administration’s maneuvering in detail. See James Bamford, *The Puzzle Palace: Inside the National Security Agency, America’s Most Secret Intelligence Organization* (New York, 1982), chaps. 7 and 10; and Thomas R. Johnson, *United States Cryptologic History, Series VI: The NSA Period, 1952–Present, Volume 5, American Cryptology during the Cold War, 1945–1989: Book III: Retrenchment and Reform, 1972–1980* (Fort Meade, MD, 1998), 83–116, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB260/>, hereafter “Johnson, AC, Book #, page #.” Like Johnson’s partially declassified *American Cryptology during the Cold War*, some of the most useful pieces dealing with the NSA aspects of the story were published inside the intelligence community and have not received sufficient attention. See James G. Hudec, “Unlucky SHAMROCK—The View from the Other Side,” *Studies in Intelligence* 10 (Winter–Spring 2001): 85–94, <https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol44no5/html/v44i5a12p.htm> and L. Britt Snider, “Unlucky SHAMROCK: Recollections of the Church Committee’s Investigation of NSA,” *Studies in Intelligence* (Winter 1999–2000), <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter99-00/art4.html>. Loch Johnson, a political scientist who served on the staff of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (better known as the Church Committee), provides insight into how the Church Committee handled the NSA aspects of its investigation in his valuable memoir, Loch K. Johnson, *A Season of Inquiry: The Senate Intelligence Investigation* (Lexington, KY, 1985). John Prados took an important preliminary step toward filling in details of the Ford administration’s handling of the NSA aspects of the Year of Intelligence in Prados, *Family Jewels*, 22–34, 82–98, and 277–79.

9. The literature on the Year of Intelligence largely mirrors this trend. See, for example, Brent Durbin, *The CIA and the Politics of US Intelligence Reform* (New York, 2017), chap. 6; Rhodri Jeffreys-Jones, *The CIA and American Democracy* (New Haven, 1989), chap. 11; Kathryn S. Olmsted, *Challenging the Secret Government: The Post-Watergate Investigations of the CIA and FBI* (Chapel Hill, 1996); John Ranelagh, *The Agency: The Rise and Decline of the CIA from Wild Bill Donovan to William Casey* (New York, 1986), chaps. 16–17; Athan Theoharis, *Spying on Americans: Political Surveillance from Hoover to the*



*Huston Plan* (Philadelphia, 1978); and Athan Theoharis, *Abuse of Power: How Cold War Surveillance and Secrecy Policy Shaped the Response to 9/11* (Philadelphia, 2011).

10. Thomas Johnson's *American Cryptology during the Cold War* takes important steps in this direction, but the insider, granular detail of NSA's development that makes it so valuable also limits—along with its only partial declassification—its big-picture contributions.

11. Keith E. Whittington and Daniel P. Carpenter, "Executive Power in American Institutional Development," *Perspectives on Politics* 1, no. 3 (September 2003): 495–513. For an overview of the state of the literature on presidential use of executive orders, see Kenneth R. Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (Princeton, 2001), 11–16.

12. In addition to Loch Johnson, *A Season of Inquiry*, accounts written by Church Committee staffers include Snider, "Unlucky SHAMROCK"; Theoharis, *Spying on Americans and Abuse of Power*; and Fredrick A. O. Schwarz Jr., *Democracy in the Dark: The Seduction of Government Secrecy* (New York, 2015).

13. Limited but valuable accounts written by executive-branch officials include the pieces by Michael Raoul-Duval and James Wilderotter in Bernard J. Firestone and Alexej Ugrinsky, *Gerald R. Ford and the Politics of Post-Watergate America*, vol. 2 (Westport, CT, 1993), 492–96, and Timothy S. Hardy, "Intelligence Reform in the Mid-1970s," *Studies in Intelligence* 20, no. 2 (Summer 1976): 1–15, [https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol20no2/html/v20i2a01p\\_0001.htm](https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol20no2/html/v20i2a01p_0001.htm). Like some of the best available information on the NSA aspects of the story, Hardy's important contribution to the executive branch story appeared in an internal intelligence community publication and has been overlooked.

14. See, for example, Johnson, *Season of Inquiry*, generally, and on NSA, 78–79, 91–96, 98, 104–14; Olmsted, *Challenging the Secret Government*, generally, and on NSA, 104–5; and Frank J. Smist Jr., *Congress Oversees the United States Intelligence Community*, 2nd ed. 1947–1994 (Knoxville, 1994), generally, and on NSA, 63–64, 74–75. Theoharis's deep work in FBI's files and integration of that information with material from the congressional investigations shows how a more complete picture can be assembled. See Theoharis, *Abuse of Power*.

15. This is true even of Olmsted's otherwise exemplary work on the Year of Intelligence. Although Olmsted also argues that historians have underestimated the Ford administration's handling of the Year of Intelligence, her work overlooks the executive actions examined in this article and as a result concludes that little came of the Year of Intelligence. See Olmsted, *Challenging the Secret Government*, and Kathryn S. Olmsted "Reclaiming Executive Power: The Ford Administration's Response to the Intelligence Investigations," *Presidential Studies Quarterly* 26, no. 3 (Summer 1996): 725–37. Surveys of the Ford administration treat the Year of Intelligence in passing, if at all, and do not give the administration much credit. See, for example, John Robert Greene, *The Presidency of Gerald R. Ford* (Lawrence, KS, 1995); Yanek Mieczkowski, *Gerald Ford and the Challenges of the 1970s* (Lexington, KY, 2005); Douglas Brinkley, *Gerald R. Ford* (New York, 2007); and Andrew Downer Crain, *The Ford Presidency: A History* (Jefferson, NC, 2009). A recent effort to show the Ford administration's influence on intelligence is Luca Trenta, "'An act of insanity and national humiliation': The Ford Administration, Congressional Inquiries and the Ban on Assassination," *Journal of Intelligence History* 17, no. 2 (2018): 121–40.

16. On the Remote Archive Capture Program, see <https://www.fordlibrarymuseum.gov/library/guides/findingaid/fordlibrac.asp>.

17. Tom Bowman and Scott Shane, “NSA Insistence on Secrecy Taken to Extreme Lengths: Memoir of Agency Retiree Stripped by Its Censors,” *Baltimore Sun*, 12 December 1995, [http://articles.baltimoresun.com/1995-12-12/news/1995346002\\_1\\_cryptographer-puzzle-palace-nsa-officials](http://articles.baltimoresun.com/1995-12-12/news/1995346002_1_cryptographer-puzzle-palace-nsa-officials).

18. Snider, “Unlucky SHAMROCK.”

19. For a definition of signals intelligence, see p. 214 of DOD Dictionary of Military and Associated Terms, as of January 2019, <https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf?ver=2019-01-30-082945-953>.

20. Bamford, *Puzzle Palace*, 356–59.

21. Johnson, *AC*, Book II, 352–57. See also *Foreign Relations of the United States, 1917–1972*, vol. 38, pt. 2, Organization and Management of Foreign Policy: Public Diplomacy, 1973–1976, ed. M. Todd Bennett and Alexander R. Wieland (Washington, DC, 2014), Document 40, <https://history.state.gov/historicaldocuments/frus1969-76v38p2/d40> and Document 61, <https://history.state.gov/historicaldocuments/frus1969-76v38p2/d61>.

22. On the evolution of NSA’s use of computers, see Colin B. Burke, *It Wasn’t All Magic: The Early Struggle to Automate Cryptanalysis, 1930s–1960s* (Fort Meade, MD, 2002), <https://fas.org/irp/nsa/automate.pdf>. See also Samuel S. Snyder, “History of NSA General-Purpose Electronic Digital Computers,” Department of Defense (1964): 2, [https://www.governmentattic.org/3docs/NSA-HGPEDC\\_1964.pdf](https://www.governmentattic.org/3docs/NSA-HGPEDC_1964.pdf); Samuel S. Snyder, “Computer Advances Pioneered by Cryptologic Organizations,” *Annals of the History of Computing* 2, no. 1 (January–March 1980): 60–70; and James Bamford, *Body of Secrets: Anatomy of the Ultra-Secret National Security Agency* (New York, 2002), 579. On NSA’s efforts to “mechanize,” see Johnson, *AC*, Book II, 361–70 and Johnson, *AC*, Book III, 151–54.

23. Johnson, *AC*, Book III, 94, 99.

24. See, for example, Memorandum for Assistant Comptroller, Requirements and Evaluation, “The CIA/NSA Relationship,” 20 August 1976, National Security Agency: Organization and Operations, 1945–2009, Digital National Security Archive (DNSA), cited in Stephen Budiansky, *Code Warriors: NSA’s Codebreakers and the Secret Intelligence War against the Soviet Union* (New York, 2016), 284–86.

25. The data come from *A National Survey of the Public’s Attitudes Toward Computers* (New York, 1971), cited in Sarah E. Igo, “The Beginnings of the End of Privacy,” *The Hedgehog Review* 17, no. 1 (Spring 2015), [https://iasc-culture.org/THR/THR\\_article\\_2015\\_Spring\\_Igo.php](https://iasc-culture.org/THR/THR_article_2015_Spring_Igo.php).

26. See, for example, *United States v. United States District Court* 407 U.S. 297–344 (1972), better known as the *Keith* case, and U.S. Congress, Senate, *Warrantless Wiretapping and Electronic Surveillance: Hearings Before the Subcommittee on Administrative Practice and Procedure and the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary and the Subcommittee on Surveillance of the Senate Committee on Foreign Relations*, 93rd Cong., 3, 8 April 1974 and 8, 9, 10, and 23 May 1974.

27. Bamford, *Puzzle Palace*, 382.

28. Memorandum for the Secretary of State and the Secretary of Defense, “Communications Intelligence Activities,” 24 October 1952, RAC Box 33, James Wilderrotter Files, Ford Library.

29. Johnson, AC, Book I, 272–74.
30. Johnson, AC, Book II, 474, and Hudec, “Unlucky SHAMROCK: The View from the Other Side.”
31. The original NSCID governing NSA, No. 9, stressed the “special nature” of NSA’s mission. See National Security Council Intelligence Directive No. 9 Revised, “Communications Intelligence, 29 December 1952, <https://history.state.gov/historicaldocuments/frus1950-55Intel/d257>. The NSCID governing NSA during the mid-1970s was No. 6, which toned down the language a bit but still gave NSA wide latitude. See National Security Council Intelligence Directive No. 6, “Signals Intelligence,” 17 February 1972, [https://www.nsa.gov/Portals/70/documents/news-features/decclassified-documents/nsa-60th-timeline/1970s/19720217\\_1970\\_Doc\\_3984040\\_NSCID6.pdf](https://www.nsa.gov/Portals/70/documents/news-features/decclassified-documents/nsa-60th-timeline/1970s/19720217_1970_Doc_3984040_NSCID6.pdf). See also Bamford, *Puzzle Palace*, 389–90.
32. Hudec, “Unlucky SHAMROCK: The View from the Other Side.”
33. Memorandum of Conversation, Kissinger, Schlesinger, Colby, Philip Areeda, Laurence Silberman, Martin Hoffman, “Investigation of Allegations of Domestic CIA Activities,” 20 February 1975, Ford Library, <http://www.fordlibrarymuseum.gov/library/document/0314/1552958.pdf>.
34. Seymour M. Hersh, “Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years,” *New York Times*, 22 December 1974, <https://www.nytimes.com/1974/12/22/archives/huge-cia-operation-reported-in-u-s-against-anti-war-forces-other.html>.
35. Telephone conversation between Donald Rumsfeld and Henry Kissinger, 9:35 a.m., 23 December 1974, Kissinger Conversations: Supplement II, 1969–77, DNSA and Memorandum from Donald Rumsfeld to Henry A. Kissinger, “Kissinger/Rumsfeld telephone conversation, 7:30 a.m., 23 December 1974, on CIA matter,” 24 December 1974, Cheney Files, Box 6, Intelligence Subseries (Colby Report), Ford Library, <https://www.fordlibrarymuseum.gov/library/document/0005/1561477.pdf>.
36. On the reorganization of the White House staff and Rumsfeld’s and Cheney’s ascents within it, see Chris Whipple, *The Gatekeepers: How the White House Chiefs of Staff Define Every Presidency* (New York, 2017), 47–75.
37. Memorandum from Donald Rumsfeld to Henry A. Kissinger, “Kissinger/Rumsfeld telephone conversation, 7:30 a.m., 23 December 1974, on CIA matter,” 24 December 1974, Cheney Files Box 6, Intelligence Subseries (Colby Report), Ford Library, <https://www.fordlibrarymuseum.gov/library/document/0005/1561477.pdf>.
38. Ron Nessen, *Making the News, Taking the News* (Middletown, CT, 2011), 139.
39. Memorandum from Jack Marsh to the President, 24 December 1974, Cheney Files, Box 7 (Intelligence, Rockefeller Commission, General), Ford Library, <https://www.fordlibrarymuseum.gov/library/document/0005/1561493.pdf>.
40. Telephone conversation between William Colby and Henry Kissinger, 9:55 a.m., 24 December 1974, Kissinger Conversations Supp. II, 1969–77, DNSA.
41. Telephone conversation between Donald Rumsfeld and Henry Kissinger, 6:25 p.m., 24 December 1974, Kissinger Conversations: Supp. II, 1969–77, DNSA.
42. *Ibid.*
43. See President’s Daily Diary Collection, Box 73 (27 December 1974), Ford Library, <https://www.fordlibrarymuseum.gov/library/document/0036/pdd741227.pdf>.

44. Cheney handwritten notes, 27 December 1974, Cheney Files Box 6, Intelligence Subseries (Colby Report), Ford Library, <https://www.fordlibrarymuseum.gov/library/document/0005/1561477.pdf>. Cheney’s notes begin at p. 14 of the PDF.

45. *Ibid.*

46. *Ibid.* Prados also points to the importance of these Cheney notes. See Prados, *Family Jewels*, 29.

47. Gerald R. Ford, Executive Order 11828—Establishing a Commission on CIA Activities Within the United States, Online by Gerhard Peters and John T. Woolley, The American Presidency Project, <https://www.presidency.ucsb.edu/node/268730>.

48. For a detailed study of the Rockefeller Commission, see Kenneth Kitts, “Commission Politics and National Security: Gerald Ford’s Response to the CIA Controversy of 1975,” *Presidential Studies Quarterly* 26, no. 4: 1081–98.

49. David E. Rosenbaum, “C.I.A.-F.B.I. Inquiry Voted by Senate,” *New York Times*, 27 January 1975, <https://www.nytimes.com/1975/01/28/archives/ciafbi-inquiry-voted-by-senate-church-is-expected-to-be-named.html>.

50. Bennett and Wieland, *Foreign Relations of the United States, 1917–1972*, vol. 38, pt. 2, Organization and Management of Foreign Policy; Public Diplomacy, 1973–76, Document 32, <https://history.state.gov/historicaldocuments/frus1969-76v38p2/d32>.

51. *Ibid.*

52. *Ibid.*, and Memorandum of Conversation, Kissinger, Schlesinger, 8 February 1975, Ford Library, <https://www.fordlibrarymuseum.gov/library/document/0314/1552950.pdf>.

53. Memorandum of Conversation, Kissinger, Schlesinger, Colby, Philip Areeda, Laurence Silberman, Martin Hoffman, “Investigation of Allegations of Domestic CIA Activities,” 20 February 1975, Ford Library, <http://www.fordlibrarymuseum.gov/library/document/0314/1552958.pdf>.

54. *Ibid.*

55. Memorandum of Conversation, Ford, Kissinger, Rumsfeld, Marsh, 21 February 1975, Ford Library, <https://www.fordlibrarymuseum.gov/library/document/0314/1552960.pdf>.

56. For comments praising Silberman’s handling of the initial phase of the crisis, see telephone conversation between Donald Rumsfeld and Henry Kissinger, 6:25 p.m., 24 December 1974, Kissinger Conversations Supp. II, 1969–77, DNSA.

57. On Silberman turning down the opportunity to manage the White House’s response to the intelligence crisis, see telephone conversation between William Walker and Henry Kissinger, 2:25 p.m., 26 February 1975, Kissinger Conversations: Supp. II, 1969–77, DNSA. For Silberman’s recommendation of Wilderrotter, see Memorandum of Conversation, Ford, Kissinger, Rumsfeld, Marsh, 21 February 1975, Ford Library, <https://www.fordlibrarymuseum.gov/library/document/0314/1552960.pdf>.

58. Memorandum of Conversation, Ford, Kissinger, Senators Frank Church and John Tower, “Congressional Investigation of CIA,” 5 March 1975, Ford Library, <https://www.fordlibrarymuseum.gov/library/document/0314/1552979.pdf>.

59. Memorandum of Conversation, Ford, Schlesinger, 28 March 1975, Ford Library, <https://www.fordlibrarymuseum.gov/library/document/0314/1553011.pdf>. Prados emphasizes Buchen’s influential role. See Prados, *Family Jewels*, 277–78.

60. Memorandum of Conversation, Ford, Schlesinger, Rumsfeld, Marsh, Buchen, “Congressional Investigation of CIA,” 28 March 1975, Ford Library, <https://www.fordlibrarymuseum.gov/library/document/0314/1553011.pdf>.

61. Note-Taking from 40 Committee Records of Action and Minutes, n.d. [1975], Loen and Leppert Files, Box 14 (Intelligence—House Select Committee: Handling and Release of Classified Documents), Ford Library, <https://www.fordlibrarymuseum.gov/library/document/0014/1075839.pdf>.

62. For examples of how this process worked, see Memorandum from Philip Buchen to the President, “Request of Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities for Information,” Cheney Files, Box 7 (Intelligence—Release of Documents to the Church Committee (1), Ford Library, <https://www.fordlibrarymuseum.gov/library/document/0005/1561490.pdf>. See pp. 4–62 of the PDF. These documents also contain Cheney’s marginalia indicating documents he did not believe should be released. See also the memos written by Wilderotter, in Cheney Files, Box 6 (Intelligence—Congressional Investigations) (1), Ford Library, <https://www.fordlibrarymuseum.gov/library/document/0005/1561480.pdf>.

63. For examples of the challenges and frustrations this caused the Church Committee, see Smist, *Congress Oversees the United States Intelligence Community*, 55–56.

64. On the national security establishment and executive branch’s secrecy advantages, see Daniel Patrick Moynihan, *Secrecy: The American Experience* (New Haven, 1998), and David Pozen, “The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information,” *Harvard Law Review* 127 (2013): 512–635. On the concept of bureaucratic autonomy, see Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928* (Princeton, 2001). The national security establishment provides a case where reputation building may be less important than control over information.

65. Cheney handwritten notes, 27 December 1974, Cheney Files Box 6, Intelligence Subseries (Colby Report), Ford Library, <https://www.fordlibrarymuseum.gov/library/document/0005/1561477.pdf>.

66. Memorandum from Philip W. Buchen to Richard Cheney, 27 March 1975, RAC Box 35, Philip Buchen Intelligence Series (9), Ford Library.

67. This dispute comes through in versions dated 21 July 1975 and 22 July 1975, both of which are in James Connor Files, Box 58 (Rockefeller Commission Recommendations and Implementation) (1), Ford Library.

68. For examples of this prodding, see Memorandum from Don Rumsfeld to Jim Cannon, 30 June 1975, James Connor Files, Box 58 (Rockefeller Commission Recommendations and Implementation) (1), Ford Library; Memorandum from Don Rumsfeld to Brent Scowcroft and Jim Cannon, 8 July 1975, James Connor Files, Box 58 (Rockefeller Commission Recommendations and Implementation) (1), Ford Library; and Memorandum from Dick Cheney to Jim Connor, Rod Hills, and Brent Scowcroft, 12 July 1975, James Connor Files, Box 58 (Rockefeller Commission Recommendations and Implementation) (1), Ford Library.

69. For a play-by-play of the Church Committee investigation of NSA, see Snider, “Unlucky SHAMROCK,” and Hudec, “Unlucky SHAMROCK—The View from the Other Side.”

70. Johnson, AC, Book III, 83–84.

71. *Ibid.*, 93.

72. *Ibid.*

73. For concise synopses of Minaret from within NSA, see Johnson, *AC*, Book III, 84–86, and David A. Hatch, “Cryptologic Almanac 50th Anniversary Series: The Time of Investigations, Part 1 of 2,” National Security Agency, September–October 2002, [http://documents.theblackvault.com/documents/nsa/cryptoalmanac/time\\_of\\_investigations\\_part\\_1.pdf](http://documents.theblackvault.com/documents/nsa/cryptoalmanac/time_of_investigations_part_1.pdf). See also Budiansky, *Code Warriors*, 289–91. On the role of bulk collection in Minaret, see Johnson, *AC*, Book III, 94. On the role of computers, see Johnson, *Season of Inquiry*, 94.

74. Johnson, *AC*, Book III, 86.

75. See *A National Survey of the Public’s Attitudes Toward Computers* (New York, 1971), cited in Igo, “The Beginnings of the End of Privacy.”

76. Frank Van Riper, “Find U.S. Agents Spy on Embassies’ Cables,” *New York Daily News*, 22 July 1975, 2.

77. Nicholas M. Horrock, “National Security Agency Reported Eavesdropping on Most Private Cables,” *New York Times*, 31 August 1975, <https://www.nytimes.com/1975/08/31/archives/national-security-agency-reported-eavesdropping-on-most-private.html>, and Russell Watson with Evert Clark and Anthony Marro, “No Place to Hide,” *Newsweek*, 8 September 1975.

78. See Prados, *Family Jewels*, 89–91, 346n32; Johnson, *AC*, Book III, 93; Snider, “Unlucky SHAMROCK, and Hudec, “Unlucky SHAMROCK—The View from the Other Side.”

79. Snider, “Unlucky SHAMROCK.”

80. *Ibid.*

81. See, for example, Nicholas M. Horrock, “N.S.A. Says It Is Not Eavesdropping,” *New York Times*, 9 August 1975, <https://www.nytimes.com/1975/08/09/archives/nsa-says-it-is-not-eavesdropping.html> and, on NSA Director Lew Allen’s meeting with Rep. Bella Abzug (D-NY) prior to one of her hearings, see Allen to Abzug, 23 October 1975, [https://www.nsa.gov/Portals/70/documents/news-features/declassified-documents/nsa-60th-time-line/1970s/19751000\\_1970\\_Doc\\_FordLibrary\\_Shamrock.pdf](https://www.nsa.gov/Portals/70/documents/news-features/declassified-documents/nsa-60th-time-line/1970s/19751000_1970_Doc_FordLibrary_Shamrock.pdf).

82. President’s Daily Diary Collection, Box 78 (7 October 1975), Ford Library, <http://www.fordlibrarymuseum.gov/library/document/0036/pdd751007.pdf>, and Memorandum from Jack Marsh to the President, “Church Committee Hearings Concerning NSA,” 7 October 1975, John Marsh Files, Box 87 (President) (9/75–12/75), Ford Library. On Levi’s appearance before the Church Committee, see Johnson, *Season of Inquiry*, 93–94.

83. See, for example, the transcript of the Abzug hearings: U.S. Congress, House, *Interception of Nonverbal Communications by Federal Intelligence Agencies: Hearings Before a Subcommittee of the Committee on Government Operations*, 94th. Cong., 1st and 2nd sess., 23 October 1975, 25 February, 3, 10, and 11 March 1976, 18, hereafter “Abzug hearings.”

84. Statement of Rex E. Lee, Assistant Attorney General, Civil Division, before the House Select Committee on Intelligence, 12 September 1975, Loen and Leppert Files, Box 15 (Intelligence, House Select Committee: Handling and Release of Classified Documents), Ford Library, <https://www.fordlibrarymuseum.gov/library/document/0014/1075839.pdf>. Lee’s testimony begins on p. 18 of the PDF.

85. McFarlane to Scowcroft, 21 September 1975, RAC 41, National Security Adviser, NSC Information Liaison with Commissions and Committees (11), Ford Library.

86. Memorandum from the President to the Secretary of State; Secretary of Defense; Director, Office of Management and Budget; Director, Central Intelligence Agency; Philip W. Buchen; and John O. Marsh Jr., 19 September 1975, James Connor Files, Box 57 (Intelligence Coordinating Group, General), Ford Library.

87. *Ibid.*

88. Memorandum from Jack Marsh to the President, “NSA Open Hearings,” 27 October 1975, Presidential Handwriting File, Box 31 (National Security, Intelligence) (7), Ford Library. On the need to preserve private-sector partnerships, see Memorandum from John Matheny to General Scowcroft, “9:00 a.m. Marsh Group Meeting, October 10, 1975,” 10 October 1975, RAC Box 41, National Security Adviser, NSC Information Liaison with Commissions and Committees (10), Ford Library.

89. Johnson, *Season of Inquiry*, 108, 111.

90. See US Congress, Senate, Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *The National Security Agency and Fourth Amendment Rights: Hearings before the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong., 1st sess., 29 October and 6 November 1975, 38, [https://www.intelligence.senate.gov/sites/default/files/94intelligence\\_activities\\_V.pdf](https://www.intelligence.senate.gov/sites/default/files/94intelligence_activities_V.pdf), hereafter “Church Committee NSA hearings.”

91. Church Committee NSA hearings, 1–55.

92. *Ibid.*, 38.

93. *Ibid.*, 38–39.

94. *Ibid.*, 38.

95. *Ibid.*, 27.

96. For a summary of the evolution of the law on warrantless electronic surveillance, see Memorandum RE: *Zweibon v. Mitchell*, D.C. Cir. No. 73-1847, June 23, 1975, James Connor Files, Box 56 (Electronic Surveillance), Ford Library.

97. *United States v. United States District Court* 407 U.S. 297-344 (1972).

98. Memorandum for the Attorney General, “Use of Warrantless Trespassory Microphones in Foreign Intelligence Matters,” 17 September 1974, RAC Box 36, Philip Buchen Files (Intelligence Series) (16), Ford Library.

99. Statement of Attorney General William B. Saxbe on National Security Electronic Surveillance and S. 2820 before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, United States Senate, 2 October 1974, CIA CREST RDP77M00144R000800110057-3, <https://www.cia.gov/library/readingroom/docs/CIA-RDP77M00144R000800110057-3.pdf>.

100. Memorandum from Phil Buchen to the President, “Warrantless Electronic Surveillance,” 12 January 1976, Presidential Handwriting File, Box 31 (National Security, Intelligence) (10), Ford Library. The original December 1974 memo to Attorney General Saxbe is an attachment. For more background on Ford’s December 1974 delegation of authority to conduct warrantless electronic surveillance, see TAB C of Memorandum from Philip W. Buchen to the President, “Assertion of Executive Privilege by You and Authorization to Bring Action to Stop Enforcement of Subpoena Issued to the American Telephone and Telegraph (AT&T) Company,” 21 July 1976, RAC Box 36, Philip Buchen Files (Intelligence Series) (16), Ford Library.

101. See Johnson, *AC*, Book III, 93, 106.

102. Memorandum from Allen to Schlesinger, “Approval of Operations to Collect Foreign Wire Communications and Electronic Emanations,” 4 October 1975, RAC Box 33, Philip Buchen Files (Codeword), Ford Library. See also Johnson, *AC*, Book III, 106. On Levi’s efforts to reform the FBI with particular emphasis on the bureau’s involvement in warrantless electronic surveillance, see Tim Weiner, *Enemies: A History of the FBI* (New York, 2012), 338.

103. Memorandum from McFarlane to Kissinger, “Meeting with the President Concerning Congressional Investigation of the Intelligence Community,” 13 October 1975, RAC Box 27, Robert McFarlane Files (3), Ford Library.

104. Memorandum from Scowcroft to Kissinger, 19 April 1975, RAC Box 51, National Security Advisor, Scowcroft Daily Work Files (10), Ford Library.

105. Letter from Attorney General Edward Levi to the President, 25 June 1975, James Connor Files, Box 56 (Electronic Surveillance), Ford Library and Memorandum RE: *Zweibon v. Mitchell*, D.C. Cir. No. 73-1847, 23 June 1975, James Connor Files, Box 56 (Electronic Surveillance), Ford Library.

106. See, for example, Abzug hearings, 11, 64, 282, 287.

107. The first law school course on “national security law” appeared in 1974. See James E. Baker, “Process, Practice, and Principle: Teaching National Security Law and the Knowledge That Matters Most,” *Georgetown Journal of Legal Ethics* 27 (2014): 165.

108. Hudec, “Unlucky SHAMROCK—The View from the Other Side.”

109. *Ibid.*

110. See Memorandum for the Honorable Philip W. Buchen, Counsel to the President, Re: Claim of Executive Privilege with respect to materials subpoenaed by the Committee on Government Operations, House of Representatives, Presidential Handwriting File, Box 31 (National Security, Intelligence) (13), Ford Library.

111. “Executive Order 11905: United States Foreign Intelligence Activities, February 18, 1976,” <http://www.fordlibrarymuseum.gov/library/speeches/760110e.asp>.

112. For an example of the standard, largely dismissive interpretation of the order, see Christopher Andrew, *For the President’s Eyes Only: Secret Intelligence and the American Presidency from Washington to Bush* (New York, 1995), 419. Luca Trenta’s article on assassination policy argues that the impact of the Ford administration’s executive order has been understated but does not examine the order in detail. See Trenta, “An act of insanity and national humiliation,” 121–40. One work that does examine Executive Order 11905 in detail is John M. Oseth, *Regulating U.S. Intelligence Operations: A Study in Definition of the National Interest* (Lexington, KY, 1985), 91–102. However, Oseth’s valuable study does not explore the order’s implementation within the intelligence community.

113. Executive Order 11905.

114. On the tone of the order, see Oseth, *Regulating U.S. Intelligence Operations*, 91–92.

115. On Congress’s failure to pass broad intelligence legislation, see Oseth, *Regulating U.S. Intelligence Operations*, 122–48; Smist, *Congress Oversees the United States Intelligence Community*, 124–26; Olmsted, *Challenging the Secret Government*, 185–86; and Theoharis, *Abuse of Power*, 144–47. On Congress’s failure to legislate a charter for NSA specifically, see Johnson, *AC*, Book III, 108–9.

116. See, for example, the Carter (Executive Order 12036) and Reagan (Executive Order 12333) administration intelligence executive orders.



117. Memorandum from S. D. Breckinridge to [redacted] SC/DCI, "Comments on 10 December Draft of 'Analysis of Issues,'" 12 December 1975, RAC Box 39, Duval Files (Intelligence Series) (6), Ford Library.

118. Memorandum from Jack Marsh to Mike Duval, 22 December 1975, John Marsh Files, Box 89 (White House Memoranda, Raoul-Duval, Michael) (2), Ford Library.

119. See Firestone and Ugrinsky, *Gerald R. Ford and the Politics of Post-Watergate America*, 496.

120. Executive Order 11905. Oseth also notes the importance of the order's focus on "legality." See Oseth, *Regulating U.S. Intelligence Operations*, 95–96.

121. David A. Hatch, "Cryptologic Almanac 50th Anniversary Series: The Time of Investigations, Part 2 of 2," National Security Agency, September–October 2002, [http://documents.theblackvault.com/documents/nsa/cryptoalmanac/time\\_of\\_investigations\\_part\\_2.pdf](http://documents.theblackvault.com/documents/nsa/cryptoalmanac/time_of_investigations_part_2.pdf). See also Johnson, AC, Book III, 105–7.

122. Memorandum from Robert A. Rosenberg to William G. Hyland, "DEPSECDEF/DCI Debate over CFI Activities," 3 September 1976, RAC Box 55, Documents from National Security Adviser Scowcroft Daily Work Files (Codeword) (5), Ford Library.

123. See, for example, Memorandum from Samuel M. Hoskinson and Robert A. Rosenberg to William G. Hyland, "CIA/NSA SIGINT Transfer," 10 November 1976, RAC Box 55, Documents from National Security Adviser Scowcroft Daily Work Files (Codeword) (5), Ford Library.

124. Memorandum of Conversation, Ford, Kissinger, Schlesinger, Levi, Lynn, Colby, Buchen, Marsh, Raoul-Duval, Rumsfeld, 13 October 1975, Ford Library, <http://www.fordlibrarymuseum.gov/library/document/0314/1553270.pdf>.

125. Memorandum from Philip Buchen to the President, "Intelligence Legislation Proposed by the Justice Department," 13 February 1976, Presidential Handwriting File, Box 31 (National Security, Intelligence) (9), Ford Library.

126. On the use of a legislative proposal to narrow Congress's room for maneuver, see Whittington and Carpenter, 501–2.

127. Memorandum of Conversation, Ford, Kissinger, Schlesinger, Levi, Lynn, Colby, Buchen, Marsh, Raoul-Duval, Rumsfeld, 13 October 1975, Ford Library, <http://www.fordlibrarymuseum.gov/library/document/0314/1553270.pdf>.

128. Memorandum from Robert S. Ingersoll to the President, "Attorney General Levi's Proposed Bill on Electronic Surveillance," 16 March 1976, attachment to Memorandum from James E. Connor to Philip Buchen and Jack Marsh, "Proposed Electronic Surveillance Legislation," 17 March 1976, Presidential Handwriting File, Box 31 (National Security, Intelligence) (14–15), Ford Library. See also Memorandum from Jack Marsh to the President, "Proposed Legislation on Electronic Surveillance," 16 March 1976, Presidential Handwriting File, Box 31 (National Security, Intelligence) (14–15), Ford Library and Memorandum from Brent Scowcroft to the President, "Legislation on Electronic Surveillance," 16 March 1976, Presidential Handwriting File, Box 31 (National Security, Intelligence) (14–15), Ford Library.

129. See then-White House Chief of Staff Donald Rumsfeld's comments in Memorandum of Conversation, Ford, Kissinger, Schlesinger, Levi, Lynn, Colby, Buchen, Marsh, Raoul-Duval, Rumsfeld, 13 October 1975, Ford Library, <http://www.fordlibrarymuseum.gov/library/document/0314/1553270.pdf>.

130. Memorandum from Philip Buchen to the President, “Intelligence Legislation Proposed by the Justice Department,” 13 February 1976, Presidential Handwriting File, Box 31 (National Security, Intelligence) (9), Ford Library.

131. Read Ahead from Jack Marsh for the President, “Meeting with Congressional Leaders on Electronic Surveillance Legislation,” 22 March 1976, Duval Papers, Box 11 (Meeting with POTUS and Congressional Leaders on Electronic Surveillance), Ford Library.

132. *Ibid.*

133. For examples of Ford administration participation in drafting FISA, see pp. 3–4 of the attachment to Memorandum from Bill Funk to William Hyland, 27 August 1976, John Matheny Files, Box 1 (FISA) (2), Ford Library. See also Memorandum from Antonin Scalia to Participants in 7/30 Meeting on S.3197 [FISA], 30 July 1976, Loen and Leppert Files, Box 13 (Intelligence, General), Ford Library. For a discussion of how the final version of FISA came to be and the differences between that bill and the language the Ford administration proposed, see Oseth, *Regulating U.S. Intelligence Operations*, 107–12. For a detailed, critical discussion of FISA, see Bamford, *Puzzle Palace*, chap. 10.

134. See Mark J. Rozell, “Executive Privilege in the Ford Administration: Prudence in the Exercise of Presidential Power,” *Presidential Studies Quarterly* 28, no. 2 (Spring 1998): 294–95.

135. *United States of America v. American Telephone and Telegraph Company et al.*, Appeal of John E. Moss, Member, United States House of Representatives, 551 F.2d 384 (1976).

136. Memorandum from Philip W. Buchen to The President, “Court of Appeals Decision in the AT&T Subpoena Case,” 3 January 1977, Presidential Handwriting File, Box C54 (Presidential Handwriting, 1/3/1977) (1), Ford Library, <https://www.fordlibrarymuseum.gov/library/document/0047/phw19770103-10.pdf>.

137. David Kris, “How the FISA Court Really Works,” *Lawfare*, 2 September 2018, <https://www.lawfareblog.com/how-fisa-court-really-works>.

138. NSC Meeting, Semiannual Review of the Intelligence Community, 13 January 1977, National Security Adviser’s NSC Meeting File, Box 2 (NSC Meeting 1/13/1977), Ford Library, <https://www.fordlibrarymuseum.gov/library/document/0312/1552411.pdf>.

139. For example, the internal NSA memo guiding implementation of FISA gave the NSA General Counsel responsibility for ensuring NSA’s compliance with FISA. The upshot was that the NSA’s Office of General Counsel, which prior to the mid-1970s had practically no role in operational matters, became a key player in NSA operations. See Memorandum from the Director to Distribution I, Plus Field Elements, “Foreign Intelligence Surveillance Act,” 3 November 1978, [https://www.nsa.gov/Portals/70/documents/news-features/declassified-documents/nsa-60th-timeline/1970s/19781103\\_1970\\_Doc\\_3979000\\_Foreign.pdf](https://www.nsa.gov/Portals/70/documents/news-features/declassified-documents/nsa-60th-timeline/1970s/19781103_1970_Doc_3979000_Foreign.pdf).

140. See, for example, Bruce Schulman, *The Seventies: The Great Shift in American Culture, Society and Politics* (Cambridge, Mass, 2002), 48, and Katherine A. Scott, *Reining in the State: Civil Society and Congress in the Vietnam and Watergate Eras* (Lawrence, KS, 2013).

141. On “interregnum,” see Fred I. Greenstein, *The Presidential Difference: Leadership Style from FDR to Barack Obama*, 3rd ed. (Princeton, 2009), 112.

142. Sen. Dianne Feinstein (D-CA) Statement on Intel Committee’s CIA Detention, Interrogation Report, 11 March 2014, <https://www.feinstein.senate.gov/public/index.cfm/>

press-releases?ID=DB84E844-01BB-4EB6-B318-31486374A895, and Mark Mazzetti and Jonathan Weisman, "Conflict Erupts in Public Rebuke on C.I.A. Inquiry," *New York Times*, 11 March 2014, <https://www.nytimes.com/2014/03/12/us/cia-accused-of-illegally-searching-computers-used-by-senate-committee.html>.

143. Richard Immerman calls congressional intelligence oversight "episodic and superficial." See Immerman, *The Hidden Hand: A Brief History of the CIA* (West Sussex, 2014), 95. Loch Johnson reviews the many challenges congressional intelligence overseers have faced since the mid-1970s in Johnson, "Congress and the American Experiment in Holding Intelligence Agencies Accountable," *Journal of Policy History* 28, no. 3 (2016): 494–514.

144. See Report on the President's Surveillance Program, 10 July 2009, <https://oig.justice.gov/reports/2015/PSP-09-18-15-full.pdf>, and Memorandum for the Attorney General, Re: Lethal Operation Against Shaykh Anwar Aulaki, 19 February 2010, [https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-02-19\\_-\\_olc\\_aaga\\_barron\\_-\\_al-aulaqi.pdf](https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-02-19_-_olc_aaga_barron_-_al-aulaqi.pdf).

145. At the time, David Kahn, one of the best-informed reporters covering NSA, argued that NSA had become indispensable, and that while it needed a legislative basis to reduce the chance of abuses, its status as the nation's "phantom ear" should not be ended. David Kahn, "Big Ear or Big Brother," *New York Times Magazine*, 16 May 1976, <https://www.nytimes.com/1976/05/16/archives/big-ear-or-big-brother-the-national-security-council-was-created-23.html>.