

DOMESTIC SURVEILLANCE IN THE UNITED STATES:
WORLD WAR II TO VIETNAM

by

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Domestic Surveillance in the United States: World War II to Vietnam

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This dissertation examines archival documents as well as Congressional committee investigations and records to understand the scope and legality of domestic surveillance in the mid-twentieth century. Additionally, it works to understand how the intelligence agencies that carried out such surveillance were able to avoid meaningful punishment, even though their actions were often illegal.

There has been a recent revival of concerns over the abilities of secret intelligence agencies to intercept and examine the communications of U.S. citizens. While the current revelations about domestic surveillance are certainly disconcerting, the reality is that domestic surveillance has a long and sordid history in the United States.

With the advent and adoption of new technologies for communication, government access to the words and ideas of citizens proliferated in the twentieth century. This meant that surveillance could be carried out more broadly and efficiently than ever before. Such surveillance captured the communications of politicians, activists, workers, students, parents, teachers, Martin Luther King, Jr., and even Supreme Court Justices.

The aim of this dissertation is two-fold. First, it seeks to understand how such surveillance impacts civil liberties, with special attention paid to First Amendment protections of speech, the press, and association, and Fourth Amendment protections against unwarranted search and seizure. This work finds that government surveillance has the consequences of chilling speech and stifling intellectual privacy. This study examines National Security Agency operations SHAMROCK and MINARET; Federal Bureau of Investigation Counterintelligence Program (COINTELPRO)

operations Communist Party USA, Socialist Workers Party, Black Nationalist Hate Groups, and New Left; and Central Intelligence Agency operations HTLINGUAL, CHAOS, MERRIMAC, and RESISTANCE. The examination of these operations concludes that the NSA, FBI, and CIA fundamentally violated the constitutional rights of countless citizens and these violations were carried out knowingly and repeatedly.

The second aim of this dissertation is to investigate how these agencies were able to avoid meaningful punishment. To understand how they skirted punishment, it is necessary to think of the United States as a dual state. The dual state theory was developed in the 1930s by German legal scholar and political scientist Ernst Fraenkel. Fraenkel sought to understand the political, economic and legal changes taking place in Germany under the Third Reich. His theory suggests that in a dual state, there is Normative State, which is charged with enforcing normative laws such as contract and traffic law, and there is a Prerogative State, which arbitrarily applies laws to groups and individuals determined to be acting “politically” or in ways that threaten the current regime—in Germany, the Prerogative State was synonymous with the Gestapo.

In much the same way, members of the American Prerogative State arbitrarily apply and suspend laws based on their perceptions of individual and group activities and ideologies. They can violate the constitutional rights of those people and organizations believed to threaten the government. Thus, the NSA, FBI, and CIA are not only members of the intelligence community, they are also members of the American Prerogative State and, as such, are able to violate laws with impunity. The dual state theory explains why these agencies were not punished for the illegal and unconstitutional surveillance practices that took place between World War II and the Vietnam War.

Table of Contents

CHAPTER 1: INTRODUCTION	1
Understanding Surveillance	4
Surveillance and Communication	10
Methods	14
Summary	19
CHAPTER 2: IDEOLOGIES AND FOUNDATIONS, 1775 – 1918	24
Toward Revolution: Legal Challenges to Writs and Warrants	25
Intelligence and the Second Continental Congress	29
George Washington and Intelligence Gathering	34
The Continental Army	38
Against Aliens and Sedition	40
The Civil War	45
Suspension of Habeas Corpus	46
Civil War Telegraphy	50
The Pinkertons	52
Early Twentieth Century	56
Political Policing and Surveillance of Labor	58
Espionage Act of 1917	61
Conclusion	63
CHAPTER 3: THE DUAL STATE, CIVIL LIBERTIES, AND SURVEILLANCE	66
The Dual State	67
The First Amendment	82
The Chilling Effect	88
The Fourth Amendment	94
CHAPTER 4: THE NATIONAL SECURITY AGENCY	99
Before the National Security Agency	102
Operation SHAMROCK	104
MINARET	113
The Church Committee	116
The Pike Committee and Abzug Subcommittee	120
Committee and Subcommittee Outcomes	123
Case Law and NSA Surveillance	125

Analysis	128
Conclusion	133
CHAPTER 5: THE FEDERAL BUREAU OF INVESTIGATION	136
Authorizing the FBI.....	138
FBI Surveillance	141
Counter Intelligence Programs	144
Communist Party, USA.....	144
Socialist Workers Party.....	146
Black Nationalist-Hate Groups	151
New Left	157
Legal Analysis	161
Freedom of Association	164
Freedom of the Press.....	165
The Chilling Effect.....	169
Conclusion	172
CHAPTER 6: THE CENTRAL INTELLIGENCE AGENCY	174
Authorizing the Central Intelligence Agency	175
SRPOINTER/HTLINGUAL	179
MH/CHAOS	182
RESISTANCE	189
MERRIMAC.....	192
Congressional Investigation.....	194
The Rockefeller Commission.....	195
Analysis	200
Conclusion	204
CHAPTER 7: CONCLUSION	206
Legacy of Congressional Investigations	206
Inhibiting Speech	208
Limitations	212
Future Research	215
BIBLIOGRAPHY	219

CHAPTER ONE

INTRODUCTION

In early 2013, Edward Snowden, a former National Security Agency and Central Intelligence Agency contractor, turned over between 50,000 and 200,000 documents¹ to journalists. The documents provided concrete evidence of massive surveillance operations being carried out by members of the United States' Intelligence Community (IC). The IC consists of 17 agencies,² with the three most familiar being the National Security Agency (NSA), Central Intelligence Agency (CIA), and Federal Bureau of Investigation (FBI). Snowden's disclosures have reignited national concern about not only the capabilities of the IC members, but also about the domestic usage of the technologies and the fact that they are, and have been, capturing large swaths of domestic communications. While the so-called "Snowden Revelations" are certainly frightening, they should not be entirely unexpected. That they were unexpected, however, is likely due to the lack of knowledge most citizens have about the history of domestic surveillance in the United States.

Since the days of the "Founding Fathers," communications in this country have been intercepted, examined and recorded. This surveillance has not only continued over the last 250 years, but has drastically increased. Examining various communications, from letters to telephones to the Internet, the U.S. government has always had an interest in knowing the thoughts and ideas of the public, often capturing communications that express those ideas without warrant and in

¹ Mark Hosenball, "NSA Chief says Snowden Leaked up to 200,000 Secret Documents" *Reuters*, November 14, 2013 accessed online at <http://www.reuters.com/article/us-usa-security-nsa-idUSBRE9AD19B20131114>

² Office of the Director of National Intelligence; Central Intelligence Agency; Defense Intelligence Agency; Federal Bureau of Investigation; National Geospatial-Intelligence Agency; National Reconnaissance Office; National Security Agency/Central Security Service; Department of Energy; Department of Homeland Security; Department of State; Department of the Treasury; Drug Enforcement Administration; U.S. Air Force; U.S. Army; U.S. Coast Guard; U.S. Marine Corps; U.S. Navy.

violation of civil liberties. Knowing the history of domestic surveillance is necessary for those hoping to contextualize the Snowden revelations in a meaningful way, but this history also raises a number of important issues. As I will show in this study, between 1945 and 1975 the NSA, FBI and CIA targeted individuals and groups engaged in constitutionally protected speech. These individuals and groups were surveilled and disrupted not because they had violated any laws or were suspected of any crimes, but because their politics and ideas were deemed dangerous to the political status quo these three agencies were charged with maintaining.

Today, surveillance by the U.S. government has expanded to an unprecedented degree. On May 1, 2013, CNN host Erin Burnett interviewed Tim Clemente, a former FBI counterterrorism agent. Two weeks earlier the Boston Marathon bombing had occurred. During the program, Burnett asked Clemente if it was possible for the FBI to access the voicemail of the bombers. This is their exchange:

BURNETT: Tim, is there any way, obviously, there is a voice mail they can try to get the phone companies to give that up at this point. It's not a voice mail. It's just a conversation. There's no way they actually can find out what happened, right, unless she tells them?

CLEMENTE: No, there is a way. We certainly have ways in national security investigations to find out exactly what was said in that conversation. It's not necessarily something that the FBI is going to want to present in court, but it may help lead the investigation and/or lead to questioning of her. We certainly can find that out.

BURNETT: So they can actually get that? People are saying, look, that is incredible.

CLEMENTE: No, welcome to America. All of that stuff is being captured as we speak whether we know it or like it or not.³

³ CNN Transcripts, *Erin Burnett Outfront*, aired May 1, 2013, accessed online at <http://transcripts.cnn.com/TRANSCRIPTS/1305/01/ebo.01.html>

In other words, all domestic and international phone calls made in the United States are apparently captured by the Intelligence Community and made accessible. This has been corroborated by William Binney, a mathematician, programmer, analyst and former NSA Director of Operations who worked for the agency for more than 30 years. Binney retired only when he realized that the NSA was carrying out surveillance operations against U.S. citizens. In an interview on PBS NewsHour, Binney was asked to assess the government's claim that only communications metadata are being collected, as opposed to communications content. He responded:

Well, I don't believe that for a minute. OK?

I mean, that's why they had to build Bluffdale, that facility in Utah with that massive amount of storage that could store all these recordings and all the data being passed along the fiberoptic networks of the world. I mean, you could store 100 years of the world's communications here. That's for content storage. That's not for metadata.

Metadata, if you were doing it and putting it into the systems we built, you could do it in a 12-by-20-foot room for the world. That's all the space you need. You don't need 100,000 square feet of space that they have at Bluffdale to do that. You need that kind of storage for content.⁴

Binney retired from the NSA in 2002 and began publicly revealing what the agency was doing only a couple of years later. Binney's whistleblowing activity took place a decade before Snowden's, but much of the world was still surprised to learn of such massive communication collection programs when they were again disclosed in 2013. Interestingly, the history of U.S. domestic surveillance is often overlooked either because it is not known or it has been forgotten.

⁴ Judy Woodruff, "NSA Collects 'Word for Word' every Domestic Communication, Says Former Analyst" PBS NewsHour, August 1, 2013, accessed at http://www.pbs.org/newshour/bb/government_programs-july-dec13-whistleblowers_08-01/

This dissertation is an historical project that works to understand the ways some Intelligence Community members used domestic surveillance to infringe on the civil liberties of very large numbers of U.S. citizens in the mid-twentieth century, and how those directing and working in these IC organizations were able to do so while avoiding meaningful punishment. By examining the development of the NSA, CIA and FBI, as well as the illegal surveillance programs each carried out, a case will be made in this dissertation that First and Fourth Amendment constitutional protections were often violated. Further, the study will argue that even though these agencies violated the U.S. Constitution knowingly and repeatedly, they were not punished because they played a particular role in securing and maintaining the power of various administrations from World War II through the Vietnam War.

Understanding Surveillance

Surveillance can be electronic, analog, covert, overt, remote, automated, benevolent, harmful, or any combination thereof. At its most basic, surveillance is the observation and collection of information for a purpose. However, this definition is insufficient because it is exceptionally broad, such that going outside to see if it is cold enough for a jacket becomes equated with carrying out surveillance on nature. While such an action could be understood as surveillance, this simplistic definition is at risk of classifying every information collection activity as surveillance, at which point the usefulness of the term disappears. A general legal definition of surveillance is illusive, but electronic surveillance does have a precise definition put forward in the Foreign Intelligence Surveillance Act (FISA)⁵:

(1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are

⁵ 50 U.S. Code § 1801

acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;

(2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of title 18;

(3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or

(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

This definition, while precise, does little to help define other types of surveillance. One of the most prominent scholars of surveillance, David Lyon, writes that surveillance once had a very narrow meaning associated with policing and espionage, now it is “a shorthand term to cover the many, and expanding, range of contexts within which personal data is collected by employment, commercial and administrative agencies as well as in policing and security.”⁶ It is important to recognize that Lyon does not include in this definition a judgment about the necessity, harm, or benefit of surveillance. This omission is intentional, as he believes it is possible for the “electronic eye to blink benignly.” Nearly ten years later, post-September 11, Lyon writes that surveillance “refers to routine ways in which focused attention is paid to personal details by organizations that want to influence, manage, or control certain persons or population groups.”⁷ This latter definition

⁶ David Lyon, *The Electronic Eye: The Rise of Surveillance Society* (University of Minnesota Press, 1994), ix.

⁷ David Lyon, *Surveillance after September 11* (Polity Press, 2003), 5.

brings to the fore a key element missing from the earlier incarnation: intent. Intent is important when working to understand surveillance beyond the contexts of policing and espionage, though those contexts are the focus of this dissertation.

Nearly all human behaviors are subject to some sort of surveillance. For example, a recent *New York Times*⁸ article explored the ways some companies acquire information about customers by paying attention to their personal details and purchasing habits, in an effort to market products that the customers might be most interested in buying. Major U.S. retailer Target has captured the data on so many customers that it has a list of 25 items that, if bought by the same customer in a short period of time, indicate pregnancy, which allows Target to market items of interest to that customer. Though many might feel their privacy is violated by such surveillance, it is neither against the law nor particularly harmful. However, if that information was then passed to the customer's employer and resulted in her being fired, it would be much more harmful. Thus, the importance of intent in surveillance activities is apparent.

Surveillance is not limited to police operations and private industry. In 1970, Laud Humphreys published his first and most famous book, *Tearoom Trade*.⁹ The purpose of his study was to understand how and where the "average guy goes" for sexual encounters with other men. Humphreys acted as the "watch queen" or lookout while men engaged in sexual activities with one another in restrooms. Then, Humphreys captured the license plates of the men, used that information to discover their home addresses, and finally visited them asking for them to fill out questionnaires about their sexuality. Thus, Humphreys carried out covert surveillance by capturing

⁸ Charles Duhigg, "How Companies Learn Your Secrets," *New York Times*, February 16, 2012 accessed at <http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html>

⁹ Laud Humphreys, *Tearoom Trade: Impersonal Sex in Public Places* (London: Duckworth 1970).

the personal details of individuals and using those details to complete his study. Aside from obvious ethical issues raised by Humphreys' research, the *Tearoom Trade* study shows that nearly anyone can carry out surveillance.

In the past, as in the present, with new technologies comes new opportunities for surveillance. In Colonial America the postal system allowed for long-distance written communication between individuals, but this communication was susceptible to surveillance, as the letters were often secured only with string or wax. This lack of security allowed for letters to be opened, read, and reclosed before reaching their final destinations.¹⁰ The invention of the telegraph brought the potential to tap into electronic transmission lines and intercept messages.¹¹ In the mid-1850s newly invented photographic technologies were occasionally used to capture the images of prison inmates, with the hope that having a visual record of the inmates' faces would deter them from committing additional crimes in the future.¹² The world's first closed-circuit television system was installed in Germany in 1942 to monitor the launching of V-3 rockets.¹³ And today, Internet Protocol Cameras allow interested parties to view live video of downtown Berlin on the Internet, surveilling any pedestrian on the sidewalk or any vehicle driving on the street. Thus, surveillance is primarily about seeing and having access to information that might otherwise be unavailable.

¹⁰ *Infra*, Chapter 2.

¹¹ *Infra*, Chapter 2.

¹² Jens Jäger, "Photography: A Means of Surveillance? Judicial Photography 1850 to 1900," *Crime, Histoire & Société* 5, 1(2001). However, Jäger does not consider such photography "a means of surveillance in the sense of a panopticon" at paragraph 14.

¹³ Martin W. Bowman, *Nachtjagd, Defenders of the Reich 1940 – 1943 (The Second World War by Night)* (South Yorkshire: Pen & Sword) 2016, 191.

Many works in the field of surveillance studies rely on Foucault's analysis of the panopticon as an important theoretical frame, although this dissertation does not. A number of scholars have raised issues with Foucault's interpretation of Jeremy Bentham's architectural panopticon.¹⁴ When Foucault discussed the panopticon in *Discipline & Punish*,¹⁵ he drew attention away from Bentham's creation by shifting focus to the human subject. Originally, the tower at the center of the panopticon was to have living quarters for the watcher, such that his family could live with him and all members would act as inspectors while only the employed watcher would be paid.

For the family in the tower there is seemingly little else to do but watch. Watching for Bentham is automated. Foucault too agrees that the panopticon produces an automatic effect, yet with no reference to the residence and its works at the heart of Bentham's panopticon... What distinguishes Foucault's and Bentham's definition of the panopticon is perspective, meaning that the view outward from the residence, the tower—in Bentham's terms is a site and more of seeing without being seen...Conceptually, for Foucault, the prisoners, not the tower, are at the center of the panopticon¹⁶

Foucault understood the panopticon as a metaphor, while Bentham believed it could be implemented to improve society. Bentham felt that the panopticon could free the watcher and the prisoner from prison managers and would require no direct intervention from judges, thus making both the watcher and the prisoner more autonomous. Further, the watcher would avoid having to deal harsh punishment to the prisoner as the prisoner would not want to be caught breaking the

¹⁴ Jeremy Bentham is credited with developing the panopticon, but it was actually his brother Samuel who had the idea for the architectural design and purpose, according to Rob Boyne in "Post-Panopticism" *Economy and Society* 29:2(2000).

¹⁵ Michel Foucault, *Discipline & Punish: The Birth of the Prison* (New York: Random House, 1977).

¹⁶ Greg Elmer, "Panopticon—discipline—control" in *Routledge Handbook of Surveillance Studies* eds. Kristie Ball, Kevin D. Haggerty, and David Lyon (New York: Routledge, 2012): 22, emphasis in the original.

prison's rules.¹⁷ For Foucault, the panopticon was an ideal model of a disciplinary mechanism, as it took a group and separated it into vulnerable and exposed individuals.¹⁸

Neither interpretation of the panopticon is particularly useful for the project at hand. Bentham's liberalist panopticon, ensuring autonomy and cooperation, is not an appropriate analogue for the intelligence community. If anything, the surveillance that the IC carries out has justified larger budgets, more employees, more bureaucracy, and less autonomy. At the same time, Foucault's panopticon, with its ability to separate out individuals, is not particularly applicable either, given that the prisoners will behave only if they are aware that there is a watcher. In the case of the IC, most domestic surveillance is initially carried out covertly, with the hopes of catching illegal actions. What is, perhaps, a more useful frame for understanding the IC is Haggerty and Ericson's notion of "surveilling assemblages," which draws on Deleuze and Guattari's understandings of assemblages. Surveillant assemblages result in the abstracting of individuals and the creation of data doubles, as well as reliance on machines to make and record observations. Further, the surveillant assemblage "does not approach the body in the first instance as a single entity to be molded, punished or controlled. First it must be known, and to do so it is broken down into a series of discrete signifying flows."¹⁹ The creation of watch lists, dossiers, and indexes²⁰ in the mid-twentieth century, combined with early computing technologies, is more in step with this conceptual framework than with the panopticon. Even so, the fit is still imprecise and does little to connect domestic surveillance with the larger discipline of communication.

¹⁷ Ibid., 24.

¹⁸ Foucault, *Discipline & Punish*, 201.

¹⁹ Kevin D. Haggerty and Richard V. Ericson, "The Surveillant Assemblage," *The British Journal of Sociology*, 51:4 (December 2000):611-13.

²⁰ *Infra*, Chapters 4, 5, 6.

Surveillance and Communication

Most often, surveillance is approached sociologically, and basically asks: How does surveillance order and impact people and society? From this perspective, surveillance is something that has fundamental implications for the human experience, be it surveillance in the workplace to ensure workers are always productive or, as recently reported by Bloomberg, to deter employees from potentially stealing²¹ (the story had the menacing subtitle: “It’s just letting people know that you’re being watched”), or surveillance as a useful and mandatory part of census taking.

Surveillance has much less often been approached from a communication perspective—this dissertation does just that. As Habermas²² pointed out in his work on the public sphere, people gathering and sharing ideas is an important aspect of contemporary societies. Similarly, the Founding Fathers recognized the importance of sharing ideas when they drafted the First Amendment to the U.S. Constitution. This short amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” Though an argument that investigates surveillance vis-à-vis the religion clause of the First Amendment could be made, it is not the goal this dissertation. Instead, this dissertation focuses on the First Amendment’s protections of speech, the press, assembly, and the implicit protection of association.²³ This dissertation addresses the ways

²¹ Josh Eidelson and Spencer Soper, “How Amazon Shames Warehouse Workers for Alleged Theft,” *Bloomberg Businessweek*, March 7, 2016 accessed at <http://www.bloomberg.com/news/articles/2016-03-07/amazon-s-story-time-is-kind-of-a-bummer>

²² Jurgen Habermas, *The Structural Transformation of the Public Sphere: An inquiry into a Category of Bourgeois Society* (MIT Press 1991).

²³ *Infra* Chapter 3.

that surveillance violates these protections, and thereby prevents citizens from sharing and communicating ideas.

When citizens seek to change society or some aspect of it, one of the most fundamental and necessary tools for doing so is the exchange and development of ideas. People learn about new ideas and work through the ideas they already have by discussing them with others. There are numerous variations on this theme, including John Stuart Mill's notion of the marketplace of ideas and Justice Oliver Wendell Holmes' dissent in *Abrams v. United States*, where he wrote "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."²⁴ That the government has the power, and responsibility, to proscribe certain speech is well established, as not all speech is fit for society (e.g., obscenity per the Miller test²⁵). However, when the government carries out surveillance with the intent of disrupting or preventing speech that is protected by the Constitution, such as political speech,²⁶ not only does the government violate our civil liberties, it prevents social progress. Ideas mean little if they cannot be shared, and, as will be shown, domestic surveillance and intelligence operations carried out by the NSA, FBI and CIA in the mid-twentieth century worked to inhibit the abilities of individuals and groups to share such constitutionally protected ideas through speech.

Often, issues of surveillance are wrapped in concerns about the Fourth Amendment. This amendment protects citizens from unwarranted search and seizure, and is a natural fit for such

²⁴ 250 U.S. 616 (1919).

²⁵ *Miller v. California* 413 U.S. 15 (1973). This test prohibits obscene speech and expression, roughly defined as speech that appeals to prurient interest, depicts sexual conduct or excretory functions in a patently offensive way, and lacks serious artistic, literary, political, or scientific value.

²⁶ *Infra*, Chapter 3.

issues. To have your telephone calls intercepted by the government, without warrant, has been determined, in most cases, to be in violation of the amendment.²⁷ Much less discussed is the chilling effect that such surveillance has on speech, the sharing of ideas, political organizing, and more. The Supreme Court first defined the chilling effect in *Gibson v. Florida Legislation Investigation Committee* (1963) as a secondary consequence of a legitimate law, which violates the free exercise of constitutionally protected rights of speech, expression and association. Further, the Court held that such a secondary violation is generally more important to prevent than is the crime the law itself aims to proscribe. In other words, the chilling effect inhibits the free exercise of speech in order to prevent some other law from being broken. Because free speech has a preferred position in the United States, it is more troubling to inhibit such speech while preventing some other illegal behavior than to allow that illegal behavior to take place in an effort to protect speech.

When the government carries out domestic surveillance against individuals, even if that surveillance is legal, it often has a chilling effect on constitutionally protected speech, creating a contentious situation. In one recent example²⁸ it was found that the government's efforts to prevent al-Qaeda terrorist attacks by surveilling internet behaviors had the effect of chilling speech. The study determined that "Muslim-Americans overwhelmingly believe that since 9/11 the U.S. government has monitored their general and online activities"²⁹ and this belief that surveillance is taking place has caused a modest percentage of Muslim-Americans to change the ways they use the Internet. Similarly, the PEN American Center found that 24 percent of writers in the United

²⁷ See *Katz v. U.S.* 389 U.S. (1967) and *infra* Page##.

²⁸ Dawinder S. Sidhu "The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim-Americans" *Univ. MD L.J. of Race, Religion, Gender and Class*, 7:2 (2007).

²⁹ *Ibid.*, 392.

States have “deliberately avoided certain topics in phone and email conversations” due to worries about government surveillance of those conversations.³⁰ In the U.S., government surveillance has proscribed citizens from engaging in constitutionally protected speech. This, in essence, is the chilling effect.

By framing government surveillance operations in terms of the First and Fourth Amendments, this dissertation offers an understanding of this interesting and understudied history that would not be possible if relying on the tired metaphor of the panopticon. To understand government surveillance as inhibiting civil liberties allows us to recognize that the NSA, FBI and CIA were not only acting beyond their legal authorities and charters, but were also acting in violation of the U.S. Constitution that they were charged with protecting. Even though their actions were well known within government, and within political organizations, these intelligence agencies faced no real punishment for their illegal deeds. To understand how they avoided such punishment, this dissertation utilizes the theory of the “Dual State” put forward by German political scientist and legal scholar, Ernst Fraenkel.

Fraenkel posits that some modern states may consist of two separate but coordinated states known as the “Normative State” and the “Prerogative State.” In the former, laws are carried out as the public might expect. The Normative State enforces things such as contract law, criminal law, civil law, small claims courts, economic regulations, and the like. These laws and regulations are applied equally to all citizens who, if they feel they have been wronged by the actions of the Normative State, have the ability to seek justification for those actions through the courts. Thus, the Normative State legitimizes the state-at-large and the regime in power. The Prerogative State,

³⁰ PEN American Center, *Chilling Effects: NSA Surveillance Drive U.S. Writers to Self-Censor*, 2013.

on the other hand, works to maintain that power by arbitrarily applying laws to citizens who participate in “political” activities that may threaten the regime. In 1930s Germany, such political activities included certain religious affiliations, working for equal rights, or advocating for alternative political parties, among others. In the United States, throughout much of the twentieth century, such problematic political activities involved working for labor rights or civil rights, being affiliated with socialism, communism and anarchism, and, in the 1960s and ‘70s, being identified with the New Left. The Prerogative State occupies a unique position in that it is allowed to violate the law with impunity. Thus, the NSA, FBI and CIA can be understood to be members of the U.S. Prerogative State in that they knowingly, willingly, and repeatedly have broken the law, violated the Constitution, and infringed on civil liberties, yet did all of these things with nearly full impunity from Executive, Legislative or Judicial punishment.

Methods

In order to understand how, why, and to what effect the government carried out such surveillance programs, this dissertation relies on a combination of primary and secondary sources. For many historical projects, the archive is the principal source for information, and this dissertation is no exception. I chose to examine the period between World War II and the Vietnam War for a number of reasons. Important for this period is its position in the technological timeline. While computing, especially within government, did take place during most of this period, it was not nearly as widespread or powerful as in the decades that followed. For the work of comparing activities, this period offered the most homogeneity in terms of technology. To be certain, technology did change, but even then the electronic world was largely analog. This allowed for less variation in available tactics for government surveillance. For example, tapping a telegraph line and telephone line are very similar procedures and yield very similar results. However, tapping

a telegraph line and tapping a cellular phone are very different not only in technique, but in results. Tapping a cellular phone can gain access not only to spoken conversation, but to live video, stored photos, text messages, applications, bank account passwords, contact lists and more, while tapping a telegraph line yields only metadata and the conversation. Therefore, the relatively similar communications technologies widely utilized between 1945 and 1975 made this period appealing to examine.

This period also provides an interesting window into domestic surveillance because much of what was instituted in the name of national security during WWII remained in place after the war had ended. The period also ends before the “Year of Intelligence”³¹ concludes, meaning that many of these intelligence and surveillance activities were able to proceed for much of the period without any major legislative inquiry into their impropriety. Further, this time period ensured that ample material would be available for researching, given that in 2009 President Barack Obama issued Executive Order 13526. That Executive Order deals with classified national security information and the time limits on such classifications. Section 1.5 (b) specifies that “information shall be marked for declassification 10 years from the date of the original decision, unless the original classification authority otherwise determines that the sensitivity of the information requires that it be marked for declassification for up to 25 years from the date of the original decision.” Additionally, subsection (c) states that “An original classification authority may extend the duration of classification up to 25 years from the date of origin of the document, change the level of classification, or reclassify specific information only when the standards and procedures for classifying information under this order are followed.” In other words, this Executive Order

³¹ 1975. See *Infra*, 190

increased the likelihood that the internal government communications documenting the surveillance operations investigated in this dissertation would be available, as all of the operations occurred more than 25 years ago. To request documents detailing surveillance operations carried out in 2010, for example, would likely have yielded few useful documents.

A number of archives were used to complete this research, including those maintained by: the National Archives and Records Administration (the National Archives); the National Security Archive at George Washington University, which provides access to more than 90,000 declassified documents; the Harold Weisberg Archive at Hood College, which contains well over 300,000 pages of CIA, FBI and Justice Department documents; as well as the Digital National Security Archive, which contains more than 650,000 pages. Of course, not all pages were relevant, and not even all relevant pages could be obtained or analyzed. In total, I estimate that I analyzed approximately 7,500 pages of documents in the process of researching and writing this dissertation. Given the large amount of data I had available, and the time and space constraints of producing this dissertation, making editorial choices about what to include and how to tell the stories of the NSA, FBI and CIA was crucial.

Because this project involved examination of primary manuscript sources,³² there was little risk that the information and the documents examined were intellectually or patently false. Intellectually false documents are those documents that “were written to mislead contemporaries or to claim illegitimate rights or privileges,”³³ and patently false documents are those that are faked or have false origins. Many of these documents were written before the Freedom of

³² Anthony Brundage, *Going to the Sources: A Guide to Historical Research and Writing*, 5th ed. (Malden, MA: Wiley-Blackwell: 2013), 20.

³³ Martha Howell and Walter Prevenier, *From Reliable Sources: An Introduction to Historical Methods* (Cornell University Press: 2001), 57.

Information Act (FOIA) was enacted in 1966 and those that were written after that year likely were only minimally impacted by the passing of FOIA because it was unclear then to what extent classified documents would be made available. Thus, the information and conversations had between individuals within these agencies were likely quite candid. In addition to primary sources, such as internal agency memoranda, a number of Congressional reports were used in this research. These Congressional reports include those of the Church Committee (1975-76), the Pike Committee (1975), the Abzug Subcommittee (1975), and the Rockefeller Commission (1975). Finally, previously published secondary material, such as books and academic journal articles, were utilized to situate this data legally and theoretically.

When writing this dissertation, I actively worked to avoid crafting a teleological history of domestic surveillance. In other words, I attempted to resist the impulse to search for documents or tell a story of the inevitability of surveillance and civil liberties violations over time. However, I believe that such a trajectory is inherent in the history itself and not an effect of teleological assumptions. While these types of “linear theories of history [often] presuppose a better future, a time when human misery is reduced, when political order is perfectly achieved, or when the human spirit is fulfilled,”³⁴ the history and trajectory of government surveillance tells a different story. Most simply, this history of surveillance in the U.S., which begins in the 1770s, shows that over time, surveillance has increased and the violation of civil liberties and the Constitution have had less and less impact on governmental decisions to carry out such surveillance. In other words, rather than proposing the inevitability of a utopian end, the history of surveillance points toward dystopian clichés.

³⁴ Howell & Prevenier, *From Reliable Sources*, 121.

Tied up in this trajectory are a number of correlative developments, about which I can only speculate, as they are beyond the scope of this study. Most notably is the increase in the willingness of the U.S. government to trample the rights of its citizens, through the use of surveillance, in correspondence with the expansion of its imperial reach. In this way, it seems that the maintenance of power has become prioritized over all else as that power has increased in intensity and breadth. This pattern will be apparent to the astute reader, but we should keep in mind that there are many complicated relationships that also contribute to such a trajectory, including those between technology and society, as well changing economic and social conditions, and international relations, to name a few. However, the intent of the following chapter is to demonstrate, in part, that the ideologies of, and willingness to violate rights by, government actors have changed over time, due in part, but certainly not exclusively, to increasing state power and imperial expansion. In the U.S., surveillance operations that inhibit the exercise of free speech and political organization by targeting specific groups and individuals who hold alternative political views contrary to the status quo becomes more brazen with the growth of imperial power.

This dissertation is situated at the nexus of communication and surveillance studies. By working to understand how government activities inhibit the abilities of citizens to speak and engage in political activity squarely situates this project in the realm of communication. Focusing on government surveillance and intelligence activities, in particular, situates this dissertation in surveillance studies. If, for example, I chose to examine how the Smith Act of 1940 or the Taft-Hartley Act of 1947 criminalized political speech, the dissertation would be at the intersection of communication and criminal justice or criminology. In choosing to examine how the First Amendment is inhibited by government surveillance, my hope is to contribute to the fields of communication and surveillance studies with the examination of a phenomenon that has received

little attention in either area. To this point, the *Routledge Handbook of Surveillance Studies* makes a one-sentence mention about the existence of what is arguably the most well-known of all surveillance operations, COINTELPRO. In contrast, the literature in the field of surveillance studies does address issues of surveillance quite well. But, surveillance studies as a discipline produces much less research on First Amendment issues. Further, examinations of such government surveillance activities are exceedingly elusive in the communication literature, although communication scholars do readily and frequently address the First Amendment. What has been lacking I propose, and what this dissertation aims to tell, is the story of government surveillance through the lens of the First Amendment, thereby melding the strengths of the two disciplines to create a foundational understanding of the impacts of such activities on freedom of speech generally. If this project is successful, it should allow for better contemporary understanding and contextualization of the Snowden revelations, as well as any subsequent leaks that may disclose additional surveillance activities.

Summary

In the following chapter, I work to show that surveillance has played an important role in the creation and maintenance of the state and has also helped to maintain industry. Beginning in 1775, the government showed its willingness to intercept mail (communications) rather than risk sabotage or subversion. In some ways, such actions set a precedent for later iterations of domestic surveillance. The chapter also examines a number of instances throughout the 1800s that involved surveillance and direct violations of the law and Constitution. During this time the government maintained a close relationship with the Pinkertons, a private detective agency that can, in many ways, be viewed as a prototypical intelligence agency. The actions carried out by the Pinkertons included inciting violence, spying on workers and labor activists, and breaking strikes. Similarly,

the War Department developed an arm dedicated to ensuring that industry would continue regardless of the wishes or political ideologies of workers, which was called the Plant Protection Service (PPS). The PPS and the Pinkertons are clear examples of political policing, whereby individuals are targeted for little more than their political beliefs and activities. Such targeting appears to have violated the First Amendment as it was understood in that particular historical moment, and would certainly be a violation given the understanding of the First Amendment held today. However, no punishment was administered for such illegal actions, and it was virtually impossible for these workers and organizers to use the judiciary as a means of addressing injustice. Also examined are various Alien and Sedition laws, because these laws generated much debate about the protections of the First Amendment. Finally, the essence of the chapter is the mapping of a trajectory that indicates a positive relationship between empire and domestic surveillance. In other words, as the imperial power of the United States grew, there was a commensurate increase in the willingness of the state to intrude on the lives of citizens through surveillance and infiltration, such that those individuals and organization that posed threats to empire, in terms of economy and politics, were specifically targeted and their speech inhibited.

In chapter three, I explicate a number of theories and perspectives that are useful for understanding domestic government surveillance. To examine only technologies or legal violations, while interesting, would add little to conversations currently taking place in the communication and surveillance studies literature—not to mention the press, after the Snowden Revelations. In order to add to this conversation, I bring together one of the first theories of modern dictatorship, the dual state theory of Ernst Fraenkel, with legal theories of the First Amendment, including the chilling effect, and understandings of the Fourth Amendment. Finally, the recent theory of intellectual privacy is discussed, as it helps us understand some of the damage that results

from the chilling of speech, while the dual state theory helps to explain how those state agencies and actors that violate our civil liberties avoid punishment.

Chapters four, five, and six all examine specific surveillance operations carried out by various intelligence agencies. In chapter four, two National Security Agency operations are examined. The first, Operation SHAMROCK, was a program that intercepted up to 150,000 telegrams per month then stored, and analyzed their content. This operation was active for nearly thirty years, invading the privacy of countless U.S. citizens, not to mention legal and constitutional violations that resulted from such activities. The second operation was given the cryptonym MINARET and involved the watch listing of targeted individuals. In addition to analyzing the constitutional violations of such programs, for example the violations of the Fourth Amendment protection against unwarranted search and seizure, the chapter works to apply the dual state theory. This application helps us to understand why the NSA was not defunded following the disclosure of such operations.

The Federal Bureau of Investigation is the focus of chapter five, with particular attention paid to the FBI's numerous counterintelligence programs, better known as COINTELPROs. This chapter works to bring some nuance to the discussion of the COINTELPROs by examining a number of individual operations rather than discussing *a* "COINTELPRO" as though it were one homogenous operation. During the mid-twentieth century the FBI specifically targeted groups and individuals with political ideologies in opposition to the American status quo. In this way, the FBI acted as a political police force, stifling the protected speech of innumerable U.S. citizens, while also disrupting political organizations through infiltration, espionage, and impersonation. Additionally, the Bureau bugged and wiretapped such notables as Martin Luther King, Jr., Supreme Court Justice Felix Frankfurter, and Professor Thomas I. Emerson. The civil liberties violations

that resulted from such surveillance is apparent. The chilling effect caused by these illegal activities is also discussed. The FBI was effective in inhibiting not only protected political speech but also basically dissolving the Communist Party and Socialist Workers Party in the U.S., impacting the development of American society and ideologies in immeasurable ways. However, the FBI faced no punishment as the Bureau is a member of the American Prerogative State.

Chapter six address the intelligence and surveillance operations carried out by the Central Intelligence Agency from its creation in 1947 until the early 1970s. During this time, the CIA intercepted tens of thousands of personal letters in an operation known as HTLINGUAL. The Agency surveilled and infiltrated student activist groups on college campuses across the country during CHAOS, MERRIMAC and RESISTANCE, in efforts to inhibit political speech and disrupt the functioning of alternative and progressive political organizations. The fear of surveillance led to ever increasing silence and complacency on college campuses in the decades that followed.

Finally, chapter seven reflects on the theoretical orientation of this dissertation as well as the historical trajectory that became apparent throughout the course of this research. Though the intelligence agencies went unpunished for their legal violations, Congressional investigations into their activities did yield some results that initially appeared to have the potential to curb such abuses. However, the poor wording of new legislation in the resulting Foreign Intelligence Surveillance Act of 1978 was so vague that from its inception through 2013, only eleven of nearly 40,000 requests for surveillance warrants were denied.

In the end, this research is useful for understanding the contemporary surveillance situation in the United States. Not only is it helpful for scholars of communication, law, and surveillance studies, but it is also helpful for political and social activists, because this history shows what our

government is willing to do and how they are willing to do it when they target an individual or organization based on political ideologies.

CHAPTER TWO

CHANGING IDEOLOGIES AND FOUNDATIONS OF SURVEILLANCE, 1775 – 1918

The topic of surveillance has enjoyed significant media attention following Edward Snowden's disclosure of the numerous massive domestic spying projects currently being carried out by the U.S. government. Such surveillance is not an isolated phenomena. This chapter surveys the history of surveillance, privacy, and the First and Fourth Amendments from 1775 through 1918. This historical research finds that not only has surveillance been a tactic used by the state since the Revolutionary War, but also that the willingness of the government to violate civil liberties in efforts to protect the state has increased over time. This history shows that as the United States became more powerful, domestically and globally, there was an increasing propensity to suspend certain laws and overlook constitutional rights and civil liberties in order to ensure the safety of the state, often justified as defending the state or national security. This history gives insight into how, following the end of World War II, the government could justify carrying out mass surveillance against its citizens.

Surveillance and spying played an important role, historically, in the foundation of the United States. However, when this nation was in its infancy it often resisted the imposition of government action on the lives of its citizens. These two notions are fundamentally at odds. How can surveillance be carried out against a public that maintains ideologies of privacy and freedom from the prying eyes of government? The explanation of such a complex negotiation between the will of the state and the will of the people, in relation to surveillance, is quite elusive. Those in favor of intrusion often suggest it is the responsibility of government to ensure peace and freedom from fear of revolution by whatever means are necessary. Those in favor of privacy often suggest that the fears of revolution of exaggerated and infringe on civil liberties under the guise of

protecting the nation. This chapter works to explain how, in the American colonies and later in the United States, surveillance of the public has been justified, carried out, and the resulting implications of such surveillance. To fully investigate domestic surveillance from 1775 to 1945 might take an entire book, or several. Still, this chapter, provides the historical foundations of surveillance, legal ideology, and constitutional concerns necessary to contextualize domestic surveillance in the mid-20th century, which is the focus of this study.

Toward Revolution: Legal Challenges to Writs and Warrants

Though no single event can take credit for the American Revolution, there are two that have been understood as pushing the issues of general warrants and writs of assistance to the fore, which, in the words of John Quincy Adams, “breathed into this nation the breath of life.”³⁵ The first is the 1760 case of Charles Paxton. Following the death of King George II, Paxton, the chief customs official in Boston, petitioned the Massachusetts Superior Court for new writs of assistance. Paxton brought this petition because writs were valid until the death of the issuing King. These writs of assistance legally enabled customs officials “to go into any Vaults, Cellars, Warehouses, Shops, Merchandises...to open any Trunks, Chests, Boxes, fardells or Packs.”³⁶ In other words, writs of assistance gave customs officials near unlimited authority to search the belongings of individuals and seize uncustomed goods—these searches required no probable cause or warrant. With the death of the King came the expiration of all writs he had issued, therefore Paxton sought new writs such that he would be allowed to search homes, trunks, and shops as he saw fit.

³⁵ William Henry Seward, *Life and Public Services of John Quincy Adams*, (Miller, Orgton & Mulligan: New York, 1856), 20.

³⁶ King George II, Amendment IV, 1752, in William A. Mowry, ed., *Hyde Park Historical Record Volume V—1905*, (Hyde Park Historical Society: Hyde Park, MA, 1905), 8.

In response to this new petition, John Otis, an attorney representing 63 Boston merchants who were challenging the writs, argued that writs were “the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;” as they placed “the liberty of every man in the hands of every petty officer.”³⁷ Although Otis lost the case, and the writs were granted, his argument and fervor are understood to have been a major spark that led to the fire of revolution.³⁸ Otis directly challenged the British Crown, his “well-stated and well-reported arguments were a direct challenge to the power of the British Parliament to make laws for the colonies.”³⁹ Adams would later recall that “Otis was a flame of fire! ... Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against Writs of Assistance. Then and there was the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child’s Independence was born. In 15 years, namely in 1776, he grew to manhood, and declared himself free.”⁴⁰ Snyder⁴¹ underscores the importance of the Otis’ argument, pointing to *Boyd v. United States*⁴² (1886) wherein the Supreme Court put forward the notion that the Paxton Case was “perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.”

The second most important event was the resistance to general warrants exemplified by *Wilkes v. Wood*⁴³ (1763) and *Entick v. Carrington*⁴⁴ (1765). In the former case, John Wilkes

³⁷ Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (Little, Brown & Co: Boston, 1871), 302, citing *Works of John Adams, Vol II*, 523-4.

³⁸ David Snyder, *The NSA’s “General Warrants”: How the Founding Fathers Fought an 18th Century Version of the President’s Illegal Spying*, 2007, accessed online at <https://www.eff.org/files/filenode/att/generalwarrantsmemo.pdf>

³⁹ Steven Harmon Wilson, *The U.S. Justice System: An Encyclopedia* (ABC-CLIO: Santa Barbara, CA, 2011), 13.

⁴⁰ Luis G. Stelzner, “The Fourth Amendment: The Reasonableness and Warrant Clauses” *N.M L. Rev.* (10) 1979, 37, quoting *Letter of John Adams to William Tudor*, 1817.

⁴¹ Snyder, *The NSA’s “General Warrants.”*

⁴² 116 U.S. 616, 625 (1886).

⁴³ 98 Eng. Rep. 489, 498-99 C.P. (1763).

⁴⁴ 19 Howell’s State Trials 1029 (1765).

criticized the King in his newspaper *The New Briton*, resulting in issuance of a general warrant seeking the arrest of Wilkes and those that published the newspaper. Wilkes and 48 others were arrested in connection with an editorial criticizing George III and charged with seditious libel. In the search for Wilkes and his associates, officials “broke down at least 20 doors and scores of trunks, and broke hundreds of lock.”⁴⁵ This single warrant allowed for the ransacking of many homes and personal effects, as well as the arrest of nearly 50 innocent individuals, all within two days of issuance. The case was extensively covered in the colonies for many reasons, including a colonial interest discovering whether or not “Crown executive officials, including royal Governors”⁴⁶ that also claimed the authority to issue warrants in America were legally able to do as much. In Amar’s view, the Wilkes case “was *the* paradigm search and seizure case for Americans. Indeed, it was probably the most famous case of the late eighteenth-century in America, period.”⁴⁷ The case is credited as an important reason state constitutions outlawed general warrants and, in turn, influenced the drafters of the Fourth Amendment.

The latter case, *Entick v. Carrington*, involved a general warrant allowing for the search of writer John Entick’s home and possessions, in an effort to find evidence of libel. The official record states that on November 11, 1762, at Westminster in Middlesex, the defendants (four of the King’s messengers)

with force and arms broke and entered the dwelling-house of the plaintiff (Entick)...continued there for four hours without his consent and against his will, and all that time disturbed him in the peaceable possession thereof, and broke open the doors to the room, the locks, iron bars, etc. thereto affixed, and broke open the boxes, chests, drawers, etc. of the plaintiff in his house...and read over, pried into and examined all the private papers, books, etc. of the plaintiff there found...and took and carried away 100

⁴⁵ Snyder, *The NSA’s “General Warrants,”* citing William Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, 758.

⁴⁶ Akhil Reed Amar, “Fourth Amendment First Principles” *Harv. L. Rev*, 107(4) 1994, 773.

⁴⁷ Amar, *Fourth Amendment First Principles*, 733.

printed charts, 100 printed pamphlets, etc. etc. of the plaintiff there found, and other 100 charts etc. etc. took and carried away, to the damage of the plaintiff of 2000£.⁴⁸

Chief Justice of the Common Court of Pleas, Lord Camden, condemned the general warrant suggesting that if he found in favor of the government in this case, “the secret cabinets and bureaus in this kingdom would be thrown open to the search and inspection of a messenger, whenever the secretary of state shall see fit to charge, or even suspect, a person to be the author, printer, or publisher of seditious libel.”⁴⁹ In other words, Lord Camden struck down the ability of the King to order the search and seizure of a person’s dwelling and personal items in a hunt to find evidence to be used against that person. This is widely understood to have had a profound impact on the adoption of the Fourth Amendment and the U.S. Supreme Court would later state as much in *Boyd v. US* (1886). Reflecting on the decision in *Entick*, Amar suggests that “once searches for mere evidence are allowed, wholly innocent and unthreatening citizens are much more likely to be implicated”⁵⁰ – as I will show below, searches for mere evidence have indeed had the impact of implicating innocent citizens.

Together, these three cases helped prime the colonies for the American Revolution, while simultaneously setting the ideological and legal foundations for rights of privacy and freedom from unwarranted search and seizure that would later become codified in the Fourth Amendment. That the King was actively issuing general warrants, writs of assistance, and having legislative impact in the colonies offended the sense of independence and freedom the revolutionaries held with the effect of encouraging, if not outright inciting, the War of Independence. Further, these cases

⁴⁸ *Entick v. Carrington*, 1765.

⁴⁹ *Ibid.*

⁵⁰ Amar, *Fourth Amendment First Principles*, 765.

indicate the growing ideologies of independence, privacy from government intrusion, and the importance of probable cause.

Intelligence and the Second Continental Congress

Put simply, the aim of intelligence is to provide necessary information to decision makers that are charged with the functioning of government. While some information is collected through what is known as open-source intelligence, that is, information gathered from newspapers, magazines, studies, journals and other publicly available and produced materials, other intelligence is gathered covertly. With this in mind, intelligence will be used in the rest of this dissertation as a synonym for covert intelligence, unless otherwise specified.

In a letter dated July 26, 1777, General George Washington—and soon-to-be first president of the United State—wrote, “the necessity of procuring good intelligence is apparent & need not be further urged – All that remains for me to add is, that you keep the whole matter as secret as possible.”⁵¹ These two sentiments were held by many of the Founding Fathers: the necessity of intelligence and the necessity of secrecy. Interestingly, secrecy was understood to be a hallmark of monarchy and something that should be avoided. Republican theory worked to reverse the presumption of secrecy and put in its place the presumption of publicity.⁵² Given the experience many Colonial Americans had with the secret decisions of the English monarchy, and the inability to contest actions and punishments that resulted from such decisions, the Founding Fathers sought to create a new nation that allowed for transparency and publicity of government in an effort to ensure that those with power could no longer abuse the people. However, publicity is in conflict

⁵¹ From George Washington to Colonel Elias Dayton, 26 July 1777, *National Archives*, accessed online at <http://founders.archives.gov/documents/Washington/03-10-02-0415>

⁵² See Daniel N. Hoffman, “Contempt of the United States: The Political Crime that Wasn’t” *25 Am. J. Legal Hist.* 343 (1981).

with the gathering of intelligence, and secrecy is contrary to the notion that legitimate power rests on the informed consent of the governed.⁵³

In the midst of the American Revolution, the Second Continental Congress met in Philadelphia on May 10, 1775. The meeting was held with an eye toward taking charge of the war effort and authorized the creation of five important entities. First, the Congress agreed to create the Continental Army under the command of George Washington, and authorized its funding. Second, the Congress authorized the creation of the Secret Committee, which “was granted a handsome budget and near-free rein to obtain armaments for the Revolution. In addition to entering into secret contracts with manufacturers of arms and gunpowder it also conducted covert operations... [and] it destroyed the records of its own transactions to minimize the possibilities of disclosure.”⁵⁴ The Secret Committee was created on September 18, 1775. It was renamed the Committee of Commerce in 1777 and is known today as the Department of Commerce.⁵⁵

Third, operating in parallel with the Secret Committee were the Committees for Detecting and Defeating Conspiracies. These committees operated in many areas throughout the colonies as a political police force that imprisoned suspects and placed suspects under bond without common-law due process. Many of the victims of these committees were political dissidents and labor strikers. Congress was fearful that direct repression would not be adequate to handle the “continued exercise of direct popular power that had destroyed the royal government in 1775 and made the

⁵³ Gabriel Schoenfield, *Necessary Secrets: National Security, the Media, and the Rule of Law*, (W.W. Norton & Co.: New York, 2011).

⁵⁴ *Ibid.*, 59.

⁵⁵ Brian N. Morton, ““Roderigue Hortalez” to the Secret Committee: An Unpublished French Policy Statement of 1777,” *The French Review* 50, no. 6 (1977): 883 footnote 13.

situation revolutionary in the first place.”⁵⁶ (Countryman, 1976, p. 659). For example, the New York City Committee of Mechanics wielded political power in the city and believed that citizens should retain the ability to directly alter the Constitution. The Committees for Detecting and Defeating Conspiracies were charged with investigating and calming these revolutionary tendencies. The State of New York Commission for Conspiracy Minutes 1778-79 stated that it was “the Intention of this Committee to apply to the Convention of this State to enact an Ordinance for Establishing a general Oath of Allegiance to be administer’d to all the Subject of this State”⁵⁷ (1924, p. 26). Those unwilling to take the Oath of Allegiance would be taken to the local jail. If they were suspected of being disloyal they would be apprehended and brought before the committee to take the oath, and upon doing so would be released; those who refused to take the oath would be considered to have joined the enemy army and dealt with accordingly.

Fourth, the Congress also authorized the Committee of Correspondence (renamed Committee of Secret Correspondence) by a resolution on November 29, 1775. The committee was one of the first intelligence directorates in America. It “employed secret agents abroad, conducted covert operations, devised codes and ciphers, funded propaganda activities, authorized the opening of private mail, acquired foreign publications for use in analysis, established a courier system, and developed a maritime capability apart from that of the Navy.”⁵⁸ The Committee of Secret

⁵⁶ Edward Countryman, “Consolidating Power in Revolutionary America: The Case of New York, 1775-1783,” *The Journal of Interdisciplinary History* 6, no. 4 (1976): 659.

⁵⁷ Victor Hugo Paltsits, *Minutes of the Commissioners for Detecting and Defeating Conspiracies in the State of New York, Albany County Sessions, 1778-1781, Volume I: 1778-1779*, (State of New York, Albany: 1909),

⁵⁸ Central Intelligence Agency, *Intelligence & the War on Independence: Organization of Intelligence*, May 01, 2008 accessed online at <https://www.cia.gov/news-information/featured-story-archive/2008-featured-story-archive/war-on-independence.html>

Correspondence was renamed the Committee of Foreign affairs in April, 1777, but kept its intelligence functions.

Fifth, the Congress authorized the Constitutional Post. In the mid-1700s, two separate communications networks existed in America: the British Post office, which claimed a legal monopoly over the circulations of parcels, including letters and newspapers, between towns and colonies, and the information networking used by colonists who were unable, or unwilling, to pay the high postage prices of the British Post or who wanted to send items to places not served by the British Post. The Post Office Act of 1710 gave officials the “power to intercept and open mail, creating the potential for imperial officials to censor political opposition and making the post an insecure means of transmitting letters for political dissenters.”⁵⁹ Then, in 1765, Parliament passed the Post Office Act, which decreased rates in hopes that more colonists would use the service and to increase revenue. The Act succeeded and the post generated revenue. However, a second, and possibly more important, result was that the post “served an imperial desire to maintain control over the circulation of politically sensitive information and to provide surveillance of groups and individuals”⁶⁰ that opposed the Crown.

In the early 1770s, reacting to the fact that certain sealed correspondences were being intercepted and destroyed by postmasters still loyal to Britain, dissenters, radical printers and their allies advocated for an extra-legal alternative to the British Post, known as the Constitutional Post. Censorship by postmasters of the imperial post prevented the distribution of newspapers, which were vital for the dissemination of radical arguments against Britain and which also linked together

⁵⁹ Joseph Adelman, ““A Constitutional Conveyance of Intelligence, Public and Private”: The Post Office, the Business of Printing, and the American Revolution,” *Enterprise & Society* 11, no. 4 (2010), 717.

⁶⁰ Ibid.

colonies.⁶¹ While many objected to this blatant censorship, others objected to the British Post because they despised the idea of Britain legislating and collecting taxes in the colonies. There were also other ideological objections to the British Post. Some objected to the post because of the understanding that personal correspondences should remain private and confidential on principle alone. Others felt that the inability to freely communicate in writing, either through personal correspondences or through newspapers, “proved that the British Administration and their Agents have taken every step in their power to prevent an Union of the Colonies which is so necessary for our making a successful opposition to their Arbitrary designs.”⁶² And finally, many colonists believed that a properly functioning post office (one without censorship) was a place to gather, receive news, debate, and develop new ideas.

William Goddard, a newsman who shared these views, set out to create an independent, private postal network. He saw his “network as a conduit for both one-to-many communication (i.e. newspapers) and one-to-one communication (i.e. letters).⁶³ Goddard recognized that newspapers would be ineffective if loyalist postmasters prevented their circulation and that newspapers, along with personal correspondences, contributed to the revolutionary goals of the colonies. In 1774, Goddard proposed the Constitutional Post, arguing “that the several mails shall be under lock and key, and liable to the inspection of no person but the respective Postmasters to whom directed, who shall be under oath for the faithful discharge of trust reposed in them.”⁶⁴

⁶¹ Ibid., 733.

⁶² Ibid., 736.

⁶³ Anuj C. Desai, “Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy,” 60 *Stan. L. Rev.* (2007), 564.

⁶⁴ Ibid., 565.

When the Congress met in 1775, British troops occupied Boston. As a result, many colonial printers left the city, and the creation of a new postal system became a military imperative. The combination of pressure from Rebels and printers, and the need for a system that could ensure the secure delivery of information to military officers, pushed Congress to adopt Goddard's Constitutional Post in 1775. In 1792 the Post Office Act declared the main source of news in the United States to be newspapers and the post office network became vital for the circulation of political debate.⁶⁵

These five authorizations offer insight into contemporary issues of secrecy and surveillance in the United States. On one hand, the Congress authorized the constitutional post, which had as its guiding principle the security and confidentiality of mails. On the other hand, the same Congress also authorized the Committee of Secret Correspondence, which was charged with intercepting and opening private mails. The creation of the Continental Army is important because, as I will argue, it became involved in coercing political dissidents, surveilling citizens, and arresting certain civilians. Finally, the Committees for Detecting and Defeating Conspiracies, as a political police force, demonstrates the resistance of even the American revolutionaries to allow labor to unionize and speak and to entertain thoughts of an alternative organization of government, and also demonstrates the importance of oaths, rather than actions, in demarcating enemies and friends.

George Washington and Intelligence Gathering

Washington took charge of the Continental Army on June 15, 1775. Before the end of the year he would begin arresting civilians and trying them by court-martial under the Articles of War. Washington was concerned about these trials and would eventually express "concern at Valley

⁶⁵ Adelman, *A Constitutional Conveyance of Intelligence, Public and Private*, 744.

Forge that many prisoners ‘are improperly detained in the Provost’.”⁶⁶ Like the Committee for Detecting and Defeating Conspiracies, Washington coerced civilians through the use of loyalty oaths, but this tactic was resisted and Congress outlawed the use of oaths in the military in 1776. Without the oaths, Washington sought new ways to ensure loyalty, including hiring civilian informants to keep tabs on their neighbors. It was in this capacity that Washington can be understood as something more than a general, president, or commander-in-chief – Washington was also a spymaster. He “planned, communicated with, controlled, and maneuvered a hidden army of spies and intelligence officers.”⁶⁷

The Rebel spy network differed in some important ways from spy networks as developed by the British in America. British spies were often trained by the military and, during the war, reported much of their information directly to British Army Officer General Henry Clinton. Clinton, acting as his own intelligence officer, and lacking a staff to systematize the innumerable reports, “simply had too many facts and far too little time to uncover Rebel plans.”⁶⁸ Taking a different approach, Washington developed a network of paid civilian spies that observed the activities of other rebels and infiltrated enemy forces “under mask of friendship.” The most successful intelligence initiative taken by Washington was the development and operations of the Culper Ring in New York City. This spy ring was organized by Major Benjamin Tallmadge. Under Tallmadge were Robert Townsend (alias, Culper, Jr.) and Abraham Woodhull (alias Culper, Sr.), publisher James Rivington, courier Austin Roe, and Lieutenant Caleb Brewster. The group was charged with gathering information on British movements and activities. In a letter to Tallmadge,

⁶⁶ Harry M. Ward, *George Washington’s Enforcers: Policing the Continental Army*, (SIU Press: 2006), 136; also William Saffell, *Records of the Revolutionary War*, (GG Evans: 1860), 379.

⁶⁷ Sean Halverson, “Dangerous Patriots: Washington’s Hidden Army During the American Revolution,” *Intelligence and National Security* 25 no. 2 (2010), 124

⁶⁸ *Ibid.*, 134.

Washington explained the types of information he believed to be valuable to the war effort: “The great objects of information you are very well acquainted with; such as arrivals, embarkations, preparations of movements, alterations of positions, situations of posts, fortifications, garrisons, strength or weakness of each, distribution of strength of corps, and, in general, every thing which can be interesting and important for us to know.”⁶⁹

The Culper Ring was designed so Washington would neither meet nor interact with the spies in an effort to keep their identities secret. Instead, the agents reported to Tallmadge, who then reported to Washington. It was well known that sending information through the post could subject it to censorship or surveillance, which, in the case of the information gathered by the Culper Ring, could render the spy efforts useless. Therefore, the information gathered was delivered in person to Washington. Working to improve the resistance of the information to surveillance, Tallmadge, in 1779, developed a cipher and code that was used to encrypt messages. Only Tallmadge, Washington, and Townsend had seen the codebook used to decipher the messages, adding an important layer of protection.⁷⁰ Washington understood the importance of intelligence and had developed new techniques and procedures to gather it. But, his methods were not limited to infiltration and observation.

Though it was much less common, Washington also authorized kidnappings. There is record of at least three such attempts: an effort was made to kidnap Benedict Arnold so that he could be returned to stand trial; Washington authorized the seizure of General Clinton; and, in 1782, he authorized a plan to capture Prince William, son of George III and heir to the throne. The

⁶⁹ George Washington, Letter to Benjamin Tallmadge, 30 April 1781, National Archives.

⁷⁰ Stephen F. Knott, *Secret and Sanctioned: Covert Operations and the American Presidency*, (Oxford Univ. Press: 1996), 17.

plan to capture Prince William was perhaps the most ambitious. Washington wrote to Colonel Matthias Ogden, the plan's orchestrator:

The spirit of enterprise so conspicuous in your plan of surprising in their quarters, and bringing off the Prince William Hendy and Admiral Digby, merits applause; and you have my Authority to make the attempt; in any manner, and at such a time, as your own judgment shall direct I am fully persuaded, that it is unnecessary to caution you against offering insult or indignity to the persons of the Prince and Admiral, should you be so fortunate as to capture them."⁷¹

As with Arnold and Clinton, the plan to capture Prince William and Admiral Digby was ultimately unsuccessful. That Washington authorized such actions shows how far he was willing to go, and the covert actions we was willing to undertake, in the effort to defeat the larger and better equipped British Army.

These intelligence operations did not come cheap. Washington believed that more funding would not only increase efficiency, but also improve the order and professionalism of the spy network. To this end, Washing sought and secured funds through Secret Congressional Committees. By the end of the war Washington had spent \$18,000, or 11 percent of total military expenditures, on intelligence.⁷² Washington's efforts to secure funds and intelligence did not stop after the war. On January 8, 1790, in his first address to Congress, Washington requested funding for future intelligence operations. He was given \$40,000 on July 1, 1790, with funding increasing to \$1 million by 1793 – over 12 percent of the entire federal budget.⁷³ In securing funding for future intelligence operations, Washington not only gave himself tools he felt necessary for the

⁷¹ George Washington, Letter to Colonel Mattias Ogden, 28 March 1782 in *The Writing of George Washington form the Original Manuscript Sources 1745-1799*, ed. John C. Fitzpatrick (Government Printing Office: Washington, 1938), 91.

⁷² Halverson, *Dangerous Patriots*, 131.

⁷³ *Ibid.*, 145.

protection of the republic, but also established for future administrations the precedent of funding intelligence, which, if needed, could account for a substantial portion of the federal budget.

The Continental Army

The Continental Army spied on innumerable civilians, arrested hundreds and imprisoned some, but executed very few for espionage or subversion. This reluctance to use the Army to directly advocate violence against civilians is indicative of the broader ideology of the time that the military ought not to be used against civilians. As a result, “military violence against civilians did not become a heritage of the American Revolution,”⁷⁴ limitations on the jurisdiction of the military were strengthened, and the Constitution of 1787 restricted military power. This restriction touches on a crucial constitutional debate undertaken by the Framers: if the best foundation for a republic is law, rather than force, what should be done in the event that law fails? Generally, it was agreed that if “the law failed, either through individual disobedience or riot and rebellion, force would be necessary to restore order and compel citizens to fulfill their social obligations.”⁷⁵

The first major failure of law following the Revolution was the Whiskey Rebellion of 1794, a reaction to excise officials’ violence and intimidation in western Pennsylvania since 1791. Angered over a new whiskey tax, which resulted in mass opposition, a group of protestors marched on the home of tax collector General John Neville. After the crowd refused to disperse, Neville fired on the protestors, killing one and injuring several. Citizens, angered by the violence, declared that they were now willing to oppose government policy with force. Though it began as a protest

⁷⁴ Joan M. Jensen, *Army Surveillance in America, 1775-1980*, (Yale Univ. Press: 1991), 11.

⁷⁵ Richard H. Kohn, “The Washington Administration’s Decision to Crush the Whiskey Rebellion,” *The Journal of American History* 59 no. 3 (1972), 567.

against taxes, the Whiskey Rebellion quickly became an armed rebellion⁷⁶ (Cornell, 2006). With the authorities in Pennsylvania no longer able to maintain order, Washington confided in Alexander Hamilton that he would enforce the law by any means necessary, though he cautioned that if the army was used “there would be the cry at once, ‘The cat is let out; we now see for what purpose an Army was raised’.”⁷⁷ Following constitutional and congressional guidelines, Washington called for the mobilization of militia and about 15,000 militiamen responded. The men were undisciplined and by the time they arrived the resistance had disappeared. The troops, anxious to fulfil their perceived responsibilities, “rounded up suspects, threw them in jails and barns, and tied them in cellars...some of these suspects remained in prison for months before civilian courts cleared them...”⁷⁸ Often understood to have demarcated the powers of the federal government, the Whiskey Rebellion of 1794 pushed Congress to expand the role of the army in an effort to avoid reliance on an undisciplined militia. It also shows that the once dominant idea of a limited military began to wane. Increasing empire justified increasing military.

The purpose of the army had drastically changed and continued to stray from the roots established during the Revolution. The new role and the increased size of the army had the effect of intimidating political opponents and dissidents. By the war of 1812, President Thomas Jefferson was using the army to arrest civilians, and enforce embargo laws. In 1816 President James Madison sent the army to destroy a Spanish fort in Florida being occupied by escaped slaves, resulting in the deaths of 300 men, women, and children. The army was mobilized in response to Nat Turner’s slave rebellion in 1831, but militias and mobs stopped the rebellion before the army arrived. In

⁷⁶ Saul Cornell, “Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion,” *Chi-Kent L. Rev.* 81 (2006).

⁷⁷ Kohn, *The Washington Administration’s Decision*, 571.

⁷⁸ Jensen, *Army Surveillance*, 14.

1834 President Andrew Jackson used the army to settle a labor dispute and in 1849 soldiers arrested civilians during the Dorr Rebellion in Rhode Island.⁷⁹ In 1851, in Christiana, Pennsylvania, a group of free and refugee blacks killed a slave owner who attempted to capture a runaway slave. Fifty railroad workers were organized by U.S. marshals as a posse comitatus and, along with 45 marines, searched households, arrested civilians and bayonet point. The military was increasingly used for internal security. As part of the internal security apparatus, the army was not only used to enforce laws, but also to squelch the voices of dissent, labor, and immigrants.

Against Aliens and Sedition

Following the French Revolution in 1789, many European nations, including England, Spain, and Prussia, declared war on France. These nations feared the spread of the revolutionary spirit that swept over France in the 1780s. France was able to fight off the attacks and took the offensive, capturing Belgium and parts of Italy. In efforts to remain neutral, for political as well as economic reasons, the United States negotiated a treaty, known as the Jay treaty, with Britain “that ensured cordial Anglo American relations.”⁸⁰ The French, upset by the treaty, retaliated, capturing over 300 American ships between 1796 and 1797. President Adams, in March 1798, demanded Congress declare war on France. Though the official declaration was never made, Congress did authorize Adams to order the navy to engage any French vessel suspected of raiding American ships.⁸¹ The United States was in a state of undeclared war, resulting in hyperpatriotism, fear, and prejudice. The fear extended beyond the citizens to the Federalists. While Republicans felt conflict with France would serve British interests, the Federalists felt that any leeway given to France

⁷⁹ Ibid., 16.

⁸⁰ Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*, (WW Norton & Co.: 2004), 21.

⁸¹ Christopher D. Jenkins, “The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence, (Marshall University).

would imperil national security and was decidedly un-American. The concern of the Federalists about the internal security of the nation resulted in the passing of Alien and Sedition laws in the late 1790s.

In the eyes of the Federalists, the greatest threat to internal security was the increasing number of foreign-born immigrants in the United States. As a result, the Federalists enacted two separate alien acts: the Alien Enemies Act and the Alien Friends Act. At the meeting of the first Congress it was decided that immigrants would be eligible for citizenship after two years residence, but in 1798, due to a combined fear of alien influence and overt racism, the Federalists increased the residence requirement to fourteen years. The Alien Enemies Act, which passed with bipartisan support, stated: “whenever there shall be a declared war between the United States and any foreign nation or government...all natives, citizens, denizens, or subjects of the hostile nation or government, being males of age fourteen and upwards...not actually naturalized, shall be liable to be apprehended, restrained, secured and removed as alien enemies.”⁸² This act remains today a part of U.S. wartime policy.⁸³

Although the Alien Enemies Act gave the power to detain immigrants based on their homeland, the Federalists also pushed for the controversial Alien Friends Act. This act, enacted as an emergency measure, allowed the president, during times of war, to seize, detain, and deport any noncitizen he deemed dangerous to the United States even if the war was not with that noncitizen’s homeland. Further, the noncitizen had no right to a hearing, to be informed of the charges, or to present evidence on his own behalf. The Alien Friends Act effectively gave the president the power to arbitrarily imprison or deport any noncitizen deemed dangerous during a time of war or conflict.

⁸² An Act Respecting Alien Enemies, Sec. 1, 1798.

⁸³ Stone, *Perilous Times*, 30.

The presumed danger no longer hinged on the homeland of the noncitizen but instead on something that person had actually, or might have only been accused of, saying or doing. Congressman Robert Williams “observed that whenever governments want ‘to make inroads upon the liberties of the people’ they trump up ‘an alarm of danger.’ He objected that no amount of danger could ever justify assigning such an ‘arbitrary power to the President’.”⁸⁴ Under the Act, noncitizens faced real dangers from false accusations or the possibility of having their words taken out of context. The hyperpatriotism of the time meant that noncitizens were under intense scrutiny, as neighbors, friends, and coworkers could all be possible informants about their words and deeds.

The Alien Friends Act inhibited the rights of due process, counsel, and judicial review for every noncitizen in the United States. The Act was allowed to expire in 1801 and is now widely considered a blemish, if not an outright embarrassment. The situation in which noncitizens found themselves during the late 1790s and early 1800s would be familiar to immigrants from Germany and communist countries during World War I and to Japanese immigrants and Japanese-Americans during World War II. Though the Act did not result in any deportations, it did encourage many French immigrants to leave the country and intimidated many other potential immigrants, drastically decreasing immigration to the United States.

In 1798, when the Sedition Act was passed, “it occasioned the first serious public debate about whether the First Amendment’s guarantee[s]...permitted prosecutions for seditious libel.”⁸⁵

Koffler and Gershman define seditious libel as:

The crime of criticizing the government. It transforms dissent, which the first amendment has traditionally been thought to protect, into heresy. Fundamentally antidemocratic, the distinguishing feature of seditious libel is, as its nomenclature suggests, injury to the

⁸⁴ Ibid., 31.

⁸⁵ Jenkins, *The Sedition Act*, 157.

reputation of government or its functionaries. Those who impugn authority's good image are diabolized and their criticisms punished as blasphemy. In this way, the doctrine lends a juristic mask to political repression.⁸⁶

Historically, seditious libel was one of the three fundamental ways that peaceful political dissent had been suppressed in Britain. The other two were constructive treason (i.e., treason) and prior restraint, either through licensing or censorship.⁸⁷ In the case of seditious libel, truth is eliminated as a defense because its purpose is to prevent any speech that is critical of the government even when that speech is based on true and accurate fact. Federalists justified the Sedition Act by painting the common man as one who was easily manipulated and fooled. The fear was that revolutionary ideas would enter the minds of citizens in the United States and turn them against the established government. Declaring war on criticism and dissent, the Sedition Act held that

If any person shall write, print, utter or publish... any false scandalous, and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United states, with intent to defame [them], or to bring them [into] contempt or disrepute; or to excited against them [the] hatred of the good people of the United States,... then such person... shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.⁸⁸

With the Act firmly in place, Congressmen Albert Gallatin “recalled that laws against political criticism had been used time and again by tyrants to throw a veil on their folly or their crimes and to satisfy those mean passions which always denote little minds” and that legislation

⁸⁶ J.S. Koffler, and Bennett L. Gershman, “The New Seditious Libel,” *Cornell Law Review* 69 no.4 (1984), 816

⁸⁷ William T. Mayton, “Seditious Libel and the Lost Guarantee of a Freedom of Expression,” *Columbia Law Review* 84 no.1 (1984).

⁸⁸ Sedition Act of 1798, Sec. 2.

of this sort could only be justified if it were necessary to save the country⁸⁹ (Stone, 2004, p. 37). Similarly, Congressman John Nichols pointed out that the acts to turn nearly any statement with a critical edge into a violation and the impact of this would be to silence the presses as printers would fear even publishing the truth. The Federalists, who controlled Congress, continued to believe the Act was justified, even when Gallatin pointed out that it violated the Constitution and presented a paradox: “we claim no power to abridge the liberty of the press; that, you shall enjoy unrestrained, you may write and publish what you please, but if you publish anything against us, we will punish you for it, so long as we do not prevent, but only punish your writings, it is no abridgement of your liberty of writing and printing.”⁹⁰

Although accounts vary, it appears that there is some agreement that 25 arrests resulted from the Sedition Act, with at least 17 verifiable indictments, most of whom were Republican journalists and editors who openly criticized President Adams and the Federalists.⁹¹ The Act, which alienated many citizens and ultimately led to the downfall of the Federalist Party, expired on Adams’ last day in office. When Jefferson became president, one of his first official acts was to pardon all who were convicted under the act and free those still jailed.

A number of important lessons are to be learned from the history of the Sedition Act, its passage, and its consequences.⁹² First, when a nation is under strain or passion of war, it is possible that the government, and some citizens, will violently react to those who question the need for

⁸⁹ Stone, *Perilous Times*, 37.

⁹⁰ Louis Edward Ingelhart, *Press Freedoms: A Descriptive Calendar of Concepts, Interpretations, Events and Court Actions, from 4000 BC to the Present*, (Greenwood Publishing: 1987), 138, quoting Albert Gallatin.

⁹¹ See Gordon T. Belt, *Sedition Act of 1798—A Brief History of Arrests, Indictments, Mistreatment & Abuse*, 1, accessed online at http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/Sedition_Act_cases.pdf

⁹² See Stone, *Perilous Times*.

military action. Second, suppressing dissent and criticism not only inhibits individual speech, but it also mutilates public discourse and government decision-making. Third, criminalizing critical viewpoints automatically condemns political opponents as “disloyal.” Fourth, it should not be assumed that courts will protect our civil liberties in moments of high national anxiety. Fifth, skepticism is warranted when the courts claim to be able to distinguish between malicious intent and legitimate dissent. Finally, the claim of national security to justify the suppression of dissent should always be scrutinized.

The Civil War

A number of events occurred during the Civil War that are important for this study. Of key importance are the instances of wiretapping, as this is one of the first opportunities that the government had to wiretap in efforts to prevent harms to the state. Additionally, President Lincoln’s suspension of habeas corpus demonstrates the extent he was willing to go to defend the state. Finally, the story of Ambrose Burnside and the *Chicago Times* shows that even when breaking the law and violating direct orders from the Executive, powerful individuals and members of the Prerogative State are able to avoid punishment.

On April 15, 1861 Fort Sumter fell; on April 17 President Lincoln called for the State Militia; and on April 19 the Sixth Massachusetts Militia arrived in Washington after battling through Baltimore, where the mayor had ordered the destruction of key infrastructure connecting the city to the North. In order to preserve the Capitol with Union forces and restore order in Baltimore, Lincoln declared martial law in Maryland and suspended the writ of habeas corpus. The decision to suspend habeas corpus was not an easy one as Lincoln had resisted doing so in the past, suggesting to the commander of the nation’s army, General Winfield Scott, the general “might, in case of necessity, bombard the cities, but only in the extremest necessity was [Scott] to

suspend the writ of habeas corpus.”⁹³ However, on April 27, Lincoln authorized such a suspension in the following order to General Scott:

You are engaged in repressing an insurrection against the laws of the United States. If at any point on or in the vicinity of the military line, which is now, or which shall be used between the City of Philadelphia and the City of Washington, via Perryville, Annapolis City, and Annapolis Junction, you find resistance which renders it necessary to suspend the writ of Habeas Corpus for the public safety, you, personally or through the officer in command at the point where the resistance occurs, are authorized to suspend that writ.⁹⁴

It was also in April that General George Brinton McClellan asked Allan Pinkerton to create a secret service for McClellan’s Ohio volunteers department. Pinkerton would eventually organize a force for the entire army, engaging civilians to spy on their neighbors, infiltrate political organizations and name “disloyal” dissenters.

Suspension of Habeas Corpus

In the United States the writ of habeas corpus is widely considered to be a fundamental and essential right. The writ “enables an individual who has been detained by government officials to seek a judicial determination of the legality of his detention.”⁹⁵ When the writ is suspended the legality of a detention is not subject to judicial review, thus preventing a judicial remedy to a potentially unlawful detention. The suspension of habeas corpus in many ways mirrors the Alien and Sedition acts of the late 1700s and previews the Espionage Act of 1917. Lincoln suspended the writ eight times during his presidency. While the first suspension and the resulting arrest of John Merryman is most crucial to understanding the impacts of Lincoln’s decision on freedom of speech, it is worth noting that the second suspension, which occurred in late September 1862 was

⁹³ Sherrill Halbert, “The Suspension of the Writ of Habeas Corpus by President Lincoln,” *The American Journal of Legal History* 2 no. 2 (1958), 98.

⁹⁴ *Ibid.*, 99.

⁹⁵ Stone, *Perilous Times*, 81.

the reaction to resistance to conscription. In an effort to raise additional troops for the army, conscription was ordered and, following the announcement, two enrollment officers in Indiana were murdered and troops sent to Pennsylvania, Wisconsin, Ohio and Indiana. Lincoln's proclamation of the suspension of the writ of habeas corpus and subsequent martial law made it illegal to discourage volunteer enlistments. National conscription became law in March 1863, encouraging anti-war protests and, with the writ suspended, resulted in the imprisonment of hundreds of resisters. With potential draftees either buying their way out of conscription with a \$300 commutation fee, or simply refusing to show up for duty, the government ordered soldiers to conduct searches of homes and break up protests.⁹⁶

In the early morning hours of May 25, 1861, about one month after Lincoln's first suspension of the writ of habeas corpus, troops under the command of Captain Samuel Yohe arrested John Merryman for participation in the destruction of Baltimore's infrastructure, specifically the destruction of railroad bridges.⁹⁷ Merryman had also spoken against the union, recruited soldiers to serve in the Confederate Army, and was, therefore, not only in disagreement with the government but was actively working to build forces to violently overthrow it. Officially, Merryman was arrested for "various acts of treason, and with being publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the government, and in readiness to co-operate with those engaged in the present rebellion against the government of the United States."⁹⁸

⁹⁶ Stone, *Perilous Times*.

⁹⁷ William H. Rehnquist, *All the Laws but one: Civil Liberties in Wartime*, (Vintage Book: New York, 1998).

⁹⁸ *Ex-parte Merryman*, 17 F. Cas. No. 9487 (1861).

Merryman's counsel sought a writ of habeas corpus from Chief Justice Roger Taney, suggesting that Merryman was being held illegally. Taney ordered General George Cadwalder to bring Merryman before the court but Cadwalder refused, citing Lincoln's suspension of the writ of habeas corpus. In *Ex-parte Merryman*, Taney ruled that the Executive did not have the authority to suspend the writ and that this could only be done by Congress, therefore the suspension was unconstitutional. Taney went to great lengths to explain the legal injustice of Merryman's detention and the general illegality of Lincoln's order, but the president did not back down. Nearly two years later, Congress sought to resolve the question of whether the Executive or Congress had the power to authorize the suspension, writing that the president can use his judgment to suspend the writ of habeas corpus when he feels the suspension is required for public safety. This was more power than Lincoln had ever sought, as he was known for giving up executive power rather than seeking it.⁹⁹

With the United States in civil war, Lincoln believed that the threat of sabotage to the Union was minimal. Instead, he felt that efforts should be put toward discovering and penalizing people who sought to undermine the war effort and harm morale. He believed that it was necessary to punish certain speech activities:

Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair on of a wiley agitator who induces him to desert? This is none the less injurious when effected by getting a father, or brother, or friend, into a public meeting, and there working upon his feeling, till he is persuaded to write the soldier boy, that he is fighting in a bad cause, for a wicked administration of a contemptable government, too weak to arrest and punish him if he shall desert. I think that in such a case, to silence the agitator, and save the boy, is not only constitutional, but, withal, a great mercy.¹⁰⁰

⁹⁹ Halbert, *The Suspension of the Writ of Habeas Corpus*, 105.

¹⁰⁰ Joseph Fornieri, *Abraham Lincoln: Philosopher Statesman*, (SIU Press, 2014), 145.

It was this logic by which Lincoln justified the suspension of the writ of habeas corpus. He believed it necessary to silence such agitators, in order to save a soldier from deserting and potentially being put to death if caught. The punishment of not just action but also of speech is an important issue that I will discuss below.

In another case of the punishment of speech, General Ambrose Burnside, in April 1863, declared martial law, without authorization, after seeing what he believed to be treasonable expressions in a number of newspapers and public meetings in Ohio.¹⁰¹ As a result Burnside issued General Order No. 38, under which the military was charged with defining the boundaries of treasonous speech because the courts failed to suppress such speech. Under the order a politician and orator, Clement Vallandigham, was arrested for a speech in which he was critical of the war effort and Order No. 38. More than 100 soldiers were sent by Burnside to arrest Vallandigham under cover of nightfall, and he was charged with “publicly expressing, in violation of general Orders No. 38... sympathy for those in arms against the government of the United States, and declaring disloyal sentiments and opinions with the object and purpose of weakening the power of the government in its efforts to suppress unlawful rebellion.”¹⁰² Vallandigham protested his detention, claiming that a civilian could not be convicted by military tribunal, and that it was unjust to detain someone for his or her speech, but he was found guilty and imprisoned. His writ of habeas corpus was denied by federal district court judge Humphrey Leavitt, who reasoned that the self-preservation of the government is of utmost importance, such that critics of the government in times of war can and should be imprisoned. This would not be the last time Burnside would exercise his authority to stifle speech he believed treasonous.

¹⁰¹ Geoffrey R. Stone, “Abraham Lincoln’s First Amendment,” 78 *NYU L. Rev.* (2003).

¹⁰² Stone, *Perilous Times*, 101.

In early 1863, the *Chicago Times* printed letters from soldiers that reflected discontent with the war. On April 1 the editor of the *Times*, Wilbur Storey, “editorialized that every conscript into the army would be ‘sacrificed uselessly if the imbecile management that has distinguished the conduct of the war hitherto continues’.”¹⁰³ As with the speech of Vallandigham, the content printed in the *Times* was understood by Burnside as ‘declaring disloyal sentiments.’ This was followed by a piece calling Burnside the “Butcher of Fredericksburg.” The sum of these pieces pushed Burnside to order Union soldiers to close the *Times* on June 1, 1863. Although a federal judge had prohibited such actions, Burnside ignored the prohibition, closed the *Times* and, in turn, brought tens of thousands of protestors into the streets of Chicago. Some scholars¹⁰⁴ paint Lincoln as not only embarrassed by the actions of Burnside but perhaps even a friend of the press, given Lincoln’s public statement that Vallandigham’s arrest would have been unjust if he were only speaking, for even in times of war the government should not punish critics. While others suggest that “his tacit acceptance of press suppression early in the war, his implicit support of Burnside in the Vallandigham proceedings, and his willingness to delay lifting of the suppression order while Storey continued to chafe under loss of his press freedom”¹⁰⁵ does not make a strong case for Lincoln being a friend of the press.

Civil War Telegraphy

In addition to the suppression of speech and the press, there are also accounts of wiretapping and telegraph censorship during the Civil War. These claims are more difficult to verify, but are still worth noting. Though telegraphy had been in Eastern cities as early as 1845, it

¹⁰³ Craig D. Tenney, “To Suppress or Not to Suppress: Abraham Lincoln and the Chicago Times,” *Civil War History* 27 no.3 (1981), 251.

¹⁰⁴ Stone, *Free Speech in Perilous Times* (2004).

¹⁰⁵ Tanney 1981

was expensive and generally used for commercial purposes. It became more widespread during, and especially after, the Civil War. During the war military leaders came to know the important advantages that came from instantaneous communication over vast distances. These leaders also came to know the advantages of intercepting communications of their opponents.

One of the first cases of telegraph wiretapping was that of Anson Stager, a telegraph operator in Philadelphia. In 1858, a train in which Stager was a passenger had a mechanical malfunction that could not be remedied by the conductor. He asked the conductor if a replacement train could be ordered in the event that Stager was able to send a telegraph request. The conductor agreed and Stager climbed a telegraph pole, loosened a wire, and dropped it to the ground. Stager then used an iron poker as a ground and touched the telegraph wire to the poker to complete the circuit and message for a new train. After sending the message, Stager held the wire on his tongue and received small electrical impulses – the return telegraph.¹⁰⁶ Wiretapping telegraphs would also be carried out by the military during the Civil War.

The Union had an elaborate military telegraph system in place since the war began. The system was useful, but it was not under control of the local commanders; instead, it was controlled by the Superintendent of Military Telegraphs in Washington. The Superintendent was Colonel Anson Stager. Given his personal knowledge of the vulnerability the network to tapping, Stager was tasked with developing a cipher to protect sensitive communications. Ciphers were so important for the war effort that “during the Civil War the President spent more of his waking hours in the War Department telegraph office than in any other place, except the White House.”¹⁰⁷

¹⁰⁶ Julie K. Petersen, *Understanding Surveillance Technologies: Spy Devices, Their Origins, & Applications*, (CRC Press: 2002), 2-16.

¹⁰⁷ David Kahn, *The Codebreakers: The Comprehensive History of Secret Communication from Ancient Times to the Internet*, (Simon & Schuster: 1996), 216.

A Confederate telegraph operator successfully tapped communications between the headquarters of General Ulysses S. Grant and Washington by employing scouts in the woods of Virginia to compromise the lines. The messages were not in plaintext, therefore it is unlikely they were decrypted or understood. The Confederates did intercept one plaintext telegraph that described a shipment of cattle to be delivered to Grant's headquarters. With this information, a Confederate force was ordered to overrun the Union transport and steal the cattle. Thus, "intercept operations, cryptanalysis, and cryptography came into their own in the Civil War."¹⁰⁸

The Pinkertons

The private investigative agency known as the Pinkertons could be viewed as a prototypical intelligence agency. The Pinkertons were hired by the government and often participated in illegal activities, and did so with impunity—as a member of the Prerogative State. Further, the Pinkertons carried surveillance against labor in such a way as to stifle the political speech and organizing of activists and workers. This is an early iteration of not just an intelligence agency, but one that chilled speech and trampled civil liberties by carrying out covert and overt surveillance for the government and industry. Finally, the early resistance to such intrusion into the lives of citizens began to dwindle as powerful and wealthy individuals began to acquire more influence over government and public opinion.

In April 1861, General George Brinton McClellan felt that Americans unenthusiastic about, if not outright resistant to, the war should be under observation. Allan Pinkerton, a man with whom McClellan had worked before, was charged with first organizing a secret service in Ohio, and then for the entire army. According to Edwin Fishel, "security was the responsibility of the entire

¹⁰⁸ Edward J. Glantz, "Guide to Civil War Intelligence," *The Intelligencer: Journal of U.S. Intelligence Studies* 18 no. 1 (2011), 57.

military establishment; Pinkerton was at the center of the whole operation, performing the most difficult part of it..."¹⁰⁹ His efforts to form a civilian force that utilized surveillance to discover disloyal Americans, and that infiltrated dissident groups and identified members of certain political groups, led to the arrest of hundreds of people who were tried by military courts during the various suspensions of the writ of habeas corpus by Lincoln. However, with the military drawback in the years following the Civil War, there was a perceived need for private armies to do things such as managing strike conflicts and many of these private armies were provided by Pinkerton. Pinkerton's agency found spying on workers to be quite lucrative and it would eventually become the agency's primary concern. In fact, the Pinkertons were the primary provider of security forces in more than seventy-five strikes between 1877 and 1892 and maintained a force of 30,000 individuals.

The Pinkertons offered four strike services: labor espionage, wherein Pinkertons became "workers" in a plant, associated with employees, assessed disaffection, infiltrated union membership during strikes, acted as agents provocateurs in attempts to incite violence, and collected information for prosecution; the agency provided strikebreakers, generally incompetent workers, who gave the appearance that a company had a replacement workforce at the ready in an effort to scare striking workers back into the factory for fear of permanently losing their jobs; the agency provided "strikeguards" or watchmen to protect property and capital from strikers; and it provided "strike missionaries" who interacted with strikers and either urged them to become violent or acted as propagandists inside worker groups in efforts to end strikes.¹¹⁰

¹⁰⁹ Edwin C. Fishel, "The Mythology of Civil War Intelligence," *Civil War History* 10 no. 4 (1964), 351.

¹¹⁰ Robert Weiss, "The Emergence and Transformation of Private Detective Industrial Policing in the United States, 1850-1940," *Crime and Social Justice* 9 (1978).

The Pinkertons were both feared and hated. In 1866, a Pinkerton guard shot and killed an innocent bystander during a stockyard strike in Chicago; in 1873, the agency provided “evidence,” acquired by infiltrating the Molly Maguires, which was used to justify the execution of ten members of the labor organization; Pinkerton guards killed three strikers in Pennsylvania in 1890; and the list goes on. But it was the role that the Pinkertons played in the Carnegie Steel Company strike in 1892 that is most famous. In 1889, Carnegie Steel tried to reduce worker wages and end collective bargaining. As a result, workers called a strike that led to the successful negotiation of a new three-year contract. As the contract expired the company again sought wage reductions and the workers prepared for a second strike. The chairman of Carnegie, Henry Fick, laid off the entire workforce of 3,800 and hired over 300 Pinkertons to step in. As the Pinkertons approached in armored barges and were ordered to seize the plant by entering from the Monongahela River in Homestead, Pennsylvania, they were confronted by armed strikers. The confrontation ended with deaths on both sides, though the exact numbers vary: Weiss¹¹¹ states ten strikers and two Pinkertons died in the conflict; Churchill¹¹² cites nine strikers and seven Pinkertons killed; Jensen¹¹³ writes that seven strikers and five Pinkertons died; Lipson¹¹⁴ states five strikers and three Pinkertons were killed. Although the exact numbers are disputed, what is not disputed is that this event led to the passage of the Pinkerton Act in 1893 forbidding the use of Pinkertons by the government.

¹¹¹ Ibid., 40.

¹¹² Ward Churchill, “From the Pinkertons to the PATRIOT Act: The Trajectory of Political Policing in the United States, 1970 to the Present,” *CR: The New Centennial Review* 4 no. 1 (2004), 22.

¹¹³ Jensen, *Army Surveillance in America*, 41.

¹¹⁴ Milton Lipson, “Private Security: A Retrospective,” *The Annals of the American Academy of Political and Social Science* (1988), 20.

It was by then illegal, in most cases, for the government to hire private investigators such as the Pinkertons, but that did not mean the law was followed. Just one year after the passage of the Pinkerton Act came the Pullman strike in Illinois. Increasing dividends and decreasing wages, compounded with the dismissal of three wage negotiators, pushed railway workers to boycott all Pullman train cars. The boycott caused nearly every line going out of Chicago to stop operating. More than 2,000 had left their posts, united by the American Railway Union. The union boasted more than 150,000 members, but the strike is estimated to have put 500,000 people out of work.¹¹⁵ Eugene Debs coordinated many of the strike details, and, although the strike began peacefully, he publicly stated that blood would be shed if soldiers were to fire on the strikers. At that point, President Grover Cleveland ordered 10,000 troops into Chicago, even though General Nelson A. Miles, the man in charge of taking the troops to the site stated, “the United States troops ought not to be employed in the city of Chicago at that time.”¹¹⁶ President Cleveland essentially gave Miles control of the city and the troops became a posse comitatus for the United States marshals. Miles, Pinkertons, and railroad managers worked together to conduct surveillance on the workers, had an established espionage fund, and “there is no doubt that Miles had violated both the Posse Comitatus Act and the restriction on the use of Pinkertons.”¹¹⁷ Strikers and their sympathizers clashed with the military for several days, resulting in the deaths of more than 20 people and the destruction of 2,000 train cars.¹¹⁸ Importantly, responsibility for the outbreak of the violence did not fall on the shoulders of the union members. In fact, the union asked news reporters for help in investigating

¹¹⁵ Jensen, *Army Surveillance in America*, 44.

¹¹⁶ Harvey Wish, “The Pullman Strike: A Study in Industrial Warfare,” *Journal of the Illinois State Historical Society (1908-1984)* (1939), 297.

¹¹⁷ Jensen, *Army Surveillance in America*, 45.

¹¹⁸ Samuel Rezneck, “Unemployment, Unrest, and Relief in the United States during the Depression of 1893-97,” *The Journal of Political Economy* (1953), 335.

who was responsible for the violence and property destruction. It was determined that former railway employees and police had incited the rioting. Some officials were found to have behaved in a most unprofessional manner, as the Chief of Police noted: “Several of these officials were arrested during the strike for stealing property from railroad cars. In one instance, two [deputies] were found under suspicious circumstances near a freight car which had just been set on fire... [the deputies] fired into a crowd of bystanders when there was no disturbance and no reason for shooting.”¹¹⁹

This was not the first time labor and government clashed and it would not be the last. There was, for the most part, ideological resistance to widespread domestic surveillance, as indicated by the passage of the Pinkerton Act. These conflicts did not result in institutionalized domestic spying, as the practice was opposed by many at that time. However, public opposition began to weaken in the beginning of the twentieth century as the military, elites, politicians, and officials expanded their respective forces, wealth, power and status.

Early Twentieth Century

The Posse Comitatus Act became law in 1878. The purpose of the act was to limit the use of federal troops as civilian police: “Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.”¹²⁰ The act reiterated the American ideology of the separation of military and civilian affairs. President Washington had many reservations about using the military, and military courts, in civil issues. As time progressed, however, the resistance

¹¹⁹ Wish, *The Pullman Strike*, 308.

¹²⁰ 18 U.S.C. § 1385.

to such uses dwindled. Even though the act was in place, it was frequently violated, along with the Pinkerton Act, in the late nineteenth and early twentieth centuries, thus raising the question of why and how punishment for such illegalities was avoided.

In 1892, wage cuts resulted in strikes at Bunker Hill and Sullivan Mining and Concentrating Company. In retaliation for the strike the mine owners brought in nonunion workers and hired the Pinkertons as well as armed guards, though this was a direct violation of the constitution and laws of Idaho. On July 11, 1892 fighting broke out leaving several dead and the nonunion men surrendered. The mine owners sent wires to Governor Norman Wiley to notify him of the situation. The Governor proclaimed martial law in Shoshone County and sent over 1,000 troops.¹²¹ The nonunion men returned and worked under the direct protection of the military. Agreements were eventually reached and union workers returned to work.

Some years later, in 1899, more disputes resulted in President McKinley calling for Brigadier General Henry Merriam and troops. The troops arrested more than 1,000 civilians, who were held prisoner under military guard, and the miners' union was outlawed. The soldiers, a posse comitatus, "engaged in house-to-house searches, guarded prisoners, and apparently joined in investigations...Merriam had ignored orders not to act as a posse comitatus."¹²² An investigation into the use of troops was carried out by the House Committee on Military Affairs, wherein the majority committee reported that the miners were at fault and that the President had authority to use the military however he saw fit. The minority committee report, on the other hand, determined

¹²¹ William J. Gaboury, "From Statehouse to Bull Pen: Idaho Populism and the Coeur d'Alene Troubles of the 1890s," *The Pacific Northwest Quarterly* 58 no. 1 (1967).

¹²² Jensen, *Army Surveillance in America*, 139-40.

the conduct of the President and the military to be unwarranted, unconstitutional, and in violation of the liberty of the workers.

As tensions between labor and capital increased during the turn of the century, so did the intensity with which the government was willing to quell disturbances. Further, the record shows the violations of state and federal laws occurred as though the laws did not exist. The above example might lead one to ask: “How was Merriam punished for illegally searching the homes of those citizens in Idaho?” or “Was President McKinley reprimanded for ordering the General to bring troops to Idaho to act as a posse comitatus?” Both questions must be answered in the negative – neither Merriam nor McKinley faced any punishment for the direct violations of state and federal law, for the violations of the constitutional rights of the workers and citizens in Idaho, or for the violations of liberty that inevitably resulted.

Political Policing and Surveillance of Labor

Fear of anarchists and communists was common to nearly every branch of the military during the twentieth century. While most today are aware of the midcentury red scare and McCarthyism, far fewer are familiar with the extent to which the federal government directly protected capital and employers in the early 1900s. It is true that some labor activists were anarchists and communists; it is also true that many were not. In the eyes of corporations and the state there was no such distinction. Many businesses and corporations “feared the growing appeal to workers of radical alternatives [to capitalism] such as socialism and the Industrial Workers of the World.”¹²³

¹²³ Greg Patmore, “Employee Representation Plans in the United States, Canada, and Australia: An Employer Response to Workplace Democracy,” *Labor* 3 no. 2 (2006), 47.

In April 1914, following a seven month strike in the coal fields of Colorado, the National Guard fired on a workers' tent colony with machine guns and cannons. Militiamen set fire to the tents where women and children hid from gunfire. The event, known as the Ludlow Massacre, was one of the bloodiest in American labor history. When the dust settled twenty-five were dead, including 13 women and children.¹²⁴ President Wilson called in 1,600 U.S. Army soldiers on April 30 and they remained for eight months, leaving once the miners conceded defeat. This event set an important precedent for corporations: it showed that with government assistance triumph over workers was possible. This combination was so successful, and assistance requested often enough, that the War Department established the Military Intelligence Division (MID) to repress seditious intent, which included labor activism, and to guard utilities.

In July 1917, the Industrial Workers of the World (IWW) called for lumber strikes in numerous states. In Minnesota, strike talks ended when U.S. attorneys arrested many of the workers and prosecuted them for failure to register for the draft. In Montana, "troops raided IWW headquarters and held leaders and members in jail...without charges... In Washington, troops broke up camp meetings, searched freights...arrested organizers, and jailed dozens of IWW members... In Chicago Bureau of Investigation agents opened a secret office where volunteers assisted in the nationwide investigation [of IWW]."¹²⁵ In September 1917, civilian volunteers of the Bureau of Investigation (BOI) along with BOI agents raided twenty IWW offices and headquarters, resulting in the indictment of over 150 IWW members for alleged violations of the Espionage Act of 1917, discussed in the following section.

¹²⁴ Elizabeth V. Burt, "Shocking Atrocities in Colorado: Newspapers' Responses to the Ludlow Massacre," *American Journalism* 28 no. 3 (2011), 65.

¹²⁵ Jensen, *Army Surveillance in America*, 143.

The Plant Protection Section (PPS) of the War Department consisted of 14 district offices and was responsible for anything from fire protection to corporate security. Walby and Lippert found that PPS was charged with keeping “touch generally with labor conditions and with anarchistic, IWW, and Socialistic activity... [using] every means to insure the employment of loyal Americans and frustrate the plans of enemy agents.”¹²⁶ The PPS sought to infiltrate the floors of various facilities to carry out surveillance, spying on workers and, eventually, attempting to incite violence such that they might arrest those willing to participate. Beyond blatant acts of sedition, PPS agents also watched for less overt means of dissent such as minor sabotage or destruction of capital, purposely slowing production, and workers who spoke critically about the United States. The Plant Protection Section was developed out of pressure from companies for government assistance in strike breaking and a perceived national security concern that centered on continued production. The IWW was a frequent target of PPS, who infiltrated IWW as well as anarchist and pacifist groups, collected information on anyone associated with those groups, and attended events at universities and private businesses. The PPS also had arrangements with the Post Office to inspect the mail of anyone deemed suspect, broke into and searched those suspects’ apartments, bugged those apartments with Dictaphones, and also investigated the lawyers those suspects hired.¹²⁷ The PPS ceased to exist by mid-1919 but the impact that it had on workers, political activists and the labor movement at large was to repress criticism and dissent, at the expense of constitutional rights but in favor of production and capitalism. Through the use of surveillance the PPS was able to gather information that could be twisted in a way that workers could be arrested and repressed. This created an atmosphere of fear, wherein workers remained

¹²⁶ Kevin Walby and Randy Lippert, “Ford First? Corporate Security and the US Department of War’s Plant Protection Service’s Interior Organization Unit 1917-1918,” *Labor History* 56 no. 2 (2015), 122.

¹²⁷ Jensen, *Army Surveillance in America*, 153.

silent on topics of wages, workplace conditions, and would not openly criticize the government lest they be fired or detained.

Espionage Act of 1917

In his 1917 Flag Day speech, President Woodrow Wilson claimed that conspirators and spies had spread disloyalty and sedition around the nation. With fear of aliens, subversives, dissidents, saboteurs, labor activists, socialists, communists, anarchists and pacifists especially high, the Espionage Act of 1917 passed into law. Many of members of those groups would eventually come to face prosecution, or threat of prosecution, under the Act. With the country in a hyperpatriotic fervor in preparation for the declaration of war against Germany, many neighbors watched neighbors for suspicious activity that could be reported. There was a government call for voluntary observers and detectives to perform their patriotic duty in this way. The largest citizen group was the American Protective League, which boasted nearly a quarter million members who reported any activity, hearsay, or gossip that could be construed as disloyal. Their work resulted in the investigation of hundreds of thousands of complaints. Groups such as this operated with a perceived impunity, as they wiretapped, bugged, burgled, and spied on other Americans.

The Espionage Act of 1917 is a fourteen-page piece of legislation that remains on the books today. Much of the Act aims at preventing the exportation of arms, traditional espionage and other direct wartime concerns, but other sections have direct implications for civil liberties. Section 3 of the Act states,

whoever shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever... shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States... shall be punished by a fine of not more than \$10,000 or imprisonment for not more than 20 years or both.

It is under this section, which prohibits war protesting and the discussion of certain political ideologies that many innocent Americans were brought to court and under which some innocent Americans were convicted.

The second section with direct implications for civil liberties is Title XII, Section 2: “Every letter, writing, circular, postal card, picture, print engraving, photograph, newspaper, pamphlet, book or other publication, matter or thing of any kind, containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, is hereby declared to be non-mailable.” One month after the Act became law, General Albert Burleson, the U.S. Postmaster General, directed the postmaster of New York City to deny the use of mails to *The Masses*, a magazine that contained four cartoons and four pieces of text Burleson believed were in violation of the act. Federal Judge Learned Hand heard the case and rejected the ban on the magazine’s use of the mail, stating, “If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me that one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under that section every political agitation which can be shown to be apt to create a seditious temper is illegal.”¹²⁸

The consequence of the Espionage Act of 1917 was to directly inhibit any speech that the United States government felt might be harmful to its own image, to the war effort, to capitalism, or, more broadly, to the political status quo. Immigrants, critics, strikers, dissidents, and German and Russian Americans were disproportionately affected by the act. The Espionage Act of 1917 was used to convict war protestors, politicians, and more. Although not initially as egregious as

¹²⁸ Rehnquist, *All the Laws*, 177 quoting Hand in 244 Fed. 540.

the earlier Alien and Sedition Acts, the Espionage Act of 1917 was amended a year later with provisions that brought it closer to the acts of 1798.

Conclusion

The early history of the United States provides the foundation for this dissertation. The trajectory of surveillance and government suppression of dissent outlined in the key events presented above, I will argue, continued through the twentieth and into the twenty first centuries. In the early years of the United States, citizens, politicians and members of the military were relatively opposed to the idea of domestic surveillance—a moral disposition that likely arose from the resistance of Americans to British legislation and taxation in the colonies. The Revolutionaries, in effect, were fighting for their privacy as well as for freedom from British rule. That the colonists valued privacy is evident in their resistance to writs of assistance and general warrants. However, they were not entirely averse to domestic surveillance, as demonstrated in the creation of the Committee of Secret Correspondence by the Second Continental Congress. Over time, it appears that the government became less concerned with the propriety of surveillance and domestic military operations, given events such as President Jefferson's use of the Army to arrest civilians in 1812 and President Jackson's use of it to settle labor disputes.

As the country developed, immigration increased, as did nationalism. This resulted in mounting fears of immigrants, especially those with radical politics. But politics were not the only thing Americans feared. The Alien and Sedition Acts in the late eighteenth century gave the President unprecedented power to remove any immigrant he judged dangerous, whether or not the country was at war with that immigrant's homeland. Thus, the motivation must not have solely been to allow the penalization of potential defectors, but instead suggests an effort to put all immigrants in a state of concern about surveillance by their neighbors, to ensure their behavior

conformed to the status quo. That the Alien and Sedition Acts became law indicates that the U.S. government can and has criminalized critical political views, suppressed dissent, and violently reacted to civilians who question official policies.

In times of great distress, the government can go beyond passing laws that repress dissent and inhibit speech, as President Lincoln did each of the eight times he suspended habeas corpus during the Civil War. Thus, I suggest that to have faith that such concentrated power will not be abused is naïve. While Lincoln was hesitant to use his power to suspend habeas corpus, the eventual and repeated suspensions demonstrate how far the government might go to ensure its own existence. These suspensions allowed the military to detain and convict civilians for their speech and even resulted in the closure of the *Chicago Times*.

Toward the end of the nineteenth century, government and business worked with private investigators to break strikes and secure capital, choices that resulted in many deaths and the suppression of labor activism. In much the same way the Pinkertons covertly spied on workers, the Plant Protection Section of the War Department also participated in the surveillance of workers and union organizers in an effort to protect industrial production in the United States. Such actions played an important role in disrupting labor's power to resist political and economic exploitation.

Finally, shortly after the turn of the twentieth century, as the United States prepared for war with Germany, the Espionage Act of 1917 became law. The Act, in addition to criminalizing war resistance, explicitly restrained certain types of speech under Title XII, Section 2, which states that it is illegal to mail any item that urges treason or resistance to any law in the United States. Such broad language inevitably resulted in the censorship of speech that should have been protected. Interestingly, the act also provides for the censorship of letters, which suggests that the

government was then, as it had in the eighteenth and nineteenth centuries, opening the private mail of civilians, reading the contents of that mail, and then assessing it.

In nearly every event discussed in this chapter there have been incidents of illegal activity. If that illegal activity was carried out by citizens or civilians, it was punished with loyalty oaths, loss of work, detention, imprisonment, or worse. If those illegal acts were performed by government officials, such as a general or president, they tended to go unpunished. What does it mean that the government can explicitly and openly violate its own laws without repercussion? How can citizens' constitutional rights be violated repeatedly with apparent impunity? These questions are not unique to periods discussed in this chapter. They are fundamental questions that will guide the rest of this work. To answer them, we must turn to Germany in the build-up to World War II.

CHAPTER THREE

THE DUAL STATE, CIVIL LIBERTIES, AND SURVEILLANCE

The previous chapter sought to show that the Founders and other earlier American leaders were often reluctant to infringe on privacy and civil liberties through rudimentary domestic intelligence networks. The ideals of privacy and security from government intrusion, hold-overs from colonial America, remained through the beginning of the nineteenth century. During the Civil War those ideals shifted and importance was given to maintaining the union (self-defense of the state), with privacy and freedom of speech only of secondary importance. That Lincoln opted for the suspension of habeas corpus illustrates not only the government's work to win the war by any means necessary, but also indicates a shift in ideology. This easing of protections of civil liberties continued throughout the nineteenth century resulting in political policing and violent conflicts with labor activists. Finally, the creation of the Espionage Act in 1917 can be understood as a direct infringement on certain types of protected speech, criminalizing not just actions, but ideas. Many indictments under the Act were the result of widespread surveillance by citizen volunteers.

The efficacy of surveillance by volunteers is well established, with a history spanning from the Revolutionary War to today (the Department of Homeland Security has trademarked the phrase "If You See Something, Say Something™"). But it was not until the twentieth century that domestic intelligence gathering was officially incorporated in bureaus and agencies. Professor Emerson points out that "the development of such agencies in the United States is, at least on the present scale, a relatively new phenomenon."¹²⁹

¹²⁹ Thomas I. Emerson, "Control of the Intelligence Agencies", *Det. C.L. Rev.* 1205 (1983), at 1205.

Surveillance operations carried out mid-century resulted in the widespread violation of civil liberties, yet the punishment meted for those violations hardly equated to a slap on the wrist – paralleling the Burnside/*Chicago Times* debacle. To understand this interesting phenomenon, Ernst Fraenkel’s “dual state” theory is instructive. This chapter argues that his theory gives insight into how state agencies can violate civil liberties without penalty. In addition, this chapter will supplement the dual state theory with Richard V. Ericson’s work on “state insecurity.” Finally, the chapter will discuss First and Fourth Amendment theory in the context of domestic surveillance and the impact of surveillance on civil liberties and intellectual privacy.

The Dual State

As the Third Reich came to power, Ernst Fraenkel became interested in the ways German politics was changing and power was being concentrated. Unlike most other Jewish intellectuals, Fraenkel was able to stay in Berlin until 1938 because he was a veteran and had a non-Jewish wife. From 1933 until he left Germany, Fraenkel continued to work as a lawyer, defending Jews and political opponents of the Third Reich, and participating in the resistance movement as well.¹³⁰ He also secretly wrote a critical analysis of the Nazi regime, which was published in the United States as *The Dual State*.¹³¹ His manuscript, which had to be smuggled out of Germany when he fled, was completed while he was at University of Chicago; it was translated by Edward Shils and published in 1941. This was one of the first major studies to put forward a theory of modern dictatorship.

¹³⁰ Hubertus Buchstein, “Political Science and Democratic Culture: Ernst Fraenkel’s Studies of American Democracy”, *German Politics and Society*, 68 (21)(3) 2003, at 52.

¹³¹ Ernst Fraenkel, *The Dual State: A Contribution to The Theory of Dictatorship*, (Oxford University Press: New York, 1941)

Fraenkel began his study by looking to the earlier works on bureaucracy by Max Weber. Weber believed that bureaucratization of the modern world had led to its depersonalization. This, in turn, was quite well suited for a capitalist economy and its concomitant system of power. One of the key aspects of Weber's conceptualization of modern bureaucracy is its hierarchical organization, where the relationships between subordinates and superiors are well established, such that the exercise of power should not be arbitrary and jurisdictions are clearly demarcated. Weber's understanding of modern society clashes with the structural operation of National-Socialism in Germany.

The National-Socialist state exercised a remarkable number of arbitrary powers but combined them with a capitalistic economic order. For Fraenkel, this was paradoxical because the arbitrary execution of power meant that rational calculation was not possible. But without rational calculation capitalism is not possible. To resolve this Fraenkel worked to theorize how the Third Reich came to power and how its arbitrary power did not immediately destroy the economy. To do this, he theorized that Germany, under National-Socialism, was actually a dual state, the first of which was what he termed the "Prerogative State" and the second was the "Normative State."

The constitution of the Third Reich was provided by martial law under the Emergency Decree of February 1933 (Decree of the president of the Reich for the protection of the people and the State of February 28, 1933). The decree is rather short with four brief paragraphs. Importantly, however, it states that

restrictions of personal freedom, the right of free expression of opinion, including the right of the press, the right of associations and meetings, interference with the secrets of letters, of the post, the telegraph and the telephone, and the issue of search warrants, as well as of

orders for confiscation or restriction of property – all these restrictions are therefore also admissible beyond the otherwise legally fixed limitations.”¹³²

When the 1933 decree was signed into German law, “the political sphere of German public life [was] removed from the jurisdiction of general law... The guiding basic principle of political administration [was] not justice; law [was] applied in the light of ‘the circumstances of the individual case,’ the purpose being achievement of a political aim.”¹³³

The Prerogative State was charged with ensuring that the National-Socialist regime remained in power through what was essentially constitutional martial law, enabled by using an emergency as an excuse to make constitutional changes and exceptions. Under the Third Reich the impositions noted in the 1933 decree were applied arbitrarily. For example, the religious freedoms of Christians were generally not inhibited, while the freedoms of Jehovah’s Witnesses were, as the latter religion became outlawed. Thus, adherents of Christianity were permitted to practice but practicing Jehovah’s Witnesses were jailed. To justify the arbitrary application of legal impositions, the “Prussian Supreme Court (Kammergericht) created the theory of the indirect Communist danger.”¹³⁴ All opponents of National-Socialism, regardless of their political affiliation, were labeled Communist, thus allowing the legal enforcement of the Prerogative State to apply equally to all political opponents of the regime. The Gestapo, which defined itself as “a general staff, responsible for the defense measures as well as the equally necessary offensive measures against all the enemies of the State,”¹³⁵ was charged with this enforcement. The Gestapo had special legal exemptions that removed any legal guarantee for judicial review of their actions.

¹³² Reichsgesetzblatt, Issued at Berlin, February 29, 1933, No. 17; Decree of the President of the Reich for the Protection of the People and the State. February 28, 1933, p. 83, Tiel I.

¹³³ Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*, (The Lawbook Exchange, Ltd.: 2006), 3.

¹³⁴ Ibid., 17.

¹³⁵ Ibid., 21.

Fraenkel suggests that the Gestapo is synonymous with the Prerogative State. The ordinary police, on the other hand, had no such exemption and their actions could still be judicially reviewed.

It is within the Normative State that the ordinary police are housed. The Normative State is charged with the usual enforcement of traffic violations, disorderly conduct (as long as it is not political), and the like. Although the day-to-day enforcement of most laws remained the jurisdiction of the ordinary police, the Third Reich could, at any time, protect itself from the jurisdiction of the Normative State (judicial review, etc.) by mandating that a particular case be handed over to the Prerogative State for regulation and enforcement, effectively preventing any real judicial review of the Third Reich. In this way, the Third Reich not only used the Prerogative State to

supplement and supersede the Normative State; it also use[d] it to disguise its political aims under the cloak of law... There is a double jurisdiction for all cases regarded as political. The police execute administrative punishments in addition to or instead of the criminal punishments executed by the courts... [citizens can be] deprived of any possibility of defense, subjected to heavier penalties and branded as an enemy of the state for the future without receiving 'due process of law.'¹³⁶

Thus the Prerogative State has no interest in formal justice, but only in material outcomes.

The Normative State has jurisdiction over most things that are not considered political by the Prerogative State. However, in the view of the Prerogative State, "political" does not "represent a single segment of... activities;" instead, potentially all activities in private and public life could be considered political if the Third Reich believed it was in the interests of National-Socialism to classify an activity in such a way. In other words, the jurisdiction of the Prerogative State is unlimited and the Normative State exists only because it is the necessary complement to the Prerogative State. "The coexistence of the Normative and Prerogative States is indicative of the

¹³⁶ Ibid., 41.

National-Socialist policy of promoting the power of efficiency of the state by means of increased arbitrariness... The Prerogative State's jurisdiction over all other jurisdictions guarantees that the efficiency of the state shall have priority over the liberty of the individual."¹³⁷ However, it is in the Normative State that the legal institutions essential for private capitalism exist, including the regulation of property, contracts, labor, unfair competition, patents and trademarks, etc. The Normative State, by retaining this jurisdiction over the necessary legal areas required for capitalism, maintained the legitimacy of the Third Reich. In other words, for most citizens the Normative State, with its judicial review, adherence to law, and the like, was the state with which they interacted. Not until a citizen was deemed to be participating in behavior that was "political" would she or he have interaction with the Prerogative State. The intended outcome was to create a population that believed in the Third Reich and National-Socialism. And, as long as citizens believed and behaved, the Prerogative State remained mostly hidden.

The Austrian-American economist Joseph Schumpeter noted in *The Sociology of Imperialisms*,¹³⁸ "Nationalism and militarism are not created by capitalism, they become, however, capitalized and, finally they take their best strength out of capitalism. Capitalism is gradually drawing nationalism and militarism into its own circles, thereby maintaining and nourishing them. They again influence and modify capitalism." The Prerogative State is seen as enforcing special laws on only the "truly bad" (i.e. Communists, terrorists, etc.) and the Normative State is seen as enabling capitalism to continue for all the "good" citizens, thereby preventing the questioning of the legitimacy of the Third Reich.

¹³⁷ Id at 71.

¹³⁸ Schumpeter quoted in Fraenkel at 183.

In Fraenkel's analysis, there must always exist the myth of a dangerous enemy for the dual state to persist in this way. Further, temporary emergencies, such as the Reichstag fire, serve as stepping stones toward dictatorship under the justification of the self-defense of the state. This self-defense logic was used to justify many atrocities carried out by the Third Reich.¹³⁹ Further, Carl Schmitt put forward the notion of such national self-defense, which was used to justify National-Socialism.¹⁴⁰ It was also the justification for writing the Law of February 10, 1936, which stated that "orders and affairs within the jurisdiction of the Gestapo are not subject to the review of the Administrative Courts."¹⁴¹ Eventually, there was no longer any aspect of life that could not potentially be considered political and put under the jurisdiction of the Prerogative State.

The Prerogative State and Normative State worked together to simultaneously punish opposition and rationalize the existence of National-Socialism. The essence of the Prerogative State includes: its refusal to accept legal restraint; its claim that material justice is more important than formal justice, which has no intrinsic value; that those who oppose National-Socialism are not just criminals but heretics; and that it will yield authority to the Normative State only in situations where this will further National-Socialism.¹⁴² The Normative State, on the other hand, is used primarily as a tool to justify and rationalize National-Socialism and the Prerogative State. At any time a person could lose the protection of the Normative State, and even though the

¹³⁹ Fraenkel, *The Dual State*, 39, "The co-existence of legal and arbitrary actions, most impressively demonstrated by the confinement in concentration camps of persons who have been acquitted by the courts, is a crucial development of the recent German Constitutional status." The claim of actions to be necessary for peace or safety was often used as justification for unlawful acts. This is important when considering that the Prerogative State could overrule the Normative State by punishing someone that had been acquitted by the court. In other words, the Prerogative State could punish for actions that were not actually against any law.

¹⁴⁰ See Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, (University of Chicago Press: 2006); and Carl Schmitt, *The Concept of the Political*, (University of Chicago Press: 2007).

¹⁴¹ *Ibid.*, 27.

¹⁴² *Ibid.*, 40-63.

Normative State would occasionally critique the Prerogative State it was never anything more than an effort to maintain the legitimacy of the dictatorship. The table below lists some of the fundamental properties of each state as put forward by Fraenkel:

<u>Prerogative State</u>	<u>Normative State</u>
<ul style="list-style-type: none"> • Works to ensure regime power. • Operates outside of the Constitution. • No guarantee of judicial review. • Supplements and supersedes normative state. • Interest in material outcomes, not formal justice. • Enforces special laws on those participating in “political” behavior. 	<ul style="list-style-type: none"> • Jurisdiction over things not considered “political.” • Necessary complement to Prerogative State. • Institutions essential for private capitalism. • Regulation of property, labor, competition, patents. • Maintains legitimacy of the state.

Recently, the dual state theory has seen some renewed interest among scholars, especially when examining states that currently have, or have had in the past, political environments considered repressive by Western standards, such as Sakwa’s use of the theory to explain Russia’s hybrid regime that combines democratic and authoritarian features.¹⁴³ Similarly, Jeffrey Kahn used the dual state theory to describe the selective use of law-as-weapon in Russia, where the law is used as a “selective device for oppression and control; it has no limit but the power of the one who wields it and no values external to the wielder that might constrain his actions.”¹⁴⁴ The dual state is discussed in Vittorio Coco’s work on the ideological divisions caused by the Cold War in Italy,

¹⁴³ Richard Sakwa, “The Dual State in Russia,” *Post-Soviet Affairs* 26 no. 3, 2010.

¹⁴⁴ Jeffrey Kahn, “The law Is a Causeway: Metaphor and the Rule of Law in Russia” in *The Legal Doctrines of the rule of Law and the Legal State* (Springer International Publishing: Switzerland, 2014).

where he examines the “double state” thesis put forward by Franco De Felice.¹⁴⁵ Jayasuriya examines how Singaporean leaders often suggest the rule of law is a defining feature of Singapore, when in reality the rule of law (Normative State) applies only to commerce, with the political arena under executive prerogative power.¹⁴⁶ Similarly, Meriéau suggests that Fraenkel’s dual state, Robert O. Paxton’s parallel state, and Peter Dale Scott’s deep state, are all terms used to explain the existence and function of a state within a state. Meriéau suggests that Thailand can be explained by these theories because of the resistance of deep state agents to the orders of elected officials.¹⁴⁷ Finally,¹⁴⁸ Brunkhorst uses the dual state theory to suggest that during the nineteenth and early twentieth centuries, there existed a global dual state where certain countries were analogs to the Prerogative State in that they had seemingly unlimited jurisdiction and their actions received no notable punishment.¹⁴⁹

Interestingly, Agamben’s “State of Exception,”¹⁵⁰ while in many ways making an analysis similar to Fraenkel’s, fails to make any mention of the dual state theory even as he points out that the Third Reich was a twelve-year state of exception. Further, Agamben suggests that the state of exception in Germany established modern totalitarianism, which can be defined as a

legal civil war that allows for the physical elimination not only of political adversaries but of entire categories of citizens who for some reason cannot be integrated into the political system. Since then, the voluntary creation of a permanent state of emergency has become

¹⁴⁵ Vittorio Coco, “Conspiracy theories in Republican Italy: The Pellegrino Report to the Parliamentary Commission on Terrorism,” *Journal of Modern Italian Studies* 20 no. 3, 2015.

¹⁴⁶ Kanishka Jayasuriya, “The Exception Becomes the Norm: Law and Regimes of Exception in East Asia,” 2 *APLPJ* I 2001.

¹⁴⁷ Eugénie Mériéau, “Thailand’s Deep State, royal power and the Constitutional Court (1997-2015),” *Journal of Contemporary Asia*, 2016.

¹⁴⁸ This is not an exhaustive list of all scholarship that uses the dual state theory, but should give an idea of how it is used to examine various states around the world.

¹⁴⁹ Hauke Brunkhorst, “Democracy Under Pressure: The Return of the Dialectic of Enlightenment in the World Society,” *Civitas, Porto Alegre*, 10 no.1, 2010.

¹⁵⁰ Giorgio Agamben, *The State of Exception*, (University of Chicago Press: 2005).

one of the essential practices of contemporary states, including so-called democratic ones.¹⁵¹

In light of September 11, the USA PATRIOT Act, Guantanamo Bay, and the War on Terror, it has been suggested that the United States has entered a permanent state of exception. Mark Neocleous suggests the idea of a permanent state of exception, or emergency, has “at its heart one basic proposition: that the emergency involves a suspension of the law.”¹⁵² However, Neocleous does not agree with the assumption that this permanent state of emergency is a relatively recent development: “read historically through the lens of emergency power, the current conjuncture is not categorically different to much that has gone on before. As such, the idea that we have recently moved into a permanent state of emergency is historically naïve.”¹⁵³ Indeed, the previous chapter shows that continuous emergencies, most often war have allowed for exceptions to established law.

Against the logic of liberalism, which suggests that law can allow for a return from the state of emergency, Neocleous criticizes the “legal fetishism” that suggests law is a universal solution to problems posed by power. This “involves a serious misjudgment in which it is simply assumed that legal procedures...are designed to protect human rights from state violence.”¹⁵⁴ This legal fetishism not only deradicalizes but it also overlooks emergency measures as part of the everyday exercise of power. It is for this reason that a return to normal law is nothing more than a return to political policing of activists, workers, and immigrants. In other words, it is not possible to return to a time when law was not used as power. Do we want to return to the time of the Sedition

¹⁵¹ Ibid., 2.

¹⁵² Mark Neocleous, “The Problem with Normality: Taking Exception to ‘Permanent Emergency’,” *Alternatives* 31, (2006), 193.

¹⁵³ Ibid., 194.

¹⁵⁴ Ibid., 207.

Act of 1798, Lincoln's suspension of habeas corpus, the Pinkertons, the Alien Friends Act, or the Espionage Act? Neocleous writes, "The least effective response to state violence is to simply insist on rule of law... What is needed is a counter politics" against the normality of class power and oppression by law.¹⁵⁵ This counter politics is likely what Walter Benjamin hoped for in number VIII of his *Theses on the Philosophy of History*:

The tradition of the oppressed teaches us that the 'state of emergency' in which we live is not the exception but the rule. We must attain to a conception of history that is in keeping with this insight. Then we shall clearly realize that *it is our task to bring about a real state of emergency, and this will improve our position in the struggle against Fascism.*"¹⁵⁶

Similarly, Raskin points out that the United States has organized itself according to emergency rules since 1933, first for economic reasons and later for imperial reason. Going further, he also posits that modern presidential power rests on the "willingness to rationalize class relations..." with the recognition that "until 1975, one was not to undermine the military and national security apparatus grouping" and "to recognize [Congress'] legitimizing function and find a means of coopting it into the national security apparatus or the lockstep of the great corporations."¹⁵⁷

In the context of domestic surveillance, and, more importantly, the state agencies and bureaus that carry out that surveillance, the dual state theory provides important insights into the perpetuation of extralegal practices and the abilities of these organizations to continually escape meaningful punishment. While some work has been done to apply the dual state theory to violent, repressive, and unjust political regimes, there is a conspicuous dearth of literature that applies the

¹⁵⁵ Ibid., 209.

¹⁵⁶ Walter Benjamin, "Theses on the Philosophy of History," in *Illuminations: Essays and Reflections* (Shoken Books: New York, 1969), 257 (emphasis added).

¹⁵⁷ Marcus Raskin, "Democracy Versus the National Security State," *Law and Contemporary Problems* 40 no. 3 (1976), 186.

theory to intelligence agencies and their operations. In the following chapters, the dual state theory will be used to understand how the FBI, CIA, and NSA have been able to disregard certain legal considerations and perform surveillance on groups and individuals engaged in activities that should otherwise be constitutionally protected. Additionally, it is important to recognize the critical position of Neocleous and Raskin, as their works provide important contributions to understanding why the Supreme Court has been so reluctant to afford constitutional rights and protections to groups that advocate political ideas that are in opposition to the mid-century brand of American capitalism.

Though the dual state theory goes a long way in explaining why these actions persist, the ability of the intelligence community to skirt prosecution can be further explained by Michael Welch's notion of state impunity. Writing about state abuses after 9/11, Welch is helpful for understanding how intelligence agencies undertake extralegal measures and engage in operations that violate civil liberties. To develop this idea, Welch brings together four separate theories to examine state impunity. He believes that "chief among recent changes that enhance power—especially in the form of the executive—is the suspension of law, producing tactics and interventions deemed illegal under international law."¹⁵⁸ In his view, it is not agencies that perpetuate crimes, but the individuals that work for those agencies. However, when the actions of an agency appear to be immune from punishment, it increases the likelihood that both crimes will be ordered by the administration of that agency and carried out by the individual actors within:

In the wake of 9/11, the U.S. government has introduced greater administrative measures in dealing with terror suspects that shield against prosecutions for war crimes the architects of those policies as well as those who carry out its tactics. The notion of impunity is significant because it not only strands those in custody from access to meaningful legal remedies but also insulates state and executive power from accountability and the rule of law, enhancing the likelihood that such abuses will persist in an endless war on terror. To

¹⁵⁸ Michael Welch, *Crimes of Power & States of Impunity*, (Rutgers University Press: NJ, 2009), 16.

be clean, it is the nature of immunity embodied in the campaign war on terror that contributes to the erosion [sic] democratic institutions...¹⁵⁹

Richard V. Ericson's work on counter-law has received much attention recently. Ericson theorizes that "counter-law I" occurs when a law is created to undermine one that already exists. This is not a power shift intended to alter agency control or jurisdiction, rather, it is an attempt to criminalize through the enactment of new laws and by inventing new uses for existing laws in an effort to "erode or eliminate traditional principles, standards, and procedures of criminal law that get in the way of preempting imagined sources of harm."¹⁶⁰ The notion of counter-law originates in the work of Foucault, who used it to explain impacts of the suspension of certain laws. Ericson believes that counter-law has become normalized and Welch believes it serves as the "dominant paradigm of government."¹⁶¹ Welch combines the theory of counter-law, Judith Butler's and Michel Foucault's notions of sovereignty and governmentality, and Agamben's state of exception, to derive the foundations for what he calls "sovereign impunity:"

As the term implies, sovereign impunity is embedded into a newly configured form of power while accentuating its inherent lack of accountability. It is that feature of power which serves as a key source for state crimes in the war on terror, specifically indefinite detention and torture, as well as the war in Iraq. Sovereign impunity not only immunizes state actors and their operatives from wrongdoing but also erases all avenues for victim compensation. Together, those dimensions of sovereign impunity create the likelihood that state crimes will persist, particularly within a wider political culture that reframes such actions as necessary to protect national security.¹⁶²

Welch's sovereign impunity squares with the dual state theory, but instead of identifying the Prerogative State explicitly, he draws attention to the degree of insulation state actors and their

¹⁵⁹ Ibid., 16.

¹⁶⁰ Richard V. Ericson, *Crime in an Insecure World*, (Polity: Cambridge, 2007), 24.

¹⁶¹ Welch, *Crimes of Power*, 18.

¹⁶² Ibid., 20.

agencies enjoy, as well as the inability of victims to find help or compensation through the judicial system. What Welch is essentially discussing is the Prerogative State described by Fraenkel nearly sixty years earlier, even going so far as to point out the lack of guaranteed judicial review for victims. Where Welch most improves our understanding of the Prerogative State is in bringing attention to the fact that it is the actors within agencies who commit state crimes, rather than the agencies themselves. It is true that agencies can, and do, have policies that infringe on civil liberties, but Welch believes, to some extent, that responsibility falls on individual actors.

In addition to counter-law I, Ericson also puts forward the notion of “counter-law II,” “which takes the form of surveillant assemblages.”¹⁶³ After the creation of new laws and new implementations of old law, new surveillance infrastructures are created and preexisting infrastructures of surveillance are used in new ways that work to erode the traditional standards of law. In other words, counter-law I is to legal theory and principles what counter-law II is to surveillance technologies. For example, it is both legal and expected that red-light cameras at intersections will be used to capture images of cars violating traffic laws by failing to stop for red lights. In the case of counter-law II, the state will use that same red-light camera to capture the license plate information of all cars in order to create a database containing information about who is driving in a particular part of town, at what times they are driving, and in what direction. The existing surveillance infrastructure is used in a novel way that upsets the principles and intent on which the technology was originally founded.

The concept of counter-law II is important in the study of surveillance, especially when investigating how technologies may be appropriated to violate constitutional rights. However, in the context of this dissertation, the concept is not particularly useful, as there is little applicability

¹⁶³ Ericson, *Crime in an Insecure World*, 24.

in terms of early surveillance techniques and it does little to explain why the Court was so reluctant to pursue the intelligence community in the first half of the twentieth century. There is, on the other hand, another theory put forward by Ericson that is quite important for this study.

Ericson believes that much of the authorization of surveillance can be understood in terms of risk. In liberal politics exists the paradoxical problem of “providing security and freedom through knowledge of the future in the face of uncertainty...”¹⁶⁴ For Ericson, this problem is best examined from a risk assessment perspective. He suggests that government agencies attempt to know as much as possible about a potential threat in order to conduct a cost-benefit analysis of the possibility of harm. In his view, these harms become coded as security threats. Then, decision-makers and administrators of various organizations are charged with selecting which threats deserve attention and are also responsible for any harm that comes from those threats. This leads decision-makers to adopt a precautionary logic, which focuses on uncertainties and harms that cannot be quantified in financial terms because they deal either with property outside the realm of such compensation (e.g., secret nuclear weapon technologies) or result in the “catastrophic loss of treasured lives.”¹⁶⁵ This precautionary logic necessarily creates suspicion and extreme preemptive measures as a result of the great amount of uncertainty face by decision-makers. This uncertainty stems, in part, from the decision-maker’s belief or knowledge that she is operating with incomplete information, her efforts to anticipate worse case scenarios, and the reality that she will not only be judged on the basis of the actions she took but also the actions she could have or should have taken.¹⁶⁶ Understanding precautionary logic helps us understand some of the social-psychological reasons that particular laws are passed or reinterpreted (counter-law I) and why decision-makers

¹⁶⁴ Ibid., 4.

¹⁶⁵ Ibid., 22.

¹⁶⁶ Ibid., 23-24.

might opt to violate civil liberties with new or repurposed surveillance technologies (counter-law II). Precautionary logic is useful for explaining, at least partially, J. Edgar Hoover's fear of Communist insurrection in the United States and the amount of energy he and the FBI directed toward Communism as a potential threat. It also helps us understand the passage of laws such as the Smith Act, which was used to prosecute members of the Socialist Workers Party, or the Espionage Act, which was used to prosecute Charles Schenck for urging young men to resist World War I conscription.¹⁶⁷

Bringing together the dual state theory with Welch's notions of state impunity and, more importantly, Ericson's theory of precautionary logic, allows us to understand more fully how the intelligence community has been able to participate in the surveillance and disruption of constitutionally protected speech and actions in the mid-twentieth century, as well as how it continues to do so today.

Before examining intelligence agencies and their operations, it is necessary to discuss two constitutional amendments vital for this study: the First Amendment, which protects speech, press, association and assembly; and the Fourth Amendment, which protects against unwarranted search and seizure. What will be most crucial to understand in terms of the First Amendment is the theory of the chilling effect. The Fourth Amendment, which many believe should protect against government infiltration into political groups for the purpose of surveillance, has failed to provide much protection. This failure of the Fourth Amendment will be discussed in relation to the First Amendment and the chilling effect.

¹⁶⁷ Schenck v. United States 249 U.S. 47 (1919).

The First Amendment

There is perhaps no other constitutional amendment as important as the first. In a short 45 words it manages to secure freedoms of religion, speech, assembly, and the press. As a result, the First Amendment has been at the center of some of the most influential and complex Supreme Court cases the country has seen. To write a comprehensive review of all First Amendment theory is beyond the scope of this dissertation, which will instead briefly discuss the work that three influential legal theorists did toward understanding the details of this amendment. The works of Alexander Meiklejohn, Thomas Emerson, and Justice William Brennan have had great impact on the legal community. Though they sometimes disagreed about what is considered expression and what the true purpose of the First Amendment is, they worked diligently to elaborate and justify their respective positions over the course of their careers.

Alexander Meiklejohn was not a lawyer, but his analyses and examinations of the First Amendment have been of great importance in debates that attempt to understand the limits and regulation of free expression. His understanding of the First Amendment does not situate it as a protector of the freedom to speak. Rather, he understands the First Amendment as protecting “the freedom of those activities of thought and communication by which we ‘govern’... [The First Amendment] is concerned, not with a private right but with a public power, a governmental responsibility.”¹⁶⁸

Meiklejohn suggests that the people of the United States reserve significant power to govern themselves, and, because the government created by the people was granted only certain powers and not others, this indicates the decision of the people to govern themselves instead of

¹⁶⁸ Alexander Meiklejohn, “The First Amendment Is an Absolute”, *Supreme Court Review* 245 (1961), in *First Amendment Anthology*, eds. D. Lively, D. Roberts, & R. Weaver (Anderson Publishing: Cincinnati, 1994).

being governed. With this basic desire of citizens in mind, the Framers wrote the First Amendment in such a way that it would ensure the people's ability to carry out this goal. Elaborating on this, he wrote,

All constitutional authority to govern the people of the United States belongs to the people themselves, acting as members of a corporate body politic. They are, it is true, 'the governed.' But they are also 'the governors.' Political freedom is not the absence of government. It is self-government... The revolutionary intent of the First Amendment is, then, to deny to all subordinate agencies authority to abridge the freedom of the electoral power of the people.¹⁶⁹

Meiklejohn understands the Bill of Rights to, in fact, be a "Bill of Powers and Rights."¹⁷⁰

For Meiklejohn, there is nothing more fundamental to social life in America than the ability to participate in expression in such a way that improves the self-governing abilities of the people. In free and open debate, it must be permitted that in the case of falsehoods being inadvertently spoken there will be no legal repercussions, because it is a necessary occurrence in such debate. Commenting on the decision in *Dennis v. United States*,¹⁷¹ Meiklejohn was critical of the Court, pointing out that "as one reads the definition of the crime of Mr. Dennis...with its easy transition from the charge of 'advocacy of revolution' to that of 'incitement to revolution,' one's mind goes back inevitably to the striking and inaccurate statement of Mr. Justice Holmes that 'Every idea is an incitement.' That assertion, when taken seriously, means that every idea is within the reach of legislative control. And with that dictum accepted, the essential meaning of the First Amendment is undermined and swept away."¹⁷²

¹⁶⁹ Alexander Meiklejohn, "The First Amendment is an Absolute," *The Supreme Court Review* (1961), 245-266, 253-254.

¹⁷⁰ *Ibid.*, 254.

¹⁷¹ 341 U.S. 494 (1951).

¹⁷² Alexander Meiklejohn, "What Does the First Amendment Mean?" *The University of Chicago Law Review* (1953), 462.

Meiklejohn takes issue with understandings of the First Amendment that hinge on the idea of free speech and the idea that any utterance should be protected. For Meiklejohn the First Amendment is something more: it is a guarantee for the people that they will remain sovereign and the government subordinate – it is the guarantee of the right to religious and political freedom.¹⁷³ In his view, the First Amendment is protected so assuredly that any act of the legislature that would infringe on it would be unconstitutional. Indeed he understood the Smith Act,¹⁷⁴ which allowed for criminal penalties to be assessed against anyone advocating for the overthrow of the government, to be unconstitutional because by criminalizing advocacy of revolution the act violated the basic principle of political freedom.

However Meiklejohn was not an absolutist. He agreed with Justice Holmes' notion in *Frohwerk v. United States*¹⁷⁵ that the First Amendment does not give immunity to all feasible uses of language, and on these grounds it was appropriate to convict Frohwerk. It is only when there is an abridgment or limitation of political freedom that Meiklejohn saw a constitutional violation. Without a distinction made between speech and political freedom he feared that in much the same way that speech could be limited as a nuisance without violation of the First Amendment it could also be limited for political reasons.¹⁷⁶ Thus, for Meiklejohn the First Amendment cannot be regulated by federal and state governments because of its necessity for the people to effectively govern themselves.

Thomas I. Emerson wrote on various topics related to the First Amendment, from association to prior restraint. Regarding freedom of expression, he believed that the values society

¹⁷³ Ibid., 464.

¹⁷⁴ 54 Stat. 671 (1940), 18 U.S.C §2385.

¹⁷⁵ 249 U.S. 204

¹⁷⁶ Meiklejohn, *What Does the First Amendment Mean*, 473.

sought through the protection of freedom of expression could be grouped into four categories: “Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society.”¹⁷⁷ Though he elaborates quite extensively on each of these categories, the following summary is adequate here: As an assurance of self-fulfillment, the First Amendment should allow for an individual to use his powers of reason and abstract thinking to access information that will be helpful in the creation of culture and self. Thus, the individual who seeks knowledge and truth needs to hear all sides of an issue, including the mainstream and alternative. To block any information is to stifle his ability to form new ideas and remove error from his thought. By preventing this blockage, the individual gains the ability to discover truth and advance his knowledge. Through this process, the individual acquires the tools necessary for participation in the process of open discussion and decision-making, which should be available to all members of society. In this way, freedom of expression is not only politically useful, it is indispensable to democracy.

The political process as described allows for decisions to be made about the survival, welfare, and progress of a society. It is in this political process that Emerson believes “the state has a special incentive to repress opposition and often wields a more effective power of suppression. Freedom of expression in the political realm is usually a necessary condition for securing freedom elsewhere.”¹⁷⁸ Finally, Emerson believes in the potential for freedom of

¹⁷⁷ Thomas I. Emerson, “Toward a General Theory of the First Amendment”, 72 Yale Law Journal 877 (1963), in *First Amendment Anthology*, eds. D. Lively, D. Roberts, & R. Weaver (Anderson Publishing: Cincinnati, 1994).

¹⁷⁸ *Ibid.*, 10.

expression to achieve an adaptable and stable community. One of the ways this stability is achieved by freedom of expression is by allowing one to freely participate and express one's self in the body politic. This expression results in a certain catharsis or "letting off of steam" that prevents the build-up of animosity toward the society and helps mitigate the number of disgruntled citizens. If these problems were not discussed publicly, they would be forced underground where they would wait to erupt.

Emerson, like Meiklejohn, understood freedom of expression to mean freedom of something more than just words; both believed in the necessity of the First Amendment for ensuring the ability of the people to assert their power and agency in the role of their own governance. It is along these lines that Emerson believes the First Amendment also includes an inherent freedom of association clause. He suggests that "no one can doubt that freedom of association, as a basic mechanism of the democratic process, must receive constitutional protection, and that limitation on such a fundamental freedom must be brought within the scope of constitutional safeguards."¹⁷⁹ For Emerson, this freedom of association is an extension of individual freedom and must be protected to the same extent as individual liberty.

Building on his theory of the difference between action and expression,¹⁸⁰ where expression is entitled to full protection from government infringement and action is subject to reasonable and non-discriminatory regulation, Emerson suggests the First Amendment protects freedom of association as associational expression, which is of the same nature as individual expression. To further justify his claim, he points out that "there are, indeed, no cases where the Court has expressly laid down a different rule for associational expression from that which protects

¹⁷⁹ Thomas I. Emerson, "Freedom of Association and Freedom of Expression," *Yale Law Journal* (1964), 1.

¹⁸⁰ See Emerson, *Freedom of Association*.

individual expression.”¹⁸¹ Expression, however, must be more than just words or communication. He believes expression “must embrace a surrounding area of conduct closely related to the making of the utterance or necessary to make it.”¹⁸² This conduct includes anything from joining a group, to renting a hall to garner a larger audience, to soliciting petition signatures. For Emerson, “as a basic principle of a democratic society freedom of association is fundamental.”¹⁸³

Serving on the Supreme Court for nearly 45 years, Justice William Brennan, Jr. took the view that the Bill of Rights was generally understood to apply to the actions of the federal government, while leaving the states to create their own criminal procedures and constitutions. However this left many minority groups at the mercy of those procedures, which generally favored the state. Justice Brennan believed one of the roles of the Supreme Court should be to remedy that situation. Some thought of Justice Brennan’s perspective as a form of judicial activism, however it seems more likely that he was motivated by his belief in the importance of the individual, which he held as a guiding principle on the Court, rather than by judicial activism. Indeed, “Brennan’s vision was of a rights bearing individual in potential conflict with a powerful government, state or federal, sometimes needing protection from government and sometimes needing the power of one government to protect her from another.”¹⁸⁴

In cases involving the First Amendment, Justice Brennan often opted to allow more speech rather than restrict it when it was unclear if the content may or may not be protected speech. That is, he often erred on the side of protecting the speech. In his dissent in *Miller v. California*,¹⁸⁵

¹⁸¹ Emerson, *Freedom of Association*, 23.

¹⁸² *Ibid.*, 25.

¹⁸³ *Ibid.*, 35.

¹⁸⁴ Patricia Lucie "Justice William Brennan Jr: Constitutional Visions Take Five Votes." *Denning LJ* 12 (1997), 10.

¹⁸⁵ 413 U.S. 15

Justice Brennan argued that the court had failed to formulate an appropriate standard for distinguishing between protected and unprotected speech, doing nothing more than lending obscure guidance. For Brennan this level of uncertainty would allow for the erratic and arbitrary enforcement of the law, which he found unacceptable.

In *Times Film Corp v. Chicago*¹⁸⁶ Justice Brennan was again in the minority, concurring with Chief Justice Warren's dissent that the court was giving its "blessing to the censorship of all motion pictures in order to prevent the exhibition of those it [felt] to be constitutionally unprotected."¹⁸⁷ Similarly in *Freedman v. Maryland*,¹⁸⁸ Justice Brennan wrote the opinion that set safeguards designed to reduce the dangers of prior restraint for films. Here he suggested that it is the censor that should be obligated to furnish proof as to why the speech in question is unprotected and that the court proceeding should be adversarial to the censor.

When taking into consideration the First Amendment values, benefits, and implications put forward by Meiklejohn, Emerson, and Brennan, there begins to emerge an understanding that the First Amendment is important not only for its ability to ensure citizens access to the means of self-governance, but it is also necessary for individual liberty and self-determination. The First Amendment can be understood narrowly as protecting the right to political speech, but can also be understood as having the broader impact of allowing citizens opportunities for personal fulfillment.

The Chilling Effect

The Supreme Court first mentioned the word "chill" in relation to the First Amendment in *Wieman v. Updegraff* (1952), when Justice Frankfurter, concurring, pointed out that inhibiting

¹⁸⁶ 365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403 (1961)

¹⁸⁷ Ibid.

¹⁸⁸ 380 U.S. 51 (1965)

teachers from joining certain organizations has “an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.”¹⁸⁹ It was not until 1963 in *Gibson v. Florida Legislation Investigation Committee* that the Court explicitly wrote of a “chilling effect.” In this case, National Association for the Advancement of Colored People (NAACP) Miami branch president Theodore Gibson was subpoenaed by the Florida Legislative committee, a committee charged with investigating “subversive organizations” in the wake of *Brown v. Board of Education*, and asked to hand over the membership list of his organization. Delivering the opinion for the Court, Justice Goldberg stated

The respondent Committee has laid no adequate foundation for its direct demands upon the officers and records of a wholly legitimate organization for disclosure of its membership; the Committee has neither demonstrated nor pointed out any threat to the State by virtue of the existence of the NAACP or the pursuit of its activities or the minimal associational ties of the 14 asserted Communists. The strong associational interest in maintaining the privacy of membership lists of groups engaged in the constitutionally protected free trade in ideas and beliefs may not be substantially infringed upon such a slender showing as here made by the respondent. While, of course, all legitimate organizations are the beneficiaries of these protections, they are all the more essential here, where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors, and the deterrent and “chilling” effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial.¹⁹⁰

The chilling effect has most frequently been applied in the context of citizens exercising their First Amendment rights. The theory of the chilling effect leads to one core conclusion: in order to prevent chilling, some laws and rules must be relaxed, if not repealed, because certain activities deserve immunity from government control. Chilling effect doctrine combines two basic

¹⁸⁹ *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952).

¹⁹⁰ *Gibson v. Florida Legislation Investigation Committee* 372 U.S. 539, 556-67 (1963).

ideas. First, all litigation in the American judicial system, as well as the entire legal process, is surrounded by uncertainty. That is, it is nearly impossible to accurately predict how police, judges or juries will react to certain activities, or, at least, it is impossible to assume that these reactions will be consistent across people and geography. A very basic example might be the impact of the racial and economic make-up of a jury on the outcome of a case, where, hypothetically, an all-white jury might view a crime differently than a mixed-race jury does. Second, the falsely justified limitation of speech is more harmful to society than a falsely justified allowance. Given the unavoidable occurrence of either false conviction or false acquittal of a particular person's expression—that is, inhibiting expression when it should be allowed or allowing expression when it should be prohibited—wrongful limitation is, *a priori*, a more serious error.¹⁹¹ In other words, it is more preferable to allow speech than prevent it, thus freedom of speech holds a preferred position in a legal system prone to uncertainty and error.

At its core, the chilling effect is a deterrence wherein a person's participation in a protected activity is prevented either by fear or penalty. It is worth distinguishing between two types of chilling. The first is the chilling of unprotected speech such as obscenity. By crafting legislation that has the capacity to penalize such speech, the Court has essentially created a chilling effect. However, this chilling effect is acceptable because the speech is unprotected and worth stifling. On the other hand, chilling constitutionally protected speech is unacceptable and has been labeled *invidious* chilling.¹⁹² First Amendment theory generally suggests that speech should, in most cases, be encouraged. This is how society works through important issues, participates in self-governing, and prevents ideas from moving underground and radicalizing. In this view, free speech is an

¹⁹¹ Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the Chilling Effect," 58 *B.U.L. Rev* 685 (1978), 686.

¹⁹² *Ibid.*, 690.

affirmative value that should be allowed in nearly all situations. To indirectly inhibit such speech, in part or whole, results in a chilling effect. Schauer defines a chilling effect as occurring “when individuals seeking to engage in activity protected by the First Amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity.”¹⁹³ The result of the chilling effect is that speech that should, or would, have otherwise been expressed is not.

Because a chilling effect is necessarily an indirect consequence, it is worth investigating the ways such an effect comes about. In much the same way that decision-makers adopt a precautionary logic in the face of uncertainty, the chilling effect can also be understood as a reaction to uncertainty. Any time a person engages in speech they make a calculation that takes into consideration a number of variables. Importantly, in the context of chilling, people take into account the perceived likelihood that a court might erroneously find them guilty of illegal activity. This likelihood of error combines with the potential harm from punishment, e.g. imprisonment under the Espionage Act, to create fear in the speaker. Additionally, the likelihood of error increases in proportion to the complexity of the legal concepts involved. Further, as activities move closer to the margins of illegality, the chance of error increases as well. For example, there is little doubt that stating “I want Eisenhower to be president” will be protected under the First Amendment and, therefore, the chance of erroneous conviction is minimal. On the other hand, stating “Someone ought to assassinate Eisenhower” is much closer to the margins of illegality and the estimation of likelihood of erroneous conviction is more difficult. This equation, $(error) \times (harm) = fear$, can be used to understand the chilling effect, where fear has a positive relationship with chilling. That is, when people are afraid that they will be erroneously convicted of breaking a law (or that their speech will not be protected) and the consequences of such

¹⁹³ Ibid., 693.

conviction are harmful, they will be fearful of speaking. This fear can also increase if a person knows or believes that an erroneous judgment might lead to extralegal penalties such as loss of job or friends. One ready example of extralegal penalties is the history of Hollywood blacklisting during the Red Scare.

In much the same way that a decision-maker with precautionary logic becomes suspicious and paranoid because of the uncertain consequences of potential worse-case scenarios, the speaker takes into consideration the uncertainty of the legal system and the harm of erroneous conviction in his or her assessment of fear of speaking and will self-censor based on that assessment. What is unstated thus far is the complex interplay of uncertainty between decision-makers and speakers. As will be shown in the following chapters, when decision-makers are uncertain, they work to stop the source of that uncertainty and this makes an already confusing legal environment even more so, as the speaker attempts to predict how the decision-maker will evaluate their speech. For example, Senator Joe McCarthy, who aggressively led a major anticommunist campaign, was uncertain about the threat and consequences of Communism, which led him to adopt a precautionary logic that eventually pushed him into paranoia regarding the threat of Communism in the United States. He worked to stop the source of his uncertainty, Communism, in such a way that it confused the legal environment, and this, in turn, led to many people self-censoring speech that should have been protected. The threat of harm, both legal and extralegal, that could result from erroneous conviction outweighed the perceived benefit of speech for many individuals who chose to self-censor to avoid trouble. Thus, the uncertainty and precautionary logic of decision-makers can directly impact the uncertainty of the speaker, leading to a chilling effect vis-à-vis self-censorship.

One final piece to the chilling effect puzzle comes from Rubin's¹⁹⁴ insight into the impacts of stigmatization. He suggests there are situations where the government can stigmatize a legal activity in such a way that it causes a chilling effect. In his examination of the 1983 Smith Guidelines that were developed to curb illegal FBI activity, Rubin found that photographing participants at public gatherings by FBI agents is allowed. He suggests that this activity actually inhibits constitutionally protected speech because it inevitably discourages some people from participating in such gatherings or prevents certain ideas from being shared by participants present at such gatherings. In this situation there is no threat of arrest or conviction by the FBI, but speech is still chilled. He posits that this chilling is an effect of stigmatization: "studies indicate that overt intelligence gathering has the effect of labelling as deviant and illegitimate the behavior of those involved in protected political expression."¹⁹⁵ When the government partakes in the overt surveillance of people and groups in the United States it signals to the general public that the government has made a judgment that the activity being surveilled is not legitimate speech or political activity. In other words, the government stigmatizes speech and behavior through its overt surveillance. The result of this stigmatization is the chilling of speech that "results from people avoiding social situations that they have so categorized as threatening."¹⁹⁶

Nearly a decade earlier it was pointed out that "surveillance invades the Plaintiffs' protected political activities and [keeping] files and dossiers on persons and organizations engaged in such protected activity [causes] an unconstitutional chilling effect upon the willingness of citizens to exercise their First Amendment rights of political protest."¹⁹⁷ Thus, even while acting

¹⁹⁴ Mitchell Rubin, "The FBI and Dissidents: A First Amendment Analysis of Attorney General Smith's 1983 FBI Guidelines on Domestic Security Investigations," 27 *Ariz. L. Rev.* 453 (1985).

¹⁹⁵ *Ibid.*, 457.

¹⁹⁶ *Ibid.*

¹⁹⁷ Frank Askin, "Surveillance: The Social Science Perspective," 4 *Colum. Hum. Rts. L. Rev.* 59 (1972), 60.

within the law, state agents can chill what should be protected speech simply by taking photographs of speakers exercising First Amendment rights.

It is important to acknowledge the impact that stigmatization has on chilling speech because, as will be shown below, the Fourth Amendment contains very few safeguards against agent infiltration into legal political groups and gatherings. Understanding the impact that government surveillance has on chilling speech is also important when taking into consideration the social science perspective, which suggests that overt surveillance of an activity indicates that activity as illegitimate. The broad impacts of government surveillance on constitutionally protected speech, which is the focus of the remaining chapters of this dissertation, can be understood in a way that is much more complex than the theories of the dual state or precautionary logic would alone permit when applying the theories of the chilling effect and stigmatization to such surveillance activities.

The Fourth Amendment

As discussed in the previous chapter, the Fourth Amendment was largely influenced by Colonial resistance to general warrants and writs of assistance. Today, the Fourth Amendment is widely understood to protect citizens from invasions of privacy by requiring the use of warrants and to require that agents of the state show probable cause before they conduct most searches or seize effects.¹⁹⁸ What is less well understood, however, is the nuanced interpretation of the Fourth Amendment that suggests the concern in instituting the Amendment was not strictly with privacy, but more crucially to preserve “the people’s authority over government—the people’s sovereign

¹⁹⁸ U.S. Constitution Amendment IV: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause...”

right to determine how and when government may intrude into the lives and influence the behavior of its citizens.”¹⁹⁹ To understand the Fourth Amendment only in terms of expectations of privacy as determined by the Court shifts power and authority away from the public and gives it to government. Similarly, it was the role of the people to protect individuals and society “against a possibly unrepresentative and self-serving officialdom.”²⁰⁰ However, under the current understanding of the Fourth Amendment, where the power to determine if a warrant is just is effectively transferred from the people and juries to judges and the government and its agents, those agents are “effectively immunized...from liability.”²⁰¹

One major problem that has resulted from this power shift is that the Court has interpreted the Constitution to impose nearly no restraints on the ability of the government to carry out overt surveillance and plant informants in legal political groups that exercise constitutionally protected rights of speech, assembly and association. This means that “secret police agents may surreptitiously gain entrance to any home or office and gather information, even though the government lacks reasonable grounds for believing that a crime has occurred. With no evidence of criminality, the government can videotape and audiotape actions and conversations that occur in the presence of covert spies.”²⁰² In Maclin’s view, it is necessary to first understand that the Fourth Amendment aimed to keep in check the discretionary powers of government to invade the privacy and security of individuals if the Court is to accurately consider whether or not government informants and undercover spies are constitutionally restrained in surveillance activities.²⁰³ The

¹⁹⁹ Raymond Shih Ray Ku, “The Founders’ Privacy: The Fourth Amendment and the Power of Technological Surveillance,” 86 *Minn. L. Rev.* (2001-2002), at 1326.

²⁰⁰ Akhil Amar, *The Bill of Rights: Creation and Reconstruction*, (Yale Univ. Press: 1998), 68.

²⁰¹ Ku, *The Founders’ Privacy*, 1339.

²⁰² Tracey Maclin, “Informants and the Fourth Amendment: A Reconsideration,” 74 *Wash. U. L. Q.* (1996), 576.

²⁰³ *Ibid.*, 584-585.

Court did maintain this understanding in the *Gouled* decision. In *Gouled v. United States*²⁰⁴ a government agent and friend of Felix Gouled asked to use Gouled's office to make a personal phone call. While Gouled was out of the office, allowing the agent to make the call in private, the agent "without warrant of any character seized and carried away several documents."²⁰⁵ The documents were used to build a fraud case against Gouled, who contested that this Fourth Amendment protections were violated by the warrantless intrusion. The Court found that there was indeed a violation, establishing that "a covert and planned government entry into a home or office, whether by force or stealth, could not escape Fourth Amendment scrutiny."²⁰⁶ In many subsequent cases dealing with infiltration, the Court has opted for a narrow interpretation of *Gouled*. For example, in *Olmstead v. United States*,²⁰⁷ a case dealing with telephone wiretapping, the Court ruled that the Fourth Amendment did not protect against such invasions because words were not tangible, thus not subject to search and seizure. Further the Court declared that when individuals use a telephone they intend to project their voice for others to hear. This understanding of words and intrusion would eventually be overturned by *Katz v. United States*.²⁰⁸ Though *Katz* is understood as protecting individuals from wiretaps, there has been no such case that protects groups or individuals from government agent infiltration since *Gouled*. After *Gouled*, cases such as *United States v. Aguilar*, in which the Court found that the "authority of the government to infiltrate is not diminished by the fact that the target of its spying is exercising First Amendment

²⁰⁴ 255 U.S. 298 (1921)

²⁰⁵ *Ibid.*, 304.

²⁰⁶ Maclin, *Informants and the Fourth Amendment*, 588.

²⁰⁷ 277 U.S. 438 (1928).

²⁰⁸ 389 U.S. 347 (1967).

rights of free speech or religious freedom,”²⁰⁹ have permitted agent infiltration and spying. What the Court, in general, has suggested is that surveillance is legal unless it is explicitly forbidden.

There are numerous implications resulting from the very limited protections the Court has afforded the people against infiltration and surveillance. The chilling effect is one, especially when considered along with the social science perspective of stigmatization. However, there is another important harm that comes from such activities: surveillance by government and private actors threatens intellectual privacy. When agents participate in surveillance and infiltration it can have a chilling effect that extends beyond that discussed earlier in this chapter. Professor Neil Richards developed the theory of intellectual privacy, which suggests

that new ideas often develop best away from the intense scrutiny of public exposure; that people should be able to make up their minds at times and places of their own choosing; and that a meaningful guarantee of privacy—protection from surveillance or interference—is necessary to promote this kind of intellectual freedom. It rests on the idea that free minds are the foundation of a free society, and that surveillance of the activities of belief formation and idea generation can affect those activities profoundly and for the worse.²¹⁰

Thus, Richards combines the interests of the First Amendment and the ideals of the Fourth Amendment to suggest that when the Fourth Amendment fails to protect the privacy of individuals and groups engaged in constitutionally protected activities, the First Amendment is also violated under the theory of intellectual privacy. If citizens are unable to freely discuss ideas in private because their political group has been infiltrated by a state agent, their ability to craft new ideas, develop new or different understandings about politics, society, etc., and their capacity to work for change through constitutionally protected channels, then not only is the individual worse off, but the entire society suffers because the marketplace of ideas becomes mutilated. Interference in

²⁰⁹ Maclin, *Informants and the Fourth Amendment*, 576 n. 16.

²¹⁰ Neil Richards, “The Dangers of Surveillance,” *Harv. L. Rev.* 126 (2012), 1946.

intellectual privacy, through surveillance and infiltration of political groups, is one of the most frequently used tactics in the intelligence community. For example, of the 17,528 domestic intelligence investigations the FBI carried out against individuals in 1974, eighty-three percent involved the use of informants of some sort.²¹¹ In its efforts to disrupt intellectual privacy, the FBI, through counterintelligence programs against groups such as the Socialist Workers Party, actively infiltrated in an effort to break down internal organization and prevent the group from accessing resources, as well as to hinder the efforts of individuals to participate in group activities.²¹² Thus, it becomes apparent that the FBI actively sought to chill constitutionally protected activity such as political organizing, as well as to disrupt the intellectual privacy of group members. The consequences of such work by the intelligence community is difficult to estimate because there is no way to know whether a group like the Socialist Workers Party might have changed ideologies or material conditions if they were allowed intellectual privacy and the ability to engage in constitutionally protected speech.

Throughout this dissertation, the dual state theory will be combined with First and Fourth Amendment theory, as well as with the theory of intellectual privacy. These theories each look at domestic government surveillance differently and combining their strengths creates a robust theoretical lens for this dissertation.

²¹¹ Church Committee, Book II, at 184.

²¹² This will be discussed in further detail below.

CHAPTER FOUR

THE NATIONAL SECURITY AGENCY: SHAMROCK AND MINARET

Following the attack on Pearl Harbor, the United States sought to create a number of formal intelligence agencies. First came the creation of the Central Intelligence Agency in 1947. Then came the National Security Agency (NSA), which was created by President Truman in 1952. At the time, intelligence operations in the United States were spread amongst several disparate agencies. In his creation of the NSA, Truman hoped to put much of this intelligence gathering under one roof, in an effort to increase efficiency and better protect national security. As a member of the intelligence community, the NSA is within the jurisdiction of the Department of Defense.

In the United States, intelligence agencies have historically been hidden from public view, from President George Washington's Culper spy ring in New York City to the War Department's Plant Protection Section. Intelligence as a pursuit, since the Revolution, has been unique in the degree of protective shielding it is afforded. This has numerous implications for the functioning of democracy, given the inability of the governed to give their consent for particular agency operations. That is, the citizens of the United States have historically been required to rely on the judgments and good intentions of intelligence officers.²¹³ Given the lack of citizen oversight, it seems it was only a matter of time before many of these intelligence agencies began to stray from their original missions. Unfortunately, the result of such "mission creep" turned out to be violations of the civil liberties of U.S. citizens. In much the same way that the Pinkertons, the Plant Protection Section, and the Army had earlier carried out tasks that violated First and Fourth Amendment

²¹³ Loch Johnson "Congressional Supervision of America's Secret Agencies: The Experience and Legacy of the Church Committee," *Public Administration Review* 64 no. 1 (2004), 4.

protections of citizens, the NSA, CIA and FBI during the mid-twentieth century carried out a number of domestic surveillance operations in direct violation of those civil liberties. Reliance on these organizations to police themselves, combined with the absence of punishment for legal violations, made the American public vulnerable to abuses of its civil liberties.

The story of these abuses, and the operations carried out by the NSA, FBI, and CIA, which perpetuated such abuses, is the subject of this and the following two chapters. From the end of World War II until 1975 these three agencies participated in the interception of telegrams, mail, and phone calls, infiltrated legal political organizations, burgled the homes of politicians, and carried out physical surveillance operations on students, authors, scholars, and journalists. These actions remained hidden, in the legal sense, until the Watergate scandal in 1972 triggered major Congressional inquiries into the actions and scopes of these agencies. The impact of the scandal was compounded by a number of major news stories in which the NSA, FBI, and CIA were accused of spying on citizens. As a result, the Senate Special Select Committee to Investigate Intelligence Activities, or the Church Committee, was created in 1975. In the House, the Permanent Select Committee on Intelligence, or the Pike Committee, was created that same year. Both committees were charged with investigating intelligence community abuses, with the Church Committee focusing on the violation of rights of citizens and the Pike Committee examining the intelligence community more broadly, including examination of budgets and operations. Additionally, the Government Information and Individual Rights Subcommittee of the Committee on Government Operations, better known as the Abzug Subcommittee, was created and it was tasked with investigating the NSA's communication surveillance tactics and legality.

The Church, Pike, and Abzug investigations resulted in public hearings where major players in the intelligence community were called upon to testify about the actions of their agencies

and whether or not those actions were justified and legal. Though most of the committee members did agree that the agencies had violated civil liberties, those agencies ultimately faced no meaningful punishment. In this way, the NSA, FBI, and CIA can be understood as members of the American Prerogative State. During the committee hearings, evidence was presented that proved the agencies violated laws and civil liberties, but the directors of the respective organizations were not even dismissed from their positions, much less punished criminally. As suggested by the dual state theory, the Prerogative State is immune from punishment, and the intelligence community is immune from real legal consequences.

To fully understand the NSA as a member of the Prerogative State, this chapter follows the historical development of communications and signals intelligence in the United States. Beginning with the country's first cryptanalytic division, the chapter will describe the NSA's predecessors as well as the NSA itself. Having established the history of the NSA, this chapter then examines two major operations carried out by the agency: SHAMROCK and MINARET. The former operation dealt with the interception of telegrams and the latter was an operation that put citizens on a watch list. Both operations violated numerous laws, as well as civil liberties. Following the description of these operations, the Church and Pike Committees will be discussed, including the respective findings of each. Finally, an examination of case law and constitutional law will provide the necessary legal background for determining how the NSA violated the law and how the agency can be understood as a member of the Prerogative State.

Before the National Security Agency

Before June 1917 the United States government had no department devoted to cryptanalytic²¹⁴ activities, though this work was being done by small patriotic groups essentially working as contractors for the War, Navy, State, and Justice Departments.²¹⁵ It was in June 1917 that the War Department commissioned Herbert Osborne Yardley, a telegrapher at the State Department,²¹⁶ to direct a small unit known as Military Intelligence – Section 8, or MI-8.²¹⁷ MI-8 grew rapidly after its creation. By autumn 1917, MI-8 had an increased staff and its duties were subdivided into six sections: 1) Code and cipher solution; 2) Code and cipher complication; 3) Training; 4) Secret inks; 5) Shorthand; 6) Communication.²¹⁸ By mid-November 1917, the unit consisted of “18 officers, 24 civilians, cryptographers, and cryptanalysts, and 109 typists and stenographers.”²¹⁹ Given the size and perceived importance of the unit, Yardley was able to get approval from the State and War Departments for “a permanent organization for code and cipher investigation and attack”²²⁰ after the end of World War I.

After the war, the unit continued to be supported by state funds. However, from the outside, the organization did not appear tied to the government. In fact, very few knew about the unit’s existence and those that did came to call it “The Black Chamber.”²²¹ The Black Chamber operated

²¹⁴ There is a difference between cryptanalysis and cryptoanalysis – the former is understood as breaking codes and ciphers, the latter understood as making codes and ciphers.

²¹⁵ James P. Finley, *U.S. Army Military Intelligence History: A Sourcebook*, (Fort Huachuca, AZ: U.S. Army Intelligence Center & Fort Huachuca, 1995), 152.

²¹⁶ *Ibid.*

²¹⁷ Committee on Government Operations, *Interception of International Telecommunications by the National Security Agency*, (Diane Publishing Co. 1953), 5.

²¹⁸ For a full account of duties associated with each subsection, see: Finley, *U.S. Army Military Intelligence History*, 152.

²¹⁹ *Ibid.*

²²⁰ *Interception of International Telecommunications*, 5, citing: Army Security Agency, *Historical Background of the Signal Security Agency Vol. III* (April 12, 1946), 74.

²²¹ *Ibid.*

from 1919 until 1929 under the codename “Code Compilation Company.”²²² Though the code breaking efforts of the unit were “highly successful during the 1920s and... funded accordingly,”²²³ when Secretary of State Henry L. Stimson “took over in 1929... he objected to this form of intelligence... and disenfranchised the unit.”²²⁴ Following the dissolution of the Black Chamber, Yardley wrote a book titled *The American Black Chamber*, which was published in 1931. In his book, Yardley pointed out the many successes of the Black Chamber’s analysis of telegrams, but did not comment on how the unit received its source material. However, in a letter to his publisher dated March 18, 1931, Yardley “revealed that those cablegrams [telegrams] had been supplied by international telegraph companies.”²²⁵

As the Black Chamber faced dissolution, another intelligence service was being developed: The U.S. Army Signal Intelligence Service (Signal Intelligence Service). This unit was also cryptological and continued under this name until 1942. Though the Second World War differed in many ways from the first, quite notable was the emergence of “Electronic Warfare and Electronic Intelligence with the introduction of a range of electronic breakthroughs, foremost among them the use of long-range radio signals, or radar, to guide planes and ships to their target.”²²⁶ The Signal Intelligence Service was tasked with exploiting “radio communications by intercepting them and passing them along to the code-breakers... Using high frequency direction-finding receivers, the source of the message could be determined and the quantity of the message traffic could be analyzed to detect enemy build-ups and deployment. A definite military advantage

²²² Ibid.

²²³ Finley, *U.S. Army Military Intelligence History*, 163.

²²⁴ Ibid; Stimson famously stated that “Gentlemen do not read other Gentlemen’s mail.”

²²⁵ *Interception of International Telecommunications*, 7.

²²⁶ Finley, *U.S. Army Military Intelligence History*, 163.

was handed to the allies by signals intelligence.”²²⁷ The Signal Intelligence Service was renamed the Signal Security Service in 1942, and then the Signal Security Agency in 1943. Eventually, the missions of the Signal Security Agency were taken over when the Army Signal Security Agency was formed in September 1945.

Operation SHAMROCK

Title 47 U.S.C. 606²²⁸ defined the President’s authority and power during the World War II. These war powers allowed for military censors to intercept international communications traffic. Through this “wartime censorship law,”²²⁹ “copies of pertinent foreign traffic were turned over to military intelligence.”²³⁰ Further, the Army “had the authority to read and censor all telegram traffic going into and out of the United States for the purpose of identifying persons divulging military secrets and committing espionage.”²³¹ During this time most telegraphs were routed through three carriers: ITT World Communications (ITT), RCA Global (RCA), and Western Union Telegraph Company (Western Union). On August 18, 1945, the Army Signal Security Agency (ASSA) sent two representatives to New York to “make the necessary contacts with the heads of the Commercial Communications Companies in New York, secure their approval of the interception of all Governmental traffic entering the United States, leaving the United States,

²²⁷ Ibid.

²²⁸ Title 47 – Telegraphs, Telephones, and Radiotelephones: Section 606, War Powers of the President, accessed April 25, 2014 at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title47/pdf/USCODE-2011-title47-chap5-subchapVI-sec606.pdf>

²²⁹ United States Senate, Ninety-Fourth Congress, *Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans: Book III Final Report of The Select Committee To Study Governmental Operations with Respect to Intelligence Activities*, (Washington D.C.: U.S. Government Printing Office – April 23, Under Authority of the Order of April 14, 1976), 767 [Cited as: Church Committee, *Book III*.]

²³⁰ Ibid.

²³¹ David W. May, Lieutenant Colonel U.S. Army. “Tapping in the Wiretap Debate.” United States Army War College. (Carlisle Barracks, PA: 2012), 7.

or transiting the United States, and make the necessary arrangements for this photographic intercept work.”²³²

These representatives from ASSA first contacted an official at ITT, who “very definitely and finally refused”²³³ the proposal. Following this refusal, the representatives sought the cooperation of Western Union. The vice president of the company agreed to cooperate so long as the U.S. Attorney General had not ruled the intercepts illegal—he had not. With the Western Union agreement in place, the representatives returned to ITT on August 21, leveraged the agreement with Western Union, and convinced the ITT president to cooperate. Finally the Army representatives met with the president of RCA, who was willing to cooperate as long as the Attorney General ruled the program legal. The resulting program would become known as Operation SHAMROCK.²³⁴

The Army representatives reported to their superiors that there seemed to be concern among the telegraph companies about the legality of turning over all telegraphs that were either being sent to a foreign country from the U.S., received in the U.S. from a foreign country, or sent from a foreign country to a foreign country but routed through the U.S. The representatives reported, “two very evident fears existed in the minds of the heads of each of these communications companies. One was the fear of the illegality of the procedure according to present FCC regulations.... The second fear uppermost in the minds of these executives is the fear of the ACA which is the communications union. This union has reported on many occasions minor

²³² Ibid., 768.

²³³ Ibid.

²³⁴ Also known as Project SHAMROCK and the SHAMROCK Operation.

infractions...”²³⁵ Even though there was some hesitation, ITT and Western Union began participating in the program starting on September 1, 1945, and RCA on October 9.²³⁶

RCA agreed to allow plain-clothed Army personnel to photograph foreign telegraphs (traffic) that passed over its facilities in New York, Washington, and San Francisco, though several alternative locations and procedures were discussed. The Army also proposed tapping RCA’s overseas lines or having RCA devote manpower to sorting the traffic and turning over that which was relevant. The first alternative was dismissed because it was understood to be too difficult, and the second was dismissed because the company did not feel comfortable involving employees in the operation. RCA did afford the Army an office onsite to sort the foreign traffic. After sorting, the messages were either sent over teletype to the New York office or taken to the San Francisco and Washington offices for microfilming.

Both RCA and ITT participated to the fullest extent possible. Sidney Sparks, the vice president for RCA noted that the company “turned over to the representatives of the Army Security Agency perforated tapes of traffic originating and terminating in the New York City tielines connected with certain agencies that they wished to scrutinize... All of the perforated tape copy inbound and outbound was turned over to them as an alternative to other procedures which the Army proposed that we found unacceptable...”²³⁷ Similarly, ITT also allowed the Army full access to all incoming, outgoing and transiting telegraphs that passed through its facilities in the U.S. and involved international communications. While RCA provided the perforated tapes to the Army,

²³⁵ Ibid.

²³⁶ *Interception of International Telecommunications*, 11.

²³⁷ *Interception of Nonverbal Communications*, 211-212.

ITT “agreed to record all such messages on microfilm, which would then be turned over to the Army Messengers.”²³⁸

Like RCA, Western Union agreed to turn over traffic to a plain-clothed representative. However, unlike RCA and ITT, Western Union insisted that its employees sort and handle the traffic before the ASSA could have access to it. Whereas RCA and ITT agreed to turn over all international traffic, Western Union turned over only the international traffic it received from one particular, undisclosed country. Western Union was not only more reserved in its information divulgence, by 1963 the company would refuse to participate in any capacity.

As SHAMROCK continued through the late 1940s, ITT, RCA, and Western Union all sought reassurance that they were not breaking the law. Secretary of Defense James Forrestal met with representatives from each company in 1947 to assure them “that if they cooperated with the Government in this program they would suffer no criminal liability and no public exposure, at least as long as the current administration was in office. They were told that such participation was in the highest interests of national security.”²³⁹ In 1949, the companies asked Forrestal’s successor, Louis D. Johnson, for reassurance that the companies would be protected. Johnson told them that both Attorney General Clark and President Truman had given approval. SHAMROCK was originally conducted by ASSA and when the Armed Forces Security Agency (AFSA) was created in 1949, it was placed in charge of SHAMROCK. Three years later, the newly formed National Security Agency (NSA) assumed control over the operation.

²³⁸ *Interception of International Telecommunications*, 12.

²³⁹ United States Senate, Ninety-Fourth Congress: First Session, *Hearings Before the Select Committee to Study Governmental Operations with Respect to Intelligence Activities Vol. 5: The National Security Agency and Fourth Amendment Rights*, (Washington D.C.: U.S. Government Printing Office October 29 and November 6, 1975 – Printed for the use of the Select Committee To Study Governmental Operations With Respect to Intelligence Activities), 58 [Cited as: *Church Committee Hearings, Vol. 5, 58*].

On October 24, 1952, President Truman sent a top secret memo to the Secretary of State, Dean Acheson, and Secretary of Defense, Robert Lovett. In the memo, Truman, with the goal of utilizing all the available resources for communications intelligence (COMINT) activities, allowed for the creation of the National Security Agency (NSA). Truman outlined the mission and responsibilities of the NSA:

The COMINT mission of the National Security Agency shall be to provide an effective, unified organization and control of the communications intelligence activities of the United States conducted against foreign governments, to provide for integrated operational policies and procedures pertaining thereto. As used in this directive, the terms ‘communications intelligence’ or ‘COMINT’ shall be construed to mean all procedures and methods used in the interception of communications other than foreign press and propaganda broadcasts and the obtaining of information from such communications by other than the intended recipients, but shall exclude censorship and the production and dissemination of finished intelligence.²⁴⁰

This executive directive apparently resisted explicit delegation of authority by only vaguely defining communications intelligence and the types of information the NSA was restricted from collecting. The NSA was not only charged with carrying out COMINT, the agency was also responsible for collecting signals intelligence (SIGINT), a term used to describe the interception of radiowaves or other broadcast signals used for communication. The NSA was to operate in secret and establish surveillance networks to be exploited by intelligence analysts.

According to Lieutenant General Lew Allen, Jr., former Director of the National Security Agency, the official establishment of the NSA came from the Secretary of Defense, “pursuant to the congressional authority delegated to him in section 133(d) of title 10 of the United States Code.”²⁴¹ Further, “the Congress enacted Public Law 86-36 which provides authority to enable the

²⁴⁰ Truman, Harry S. “Top Secret memorandum for Secretary of State and Secretary of Defense, Subject: Communications Intelligence Activities,” October 24, 1952.

²⁴¹ *Church Committee Hearings, Vol. 5, 7.*

NSA as the principal agency of the Government responsible for signals intelligence activities, to function without disclosure of information which would endanger the accomplishment of its functions.²⁴²

Unlike other intelligence agencies, the NSA did not have a statute that established “the permissible scope of its responsibilities.”²⁴³ This resulted in the creation of an agency guided by executive directives, which often failed to define exactly what technical and intelligence information the NSA was authorized to collect.²⁴⁴ However, in 1958 a National Security Council Intelligence Directive²⁴⁵ outlined the functions of the NSA for the first time:

For the purpose of this directive, the terms ‘Communications Intelligence’ or ‘COMINT’ shall be construed to mean technical and intelligence information derived from foreign communications by other than the intended recipients.

COMINT activities shall be construed to mean those activities which produce COMINT by the interception and processing of foreign communications passed by radio, wire, or other electromagnetic means, with specific exceptions stated below, and by the processing of foreign encrypted communications, however, transmitted. Interception comprises search, intercept, and direction finding. Processing comprises range estimation, transmitter operator identification, signal analysis, traffic analysis, cryptanalysis, decryption, study of plain text, the fusion of these processes, and the reporting of results.

COMINT and COMINT activities as defined herein shall not include (a) any intercept and processing of unencrypted written communications, press and propaganda broadcasts, or (b) censorship.²⁴⁶

It appears, then, that the exclusion of *unencrypted* written communications would prohibit the NSA from intercepting telegrams. That interceptions of such communications nevertheless took place could be interpreted as a sign that the agency was lacking oversight—and this lack of

²⁴² Ibid.

²⁴³ Ibid., 1.

²⁴⁴ Ibid.

²⁴⁵ National Security Counter Intelligence Directive number 6, September 15, 1958

²⁴⁶ Quoted in: *Interception of International Telecommunications*, 13.

oversight would become one of the key concerns and target of recommendations in both the Church and Abzug Committee investigations.

When SHAMROCK began in 1945, it was assumed the operation would cease with the conclusion of World War II. Instead, it gained traction with the establishment of the NSA. Technically, Operation SHAMROCK was the “code name under which the cable companies made most of their international telecommunications traffic available to the NSA, and to a lesser extent to the FBI.”²⁴⁷ This was a

message-collection program in which the Government persuaded three international telegraphy companies, RCA Global, ITT World Communications, and Western Union International, to make available in various ways certain of their international telegraph traffic to the U.S. Government. For almost 30 years, copies of most international telegrams originating in or forwarded through the United States were turned over to the National Security Agency and its predecessor agencies.²⁴⁸

The NSA did not need to utilize advanced technology or methods to intercept these telegraphs. Instead, telegraph companies opted to cooperate with the Army in the 1940s and, with the exception of Western Union, that cooperation continued until the operation was terminated.

The NSA received microfilm and paper tape from 1953 to 1963. RCA and ITT made the transition to magnetic tape in 1963. The transition to this new technology caused “the character of the SHAMROCK operation [to change] markedly.”²⁴⁹ By 1964 the NSA was able to electronically sort data rather than doing it by hand with paper tape or microfilm. This transition took the NSA less than a year to accommodate and embrace. The most important aspect of the transition was the increased sorting speed that magnetic tape provided over paper tape. The statistics vary, but IBM’s Wayne Winger suggests that 133 characters per second was a “good” speed for paper tape reading.

²⁴⁷ *Interception of International Telecommunications*, 14.

²⁴⁸ *Church Committee Hearings, Book 5*, 58.

²⁴⁹ *Ibid.*, 775.

In contrast, the first marketed magnetic tape drive from IBM operated at 7,500 characters per second, or 56 times faster than paper tape. Additionally, space requirements decreased significantly when using magnetic tape compared to paper tape: “Even at the first working density of 100 bits per inch on a half-inch wide tape, a 10.5 inch diameter reel of tape could hold the equivalent of more than 35,000 punched cards.”²⁵⁰ The transition to a new, more efficient technology, allowed the NSA to not only capture and store more information more quickly and compactly, it also permitted the agency to sort through the data with greater speed. Before magnetic tape, there were physical constraints to the amount of information the NSA could collect, transport, and inspect. After adopting the new technology those restraints were lifted, paving the way for more extensive surveillance.

From 1964 to 1966 RCA’s magnetic tapes were brought to Fort Meade, Maryland each morning and returned to New York City later the same day. Once ITT began producing records on magnetic tape in 1965, the NSA felt that retrieving and returning the tapes was too burdensome. To improve efficiency, the NSA sought to rent a facility in New York City that could be used as a tape processing and duplicating site. The deputy director of the NSA in 1966 was Dr. Louis W. Tordella, and he “requested the CIA provide ‘safe’ space where this operation could be conducted.”²⁵¹ The CIA complied and rented an office space under the guise of a television tape processing company in lower Manhattan and designated the project LPMEDLEY.²⁵² This continued until August 1973 when CIA General Counsel became concerned of possible illegalities

²⁵⁰ IBM Archives: Fifty Years of storage innovation, http://www-03.ibm.com/ibm/history/exhibits/storage/storage_fifty.html, accessed April 24, 2014.

²⁵¹ *Church Committee Book III*, 775.

²⁵² *Ibid.*

regarding any CIA operation in the United States. After this, the NSA moved its operation to a different office space in Manhattan until the termination of SHAMROCK.²⁵³

SHAMROCK continued until May 1975, when it was halted by Secretary of Defense Donald Rumsfeld. After terminating the operation, President Ford, on the advice of Rumsfeld and Chief of Staff Dick Cheney, extended Executive privilege to the participating companies, shielding them from any public testimony in the future.²⁵⁴

During the thirty years that SHAMROCK was operational, it was quite fruitful for the intelligence community, especially considering that from 1971 to 1974, the three companies that turned over their telegraph messages to the NSA carried 94.9 percent of all international telegraph messages in and out of the United States.²⁵⁵ At its peak, SHAMROCK was funneling approximately 150,000 telegrams every month to the NSA,²⁵⁶ providing many benefits for the government while invading the privacy of many citizens. In fact, “the ‘take’ from Operation SHAMROCK—and from other NSA intercept programs—was used by the NSA in the early 1960s and early 1970s to compile files on American citizens. The NSA maintained a ‘watch-list’ of names of individuals and organizations against which the ‘take’ was sorted.”²⁵⁷ This watch list program was a consequence of a second NSA project known as MINARET.

²⁵³ Ibid.

²⁵⁴ Siobhan Gorman, “A Look at The Telephone Surveillance Issue,” *Baltimore Sun*, May 12, 2006. Accessed at http://articles.baltimoresun.com/2006-05-12/news/0605120210_1_surveillance-phone-calls-major-phone-companies/2

²⁵⁵ *Interception of International Telecommunications*, Citation #44, 2.

²⁵⁶ Church Committee, *Book III*, 765.

²⁵⁷ *Interception of International Telecommunications*, 14.

MINARET

The 1960s was a tumultuous decade in the United States. McCarthyism had come to an end, but the fear that there could still be groups funded by the Soviet Bloc persisted. Additionally, a number of social movements came into their own, including the women's movement, environmental movement, gay rights movement, free speech movement, and, importantly for this chapter, the anti-war and civil rights movements. The United States officially entered the Vietnam War in 1965, causing major protests against the war, the draft, and, more generally, American military power. Just one year later the Black Panther Party was founded. These two events, in the eyes of the government, were exceptionally dangerous to the Johnson and Nixon administrations. Perhaps due to the precautionary logic of these two presidents, the NSA was tasked with ramping up intelligence efforts, with special attention paid to civil rights activists and war protesters. These efforts would eventually warp into the creation of a watch list, which targeted U.S. citizens engaged in lawful and constitutionally protected political activities. This watch list program was known as MINARET

Project MINARET, a sister program to SHAMROCK, began on July 1, 1969 under President Nixon, with the U.S. heavily engaged in the war in Vietnam. The project gave authority to analysts to gather by-product intelligence from two primary sources: “(1) NSA’s interception of international commercial carrier (ILC) voice and non-voice communications [redacted] and (2) copies (or tapes) of international messages furnished to NSA by U.S. commercial communications carriers in the “Shamrock” operation.”²⁵⁸ In other words, the purpose of MINARET was to provide by-product intelligence to federal agencies and departments as requested by those entities. In

²⁵⁸ *Report on Inquiry into CIA-Related Electronic Surveillance Activities*, 26.

responding to such requests, the NSA was to assume that the request for intelligence was legitimate—that is, the NSA was not directly concerned with whether the request was within the legal scope of the requesting agency—and was supposed to deal exclusively with foreign communications. For MINARET, foreign communications were defined as any communication with one foreign terminal. This meant a communication from a foreign country to the U.S., from the U.S. to a foreign country, or from the U.S. to the U.S. if routed through a foreign country or terminal.

MINARET had special intelligence dissemination protocols to prevent the NSA from being identified as the source of the communication interceptions and dissemination.²⁵⁹ In effect, MINARET formalized the work the NSA had already been doing to intercept communications in efforts to understand if and how foreign actors were influencing protests and disturbances in the U.S., with special attention paid to Vietnam War protesters. What MINARET became was a “watch list” program, wherein the NSA intercepted communications, searched for keywords, actor names, and locations, and placed on the watch list American citizens and organizations.

The NSA defined two types of communications in relation to MINARET. First, was the domestic communications network, a “contiguous, switched (e.g., from wire to cable to microwave), automatic and self-routing [system]. Its wireless component was a multi-channel microwave carrier system capable of carrying up to 2,000 communications on some channels.”²⁶⁰ In contrast, international commercial radio-telephone communications were those “transmitted by

²⁵⁹ Ibid., 27

²⁶⁰ Ibid., 131

high-frequency, single or multi-channel telephony which enters the national communications network through what are known as ‘gateways.’”²⁶¹

The NSA voluntarily adopted the directive to focus on international communication. In other words, the decision to follow the “one-terminal rule” was discretionary. Of course, the NSA had the technical capacity to intercept all communications, including those that were purely domestic, but the agency believed that the one-terminal rule gave adequate protection for both the privacy of Americans and the legitimacy of the NSA. The upshot of this decision was that the international communications of Americans were treated the same as purely foreign communications, meaning they were intercepted, analyzed, and void of protection.

President Nixon took office on January 20, 1969 and by mid-summer he began to use the pool of intercepted communications information to illegally target specific Americans who were watch-listed. The McMillan memo lays out the activities MINARET sought to gather intelligence on and that could result in being placed on a watch list:

1. Foreign governments, organizations and individuals attempting to influence, coordinate or control U.S. organizations and individuals who might incite or foment civil disturbances, or otherwise undermine national security.
2. U.S. organizations or individuals engaged in activities which might result in civil disturbances or otherwise subvert the national security.
3. Communications from, to, or concerning groups and individuals [redacted].
4. Communications which indicated foreign contacts or connections with various assassins, [redacted].
5. Military deserters involved in the anti-war movement.²⁶²

²⁶¹ Ibid.

²⁶² Ibid., 26.

Given the types of activities with which the NSA was concerned, it is apparent that MINARET no longer focused exclusively on foreign communications or foreign citizens. American citizens were now being surveilled and placed on the watch list; over 1,600 U.S. citizens were placed on the watch list as a direct result of MINARET.

Expanding beyond its original scope, MINARET suffered mission creep in much the same way as SHAMROCK. This resulted in the NSA intercepting communications and discussions about peace concerts, the communications of the spouses of politicians, communications between journalists and their employers, and anti-war activists' requests for public speakers at rallies.²⁶³

Importantly, "the material which resulted from the "Watch List" was of little intelligence value; most intercepted communications were of a private or personal nature or involved rallies and demonstrations that were public knowledge."²⁶⁴ The information gathered on those who were placed on the watch list was subsequently shared with the FBI.

Given the dubious legal justifications of SHAMROCK and MINARET, investigations into their procedures, charters, and consequences were carried out by the Church and Pike Committees, as well as by the Abzug Subcommittee in 1975.

The Church Committee

SHAMROCK and MINARET were not the only operations in which the NSA had engaged, but they were the two programs on which the Church and Pike Committees focused their efforts. These investigations were the reaction to the concerns over abuses of power that the NSA may

²⁶³ Church Committee, *Book III*, at 108.

²⁶⁴ *Id* at 108-9.

have engaged in or was currently engaging in, concerns brought to the fore by the Watergate scandal. Senate Resolution 21, approved by a vote of 82-4 on January 27, 1975, required that a committee “investigate illegal, improper, or unethical activities” engaged in by intelligence agencies, and “decide on the need for specific legislative authority to govern operations of the National Security Agency.”²⁶⁵ This resolution established the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, better known as the Church Committee. Although Senate Resolution 21 was not up for debate, during the hearing there was debate about whether or not the results and conclusions of the Church Committee investigations should be made public. The Church Committee was chaired by Frank Church, with the Vice Chairman John G. Tower. Other Senators on the committee were Philip Hart (D-MI), Walter Mondale (D-MN), Walter Huddelston (D-KY), Robert Morgan (D-NC), Gary Hart (D-CO), Howard Baker (R-TN), Barry Goldwater (R-AZ), Charles Mathias (R-MD), Richard Schweiker (R-PA).

In his opening statement to the Committee, Chairman Church acknowledged that he believed the mission of the NSA was generally just, and the “value of its work to our national security has been and will continue to be inestimable.”²⁶⁶ He made sure to point out that the purpose of the committee was not to impair the NSA or to undermine the agency’s efforts. Rather, given what was discovered over the 5 month investigation of the agency, Church felt that the committee must recognize that if its members were to “remain true to [their] oath to uphold the Constitution and the laws of the land”²⁶⁷ the committee must not exempt the NSA from public

²⁶⁵ *Church Committee Hearings*, Vol. 5, 2.

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

accountability. Speaking on behalf of the committee, Church suggested there was a real danger in the NSA's ability to turn its technological capabilities against domestic communications.

Given the nature of NSA projects, the Church Committee had to examine many classified documents. Due to the sensitivity of some of the topics and documents, there was disagreement among committee members about whether or not the findings and hearings should be made public. Notable among those who called for secrecy was Vice Chairman Tower. He opposed the public hearings on the NSA because he felt that "these open hearings represent a serious departure from our heretofore responsible and restrained course in the process of our investigation... Public inquiry, I believe, serves no legitimate legislative purpose, while exposing this vital element of our intelligence capability to unnecessary risk."²⁶⁸ Tower suggested that even if, hypothetically, there were no risks, looking into the NSA as an institution was looking in the wrong place for the problem. That problem, he felt, could be found in the leaders who directed the organization to take the questionable actions. Tower continued, "there comes a point when the people's right to know must of necessity be subordinated to the people's right to be secure, to the extent that a sophisticated and effective intelligence-gathering capability makes them secure."²⁶⁹ Over Tower's objections, however, the investigations were made public.

The first witness the committee invited was Lt. Gen. Lew Allen, Jr. The purpose of Allen's testimony was to review the goals of the NSA and the authorities under which its operations were legal, review the ways by which the NSA is asked to gather information for other government agencies, describe the procedures of MINARET and the operation's responses to external requirements by other agencies, and explain how MINARET resulted in the creation and

²⁶⁸ Ibid., 3.

²⁶⁹ Ibid., 4.

monitoring of watch lists.²⁷⁰ Importantly, Allen's testimony also sought to establish, for the committee, how oversight of the NSA was accomplished. This testimony and discussion of NSA oversight is arguably his most important contribution to the investigation.

Before Allen attempted to explain how oversight was achieved, he cited a number of codes that he felt should prevent the hearing from being open to the public and that established the legitimacy of the NSA. His points are briefly listed:

- 18 U.S.C. 952: Prohibits the divulging of the contents of decoded foreign diplomatic messages, or information about them.
- 18 U.S.C. 798: Prohibits the unauthorized disclosure, prejudicial use, or publication of classified information of the Government concerning communications intelligence activities, cryptologic activities, or the results thereof.
- 18 U.S.C. 2511(3): Nothing contained in this chapter or in Section 605 of the Communications Act of 1934, 47 U.S.C. 605, shall limit the constitutional power of the President to take such measures as he deems necessary to protect the nation against actual or potential attack.
- Section 133(d) of title 10 U.S.C.: Allows for the Secretary of Defense to establish the NSA.
- Public Law 86-36: Provides authority to enable the NSA as the principal agency of the Government responsible for signals intelligence activities, to function without the disclosure of information which would endanger the accomplishment of its functions.
- Public Law 88-290: Establishes a personnel security system and procedures governing persons employed by the NSA.

Allen suggested that because Congress had annually appropriated funds for the NSA, and because the NSA gave briefings on its missions to both houses of Congress, there was already appropriate oversight.²⁷¹ Allen also addressed the issue of watch lists. He suggested that the

²⁷⁰ Ibid., 5.

²⁷¹ Ibid., 8.

“activity was reviewed by proper authority within NSA and by competent external authority. Those authorities included two former Attorneys General and a former Secretary of Defense.”²⁷²

Allen was then questioned by the committee. Notably, Senator Schweiker asked, “is there any law that you feel prohibits you from intercepting messages between American citizens if one is a foreign terminal and the other is at a domestic terminal, or do you feel there is no law that covers this situation?”²⁷³ To which Allen responded, “No, I do not believe there is a law that specifically does that. The judgment with regard to that is an interpretation.”²⁷⁴ When taken in the full context of the purpose of the Church Committee, this is one of the most important lines of questioning because it points out two shortcomings: First, the law had not yet caught up to the technological capacity of modern intelligence agencies; Second, there was a good deal of room for personal judgment and interpretation that might need to be rectified—a rectification that would likely only be possible through legislation.

The Pike Committee and Abzug Subcommittee

Just as the Church Committee from the Senate investigated the NSA, FBI, CIA, and IRS, the Pike Committee from the House of Representatives sought to investigate some of these same agencies. The Church Committee focused on particular operations and procedures, with attention paid to the rights of U.S. citizens. The Pike Committee, chaired by Otis Pike (D-NY), was created to examine the intelligence community more broadly as it had the “mandate to investigate the entire intelligence community; in fact, it was set up not only to investigate alleged abuses but also

²⁷² Ibid., 13.

²⁷³ Ibid., 30.

²⁷⁴ Ibid.

to look at operations effectiveness.”²⁷⁵ The Pike Committee investigation was successful in getting NSA Director Lew Allen Jr. and CIA Director William Colby to admit that the NSA routinely tapped not only telegraph lines but also the telephone calls of U.S. citizens.²⁷⁶

Of particular importance to this dissertation is the investigation performed by the Government Information and Individual Rights Subcommittee of The Committee on Government Operations, also known as the Abzug Subcommittee. The Abzug Subcommittee was chaired by New York Democratic Congresswoman Bella Abzug and was the longest-running congressional investigation of the NSA. Also on her committee were Leo Ryan (CA), John Conyers, Jr. (MI), Toberth Macdonald (MA), John Moss (CA), Michael Harrington (MA), Andrew Maguire (NJ), Anthony Moffett (CT), Sam Steiger (AZ), Clarence Brown (OH), and Paul McCloskey, Jr. (CA).

Though less well known than the Church Committee or the Pike Committee, the Abzug Subcommittee tended to be much more critical in its assessment of the actions of the NSA. While both committees had similar findings and conclusions, the more critical Abzug committee faced many hurdles in its attempt to investigate the agency.

The Abzug Subcommittee had difficulties getting witnesses to fully participate. This reluctance was likely due in part to the fact that the subcommittee refused to sign an indoctrination oath for access to classified materials.²⁷⁷ The first statement the Subcommittee heard was that of Joe R. Craig, Former FBI Special Agent, who was subpoenaed before the subcommittee. Craig brought with him Howard W. Fogt, Jr., Counsel, and Irwin Goldbloom, Deputy Assistant Attorney

²⁷⁵ NSA, “Cryptologic Almanac 50th Anniversary Series: The Time of Investigations, Part 2 of 2.” DOCID: 3098552, declassified January 9, 2007, 2.

²⁷⁶ Nicholar Horrock, “Colby Says N.S.A. Tapped Phone Calls of Americans.” *New York Times*, August 07, 1975.

²⁷⁷ Ibid.

General, Civil Division, Department of Justice. Immediately, Subcommittee member Mr. Moss asked, “Since when does the Department of Justice take the role of representing a former employee of the government of the United States?... Under What Authority?”²⁷⁸ Mr. Goldbloom responded that it was under the authority of the Deputy Attorney General. After a back and forth conversation with the Chairwoman of the Subcommittee, New York Democratic Congresswoman Bella Abzug, Craig refused to answer any questions and was held in contempt of Congress. The next statement heard was from Walter C. Zink, FBI Special Agent, accompanied also by Irwin Goldbloom. Zink told Chairwoman Abzug that the Attorney General had instructed him not to answer any questions from the Subcommittee, and Representative Abzug held him also in contempt of Congress. This happened as well with David G. Jenkins, FBI Special Agent, John P. Loomis, FBI Special Agent, and Joseph J. Tomba, National Security Agency Agent.²⁷⁹ Unfortunately for the Subcommittee, there was nothing else its members could do to get these witnesses to speak. However, that did not stop the Abzug Subcommittee from criticizing and making recommendations for the NSA.

The Abzug subcommittee subpoenaed a massive amount of information from the NSA, but the agency refused to comply. One such subpoena was for all records and tape recordings “pertaining to the Agency’s COMINT mission,”²⁸⁰ which was estimated to be approximately one million reels of tape. This request and others were denied by the Ford administration due to fear of press leaks.

Both the Pike Committee and Abzug Subcommittee compiled final reports of their findings. The Ford administration objected to the publication of the Pike Committee report on the

²⁷⁸ *Interception of Nonverbal Communications*, 65.

²⁷⁹ *Ibid.*, 70-88.

²⁸⁰ NSA, “Cryptologic Quarterly” Top Secret Document 523696 REFID: A523696.

grounds that it contained confidential information. The report was eventually leaked. Daniel Schorr, a CBS correspondent stated that he had a copy of the report while he was live on national television. However, CBS refused to publish it because of fear of backlash by the Ford administration. The *Village Voice* did publish major parts of the report, and as a result CBS fired Schorr, because he had given the *Village Voice* a copy of the document. Chairman Otis Pike condemned the government's refusal to release the report as the "biggest coverup since Watergate."²⁸¹

Committee and Subcommittee Outcomes

After detailed and thorough investigations by both the Senate and House, it became clear that SHAMROCK and MINARET were illegal activities. The Abzug Subcommittee found that "utilizing the telegrams intercepted under Operation SHAMROCK, the NSA's Office of Security maintained approximately 75,000 files on American citizens between 1952 and 1974."²⁸² Additionally, the Subcommittee found that the "fact that the NSA, and its predecessors, indiscriminately obtained without a warrant copies of virtually half of all international telegrams leaving the United States for a period of 30 years would appear to violate this constitutional [Fourth Amendment] guarantee of privacy."²⁸³ Finally, and importantly, the Subcommittee found that although, according to the Church Committee, Operation SHAMROCK was terminated on May 15, 1975, "circumstantial evidence suggests that SHAMROCK, under another name, continues through the use of other technology which is wholly within NSA's capability and which probably does not require going through the facilities of the cable companies."²⁸⁴

²⁸¹ Id at 97.

²⁸² *Interception of International Telecommunication*, 14

²⁸³ *Ibid.*, 15.

²⁸⁴ *Interception of Nonverbal Communications*, 64.

Much less critical than the Pike or Abzug Subcommittee, the Church Committee also drew a number of conclusions from its investigations. The Church Committee found that there was a doctrine of plausible deniability that ran rampant throughout the intelligence community. This meant there was a bureaucratic protection, or shield, whereby blame could not easily be placed on any one person or group, but rather any failures appeared to be systemic ones that prevented officials and agents from facing personal consequences. Additionally, Chief Counsel Schwartz suggested that “what is crystal clear is that the presidents, national security advisors and other high executive branch officials knew about the plausible deniability system.”²⁸⁵

The McMillan memo indicates that the Justice Department had two legal concerns in regards to MINARET that were not directly addressed by the Church or Pike Committees. First, the Justice Department was concerned that MINARET had violated 18 U.S.C. §2511 through its efforts in aural acquisition (and/or use, disclosure, etc.) of wire and oral communications. Second, it was concerned about the violation of the Communications Act of 1934²⁸⁶ by the receipt or interception and divulgence or use of radio communications. McMillan, in an effort to lay out a legal defense against such violations, suggested that the NSA could justify these actions under the “plain view” doctrine. The plain view doctrine suggests that “objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence... The plain view doctrine might be invoked, by analogy, to justify incidental communications intercepts, e.g., the incidental interception of communications...”²⁸⁷

The second defense McMillan proposed relied on the lack of statutory restrictions on the NSA. As

²⁸⁵ Schwarz, F. A. O. “The Church Committee and a New Era of intelligence Oversight.” *Intelligence and National Security* 22, no. 2 (2007): 270-297, 291.

²⁸⁶ 47 U.S.C. § 605.

²⁸⁷ McMillan at 125

the Church Committee found, there were no statutes that controlled, limited, or even defined the SIGINT activities of the NSA. Further, no statutes or directives explicitly prohibited the NSA's monitoring of a telephone circuit with one terminal in the U.S., and this lack of explicit prohibition meant that surveillance activities were legal unless expressly forbidden. However, these defenses do little to address two key surveillance-related cases that the U.S. Supreme Court considered in 1967 and 1972.

Case Law and NSA Surveillance

In *Katz v. United States* (1967), the Supreme Court established that wiretapping without a warrant was illegal. The case involved the wiretapping of Charles Katz, who was suspected of transmitting gambling information across state lines, by FBI agents.²⁸⁸ The agents did not have a warrant for the wiretap because the Court held in *Olmstead* that words were not tangible items, thus not subject to search and seizure. Further, the FBI believed that because there was no physical intrusion into the phone booth Katz was using to make calls, given that it was a wiretap, Katz was not protected by the Fourth Amendment. The Court of Appeals agreed that, given the fact that the wiretap was outside of the phone booth used by Katz, there was no physical intrusion and therefore no Fourth Amendment violation. The Supreme Court, however, found the wiretap to be illegal because Katz had reasonably assumed that his conversation within the phone booth would be private, thus any intrusion on that conversation, either from inside the phone booth or not, constituted a search and seizure; that the Fourth Amendment does not only apply to tangible goods but also to words; that the Fourth Amendment protects people and cannot hinge on intrusion, overturning *Olmstead*; and that a warrant must be issued before electronic surveillance can be

²⁸⁸ In violation of 18 U.S.C. § 1084.

considered legal. However, *Katz* appeared to have little effect on either SHAMROCK or MINARET.

Five years after *Katz* the Supreme Court heard another case, known simply as the *Keith*²⁸⁹ case, which dealt with wiretapping. Justice Powell, delivering the opinion of the Court, stated that *Keith* was important because it involved

The delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval... This case brings the issue here for the first time. Its resolution is a matter of national concern, requiring sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion.²⁹⁰

The Government argued that wiretaps placed on three defendants who were charged with conspiring to destroy Government property were legal, even though it had no warrant, because the wiretaps were necessary for the protection of national security. The wiretaps were approved by the Attorney General to “gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of Government.”²⁹¹

The Court found that “Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillance may be conducted solely within the discretion of the Executive.” This understanding of the fundamental protections of the Fourth Amendment is congruent with interpretations of Fourth Amendment doctrine that suggest it acts as a safeguard against a self-serving officialdom. In the Court's view, exclusively executive discretion would inhibit the Judiciary from performing impartial analyses and would likely result in abuses of surveillance. It was held that even if national security justified domestic surveillance, such activities must operate

²⁸⁹ 407 U.S. 297 (1972).

²⁹⁰ *Id* at 299.

²⁹¹ *Id* at 300.

within the confines of the Fourth Amendment. Justice Douglas, concurring, stated, “we are told...these surveillances are directed primarily to the collecting and maintaining of intelligence with respect to subversive forces,” not in an effort to gather evidence for criminal prosecution, and that, therefore, this should not require a traditional warrant. However, “we do not think a case has been made for the requested departure from Fourth Amendment standards. The circumstances described do not justify complete exemption of domestic security surveillance from prior judicial scrutiny. *Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech.*”²⁹²

Even though *Katz* and *Keith* held that domestic surveillance cannot be solely within the discretion of the Executive, but requires probable cause and the issuance of a warrant, the intelligence agencies under Nixon did not cease domestic surveillance activities. Not only had the NSA been directed against American citizens and domestic organizations associated with Vietnam War resistance and civil rights, “the Nixon Administration did not order the NSA to cease collecting or analyzing intelligence on Americans’ domestic activities in light of this [*Keith*] Supreme Court decision. Instead, it asked the NSA to stop *disseminating* the information it was analyzing to *other* agencies.”²⁹³ General Lew Allen, Jr., justified both ignoring the Supreme Court’s rulings and justified the lawfulness of domestic surveillance by claiming such surveillance was the by-product of other collection activities:

No communications intercept activities have been conducted by NSA, and no cryptologic resources have been expended *solely* in order to acquire messages concerning names on the Watch Lists; those messages we acquire always are by-products of the foreign

²⁹² Id at 407, emphasis added.

²⁹³ Lisa Graves “The Right to Privacy in Light of Presidents’ Programs: What Project MINARET’s Admissions Reveal about Modern Surveillance of Americans,” 88 *Tex. L. Rev.* (2009-10), 1881.

communications we intercept in the course of our legitimate and well recognized foreign intelligence activities.²⁹⁴

Not only does this logic fail to square with that of the Court, the fact that the NSA created and shared nearly 4,000 reports on watch-listed Americans further builds the case against the legality of MINARET.

Analysis

That SHAMROCK and MINARET fundamentally violated constitutional rights of U.S. citizens was well established by the Church and Pike Committees and the Abzug Subcommittee. However, no meaningful penalties were levied against the NSA. The Justice Department, in an effort to protect the NSA, worked out a legal defense the agency could use to justify these operations. The Church Committee did little more than suggest that new laws be created to better guide the NSA. The Pike Committee, whose report was rejected by the administration, was unable to elicit much meaningful testimony, and as a consequence, could not advocate for punishment of either General Allen or anyone else in the agency, much less the agency itself. The Abzug Subcommittee produced the most scathing final report of the three, but the subcommittee was taken somewhat less seriously by the government. This is evidenced by an internal, top secret NSA document that not only described the Abzug Subcommittee hearings as an *opéra bouffe*, but also claimed that the subcommittee faded into irrelevance soon after it released its report.²⁹⁵ The report essentially made the same recommendations as those by the Church Committee, though with language that was somewhat more critical.

²⁹⁴ Id at 1881, citing Letter from Gen. Lew Allen, Dir., Nat'l Sec. Agency, to Elliot L. Richardson, Att'y Gen. of the United States (Oct 4, 1973).

²⁹⁵ NSA, *Cryptologic Quarterly*, at 99.

The Church Committee put forward a number of recommendations in regards to the NSA. First, it recommended that the NSA should not engage in domestic security activities; second, the NSA should take any practicable measure that would minimize the interception and monitoring of communications involving Americans; third, the NSA should not monitor an American's communication without consent; fourth, the NSA should not disseminate personally identifiable information without that person's consent; and fifth, the NSA should be able to conduct background checks on potential agency employees, but only to assess goodness of fit for the job—the agency should not conduct physical surveillance.

The glaring lack of consequences as a result of the illegal activities of the NSA can be explained in a number of ways. When a major agency such as the NSA comes head-to-head with an official government committee such as the Church Committee, the criticisms brought are only enough to give the illusion that the government is upset with the agency's behavior. This, in part, explains why the Church Committee gave "recommendations." These sorts of reactions to government impropriety—which also include the creation of executive orders, directives and other similar decisions—function to reiterate to the public that the law is working as it should. Although there is no real punishment meted out, such official declarations and criticisms notify the public that all is well, authority has been restored to the state, and the agency has agreed to cease actions in violation of the agreement.²⁹⁶ The three committees discussed above had the effect of hiding the reality that intelligence agencies were routinely violating the constitutional rights of citizens, and had been doing so for decades. Athan Theoharis points out,

We are confronted with the troublesome recognition that legal and constitutional restriction, and the underlying principles governing the American political system, have proven ineffective. Rather than celebrating the workability of our constitutional system, as

²⁹⁶ Chester Barnard, *The Functions of the Executive*, (Harvard University Press: MA, 1971), 42.

we did in 1974 during the course of congressional impeachment proceedings, we might better recognize the starker, more unpleasant reality that in fact the system had not worked and that only fortuitous circumstances resulted in the disclosures of the extent of past abuses of power.²⁹⁷

Although warrantless surveillance was illegal, surveillance as a law enforcement technique was not explicitly outlawed. Title III of the Omnibus Crime Control and Safe Streets Act of 1968²⁹⁸ allowed for the authorization of such tactics, but required prior judicial approval if surveillance was to be carried out. The intent of Title III was to prevent privacy violations of U.S. citizens while giving law enforcement agencies access to tools for crime control. The requirements followed those set out in *Katz*, as well as in *Berger v. New York*,²⁹⁹ which, like *Katz*, held that the interception of a conversation by electronic means constituted a search under the Fourth Amendment. More than 30 years before *Katz* or *Berger*, the Communications Act of 1934 was passed. In section 605 of the Act it was written that “no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, content, substance, purport, effect, or meaning thereof, except through authorized channels of transmission and reception.”³⁰⁰ That is, on its face, the 1934 Communications Act prohibited the behavior that the telegraph companies participated in, even though the government assured the companies that no charges would be pressed and that their cooperation was entirely legal. Thus, the NSA operated in violation of the Communications Act of 1934, *Katz*, *Berger*, *Keith*, and even Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Additionally, its use of watch list surveillance was in violation of the Fourth Amendment.

²⁹⁷ Theoharis, *The assault on privacy*, at 252.

²⁹⁸ Title III, Pub. L. No. 90-135, 82 Stat. 197 (1968).

²⁹⁹ 388 U.S. 41 (1967).

³⁰⁰ 47 U.S.C. § 605 (a).

As discussed earlier, the Fourth Amendment is fundamentally about the power to prevent the government from deciding what is considered reasonable activity on its part without the input of the people. Because there were no warrants acquired before placing Americans on the NSA watch list, the agency effectively took the power to determine whether or not an activity depriving citizens of their rights to privacy was just, independently of the people. Doing so placed that power exclusively in the realm of the Executive, thereby immunizing the NSA from liability and public scrutiny. This begs the question: Did Americans placed on the watch list have their privacy violated? According to the Supreme Court, a citizen has a reasonable expectation of privacy from intrusion by the government if that expectation is one shared by a reasonable person in a similar situation and if the benefits of the protection of expected privacy are not *de minimis*.³⁰¹ It should be apparent that a reasonable person, when placed on a watch list and designated as a target for government surveillance without a warrant, would feel that her or his expectation of privacy was violated. Therefore, the watch list surveillance program was in violation of the Fourth Amendment.

Even though the NSA broke numerous laws and violated the constitutional rights of U.S. citizens, the agency was not reprimanded. To understand this further, the dual state theory is useful. An overarching theme that will become clear by the end of this dissertation is that the intelligence agencies examined can be understood as operating in the Prerogative State. The German Prerogative State (Gestapo) was charged with ensuring the National-Socialist regime remained in power, paying special attention to citizens that were engaged in activities they considered “political.” The Gestapo would arbitrarily apply laws against, and violate the rights of, those “political” citizens. Further, there was no judicial review of the actions of the Gestapo, as it was

³⁰¹ Richard Gruner, “Government Monitoring of International Electronic Communications: National Security Agency Watch List Surveillance and the Fourth Amendment.” *S. Cal. L. Rev.* 51 (1977), 436.

operating entirely without oversight and with executive authority. During this time, the citizens of Germany could be watch-listed as enemies of the state without due process of law. As a general rule, a Prerogative State is not interested in formal justice, but instead only in material outcomes.

The NSA can be understood as a member of the ideal type, in the Weberian sense, of Fraenkel's Prerogative State. The NSA worked to maintain the power of the current political regime in the United States from the beginning of SHAMROCK's existence in 1945 until the Church and Pike Committee hearings in 1975. By targeting anti-war protestors and civil rights activists, the NSA was focusing on citizens that they considered to be engaged in political activity. That is, activity that was a political threat to the status-quo. The NSA also violated the Fourth Amendment rights of citizens by watch-listing them and engaging in targeted, warrantless surveillance. Because this surveillance was done without warrant, there was no judicial review of the actions of the NSA and therefore no possibility that the surveillance would be prevented, unless done so by the agency itself. In many ways, citizens were denied due process of law because the warrantless, targeted surveillance punished them with privacy violations, and that punishment was not determined by the Judiciary.

When the NSA took over SHAMROCK the intent was most likely not to violate the constitutional rights of citizens, but because the agency had more interest in material outcomes than in formal justice, it was easy to rationalize and allow those violations to take place—the ends justified the means. As a member of the Prerogative State, the NSA was able to avoid any meaningful punishment by the Executive, Legislative or Judiciary, with the Church and Pike Committees only criticizing existing operations and recommending new practices. Evidence of the NSA's insulation from penalty is shown by the fact that in 1975 the agency had a \$1.2 billion

budget and employed more than 25,000 people.³⁰² The continuation of the agency is not unexpected, given Welch's theory of state impunity, which suggests, like Fraenkel's dual state theory, that state agencies and actors are, for the most part, immune from legal punishment when they break the law or violate rights.

Conclusion

The NSA was not created until 1952, but nearly a decade before it came into existence, the government began intercepting telegrams under what would be called Operation SHAMROCK. The operation, like so many others, began with a narrow goal. The scope of program eventually expanded such that it was capturing and analyzing the communications of U.S. citizens. When the program was young, the law was somewhat unclear. *Olmstead* (1928) held that it was acceptable to intercept communications via wiretapping without a warrant because wiretapping, at the time, did not constitute search and seizure under the Fourth Amendment. The Fourth Amendment was understood to protect only physical items such as papers, effects and homes, not intangible items, such as spoken words and conversations. The *Olmstead* Court recognized that wiretapping was unethical but, because it was not explicitly against the law, it was allowed.

When the Communications Act of 1934 was passed, *Olmstead* was still good law. Section 605 of the Act created a fog in the world of surveillance law because it prohibited the interception of electronic communications without warrant. However, the act only implicitly overruled *Olmstead*. *Nardone v. United States* (1937)³⁰³ brought the issue of wiretapping under the new act to the fore. In *Nardone*, federal agents used a wiretap to acquire evidence for a criminal trial. This activity was legal under *Olmstead*. However, the Supreme Court held that the Communications

³⁰² Id at 430.

³⁰³ 302 U.S. 379, (1937). On appeal, 308 U.S. 338 (1939).

Act of 1934 applied to federal agents, such that the agents in *Nardone* could not discuss the contents of the intercepted communications, rendering the evidence inadmissible. Speaking for the Court, Justice Roberts stated that when “taken at face value, the phrase ‘no person’ comprehends federal agents, and the ban on communication to ‘any person’ bars testimony to the content of an intercepted message.”³⁰⁴ Thus, the legal path to surveillance became unclear. Could an agent wiretap and use the information as evidence under *Olmstead*? Could the agent wiretap but not discuss the evidence under *Nardone*? Or was it perhaps something different altogether? What is not muddled is the fact that the telegraph companies and NSA violated the Communications Act of 1934, and that the NSA violated *Katz*, *Berger*, *Keith*, and the Fourth Amendment.

The investigations into the crimes of the NSA did not come about because of the appropriately functioning oversight or adherence to directives. Instead, these investigations were the fortuitous result of the Watergate scandal, which resulted in part from Nixon’s illegal use of the Central Intelligence Agency. The Church and Pike Committees were critical of the NSA, but in the end did little more than criticize. This criticism had the immediate effect of assuaging public concern about the impropriety of America’s most secret agency. While they did not result in direct punishment, the investigations did shine some light on the NSA, implicitly increasing the agency’s public accountability and eventually paving the way for the creation of the Foreign Intelligence Surveillance Act of 1978. Of more direct concern to this dissertation is the fact that the NSA, General Allen, and others involved in the violations of law and constitutional rights, were able to avoid consequences and prosecution. This is readily explained by Fraenkel’s dual state theory. Fraenkel suggested that the Gestapo in Germany was synonymous with the Prerogative State. In

³⁰⁴ id

the case at hand, the NSA is best understood as one member of the Prerogative State, rather than the sole constituent. As a member, the NSA still embodies the fundamental properties of the Prerogative State as discussed above.

To single out the NSA as the only agency to trample on the rights of citizens would be disingenuous. The FBI, like the NSA, experienced noteworthy mission creep from its inception to the Church and Pike Committee and Abzug Subcommittee hearings. And, like MINARET, the FBI's counterintelligence programs utilized watch lists and paid great attention to civil rights activists, anti-war protesters, and various other groups that were considered by the Bureau to be members of the radical new left. In much the same way that the NSA can be viewed as one member of the Prerogative State, the FBI is another. In fact, the FBI can so obviously and intuitively be understood as a member of the Prerogative State that, in a letter to J. Edgar Hoover, First Lady Eleanor Roosevelt complained that the FBI had been engaging in "Gestapo methods" when investigating two of her closest assistants.³⁰⁵

³⁰⁵ Maurine H. Beasley, *Eleanor Roosevelt and the Media: A Public Quest for Self-fulfillment*, (University of Illinois Press: 1987), 167-8.

CHAPTER FIVE

THE FEDERAL BUREAU OF INVESTIGATION: REPRESSING DISSENT

On May 27, 1908, the Department of Justice (DOJ) was officially prohibited from engaging Secret Service operatives in investigative efforts. One month later, a group of special agents was brought together to work as an investigative arm of the DOJ, because President Theodore Roosevelt felt the department ought to have both the authority and capacity to investigate anti-trust violations, land frauds, and interstate crime. The grandnephew of Napoleon I of France and grandson of the king of Westphalia, Charles J. Bonaparte, Attorney General under Roosevelt, was charged with assembling this group, which was comprised of former Secret Service employees and DOJ investigators. On July 26, 1908, Bonaparte “ordered them to report to Chief Examiner Stanley W. Finch.”³⁰⁶ In 1909 this group was named the Bureau of Investigation (BOI). Roosevelt had hoped the BOI would be useful for enforcing laws against corporate interests and political corruption. In the years immediately following its creation, the BOI worked to investigate and prevent not only interstate commerce crimes but also “moral” crimes such as prostitution.³⁰⁷ In 1917, the BOI was comprised of 141 individuals and a budget of less than \$500,000. As the U.S. entered WWI, the BOI was charged with investigating violations of various federal laws as outlined in the Selective Service, Espionage, and Sabotage Acts.³⁰⁸ This change in focus indicates the shifting priorities of both the BOI and administration. What was once a federal criminal investigation unit was rapidly becoming a political police force, as issues of loyalty, political ideology, and national security came to the fore. Indeed, the BOI now viewed itself as the agency

³⁰⁶ FBI, “A Brief History of the FBI.” www.fbi.gov/about-us/history/brief-history accessed April, 2016.

³⁰⁷ Ivan Greenberg, *Surveillance in America: Critical Analysis of the FBI, 1920 to the Present*, (Lexington Books: New York, 2012), 5.

³⁰⁸ Neil Wynn, *The A to Z of the Roosevelt-Truman Era*, (Scarecrow Press: 2009), 147.

charged with protection against crimes directed at the United States.³⁰⁹ The BOI's enforcement of these acts, especially the Espionage Act, which effectively outlawed any speech critical of the government and its policies, underscore this emerging view.

The BOI was not only actively repressing dissident organizations and individuals, such as anarchists during the War, it was also active in repressing labor. Such repressive activities included raiding the offices of the Socialist Workers Party (SWP) and Industrial Workers of the World (IWW) in 1917 and 1918. These raids resulted in the trial of 166 IWW leaders. This success and others demonstrated the utility of the BOI not only for the federal government, but also for capital. As a result, the BOI budget increased in 1918 to \$1.7 million, up from \$500,000 the previous fiscal year.³¹⁰

As World War I came to an end in 1919, the efforts of the BOI turned to Bolshevism and the emerging Red Scare. The enforcement of the Espionage and Sedition Acts netted over 2,000 convictions, and by 1919 the BOI listed 80,000 individuals and groups as threats—6,000 of these listed individuals were arrested in the Palmer Raids of 1920 and nearly 600 were deported.³¹¹ Also in 1919 J. Edgar Hoover became head of the newly created Radical Division of the Justice Department, which was renamed the General Intelligence Division (GID) the following year.

Hoover, as Director of GID, collected the books, newspapers, pamphlets, speech transcriptions and periodicals of radical groups in an effort to identify their leaders, members and beliefs. He created a card index system that listed every identified radical. This index included

³⁰⁹ Ibid., 6.

³¹⁰ Michal R. Belknap, "The Mechanics of Repression: J. Edgar Hoover, the Bureau of Investigation and the Radicals 1917-1925," *Crime and Social Justice* no. 7 (1977).

³¹¹ Greenberg, *Surveillance in America*, 6.

more than 200,000 entries by the end of 1920.³¹² Hoover's proclivity for organization and investigation landed him a job as Assistant Director of the BOI in 1921. Over the next three years, the BOI engaged, to an unprecedented degree, in illegal political activities aimed at hindering criticism of the Bureau, including burglarizing the offices of numerous congressmen. BOI agents were also directed to spy on Montana Senator Burton K. Wheeler, because he had accused the DOJ of impropriety. On May 10, 1924, Hoover was appointed acting director of the BOI by Attorney General Harlan Fiske Stone. Hoover was able to convince Stone that he had no part in the alleged illegal activities and pledged to ensure that the BOI would no longer participate in countersubversion.

Authorizing the FBI

In 1935, the BOI was renamed the Federal Bureau of Investigation and Hoover worked to craft an image of a successful crime-fighting agency, rather than a force of political policing and repression. However, with World War II on the horizon, the government feared that Nazi sympathizers, anarchists, communists and other subversives might fundamentally damage the administration. Thus, on June 26, 1939, President Franklin D. Roosevelt (FDR) issued a secret directive that put the FBI in charge of sabotage, espionage and counterespionage:

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 of the Navy Department. The Directors of these three agencies are to function as a committee to coordinate their activities.³¹³

³¹² Athan Theoharis, *The FBI: A Comprehensive Reference Guide*, (Greenwood Press: 1998), 108.

³¹³ Presidential Directive of June 26, 1939.

On September 6, just five days after the start of WWII, FDR expanded on his earlier directive. In a public statement he placed the FBI in charge of investigating matters related to espionage and ordered all police to turn over to the FBI any information that had been or would be obtained by their respective departments relating to subversive activities, espionage, counter-espionage or sabotage:

The Attorney General has been requested by me to instruct the Federal Bureau of Investigation of the Department of Justice to take charge of investigative work in matters relating to espionage, sabotage, and violations of the neutrality regulations. This task must be conducted in a comprehensive and effective manner on a national basis, and all information must be carefully sifted out and correlated in order to avoid confusion and irresponsibility. To this end I request all police officers, sheriffs, and other law enforcement officers in the United States promptly to turn over to the nearest representative of the Federal Bureau of Investigation any information obtained by them relating to espionage, counterespionage, sabotage, subversive activities and violations of the neutrality laws.³¹⁴

The Palmer Raids were recent enough that many Americans were weary of a central agency, such as the FBI, with the power to determine who and what was subversive. To calm the public, Attorney General Frank Murphy told the press that “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.”³¹⁵ But Hoover was not concerned about civil liberties, as he considered himself already at war with subversives. He believed that if he were to be victorious, the government would need to make three key concessions. First, Hoover sought stronger laws against subversion. Although not a direct consequence of Hoover’s actions, the Smith Act (1940) was soon passed and became the equivalent to a peacetime sedition law. The act outlawed words, thoughts, and actions that aimed

³¹⁴ Presidential Directive of September 6, 1939.

³¹⁵ Gentry, Curt, “J. Edgar Hoover: The Man and the Secrets,” W.W. Norton, 2001, at 211.

to overthrow the government and made it a federal crime to be a member of any group with such intent. Second, Hoover wanted a stronger practice of watch-listing potential threats residing in the U.S. such that they could be quickly detained in the event of war. In early December, 1939, he ordered every FBI agent under his command to prepare a list of citizens and aliens who should be detained in such an event. That included communists, socialists, Nazi sympathizers, people identified as “pro-Japanese,” and anyone else who might become involved in political warfare—this became the Custodial Detention Program. Finally, he sought the ability to wiretap without oversight. Hoover had to devise a way to circumvent the *Nardone* holding that prevented wiretapping.³¹⁶ To do this, he claimed that the FBI required wiretap privileges if it was to successfully defend the U.S. against the Germans. He warned Treasury Secretary Henry Morgenthau that “German intelligence officers had a network of money and information that ran through the American banking system. Nazi gold was flowing to FDR’s political enemies in the United States. And the FBI had no way of wiretapping them.”³¹⁷ Morgenthau passed this information on to FDR who, on May 21, 1940, wrote a confidential memo to the Attorney General, which stated:

I have agreed with the broad purpose of the Supreme Court [*Nardone*] decision relating to wire-tapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and is also right in its opinion that under ordinary and normal circumstances wire-tapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights.

However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation...

It is too late to do anything about it after sabotage, assassinations and ‘fifth column’ activities are completed.

³¹⁶ Tim Weiner, *Enemies: A History of the FBI*, (Random House: 2012), 83-84.

³¹⁷ *Id* at 87.

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices direct to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies.³¹⁸

With this memo, the President gave the FBI authority to wiretap, limited by its own perception and discretion, without judicial oversight.

While the bureau repeatedly held that the U.S. had been thoroughly infiltrated by spies, the threat was almost certainly exaggerated. However, the FBI did claim in later years that 389 Axis agents had been arrested and 24 Nazi spy-ring radio stations had been destroyed as a result of various government intelligence and surveillance efforts during World War II.³¹⁹ After WWII ended, the FBI turned attention away from German spies and saboteurs and toward Communists. More broadly, though, the FBI remained dedicated to surveilling, investigating and harassing individuals and organizations critical of the government and administration. The FBI used various tactics against the Communist Party and other radical organizations, including wiretapping, bugging meetings, sending anonymous letters, planting false evidence, and carrying out what the bureau called “black bag jobs,” which were essentially evidence gathering burglaries.³²⁰

FBI Surveillance

President Roosevelt maintained a close relationship with Hoover, in large part because FDR felt that FBI investigations, whether legal or not, could serve his policy interests. But, the FBI’s intelligence gathering did not end with Roosevelt’s death. President Truman, in May, 1945, told Budget Director Harold Smith that he opposed setting up an American Gestapo.

³¹⁸ Franklin D. Roosevelt, Confidential Memorandum for the Attorney General, May, 21, 1940.

³¹⁹ Weiner, *Enemies*, at 116.

³²⁰ David Cunningham *There’s Something Happening Here: The New Left, the Klan, and FBI Counterintelligence*, (University of California Press: 2004).

However, the FBI continued to surveil radical activists, politicians, and even Supreme Court Justices. For example, on May 23, 1945, Hoover reported on the activities of an unnamed Executive official. This report was included the “transcripts of telephone conversations between [the official] and [U.S. Supreme Court] Justice Felix Frankfurter and between [the official] and [nationally syndicated columnist] Drew Pearson.”³²¹ Hoover provided the Truman White House with political intelligence that described the political strategies of those people and groups critical of the administration, as well as groups and individuals that Hoover personally wanted to discredit because of his own political biases. These targets were predominantly aligned with the Left, however there were some ultra-conservatives as well.

The FBI not only gave such political intelligence to the Truman administration, but Hoover also leaked information to newspapers in order to discredit his opponents. It is important to note that the FBI reached beyond political intelligence and gathered personal information about targets. Beginning in 1950, bureau agents compiled files on all newly elected congressmen. Further, whenever the information collected about either a congressman or his family was derogatory or potentially harmful, an FBI agent would visit that congressman. Once notified about the information, the agent would assure the congressman that those secrets would be closely guarded by the Bureau. Former FBI Assistant Director William Sullivan suggests that “this FBI visit forewarned the congressman not to challenge the bureau.”³²² In this way, Hoover’s FBI was participating in something akin to extortion and fundamentally altering the operation of government.

³²¹ Athan Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan*, (Temple University Press: Philadelphia, 1978), 160.

³²² *Ibid.*, 165.

Hoover also worked closely with a number of reporters, fundamentally altering the nature of information publication and dissemination. The reporters, from publications as prominent as the *Chicago Tribune*, were given access to confidential FBI files and reports. They were also leaked derogatory information about radical groups, such as the Black Panther Party, the Socialist Workers Party, and the National Lawyers Guild (NLG). Surveillance of the NLG netted a 1,500 page file on law professor Thomas Emerson. The FBI even broke into Emerson's office to photograph legal manuscripts the professor was working on, which criticized the Bureau's use of wiretapping and mail interception. Thus, the FBI operated not only defensively, but also actively worked to discredit groups and individuals.

The FBI asserted that its main function was to discover subversion before it took place, to protect the administration and the public, and, more generally, to ensure national security. This assertion, however, masks the FBI's role as a weapon against threats to the political status quo. One of the foremost historians of American political intelligence, Frank Donner, suggests that "planned injury, implemented by an illegal autonomous system of power, explains domestic intelligence far more convincingly than either the "pure" or "preventive" intelligence thesis. Investigation and accumulation of information are at root merely the means to the ends of punishment, intimidation, frustration, and defeat of movements for change of any kind."³²³ By the mid-1950s, the Bureau had apparently abandoned any effort to remain within the confines of established law. To understand the extent to which the FBI was willing to go in its surveillance, counterintelligence, and political policing efforts, it is necessary to examine the counterintelligence

³²³ Frank Donner, *The Age of Surveillance: The aims and Methods of America's Political Intelligence System*, (Vintage: New York, 1981), 177.

programs that the Bureau carried out between 1956 and 1971. Given the limited amount of space available, only four of these programs will be examined in detail.

Counter Intelligence Programs

The aggressive surveillance and intelligence undertaken by the FBI in the 1940s and '50s transformed into a number of official counterintelligence programs, designated by the cryptonym COINTELPRO. Probably the most famous of any domestic intelligence operations, the COINTELPROs are also the most misunderstood. The COINTELPRO operation took place from 1956 until April, 1971. While the operation was active, at least 2,679 actions were proposed and at least 2,340 were implemented.³²⁴ Additionally, the number of individual COINTELPRO operations that took place is not agreed upon by scholars. The FBI itself has identified seven operations, each with the prefix COINTELPRO: White Hate Groups; New Left; Puerto Rican Groups; Black Nationalist Hate Groups; Hoodwink; Socialist Workers Party; and COINTELPRO Espionage Programs. To this list, Churchill and Vander Wall add COINTELPRO – CPUSA (Communist Party USA) and COINTELPRO – AIM (American Indian Movement).³²⁵

Communist Party, USA

COINTELPRO – CPUSA was the FBI's first official COINTELPRO. CPUSA began in 1956 and was directed against the Communist Party, USA. However, the program targeted not only Communist Party members but also "sponsors of the National Committee to Abolish the House Un-American Activities Committee and civil rights leaders allegedly under Communist

³²⁴ The actual number of proposed and implemented actions is likely much larger, as these figures were self-disclosed by the FBI during the Church Committee hearings of 1975-6 and did not include disruptive and aggressive actions undertaken without approval. These unapproved actions, known as maverick operations, included such things as car burnings and physical assaults, disruptive burglaries, etc.

³²⁵ Ward Churchill and Jim Vander Wall, *The COINTELPRO Papers: Documents from the FBI's Secret Wars Against Domestic Dissent*, (South End Press Collective: 1990).

influence or not deemed to be ‘anti-Communist’”³²⁶ When CPUSA was initiated, the FBI still had the Smith Act available for prosecution of criminal actions within the scope of the statute. That this statute was still good law indicates that the FBI did not intend to seek out individuals and organizations engaging in criminal activity, but rather that the FBI was devoted to extralegal initiatives. The Bureau, and Hoover in particular, objected to the politics and ideologies of the Communist Party and also sought to stifle any political activity resisting government policy. Throughout CPUSA, the FBI increased aggressive surveillance and planned injury. Further, the FBI opted for tactics of internal disruption.

CPUSA offered an opportunity to use the numerous informants on the FBI payroll to damage the political party, its members, and anyone associated with Communism. Informants worked closely with agents to surveil and report on meetings, to plan disruption and to damage individuals and organizations alike. According to William Sullivan, the FBI sought “to divide, confuse, and weaken, in diverse ways, an organization.”³²⁷ A major objective of CPUSA was to foster factionalism and cause confusion within the party, even though the FBI did not believe that the Communist Party was a serious espionage threat, given the Party’s decline since the 1940s. Another major objective was to ensure that the Party would not be able to grow and organize. As a small and disparate group, the Communist Party was an easier target in terms of surveillance, disruption, and the FBI could more easily stifle or negate the political ideas of the Party than it could a stronger party.

With HUAC and McCarthyism still prominent in America, the FBI often carried out anonymous communications in attempts to prevent Communist infiltration of mainstream

³²⁶ Church Committee, *Book II*, at 214.

³²⁷ Church Committee, *Final Report*, at 65.

community, economic, and political organizations. These anonymous communications varied, but a favorite technique “was to notify a leader of the organization, often by anonymous communications, about the alleged Communist in its midst.” As a result of such communication, the named individual would often be ostracized from the organization. There were additional impacts of such actions, as well. These anonymous communications could result in individuals being fired from their jobs, evicted from their homes, or shunned by friends and family. By 1959 the Communist Party was nearly nonexistent. Infighting and stigmatization had effectively cut membership to a few thousand. Of the remaining members, some 1,500 were FBI informants. Still unsatisfied, Hoover “escalated the level of tactics employed within COINTELPRO—CPUSA to include attempts to orchestrate the assassinations of ‘key communist leaders.’”³²⁸

CPUSA was the first official COINTELPRO and, in many ways, it became the template for subsequent COINTELPROs. The tactics of CPUSA, perhaps with the exception of assassination, were used to some degree in all COINTELPROs. CPUSA reflects “a deliberate intent to punish targets who were concededly neither suspected nor convicted of crime,” and was “conducted by government representatives over a period of years, in secret.”³²⁹ This COINTELPRO made explicit that which may have been only assumed: The FBI could define enemies and methods for dealing with those enemies, even if no crimes had been committed.

Socialist Workers Party

The Socialist Workers Party (SWP) began participating in electoral politics when it was founded in 1938.³³⁰ It is likely that the FBI began work to disrupt the SWP at the same time, but it

³²⁸ Churchill and Vander Wall, *The COINTELPRO Papers*, at 44-45.

³²⁹ Donner, *The Age of Surveillance*, at 180

³³⁰ Mark D. Rosenbaum, “The Inviolability of Privacy Belonging To a Citizen’s Political Loyalties,” *3 Hastings Const. L. Q.* 99 (1975).

was not until 1961 that a COINTELPRO operation was officially initiated against the party. In the Bureau's assessment, the Party "follows the revolutionary principles of Marx, Lenin, and Engels as interpreted by Leon Trotsky and that it was in frequent contact with international Trotskyite groups stopping short of open and direct contact with these groups."³³¹

In the late 1940s the FBI exploited the rivalry between the Socialist Workers Party and the Soviet-oriented Communist Party. By the FBI's own admission, the Party had not been responsible for violence nor urged violent actions that were indictable.³³² However, with COINTELPRO—SWP (CIP-SWP), the FBI stepped up disruptive efforts. In the memo to field offices that initiated CIP-SWP, Hoover stated that the Party had

Over the past several years, been openly espousing its line on a local and national basis through the running of candidates for public office and strongly directing and/or supporting such causes as Castro's Cuba and integration problems arising in the South. The SWP has been in frequent contact with international Trotskyite groups stopping short of direct contact with these groups...It is felt that a disruption program along similar lines [to COINTELPRO-CPUSA] could be initiated against the SWP on a very selective basis. One of the purposes of this program would be to alert the public to the fact that the SWP is not just another socialist group... It may be desirable to expand the program after the effects have been evaluated.³³³

The SWP supported the Monroe defendants, a "group of black and a white supporters who had followed the leadership of Monroe, North Carolina NAACP leader Robert Williams in adopting a posture of armed self-defense against Ku Klux Klan terror."³³⁴ This support included cooperating with the NAACP in the creation of a committee to aid in legal efforts for the Monroe defendants. The FBI, in reaction to this cooperation, sought to disrupt this support network, thereby

³³¹ Church Committee, *Final Report*, 67.

³³² *Ibid.*, 180.

³³³ Cunningham, *There's Something Happening Here*, 29.

³³⁴ Churchill and Vander Wall, *The COINTELPRO Papers*, 51.

inhibiting the efficacy of the defendants' legal strategy. This strategy was often used, though with differing tactics, throughout the COINTELPRO era. More often, the tapping of phones to discover legal strategies was the preferred tactic.

Much as it did with actions against the Communist Party, the FBI was active in exploiting factional splits within the SWP. The result of this internal disruption was certain damage to the SWP. Informers within the SWP would occasionally run for membership of the executive committee, which, if elected, would provide increased possibilities for disruption.

The FBI also worked with other local, state, and government agencies in its efforts to bring down SWP. Shortly after the operation began, the Bureau's Philadelphia office proposed coordinating an eviction of the local SWP branch from the Party facilities. The proposal was approved by headquarters. The SWP rented offices from the Philadelphia Redevelopment Authority. The FBI contacted the Authority, pressuring for the eviction of the SWP. The Authority responded that there was no standing for the eviction, as the SWP was in good standing, but this pressure from the Bureau likely pushed the Authority to scrutinize their SWP renters more closely. Soon after the FBI had first discussed the eviction, the SWP was late on one rent payment. The Authority immediately sent a sheriff out to serve an eviction notice, but the SWP was quick to pay the late rent and avoided eviction, in spite of FBI pressure on the Authority.

In another joint operation, work was coordinated with the New Jersey State Alcoholic Beverage Control Board. This operation aimed to arrest SWP members who were serving alcohol during a Labor-day event at an SWP-operated camp. Informers within the Party were told of the plan and warned to not serve any alcohol at the event, as they would likely be arrested. Two SWP members were arrested in the raid, and held in jail on \$1,000 bail. This overt targeting of the Party, especially given that the event was not directly political in nature, not only impacted the SWP's

finances but resulted in property damage and discouraged potential members from joining the Party.³³⁵ The disruption was so valuable to the Bureau that the coordinating agent of the action was recommended for an “Incentive Award” by the Newark Division, according to an internal memo dated September 24, 1962.

Creating financial hardships for the SWP was an important objective for the Bureau. In a confidential memo from Hoover to the New York office, a plan was developed to disrupt an upcoming event that had traditionally been used to garner funds for the Party:

It has been noted by the NYO [New York Office] that in December, 1962, and for many years prior to this, the SWP in NY held a Christmas bazaar as a fund-raising effort. According to informants and sources, these have invariably been successful and have been productive of financial gain for the Party. Informants also advised that although SWP members contribute various articles to be sold or auctions at the bazaar, a considerable portion of the more valuable items comes from solicitation of merchants. For the 1962 bazaar [redacted].

A review of files of the NYO reflects that the bazaar has continually been carried out under the name of the NY School of Social Science, obviously as a means of concealing the facts that it is actually for the benefit of the SWP. Although the NY School of Social Science is listed in the NY Telephone Directory at the address of 116 University Place (SWP Headquarters), it has never been known to function as anything but a cover activity for the annual collection of merchandise and ~~the~~³³⁶ donations from ~~these~~³³⁷ individuals outside the Party.

It is believed that if it became known to merchants who were contacted to contribute to the bazaar that the NY School of Social Science was actually a cover for the SWP they would not be apt to contribute.

It is therefore suggested that as a disruption tactic to be used against the SWP, that an anonymous letter be sent to the Better Business Bureau of NYC, setting forth the fact that the NY School of Social Science is not a bona fide organization....

The memo continued, outlining the exact verbiage to be used in the letter. The anonymous letter was designed to appear as though it had been written by a former SWP member who had left the

³³⁵ Donner, *The Age of Surveillance*, at 198.

³³⁶ Strikethrough in original document.

³³⁷ Strikethrough in original document.

party: “This letter will be unsigned because I am a former member of the Socialist Workers Party...” and continues, “Before I saw the light and broke with the Party...I helped prepare for the December bazaar” and it suggested that the Better Business Bureau should warn its members that any solicitations coming from the New York School of Social Science were fraudulent and any funds raised would help further the goals of a “Marxist organization.”

The tactic of sending anonymous letters was widely used by the FBI. In an attempt in 1962 to push the University of California, Los Angeles to prohibit the Young Socialist Alliance (YSA) from campus, an anonymous letter written by a “perturbed parent” suggested that the YSA was un-American and a deadly enemy of the American way of life. The FBI believed that “when this letter is received by the [redacted] UCLA and the Regents, action will undoubtedly be taken.”³³⁸ In further attempts to push the YSA from college campuses, the Bureau sent anonymous letters to the parents of students involved in the group, “warning of their offspring’s political aberrations.”³³⁹

The FBI worked to disrupt, if not outright destroy, the livelihoods of numerous SWP members. Some Party members taught in public schools and at universities around the country, and the Bureau considered these members important targets as it was feared that educators were in particularly powerful positions to corrupt the minds of the youth. One notable case that underscores these Bureau efforts was that of Arizona State University philosophy professor Morris Starsky. Starsky was placed under surveillance for a number of years because he was outspoken against the Vietnam War and a prominent member of the SWP. The Arizona legislature wanted him removed from the university but was unable to find an appropriate pretext for such action.

³³⁸ FBI, Memo from W.C. Sullivan to F.J. Baumgardner Re: Young Socialist Alliance, Internal Security—SWP, July 16, 1962.

³³⁹ Donner, *The Age of Surveillance*, at 199.

Eventually, after continued Bureau pressure, the Board of Regents refused to renew Starsky's contract in spring 1970. These actions were not limited to the Arizona campus. The Bureau carried out disruption efforts against educators in a clear effort to inhibit freedom of expression and stifle dissent against official government policy. Additional actions were carried out on a number of campuses across the country.

The COINTELPROs aimed at the Communist Party and Socialist Workers Party were unique in their direct attacks against groups and individuals based on little more than political party affiliation. But they were not unique in their attacks against groups and individuals with particular political ideologies. In other words, these two COINTELPROs were the only operations that explicitly worked to disassemble groups with political candidates on local and national ballots. However, this targeting based on political ideology was not limited to these early COINTELPROs.

Black Nationalist-Hate Groups

COINTELPRO-Black Nationalist-Hate Groups (BNHG) was the second largest COINTELPRO in terms of numbers of actions carried out. With 360 actions between 1967 and when the operation ended in 1971, BNHG was second only to CPUSA, which entailed 1,338 approved actions. Although the latter program served as the template for BNHG, there are many important differences, including, most apparently, the program name. The FBI did not need to name COINTELPRO-CPUSA anything more threatening because of the perception of the Communist Party, and Communism in general, at that particular historical moment. However, BNHG needed a threatening name because, for the most part, the program targeted civil rights advocates—COINTELPRO-Civil Rights does not have the same menacing sound. By labeling this COINTELPRO-Black Nationalist Hate Groups, the FBI intends to imply that the targets of the

program were subversive, extremist, dangerous, violent and/or revolutionary. While this was certainly true for some individuals and groups, it passes over any nuances by equating all civil rights groups with the most extreme and smallest , minute faction. For example, the Southern Christian Leadership Conference, a group of nonviolent ministers, was

“labeled by the Bureau, assigned the label of ‘Black Hate group,’ for the purpose of an attack against them, designed to destroy and disrupt them. They were characterized as being among the groups having violent leaders. So we have to be extremely careful of these labels. A language has lost its meaning if groups like SCLC become labeled as Black Hate groups or as violence-prone.”³⁴⁰

BNHG was officially named on August 25, 1967 with a classified letter to FBI offices in 22 major cities from Atlanta to Washington D.C. According to this letter, the purpose of the newly created program was

To expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of Black Nationalist, hate-type organizations and groupings, their leadership, spokesmen, membership, and supporters, and to counter their propensity for violence and civil disorder. The activities of all such groups of intelligence interest to this Bureau must be followed on a continuous basis so we will be in a position to promptly take advantage of all opportunities for counterintelligence and to inspire actions in instances where circumstances warrant. The pernicious background of such groups, their duplicity, and devious maneuvers must be exposed to public scrutiny where such publicity will have a neutralizing effect.

This letter indicates that many of the same methods used against the Communist Party and Socialist Workers Party were to be used against these so-called “black nationalist, hate-type organizations.” The FBI pointed out that all opportunities to exploit organizational and personal conflicts between

³⁴⁰ Church Committee, *Book VI*, Mr. Schwartz to Senator Tower, at 12.

leaders and groups and within groups should be seized. Further, “when an opportunity is apparent to disrupt or neutralize [these] organizations through the cooperation of established local news media contacts,” agents should ensure that the targeted groups are not just publicized but, rather, disrupted, ridiculed, and/or discredited through publicity.

The program targeted a number of groups and individuals in addition to SCLC, such as the Student Nonviolent Coordinating Committee (SNCC), Congress of Racial Equality (CORE), Nation of Islam, and Deacons for Defense and Justice. The FBI also directed efforts against “extremists who direct the activities and policies of revolutionary or militant groups such as Stokely Carmichael, H. “Rap” Brown, Elijah Mohammad, and Maxwell Stanford.” Finally, this first letter concludes with a personalized message to FBI agents: “You are urged to take an enthusiastic and imaginative approach to this new counterintelligence endeavor and the Bureau will be pleased to entertain any suggests or techniques you may recommend.”³⁴¹ Agents’ imaginative approaches included inciting violence within and between groups, instigating raids and arrests by local police, vandalism, the use of provocateurs, sending anonymous letters, forgery, burglary, blackmail, impersonation, sexual exploitation, wiretapping, bugging, interception, and infiltration. Many of these tactics had been used either in previous COINTELPROs or other FBI operations. However, one new tactic used in BNHG was “the stress on punitive action against individuals.”³⁴²

It was during BNHG that the FBI, for the first time, named individual targets. In the past, agents were to identify groups and individuals based on rough affiliations with particular political

³⁴¹ FBI, Letter from Director Hoover Re: Counterintelligence Program – Black Nationalist – Hate Groups; Internal Security, August 25, 1967.

³⁴² Donner, *The Age of Surveillance*, at 212.

parties and ideologies. Now, agents were to gather information on black leaders in their respective areas and check the names of those leaders against the FBI Rabble Rouser Index; those listed would become targets for aggressive FBI action.

Authorized in 1967, the Rabble Rouser Index was a list that included persons “identified not as criminals or criminal suspects, but as ‘rabble rousers,’ ‘agitators,’ ‘key activists,’ or ‘key black extremists’ because of their militant rhetoric and group leadership.”³⁴³ These vague standards for inclusion were broadened in late 1967 to cover those individuals with a propensity for creating or encouraging public disorders that could impact internal security. Thus, the list included names of black nationalists, civil rights activists, war protestors, white supremacists, and “other extremists.” The Rabble Rouser Index was renamed the Agitator Index in March 1968 and each field office was instructed to obtain a photograph of every person included on the Index.

The FBI’s strategy of personalized surveillance, disruption, and attacks is best illustrated by efforts to destroy Martin Luther King, Jr. Surveillance of King actually began much earlier than the initiation of BNHG, as he rose to national prominence in the 1950s and landed on the cover of *Time* magazine in 1962. The following year the FBI began tapping King’s phones. On January 4, 1964, King’s room at the Willard Hotel was bugged in an effort to develop information about his private life, rather than just focusing on his politics. Personal information was also gained through surreptitious entry (burglary) and photographic surveillance. Informers were paid to report on King’s activities and speeches in the SCLC. All of this information was compiled into packets for journalists and editors. Agents had hoped that the information would be aired publicly, as it was often embarrassing, or at least questionable.

³⁴³ Church Committee, *Final Report*, at 69.

On October 14, 1964, it was announced that King would receive the Nobel Peace Prize. This information sent Hoover over the edge. Within days of the announcement the Bureau edited and assembled bits and pieces of the audio captured during the bugging of King's hotel room. The final product was a "tape that purported to demonstrate that King had a number of 'orgiastic' trysts with prostitutes and, thus, show 'the depths of his sexual perversion and depravity.'"³⁴⁴ Assistant Director Sullivan "put into effect a plan to send to Mrs. Coretta King edited tape material with the intent of breaking up the marriage and silencing King's criticism of the Bureau."³⁴⁵ The tape was sent to King's home, along with a letter presumably suggesting that unless King committed suicide³⁴⁶ a copy of the tape would be released to the media. The letter, which was written anonymously, without Bureau letterhead, and in racially charged language, stated, in part:

In view of your low grade, abnormal personal behavior I will not dignify your name with either a Mr. or a Reverend or a Dr...

King, look into your heart. You know you are a complete fraud and a great liability to all of us Negroes... You could not believe in God and act as you do. Clearly you don't believe in any personal moral principles...

You will find yourself and in all your dirt, filth, evil and moronic talk exposed on the record for all time...

The American public, the church organizations that have been helping – Protestant, Catholic and Jews will know you for what you are – an evil, abnormal beast...

King, there is only one thing left for you to do. You know what it is. You have just 34 days in which to do (this exact number has been selected for a specific reason, it has definite practical significant. You are done. There is but one way out for you. You better take it before your filthy, abnormal fraudulent self is bared to the nation.

³⁴⁴ Churchill and Vander Wall, *The COINTELPRO Papers*, at 97.

³⁴⁵ Donner, *The Age of Surveillance*, at 216.

³⁴⁶ This is the widespread consensus among scholars such as Theocharis, Donner, and Churchill and Vander Wall. However, the wording of the letter does not explicitly suggest suicide. In 2014, Beverly Gage, an American history professor at Yale, discovered an unredacted copy of the letter in a file of reprocessed documents while doing research. Writing in the *New York Times*, Gage points out that "it's tough to puzzle out what the Bureau wanted King to do." Thus, some believe the line in the letter "There is only one thing left for you to do. You know what it is" is a call for suicide, but others believe this may have been an effort to urge King to step aside and let someone else lead the civil rights movement.

King did not comply with the Bureau and the tape was never released. However, the FBI did maintain close contact with a number of journalists who were also encouraged to ask King questions about the secret information at public gatherings and demonstrations. In March 1967, the FBI prepared and distributed press conference questions to “friendly” journalists in an effort to discredit King. Two months later the Bureau discussed how King could be prevented from running for national office, if he decided to do so. Then, in October 1967, Hoover “approved the dissemination of an editorial in order to publicize King as a traitor to his country and his race and thus reduce his income from a fund-raising promotion.”³⁴⁷

In total, the FBI placed eight wiretaps on King and installed 16 bugs. The information captured by these efforts has not been released. However, it is believed that the content largely consists of King thinking out loud to himself and planning marches and demonstrations; this is the consensus among scholars, but the truth will not be known for certain until 2027, when the transcripts of the taps and bugs, which are sealed under judicial order, are released.

The examination of the surveillance of King is important not only because it shows the tactics that the FBI uses, including the distance to which the Bureau is willing to go, including extortion, media manipulation, and possibly urging suicide, but also because this case indicates that there was no person beyond the reach of the FBI. A *Time* magazine man of the year, a Nobel Peace Prize winner, and the most prominent voice of the civil rights movement, King was placed under intense, long-term surveillance by the Bureau. However, it is also important to realize that King was one of many leaders, individuals, and organizations surveilled by the agency, though perhaps none endured surveillance of the same quantity and intensity. The impetus for BNHG was,

³⁴⁷ Ibid., 218.

by most accounts, the FBI's concern that the civil rights movement was being either funded or guided by Communists. But, by the Bureau's own admission, Communist Party membership was approximately five percent of what it had been before WWII, implying that BNHG was more ideologically driven than Hoover acknowledged.³⁴⁸

New Left

The final COINTELPRO carried out by the Bureau was directed against what was generally called the New Left. On May 9, 1968, an FBI memo was sent out, stating:

Our Nation is undergoing an era of disruption and violence caused to a large extent by various individuals generally connected with the New Left. Some of these activists urge revolution in America and call for the defeat of the United States in Vietnam... The New Left has on many occasions viciously and scurrilously attacked the Director and the Bureau in an attempt to hamper our investigation of it and to drive us off the college campuses. With this in mind, it is our recommendation that a new Counterintelligence Program be designed to neutralize the New Left and the Key Activists...

The Purpose of this program is to expose, disrupt, and otherwise neutralize the activities of this group and persons connected with it....³⁴⁹

Though COINTELPRO-New Left (NL) began as a program to stop the Key Activists and groups associated with the New Left (Weather Underground, SNCC, etc.), NL quickly became a program directed against the entire youth movement, due in part to lack of direction and oversight in the Bureau. This meant that everything from anti-war groups to free speech activists were targeted. In the memo initiating NL, it was pointed out that criticizing Hoover or the FBI was unacceptable. As it would happen, many of the victims of NL were targeted not because of any illegal activity, but as retribution for criticism. If it was not clear before, NL made it apparent that the FBI considered itself the defender traditional American ideals.

³⁴⁸ See, Weiner, *Enemies*, 131-288.

³⁴⁹ Classified internal memo from Charles Brennan to William Sullivan, May 9, 1968.

This COINTELPRO had trouble being successful in its stated objectives because the New Left was so amorphous. It was difficult for the FBI to exploit internal disputes and opposing factions as was done in the past. The nature of the New Left and the social movements with which it was connected allowed for acquaintances and others with weak connections to participate. Additionally, there were a number of spontaneous actions that could not be predicted by the Bureau. Not only were the traditional exploitation tactics minimally effective, the FBI's most preferred weapon, anonymous letters, was also less potent. However, this is not to say that the FBI did not continue to use such tactics. For example, on February 6, 1969, Hoover sent a classified memo to the Special Agent in Charge (SAC) of the Denver office:

The records of the [redacted] Denver, Colorado, as checked by Mrs. [redacted] 1/23/69, reflect that the parents of [redacted] are [redacted] and [redacted] who reside at [redacted], Denver, Colorado. The records of [redacted] reflect that [redacted]'s father is employed by the U.S. Department of Interior, U.S. Bureau of Reclamation, and that the mother is a teacher in the Englewood Schools. The family came to Denver, Colorado, in 1933 and have been on record since October, 1935.

There is nothing unfavorable in the RCMA files and Denver files contain no information pertaining to [redacted] and [redacted].

In view of the fact that the parents of [redacted] appear to be well respected and competent people, an anonymous letter as suggested by San Antonio would most likely cause them considerable concern. The Denver Office feels that the place of mailing this letter would not make any particular difference and it is felt San Antonio could mail it from their division.³⁵⁰

This memo shows the how the Bureau sought to disrupt the behavior of young people participating in activities targeted by NL. In this case, the FBI investigated the parents of the young person to ensure they were upstanding citizens and that an anonymous letter to them about the activities of their child would cause concern. Thus the FBI was attempting to push the parents to

³⁵⁰ Classified internal memo from SAC Denver (100-9553) (P) to FBI Director (100-44969), "Re San Antonio letter to Bureau 1/14/69" on February 6, 1969.

prevent their child from such participation. The efficacy of this particular anonymous letter is unknown, but most often the letters had little impact. The Bureau also sent anonymous letters to university officials and Boards of Regents where radical professors were employed. Such letters would be signed by “A concerned alumni” or similar and urged the firing of those professors.³⁵¹

Of all NL targets, there was one more vulnerable than the rest: Students for a Democratic Society (SDS). Because SDS was more structured, with consistently identifiable members, leadership, and financial donors, the FBI was able to carry out a number of actions against the group. One such action was the illegal acquisition of the IRS records of an SDS donor. The FBI got the records with the hope that something would be found that might give the Bureau leverage to “encourage” the donor to cease her support. The fishing expedition came up empty. The Bureau also collaborated with local police departments to arrest SDS members and supporters on false charges in efforts to decrease the attendance of SDS meetings.

The Bureau collaborated with the *Chicago Tribune*, in an effort to discredit SDS as a Communist group, with the hopes that this would decrease support for the organization thereby inhibiting its continuance. Chicago SAC Johnson, on June 24, 1969, reported that one article, published in the *Chicago Tribune* at the behest of the Bureau, “forced all groups to harden their stances, thereby alienating a large number of non-members and leaving a number of disillusioned delegates who do not have a strong commitment to any of the factions. This, it is felt, has weakened SDS severely.” Further, Johnson concluded, “the article which resulted from the Bureau authorized

³⁵¹ Cunningham, *There's Something Happening Here*, 2004.

contact by SAC M.S. Johnson with [redacted] of the Chicago *Tribune* aggravated a tense situation and helped create the confrontation that split SDS.”³⁵²

The FBI also worked with other members of the press in efforts to discredit various organizations. Some journalists were paid informants, making it easy to get FBI generated propaganda published. But, there was also a list of all journalists and media outlets considered friends of the Bureau. There were at least several hundred journalists that collaborated with the FBI throughout the existence of all COINTELPROs. These journalists worked for *Life*, *Time*, *Reader's Digest*, *Colliers*, *Fortune*, *Newsweek*, *Business Week*, *U.S. News and World Report*, *New York Times* and *Look*.³⁵³ Additionally, Hoover had a direct line to CBS president William S. Paley. The Bureau surveilled several dozen prominent reporters, and, in 1970, President Nixon urged the FBI to find any derogatory information on members of the press, and to investigate “the Washington press corps to uncover any ‘homosexuals’.”³⁵⁴

Another attempt to tamper with the press came by way of the Detroit FBI’s plan to target a printing plant producing New Left literature. On October 13, 1970 a plan was hatched in collaboration with police to disrupt the sale of radical newspapers. To carry out the plan, “The Bureau is requested to prepare and furnish to Detroit in liquid form a solution capable of duplicating a scent of the most foul smelling feces available. In this case it might be appropriate

³⁵² Donner, *The Age of Surveillance*, 233, no citation.

³⁵³ Greenberg, *Surveillance in America*, 99.

³⁵⁴ *Ibid.*, 103.

to duplicate the feces of the species *sus scrofa*³⁵⁵.³⁵⁶ The newspapers were intercepted and doused with the spray. Thousands of papers were unsellable because of the smell.

Then, in 1971, the FBI opened a full investigation into CBS correspondent Daniel Schorr because of his unfavorable, critical analysis of a speech made by Nixon. As part of this investigation, the Bureau interviewed at least 25 people who associated with Schorr in some capacity.³⁵⁷ Nixon also placed *Washington Post* columnist Jack Anderson on his enemies list and under surveillance. A final tactic the FBI used to attack press independence was agent impersonation of news reporters and the use of fake press credentials.

COINTELPRO-New Left was the last official program of its kind. Ending in 1971, the program did damage not only to individuals and organizations, but also to journalists, the press at large, and the nation. The New Left, in general, was more resilient to the attacks from the FBI, but the sheer volume and tenacity of those actions assured that some would have the desired impact. Of the 2,340 approved COINTELPRO actions, many were illegal, not to mention unethical. The use of wiretaps, bugs, infiltration, and press manipulation raise many civil liberties concerns.

Legal Analysis

In the FBI's pursuit of surveillance and domestic intelligence, the Bureau ran up against many of the same laws that prevented, or should have prevented, the NSA from intercepting the communications of citizens. In 1936, FDR met with Secretary of State Cordell Hull and Hoover. The purpose of the meeting was to give Hoover *carte blanche* to investigate the Communist

³⁵⁵ Wild Boar.

³⁵⁶ Ahmad Rahman, "Marching Blind: The Rise and Fall of the Black Panther Party in Detroit," in *Liberated Territory: Untold Local Perspectives on the Black Panther Party*, Eds., Yohuru Williams, Jama Lazerow (Duke University Press: 2009), 213.

³⁵⁷ Greenberg, *Surveillance in America*, 104.

menace in the United States. With this open order, Hoover worked to investigate every member of and any person affiliated with the Communist Party, using any methods and tactics that might render useful information. Though *Olmstead* held that the government would be within its rights to wiretap without warrant, the Communications Act of 1934 prohibited such action. The 1934 Act banned both the interception of telephone calls and the disclosure of the contents of such telephone calls. Hoover, however, was able to rationalize Bureau surveillance to himself and other bureaucrats. He interpreted the word “disclosure” in the most literal way. That is, if a wiretap was carried out but the information gathered was not disclosed or used in court, then, he reasoned, the tap was not illegal—which would seem to be an obvious perversion of the intent of the 1934 Act. Hoover believed that wiretaps were one of the Bureau’s most effective tools against Communism. This rationalization or justification of wiretapping is indicative of the FBI’s membership in the Prerogative State. The FBI was more concerned with material outcomes than with actual justice, as demonstrated by the Bureau’s engagement in surveillance, infiltration, disruption and manipulation.

Fourth Amendment protections were consistently violated by the FBI between 1945 and 1975. The analysis of FBI wiretapping, from a civil liberties perspective, parallels the analysis of the NSA provided in the previous chapter, so it will not be duplicated here. However, the FBI went beyond Fourth Amendment violations and intruded on the First Amendment through its use of infiltration and surveillance. The First Amendment is complicated in that it encompasses the protection of religion, speech, assembly and association. For the argument being made in this dissertation, the protections of association, privacy and speech are of most immediate concern.

Not all speech is protected by the First Amendment, but it is difficult to justify infringing on speech that is useful for making decisions about government. Although there were a number of

cases in the first half of the twentieth century that allowed for the prosecution of what most today would consider free speech, such as *Schenk*, *Frohwerk*, *Debs*, and *Abrams*, from the creation of the Constitution there has been a broad and shared understanding that the free exchange of ideas is necessary for a free society.³⁵⁸

The 1940 Smith Act, which permitted the punishment of activities advocating the overthrow of the government, or membership in an organization engaged in such advocacy, was good law when the FBI initiated its first COINTELPRO. This raises the question: If the FBI truly believed that communists posed a serious and imminent threat to the government, why did the Bureau feel the need to institute a secret operation to punish those communists for speech advocating the overthrow of the government, rather than utilizing the Smith Act? One answer is that the FBI did not believe that Communism posed such a threat but, instead, disagreed with communist ideas and philosophy. Another explanation might be that there were advantages to intelligence gathering and countersubversion that would be lost if the FBI enforced the Act against such groups. Further, it was more difficult to criminally prosecute under the Smith Act, given First Amendment concerns, than it was to secretly disrupt the Communist Party. Finally, as Donner argues, “a criminal suspect is investigated when evidence links him or her in some rational way to a crime (probable cause), but the selection of a target for political surveillance is typically governed by ideological considerations. Then, too, the interest protected by political intelligence, national security or internal security, is broad and amorphous.”³⁵⁹ In other words, the FBI carried out political policing rather than criminal policing, and, as such, was often unable to tie individuals to

³⁵⁸ Church Committee, *Book II*, 290.

³⁵⁹ Donner, *The Age of Surveillance*, 22.

criminal activity in a rational way. In this way, the FBI was able to circumvent the law and investigate people based on association.

Freedom of Association

Freedom of association is not expressly written into the First Amendment, but in 1958, just two years after CPUSA officially began, the Supreme Court ruled that free association was implicit in the guarantee of freedom of speech. In *NAACP v. Alabama*³⁶⁰ the Court held that compelling the NAACP to disclose its membership lists would suppress the freedom of association. This ruling meant that the lawful private interests of association were protected. Therefore, compelling member list disclosure infringed on the freedom of association. There are also three other ways that the government can infringe on this freedom. The government can try to force the disclosure of an individual's associational ties. The Supreme Court ruled that such forced disclosure was unconstitutional in *Shelton v. Tucker*,³⁶¹ holding that the state could not compel school teachers to disclose with which organizations they associated or to which they contributed. Additionally, the government can interfere with a citizen's freedom of association if it interferes with group activities "justified solely by an associational link between the target group and a group with a history of illegal and disruptive behavior. Even where a legitimate interest justifies interference, the government must show that noninterference would seriously impair the interest, and that there is no less intrusive alternative."³⁶² Finally, the government cannot outlaw an organization unless it can show that such an organization continuously participates in criminal activities, which would

³⁶⁰ 357 U.S. 449 (1958)

³⁶¹ 364 U.S. 479 (1960)

³⁶² 56 S. Cal. L. Rev. 207 (1983), at 214.

allow for punishment if carried out by an individual—otherwise it is a violation of the freedom of association.

Through its various COINTELPROs, the FBI worked to obtain membership lists and associations. However, these efforts were not made legitimately, by asking or seeking forced disclosure by the Judiciary. The FBI worked to attain such lists through surveillance, surreptitious entry and infiltration. The criminality of many of the groups and individuals the Bureau investigated would have been difficult to prove. Therefore, the FBI chose to operate extralegally when it disrupted the Communist Party, Socialist Workers Party, civil rights movement, and the activities of the New Left. It is apparent that the FBI directly infringed in numerous instances on the freedom of association. The FBI justified its interference with the activities of legal and constitutionally protected groups, such as SCLC or even the SWP, by attempting to make associational links between such groups and criminal organizations. This explains, in part, why the Bureau chose the name COINTELPRO-Black Nationalist Hate Groups—such a name associates all civil rights organizations with the most criminal hate groups, thereby justifying surveillance and infiltration. The FBI violated First Amendment guarantees in other ways, as well.

Freedom of the Press

Press freedom is guaranteed by the First Amendment. Generally, the Court has understood the Free Press guarantee to be a structural provision of the Constitution, extending protections to the press as an institution.³⁶³ This goes beyond the guarantee that publishers be able to enjoy freedom of expression. The Free Press clause of the First Amendment was included in the Constitution in an effort to create a fourth estate, which should function outside of government

³⁶³ Potter Stewart, “Or of the Press,” 26 *Hastings L.J.* 631 (1975).

and act as a check on the Executive, Judicial, and Legislative branches. A properly free press is enabled to engage in expert scrutiny of government and to expose corruption and impropriety. Additionally, a free press provides for the people information necessary for democratic governance.

Although the Bureau did not forcibly inhibit all members of the press from criticizing its actions and policies, it did fundamentally manipulate the press and the public's understandings of current events. The Bureau not only interacted with "friendly" journalists and punished those that were radical, but it also actively worked to discredit authors who were critical of Hoover, the administration, or the Bureau in general. During Hoover's tenure as director, he sent tens of thousands of letters to hundreds of journalists, both friendly and not. It is unlikely that he wrote each letter, but they bore his signature and were official FBI correspondences. In the 1940s the FBI monitored the Newspaper Guild, compiling lists of newsroom communists. This practice continued even though officials at the Department of Justice had previously ordered Hoover to stop.

From 1952 through 1956, the Bureau leaked information about journalists to the House Un-American Activities Committee (HUAC), Senator Joseph McCarthy's Subcommittee on Government Operations, and Senator James Eastland's Internal Security Committee. These were the three primary anticommunist committees in the United States and the "FBI played a substantial role in determining which journalists were subpoenaed to testify before HUAC and other investigative committees."³⁶⁴ The FBI infiltrated newspapers in Los Angeles, Detroit and Albany and gave to HUAC files on a number of journalists from each city. Those journalists would be,

³⁶⁴ Edward Alwood, "Watching the Watchdogs: FBI Spying on Journalists in the 1940s," *Journalism and Mass Communication Quarterly* 84 no.1 (2007), 139.

based on these FBI files, subpoenaed before HUAC to testify. Authors such as Max Lowenthal, Harvey Matusow and Norman Mailer were also deemed dangerous by Hoover and considered for possible detention because they were “in a position to influence others against the national interest,” as were other “writers, lecturers, newsmen, entertainers, and others in the mass media field.”³⁶⁵

On June 27, 1961, the Kennedy administration suspected that a *Newsweek* article addressing plans that the U.S. had with Germany was based on classified information and ordered the FBI to investigate. The Bureau wiretapped the home of Lloyd Norman, the reporter who wrote the story. No damning information was discovered, but the residential tapping turned out to be part of a larger pattern. In June, 1962 the Bureau tapped the residential telephones of *New York Times* military correspondent Hanson Baldwin after Baldwin wrote an article about Soviet missile systems. Additionally, the home of Baldwin’s secretary was tapped in an effort to discover any leaks of classified information. Although the taps continued until August, no leaks were found. These taps, and others like them, were justified by national security concerns. However, “to accept this rationale... involves acceptance of the administration’s right to control the flow of information to the public and thereby to determine the parameters and timing of the debate over U.S. foreign policy.”³⁶⁶ This acceptance is in fundamental conflict with the role of the press and free press guarantees as provided by the First Amendment.

Broadly, the FBI had three core goals for its “media policy.” First, the FBI actively sought out critics of the Bureau and administration in an effort to quell negative publicity. As he had done

³⁶⁵ Athan Theoharis, “The FBI, the Roosevelt administration, and the ‘subversive’ press,” *Journalism History* 19 no. 1 (1993), 2.

³⁶⁶ Theoharis, *Spying on Americans*, 170.

when he took over the BOI, FBI Director Hoover worked diligently to ensure that the Bureau was positively portrayed by the media. Second, the FBI was aggressive in its work to discredit liberals and radicals by generating negative publicity. The FBI maintained a list of journalists and editors that were friends of the Bureau, and those friends received FBI propaganda for publication. In turn, those friends were granted access to classified and confidential information, presumably allowing them to scoop stories. Third, the FBI carried out direct attacks against alternative and radical media, as well as against mainstream journalists critical of the FBI and government policy. These attacks included anything from giving files to HUAC for the purposes of subpoenaing journalists, to sabotaging newspaper shipments with foul-smelling liquids, to bugging and wiretapping the homes and offices of journalists.

The FBI often targeted investigative reporters, as they were deemed dangerous in terms of exposing Bureau or administration secrets and corruption. One critic of Hoover was I.F. Stone, an investigative journalist who had worked for *The Nation*, *New York Post*, *PM*, and then, after being blacklisted during the Red Scare, published his own *I. F. Stone's Weekly*. As a result of his criticisms and investigative journalism, “the Bureau assembled a 5,000-plus-page file on Stone...spanning more than 45 years. The Bureau bugged his phone, went through his trash, opened his mail, and monitored the content of his writing and public speeches. They also interfered in his network of relations by interviewing family, friends and work peers.”³⁶⁷ Similarly, in the Bureau’s investigation of CBS correspondent Daniel Schorr, his network of relations was disrupted. He recalled that the FBI’s inquiry “complicated” the relationships he had with CBS and a number of other news sources as well.³⁶⁸ For Schorr, this created a “chilling” effect. He wrote,

³⁶⁷ Greenberg, *Surveillance in America*, 103.

³⁶⁸ *Ibid.*, 104.

“There are many kinds of chilling effects on the exercise of press freedom. Whenever a president uses the powers entrusted to him to go after a reporter, there are bound to be some.”³⁶⁹

The Chilling Effect

Much of the work carried out by the FBI against political groups, radicals, critics and activists chilled speech. At its core, “a chilling effect occurs when individuals seeking to engage in activity protected by the First Amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity.”³⁷⁰ However, that does not mean that the chilling effect only derives from legitimate governmental regulation. The FBI chilled speech when it carried out surveillance. This surveillance was not only wiretapping and bugging, but also came in the form of investigations and group infiltrations.

Much of the surveillance carried out by the FBI captured intimate details of the lives of targets. These details ranged from sexual behavior to politics and work schedules. This information was obtained by a number of tactics, including wiretapping and bugging, as in the case of Martin Luther King, Jr., and informants as in the case of COINTELPRO-New Left. One such informant, Robert Merritt, was instructed by the FBI to “solicit and provide information to the FBI regarding the homosexual proclivities of politically prominent people and individuals of the New Left.”³⁷¹ The FBI’s need for such information, if it were adhering to its charter of crime prevention, is not apparent. Given that homosexual proclivities did not warrant criminal charges under the FBI’s jurisdiction, it would seem the only reason the Bureau would care about such information was for purposes of extorting, blackmailing, or, more likely, discrediting these people. Additionally,

³⁶⁹ Daniel Schorr, “The FBI and me,” *Columbia Journalism Review* 13 no. 4 (1974), 14.

³⁷⁰ Schauer, *Fear, Risk, and the First Amendment*, at 693.

³⁷¹ 26 Buff. L. Rev. 173 (1977) at 183, citing House Select Committee on Intelligence, Committee Report, 94th Congress (Pike Committee report) in *Village Voice*.

because of paranoia induced by the potential for FBI infiltration and surveillance, citizens already marginalized by, for example, their sexual preference, may be even more reluctant to participate in constitutionally protected speech or join legal organizations, fearful that such activities may make them an FBI target.

Often the FBI sent agents and informants to infiltrate political groups not because those groups were engaged in illegal activities but because their politics, ideals or criticisms, in the eyes of the Bureau, were reprehensible. Such infiltrations not only violated the First Amendment protection of the right of association, but often also resulted in a chilling effect. The FBI's surveillance was designed to inhibit the willingness of people to join various organizations and to speak freely about their political ideologies. It has been shown that if a meeting or idea is controversial in nature, many will not attend or not speak if their actions and words are being recorded.³⁷² Such surveillance was carried out by the FBI—disproportionately against individuals and groups on the Left. These “dissident organizations have been made targets of intelligence operations in order to enhance the paranoia endemic in these circles and to further serve to get the point across that there is an FBI agent behind every mailbox.”³⁷³

Infiltration and surveillance signals to society which group or individual activities are unacceptable. This effect was not lost on the FBI, as “there is evidence that intelligence gathering units are acutely aware that their ability to stigmatize a group and inhibit their political expression by engaging in surveillance.”³⁷⁴ Further, because these targets were often aware that surveillance was being carried by the FBI against others, if not against themselves, they were left to imagine

³⁷² *People v. Collier*, 376 N.Y.S. 2d 954.

³⁷³ 26 Buff. L. Rev. 173 at 193.

³⁷⁴ Askin, *Surveillance*, 70.

how the information might be used. This further chills constitutionally protected speech. For example, “the need to protect oneself from being investigated, when coupled with the public knowledge that surveillance occurs at certain types of political meetings, can lead to the perception that it is occurring or will occur at a specific meeting in question. People will then respond to the meeting based not on what the actual social situation is”³⁷⁵ but based on an imagined scenario either informed by historical experience or paranoia. This chilling effect does not necessarily require one to be concerned about government surveillance or infiltration. Once a perspective or ideology has been stigmatized by the government implicitly through criticism or surveillance, individuals who might agree with such a perspective or ideology will be inhibited from expressing that agreement, even when they know government agents will not observe such agreement, because they do not want to be ostracized by coworkers, friends and family.

The FBI actively and intentionally caused personal problems for targets. One example is the effort put into disrupting the marriage of Martin Luther King, Jr. This was not a one-time occurrence. The FBI would frequently “plant provocateurs...to create conflict. They knew how to stir up difficulties in personal relationships, how to play people off against each other.”³⁷⁶ This was a core tactic utilized by the Bureau in its work to disrupt legal organizations. It also prevented individuals from freely expressing themselves out of fear that they would be targeted and incur the wrath of Hoover’s FBI, which routinely ignored the law and the Constitution in pursuit of its own ends.

³⁷⁵ Id at 72.

³⁷⁶ Bob Shultz & Ruth Schultz, *It Did Happen Here: Recollections of Political Repression in America*, (University of California Press: 1990), 257.

Conclusion

If one federal agency has the reputation of being a no-holds-barred surveillance machine, it is the FBI. To be certain, this reputation is warranted. From its creation until the end of the last COINTELPRO in 1971, the Bureau tirelessly investigated any group or individual that posed a possible threat to the status quo. The Bureau sought to disrupt any political or critical challenge to itself or the administration for more than forty years. The goal of disruption was characterized as “protection” or ensuring “national security.” No matter the term used, its achievement was the FBI’s priority, often at the expense of justice. As a member of the Prerogative State, the FBI was certainly more concerned with the material outcomes of its actions than with the administration of actual justice. This is evident in every COINTELPRO operation and action. The FBI engaged in wiretaps and bugs without warrant, infiltrated organizations and carried out black bag jobs. The FBI also sent anonymous letters to bosses, parents and spouses in efforts to get employees fired, to get children in trouble with their parents, and to break up marriages. All of these activities were an effort to maintain the power of the Bureau and the administration and often they were also means of retaliation or revenge for criticism or deviant behavior.

In much the same way that the German Gestapo applied laws arbitrarily to groups and individuals participating in behaviors deemed political, the FBI targeted those who threatened the American way of life. To the FBI, these threats predominantly came from the Left. Just as the NSA maintained watch lists, the FBI created indexes with names, photos and information about people considered problematic. By the end of COINTELPRO-New Left, the FBI had amassed more than 500,000 intelligence files on domestic groups and citizens. As part of its surveillance, the FBI, like the NSA, intercepted a tremendous amount of communications. While the NSA listened in on the telegraph lines, the FBI listened to the telephone lines; while the NSA watch-listed Americans to

be put under surveillance, the FBI actively surveilled those on the watch lists; and, while the NSA examined the content of personal telegrams, the FBI opened and photographed approximately 130,000 personal first class letters sent through the United States Postal Service.

The FBI consciously and actively infringed on the civil liberties of untold numbers of Americans. It is impossible to know how the United States might have been different today, had the FBI not suppressed dissent in the 1950s, '60s and '70s. The FBI, like the NSA, is a member of the Prerogative State. The Bureau violated privacy laws, wiretapping laws, the Communications Act of 1934, the Fourth Amendment, and, perhaps most disturbingly, the First Amendment. Regardless, Hoover remained the Bureau's director until he died in 1972, never facing any punishment. In fact, even after the Church Committee investigated the FBI and scrutinized its surveillance operations, its multiple COINTELPROs, and its general disregard for law and the Constitution, no meaningful punishment was delivered. This lack of punishment can be explained by the FBI's special status as a member of the Prerogative State.

Today, the FBI has a budget of \$8.48 billion and employs more than 35,000 people. This is nearly 17,000 times larger than the Bureau's \$500,000 budget in 1917. Thus, it appears that the FBI has been able to violate laws with impunity. Not even Congressional investigations have been able to harm the Bureau, and the Judicial branch has been ineffective as well. As part of the Department of Justice, the FBI is under the authority of the Executive. As such, it occupies a similar position to the NSA in that both are controlled by the Executive, both are members of the Prerogative State, both have the technical capabilities to surveil U.S. citizens, and both have done just that with impunity. There is, however, another important intelligence agency under the control of the Executive—the Central Intelligence Agency—to which this dissertation now turns.

CHAPTER SIX

CENTRAL INTELLIGENCE AGENCY: MAIL INTERCEPTION AND STUDENT SURVEILLANCE

Many people point to the attack on Pearl Harbor as the event that signaled the coming of a new era in intelligence. Before World War II, General Eisenhower described American intelligence as “shockingly deficient.”³⁷⁷ As has been shown, intelligence collection and surveillance operations were carried out for at least 150 years prior to WWII. But, the war did put substantial pressure on the government to centralize intelligence activities in an effort to protect the United States. On June 13, 1942, FDR issued an executive order creating the Office of Strategic Services (OSS). The OSS was charged with the collection and analysis of intelligence primarily for the Joint Chiefs of Staff. Though the OSS did collect some intelligence itself, information was mostly fed to OSS for analysis. The OSS received such information from three sources: The Secret Service Intelligence division, which was responsible for the collection of espionage intelligence abroad; the X-2 division, which was a counterespionage unit charged with maintaining the security of U.S. espionage agents; and the Research and Analysis division, responsible for writing intelligence reports and making policy recommendations.

Before the end of the War there was talk of creating a central intelligence agency that would handle the responsibilities of the OSS and the three units that delivered intelligence to it. In November 1944, FDR had called for separating the Joint Chiefs of Staff from its intelligence activities, hoping to centralize U.S. intelligence efforts. However, the prospects for such an agency looked grim as Secretary of War Henry Stimson vehemently opposed its creation.³⁷⁸ In late

³⁷⁷ Lawrence Freedman, *U.S. Intelligence and the Soviet Strategic Threat*, (Princeton University Press: 1987), 13.

³⁷⁸ Tim Weiner, *Legacy of Ashes: The History of the CIA* (New York: Anchor: 2008), 10.

September 1945, Stimson resigned. His resignation presented the opportunity to move forward with plans to create a central intelligence agency. One week later, President Truman signed Executive Order 9621, abolishing the OSS as of October 1, 1945,³⁷⁹ and convoluting U.S. intelligence collection efforts—Research and Analysis began operating under the State Department and X-2 moved to the Strategic Services Unit. There were many pressures leading to Truman’s decision to shut down OSS, but perhaps most important were internal concerns. With the end of the War, any talk of a preserving the OSS or creating a peacetime intelligence agency made many in government uneasy. There was fear that such an agency would become the “American Gestapo.”³⁸⁰

Authorizing the Central Intelligence Agency

In response to the dissolution of OSS, the Navy proposed the creation of a central agency that would have the responsibility of coordinating and unifying intelligence collection and information. There was much debate about whether this agency should be truly centralized or interdepartmental, and what its role should be in the collection of intelligence—should it collect only foreign intelligence, participate in covert operations, or, simply act as an information analysis unit. These debates led President Truman to establish the Central Intelligence Group (CIG) on January 22, 1946. Truman’s Directive on Coordination of Foreign Intelligence Activities outlined the responsibilities of CIG:

[To] plan for the coordination of such of the activities of the intelligence agencies of your Departments as relate to the national security and recommend to the National Intelligence Authority the establishment of such over-all policies and objectives as will assure the most effective accomplishment of the national intelligence mission.

³⁷⁹ Michael Warner, “The Creation of the Central Intelligence Group,” *CIA Center for the Study of Intelligence* (1996).

³⁸⁰ Ibid.

[To] perform, for the benefit of said intelligence agencies, such services of common concern as the National Intelligence Authority determines can be more efficiently accomplished centrally.

[To] perform such other functions and duties related to intelligence affecting the national security as the President and the National Intelligence Authority may from time to time direct.

[And,] no police, law enforcement or internal security functions shall be exercised under this directive.³⁸¹

The CIG was a compromise that sought to appease those officials seeking an interdepartmental intelligence agency and those wanting one that was centralized, as it coordinated the existing intelligence operations of varying departments and carried out its own operations that were more efficiently handled by a central agency. The CIG operated until 1947 when it was replaced by the Central Intelligence Agency.

President Truman signed the National Security Act of 1947 on July 26 in an effort to not only reform intelligence, but also coordinate intelligence activities that would impact national security. Officially, the Act sought “to promote the national security by providing for a Secretary of Defense; for a National Military Establishment; for a Department of the Army, a Department of the Navy, and a Department of the Air Force; and for the coordination of the activities of the National Military Establishment with other departments and agencies of the Government concerned with national security.”³⁸² Section 102 of the Act established the Central Intelligence Agency (CIA).

The CIA was created for “the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security.”³⁸³ The duties

³⁸¹ Harry S. Truman, “Directive on Coordination of Foreign intelligence Activities,” January 22, 1946, (Harry S. Truman Library and Museum) accessed online at: <http://trumanlibrary.org/publicpapers/viewpapers.php?pid=1461>

³⁸² Public Law 253, 80th Congress; Chapter 343, 1st Session; S. 758 (The National Security Act of 1947).

³⁸³ National Security Act of 1947.

of the agency included advising the National Security Council (NSC) on matters concerning intelligence activities relating to national security, making recommendations to the NSC for coordinating such activities, correlating and evaluating intelligence relating to the national security and providing for the dissemination of such intelligence, benefiting existing intelligence agencies by performing services the NSC determines are more efficiently accomplished centrally, and performing other functions and duties related to national security intelligence.³⁸⁴ Perhaps the most important piece of the National Security Act for this dissertation comes from Title I, Section 102 (d)(3). This section gives the CIA the responsibility of correlation and evaluation of intelligence. However, it makes clear

That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions:

PROVIDED FURTHER, That the departments and other agencies of the Government shall continue to collect, evaluate, correlate, and disseminate departmental intelligence:

AND PROVIDED FURTHER, That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;

In other words, the CIA was prohibited from law enforcement activities and taking part in internal security, suggesting that Congress recognized the potential for the CIA to become an American Gestapo. This provision also meant any CIA activity that could be construed as law enforcement or internal security—activities carried out domestically—were deemed outside of the charter of the CIA and therefore illegal. Additionally, this section placed on the Director of Central Intelligence (DCI) the final responsibility of protecting intelligence sources and methods from disclosure—meaning the DCI must make sure identities of informants were kept secret, that

³⁸⁴ National Security Act of 1947, (d) 1-5.

operations were kept secret, that tactics and techniques were kept secret, and that no leaks would be allowed.

The National Security Act of 1947 reflects the needs of the president to have control over a centralized intelligence agency that would be charged with providing the administration a full and accurate picture of the capabilities and intentions of foreign nations. Including restrictions on the Agency's law enforcement and internal security functions demonstrates the fundamental concern many had at the time about such a centralized agency. Representative Clarence Brown (R-OH) commented that while he wanted to see the U.S. lead the world in intelligence capabilities, he was also concerned that the CIA could be abused by the Executive:

I am very much interested in seeing the United States have as fine a foreign military and naval intelligence as they can possibly have, but I am not interested in setting up here in the United States any particular central policy (intelligence) agency under any President, and I do not care what his name may be, and just allow him to have a gestapo of his own if he wants to have it. Every now and then you get a man that comes up in power and that has an imperialist idea.³⁸⁵

Additionally, some congress members were concerned about the intelligence collection function of the CIA, but their resistance was not enough to remove such functions from the Act. While it is clear that the CIA should not collect intelligence domestically, in an internal security capacity, what is not clear is the authority of the CIA to collect foreign intelligence at home. The legislative history of the National Security Act shows that the activities of the CIA are permitted only on foreign soil, with the exception of collecting and organizing domestic intelligence gathered from other agencies. But, this legislative history does not definitively show whether or not the CIA

³⁸⁵ Commission on CIA Activities within the United States (Rockefeller Commission), *Final Report* (1975), 50.

can collect clandestine foreign intelligence within the United States, such that the source of the intelligence would be unaware that the information was being given to the Agency.

The 1947 Act charged the CIA with carrying out all espionage³⁸⁶ and clandestine counterintelligence³⁸⁷ abroad. In 1948, the NSC gave the CIA permission, and the responsibility, to overtly collect foreign intelligence in the U.S., such that the target would be aware that the Agency was involved. This would include, for example, a CIA agent asking a foreign national in the U.S. about the satellite capabilities of his/her home country. However, the NSC did not give the CIA permission to carry out clandestine foreign intelligence collection in the U.S. For example, the CIA cannot, without warrant, bug a foreign national's hotel room in hopes of capturing discussions about his/her home country's satellite capabilities.

With the exception of clandestine foreign counterintelligence, the National Security Act of 1947 was explicit in defining the responsibilities of the CIA, as well as the actions beyond the legal scope of the Agency. Like the NSA and the FBI, the CIA also violated its regulating charter in pursuit of intelligence. The CIA carried out physical and electronic surveillance against U.S. citizens, including mail inspection, tax inspection, surreptitious entry, infiltration, and it created indexes and watch lists that included the names of individuals and organizations.

SRPOINTER/HTLINGUAL

The fear of Soviet influence in the U.S. was a constant motivator of intelligence operations since WWII. Following the National Security Act, the White House was quick to put the CIA to

³⁸⁶ Clandestine collection of foreign intelligence.

³⁸⁷ Counterintelligence can be defined as the interruption of a foreign entity's attempts to collect intelligence on U.S. assets (e.g., spies, agents, and informants), technologies, political information, etc. When this is clandestine it means that it is done in secret and the target does not know that such interruptions are happening.

work in investigating such activities. The recently created agency began a mail interception operation in 1953 that captured letters sent through a major New York postal facility to or from the Soviet Union. This program was initially designated by the cryptonym SRPOINTER, but was later changed to HTLINGUAL. HTLINGUAL began as a mail cover operation, meaning the outsides of the envelopes were recorded as were the names of the senders and recipients. In effect, this program captured what might be called today postal metadata. The following year, the CIA began opening those letters in an effort to identify people in the U.S. who were cooperating with, or being influenced by, the Soviets. Though the mail cover aspect of HTLINGUAL was likely legal, assuming that the CIA captured such metadata in accordance with U.S. Postal Service guidelines, the letter opening activity was not. For more than twenty years the CIA carried out this mail interception program. A secret, “eyes only” CIA memo from May 16, 1973 describes SRPOINTER/HTLINGUAL:

Since 1953, this office has operated a mail intercept program of incoming and outgoing Russian mail and, at various times, other selective mail at Kennedy Airport in New York City. This operation included not only the photographing" of envelopes but also surreptitious opening and photographing of selected items of mail. The bulk of the take involved matters of internal security interest which was disseminated to the Federal Bureau of Investigation. This program is now in a dormant state pending a decision as to whether the operation will be continued or abolished.³⁸⁸

In a secret memo, Director of Central Intelligence William Colby explained the program in more detail:

The Office of Security [redacted] had a unit at the JFK International Airport that photographed mail going to Soviet Bloc countries. This work was done by Agency staff employees. The mail was placed in bags by the regular Post Office employees and stacked. After their departure for the night, the Agency employees would open the mail and photograph it. Both incoming and outgoing mail, including postcards, were photographed.

³⁸⁸ CIA, Secret Report to Executive Secretary, CIA Management Committee from Director of Security, Howard Osborn, “Family Jewels,” (May 16, 1973), 00028.

A watch list was maintained and priority was given to the names listed, but generally all mail was processed.

The results of the operation were sent to Washington Headquarters where they were handled by [redacted]. He would receive a teletype advising him of the registry number and the number of items....

About twice a month the CI Staff would add named to or delete names from the list. [redacted] would send the changes in the list to the field office. The watch list was made up primarily of [redacted] who were in the United States. When [redacted] left the Office of Security in 1970, the project was still active.³⁸⁹

By 1958, the FBI caught wind of the operation, joined it, “levied requirements on it, and received the fruits of the coverage”³⁹⁰ throughout its duration. The FBI received 57,000 letters while involved with the project, which were used to supplement its own surveillance and intelligence gather operations, such as the COINTELPROs. The CIA knew that the operation was in violation of federal criminal laws prohibiting the obstruction of mails, and also knew that such an operation was likely in violation of the National Security Act of 1947, given that the surveillance of such mail was clandestine by nature, even though it did have a foreign intelligence function. HTLINGUAL was terminated in 1973 when the Chief Postal Inspector, William J. Cotter, requested official approval for the program. This request was most likely a reaction to the publicity of the Watergate scandal, which resulted in widespread scrutiny of government surveillance. Further, Cotter threatened to expose the program to the public if the government questioned his capacity as Chief Postal Inspector to request such official approval.³⁹¹ In its final operating year, approximately 4.3 million items were sent to and from the Soviet Union. Of those, 2.3 million were captured by HTLINGUAL, photographs were taken of 33,000 envelopes and

³⁸⁹ CIA, Secret Memorandum to William Colby from Inspector General William V. Broe, May 22, 1973.

³⁹⁰ Rodney Carlisle, *Encyclopedia of intelligence and Counterintelligence*, (Routledge: 2004), 510.

³⁹¹ Skip William, “Reframing ‘official memory’: Don DeLillo’s *Libra* and the House Select Committee on Assassinations” *Arizona Quarterly: A Journal of American Literature, Culture, and Theory* 71 no. 3 (2015), 141.

8,700 were opened.³⁹² Because the program lasted for the better part of two decades, there are no accurate figures describing the exact amount of mail intercepted, photographed, opened, or recorded in total. However, if the final year of the program is any indication of the breadth and scope of HTLINGUAL, it is possible that tens of millions of letters were compromised to some degree by the CIA.

MH/CHAOS

The expansion and increasing intensity of political dissent in the 1960s brought with it numerous concerns for government officials. One of the most primary concerns was the influence of foreign states and actors on American political organizations and individuals protesting the war in Vietnam. The first major antiwar rally took place on April 17, 1965. There were fewer than 25,000 U.S. troops in Vietnam at the time, but the rally brought 16,000 to the capital. As the Vietnam War progressed, antiwar sentiments increased. In early 1967, *Ramparts* published an article describing some of the CIA's activities, prompting Richard Ober, head of Special Operations Group, to investigate ties between American dissidents and foreign intelligence services. Further, Ober created a computer database that indexed the names of American dissidents linked to *Ramparts*. The index held the names of several hundred Americans and Ober created files on dozens of those individuals.

The combination of antiwar, civil rights, women's rights, and free speech movements pushed President Lyndon Johnson to question why so many Americans were upset with his domestic and foreign policies. His answer was that the dissident groups were being funded and controlled by foreign entities, most likely from the Soviet Union. As a result, Johnson put pressure

³⁹² Rockefeller Commission, *Final Report*, 20.

on the CIA to investigate these domestic groups for foreign influence. In 1967, CIA Director Richard Helms, having endured increasing pressure from Johnson to investigate such groups, verbally established Operation MHCHAOS (CHAOS). Then, on August 15, a memo from the CIA's Deputy Director of Plans, Thomas Karamessines, to Chief of Counter Intelligence Staff James Angelton, established CHAOS in writing. The subject of the classified memo was "Overseas Coverage of Subversive Student and Related Activities" and explained CHAOS' creation and goals:

Further to our discussion with the Director this morning, please take the steps necessary to accomplish the following:

- a. Designation of the officers in the CI Staff who will be the responsible focal points and coordinators of operational activity in this matter. (Harry Rositzke and Dick Ober appear to be excellent candidates, as you suggested.)
- b. The exclusive briefing of specific division chiefs and certain selected officers in each division, on the aims and objectives of this intelligence collection program with definite domestic counterintelligence aspects.
- c. The establishment of some sort of system by one of the CI Staff officers (or whatever officer you select) for the orderly coordination of the operations to be conducted, with the responsibility for the actual conduct of the operations vested in the specific area divisions.
- d. The identification of a limited dissemination procedure which will afford these activities high operational security while at the same time getting the information to the appropriate departments and agencies which have the responsibility domestically.
- e. The establishment of a periodic reporting system, preferably monthly, to gauge progress in the enterprise.³⁹³

CHAOS initially began as an overseas operation, but, as did so many others, the mission of CHAOS began to broaden over time, eventually focusing almost exclusively on domestic dissidence.

³⁹³ CIA, Classified Memo, "Overseas Coverage of Subversive Student and Related Activities" to James Angelton from Thomas H. Karamessines, August 15, 1967.

By autumn 1967, approximately 13,000 Americans had died in the Vietnam War and one of the largest protests of the 1960s took place, becoming “a cultural touchstone of the decade, a defining moment of American history... For the first time, the counterculture openly confronted the Establishment at the seat of American Power.”³⁹⁴ On October 21, 1967, an estimated 100,000 antiwar protesters marched on Washington. Organized by the Mobilization Committee to End the War in Vietnam, it was the first national demonstration against the war.³⁹⁵ The White House reacted to the protest by demanding the CIA investigate foreign influence on the Mobilization Committee to End the War in Vietnam specifically, and, more generally, on the New Left. To fulfil this mandate, the Agency produced a Top Secret study dated November 15, 1967 titled, “International Connections of US Peace Groups.” In part, the 46-page study found that

- A. Diversity is the most striking single characteristic of the peace movements at home and abroad. Indeed it is this very diversity which makes it impossible to attach specific political or ideological labels to any significant section of the movements. Diversity means that there is no single focus in the movement... Thus a handful of activists coordinate the activities and propel the energies of large heterodox masses toward a few broad purposes.
- B. The coordinators of the peace movement—personalities such as [Dave] Dellinger, [Tom] Hayden, [James] Bevel and [Nick] Egleson³⁹⁶—are tireless, peripatetic, full time crusaders. They have the requisite funds for travel; they simplify the interaction among the peace groups by assuming a multiplicity of offices and establishing interlocking personal contacts between groups. Many have close Communist associations *but they do not appear to be under Communist direction...*³⁹⁷

Helms sent a memo to President Johnson conveying the results of the study: There was no evidence of foreign financing of the peace movement; there was no evidence of contact between peace movement leaders and foreign embassies, either at home or abroad; and there was little

³⁹⁴ Jeff Leen, “The Vietnam Protests: When Worlds Collided,” *Washington Post*, (Monday, September 27, 1999) Page A1.

³⁹⁵ U.S. Marshals Service, “History – U.S. Marshals and the Pentagon Riot of October 21, 1967,” accessed online at <http://www.usmarshals.gov/history/civilian/1967a.htm>

³⁹⁶ Dellinger was a member of the Chicago Seven, Hayden and Egleson were leaders of SDS, and Bevel was Director of Direct Action and of Nonviolent Education in SCLC.

³⁹⁷ CIA, Top Secret Report, “International Connections of US Peace Groups” 1967.

information available about radical movements groups on college campuses in the United States.³⁹⁸ This early study demonstrates the expansion of CHAOS into the realm of internal security, as it examined American organizations affiliated with the peace movement—its focus had turned toward domestic groups. It also became a template for later CIA investigations into American dissent.

The White House, hoping to find a foreign connection, was dissatisfied and ordered Helms and the CIA to work harder to discover such influences. This pressure expanded CHAOS. The operation now had two main sources of information: CIA stations abroad (foreign intelligence) and the FBI (domestic intelligence). The CIA received all reports compiled by the FBI on the peace movement, including, reports resulting from various COINTELPRO operations, as well as information about domestic communications, travels, and contacts of individuals either on watch lists or associated with organizations under surveillance. The FBI sent approximately 1,000 reports to the CIA every month.³⁹⁹ Such activities operated in a legal grey-area. The CIA struggled to navigate the potential tensions between adhering to the demands of the President and following the CIA's charter, a difficult task compounded by potential Constitutional violations. Thus, Karamessines sent a cable to CIA field stations directing that they increase security and control of reporting procedures for CHAOS related information, as exposure of the operation had the potential to cause great embarrassment for the Agency and administration.

On January 5, 1968, another CIA study, "Student Dissent and Its Techniques in the U.S.," was delivered to the White House. The study investigated student dissent, dealing exclusively with student activists in the United States. In other words, the study, with its focus on domestic

³⁹⁸ Church Committee, *Book II*, 693.

³⁹⁹ Rockefeller Commission, *Final Report*.

individuals and organizations, demonstrated the CIA's capacity for, and direct involvement in, internal security. As with earlier studies, it found that there was no Communist link to campus activism and, further, it determined that "except on the issue of selective service, the student community appears generally to support the Administration more strongly than the population as a whole."⁴⁰⁰ Another study produced by the CIA, for President Johnson, was "Restless Youth." This study concluded, like the others, that domestic dissidence was not being directed by foreign powers and student dissent was homegrown. The study examined in depth the activities, ideologies, and membership of SDS. In the report's cover memo, Helms wrote to the president, "You will, of course, be aware of the peculiar sensitivity which is attached to the fact that CIA has prepared a report on student activities both here and abroad."⁴⁰¹ This report was later updated and sent to National Security Advisor Henry Kissinger and President Nixon in 1969. Part of the update was to include a more explicit warning about the nature of the study: "Herewith is a survey of student dissidence worldwide as requested... we have included a section on American students. *This is an area not within the charter of this agency*, so I need not emphasize how extremely sensitive this makes the paper. Should anyone learn of its existence, it would prove most embarrassing for all concerned."⁴⁰²

Even though every study conducted by and disseminated through CHAOS essentially concluded that there was no notable foreign influence guiding dissident groups in the United States, the operation expanded yet again under President Nixon. CHAOS developed two additional information sources. First, it trained agents in the U.S. to carry out intelligence activities abroad—

⁴⁰⁰ CIA, *Student Dissent and Its Techniques in the U.S.*, 1/5/68, i.

⁴⁰¹ Church Committee, Book II, 697.

⁴⁰² Emphasis added.

allowable by the charter. Second, it developed a domestic intelligence collection program undertaken by the Domestic Contact Service (DCS). CHAOS and DCS carried out surveillance and intelligence operations against black militants; radical youth groups; the radical underground press; antiwar groups, and draft resistance movements.⁴⁰³

Agents gathered information on these groups by collecting and analyzing the literature each produced, recording speeches, collecting newspaper clippings, and even joining such groups and participating in the radical activities. Through an intelligence project known only as “Project 2” agents entered universities in the U.S. after training with the CIA in an effort to develop their “leftist coloration.”⁴⁰⁴ After the agents were well versed in and known within the American dissident groups, they were transferred overseas to collect intelligence on foreign organizations. When overseas, these agents would report on both the radical left in the native country as well as on the activities of other Americans associated with those groups.⁴⁰⁵ Through these intelligence operations, CHAOS compiled a list of names of individuals to be added to the NSA’s MINARET watch list.

As student activism began to die down in the early 1970s, and concerns about the impropriety of the CHAOS activities increased, the CIA scaled back the operation. On March 5, 1974 CHAOS was officially terminated by recently appointed CIA Director William Colby. The three-page cable terminating CHAOS was sent by Colby to CIA field stations and stated, in part:

1. This message is to notify you of the termination of the []⁴⁰⁶CHAOS program and to provide guidelines under which HQS has been operating for some time on certain activities formerly included in []CHAOS.

⁴⁰³ Rockefeller Commission, *Final Report*; Church Committee, *Book III*.

⁴⁰⁴ Id at 704.

⁴⁰⁵ Church Committee, *Book III*.

⁴⁰⁶ The blank/redacted brackets most likely contained the letters “MH” as in MHCHAOS or MH/CHAOS. The MH prefix or designation is an internal CIA code indicating an operation is global in scope. Similarly, the mail

2. GUIDELINES: All collection takes place abroad. Collection is restricted to information on foreign activities related to domestic matters. CIA will focus clearly on the foreign organizations and individuals involved and only incidentally on their American contacts. In doing this, following will apply:
 - a. Whenever information is uncovered as a byproduct result of CIA foreign-targeted intelligence or counterintelligence operations abroad which make Americans abroad suspect for security or counterintelligence reasons, the information will be reported in the following manner.
 - i. With respect to private American citizens abroad, such information will be reported to the FBI.
 - ii. With respect to official U.S. personnel abroad, such information will be reported to their parent agency's security authorities, and to the FBI if appropriate.

In both such cases, under this sub-paragraph, specific CIA operations will not be mounted against such individuals: CIA responsibilities thereafter will be restricted to reporting any further intelligence or counterintelligence aspects of the specific case which come to CIA attention as a by-product of its continuing foreign-targeted operational activity...⁴⁰⁷

With this memo, Director Colby not only terminated CHAOS, but developed new guidelines for CIA activities involving American citizens. This was likely a reflection of Colby's understanding that the CIA had not only violated the CIA's charter, but also infringed on the Constitutional rights of numerous U.S. citizens during operation CHAOS, and, more generally, since the early 1950s. Much like Chief Postal Inspector Cotter, Colby felt pressure to ensure his agency was running a clean operation in light of the Watergate scandal. Further, on April 27, 1973, the *New York Times* disclosed that the government had broken into the office of Pentagon Papers leaker Daniel Ellsberg, with the help of the CIA. These two events weighed heavy on Colby. However, they are not the only explanations for Colby's critical view of the agency. Colby's CIA

interception programs could more clearly be written as SR/POINTER and HT/LINGUAL. The meanings the SR and HT prefixes have been kept classified, therefore it is unclear what they designate.

⁴⁰⁷ CIA, Secret, Eyes Only Cable, "Termination of CHAOS" from William Colby to Chief, OPS/ITG with copy for Chief of the Area Division, 1974.

colleagues described him as a “dedicated soldier-priest,”⁴⁰⁸ meaning he was willing to carry out his duties so long as they were within the confines of the law, and it was his mission to root out illegal activities within the Agency. In fact, Colby advocated for taking half of the multi-billion dollar CIA budget and dedicating it to “education, economic competitiveness, and programs for the poor.”⁴⁰⁹

By the time Colby sent the cable, CHAOS had disseminated more than 5,000 reports to the FBI, collected the names of 300,000 U.S. and domestic organizations, created more than 13,000 files on 7,200 citizens, prepared 3,500 internal memoranda and 3,000 memoranda for dissemination to the FBI, and distributed 37 memoranda directly to the White House.⁴¹⁰ These estimates are likely conservative, especially when taking into consideration the amount of editing done on the Rockefeller Commission report; President Ford’s deputy White House Chief of Staff Richard (Dick) Cheney was responsible for editing the Rockefeller Commission Report in 1975; Cheney removed an entire 86 page section on CIA assassination plots and edited numerous other pages.⁴¹¹ Further, there is no way to check the actual files because all documents associated with CHAOS were destroyed in 1990.

RESISTANCE

CHAOS was one of many CIA programs carried out during the 1960s and ‘70s. Although CHAOS initially collected intelligence in such a way that it was legal, it quickly expanded and

⁴⁰⁸ Douglas Waller, *Disciples: The World War II Missions of the CIA Directors Who Fought for Wild Bill Donovan*, (Simon & Schuster 2015), 10.

⁴⁰⁹ Tim Weiner, “William E. Colby, 76, Head of C.I.A. in a Time of Upheaval” *New York Times*, May 7, 1996.

⁴¹⁰ Rockefeller Commission, 24.

⁴¹¹ John Prados and Arturo Jiminez-Bacardi, “Gerald Ford White House Altered Rockefeller Commission Report in 1975; Removed Section on CIA assassination Plots,” *National Security Archive Briefing Book No. 543*, February 29, 2016.

began operating beyond the legal scope of the Agency. On occasion, the CIA initiated an operation with no pretense of foreign intelligence. One wholly domestic surveillance operation known as RESISTANCE was initiated by the CIA in 1967. The National Security Act of 1947 charged the Director of Central Intelligence with protecting intelligence sources and methods from unauthorized disclosure. This was interpreted broadly by the CIA. The Agency read this section of the Act as an authorization to protect of all Agency personnel and facilities against any kind of security threat, not just the threat of leaks and unauthorized disclosure. It was under this authority to protect its sources and methods that the CIA justified the domestic surveillance program known as RESISTANCE.

In February 1967, the CIA support arm, the Office of Security (OS), “directed its field offices to report on the possibilities of violence or harassment at [colleges] which CIA recruiters planned to visit.”⁴¹² The CIA expected significant student resistance to the government’s efforts to recruit students on a number of college campuses. In most cases, the CIA was able to make arrangements with school security and school officials at the colleges and universities, preventing most of the expected opposition. Given how widespread was the student movement and how important the CIA believed these recruiting efforts to be, the CIA’s Deputy Director Vice Admiral Rufus Taylor ordered the Office of Security to systematically study and investigate campus dissidence, with special attention paid to aims, causes, attitudes, beliefs, and the question of how students not directly involved felt about the groups and individuals participating in the student movement.⁴¹³

⁴¹² Church Committee, *Final Report: Book III*, 721.

⁴¹³ Church Committee, *Final Report: Book III*.

In the beginning the field offices and agents focused their efforts on information readily available to the public, a tactic known in the intelligence community as Open-Source intelligence (OSINT), and dealt with campus demonstrations for and against local and national issues. So much information was collected and reported that in 1968 the CIA was forced to establish the Target Analysis Branch, which was in charge of processing the information. The emphasis on OSINT resulted in the Office of Security's field offices essentially reproducing media reports on campus demonstrations. To combat this redundancy, and create opportunities to gather new and generally unavailable information, field offices began collecting information from confidential sources, such as police and school officials.

There are no records indicating that agents infiltrated student groups under RESISTANCE. However, by early 1971, there was concern that coordinating information collection with confidential sources might be outside the authority of the CIA, resulting in the dissemination of a memo from CIA headquarters that outlined limitation instructions to all participating field offices. The memo prohibited attempts

To recruit new informants or sources such as campus or police officials for the express purpose of obtaining information regarding dissident groups, individuals, or activities. No new requirements for information should be levied on existing sources. The above limitation do not preclude acceptance of information gratuitously offered by informants or sources and field personnel should continue to be on the alert for non-solicited information which might contribute to the protection of the Agency personnel, projects or installations.⁴¹⁴

In other words, RESISTANCE had grown beyond its intended scope and needed to be limited to prevent further violations of the CIA charter. These activities, both legal and not, netted the CIA an index of approximately 16,000 names and developed 700 files on groups and

⁴¹⁴ Church Committee, *Final Report: Book III*, 723.

individuals involved in campus demonstrations. Further, the Office of Security used the information gathered by the field offices to predict when and where student demonstrations against the CIA or other government agencies would take place. The project ended in June 1973, but the index and files were maintained and used for the purpose of backgrounds on prospective employees.

MERRIMAC

The Office of Security initiated another project in an effort to protect the CIA from perceived threats due to student demonstrations and actions. Project MERRIMAC is believed to have been created in February 1967,⁴¹⁵ with the aim of gathering intelligence on dissident groups in the Washington, D.C., area. MERRIMAC was created to predict when and where demonstrations would take place. The Office of Security chose four “indicator” organization to extensively monitor, believing them to be forerunners to larger demonstrations. Those groups were the Student Nonviolent Coordinating Committee, Women’s Strike for Peace, The Washington Peace Center, and the Congress of Racial Equality.⁴¹⁶

Initially, no advanced agents collected such intelligence, only assets who were hired on a part-time basis would monitor and report about plans the organizations had that might threaten the CIA. By June 1967, the project had expanded and the assets were asked to gather information about finances and external support. In autumn 1967, MERRIMAC expanded yet again, seeking information about the leadership of these organizations and their plans for participating in the

⁴¹⁵ Director Helms testified before the Rockefeller Commission that he believed he approved the project at some point in early 1967, though it was a verbal approval, thus no record of its initial creation exists. The Assassination Archives and Research Center has narrowed the creation of MERRIMAC to sometime in February 1967. However, it is not possible to know the exact date of approval.

⁴¹⁶ Church Committee, *Final Report: Book III*, 724; also Geoffrey Stone, in *Perilous Times*, mistakenly includes SDS in place of SNCC, at 491.

National Mobilization Committee to End the War.⁴¹⁷ MERRIMAC continued to increase in scope, with the CIA requesting assets “report any information about the plans and attitudes of groups revealed at meetings, their associations with other groups, sources of support, and [accounts] of what was said [during] meetings, in addition to information specifically relating to threatened action against the CIA.”⁴¹⁸ The number of targets expanded as well, with nearly a dozen under surveillance by August 1968.

By late 1968, the CIA had started to use agents in MERRIMAC, who carried out surveillance of group leaders and implement physical surveillance tactics. The agents photographed leaders, meeting attendees, and license plates, and followed attendees and leaders to their homes after meetings to record their addresses. The last MERRIMAC files were created in 1968 and the program was officially terminated in September 1970.

In August 1973, Director Colby criticized the program and sent out a directive stating:

It is appropriate for the Office of Security to develop private sources among CIA employees. *It is not appropriate for CIA to penetrate domestic groups external to CIA, even for the purpose of locating threats to the Agency.* Notice of such threats should be reported to the appropriate law enforcement bodies and CIA will cooperate with them in any action required which does not involve direct CIA participation in covert clandestine operations against U.S. citizens in the United States.⁴¹⁹

While it was in operation, all of the information gathered by MERRIMAC was available to agents participating in CHAOS and this likely encouraged MERRIMAC to expand beyond its original scope. It is unclear how many files MERRIMAC contributed to or how many names were

⁴¹⁷ Church Committee, *Final Report: Book III*.

⁴¹⁸ Church Committee, *Final Report: Book III*, 724, citing a CIA memo from Headquarters to Proprietary Gen. Manager, August 8, 1968.

⁴¹⁹ Ibid., citing Memorandum from William Colby to Deputy Director of Administration, Attachment, “Memorandum : MERRIMAC,” August, 29, 1973 – emphasis added.

indexed as a result of the program. What is clear is that Director Colby recognized the program had expanded beyond the scope of legal CIA activities. Colby directly criticized MERRIMAC not long after the confirmation hearings, which confirmed him as the Director of the CIA, were convened in July 1973.

Congressional Investigation

On December 22, 1974, the *New York Times* published an article titled “Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years.” The front-page story began, “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.”⁴²⁰ The author, Seymour Hersh, alleged that the CIA had been engaged in illegal acts including break-ins, wiretaps, and mail interception since the 1950s. Hersh revealed that there existed intelligence files on 10,000 citizens, and that these files were maintained by a special CIA unit that also followed and photographed antiwar demonstrators. His article would lead 1975 to be known as the “Year of Intelligence.”

The article had many significant consequences. Not only did it lead the CIA to engage in surveillance actions against Hersh, it also brought to the American people information about the CIA’s domestic and international operations. According to Cord Meyer, many Americans, after reading the article, believed that “the CIA had become a domestic Gestapo.”⁴²¹ This belief “stimulated an overwhelming demand for the wide-ranging congressional investigations that were

⁴²⁰ Seymour Hersh, “Huge CIA Operation Reported in U.S. against Antiwar Forces, Other Dissidents in Nixon Years,” *New York Times*, December 22, 1974, Page 1.

⁴²¹ Cord Meyer, *Facing Reality: From World Federalism to the CIA* (University Press of America: 1980), 14.

to follow.”⁴²² The actions of the CIA were investigated due to public pressure. The Rockefeller Commission, the Church Committee, and the Pike Committee all had an opportunity to hear testimony from high-ranking CIA officials, though only the Rockefeller Commission is discussed below. As expected, the result of these investigations was a number of recommendations, but led to no direct punishment of individuals who had carried out illegal surveillance and intelligence activities or against officials who had authorized such operations.

The Rockefeller Commission

On January 4, 1975, President Gerald Ford established the Rockefeller Commission—so named because it was chaired by Vice President Nelson Rockefeller—in response to Hersh’s article. The Commission was responsible for determining whether the CIA had, in fact, engaged in domestic activities that were outside the charter and legal authority given to the Agency by the National Security Act of 1947. There was concern within the administration that such an investigation would bring to light CIA activities that, in the interests of national security, were necessarily hidden from public view and scrutiny. However, public concern about the possible illegality of some Agency activities overwhelmingly favored an officially sanctioned investigation.

President Ford assigned the Commission three tasks:

1. Ascertain and evaluate any facts relating to activities conducted within the United States by the Central Intelligence Agency which give rise to questions of compliance with the provisions of 50 U.S.C. 403 [National Security Act of 1947];
2. Determine whether existing safeguards are adequate to prevent any activities which violate the provisions of 50 U.S.C. 403;
3. Make such recommendations to the President and to the Director of Central Intelligence as the Commission deems appropriate.⁴²³

⁴²² Ibid.

⁴²³ Rockefeller Commission, *Final Report*, x.

Thus, the Rockefeller Commission was created with the purpose of investigating *domestic* actions. This decision did not mean that the CIA was acting entirely within its authority overseas. On the contrary, there were a number of illegal foreign actions carried out by the CIA during this time. However, President Ford told Secretary of State and National Security Advisor Henry Kissinger, Vice President Rockefeller, and White House Chief of Staff Donald Rumsfeld that if information about the CIA's "plans to assassinate certain foreign leaders...[and that Director] Helms may have committed perjury during the confirmation hearings" were leaked to the press, "the CIA would be destroyed."⁴²⁴

Public pressure forced the president to promise that a commission would be convened to investigate possible CIA impropriety. To assure that any information with the potential to destroy the CIA was kept hidden from public view, Ford assigned Vice President Rockefeller to lead the Commission and ordered him to avoid questions about foreign actions. Ford knew that "it would be tragic if [the Commission] went beyond"⁴²⁵ investigating domestic activities. Ford, Rockefeller, Kissinger, and Former Director of Central Intelligence Richard Helms all agreed that the purpose of the Commission's final report would be damage control rather than exposure.⁴²⁶ In February 1975, Rumsfeld was given the responsibility of "determining how many—if any—of the CIA's secrets Ford and Rockefeller would share with Capitol Hill."⁴²⁷

To say that the Commission was tainted from the start would be an understatement. Not only was it being directly guided and managed by the Ford administration, but the seven members

⁴²⁴ Tim Weiner, *Legacy of Ashes*, 391.

⁴²⁵ *Ibid.*, 392.

⁴²⁶ *Ibid.*

⁴²⁷ *Ibid.*, 393.

of Rockefeller's Commission were drawn from private industry rather than from Congress. The commission membership included: Vice President Rockefeller; Jack Connor, Chairman and CEO of Allied Chemical Corporation; C. Douglas Dillon, Director of Dillon, Read & Co., Inc., an investment banking firm; Erwin N. Griswold, lawyer and former Dean of Harvard Law School; Lane Kirkland, Secretary-Treasurer of the AFL-CIO; Lyman Lemnitzer, a retired U.S. Army General; Ronald Reagan, a former president of the Screen Actors' Guild and former governor of California; Edgar Shannon, a professor of English and former president of University of Virginia; and David Belin, a lawyer from Des Moines, Iowa, who was appointed as the commission's executive director. One can only speculate about the reasons for selecting a commission on which no active national politicians sat. Further, the investigation was closed to the public, given the sensitive nature of CIA activities, which preventing much scrutiny from the press and the public.

In the view of the Commission, as stated in its final report, "ensuring domestic tranquility and providing a common defense are not only Constitutional goals but necessary preconditions for a free, democratic system... The government has both the right and the obligation within Constitutional limits to use its available power to protect the people and their established form of government."⁴²⁸ The Commission struggled to draw the line between the legitimate need for and use of intelligence, and the rights and guarantees afforded by the Constitution. Pointing out that the U.S. was the "principle intelligence target of the communist bloc," the Commission stated that it believed the free environment in the U.S. was allowing foreign intelligence operations hostile to the U.S. to flourish. Therefore, the Commission believed it was essential that the "intelligence activities of the CIA and our other intelligence agencies, as well as the domestic

⁴²⁸ Rockefeller Commission, *Final Report*, 5.

counterintelligence activities of the FBI, be given the support necessary to protect our national security and to shield the privacy and rights of American citizens from foreign intrusion.”⁴²⁹

To its credit, the Commission did investigate much of what the public had hoped would be examined. According to the Commission’s report, the “public charges” against the CIA were that the Agency’s domestic activities involved:

1. Large-scale spying on American citizens in the United States by the CIA, whose responsibility is foreign intelligence;
2. Keeping dossiers on large numbers of American citizens;
3. Aiming these activities at American who have expressed their disagreement with various government policies.

These initial charges were subsequently supplemented by others including allegations that the CIA:

- Had intercepted and opened personal mail in the United States for 20 years;
- Had infiltrated domestic dissident groups and otherwise intervened in domestic politics;
- Had engaged in illegal wiretaps and break-ins; and,
- Had improperly assisted other government agencies.⁴³⁰

The Commission drew a number of conclusions from the testimony it heard and from its investigation in general. The Commission believed that the National Security Act of 1947 should be amended to explicitly state that the CIA should engage only in foreign intelligence and that the president should prohibit the CIA from collecting information about the domestic activities of citizens. The Commission also recommended that the Department of Justice should more actively exercise an oversight role and initiate prosecutions for criminal misconduct by the CIA. This recommendation was a reaction to the fact that the CIA had previously been entirely in charge of

⁴²⁹ Ibid., 8.

⁴³⁰ Ibid., 9.

determining whether its own agents and employees had violated laws and if they should be prosecuted.

New standards for CIA activities were recommended. The Commission proposed that these guidelines should explicitly state which types of activities were permitted and prohibited, and should specify that:

- Clandestine collection of intelligence directed against United States citizens is prohibited except as specifically permitted by law or published Executive Order;
- Unlawful methods or activities are prohibited;
- Prior approval of the DCI shall be required for any activities which may raise questions of compliance with the law or with Agency regulations.⁴³¹

The Commission determined that the CIA had participated in mail interception from at least 1952 until 1971 and that these interceptions were explicitly illegal under U.S. statutes and outside the authority of the CIA. Further, these mail interceptions indicated that the CIA was carrying out internal U.S. security responsibilities in its joint efforts with the FBI.

It was determined by the Commission that some of the activities undertaken through the CHAOS program unlawfully exceeded the CIA's statutory authority. As a result, the Commission recommended that "Presidents should refrain from directing the CIA to perform what are essentially internal security tasks," that the CIA "should resist any efforts, whatever their origin, to involve it again in such improper activities," and that "the files of the CHAOS project which have no foreign intelligence value should be destroyed by the Agency at the conclusion of the current congressional investigation, or as soon thereafter as permitted by law."⁴³² It was also

⁴³¹ Ibid., 19.

⁴³² Ibid., 25.

recommended that the CIA not infiltrate dissident groups in the United States, and that the Agency not spy on meetings or compile records on the communications of individuals in the U.S.

Generally, the Commission report suggested the CIA committed a number of crimes and repeatedly participated in activities beyond the Agency's charter. Much like the Church and Abzug Committees did in their investigations of the NSA and FBI, the Rockefeller Commission pointed out the Agency's illegal actions and made recommendations for how the Agency could keep itself from breaking the law in the future.

The Commission believed that if the American people knew more about the actual scope of CIA activities, they would be reassured. The Commission also confirmed much of what Seymour Hersh had exposed in his *New York Times* article. The U.S. public pushed for an investigation into the activities of the CIA and was successful in that endeavor. Unfortunately, the Rockefeller Commission was not only directly guided and managed by the Ford administration, it also lacked the teeth necessary to ensure punitive consequences be meted out against individuals who had participated in illegal actions or who had approved illegal actions. Thus, the CIA was ultimately able to trample the rights of U.S. citizens and work outside its charter for more than twenty years and face no meaningful sanctions or consequences.

Analysis

The CIA's authority comes most directly from the National Security Act of 1947. The Agency in the course of its operation has seemingly misread or redefined this Act in such a way as to permit itself to carry out internal security functions. It is difficult to know if this misreading was the result of simple ineptitude or instead reflects an intentional effort to increase the legal authority of the CIA. Because the Agency did not ask for legislative clarification on the subject, it can be speculated the Act was *intentionally* misread. In that case, the CIA can be understood as

engaging in what Ericson terms counter-law I. The National Security Act was passed with the intent of centralizing intelligence and creating an agency that would not have domestic policing or internal security functions. Counter-law I posits that agencies such as the CIA will reinterpret or intentionally misread statutes and legislation in ways that provide it additional authorities or legal capacities. If this theory is correct, the CIA's interpretation of the 1947 Act is incongruent with the intentions of Congress when it debated and ultimately passed the statute, and is thus an apt example of counter-law I.

The National Security Act charged the Director of Central Intelligence (DCI) with the responsibility "for protecting intelligence sources and methods from unauthorized disclosure." This responsibility likely led the various DCIs to adopt a precautionary logic. Such a logic focuses on harms and uncertainties that cannot be quantified or even accurately predicted. The result of such uncertainty is paranoia, suspicion, and a willingness to bend, if not break, the law so as to counter the imagined threat. This may explain, in part, why these CIA programs were initiated and allowed to persist. Precautionary logic also helps to explain the CIA's reinterpretation of the National Security Act (counter-law I).

It follows that many of the CIA's illegal activities stemmed from this reinterpretation. Throughout the existence of HTLINGUAL the CIA repeatedly violated not only its own charter, but also federal statutes protecting the interception and obstruction of U.S. citizens' mail. The intelligence gleaned from these illegal activities was then passed on to the FBI. Further, the CIA actively collaborated with the FBI to intercept mail sent between particular individuals, indicating that the CIA was operating in the interest of internal security rather than observing its mandate to focus on foreign intelligence. The Agency is responsible for giving intelligence to other federal agencies when it is directly relevant to an ongoing criminal investigation. However, it is illegal for

the CIA to actively investigate, carry out surveillance of, and acquire intelligence on U.S. citizens in the hope that such efforts will disclose that the citizen had participated in criminal action. More commonly called a “fishing expedition,” this type of activity is entirely outside the authority of the CIA.

As has been shown above, the First Amendment does not protect all speech in all situations. However, of all types of speech that are protected, political speech is arguably the most important. When the CIA carried out operations that intercepted personal letters (HTLINGUAL), generated studies on American dissident groups (CHAOS), infiltrated student groups (RESISTANCE), photographed license plates of political meeting attendees (MERRIMAC), and generally indexed names and created dossiers on citizens, the Agency was in violation of the U.S. Constitution. The sympathetic Rockefeller Commission acknowledged that “the interception of private communications and the undue accumulation of information on political views or activities of American citizens could have some inhibiting effect.”⁴³³ Thus, the Commission recognized that the activities of the CIA had a chilling effect on protected speech.

In much the same way that the activities of the FBI resulted in a chilling effect, which inhibited individuals from expressing protected speech, these CIA operations did the same. But freedom of speech was not the only Constitutional right violated by the CIA. CHAOS produced studies of domestic student groups, indexing the individuals directly involved as well as their associates. In this way, the operation violated the First Amendment protection of free association. As with the COINTELPROs, CHAOS, MERRIMAC, and RESISTANCE overwhelmingly targeted citizens and domestic groups on the Left. No evidence was found to suggest that these

⁴³³ Rockefeller Commission, *Final Report*, 63.

CIA operations surveilled or investigated anyone with conservative ideologies. Thus, the CIA was targeting groups based on their political beliefs, not based on their real threat potential—otherwise these programs would have investigated the Ku Klux Klan, as had been done with the COINTELPRO-White Hate.

The Fourth Amendment was also repeatedly violated by the CIA. The NSA and, to a lesser extent, the FBI, began surveillance activities during a time when the Supreme Court's understanding of the Fourth Amendment was changing. The Court in *Katz* held that private conversations had the protection of the Fourth Amendment. This case concluded in 1967, more than 20 years after the NSA began intercepting telegrams and more than a decade after the first COINTELPRO operation began. In contrast, CHAOS, MERRIMAC, and RESISTANCE were all initiated the year of the *Katz* ruling. Thus, these later operations should have never been initiated, or, more charitably, they should have been terminated once the *Katz* ruling was handed down in December 1967.

Katz held that private conversations were protected from unwarranted intrusion, including recording and surveillance, but there is no Constitutional protection against public physical surveillance, except where such surveillance meets the legal definition of harassment. The effect of such open surveillance, however, is quite apparent. As put forward in the theory of stigmatization, when a government agency openly surveils groups or individuals participating in protected speech, such as a political rally, that surveillance signifies to the community at large that the government does not believe such political speech or political ideas to be legitimate. In this way, the government is able to avoid directly violating the First and Fourth Amendments, while reaping the benefits of such violations. In its investigation, the Rockefeller Commission stated that

it believed the exposure of CIA operations would put the public at ease, but this is unlikely given the stigmatizing effect that such disclosure likely had on the Left.

The evidence showing that the CIA violated federal statutes, its own charter, and the Constitutional rights of countless Americans is overwhelming. Again, the question is: How did the officials and agents at the CIA avoid punishment if they repeatedly broke the law? Again, the answer is, the CIA is a member of the Prerogative State. The CIA, like the NSA, FBI, and Prerogative State at large, was more concerned about the material outcomes of their actions and operations than about actual justice. Certainly, there were pressures placed on the Agency by multiple presidents and this likely exacerbated the desire for material outcomes. The CIA was repeatedly ordered to find a foreign connection to domestic dissidence when it did not exist. As a result, the Agency kept expanding its programs and scope in efforts to find such connections.

One piece of evidence that most directly shows the CIA as a member of the Prerogative State is the Rockefeller Commission. The president selected his vice president to head the Commission with the express intent of preventing particular types of questions from being asked, to conduct the investigation in such a way that it would not aim to expose impropriety as much as it would control the damage done by Hersh's *New York Times* article. President Ford and former DCI Helms agreed on this aim before the investigation had even started. After it was complete, Cheney edited the report to exclude more than 86 pages. In this way, the CIA was acting as an American Gestapo, doing whatever it could to ensure there were no threats to the power of the administration. In turn, the CIA was permitted to violate the law and Constitution with impunity.

Conclusion

From its creation in 1947 until Seymour Hersh published his *New York Times* article on December 22, 1974, the CIA carried out numerous illegal intelligence operations. The first was

HTLINGUAL, which intercepted millions of pieces of mail. Then came CHAOS, which reported on the activities, ideas, aims, and finances of political groups participating in constitutionally protect political speech. Additionally, CHAOS disseminated more than 5,000 reports to the FBI, had compiled an index that included the names of 300,000 citizens and dissident groups, created more than 13,000 files on 7,200 citizens, and prepared more than 6,000 memoranda for both internal and external dissemination. RESISTANCE gathered intelligence about political organizations and individuals on college campuses across the United States, resulting in an index of 16,000 names and the development of 700 files on groups and individuals. Finally, operation MERRIMAC surveilled a number of “indicator” groups with the hope that such groups would act as bellwethers for other campus demonstrations and protected political activism.

As with the surveillance programs carried out by the NSA, and especially, the FBI, it is difficult to understand the full extent of the impact the CIA’s illegal surveillance operations had on individuals, political organizations, and on the political and cultural life of the United States in general. There is no evidence that any of these programs resulted in greater national security by means of disrupting violence or foreign influence, which raises the suspicion that they were permitted to persist for so long because they were effectively disrupting Left political factions and groups. Such tireless surveillance necessarily inhibited the political speech of some individuals and groups. This surveillance violated not only federal statutes, but the First and Fourth Amendments as well. However, the CIA managed to escape investigation beyond Congressional recommendations that the Agency might consider so that it would not break the law in the future. In the end, the CIA should be understood as not just a member of the intelligence community, but as a member of the Prerogative State as well.

CHAPTER SEVEN

CONCLUSION

Before the *New York Times* published the infamous Seymour Hersh article, there was very little known about the activities of the U.S. intelligence community. His work not only provided the impetus for Congressional investigation into these activities, but it generated public interest in those activities. This public interest put pressure on the Executive, and resulted in the Rockefeller, Church, Pike, and Abzug Committees. These investigative committees confirmed what Hersh had written, but also made an unexpected discovery: Hersh had barely scratched the surface of the illegal actions undertaken by members of the intelligence community. For example, investigators found that intelligence units from the Army had compiled files on more than 100,000 citizens during the Vietnam War, that the FBI had created more than 1 million such files and also attempted to incite violence among dissident groups. One such operation was the FBI's project HOODWINK, which sought to incite violence against "the Communist Party of the United States by setting it against La Cosa Nostra [the Sicilian Mafia]." ⁴³⁴

Legacy of Congressional Investigations

In response to the numerous Congressional investigations that took place during the Year of Intelligence, Congress passed the Foreign Intelligence Surveillance Act in 1978 (FISA). ⁴³⁵ The purpose of FISA is "to review Justice Department applications and issue secret warrants for electronic eavesdropping and, since 1995, clandestine entries into premises in connection with 'security' investigations." ⁴³⁶ The review process is carried out by the Foreign Intelligence

⁴³⁴ John M. Goshko, "FBI 'Hoodwink' Ploy Detailed", *Washington Post*, December 6, 1975.

⁴³⁵ Pub. L. No. 95-511, 92 Stat. 173, 50 U.S.C. 36 (1978)

⁴³⁶ Gerald H. Robinson, "We're Listening! Electron Eavesdropping, FISA, and the Secret Court" 36 *Williamette L. Rev.* 51 (2000), 51.

Surveillance Court (FISC), which was originally composed of seven district judges appointed by the Chief Justice.⁴³⁷ The Court largely operates in secret, and has been criticized as a “rubber stamp for government requests.”⁴³⁸ There is some merit to this criticism, as FISC has only declined 11 of 33,900 (0.03%) surveillance requests between 1979 and 2013.⁴³⁹ This is due, in part, to the wording of FISA, which is extremely vague. The Act uses words such as “substantially,” “political,” and “organization” without any further specification about what they might mean. At first glance, criticism of such wording may seem like nitpicking, but when considering how broad these words are, it becomes apparent that such vagueness has the effect of casting an extremely wide net, where almost any activity can potentially be defined as “political” or any group as an “organization,” and therefore open to potential warranted surveillance. To make matters worse, the FISC’s interpretations of these words and decisions about warrants “are essentially immune to meaningful review.”⁴⁴⁰

One additional—though not the only—problem with FISA, has to do with electronic surveillance authorizations. The Act “authorizes the Justice Department to engage in electronic surveillance to collect [foreign intelligence information] without a court order for up to one year,”⁴⁴¹ with virtually the only caveat being that there be no “substantial likelihood” that the intercepted communications will be those of a citizen—again, there is no definition of “substantial likelihood,” and this is especially important given that it is the only limitation on warrantless electronic surveillance. It would seem, then, that if Congress had been serious about reforming the

⁴³⁷ The USA PATRIOT Act increased the number of judges to eleven.

⁴³⁸ Linda Wertheimer, “FISA Court Appears to be Rubber Stamp for Government Requests” *National Public Radio-Morning Edition*, June 13, 2013 accessed online at <http://www.npr.org/2013/06/13/191226106/fisa-court-appears-to-be-rubberstamp-for-government-requests>

⁴³⁹ Evan Perez, “Secret Court’s Oversight Gets Scrutiny” *The Wall Street Journal*, June 9, 2013.

⁴⁴⁰ Robinson, *We’re Listening!*, 56.

⁴⁴¹ *Ibid.*, 60.

abilities and opportunities for the intelligence community to carry out surveillance on U.S. citizens, attention would have been paid to the fact that much of the trouble in the mid-twentieth century can be traced back to the vague and ambiguous wording of the National Security Act of 1947.

Though Congress made recommendations to the intelligence agencies about how to avoid violating their respective charters, as well as the Constitution, the agencies faced virtually no meaningful punishment. Perhaps the worst consequences of these violations was the tedium of enduring so many Congressional investigations, or that the agencies would be inconvenienced with the requirement that some of their operations be rubber stamped by FISC. The histories of these agencies and their membership in the Prerogative State indicate that they are most likely carrying out a number of illegal programs at any time. This dissertation is in a unique position to have this educated suspicion confirmed via the Snowden documents, rather than being only able to take the research presented and carry it out to the logical conclusion that such activities might be taking place today. In other words, the predictive power of the project is confirmed, at least in part, by the Snowden documents.

Inhibiting Speech

Throughout this dissertation, I worked to show that the NSA, FBI, and CIA repeatedly and knowingly violated the law and the civil liberties of U.S. citizens. From SHAMROCK to COINTELPRO to CHAOS, these agencies carried on with seemingly little regard for the First and Fourth Amendments. In Chapter 2, I presented a number of important historical issues. First, the U.S. state has been carrying out surveillance against the public and intercepting communications since before the Revolutionary War. Additionally, I showed the shift in ideologies over time—a shift that moved from reluctance to violate, and respect for, individual rights and autonomy, toward the willingness to ignore civil liberties and the rights of individuals in order to protect the state.

This brief history demonstrates what appears to be a consistent trajectory of changes, which eventually led to mass public surveillance and the capturing of huge quantities of personal data for government use—that is, the preference of state power over individuals’ civil liberties.

In the third chapter, I discussed a number of important theoretical perspectives that were used to inform the analyses of surveillance activities discussed in subsequent chapters. These theories work in tandem with one another to help us understand why such surveillance is a problem and how the intelligence agencies were able to get away with these operations. While many people have an inherent feeling that surveillance invades personal space and is often disagreeable, subjective feelings of this sort are generally of little juridical consequence. In order to understand why such surveillance was harmful, we have to look beyond the subjective and anecdotal. To do so, I utilized the legal theory of the “chilling effect.” This effect is the byproduct of other government operations, legal or otherwise, which inhibit the expression of protected speech. In the event that protected speech is being hindered by a legitimate law, the preference is to reign in that law so that the speech can be exercised. In the case of an illegal government activity that chills speech, to allow its continuation is entirely impermissible and the surveillance operations discussed in chapters 4, 5, and 6, were all illegal even before accounting for the chilling effect.

This chilling effect not only inhibits various types of protected speech, it also prevents people from exercising what is known as intellectual privacy. The notion of intellectual privacy suggests that people must be able to discuss new or confusing ideas, no matter how upsetting they may be to the government, if we are to have a functioning democracy. Working through controversial ideas away from the intense scrutiny of the government is required in order to allow people to make up their minds about issues as they see fit, and this intellectual freedom is one of

the cornerstones of a free society. Government surveillance prevents, or at least inhibits, some individuals from carrying out such tasks, effectively prohibiting certain thoughts and ideas.

Examining the combination of the chilling effects and the inhibition of intellectual privacy that results from government surveillance was the goal of this dissertation, and it is also where the fields of communication and surveillance studies come together. Each field has its normative preferences, the former in regard to First Amendment law and the latter in regard to government surveillance. I suggest that bringing them together and utilizing their respective strengths allows for a more powerful examination and analysis than if either were used alone. The analyses of the surveillance operations of the NSA (chapter 4), the FBI (chapter 5), and CIA (chapter 6) utilized these two theories to show how and why such operations were illegal and in violation of the Constitution.

The illegality of such operations was repeatedly demonstrated, leaving the reader—and this author—to ask, “Why were the agencies not punished for such activities?” The answer to this question can be explained with Ernst Fraenkel’s dual state theory. I used this theory to posit that the United States consists of a Normative State and a Prerogative State. In the former, regular or day-to-day laws are followed and enforced in a meaningful and predictable manner. The Prerogative State, on the other hand, is allowed to arbitrarily apply laws to individuals and groups that it considers to be “political” in nature. This means that while one group may practice its politics (the Republican Party or the Democratic Party, for example) the Prerogative State could arbitrarily prohibit other forms and expressions of politics (that of the Communist Party, for example) based on the political nature of the group rather than instituting a law that prohibits all political parties. Further, the Prerogative State itself (and its agents) is permitted to break the law when it arbitrarily targets specific groups and individuals and does not have to worry about facing

meaningful punishment. This theory explains how the intelligence agencies, as members of the Prerogative State, were able to carry out illegal surveillance operations and avoid being dissolved, sanctioned or defunded, and why the individuals that allowed, ordered or carried out such operations faced no jail time for such illegalities.

Through the use of these three theories, this study allows us to see agencies and actions that are usually hidden from the public view. Further, this basic approach can be used to analyze surveillance operations that took place during other periods that have not been treated here. In other words, the theoretical perspective used in this dissertation is not limited to a particular historical moment but can easily be used to examine such activities as the NSA's PRISM or TRAILBLAZER surveillance operations that were disclosed in June 2013 by Edward Snowden. These programs also chill speech, as people are not sure if their communications are being intercepted and if so, for what end. Further, the same basic motivations of earlier surveillance operations can be seen today. One NSA document leaked by Snowden demonstrates that the NSA has been, and is actively, surveilling political activists' and radicals' online pornography viewing in order to use those habits and interests to delegitimize such individuals within their political organizations and communities:

The NSA document, dated Oct. 3, 2012, repeatedly refers to the power of charges of hypocrisy to undermine such a messenger [political activists]. "A previous SIGINT" -- or signals intelligence, the interception of communications -- "assessment report on radicalization indicated that radicalizers appear to be particularly vulnerable in the area of authority when their private and public behaviors are not consistent," the document argues. Among the vulnerabilities listed by the NSA that can be effectively exploited are "viewing sexually explicit material online" and "using sexually explicit persuasive language when communicating with inexperienced young girls."⁴⁴²

⁴⁴² Paul Owen, "NSA 'spied on porn habits to target radicalisers'" *The Guardian*, November 27, 2013 accessed online at <http://www.theguardian.com/world/2013/nov/27/nsa-files-live-coverage-developments-reaction>

We can understand this as an effort to chill the speech of political organizations and individuals, as people will become afraid to discuss their politics when they know such open discussion may result in surveillance and disclosure of extremely private, and possibly embarrassing, details. Further, this surveillance inhibits intellectual privacy, as the reasons for looking at such sexually explicit material online could have numerous motivations, such as academic research, sexual exploration, data analysis, and more. To be dissuaded from such exploration could result in an inability to work through certain ideas, discouraging and preventing free thought. Finally, the obvious illegality of such surveillance, and its efforts to inhibit protected political speech by disrupting the functioning of political organizations, coupled with the apparent lack of punishment of the NSA can be explained by the dual state theory.

Limitations

Throughout the course of conducting research for this dissertation I encountered a number of issues. The most inhibiting involves the nature of researching secret agencies. In October 1965, the Senate passed S. 1160, with the House following suit it in June 1966. Soon after, President Lyndon B. Johnson signed into law S. 1160, also known as the Freedom of Information Act (FOIA), which revised certain parts of the Administrative Procedures Act and was an effort to open up government documents to the public. Upon signing the Act, the president released an official statement on July 4, 1966 that addressed the potential benefits of FOIA: “This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation will permit.”⁴⁴³ Johnson also wrote that as long as there are threats to the peace, there must be secrets. These “secrets” were intelligence and

⁴⁴³ Lyndon B. Johnson, “Statement by the President upon Signing S.1160” accessed online at <http://nsarchive.gwu.edu/NSAEBB/NSAEBB194/Document%2031.pdf>

surveillance operations, as well as certain types of internal communications and other classified documents. These were mostly kept secret for the next eight years.

In 1974, in the wake of Watergate, FOIA was amended and the FBI was required to release all records relevant to specific requests unless they were necessary for national security or they might reveal the methods of the Bureau. Similarly, the CIA and NSA were also required to protect sources and methods of intelligence collection. Given that all three of the intelligence community members that this dissertation has examined have legal exemptions from releasing documents that reveal their intelligence methods, and this dissertation specifically sought to understand those methods and operations, the inability to acquire some documents limited the depth of this research. The problems that might arise when researching such agencies is well noted in the literature.⁴⁴⁴

This project also came up against the important limitation, which is somewhat paradoxical given the previously mentioned limitation, of space constraints. Though there certainly are important documents that were inaccessible due to classification, there were hundreds of thousands of pages that were not classified. It was impossible to examine all such data, even though they were readily accessible. For example, from 1958 through 1977, the FBI carried out Operation SOLO, which was a program to infiltrate the Communist Party of the United States. The files were recently declassified⁴⁴⁵ and comprise 45 volumes totaling nearly 7,000 pages. To analyze such a massive file-dump could constitute a dissertation itself.

There is a third limitation inherent in researching secret government agencies: document destruction. It is well known that J. Edgar Hoover maintained multiple filing schemes for FBI

⁴⁴⁴ See Athan Theoharis, "Researching the Intelligence Agencies: The Problem of Covert Activities" *The Public Historian* 6:2 (1984) 67-76.

⁴⁴⁵ Part were declassified in August 2011 and part in January 2012.

documents, including one that prevented documents from entering the official public record, as well as one that allowed for the destruction of certain files. For example, “the FBI’s Personal and Confidential files were under the ever-watchful eye of Hoover’s personal secretary, Helen Gandy, in her outer office... The *New York Times* quoted an anonymous FBI source in the spring of 1975 as saying ‘Gandy had begun almost a year before Mr. Hoover’s death and was instructed to purge the files that were then in his office.’”⁴⁴⁶ It is unknown how many files were destroyed or exactly what their content was, but Gandy later testified that Hoover had instructed her to destroy his files in the event of his death, including files addressing his harassment of Martin Luther King, Jr. This clandestine destruction of secret files is not the only worry.

The FBI has also worked through the appropriate channels to destroy files. In 1978, the National Archives approved the destruction of the FBI’s Sex Deviate files, a collection of files that examined “Sex Perverts in Government Service,” “Sex Offenders Foreign Intelligence,” and Sex Degenerates and Sex Offenders.” The FBI’s destruction proposal, and the National Archive’s subsequent approval of the proposal, resulted in the destruction of “99 cubic feet (approximately 330,000 pages) and had contained index cards, abstracts and related FBI documents that had been created during the period from 1937 through 1977.”⁴⁴⁷

This dissertation would have benefitted from access to internal documents and minutes of some of the political organizations targeted by these surveillance and intelligence operations. Because the intelligence community, and particularly the FBI, was so successful in infiltrating and disrupting these political organizations, many were fearful of taking minutes or writing anything

⁴⁴⁶ Henry M. Holden, *FBI 100 Years: An Unofficial History*, (Zenith Press: 2008), 44.

⁴⁴⁷ Athan Theoharis, “Secrecy and Power: Unanticipated Problems in Researching FBI Files” *Political Science Quarterly* 119 no. 2 (2004), 284.

down. This necessarily inhibits the opportunities for researchers to access these documents through archival research, though the opportunity for qualitative interviewing of organization members does remain a possibility.

The scope of this dissertation prohibited situating its examination of U.S. surveillance operations among the surveillance operations carried out by foreign nations against their own citizens, thus there were no cross-national comparisons. Surely there were domestic operations in many countries in the mid-twentieth century, but this project cannot make claims about the goals, extent, capabilities or legalities of such foreign operations. Thus, I feel it is important to keep in mind that this is not a project that advocates American exceptionalism in domestic surveillance. Similarly, to fully frame the rise of surveillance in terms of the rise of American empire was outside the scope of this dissertation.

Future Research

This dissertation examined a number of domestic surveillance operations in terms of their legality and impact on the First Amendment. The operations led to the creation of innumerable files on U.S. citizens and the listing of millions of names based on people's political and social associations. The quantity of data contained in those files and indexes would have been impossible to handle at the beginning of the twentieth century. The creation and improvement of technology such as radio frequency transmitters (bugs), high-speed telephoto lenses and improved photography technologies, as well as video allowed for the creation of these files, but it was steady advances in computing that allowed for the handling of such massive amounts of data.

After the U.S. entered World War II, the Moore school, housed at University of Pennsylvania, became an important asset for the military. It was here that numerous graduate students would do manual calculations to determine the appropriate trajectories for artillery.

However, doing these calculations manually (with only the help of electrically powered mechanical calculators) was slow and tedious. John Mauchly, in the Moore School of Engineering, suggested that these trajectories could be calculated much faster with the use of vacuum tubes. Mauchly along with an engineer, Pres Eckert, proposed the development of a new machine that could “compute ballistic trajectories... at least 100 times as fast as a human computer with a desk calculator”⁴⁴⁸ to the U.S. Army’s Ballistic Research Laboratory, Aberdeen Proving Grounds, on April 2, 1943. This new machine would later be called the Electronic Numerical Integrator and Computer, or ENIAC, and was comprised of 18,000 vacuum tubes operating at 100,000 pulses per second to fully exploit the available vacuum tube technology. It was through the pulses that numbers and control signals were transmitted. The ENIAC was able to compute the trajectory of a shell in 20 seconds—thus was the benefit of computing in war made apparent.

World War II resulted in the government fast-tracking computer research and development projects such as ENIAC, boosting computing power and making such technology more accessible in the future. By 1975, IBM introduced the IBM Data Cartridge in a Mass Storage System, which provided anywhere from 32 to 472 gigabytes of on-line data. The system was made up of a number of cartridges arranged in a honeycomb-like fashion, which was called the library. Each cartridge would be mechanically retrieved by a robotic arm and placed in a manner such that the data could be read. The staging time for this system—that is, for a computer to request a set of data, then for the robotic arm to pull a cartridge from the library and transport it to the mandrel that allowed it to spin and be read—took about 15 seconds.

⁴⁴⁸ Arthur Burks, “From ENIAC to the Stored Program Computer: Two Revolutions in Computers” *Logic of Computers Group Technical Report No. 210*; national Science Foundation, Grant No. MCS76-04297.

The development of computing and data storage technology from the early 1940s through the mid-1970s shows the speed with which technology improved. This was, in large part, due to the U.S. government's powerful interest in developing new and more efficient technologies for wartime use, as well as for security purposes in peacetime. In 1952, ENIAC had a memory capacity of 100 words; by 1975, IBM was producing systems with up to 472 gigabytes of data storage. Such advances certainly played a major role in the creation, sorting and maintenance of government surveillance data.

One future research project for which this dissertation lays the foundation is that of exploring the links between the trajectory of increasing surveillance operations and the trajectory of improving technologies, especially in computing. Such research would be forced to address how such technologies impacted decisions about, and the scope of, various surveillance operations. Those connections exist, but have not yet been carefully investigated—the Committee for Secret Correspondence was not intercepting and cataloging 150,000 letters every month as the NSA did with telegraphs during Operation SHAMROCK, and this has much to do with the available technologies for communication, interception, storage and examination.

This dissertation also opens a path for similar projects to address later periods, such as 1975-1990 (the birth of the digital) and 1990-2015 (the information age). However, much of this information will take some years to become available to researchers, given the stipulations in Executive Order 13526, President Obama's declassification order mandating that most documents be declassified within 25 years of their original classification date.

Finally, future research should work to compare the surveillance operations presented in this dissertation to the operations currently being carried out by members of the intelligence community. In deepening our understanding of the relationship that the intelligence community

had to the U.S. state in the mid-twentieth century, as central members of the Prerogative State, we should be better able to assess contemporary domestic surveillance leaks and disclosures that seemingly show an intelligence community run amok. The research in this dissertation helps to show that unless the intelligence community is fully extricated from the Prerogative State, punishment of these agencies will be nothing more than wishful thinking. Additionally, recognizing the chilling effect of earlier surveillance operations may help political organizations and individuals on the Left to understand what to expect and how to combat such effects as they might happen under massive state surveillance.

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