

B. ESTABLISHING A PERMANENT DOMESTIC INTELLIGENCE STRUCTURE: 1936-1945

1. *Background: The Stone Standard*

The first substantial domestic intelligence programs of the federal government were established during World War I.

The Justice Department's Bureau of Investigation (as the FBI was then known), military intelligence, other federal investigative agencies, and the volunteer American Protective League were involved in these programs.³ In the period immediately following World War I, the Bureau of Investigation took part in the notorious Palmer Raids and other activities against persons characterized as "subversive."⁴

Harlan Fiske Stone, who became Attorney General in 1924, described the conduct of Justice Department and the Bureau of Investigation before he took office as "lawless, maintaining many activities which were without any authority in federal statutes, and engaging in many practices which were brutal and tyrannical in the extreme."⁵

Fearing that the investigative activities of the Bureau could invade privacy and inhibit political freedoms, Attorney General Stone announced:

There is always the possibility that a secret police may become a menace to free government and free institutions, because it carries with it the possibility of abuses of power which are not always quickly apprehended or understood. . . . It is important that its activities be strictly limited to the performance of those functions for which it was created and that its agents themselves be not above the law or beyond its reach. . . . The Bureau of Investigation is not concerned with political or other opinions of individuals. It is concerned only with their conduct and then only with such conduct as is forbidden by the laws of the United States. When a police system passes beyond these limits, it is dangerous to the proper administration of justice and to human liberty, which it should be our first concern to cherish.⁶

When Stone appointed J. Edgar Hoover as Acting Director of the Bureau of Investigation, he instructed Hoover to adhere to this standard:

The activities of the Bureau are to be limited strictly to investigations of violations of law, under my direction or under

³ See Joan Jensen, *The Price of Vigilance* (Chicago: Rand McNally, 1968). One FBI official recalled later, "There were probably seven or eight such active organizations operating at full force during war days and it was not an uncommon experience for an Agent of this Bureau to call upon an individual in the course of his investigation, to find out that six or seven other Government agencies had been around to interview the party about the same matter." (Memorandum of F. X. O'Donnell, Subject: Operations During World War I, 10/4/38).

⁴ See footnote 1, p. 21.

⁵ Letter from Justice Harlan Fiske Stone to Jack Alexander, 9/21/37, cited in Alpheus T. Mason, *Harlan Fiske Stone: Pillar of the Law* (New York, Viking, 1956), p. 149.

⁶ New York Times, 5/10/24.

the direction of an Assistant Attorney General regularly conducting the work of the Department of Justice.⁷

Nevertheless, beginning in the mid-thirties, at White House direction, the FBI reentered the realm of collecting intelligence about ideas and associations.

2. *Main Developments of the 1936-1945 Period*

In the years preceding World War II, domestic intelligence activities were reinstated, expanded, and institutionalized. Based upon vague and conflicting orders to investigate the undefined areas of "subversion" and "potential crimes" related to national security, the FBI commenced a broad intelligence program. The FBI was authorized to preempt the field, although the military engaged in some investigation of civilians.

The FBI's domestic intelligence jurisdiction went beyond investigations of crime to include a vague mandate to investigate foreign involvement in American affairs. In the exercise of this jurisdictional authority, the Bureau began to investigate law abiding domestic groups and individuals; its program was also open to misuse for political purposes. The most intrusive intelligence techniques—initially used to meet wartime exigencies—were based on questionable statutory interpretation, or lacked any formal legal authorization.

The executive intentionally kept the issue of domestic intelligence-gathering away from the Congress until 1939, and thereafter the Congress appears to have deliberately declined to confront the issue. The FBI generally complied with the Attorney General's policies, but began to resist Justice Department review of its activities. On one occasion, the Bureau appears to have disregarded an Attorney General's policy directive.

However important these developments were in themselves, the enduring significance of this period is that it opened the institutional door to greater excesses in later years.

3. *Domestic Intelligence Authority: Vague and Conflicting Executive Orders*

The executive orders upon which the Bureau based its intelligence activity in the decade before World War II were vague and conflicting. By using words like "subversion"—a term which was never defined—and by permitting the investigation of "potential" crimes, and matters "not within the specific provisions of prevailing statutes", the foundation was laid for excessive intelligence gathering about Americans.

⁷ Stone to Hoover, 5/13/24, quoted in Mason, *Harlan Fiske Stone*, at p. 151. Although Hoover had served as head of the General Intelligence Division of the Justice Department at the time of the "Palmer Raids" and became an Assistant Director of the Bureau in 1921, he persuaded Attorney General Stone and Roger Baldwin of the American Civil Liberties Union that he had played an "unwilling part" in the excesses of the past, and he agreed to disband the Bureau's "radical division." Baldwin advised Stone, "I think we were wrong in our estimate of his attitude." (Baldwin to Stone, 8/6/24, quoted in Donald Johnson, *The Challenge to American Freedoms* (University of Kentucky Press, 1963), pp. 174-175.)

In December 1924, Stone made Hoover Director of the Bureau of Investigation.

a. The Original Roosevelt Orders

In 1934, according to a memorandum by J. Edgar Hoover, President Roosevelt ordered an investigation of "the Nazi movement in this country." In response, the FBI conducted a one-time investigation, described by FBI Director Hoover as "a so-called intelligence investigation." It concentrated on "the Nazi group," with particular reference to "anti-racial" and "anti-American" activities having "any possible connection with official representatives of the German government in the United States."⁸

Two years later, in August 1936, according to a file memorandum of Director Hoover, President Roosevelt asked for a more systematic collection of intelligence about:

subversive activities in the United States, particularly Fascism and Communism.

Hoover indicated further that the President wanted:

a broad picture of the general movement and its activities as [they] may affect the economic and political life of the country as a whole.

The President and the FBI Director discussed the means by which the Bureau might collect "general intelligence information" on this subject.⁹ The only record of Attorney General Homer Cummings' knowledge of, or authorization for, this intelligence assignment is found in a memorandum from Director Hoover to his principal assistant.¹⁰

b. Orders in 1938-39: The Vagueness of "Subversive Activities" and "Potential" Crimes

In October 1938, Director Hoover advised President Roosevelt of the "present purposes and scope" of FBI intelligence investigations, "together with suggestions for expansion." His memorandum stated that the FBI was collecting:

⁸ Memorandum from J. Edgar Hoover to Mr. Cowley, 5/10/34.

⁹ J. Edgar Hoover memorandum to the files, 8/24/36. This memorandum states that, earlier in the conversation, Director Hoover had told the President:

(i) Communists controlled or planned to take control of the West Coast longshoreman's union, the United Mine Workers Union and the Newspaper Guild (and using those unions would be "able at any time to paralyze the country");

(ii) "activities . . . inspired by Communists" had recently taken place in the Government, "particularly in some of the Departments and the National Labor Relations Board"; and

(iii) The Communist Internationale had recently issued instructions for all Communists to "vote for President Roosevelt and against Governor Landon because of the fact that Governor Landon is opposed to class warfare."

These comments indicate that the Bureau had already begun some intelligence gathering on Communists and activities "inspired" by them prior to any Presidential order. In addition, Hoover's memorandum referred to prior intelligence collection on domestic right-wing figures Father Charles Coughlin and General Smedley Butler.

¹⁰ Hoover stated that Secretary of State Hull "at the President's suggestion, requested of me, the representative of the Department of Justice, to have investigation made of the subversive activities in this country, including communism and fascism." He added that "the Attorney General verbally directed me to proceed with this investigation." (Memorandum from J. Edgar Hoover to E. A. Tamm, 9/10/36.)

information dealing with various forms of activities of either a subversive or so-called intelligence type.¹¹

Despite the references in Director Hoover's 1938 memorandum to "subversive-type" investigations, an accompanying letter to the President from Attorney General Homer Cummings made no mention of "subversion" and cited only the President's interest in "the so-called espionage situation."¹² Cummings' successor, Attorney General Frank Murphy, appears to have abandoned the term "subversive activities."¹³ Moreover, when Director Hoover provided Attorney General Frank Murphy a copy of his 1938 plan, he described it, without mentioning "subversion," as a program "intended to ascertain the identity of persons engaged in espionage, counterespionage, and sabotage of a nature *not within the specific provisions of prevailing statutes.*"¹⁴ [Emphasis added.] Murphy thereafter recommended to the President that he issue an order concentrating "investigation of all espionage, counter-espionage, and sabotage matters" in the FBI and military intelligence.¹⁵

President Roosevelt agreed and issued an order which, like Murphy's letter, made no mention of "subversive" or general intelligence:

It is my desire that the investigation of all espionage, counter espionage, and sabotage matters be controlled and handled by the Federal Bureau of Investigation of the Department of Justice, the Military Intelligence Division of the War Department, and the Office of Naval Intelligence in the Navy Department. The directors of these three agencies are to function as a committee to coordinate their activities.

No investigations should be conducted by any investigative agency of the Government into matters involving actually *or potentially* any espionage, counterespionage, or sabotage, ex-

¹¹ Memorandum on "domestic intelligence," prepared by J. Edgar Hoover, enclosed with letter from Attorney General Cummings to Roosevelt, 10/20/38. Director Hoover met with the President who, according to Hoover's memorandum, "approved the plan which I had prepared and which had been sent to him by the Attorney General." (Memorandum to the files from J. Edgar Hoover, 11/7/38.)

¹² Letter from Attorney General Cummings to the President, 10/20/38.

¹³ On 2/7/39, the Assistant to the the Attorney General wrote letters to the Secret Service, the Bureau of Internal Revenue, the Narcotics Bureau, the Customs Service, the Coast Guard, and the Postal Inspection Service stating that the FBI and military intelligence had "undertaken activities to investigate matters relating to espionage and subversive activities." (Letter from J. B. Keenan, Assistant to the Attorney General, to F. J. Wilson, Chief, Secret Service, 2/7/39.)

A letter from Attorney General Murphy to the Secretary of the Treasury shortly thereafter also referred to "subversive activities." (Letter from Attorney General Murphy to the Secretary of the Treasury, 2/16/39.)

However, a similar letter two days later referred only to matters "involving espionage, counterespionage, and sabotage," without mentioning "subversive activities." (Letter from Attorney General Murphy to the Secretary of the Treasury, 2/18/39.) This may have reflected a decision by Murphy to cease using "subversive activities" to describe FBI investigations. The record does not clarify the reason for his deletion of the phrase.

¹⁴ Memorandum from J. Edgar Hoover to Attorney General Murphy, 3/16/39. Murphy was aware that the FBI contemplated investigations of subversive activities, since Hoover enclosed his 1938 plan with this memorandum.

¹⁵ Letter from Attorney General Murphy to the President, 6/17/39.

cept by the three agencies mentioned above. [Emphasis added.]¹⁶

Precisely what the President's reference to "potential" espionage or sabotage was intended to cover was unclear. Whatever it meant, it was apparently intended to be consistent with Director Hoover's earlier description of the FBI program to Attorney General Murphy.¹⁷

Three months later, after the outbreak of war in Europe, Director Hoover indicated his concern that private citizens might provide information to the "sabotage squads" which local police departments were creating rather than to the FBI. Hoover urged the Attorney General to ask the President to request local officials to give the FBI all information concerning "espionage, counterespionage, sabotage, subversive activities, and neutrality regulations."¹⁸

The President immediately issued a statement which continued the confusing treatment of the breadth of the FBI's intelligence authority. On the one hand, the statement began by noting that the FBI had been instructed to investigate:

matters relating to espionage, sabotage, and violations of the neutrality regulations.

On the other hand, the President concluded by adding "subversive activities" to the list of information local law enforcement officials should relay to the FBI.¹⁹

c. Orders 1940-43: The Confusion Continues

President Roosevelt used the term "subversive activities" in a secret directive to Attorney General Robert Jackson on wiretapping in 1940. Referring to activities of other nations engaged in "propaganda of so-called 'fifth columns'" and "preparation for sabotage," he directed the Attorney General to authorize wiretaps "of persons suspected of subversive activities against the Government of the United States, including suspected spies." The President instructed that such wiretaps be limited "insofar as possible" to aliens.²⁰ Neither the President

¹⁶ Confidential Memorandum from the President to Department Heads, 6/26/39.

¹⁷ Memorandum from Hoover to Murphy, 3/16/39, enclosing Hoover memorandum on "domestic intelligence," 10/20/38.

¹⁸ Memorandum from J. Edgar Hoover to Attorney General Murphy, 9/6/39.

¹⁹ Statement of the President, 9/6/39.

President Roosevelt never formally defined "subversive activities"—a term whose vagueness has proven a problem throughout the FBI's history. However, a hint as to his definition is contained in his remarks at a press conference on September 9, 1939. A national emergency had just been declared, and pursuant thereto, the President had issued an authorization for up to 150 extra FBI agents to handle "additional duties." In explaining that action, he stated he was concerned about "things that happened" before World War I, specifically "sabotage" and "propaganda by both belligerents" to "sway public opinion. . . . [I]t is to guard against that and the spread by any foreign nation of propaganda in this nation which would tend to be subversive—I believe that is the word—of our form of Government." (1939 Public Papers of Franklin D. Roosevelt, pp. 495-496.)

²⁰ Confidential memorandum from President Roosevelt to Attorney General Jackson, 5/21/40. In May 1941, the Secretary of War and the Secretary of the Navy urged "a broadening of the investigative responsibility of the Federal Bureau of Investigation in the fields of subversive control of labor." (Memorandum from the Secretary of War and the Secretary of the Navy to the President, 5/29/41.) The President replied that he was sending their letter to the Attorney General "with my general approval." (Memorandum from President Roosevelt to the Secretaries of War and Navy, 6/4/41.)

nor the Attorney General subsequently clarified the scope of the FBI's authority to investigate "subversive activity."

The confusion as to the breadth of President Roosevelt's authorization reappeared in Attorney General Francis Biddle's description of FBI jurisdiction in 1942 and in a new Presidential statement in 1943.

Biddle issued a lengthy order defining the duties of the various parts of the Justice Department in September 1942. Among other things, the FBI was charged with a duty to "investigate" criminal offenses against the United States. In contrast, the FBI was to function as a "clearing house" with respect to "espionage, sabotage, and other subversive matters."²¹

Four months later, President Roosevelt renewed his public appeal for cooperation by police and other "patriotic organizations" with the FBI. In this statement, he described his September 1939 order as granting "investigative" authority to the FBI for "espionage, sabotage, and violation of the neutrality regulations." The President did not adopt Attorney General Biddle's "clearing-house" characterization, nor did he mention "subversion."²²

4. *The Role of Congress*

a. Executive Avoidance of Congress

In 1938, the President, the Attorney General, and the FBI Director explicitly decided not to seek legislative authorization for the expanding domestic intelligence program.

Attorney General Cummings cautioned that the plan for domestic intelligence "should be held in the strictest confidence."²³ Director Hoover contended that no special legislation should be sought "*in order to avoid criticism or objections* which might be raised to such an expansion by either ill-informed persons or individuals with some ulterior motive." [Emphasis added.] Hoover thought it "undesirable to seek any special legislation which would draw attention to the fact that it was proposed to develop a special counter-espionage drive of any great magnitude" because the FBI's intelligence activity was already "much broader than espionage or counterespionage."²⁴

Director Hoover contended that the FBI had authority to engage in intelligence activity beyond investigating crimes at the request of the

²¹ Attorney General's Order No. 3732, 9/25/42, p. 19. But see *Delimitation Agreement between the FBI and Military Intelligence*, 2/9/42, at footnote 56.

²² Statement of the President on "Police Cooperation," 1/8/43. A note in the President's handwriting added that the FBI was to receive information "relating to espionage and related matters." (Copy in FDR Library.)

²³ Cummings to Roosevelt, 10/20/38.

²⁴ Hoover memorandum, enclosed with letter from Cummings to Roosevelt, 10/20/38. Director Hoover's full point was that:

"In considering the steps to be taken for the expansion of the present structure of intelligence work, it is believed imperative that it be proceeded with, with the utmost degree of secrecy in order to avoid criticism or objections which might be raised to such an expansion by either ill-informed persons or individuals having some ulterior motive. The word 'espionage' has long been a word that has been repugnant to the American people and it is believed that the structure which is already in existence is much broader than espionage or counterespionage, but covers in a true sense real intelligence values to the three services interested, namely, the Navy, the Army, and the civilian branch of the Government—the Department of Justice. Consequently, it would seem undesirable to seek any special legislation which would draw attention to the fact that it was proposed to develop a special counterespionage drive of any great magnitude."

Attorney General or the Department of State. He relied on an amendment to the FBI Appropriations Act, passed before World War I, authorizing the Attorney General to appoint officials not only to "detect and prosecute" federal crimes but also to:

conduct such other investigations regarding official matters under the control of the Department of Justice, or the Department of State, as may be directed by the Attorney General.²⁵

After conflicts with the State Department in 1939, however, the FBI no longer relied upon this vague statute for its authority to conduct intelligence investigations, instead relying upon the Executive orders.²⁶

b. Congress Declines to Confront the Issue

Even though Executive officials originally avoided Congress to prevent criticism or objections, after the President's proclamation of emergency in 1939 they began to inform Congress of FBI intelligence activities. In November 1939, Director Hoover told the House Appropriations Committee that the Bureau had set up a General Intelligence Division, "by authority of the President's proclamation."²⁷ And in January 1940, he told the same Committee that the FBI had authority under the President's September 6, 1939 statement to investigate espionage, sabotage, neutrality violations, and "any other subversive activities."²⁸

There is no evidence that the Appropriations Committee objected or inquired further into the meaning of that last vague term, although members did seek assurance that FBI intelligence could be curtailed when the wartime emergency ended.²⁹

In 1940, a joint resolution was introduced by New York City Congressman Emmanuel Celler which would have given the FBI broad jurisdiction to investigate, by wiretapping or other means, or "frustrate" any "interference with the national defense" due to certain specified crimes (sabotage, treason, seditious conspiracy, espionage, and violations of the neutrality laws) or "in any other manner."³⁰ Although the resolution failed to reach the House floor, it seems likely that, rather than opposing domestic intelligence investigations, Congress was simply choosing to avoid the issue of defining the FBI's intelligence jurisdiction. This view is supported by Congress' passage in 1940 and 1941 of two new criminal statutes: the Smith Act made it a crime to advocate the violent overthrow of the Government;³¹ and the Voorhis Act required "subversive" organizations advocating the

²⁵ 28 U.S.C. 533(3).

²⁶ The conflicts between the FBI and the State Department in 1939 are discussed at footnote 54.

²⁷ Emergency Supplemental Appropriation Bill, 1940, Hearings before the House Appropriations Committee, 11/30/39, pp. 303-307.

In fact, the FBI had established a General Intelligence Section in its Investigative Division shortly after the President's 1936 requests. Congress was not advised of the Bureau's activities undertaken prior to September 1939, nor of the President's earlier directives.

²⁸ Justice Department Appropriation Bill, 1941, Hearings before the House Appropriations Committee, 1/5/40, p. 151. The President's 1939 statement did not specifically say that the FBI had authority to investigate "subversive activities."

²⁹ 1939 Hearings, p. 307; First Deficiency Appropriation Bill, 1941, Hearings before the House Appropriations Committee, 2/19/41, pp. 188-189.

³⁰ H.J. Res. 571, 76th Cong., 2d Sess. (1940).

³¹ 18 U.S.C. 2385, 2387.

Government's violent overthrow and having foreign ties to register or be subject to criminal penalties.³²

Although, as indicated, the Executive branch disclosed the fact that the FBI was doing intelligence work and Congress generally raised no objection, there was one occasion when an Executive description of the Bureau's work was less than complete. Following Director Hoover's testimony about the establishment of an Intelligence Division and some public furor over the FBI arrest of several Communist Party members in Detroit, Senator George Norris (R. Neb.) asked whether the Bureau was violating Attorney General Stone's assurance in 1924 that it would conduct only criminal investigations. Attorney General Jackson replied:

Mr. Hoover is in agreement with me that the principles which Attorney General Stone laid down in 1924 when the Federal Bureau of Investigation was reorganized and Mr. Hoover appointed as Director are sound, and that the usefulness of the Bureau depends upon a faithful adherence to these limitations.

The Federal Bureau of Investigation will confine its activities to the investigation of violation of Federal statutes, the collecting of evidence in cases in which the United States is or may be a party in interest, and the service of process issued by the courts.³³

The FBI was, in fact, doing much more than that and had informed the Appropriations Committee of its practice in general terms. Attorney General Jackson himself stated later that the FBI was conducting "steady surveillance" of persons beyond those who had violated federal statutes, including persons who were a "likely source" of federal law violation because they were "sympathetic with the systems or designs of foreign dictators."³⁴

5. *Scope of Domestic Intelligence*

a. Beyond Criminal Investigations

According to Director Hoover's account of his meeting with President Roosevelt in 1936, the President wanted "a broad picture" of the impact of Communism and Fascism on American life.³⁵ Similarly, the FBI Director described his 1938 plan as "broader than espionage" and covering "in a true sense real intelligence."³⁶ Thus it appears that one of the first purposes of FBI domestic intelligence was to perform the "pure intelligence" function of supplying executive officials with information believed of value for making policy decisions. This aspect of the assignment to investigate "subversion" was entirely unrelated to the enforcement of federal criminal laws. The second purpose of FBI domestic intelligence gathering was essentially "preventive,"

³² 18 U.S.C. 2386.

³³ Letter from Attorney General Jackson to Senator Norris, 86 Cong. Rec. 5642-5643.

³⁴ Proceedings of the Federal-State Conference on Law Enforcement Problems of National Defense, 8/5-6/40.

Several months earlier, Attorney General Jackson had warned federal prosecutors about the dangers of prosecuting "subversives" because of the lack of standards and the danger of overbreadth. (Robert H. Jackson, "The Federal Prosecutor," *Journal of the American Judicature Society*, 6/40, p. 18.)

³⁵ Hoover memorandum to the files, 8/24/36.

³⁶ Hoover memorandum, enclosed with Cummings to Roosevelt, 10/20/38, see p. 28.

in compliance with the President's June 1939 directive to investigate "potential" espionage or sabotage.³⁷ As war moved closer, preventive intelligence investigations focused on individuals who might be placed on a Custodial Detention List for possible internment in case of war.³⁸

Both pure intelligence about "subversion" and preventive intelligence about "potential" espionage or sabotage involved investigations based on political affiliations and group membership and association. The relationship to law enforcement was often remote and speculative; the Bureau did not focus its intelligence gathering solely on tangible evidence of preparation for crime.

Directives implementing the general preventive intelligence instruction to investigate "potential" espionage or sabotage were vague and sweeping. In 1939, for instance, field offices were told to investigate persons of German, Italian, and Communist "sympathies" and any other persons "whose interests may be directed primarily to the interest of some other nation than the United States." FBI offices were directed to report the names of members of German and Italian societies, "whether they be of a fraternal character or of some other nature," and members of any other groups "which might have pronounced Nationalistic tendencies." The Bureau sought lists of subscribers and officers of German, Italian, and Communist foreign-language newspapers, as well as of other newspapers with "notorious Nationalistic sympathies."³⁹ The FBI also made confidential inquiries regarding "various so-called radical and fascist organizations" to identify their "leading personnel, purposes and aims, and the part they are likely to play at a time of national crisis."⁴⁰

The criteria for investigating persons for inclusion on the Custodial Detention List was similarly vague. In 1939, the FBI said its list included persons with "strong Nazi tendencies" and "strong Communist tendencies."⁴¹ FBI field offices were directed in 1940 to gather information on individuals who would be considered for the list because of their "Communitistic, Fascist, Nazi, or other nationalistic background."⁴²

b. "Infiltration" Investigations

The FBI based its pure intelligence investigations on a theory of subversive "infiltration" which remained an essential part of the rationale for domestic intelligence after the war: anyone who happened to associate with Communists or Fascists or was simply alleged to have such associations became the subject of FBI intelligence reports.⁴³ Thus, "subversive" investigations produced intelligence about

³⁷ Confidential memorandum from the President to Department heads, 6/26/39.

³⁸ See pp. 34-35.

³⁹ The above-mentioned directives were all contained in a memorandum from J. Edgar Hoover to FBI Field Offices, 9/2/39.

⁴⁰ Memorandum from Clyde Tolson to J. Edgar Hoover, 10/30/39.

⁴¹ Internal FBI memorandum of E. A. Tamm, 11/9/39.

⁴² Memorandum from J. Edgar Hoover to FBI Field Offices, 6/15/40.

⁴³ Director Hoover declared in 1940 that advocates of foreign "isms" had "succeeded in boring into every phase of American life, masquerading behind 'front' organizations." (Proceedings of the Federal-State Conference on Law Enforcement Problems of National Defense, August 5-6, 1940.) In his best-selling book on Communists, Hoover stated, "Infiltration is the method whereby Party members move into noncommunist organizations for the purpose of exercising influence for communism. If control is secured, the organization becomes a communist front." (J. Edgar Hoover, *Masters of Deceit* (New York: Henry Holt, 1958), Ch. 16.)

a wide variety of lawful groups and law-abiding citizens. By 1938, the FBI was investigating alleged subversive infiltration of:

the maritime industry;
 the steel industry;
 the coal industry;
 the clothing, garment, and fur industries;
 the automobile industry;
 the newspaper field;
 educational institutions;
 organized labor organizations;
 Negroes;
 youth groups;
 Government affairs; and
 the armed forces.⁴⁴

This kind of intelligence was transmitted to the White House. For example, in 1937 the Attorney General sent the President an FBI report on a proposed pilgrimage to Washington to urge passage of legislation to benefit American youth. The report stated that the American Youth Congress, which sponsored the pilgrimage, was understood to be strongly Communist.⁴⁵ Later reports in 1937 described the Communist Party's role in plans by the Workers Alliance for nationwide demonstrations protesting the plight of the unemployed, as well as the Alliance's plans to lobby Congress in support of the federal relief program.⁴⁶

Some investigations and reports (which went into Justice Department and FBI permanent files) covered entirely legal political activities. For example, one local group checked by the Bureau was called the League for Fair Play, which furnished "speakers to Rotary and Kiwanis Clubs and to schools and colleges." The FBI reported in 1941 that:

the organization was formed in 1937, apparently by two Ministers and a businessman for the purpose of furthering fair play, tolerance, adherence to the Constitution, democracy, liberty, justice, understanding and good will among all creeds, races and classes of the United States.

A synopsis of the report stated, "No indications of Communist activities."⁴⁷

In 1944, the FBI prepared an extensive intelligence report on an active political group, the Independent Voters of Illinois, apparently because it was considered a target for Communist "infiltration." The Independent Voters group was reported to have been formed:

for the purpose of developing neighborhood political units to help in the re-election of President Roosevelt, and the elec-

⁴⁴ Hoover memorandum, enclosed with Cummings to Roosevelt, 10/20/38.

⁴⁵ Letter from Attorney General Cummings to the President (and enclosure), 1/30/37 (FDR Library).

⁴⁶ Letter from Attorney General Cummings to the President (and enclosure), 8/13/37 (FDR Library).

⁴⁷ Report of New York City field office, 10/22/41, summarized in Justice Department memorandum from S. Brodie to Assistant Attorney General Quinn, 10/10/47.

tion of progressive congressmen. Apparently, IVI endorsed or aided Democrats for the most part, although it was stated to be "independent." It does not appear that it entered its own candidates or that it endorsed any Communists. IVI sought to help elect those candidates who would favor fighting inflation, oppose race and class discrimination, favor international cooperation, support a "full-employment" program, oppose Facism, etc.⁴⁸

Thus, in its search for subversive "influence," the Bureau gathered extensive information about the lawful activities of left-liberal political groups. At the opposite end of the political spectrum, the activities of numerous right-wing groups like the Christian Front and Christian Mobilizers (followers of Father Coughlin), the American Destiny Party, the American Nationalist Party, and even the less extreme "America First" movement were reported by the FBI.⁴⁹

c. Partisan Use

The collection of pure intelligence and preventive intelligence about "subversives" led to the inclusion in FBI files of political intelligence about the President's partisan critics. In May 1940, President Roosevelt's secretary sent the FBI Director hundreds of telegrams received by the White House. The attached letter stated:

As the telegrams all were more or less in opposition to national defense, the President thought you might like to look them over, noting the names and addresses of the senders.⁵⁰

Additional telegrams expressing approval of a speech by one of the President's leading critics, Colonel Charles Lindbergh, were also referred to the FBI.⁵² A domestic intelligence program without clearly defined boundaries almost invited such action.

d. Centralized Authority: FBI and Military Intelligence

The basic policy of President Roosevelt and his four Attorneys General was to centralize civilian authority for domestic intelligence in the FBI. Consolidation of domestic intelligence was viewed as a means of protecting civil liberties. Recalling the hysteria of World War I, Attorney General Frank Murphy declared:

Twenty years ago, inhuman and cruel things were done in the name of justice; sometimes vigilantes and others took over the work. We do not want such things done today, for the work has now been localized in the FBI.⁵³

Centralization of authority for domestic intelligence also served the FBI's bureaucratic interests. Director Hoover complained about

⁴⁸ Report of Chicago field office. 12/29/44. summarized in Justice Department memorandum from S. Brodie to Assistant Attorney General Quinn, 10/9/47.

⁴⁹ Justice Department memorandum re: Christian Front, 10/28/41.

⁵⁰ Letter from Stephen Early, Secretary to the President, to J. Edgar Hoover, 5/21/40 (FDR Library).

⁵² Memorandum from Stephen Early, Secretary to the President, to J. Edgar Hoover, 6/17/40.

⁵³ New York Times, 10/1/39, p. 38.

attempts by other agencies to “literally chisel into this type of work.”⁵⁴ He exhorted: “We don’t want to let it slip away from us.”⁵⁵

Pursuant to President Roosevelt’s 1939 directive authorizing the FBI and military intelligence to conduct all investigations of “potential” espionage and sabotage, an interagency Delimitation Agreement in June 1940 assigned most such domestic intelligence work to the FBI. As revised in February 1942, the Agreement covered “investigation of all activities coming under the categories of espionage, subversion and sabotage.” The FBI was responsible for all investigations “involving civilians in the United States” and for keeping the military informed of “the names of individuals definitely known to be connected with subversive activities.”⁵⁶

The military intelligence agencies were interested in intelligence about civilian activity. In fact, they requested extensive information about civilians from the FBI. In May 1939, for instance, the Army G-2 Military Intelligence Division (MID) transmitted a request for the names and locations of “citizens opposed to our participation in war and conducting anti-war propaganda.”⁵⁷ Despite the Delimitation Agreement, the MID’s Counterintelligence Corps collected intelligence on civilian “subversive activity” as part of a preventive security program using volunteer informers and investigators.⁵⁸

6. Control by the Attorney General: Compliance and Resistance

The basic outlines of the FBI’s domestic intelligence program were approved by Attorney General Cummings in 1938 and Attorney General Murphy in 1939.⁵⁹ Director Hoover also asked Attorney General Jackson in 1940 for policy guidance concerning the FBI’s “suspect list

⁵⁴ Memorandum from J. Edgar Hoover to Attorney General Murnhy, 3/16/39. The “literally chisel” reference reflects concern with a State Department attempt to “coordinate” all domestic intelligence. It may explain why, after 1938, the FBI no longer relied for its intelligence authority on the statutory provision for FBI investigations of “official matters under control of . . . the Department of State.” Director Hoover stated that the FBI required State Department authorization only where “the subject of a particular investigation enjoys any diplomatic status.”

⁵⁵ Note attached to letter from Col. J. M. Churchill, Army G-2, to Mr. E. A. Tamm, FBI, 5/16/39.

⁵⁶ Delimitation of Investigative Duties of the Federal Bureau of Investigation, the Office of Naval Intelligence, and the Military Intelligence Division, 2/9/42.

⁵⁷ Memorandum from Colonel Churchill, Counter Intelligence Branch, MID, to E. A. Tamm, FBI, 5/16/39.

⁵⁸ Victor J. Johanson, “The Role of the Army in the Civilian Arena, 1920-1970,” U.S. Army Intelligence Command Study (1971). The scope of wartime Army intelligence has been summarized as follows:

“It reported on radical labor groups, communists, Nazi sympathizers, and ‘semi-radical’ groups concerned with civil liberties and pacifism. The latter, well intentioned but impractical groups as one corps area intelligence officer labeled them, were playing into the hands of the more extreme and realistic radical elements. G-2 still believed that it had a right to investigate ‘semi-radicals’ because they undermined adherence to the established order by propaganda through newspapers, periodicals, schools, and churches.” (Joan M. Jensen, “Military Surveillance of Civilians, 1917-1967,” in *Military Intelligence*. Hearings before the Senate Subcommittee on Constitutional Rights (1974), pp. 174-175.)

⁵⁹ Letter from Attorney General Cummings to the President, 10/20/38; letter from Attorney General Murphy to the President, 6/17/39. The confusion as to whether Attorney General Murphy, Attorney General Jackson and Attorney General Biddle defined the FBI’s duties to cover investigation of “subversive activities” is indicated at footnotes 13, 21 and 34.

of individuals whose arrest might be considered necessary in the event the United States becomes involved in war.”⁶⁰

The FBI Director initially opposed, however, Attorney General Jackson’s attempt to require more detailed supervision of the FBI’s role in the Custodial Detention Program. To oversee this program and others, Jackson created a Neutrality Laws Unit (later renamed the Special War Policies Unit) in the Justice Department. When the Unit proposed to review FBI intelligence reports on individuals, Director Hoover protested that turning over the FBI’s confidential reports would risk the possibility of “leaks.” He argued that if the identity of confidential informants became known, it would endanger their “life and safety” and thus the Department would “abandon” the “subversives field.”⁶¹

After five months of negotiation, the FBI was ordered to transmit its “dossiers” to the Justice Department Unit.⁶² To satisfy the FBI’s concerns, the Department agreed to take no formal action against an individual if it “might interfere with sound investigative techniques” and not to disclose confidential informants without the Bureau’s “prior approval.”⁶³ Thus, from 1941 to 1943, the Justice Department had the machinery to oversee at least this aspect of FBI domestic intelligence.⁶⁴

In 1943, however, Attorney General Biddle ordered that the Custodial Detention List should be abolished as “impractical, unwise, and dangerous.” His directive stated that there was “no statutory authority or other present justification” for keeping the list. The Attorney General concluded that the system for classifying “dangerous” persons was “inherently unreliable;” the evidence used was “inadequate;” and the standards applied were “defective.”⁶⁵ Biddle observed:

the notion that it is possible to make a valid determination as to how dangerous a person is in the abstract and without reference to time, environment, and other relevant circumstances, is impractical, unwise, and dangerous.

Returning to the basic standard espoused by Attorney General Stone, Attorney General Biddle declared:

The Department fulfills its proper function by investigating the activities of persons who may have violated the law. It is not aided in this work by classifying persons as to dangerousness.⁶⁶

⁶⁰ Memorandum from J. Edgar Hoover to Attorney General Jackson, 10/16/40.

⁶¹ Memorandum from J. Edgar Hoover to L.M.C. Smith, Chief, Neutrality Law Unit, 11/28/40.

⁶² Memorandum from M. F. McGuire, Assistant to the Attorney General, to J. Edgar Hoover and L. M. C. Smith, 4/21/41.

⁶³ Memorandum from M. F. McGuire, Assistant to the Attorney General, to J. Edgar Hoover, 4/17/41.

⁶⁴ The Custodial Detention Program should not be confused with the internment of Japanese Americans in 1942. The mass detention of Americans solely on the basis of race was exactly what the Program was designed to prevent, by making it possible for the government to decide in individual cases whether a person should be arrested in the event of war. When the Program was implemented after Pearl Harbor, it was limited to dangerous enemy aliens only. FBI Director Hoover opposed the mass round-up of Japanese Americans.

⁶⁵ Memorandum from Attorney General Biddle to Assistant Attorney General Cox and J. Edgar Hoover, Director, FBI, 7/16/43.

⁶⁶ Memorandum for Attorney General Biddle to Assistant Attorney General Cox and J. Edgar Hoover, Director, FBI, 7/16/43.

Upon receipt of this order, the FBI Director did not in fact abolish his list. The FBI continued to maintain an index of persons “who may be dangerous or potentially dangerous to the public safety or internal security of the United States.” In response to the Attorney General’s order, the FBI merely changed the name of the list from Custodial Detention List to Security Index. Instructions to the field stated that the Security Index should be kept “strictly confidential,” and that it should never be mentioned in FBI reports or “discussed with agencies or individuals outside the Bureau” except for military intelligence agencies.⁶⁷

This incident provides an example of the FBI’s ability to conduct domestic intelligence operations in opposition to the policies of an Attorney General. Despite Attorney General Biddle’s order, the “dangerousness” list continued to be kept, and investigations in support of that list continued to be a significant part of the Bureau’s work.

7. Intrusive Techniques: Questionable Authorization

a. Wiretaps: A Strained Statutory Interpretation

In 1940, President Roosevelt authorized FBI wiretapping against “persons suspected of subversive activities against the United States, including suspected spies,” requiring the specific approval of the Attorney General for each tap and directing that they be limited “insofar as possible to aliens.”⁶⁸

This order was issued in the face of the Federal Communications Act of 1934, which had prohibited wiretapping.⁶⁹ However, the Attorney General interpreted the Act of 1934 so as to permit government wiretapping. Since the Act made it unlawful to “intercept and divulge” communications, Attorney General Jackson contended that it did not apply if there was no divulgence *outside* the Government. [Emphasis added.]⁷⁰ Attorney General Jackson’s questionable interpretation was accepted by succeeding Attorneys General (until 1968) but never by the courts.⁷¹

Jackson informed the Congress of his interpretation. Congress considered enacting an exception to the 1934 Act, and held hearings in which Director Hoover said wiretapping was “of considerable importance” because of the “gravity” to “national safety” of such of-

⁶⁷ Memorandum from J. Edgar Hoover to FBI Field Offices. Re: Dangerousness Classification. 8/14/43. This is the only document pertaining to Director Hoover’s decision which appears in the material provided by the FBI to the Select Committee covering Bureau policies for the “Security Index.” The FBI interpreted the Attorney General’s order as applying only to “the dangerous classifications previously made by the . . . Special War Policies Unit” of the Justice Department. (The full text of the Attorney General’s order and the FBI directive appear in Hearings, Vol. 6, pp. 412–415.)

⁶⁸ Confidential memorandum from President Roosevelt to Attorney General Jackson, 5/21/40.

⁶⁹ 47 U.S.C. 605. The Supreme Court held that this Act made wiretap-obtained evidence or the fruits thereof inadmissible in federal criminal cases. *Nardone v. United States*, 302 U.S. 379 (1937); 308 U.S. 338 (1939).

⁷⁰ Letter from Attorney General Jackson to Rep. Hatton Summers, 3/19/41.

⁷¹ E.g., *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974), cert. denied sub nom. *Ivanov v. United States*, 419 U.S. 881 (1974). The Court of Appeals held in this case that warrantless wiretapping could only be justified on a theory of inherent Presidential power, and questioned the statutory interpretation relied upon since Attorney General Jackson’s time. Until 1967, the Supreme Court did not rule that wiretapping violated the Fourth Amendment. [*Olmstead v. United States*, 275 U.S. 557 (1927); *Katz v. United States*, 389 U.S. 347 (1967).]

fenses as espionage and sabotage.⁷² Apparently relying upon Jackson's statutory interpretation, Congress then dropped the matter, leaving the authorization of wiretaps to Executive discretion, without either statutory standards or the requirement of a judicial warrant.⁷³

The potential for misuse of wiretapping was demonstrated during this period by several FBI wiretaps approved by the Attorney General or by the White House. In 1941, Attorney General Biddle approved a wiretap on the Los Angeles Chamber of Commerce with the caveat:

There is no record of espionage at this time; and, unless within a month from today there is some evidence connecting the Chamber of Commerce with espionage, I think the surveillance should be discontinued.⁷⁴

However, in another case Biddle disapproved an FBI request to wiretap a Philadelphia bookstore "engaged in the sale of Communist literature" and frequented by "important Communist leaders" in 1941.⁷⁵

Materials located in Director Hoover's "Official and Confidential" file indicate that President Roosevelt's aide Harry Hopkins asked the FBI to wiretap his own home telephone in 1944. Additional reports from "technical" surveillance of an unidentified target were sent to Hopkins in May and July 1945, when he served as an aide to President Truman.⁷⁶

In 1945 two Truman White House aides, E. D. McKim and General H. H. Vaughn, received reports of electronic surveillance of a high executive official. One of these reports included "transcripts of telephone conversations between [the official] and Justice Felix Frankfurter and between [the official] and Drew Pearson."^{76a}

From June 1945 until May 1948, General Vaughn received reports from electronic surveillance of a former Roosevelt White House aide. A memorandum by J. Edgar Hoover indicates that Attorney General Tom Clark "authorized the placing of a technical surveillance" on this individual and that, according to Clark, President Truman "was particularly concerned" about the activities of this individual "and his associates" and wanted "a very thorough investigation" so that "steps might be taken, if possible, to see that such activities did not interfere with the proper administration of government." Hoover's memorandum did not indicate what these "activities" were.^{76b}

⁷² Hearings before the House Judiciary Committee, To Authorize Wiretapping, 77th Cong., 1st Sess. (1941), p. 112.

⁷³ Congress continued to refrain from setting wiretap standards until 1968 when the Omnibus Crime Control Act was passed. The Act was limited to criminal cases and, once again, avoided the issue of intelligence wiretaps. [18 U.S.C. 2511(3).]

⁷⁴ Memorandum from Attorney General Biddle to J. Edgar Hoover, 11/19/41. Biddle advised Hoover that wiretaps (or "technical surveillances") would not be authorized unless there was "information leading to the conclusion that the activities of any particular individual or group are connected with espionage or are authorized sources outside of this country."

⁷⁵ Memorandum from J. Edgar Hoover to Attorney General Biddle, 10/2/41; memorandum from Attorney General Biddle to J. Edgar Hoover, 10/22/41.

⁷⁶ Memorandum from FBI to Select Committee, 3/26/76 and enclosures.

^{76a} Memorandum from D. M. Ladd to Hoover, 5/23/45.

^{76b} Hoover memorandum, 11/15/45; a memorandum headed "Summaries Delivered to the White House" lists over 175 reports sent to General Vaughn from this surveillance; memorandum from FBI to Select Committee, 3/26/76, and enclosures.

b. Bugging, Mail Opening, and Surreptitious Entry.

Intrusive techniques such as bugging, mail opening and surreptitious entry were used by the FBI without even the kind of formal Presidential authorization and requirement of Attorney General approval that applied to warrantless wiretapping.

During the war, the FBI began “chamfering” or surreptitious mail opening, to supplement the overt censorship of international mail authorized by statute in wartime.⁷⁷ The practice of surreptitious entry—or breaking-and-entering—was also used by the FBI in wartime intelligence operations.⁷⁸ The Bureau continued or resumed the use of these techniques after the war without explicit outside authorization.

Furthermore, the installation of microphone surveillance (“bugs”), either with or without trespass, was exempt from the procedure for Attorney General approval of wiretaps. Justice Department records indicate that no Attorney General formally considered the question of microphone surveillance involving trespass, except on a hypothetical basis, until 1952.⁷⁹

C. DOMESTIC INTELLIGENCE IN THE COLD WAR ERA: 1946–1963

1. Main Developments of the 1946–1963 Period

The domestic intelligence programs of the FBI and the military intelligence agencies, which were established under presidential authority before World War II, did not cease with the end of hostilities. Instead, they set the pattern for decades to come.

Despite Director Hoover’s statement that the intelligence structure could be “discontinued or very materially curtailed” with the termination of the national emergency, after the war intelligence operations were neither discontinued nor curtailed.⁸⁰ Congressional deference to the executive branch, the broad scope of investigations, the growth of the FBI’s power, and the substantial immunity of the Bureau from effective outside supervision became increasingly significant features of domestic intelligence in the United States. New domestic intelligence functions were added to previous responsibilities. No attempt was

⁷⁷ FBI memorandum from C. E. Hennrich to A. H. Belmont, 9/7/51.

⁷⁸ Memorandum from the FBI to the Senate Select Committee, 9/23/75.

⁷⁹ A 1944 Justice Department memorandum discussed the “admissibility of evidence obtained by trash covers and microphone surveillance,” in response to a series of hypothetical questions submitted by the FBI. The memorandum concluded that evidence so obtained was admissible even if the microphone surveillance involved a trespass. (Memorandum from Alexander Holtzoff, Special Assistant to the Attorney General, to J. Edgar Hoover, 7/4/44; c.f., memorandum from Attorney General J. Howard McGrath to J. Edgar Hoover, 2/26/52.) See footnote 229 for the 1950s consideration of bugs by the Attorney General.

⁸⁰ In early 1941, Director Hoover had had the following exchange with members of the House Appropriations Committee:

“MR. LUDLOW. At the close of the present emergency, when peace comes, it would mean that much of this emergency work necessarily will be discontinued.”

“MR. HOOVER. That is correct. . . . If the national emergency should terminate, the structure dealing with national defense can immediately be discontinued or very materially curtailed according to the wishes of Congress.” (*First Deficiency Appropriation Bill, 1941, Hearings before the House Committee on Appropriations, 3/19/41, pp. 188–189.*)