The Federal Bureau of Investigation and the Bill of Rights

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Tensions between police practices and democratic principles are inevitable. Forces inherent in the operation of a police force—its authoritarian structure and outlook, its zeal to do a difficult and sometimes dangerous job, its loss of contact with the people who make up the community—press insistently toward arbitrary, abusive, sometimes inhuman, conduct in law enforcement. One of the chief purposes of the Bill of Rights, of course, is to interpose legal safeguards against improper police action. The extent to which police practices are kept under control through enforcement of these constitutional principles is an important measure of the success achieved by a society in realizing its democratic goals. Hence the application of the Bill of Rights to the operations of the Federal Bureau of Investigation, a national police force, is of vital concern to the citizens of this country.

There are two main sets of problems for a democratic society in controlling the operations of its police. One relates to specific police methods and procedures. Protection of the citizen against arbitrary arrest, illegal detention, official brutality, improper interrogation, and similar unjust or inhuman treatment is essential to a civilized community. The Bill of Rights has been invoked most often in this context. The other set of problems raises broader issues and relates more to the substantive rights of the people than to the procedures of law enforcement. These questions concern the extent to which the operations of a police force tend to limit and confine the openness of the society, particularly as they inhibit its system of free expression. Of course, enforcement of the laws of the collective inevitably restricts, in some ways, the freedom of the individual. Yet the requirements of law and order need not eliminate all looseness, all spontaneity, all creative activity, all change in the society. The problem is to draw the line between order and vitality. And the police forces, who have a vested interest in the order side of the equation, are not necessarily disposed to the same solution as is contemplated by the Bill of Rights.

In the case of the Federal Bureau of Investigation, the major current controversies with respect to methods and procedures concern the employment of electronic devices and the use of informers. At times, as in the Palmer raids and in national security investigations following World War II, the Bureau has engaged in improper conduct in connection with arrests, interrogation, searches, and the like. But on the whole the policies and practices of the Bureau in these matters have probably been superior to those of most state and local police and have not raised novel problems under the Bill of Rights. Hence they will not be considered here in any detail.[1]

The primary focus of this article is thus on the second set of problems raised by police forces in a democratic society. To what degree has the Federal Bureau of Investigation affected the openness of American society, particularly its system for free

exchange of ideas? And, if that effect has been suppressive, what remedies are available? The issues center around the role of the Bureau in protecting the "national security." Other law enforcement activities of the Bureau, which are many and important, are only of peripheral significance to the central problem here under consideration.

I. The Operations of the Federal Bureau of Investigation

It is first necessary to examine, albeit very briefly, the operations of the Federal Bureau of Investigation in the area of "national security." Unfortunately it is not easy to obtain information about the real workings of the Bureau. Like all police organizations, the Federal Bureau of Investigation conducts its business largely in secret. Even the Attorney General, who nominally controls the Bureau, is not privy to its internal affairs. No committee of Congress has probed the operations of the Bureau since a brief investigation of the Palmer raids by the Senate Judiciary Committee in 1921. Only sporadically do the cases in court shed some light. Statements of persons whose lives are touched by the Bureau are available, and some accounts by former agents exist; both of these sources, however, are sometimes difficult to evaluate. Official reports and statements of the Bureau, of course, may be found in abundance; these are useful but limited.

Only on two occasions has the veil which shrouds the Federal Bureau of Investigation been lifted. In 1949, in the trial of Judith Coplon for espionage, the government was forced to produce 28 Bureau reports dealing with national security matters. These take up approximately 800 typewritten pages of the record.[2] In 1971 a group calling itself the Citizens' Commission to Investigate the FBI, entered the Bureau's offices in Media, Pennsylvania, and carried off all or a large proportion of its files, about 800 altogether. Some of these files have been made available to newspapers and others.[3] The Coplon reports and the Media documents afford an inside view, of some breadth and depth, into the operations of the Federal Bureau of Investigation. Together with the other sources, it is thus possible to obtain a reasonably realistic picture of the role of the Bureau in the national security field.[4]

A. Functions

From a study of the available materials it is apparent that the Federal Bureau of Investigation conceives its function primarily as constituting the first line of defense, and the major bulwark, against threats to the national security. It undertakes to man both the early warning system and the main barricades. Moreover, its view of the dangers to national security—dangers which it believes the government must combat at all costs—is a broad one. The Bureau is concerned not only with the possibility of espionage, sabotage, and the use of force or violence to effect political change. Its interests and activities extend to two other areas of major importance. One is the sphere of "loyalty", an area that encompasses the attitudes, beliefs, opinions and associations of individuals. While the Bureau's concern with loyalty is legally grounded in the Federal employee loyalty program, its operations tend to cover the loyalty of all citizens. The second sphere is that of "subversive activities." This area, vague in the extreme, extends far beyond acts of force or violence to militantly expressed opinions, organizational activities of radical groups, and any signs of potential dissidence or disruption. The concepts of "loyalty" and "subversive activities", as developed by the Bureau, carry it very far in the direction of viewing all militant or radical dissent as a threat to the national security.

The result is that, in essence, the Federal Bureau of Investigation conceives of itself as an instrument to prevent radical social change in America. This view, when implemented in practice, leads to three significant features of the Bureau's operation.

First, throughout most of its history the Federal Bureau of Investigation has taken on the task not only of investigating specific violations of Federal laws, but gathering general intelligence in the "national security" field. At its inception in 1908, and for some years thereafter, the operations of the Bureau were limited to collecting evidence of violation of Federal statutes, the Mann Act in particular.[5] But by the time of World War I the activities of the Bureau had branched out to include surveillance of radical groups such as the Socialists, Industrial Workers of the World, syndicalists, and the Non-Partisan League.[6] In 1919 a General Intelligence Division was created in the Department of Justice, with J. Edgar Hoover as its head, to cooperate with the Bureau in collecting information with regard to the unrest and radicalism that then appeared to the government to be threatening the country.[7] Attorney General Stone, reorganizing the Bureau in 1924 and promoting Hoover to be its Director, cut back its operations to strictly law enforcement activities.[8] How long this state of affairs lasted is not entirely clear, but it is certain that the Bureau maintained a close watch over the Communist Party in the late 1920's and early 1930's, and in 1934 made a general investigation of pro-Nazi organizations.[9] In 1936, according to Hoover, President Roosevelt called him to the White House

and directed him "to have investigation made of the subversive activities in this country."[10] Hoover seized the opening with alacrity and has pursued that mission vigorously since then. In the 1950's the Bureau undertook the gathering of general intelligence with respect to racist organizations, and in the 1960's with respect to civil rights, racial, and peace groups.[11] The Coplon and Media documents abundantly illustrate the breadth of the Bureau's surveillance since World War II. There can be little question, then, that the Bureau has for many decades assumed the function of collecting general intelligence on all matters that could conceivably be relevant to its expandable concept of "national security."

Second, when the Bureau addresses itself to the enforcement of specific Federal laws, it conceives its task to be one of collecting information which is relevant, not only to a violation that has already occurred or is about to occur, but to violations which might occur in the future. For example, among the Media documents is a memorandum dated February 26, 1968, in which the Special Agent in Charge urged all agents in the office to develop "racial informants" in ghetto areas, on the theory that "if a riot does occur, especially in Philadelphia, all Agents will be working on riot problems." One can hardly doubt, either, that the Bureau collected data on, and prepared lists of, persons who were considered subjects for incarceration under the Emergency Detention Act of 1950 in the event of an "Internal Security Emergency."[12] Such a "preventive" approach to law enforcement leads to unlimited expansion of data collection, virtually all activity outside the conventional rounds of American politics becoming grist for the Bureau's mill.[13]

Thirdly, the Bureau's view of its function leads it beyond data collection and into political warfare. The pronouncements of J. Edgar Hoover, presumably based upon material collected by Bureau agents and made in his capacity as an expert on subversive activities, are intended to arouse government and public hostility against political groups disfavored by the Bureau. At another level of action, investigation turns into harassment. Thus, in another Media document, a Bureau newsletter, it is suggested to all agents that there be "more interviews with these subjects and hangers-on" since that "will enhance the paranoia endemic in these circles and will further serve to get the point across there is an FBI Agent behind every mailbox." Don Whitehead in his semi-official history of the Bureau sums up the point well when he says that "the FBI literally went to war against the Communist party."[14]

Ultimately the Federal Bureau of Investigation's concept of its role comes down to the proposition that the Bureau is the general guardian of the national security and that it should seek to achieve its goals not merely through assisting the prosecuting authorities in enforcement of the law through direct measures of its own. This has been clearly expressed by Hoover himself when he describes his mandate as being "to identify individuals working against the United States, determine their objectives and nullify their effectiveness."[15]

B. Ideology

The basic ideology of the Federal Bureau of Investigation—its concept of the dangers to national security and the way in which they must be combatted—has remained largely unchanged over the years. This is not surprising in as much as the Bureau has been dominated by a single individual, its Director, since 1924. Many observers have commented upon these fundamental political assumptions underlying the operation of the Bureau, and it is only necessary to list them in summary form:

(1) The Bureau tends to equate national security with preservation of the traditional American way of life, as understood by the most conservative Americans, in its most pristine form. Any serious disagreement with the principles underlying this way of life is likely to be viewed as "disloyalty", and any conduct which seeks substantial alteration of its institutions is viewed as "subversive."

(2) The main danger to the American way of life (and hence to national security) comes from alien ideologies, primarily as espoused by the Communist Party, which is a powerful and diabolical force in the United States. Americans, if left to themselves, are liable to be seduced or deceived by these purveyors of false ideas, and those who propose or work toward serious change in the established order are giving aid and comfort to the enemy.

(3) National security can be assured only by total vigilance. There is little room for play in the joints of the American system. To take another metaphor, every radical spark must be rubbed out ruthlessly, lest it start a conflagration. Hence, the interest in national security normally takes precedence over the risks of conflict inherent in the toleration of strong dissent.

(4) National security will be achieved primarily through application of official coercion against those who threaten disruption. Hence emphasis is placed

upon enforcement of law and order rather than upon methods of relieving social discontent.

(5) The appropriate limits on political opposition are determined by the nature of the ideas advanced and the moderation with which they are put forward. Freedom of expression does not include "license".

(6) An individual who for any purpose associates with another individual or a group working against the American system is likely to have adopted, or is prepared to adopt, all the beliefs and actions of the other person or group. Hence association with "subversives" is itself "subversive". Furthermore, any organization is susceptible to influence and control by its most extreme members.

(7) The policies and practices necessary for protection of the national security are not matters to be left to the ordinary "civilian" but require a professional organization of experts. That agency must be tightly organized, rigidly disciplined, and ready to give unquestioned obedience to the commands of its chief. Criticism or dissent within the organization is not to be tolerated. The organization must operate in complete secrecy and must have absolute independence in the conduct of its investigations and other activities.

(8) Criticism from outside sources of the agency charged with protection of the national security is likely to be motivated by anti-American beliefs and to be "subversive". If the criticism is worthy of answer at all, it deserves utter condemnation.

This listing of the preconceptions underlying the operation of the Federal Bureau of Investigation is not meant to imply that the Bureau's actions are always rigidly controlled by these principles and that no other ideas or values find a place in the conduct of its affairs. The specific formulations, likewise, may perhaps be exaggerated. Nevertheless, one cannot come away from a study of the available material on the Bureau without a clear feeling that the above account gives a reasonably accurate impression of the world in which the Federal Bureau of Investigation lives.

C. Scope of Operations

The scope of the operation of the Federal Bureau of Investigation is extensive and constantly expanding. Its budget requests are seldom questioned and never reduced. They have steadily increased year by year. For the fiscal year 1971 the Bureau operated on a budget of $334,000,000 and employed 8482 agents.[16] There were 59 major Bureau offices and 500 resident agency offices. The work product is massive. In 1971 the Bureau had an estimated 200,000,000 fingerprint cards in its files.[17] Its Domestic Intelligence Division is reported to have 50,000,000 index cards, and nearly 6,000,000 investigative files.[18] New techniques of storage have made all this information more readily available.

The proportion of Bureau resources devoted to national security matters is not precisely known. It has been estimated that the Bureau has 2000 agents investigating political activities.[19] Other evidence on the point comes from a breakdown of the documents stolen from the Media office, as released by the Citizens Commission to Investigate the FBI. Of over 800 files taken, the Commission stated, 40 per cent involved political surveillance. Of these, two related to right-wing organizations, ten to aliens, and the remainder to left-wing or liberal groups. The evidence is by no means conclusive. There can be small doubt, however, that a substantial proportion of the Bureau's enormous energies and manpower is devoted to watching over or influencing the political activities of American citizens.

D. Subjects of Investigation

What are the criteria by which the Federal Bureau of Investigation, as guardian of the national security, determines when to collect information about a particular individual, organization or group? The precise answer is not known, as no standards have ever been made public by the Bureau. It is possible, however, to draw some conclusions from the facts which have come to light.

Some subjects of Bureau inquiry are persons or organizations suspected of being in violation of Federal criminal or other statutes under the Bureau's jurisdiction. These laws cover a wide area where political activity is taking place. Thus Federal statutes make it a crime to engage in espionage or some forms of sabotage. Federal anti-sedition laws, primarily the Smith Act, punish advocacy of force or violence to overthrow the government, or formation of an organization for that purpose. The Internal Security Act of 1950 provides for a listing of Communist-Action, Communist-Front, and Communist-Infiltrated organizations, as well as members of a

Communist-Action organization. Aliens are subject to deportation on certain political grounds. Recent Federal laws prohibit the crossing of state lines with the intent to blow up buildings, participate in or encourage a riot, or engage in similar activities. These and other statutes form a base from which the Bureau's investigative process begins.

The Federal loyalty-security programs add another dimension to the Bureau's investigations in the national security field. Under the main loyalty-security program no person may obtain or hold a Federal job unless his employment is "clearly consistent with the interests of national security."[20] The program also calls for maintenance by the Attorney General of a list of organizations that are "totalitarian, Fascist, Communist, or subversive." Other programs, such as the industrial security program, cover millions of persons employed outside the government. All these provisions furnish the Bureau with a broad mandate to launch inquiries into areas of political conduct.

From these foundations the Bureau investigations take off and a process of proliferation begins. Investigation of an individual leads to investigation of his friends and associates, then to the organizations of which he is a member, and from there to the leadership of the organizations. The duty to check on Communist Party members carries the Bureau on to checks of fellow travelers, "pseudo-liberals", "dupes", and the associates of any of these. A "non-subversive" organization may be deemed to need investigation in order to determine whether it has "subversive" members, or whether "extremists" come to its meetings. As J. Edgar Hoover describes the process, "We, of course, do not investigate labor unions . . . We have, however, investigated innumerable instances of Communist infiltration into labor unions."[21] The chain of inquiry which starts with searching out "loyalty" and "subversive activities" is an endless one.

In addition, the Federal Bureau of Investigation does not necessarily start from the foundations supplied by specific Federal statutes or the loyalty programs. As noted above, the Bureau conceives its function to include the collection of general political intelligence and preventive data on matters relating to national security. Under this view of the Bureau's authority there are even fewer limits on the kinds of individuals or organizations that become subject to Bureau scrutiny.[22]

The full implications of the Bureau's theory of its investigative jurisdiction are revealed whenever the internal operations of the Bureau are exposed to public view. Thus the Coplon reports showed that the Bureau compiled a dossier on the actor Frederic March and his wife, Florence Eldridge, because they were reported to have participated in the activities of various organizations associated with the Henry Wallace movement. A music student was investigated because he visited the New Jersey headquarters of the Communist Party and talked with his mother there. Another person came under surveillance because he "was connected with some pro-Israel organization which was sending representatives to various parts of the world." A committee of the National Lawyers Guild, after a detailed study of the Coplon reports, summarized its findings in the following terms:

> It is, then, perfectly plain that, by and large, the FBI investigations described in the Coplon reports were attempting to determine not what crimes the subject had committed, but what kind of a person he was with reference to his social, political and economic views, his personal associations, and his organizational affiliations. The Coplon investigations demonstrate that the FBI investigates persons in order to determine whether they have radical views and associations. [23]

The Media documents demonstrate that in recent years the Federal Bureau of Investigation has cast its net even more widely. One document is a lifetime profile of an anti-war activist who had committed no offense beyond a breach of the peace for which he was fined $5 in 1954.[24] Another revealed an investigation being made of a student at the University of Maryland who had been "a constant source of agitation at the University for the past few years" and a leader in a demonstration which resulted in some arrests. J. Edgar Hoover himself ordered "discreet, preliminary inquiries . . . into all BSUs [Black Student Unions] and similar organizations organized to project the demands of black students, which are not presently under investigation." Agents were ordered to prepare for the convention of the National Association of Black Students by having "logical [i.e. black] informants . . . locate NABS chapters and representatives" and by having "informants in a logical position to do so, attend the convention." A watch was kept on other black organizations, including CORE, SCLC, the Black Coalition, National Black Economic Conference, and a settlement house. Indeed the Bureau was under general instructions that it was "essential" to develop "racial informants" in ghetto areas; their duties included visits to Afro-American type bookstores "for the purpose of determining if militant extremist literature is available therein and, if so, to identify the owners, operators, and clientele of such stores." Also included in the Media documents was a memorandum directing surveillance of the Conference of War Resisters, a pacifist group meeting at Haverford College, in order to determine whether "it will generate any anti-U.S. propaganda"; and a report on a peaceful demonstration in Philadelphia on chemical warfare.

The scope of the Bureau's political surveillance appears also from other sources. Thus in the hearings on the Bureau's 1960 budget Hoover testified, "We now have 155 known, or suspected, Communist front and Communist-infiltrated organizations under investigation."[25] By the hearings on the 1962 budget the number had increased to "some 200."[26] In

April 1971 Senator Edmund S. Muskie revealed that the Bureau had conducted a "widespread surveillance" of anti-pollution rallies held on Earth Day in 1970, including one at which the Senator himself had been a speaker.[27] Attorney General Mitchell defended the surveillance on the ground that the Bureau had advance information (the source not disclosed) that persons with records of violence were planning to attend.[28] Finally, the Bureau's inquiries into political affairs carry even into such sensitive areas as the campus.[29]

It is fair to conclude from the above that the Federal Bureau of Investigation's interest and attention extends to virtually all persons politically active who do not operate within the confines of the two major parties, to all organizations who take a militant or strong dissenting position, to all groups which are considered by the Bureau potentially disruptive, and to all persons associated with these. The extent to which the Bureau's surveillance machinery is actually put into operation depends, of course, upon its available resources and its order of priorities. But there is no doubt that the Bureau does amass political intelligence throughout a wide sector of its field of interest.

E. Kinds of Information Collected

The information collected by the Federal Bureau of Investigation in its national security investigations, and stored in its files or incorporated into its reports, covers an extraordinarily broad spectrum of human conduct. It includes data on most aspects of the public life and many aspects of the private life of the individual under scrutiny. It deals with virtually every feature of organizational existence. One is hard put to discern any criteria of relevancy. Of course, any investigation by its very nature probes into outlying areas, the investigators not knowing in advance what may turn up. And any investigating agency is likely to acquire or be furnished with large amounts of raw material which prove to be of no use to it. But the Bureau's investigations—no doubt in part due to the use of informers, wiretapping and bugging, and in part because the inquiry delves into beliefs, attitudes and opinions—seem to extend far beyond normal limits.

The Coplon documents abound in examples of the type of data the Federal Bureau of Investigation considers relevant, or at least puts into its reports. The first six items on a longer list compiled by the National Lawyers Guild Committee were as follows:

> Being affiliated with the Progressive Party [Henry Wallace Party].
> Admiring the military feats of the Russian Army during World War II.
> Acting (in 1945) in a skit about the battles of Leningrad and Stalingrad.
> Opposing the Committee on Un-American Activities.
> Writing a master's thesis on the New Deal in New Zealand.
> Attending a rally against the Mundt bill. [30]

The Media papers contain other illustrations. The investigation of the anti-war activist, mentioned above, included the following information:

> Statements from unnamed informants who worked with him at the Bellevue Medical Center in New York City in 1957, in which he was "described as 'queer fish', 'screwball', 'smarty pants'."
> A report that he volunteered for risky research experiments and was described by the psychiatrist who did the work as "altruistic, sincere, believer in God, but not in conventional religion."
> Reports from police intelligence in Haverford, Pa., of the distribution of antiwar leaflets in 1968.
> A report of his presence at a rally at which the war in Vietnam was called "unconstitutional" and "illegal."
> References to newspaper clippings on letterheads of anti-war organizations' stationery that indicate connections with antiwar and antidraft groups.[31]

Similarly an investigation of a philosophy professor at Swarthmore records such information as that he invited controversial speakers to the campus without permission, was visited by "hippie types", and had printing equipment in his garage. We also learn from the Media documents the names of all identifiable persons at meetings of a black church group, that a lay brother at Villanova Monastery reported that a Villanova University priest had borrowed a monastery car, and that a student under surveillance had majored in Greek.

Materials from other sources confirm that these samples of the type of data collected by the Federal Bureau of Investigation are not untypical of its operations.[32] Once the eye of the Bureau fastens on a particular individual or organization there is virtually no limit to where the inquiry may carry. The process is by nature Orwellian.

F. Methods

The Federal Bureau of Investigation utilizes the full panoply of detection techniques in conducting investigations. Its agents make inquiries of friends, acquaintances, neighbors, employers, landlords, bankers, schools, and any other person or institution likely to have information about the subject. The time span of the investigation often reaches into family background and early childhood history. Information is obtained not only through interrogation of potentially knowledgeable persons but through photographing, tailing, wiretapping, bugging, placing informers and infiltrators, searching premises, observing mail, inspecting trashcans, clipping newspapers, and many

other devices. Quantities of raw data are stored in dossiers and reports are prepared summarizing the material deemed most relevant.[33]

All this is not necessarily different from the methods used by other police forces or private detective agencies. Yet it is important to keep in mind that we are concerned here with investigations into political conduct. In that context two considerations take on special significance.

First, Federal Bureau of Investigation practices, like those of any other police force, can easily slip into patently unconstitutional conduct. As mentioned above, the Bureau's record on this is better than most but it is not beyond reproach. Prior to the reorganization of the Bureau in 1924 illegal practices were widespread.[34] Subsequently, the Coplon reports disclose that in the post World War II period the Bureau engaged not only in extensive wiretapping (then illegal) but on occasion intercepted and opened mail and, at least in three cases, entered private homes and searched personal effects without a warrant.[35] The very existence of an elaborate investigatory apparatus makes such practices quite possible, though they can rarely be documented.[36]

Second, the Bureau's investigations cannot be viewed as the mere gathering and storage of data. The investigatory process itself affects attitudes, careers, and lives in crucial ways. One of the Media documents affords a graphic picture of what it is like to be the subject of a Bureau investigation. The Swarthmore philosophy professor, referred to previously, was being checked on the possibility that it might lead to the apprehension of two women alleged to have participated in a bank robbery and murder engineered by a radical political group. The Bureau's agents made contact with the college security officer, a neighbor, the switchboard operator, the local chief of police who lived two doors away, and the postmaster, all of whom gave information and promised to keep the professor, his telephone calls, his mail, and his other doings under close surveillance. This example is noted, not because the particular investigation was necessarily illegitimate, but to illustrate that the side effects of a Bureau investigation have to be reckoned with.

G. Activities Beyond the Collection of Data

The Federal Bureau of Investigation constantly asserts that its sole function is to collect information and pass it on to other government officials, who draw all conclusions from the raw data and make all decisions regarding further action. Plainly the Bureau underestimates its role even as a gatherer of information; obviously it must determine what to collect, evaluate what it receives, and pass on what it considers relevant. However that may be, to view the Bureau as merely a data-collection agency would be wholly unrealistic. As an integral part of its operations the Bureau engages in various activities which have far-reaching effects upon American political life.

1. Public Relations

The public relations system of the Federal Bureau of Investigation is generally regarded as second to none in the Federal government, and perhaps in the nation. Focus of interest has usually been upon its role in building an image of the Director. This is a disturbing problem: creating a national hero out of the head of the security police raises troublesome questions about American democracy. But other features of Bureau publicity are even more significant.

The Federal Bureau of Investigation, primarily through its Director, has vigorously spread its ideology throughout the country in speeches, statements, reports, articles, interviews, motion pictures, radio and television programs, and other ways.[37] As noted above, by and large this ideology has consisted of a primitive anti-Communism, a messianic dedication to the "American way of life", a hard-nosed view of law and order, and similar features. Moreover, the Bureau has gone even further in attempting to sell its point of view to the American public. The Media documents reveal that all agents were sent copies of an article from Barron's entitled "Campus or Battleground?", subtitled "Columbia Is A Warning To All American Universities," and urged to furnish the reprints "to educators and administrators who are established sources." The covering memorandum went on: "It may be mailed anonymously to college educators who have shown reluctance to take decisive action against the 'New Left'. Positive results or comments by recipients should be furnished to the Bureau." How much of this sort of propaganda the Bureau undertakes has not been disclosed.

One facet of the Bureau's public relations deserves particular notice. Much of the Bureau's publicity seems intended to arouse fears and anxieties in the public mind about our national security, or at least has had that effect. Events have not borne out the

dire predictions, and skeptics have frequently suggested that the Bureau's major purpose has been to assure an increase in appropriations. Whether or not this be the design the result has been that a rational approach to security questions has been made difficult and public attention turned away from the real problems to be solved. All in all the efforts expended by the Bureau in its public relations have had a pervading and important influence upon American public opinion.

2. Disclosures and Leakage

The Federal Bureau of Investigation claims that the materials in its files are held in strict secrecy and are never revealed to any person other than a government official having need for them in connection with law enforcement or similar duties. There is abundant and convincing evidence, however, that substantial amounts of data from the Bureau's files ultimately become public through disclosure or leakage, and that the possibility of such exposure is ever present. Without attempting an exhaustive survey of the matter, it is sufficient to note the following facts.

First, J. Edgar Hoover himself quoted previously unpublished material from Federal Bureau of Investigation files in his book *Masters of Deceit*.[38] Again, in 1954 Attorney General Brownell read material from the Bureau files in making an attack on the previous Democratic administration for continuing Harry Dexter White in government employment.[39] President Truman followed a general policy of refusing to disclose Bureau files but in some cases allowed individual Congressmen to see them at the White House.[40] President Eisenhower adhered to the general policy of non-disclosure but conceded that summaries and factual information from Bureau files had been turned over to Congressional Committees.[41] Vice President Nixon, in October 1954, disclosed extensive material from Burean files in an attack upon Rep. Robert L. Condon of California.[42]

Second, over the years a steady volume of information has found its way from Federal Bureau of Investigation files to various Congressional committees investigating "subversive activities". Senator Joseph McCarthy's Permanent Subcommittee on Investigations obtained substantial amounts of material from Bureau sources, apparently by way of military intelligence.[43] On one occasion Robert Morris, counsel to the Senate Subcommittee on Internal Security, read into the record extracts from the loyalty files of Solomon Adler, a former Treasury official.[44] Likewise in the Senate debate over the confirmation of Charles E. Bohlen to be Ambassador to Russia, Senator Gillette described several items of information which had come from the Bureau by way of Secretary of State Dulles.[45] There is substantial evidence, also, that the House Committee on Un-American Activities continuously received material originating in Bureau files.[46]

Third, vast quantities of information are transmitted by the Federal Bureau of Investigation to various government agencies under the loyalty-security programs or simply by way of informing the agency of public opposition to its programs or practices.[47] The official policy is to keep such reports confidential but in the ordinary course of business numerous persons read them or have access to them. Leaks from this source are inevitable.

Fourth, state legislative committees investigating "subversion" also seem to have obtained information which originated in Federal Bureau of Investigation files.[48]

Fifth, it has recently been disclosed that a private collection of files on 125,000 alleged "subversive" persons and organizations, maintained by former Major General Ralph H. Van Deman (one time head of Army Intelligence) and his wife contained massive materials from Federal Bureau of Investigation files. The New York Times reported: "The heart of the Van Deman files, according to military sources who have seen them, comprises confidential intelligence reports that General Van Deman obtained regularly from Army and Navy intelligence and from the Federal Bureau of Investigation."[49]

Sixth, it has been reliably reported from numerous sources that material on Martin Luther King, Jr., with whom J. Edgar Hoover was then engaged in controversy, was leaked from Federal Bureau of Investigation files to the press.[50] Also, the Department of Justice admitted that damaging material from the Bureau files on Mayor Alioto had been given to Look Magazine.[51]

From this and other evidence it would seem plain that, whether for reasons of motivation, pressure, or bureaucratic looseness, substantial disclosures and leaks of confidential material from Federal Bureau of Investigation files do and always will occur.

3. Harassment

The dynamics of any police force press toward a mode of operation that goes beyond legitimate police activity and ends in harassment. Given the Federal

Bureau of Investigation ideology, one might expect that institution to exhibit these tendencies especially in its work in national security. Conceiving its mission to be that of carrying on a holy war against a diabolical foe, the Bureau, or the more zealous parts of it, might easily be tempted to carry the struggle beyond the collection of data to more affirmative action. There is no doubt that this has occurred.

On occasion Director Hoover has himself led his forces in this kind of warfare. Thus recently Hoover, before any indictment had been returned, accused the Berrigan brothers of participating in a plot to kidnap a government official and blow up underground electrical conduits and steam pipes in Washington.[52] Earlier Hoover had launched a personal attack upon Martin Luther King, Jr., saying, "I consider King to be the most notorious liar in this country."[53] It is true that King had criticized the Bureau for inadequate enforcement of the Federal civil rights laws in the South, but the retaliation went far beyond a reasonable answer to reasonable criticism. The Hoover attack, as noted above, was followed up by disclosures to the press of material derogatory to King from Bureau files.

Other examples of Federal Bureau of Investigation harassment from the top have come to light. Thus at one time a Federal judge severely rebuked Hoover for issuing statements highly prejudicial to a Smith Act defendant on the eve of his trial.[54] More recently Senator McGovern presented evidence that Hoover had attempted to get a TWA pilot, who had criticized the Bureau for its handling of a hijacking episode, discharged by informing his employer that the pilot had "experienced some personal difficulty in the Air Force prior to his employment by TWA."[55]

At lower levels of the Federal Bureau of Investigation harassment has taken place in the form of photographing persons participating in peaceful demonstrations, obvious presence of agents at or outside meetings, open shadowing, recording of license plates of cars, unnecessary interviews, and other forms of ostentatious surveillance.[56] On other occasions excessive or ill-conceived use of informers or infiltration has had the same effect.[57] That these forms of harassment are widespread is evident from the Bureau newsletter, already quoted, which urged agents to engage in activities which would "enhance the paranoia" of those under investigation and "serve to get the point across there is an FBI agent behind every mailbox."

4. Political Influence

A predisposition to wield political influence inheres in all security police forces. In the case of the Federal Bureau of Investigation this tendency is again enhanced by the basic attitudes and ideology which dominate the organization. War against a political movement inevitably must be fought on political levels. Moreover, an underlying distrust of the political reliability of the American people—a fear that they are easily misled by radical political propaganda—makes it difficult for the guardians of the national security to remain aloof from the political scene. One would anticipate, therefore, that the Bureau is heavily involved in politics, and it is. The Bureau officially takes the position, of course, that it does not engage in any kind of political activity, and the myth of J. Edgar Hoover is that he is "above politics." So far as narrow partisan politics are concerned, this is largely true. But in a broader sense the Bureau is an intensely political organization.

A large part of the political influence of the Federal Bureau of Investigation emanates from its general public relations activities described above. But the Bureau also exerts a much more specific kind of political impact. For example, in the midst of the controversy surrounding Senator Joseph McCarthy, Hoover publicly placed himself in the McCarthy camp, defending him against his critics and giving him a personal blessing: "I've come to know him well, officially and personally. I view him as a friend and believe he so views me."[58] On another occasion when George McGovern was running for the Senate against Senator Karl Mundt in South Dakota, Hoover made public a letter praising Mundt's anti-Communist activities.[59] Later, when Senator Eugene McCarthy was campaigning for President and said Hoover had become too independent and should be replaced, Hoover wrote in the Federal Bureau of Investigation Bulletin: "All Americans should view with serious concern the announced intentions and threats by a political candidate, if elected, to take over and revamp the F.B.I. to suit his own personal whims and desires."[60] Other forms of political influence are exerted behind the scenes.[61]

Many Washington observers believe that a major source of the Federal Bureau of Investigation's political power lies in the fact that the Bureau files contain information about members of Congress which would be embarrassing (or worse) if disclosed. Other government officials are subject to the same pressures. As the New York Times reported recently: "Sophisticated lawyers in government and on its fringe contend that many officeholders believe that the Bureau has files with material on the personal peccadilloes of people in the government and were—justifiably or not—afraid of being blackmailed."[62] The Bureau vehemently denies that investigation of Congressmen "as such" are made, or that special dossiers on government officials are kept. The truth of the situation is not fully known. But it is clear that many legislators and executive officials are sufficiently concerned by the possible existence of Bureau dossiers on them that their political conduct is affected.[63]

Taken as a whole, there can be no doubt that the political influence of the Federal Bureau of Investigation is enormous. It is equally clear that the potential power of such an organization is even greater.

5. Relations With State and Local Police Authorities

The Federal Bureau of Investigation has established close relations with state and local police authorities. It runs a National Academy for training police; it maintains a National Crime Information Center for the collection and dissemination of data; it operates crime laboratories which assist state and local authorities; it exchanges information; and generally it maintains a close liaison. At times there has been some friction between the Bureau and state or local police, largely in the case of big city police departments. But in general the relations are good. This is particularly true in the national security field. As Frank Donner has pointed out, working relationships are so close in this area that "local and national intelligence agencies are beginning to coalesce into an 'intelligence community' ".[64] Indeed there is evidence that the Bureau has undertaken the task of developing counter-insurgency policies and plans on a nationwide scale.[65]

In this network of police forces the Federal Bureau of Investigation occupies the dominant position. Its leadership, as to both theory and practice, is generally followed. It sets the general tone of police work at all levels. Thus the influence of the Bureau extends far beyond the sphere of Federal law enforcement. It plays a role in the operation of virtually every police force in the nation.

H. Concentration of Power

The Federal Bureau of Investigation is highly centralized and highly disciplined. It is run from the top and dissent is not tolerated. At the present time it seems to be in the grip of a "cult of the Director."

The Bureau also functions independently and secretly. It is officially a part of the Department of Justice, but for many years the Attorney General has had little connection with its operations and virtually no control over them. The President is, of course, the titular superior; yet he is obviously not in a position to exert any supervision. In Congress only the subcommittees of the House and Senate appropriation committees have an opportunity to question Bureau officials or obtain information about its work. For many years these subcommittees have done nothing but rubber-stamp the Bureau's request for funds, or increase them.[66] In short no official of government, much less a member of the public, oversees the Bureau's policies, reviews its programs, or sees its operations from the inside. The Bureau is a virtually autonomous institution.

Finally, the Federal Bureau of Investigation is highly sensitive to criticism and reacts savagely to crush its critics. Martin Luther King, Jr. felt the impact. So have others. Sometimes the blows come directly from the Bureau; on other occasions from its allies. Plainly the Federal Bureau of Investigation seeks to achieve the status of untouchability.[67]

II. Dangers to the Bill of Rights

The operations of the Federal Bureau of Investigation pose evident dangers to the system of individual rights embodied in our Constitution. These dangers are not confined to the way in which the Bureau presently performs its functions. They are inherent in the very existence of a police force. But the current operations of the Bureau serve to focus attention upon some of the specific problems which must be met if a free and open society is to survive.

The most common violations of individual rights by police—those connected with arrest, detention, coercive interrogation, search, and the like—can easily become a serious problem with a national security police force. In ordinary police work, involving the investigation and prosecution of specific crimes, infringements of individual rights are more likely to come to light and be open to correction by the courts, by the press, or by public demand. In the case of security police, collecting general intelligence, neither the product nor the method may be subject to judicial or public scrutiny. Thus the type of illegal search revealed in the Coplon reports—ransacking an apartment without a warrant—would never be exposed. Nor, if disclosed, is it open to remedy by the individual citizen. Hence the principle of eternal vigilance is applicable, even where no visible signs of improper practices appear on the surface.

In the two areas where current Bureau operations raise acute problems—electronic surveillance and the use of informers—the dangers to individual rights are obvious. Wiretapping, bugging and similar methods of obtaining information invade the right of privacy, constitute a general search, abridge the privilege against self-incrimination, lend themselves to blackmail, are impossible to keep under control, and operate as a general inhibition upon political freedom. The use of informers and infiltrators infringe the same rights and have a specially debilitating effect upon freedom of association.[68]

Undoubtedly the most important impact of the Federal Bureau of Investigation is that it jeopardizes the whole system of freedom of expression which is the cornerstone of an open society. The philosophy and much of the activity of the Bureau is in direct conflict with the fundamental principles underlying that system. The Bureau's concept of its function, as dedicated guardian of the national security, to collect general political intelligence, to engage in preventive surveillance, to carry on warfare against potentially disruptive or dissenting groups, is wholly inconsistent

with a system which stipulates that the government may not discourage political dissent or efforts to achieve social change, so long as the conduct does not involve the use of force, violence, or similar illegal action. An ideology which so singlemindedly rejects new ways of thought, is skeptical of the capacity of the American people to think for themselves, fears to leave any looseness in the structure of law and order, and views criticism of the Bureau as *lèse majesté* is in total opposition to a system that seeks to promote diversity of opinion, a clash of ideas, and indeed a limited degree of conflict within the society. The magnitude of the Bureau's operation, particularly in the national security field, makes its influence pervasive and creates the danger of an uncontrolled center of despotic power. The vast range of persons and organizations subject to the Bureau's scrutiny, and the unconfined scope of its inquiries, create a chilling effect quite opposed to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."[69] And the very process of investigation itself may have effects that are as intrusive and repressive as those of totalitarian police.

It is not only in the performance of its investigating function, however, that the Federal Bureau of Investigation poses a serious threat to our political freedoms. The Bureau has become much more than a data-collection agency. In its official statements and other publications it has had an important influence on public attitudes and opinions. Disclosure of materials in the Bureau files and leakage from those files has had a devastating effect upon some citizens, and the possibility of it hangs heavy over all citizens. The Bureau has it within its power, should its Director or some subordinate so desire, to make the life of any citizen highly uncomfortable, or perhaps unlivable. At times it has done so. As an important center of power in Washington the Bureau is in a position to influence political events in situations where a police force, like the military, should keep its hands off. The building of the Bureau into a smugly independent, highly centralized, professional organization raises critical issues of the ability of the Administration or of Congress to keep it under control.

The present position of the Federal Bureau of Investigation in the American political scene thus threatens, at best, grave injury to our democratic institutions. At worst it raises the specter of a police state. The search for ways in which these dangers can be met is a matter of urgency for all Americans.

III. Protective Measures: Judicial

In considering protective measures against the threats to our Bill of Rights posed by the Federal Bureau of Investigation, or by any similar security police force, it is natural to turn first to our laws and legal institutions. This will be done here. But it is well to keep in mind throughout that other avenues of approach are equally crucial.

A. Limiting the Statutory Authority of the Federal Bureau of Investigation Strictly to Law Enforcement

The most important single step which should be taken to safeguard the Bill of Rights is to limit the statutory authority of the Federal Bureau of Investigation to the narrow function of assisting directly in the enforcement of those Federal Laws over which it is given jurisdiction. The significance of such a limitation was clearly understood by members of Congress at the time the Bureau was created.[70] It was reiterated by Attorney General Stone when, in reorganizing the Bureau in 1924, he said:

> The Bureau of Investigation is not concerned with political or other opinions of individuals. It is concerned only with their conduct and then only with such conduct as is forbidden by the laws of the United States. When a police system passes beyond these limits, it is dangerous to the proper administration of justice and to human liberty, which it should be our first concern to cherish. [71]

Attorney General Jackson made the same point:

> All that is necessary is to have a national police competent to investigate all manner of offenses, and then, in the parlance of the street, it will have enough on enough people, even if it does not elect to prosecute them, so that it will find no opposition to its policies. Even those who are supposed to supervise it are likely to fear it. I believe that the safeguard of our liberty lies in limiting any national policing or investigative organization, first of all to a small number of strictly federal offenses, and secondly to nonpolitical ones. [72]

Under such an arrangement the function of the Federal Bureau of Investigation would be confined to investigations where there were reasonable grounds to believe that a violation of law had or was about to occur. The Bureau might also perform other duties, such as investigation of an individual under consideration for appointment to Federal office, but such an investigation would be strictly limited to that subject. The Bureau would have no authority to collect general political intelligence, to prepare for possible future events by infiltrating a political group, or to maintain dossiers except as to persons specifically investigated under its limited authority. Its mission to carry on general political warfare would be eliminated.

Cutting back the operations of the Federal Bureau of Investigation to their 1924 scope could be achieved through action of the President or the Attorney General. Or it could be specifically prescribed in legislation enacted by Congress. There is a substantial chance, also, that it could be achieved through court proceedings.

There is no inherent power in the Federal Bureau of Investigation or in any executive agency, to carry on at will. The Bureau must derive its authority from a statute passed by the legislature or, in limited instances, from a constitutional power of the Chief Executive. Analysis of the Bureau's statutory authority reveals that existing legislation does not contemplate or sanction its excursions beyond the area of strict law enforcement.[73] The Bureau undertook such an expansion by seizing upon statements of the President, by stretching its statutory authority beyond recognition, and by sheer usurpation.

Indeed supporters of the Bureau's present mode of operation rest their argument, not on the existence of any statutory authority, but upon the inherent powers of the President.[74] This claim of an authority, however, seems clearly insufficient. The President does have some implied powers to collect information and keep himself abreast of events and trends in the country. That he possesses any inherent power to establish a national security police force, which keeps dossiers on millions of citizens, conducts surveillance of dissenting political groups, and maintains the whole apparatus of a secret police, would appear constitutionally inconceivable. The decision of the Supreme Court in the *Youngstown Sheet and Tube* case, invalidating President Truman's seizure of the steel mills, makes plain that no such Presidential assumption of power is contemplated by our Constitution.[75] Nor can it be persuasively argued that Congress by appropriation of funds for the Bureau has *sub silentio* given consent to the exercise of Bureau powers. In the first place, the full sweep of the Bureau's activities have never been revealed to Congress, but rather concealed from it. More importantly, in an area which touches so deeply the right to freedom of expression, freedom from unreasonable searches, and other individual rights protected by the Constitution, an inference of this sort would not be lightly drawn. All in all it seems most unlikely that the Supreme Court would uphold an implied Presidential power to maintain a secret police.

A more difficult problem is that of drawing the line between legitimate Bureau powers in law enforcement and unauthorized powers of political surveillance. This question takes us into constitutional considerations and therefore will be discussed at a later point. Meanwhile it should be noted that the Bureau itself has always understood the basic distinction between the exercise of law enforcement powers and of intelligence-gathering and political-warfare powers.[76] Indeed the Bureau has consistently confined itself to the law enforcement function in the field of civil rights. Speaking of the Bureau's operation in this area Director Hoover has observed: "Our agents cannot be used as instruments for social reform. They are law-enforcement agents. Their job is to gather facts when there is an indication that a Federal law has been violated."[77] The Bureau has a similar attitude toward certain other areas under its jurisdiction. There is no reason why this approach should not be applied to the field of national security.

Any effort to establish the Bureau's existing legal authority in court might run into the question of whether a private citizen or organization would have standing to challenge the Bureau's scope of operation. But the courts have been expanding such rights of standing in recent years and this problem could probably be successfully overcome. In that event there seems no reason why a court should not enjoin the Bureau from operating beyond the scope of its statutory authority and confine it to strictly law enforcement functions.

B. Constitutional Limits on Political Surveillance

In addition to statutory limits upon the scope of Federal Bureau of Investigation activity there are important constitutional restrictions. These are applicable, of course, whether the Bureau is assumed to be operating under legislative authority or under inherent Presidential authority. The main constitutional limits on the general powers of the Bureau to engage in political surveillance derive from the First Amendment and the right of privacy. These issues may be considered together.

There can be little doubt that the operations of the Federal Bureau of Investigation, in their present form, infringe upon rights guaranteed by the First Amendment. The general impact of the Bureau's activities upon the system of freedom of expression has already been described. The details could be spelled out at length. For example, the maintenance by the government of a dossier containing the political beliefs, opinions, associations and activities of a citizen is bound to cause concern, anxiety and fear in him and his associates. The content of such a file can be held against him in future investigations or prosecutions; it can affect his employment and his whole career; if disclosed it can subject him to social pressures, economic discriminations, and political reprisals; it may be the basis of blackmail; it may be inaccurate or used out of context. Knowledge that the government is watching and recording one's political thoughts and moves is, for most people, a shattering experience. Only the most resolute remain uninhibited. The same sort of chilling effects flow from other activities of the Bureau.

The decisions of the Supreme Court leave no room to question that government conduct which produces such an impact impairs freedom of expression. The Court has held that the mere requirement that a citizen file a request with the government in order to receive "foreign Communist propaganda" in the mail abridges rights under the First Amendment; that a law compelling the disclosure of the names of author or distributor of a political leaflet inhibits First Amendment rights; and that exposure

of the membership lists of an organization like the NAACP violates the same constitutional guarantee.[78] In another series of cases the Court has ruled that government measures which go beyond the point strictly necessary to accomplish a legitimate purpose and thereby infringe First Amendment rights are invalid as overbroad; "less drastic means" must be used to accomplish the government's objective.[79] Both lines of cases point clearly to the conclusion that much of the Bureau's operation would fall within the coverage of the First Amendment.

On the other hand the Federal Bureau of Investigation performs some legitimate functions in a legitimate manner. It clearly can be given the basic power to investigate violations of valid Federal laws. And the nature of the investigatory process is such that the Bureau may not always find it easy to foretell at the initial stages what information may be relevant and what not. Furthermore a police force may through patrolling, deploying, or by other means seek to prevent as well as punish the commission of crime. Likewise it may, in some degree at least, develop general information which will enable it to carry out its functions more effectively. These activities may, in a certain sense, have a retarding or inhibiting effect upon lawful political conduct. A citizen may curtail his political activity in the presence of a police officer because he does not know exactly how far he can go, or fears that a police mistake will be made, or simply decides to stay on the safe side of the law. The problem for the court, therefore, is to draw the distinction between legitimate investigative activity and unlawful invasion of First Amendment rights.

The place at which the court will establish this line depends to some extent upon what legal doctrine it employs in deciding First Amendment issues. If the court adopts the balancing test—a doctrine frequently invoked in comparable situations—it will undertake to weigh the government interest in law enforcement against the individual and social interest in freedom of expression. As an alternative test it has been proposed that the government must show a sufficient nexus or connection between the particular investigatory activity and the needs of law enforcement. A third theory, designed to give full protection to First Amendment rights, would seek to determine whether the predominate effect of the agency's conduct was to secure law enforcement or to inhibit freedom of expression; in the former event the conduct would be legitimate, but in the latter event it would be unconstitutional. The Supreme Court decisions to date leave unclear which of these doctrines, if any, it would apply in this situation.[80] One cannot therefore predict with any assurance what the outcome of a lawsuit would be. Nevertheless it seems reasonable to assume that at some point the Bureau's mode of operation would be ruled in violation of the First Amendment.

The constitutional right of privacy also establishes a boundary to political surveillance by the Federal Bureau of Investigation. In *Griswold* v. *Connecticut*, in which the right of privacy was first given recognition as part of the Bill of Rights, the Supreme Court held the Connecticut birth control statute unconstitutional on the ground that it would permit police snooping into the privacies of the marital relation.[81] The scope of the constitutional right of privacy has not yet been fully developed by the courts. Nevertheless the doctrine would clearly be applicable to some of the operations of the Bureau. Probing into personal affairs, shadowing, compiling dossiers, and similar practices, where unrelated to specific law enforcement needs, are plainly intrusions into privacy. Again, the courts have not yet formulated the legal doctrine by which to determine when an invasion of privacy constitutes a denial of the constitutional right. Very likely they would apply a balancing test, in which the governmental interest involved is weighed against the individual and social interest in privacy. Until more decisions are forthcoming the boundaries will remain obscure. And in any event they would not seem as confining for the Bureau as those imposed by the First Amendment, since most political conduct is carried on in the public arena. Nevertheless the privacy doctrine would not only support the First Amendment position at important points but would in its own right operate as a significant limiting factor.

Taking the First Amendment and privacy doctrines together, it can be persuasively argued that the constitutional guarantees in the Bill of Rights preclude the Federal Bureau of Investigation from engaging in the following kinds of activity:

(1) Photographing peaceful demonstrators, recording license numbers of persons attending a meeting, ostentatious surveillance of a public gathering, or similar blanket collection of data on persons not engaging in criminal activities.

(2) Compiling dossiers of political intelligence upon persons who are not charged with or reasonably suspected of a specific violation of Federal law, or who are not candidates for Federal office.

(3) Making investigations or maintaining political surveillance of organizations or groups in the absence of a charge of, or reason to suspect, a violation of Federal law, or carrying such investigation beyond that necessary to dispose of the violation issue.

(4) Disclosing material from any dossier or otherwise except for specific law enforcement purposes.

(5) Conducting investigations or other activities in such a way as to constitute political harassment of the subject, not related to strict law enforcement functions.

(6) Engaging in political action or expression not directly related to the strict performance of law enforcement functions.

The foregoing enumeration undoubtedly does not cover all operations of the Federal Bureau of Investigation that go beyond the bounds of the constitutional limitations. Other conduct, as it is revealed in particular situations, should be added to the list. In essence what is proscribed is all activity of the Bureau which attempts to deal with national security *through preventive measures that infringe upon rights protected by the First Amendment*. It is a fundamental principle of the First Amendment that the government may not curtail freedom of expression as a means of achieving social controls. This is what the Bureau has, more and more, attempted to do. No agency of the government should wield such powers, least of all the security police. Real prevention of danger to national security requires affirmative measures to solve the underlying problems, not suppression of movements for redress.

It is readily admitted that the drawing of a constitutional line between legitimate and illegitimate Bureau conduct, just as the drawing of a statutory line discussed above, will sometimes pose hard questions. The proliferation process of investigation, already noted, is difficult to circumscribe by legal rules. Probably the only answer which can be given at this time is that the law must develop, as it customarily does, on a case by case basis. The principle is clear—it has indeed been recognized by the Bureau from the beginning—and the cases falling toward the ends of the spectrum are easily dealt with. Actually, statutory or judicial application of the rule would immediately result in drastic alteration in the Bureau's operations. More precise formulations of the rule would follow later.

One crucial point should, however, be emphasized. Under the best of circumstances, judicial restraint upon Federal Bureau of Investigation practices will be only partially effective so long as Federal legislation exists that imposes sanctions upon political conduct which takes the form of expression. This legislation includes Federal anti-sedition laws, such as the Smith Act and the Internal Security Act; the Federal Anti-Riot Act, which penalizes the crossing of state lines with intent to "encourage" a riot; and the Federal loyalty programs. To the extent that the Federal government can penalize expression the Bureau can investigate expression. In the final analysis, only by confining Federal controls of police activity to conduct that amounts to action, and allowing expression to be free, will we be able to end serious encroachment by the Bureau upon rights supposedly guaranteed by the Bill of Rights.

In any event, the difficulties in rolling the Bureau back to its constitutional boundaries through litigation should not be underestimated. The courts, like all other parts of the government, are reluctant to inject themselves into Bureau affairs. Technical problems, such as the standing of private parties to raise the constitutional issues, will have to be met. More important the problems of proof will be serious. Once litigation has commenced the usual legal rules for obtaining disclosure from the government become applicable; in this way some exposure of Bureau operations may be obtained. But the very sensitive issues of forcing the security police to reveal information about their operations are not easily solved.

If the courts reach a decision upholding the constitutional rights of citizens against the Federal Bureau of Investigation, troublesome questions remain with regard to enforcement of the court rulings. How can a decree be framed so that it will protect the individual without impairing the legitimate functions of the Bureau? Equally important, how will the parties, the court, or the public know whether the Bureau has complied with the court's order? If the court requires that certain Bureau records be destroyed, or sequestered, how can anyone be assured that microfilm copies will not be retained? Can the court appoint a receiver or trustee to supervise the enforcement of its orders? Plainly only vigorous and innovative action on the part of the judiciary, such as some courts have applied in the enforcement of civil rights orders, will be necessary if a judicial solution is to be achieved.

Lawsuits raising these and other problems, most of them aimed at police forces other than the Federal Bureau of Investigation, are being brought with increasing frequency. This is a promising development. It is important that the facts be brought into the open and that the evolution of necessary legal doctrines begin. Thus far encouraging successes have been achieved, but the results are still inconclusive. The major questions remain to be resolved.[82]

C. Constitutional Limitations on the Use of Informers

Federal Bureau of Investigation practices with respect to the use of informers are described elsewhere.[83] We are concerned here only with the legal question of what judicial controls might be available to restrain the activities of the Bureau in this area. The main constitutional limitations flow from the First Amendment, the right of privacy, and the Fourth Amendment. There are also potential limitations derived from the law of entrapment.

1. The First Amendment

Application of the First Amendment must begin, as in the case of general political surveillance, with a factual examination of the impact which the use of informers, and particularly infiltrators, have upon exercise of the right of expression. One such analysis suggests that the Bureau's widespread employment of informers in its national security operations, and its heavy reliance upon their product, seriously impair free and open expression, particularly the expression of those ideas disfavored by the Bureau.[84] The effects are the same as those caused by political surveillance generally, as described before, but with a much more serious impact upon freedom of association. The prevalence of informers in a political organization is highly disruptive, alters the character of the organization, and often leads to its disintegration. There can be no doubt that an impact of this sort infringes upon the rights which the First Amendment seeks to protect.

The question then becomes whether, under the applicable legal doctrine, such an infringement violates the constitutional mandate. The Supreme Court has never passed upon this issue. It has never had a case in which a full factual presentation of Federal Bureau of Investigation informer practices, and their impact upon freedom of expression, has been made to it, and the First Amendment issues fully developed. Nor has the law been expounded in the decisions of other courts. The Supreme Court has held that "the use of secret informers is not *per se* unconstitutional."[85] By the same token some uses *are* unconstitutional. It would seem reasonable to conclude that the same basic dividing line should be drawn here as in the case of political surveillance generally. This would mean that the Bureau may use informers only for direct law enforcement activities, that is, specific violation of Federal laws, and not for the collection of general intelligence data or for information relevant only to the prevention of events that have not yet taken place. Even if the courts refuse to accept this general doctrine, which should apply to any method of political surveillance, they ought to take special account of the impact on the right of association of certain types of informers. An informer who is placed by the police within an organization or has such a relation with the police as to be in effect a government agent surely ought not to be permitted to function except in a narrow, crime-investigation, capacity.[86]

Efforts to apply these constitutional principles through a series of lawsuits challenging the Federal Bureau of Investigation's use of informers would present the same practical hazards as have been noted above. There would, indeed, be some extra difficulties. Thus, since informers operate undercover, problems of proof would be even more burdensome. The task of separating crime investigation from political surveillance would be more exacting. Nevertheless, it would be important to begin the process of ascertaining just where the constitutional limits lie. Only time can give the answer.

2. The Right of Privacy

The constitutional right of privacy interposes a limitation upon the use of informers in the same way as it does upon other investigative operations of the Federal Bureau of Investigation. In situations where the relationship of the informer to those upon whom he is informing remains entirely impersonal, or organizational, presumably no issue of the right to privacy would arise. But where an informer establishes a personal relation with another person, representing himself to be a private citizen but actually being an agent of the government, one does not have to strain hard to view his conduct as a governmental invasion of privacy. Whether a court, balancing the interests at stake, would consider such an intrusion justifiable would probably turn upon the nature of the investigation in progress. It would be entirely reasonable to hold that where the object of the investigation was to ferret out the perpetrator of a specific crime the conduct was permissible; but where the purpose was the seeking of general political intelligence the invasion of privacy was not warranted. This analysis leads to the conclusion that the right of privacy is applicable in the same general circumstances as the First Amendment.

3. Entrapment

On its face the concept of entrapment would appear to introduce important restrictions upon the Federal Bureau of Investigation's use of informers.

To the extent that an informer operated as an agent provocateur, joining with other persons in political activity, or working actively within an organization, it would seem that the government itself was in part responsible for any illegal conduct in which the informer participated. It would then follow that the government's use of an informer in this way could be enjoined or otherwise prevented, and that the government would have waived its right to punish anyone for the offense in which its agent joined.

In actual practice, however, the law of entrapment has not functioned in this way. The doctrine has never been held to rest on constitutional foundations; rather it is considered either a rule of statutory interpretation or a rule originated by the courts and applied by them as a matter of judicial policy. In part for this reason the entrapment doctrine has never served as grounds for obtaining an injunction against improper use of informers by the police or as grounds for a civil remedy against the police for violation of individual rights. Entrapment as a legal doctrine has been limited in its use to a defense against criminal prosecution. Even here its scope and effect have been drastically curtailed.

As a defense to a criminal prosecution the law of entrapment has two major drawbacks. In the first place, most courts hold that it can be invoked as a defense only by admitting the offense charged. Thus it is normally used only as a last resort in an otherwise hopeless case. Second, the courts have adopted very strict rules as to what constitutes entrapment. The view accepted by a majority of the Supreme Court is that the defense of entrapment is available only when "the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission."[87] Thus the offense must be the product of the government agent, originated by him and procured by him from an otherwise wholly innocent defendent. This opens up the opportunity for the prosecution to make an "appropriate and searching inquiry into [the defendant's] conduct and predisposition" as bearing on his claim of innocence.[88] The result is that the defense of entrapment can rarely be proved to the satisfaction of a jury and is seldom attempted.[89]

The doctrine of entrapment evolved largely out of prosecutions of sumptuary laws—narcotics, prostitution and gambling—where active use by the police of informers and solicitation was considered imperative and where the rights of the defendants were submerged under a tide of morality. The law should be reconstructed, at least when applied in other contexts, to take into account the realities of Federal Bureau of Investigation practices in national security investigations. The main points at which pressure should be exerted to make entrapment law more attuned to the protection of individual rights in the area of political expression are apparent from the previous discussion.

An important beginning would be to persuade the courts to place the law of entrapment in a constitutional framework. Such a foundation could readily be found in the Fourth Amendment or in the due process clause. The way would then be open for the use of the right against entrapment as an affirmative instrument to enjoin improper police practices or to penalize police who engage in them. Another significant reform would be to allow the claim of entrapment as an alternative defense, not dependent upon an admission of guilt. This would probably require—a change justified also on other grounds—a pre-trial determination by the court of whether entrapment had in fact occurred. A further change would be to impose upon the police the obligation to establish probable cause that a law violation was taking place as a condition of planting an informer in an organization or group. This would have the advantage of eliminating the use of informers altogether except in situations subject to check by the courts, rather than trying to pick up the pieces after the damage had occurred.

Most important of all would be the development of a new definition of entrapment. A suggestion of the lines this reformulation of the concept might take appears in the minority position of the Supreme Court in its entrapment decisions. According to this view the basic question should be "whether the police conduct revealed in the particular case falls below standards . . . for the proper use of governmental power."[90] The test would then be whether the government agent went beyond the proper degree of encouragement. The acceptance of such a theory would go far to make entrapment doctrine a major obstacle to the excesses of the Bureau in using informers in the national security field.

4. The Fourth Amendment

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." One of its primary purposes, as revealed by both English and American history, was to protect the right of political opposition against unwarranted intrusions by official authority. Moreover, the employment of informers and infiltrators has always been recognized as "dirty business": informers are likely to be unsavory characters; the product of their labors—the informer's tale—must be viewed with distrust; the practice requires the government to engage in gross deceptions in dealing with its citizens; and the whole process is associated with a totalitarian type of secret police. In view of this background one would expect the Fourth Amendment to be an important factor in curbing the use of informers in political surveillance. It is surprising to find that such is not the case. On the contrary, as presently interpreted

and applied, the Fourth Amendment imposes very little restriction upon Federal Bureau of Investigation practices in this regard.[91]

The legal issues that the courts must consider in dealing with the Fourth Amendment revolve around three major problems. First, does the government's action that is challenged constitute a "search" or "seizure"; that is to say, is the Fourth Amendment applicable at all? Second, if the conduct falls within the terms of the Amendment, was the search or seizure "unreasonable"? If so, the government is violating the constitutional right. Third, if the search or seizure would be reasonable, what procedures are required; is a warrant necessary and upon what basis should it be issued? The development of Fourth Amendment law with respect to informers has been hung up on the first problem.

In its first major decision on the scope of the Fourth Amendment the Supreme Court gave the constitutional mandate a broad application. *Boyd v. United States,* decided in 1886, held that a legal proceeding to compel the production of books and papers violated both the Fourth and Fifth Amendments. The Fourth Amendment, said the Court, applied to "all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property."[92]

Later decisions, however, drastically curtailed the Fourth Amendment's application. Thus in *Olmstead v. United States* the Court ruled that the Fourth Amendment was limited to the seizure of tangible objects and hence did not apply to wiretapping.[93] And in subsequent cases, mostly involving other forms of electronic surveillance, the Court majority came to accept a property theory of the Fourth Amendment. In that view only those government intrusions which infringed upon lawfully held property were within the coverage of the Amendment.[94] Such a position left no room for application of the Fourth Amendment to the use of informers (apart from a situation where the informer's methods involved a trespass upon property) and in three cases in 1966 the Court in effect took this position.[95]

Meanwhile the property theory of the Fourth Amendment was breaking down and in two cases decided in 1967—*Berger v. New York* and *Katz v. United States*—the position was abandoned.[96] The *Berger* and *Katz* cases, overruling *Olmstead,* held that the Fourth Amendment did apply to wiretapping and other forms of electronic surveillance, regardless of whether trespass or other invasion of physical property had occurred. At this point the Supreme Court seemed on the verge of returning to the *Boyd* theory—that any intrusion by the government upon personal security and liberty would be subject to the Fourth Amendment. That hope was dashed in *White v. United States* when the Court reaffirmed its position that the activities of an informer (using a concealed radio transmitter) were not within the scope of Fourth Amendment limitations.[97] The Supreme Court has never squarely faced the question, however, whether the Fourth Amendment applies to the use of informers for political surveillance.

The current position of the Supreme Court seems wholly inconsistent with the original purpose and present function of the Fourth Amendment. A government informer, acting as a government agent to obtain information from unsuspecting citizens, is surely engaged in a search and a seizure. His conduct plainly constitutes an intrusion by the government into the personal privacy and liberty of those upon whom he reports. The fact that the information is obtained by deception rather than by forceful entry would not seem to be a decisive factor. The whole process violates the basic right the Fourth Amendment was designed to protect—the right to be let alone. Moreover, it seriously interferes with the right of political opposition: dissenting activities cannot be carried on with the government looking over the citizen's shoulder. The Supreme Court is undoubtedly reluctant for practical reasons to place controls over the ancient police practice of employing informers. The record of the Federal Bureau of Investigation to date, however, and the possibility of worse abuse in the future, make it imperative that the Court return to the original premises of the Fourth Amendment and make that guarantee applicable to the use of government informers, at least in the area of national security investigators.[98]

Once the informer system is brought under the control of the Fourth Amendment, other problems could be faced and resolved. The next issue would be for the courts to determine what kinds of informer practices constitute an "unreasonable" search or seizure and so are totally forbidden. Two points of reference in drawing the line between "reasonable" and "unreasonable" are important: First, for reasons already stated, the use of informers for the collection of general political intelligence or data pertaining to prevention of possible political offenses in the future, would fall into the category of an "unreasonable" search and seizure. Use in direct crime investigation, on the other hand, would be prima facie reasonable. Here the line is drawn in the same place as in the application of First Amendment and privacy doctrines. Second, the delineation between unreasonable and reasonable would be marked by various factors relating to the methods used. The degree to which the government took the initiative in placing the informer, the kind of controls the government exercised over the informer, the manner in which the informer obtained information, and especially the extent to which the informer participated in the activities of the persons or organizations he was assigned to watch, are some of the considerations upon which such a determination would be based.

There are obvious difficulties in compelling the

Federal Bureau of Investigation, or any police agency, to adhere to the rules that the courts adopt. Success in securing compliance would depend upon the vigor with which the courts and the public pressed the issues. It should be noted, however, that in situations where information obtained by informers was used in a criminal prosecution the rule requiring exclusion of illegally seized evidence would operate, in some degree, as an enforcement device.

Finally, in those cases where the use of informers would not constitute an "unreasonable" search or seizure, important questions of procedure would arise. Under the Fourth Amendment a warrant would be mandatory, at least in all but exceptional situations, before the government could employ an informer. This would require the government to make a showing of "probable cause", supported by oath, and to "particularly" describe the scope of the informer's activities and the nature of information he was to obtain. The warrant procedure could also be used to compel a statement of the duration of the operation and the kind of deception contemplated.

Again, there are many practical problems. Experience has shown that the procedures for issuing a warrant may become wholly formalized, that the demonstration of probable cause may be minimal, and that the role of the judicial officer may be merely to rubber-stamp the whole process. Under such circumstances the requirement of a warrant does not afford much protection. There are signs, however, that the Supreme Court will insist more rigorously upon the duty of the judicial officer to make a more knowledgeable decision in warrant cases. Hence the requirement of judicial supervision could become a more useful control. Furthermore, the warrant procedure would produce a better record than we now have of how much and where the Federal Bureau of Investigation uses the informer system.

D. Conclusions

The conclusion to be drawn from this survey is that our judicial system is capable of affording a much more effective protection than it does now against infringements of the Bill of Rights by the Federal Bureau of Investigation and other police agencies. The fundamental principles embodied in the Bill of Rights were designed to safeguard the citizen against the very dangers now confronting us. The character and magnitude of the problems have changed, however, and the courts have failed to adapt the ancient principles to the new conditions. Particularly, they have failed to recognize the need for special application of the constitutional guarantees against the threats which have grown out of the mass of restrictive measures imposed by the government in the name of "national security". Unless the courts focus more attention upon bringing the Bill of Rights up to date in this area, judicial protection against improper practices of the Bureau will remain weak.

IV. Protective Measures: Legislative and Executive

The protective measures afforded by the judicial system cannot, of course, be the sole reliance in attempting to meet the dangers posed by a national security police to democratic institutions. The role which can be played by legal principles and legal institutions is limited in itself and ineffective without support from the whole community. It is therefore necessary to look to other institutions and other methods as well.

There are two prime elements in undertaking to formulate additional measures of control. One is the overriding importance of access to information about Federal Bureau of Investigation operations. The other is the development of techniques for scrutiny and supervision of those operations.

Access to information is essential for any control because there is no other way by which the issues can be known, understood, confronted, and solved. There are, of course, many difficulties. A police force, especially a security police force, cannot operate altogether in the open. Yet this fact simply makes the problem harder; it does not lessen its significance. Uncontrollable strength and power grow out of secrecy. Not only does concealment permit and encourage abuses of authority and prevent rectification, but it feeds the rumors, ignorance, and myth-making which envelop a security police. Secrecy permits the police force to play upon fear, manipulate public opinion, and further aggrandize its power. The Federal Bureau of Investigation would not be the institution it is today except for its ability to conceal what it does. Visibility in its operations is crucial to any reform.

Scrutiny and supervision by outside agencies are equally important. James Madison and the founding fathers rested their hopes of an open society on a system of checks and balances, and history has confirmed their theories. Yet the Federal Bureau of Investigation is virtually unique in its isolation and independence. It is a self-perpetuating, ingrown institution shielded from any supervision and even from criticism. Such a state of affairs, we should have learned by now, cannot be tolerated within a free nation.

In seeking these objectives of greater visibility and greater supervision it should be possible to rely to some extent upon existing institutions. The President and the Attorney General owe an obligation to the American people to establish control over the Federal Bureau of Investigation. Congress, through its appropriation committees, judiciary committees, and special investigating committees, should begin to

treat the Bureau like any other agency in the executive branch. And the Bureau itself should be reshaped in ways that have been proposed, not the least of which is to have as its Director a person who is not by profession a policeman.[99]

But it seems clear that this will not be enough. The Federal Bureau of Investigation is not any ordinary institution, and it has not reached its present intrenched position by accident or by the work of one man. There is need for some special machinery designed to meet the special problem of controlling a security police force. The form this machinery should take grows out of two basic considerations. First, a security police can never be controlled without mobilizing power outside the governmental apparatus. The government is so obsessed with its law and order function, so ridden with bureaucratic loyalties, so vulnerable to its own investigators, that it cannot be trusted to curb its police force. The way must be shown by independent forces in the community who represent the long-range aspirations of the society and are less committed to the immediate fortunes of the administration in power. Second, individual citizens must have a direct, assured method, separate from the cumbersome judicial process, for airing complaints that the Bureau has abused its authority.

These two requirements are not met by the same kind of machinery. The first calls for a Board of Overseers, composed of distinguished private citizens who are committed to the principles of an open society and see the problems in a different way from the Bureau and the government. Such a Board would have access to all Bureau records and activities. It would have the function of reviewing the Bureau's policies, scrutinizing its programs, and inspecting its operations. It would make periodic and special reports to the President and the Attorney General, to Congress and to the public. Recommendations of the Board would not be binding on the government but hopefully they would let in some light and be influential. The power of the Board would rest upon its understanding of the ground rules of a democratic society and its appeal to the democratic conscience of the nation.

The other type of machinery calls for an Ombudsman, having authority to receive and investigate citizen complaints. He too would have access to Bureau materials, power to obtain information necessary to his inquiries, and authority to recommend remedial action.

No mere reform of present institutions or establishment of new ones will, of course, solve the basic problem of holding a security police within the boundaries of the Bill of Rights. Ultimately, the only solution rests on an understanding of the dangers, a commitment to watch for their appearance, and the courage to demand their correction. Such a solution must be found in the attitudes and actions of the nation's leadership, official and nonofficial. But even more it demands a positive acceptance of the principles of an open society by the community as a whole.

1. The issues involved in electronic surveillance and the use of informers were discussed by other participants in the Princeton Conference and hence these matters are likewise not treated in this article, except in regard to certain constitutional questions relating to informers. *See* the chapter by Victor Navasky and Nathaniel Lewin and that by Frank Donner in the forthcoming *Investigating the FBI.*

2. *United States* v. *Coplon,* U. S. Dist. Ct., Dist. of Col., No. 381–49. An analysis of the reports, together with a summary of each, may be found in *Report on Certain Alleged Practices of the FBI,* 10 Law. Guild Rev. 185 (1950).

3. The Media papers have not been published in full but those released are available in xeroxed form. Newspaper accounts may be found in The New York Times for March 25, 26, 28, 29, April 8, 10, 13, 14, 25, and May 13 and 18, 1971. An account also appears in The New Republic, April 10, 1971, p. 5. The papers are cited hereinafter as the Media documents.

4. In addition to numerous newspaper stories, articles, testimony before appropriation sub-committees, and similar sources, material may be found in half a dozen books written about the Federal Bureau of Investigation. Accounts favorable to the Bureau include Don Whitehead, *The FBI Story* (1956), and Harry and Bonaro Overstreet, *The FBI in Our Open Society* (1969). Critical accounts appear in Max Lowenthal, *The Federal Bureau of Investigation* (1950), and Fred J. Cook, *The FBI Nobody Knows* (1964). Accounts by former agents include Norman Ollestad, *Inside the FBI* (1967), and William W. Turner, *Hoover's FBI* (1970). *See* also Victor S. Navasky, *Kennedy Justice* (1971). All of these are cited hereinafter simply by the name of the author.

5. *See* the chapter by Vern Countryman in *Investigating the FBI.*

6. Lowenthal, at 50–51.

7. Lowenthal, at 83–92.

8. Lowenthal, at 297–298; Whitehead, at 68–69.

9. Whitehead, at 161–162.

10. Whitehead, at 157-161.

11. *See* the chapter by John Elliff in *Investigating the FBI.* A detailed account of the activities of the Bureau in gathering general political data appears in Professor Elliff's chapter.

12. The Emergency Detention Act was repealed in Sept. 1971, P.L. No. 92–128.

13. For a recent account of the efforts of the Nixon Administration to expand surveillance of radical groups, *see* James M. Naughton, *U. S. to Tighten Surveillance of Radicals,* N. Y. Times, April 12, 1970.

14. Whitehead, at 16.

15. Federal Bureau of Investigation, Annual Report (1965), at 23.

16. *See* the chapter by Walter Pincus in *Investigating the FBI.* Robert M. Smith reported in the N. Y. Times of April 19, 1971, that of 7,910 agents then employed, 108 were from "non-white minority groups."

17. *See* the chapter by Aryeh Neier in *Investigating the FBI.*

18. H. H. Wilson, *The FBI Today,* The Nation, Feb. 8, 1971, p. 171; Countryman, in *Investigating the FBI.*

19. American Civil Liberties Union, *Surveillance: Is This the Law?* (1971).

20. Executive Order 10450, 3 C.F.R. 936 (Supp. 1953).

21. J. Edgar Hoover, *On Communism* 123 (1969).

22. Professor Elliff's chapter contains a fuller description of the basis upon which the Bureau claims authority to investigate in the national security area.

23. *Report on Certain Alleged Practices of the FBI,* 10 Law. G. Rev. 185, 189 (1950).

24. On its face this document might have been a conscientious objector report, but contact with the subject himself has established that it is not.

25. Quoted in I. F. Stone's Weekly, Nov. 2, 1959, p. 2.

26. Quoted in I. F. Stone's Weekly, Oct. 14, 1963, p. 4. For the figures on other years, *see* Donner, in *Investigating the FBI.*

27. N.Y. Times, April 15, 1971.

28. N.Y. Times, April 17, 1971.

29. *See, e.g.,* Cook, at 394–404; Media documents.

30. *Report on Certain Alleged Practices of the FBI, supra* note 23, at 189.

31. Summary taken from N.Y. Times, April 25, 1971.

32. Other accounts of the character of Bureau national security investigations may be found in Thomas I. Emerson and David M. Helfeld, *Loyalty Among Government Employees,* 58 Yale L.J. 1, 70–72 (1948); Eleanor Bontecou, *The Federal Loyalty-Security Program,* ch. III (1953); Alan Barth, *How Good Is An FBI Report?* Harper's Magazine, March 1954, p. 25; Ralph S. Brown, Jr., *Loyalty and Security* 24–30 (1958).

33. For details on the Bureau's filing system, *see* Elliff, *supra* note 11.

34. *See, e.g.,* Lowenthal, at 86–92; Cook, ch. 3 and 4.

35. *Report on Certain Alleged Practices of the FBI, supra* note 23, at 191-192.

36. *See* Lowenthal, at 319–322; Cook, at 26–27.

37. For a description of Bureau publicity operations *see* the chapter by Robert Sherrill in *Investigating the FBI.*

38. *See, e.g.,* ch. 11. In his later writing Mr. Hoover seems to have abandoned the practice.

39. For an account of this episode *see* Francis Biddle, *'Ethics in Government' and the Use of FBI Files,* The Reporter, Jan. 5, 1954, p. 13.

40. N.Y. Times, Oct. 27, 1954.

41. N.Y. Times, Mar. 25, 1954.

42. N. Y. Times, Oct. 27, 1954.

43. I. F. Stone's Weekly, Nov. 9, 1959, p. 3; Tom Wicker, *What Have They Done Since They Shot Dillinger?,* N.Y. Times Magazine, Dec. 28, 1969, p. 4, 15. *See, generally,* the chapter by I. F. Stone in *Investigating the FBI.*

44. Alan Barth, *How Good Is An FBI Report?,* Harper's Magazine, March 1954, p. 25.

45. *Id.;* N.Y. Times, Mar. 24, 1953.

46. *See, e.g.,* Alan Barth, *The Loyalty of Free Men* 159–160 (1951); Robert K. Carr, *The House Committee on Un-American Activities* 168–169 (1952); I. F. Stone's Weekly, Nov. 9, 1959, pp. 1–2.

47. *See, e.g.,* the material transmitted to the Federal Communications Commission, as reported in Cook, at 391–394. *See* also Elliff, *supra* note 11.

48. *See, e.g.,* Vern Countryman, *Un-American Activities in the State of Washington* 153, 158–159 (1951); I. F. Stone's Weekly, Nov. 9, 1959, p. 1.

49. N.Y. Times, Sept. 7, 1971. The Times also reported: "A spokesman for the F.B.I. contended, however, that those reports could not have come directly from the bureau." *Id.*

50. *See, e.g.,* Tom Wicker, *What Have They Done Since They Shot Dillinger?,* N.Y. Times Magazine, Dec. 28, 1969, p. 4, 14; Victor Navasky, *Kennedy Justice* 35, 137–138, 153–154 (1971).

51. N.Y. Times, Mar. 3 and 18, 1971.

52. N.Y. Times, Nov. 28, 1970.

53. U.S. News and World Report, Nov. 30, 1964, p. 56; N.Y. Times, Nov. 19, 1964. For a further account of this episode *see* Wicker, *supra* note 50, at p. 14; Navasky, *supra* note 50, at 153–154.

54. The Nation, May 19, 1956, p. 421.

55. N.Y. Times, Apr. 20, 1971.

56. At the Princeton Conference former Bureau agent Robert Wall described various episodes of this character in which he had participated.

57. *See* Donner, in *Investigating the FBI.*

58. Quoted in *J. Edgar Hoover and the FBI,* The Progressive, Feb. 1960, p. 30. For other accounts of the Hoover-McCarthy relationship *see* Wicker *supra* note 50, at p. 28; Cook, at 422.

59. William V. Shannon, *He May Be the Man Who Stayed Too Long,* N.Y. Times, Apr. 18, 1971.

60. Quoted in Wicker, *supra* note 50, at p. 19.

61. For an appraisal of the political impact of the Bureau by two seasoned Washington reporters, *see* Wicker, *supra* note 50, at pp. 19, 28–30; Stone, in *Investigating the FBI. See* also Turner, ch. VI.

62. N.Y. Times, Apr. 19, 1971.

63. *See, e.g., J. Edgar Hoover and the FBI,* The Progressive, Jan. 1960, p. 25; James A. Wechsler, *The Decline of J. Edgar Hoover,* The Progressive, Jan. 1965, pp. 12, 16–17; Wicker *supra* note 50, at pp. 14–15; Cook, at 415; Turner, at 95–97.

64. Frank Donner, *The Theory and Practice of American Political Intelligence,* The New York Review of Books, Apr. 22, 1971, pp. 27, 29.

65. *See* Anne Flitcraft, *Police on the Home Front* (1971).

66. *See* the chapters by Pincus and Countryman in *Investigating the FBI.*

67. *See, e.g.,* Cook, Ch. 12; Turner, Ch. VIII.

68. These matters were discussed by others in the Princeton Conference and hence are not pursued further here.

69. *New York Times* v. *Sullivan,* 376 U.S. 254, 270 (1964).

70. Lowenthal, Ch. 1; Cook, at 50–55; Vern Countryman, *The Illegal FBI,* The New York Review of Books, July 31, 1969, p. 34; Countryman, in *Investigating the FBI.*

71. Quoted in Lowenthal, at 298.

72. Robert H. Jackson, *The Supreme Court in the American System of Government* 71 (1955). *See also* Alan Barth, *supra* note 46, at 150–156.

73. *See* Elliff, *supra* note 11.

74. *Id.*

75. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952). The broad language of the Supreme Court in *In Re Neagle,* 135 U.S. 1 (1890), and *In Re Debs,* 158 U.S. 564 (1895), upon which the government position relies, was drastically curtailed by the decision in the Youngstown case.

76. *See, e.g.,* the reactions of the Bureau to Attorney General Stone's limitation of power in 1924 and President Franklin Roosevelt's expansion of power in 1936. Whitehead, at 68–69, 157–161. *See also* Elliff, *supra* note 11.

77. N.Y. Times, Dec. 5, 1964. *See also J. Edgar Hoover and the FBI, supra* note 58, pp. 28–29; Cook, at 404–411; *see* the chapter by John Doar and Dorothy Landsberg, in *Investigating the FBI.*

78. *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965); *Talley* v. *California,* 362 U.S. 60 (1960); *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1958); *Bates* v. *Little Rock,* 361 U.S. 516 (1960); *Gibson* v. *Florida Legislative Investigation Committee,* 372 U.S. 539 (1963).

79. *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *United States* v. *Robel,* 389 U.S. 258 (1967); *Schneider* v. *Smith,* 390 U.S. 17 (1968).

80. For a discussion of the legal doctrines and how they might be applied, *see* Frank Askin, *Police Dossiers and Emerging Principles of First Amendment Adjudication,* 22 Stan. L. Rev. 196 (1970); Note, *Chilling Political Expression By Use of Police Intelligence Files: Anderson* v. *Sills,* 5 Harv. Civ. Rts.-Civ. Lib. L. Rev. 71 (1970): and Notes in 65 N.W.U.L. Rev. 461 (1970); 83 Harv. L. Rev. 935 (1970); and 58 Geo. L. J. 553 (1970).

81. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *see also Stanley* v. *Georgia,* 394 U.S. 557 (1969).

82. The principal decisions thus far have been *Anderson* v. *Sills,* 106 N.J. Super. 545, 256 A. 2d 298 (Super. Ct. 1969), *rev'd* 56 N.J. 210, 265 A. 2d 678 (1970); *American Civil Liberties Union* v. *Westmoreland,* 323 F. Supp. 1153 (N.D. Ill. 1971); *Tatum* v. *Laird,* 444 F. 2d 947 (D.C. Cir. 1971), *cert. granted,* Nov. 16, 1971. For earlier scattered cases dealing with similar issues, *see Local 309* v. *Gates,* 75 F. Supp. 620 (N.D. Ind. 1948); *Giancana* v. *Johnson,* 322 F. 2d 789 (7th Cir. 1963), 335 F. 2d 366 (7th Cir. 1964), *cert. den.* 379 U.S. 1001 (1965); *Mohammad* v. *Sommers,* 238 F. Supp. 806 (E. D. Mich. 1964); *But see Books* v. *Leary,* 291 F. Supp. 622 (S.D. N.Y. 1968). *See also United States* v. *Tijerina,* 412 F. 2d 661 (10th Cir. 1969), *cert. den.* 396 U.S. 990 (1969); *United States* v. *McLeod,* 385 F. 2d 734 (5th Cir. 1967). A number of other suits are pending.

83. *See* Donner, in *Investigating the FBI.*

84. *Id.*

85. *Hoffa* v. *United States,* 385 U.S. 293, 311 (1966).

86. For discussion of the application of the First Amendment to the use of informers *see,* Note, *Police Undercover Agents: New Threat to First Amendment Freedoms,* 37 Geo. Wash. L. Rev. 634, 659–665 (1969); Note, *Present and Suggested Limitation On the Use of Secret Agents and Informers in Law Enforcement,* 41 U. Colo. L. Rev. 261, 278–281 (1969); Peter Buschbaum, *Police Infiltration of Political Groups,* 4 Harv. Civ. Rts.-Civ. Lib. L. Rev. 331 (1969).

87. *Sorrells* v. *United States,* 287 U.S. 435, 442 (1932). The other leading decision, which reaffirms the rule, is *Sherman* v. *United States,* 356 U.S. 369 (1958).

88. 287 U.S. at 451; *see also* 356 U.S. 373.

89. For discussion of the law of entrapment *see* Richard Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs,* 60 Yale L. J. 1091 (1951); Note, *The Serpent Beguiled Me and I Did Eat: The Constitutional Status of the Entrapment Defenses,* 74 Yale L. J. 942 (1965); Rotenberg, *The Police Detention Practice of Encouragement: Lewis v. United States and Beyond,* 4 Hous. L. Rev. 609 (1967); Lester B. Orfield, *The Defense of Entrapment in the Federal Courts,* 1967 Duke L. J. 39 (1967).

90. *Sherman* v. *United States,* 356 U.S. 382.

91. For discussion of the application of the Fourth Amendment to informers, *see* Donnelly, *supra* note 89; Note, *Judicial Control of Secret Agents,* 76 Yale L.J. 994 (1967); Note, *Present and Suggested Limitations On the Use of Secret Agents and Informers in Law Enforcement, supra* note 86; Robert L. Bergstrom, *The Applicability of the "New" Fourth Amendment to Investigations by Secret Agents,* 45 Wash. L. Rev. 785 (1970); Note, *Privacy and Political Freedom: Application of the Fourth Amendment to "National Security" Investigations,* 17 U.C.L.A. L. Rev. 1225 (1970). It should again be noted that we are not dealing here with electronic surveillance, which is treated in the chapter by Victor Navasky and Nathaniel Lewin in *Investigating the F.B.I.*

92. *Boyd* v. *United States,* 116 U.S. 616, 630 (1886).

93. 277 U.S. 438 (1928).

94. *Goldman* v. *United States,* 316 U.S. 129 (1942); *On Lee* v. *United States,* 343 U.S. 747 (1952); *Lopez* v. *United States,* 373 U.S. 427 (1963).

95. *Lewis* v. *United States,* 385 U.S. 206 (1966); *Hoffa* v. *United States,* 385 U.S. 293 (1966); *Osborn* v. *United States,* 385 U.S. 323 (1966).

96. 388 U.S. 41 (1967); 389 U.S. 347 (1967).

97. 401 U.S. 745 (1971).

98. There is clear authority for applying the Fourth Amendment with greater stringency when First Amendment rights are involved. *Marcus* v. *Search Warrant,* 367 U.S. 717 (1961); *A Quantity of Copies of Books* v. *Kansas,* 378 U.S. 205 (1964); *Stanford* v. *Texas,* 379 U.S. 476 (1965).

99. For discussion of proposals for internal reform of the Bureau, *see* H. H. Wilson, *The FBI Today: The Case for Effective Control,* The Nation, Feb. 8, 1971, p. 169.