

# Joel Brenner

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## Forty Years After Church-Pike: What's Different Now?

This is the Henry F. Schorreck Memorial Lecture that I delivered at the National Security Agency

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**About ten years ago**, when I was the inspector general here, I found myself one day in Hawaii, under the Pineapples, and by coincidence there was at the same time a conference nearby of the agency's training staff from all over the Pacific region. And one of them came to me and said, We do all this training about the legal restrictions on our activities — USSID 18 and Executive Order 12333 and all that — and we know it's a big deal, but none of the people we're training know why we're doing it. And then after a pause she said: And frankly, we're not sure either.

I had lived through the upheavals of the late 'sixties and the 'seventies — the Vietnam War, the intelligence scandals, the Nixon impeachment, and the implementation of the legislative and regulatory framework that we impliedly refer to every time we say that this agency operates under law. Younger people had not.

We Americans don't take instructions well if we don't understand the reasons for them. And so I decided it was incumbent on us to tell and re-tell the story of how and why the United States became the first nation on earth to turn intelligence into a regulated industry. But the story isn't entirely behind us. It continues. And so this morning I'm not only going to recount what happened in the 'seventies; I'm also going to

address the Agency's position in the wake of the Snowden leaks, and how we got here. Because insofar as NSA has again been in the public's doghouse (It is certainly not in the policymakers' dog house), it is for very different reasons from those in 1976, and that difference is worth reflecting on.

Let's go back to January 1970, when a former Army captain in military intelligence, Christopher Pyle, disclosed in the *Washington Monthly* that the U.S. Army intelligence had more than a thousand plainclothes agents surveilling every significant political demonstration in the United States.<sup>[2]</sup> According to Pyle's account, the Army kept "files on the membership, ideology, programs, and practices of virtually every activist political group in the country . . . including . . . the Southern Christian Leadership Conference, Clergy and Laymen United Against the War in Vietnam, the American Civil Liberties Union, Women Strike for Peace, and the National Association for the Advancement of Colored People."<sup>[3]</sup> It also kept a "Blacklist" of "people who might cause trouble for the Army."<sup>[4]</sup> There had been violent, destructive race riots in Los Angeles in 1965, in Detroit in 1967, and then in April 1968 in Washington after Rev. Martin Luther King, Jr. was assassinated. Two months later, Bobby Kennedy was assassinated. That same year, the Soviet Army moved into Prague, the Fifth Republic in France nearly fell as a result of massive domestic unrest, and Chicago during the 1968 Democratic National Convention was the scene of serious street violence. Lest anyone forget, we were also deep in the Cold War, early in the Brezhnev years, and the antiwar movement unquestionably included a small but violent far-left element. Stability was a genuine concern of sober people.

The scope of the Army's domestic spying was nevertheless unauthorized in law, out of control, and plainly political. In the Army's eyes, dangerous people included Coretta Scott King, Georgia State Representative Julian Bond, folk singer Arlo Guthrie, and former military officers who opposed the Vietnam War. In Colorado Springs, the leader of a church youth group attended a peaceful antiwar protest; in response, the Army infiltrated his church. In Kansas City, the Army asked local high schools and colleges to turn over the names of 'potential trouble makers' and anyone who was 'too far left or too far right.'" Classroom statements by teachers and students found their way into police and Army files.<sup>[5]</sup> Based on Pyle's account, Senator Sam Ervin, a conservative southern Democrat from North Carolina and chairman of the Senate Judiciary Committee, opened hearings, but they ran into a wall because the Executive Branch, citing executive privilege and "national security," declined to provide much information. This episode nevertheless opened the first, small wedge into a system of government secrecy that had been little questioned since 1941.

The Army hearings were not the beginning of the American public's distrust of government, but by 1970, trust was running out on a strong ebb tide. Just to color the picture a bit brighter, in April 1970, the United States secretly expanded the Vietnam War into Cambodia, but the operation was leaked and produced vehement opposition. On May 4, frightened and undisciplined Ohio National Guard troops fired into a crowd of student demonstrators at Kent State University, killing four and wounding nine. In July, a cabal of radicals blew up the Army Math Research Center at the University of Wisconsin, killing a graduate student. The Weather Underground planned further bombings.

The sense of anxiety and pessimism was profound, and lots of people really did seem to believe, as the song said, that we were on the eve of destruction. (That song was actually written in 1964, but it had long legs.)

On December 22, 1974, the *New York Times* published a front-page story by Seymour Hersh about a CIA program called "family jewels." It began this way:

The Central Intelligence Agency, directly violating its charter, conducted a massive, illegal domestic intelligence operation during the Nixon

Administration against the antiwar movement and other dissident groups in the United States, according to well-placed Government sources.

An extensive investigation by The New York Times has established that intelligence files on at least 10,000 American citizens were maintained by a special unit of the C.I.A. that was reporting directly to Richard Helms, then the Director of Central Intelligence ....

This article is worth your reading, or re-reading after forty-one years – and not only for the mood of the country and the revelations themselves. It also lays out the unbelievably bad blood between the FBI and the CIA and the *intentional* freezing of cooperation between them. The seeds of the next generation's intelligence problem were there to see, unnoticed in plain view.

Just two weeks after Hersh's article, in January 1975, the Senate convened a Select Committee to Study Governmental Operations with Respect to Intelligence Activities, chaired by Senator Frank Church of Idaho. The Committee's work had support from both sides of the aisle. A similar committee convened in the House under Rep. [Otis G. Pike](#) of [New York](#), but the Senate version under Church was the more significant. It published fourteen reports in 1975-76 on intelligence agency activities, probably the most such comprehensive reports in history, in any country. The reports detailed the CIA's habit of opening our mail, NSA's domestic interception programs, and CIA's human subject research – including a notorious instance of LSD administered to an unwitting subject who, in a hallucinating fit, jumped out a window to his death. They also went deeply into intelligence activities overseas as well as at home, disclosing assassination plots against the Diem brothers of Vietnam, Patrice Lumumba in the Congo, General René Schneider in Chile, and Rafael Trujillo in the Dominican Republic, as well as the failed plan to use the Sicilian Mafia to kill Fidel Castro. Coups against the governments of Arbenz in Guatemala and Mosaddegh in Iran were also exposed.

The country was stunned by the systematic domestic surveillance, and shocked to learn that assassination was a tool of American foreign policy. It was as if we Americans had eaten of the fruit of the Tree of Knowledge. We had lost our innocence and the belief in the purity of our methods as well as our intentions.

Revelations about the FBI were, if possible, even more stunning. For 17 years, from 1956 to 1973, the Bureau under J. Edgar Hoover had run a covert program called COINTELPRO, for Counterintelligence Program. It had antecedents at least back to World War I. Its initial purpose was to assess the activities of the Communist Party of the U.S., but it eventually included surveillance of Senators Howard Baker and Church (who were the ranking member and chairman of the Senate Foreign Relations Committee), the women's movement, nearly all groups opposing the Vietnam War, Albert Einstein, and many civil rights leaders. Hoover loathed Martin Luther King, Jr., and after the March on Washington in 1963, he called King "the most dangerous Negro of the future in this nation from the standpoint of communism, the Negro, and national security." The FBI systematically bugged King's home and hotel rooms. By the way, much of the surveillance was personally approved by Attorney General Robert F. Kennedy – who later discovered he too had been a target of FBI surveillance.

On November 21, 1964, the FBI sent an anonymous package to King that contained audio recordings of his sexual indiscretions together with a letter that said: "There is only one way out for you. You better take it before your filthy, abnormal, fraudulent self is bared to the nation." The FBI was encouraging King to commit suicide.

Hoover, by the way, was regarded by several presidents as too powerful to remove from office because he was known or believed to have dossiers on them with embarrassing information.

NSA, meanwhile, was running two projects called SHAMROCK and MINARET. SHAMROCK began in August 1945 – the month Japan surrendered – and involved the collection by NSA's predecessor, the Armed Forces Security Agency and then by NSA, of all telegraphic traffic entering or leaving the United States. Western Union, RCA, and ITT gave the agency direct daily access to microfilm copies of this traffic – up to 150,000 messages per month. There was wartime precedent for this, but the scope of the collection, and its conduct in peacetime, was a different story.

MINARET was a related project by which NSA intercepted electronic communications of 1,650 people who were on a watch list. There were no warrants and no judicial oversight of these activities, which were simply assumed to be the normal activities of a foreign intelligence agency. The targets included Senators Church and Baker, many critics of the Vietnam War, King, Whitney Young, Muhammad Ali, Tom Wicker of the *New York Times*, and *Washington Post* columnist Art Buchwald. After the Church Committee disclosed these programs, then-NSA Director Lew Allen shut them down. The director's testimony before the Committee was the first time since NSA's founding in 1952 that any director had publicly testified before Congress; it was also the first time that NSA's existence was publicly acknowledged. Before then, NSA really did stand for "No Such Agency." (Now it stands for "Not Secret Anymore.")

I think it fair to say, and important to say, that everyone associated with these various programs thought that he was a patriot acting in the national interest. *Which is precisely why subjective notions of patriotism and national security are insufficient guides for people and agencies that claim to operate under law in a democratic republic.* (Snowden and Hoover actually represent converse instances of unmoored, egotistical arrogation to oneself of the right to determine the public good. The comparison will annoy their respective admirers. So much the better. They should think about it.)

The Church-Pike hearings were watershed events in our nation's history, psychologically as well as politically, and they led directly to the legal structures you operate under today. President Ford's Executive Order 11905, later modified and reissued by President Reagan as E.O. 12333 in substantially the form we now know it; the creation of the House and Senate *permanent* select committees on intelligence; the Foreign Intelligence Surveillance Act of 1978; the Inspector General Act of 1978; and USSID 18 (originally issued in 1980) – not to mention drastic budget cuts in intelligence – all these were the direct product of the Church-Pike hearings and reports.

Because of the hearings whose anniversary we celebrate today, the men and women of the intelligence community operate with a profoundly different mindset. You take orders from a democratically elected government, and you answer to an independent judiciary. *This is the "why."* This is the answer to the question put to me that day in Hawaii. This is the history we must teach to our successors.

I'm glad to say that NSA did not repeat the mistakes of the period that led to the Church-Pike hearings. Okay, then, so how did we get in the doghouse this time?

The seed of the problem was planted shortly after 9/11, when the White House determined to undertake certain collection outside the FISA regime under a highly classified, but now mostly declassified, program called STELLAR WIND.<sup>[6]</sup> That program was not SAP'ed, because the creation of a new special access program requires Congressional notification, but it was run directly by the Office of the Vice President and put under the direct personal control of the Vice President's counsel, David Addington. Under periodically renewed Presidential orders, NSA collected two kinds of intelligence: First, the contents of communications between a person outside the United States with a known connection to Al Qaeda or certain affiliated organizations, and a person inside the country; and second, bulk metadata in order to chain off

the domestic link. In my judgment, any President who had failed to order such surveillance on an emergency basis immediately after 9/11 would have been derelict. The President's first duty is to protect the nation, and the fear of further attack was palpable. You could smell it. But under statute, the interceptions were not permissible without a FISA order because they were taken from a wire inside the United States; and FISA did not permit metadata collection at all. Under prevailing law, metadata, which is analogous to the information on the outside of a mailed envelope, may have had no *Constitutional* protection. But the bulk collection of that data was a watershed *political* event in the history of American intelligence and in American politics. As an *emergency* matter, there's no question in my mind that the President had the power under Article II of the Constitution to order this collection – both kinds. But how long does an emergency last? (An emergency usually doesn't come with a specific expiration date like a quart of milk, but claims of emergency do get sour.)

Now, it was the view in the White House that the President did have the power to collect this intelligence on a *permanent* basis. And I am persuaded that the White House, and certainly the Office of the Vice President, believed that FISA was an unconstitutional limitation on the President's Article II power in all circumstances. This was an odd view, because Article I, Section 8 of the Constitution gives Congress the power to regulate interstate and foreign commerce, and that includes telecommunications. Under well-settled law, Congress cannot exercise its power in a manner that makes it impossible for the Executive to carry out its Constitutional duties, but it can regulate that exercise in a reasonable manner.

Both the NSA General Counsel at the time, Bob Deitz, and I looked for guidance in this situation to one of the more famous passages of Twentieth Century Constitutional law, and I'm going to read you a short bit of it. It's by Justice Robert Jackson, concurring in the Supreme Court's decision striking down President Truman's seizure of the steel mills on national security grounds. Jackson is talking about Presidential power in a divided government and the point at which law and politics cannot be separated. The President's power fluctuates, Jackson observed, depending upon Congress' exercise of its power. He saw three possibilities:[\[7\]](#)

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.
1. When the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. ...In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
1. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb ....

In my view, President Bush's STELLAR WIND orders fell into the third category – at least, I thought they did after some fairly brief but indeterminate emergency. (This was not the Administration's view. They thought the Authorization for Use of Military Force impliedly granted the power to implement STELLAR WIND. That was a serious argument, but it was based on debatable inferences; so even accepting that view, I thought the President was in the twilight zone.) You may know that after President Lincoln unilaterally suspended *habeas corpus* during the Civil War on the grounds that it was necessary to save the Union, he went to Congress to get his action ratified. President Bush chose not to do that. So I put the question to NSA's senior leadership: Why don't we amend FISA, which we could easily have done in the aftermath of 9/11, and do this collection under statute? This was actually an academic question, because policy was being

driven, and driven hard, by Addington, who detested the FISA statute. “We’re one bomb away from getting rid of that obnoxious [FISA] court,” he would say.<sup>[8]</sup> But the answer I got here at the Fort was interesting. It was that amending FISA would require a public debate; that the public debate would educate our adversaries; and that we would lose intelligence as a result. My response was that the program could not be kept secret forever, and that its eventual disclosure would create a firestorm and divide the country. The broad unity of the country behind the agency’s activities was a strategic asset; the loss of collection was likely to be tactical and temporary; and sacrificing a strategic asset for tactical advantage was as foolish in politics as it is in military operations. Better, I said, to amend the statute. But Inspectors General do not make policy, and they are not consulted about it, nor should they be.

Sooner or later this program’s cover was going to be blown, and on December 16, 2005, it happened: The *New York Times* exposed the interception part of the program (but not the bulk metadata portion), amid accusations that NSA was engaged in “domestic” spying because it was intercepting communications involving Americans. In my view that was a distorted description, but when you’re explaining, you’re losing. This was the beginning of a shift in public opinion that until then had, on the whole, been highly supportive of our intelligence agencies. Suddenly we faced a country that was seriously divided about our activities.

Most of the criticism actually had little to do with the merit of the interceptions, just the authority for it. Nor surprisingly, the inflammatory publicity attendant on the STELLAR WIND disclosure and the resulting damage to actual collection, to NSA’s reputation, and to our public support were far greater than any damage that would have occurred if the program, and the reasons for it, had been publicly discussed at the outset and the FISA statute amended.

Ladies and gentlemen, democracies distrust power and secrecy and are right to do so. Intelligence agencies are powerful and secret. To square that circle, two conditions must be met: The rules under which they operate must be clear to the public and authorized by law, and the public must have reason to believe that the rules are being followed. STELLAR WIND failed to meet those requirements, and NSA paid for it in loss of public trust.

Again, a lesson was learned – but imperfectly. FISA was amended in 2008, but only after a rancorous public debate, and the statute is frankly a bit of a mess. Still, you follow that statute.

And then in 2013 came Mr. Snowden. Overseas, people were stunned to learn how extremely good NSA really is at its business – sometimes at their expense. You were being criticized for being too good. And of course the dough of outrage rose higher and higher when leavened with the yeast of hypocrisy.

But why did the Snowden leaks hurt so badly here in our own country? There hasn’t been even a whiff of intelligence abuse for political purposes. This was the only intelligence scandal in history involving practices approved by Congress and the federal courts and the President, and subject to heavy oversight. How did this happen?

The answer, I think, goes back to the power-and-secrecy principle and to the evolution of our representative democracy in the digital age. NSA was operating under statute – but ordinary, intelligent, educated Americans could not have looked at that statute and understood that it meant what the FISA Court interpreted it to mean. The intelligence committees knew. Any member of Congress who wanted to know either did know or could have known. (I discount the hypocrisy from that quarter, and the Second Circuit Court of Appeals’ opinion last

week is just wrong about that.) But it is true that the FISA Court's expansive interpretation of the law was secret. So the argument that the Agency was operating under "secret law" had legs with the public, much of which is allergic to bulk collection and doubts its value.

We had amended FISA, yes, but our leaders had failed to absorb the transparency lesson. You now live in a glass house. How could anyone think the bulk collection program would remain secret? I'm not telling you there are no more secrets. You still have plenty of them. I am telling you that with instantaneous electronic communications, secrets are hard to keep; and that which can be kept secret does not stay secret for long. The idea that the broad rules governing your activities – not specific operations, but the broad rules – can be kept secret is a delusion. And they *should not* be kept secret. Leaders who do not understand this will continue to make strategic blunders. I do not state this as a policy preference. I state it as a fact of life that political leaders and intelligence agencies – *I mean you* – must take into account as you make decisions about what can be, and should be, kept secret – and about what activities you can and should undertake.

I should note that even if the general counsel or the Director *had* given different advice to President Obama about bulk collection, it would not have been followed. The fight in 2008 was bruising enough. The White House had no appetite for more FISA battles. In any case, that was the President's call – not the Director's. The Director was on the right side of the law. Would the program be unpopular? Maybe. But we do our work. We keep our heads down. Sometimes we take some punches for it. Besides, there's always a political faction that doesn't like us no matter what. Tough luck. If it's legal, we do our work.

But in retrospect there's a lesson to learn. The public, not just the three branches of government, must know what kinds of things we are allowed to collect domestically.

If you disagree with me on this, do your own damage assessment. In the wake of Snowden, our country has lost control of the geopolitical narrative; our companies have lost more than \$100 billion in business and counting. Collection has surely suffered. The damage from the Snowden leaks to American foreign intelligence operations, to American prestige, and to American power – not to mention the damage to morale and to personnel retention right here at Fort Meade – has unquestionably been vastly greater than if the Executive Branch had determined from the outset to amend FISA back in 2002 to permit the activities the White House felt necessary to protect the country.

Do you reply that the Congress in late 2001 or in 2002 might not have permitted NSA to do it? I doubt it. But even so, in a functioning representative democracy, this Agency cannot keep the nation safer than the nation, acting through its elected representatives, wants to be kept.

We learned the hard lessons of 1976. Let's now think hard and learn this lesson too. And let's teach it to those who come after us.

Thank you for the opportunity to address you. What you do is enormously important, and I count it a great privilege to have served among you.

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[\[1\]](#) Joel Brenner was the Inspector General of the National Security Agency from 2002-2006; the National Counterintelligence Executive in

the Office of the Director of National Intelligence from 2006-2009; and senior counsel at NSA from 2009-10. He now maintains a private law and consulting practice and is the Robert F. Wilhelm Fellow at the Massachusetts Institute for Technology's Center for International Studies.

[2] Christopher H. Pyle, "CONUS Intelligence: The Army Watches Civilian Politics," Washington Monthly I, January 1970, 4; reproduced in Congressional Record (hereafter cited as "Cong. Rec.") 91st Cong., 2nd sess., 2227-2231.

[3] Pyle, "CONUS" Intelligence", 5-6.

[4] Ibid.

[5] Karl E. Campbell, "Senator Sam Ervin and The Army Spy Scandal of 1970-1971: Balancing National Security and Civil Liberties in a Free Society," Charlotte-Mecklenburg Historic Landmarks Commission, at <http://www.cmhpf.org/Random%20Files/senator%20sam%20ervin.htm>, citing primary sources.

[6] The orders themselves have not been declassified, so far as I know.

[7] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).

[8] Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: W.W. Norton & Co., 2007), p. 181.

## More About Joel



Brenner talks about his career as a lawyer, writer, and intelligence official.

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