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A REASSESSMENT OF THE WICKERSHAM COMMISSION REPORT: THE EVOLUTION OF A SECURITY CONSENSUS

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The principal catalyst to the appointment of the National Commission on Law Observance and Enforcement (the so-called Wickersham Commission) in 1929 stemmed from a heightened public concern over the increase in crime and the attendant undermining of respect for the rule of law following the recent enactment of Prohibition. As such, with the public release of the Commission's fourteen-volume report, critical scrutiny at the time centered on the Commission's failure to offer a definitive assessment of the wisdom of Prohibition. In the process, the report's broader findings and recommendations concerning policing practices commanded surprisingly limited attention. This Symposium proposes to remedy this neglect. Yet, as I shall argue in this Paper, there is a need to reassess the Commission's core premise that changes in administrative procedures would solve the problems of ineffective law enforcement and abuses of power specifically by rationalizing decision making and promoting professionalism. The deficiency in this premise, I shall argue, derives from the Commission's failure to have anticipated the far-reaching changes in the federal role instituted after 1936 and in the authority underpinning this changed role.

In this Paper, I shall not assess this core premise directly. I shall instead assess two congressional initiatives that bookend the Commission's appointment: first, Congress's action in 1907 and 1908 that led Attorney General Charles Bonaparte in July 1908 to establish the Bureau of Investigation (formally renamed the Federal Bureau of Investigation in 1935), and, second, its enactment of Title III to the Omnibus Crime Control and Safe Streets Act in 1968 legalizing wiretapping and bugging.¹

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1. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §§ 801-

The belated establishment of the Bureau of Investigation in 1908 marked the abandonment of a long tradition whereby law enforcement was perceived to be principally a local and state responsibility. Indeed, whereas the Departments of State, Treasury, War, and Navy had been established by statute in the 1790s, the Department of Justice was not established until 1870. And, even though under this 1870 legislation Justice Department officials were authorized to “detect[] and prosecut[e] [federal] crimes,” they did not establish a discrete departmental investigative division in 1871 or in subsequent decades.² Instead, on an as needed and temporary basis over the next thirty-seven years, Justice Department officials either contracted with private detective agencies or the Treasury Department’s Secret Service division whenever they required the services of skilled investigators.³

This all changed in 1907 and 1908. At this time, members of Congress first rejected Attorney General Bonaparte’s 1907 and 1908 requests to fund a departmental investigative force, and second approved appropriation restrictions that precluded Justice Department officials from contracting for the temporary services of Secret Service agents in 1908. On June 29, 1908, in response to this latter action and relying on the Department’s contingency funds, Bonaparte hired ten former Secret Service agents, and then, on July 26, 1908, appointed Stanley Finch to head a permanent departmental investigative force of thirty-four agents.⁴

While steeped in controversy at the time of its establishment, the Bureau of Investigation nonetheless soon commanded the public and

804, 82 Stat. 197, 211–25 (codified as amended at 18 U.S.C. §§ 2510–22 (2006)); RHODRI JEFFREYS-JONES, *THE FBI: A HISTORY* 5 (2007).

2. Act of Apr. 20, 1871, ch. 21, 17 Stat. 5, 6 (appropriating funds to supply for deficiency in fiscal year ending 1871); Act of Mar. 8, 1871, ch. 113, 16 Stat. 495, 497 (appropriating funds for fiscal year ending 1872).

3. ATHAN G. THEOHARIS, *THE FBI & AMERICAN DEMOCRACY: A BRIEF CRITICAL HISTORY* 15–16 (2004) [hereinafter THEOHARIS, *FBI & AM. DEMOCRACY*]; SANFORD J. UNGAR, *FBI* 39 (1976); see also JEFFREYS-JONES, *supra* note 1, at 3, 5 (2007).

4. MAX LOWENTHAL, *THE FEDERAL BUREAU OF INVESTIGATION* 4–5 (1950); THEOHARIS, *FBI & AM. DEMOCRACY*, *supra* note 3, at 16–17; TIM WEINER, *ENEMIES: A HISTORY OF THE FBI* 11–12, 453–54 (2012); see FRED J. COOK, *THE FBI NOBODY KNOWS* 54–55 (1964); JEFFREYS-JONES, *supra* note 1, at 5, 39, 50; Vern Countryman, *The History of the FBI: Democracy’s Development of a Secret Police*, in *INVESTIGATING THE FBI* 33, 35 (Pat Watters & Stephen Gillers eds., 1973) (noting there were at least nine full-time investigators); Aaron Stockham, *Lack of Oversight: The Relationship Between Congress and the FBI, 1907–1975*, 47–48 (May 2011) (unpublished Ph.D. dissertation, Marquette University), available at http://epublications.marquette.edu/dissertations_mu/111/.

Congress's acceptance as an agency that advanced the nation's law enforcement interests. Members of Congress, implicitly recognizing the new agency's value in 1910, enacted the White Slave Traffic (or Mann) Act and in 1919 the Stolen Motor Vehicles (or Dyer) Act.⁵ These legislative initiatives captured their recognition of the importance of a federal law enforcement role, namely that local and state police agencies were incapable of addressing a growing problem of interstate crime. This altered perception of federal responsibilities quickly commanded even wider support first in the wake of the upsurge of violent gangs during the 1920s and then in response to a wave of kidnappings and bank robberies during the 1930s.

Public and congressional concerns about a perceived serious national "law and order" crisis resurfaced during the 1960s, triggered by that decade's sharp increase in urban crime, urban race riots, and violent anti-Vietnam War demonstrations. In 1968, Congress enacted the Omnibus Crime Control and Safe Streets Act to expand the federal government's law enforcement authority to address this perceived national crisis.⁶ Indeed, Title III of the Omnibus Act captures this sense that the federal government's law enforcement capabilities needed to be expanded by rescinding the ban on wiretapping instituted under the 1934 Communications Act. Title III would legalize wiretapping and bugging during criminal investigations subject, however, to a prior court-approved warrant requirement. The proposed legislation, nonetheless, contained a broad exemption: namely, that the warrant requirement shall not "limit" a president's "constitutional power" in an undefined national security area.⁷ The rationale advanced for this exemption was "whatever means are necessary should and must be taken to protect the national security interest."⁸

The contrast between congressional opposition in 1907–1908 to a centralized police force and approval in 1968 of legislation endorsing undefined presidential powers in the national security area pinpoints one key reason for the unprecedented expansion of federal law

5. Stockham, *supra* note 4, at 63–69.

6. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197.

7. § 802, 82 Stat. at 213 (codified at 18 U.S.C. § 2511(c) (2006)).

8. S. REP. NO. 90-1097, at 69 (1968); *see also* ATHAN G. THEOHARIS, ABUSE OF POWER: HOW COLD WAR SURVEILLANCE AND SECRECY POLICY SHAPED THE RESPONSE TO 9/11, 40–41 (2011) [hereinafter THEOHARIS, ABUSE OF POWER]; Stockham, *supra* note 4, at 258–63 (discussing the debate sparked by the presidential exception).

enforcement powers and, as a byproduct, predictable abuses of power: namely, the emergence of what I would describe as a “national security” consensus, one reflected in the transformation of American conservatism. While the prevailing interpretation singles out the crucial role of liberal Presidents and members of Congress (notably during the Progressive, New Deal, and Great Society eras) as effecting the growth of a powerful federal government, this prevailing view missed what has been a secondary factor contributing at minimum to the expansion of federal law enforcement powers: the shift among conservatives in their conception of presidential power during the Cold War era.

Thus, if we ask the question which members of Congress had opposed Attorney General Bonaparte’s requests of 1907–1908 to fund a departmental police force and then in 1908 had approved appropriation restrictions to foreclose Justice Department officials’ access to Secret Service agents, the answer is conservative Republicans and Southern Democrats. Just as conservative Republicans during the so-called Progressive Era of 1901–1917 had opposed both the expansion of federal regulatory powers and the establishment of executive commissions such as the Food and Drug Administration, the Federal Trade Commission, and the Federal Reserve Board, in 1907–1908, they had similarly opposed the establishment of a federal police force that would be subject to the direction of executive branch officials. For quite different reasons, Southern Democrats—who during the pre-Civil War years had opposed protective tariffs, liberal land disposition policies, or funding a transcontinental railroad system, and were later scarred by the South’s experience during Military Reconstruction—in 1907–1908 similarly opposed, on states’ rights grounds, the establishment of a federal police force that would be subject to the direction of executive branch officials.⁹

These concerns of conservative Republicans and Southern Democrats about the perils that a federal police force posed to limited government and to personal and political rights had led them to reject Bonaparte’s requests to fund a departmental investigative division and to endorse appropriation restrictions that would prohibit the department’s temporary employment of Secret Service agents.¹⁰ For

9. ATHAN G. THEOHARIS & JOHN STUART COX, *THE BOSS: J. EDGAR HOOVER AND THE GREAT AMERICAN INQUISITION* 42–43 (1988).

10. See LOWENTHAL, *supra* note 4, at 3–4; WEINER, *supra* note 4, at 11; Stockham, *supra* note 4, at 21–35.

example, Congressman Walter Smith (Republican, Iowa) pointedly asked Bonaparte whether the Attorney General agreed that Congress's opposition was "evidence of the hostility to what might be called a spy system," while Congressman Joseph Swagger Sherley (Democrat, Kentucky) characterized such a force as "not . . . being in accord with the American ideas of government."¹¹ "[A] secret service force," Sherley asserted, "had inherently in it the possibilities of abuse"¹² Echoing Sherley's warning, Congressman George Waldo (Republican, New York) defined as the central issue: "[W]hether we believe in a central secret-service bureau, such as there is in [czarist] Russia to-day [sic] . . . it would be a great blow to freedom and to free institutions if there should arise in this country any such great central secret-service bureau as there is in Russia."¹³ Would not such a centralized agency, Sherley feared, lead to investigations of the "private conduct of an officer or employee of the Government," and specifically, "if the accusation was made against a member of Congress that he ha[d] been guilty of conduct unbecoming a gentleman and a member of Congress"?¹⁴ Alarmed by this ominous possibility, Congressman Smith maintained that "no general system of spying upon and espionage of the people, such as has prevailed in [czarist] Russia, in France under the [infamous police chief Joseph Fouché during the Napoleonic] empire, and at one time in Ireland, should be allowed to grow up."¹⁵

Not surprisingly, Congress critically reviewed Attorney General Bonaparte's unilateral appointment of a departmental investigative force, instituted while Congress was not in session and in violation of the spirit and intent of Congress's recent actions, when reconvening after the November elections. Bonaparte at this time confronted a delicate political problem of having to justify his unilateral decision and to ward off any congressional effort to rescind his action. President Theodore Roosevelt's public intercession further compounded Bonaparte's political problem. For, in his annual message to Congress of December 1908, the outgoing President (who had not been a candidate for re-

11. *Sundry Civil Appropriation Bill for 1909: Hearing Before the Subcomm. of the H. Comm. on Appropriations*, 60th Cong. 776, 779 (1908).

12. 43 CONG. REC. 671 (1909).

13. *Id.* at 3132.

14. *Id.* at 669.

15. *Id.* at 672; see also COOK, *supra* note 4, at 54; JEFFREYS-JONES, *supra* note 1, at 51–52; LOWENTHAL, *supra* note 4, at 3–4; WEINER, *supra* note 4, at 11; Countryman, *supra* note 4, at 33–34, 36; Stockham, *supra* note 4, at 21–35.

election that November) sharply condemned the recently imposed restrictions that denied the Justice Department access to the temporary use of Secret Service agents.

The President pointedly described this congressional initiative as “of benefit only, to the criminal classes.”¹⁶ Had this restriction been “deliberately introduced for the purpose of diminishing the effectiveness of war against crime,” Roosevelt claimed, “it could not have been better devised to this end.”¹⁷ Characterizing this legislative action’s “chief argument” as self-serving, he posited that “the Congressmen did not themselves wish to be investigated by Secret Service” agents to uncover their possible criminal conduct.¹⁸ The President concurrently defended the value of a centralized police force as the most effective means for solving crime, adding that any possible abuse could be averted through congressional oversight.¹⁹

The President’s criticisms were immediately denounced by these same members of Congress. Their comments captured their earlier skepticism about executive power and purpose. For one, Senator Augustus Bacon (Democrat, Georgia) condemned President Roosevelt’s comments as “the most deliberate, the most carefully designed, and the most skillfully worded insult that was ever sent to any parliamentary body by an executive officer, either in this country or in any other country.”²⁰ Echoing this complaint, Congressman James Tawney (Republican, Minnesota) claimed that “nothing can contribute so much to the destruction of this great essential of government or to the disintegration of our Republic as an attempt upon the part of one branch of the Government to impeach the honor and integrity of another branch.”²¹ Nonetheless, the main criticism of President Roosevelt’s comments centered less on his impolitic rhetoric than over what Congressman Sherley articulated as Congress’s purpose when adopting this appropriation restriction: a principled conviction that “a secret service force had inherently in it the possibilities of abuse.”²² The House of Representatives, not surprisingly, thereupon approved a

16. 43 CONG. REC. 458 (1909).

17. *Id.* at 459.

18. *Id.*

19. *Id.* at 458–62; *see also* Countryman, *supra* note 4, at 35–36; Stockham, *supra* note 4, at 33–39.

20. 43 CONG. REC. 315 (1909).

21. *Id.* at 660.

22. *Id.* at 671.

resolution demanding that President Roosevelt document his accusations and specifically identify any instances of a member of Congress's criminal conduct when acting in an official capacity.²³

More importantly, these congressional critics directly challenged Bonaparte's independent action during hearings conducted by the House Appropriations Committee in February 1909. Seeking to tamp down the controversy that the President's intemperate remarks had precipitated, in his testimony and in his earlier annual report to Congress, the outgoing Attorney General (whose term expired the next month and who, ironically, was succeeded by George Wickersham) defended his decision to establish the Bureau of Investigation as having been "involuntary" and as having been properly funded through the Department's appropriations authorizing investigations to detect and prosecute crime.²⁴ He had no other recourse at the time, Bonaparte protested, having lost access to the services of Secret Service agents. Furthermore, Bonaparte contended, a departmental agency would be more efficient and "under modern conditions, [is] absolutely indispensable to the proper discharge of the duties of this department, and it is hoped that its merits will be augmented and its attendant expense reduced by further experience."²⁵ Bonaparte also sought to rebut fears that a centralized force would inevitably abuse its power. To the contrary, he argued, "a centralized and accurately ascertained authority and responsibility [combined with] a system of record as will enable the legislative branches of the Government, the head executive, and possibly the courts [will] fix the responsibility for anything that goes wrong."²⁶ Centralization, he maintained, would ensure better oversight and thereby preclude possible abuses. Nor, the Attorney General emphasized, would this recently established force be used to spy on the "personal conduct" of the citizens, to "dig up the private scandals of men," or for political purposes.²⁷ And, when responding to skeptical questioning about executive oversight, he added that such abuses could

23. *Id.* at 311–15, 645–84, 3122–35; see also Stockham, *supra* note 4, at 34–35.

24. 1908 ATT'Y GEN. ANN. REP. 7; see *Sundry Civil Appropriation Bill for 1910: Hearing Before the Subcomm. of the H. Comm. on Appropriations*, 60th Cong. 1006–07 (1909) [hereinafter *Sundry Civil Appropriation Bill for 1910*]; see also WEINER, *supra* note 4, at 12; Stockham, *supra* note 4, at 48–49.

25. 1908 ATT'Y GEN. ANN. REP. 7.

26. *Sundry Civil Appropriation Bill for 1910*, *supra* note 24, at 1032 (1909); see Countryman, *supra* note 4, at 36; Stockham, *supra* note 4, at 56.

27. 42 CONG. REC. 5557–58 (1908) (statement of Rep. Sherley).

be averted through congressional oversight. Pressed as to whether executive officials would honor congressional requests for relevant records, the Attorney General conceded that the “Senate would have the legal right to convict” an executive official who refused to honor such requests.²⁸

All members of Congress were not convinced by the Attorney General’s assurances of executive restraint. Articulating his own (and others) deep skepticism about Bonaparte’s assurances, Congressman Sherley maintained instead that

the whole theory of our Government looks to the fact that we should have a Government of laws and not of men, and that the rights of a citizen should depend not so much upon the wisdom and discretion of an executive officer, as upon fixed rules of law and of conduct²⁹

Nonetheless, and despite the furor created by Bonaparte’s unilateral action and President Roosevelt’s disparaging accusations, Congress did not then explicitly bar the use of appropriated departmental funds for such a force or enact a legislative charter to delimit this newly-established agency’s powers. Instead, Congress stipulated that appropriated funds could only be used for the “detection and prosecution of crimes against the United States.”³⁰ This provision governing Department appropriations, however, was slightly amended in 1910 to “such other investigations regarding official matters under the control of the Department of Justice as may be directed by the Attorney General.”³¹

During the years 1907–1909, conservative Republicans and Southern Democrats had adamantly opposed an executive-mandated police force. Ironically, during the 1960s, conservative Republicans and Southern Democrats adamantly supported legislation authorizing wiretapping, the scope of which was to be left to the discretion of the President.

In 1934, when enacting legislation regulating the telephone and telegraph industries, Congress adopted a section banning wiretapping. Despite this prohibition, Justice Department officials at the time

28. *Sundry Civil Appropriation Bill for 1910*, *supra* note 24, at 1040.

29. *Id.* at 1033; Stockham, *supra* note 4, at 57–58.

30. *Sundry Civil Appropriation Bill for 1910*, *supra* note 24, at 1048.

31. Countryman, *supra* note 4, at 37 (quoting Act of June 25, 1910, Pub. L. No. 61-266, 36 Stat. 703).

privately concluded that this ban did not apply to federal agents. The Supreme Court, however, soon struck down this assessment. In rulings of 1937 and 1939, both *Nardone v. United States*, the Court held first (in 1937) that this ban did apply to federal agents and then held (in 1939) that any indictment based on information illegally obtained from a wiretap would be tainted and, accordingly, required the dismissal of the indictment.³² The Court's rulings, however, did not lead to the termination of FBI wiretapping. Instead, President Franklin Roosevelt, fearing potential "fifth column" threats to the nation as had occurred recently in Europe, in May 1940 secretly authorized FBI wiretapping during "national defense" investigations.³³ Roosevelt's secret directive, however, did not legalize FBI wiretapping. His directive was based on his private assessment that the Court's ruling applied only to such uses during criminal investigations but not to investigations intended to anticipate and prevent foreign-directed espionage or sabotage. Nonetheless, he (and his President successors Harry Truman, Dwight Eisenhower, and John Kennedy) over the next thirty-seven years lobbied Congress unsuccessfully to legalize "national security" wiretapping. These efforts finally succeeded in 1968 when Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act.³⁴

When drafted and approved by the House, the proposed Omnibus Crime Control and Safe Streets bill did not include a title authorizing wiretapping. That provision was added during the deliberations of the Senate Judiciary Committee. In that Committee's report on the proposed bill and during the Senate floor debate, proponents of the wiretapping title extolled the value of wiretapping in advancing the nation's law enforcement interests. The proponents also cited the safeguards that they had instituted to preclude possible abuses. They specifically called attention to the requirement that Government agents would have to obtain court-approved warrants before employing a tap or bug. Nonetheless, not all wiretaps would be subject to the warrant requirement, the proposed bill included a broad exemption that the warrant requirement would not

limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against

32. *Nardone v. United States*, 308 U.S. 338, 340-43 (1939); *Nardone v. United States*, 302 U.S. 379, 384 (1937).

33. THEOHARIS, ABUSE OF POWER, *supra* note 8, at 27.

34. *See id.* at 24-40.

actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.³⁵

The Senate report endorsing the proposed wiretapping title indeed specified that “[w]here foreign affairs and internal security are involved, the proposed [court-ordered warrant requirement system] . . . is not intended necessarily to be applicable.”³⁶

This undefined exception and the attendant discretion to be accorded to Presidents became the subject of pointed debate during the Senate’s deliberations on the bill. In both his minority views printed in the Judiciary Committee’s report on the bill and during his exchange with the floor leaders of the bill, Senator Philip Hart (Democrat, Michigan) directly challenged Senator John McClellan’s (Democrat, Arkansas) contention that the wiretapping title was “carefully drafted to meet both the letter and spirit” of the recent Supreme Court decisions in *Berger* and *Katz*.³⁷ Wiretapping, McClellan claimed, would be permitted “only under strict controls” and “certain carefully detailed conditions,” although Presidents would be allowed some discretion when exercising their responsibility “to protect the internal security of the United States from those who advocate its overthrow by force or other unlawful means.”³⁸ Disputing McClellan’s benign characterization, Hart claimed that the proposed wiretapping title “leaves too much discretion in the hands of a President.”³⁹ Would not, he asked McClellan pointedly, the language “against any . . . clear and present danger to the structure or existence of the Government” empower a President to conduct

35. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 214 (1968).

36. S. REP. NO. 1097, at 94 (1968).

37. THEOHARIS, ABUSE OF POWER, *supra* note 8, at 41–42; *see Katz v. United States*, 389 U.S. 347 (1967); *Berger v. New York*, 388 U.S. 41 (1967).

38. 114 CONG. REC. 11,208, 14,469 (1968); THEOHARIS, ABUSE OF POWER, *supra* note 8, at 41.

39. S. REP. NO. 1097, at 174 (1968).

“unlimited, [unsupervised]” bugging and tapping of right-wing and left-wing groups and activists, such as the Ku Klux Klan, Black Panther Party, draft dodgers, and the New Left?⁴⁰ Hart specifically pressed McClellan to clarify what he understood a President’s constitutional powers to be and the limits to such powers.⁴¹ Hart’s concerns were unfounded, McClellan responded.⁴² The proposed language, he contended, joined by a second supporter of the proposed title, Senator Spessard Holland (Democrat, Florida), did not “affirmatively” give any power to the President but simply stipulated that a President’s constitutional powers would not be restricted.⁴³ “There is nothing affirmative in this statement[,]” Holland maintained.⁴⁴ Congress, Holland added, was not foolishly attempting to “negat[e]” a President’s constitutional power.⁴⁵

Enacted in the waning months of Lyndon Johnson’s presidency, Title III’s deferential endorsement of undefined presidential powers was first employed during President Richard Nixon’s administration. The Supreme Court eventually reviewed one such use: warrantless wiretaps installed during an FBI investigation of radical New Left activists. In its 1972 ruling in that case, *United States v. United States District Court*, the Court rejected the claim that a President possessed inherent power to authorize warrantless wiretaps during a “domestic security”

40. 114 CONG. REC. 14,750 (1968) (statement of Senator Hart (quoting S. 917, 90th Cong. (as reported by S. Comm. on the Judiciary, Apr. 29, 1968))); *see also* THEOHARIS, ABUSE OF POWER, *supra* note 8, at 41–42.

41. 114 CONG. REC. 14,750–51 (1968).

42. *Id.*

43. *Id.* at 14,751.

44. *Id.*

45. *Id.*; *see* S. REP. NO. 1097, at 11–19 (1968) (containing amendments to the wire interception and interception of oral communications section of Senate bill 917); S. REP. NO. 1097, at 27–28 (describing the purposes of the amendments); *id.* at 66–69 (discussing problems with wiretapping and electronic surveillance caused by technological advancements); *id.* at 88–108 (discussing Title III of the Senate bill 917); *id.* at 122–23 (discussing definitions contained in Chapter 119 of Senate bill 917); *id.* at 161–77 (discussing the views of Senators Long and Hart in opposition to Title III of Senate bill 917); *id.* at 182–83 (discussing the views of Senator Fong regarding Title III of Senate bill 917); *id.* at 214–18; *id.* at 220 (discussing the views of Senator Eastland to Senate bill 119); *id.* at 224–25 (discussing the views of Senators Dirksen, Hruska, Scott, and Thurmond regarding Senate bill 917); 114 CONG. REC. 14,469–70 (1968) (discussing Senate bill 917); 114 CONG. REC. 14,469–70, at 14,708–16 (discussing recent Supreme Court opinions regarding police investigative techniques); 114 CONG. REC. 14,469–70, at 14,746–51 (discussing Senate bill 917); *see also* THEOHARIS, ABUSE OF POWER, *supra* note 8, at 40–43; Athan G. Theoharis, *Misleading the Presidents: Thirty Years of Wiretapping*, THE NATION, June 14, 1971, at 744, 747–49; Stockham, *supra* note 4, at 259–63.

investigation.⁴⁶ The Court did acknowledge a President's constitutional power to "protect our Government against those who would subvert or overthrow it by unlawful means."⁴⁷ Nonetheless, it denied that a President could authorize warrantless wiretaps of a domestic organization or of an individual not directly or indirectly connected with a foreign power. The Court's ruling, however, left unanswered the matter of a President's "foreign intelligence" powers.⁴⁸

In 1978, Congress revisited the issue of a President's "foreign intelligence" power when enacting the Foreign Intelligence Surveillance Act. Revelations publicized by the Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities (the so-called Church Committee) in 1975–1976 documented the very abusive practices cited by Senator Hart during the floor debate over Title III of the Omnibus Crime Control and Safe Streets Act.⁴⁹ The first revelation involved an FBI wiretapping operation, conducted at the request of the Nixon White House, which had targeted members of the Washington, D.C. press corps, White House and National Security Council aides, and second-level State and Defense Department employees. Ostensibly instituted in 1969 to uncover the source of a leak of classified information to the *New York Times*, this FBI wiretapping program, which continued until 1971, soon evolved into a highly sensitive political intelligence operation whereby the White House obtained, through two of these FBI wiretaps, advanced intelligence about the plans of President Nixon's Democratic adversaries, notably the then-perceived front runner for the 1972 Democratic presidential nomination, Senator Edmund Muskie.⁵⁰ The second revelation involved an equally sensitive and highly secret program, code named Operation MINARET, under which the National Security Agency (NSA), dating from 1967 and refined in 1969, intercepted the international communications of civil rights and anti-Vietnam War activists whose names had been provided

46. *United States v. United States District Court*, 407 U.S. 297, 320 (1972).

47. *Id.* at 310.

48. HAROLD H. BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR* 143 (2009); ATHAN THEOHARIS, *THE QUEST FOR ABSOLUTE SECURITY: THE FAILED RELATIONS AMONG U.S. INTELLIGENCE AGENCIES* 217 (2007); WEINER, *supra* note 4, at 312.

49. THEOHARIS, *ABUSE OF POWER*, *supra* note 8, at 144–45; *see supra* note 35 and accompanying text.

50. THEOHARIS & COX, *supra* note 9, at 413–16.

by the FBI and the Central Intelligence Agency (CIA).⁵¹

These revelations became the catalyst to Congress's drafting of what became the Foreign Intelligence Surveillance Act of 1978. When drafting this bill, members of Congress rejected both the premise that Presidents had inherent powers to authorize on their own warrantless wiretapping and, as articulated by Senators McClellan and Holland, that Congress should defer to the President in the conduct of claimed "national security" operations.⁵² Indeed, both the Senate report on the proposed bill and the language of the Act itself repudiated the broad language of the Omnibus Crime Control Act's provision governing the President's authority.⁵³ Proponents of the proposed bill instead affirmed that this legislation would constitute the "exclusive means" for any interception conducted in the United States.⁵⁴ Indeed, the accompanying Senate report explicitly rejected "the notion that Congress recognizes an inherent Presidential power to conduct such surveillances in the United States outside of [statutory] procedures."⁵⁵ Thus, while distinguishing between "domestic security" and "foreign intelligence" investigations, the Act required that a specially-established court must approve all interceptions conducted during a "foreign intelligence" investigation of "U.S. persons who are in the United States."⁵⁶ It further required that Government officials would have to seek the approval of this special court by certifying that the target of the proposed interception was a "foreign power," "an entity directed and controlled by a foreign government," or "an agent of a foreign power."⁵⁷ The bill did recognize a need to safeguard legitimate security interests and accordingly permitted the submission of such certification requests

51. Operation MINARET was discontinued in 1973 but only because of the possibility of its public exposure. ATHAN THEOHARIS, *SPYING ON AMERICANS: POLITICAL SURVEILLANCE FROM HOOVER TO THE HUSTON PLAN* 122 (1978); *see also* LOUIS FISHER, *IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE* 145–46, 149 (2006); THEOHARIS, *ABUSE OF POWER*, *supra* note 8, at 67.

52. *See* 114 CONG. REC. 14,750–51 (1968) (debating whether the bill could possibly enlarge the President's constitutional powers); *see also* THEOHARIS, *ABUSE OF POWER*, *supra* note 8, at 144–45.

53. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 STAT. 1783, 1797; S. REP. NO. 95-604, at 64 (1977).

54. S. REP. NO. 95-604, at 64.

55. *Id.*

56. S. REP. NO. 95-701, at 7, 9, 12–15 (1978); THEOHARIS, *ABUSE OF POWER*, *supra* note 8, at 146.

57. S. REP. NO. 95-701, at 8.

to be in secret while limiting the special court's supervisory role to ascertaining only whether the Government had established a foreign government connection (and not whether the proposed interception was necessary). The Act, moreover, contained an emergency exception to the advance certification requirement but stipulated that in these instances the Government would have to obtain after-the-fact court approval within twenty-four hours.⁵⁸

This premise that Congress should define the limits of federal surveillance authority proved to have a short life span. Responding to the traumatic impact of the terrorist attacks of 9/11, the George W. Bush Administration in September/October 2001 lobbied Congress to enact legislation, the USA Patriot Act, which expanded the surveillance authority of the U.S. intelligence agencies.⁵⁹ The premise advanced as justification for this massive bill was that the failure of the U.S. intelligence agencies to anticipate this attack had been due primarily to limitations on their authority. Nonetheless, at the time Administration officials did not ask Congress to amend the Foreign Intelligence Surveillance Act's prior court review requirement. Instead, advised that NSA Director Michael Hayden had concluded that "nothing more could be done within existing [legal] authorities" to enable the NSA to uncover planned terrorist operations, President Bush on October 4, 2001 secretly authorized a Terrorist Surveillance Program.⁶⁰ His secret order empowered the NSA, and without having to seek and obtain the prior approval of the special court, to intercept and record all international communications (telephone, e-mail, fax) "into and out" of the United States about which there was "a reasonable basis to conclude that one party to the communication [was] a member of al-Qa'ida, affiliated with al-Qa'ida, or a member of an organization affiliated with

58. 92 STAT. at 1791-92; *see also* BRUFF, *supra* note 48, at 143; LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 150 (2006); THEOHARIS, ABUSE OF POWER, *supra* note 8, at 146.

59. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

60. OFFICES OF INSPECTORS GEN. OF THE DEP'T OF DEF., DEP'T OF JUSTICE, CENT. INTELLIGENCE AGENCY, NAT'L SEC. AGENCY, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, (U) UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM, REPORT NO. 2009-0013-AS, 1, 5-6 (July 10, 2009), <http://judiciary.house.gov/hearings/pdf/IGTSPReport090710.pdf> [hereinafter *Unclassified Report*]; BRUFF, *supra* note 48, at 145-46; THEOHARIS, ABUSE OF POWER, *supra* note 8, at 158.

al-Qa'ida.”⁶¹ The President's order authorizing this program was not only issued in secret but its requirement that this interception program would have to be re-authorized every forty-five days stipulated that all activities carried out under this program would have to be conducted in a manner to ensure complete secrecy.⁶²

At the time, Administration officials recognized the potential political problem posed by a presidential decision to ignore the Foreign Intelligence Surveillance Act's prior court review requirement. As justification for this defiant action, in a secret memorandum circulated internally within the Administration in November 2001, Justice Department Attorney John Yoo offered an expansive interpretation of presidential powers. His memorandum explicitly affirmed that although the Foreign Intelligence Surveillance Act (FISA) “purports to be the exclusive statutory means for conducting electronic surveillance for foreign intelligence” operations that “[s]uch a reading of FISA would be an unconstitutional infringement on the President's Article II authorities.”⁶³

Three years later in 2004, however, Jack Goldsmith, the recently appointed head of the Justice Department's Office of Legal Counsel, privately challenged Yoo's secret analysis. For one, Goldsmith sharply criticized the “shoddiness” of Yoo's analysis and its questionable “factual and legal basis.”⁶⁴ His critical assessment, endorsed by other senior Justice Department officials, precipitated an internal re-assessment of the Terrorist Surveillance Program. A principal concern of these Justice Department officials involved a conclusion that “Yoo's legal analysis entailed ignoring an act of Congress, and doing so without full congressional notification.”⁶⁵ Goldsmith's subsequent threat to resign (joined by Deputy Attorney General James Comey and FBI Director Robert Mueller III) eventually led President Bush that year to

61. UNCLASSIFIED REPORT, *supra* note 60, at 6 (quoting Press Briefing, Alberto Gonzales, U.S. Att'y Gen., & Michael Hayden, Gen., Principal Deputy Dir. for Nat'l Intelligence (Dec. 19, 2005), <http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/print/20051219-1.html> (internal quotation marks omitted)).

62. BRUFF, *supra* note 48, at 152; WEINER, *supra* note 4, at 432.

63. Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to the U.S. Att'y Gen. (Nov. 2, 2001), available at <https://webpace.utexas.edu/rmc2289/OLC%20131.FINAL.PDF>; UNCLASSIFIED REPORT, *supra* note 60, at 11; *see also* BRUFF, *supra* note 48, at 160–78; WEINER, *supra* note 4, at 432–36.

64. UNCLASSIFIED REPORT, *supra* note 60, at 20, 27.

65. *Id.* at 19–21, 27.

“modify certain PSP [President’s Surveillance Program] intelligence-gathering activities and to discontinue certain Other Intelligence Activities that DOJ [Department of Justice] believed were legally unsupported.”⁶⁶

The secrecy shrouding the institution and conduct of this Program, which accordingly precluded an independent assessment of its wisdom and legality, was first breached in December 2005. In a fairly detailed front-page account, the *New York Times* publicized the Program’s existence and operation.⁶⁷ The newspaper’s dramatic revelation precipitated a somewhat heated public and congressional debate over the propriety and legality of the President’s action.⁶⁸ Nonetheless, members of Congress never directly repudiated President Bush’s secret and unilateral action. Instead, after extended debate, and some hand-wringing, in July 2008 they amended the Foreign Intelligence Surveillance Act to permit the interception of the international communications (e-mail and telephone) of “non-U.S. persons” without requiring the Government to obtain the special court’s prior approval for such interceptions whenever “a significant purpose of the acquisition [pertains to] foreign intelligence.”⁶⁹ Interceptions of the communications of U.S. citizens, however, would have to be based on the special court’s prior approval, although that requirement could be waived in “exigent” (emergency) situations. In such cases, court approval would have to be sought within seven days. The amended law, in addition, granted immunity from prosecution to those telecommunication corporations that had assisted the NSA in the conduct of this program *since its inception in 2001*.⁷⁰

Congress’s unwillingness to challenge the Bush Administration’s purposeful decision to ignore the court approval requirements of the Foreign Intelligence Surveillance Act and then its further decision to grant *ex post facto* immunity to the participating telecommunication

66. *Id.* at 29; *see also* BRUFF, *supra* note 48, at 152–56, 160–78; WEINER, *supra* note 4, at 432–36;

67. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, A16.

68. BRUFF, *supra* note 48, at 157–60; *see* Risen & Lichtblau, *supra* note 67.

69. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110–261, 122 STAT. 2436, 2440 (2008); UNCLASSIFIED REPORT, *supra* note 60, at 31.

70. *See* BRUFF, *supra* note 48, at 160; GLENN GREENWALD, WITH LIBERTY AND JUSTICE FOR SOME: HOW THE LAW IS USED TO DESTROY EQUALITY AND PROTECT THE POWERFUL 53–97 (2011); THEOHARIS, ABUSE OF POWER, *supra* note 8, at 159–61.

corporations underscores an important limitation of the Wickersham Commission's report. This limitation derives from the Commission's underlying premise that the sources of policing abuses were due to inadequate administrative procedures—deficiencies in professionalism or internal rules. Drafted in 1929–1931, the Commission's report could not have anticipated that federal investigations would expand beyond simple law enforcement to include a proactive, intelligence approach predicated on secret executive directives (whether issued by Presidents, attorneys general, or senior FBI officials) and that in turn were based on torturous interpretations of a President's claimed constitutional powers in the “national security” area.⁷¹

Dating from the mid-1930s and expanded thereafter, FBI investigations were ostensibly launched for the stated purpose of anticipating and preventing suspected internal security threats and not simply to uncover evidence to prosecute spies, saboteurs, or terrorists. These investigations, however, at times strayed beyond legitimate security threats to include monitoring individuals and organizations engaged in dissident activities or seeking to influence public opinion. Nor were FBI officials content simply to collect derogatory personal and political information about these suspected “subversives” and, when assured that their actions could not be uncovered, leaked information whether to sympathetic members of Congress, congressional committees, or reporters and columnists.⁷² Liberals and conservatives

71. On FBI wiretapping authority, see Confidential Memorandum from President Franklin Roosevelt to Att'y Gen. Robert Jackson (May 21, 1940) (Wiretapping Uses folder, Official and Confidential Files of FBI Director J. Edgar Hoover (henceforth Hoover O&C)). On FBI bugging authority, see Confidential Memorandum from Att'y Gen. Herbert Brownell to FBI Dir. J. Edgar Hoover (May 20, 1954) (Fred Black folder, Hoover O&C). Senior FBI officials, however, privately conceded that FBI break-ins were “clearly illegal” and FBI wiretaps and bugs were “sources illegal in nature.” On FBI break-ins, see Do Not File Memorandum from FBI Assistant Director William Sullivan to FBI Assistant Director Cartha DeLoach (July 19, 1966) (“Black Bag Jobs” folder, Hoover O&C). On FBI wiretaps and bugs, see Memorandum from FBI Supervisor W. Raymond Wannall to FBI Assistant Director William Sullivan (January 17, 1969) (FBI 66-1372-49) (on file with author).

72. Indeed, the subjects of FBI investigations included not only Soviet agents, Communist activists, and suspected German spies but also prominent Americans, some of whom were also the targets of FBI wiretaps, bugs, and break-ins. These included: First Lady Eleanor Roosevelt, Illinois Governor and the Democratic presidential nominee in 1952 and 1956 Adlai Stevenson, Ensign/Congressman/Senator/President John F. Kennedy, prominent civil rights leader Martin Luther King, Jr., journalists Joseph Alsop, I. F. Stone, Hanson Baldwin, and Harrison Salisbury, authors Ernest Hemingway, Upton Sinclair, and Norman Mailer, popular entertainers Frank Sinatra, Pete Seeger, and John Lennon, labor leaders Walter Reuther, Harry Bridges, and John L. Lewis, clerks to Supreme Court justices, and

might not have known about the scope of these abusive actions that were belatedly uncovered decades later. Nonetheless, with the exception of the Foreign Intelligence Surveillance Act, they did not act to ensure that future “intelligence” investigations would be lawful and would be confined to advancing legitimate security interests. Finally, and paradoxically, in striking contrast to their counterparts of the early twentieth century (and as well of the 1930s and 1940s), many conservatives by the mid-1950s had come to accept (and defend) executive-directed surveillance that contradicted their philosophical commitment to principles of limited government and the rule of law.

prominent attorneys Bartley Crum, Thomas Corcoran, and Abe Fortas. *See generally* THEOHARIS, ABUSE OF POWER, *supra* note 8 (discussing the scope of exceptions).