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The Bureaucratic Politics of the Federal Bureau of Investigation

By

Cooper Hearn

Fulbright Honors Thesis, Fall 2019

Thesis Advisor: Dr. William Schreckhise

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Abstract

This is a comprehensive study of how the administrative powers of the Federal Bureau of Investigation (FBI) have evolved in response to external political forces. To analyze the changes made to FBI administrative powers, this project will assess theories of public administration, bureaucratic politics, various congressional statutes, court rulings, and executive policies that have affected the bureau's capacity to perform investigations and intelligence operations.

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Introduction

Bureaucratic Politics and the Federal Bureau of Investigation

Because they are chiefly organizations of people, government agencies have unique and individual personalities akin to human personalities--complete with self-interests, flaws, likes, and dislikes--that determine the way in which they operate. In certain cases, an agency's personality may also be defined by the general culture of its general workforce, not its administrative leadership. In his 1980 book *Street Level Bureaucracy: Dilemmas of the Individual in Public Services*, political scientist Michael Lipsky posits that it is the discretion of frontline civil servants who operate on the field and interact directly with the public that define an agency's interpretation of the law. Lipsky assesses how field agents of local government, such as teachers and policemen, are most directly in control of how an agency operates, which informs our understanding of direct enforcement by governmental entities (Lipsky 1980). However, in the case of high-level federal bureaucracy, the overarching disposition and direction of an agency generally parallels the personality of that agency's leadership. The high-level actors become symbolic of the agencies they represent and governmental action and policymaking is often a result of the bargaining by these actors.

The subfield of bureaucratic politics aims to understand how the government operates by considering how these actors characterize and affect the operations of agencies. Bureaucratic politics is defined as a theoretical and actor-oriented approach to public policy that emphasizes internal political bargaining within the state by a variety of intergovernmental actors (Hegele 2018, 753-754). The bureaucratic politics model was first described by political scientist Graham T. Allison in his article "Conceptual Models and the Cuban Missile Crisis," in which Allison contrasts the bureaucratic politics model of policymaking with the "rational policy" model--

which suggests that the state acts as a unitary actor in effectuating the most rational approach to policy problems-- and the “organizational process” model--which suggests that all policymaking derives from a uniform set of established bureaucratic procedures (Allison 1969, 691-694; 698-700). Allison argues that policymaking is a multilateral process that involves a variety of “players positioned hierarchically within the government” (Allison 1969, 707). These actors are driven by a variety of factors affecting their decision-making. These factors may include the interests of an elected officials constituents, the trade agreements of the military-industrial complex, and distinctive missions and leadership styles of various officials. Due to the diverse nature of government agencies, various bureaucracies often have competing interests with each other.

Among the most significant case studies of bureaucratic politics is the Federal Bureau of Investigation. Since its creation in the early 20th Century, the FBI has found itself directly involved in the most significant national policy arenas of the United States government. As an agency, the bureau has operated with a distinctive culture and personality that has evolved in response to its directorship, world affairs, political movements, and other external factors. For the majority of its history, the FBI’s personality was dictated by its longest-serving and most influential director, J. Edgar Hoover. Director Hoover, who served as the head of the FBI for almost fifty years, played a monumental role in expanding the bureau from a negligible agency of only thirty-four agents to a looming bureaucratic giant--nearly one-thousand times bigger than its inaugural size. Primarily through Hoover, the FBI came to symbolize government surveillance, security, and enforcement. However, despite the incredible influence of the FBI director, researchers cannot discount the profound effects of external actors on the bureau’s personality.

The objective of this project is to describe the bureaucratic politics of the FBI since its inception in 1908 and assess how intergovernmental bargaining and external forces shaped the agency's development and behavior over time. Understanding the effects of bureaucratic politics on the FBI informs our understanding of the bureau's complex and dynamic relationships with other government agencies, expanded administrative powers, controversial operations, and overall role in global affairs. Because external forces influence the agendas of bargaining actors in bureaucratic politics, it is hypothesized that changes in the FBI's external environment influence changes to the FBI's operation in that the bureau is entrusted with greater administrative discretion when the United States' external environment becomes more uncertain. External uncertainty, in national and international context, likely results in the growth of FBI power, especially power that is relatively independent of legislative or judicial checks and balances.

A Brief Summary of FBI History

When the Bureau of Investigation (BOI) was first established by Attorney General Charles Bonaparte on July 26th, 1908, the diminutive agency employed a total of thirty-four agents. The scope of BOI jurisdiction was limited to investigating violations of antitrust laws and interstate commerce laws. The small government agency gradually began to amass more power as various crimes, like human trafficking via the Mann Act (1910) and the interstate transportation of stolen vehicles via the Dyer Act (1919), became designated as federal offenses. When J. Edgar Hoover was appointed head of the agency in 1924 by President Calvin Coolidge, the BOI underwent a powerful, long-term metamorphosis. Finally, in 1935, the Bureau of Investigation was formally renamed the Federal Bureau of Investigation.

Throughout WWII and the Cold War, the FBI proved instrumental to wartime counterintelligence operations, including the bureau's intimate involvement with the Venona Project, a program charged with intercepting Signal Intelligence transmissions from the Soviet Union. It surveilled communist spies and political radicals who engaged in alleged subversive activities that threatened domestic security. To fulfill the bureau's mounting responsibilities, Director Hoover sponsored tremendous advancements within the FBI, such as the creation of the National Crime Lab. During his forty-eight year tenure as director, J. Edgar Hoover almost singlehandedly transformed a once negligible squad of detectives into the most powerful law enforcement agency in the world.

Upon Hoover's death in 1972, there was somewhat of a reversal of the FBI's public image. Shortly after Hoover's passing, "Deep Throat," a whistleblower later revealed to be Associate FBI Director Mark Felt, exposed the FBI's questionable role in the Watergate cover-up. In 1975, the United States Senate formed the Church Committee, which investigated the furtive activities of the U.S. intelligence community. The committee uncovered several examples of abuses of power perpetrated by the FBI--including particularly disturbing activities committed during the Counterintelligence Program (COINTELPRO). The Church Hearings, coupled with growing mistrust toward government bureaucracies since Watergate, led to massive outcry against perceived abuses of power by the agencies of the U.S. intelligence community and drove several subsequent pieces of legislation designed to reign in these agencies' relatively unchecked powers. The reputation of the FBI was continually challenged for the rest of the 20th Century since the Church Committee findings. The bureau became associated with the failures of the Ruby Ridge Incident (1992) and the Waco Siege (1993). Because of these incidents, the FBI was increasingly viewed as reckless and incapable of monitoring the activities of its own personnel.

Upon the tragedy of 9/11, many critics of the FBI reneged on their calls to ground the agency. The traumatized nation turned to the intelligence community to protect it from the newly apparent threat of foreign terrorism. Under Director Robert Mueller, the FBI became considerably more powerful, particularly with the passage of the PATRIOT Act. The bureau took on an increasingly internationalized role and its domestic surveillance was not only permitted but accepted by Congress and much of the public. Recently, the FBI's activities in the 2016 presidential election and the Trump Administration have led to yet another widespread reconsideration of the agency's role in American life. While the public and legislative opinion of the agency remains sharply inconstant, the ebbs and flows of the FBI's influence and authority continue to be inextricably connected to external trends in American politics.

Part I - J. Edgar Hoover

In the Beginning: The Birth of the Bureau of Investigation (BOI)

Prior to the establishment of its own investigatory arm, the United States Department of Justice relied on borrowing agents from the U.S. Secret Service to fulfill its on-the-field needs. This practice of using Secret Service operatives ended in May of 1908 when Congress prohibited the lending of Secret Service employees to any outside federal agency or department. In response to this ban and the growing need for investigators, Attorney General Charles Bonaparte established the Bureau of Investigation (BOI), a team of thirty-four agents who would investigate federal offenses on behalf of the Justice Department, on July 26, 1908 (FBI, A Brief History).

The two principal actors involved in the Bureau of Investigation's foundation were the White House and the U.S. Department of Justice. The backdrop of the bureaucratic politics that formed the bureau was the shared interest in trust-busting, a movement that partly defined the Progressive Era of American Politics. Both President Theodore Roosevelt and his Attorney General Charles Bonaparte were staunch progressives with a shared agenda that involved combatting corrupt trusts and monopolies. Because of its founders' trustbuster tradition, the BOI was initially focused on antitrust investigations. In addition to antitrust cases, the BOI also investigated violations of Interstate Commerce Act of 1887, though the scope of what constituted an interstate commerce violation was limited due to the relative infancy of American interstate commerce laws (FBI, A Brief History).

The BOI began to accumulate further responsibilities as various state crimes became federal offenses. Principal statutes that affected the BOI's investigative jurisdiction involved the definitional purview of interstate commerce laws, including:

- The Mann Act (1910) 18 U.S.C. § 2421 et seq: This law designated the transportation of “any individual, male or female, in interstate or foreign commerce or in any territory or possession of the United States for the purpose of prostitution or sexual activity” as a federal offense. Also known as the “White Slave Traffic Act”.
- The Dyer Act (1919) 18 U.S.C. § 2311 et seq: This law made “the interstate transportation of stolen vehicles a federal crime”. The Dyer Act originally only specified automobile theft as a federal crime, though the theft of aircraft was formally added to the statute in 1945.

WWI and the Espionage Act

From the beginning of the 20th Century, concerns about political radicals pervaded American life--mainly worries toward socialists, anarchists, and communists. Socialism had already become widely associated with political violence due to several violent riots that occurred in labor union disputes, such as Chicago’s Haymarket massacre of 1886 which led to “widespread hysteria directed against immigrants and labor leaders” (Encyclopaedia Britannica 2019). Similarly, anarchism had quickly become a threatening trend. President William McKinley had previously been assassinated by Polish-American anarchist Leon Czolgosz in 1901, which catapulted the fringe movement to the forefront of public worry (Eschner 2017). In response to his predecessor’s death at the hands of an avowed anarchist, President Theodore Roosevelt stated, “When compared with the suppression of anarchy, every other question sinks into insignificance” (Rapoport 2006, 386). Furthermore, the Russian Revolution in 1917 demonstrated to the American public as well as the rest of the world how dangerously efficacious communist groups could be in overthrowing national governments. The combined

influence of these fears played such a significant role in American life at this time that this era became known as the First Red Scare.

The most aggressive elements of anarchist-socialist radicalism culminated in the Galleanist Bombings of 1919. Italian anarchist Luigi Galleani orchestrated a series of bombings that targeted politicians and government officials throughout the United States (Segre 1991). Among the targets of Galleani's terroristic campaign was Attorney General Mitchell Palmer, whose house was nearly destroyed by a mail bomb delivered by Galleanist Carlo Valdinoci on June 2nd, 1919 (FBI n.d.). Palmer, understandably affected by the attempt on his life, led an impassioned campaign to crackdown on the subversive ideologues in the United States. In the bargaining process with the national legislature, the attorney general, echoing President Roosevelt's dramatic claims against anarchists, told Congress that the anarchist revolutionaries could "on a certain day...rise up and destroy the government at one fell swoop" to justify his requests for increased funding for Justice Department operations (Michaels 2017, 50). To abet his anti-radical campaign, Mitchell Palmer assigned his assistant, twenty-four year old John Edgar Hoover, to head the Department of Justice's General Intelligence Division (GID) on August 1st, 1919 (FBI, Palmer Raids).

During the First Red Scare, the BOI was seen as a means to handle the growing concerns about domestic loyalties during WWI. To protect against "subversion and sabotage", Congress passed both the Espionage Act of 1917 and the Sedition Act of 1918. (FBI, A Brief History).

- Espionage Act (1917) 18 USC Ch. 37 § 792 et seq (Originally Pub. L. 65-24, 40 Stat. 217): Outlawed the production and conveyance of "false reports or false statements with intent to interfere" with national defense operations, the incitation of insubordination or

disloyalty in the U.S. armed forces, and the obstruction of recruitment and enlistment serves of the military.

- Sedition Act (1918) Pub. L. 65–150, 40 Stat. 553: An extension to the Espionage Act that prohibited “disloyal, profane, scurrilous or abusive language” concerning the national government, the U.S. flag or military. Furthermore, the Sedition Act criminalized speech “that caused others to view the American government or its institutions with contempt”. The act was repealed in 1921.

The constitutionality of the Espionage Act was challenged in the landmark Supreme Court case *Schenk v. United States* (1919). The appellant, general secretary of the Philadelphia Socialist Party Charles Schenck, was charged with “conspiracy to violate the Espionage Act of 1917 by attempting to cause insubordination in the military and to obstruct recruitment” through the distribution of anti-draft leaflets. Schenck challenged the admissibility of the government’s evidence on First Amendment grounds. Justice Oliver Wendell Holmes authored a unanimous opinion in favor of the United States, arguing that the national security interest superseded Schenck’s First Amendment rights and famously stating:

“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. ... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”
(Holmes 1919) .

With congressional authorization and additional affirmation by the Supreme Court’s ruling in *Schenk v. United States*, the Department of Justice was given authority over counterintelligence

investigations, enforcement, and prosecution as clarified by the Espionage and Sedition Acts and the BOI became the primary investigatory agency for such cases. The General Intelligence Division (GID) of the Department of Justice--which would later be established as a division within the BOI in 1921--was responsible for facilitating BOI investigations into suspected traitors and for the identification of people associated with radical political groups. The BOI worked closely with J. Edgar Hoover to provide his division with information and evidence that implicated individuals likely to be involved in the violent activities of radical organizations (FBI, Palmer Raids). Using the authority endowed by the Espionage and Sedition Acts, the GID arrested various prominent figures in radical subculture. Among those arrested were anarchist writers Emma Goldman and Alexander Berkman, who were charged with conspiring against WWI conscription, a violation of the Espionage Act (*New York Times* 1917).

Additionally, the congressional statutory authorization in the aforementioned acts gave actors Attorney General Mitchell Palmer and GID Head J. Edgar Hoover the administrative power to launch the Palmer Raids, a series of law enforcement raids lasting from November 1919 to January 1920 in which radical leftists were apprehended and charged with violations of the Espionage Act. The publicized enforcement of the Espionage Act led the Bureau of Investigation to become known as the face of wartime domestic security in the United States. The joint nature of the anti-radical programs orchestrated and executed by the General Intelligence Division and the Bureau of Investigation led to an absorption of the GID by the BOI in 1921 as well as the appointment of J. Edgar Hoover as assistant director of the BOI in the same year (FBI, n.d.).

By 1924, the Palmer Raids of the First Red Scare had enabled the Bureau of Investigation to “retain wartime levels of staffing” and the agency employed a total of 697 personnel, a 556 staffing increase since the outbreak of WWI in 1914 (Belknap 1982, 27). The BOI was, at this

point, the largest bureau in the Department of Justice (Belknap 1982, 26). In spite of this, the Palmer Raids were characterized by miscommunications, ineffective planning, inaccurate intelligence about the targets of arrest warrants, and a long list of constitutional violations (FBI n.d.). As a result, public opinion turned against the Department of Justice. Following the calamitous Palmer Raids, the Department of Justice underwent a period of continuing scandals that further aggravated its image crisis. Attorney General Mitchell Palmer's successor, Harry M. Daugherty, was responsible for escalating labor tensions. Attorney General Daugherty, an unscrupulous political operative who had previously served as President Warren G. Harding's campaign manager, falsely alleged that the Great Railroad Strike of 1922 was organized by communists and directed a series of injunctions against the union leaders involved. Similar to the Palmer Raids, Daugherty's campaign against the railroad strikers proved to be widely unpopular and further damaged the reputation of the Department of Justice. Moreover, Daugherty was accused of corruption stemming from his connection with the "Ohio Gang" of Ohio-based politicians who had been appointed to prominent executive positions via cronyism. After Harding's death, President Calvin Coolidge compelled Harry Daugherty's resignation (University of Michigan, n.d.; Grossman 2017).

President Coolidge, eager to repair the damaged reputation of the Department of Justice, appointed Harlan Fiske Stone to replace Daugherty as attorney general. Attorney General Stone was a reformist and advocate-statesman who quickly fired Harding's cronies from the DOJ and curbed the domestic surveillance and persecution of American political figures by the Bureau of Investigation. Attorney General Stone dismantled the BOI's first domestic intelligence program, prohibited the usage of wiretaps, and barred the BOI from political spying, limiting the bureau's role "strictly to investigations of violations of the law" (Elliff 2016, 16; Katyal 2008, 1035). He

was quoted in the American Civil Liberties Union's 1924 pamphlet "The Nationwide Spy System Centering in the Department of Justice," stating:

"There is always the possibility that a secret police system may become a menace to free government and free institutions because it carries with it the possibility of abuses of power which are not always quickly apprehended or understood. The enormous expansion of federal legislation... has made a federal bureau of investigation a necessary instrument of law enforcement. But it is important that its activities be strictly limited to those functions for which it was created and that its agents themselves be not above the law or beyond its reach" (Belknap 1985, 201).

Despite his efforts to otherwise reign in the Department of Justice, Stone is partly remembered as the attorney general who formally appointed J. Edgar Hoover to serve as director of the Bureau of Investigation in May of 1924.

The Early Hoover Years: Profiling the FBI and Its Directorship From 1924-1935

As aforementioned, an agency is often characterized by its leadership and directing actors may become emblematic of the agency as a whole. Because of this, to understand an agency's disposition, it is important to understand various models of bureaucratic leadership. In his 1964 study *Inside Bureaucracy*, Anthony Downs highlights five different archetypes of bureaucratic personalities exhibited by agency officials. According to Downs' bureaucratic models theory, there are purely self-interested officials who are "motivated entirely by goals which benefit themselves rather than their bureaus or society at large" (Downs 1964, 4). These officials include

climbers who “seek to maximize their own power, income, and prestige” through promotion and aggrandizement and conservers who “seek to maximize their own security and convenience” maintaining the status quo and opposing change (Downs 1964, 4). Conversely, there are also mixed-motive officials who “have goals that combine self-interest and altruistic loyalty to larger values” (Downs 1964, 5). These officials include three profiles: zealots “who are loyal to relatively narrow policies or concepts” and seek power to “effectuate the sacred policies to which they are loyal,” advocates who are “loyal to a broader set of policies or to a broader organization” and are “highly partisan in supporting [their] organization in conflicts with outsiders,” and statesmen who are “loyal to the nation or society as a whole” (Downs 1964, 5).

J. Edgar Hoover was simultaneously a climber and an advocate. As a climber, Hoover was a Machiavellian bureaucrat whose shrewd maneuvering and navigation of complex bureaucracy remains unparalleled. His rise to prominence was unfathomably precocious. From Director Hoover to Director Christopher Wray, the average age of FBI directors upon their appointment was 51 years. When J. Edgar Hoover was first appointed director of the bureau, he was 29 years-old. Like many who rise to power in a short span of time, J. Edgar Hoover’s timing was impeccable. Despite his association with the failed Palmer Raids, Hoover entered government service at a time when the United States was still gripped with fear and desperate for effective protection against the rising threats of political radicalism. Hoover’s personality seemed superbly fitting for a federal bureaucrat during this time, not only due to his ambition and cunning, but also because he essentially embodied the First Red Scare. Throughout Hoover’s life, crises provided a necessary backdrop to his professional climb as, “in quieter times, [his] aggressive brand of leadership may [have been] less necessary and less acceptable” (Baumer

2014, 102). Furthermore, Hoover frequently exercised his administrative powers to effectuate his own personal interests and, most notoriously, his personal vendettas.

However, in addition to his egocentric exploitations of the FBI, Hoover was undoubtedly a stalwart advocate of the bureau. As characteristic of Downs' advocate archetype, J. Edgar Hoover was extremely partisan in representing FBI interests against competing interests and elevating his agency's power above all outside organizations--resulting in a closed-system of intelligence. Perhaps more so than any other civil servant, Hoover came to embody the agency he directed and "the indoctrination and socialization of FBI people were so thorough and so uniform that the Bureau had, to a large extent, become the mirror reflection of J. Edgar Hoover" (Lewis 1984, 140). Because of his aggressive advocacy of his organization in policymaking, Hoover is a prime example of bargaining actors in the processes described by bureaucratic politics.

For much of its early history, the bargaining group responsible for FBI policies and practices was relatively small. The key actors involved in the FBI were (1) the president, (2) the attorney general, and (3) Director J. Edgar Hoover. Of these actors, J. Edgar Hoover was the most consistent player and his tenure outlasted all other bargaining actors, including eight presidents. This gave Hoover a strong advantage as he was embedded in the executive branch and had an acute understanding of its operations and secrets. Hoover's proficiency with bureaucratic politics enabled him to exert his will over surveillance policy over the course of his directorship, particularly as it pertained to wiretapping.

While the attorney general's regulation against wiretapping practices was not violated by the any component of the Department of Justice, the Department of Treasury's Bureau of Prohibition continued using wiretap evidence in its investigations of criminal bootleggers. One

such bootlegger, a corrupt Seattle policeman named Roy Olmstead, was indicted for conspiracy to violate the Volstead Act based on an investigation that relied on evidence gathered from wiretapped household phones. Olmstead challenged the admissibility of the evidence on Fourth and Fifth Amendment grounds and the case was eventually heard by the United States Supreme Court. In *Olmstead v. United States* (1928), the Court ruled in favor of the respondent prohibition agents, holding that the Fourth Amendment was inapplicable to wiretapping evidence because wiretapping technology could not have been considered when the Amendment was first authored. The Court did however affirm the power of Congress to restrict wiretap evidence through subsequent legislation (Katyal 2008, 1035). Even though the legality and admissibility of wiretapping was affirmed, BOI Director J. Edgar Hoover publicly denied the use of such investigatory methods in 1929. The Bureau of Prohibition was transferred from the Department of Treasury to the Department of Justice in 1930, renewing considerations of wiretapping evidence in both the Justice Department and Congress (Murchison 2003). In 1934, Congress used its legislative authority clarified in *Olmstead* and passed the Communications Act of 1934, which broadly regulated telephonic wiretapping practices.

- Communications Act (1934) 47 U.S.C. § 151 et seq: This law regulates interstate and foreign communication by wire or radio, and for other purposes. Section 705 ([47 U.S.C. 605) addresses the interception of such communication, stating that “no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person” (FCC 1934, 319).

The Department of Justice interpreted that the legislation “did not preclude wiretapping per se, only wiretapping plus disclosure” and thus resumed wiretapping activities in criminal investigations (Katyal 2008, 1038).

At this time, the Bureau of Investigation had emerged as a premier crimefighting agency. In 1932, Director J. Edgar Hoover helped pioneer the use of fingerprint identification in criminal investigations and established the “Criminological Laboratory,” a facility for the bureau’s scientific analysis of forensic evidence (Press 1932 and FAS n.d.). Within the first year of the lab’s existence, the “National Fraudulent Check File and Single Fingerprint Section” were added to the laboratory’s repertoire and, in 1934, the Criminological Laboratory was moved to the Department of Justice building. In an amazingly short span of time, the Criminological Laboratory--renamed the FBI Laboratory in 1943--had revolutionized the nascent field of forensic science and had equipped the bureau with state-of-the-art investigative capabilities (FAS n.d.). In 1935, the Bureau of Investigation was formally renamed the Federal Bureau of Investigation, or the FBI.

In addition to its internal advancements, the bureau received more public recognition than ever before. Previously, Attorney General Harlan Fiske Stone had urged Director Hoover to follow the model of law enforcement established by Scotland Yard and avoid “wide publicity” (Elliff 2016, 16). J. Edgar Hoover decided to ignore this direction entirely and, throughout the 1920s and 1930s, Hoover launched a flamboyant “War on Crime” in which he aggressively pursued the most celebrated crimes in American media. Hoover’s dogged efforts to commandeer investigations of headliner cases led to further statutory changes to the federal criminal code. In March of 1932, the infant son of celebrity aviator Charles Lindbergh was abducted from his nursery. Charles Lindbergh Jr.’s disappearance was accompanied by a ransom note that

demanded payment of \$50,000. Hoover supported the ongoing investigation of the kidnapping by the New Jersey State Police and inserted the bureau as an active member in the case (FBI, Lindbergh Kidnapping). The case incited public sentiments and there was a widespread call for Congress to step in (Bomar 1934, 436). The outcry led to Congress passing the Federal Kidnapping Act, which gave Hoover's agency chief jurisdiction over the Lindbergh investigation.

- Federal Kidnapping Act (1932) 18 U.S.C. § 1201(a)(1): This law extended federal jurisdiction over interstate kidnaping. Under this bill, the maximum penalty for federal kidnapping charges was life imprisonment. The Federal Kidnapping Act is also known as the "Little Lindbergh Law" (Bomar 1934, 437).

Meanwhile, as the Bureau of Investigation garnered mass idolatry for its well-publicized achievements, the once-fringe Nazi Party had finally come to power in Germany. Paul von Hindenburg had appointed Adolf Hitler chancellor of Germany in 1933 and Hitler would seize total control of the nation as Führer the following year. President Franklin Delano Roosevelt was profoundly wary of the threat posed by the Nazis. Two months after the passage of the Communications Act, President Roosevelt directed J. Edgar Hoover to resume domestic intelligence operations to probe the Nazi movement in the United States. Hoover instructed all FBI field offices to conduct an intensive "intelligence investigation" into far right-wing agitators. In the probe of domestic fascists, Hoover investigated several critics of the New Deal, including the Nazi-sympathizing radio-preacher Father Charles Coughlin and General Smedley Butler, who was associated with the "Business Plot"--an alleged 1933 conspiracy to usurp the American government and install a fascist regime. The past efforts of the bureau to surveil left-wing radicals underwent a notable reversal of focus to concentrate on right-wing radicals. The Bureau

of Investigation had fully resumed its surveillance of political figures by 1935, veritabily contradicting the reforms of Harlan Fiske Stone (O'Reilly 1982, 646).

President Roosevelt's interest in censoring critics of his administration became allied with Hoover's interest in censoring critics of his agency. Within the context of WWII, it was not uncommon for federal agencies to influence media portrayals of government. During the war, both the Department of War and the Department of Treasury joined forces with radio networks in a joint effort to advertise war bonds in entertainment programming. The FBI entered the wartime propaganda system by authorizing depictions of itself that portrayed the bureau as an upstanding law enforcement organization. The bureau directly influenced its depiction in books, movies, news articles, and, perhaps most prominently, radio dramas. In "authorized retellings" of FBI activities, "any inkling of an out-of-control or overly powerful FBI was scrubbed from the historical record, replaced with themes of science, responsibility, and Hoover's cautious and protective leadership" (Cecil 2015, 253). Ironically, the key value Hoover sought to portray was the bureau's quiet restraint, as this "restrained image...was a key element in the physical and jurisdictional growth of the bureau" (Cecil 2015, 253).

Executive Unilateralism: FDR, the FBI, WWII, and the VENONA Project

Though the FBI had established itself as a domestic crimefighting agency during the glamorous "War on Crime" that lasted from 1924 well into the 1930s, J. Edgar Hoover was increasingly interested in non-criminal intelligence operations, particularly amid growing international tensions related to the rise of authoritarian regimes abroad. However, the FBI had no legal authority to involve itself in operations beyond the realm of domestic criminal

investigations. Furthermore, despite his support for executive branch power and empowered national security, President Roosevelt feared that a “formal request for non-criminal intelligence investigations would leak and generate public controversy”. To avoid giving the FBI too much power, President Roosevelt only allowed Hoover to partake in operations jointly approved by Attorney General Homer Cummings and Secretary of State Cordell Hull (Katyal 2008, 1038). J. Edgar Hoover, a relatively subservient actor in this established bargaining group, decided to ignore the president and bypass cabinet approval, and he unilaterally directed the FBI to begin developing a surveillance program for the collection of non-criminal intelligence (Katyal 2008, 1039). Notably, Hoover’s dismissal of the president’s orders was a flagrant and unprecedented subversion of Graham Allison’s organizational process model of bureaucracy, as he opted to ignore administrative rules and procedures from the highest end of governmental hierarchy in order to effectuate his desired policy. Hoover’s method of bypassing the established bargaining process would become a recurring element of his leadership and major cause for his ability to expedite policy in spite of interagency checks and balances associated with bureaucratic politics.

Because of the permissive interpretation of the 1934 Communications Act as a prohibition of wiretapping disclosures rather than wiretapping practices, federal law enforcement resumed wiretap operations throughout the late 1930s. The legality of this practice was challenged in 1939 in *Nardone v. United States*, in which the Supreme Court clarified that wiretapping was forbidden at any stage of a criminal investigation, as any information used to direct the overarching investigation was considered “fruit of the poisonous tree” that tainted the admissibility of all resultant evidence. With the *Nardone* ruling, antagonism towards wiretapping had finally come full circle-- having “been expressed by Congress, affirmed by the Court, and applauded by the media” (Katyal 2008, 1047). Moreover, Attorney General Robert H. Jackson

further acknowledged the *Nardone* decision by signaling the end of wiretapping practices in an official Department of Justice press release. Boldly, J. Edgar Hoover made the Justice Department's codified ban on wiretapping appear as *his* idea to the public, in spite of his extreme behind-the-curtains advocacy for enhanced surveillance measures (Katyal 2008, 1048). The media propagated this subterfuge and, on Mar. 18, 1940, a *New York Times* headline even reported, "Justice Department Bans Wire Tapping: Jackson Acts on Hoover Recommendation" (Katyal 2008, 1048). As he publicly assumed credit for supporting *Nardone*, J. Edgar Hoover quietly worked to reallocate wiretapping operations. He duplicitously "began leaking stories to the press of how Jackson's policies hindered FBI investigations," sowing the seeds for an eventual reconsideration of wiretapping laws (Katyal 2008, 1049-1050).

J. Edgar Hoover was far from the only official at personal odds with the *Nardone* ruling. World War II had broken out just three months prior to *Nardone* and the globe had erupted in chaos and hostility. President Roosevelt was insecure about the United States' capacity for counterintelligence during the war and was particularly concerned by "German and Soviet involvement in the organization of propaganda or so-called 'fifth columns' ... and in the preparation for sabotage, as well as in actual sabotage in Spain, France, and the western hemisphere." Though the U.S. had not yet formally entered WWII, Roosevelt believed that wiretapping was necessary to effectively combat the promulgation of foreign agendas in the United States by the fifth column propaganda machines. Finally, on May 21, 1940, Roosevelt relayed a confidential memorandum that granted secret authorization of FBI wiretapping (Theoharis 1992, 104). His memorandum to Attorney General Jackson read as follows:

"I have agreed with the broad purpose of the Supreme Court decision relating to wiretapping in investigations. The Court is undoubtedly sound both in regard to the use

of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and it is also right in its opinion that under ordinary and normal circumstances wiretapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights. However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation... You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigating agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.” (Roosevelt, 1940).

Attorney General Jackson sought to distance himself from the authorization, declining to keep detailed records “concerning the cases in which wire-tapping would be utilized” and yielding considerable bureaucratic discretion to Director Hoover, who in turn kept exclusive record of wiretapping operations for himself (Theoharis 1992, 105). The FBI was thus authorized to conduct intelligence gathering operations at the direct behest of the White House without having to undergo the checks and balance of external approvals. The collaboration of Roosevelt and Hoover led to the establishment of a closed-system of intelligence gathering by the executive branch, independent from legislative or judicial scrutiny. Though these surveillance activities were meant to be used exclusively in matters of national defense, the president “retained the discretion to define what constituted a national defense case.” Accordingly, Franklin Roosevelt, and later Harry Truman, both requested wiretaps of “political adversaries.” Just as Roosevelt’s

previous requests, this included various critics of his New Deal programs, including Cornelius Vanderbilt IV (Theoharis 1992, 107 and 108).

As the United States became increasingly involved in World War II, the FBI's wartime purview expanded beyond internal security and domestic wiretaps. WWII marked the bureau's first foray into international operations. On June 24, 1940, the FBI established the Special Intelligence Service (SIS), a division of the bureau that specialized in international undercover services. The SIS was created in response to a memorandum by Assistant Secretary of State Adolf A. Berle Jr., who relayed President Roosevelt's request for the FBI to "be responsible for foreign intelligence work in the Western Hemisphere". Two years later, the FBI was admitted to operate alongside military intelligence in joint-international counterintelligence. On November 25, 1942, three intelligence heads agreed to coordinate counterintelligence operations in the western hemisphere between their respective agencies. These actors included Major General George V. Strong, the assistant chief of staff for the U.S. Department of War, Rear Admiral H.C. Train, the director of the Office of Naval Intelligence (ONI), and FBI Director J. Edgar Hoover. The arrangement was formally named the "Agreement Between MID, ONI, and FBI for Coordinating Special Intelligence Operations in the Western Hemisphere" (CIA 1942). Subsequently, in the domain of wartime intelligence operations, these three actors formed the primary bargaining group for international intelligence gathering. Previously, the three aforementioned intelligence agencies "operated independently, although they did share information." Due to a lack of a master plan by the president or cabinet officials to coordinate intelligence collection and analysis, there was a culture of duplicated efforts and "bureaucratic rivalries" within government intelligence (Theoharis 1999, 161). The "Agreement Between MID, ONI, and FBI for Coordinating Special Intelligence Operations in the Western

Hemisphere” provided a blueprint for administrative collaboration and was a relatively major step forward for interagency cooperation.

Around the time of the joint-counterintelligence agreement, the initial SIS directive was supplemented with a “Delimitation Agreement,” which clarified the responsibilities of the FBI’s SIS as the obtainment of “economic, political, industrial, financial, and subversive information and also information concerning movements, organizations, and individuals whose activities are prejudicial to the interests of the United States by reasons of espionage, sabotage, or otherwise”. The SIS was placed under the immediate jurisdiction of the FBI legal attachés in U.S. Embassies throughout the Western Hemisphere. Though the new division creating police liaison networks with foreign law enforcement agencies as well as various signal intelligence, or SIGINT, networks abroad, the most notable feature of the SIS was the undoubtedly the “3,000 confidential informants and sources of information” it directed throughout Central and South America. Undercover confidential informants and agents began collecting human intelligence, or HUMINT, in the Americas related to secret and subversive political activities (CIA 1946).

SIS intelligence collection was most notably concentrated in Latin America, where the FBI commissioned over 340 undercover operatives. South America, in particular, was a major hub for German expats--in over 1.5 million German emigrants had “settled in Brazil and Argentina alone”. Over the course of the war, the SIS proved enormously effective. By 1946, the SIS had identified 887 Axis spies, 281 propaganda agents, 222 agents smuggling strategic war materials, 30 saboteurs, 97 other agents, 24 secret Axis radio stations, 40 enemy radio transmitters, and 18 enemy receiving sets (FBI, World War). The FBI disbanded the SIS at the end of WWII, but maintained its international presence via legal attachés. As of 1946, the FBI had international agents operating from the American Embassies in France, Italy, Portugal,

Spain, and England as well as through U.S. Army installations in the Philippine Islands and Japan. Moreover, the SIS created a precedential model that influenced the Office of Strategic Services--a federal department tasked with foreign intelligence collection and the predecessor organization to the Central Intelligence Agency (FBI, World War).

On September 1, 1947, Special Agent S. Wesley Reynolds, the FBI's liaison to the National Security Agency, was briefed by Colonel Carter Clark, chief of the War Department's military intelligence services, on the VENONA Project--a signal intelligence/SIGINT project run by the U.S. Army and NSA that intercepted, decrypted, and translated messages transmitted by Soviet intelligence agencies. The VENONA Project was first established by the U.S. Army's Signal Intelligence Service, the predecessor agency of the NSA, on February 1st, 1943, as a closed system of intelligence that only included the U.S. Army and the NSA. Col. Clark was first motivated to notify the FBI of SIGINT gathering by the NSA due to his interest in Soviet codenames intercepted by the bureau that might prove fruitful to the VENONA mission. Reynolds provided a list of 200 intercepted codenames to Col. Clark. Interested in the exchange of intelligence, FBI Supervising Agent Robert Lamphere eventually made contact with Meredith Gardner, an NSA cryptologist and VENONA codebreaker (Fox 2005). Through Lamphere's liaison with Gardner, a great number of Soviet espionage cases opened and, from 1948-1951, VENONA uncovered major KGB espionage agents, including "Klaus Fuchs, Harry Gold, David Greenglass, Theodore Hall, William Perl, the Rosenbergs, Guy Burgess, Donald Maclean, Kim Philby, and Harry D. White" (Benson, 8).

Despite the inclusion of the FBI, VENONA remained a closed-system and was kept secret from both other government agencies and the public. The eventual inclusion of other intelligence agencies was limited and gradual. Even the CIA, a later participant in VENONA,

was not aware of the VENONA Project until 1952 and was not officially briefed until 1953 (Benson, 8). VENONA was additionally kept secret from the White House. In his 1949 memorandum, FBI Special Agent Howard Fletcher described how, upon learning of VENONA, Admiral Earl E. Stone, then director of the Armed Forces Security Agency (ASA), argued that “President Truman and Adm. Roscoe H. Hillenkoetter, the first director of the Central Intelligence Agency, should be advised as to the contents of all these messages.” The notion of including President Truman and/or the CIA was fought by Brigadier General--formerly colonel--Carter Clarke as well as Army General Omar Bradley, chairman of the Joint Chief of Staffs. Agent Fletcher’s memorandum describes General Bradley’s desire to ensure that “the FBI did not ‘handle the material in such a way that Adm. Hillenkoetter or anyone else outside the Army Security Agency, [name deleted] and the Bureau [FBI] are aware of the contents of these messages and the activity being conducted at Arlington Hall [ASA headquarters]” (Novak 2003). Ultimately, VENONA materials were not released to the public until July of 1995 (Benson, 3).

While this closed-system of intelligence was primarily motivated by fears of infiltration of government agencies by KGB agents and assets, the exclusivity of VENONA also kept the program from being impeded by the politics, conflicts, and red-tape inherent in bureaucratic politics. The key actors involved in the bargaining process of the early VENONA Project carefully maintained a three-actor membership--the U.S. Army, the NSA, and the FBI--all of whom had shared objectives and none of whom had conflicting agendas. Because of this, bureaucratic bargaining was uniquely collaborative and the operation was enormously successful. Furthermore, the exclusion of the president from this program was most likely opportune for FBI Director Hoover, who no longer wielded the confidant influence in the White

House. Going forward, J. Edgar Hoover would rely on other bargaining actors to maneuver his way through bureaucratic politics during the Second Red Scare.

The McCarthy Era and the Second Red Scare

Following the deterioration of U.S.-Soviet relations after 1945, many Americans believed that rising tensions between the United States and USSR could possibly intensify and culminate in warfare. Domestically, these fears manifested as paranoia of communists infiltrating the United States infrastructure. This era of anti-communist paranoia in the U.S. became known as the Second Red Scare, the analogous successor to the First Red Scare in the early 1900s. The Second Red Scare inspired revived support for domestic surveillance and proved to be a propitious backdrop in the continuity of FBI power, despite new challenges from the White House. After President Roosevelt's death in 1945, J. Edgar Hoover found his bargaining powers somewhat capped by the new presidential administration. Hoover failed to cultivate the same kind of alliance he had with President Franklin Roosevelt with President Harry Truman. Truman allegedly "wanted nothing to do directly with Hoover" and rejected direct contact with him, instead directing his military aide, Brigadier General Harry Vaughan, to liaise with the FBI director (*TIME* 1975). Furthermore, President Truman publicly criticized Director Hoover, challenging his national reputation and highlighting his abusive bureaucratic maneuvering. Of Hoover's FBI, President Truman once wrote "We want no Gestapo or secret police. FBI is tending in that direction. They are dabbling in sex-life scandals and plain blackmail... Edgar Hoover would give his right eye to take over, and all congressmen and senators are afraid of him" (Summers 2011). Though no record exists of FBI Director Hoover's position on notifying President Truman on the VENONA Project, it is reasonable to speculate that Hoover

reciprocated Truman's distrust and likely supported Brig. General Carter Clarke and General Omar Bradley in excluding Truman.

Despite falling out of favor with the Oval Office, Hoover still maintained sway over the rest of the executive branch. At the end of World War II, J. Edgar Hoover began pushing for a crackdown and registry on suspected communists in the U.S., mirroring his efforts in the pre-FBI General Intelligence Division under Attorney General A. Mitchell Palmer. Like his past relationship with Attorney General Palmer, J. Edgar Hoover had a very strong working relationship with U.S. Attorney General Tom Clark, who later served as a Supreme Court justice, and both abetted each other's administrative power. In March of 1946, Hoover submitted his recommendation to Attorney General Clark that he "determine what legislation is available or should be sought to institute a program to detain all listed members of the Communist Party and any others who might be dangerous." He particularly emphasized his suspicion of individuals holding "important positions in organized labor and civil rights movements, education, churches, and the media who have shown sympathy for Communist objectives and policies." Director Hoover stipulated that effective efforts to combat such infiltration by communists would require "statutory backing" (Theoharis 1999, 28). In August of 1948, Attorney General Clark gave the FBI the authority to compile a "master list" of people suspected of being communists, radicals, or generally disloyal to the United States. On July 7, 1950, Hoover submitted a plan to Sidney W. Souers, the first director of central intelligence and President Truman's special national security assistant, requesting a "master warrant" for the arrest and permanent detention of nearly 12,000 "individuals potentially dangerous to national security." The requested proclamation would effectively suspend the Writ of Habeas Corpus, which protects individuals against

unlawful detention by the state (Weiner 2007). Truman was strongly opposed to this proposition and did not permit the suspension of Habeas Corpus.

Despite President Truman's resistance to Hoover's anti-radical initiatives, the legislative and judicial branches of government were allied with the FBI director's interests. On September 12, 1950, Congress passed the McCarran Internal Security Act, which granted much of Hoover's proposition.

- The Internal Security Act of 1950, 64 Stat. 987, Public Law 81-831, (1950): This law “authorized the forced deportation of alien radicals; barred communists from employment in defense industries and from securing passports; required communist, communist-front, and communist-action organizations to register as foreign agents with a specially created Subversive Activities Control Board (SACB), to submit lists of their members to the SACB, and to label their publications as communist propaganda; and authorized the detention of dangerous radicals during presidentially declared national emergencies” (Theoharis 1999, 27).

President Truman vetoed the McCarran Act on September 22, 1950. Nevertheless, both the House of Representatives and the Senate overrode the president's veto and the McCarran Internal Security Act was officially enacted. The day after the legislative override, President Truman responded to the McCarran Act in his September 23, 1950 “Speech on the Veto of the Internal Security Act.” In his address, Truman stated “the application of the [act's] registration requirements to so-called communist-front organizations can be the greatest danger to freedom of speech, press and assembly, since the Alien and Sedition Laws of 1798” (Truman 1950). President Truman's warning fell on deaf ears and the national legislature became enveloped in an

anti-Communist craze that included very few qualms with the sidestepping of due process and civil rights in the quest to stomp out the perceived Communist threat

In 1953, Senator Joseph McCarthy was appointed chairman of the Senate Committee on Government Operations and dominated the American political landscape with his fiery anti-communist rhetoric and rabid purge of suspected communist-sympathizers. Though it would seem that their mutual interest in cleansing the United States of communist infiltrators would make J. Edgar Hoover obvious bargaining allies with Joseph McCarthy and Roy Cohn, the relationship between the three men has been disputed. J. Edgar Hoover supported Senator McCarthy early on in his political career and it is believed that J. Edgar Hoover, impressed by Roy Cohn's prosecution of Julius and Ethel Rosenberg as an assistant U.S. attorney for the Southern District of New York, recommended Cohn for the position of Senator McCarthy's chief counsel (Meroney 2006 and Logue). However, Hoover's support for McCarthy seems to have weakened as the senator for Wisconsin became more overzealous. Cartha DeLoach, associate director of the FBI and Hoover's third-in-command, has asserted that J. Edgar Hoover was actually dismissive and resentful toward McCarthy and Cohn. In a letter criticizing a portrayal of his former boss in the *X-Files*, DeLoach described Hoover's animosity toward McCarthy, writing, "Hoover chastised McCarthy for claiming there were two hundred and eighty three communists in the Department of State...Hoover made McCarthy back down and admit this was simply a 'laundry list' he had been reading from." DeLoach also described Roy Cohn as an ineffectual and insignificant member of the bargaining group, stating "Hoover would also have nothing to do with Roy Cohn. He never provided any information to either McCarthy or Cohn...Cohn tried to see Hoover several times, but was always shunted off to L.B. Nichols, an assistant, who got rid of him fast...Cohn never had any influence on the FBI" (DeLoach 1998).

It is likely that J. Edgar Hoover came to dislike Senator McCarthy for his detrimental effect on Communist Party investigations. Herbert Philbrick, an adman commissioned by the FBI to spy on the Communist Party of the United States, described how the Communist leaders he knew believed that “McCarthy has helped them a great deal...McCarthy's kind of attacks add greatly to the confusion, putting up a smokescreen for the party and making it more difficult than ever for people to discern who is a communist and who is not” (Meroney 2006). For whatever reason, there is no record to support that Director Hoover was a direct cohort of Senator McCarthy at the height of McCarthyism. The image of Hoover, McCarthy, and Cohn as a close-knit triumvirate of terror during the Second Red Scare is a misconception and J. Edgar Hoover and the McCarthyites should be considered as separate camps in the bureaucratic political process.

Despite McCarthy’s purportedly detrimental effective on FBI investigations, his impact and influence in Congress established a legislative culture of gung-ho and fervent anti-Communism that benefited J. Edgar Hoover’s policymaking agenda. On August 24, 1954, Congress passed the Communist Control Act, which criminalized affiliation with the Communist Party. The act was signed into law by President Dwight Eisenhower.

- The Communist Control Act, 68 Stat. 775, 50 U.S.C. 841-844 (1954): This law formally outlawed the membership and support for the Communist Party of the United States on the basis that such affiliation is a threat to national security. Furthermore, the act denied the Communist Party “or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence” the “rights, privileges, and

immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof” (GPO 1954, 776).

The Communist Control Act of 1954, combined with the McCarran Internal Security Act of 1950, effectively provided the statutory framework for the Second Red Scare. However, despite strong legislative support for Hoover’s plan as per the McCarran Act and Communist Control Act, the “laws did not, in fact, shift the FBI’s role from intelligence gathering to law enforcement” and Hoover’s plans never came to fruition. This is partly due to a change in legislative actors. Republicans, the primary supporters of McCarthyism, “lost control of the Senate in the midterm elections” in November 1954 and McCarthy was replaced as chairman of the Senate Committee on Government Operations before being censured by his fellow senators in December (Britannica 2000). With the loss of his Republican allies in the U.S. Senate, Hoover had lost the support of legislative actors in the bureaucratic bargaining process for his suspension of Habeas Corpus. However, the most primary explanation for the lack of enforcement of the McCarran and Communist Control acts was the judicial branch acting in the bargaining group against the interests of Hoover and the former legislature, as “the prosecutive option was foreclosed by a series of Supreme Court rulings-- in particular the Court’s 1965 ruling in *Albertson v. Subversive Activities Control Board*.” In *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), the Subversive Activities Control Board (SACB) sought to compel William Albertson and Roscoe Quincy Proctor, alleged members of the Communist Party of the USA, to register as members of a “communist action organization,” as defined by the McCarran Act. Albertson and Proctor refused to register, asserting their Fifth Amendment privilege against self-incrimination. The Court ruled in favor of Albertson and Proctor, holding that compulsory

registration, as stipulated by the McCarran Act, did in fact constitute self-incrimination and was therefore a violation of Fifth Amendment rights (Theoharis 1999, 27-28).

Furthermore, the Court addressed the detention clause in *Jencks v. U.S.*, again declining to rule in Hoover's favor. In *Jencks v. U.S.*, 353 U.S. 657 (1957), two undercover FBI agents charged union leader Clinton Jencks with falsely filing an Affidavit of Non-Communist Union Officer with the National Labor Relations Board (NLRB). Jencks' request to review the testimonial reports of the informants' evidence was denied and he was found guilty on two counts of communist activity, thus violating the Communist Control Act. After a series of appeals, Clinton Jencks' case was reviewed by the Supreme Court. The Court ruled that, because the documents could potentially contain information that discredited the testimony of the FBI informants, the defendant had the right to review them (Oyez, 2019). The court's ruling in Jencks further deterred prosecution and invalidated the bulk of the FBI's anti-communist undercover operations due to the admissibility of sealed testimonial evidence.

The combined effect of these rulings impeded the ability of executive agencies, like the FBI, to enforce anti-communist statutes and the Supreme Court emerged as the most definitive actor in Second Red Scare bargaining process. Unlike in the bargaining for wiretapping powers under FDR, J. Edgar Hoover was unable to subvert the Court's decisions and, therefore, was unable to garner the authority to apprehend the individuals of his security index program. The invalidation of the anti-communist legislation marked one of the first instances of Hoover being defeated in the arena of bureaucratic politics.

COINTELPRO

On March 8, 1971, the Citizens' Commission to Investigate the FBI, a radical activist group, broke into the FBI's resident office in Media, Pennsylvania and stole documents that "documented the FBI's widespread surveillance of domestic groups, including left-wing organizations and black militant groups" (Theoharis 1999, 188). The release of this information understandably led to a public outcry. Carl Stern, a reporter for NBC, followed up on the released documents by filing a FOIA lawsuit aimed at disclosing other documents associated with the domestic surveillance of political organizations. Stern's suit as well as various other FOIA requests led to the release of "tens of thousands of pages" of documents detailing the FBI's most controversial and notorious programs--COINTELPRO (Theoharis 1999, 188).

COINTELPRO, an abbreviated codename for "counterintelligence program," was originally authorized by Director Hoover on August 28, 1956 to undermine communist influence by disrupting and discrediting the activities of the Communist Party (Theoharis 1999, 29). The irony of COINTELPRO is that it began when the Communist Party was arguably at its weakest state. COINTELPRO was initiated shortly after Nikita Khrushchev gave his famous 1956 "On the Cult of Personality and Its Consequences" speech, the first acknowledgement by the Soviet government of Joseph Stalin's abuses of power. The exposure of communist atrocities hampered socialist idealism in the United States and the Communist Party's membership was reduced to only twenty-two thousand members--one-fifth of the membership's size during its peak years in the 1940s (Cunningham 2004, 28).

Despite the lessened impact of communists in the United States, the fears of communist infiltration of government continued to pervade the American mindset. However, also due to the diminished influence of the American communist party, the FBI's counterintelligence activities

were primarily political rather than criminal. Without the need for prosecutorial framework, Director Hoover's counterintelligence proposals for a centralized, closed system of counterintelligence were exempted from the need for legal justifications and received minimal political opposition (Cunningham 2004, 28). Hoover provided the following report to President Dwight Eisenhower and his cabinet, inexplicitly explaining COINTELPRO:

“[The] program [is] designed to intensify confusion and dissatisfaction among its members. . . . Selective informants were briefed and trained to raise controversial issues within the Party. In the process, they may be able to advance themselves to high positions. The Internal Revenue Service was furnished the names and addresses of Party functionaries. . . . Based on this information, investigations have been instituted in 262 possible income tax evasion cases. Anticomunist literature and simulated Party documents were mailed anonymously to carefully chosen members” (Cunningham 2004, 28).

For the period of COINTELPRO in which the Communist Party was the exclusive target, both the executive and legislative branches of government were in accordance in regard to the program's goal and scope. By the end of 1956, the Communist Party's membership was further reduced to just 4,000-6,000 members. The FBI attributed this extreme reduction to the success of COINTELPRO and, in 1961, Hoover sought to expand the scope of COINTELPRO operations to other factions. The second organization targeted was the Socialist Workers Party (SWP). However, this expansion of COINTELPRO involved significantly less consultation with government officials outside of the bureau. Notably, the FBI began surveilling and infiltrating the SWP without notifying Attorney General Robert Kennedy, who had formerly been informed

of COINTELPRO operations against the Communist Party and had approved of the program without objections (Cunningham 2004, 29).

Over time, Hoover began conflating a wider set of organizations with the communist threat and COINTELPRO began surveilling and infiltrating an expansive registry of organizations. The groups monitored included the American Nazi Party, the Black Panthers, the John Birch Society, Ku Klux Klan, the National Rifle Association, the Nation of Islam, and “every major organization associated with civil rights actions in the South, along with the New York-based National Association for the Advancement of Colored People (NAACP)” (Cunningham 2004, 273-276 and 30). As part of COINTELPRO, the FBI sought to silence prominent public influencers through blackmail and discreditation. In 1964, after COINTELPRO surveillance procured evidence of Martin Luther King Jr.’s infidelity, FBI Assistant Director William C. Sullivan wrote a letter to King informing the civil rights leader that he had “34 days” to commit suicide or else his extramarital sexual liaisons would be revealed to the public (Gage 2014). Fred Hampton, the Central Committee Chief of Staff of the Black Panther Party, was also targeted by the bureau. The FBI directed informant William O’Neal to infiltrate the Black Panthers and ingratiate himself with Hampton. Through O’Neal, the bureau undermined Hampton’s coalitions with other black activist groups and incited internal disputes. The FBI’s operation against Fred Hampton and the Black Panther became increasingly aggressive until, on December 3, 1963, William O’Neal drugged Fred Hampton in his apartment. Shortly after, officers associated with an FBI task force raided the apartment and executed Hampton by shooting him in the head while he was unconscious (National Archives).

Shortly after the exposure of the FBI’s COINTELPRO operations, Director J. Edgar Hoover found himself at war with the White House over deniability of President Nixon’s role in

the FBI's less-than-legal investigations. Previously, on June 5, 1970, President Nixon tasked J. Edgar Hoover, CIA Director Richard Helms, and military intelligence officials with "getting better information on domestic dissenters and directed them to determine whether they were subject to foreign influence." Later that month, in response to Nixon's request, the intelligence agencies compiled a special report to the White House detailing a list of options that "ranged from the innocuous to the extreme, from doing nothing to violating the civil liberties of American citizens." Tom Charles Huston, a Nixon aide, authored a memorandum, later known as the "Huston Plan," to President Nixon, which counseled Nixon to employ the most aggressive intelligence strategies from the special report. Nixon initially authorized the intelligence community to initiate the Huston Plan, though revoked this authorization five days later at the insistence of both the Attorney General John N. Mitchell and, notably, Director J. Edgar Hoover (U.S. Senate 1975a, 1). Hoover opposed the Huston Plan due to his belief that the coordination was "too risky" and "leaks to the press...would be damaging." President Nixon recalled the Huston Plan authorization on the basis that Hoover's opposition "subverted [Nixon's] strategy of deniability" and implicated his administration in illegal investigations that had been functioning long before his presidency (Theoharis 1999, 35).

In October of 1971, President Richard Nixon and officials in the White House, including Attorney General John N. Mitchell, strongly considered requesting Director Hoover's resignation on the basis of both scandals and Hoover's age (he was 76 years-old). However, when G. Gordon Liddy, a former FBI agent turned Nixon operative, provided President Nixon with a memorandum profiling Director Hoover's personality and leadership, Nixon saw the potential for blackmail and the retaliatory disclosure of Hoover's files on the Nixon Administration. In his reaction to Liddy's memorandum, President Nixon told his aides that it made "a stronger case for

not doing something on Hoover than doing something... We may have on our hands here a man who will pull down the temple with him, including me” (Wines 1991, 2). President Nixon decided to postpone his demand for Hoover’s resignation “until after the 1972 presidential election” to avoid any political repercussions that may arise as a result of the ouster (Theoharis 1999, 153). However, on May 2, 1972, Director J. Edgar Hoover died of a heart attack. When informed of Hoover’s death, President Nixon privately proclaimed “Jesus Christ! That old cocksucker!” (Summer 2011).

Part II - The Interim Period

Year of Intelligence: The Church Committee

Despite Director Hoover's death, the FBI's relationship with the White House continued to be a point of rising public controversy, culminating in multiple exposures as a result of congressional inquiries. During the 1973-1974 Watergate Hearings, the Select Committee on Presidential Campaign Activities procured documents from White House Counsel John Dean "that showed how earlier presidential administrations had misused the FBI, and also that FBI Director Hoover maintained in his office files containing derogatory information on public officials" (Theoharis 1999, 128). These documents included two memoranda authored by Assistant FBI Director William Sullivan, who had described how President Franklin Roosevelt and Lyndon Johnson had exploited the bureau for political purposes. Nixon and Dean's strategy was meant to demonstrate how previous presidential administrations had used the FBI in similar engagements, including FBI-coordinated burglaries, aka "black bag jobs," perpetrated under the Kennedy and Johnson presidencies that paralleled the Watergate break-in (Theoharis 1999, 128). The testimonies of Nixon officials and production of evidence during the Watergate Hearings brought numerous instances of FBI misconduct to light. This, in addition to the prior exposure of COINTELPRO, led to a legislative crackdown on the bureau. On January 27, 1975, the U.S. Senate established the Senate Committee to Study Government Operations with Respect to Intelligence Activities. Chaired by Senator Frank Church from Idaho, the committee's activities became known as the Church Committee Hearings. The House of Representatives also established an investigative committee, the House Select Committee on Intelligence--or the Pike Committee, to examine alleged malfeasance by intelligence agencies, though the Pike Committee's final report was sealed by a vote to suppress its contents due to a lack of executive

review. The Church Committee inquiry was more successful in the obtainment of information, presentation of findings, and subsequent impact of intelligence reforms in the United States (Theoharis 1999, 128).

The Church Committee investigated all prominent national intelligence agencies, including the Department of Defense, CIA, NSA, FBI, and the Bureau of Narcotics and Dangerous Drugs. The Church Committee focused its investigation of the FBI foremost on the COINTELPRO programs, but also uncovered various other controversial operations. The FBI had collaborated with other agencies of the American Intelligence Community, most primarily the National Security Agency and the Central Intelligence Agency, to procure sensitive information extracted from illegal intelligence operations. This included telegraphic communications that had been intercepted by the NSA as part of Project SHAMROCK. The messages intercepted by Project SHAMROCK were disseminated to “the DoD, the CIA, the [FBI], the Secret Service, and the Bureau of Narcotics and Dangerous Drugs (a precursor of the Drug Enforcement Administration).” Furthermore, the “inclusion of the FBI and the Bureau of Narcotics and Dangerous Drugs [was] especially noteworthy, as their mission included mostly domestic targets” (Owen 2012, 34).

In addition to collecting the telegraphic data of citizen communications provided by SHAMROCK, the FBI also collaborated with the CIA on Project HTLINGUAL; a mail opening program. According to a May 4, 1956 memorandum, authored by the Director of the CIA and later examined by the Church Committee, HTLINGUAL was a “sensitive project involving the analysis of mail entering New York City from the Soviet Union... While the project was originally designed to examine and record information from only the outside of the envelopes, for some time selected openings have been conducted and the contents examined... This is, of

course, without the knowledge of the postal authorities” (U.S. Senate 1975b, 18 and 19). Just as with SHAMROCK, the FBI was not a direct extractor of mail contents, but was provided intel based on the interceptions by the CIA. According to a separate memorandum detailing a May 19, 1971 meeting, CIA Director Richard Helms “asked, who outside of CIA knows about the HTLINGUAL operation or gets its material” and was told by a CIA officer associated with the project “only the FBI.” (Exhibit 9, U.S. Senate 1975b, 206). In all, the Church Committee conducted over 800 interviews and over 250 executive hearings, and procured over 110,000 documents. The final report of the Church Committee proposed a total of 183 recommendations to reform American intelligence agencies. The accounts of FBI misconduct are detailed in Book III of the Church Committee’s final report, describing COINTELPRO, the Huston Plan, HITLINGUAL, SHAMROCK, and the “use of informants, electronic surveillance, [and] surreptitious entries” (Theoharis 1999, 129).

Several intelligence reforms were initiated in the aftermath of the Church Committee. At the legislative level, the Senate passed Resolution 400 in 1976, permanently “establishing the Senate Select Committee on Intelligence,” a committee designed to maintain “vigilant legislative oversight over the intelligence activities of the United States to assure that such activities are in conformity with the Constitution and laws of the United States.” Two years later, Congress passed the Foreign Intelligence Surveillance Act (FISA) which required “the executive branch to request warrants for wiretapping and surveillance purposes from a newly formed FISA Court.” FISA was signed into law by President Jimmy Carter (U.S. Senate 2019). In addition to overarching changes to federal intelligence practices, the findings of the Church Committee resulted in various administrative and structural changes specific to the FBI. Investigations of domestic radical and terrorist organizations were transferred from the Intelligence Division to the

General Investigative Division, where the operations would be subject to the legal parameters of a criminal investigation complete with a prosecutorial framework. Domestic security investigations underwent a review and drastic overhaul, reducing the bureau's active domestic security investigations from 21,000 to "300 by the end of 1976" (Theoharis 1999, 129).

The Church Committee also proposed superior congressional oversight of the FBI as well as a legislative charter to codify legal boundaries for FBI operations and "delineate the FBI's powers, functions, and responsibilities, with the attorney general [and the president] having the discretion to issue specific rules governing how to carry out authorized investigations" (Theoharis 1999, 129). As per the recommendations, Congress established permanent intelligence committees with the authority to monitor the operations of U.S. intelligence agencies, including the FBI. The committee's proposition regarding specific rules issued by the attorney general to dictate the standards and limitations of domestic security investigations became a formal practice on April 5, 1976. These directives became known as the attorney general's guidelines or "Levi Guidelines...named after Attorney General Edward Levi" (Theoharis 1999, 129). The Levi Guidelines restricted the procedures the FBI could use and "distinguished three types of domestic security investigations: 1) preliminary investigations, 2) limited investigations, and 3) full investigations." Furthermore, the guidelines only permitted the bureau to initiate full domestic security investigations if there were "specific and articulable facts giving reason to believe that an individual or group is or may be engaged in activities which involve the use of force or violence" (OIG 2005). Interestingly, a legislative charter to formally define the FBI's structure and powers was never enacted. A formal charter would have unambiguously established an inflexible organizational structure to clearly demarcate the FBI's authority, as had traditionally been the practice in cases where the president or attorney general

authorized executive orders or guidelines. Because of this failure to codify the FBI's administration, the nature of the bureau remained relatively nebulous in spite of the reforms.

The FBI in the 1980s

Because Congress failed to enact a legislative charter clearly defining the FBI's jurisdiction and structure, the bureau continuously tested the boundaries of its amorphous investigative authority throughout the eighties and nineties. On February 3, 1980, the FBI operation ABSCAM was revealed to the public by a New York Times report. The article described how several public officials, including U.S. Senator Harrison A. Williams and seven members of the U.S. House of Representatives, were implicated in an undercover operation in which FBI agents "posed as businessmen and Arab sheiks willing to pay bribes" (Maitland 1980, 1). While much of the country lauded the bureau for its success in bringing down multiple corrupt politicians, ABSCAM became a subject of multiple controversies. ABSCAM raised numerous questions about "the uses, and potential abuses, of undercover tactics" by the FBI (Maitland 1982, 4). At the heart of the controversy over the bureau's undercover activities in ABSCAM was the issue of entrapment; the FBI had effectively enticed those indicted in ABSCAM to commit criminal offenses and, subsequently, there would be insufficient evidence of corruption if not for the agency's operation. Furthermore, there was concern that the FBI, in targeting politicians, may have been influenced by a "vendetta against Congress"--perhaps in response to the bureau's humiliation during the Church Committee Hearings (Theoharis 1999, 132).

In response to the renewed concerns about the FBI's use of informants in undercover operations, Attorney General Benjamin Civiletti issued revised attorney general guidelines. The Civiletti Guidelines formalized the procedures for the use of undercover informants and required that federal prosecutors coordinate informant activity, stating:

“In any matter presented to a United States Attorney or other federal prosecutor for legal action . . . where the matter has involved the use of an informant or a confidential source in any way or degree, the FBI shall take the initiative to provide full disclosure to the federal prosecutor concerning the nature and scope of the informant's or confidential source's participation in the matter” (U.S. Senate 1983, 539)

Due to various crimes committed by FBI informants under the pretense of immunity, the Civiletti Guidelines also mandated that FBI officials handling informants must “advise informants that their relationship with the FBI would not protect them from arrest or prosecution for any violation of federal, state, or local law, except insofar as a field supervisor or SAC determined pursuant to appropriate Attorney General Guidelines that the informant's criminal activity was justified” (OIG 2005).

Critics of the FBI during the ABSCAM controversy, such as the American Civil Liberties Union, suggested that legislation should be passed governing the use of undercover agents, similar to the laws that mandated warrants for wiretapping in criminal investigations. Several justice department officials, including FBI Director William Webster and Associate Attorney General Rudolph Giuliani, opposed such suggestions, arguing that the proposed legislation to restrict undercover operations would impede the investigations of white-collar crime and official corruption. Giuliani stated, “The question of how and when to investigate is a matter for the executive branch except when it collides with Fourth Amendment protections against search and

seizure...there is no constitutional right not to be investigated” (Maitland 1982, 4). In response to the ABSCAM controversy, two congressional committees, a Select Senate Committee to Study Undercover Activities and the House Subcommittee on Civil and Constitutional Rights within the Judiciary Committee, were mobilized to examine the limits of undercover operations by the FBI.

The Senate’s final report in 1983 was supportive of the FBI’s undercover activities, finding “that undercover operations of the United States Department of Justice have substantially contributed to the detection, investigation, and prosecution of criminal activity...some use of the undercover technique is indispensable to the achievement of effective law enforcement” (U.S. Senate 1983, 22). The House subcommittee was less supportive and questioned the value of the Civiletti Guidelines issued by the attorney general, finding “a pattern of widespread deviation from avowed standards, with substantial harm to individuals...and insensitivity regarding interference in the political and judicial processes” (U.S. House 1984, 14). The report recommended legislation requiring judicial authorization before an undercover operation could be initiated” (U.S. House 1984, 14 and Theoharis 1999, 132). No such legislation was enacted and undercover operations by the FBI remained reliant on the standards set by the attorney general’s guidelines.

Throughout the late seventies and early eighties, there was a rising concern of Islamic fundamentalism following the rise of Ayatollah Ruhollah Khomeini in the Iranian Revolution of 1978. In addition to--and often as a result of--the rise of anti-west theocracies, terrorism became a growing issue in the United States. By 1978, when William H. Webster was appointed director of the FBI, over “a hundred terrorist attacks a year were taking place in the United States” and, “by the mid-1970s, terrorist bombs were being set off in the country at an average rate of 50 to

60 a year” (Jenkins 2015). In stark contrast with congressional attitudes during the Church Committee Hearings, the national government in the 1980s was much more suggestible to re-empowering the investigative authority of the FBI. Republicans, who took control of the U.S. Senate following the 1980 senatorial elections, and President Ronald Reagan, who had formerly lambasted his predecessor’s failure to contain national security threats in his 1980 presidential campaign, strongly supported a deregulation of national intelligence agencies.

Following the congressional inquiries on ABSCAM and informant procedures, another senate inquiry was initiated on June 24, 1982 to examine the FBI’s domestic security powers. Whereas the previous inquiries were based on fear that the FBI had too much discretion in undercover informant operations, the 1982 and 1983 hearings of the Senate Subcommittee on Security and Terrorism were based on concerns that the Levi and Civiletti Guidelines "unduly restricted the FBI's authority to monitor and prevent potential terror or violence against persons and property in the United States," primarily due to the necessity of a “criminal predicate to initiate an investigation” (OIG 2005). In its final assessment of the attorney general’s guidelines, the Senate Subcommittee on Security and Terrorism found that, while the guidelines were "necessary and desirable," they should “be revised to delete the criminal standard for initiating domestic security investigations; extend time limits for investigations, particularly those for preliminary and limited investigations; lower the evidentiary threshold for initiating limited investigations; relax restrictions on the recruitment and use of new informants; and authorize investigations of systematic advocacy of violence, alleged anarchists, or other activities calculated to weaken or undermine federal or state governments” (U.S. Senate 1984, 34-35 and OIG 2005). In accordance with the Senate’s recommendations, the Civiletti Guidelines were formally revised by the Reagan Administration in March 1983. The attorney general’s

guidelines, now called the Smith Guidelines after Attorney General William French Smith, “granted the FBI greater latitude to initiate domestic security and terrorism investigations” (Theoharis 1999, 130).

In January 1988, the FBI disclosed to the Center for Constitutional Rights that the bureau had, in the early eighties, investigated the Committee in Solidarity with the People of El Salvador (CISPES), a U.S. activist organization that opposed the Reagan Administration’s foreign policy as it pertained to support for right-wing political movements in Central America. The pretense for the CISPES investigation was originally rooted in suspicions that the group had violated the Foreign Agents Registration Act of 1938, which mandates that “individuals doing political or advocacy work on behalf of foreign entities in the United States” must “register with the Department of Justice” and “disclose their relationship, activities, receipts, and disbursements in support of their activities” (Theoharis 1999, 134 and Straus 2019, 1). As the CISPES was surveilled, the FBI began to believe that the organization served as a front for a terrorist program devised to support the Farabundo Marti Front for National Liberation, El Salvador’s leftist political party, through international terrorism. The FBI zealously employed numerous investigative techniques, including the monitoring of individuals and infiltration of public activities, to gather intelligence on the CISPES under the security provisions of the Smith Guidelines. The bureau’s file on the CISPES investigation confirmed a “pattern of surveillance reminiscent of the Bureau during the Hoover era” (Theoharis 1999, 134).

The release of the CISPES files led to numerous re-evaluations of the FBI’s scope of authority in light of the multiple congressional hearings on FBI procedures, including an internal inquiry launched by the agency, a Senate inquiry by the Select Committee on Intelligence, and a House of Representatives inquiry by the Permanent Select Committee on Intelligence. In

September 1988, FBI Director William Sessions disclosed to the House Permanent Select Committee on Intelligence that the FBI's internal inquiry determined that the initial investigation was likely unwarranted because it was contingent on information provided by Frank Varelli, an improperly vetted FBI informant who was later found to be unreliable, and that the "scope of the investigation was unnecessarily broadened in October 1983," a misdirection that further mirrored the tendencies of the FBI's former COINTELPRO investigations (Theoharis 1999, 134). Both congressional committees found that the CISPES fiasco was a result of internal mismanagement and found a total of 31 violations of the attorney general's guidelines. The Senate Select Committee on Intelligence stressed the importance of the attorney general's guidelines in FBI functions, stating in their final report:

"Federal laws do not regulate most of the FBI's standard investigative methods, including photographic and visual surveillance, trash checks, the use of informants and undercover agents, attendance at meetings and infiltration of groups, interviews of individuals and their employers and associates, and checks of various law enforcement, license, utility, and credit records. Investigations such as the CISPES case using these methods are governed by internal FBI policies and by guidelines issued by the Attorney General. Violations are normally punishable only by internal disciplinary action. The CISPES investigation demonstrated the vital importance of adherence to policies and guidelines that keep the FBI from making unjustified inquiries into political activities and associations" (U.S. Senate 1989, 12).

Following the controversy of the CISPES investigation, the Attorney General Dick Thornburgh and Department of Justice established yet another revised set of attorney general's guidelines, the Thornburgh Guidelines, which provided guidance on the conditions to initiate a terrorism

investigation, the information that may be collected, and the reporting standards of domestic security operations. Furthermore, to counter the internal mismanagement that had misguided the CISPES investigation, the Thornburgh guidelines required authorizations by either the FBI director or assistant director to initiate and renew terrorism investigations (Thornburgh 1989). The Thornburgh Guidelines went into effect on March 21, 1989.

The FBI in the 1990s

With the dissolution of the Soviet Union in 1991, the FBI domesticized its focuses and reassigned 300 agents “from foreign counterintelligence duties to [national] violent crime investigations” (FBI 2015). Over the past decade, the United States had experienced a 40% increase in violent crime. This violent crime wave peaked in 1991 “at 716 violent crimes per 100,000” (Friedman 2017, 1). To combat the epidemic of violence, federal law enforcement sought to combine its crimefighting efforts with local and state law enforcement agencies. In January of 1992, the FBI launched the Safe Streets Violent Crimes Initiative, a program that enabled the Special Agents in Charge of each FBI field office to sponsor long-term joint-task forces comprised of law enforcement officials from agencies at all levels of government that would investigate “violent gangs, crimes of violence, and the apprehension of violent fugitives” (Ashley 2003).

In the next two years, the FBI would once again find itself in the center of national controversy in two infamous cases of lethal force by the bureau. On August 21, 1992, a firefight broke out in the mountains of Northern Idaho between federal law enforcement and the family of Randy Weaver, an anti-government militiaman who was being investigated for failure to appear

in court. Weaver had previously been arrested in 1989 for illegally selling weapons to an informant of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). When he refused to cooperate with the ATF as an informant in their investigation of the Aryan Nations, Weaver was indicted. When he declined to appear for his trial on February 20, 1991, Weaver became a fugitive of the United States Marshals Service (USMS). On August 21, 1992, when the U.S. Marshals attempted to apprehend Randy Weaver at his cabin in Ruby Ridge, Idaho, the Weaver Family and the USMS agents opened fire on each other. On the first day of the eleven-day siege, Randy Weaver's fourteen year-old son Sammy Weaver and Deputy U.S. Marshal Bill Degan were both killed (DOJ 1994, 3). The killing of DUSM Bill Degan led to the FBI's involvement in Ruby Ridge. On August 22, 1992, the day after the FBI became involved, FBI Hostage Response Team (HRT) Agent Lon Horiuchi fatally sniped Randy Weaver's wife, Vick Weaver, while she held her ten month-old infant daughter (Freeh 1995, 4-5). The siege finally ended on August 31, 1997 with the surrender of the Weaver Family (DOJ 1994, 4).

Less than one year after the Ruby Ridge disaster, on February 28, 1993, federal law enforcement agents became involved in yet another violent siege, this time with the Branch Davidians, a cult of religious fanatics led by David Koresh. On February 28, 1993, the ATF attempted to execute an arrest warrant for Koresh for the "unlawful possession of a destructive device, in violation of 26 United States Code, section 5845(f)" (Scruggs 1993). The Branch Davidians of the Mount Carmel compound opened fire on the ATF, killing four agents and initiating a violent siege that lasted fifty-one days. The FBI Crisis Management Team (CMT) arrived at the scene in the evening of February 28 and assumed management of the standoff. Initially, the FBI's HRT personnel sought to establish a dialogue with David Koresh to resolve the matter peacefully. However, the attempts to diffuse the situation diplomatically failed and, on

April 19, 1993, the FBI HRT launched the final assault on Mount Carmel. The HRT agents attempted to break down the walls of the compound with grenade launchers and use CS gas to flush out the Branch Davidians. Amid the assault, fire broke out inside the compound. From both fire, smoke inhalation, and shooting, seventy-six members of the Branch Davidian sect were killed, including David Koresh (Scruggs 1993).

Following both accounts of lethal force by the FBI, numerous questions and controversies were raised. In 1995, the U.S. Department of Justice and the surviving members of the Weaver Family reached an “out-of-court settlement of \$3.1 million,” though continued to deny any wrongdoing in the Ruby Ridge standoff (Theoharis 1999, 139). The bureau’s position was reversed following the change in directorship from William Sessions to Louis Freeh. In January of 1995, Director Freeh announced that twelve employees of the FBI would face disciplinary actions. However, in his testimony before the U.S. Senate Subcommittee on Terrorism, Technology, and Government Information, Freeh denied allegations of criminal misconduct, citing “inadequate performance, improper judgment, neglect of duty, and failure to exert proper managerial oversight” as the key reasons for the mishandling of Ruby Ridge (Freeh 1995, 7-8). The federal government’s conclusion was not unanimously shared with other levels of government and, when the U.S. Department of Justice declined to charge him for killing of Vicki Weaver, FBI HRT Special Agent Lon Horiuchi was indicted for manslaughter by the Boundary County District Attorney’s Office in 1997. This led to questions regarding criminal immunity and federal supremacy in prosecution. Ultimately, the U.S. 9th Circuit Court of Appeals found that Horiuchi was “entitled to immunity from criminal prosecution” (Weinstein 2000). The court held that Horiuchi was acting “within the scope of his duties” and that the killing of Vicki Weaver was deemed “necessary and proper under the circumstances” (*Idaho v.*

Horiuchi 2000). Simultaneously with the Ruby Ridge inquiries, Congress and the Department of Justice also evaluated the Waco Siege in 1995. In addition to internal departmental reviews, the House of Representatives Judiciary Committee's Subcommittee on Crime and the Committee on Government Reform and Oversight's Subcommittee on National Security, International Affairs, and Criminal Justice jointly held hearings on the Waco incident to assess the Department of Justice's handling of the siege and the committees' final report found that, while David Koresh and the Branch Davidians were ultimately responsible for the deaths at Mount Carmel, the "FBI's strategy decisions during the 51-day standoff were flawed and highly irresponsible" and the "Attorney General's decision to assault the complex on April 19, 1993, was premature, wrong, and highly irresponsible" (Danforth 2000, 189).

The findings that the FBI had been legally justified on all accounts of lethal force led to concern that the FBI had validity as a paramilitary force. Despite the judicial support for the FBI, the American public was highly skeptical of federal law enforcement and the scandals fueled the rise of anti-government militias and terrorism. On April 19, 1995, the second anniversary of the Waco fire, Timothy McVeigh and Terry Nichols bombed the Alfred P. Murrah Federal Building in Oklahoma City. The explosion killed 168 people, including eight federal law enforcement agents--none of whom were FBI agents (Romano 1997). The attack was viewed by the perpetrators as retribution against the federal government for both Ruby Ridge and Waco and this connection brought the cases back into media focus. Moreover, distrust of federal law enforcement was not limited to fringe militiamen. In an August 1999 survey, *TIMES* magazine found that "61% of respondents believed that federal law enforcement had started the fire" that killed the Branch Davidians (Benson 2018). In light of rising public distrust and increasing assertions of coverup, Attorney General Janet Reno appointed John Danforth, the former U.S.

senator for Missouri, to serve as Special Counsel and investigate both allegations of fire-starting and coverup by the Department of Justice and its component agencies. John Danforth and the Office of Special Counsel conducted a comprehensive review and issued the “Final report to the Deputy Attorney General concerning the 1993 confrontation at the Mt. Carmel Complex, Waco Texas,” also known as the “Danforth Report,” which “found [the] allegations totally meritless” (Danforth 2000, 41). The conclusiveness of the Danforth Report as well as the FBI’s “peaceful settlement of another confrontation” with an “armed citizens’ group” during the Montana Freemen standoff in June 1996, “partially restored the [FBI’s] reputation in its handling of crisis situations and helped amend the damaged relationship between federal law enforcement and the American public (Theoharis 1999, 141).

Part III - The War on Terror and the FBI Today

PENTTBOM and Detainees

One week after Robert Mueller was sworn in as the sixth director of the FBI, almost three thousand people were killed in the September 11 attacks. 9/11 demarcated a new era of American national security that would have major impacts on the FBI's administration. Following 9/11, the FBI launched its Pentagon/Twin Towers Bombing Investigation, or PENTTBOM. At the height of the investigation, PENTTBOM involved 7,000 agents--over half of the FBI's total agents-- as well as "half a million leads," making PENTTBOM the bureau's largest investigation to date (Goldberg 2007, 161).

PENTTBOM involved the pre-convictional detainment of hundreds of suspects. The FBI jointly operated with the Immigration and Naturalization Service (INS) to forestall the mobilization of immigrant suspects through administrative detention. According to the 2005 Senate hearing on terrorism detainees:

"If the FBI encountered an alien in connection with pursuing any [PENTTBOM] leads, whether or not the alien was the subject of the lead, the FBI asked the INS to determine the alien's immigration status. If the alien was found to be in the country illegally--either by overstaying his visa or entering the country illegally--the alien was detained by the INS. The FBI then was asked to make an assessment of whether the arrested alien was 'of interest' to its terrorism investigation. If the FBI indicated that the alien was 'of interest,' 'of high interest,' or 'of undetermined interest,' the alien was placed on the INS Custody List and treated as a September 11 detainee" (U.S. Senate 2006, 209).

In the first eleven months after the 9/11 attacks, “762 aliens were detained on immigration charges in connection with the PENTTBOM investigation” and all detainees were included on the INS Custody List. The detainees were held until the FBI was able to clear them of connections to “September 11 or terrorism in general” (208). The average time that an uncharged detainee was kept in custody over the course of PENTTCOM was 80 days (U.S. Senate 2006, 211).

The detentions of PENTTCOM inspired legal questions and challenges that were similar to those regarding military detainment at Guantanamo Bay. Furthermore, the FBI played a prominent role in both stateside INS confinements as well as Gitmo military detentions--FBI agents were frequently assigned to Guantanamo Bay to oversee interrogations and, later on, the voluntary testimony of these agents would prove instrumental in uncovering the questionable practices at the facility (OIG 2008). Extended detainment and classified registries of suspects echoed past intelligence controversies and the dubious interpretation of habeas corpus seemed reminiscent of past intelligence abuses, such as J. Edgar Hoover’s memorandum to President Truman requesting the suspension of habeas corpus so that the bureau could apprehend, detain, and register anti-American suspects post-WWII. In *Rasul v. Bush* (2004), the U.S. Supreme Court ruled that habeas corpus applied “extraterritorially” to Guantanamo Bay and that detainees were permitted to file habeas petitions; however, it did not determine if “enemy alien detainees” were entitled to constitutional rights (U.S. Senate 2005, 329). The treatment of detained terrorist suspects was considered by Congress in 2005 during the U.S. Senate Judiciary Committee’s Hearing on Detainees, which affirmed that the Al Qaeda was “not a party to the Geneva Convention” and therefore “individuals detained as members of Al Qaeda are not entitled to the protection of the treaties” (U.S. Senate 2005, 334).

The PATRIOT Act

Following the 9/11 attacks, on October 26, 2001, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, or USA PATRIOT, Act of 2001 was signed into law by President George W. Bush. The law received overwhelming legislative support and was passed with a vote of 357-66 in the House of Representatives and with near unanimity in the Senate with a final vote of 98-1 (DOJ 2001).

Among the most controversial provisions of the PATRIOT Act were those related to national security letters. National security letters are administrative subpoenas that mandate their recipients to produce private information to federal investigators. The national security letter stipulations of the PATRIOT Act “included gag orders that forbade recipients from discussing the letter's contents and instructions and “the letters did not require a judge's authorization, and were subject to only limited judicial review” (LII, 2019). Section 501 of the PATRIOT Act permitted the FBI Director or designee of the director the authority to apply for “an order requiring the production of any tangible things [including books, records, papers, documents, and other items] for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution” (U.S. Congress 2001, 17). Furthermore, Sec. 505 of the PATRIOT Act allowed any FBI personnel “not lower than Deputy Assistant Director” to access telephone, toll, and transactional records; financial records; and consumer reports when “the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities” (U.S. Congress 2001, 95).

Due to the intrusiveness and questionable constitutionality of the PATRIOT Act, the law was subject to statutory deadlines, or sunset clauses, in which many of the powers afforded by the law would expire without congressional reauthorization. In 2005, during the first sunset-clause expiration, Congress passed the USA PATRIOT Improvement and Reauthorization Act. The reauthorization repealed the sunset deadlines for much of the PATRIOT Act, making most of the surveillance provisions permanent with the exception of mandatory reauthorizations every four years for the roving surveillance authority and national security letters provisions (U.S. Congress 2005).

The sunset deadline was delayed by two years via two short-term extensions: the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006--which amended the nondisclosure orders attached to national security letters--and a one year extension signed by President Barack Obama in 2010 (U.S. Congress 2006; Farrell 2010). President Obama signed the PATRIOT Sunset Extensions Act of 2011, granting a four-year extension to three parts of the PATRIOT Act, including: the “roving wiretap” provision that enables “federal authorities to listen in on conversations of foreign suspects even when they change phones or locations”; the “library provision” which allows the “government access to the personal records of terrorism suspects”; and the “lone wolf” provision that permits the investigation of “foreigners who have no known affiliation with terrorist groups” (Mascaro 2011).

PATRIOT Act provisions were renewed upon their expiration in June of 2015 by the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015, also known as the USA Freedom Act. However, in addition to reauthorizing the aforementioned provisions, the USA Freedom Act did enact limits on PATRIOT Act intelligence authorities. This was largely in response to the NSA surveillance

practices exposed by Edward Snowden. The bill was introduced “to rein in the dragnet collection of data by the National Security Agency and other government agencies, increase transparency of the Foreign Intelligence Surveillance Court, provide businesses the ability to release information regarding FISA requests and create an independent constitutional advocate to argue cases before the FISC” (Byers 2013). The USA Freedom Act imposed restrictions on the use of national security letters by the FBI, namely the “bulk collection” of data via administrative subpoenas, by requiring the FBI to identify a “person, entity, telephone number, or account as the basis for a [national security letter] request” and permitted the “judicial review” of national security letter nondisclosure orders by district courts (U.S. Congress 2015, 16 and 22). The reauthorizations of the PATRIOT Act by the USA Freedom Act are currently set to expire by December 15, 2019 (U.S. Congress 2015, 34).

The 9/11 Commission and the Intelligence Community

Naturally, the possible prevention of the 9/11 attacks was contemplated by most Americans. The National Commission on Terrorist Attacks Upon the United States--more commonly known as the 9/11 Commission--was created by congressional legislation and the signature of President George W. Bush in late 2002 with the purpose of evaluating the events preceding 9/11 and issuing recommendations for superior counterterrorism policy.

The final report of the 9/11 Commission was critical of the management and intelligence sharing of the FBI and CIA leading up to the events of September 11, 2001. The report reprimanded the component agencies of the U.S. Intelligence Community for operating as closed-systems of intelligence and included a list of ten “operational opportunities” the FBI and

CIA had to act on intelligence that may have averted the 9/11 terror attacks. Four of these ten opportunities involved the failure of the CIA to notify the FBI of counterterrorism leads associated with Al Qaeda membership (9/11 Commission 2004, 355-356). Based on its findings, the 9/11 Commission recommended that the “government must find a way of pooling intelligence and using it to guide the planning of and assignment of responsibilities for joint operations involving organizations as disparate as the CIA [and] FBI” (9/11 Commission 2004, 357).

The 9/11 Commission recommended the formation of a “National Intelligence Director” to “oversee counterterrorism intelligence work” and who could “set and enforce standards for the collection, processing, and reporting of information” (9/11 Commission 2004, 423). In accordance with this recommendation, the U.S. Congress established the Office of the Director of National Intelligence (ODNI) to manage all components of the U.S. Intelligence Community and facilitate information sharing between the agencies (U.S. Senate 2002). Additionally, on December 17, 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act. Title VII of this law, the “Implementation of 9/11 Recommendations,” which, in addition to enacting the commission’s suggested changes to broader foreign policy, mandated that the FBI director submit an annual report on “whether the major information technology investments of the Federal Bureau of Investigation are incompliant with the enterprise architecture of the Federal Bureau of Investigation and identify any inability or expectation of inability to meet the terms set forth in the enterprise architecture” (U.S. Congress 2004, 232). This was in response to the 9/11 Commission’s conclusion that the FBI was hindered by inadequate information technology as well as “tightly restricted appropriations for improvements in information technology” (9/11 Commission 2004, 106).

Discussion: Hypothesis and Theory

It is indisputable that the War on Terror has unified the American intelligence community, even beyond simply the codification of the ODNI. By examining the history of the FBI, we can see that this cooperation has both benefits, such as the success of joint-terrorism task forces, and consequences, such as the abuses of COINTELPRO, HTLINGUAL, Project Shamrock, etc. Counterterrorism efforts by the FBI and other intelligence agencies have been widely successful since the September 11, 2001 terror attacks. PENTTBOM, despite being the largest global investigation in FBI, successfully identified all nineteen 9/11 hijackers in “a matter of days” (FBI 2003). When President Obama signed a one-year extension to the PATRIOT Act provisions in 2010, “28 terrorist attacks” had been foiled by U.S. intelligence agencies using powers vested by the PATRIOT Act (Farrell 2010). By 2013, during the hearings on NSA surveillance powers, senior government officials testified that over fifty terrorist plots had been disrupted by the “U.S. government’s sweeping surveillance programs” (Nakashima 2013).

Consideration of external forces is imperative to understanding support for the FBI’s intelligence policy. In 2003, just two years after 9/11 and the passage of the PATRIOT Act, a Gallup poll found that only 21% of Americans believed that the Bush Administration had gone too far “in restricting people's civil liberties in order to fight terrorism” (Moore 2003). It has since become evident that public attitudes toward counterterrorism policy are changing. In 2015, twelve years after the Gallup poll, bipartisan polling commissioned by the American Civil Liberties Union found that 60% of Americans believed that the Patriot Act should be reformed “to limit government surveillance and protect Americans' privacy” (Walker 2015). The FBI’s history supports the hypothesis that the bureau is entrusted with greater administrative discretion when the United States’ external environment becomes more uncertain. External uncertainty is

positively correlated with expansions to FBI power, specifically administrative authority independent of legislative or judicial checks and balances. The First Red Scare led to the creation of the Bureau of Investigation. World War II led to the expansion of the FBI's foreign and domestic surveillance, particularly via wiretapping. The Second Red Scare and the Cold War led to the temporary registry of suspected radicals and COINTELPRO. The War on Terror led to centralized intelligence and the PATRIOT Act. With crisis, whether it be anarchist bombing campaigns, the rise of fascist regimes, communist infiltration of government, or Islamic terrorism, the public and the government are significantly united in support for hardline national security policy.

However, in periods of stability in national security, there is less support for drastic intelligence measures. Peacetime, whether it be the early 1970s or today, privileges civilians to more critically assess security policies that infringe on civil rights. One reason that the backlash against COINTELPRO was so severe was the lack of urgency in the national context. The most pressing issues facing the government at the time of the exposure of COINTELPRO were primarily internal governmental conflicts. The communist threat had subsided and the nation was at a state of relative ease. This context made the Church Committee findings all the more offensive to the public. It is predictable that the electorate and, accordingly, the legislature would be more receptive to hardcore national security measures during times of distress and less receptive during peacetime. But to what extent does context affect the value debate over security and freedom? Would the Church Committee Hearings have proceeded as smoothly if they had occurred during the backdrop of 9/11?

Following the September 11 attacks, some officials blamed the Church Committee for disempowering American intelligence and making the country dangerously susceptible to

terrorism. John Sununu, President George H.W. Bush's chief of staff, asserted that the Church Committee "gutted our intelligence structure" by mandating the exposure of intelligence assets and thus preventing the "on-the-ground support that would corroborate and give the details to fill in the kind of abstract information that was available before September 11" (CNN 2002).

Certainly joint-agency cooperation and intelligence sharing was more prevalent and effective during the time of operations like COINTELPRO, HTLINGUAL, and Project SHAMROCK. It could be potentially be argued that the effects of the Church Hearings sowed inter-agency distrust and dissuaded the intelligence sharing between the CIA and FBI that the 9/11 Commission found may have thwarted the September 11 attacks. However, one would be hard-pressed to reread the FBI's blackmail letter to Martin Luther King Jr., urging him to commit suicide, and still challenge the absolute necessity of the Church Hearings.

Despite certain consequences of ambiguous doctrines and amorphous administration, the flexible nature of the FBI's administrative law is an asset to its operations. When considering the FBI's most significant and controversial operations, it is apparent that most of the operations were enormously effective in their initial stages. COINTELPRO effectively dismantled the Communist Party of the USA while PENTTBOM led to the unprecedentedly fast identification of the perpetrators of 9/11. While libertarian-minded critics may challenge the constitutionality of drastic actions taken by intelligence agencies, it would be fallacious to deny that these actions often net results that potentially save lives. When national security is a variable, extreme measures are not undertaken by intelligence agencies out of convenience but rather perceived urgency.

It is advisable that the authorizations of national security measures that have ambiguous constitutionality should be subject to sunset provisions. Mandatory deadlines for reauthorizations

during a reasonable span of time provide better direction to the mission of the FBI and similar agencies, preventing investigations from becoming too broad and all-encompassing like COINTELPRO. Having scheduled deadlines for the rereview of bureaucratic powers also promotes farsightedness in intelligence operations, compelling agency managers to foresee endgames in operations rather than relying on the indefiniteness of unchecked practices. Most importantly, these periodic evaluations allow for the review and possible suspension of extreme programs once such programs have run their course and netted all actionable intelligence necessary to protect and prosecute.

It is also important to highlight the importance of intergovernmental oversight in intelligence operations. Interestingly, when reviewing the FBI's administrative history, it seems that Congress is a more effective watchdog than the judiciary in regard to big-picture operational practices. While certain legislative conclusions, like the PATRIOT Act, remain highly controversial, it is apparent that the most egregious violations of civil rights and constitutional law were effectively curbed by House and Senate hearings and regulation. Of course, given the sealed and classified nature of administrative proceedings like those in the FISA court, it would be inaccurate to overlook the importance of judicial oversight over smaller-scale bureau affairs. Furthermore, it must be noted that legislative oversight is limited by the sensitivity of the information retrieved by the FBI. It is unrealistic and dangerous to expect total sharing of intelligence between executive agencies and Congress. The public disclosure of sensitive information by just one rogue legislator could potentially compromise ongoing investigations and, consequentially, national security.

Bureaucratic politics, while often an inconvenience and obstacle to intelligence gathering, is both an inexorable reality of and vital necessity to FBI operations. The conflict and bargaining

process that determines the bureau's authority is a chess game of checks and balances. This chess game becomes easier in the midst of national insecurity. Therefore, when considering the supported hypothesis and the bureaucratic politics model, we can theorize that, when faced with heightened external tensions, the FBI is less expected to participate in the bargaining process of bureaucratic politics in its role as an intelligence agency and acts more independently, powerfully, and expansively.

Further research on the effect of external forces on bureaucratic politics should be considered to determine whether or not the FBI is unique in this theoretical operation when compared with other agencies. It seems probable that the theory applies to all agencies and departments associated with broader national security. If the theory proves applicable to other government agencies, we may see the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) expand similarly in response to the mass shooting epidemic, or the powers of the Environmental Protection Agency (EPA) grow as the climate crisis worsens.

Conclusion: The Privilege of Peace

The conclusion of this thesis--that the direction and independence of the FBI has largely been contingent on public fear--should not prove surprising to most readers. It is likely that most Americans, with or without research, understand that public and legislative support for intelligence powers rise during periods of instability. It hardly seems far-fetched that most people would easily forsake their utopic democratic values in the face of Armageddon. H.L. Mencken lamented this quality in his book *Notes on Democracy*, writing,

“I have spoken hitherto of the possibility that democracy may be a self-limiting disease, like measles. It is, perhaps, something more: it is self-devouring. One cannot observe it objectively without being impressed by its curious distrust of itself—its apparently ineradicable tendency to abandon its whole philosophy at the first sign of strain. I need not point to what happens invariably in democratic states when the national safety is menaced. All the great tribunes of democracy, on such occasions, convert themselves, by a process as simple as taking a deep breath, into despots of an almost fabulous ferocity” (Mencken 1926, 221-222).

It is perfectly reasonable that, when an atrocity occurs, people become united to enact whatever available measures better ensure that such violence never happens again. It is easy for people to decry drastic reactions to events when they themselves are not victimized by such events. It is just as uncomplicated for an individual who has not been directly impacted by foreign terrorism to denounce policies like the PATRIOT Act as it is for an individual who has not been directly impacted by mass shooting to denounce gun control laws. The privilege of peace empowers the average American to cast judgment. This form of shallow virtue-signaling does not meaningfully contribute to national security discourse. The destruction wrought by national security threats rightfully changes perspectives on policy. It sheds moral indignation and fixations on virtuous appearances in favor of a pragmatic, complicated assessment of harsh reality.

With other theoretical models of public administration, these assessments would be straightforward. The rational policy model assumes that the state operates unitarily and, therefore, will produce the most relatively unanimous and rational approaches to conflict. The organizational process model assumes that the laws, policies, and procedures of the state preaddress most conflicts and, therefore, policy may derive directly from preexisting rules.

Unfortunately, these models do not account for the reality of government administration. Bureaucratic politics theory understands the plurality of agendas within the state and correctly assesses policymaking as a process of conflict and bargaining by diverse actors. The existence and supremacy of bureaucratic politics is vital because, if the competing apparatuses of government are well-counterbalanced, the results of such bargaining are formed by compromise. The assessment of national security policy, including the administrative powers of the FBI, cannot be exclusionary and must involve the influence of all components of government. Bureaucratic politics protects against despotism because the compromises required by interconnected and conflictual policymaking between all branches of government moderates outcomes. Therefore, given the historical tendency of the FBI to participate less in bureaucratic politics bargaining during national insecurity, it is incredibly important to reinforce intergovernmental oversight and counterbalance during times of crisis. A perfect government is impossible. However, much of the infighting, red-tape, and iron triangles that people associate with governmental ineffectiveness are actually key bastions that defend and reconcile American freedom with security.

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