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Providing for the common defense: internal security and the Cold War, 1945-1975

Marc A. Patenaude

Louisiana State University and Agricultural and Mechanical College, mpaten1@tigers.lsu.edu

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PROVIDING FOR THE COMMON DEFENSE:
INTERNAL SECURITY AND THE COLD WAR, 1945-1975

A Dissertation
Submitted to the Graduate Faculty of the
Louisiana State University and
Agricultural and Mechanical College
in partial fulfillment of the
requirements for the degree of
Doctor of Philosophy

in

The Department of History

by
Marc Patenaude
B.A., University of Arkansas at Little Rock, 2003
M.A., Louisiana State University, 2006
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Abstract

While the historiography of the Red Scare has often discussed the major internal security legislation passed during the period, the legislation in question is often given short shrift and characterized as a misguided response by Congress. It is important to examine this legislation not only for what it did for the internal security of the nation, but also for what it meant symbolically. Implementation of governmental policy, including internal security policy, through legislation often also serves as a window to the beliefs and values of those crafting the legislation. By examining the internal security legislation passed during the Red Scare, we can determine some of the beliefs and values that underlay the legislation. This dissertation argues three points. First, Congressional politics and legislation during the Second Red Scare created a pattern for dealing with internal security crises both during and after the Cold War. As part of this pattern, the values and beliefs that underlay the initial internal security legislation are present in internal security legislation of the 1960s and the early 2000s. The judicial response to this legislation created necessary limits to Congressional action. Second, while the race riots of many major urban centers in the 1960s have been explained as social crises, it's important that they be studied as internal security crises as well. Particularly within Congress, some viewed these riots as an insurgency and an insurrection and framed their responses and legislation towards combating them. Finally, while attempts have been made to create a post-Cold War policy towards combating terrorism, the initial post-September 11, 2001, attempts at anti-terror legislation (such as the USA PATRIOT Act) continued to follow much of the same pattern established for internal security crises during the Cold War.

Introduction

During the Cold War, the United States experienced two major internal security crises: the second Red Scare, the anticommunist crusade that occurred from 1947 to 1954; and the period of racial unrest and violence in America's urban centers that occurred from 1964 to 1968.¹ In each of these internal security crises, Congress passed legislation that abridged the civil rights of citizens in the name of protecting national security. During the period of the second Red Scare, Congress, believing that exposing the threat of Communists to the nation as a whole would diffuse the threat, passed the Internal Security Act of 1950 and the Communist Control Act of 1954 that required perceived potential threats to register with the government. This registration requirement was later found by the Supreme Court to violate First Amendment protections of freedom of association and Fifth Amendment protections against self-incrimination. The legislation inspired by the racial violence and unrest in American cities during the mid-to-late 1960s required stronger, more direct government involvement to address the perceived root cause: incitement to violence from alleged Communists and radical sources. To this end, Congress passed the Omnibus Safe Streets and Crime Control Act of 1968, part of which authorized legal wiretapping and electronic surveillance of citizens. However, concerns over issues of privacy and government overuse and abuse of surveillance legislation led to Congress placing limitations on government surveillance of citizens, in particular the passage of the Foreign Intelligence Surveillance Act (FISA) in 1978.

Since 1995, historians studying the second Red Scare have been aided by the revelations of the Venona intercepts. The intercepts, providing evidence that concerns over Communist espionage within the government itself were not without merit, have led to a re-examination of

¹ I have chosen to use the term "anticommunist crusade" rather than "McCarthyism" as I believe "anticommunist crusade" allows for a broader scope of inquiry, allowing for an examination of both conservative and liberal forms of anticommunism and the anticommunist consensus that occurred during this period.

the second Red Scare. Some historians, such as Ellen Schrecker and Maurice Isserman have acknowledged the Venona intercepts but minimized their impact, arguing that because Soviet agents mentioned within the intercepts were referred to by code names, and the limited time period in which the government could read the codes, the intercepts required interpretation that could not be independently verified. According to this interpretation, the Red Scare was a time in which the government used the issue of communists in government to remove unwanted elements, while some politicians in Congress used the same issue to attack the administrations of Franklin Roosevelt and Harry Truman, a conservative backlash against two decades of the New Deal, Fair Deal, and liberal expansion of government.² Other historians have used the revelations of the Venona intercepts to try and reclaim the image of Senator Joe McCarthy, arguing that the intercepts show that McCarthy's charges were not wrong and, based on the Venona intercepts, Communists indeed infiltrated the government and spied for the Soviet Union.³

Between the two extremes of minimizing the Venona intercepts and using them as proof that McCarthy and his supporters were correct lies the argument that Communists did infiltrate the government and provided intelligence for the Soviet Union, but not to the extent asserted by McCarthy defenders, and that McCarthy's tactics were counterproductive in dealing with the internal security threat. The focus on the Venona intercepts often centers on particular individuals involved in the Red Scare and renewed some of the major controversies of the period, including the Whittaker Chambers-Alger Hiss confrontations between 1948 and 1950.

² Ellen Schrecker, *Many are the Crimes: McCarthyism in America* (Princeton, New Jersey: Princeton University Press, 1998); Maurice Isserman and Ellen Schrecker, "'Papers of a Dangerous Tendency': From Major Andre's Boot to the VENONA Files," in *Cold War Triumphalism: The Misuse of History after the Fall of Communism*, ed. Ellen Schrecker (New York: The New Press, 2004), 149-173.

³ Arthur Herman, *Joseph McCarthy: Reexamining the Life and Legacy of America's Most Hated Senator* (New York: The Free Press, 2000); M. Stanton Evans, *Blacklisted by History: The Untold Story of Senator Joe McCarthy and his Fight against America's Enemies* (New York: Crown Forum Publishing, 2007).

The debate over the guilt or innocence of Alger Hiss in committing espionage for the Soviet Union continued throughout the Cold War and long after the end of the second Red Scare.⁴ With Venona, it was hoped that the debate would once and for all be settled; this, however, proved not to be the case. In the Venona intercepts, historians identified particular people with particular code names by comparing known movements, professions, and other information against the limited information provided within the intercepts. In the case of Alger Hiss, Hiss seemed to have fit the profile of the agent codenamed “Ales.” In particular, historians focus on evidence in the Venona intercepts that “Ales” visited Moscow shortly after the Yalta conference in 1945 where he allegedly secretly met with a high-ranking Soviet official.⁵ Hiss went to Moscow as part of a small group headed by Edward Stettinius, Secretary of State for both Franklin Roosevelt and Harry Truman, that travelled to Moscow after the Yalta conference and Hiss followed the itinerary established by the Venona intercepts to have been followed by “Ales.” Some disagree with this assessment of Hiss as “Ales.” Kai Bird and Svetlana Chervonnaya, for example, have attempted to provide a number of candidates other than Hiss that met most of the criteria to fit the profile of “Ales,” while John Lowenthal noted a number of inconsistencies between “Ales” and Alger Hiss, including travel itineraries, and challenged the assertion that “Ales” was even at

⁴ See for example: Whittaker Chambers, *Witness* (New York: Random House, 1952); Alistair Cooke, *A Generation on Trial: US v. Alger Hiss* (New York: Penguin Books, 1968); Sam Tanenhaus, *Whittaker Chambers: A Biography* (New York: Random House, 1997); Allen Weinstein, *Perjury: The Hiss-Chambers Case* (New York: Random House, 1997); and G. Edward White, *Alger Hiss's Looking-Glass Wars: The Covert Life of a Soviet Spy* (New York: Oxford University Press, 2004). Additionally, David Chambers, grandson of Whittaker Chambers, runs www.whittakerchambers.org that collects sources and writings on Whittaker Chambers, Alger Hiss, and the Hiss-Chambers case.

⁵ The message in question was intercept 1822 that noted the meeting between “Ales” and a high-ranking Soviet official. John R. Schindler, “Hiss in VENONA: The Continuing Controversy” (paper presented at the Center for Cryptologic History Symposium, October 27, 2005). Paper available at: <http://www.johnearlhaynes.org/page61.html>.

Yalta.⁶ Champions of Alger Hiss meeting the criteria of “Ales” received a boost with the addition of the Vassiliev notebooks to the historical record. Alexander Vassiliev, a former member of the KGB, was chosen to be the Russian editor of a proposed series by Random House based on Soviet archives and received temporary access to those archives for the project. This unprecedented access to contemporaneous accounts of KGB memos and activities in the 1930s through the 1950s continued for a two year period between 1994 and 1996 during which Vassiliev was allowed to research documents but forbidden to make copies of any documents. Vassiliev took copious notes on the files, documenting as much as he could in notebooks that remained unchecked and were allowed to remain in Vassiliev’s possession by the archivists of the former KGB archive, before access was discontinued due to financial and political considerations.⁷ Vassiliev’s research provides additional support for the argument that Hiss was indeed the Soviet agent codenamed “Ales.”⁸

One subject that has been overlooked is the role of anticommunist legislation passed during the period of the second Red Scare. The revelations of Soviet espionage by the testimony of former underground members of the CPUSA, such as Whittaker Chambers and Elizabeth

⁶ For example, Bird and Chervonnaya suggested that one of Stettinius’ assistants, Wilder Foote, had access to the same classified material as Alger Hiss and, as part of the Moscow contingent, followed the same itinerary as Hiss. Kai Bird and Svetlana Chervonnaya, “The Mystery of Ales,” *The American Scholar* (Summer 2007); John Lowenthal, “Venona and Alger Hiss,” *Intelligence and National Security* vol. 15, no. 3 (Autumn 2000).

⁷ The Vassiliev notebooks were the notes taken by Alexander Vassiliev during the period in which he was allowed to examine the KGB archives. Alexander Vassiliev was the only person to have been allowed access to the KGB archives and only for a short period of time before the Russian Government closed the archives to research. The Russian government attempted to secure the research, but Vassiliev was able to smuggle out his notebooks and defect. The notebooks have been translated and verified to the extent possible by a number of historians. Both the English and Russian versions of notebooks have been digitized by the Cold War International History Project and are available at:

http://www.wilsoncenter.org/index.cfm?topic_id=1409&fuseaction=topics.documents&group_id=511603

See also: John Earl Haynes, Harvey Klehr, and Alexander Vassiliev, *Spies: The Rise and Fall of the KGB in America* (Ann Arbor, Michigan: Sheridan Books, 2009).

⁸ Eduard Mark, “In *Re: Alger Hiss*: A Final Verdict from the Archives of the KGB,” *Journal of Cold War Studies* vol. 11, no. 3 (Summer 2009): 26-67.

Bentley, convinced many Americans of the need for stronger anti-subversive legislation, including the Internal Security Act of 1950 and the Communist Control Act of 1954. The specter of Senator Joseph McCarthy and other Congressional investigative committees, particularly the House Committee on Un-American Activities (HUAC), dominate history's views of Congress during the second Red Scare. Legislation passed during this period, when it is discussed at all, is portrayed as Congressional rubberstamping of the anticommunist consensus. Ted Morgan's *Reds: McCarthyism in Twentieth-Century America* and Richard Gid Powers' *Not Without Honor: The History of American Anticommunism* both ignore the anti-communist/anti-subversion legislation passed during this period, while Ellen Schrecker's *Many are the Crimes* discusses the legislation only in reference to its potential usefulness to the FBI.⁹ This lack of historical interest goes back to an earlier Red Scare historiography that dealt with internal security legislation only briefly and dismissed such legislation as a by-product of the anticommunist hysteria and as a political tool.¹⁰ While the internal security legislation may have been passed during the height of the anticommunist hysteria of the second Red Scare, Congress designed the legislation to fill perceived gaps in the internal security of the United States. The importance of the internal security legislation of this period lay in how it exemplified the politics at hand vis-à-vis internal security threats, the growing anticommunist consensus of the early

⁹ Ted Morgan, *Reds: McCarthyism in Twentieth-Century America* (New York: Random House, 2003); Richard Gid Powers, *Not Without Honor: The History of American Anticommunism* (New York: The Free Press, 1995); Schrecker, *Many are the Crimes*, 141, 241. The lack of interest in anti-communist/anti-subversion legislation in these works show that these historians accept the traditional view of the legislation as a misguided byproduct of anticommunist hysteria.

¹⁰ Albert Fried, for example, has referred to the legislation as exemplifying strident McCarthyism, while David Caute referred to the McCarran Act as an additional weapon of intimidation for bureaucratic persecution of the CPUSA. Albert Fried, *McCarthyism: The Great American Red Scare, A Documentary History* (New York: Oxford University Press, 1997), 74; David Caute, *The Great Fear: The Anti-Communist Purge under Truman and Eisenhower* (New York: Simon and Schuster, 1978), 170-71.

1950s, and provided a framework within which both the anticommunist debate and future internal security legislation would operate.

Today, there is new interest in both the second Red Scare at the national level and on the state level. Recent studies have examined the role of “little HUAC committees” at the state level in continuing the anticommunist crusade and the use of anticommunist rhetoric by Southern conservatives at the state level to deal with the race issue.¹¹ Michael Heale, for example, shows the interplay between national and state anticommunism, and how such anticommunism and anticommunist tactics continued to flourish on the state level. It is important to note that concerns over communist infiltration of American government and society continued to exist at various levels of the federal government long after the Senate censure of McCarthy in December 1954. In particular, the FBI shifted its anticommunist focus from subversion within government, to communist infiltration of civil rights groups and communist instigation of racial discord in the South and the rest of the nation.¹² This focus on communist infiltration of civil rights groups, and the growing radicalization of these groups, found a receptive audience in a Congress grappling with racial violence in the nation’s cities between 1964 and 1968.

When the registration requirements of the internal security legislation passed in the early 1950s declared unconstitutional by the Supreme Court in the mid-1960s, Congress had to find

¹¹ For the use of “little HUACs” at the state level, see: Michael J. Heale, *McCarthy’s Americans: Red Scare Politics in State and Nation* (Athens: University of Georgia Press, 1998). For the South and the anticommunist crusade at the state level, see: Jeff Woods, *Black Struggle, Red Scare: Segregation and Anti-Communism in the South, 1948-1968* (Baton Rouge: Louisiana State University Press, 2004).

¹² See, for example: David Garrow, *The FBI and Martin Luther King, Jr.* (New York: Penguin books, 1983). For the development of the CPUSA position on Civil Rights, see: Timothy Johnson, “‘Death for Negro Lynching!’ The Communist Party, USA’s Position on the African American Question,” *American Communist History* vol. 7, no. 2 (December 2008): 243-254.

another approach to deal with the incitement of urban racial violence.¹³ Finding that state and federal law enforcement lacked essential tools to deal with the crisis – law enforcement officials emphasized the need for electronic surveillance of suspected radicals involved in inciting racial violence as a means by which law enforcement could prevent future racial violence – Congress passed the Omnibus Crime Control and Safe Streets Act of 1968 and provided the legislative authority for law enforcement to engage in electronic surveillance and wiretapping of citizens on a limited basis.¹⁴ This marked the first time that Congress permitted the use of wiretaps and electronic surveillance by law enforcement officials.

These two internal security crises provided the framework within which Congress operated during the period immediately after the September 11, 2001, terror attacks and provided a precedent for congressional legislation that curtails civil liberties of citizens in favor of national security. Constitutional protections of individuals were not completely ignored during times of internal crisis but, when weighing the balance between national security and civil liberties during periods of internal security crises, the scale shifted in favor of national security. The protection of civil liberties must be carefully balanced in a democratic society because neither the state nor the individual has absolute authority. As Justice Robert Jackson once noted: “the choice is not between order and liberty. It is between liberty and order or anarchy without either.”¹⁵ When the nation is under threat, the government has an obligation to its citizens to enhance the security of the state. Once the threat has passed, government and society shift the balance towards liberty. As the internal security crises in the 1950s and 1960s show, government responded to

¹³ The Supreme Court overturned the registration requirements of the Internal Security Act in 1965 in *Albertson v. Subversive Activities Control Board*, 382 US 70 (1965).

¹⁴ *Omnibus Crime Control and Safe Streets Act of 1968*, 82 Stat. 197.

¹⁵ *Terminiello v. Chicago* 337 US 36 (1949).

perceived security threats through legislation that infringed upon the liberties of its citizens, only to have the legislation modified as the immediate threat passed.

Chapter 1

Internal Security Legislation and the Second Red Scare

The years immediately after the Second World War saw the development of an anticommunist consensus that culminated in the second Red Scare, 1948 to 1954. The consensus developed as a result of foreign policy reverses and domestic politics, and included both Democrats and Republicans – not just the conservative elements of each party, but liberals as well. In 1950, anticommunist conservatives of both parties rallied together behind Democratic Senator Pat McCarran of Nevada to pass the Internal Security Act of 1950 over the objections of President Harry Truman and his Congressional allies. The goal of the Internal Security Act of 1950 was to address perceived flaws in the nation’s internal security and to allay concerns that the Communist Party of the United States (CPUSA) posed a threat to the internal security of the United States. The fear of the CPUSA as a possible “fifth column” or subversive element in an American conflict against the Soviet Union led McCarran and his allies to define associated organizations as either Communist-action organizations (the CPUSA) or as Popular-Front organizations used by Communists. During the height of the second Red Scare in 1954, anticommunist congressional liberals attempted to respond to the McCarthy-style anticommunists by passing the Communist Control Act of 1954. With the Communist Control Act, anticommunist liberals such as Senator Hubert Humphrey hoped to modify and moderate the excesses of the more extreme anticommunists, including McCarthy, while maintaining their own anticommunist credentials. The legislation was designed to broaden the Internal Security Act of 1950 to include Communist-infiltrated organizations, including major labor unions. Both the Internal Security Act of 1950 and the Communist Control Act of 1954 expanded the power of the federal government over the individual’s right to association, requiring that members of listed associations register them with the government. The government based the registration

requirement on the belief that exposing these organizations to public scrutiny through registration with the government posed the least threat to individual liberty while protecting the security of the nation. The threat of subversive activity in the face of both a passive and active conflict against the Soviet Union required Congress to act.

While Senator Joseph McCarthy was the public face of anticommunism in the 1950s, he held relatively little power inside the Senate other than what he could accumulate through his public persona and personal popularity. The real power of the anticommunist movement within the Senate was in the hands of Senator Patrick McCarran. McCarran, at the height of the second Red Scare, was chairman of the powerful Senate Judiciary Committee, the committee from which any anti-subversion and internal security legislation would originate, and therefore had great influence over any legislation that would come before the Senate. McCarran was the political and legislative muscle behind both the Internal Security Act of 1950 and the Communist Control Act of 1954 and provided what advocates of strong internal security legislation wanted.

Patrick McCarran was born in Reno, Nevada, on August 8, 1876, to poor Irish immigrants. Patrick McCarran, Sr. emigrated from Ireland in 1862 and settled in the Reno area where he bought enough land to ranch lambs and engage in small farming. In 1875, the elder McCarran married Margaret Shay, a woman 23 years his junior. Pat McCarran was their only child and worked the family ranch and farm to help the family finances, as his parents were too poor to employ hired hands. The elder McCarran would be sued a number of times over land use and debt, including one instance when he was arrested, and acquitted, for attempted murder when he shot at a rancher who allowed his sheep to graze on a small part of the McCarran ranch.¹ As the son of good Irish immigrants, Pat McCarran was raised Roman Catholic,

¹ Michael J. Ybarra, *Washington Gone Crazy: Senator Pat McCarran and the Great American Communist Hunt* (Hanover, N.H.: Steerforth Press, 2004), 19; Papers of Eva Bertrand Adams, "Figures of the Senate: Patrick

although the distance between the ranch and the nearest Catholic church meant that he and his mother attended only once a year at Easter.²

As with a number of children of ranching and farming families, young Pat McCarran entered school later than a lot of his classmates, starting at the age of ten at a one-room schoolhouse ten miles from the family ranch. In addition to being four years older than the rest of his classmates, Pat McCarran's attendance was spotty, based on the weather and the needs of his family's ranch. He was able to attend school regularly only after the harvest in October until the snow fell, making the roads from the ranch to the school impassable. Once the snow melted, the flooding of the Truckee River made attendance difficult, and McCarran attended class only through March, which was when lambing season started.³ This pattern of schooling continued for the next five years, when his mother took another job to get money to send him to a boarding school in Reno in 1891. Once again the oldest amongst his classmates, McCarran found it difficult being a young man in the big city. His teacher, Libby Booth, noticed his potential, taking him under her wing, and provided extra tutoring and classes. These classes, which included stenography and telegraphy, occupied his time and focused McCarran to the point of his graduation from school at the age of 21 as valedictorian of his sixteen-person class in 1897.⁴ McCarran started at the University of Nevada – Reno the fall of the same year. At the university, McCarran majored in political science, while participating in the track and field team, competing in the shot put and hurdles, writing sports for the student paper, and becoming a member of the

Anthony McCarran of Nevada,” Collection 82-11, Subgroup I, Series 1, Box 2, Folder 70, University of Nevada-Reno Library, Special Collections Department. [Hereafter referred as EBA Papers].

² Ybarra, *Washington Gone Crazy*, 21.

³ *Ibid.*, 22; EBA Papers. ”Brief Biography of Senator Pat McCarran,” 1, Collection 82-11, I/1/2/70.

⁴ Ybarra, *Washington Gone Crazy*, 23; Jerome Edwards, “Patrick Anthony McCarran,” *Online Nevada Encyclopedia*, http://www.onlinenevada.org/patrick_anthony_mccarran.

debate team. It was on the debate team that McCarran found his calling, taking part in a losing effort against University of Utah, but being named best debater.⁵ During his time at the University of Nevada, McCarran had acquired several sheep of his own to help pay for his education. Family tragedy forced him to abandon his education in 1901 when his father fell from a horse, breaking his hip. This forced Pat to take over the family ranching business in which he achieved a measure of economic success as a rancher.⁶

During his days as a rancher, McCarran started learning the law, borrowing a number of law books from lawyers in nearby Reno. He spent the time with his sheep reading Blackstone and practicing arguments to his flock.⁷ As a rancher, McCarran found himself among immigrant ranchers from the Basque region of France and Spain. He felt kinship with these people and, as a Senator, would work to better the status of Basques in Nevada. His success as a rancher did not last long, however. Two years after taking over his father's ranch, tragedy struck: a large number of McCarran's sheep were killed when a train plowed through the flock as they were being driven across some tracks to graze.⁸

In 1903, Pat McCarran married Martha Harriet Weeks, known to her friends as "Birdie." Pat met Birdie at a school dance that she attended with another man, but Pat was infatuated. He asked Birdie to the next school dance, but they went their separate ways when Pat had to drop out of school and Birdie graduated and returned home to Clover Valley in the northern part of the state. Pat and Birdie stayed in touch through letters, but they did not have their next date until Pat was elected to the Nevada legislature in 1902 and he asked Birdie to attend the

⁵ Ybarra, *Washington Gone Crazy*, 25; EBA Papers, "A Brief Biography of Senator Pat McCarran," 1, Collection 82-11, I/1/2/70.

⁶ EBA Papers, "A Brief Biography of Senator Pat McCarran," 1, Collection 82-11, I/1/2/70.

⁷ Ybarra, *Washington Gone Crazy*, 33-34.

⁸ *Ibid.*, 34-35; EBA Papers, "A Brief Biography of Senator Pat McCarran," 1-2, Collection 82-11, I/1/2/70.

inaugural ball in Carson City. Birdie's family was not happy with the thought of their young daughter going to the capital across the state with a man they had not met. Pat took the train up to Clover Valley to see Birdie and proposed. The McCarrans married in August 1903 in Clover Valley before they took the train to San Francisco, where they remarried in a Catholic church.⁹ Pat and Birdie stayed happily married for the next 51 years until McCarran's death in 1954. Together, they had five children: Margaret (born in 1904), Mary (1906), Norine (1911), Sylvia Patricia (1919), and Samuel Patrick (1921).

As a junior member of the Nevada legislature in 1902, McCarran found himself in a political situation ripe for change. McCarran focused on helping the working class of Nevada, calling for progressive legislation that helped the miners and smelters that made their livelihood in the silver mines of Nevada. The most important progressive legislation championed by McCarran included an eight-hour work day as well as some form of worker's compensation for mining injuries.¹⁰ While McCarran served in the Nevada Legislature, he continued pursuing his law degree and was admitted to the Nevada Bar near the end of his term as representative and shifted his focus towards a career in law.¹¹

McCarran's first client after passing the bar in 1905 was a familiar one: Patrick McCarran Sr. The elder McCarran found himself in trouble with the government when he cut down forty telegraph lines that went across his land. Pat McCarran got his father acquitted when McCarran called himself to the stand and testified that he, not his father, cut down the telegraph poles. He

⁹ Ybarra, *Washington Gone Crazy*, 31-32; EBA Papers, "A Brief Biography of Senator Pat McCarran," 1, Collection 82-11, I/1/2/70.

¹⁰ EBA Papers, "A Brief Biography of Patrick McCarran," 2, Collection 82-11, I/1/2/70; EBA Papers, "Figures of the Senate: Patrick Anthony McCarran of Nevada," Collection 82-11, I/1/2/70.

¹¹ EBA Papers, "A Brief Biography of Senator Pat McCarran," 2, Collection 82-11, I/1/2/70.

then promptly paid the fine.¹² After his father's trial, Pat McCarran moved his young family to Tonopah, a mining boomtown in Nye County. Shortly after setting up office in Tonopah, McCarran was selected by the state Democratic convention to be the candidate for District Attorney for Nye County. Running without Republican opposition, McCarran ran virtually unopposed and served a two-year term as District Attorney. As the mining boom ended in Tonopah, McCarran moved his family to Reno and set up a new law practice.¹³

The stay in Reno was a relatively short one for the family, as they moved once again with Pat McCarran's successful election to the Nevada Supreme Court in 1912. Moving to Carson City, McCarran's term as Justice (1913-16) and Chief Justice (1917-18) of the Nevada Supreme Court was relatively uneventful.¹⁴ McCarran, in his time on the court, became more focused on attaining federal political office; in particular, he wanted to be U.S. Senator for Nevada. McCarran, defeated in his re-election campaign to the court in 1918, returned to private life in Reno. In private life, Pat McCarran began to make a name for himself as a divorce lawyer after he handled the high-profile divorce of Mary Pickford. Pickford, known as "America's Sweetheart" and, at the time, one of the most famous people in the world, petitioned her estranged husband, Owen Moore, for divorce in 1920, so she could marry Douglas Fairbanks, Sr. Taking advantage of Nevada's lax divorce laws, Pickford contacted McCarran to take care of her divorce proceedings. Pickford arrived in Reno in February 1920, staying at a ranch near Lake Tahoe, while McCarran dealt with the divorce proceedings. Moore was not contesting Pickford's application for divorce on the grounds of desertion; the problem was the residency requirement of Nevada's lax divorce laws. Nevada's divorce laws required an applicant to show

¹² Ybarra, *Washington Gone Crazy*, 37; Papers of U.S. Senator Patrick A McCarran, "McCarran Sr.," Series IV, Box 24. [Hereafter referred as McCarran Papers].

¹³ Edwards, "Patrick Anthony McCarran," http://www.onlinenevada.org/patrick_anthony_mccarran.

¹⁴ EBA Papers, "A Brief Biography of Senator Pat McCarran," 3, Collection 82-11, I/1/2/70.

a six-month residency in the state; McCarran was able to get around this by arguing that Pickford would be staying in Nevada for rest and recuperation, estimated to be longer than six months. The judge granted Pickford the divorce; she spent less than a month in Nevada before marrying Douglas Fairbanks, Sr.¹⁵ Shortly after the Pickford divorce, Nevadan divorce laws were changed to a three-month residency requirement that was more strictly enforced.



While known as a divorce attorney, McCarran attempted his first run at Senate in 1926. As one of six contenders for the Democratic nomination, McCarran made his first real inroads in Nevadan Democratic politics. McCarran canvassed up and down the state for votes, but came up short in his attempt for the Democratic nomination for Senate. It was rather fortunate for McCarran that he did not gain the Democratic nomination in 1926 as the Republican incumbent, Senator Tasker Oddie,

Figure 1: Senator Pat McCarran¹⁶

controlled the state political machine through political and familial connections, directed the important federal patronage that went to the state, and had support from the major state newspapers (including the *Las Vegas Sun*).¹⁷ McCarran would have to wait for his next attempt to be one of Nevada's senators.

¹⁵ Ybarra, *Washington Gone Crazy*, 80-85; Eileen Whitfield, *Pickford: The Woman who Made Hollywood* (Lexington: University Press of Kentucky, 2007), 197-199; McCarran Papers, "Mary Pickford Divorce Case," Series IV, box 25.

¹⁶ Biographical Directory of the United States Senate, 1774-Present, "Senator Pat McCarran," <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000308>.

¹⁷ Ybarra, *Washington Gone Crazy*, 90-93; Jerome E. Edwards, *Pat McCarran: Political Boss of Nevada* (Reno: University of Nevada Press, 1982), 32-33.

The political calculus changed in Nevada, as it did in most of the United States, with the coming of the Great Depression in 1929. In 1932, McCarran again campaigned for the Democratic nomination for Senate, successfully this time, and then took on Senator Oddie. Senator Oddie did not take his opponent seriously and stayed in Washington; McCarran went all over Nevada, making a key campaign promise to constituents to push for the full payment of the promised bonus to veterans, gaining key endorsements such as the *Las Vegas Sun*, and established his own political machine in the state. In one of the most heated political campaigns to date in Nevada, McCarran was able to use the political and economic unrest created by the Great Depression in Nevada and the rest of the United States to become the junior Senator for Nevada. McCarran acted quickly to consolidate his own power and entrenched his Democratic political machine in the major cities of Reno, Las Vegas, and Carson City.¹⁸

Once elected to the Senate, McCarran wanted to get things done; in particular, McCarran wanted to be on the Senate Judiciary committee, where he felt most of the action in the Senate occurred. To this end, one of the first moves McCarran made upon arriving at the Senate was to become close to a senior Senator, in this case, Republican Senator William Borah of Idaho.¹⁹ Borah, a progressive Republican from Idaho, was close to McCarran on many issues and differed only in political affiliation. Borah was able to use some of his influence to get McCarran on to the Senate Judiciary committee. It is as a member of the Judiciary committee that McCarran would cause the most trouble for the new Roosevelt administration.

¹⁸ EBA Papers, "A Brief Biography of Patrick McCarran," 3, Collection 82-11, 1/1/2/70; Don W. Driggs and Leonard E. Goodall, *Nevada Politics and Government: Conservatism in an Open Society* (Lincoln: University of Nebraska Press, 1996), 53.

¹⁹ Patronage power for federal jobs in Nevada was divided between the state's two Senators: Key Pittman, who had seniority, and McCarran. Betty Glad, *Key Pittman: The Tragedy of a Senate Insider* (New York: Columbia University Press, 1986), 212-12; Ybarra, *Washington Gone Crazy*, 136.

One of the tenets of Pat McCarran's political ideology was the sanctity of the Constitution and the separation of powers between the legislative and the executive branches. As one of the new Democratic senators entering Congress in 1933, McCarran was expected to fall in line behind Roosevelt's New Deal initiatives. McCarran, along with a number of Southern, Western and Midwestern Democrats, tended to be somewhat more conservative, which lead McCarran to be on the opposite side of some of Roosevelt's ideas. A particular battle between McCarran and the Roosevelt's New Deal would occur over the second bill introduced in the Congressional session: the Roosevelt-backed Economy Act of 1933. It was designed to cut federal spending by delegating the authority to the White House to cut federal salaries and veteran's benefits. McCarran vigorously opposed the Economy Act of 1933 on the grounds that it directly cut veteran's benefits, something McCarran pledged to protect during his campaign, and, more importantly, that it removed constitutionally-delegated power from the legislative branch to the executive branch. The Act would have given the President limited authority to reorganize agencies within the federal government, something that McCarran felt should be done through legislative, not executive, action. McCarran first unsuccessfully attempted to get the bill bogged down in committee, requesting that the bill be shuffled to the Judiciary Committee for further study. When that failed, he next tried to slow the bill down by piling amendment after amendment on the bill. McCarran would eventually vote against the Economy Act when his legislative attempts to slow the bill failed, but this would not be the last time that he would be dealing with the Economy Act of 1933.

Senator McCarran would spend the early part of 1934 attempting to fix the "mistake" of the Economy Act by adding amendments to appropriations bills that would restore the pay of federal employees and veteran's benefits. In February 1934, McCarran experienced one of his

first successes when he managed to restore veteran's benefits to veterans of the Spanish-American war. McCarran threatened to continue adding such amendments to the Economy Act when the Roosevelt administration put forth a compromise by which two-thirds of the cuts to federal employees and veterans would be restored. With the Roosevelt plan deadlocked in the Senate Judiciary Committee, McCarran agreed to go along with the Roosevelt plan, declaring that "two thirds of a loaf of bread is better than none" and that the poor of the country needed to eat.²⁰

The major break between the McCarran and the Roosevelt administration centered on Roosevelt's abortive "court-packing" plan in 1937. McCarran felt that the Roosevelt administration had been pushing the boundaries of the Constitution with some of his New Deal initiatives – indeed that was the reason behind McCarran's opposition of some New Deal legislation – but felt that Roosevelt had gone too far with his plan to increase the number of sitting justices from nine to fifteen. While McCarran privately led the western opposition to the "court-packing" plan in the Judiciary Committee, working closely with Southern senators who were equally distressed with the plan, publicly he remained undecided. While McCarran's opposition to Roosevelt's legislative plan should have been apparent, he remained publicly undecided in an effort to retain power within the committee. With the committee deadlocked and McCarran the leader of the three remaining undecided committee members (Senators Joseph O'Mahoney of Wyoming and Carl Hatch of New Mexico), he was in a position to craft a compromise favorable to opponents of the Roosevelt Court bill. McCarran's noncommittal public stance was also for his Nevadan constituents, as McCarran could not publicly break with

²⁰ Ybarra, *Washington Gone Crazy*, 164-65; EBA Papers, "Brief Biography of Senator Pat McCarran," 3, Collection 82-11, 1/1/2/70.

Roosevelt leading into his re-election campaign.²¹ After Senator Burton Wheeler (D-Montana) read a letter from Chief Justice Charles Evan Hughes disputing Roosevelt's reasons behind the "court-packing" plan, opposition to the plan gained the upper hand. McCarran attempted to regain control of the situation by putting forth a compromise where only two new Justices would be added to the Court, but both supporters and opponents of Roosevelt's plan rejected McCarran's compromise, after which McCarran and the other two declared undecided senators voted against Roosevelt's plan before the Judiciary Committee. McCarran was able to use his influence on the committee to help write the conference report that delivered the Roosevelt plan negatively to the Senate as a whole.²²

While Senator McCarran is best known for his anti-Communist legislation, his dislike of Communists preceded his entrance to the Senate in 1932. While he worked for the betterment of miners and smelters on an individual level, McCarran opposed the wave of unionization occurring throughout the Southwest in the early years of the 20th century. In Nevada, McCarran experienced the radicalism of some early 20th-century unions when the Western Federation of Minors (WFM) and members of the Industrial Workers of the World (IWW, also known as the "Wobblies") caused problems in Nye County, Nevada, while McCarran served as the District Attorney for the county. In 1907, members of the WFM and the IWW took control of the town of Goldfield after a period of strife between miners and the owners of the mine. Local control was restored when President Theodore Roosevelt sent in three hundred federal troops in late

²¹ Ybarra, *Washington Gone Crazy*, 200-02, 205-06; EBA Papers, "A Brief Biography of Patrick McCarran," 3-4, Collection 82-11, 1/1/2/70; Edwards, *Pat McCarran*, 81-83.

²² Ybarra, *Washington Gone Crazy*, 208; Edwards *Pat McCarran*, 75-77; Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998), 21. For the Court Packing plan, see: William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995); Peter Irons, *A People's History of the Supreme Court: The Men and Women whose Cases and Decisions have Shaped our Constitution* (New York: Penguin Books, 2006), 307-330; and William H. Rehnquist, *The Supreme Court* (New York: Vintage Books, 2002), 116-33.

1907 to remove the miners.²³ McCarran's distrust of unions deepened with the emergence of the Congress of Industrial Organizations (CIO) in 1936, a labor organization which, he felt, was heavily communist-influenced. CIO-affiliated unions, most notably the Mine-Mill Union that organized most miners and smelters within Nevada, opposed McCarran in his successful 1938 re-election campaign. The CIO Political Action Committee had McCarran as one of its top targets for removal in the 1938 campaign cycle. One pro-McCarran biographer suggested that "every known method of ridicule, innuendo, and vituperation has been used [by Communists] to discredit and defeat him" during the 1938 campaign.²⁴ Thus, at first, the communist question for McCarran was a state political question. By the late 1940s, however, McCarran viewed the communist question more as a national and international problem.

Prior to the advent of Joseph McCarthy on the national stage, McCarran was characterizing the communist question as an immigration problem.²⁵ In a May 1949 radio address to his Nevada constituency, McCarran argued that the "entire immigration system has been weakened to make it often impossible for our country to protect its security from this black era of fifth column infiltration and cold warfare with the ruthless masters of the Kremlin."²⁶ For McCarran, if the federal government could "sever the international lifeline which is feeding the

²³ Russell R. Elliott, "Labor Troubles in the Mining Camp at Goldfield, Nevada, 1906-1908," *Pacific Historical Review* vol. 19, no. 4 (November 1950): 369-84; Phil Mellinger, "How the IWW lost its Western Heartland: Western Labor History Revisited," *The Western Historical Quarterly* vol. 27, no. 3 (Autumn 1996): 303-24; Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870-1920* (New York: Oxford University Press, 2003), 142; Robert Justin Goldstein, *Political Repression in Modern America from 1870-1976* (Champaign: University of Illinois Press, 2001), 77.

²⁴ EBA Papers, "Figures of the Senate: Patrick Anthony McCarran of Nevada," Collection 82-11, I/1/2/70. Edwards, *Pat McCarran*, 81-83.

²⁵ McCarran's characterization of the communist question as an immigration problem would continue after the passage of the Internal Security Act in 1950. In 1952, McCarran sponsored the McCarran-Walter Act; an immigration bill that abolished the old racial quotas used for immigration and established a quota system based on nationality that allowed the government to use the legislation to bar and deport suspected subversives. *Immigration and Nationality Act of 1952*, 182 stat. 56.

²⁶ EBA Papers, Transcript, Patrick McCarran radio speech to Nevada, May 9, 1949, 4, Collection 82-11, I/1/2/66.

Communist conspiracy” in America, then the domestic sources of communism and subversion would lose power.²⁷ However, when the Soviet Union became a greater threat after the Second World War, McCarran began to see the communist question as an existential one – either capitalism and the United States or Communism and the Soviet Union would survive, not both. In McCarran’s view, the struggle with the Soviet Union was “the fight for the survival of democratic government on this globe.”²⁸ By the time internal security legislation became necessary, McCarran was established as Chairman of the Senate Judiciary committee and in a position to make his feelings on communists into law.

By mid-1950, President Truman came under greater political pressure to increase the internal security of the United States. Although Truman issued Executive Order 9835 in March 1947, establishing a general loyalty program for the federal government to solve the perceived problem of “Communists in Government,” the growing popularity of prominent anticommunists such as Joe McCarthy and Richard Nixon had created the public perception that more needed to be done. In a political maneuver designed to give Congress little time to debate the issue and to allow administration supporters in Congress the opportunity to pass an internal security bill favored by the administration, Truman called for a special session of Congress in the summer of 1950 with a mandate to solve the internal security issue. In early August 1950, Senator Harley Kilgore of West Virginia, one of Truman’s main lieutenants in the Senate, put together an omnibus bill to rally all supporters of internal security legislation. Unfortunately for Truman, administration foes marshaled quickly and presented an alternative to the bill put forth by Truman loyalists in the Senate.

²⁷ EBA Papers, Transcript, McCarran speech, May 9, 1949, 5, Collection 82-11, I/1/2/66.

²⁸ EBA Papers, Transcript, McCarran Speech, May 9, 1949, 13, Collection 82-11, I/1/2/66; Ybarra, *Washington Gone Crazy*, 485-88.

While Senator Kilgore tried rallying public support in the press behind the administration's plans, McCarran put his Senate staff to work to develop his own omnibus bill and used his influence as chairman of the Senate Judiciary Committee to take control of the internal security debate.²⁹ Within the Senate Judiciary Committee, the time crunch imposed on Congress by virtue of Truman calling a special session of Congress worked against the Truman loyalists. Senator Warren Magnuson of Washington produced a new "administration bill" to try to take committee support away from McCarran's proposed omnibus bill and to recapture the internal security debate. The "administration bill," however, was almost identical to McCarran's proposed bill; Senator Magnuson withdrew his substitute bill when it became clear that his substitute bill would be handily defeated in a committee vote.³⁰ On August 21, 1950, the Senate Judiciary Committee was ready to report and present McCarran's omnibus anti-subversive bill after Senator McCarran was able to convince Karl Mundt of South Dakota and Senator Homer Ferguson of Michigan, two prominent anticommunists in the Senate, to support the proposed omnibus bill instead of putting forth bills of their own.³¹ By late August 1950, Senator McCarran controlled the internal security debate in the Senate.

The McCarran Act built upon the anti-Fascist/anti-Communist legislation passed during the Second World War, in particular the Alien Registration Act of 1940 – more popularly known as the Smith Act after its main sponsor, Representative Howard Smith (D-Virginia). The Smith Act made it illegal for anyone who "knowingly or willingly advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the

²⁹ EBA Papers, Letter, Julian Sourwine to Eva Adams, August 9, 1950, Collection 82-11, I/1/2/53.

³⁰ EBA Papers, Letter, Sourwine to Adams, August 17, 1950, Collection 82-11, I/1/2/53.

³¹ EBA Papers, Letter, Sourwine to Adams, August 21, 1950, Collection 82-11, I/1/2/53. McCarran was able to gain the support of Senators Mundt and Ferguson by agreeing to use language suggested by the two men in the Omnibus bill.

United States.”³² The Smith Act also introduced registration requirements for all non-citizen adult residents, with 4.7 million registering with the government under the Smith Act provisions. The success of the Smith Act registrations showed legislators that registration was an effective measure when dealing with aliens, a major bloc of support for the CPUSA, and provided the federal government with the tools to prosecute fascists and communists within the country. In 1941, the Roosevelt Justice Department first used the Smith Act provisions to prosecute members of the Socialist Worker’s Party, a Trotskyite splinter group from the CPUSA. The government successfully prosecuted 23 members of the Socialist Worker’s Party leadership, with each defendant receiving a sentence of 12-18 months imprisonment for violating the Smith Act statutes.³³ The Smith Act statutes were next used against Communists in 1948 when the Truman Justice Department indicted the leadership of the CPUSA for violating the Smith Act. Convicted of violating the Smith Act, the Party leadership appealed their case to the Supreme Court, which heard oral arguments for the case in 1950 and 1951. The Supreme Court would eventually rule against the CPUSA in 1951 establishing a new standard for “Clear and Present Danger” test for the Cold War.³⁴

The McCarran Act, passed on September 12, 1950, had two principal provisions: to prevent communists and other subversives from finding government positions and to provide the government with easier ways to prosecute offenders and to strengthen immigration legislation. The Congressional testimony of the head of the FBI, J. Edgar Hoover, provided the rationale behind the McCarran Act. Senator McCarran reported to the Senate that Hoover testified that

³² *Alien Registration Act of 1940*, 18 USC 155 §2385.

³³ Michal R. Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties* (Westport, Conn.: Greenwood Press, 1977), 77-116.

³⁴ For a greater discussion of *Dennis v. United States* (1951), see Chapter 2.

while “there are only 54,174 members of the [CPUSA], the fact remains that the party leaders themselves boast that for every party member there are 10 others who follow the party line and who are ready, willing, and able to do the party’s work.”³⁵ The fear of a possible “fifth column” of supporters ready to strike against the United States was used in arguments emphasizing the conspiratorial nature of communism.

Senator McCarran described the nature of communism while arguing for the act’s passage. Senator McCarran said that the CPUSA, and the threat of a fifth column directed by the Party, constituted both a “clear and present danger to this government and to all that we cherish in our democratic institutions” and that, through testimony collected by various congressional committees (including HUAC), there were “cold, hard facts respecting the interlocking of the Communist fifth column in this country with the international Communist espionage-sabotage subversion network.”³⁶

The most vociferous debate in the Senate regarding the McCarran Act was over its constitutionality. One of the primary arguments used against the McCarran Act was that it would force the government into the role of deciding whether a man’s thoughts or ideas were dangerous to the state. Arguing that the McCarran Act would put the government in the business of policing the thoughts of citizens, Senator Herbert Lehman (D-New York) invoked the imagery of the French Revolution when he suggested that the McCarran Act would not “catch only those whose views you hate. All of us may become victims of the gallows we erect for the enemies of freedom.”³⁷ Liberal senators, such as Lehman, Hubert Humphrey (D-Minnesota) and Paul Douglas (D-Illinois), argued that the registration section of the McCarran Act would penalize

³⁵ *Congressional Record*, 81st Congress, 2nd Session, 1950, pt. 10: 14171.

³⁶ *Ibid.*, pt. 10: 14171.

³⁷ *Cong. Rec.*, 81st Cong. 2nd Sess., pt. 10: 14194.

citizens on the basis of their thoughts, opinions, and beliefs and in a manner which violated both the letter and the spirit of the First Amendment.

Liberals attacked the McCarran act on constitutional grounds by arguing that it violated the Fifth Amendment. Senators Douglas and Lehman used the successful conviction of the leadership of the Communist Party in the Smith Act trial in 1948 to argue that the registration section of the McCarran Act would constitute self-incrimination and, thus, be in violation of the Fifth Amendment. The government successfully prosecuted the CPUSA leadership on the basis that the Communist Party was a conspiratorial organization that advocated the violent overthrow of the United States. Lehman argued that the registration of organizations and individuals as members of a communist-action or communist-front organization would “constitute self-incrimination, if not under the terms of this law, then under the terms of the Smith Act.”³⁸

Proponents of the McCarran Act insisted that the act conform to the rights given to citizens under the Constitution. Senator McCarran argued the act’s constitutionality based both on judicial precedent and on his record of upholding the Constitution in the Senate and as Chair of the Senate Judiciary Committee. McCarran cited the “clear and present danger” test, established in *Schenck v. United States* (1919), and argued that the communist conspiracy against the United States presented a clear and present danger to the government. McCarran also cited the precedent in the majority decision of the Supreme Court in *Gitlow v. People of New York* (1925) in which the Supreme Court found that the freedom of speech and the press “does not deprive a State of the primary and essential right of self-preservation; which, so long as human governments endure, they cannot be denied.”³⁹ Along with these two precedents, McCarran pointed to his twenty-year Senatorial career as a defender of the Constitution and his “respect

³⁸ *Ibid.*, pt. 10: 14190.

³⁹ *Schenck v. United States*, 249 U.S. 47 (1919); *Gitlow v. New York*, 268 U.S. 652 (1925).

and love for the organic law of the United States” to sway his fellow senators.⁴⁰ Throughout his Senatorial career, McCarran challenged and fought against every attempt by the executive branch to overstep what he felt was its constitutional authority.

The constitutional debate of the McCarran Act prompted the sponsors of the act to incorporate a constitutional defense within the act itself. Legislators prefaced the McCarran Act with a section laying out the “necessity for legislation;” a section that argued that communism, in the opinion of Congress, presented a clear and present danger to the United States. The “necessity for legislation” argued that there existed a world communist movement dedicated to establishing “a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.”⁴¹ This section further argued that this organization often used, but did not limit themselves to, political means to attempt to gain power and convert countries into a totalitarian dictatorship:

The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship [i.e. the Soviet Union]. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.⁴²

⁴⁰ *Cong. Rec.*, 81st Cong. 2nd Sess., pt. 10: 14174.

⁴¹ *Internal Security Act of 1950*, Title I, Sec. 2 (1), 64 Stat. 987 (1950).

⁴² *Ibid.*, Title I, Sec. 2 (6).

The goals of the Communist Party of the United States, Congress argued, were in lockstep with the goals of a world-wide communist movement under the direction of the Soviet Union. The legislation further argues that the American apparatus of this communist movement is:

an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement [...] The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions.⁴³

Soviet espionage between 1945 and 1950, the outbreak of the Korean War in June 1950, and the general tension between the United States and the Soviet Union created an environment ripe for the emergence in the United States of a Soviet “fifth column” in the guise of the CPUSA. The danger of the Communist party was clear to Congress and the general environment of the Cold War suggested that the danger was present.⁴⁴

The registration of communists would allow the FBI and the Justice Department to use informants and other former communists to identify CPUSA members or former members who might have gone “underground” and prosecute them for not registering under the McCarran Act. The question of who should register and be registered under the McCarran Act was hotly debated issue. The Act required the registration of communist-action and communist-front organizations. While defining communist-action organizations as those “substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist

⁴³ Ibid., Title I, Sec. 2 (15).

⁴⁴ A reinterpretation of the “clear and present danger” test based on the contemporary Cold War environment would appear in the heavily divided Supreme Court decision of *Dennis v. United States* (1951), the final review of the Smith act convictions. In *Dennis v. United States* (1951), Chief Justice Fred Vinson argued the majority decision that the environment created by the Cold War increased the proximity of the danger posed by Communists and the Communist party. *Dennis v. United States*, 341 U.S. 494 (1951).

movement,” the act defined a communist-front organization in broader terms.⁴⁵ As defined by the McCarran Act, a communist-front organization is one that is “substantially directed, dominated, or controlled by a Communist-action organization” and is “primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement.”⁴⁶ Attempting to decide whether or not an organization was dominated, controlled, or influenced by communists was difficult enough, this problem was further compounded by the vagueness of “giving aid and support.”

Liberal senators questioned whether the vagueness of “giving aid and support” could be used to force the registration of otherwise patriotic organizations. Douglas brought the issue close to home for members of the Senate, noting that, some of the positions and beliefs held by members of Congress were congruent with that of the CPUSA and, while not directed by a Communist-action organization, could be seen “giving aid and support” to Communist cause. Douglas suggested that, under such legislation, it would be possible “for an injudicious Attorney General and a Subversive Activities Control Board to list an organization of such men as a Communist front, even though it were in reality innocent.”⁴⁷

Senator Lehman, on the other hand, questioned whether or not unions could be subject to registration. Unionism had become occasionally associated with communism in the late-nineteenth and early-twentieth century as battles between organized labor and business occurred and some unions had advocated similar policies to those that communists advocated during the popular-front period. Lehman argued that a union such as the United Auto Workers (UAW)

⁴⁵ This registration statute does not, of course, include embassy and other diplomatic organizations and positions. *Internal Security Act of 1950*, Title I, Section 3 (3[a]).

⁴⁶ *Internal Security Act*, Title I, Sec. 3 (4).

⁴⁷ *Cong. Rec.*, 81st Cong. 2nd Sess., pt. 11: 14412.

would be forced to register because of its support on certain liberal or progressive positions. As

Lehman noted:

Communists pay lip service to many causes, such as public housing, peace, antidiscrimination, and social security. These causes happen to be supported very enthusiastically by the UAW union. The UAW supports many other principles [...] to which the Communist Party gives its questionable blessings⁴⁸

Furthermore, Lehman argued, the UAW would have to register if even a small number of UAW officers demonstrated sympathy for the communist cause as fellow travelers. Senator Humphrey suggested that the National Farmers Union, a multi-state organization of farmers and ranchers, might be forced to register as a communist-front organization for some of the pro-socialist ideas promoted by the union, despite its consistent support of pro-western and pro-American policies such as NATO and continued military support of beleaguered nations.⁴⁹

The registration section of the McCarran act was similar in most respects to that of the Alien Registration of 1940. Designated communist organizations were required to submit the following information to the Attorney General's office:

- (1) The name of the organization and the address of its principal office
- (2) The name and last-known address of each individual who is at the time of filing of such registration statement, and of each individual who was at any time during the period of twelve full calendar months next preceding the filing of such a statement, an officer of the organization [...]
- (3) An accounting, in such form and detail as the Attorney General shall by regulations prescribe, of all moneys received and expended (including the sources from which received and the purposes for which expended) by the organization during the period of twelve full calendar months [...]
- (4) In the case of a Communist-action organization, the name and last-known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.

⁴⁸ *Cong. Rec.*, 81st Cong., 2nd Sess., pt. 10:14193.

⁴⁹ The main charge against the National Farmers Union (NFU) was the NFU's promotion of cooperatives to help farmers as well as the fact that some members were inclined towards Communism and became members of the CPUSA. *Cong. Rec.*, 81st Cong. 2nd Sess., pt. 10: 14283-84.

(5) In the case of any officer or member whose name is required to be shown in such statement, and who uses or has used or who is or has been know by more than one name, each name which such officer or member uses or has used or by which he is shown or has been known.⁵⁰

This information submitted to the Attorney General's office was then opened to public scrutiny in a yearly list published by the Attorney General.⁵¹ The McCarran act left it up to individuals to ensure that, if they were a member of a designated Communist-action or –front organization, they were properly registered under the terms of the act. This meant that the FBI and the Justice Department could use this information to determine if the registered organization supplied its full membership list and to initiate investigations or prosecutions under the act.

The publication of this yearly list, however, made some senators question whether the organizations or individuals would register themselves accurately and not submit false information; slandering innocent individuals or organizations. Senator Douglas made this point vividly:

A man's patriotism is like a woman's honor, it is sullied by even being questioned or talked about. A stain is put upon it by being questioned which cannot be completely removed, no matter how devoted a man may be.⁵²

Registration of this sort allowed for organizations and, more importantly, individuals to submit false information to avoid being registered and to do damage to the reputation of others.

Proponents of the McCarran Act, however, argued that the creation of a Subversive Activities Control Board (SACB) allowed falsely registered organizations and individuals a means of redress.

⁵⁰ *Internal Security Act*, Title I, Sec. 7 (d).

⁵¹ For the Attorney General's list, see: Robert Justin Goldstein, *American Blacklist: The Attorney General's List on Subversive Organizations* (Lawrence: University Press of Kansas, 2008); and Eleanor Bontecou, *The Federal Loyalty-Security Program* (Ithaca N.Y.: Cornell University Press, 1953).

⁵² *Cong. Rec.*, 81st Cong. 2nd Sess., pt. 11: 14412.

The McCarran Act designed the SACB to serve as a lower appellate court for organizations and individuals. The SACB, made up of five members appointed by the President, of which no more than three could be members of the same political party, and subject to the approval of Senate, applied the definitions of the McCarran Act to registering organizations. Individuals and organizations could petition the SACB if they felt that they were improperly registered or to have their previous registration removed from the annual list. The SACB would then function in a manner similar to a Congressional committee, such as HUAC, with the power to subpoena witnesses, and the ability to administer oaths and debrief and interview witnesses and pertinent publications for the case at hand. The petition of the individual or organization to be removed from the annual list would then be presented in an open hearing, to allow the individual or organization to publicly plead its case.

The McCarran Act provided specific considerations that the SACB would take into account in determining the status of the petitioner. In determining whether the petitioner was or belonged to a communist-action organization, the SACB took into consideration the policies, the finances, and, in the case of organizations, the membership of the petitioner. The SACB would then attempt to determine the extent to which the formulated policies and beliefs of the petitioner conformed to those of foreign governments and organizations. This meant that if the government, through the SACB, determined that the goals and beliefs of an organization differed from those of the United States and were directed by a foreign organization, the petitioner was one step closer to being considered a Communist-action organization. Allowing the SACB such broad interpretive powers regarding the policies of an organization meant that organizations were placed under pressure to shift policies to conform to those of the current administration. This

meant that, had the McCarran Act been law in 1948, the Progressive party could have been considered a communist-action organization because of its opposition to big business.⁵³

The SACB could also examine the finances and support of the petitioner to determine the extent to which the petitioner received financial support from foreign governments or organization. The McCarran Act required full disclosure of financial information from individuals and organizations to ensure that these groups did not receive money directly or indirectly from unfriendly governments or organizations. The full disclosure of financial information would allow the SACB and its investigators to trace any financial aid to these organizations and to follow the money trail to see if the original organization was influencing others.

Most importantly, however, the SACB had to take into consideration the membership of the organizations involved. The SACB had to determine:

- (4) the extent to which [the petitioner] sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world Communist movement; and
- (5) the extent to which it reports to such foreign government or foreign organization or to its representatives; and
- (6) the extent to which its principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of such foreign government or foreign organization or its representatives; and
- (7) the extent to which [...] (i) it fails to disclose, or resists effort to obtain information as to, its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its members refuse to acknowledge membership therein; (iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meetings are secret; and (v) it otherwise operates on a secret basis; and
- (8) the extent to which its principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization.⁵⁴

⁵³ *Internal Security Act*, Title I, Sec. 13 (e).

⁵⁴ *Ibid.*, Title I, Sec. 13 (e).

The membership requirements of a communist-action organization were clearly written as to ensure that the CPUSA would be considered a communist-action organization.

The SACB had an even broader set of criteria for determining whether or not a petitioner constituted a communist-front organization. For example, to determine if an organization was a communist-front organization, the SACB had to consider:

- (1) the extent to which persons who are active in [the petitioner's] management, direction or supervision, whether are not holding office therein, are active in the management, direction, or supervision of, or as representatives of, any Communist-action organization, Communist foreign government, or the world Communist movement [...]; and
- (2) the extent to which its support, financial or otherwise, is derived from any Communist-action organization, Communist foreign government, or the world Communist movement [...]; and
- (3) the extent to which its funds, resources, or personnel are used to further or promote the objectives of any Communist-action organization, Communist foreign government, or the world Communist movement [...]; and
- (4) the extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement.⁵⁵

This broad definition meant that any number of organizations could be branded as communist-front organizations. Any member of the CPUSA, previously defined as a communist-action organization, could be interpreted as a representative of the CPUSA within another organization. Some could argue that organizations with a possible overlap in membership with the CPUSA were using personnel to further the objectives of the Communist Party. Any organization that supported policies similar to those supported by communists could be seen as deriving support from the CPUSA. Organizations such as unions, whose membership included numbers of CPUSA members or supporters and supported some policies consistent with the Communist party, could conceivably be considered communist-front organizations by the SACB.

⁵⁵ Ibid., Title I, Sec. 13 (f).

To promote registration, the McCarran Act imposed a number of penalties for those failing to register or appeal their case to the SACB. As the FBI already had a detailed membership list of the CPUSA through informants and former party members, lawmakers felt that it would be easier to track down and punish those who didn't comply with registration. Failure to register would provide the government with grounds for prosecution against alleged subversive individuals and organizations. Upon conviction by the SACB for failure to register, organizations were fined up to ten thousand dollars for each member that they failed to register. Individuals convicted by the SACB for failure to register were also subject to a fine of up to ten thousand dollars or up to five years in prison. In the case of individuals providing false registration information, these individuals were subject to the same punishment as for failing to register.⁵⁶ Individuals and organizations could appeal the registration and penalties imposed by the SACB to the U.S. District Court of Appeals or, failing there, the U.S. Supreme Court.

Once registration determined the membership lists of communist-action and communist-front organizations, the government would then be able to remove possible subversive elements. The McCarran Act made it impossible to receive appointed positions within the federal government for members of communist-action and communist-front organizations. It became unlawful for any member of these organizations to hold any non-elective office within the federal government or to hold any position within the defense industry. Furthermore, it prevented any officer or employee of the United States from contributing aid to any member of a communist-action or communist-front organization.⁵⁷ This part of the legislation was mainly directed towards the State Department, considered by most anti-communists to be most

⁵⁶ Ibid., Title I, Sec. 15.

⁵⁷ Ibid., Title I, Sec. 5 (2).

susceptible to communist infiltration.⁵⁸ Any contact with a registered communist organization, past, present, or future, resulted in the termination of the employee. Lawmakers felt that this legislation would better remove subversive elements from the State Department than Truman's loyalty program.⁵⁹

The final means available to remove possible subversive threats was the Emergency Detention amendment, dubbed by opponents as the "concentration camp" amendment. The Emergency Detention amendment was originally offered to the Senate by Senate liberals as a substitute to the McCarran act, but was defeated by conservative opposition. Senators Harvey Kilgore, Paul Douglas, Hubert Humphrey (D-Minnesota), and Herbert Lehman (D-New York) attempted to derail the Internal Security Act by reminding legislators of Japanese-American detention during the Second World War. Their strategy was to use the negative connotations of Japanese internment to discredit the Internal Security Act by proposing draconian legislation requiring preventative detention of possible subversives during internal security crises. Kilgore, Douglas, and the others believed that by proposing the Emergency Detention amendment, they could reduce enthusiasm for the McCarran Act, either to prevent its passage or to uphold Truman's threatened veto.

⁵⁸ Anti-communists such as McCarthy and McCarran held that it was the State Department that was primarily responsible for the American reverses that occurred vis-à-vis the Soviet Union between 1945 and 1950. Communist infiltration of the State Department was believed responsible for policies that led to the "loss" of China, the loss of the American nuclear monopoly, and other reverses.

⁵⁹ The Truman administration, in response to the same security issues that prompted the McCarran act, enacted a loyalty program throughout the executive branch and departments starting in 1947. Careful to avoid any Constitutional issues involving the first or fifth amendments, the Truman loyalty program carefully screened federal employees, particularly those working in the Departments of State and Defense, for possible subversion through a Loyalty Board. Similar to SACB in the McCarran act, the Loyalty Board would examine an employee's file and interview the employee to try and determine his or her loyalty. If, during this process, something raised questions or concerns for the Loyalty Board, the employee would be quietly removed from governmental work until the questions or concerns were satisfactorily answered. Executive Order 9835, *Code of Federal Regulations*, Title 3, sec. 627 (1943-1948). <http://trumanlibrary.org/executiveorders/index.php?pid=502>.

The liberal senators, led by Kilgore, argued that the relocation of Japanese-Americans to camps in the heartland of American and the South during the Second World War was analogous to detaining Communists during a future crisis. Senator Humphrey, in his support for the Emergency Detention amendment, argued that the McCarran Act, used in conjunction with the Smith Act of 1940, made membership of the Communist Party a crime; making the Emergency Detention amendment the only proposed constitutional means of dealing with the internal security crisis.⁶⁰ Senator Douglas took a different, overstated position, arguing that detention during times of crisis was preferable to incarceration and imprisonment during times of peace:

The worst part of imprisonment is the blot upon the name which comes from conviction for a crime. Defamation of character is worse than detention [...] Defamation is really more injurious than detention.⁶¹

Detention for the duration of a national security crisis, according to Douglas, would not carry the same stigma as the possibility of incarceration for belonging to an organization. A name can be reclaimed from detention, he argued, but not from incarceration.

With the defeat of the Emergency Detention amendment as a bill, supporters shifted from trying to substitute another bill for the McCarran Act to attaching the bill to the act itself as an amendment. Humphrey and others believed that by attaching the emergency detention bill to the McCarran act, it would act as a “poison pill” for the legislation; McCarran’s proposed internal security legislation would become intolerable to other Democrats, defeating the entire bill and leaving the administration’s internal security bill as the only viable piece of internal security legislation available. The amendment did not have its intended effect. Senator McCarran

⁶⁰ In 1948, the leadership of the CPUSA was charged under the conspiracy statutes of the Smith Act. The leadership appealed and, in early 1951, the Supreme Court, in *Dennis v. United States*, ruled upholding the conviction on the basis of the conspiratorial nature of CPUSA. Senator Humphrey argued that the registration statutes in the McCarran act would constitute self-incrimination. *Cong. Rec.*, 81st Cong., 2nd Sess., pt. 11: 14421-22. For the original *Dennis* trial, see: *Dennis v. United States* (1951); and Belknap, *Cold War Political Justice*, 77-116.

⁶¹ *Cong. Rec.*, 81st Cong. 2nd Sess., pt. 11: 14424.

worked with Majority Leader Scott Lucas (D-Illinois) to attach the amendment to the McCarran act in exchange for minor revisions to the amendment, particularly with respect to appropriations for detention.⁶² The subsequent vote in the Senate attached the Emergency Detention amendment to the McCarran act by 70 to 7, including aye votes from Senators Douglas and Humphrey who believed they would be able to tie up the entire McCarran act in committee until the amended changes were made.⁶³

Based upon the same information and framework as the rest of the McCarran Act – that the FBI has knowledge of and could arrest most of the Communist apparatus within the United States – the Emergency Detention amendment allowed the President, in times of national emergency, to:

apprehend and by order detain [...] each person as to whom there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage.⁶⁴

This power to apprehend and detain individuals provided congressional sanction to similar actions as President Roosevelt's order to remove Japanese-Americans from the West Coast. As the result of the partisan maneuvering, this amendment, intended to subvert the McCarran act, actually took the McCarran act to its ultimate conclusion. Although Senators McCarran and Mundt were concerned initially with deportation, rather than detention, of possible subversive, the proposed registration statutes, particularly with the involvement of the Attorney General and the Justice Department in the registration process, logically required detention during times of crisis.

⁶² The appropriation revisions were important to McCarran, as it increased Congressional control over detentions and detention camps and restrained the Presidency in this aspect of internal security. McCarran was of the opinion that the President, like children, should be seen but not heard. Ybarra, *Washington Gone Crazy*, 157-58, 525.

⁶³ Ybarra, *Washington Gone Crazy*, 524-25; Paul Douglas, *In the Fullness of Time: The Memoirs of Paul H. Douglas* (New York: Harcourt Brace, 1972), 306-308.

⁶⁴ *Internal Security Act*, Title II, Sec. 103 (a).

Once the President declared a state of national emergency, the detention amendment authorized the Attorney General and Justice Department to issue warrants to those individuals registered under the McCarran act. The amendment prevented the Justice Department from issuing a blanket warrant to the entire list. However, each warrant, in accordance to American law, was issued only with probable cause and had to specifically describe the person to be apprehended or detained.⁶⁵ Although designed to protect civil liberties, this would impede the Justice Department in detaining possible subversives during a state of national emergency. Registration under the McCarran Act meant that an individual was a member of either a Communist-action or Communist-front organization; organizations that, according to Congress, were both conspiratorial and possibly subversive. This meant that probable cause was already established based upon registration. Once the warrant was delivered, the individual would be detained until the crisis passed.

More care was taken with protecting the civil liberties of possible detainees in the detention amendment than the rest of McCarran Act. Looking at the Supreme Court decisions coming out of the Japanese exclusion cases (*Hirabayashi v. United States*; *Korematsu v. United States*; and *Ex Parte Endo*), Congress ensured that the civil rights of possible detainees were protected and a review process was in place. The detention amendment ensured that each detainee understood his rights and the reason why they were being detained.⁶⁶ Furthermore, a preliminary hearing officer was appointed to each detainee and an overview of the evidence against the detainee was presented. At this time, the detainee was allowed to present, if possible, opposing evidence proving that it was unnecessary for them to be detained. Based on the

⁶⁵ *Ibid.*, Title II, Section 104 (a), Para 2.

⁶⁶ Although 16 years before the landmark Supreme Court case, *Miranda v. Arizona* 384 U.S. 436 (1966), the Detention amendment ensured that each detainee was read and understood their Miranda rights.

evidence presented to the hearing officer, the officer would assess the evidence and decide if probable cause existed to detain the individual. The detainee would then either be remanded to the detention center or released.⁶⁷

The detention amendment allowed detainees to appeal their original assessment and petition a new assessment. The Detention Review Board was similar to the SACB and Truman's Loyalty Boards in most respects. It had the power to subpoena relevant witnesses and had access to the government evidence against the detainee. Made up of nine members, the Detention Review Board (DRB) considered the petition of any detainee to have their case reviewed and, if granted, oversaw each new hearing. Should the DRB decide that there was sufficient evidence to show that the detainee did not pose a threat to national security, the Board ordered the detainee released. The DRB also oversaw petitions of former detainees regarding claims, such as the loss of income, due to detention.⁶⁸

In assessing whether just cause existed for the detention of an individual, the detention amendment had certain criteria that both the preliminary hearing officer and the DRB had to look for. Based upon the evidence presented by the government and by the detainee, both the DRB and the hearing officer had to determine:

- (1) Whether such person has knowledge of or has received or given instruction or assignment in the espionage, counterespionage, or sabotage service or procedures of a government or political party of a foreign country, or in the espionage, counterespionage, or sabotage service or procedures of the Communist Party of the United States or of any other organization or political party which seeks to overthrow or destroy by force and violence the Government of the United States or of any of its subdivisions and to substitute therefor a totalitarian dictatorship controlled by a foreign government, and whether such knowledge, instruction, or assignment has been acquired or given by reason of civilian, military, or police service with the United States Government, the governments of the several States, their political

⁶⁷ *Internal Security Act*, Title II, Sec. 104 (d).

⁶⁸ *Ibid.*, Title II, Sec. 109.

- subdivisions, the District of Columbia, the Territories, the Canal Zone, or the insular possessions, or whether such knowledge has been acquired solely by reason of academic or personal interest not under the supervision of or in preparation for service with the government of a foreign country or a foreign political party, or whether, by reason of employment at any time by the Department of Justice or the Central Intelligence Agency, such person has made full written disclosure of such knowledge or instruction to officials within those agencies and such disclosure has been made a matter of record in the files of the agency concerned;
- (2) Any past act or acts of espionage or sabotage committed by such person, or any past participation by such person in any attempt or conspiracy to commit any act of espionage or sabotage, against the United States, any agency or instrumentality thereof, or any public or private national defense facility within the United States;
 - (3) Activity in the espionage or sabotage operations of, or the holding at any time after January 1, 1949, of membership in, the Communist Party of the United States or any other organization or political party which seeks to overthrow or destroy by force and violence the Government of the United States or of any of its political subdivisions and the substitution therefore of a totalitarian dictatorship controlled by a foreign government.⁶⁹

Under the detention amendment, it was not necessary for each criterion to be met. The hearing officer and DRB used the criteria as guidelines in weighing the possible threat that each detainee posed to national security. For example, the holding of membership in the CPUSA contributed to the justification by the hearing officer and the Board of probable cause with respect to detainees. As with the SACB, detainees were able to appeal the findings of the DRB to the U.S. District Court of Appeals or the U.S. Supreme Court.

In addition to attempting to remove possible subversives from the government, the McCarran act also attempted to strengthen previous legislation. Most of these attempts were in response to and based on the legal actions against real and alleged communists between 1948 and 1950. In 1948, the government charged the leadership of the CPUSA with violations of the Smith act. In preparing for the case, U.S. attorneys realized that it would be difficult to argue beyond a reasonable doubt that the communist leadership had advocated for the violent

⁶⁹ Ibid., Title II, Sec. 104 (h).

overthrow of the United States and, thus, violated section 2 of the Smith Act; the defense would be able to argue that the evidence presented against the accused merely advocated change of the current system, not necessarily revolution by violence. The government avoided this problem by charging the communist leadership under the conspiracy statutes of the Smith act, arguing that, while not outright advocating for violent revolution, the mere fact that they were leaders in the Communist party constituted *prima facie* evidence of a conspiracy against the United States government.⁷⁰ The use of conspiracy statutes and the successful prosecution of the Smith Act trials in 1948 led proponents of the McCarran Act to rely on the legal use of conspiracy to close any loopholes in previous Anti-Communist legislation.

The McCarran act made it illegal for any person knowingly to “combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship.”⁷¹ The purposefully broad language of the conspiracy clause allowed the FBI and the Justice Department to cast a wide net with regards to what constituted conspiratorial actions. The phrase “substantially contribute” was vague enough to encompass a broad number of acts including the donation of money to an organization to the teaching of Marxist texts in universities.⁷² The use of the conspiracy clause spoke to the view that legislators had regarding the nature of Communism and the best ways of combating it. Senators on both sides of the political spectrum emphasized the conspiratorial

⁷⁰ Most of the evidence against the accused consisted of Communist literary tracts and publications by the CPUSA. The prosecution then produced witnesses, including F.B.I. informants and former Communists such as Louis Budenz and Harvey Matusow, to interpret the material so that it conformed to the charges at hand. Belknap, *Cold War Political Justice*, 77-116.

⁷¹ *Internal Security Act*, Title I, Sec. 4 (a).

⁷² The fear of Communists in the education system was also a big fear during this period. Some of the more conservative senators, including McCarran and McCarthy, felt that the use of Marxist texts in any context, such as its use as a comparative text in a political science or economics class, constituted the undermining of American values in the education system.

nature of the communist movement. Senators Mundt and Douglas emphasized the conspiracy of Communism while promoting and denouncing the McCarran Act respectively. The perceived nature of the communist movement led legislators to use the conspiracy clause as a means to more effectively indict and prosecute communists and other potential spies within government. Legislators were careful, however, to ensure that they framed the wording of the clause in such a way that the McCarran Act did not make membership of the Communist party illegal under the conspiracy clause. While it would be possible for an overly-zealous Attorney General or Justice Department to use the conspiracy clause in such a manner that it would effectively declare the Communist party illegal – the CPUSA had been designated a communist-action organization by the McCarran Act and, thus, an organization believed to be directed by the world communist network and dedicated to the violent overthrow of the United States – legislators made sure to prevent this by noting that “neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation” of the conspiracy clause.⁷³

The McCarran Act did not address the main issue of communists within government. A number of the people named as communists in government, including Alger Hiss and Henry Dexter White, were not actual members of the CPUSA nor were they members of any communist-front organizations. There would be no need for them to register and their names would not appear on any membership lists. The McCarran act did restrict members of the CPUSA from going underground in the future and did prevent members of the CPUSA and communist-front organizations from entering government positions, but did not prevent those already in power from recruiting possible spies from outside the party apparatus. Greater internal security legislation was necessary by late 1950, but the response of the Senate to the Korean War and anti-communist sentiment resulted in legislation that was less than adequate.

⁷³ *Internal Security Act*, Title I, Sec. 4 (f).

While both the Senate and the House passed the McCarran act overwhelmingly, it still needed to be signed into law by President Truman and, eventually, meet the approval of the Supreme Court. When, in the summer of 1950, President Truman called for a special session of Congress to debate the issue of the internal security of the United States, he had hoped for a relatively short session and that Congress would deliver him internal security legislation similar to his loyalty program in the executive branch. Neither of his hopes reached fruition. The special session allowed Congress to debate internal security legislation through most of the latter half of summer and into the first weeks of September 1950 before presenting President Truman with the McCarran act to sign into law – a piece of legislation that was almost the opposite of what Truman expected. The McCarran act presented President Truman with a dilemma: the American public expected internal security legislation to be passed by Congress and accepted by the President, but the legislation passed by Congress infringed too heavily on the civil liberties of Americans.

Faced with a war against communists in the Korean peninsula, domestic fears of Communist subversion at home, and an unfriendly Congress, it took a great deal of political courage to veto the McCarran act.⁷⁴ On September 22, 1950, President Truman addressed the nation to explain his rationale behind his veto of the McCarran act. President Truman's veto contained many of the same arguments used by detractors during the Senate debate on the bill. The underlying basis of the veto remained the fact that Truman felt that the McCarran act “would

⁷⁴ Although a member of Congress prior to being elected as Vice-President in 1944, President Truman experienced a rocky relationship with Congress as President. This relationship reached its nadir with Truman's veto over the Taft-Hartley act in 1947, and the President's derision of the Republican-controlled 80th Congress as a “do-nothing” Congress. The loss of the conservative Democratic South as a reliable voting block after the Dixiecrat revolt in 1948 also severely limited Truman's ability to push his agenda in Congress. See, for example, Robert Dallek, *Harry S. Truman* (New York: Henry Holt and Company, 2008), 100-116; and Robert J. Donovan, *Tumultuous Years: The Presidency of Harry S. Truman, 1949-1953* (Columbia: University of Missouri Press, 1996), 162-175, 295-98.

not hurt the communists. Instead, it would help them.”⁷⁵ President Truman had several principal objections to the McCarran Act. Truman felt that:

1. It would aid potential enemies by requiring the publication of a complete list of vital defense plants, laboratories, and other installations [as was required by Section 5]
2. It would require the Department of Justice and its Federal Bureau of Investigation to waste immense amounts of time and energy attempting to carry out its unworkable registration provisions
3. It would deprive us of the great assistance of many aliens in intelligence matters
4. It would antagonize friendly governments
5. It would put the Government of the United States in the thought control business
6. It would make it easier for subversive aliens to become naturalized United States citizens
7. It would give government officials vast powers to harass all of our citizens in their exercise of their right to free speech.⁷⁶

Truman’s principal objections to the McCarran act fell into three categories: those that would directly aid possible subversives, those that would obstruct the United States in maintaining internal security, and those that infringe upon the civil rights of American citizens.

President Truman was justifiably concerned about certain aspects of the McCarran Act that seemed to aid, rather than hinder, possible subversives. Section 5 of Title I was of particular concern. Section 5 authorized the Secretary of Defense to designate a list of defense and industrial facilities that are considered essential to the security of the United States and to post this list in the Federal Register. The management of each facility on this list would furthermore be required to post conspicuously a bulletin notifying all employees of the designation of the facility as essential to national security.⁷⁷ This section was originally added in an attempt to

⁷⁵ “Truman Veto of Internal Security Bill, September 22, 1950,” *Public Papers of the President of the United States: Harry S. Truman, 1950* (Washington, D.C: Government Printing Office), 645. [Hereafter referred as *Public Papers, Truman*].

⁷⁶ *Ibid.*, 645-46.

⁷⁷ *Internal Security Act*, Title I, Sec. 5 (b).

prevent industrial and military espionage but was changed after concerns of its applicability towards foreign diplomats and military officers of friendly nations.⁷⁸

With respect to the naturalization of aliens, Truman felt that the McCarran act did little to prevent subversive aliens currently in the country from becoming naturalized citizens. Under the McCarran Act, the only added stipulation for an alien to become a naturalized citizen was simply not to be a member of a listed communist-action or communist-front organization. This meant that each petitioner for citizenship had had to go through the same screening process as the membership lists of registered communist-action or communist-front organizations. With hundreds of thousands of applicants, this meant thousands of man-hours by the Immigration and Naturalization Service (INS) and by the FBI in order to do background checks for petitioners for citizenship.

President Truman's primary concern about the registration provisions, in addition to the time spent by the FBI and Department of Justice implementing them, was his belief that they were ill-conceived and would be ineffective and extremely difficult to implement. President Truman felt that the McCarran Act duplicated the previous effort of the executive branch in the realm of internal security, including the Attorney General's list, and did nothing to improve the nation's security. Truman noted that "we already have on the books strong laws which give us most of the protection we need from the real dangers of treason, espionage, sabotage, and actions looking to the overthrow of our government by force and violence."⁷⁹ Furthermore, Truman felt that it would require the Department of Justice to do twice the work for the same amount of gain and that the provisions "would result in obtaining no information about communists that the FBI

⁷⁸ In the debate over this section, Senator Estes Kefauver of Tennessee went so far as to suggest that, under the original wording of section 5, any non-American member of NATO would be prohibited from viewing classified materials. *Cong. Rec.*, 81st Cong. 2nd Sess., pt. 11: 14243.

⁷⁹ Truman, "Truman Veto of Internal Security Bill, September 22, 1950," *Public Papers, Truman*, 646.

and our other security agencies do not already have.”⁸⁰ The registration provisions, based upon the lists already compiled by the Attorney General and FBI, would essentially be superfluous.

In addition to taking time and energy away from the Department of Justice and other security agencies, President Truman felt that the registration provisions would have consequences in the intelligence field and diminish the intelligence capability of the United States. During its investigations of the Communist Party, the FBI relied on informants within the Party for information to build its case. These informants, who were often paid for their information, provided key testimony in Grand Jury investigations that often swayed the judge, the jury, or both in favor of the government’s case. One of the more famous examples is that of Elizabeth Bentley, whose testimony made many aware of Whittaker Chambers’ and Alger Hiss’s membership in the communist underground within Washington D.C. and the federal government.⁸¹ The registration provisions would make it more difficult for the FBI to convince, or even find, former members of communist-action or communist-front organizations to come forward and testify, as they would be subject to any penalties under the registration provisions.

As important as the practical objections that Truman had against the McCarran Act were, the main thrust of his address was towards the threat he felt that the McCarran Act posed to the civil liberties of American citizens. Truman noted that the provisions of the McCarran Act, “instead of striking blows at communism, they would strike blows at our own liberties and at our position in the forefront of those working for freedom in the world.”⁸² According to Truman, the United States, as the exemplar of freedom and democracy throughout the world, should continue to strive towards these ideals and that the McCarran Act would present the United States with a

⁸⁰ *Ibid.*, 646.

⁸¹ Tanenhaus, *Whittaker Chambers*, 210-11; Weinstein, *Perjury*, 20-21; Cooke, *A Generation on Trial*, 49-54.

⁸² Truman, “Truman Veto of Internal Security Bill, September 22, 1950,” *Public Papers, Truman*, 648.

blemish as leader of the free world. The McCarran Act raised the specter of the recently defeated Nazi regime; Truman feared that the McCarran Act would place the Department of Justice in the role of the Gestapo, ensuring that citizens were thinking and advocating “right” thoughts and ideas. To illustrate his point, Truman uses the section of the McCarran Act (Title I, section 22) that amended the Deportation act of 1918:

Section 22 is so contrary to our national interests that it would actually put the government into the business of thought control by requiring the deportation of any alien who distributes or publishes, or who is affiliated with an organization which distributes or publishes, any written or printed matter advocating (or merely expressing belief in) the economic and governmental doctrines of any form of totalitarianism. This provision does not require an evil intent or purpose on the part of the alien.⁸³

This provision rejects the notion of America as the land of the free, suggesting a more limited free America. This section would also set a precedent for anti-Communism to make inroads into higher education, with senators such as Joseph McCarthy and Pat McCarran calling for, and at times succeeding with, the removal of “red” or “pinko” professors whose only crime was teaching Marxist economics as a counterpoint to capitalism or even just for refusing to take a loyalty oath.⁸⁴

President Truman’s strong veto message was applauded by liberals, but failed to impress Congress. Seen as another attack in the ongoing conflict between Congress and the presidency during Truman’s administration, Congress overturned Truman’s veto of the McCarran Act by a large margin in both the House and the Senate. The Internal Security Act became law on September 23, 1950.

⁸³ Ibid., 652.

⁸⁴ For a full discussion of the effect of the anti-communist crusade and academia, see: Ellen Schrecker, *No Ivory Tower: McCarthyism and the Universities* (New York: Oxford University Press, 1987). For the Supreme Court and Academic Freedom, see: William W. Van Alstyne, Walter P. Metzger, Judith Jarvis Thomson, and Robert M. O’Neill, *Freedom and Tenure in the Academy* (Durham, N.C.: Duke University Press, 1993), 79-154.

While President Truman unsuccessfully attempted to veto the passage of the Internal Security Act in 1950, the debate over the anti-communist crusade continued outside the halls of Congress. Herbert Block, a political cartoonist for the *Washington Post*, began focusing on the growing concerns in government over security and the tactics used by politicians, including McCarthy and McCarran, to achieve a secure United States. Herblock, as the cartoonist was known, started drawing for the *Chicago Daily News* in 1929 before he moved to the *Newspaper Enterprise Association*, where he would win the first of his three Pulitzer prizes for his editorial cartoons. Herblock joined the *Washington Post* in 1946, where he would spend a majority of his career.⁸⁵ His cartoons, syndicated to hundreds of newspapers throughout the country, were influential with Joseph Rauh, amongst others, calling him a “one-man army enlisted for life in the cause of civil rights and liberties,” and did the most to demonize the anti-communist crusade.⁸⁶ Herblock’s cartoons changed not only opinions of his readers, but also the personal habits of those he characterized. Both Joseph McCarthy and Richard Nixon have been reported to shave more than once a day to avoid resemblance to their characterization in Herblock’s cartoons.⁸⁷ McCarran, another target of Herblock, was often portrayed as disheveled as Herblock felt McCarran “prides himself on being something of a dude.”⁸⁸

⁸⁵ Marilyn Berger, “Herblock, *Washington Post* Cartoonist with Wit and Bite, is Dead at 91,” *New York Times*, October 9, 2001. A24.

⁸⁶ *Ibid.*, A24.

⁸⁷ *Ibid.*, A24.

⁸⁸ Herbert Block, *The Herblock Book* (Boston: Beacon Press, 1952), 25.



Figure 2: McCarthyism⁸⁹

Herblock coined the term “McCarthyism” in a March 1950 cartoon depicting an elephant being pushed on to a political platform built on the tar buckets of McCarthyism. McCarthyism, the smearing of political opponents with accusations of communist affiliations and sympathies, was a strong component of Republican Party politics in the late 1940s and Herblock’s “McCarthyism” cartoon illustrated his belief that the Republican Party as a whole did not approach or embrace the tactics of McCarthyism wholeheartedly, but rather was led and cajoled towards accepting

McCarthyism as a viable tactic through a party leadership looking to regain power within Congress. The cartoon shows that the Republican Party was being more and more controlled by its conservative and reactionary elements and willing to use unsavory tactics to control the debate.

Herblock, as with all political cartoonists, tended to exaggerate physical aspects of politicians appearing within his cartoons. In the case of prominent anti-communists such as Senator Joseph McCarthy, Senator Patrick McCarran, and Vice President Nixon, Herblock tended to portray them as in need of a shave and fresh clothes. Such a portrayal gave the men a look that often made them seem sinister.

⁸⁹ Ibid., 145.



Figure 3: "Here he comes now"⁹⁰



Figure 4: "Have a care, sir"⁹¹



Figure 5: "Drop In Any Time"⁹²

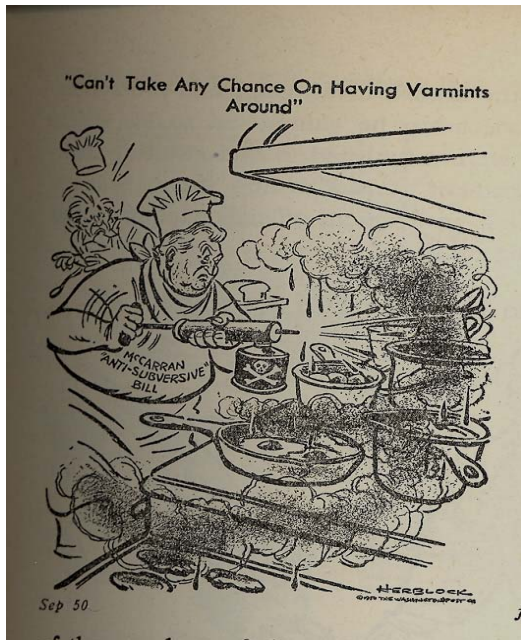
In each of these cartoons, Nixon, McCarthy, and McCarran were all seen as rumpiled and unkempt, in need of a good shave. Herblock portrayed the three with stubble as a “moral 5 o’clock shadow,” making each man seem more sinister to the reader.⁹³ As important to the caricature as the stubble was the fact that each was portrayed as squinting. By portraying these politicians in such a fashion, Herblock provided a sense of unease and untrustworthiness to his audience. Working in a visual medium and within a confined area as political cartoons, Herblock needed to get his message across as quickly and easily as possible. By portraying anti-communist politicians in such an unappealing and untrustworthy manner, Herblock criticized not only the politician as a person, but also the policies endorsed by the politician.

⁹⁰ Herbert Block, *Herblock's Here and Now* (New York: Simon and Schuster, 1955), 45.

⁹¹ *Ibid.*, 114.

⁹² Block, *The Herblock Book*, 45.

⁹³ Berger, “Herblock Dead at 91,” A24.



Although Senator McCarran was a target of Herblock's cartoons before the passage of the Internal Security Act of 1950 – Herblock drew cartoons against McCarran's policy on limiting the influx of refugees displaced by the Second World War for example – Herblock now turned his pen more directly towards McCarran. While the debates raged over internal security in Fall 1950, Herblock took issue with McCarran's approach to securing the nation.

Figure 6: "Can't take any Chances"⁹⁴

Herblock's September 1950 cartoon, "Can't take any chances," portrayed McCarran as the unkempt chef of a greasy spoon diner. Armed with a flit gun full of poison, McCarran is shown poisoning the food in his attempt to remove subversives, while Uncle Sam stands in shock behind McCarran. For Herblock, McCarran's approach to internal security – McCarran wanted to solve the internal security crisis through a single omnibus bill encompassing the various individual internal security bills presented in Congress – would certainly solve the crisis, but at the expense of the nation. Furthermore, the McCarran act would act as a poison within American society, taking care of not only any communists ("varmint") in American society, but also poison American liberty.

⁹⁴ Block, *The Herblock Book*, 151.

Herblock's view of the role of the McCarran Act in American society continued in his October 1950 "Scales of Justice" cartoon. Using the well known image of Lady Justice and her scales, Herblock criticizes the McCarran Act and its new role within American society. The McCarran Act, in the form of a monkey wrench, weighs down the scales – meant to portray the balance of order and liberty in society – on the side of order leading towards a loss of liberty and pushing society towards tyranny. Interestingly, the man representing the public in



Figure 7: "Scales of Justice"⁹⁵

"Scales of Justice" suggests that Lady Justice remove her blindfold and correct the imbalance created by the McCarran Act. Herblock sees the McCarran Act as a monkey wrench within the American justice system and argues for either the federal government or the judiciary, the two branches most associated with the administration of justice in American society, to actively step in and correct the imbalance created by the McCarran Act.

While Herblock targeted the McCarran Act in general terms, the Subversive Activities Control Boards (SACB) and the Senate Internal Security Subcommittee (SISS) created by the McCarran Act also provided a target for Herblock and his critique on anti-communist legislation. As with other Congressional Committees at the time, both of the committees created by the McCarran Act often had the same witnesses telling the same story regarding different accused.⁹⁶

⁹⁵ Block, *The Herblock Book*, 153.

⁹⁶ Harvey Matusow, for example, made a small career out of being a professional witness for various anti-communist Congressional committees before later revealing that he worked for the FBI and committed perjury in his Congressional testimony. See: Harvey Matusow, *False Witness* (New York: Cameron and Kahn, 1955).



In most of these Congressional Committees, witnesses often provided little by way of solid evidence against the accused and dealt more with rumor and innuendo. In a September 1951 cartoon, Herblock tackled the subject of hearsay evidence directly. Entitled “Always Happy to take the Word of a Lady,” the cartoon shows Dame Rumor testifying before the McCarran Committee along with her bird, a parrot in a cage of hearsay evidence – representing the standard anti-communist witness parroting the

Figure 8: "Always Happy to take the Word of a Lady"⁹⁷

answers of other witnesses.⁹⁸ Herblock is

playing off of the stereotype of older women, often spinsters or widowers, as gossips, visually damning the witnesses appearing before Congressional Committees, a majority of whom were men. Senator McCarran, unkempt, in need of a shave, but wearing gloves to make sure that his hands don't get dirty, stands in the presence of Dame Rumor, ready to take her word on any number of issues.

⁹⁷ Block, *The Herblock Book*, 152.

⁹⁸ Senator McCarran was chair of both the Senate Judiciary Committee and the Senate Internal Security Subcommittee before his death in 1954. In “Always Happy to take the Word of a Lady,” Herblock most likely has Dame Rumor testifying before the Senate Internal Security Subcommittee as that was the committee most likely to deal with subversion rather than the full Judiciary Committee.

Herblock also portrayed the McCarran committee as something out of the Spanish Inquisition. In a February 1952 cartoon, Herblock shows the committee from the perspective of the accused. Entitled “Now, you said you wanted to be heard?,” the cartoon shows an accused man requesting that his side of the story be heard before the committee. The Committee itself is portrayed as a tribunal of masked men overseeing the torture the accused until he tells his side of the story the way that the Committee wishes to hear it. Herblock equated a Committee’s power of subpoena to a form of medieval torture.

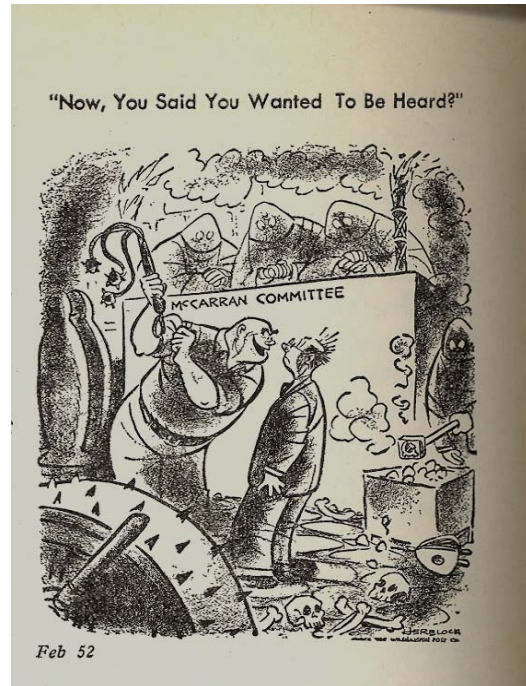


Figure 9: "You say you want to be heard?"⁹⁹

Herblock’s political cartoons dealing with Senator Joseph McCarthy, Vice President Richard Nixon, and Senator Patrick McCarran helped frame the debate over popular domestic anti-communism and provided images to the public consciousness regarding major players and events. An average person, for example, might read about someone testifying before a Congressional Committee and not give it much thought. However, adding Herblock’s political cartoons helped change the experience. The same person could read about the same committee, then read Herblock’s “Now, you said you wanted to be heard?” cartoon and begin seeing and associating Committee questioning with an inquisition, making the reader side with the witness before the Committee.

⁹⁹ Block, *The Herblock Book*, 150.

By the height of McCarthyism in 1954, Congress more clearly legislated against the CPUSA with the Communist Control Act of 1954. The Communist Control Act, introduced by Republican Senator John Butler of Maryland and once again championed in the Judiciary Committee by Senator McCarran, was designed to augment the Internal Security Act of 1950 and to deal with the problem of communists and their association with labor organizations.¹⁰⁰ The Communist Control Act dealt with these problems in two simple ways. The Act surpassed the Internal Security Act in its zealous treatment of the CPUSA, explicitly proscribing the Party as a political organization, depriving it of “any of 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.”¹⁰¹ The reasons for proscribing the party had shifted since the passage of the Internal Security Act four years earlier. Whereas the Internal Security Act focused on the potentiality of the CPUSA attaining its goals through eventual force of numbers, the Communist Control Act focused on the peril posed by the individual members of the party. The legislators creating the act found that the peril of the CPUSA comes from “its failure to acknowledge any limitation as to the nature of its activities” and the dedication by members to the “proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including [...] force and violence.”¹⁰² By proscribing the CPUSA, the Communist Control Act shows the extent to which Congress believed the party to be a threat to the internal security of the United States and the extent to which the anti-communist crusade

¹⁰⁰ Senator Butler owed his election to the Senate largely to Joseph McCarthy. Butler was the Republican candidate in the 1950 Senatorial race against incumbent Millard Tydings, an avowed anti-McCarthyite. As chair of the Tydings committee to investigate Senator McCarthy’s charges of Communists in government in 1950, Tydings was the major target by McCarthy for defeat as McCarthy used his popularity as an anti-communist to support a number of Conservative politicians in the 1950 midterm elections. James Cross Giblin, *The Rise and Fall of Senator Joe McCarthy* (New York: Clarion Books, 2009), 116-118.

¹⁰¹ *Communist Control Act of 1954*, Sec. 3, 65 Stat. 775 (1954).

¹⁰² *Ibid.*, Sec. 2.

had become an issue for politicians. The second way the Communist Control Act dealt with the problem of communists and labor organizations was by bringing labor organizations under the purview of the Subversive Activities Control Board and applying the punishments designated by the Internal Security Act to any offending organizations,

The Communist Control Act attempted to correct a perceived difficulty in the classification of organizations in the Internal Security Act. Believing that communist infiltration into labor organizations, particularly into leadership positions, would hinder American military production during a time of war, Congress felt that the issue of communists and labor unions be directly addressed. Feeling that the “Communist-Action” and “Communist-Controlled” designations were limiting, the Communist Control Act added a “Communist-Infiltrated” designation that covered organizations that:

(A) is substantially directed, dominated, or controlled by an individual or individuals who are, or who within 3 years have been actively engaged in, knowingly given aid or support to a Communist-action organization, a Communist foreign government, or the world Communist movement and (B) is knowingly serving, or within 3 years has knowingly served, as a means for (i) the giving of aid or support to any such organization, government, or movement, or (ii) the impairment of the military strength of the United States or its industrial capacity to furnish logistical or other material support required by its Armed Forces.¹⁰³

The “Communist-infiltrated” designation focused on the three years prior to the passage of the Communist Control Act to ensure that the Act did not infringe on the Internal Security Act of 1950. As the issue of communist infiltration was based on the definitions established by the Internal Security Act, it required the legislation to use that three year window to establish whether an organization could be considered infiltrated by communists. The primary concern of a number of senators, including Democratic Senators Hubert Humphrey of Minnesota and

¹⁰³ *Cong. Rec.*, 83rd Cong. 2nd Sess. Vol. 100, pt. 10: 14235.

Hubert Lehman of New York, was that such a designation would be used by an anti-labor Attorney General against labor unions.

The initial hurdle faced by proponents of the Communist Control Act was not one of civil liberties or the rights of labor organizations, but rather one of jurisdiction. Liberal opponents of the bill believed that labor organizations fell under the jurisdiction of the National Labor Relations Board (NLRB) and that both the NLRB and the unions themselves were already doing the job of preventing communist infiltration into the unions. Senator Lehman noted that:

In the CIO, nine international unions were expelled 5 years ago [1949-1950] because of Communist influence. The CIO leadership launched a concerted offensive to capture the loyal portion of the membership of those unions, and to give the workers organized by these Communist-influenced unions some place to go. In fact, Mr. President, these efforts have had a brilliant success. The nine unions I have referred to had a total membership of approximately 1 million members when they were expelled from the CIO. Today [1954] only six of these unions are left in existence. They have a total of about 250,000 members. Approximately 750,000 of their members have left them and have joined non-Communist Unions of the CIO or, in some cases, of the American Federation of Labor.¹⁰⁴

Lehman, among others, argued that there was no direct need for Butler's proposed legislation as the NLRB had sufficient safeguards and protocols to deal with communist infiltration and the unions were policing themselves against communist infiltration and domination. However correct Senator Lehman was regarding the lack of necessity for this legislation, the issue of communism in American society remained strong enough for the legislation to wind its way through the Senate. Moderate politicians who may have agreed with Lehman on the lack of necessity for the Communist Control Act nonetheless voted for it, seeing the legislation as an easy means of padding ones anti-communist credentials in a midterm election year.

While initially introduced and supported by conservative senators, liberals, led by Senators Lehman and Humphrey, quickly took over control of the bill both to show their anti-

¹⁰⁴ Ibid., pt. 10: 14102.

communist credentials and to provide a degree of protection to labor organizations supporting the Democratic Party. Senator Humphrey decided to reduce anti-labor excesses in the bill by offering a substitute bill in place of Senator Butler's original proposal. Whereas the original Butler proposal carried no exceptions to the "Communist-infiltrated" category, the Humphrey substitute allowed that any labor union affiliated with, and operating in good standing with, a national labor organization whose "policies and activities have been directed to opposing Communist organizations" and the "World Communist Movement," would be assumed to be a non-communist infiltrated organization.¹⁰⁵ Such exceptions would include the large number of unions working under the umbrella of the American Federation of Labor and acknowledged the fact that labor unions, for the most part, had been self-policing and had taken a hard line with respect to communist infiltration of their membership.

Although initially proposed as an anti-communist bill by conservative senators associated with McCarthy, by the time the Communist Control Act was passed, it was a thoroughly liberal piece of anti-communist legislation. The fact that the proscription of the CPUSA made it through intact shows the extent to which the anti-communist crusade had become a central political issue and that a degree of consensus over the role of the Communist Party in American society had developed. Senators who opposed the proscription of the CPUSA voiced their dissent not by voting against the Communist Control Act, but through abstention; rather than risk being associated with communism by voting against a piece of anti-communist legislation, those senators opposing the bill chose not to vote. By August 1954, anti-communism was not a one-party issue as it was in the late-1940s, but was found on both sides of the aisle. The Communist Control Act, with the provisions introduced by Senator Humphrey, added the category of

¹⁰⁵ Ibid., pt. 10: 14235.

“Communist-infiltrated” organizations to those listed in the Internal Security Act while protecting labor unions that had expunged Communist members within their organizations.

President Eisenhower signed the Communist Control Act into law on August 24, 1954, declaring:

The American people are determined to eliminate from their midst organizations which, purporting to be political parties in the accepted sense of that term, are actually conspirators dedicated to the destruction of our form of government by violence and force.

Now they are also determined to do this by means that are fair, just and in accordance with our Constitution. They well realize that to do it in any other way could affect the innocent adversely as well as the guilty, and could in the long run distort and damage our entire judicial procedures.¹⁰⁶

The proscription of the CPUSA was the capstone of federal anti-communist legislation during the second Red Scare. With strong anti-Communist legislation passed over presidential veto (the Internal Security Act), as well as with presidential consent (the Communist Control Act), it was left to the Judiciary to determine the fate of this anti-Communist legislation and to determine the direction in which future internal security legislation would travel.

¹⁰⁶ Dwight D. Eisenhower, “Remarks on the Communist Control Act. August 24, 1954,” *Public Papers of the President: Dwight D. Eisenhower, 1954*, (Washington: Government Printing Office, 1960), 759-60.

Chapter 2 The Supreme Court and the Anti-Communist Prosecutions

As the McCarran Act was being debated in Congress, the Supreme Court was going through a period of transition with respect to its stand on civil liberties. The Court was transitioning from a court dominated by Roosevelt and Truman appointees, one more sympathetic to the government, towards the Warren court of the mid- to late-fifties, a more progressive court.¹ From *Dennis v. United States* and *Carlson v. Landon* in the early 1950s, through the “Red Monday” cases in 1957 (*Watkins v. United States* and *Yates v. United States*), and the “Communist Party” cases (*Communist Party of the United States v. Subversive Activities Control Board* in 1961, and *Albertson v. Subversive Activities Control Board* in 1965), the Supreme Court’s position vis-à-vis the CPUSA transitioned slowly from one of strong support for governmental action against the party to one that limited the government’s range of action against the Party.

Although President Franklin Roosevelt had little opportunity early in his presidency to appoint Justices to the Supreme Court, the Court was certainly considered a Roosevelt Court by the time of his death in 1945. President Roosevelt appointed eight Justices to the Court between 1937 and 1943 and included both political allies, such as Justices Frank Murphy and James Byrnes, and strong personalities such as Justices Hugo Black and Felix Frankfurter. Appointed primarily for their support of the New Deal, the Roosevelt Court, led by Chief Justice Harlan Fiske Stone starting in 1941, tended to side with the government in a majority of cases before it – strongly liberal, with little dissent, on economic issues, but greater dissent amongst the Brethren

¹ “Conservative” and “progressive” are used here in the context of civil liberties. A “conservative” court or individual justice supports the government over the individual in civil liberties cases, whereas opinions from a “progressive” court or individual justice would rule in favor of the individual.

on other issues, particularly government wartime actions on the home front.² With Harry Truman taking over the presidency upon Roosevelt's death on April 12, 1945, the Supreme Court entered a period of transition between the pro-government Roosevelt Court and the liberal Court of Earl Warren concerned with civil liberties.

When Chief Justice Harlan Fiske Stone died in April 1946, President Truman faced a major decision that would affect the direction of the Court. Chief Justice Stone had been able to contain some of the personality conflicts amongst the Brethren during his tenure as Chief Justice. Upon his death, these personality conflicts became public knowledge. Justice Robert Jackson, serving in Germany as the American chief prosecutor in the Nuremberg trials at the time of Stone's death and believing that the position of Chief Justice had been promised to him by President Roosevelt, and Justice Hugo Black were both seen as contenders for the Chief Justice chair. Each, however, had privately told President Truman that he would resign from the Court should the other be appointed Chief. Exacerbating the situation, Justice Jackson released a public statement to the chairmen of the House and Senate Judiciary Committees that attacked Justice Black for his failure to disqualify himself from a case that a former law partner argued before the Court.³ The public nature of the Jackson-Black feud led President Truman to look for

² For example, in *Korematsu v. United States* (1944), Justice Hugo Black wrote for the six member majority upholding the removal of Japanese-American citizens from the West Coast and placing them in relocation camps in the center of the country. Justices Frank Murphy and Robert Jackson issued strongly worded dissents, with Justice Murphy referring to the *Korematsu* decision as a "legalization of racism." *Korematsu v. United States* 323 U.S. 214 (1944); William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (New York: Random House, 1998), 184-202; Roger K. Newman, *Hugo Black: A Biography* (New York: Pantheon Books, 1994), 315-319.

³ The case, *Jewell Ridge Coal Company v. United Mine Workers of America*, dealt with providing monetary compensation for miners as they travelled underground to and from the work site. The Court found that the miners should be compensated for underground travel as they were subject to dangers that miners travelling above ground were not subject to. Justice Jackson dissented on the grounds that the majority opinion ran contrary to the legislative intent of the controlling Fair Labor Standards Act, as well as the fact that the union was represented by Crampton P. Harris, Justice Black's former law partner. *Jewell Ridge Coal Company v. United Mine Works of America*, 325 US 161 (1945). See also: William Domnarski, *The Great Justices, 1941-54: Black, Douglas, Frankfurter and Jackson in Chambers* (Ann Arbor: University of Michigan Press, 2006); Newman, *Hugo Black*, 333-346; and Dennis J. Hutchinson, "The Black-Jackson Feud," *The Supreme Court Review* (1988): 203-43.

someone outside of the Court to replace Stone as Chief Justice. President Truman's choice of Fred Vinson to succeed Harlan Fiske Stone as Chief Justice seemed to be a good choice for the fractured Court: Vinson was not associated with President Roosevelt, meaning that he was detached from any of the factions on the Court and was a long-time personal friend of Truman, allowing the president to appoint someone he trusted to the Court. Truman believed that Vinson's interpersonal skills would allow Vinson to overcome the factions developing in the Court.

As Chief Justice, Vinson would ultimately be unsuccessful in healing the ideological and personal fractures within the Court. During the first years of the Vinson Court, it became clear that two competing ideological factions had begun to emerge. One faction argued that judicial decision-making should be based on a textual interpretation of the Constitution, statutes brought before the Court, and the original intent of legislators; with Justices showing restraint in overturning legislation. A competing faction developed in response, arguing that judicial decision-making should be based more on judicial discretion and decisions crafted with a greater focus on societal attitudes. While these ideological factions were in their infancy during the tenure of both Harlan Fiske Stone and Fred Vinson as Chief Justice, ideological tensions revealed themselves in the jurisprudence involving internal security and civil liberties. On the one hand, Justices Frankfurter and Jackson argued for judicial restraint, focusing on the intent of legislators when passing statutes dealing with communists, and the balancing of state and individual interests in internal security cases. Justices Black and William Douglas found themselves on the other end of the ideological divide, arguing for strict interpretation of the First and Fifth Amendment protections for communists charged under the McCarran Act regardless of the state interest. It is during this transitional period, under Chief Justice Vinson, that the first of

the Smith Act appeals reached the Supreme Court and the Court's decision would shape the debate of internal security and its relationship with civil liberties

In 1950, the Supreme Court was faced with the case that would define the legal position of the court vis-à-vis communists until the “Red Monday” cases of 1957: *Dennis v. United States*. As the first case dealing with the CPUSA before the Supreme Court, *Dennis* is important in that it set the legal precedent for not only the Supreme Court, but also provided a basis for guidance in the lower court's dealings with communist cases as they worked their way through the federal judiciary. The *Dennis* case also established the key argument that would come to dominate future jurisprudence regarding anti-communism: Where do the protections of the First Amendment for the legitimate advocacy of ideas end and the state's ability to punish an individual inciting action against the government begin?

In 1948, the Justice Department, with considerable prodding by J. Edgar Hoover, started prosecutions of top officials of the CPUSA under the Smith act. The Smith act prohibited advocating, printing, publishing or teaching the “duty, necessity, desirability or propriety of overthrowing or destroying the government of the United States.”⁴ The government targeted the Party leadership – including General Secretary Eugene Dennis and John Gates, editor of the *Daily Worker* – believing that the Party would fall apart with the leadership in prison. During the long nine-month initial trial in New York City, the CPUSA argued that it was a legitimate political organization and that any acts, writings and statements by the Party were essentially non-violent in nature, posing no clear and present danger to the United States and that it should be constitutionally protected under the First Amendment. The Party also employed a strategy designed to make a mockery of the trial. Members of the Party protested against the trial both inside and outside the courtroom, charging that the trial was little more than a kangaroo court.

⁴ *Alien Registration Act of 1940*. 54. Stat. 670.

Unfortunately, the strategy of harassment overwhelmed the CPUSA legal strategy; the CPUSA alienated Judge Medina, creating an almost circus-like atmosphere with an openly antagonistic judge.⁵ Ultimately, both strategies failed the CPUSA: Dennis, Gates, and 10 others were found guilty under the Smith Act and were forced to appeal to the Supreme Court to have their convictions overturned.

In 1951, *Dennis v. United States* came before the Supreme Court. Appealing the Smith Act convictions of the CPUSA leadership in 1949, the petitioners in *Dennis* argued that sections 2 and 3 of the Smith Act – the sections making it illegal to advocate or organize groups that advocate the overthrow the government of the United States and the conspiracy statute – violated the constitutional rights of the leadership of the CPUSA under the First Amendment. The petitioners argued that these sections of the Smith Act prevented them from exercising their constitutional right to free speech and that the Marxist-Leninist documents presented at their trial were misinterpreted; they argued that it was merely change in the political and economic structure of government that they advocated, not the complete overthrow of it. This left the Supreme Court to decide whether or not the First Amendment protected the ideas advocated by the CPUSA or if these ideas, using the test developed by Justice Holmes in *Schenck v. United States* (1919), presented a “clear and present danger” to the security of the United States.⁶

In a contentious decision, the Supreme Court ruled 6 to 2 to affirm the Smith Act convictions.⁷ Chief Justice Vinson, writing the majority opinion for himself, and Justices Stanley Reed, Harold Burton, and Sherman Minton, based the decision, in part, on a re-

⁵ Belknap. *Cold War Political Justice*, 177-202.

⁶ *Schenck v. United States*, 249 U.S. 47 (1919).

⁷ Although a 6:2 majority ruled for the government, a total of five separate opinions (3 affirming, 2 dissenting) constituted the Court’s decision. Justice Tom Clark, Truman’s Attorney General at the time of the original case, recused himself from the decision.

interpretation of the “clear and present danger” test used by Judge Learned Hand, the chief judge of the appellate court that heard the original *Dennis* case. The Vinson-Hand interpretation of “clear and present danger” focused more on the intent of the speech and the “gravity,” or proximity, of the danger presented by the speech. Vinson took up Judge Hand’s articulation of this interpretation in his majority opinion:

In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.⁸

As adopted by Chief Justice Vinson, the modified “clear and present danger” doctrine could prohibit speech and action if the speech and action proved to be a clear and present danger to others AND if the clear and present danger was proximate with respect to time (ie. the danger was imminent).⁹ Chief Justice Vinson noted that the government had a responsibility for self-defense and could not “wait until the putsch is about to be executed, the plans have been laid and the signal is awaited” before acting in its own self-interest.¹⁰ Furthermore, Chief Justice Vinson argued, any attempt to overthrow the government by force, regardless of the probability of success, presented a sufficient evil for Congress to prevent.

The context of speech became factored into this reinterpretation of the “clear and present danger” test. With *Dennis*, this meant that the nature of the organization, in this case the CPUSA, mattered almost as much as the speech used. As Chief Justice Vinson noted, while the CPUSA did not actively attempt to overthrow the government by force between the reformation of the CPUSA in 1945 and the conviction of its leadership under the Smith Act in 1948, the

⁸ Marvin Schick, *Learned Hand’s Court* (Baltimore: Johns Hopkins Press, 1970), 180.

⁹ Judge Hand’s language in the appellate decision focused more on the “gravity” of the situation, language that Chief Justice Vinson had problems with reconciling within his majority decision in 1951.

¹⁰ *Dennis v. United States*, 341 US 494 (1951).

overthrow of the government was its ultimate goal. Chief Justice Vinson argued that the CPUSA existed within a particular context that was not compatible to the internal security of the United States. In affirming the conviction of the CPUSA under the Smith Act, the majority opinion noted that the CPUSA was:

a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score.¹¹

The environment of the early Cold War period, according to Chief Justice Vinson, provided the context through which the ideas advocated by the communist leadership were to be viewed. In this context, both the constitutionality of sections 2 and 3 of the Smith Act and the right of Congress to legislate its internal security were affirmed due to the proximity of the danger posed by the ideas advocated by the CPUSA.

Both Justice Felix Frankfurter and Justice Robert Jackson wrote concurring opinions to the majority opinion in which they agreed with the result of the case, but not the means by which the result was attained. Justice Frankfurter affirmed the conviction of the communist leadership, but argued that the result should not have been based on the “clear and present danger” test, but rather based on a balancing of interests between the public interest (in this case, internal security) and the private interest. Justice Frankfurter developed this “balancing” test based on his view of the role of the judiciary vis-à-vis the legislative branch. Justice Frankfurter argued that it was not the job of the judiciary to decide what constituted a danger to the government of the United States; rather that duty fell upon the legislative branch. Justice Frankfurter argued that:

¹¹ Ibid.

Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech. The determination was made after due deliberation, and the seriousness of the congressional purpose is attested by the volume of legislation passed to effectuate the same ends.¹²

This argument fell in line with Justice Frankfurter's belief in judicial restraint. Congress should be allowed to determine what poses a danger to it rather than the judiciary interpreting what constitutes a danger. This, however, did not mean that Justice Frankfurter felt that Congress had carte blanche in legislating self-defense. He noted that:

Congressional power and duty of self-preservation are not absolute. Like the war power, which is indeed an aspect of the power of self-preservation, it is subject to applicable constitutional limitations [...] Our Constitution has no provision lifting restrictions upon governmental authority during periods of emergency, although the scope of restriction may depend on the circumstances in which it is invoked.

The First Amendment is such a restriction. It exacts obedience even during periods of war; it is applicable when war clouds are not figments of the imagination no less than when they are.¹³

For Justice Frankfurter, the inherent right of Congress to defend itself and the rights given to citizens under the Constitution must achieve some form of balance.

Justice Jackson's concurring opinion differed from that of both the majority and Justice Frankfurter's opinion in that Justice Jackson wanted to disregard the "clear and present danger" test altogether. Also a proponent of judicial restraint, Justice Jackson argued that the "clear and present danger" test was not applicable to the *Dennis* case or to any other communist cases because the test simply was not applicable to the stratagems of the communists, namely that of conspiracy. While keeping the "clear and present danger" test "for the application as a 'rule of reason' in the kind of case for which it was devised," Justice Jackson argued that the universal applicability of the test would extend to the communists a host of immunities and would end

¹² Ibid. This "volume of legislation" included both the Smith Act and the McCarran Act.

¹³ *Dennis v. United States* (1951).

with holding the “government captive in a judge-made verbal trap.”¹⁴ This thinking falls in line with previous opinions by Justice Jackson with respect to the First Amendment, primarily his *Terminiello* decision in 1949 where he argued against the doctrinaire use of tests in First Amendment cases, suggesting that such use would essentially turn the Bill of Rights into a “suicide pact.”¹⁵

In his *Dennis* concurrence, Justice Jackson emphasized the conspiratorial nature of the communist movement. Noting that the Court had previously dispensed with the “clear and present danger” test with respect to conspiracies and that the court had also made clear that the conspiracy to commit a crime is a criminal act in and of itself, Justice Jackson argued that, in this light, it would be a logical fallacy to use the “clear and present danger” test in this, or any other communist, case.¹⁶ By using the “clear and present danger” test, the Court would “compel the Government to prove two crimes [conspiracy and intent] in order to convict for one.”¹⁷ Justice Jackson argued that conspiracy statutes have been the primary weapon used against organizations and there is no constitutional authority to remove them from the government’s arsenal.

While the opinions of Justice Frankfurter and Justice Jackson are important in the evolution of the use of the “clear and present danger” test, the majority opinion’s focus on the “gravity” and proximity of the danger in *Dennis* would shape the view of Communism

¹⁴ Ibid.

¹⁵ *Terminiello v. Chicago* 337 US 1 (1949). The case involved the violation of a “breach of peace” city ordinance by a Catholic priest, Arthur Terminiello, in which he gave a speech filled with numerous anti-Semitic and other inflammatory comments. The majority opinion, written by Justice Douglas, overturned Terminiello’s conviction on First Amendment grounds. Justice Jackson dissented, arguing that: “The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”

¹⁶ For conspiracy as a separate crime, see: *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

¹⁷ *Dennis v. United States* (1951).

throughout most of the 1950s. This interpretation would allow the McCarran Act to push forward with the registration of Communist-Action and Communist-Front organizations and the Subversive Activities Control Board initiated hearings to determine the categorization of the CPUSA.

The McCarran Act first came before the Supreme Court in 1952 with *Carlson v. Landon*. Section 23 of the McCarran Act amended the Immigration Act of 1917 to allow for the deportation of aliens based upon their undesirability as members of the CPUSA. In this case, the Attorney General had warrants served to five alien members of the CPUSA and detained them without bail until such a time they could be deported. Each suspect requested a writ of habeas corpus, alleging that they were being held without due process and that the legislation under which they were charged was unconstitutional. The Attorney General produced evidence that supplied probable cause for concern of internal security and the aliens were remanded back to custody pending deportation. *Carlson's* importance to the McCarran Act is that if the decision of the lower court was reversed, if it was decided that the Attorney General could not hold possibly dangerous aliens pending the removal of the danger, then a precedent would be created against Title II of the McCarran Act (the detention statute). In a 5 to 4 decision, the Court agreed with the government, upholding section 23 of the McCarran Act, and allowing the government to hold the petitioners without bail pending deportation.

Writing the majority opinion, Justice Stanley Reed argued primarily along the lines of the separation of power between the branches of the government. Justice Reed notes that “the power to expel aliens, being essentially a power of the political branches, [...] may be exercised entirely through executive officers.”¹⁸ Just as aliens who become citizens of the United States are

¹⁸ *Carlson v. Landon*, 342 U.S. 524 (1952).

allowed in the country by executive and legislative branches, they can also be deported based on the sovereign right of Congress to determine which non-citizens reside in the country. With regard to the charge that the Attorney General abused his power and denied due process to the petitioners, Justice Reed noted that “deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the Constitution.”¹⁹ On the topic of deportation, both the executive and judicial branches are reliant on the discretion of the Attorney General. This does not mean, however, that the discretion of the Attorney General cannot be questioned or even overturned by the executive and judicial branches; in clear cases of abuse, both the executive and judicial branches have a clear obligation to overturn the discretion of the Attorney General.

Justice Reed argued the case for detention in similar terms to Justice Jackson’s concurring opinion in *Dennis*. The majority opinion argued that Congress’ understanding of communism and the strategy of the CPUSA, coupled with the active participation of the petitioners, constituted adequate reason for detention and deportation. Furthermore, “it cannot be expected that the government should be required in addition to show specific acts of sabotage or incitement to subversive action.”²⁰ Thus, with communism and the CPUSA generally seen in conspiratorial terms, knowingly participating in the party by resident aliens constituted probable and reasonable cause for deportation.

By 1957, the Supreme Court had slowly moved away from the strident McCarthy style anti-Communism of 1954. At the end of the 1957 term, the Supreme Court released a number of decisions that, while not completely protecting the CPUSA from harassment and prosecution, limited the field of action in which the government could operate with respect to the Party. The

¹⁹ Ibid.

²⁰ Ibid.

decisions upset a number of people in law enforcement, most notably J. Edgar Hoover, who referred to the day that the series of decisions against the government in anti-communism cases as “Red Monday.”²¹ In *Watkins v. United States*, the first of the two major “Red Monday” cases, the issue at hand was the extent of the powers of HUAC and, in particular, the authority to cite witnesses for contempt of congress. John Watkins was a union vice president who was summoned to testify before HUAC in 1954. Watkins was forthright in answering questions put to him before the committee: he admitted to participating in communist activities and cooperating with members of the Communist Party during a five-year period from 1942 to 1947, but denied that he had joined the Party. Watkins repeatedly refused to invoke his 5th amendment rights and stated his view to the committee:

I refuse to answer certain questions that I believe are outside the proper scope of your committee’s activities. I will answer any questions which this committee puts to me about myself. I will also answer questions about those persons whom I knew to be members of the Communist Party and whom I believe still are. I will not, however, answer any questions with respect to others with whom I associated in the past. I do not believe that any law in this country requires me to testify about persons who may in the past have been Communist Party members or otherwise engaged in Communist Party activity but who to my best knowledge and belief have long since removed themselves from the Communist movement.²²

It was this principled stand, the refusal of Watkins to discuss the political activity of any past associates, which drew the citation for contempt of Congress with a relatively light fine of \$100.00 and a suspended sentence of 1 year.

In an 8 to 1 opinion, Chief Justice Earl Warren overturned the contempt of Congress citation and, more importantly with respect the powers of congressional investigative committees

²¹ Arthur J. Sabin, *In Calmer Times: The Supreme Court and Red Monday* (Philadelphia: University of Pennsylvania Press, 1999), 1-2. The cases making up “Red Monday” were: *Watkins v. United States* 354 U.S. 178 (1957), *Sweezy v. New Hampshire* 354 U.S. 234 (1957), *Service v. Dulles* 354 U.S. 363 (1957), and *Yates v. United States* 354 U.S. 298 (1957).

²² *Watkins v. United States* 354 U.S. 178 (1957).

(such as HUAC), argued that the power of investigative committees to probe into private affairs were broad, but not unlimited. Warren argued that congressional investigative committees had to show a demonstrable and evident purpose to probe into the affairs of private individuals and that exposure for exposure's sake was not sufficient. Warren further argued that the original authorizing resolution for HUAC had been overly vague and, with respect to Watkins appearance before the committee, the committee chairman had not reasonably defined the scope of inquiry, which legally allowed Watkins the right to refuse to answer questions. The *Watkins* decision was further strengthened by a concurring opinion by Justice Frankfurter in which he argued that a witness must be aware of the "pertinency of the information that he has denied to Congress."²³ That is, the questions asked of the witness must be pertinent to the defined scope of inquiry and the witness must be made aware of the pertinence of the inquiry.

The second major decision in the "Red Monday" cases involved a second round of convictions of CPUSA for violating the Smith Act: *Yates v. United States*. In 1952, Oleta O'Connor Yates and thirteen other leaders of the Communist Party in California were charged with violating sections of the Smith Act. Similar to those charged in the *Dennis* case, Yates and her comrades were charged and convicted of advocating and conspiring to overthrow the federal government. In a very precise 7 to 1 ruling Justice John Marshall Harlan II proceeded to reverse the convictions of 5 defendants and allowed the remaining 9 defendants to be retried should the government choose to do so.

Justice Harlan's ruling placed higher standards of evidence on the government to prove violations of the Smith Act. For example, one of the major means by which the government was able to secure indictments and convictions under the Smith Act was to argue, as it did in *Dennis*, that the communists were engaged in conspiratorial actions against the government. In their case

²³ Ibid.

against Yates, the government alleged that the reorganization of the CPUSA in 1945 was part of an ongoing conspiracy against the government and that membership in the CPUSA constituted willful engagement in said conspiracy. Justice Harlan seized on the term “organizing” with respect to the Communist Party and took a strict view in his opinion of the Smith Act’s use of the term. Justice Harlan, going back to the legislative history of the Smith Act, interpreted “organizing” as a one-time, rather than a continuing, act and threw out that part of the indictment on the basis that enough time had passed between the organizing act (1945) and the arrest of Yates (1952) that the statute of limitations had expired on that indictment.

Justice Harlan’s opinion not only limited the Smith Act and prevented the government from prosecuting communists for organizing the CPUSA in 1945, but also limited the government’s ability to indict people for advocating ideas. In the previous Smith Act convictions, communists were convicted based on the fact that they believed that it was necessary to overthrow the government. Most of the evidence presented by the government in these cases included the writings of Marx, Engel, Lenin, and other prominent socialist and communist writers and communists were convicted based on the advocacy of the ideas present in these writings.²⁴ Justice Harlan’s decision shifted the requirement to convict persons under the Smith Act from a theoretical realm (i.e. the realm of ideas) to requiring that the government prove a reasonable expectation that advancing these ideas could incite people into action. Justice Harlan allowed communist ideas to remain within the marketplace of ideas by extending First

²⁴ *Yates v. United States*, 354 U.S. 298 (1957).

Amendment protection of these ideas while allowing some government prohibition of incitement.²⁵

While *Dennis* remained the controlling case for the Supreme Court through the mid-1950s, challenges to the McCarran Act and other state and federal anti-communist legislation by the CPUSA wound their way through the judicial system. The first of these cases to arrive before the Supreme Court was in 1955 with *Communist Party of the United States of America v. Subversive Activities Control Board*. As pursuant to its directives under the McCarran Act, the Subversive Activities Control Board (SACB) held hearings to determine whether the CPUSA met the criteria of a “Communist-Action” organization. In *Communist Party*, the CPUSA challenged the order of the Control Board for the Party to register as a “Communist Action” organization.

The Party attacked the order to register on three fronts. First, they disputed the Board’s findings of the CPUSA as a communist-action organization. Next, lawyers for the Party attacked the registration statute as violating the First Amendment protections on speech and association of its members. Finally, the CPUSA argued that the Internal Security Act violated due process and the Fifth Amendment protections offered to Party members.

The Board’s report made a number of findings against the CPUSA that led to the determination that the Party was a communist-action organization. The first two major findings of the Board against the Party was that the Party acted pursuant to Soviet policy and that it advocated views and policies in line with those of the Soviet Union that included, but were not limited to:

²⁵ In this case, Justice Harlan better articulated Judge Hand’s argument in the initial appeal of the *Dennis* case than did Chief Justice Vinson. By requiring the government to prove a reasonable expectation of incitement, advocacy of Communist ideas becomes protected by the First Amendment.

That the Chiang Kai-shek [sic] regime while on the mainland of China was reactionary and corrupt; that the People's Republic of China should be admitted into the United Nations; that the United States and the United Nations should not have intervened in the Korean War; or that prohibition of the use of atomic weapons, as proposed in the Stockholm Resolution, was in the interest of world peace.²⁶

The finding of non-deviation, the CPUSA lawyers argued, provided a means for governmental control over political expression. If the Party could be classified as a communist-action organization on the basis of political beliefs, then other organizations, such as labor organizations, could be classified in a similar manner.

In addition to the issue of non-deviation within the Board's report, lawyers for the Party also argued that a majority of evidence put before the Board was not relevant to the proceedings. The Board, argued the Party's lawyers, faced a difficulty in finding evidence of Soviet directives for the Party after the disaffiliation of the Party from the Communist International in 1940. Outside of witnesses against the Party, some of whom may or may not have perjured themselves, the bulk of documentary evidence against the Party included the "so-called Marxist classics, the writings of Marx, Engels, Lenin, Stalin, most of them written before there was a Soviet Union," and evidence from the 1920s and 1930s, prior to the Party's disaffiliation with the Comintern.²⁷

The most interesting argument with the Board's report was not against the report, but against the Board itself. Joseph Forer suggested that the Board was prejudicial against the Party and the report of the Party as a communist-action organization should be invalid as the Board was not an impartial tribunal and required such a finding for its continued existence. The Internal Security Act created the Subversive Activities Control Board, the sole purpose of which

²⁶ John Abt, "Communist Party of the United States v. Subversive Activities Control Board," *Oral Arguments of the Supreme Court of the United States: The Warren Court, 1953-1968 Term*, (Frederick, Maryland: University Publications of America, 1984), 10. [Hereafter referred as *Oral Arguments*].

²⁷ Joseph Forer, "Communist Party of the United States v. Subversive Activities Control Board." *Oral Arguments*, 27-28.

was to determine whether any organization can be identified as communist-action or communist-front organization.²⁸ Forer argued that if the Board had decided in favor of the Party:

it would have made the Act inoperative – it would have, in effect, repealed it. Because there could be no organization which could have been accused under the Act once the petitioner had been cleared. The Board thereby, by deciding in favor of petitioner, would have eliminated its entire jurisdiction, all future business for itself, and with it the jobs and salaries of the Board members. That therefore put the board under irresistible pressure to decide against the petitioner, and the temptation of self-interest to so decide.²⁹

In essence, Forer argued, the Board had to return a finding of the Party as a communist-action organization in order to justify its own continued existence. Any other decision by the Board was signing its own death warrant.

The focus of the Party's First Amendment defense was not on the Amendment's Speech protections, but rather on Freedom of Association. Abt argued that the act attempted to "coerce conformity by suppressing advocacy, association, and collective activity for wholly legitimate purposes."³⁰ Forcing the Party to register with the government would further stigmatize the Party in the eyes of the public, hurting not only the Party but its members, by classifying it as part of a seditious conspiracy against the United States. The only remedy for members from this stigma was disassociation with the Party, as revealed through questioning from Chief Justice Warren:

THE COURT: His only remedy is to withdraw from the organization?

MR. FORER: You mean he – yes, he can withdraw from the organization.

That's a violation of his right of association. In other words, the remedy that you're suggesting, that the –

THE COURT: I just asked if that was the sole remedy?

MR FORER: That is his sole remedy, if you can call it a remedy. In other words, in order to get due process he has to sacrifice his First Amendment right.

²⁸ *Internal Security Act of 1950*. Title I, Sec. 12.

²⁹ Forer, "Communist Party of the United States v. Subversive Activities Control Board," *Oral Arguments*, 23.

³⁰ Abt, "Communist Party of the United States v. Subversive Activities Control Board," *Oral Arguments*, 1.

THE COURT: Those consequences are entailed only after the judgment of the Board?

MR. FORER: Only after the judgment of this Court – of the Board – and only if it's sustained by this Court.³¹

In order for members to avoid the stigma attached to the Party after being forced to register, members would have to choose between leaving the Party and giving up their freedom to associate with whomever they desire or to remain with the Party and carry the stigma of being associated with an organization considered by the government to be treasonous.

In addition to being stigmatized as being a member of a seditious conspiracy against the United States, the Party argued that that the function of the sanctions levied against members of a communist-action or communist-front organizations were to make the cost of being a member of said organizations progressively prohibitive. The prohibition against members of said organizations to hold non-elective office, the inability of members to apply for or use passports, and the ability of the government to revoke the citizenship of naturalized members and to deport alien members, according to the Party's lawyers, all provided deterrence for people joining the Party and exercising their right to association and provided incentives for aliens and naturalized citizens to leave an organization that relied heavily on foreign or newly naturalized membership.

The Party also argued that forced registration constituted a violation of the Fifth Amendment rights of members. Registration, the Party argued, did not merely expose organizations and members to having their names published on a list. By registering with the government, the Party agreed with the government's definition of it as part of a foreign-controlled seditious conspiracy, which is in clear violation of the Fifth Amendment protection against self-incrimination. Thus, the registration requirement gave the Party a "choice between

³¹ Forer, "Communist Party of the United States v. Subversive Activities Control Board," *Oral Arguments*, 19.

suicide by registration and governmental execution for nonregistration.”³² The Party must either register and be publically labeled and stigmatized as a member of a conspiracy against the United States or refuse to register and expose itself to sanctions that would cripple the Party and its membership.

In addition to the Act violating the protections against self-incrimination, the Party also argued that the Act violated due process and the Fifth and Sixth Amendment rights of members of targeted organizations. The Party argued that the Internal Security Act was based on the existence of a “world Communist movement” to which the CPUSA was party. The existence of this movement, with respect to the Act, was determined through legislative findings, not through adjudication or hearings where the defendant would be able to cross-examine witnesses and the evidence against itself. Congress, Abt argued, incorporated these legislative findings into the definitions established within the Act and, by doing so, “it made the liability of a particular organization to register dependent upon the existence of facts which it found legislatively, and legislatively only, and which the organization is foreclosed from litigating.”³³ By preventing the Party and other organizations from challenging the existence of, or the Party’s involvement in, a worldwide Communist conspiracy, the Act violated the Fifth and Sixth amendment right of members of said organizations.

Unfortunately for the CPUSA, the Court did not entirely agree with their arguments. In a 6 to 3 majority opinion written by Justice Frankfurter, the Court focused more on the evidentiary problems brought forth in the appellate case than on the constitutional questions brought forth by the Party’s lawyers. Justice Frankfurter did not completely ignore the constitutional issues, but rather argued that it was necessary to deal with what he perceived as an error by the lower court

³² Abt, “Communist Party of the United States v. Subversive Activities Control Board,” *Oral Arguments*, 6.

³³ *Ibid.*, 15-16.

ignoring problems in the Board's initial hearing – particularly those dealing with witnesses. During the appellate argument, the Party claimed, without a challenge from the government, that three key witnesses committed perjury before the Board in their written statements against the Party.³⁴ The appellate court saw fit that the mass of evidence against the Party outweighed the perjured testimony of three witnesses. Justice Frankfurter argued that, while the Party did raise some significant constitutional problems with the Internal Security Act, the Court could not deal with these constitutional problems until there was a fair and full hearing and decision on the question of whether the Party should be classified as a communist-action organization and ordered that the Board must “reconsider its original determination in light of the record as freed from the challenge that now beclouds it.”³⁵ If the Board then determined that the Party met the criteria of a communist-action organization, the Court could then decide upon any constitutional challenges brought forth by the Party.

By 1960, after the Board abided by the Court's requirement to reconsider the record of the CPUSA, the case against the Subversive Activities Control Board once again made it before the Supreme Court. The Court allowed John Abt and Joseph Forer to re-introduce their constitutional arguments from the previous case and, with the reconsideration of the Board on the question of the Party as a communist-action organization, the Court would be able to rule on the constitutional questions posed by the Act.³⁶ In a 5 to 4 decision, Justice Frankfurter once again ruled as premature a number of the constitutional questions brought before the Court,

³⁴ Each of the witnesses, Harvey Matusow, Paul Crouch, and Manning Johnson, were all professional witnesses for anti-Communist committees and organizations. Harvey Matusow, in particular, admitted to being hired by the F.B.I and paid by the agency to lie about members of the CPUSA in his book *False Witness*. Harvey Matusow. *False Witness* (New York: Cameron, 1955).

³⁵ *Communist Party of the United States v. Subversive Activities Control Board*. 351 U.S. 115 (1956).

³⁶ The Court ruled that the written record could be used in 1960 in *Communist Party of the U.S. v. Subversive Activities*, 361 U.S. 951 (1960).

including: whether the Act regulated or prohibited conduct of registered organizations and members; and whether registration constituted a violation of members Fifth Amendment protections. Justice Frankfurter's opinion focused primarily on the constitutionality of the registration statute, particularly the Fifth Amendment question of due process and the First Amendment question of protecting freedom of speech and association.³⁷

Responding to the Party's charge that the Act constituted a bill of attainder against the Party, violating the Party's Fifth Amendment rights, Justice Frankfurter argued that the Act applied "not to specific organizations but to described activities in which an organization may or may not engage."³⁸ The focus on "activities" was key to Justice Frankfurter's finding that the Act did not violate the due process. Justice Frankfurter argued that it was within the realm of the legislative branch to curb certain behavior deemed to be harmful to the public welfare and "so long as the incidence of legislation is such that the persons who engage in the regulated conduct, be they many or few, can escape regulation merely by altering the course of their own present activities, there can be no complaint of attainder."³⁹ As the Act focuses on behavior rather than on a specific class of people, it could not be classified as a bill of attainder.

With respect to the First Amendment question posed by the Party, Justice Frankfurter applied the balancing test to try to accommodate the "exigencies of self preservation and the values of liberty."⁴⁰ Justice Frankfurter focused on the legislative history of the Internal Security Act and other anti-communist legislation to weigh the threat to public welfare posed by the Party. The government, he argued, had a rational interest in requiring the registration of the

³⁷ *Communist Party v. SACB*, 367 U.S. 1 (1961).

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ *Communist Party v. SACB* (1961).

Party and the exposure of its officers and members on the Attorney General's list to expose what it felt was a conspiracy against the government. Registration removes the anonymity of officers and members that served:

the double purpose of protecting [the Party] from popular prejudice and of enabling them to cover over a foreign-directed conspiracy, infiltrate into other groups, and enlist the support of persons who would not, if the truth were revealed, lend their support, [...] it would be a distortion of the First Amendment to hold that it prohibits Congress from removing the mask⁴¹

In Justice Frankfurter's view, the public interest in exposing the membership and officers of the Party outweighed the Party's individual interest. The constitutional issues that Justice Frankfurter felt were prematurely brought before the Court in the *Communist Party* cases would be handled by the court in cases involving individuals and the Internal Security Act, particularly *Albertson v. SACB*.

Although ordered by the Supreme Court to register with the government after the *Communist Party* cases, the Party refused to register and continued to litigate against the Internal Security Act. The government, following the guidelines of the Act, proceeded to issue orders for individual members to register with the Attorney General. William Albertson challenged his order to register as an individual on the grounds that it violated his Fifth Amendment rights.

The Party argued along the same lines as they had in the *Communist Party* cases with respect to the Fifth Amendment. John Abt, arguing for the Party, suggested that registration for individuals left them stuck between the choice of "self-incrimination, self-defamation and the sacrifice of privacy, conscience and belief by registering, or life imprisonment for nonregistration."⁴² Unlike the *Communist Party* cases, which dealt with the organization as a

⁴¹ Ibid.

⁴² Abt, "Albertson v. Subversive Activities Control Board," *Oral Arguments*, 4.

whole, the individual orders for registration, Abt argued, allowed for protection under the Fifth Amendment.

The Fifth Amendment issue brought forth by the Party was the issue of form IS-52(a); the form required to be signed by individuals when they register. The form required individuals to provide the following information to the government:

1. Name of the Communist-action organization of which Registrant was a member within the preceding twelve months.
2. (a) Name of Registrant.
(b) All other names used by Registrant during the past ten years and dates when used.
(c) Date of birth.
(d) Place of birth.
3. (a) Present business address.
(b) Present residence address.
4. If the Registrant is now or has within the past twelve months been an officer of the Communist-action organization listed in response to question number 1:
 - (a) List all offices so held and the date when held.
 - (b) Give a description of the duties or functions performed during tenure of office.⁴³

The Party argued that that by admitting to membership in a Communist-action organization as required by the form would be tantamount to admitting to be part of a seditious conspiracy against the United States. The information required by the form could then be used, according to the Party's lawyers, not merely for exposing members but as leads and incriminating evidence in future prosecutions.⁴⁴

In an 8 to 0 decision, Justice Brennan ruled in favor of Albertson. Brennan's opinion focused solely on the issue of whether the registration statute violated the Fifth Amendment rights of individuals required to register with the Attorney General. Justice Brennan noted that the registration requirement, particularly the requirement to fill out a written declaration, was

⁴³ See Appendix for form IS-52(a)

⁴⁴ The government could prosecute members under either the Smith Act (18 U.S.C. § 2385) or the Subversive Activities Control Act (64 Stat. 991) on the basis of their registering under the Internal Security Act.

equivalent to a witness on the witness stand, and therefore “if the admission cannot be compelled in oral testimony, we [the Court] do not see how compulsion in writing makes a difference for constitutional purposes.”⁴⁵ The Internal Security Act attempted to preclude some of the Fifth Amendment challenges to the registration statute by incorporating certain immunity language, including the fact that admission of party membership “shall not *per se* constitute a violation of § 4(a) and (c) or any other criminal statute, or ‘be received in evidence’ against a registrant in any criminal prosecution.”⁴⁶ Justice Brennan argued that the protection offered by the immunity language was incomplete and that for the immunity language to supplant the protection offered by the Fifth Amendment, the statute must provide “complete protection from all the perils against which the constitutional prohibition was designed to guard.”⁴⁷ With protection of the Fifth Amendment extended over the signing of registration statements, the registration statute of the Internal Security Act was rendered obsolete.⁴⁸

While the Communist Party fought the registration requirements of the Internal Security Act in the Federal Courts, the anti-communist crusade continued apace on both the state and federal levels. As the Communist Party challenges to government registration moved through the courts, the focus of the anti-communist crusade shifted from a fear of communist infiltration into the federal government to a fear of communist provocation of racial problems to weaken the nation. Attempts by the state and federal governments to secure themselves against perceived communist instigation on the race question allowed the ideas of communism and racial

⁴⁵ *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965).

⁴⁶ *Internal Security Act of 1950*, Title I, Sec. 4(f).

⁴⁷ *Albertson v. Subversive Activities Control Board* (1965).

⁴⁸ For an exhaustive examination of the Attorney General’s list of Subversive Organizations, see: Goldstein, *American Blacklist*, 2008.

integration to become intertwined and for opponents to use the methods of the anti-communist crusade against the growing civil rights movement.

Chapter 3 **Anti-Communism and Civil Rights in the 1950s**

The death of Senator Pat McCarran in September, and the Senate censure of Joseph McCarthy in December of 1954, removed from the anti-Communist crusade two of its most prominent members. With McCarthy sidelined, other national issues – particularly civil rights after the *Brown v. Board of Education* decision in May 1954 – replaced the anti-communist crusade as the preeminent domestic issue of the day. On the federal level, the issue of government registration of the CPUSA was winding its way through the Supreme Court, while the domestic focus of the Eisenhower administration necessarily shifted from anti-communism to civil rights in the second term of Eisenhower’s presidency. Domestic anti-communism did not simply disappear, but instead shifted focus. Domestic anti-communism became more prominent at the state level – for example, the long-running Tenney Committee in California and the growing emphasis Southern politicians placed on the connection between communism and civil rights. The FBI, under Hoover’s direction, continued to investigate domestic communism, including links between communists and civil rights groups.

The FBI, in its pursuit of communists, had a solid basis for investigating communist involvement in civil rights groups. Since the formation of the CPUSA in 1919-1920, the Party had been interested in the status of blacks in American society for both political and ideological reasons.¹ The Party believed that a revolution of the working class in America could not occur with a racial divide between blacks and whites and the Party could gain significant support from blacks throughout the nation. John Reed, attending the Second Congress of the Communist International in 1920 as a representative of the Communist Labor Party, provided his observations of the racial situation in the United States, noting that blacks:

¹ The CPUSA would be formed through the forced merging of the Communist Labor Party and Communist Party of America by the Communist International.

hold themselves above all to be Americans, they feel at home in the United States. That simplifies the tasks of the communists considerably. The only correct policy for the American Communists towards the Negroes is to regard them above all as workers.²

By focusing on blacks, particularly Southern blacks, as workers first, rather than an oppressed people, the CPUSA offered incentives for blacks to work for the Party. The Party did not portray itself as a paternalistic organization liberating blacks, but rather an organization that focused on class rather than racial divisions. The CPUSA demonstrated its policy on race primarily in the South, for example having a black man appointed to a leadership position in the Party. James Ford was selected as the Party's Vice Presidential candidate in presidential campaigns between 1932 and 1940, the first black man to be on a presidential ticket. The Party also established popular front organizations such as the American Negro Labor Congress, the League of Struggle for Negro Rights, and the National Negro Congress. These popular front organizations would have some measure of success for the CPUSA – the poet, Langston Hughes, for example, would join the League of Struggle for Negro Rights in its support for the “Scottsboro boys” in their trials during the 1930s – but the black popular front organizations were unable to achieve the success hoped by the CPUSA.³

When the popular front between liberals and communists collapsed with word of the August 23, 1939, non-aggression pact between Germany and the Soviet Union, the CPUSA lost much of its success and credibility among the black community that had been gained during the

² Philip Foner and James Allen, eds., *American Communism and Black Americans: A Documentary History, 1919-1929* (Philadelphia: Temple University Press, 1987), 6.

³ The “Scottsboro Boys” were nine black men arrested in Paint Rock, Alabama in 1931. Initially charged with vagrancy, the men were charged with rape when two women alleged that they were raped by the accused. The men were transferred to Scottsboro, Alabama, where they received poor legal representation and biased jury trials. See, for example: Dan T. Carter, *Scottsboro: A Tragedy of the American South*, revised edition (Baton Rouge: Louisiana State University Press, 1979); and Michael Thurston, “Black Christ, Red Flag: Langston Hughes on Scottsboro” *College Literature*, vol. 2, no. 3, Race and Politics: The Experience of African-American Literature (October 1995): 30-49.

popular front period. The loss of credibility did not deter the Party in its push for racial harmony within the working class and the Party continued to attempt to exploit opportunities within the black community, as it did for the “Scottsboro boys” in the 1930s.⁴ In the mid-to-late 1950s, the CPUSA attempted to exploit another national racial issue, the lynching of Emmett Till in 1955. Till, a 14 year-old boy from Chicago, was visiting family in Mississippi, when he was taken from his family’s house and brutally beaten and killed before his body was dumped into the Mississippi River by a man who believed that Till had been flirting with his wife.⁵ The lynching of Emmett Till, occurring between the *Brown* decision in 1954 and the Montgomery Bus Boycott in December 1955, became a major event in the early civil rights movement and the Communist Party attempted to take advantage to gain support amongst the black community.

Shortly after the acquittal of Till’s murderers in September 1955, the CPUSA urged members to take advantage of the situation. A September 29, 1955, memo from the Party leadership to all Party districts illustrated the importance the Party placed on the indignation in the North created by the Till lynching and acquittal. The Party leadership noted that:

Popular indignation is widespread. Negro organizations, Negro leaders and the Negro press have sounded the alarm. If this important struggle is to be won, however, the Communist Party, and the American Left, in the first place, must be fully mobilized.⁶

⁴ After the initial Scottsboro trials resulted in convictions for the men, the legal arm of the CPUSA (the International Labor Defense) took over for the subsequent appeals to the Supreme Courts of Alabama and United States.

⁵ See: Stephen J. Whitfield, *A Death in the Delta: The Story of Emmett Till* (Baltimore: Johns Hopkins University Press, 1991); John R. Tisdale, “Different Assignments, Different Perspectives: How Reporters Reconstruct the Emmett Till Civil Rights Murder Trial,” *The Oral History Review*, vol. 29, no. 1 (Winter-Spring 2002), 39-58; Terry Wagner, “America’s Civil Rights Revolution: Three Documentaries about Emmett Till’s Murder in Mississippi (1955),” *Historical Journal of Film, Radio, and Television* vol. 30, no. 2 (June 2010): 187-201.

⁶ Memorandum, National Administrative Committee (CPUSA), “Re: Emmett Louis Till Lynching,” September 29, 1955. White House Office of the Special Assistant for National Security Affairs, FBI Series, Box 3, FBI T-Z (1), Dwight D. Eisenhower Presidential Library. http://www.eisenhower.archives.gov/Research/Digital_Documents/Civil_Rights_Emmett_Till_Case/New%20PDFs/1955_09_29_Memo_re_lynching.pdf [Hereafter referred as Digital Document, Eisenhower Library].

The problem, however, was a lack of a concerted effort throughout the Party to mobilize around the issue. The Party's split focus at the time of the Till lynching had to do with the Party challenging the registration requirements of the McCarran Act in the Courts, while at the same time coordinating day-to-day Party activities, including mobilizing against Emmett Till's murderers.

To produce a coordinated effort against the Till lynching, the Party leadership ordered the undertaking of three initiatives: (1) putting public pressure on the Eisenhower administration; (2) putting pressure on Congress and the Congressional delegation of Mississippi; and (3) position the Party as a leading proponent for racial justice. The Party wanted to put pressure on the Eisenhower administration, particularly Attorney General Herbert Brownell, to intervene in Mississippi on behalf of the Till family. To pressure the Eisenhower administration, the Party leadership urged the writing of "hundreds of thousands of postcards, telegrams, letters, petitions, and resolutions to the President and Attorney General Brownell from individuals and organizations."⁷ The letter-writing campaign, stimulated by Party members in trade unions and involving other organizations such as the NAACP, was regarded as a precursor to the organizing of delegations to go to Washington, D.C. to present petitions and the organizing of Emmett Till memorial meetings throughout major cities to show support to both the black community and pressure the Eisenhower administration to act.

In addition to urging the Eisenhower administration to intervene in Mississippi, the Party leadership also targeted Congress. Declaring the Mississippi Congressional delegation to be "in Congress illegally," the CPUSA leaders hoped to influence labor unions, the NAACP, and other black organizations to pressure the Democratic Party to challenge the right of Congress to seat Senator James Eastland, Chairman and ranking Democratic Senator on the Senate Judiciary

⁷ Ibid.

Committee, and to urge for a special session of Congress to deal with anti-lynching legislation.⁸ The Party hoped that by using two key constituencies of the Democratic Party, labor and blacks, enough pressure would be brought on primarily Northern Democrats to push Democratic leaders into acting against some of their Southern brethren.

The Party leadership wanted greater coordination in dealing with the Till lynching and other racial issues so the Party could position itself in the forefront of racial issues so as to influence the movement. The Party:

must find the way, in the broadest and most flexible manner to advance the Party analysis of these events, showing at all times the need for a greater focus on [Attorney General Herbert] Brownell, and a more rounded program of demands.⁹

By stepping to the forefront of racial issues, the CPUSA could portray itself as leading the reformers in the labor and black organizations rather than being a latecomer to these issues. The Party believed that these organizations lacked a coherent and unifying message and that the Party could and should step in and fill that role.

While the CPUSA attempted to develop a coherent strategy with regard to race, FBI Director Hoover reported to the White House the initial communist organizing event relating to Emmett Till. In a September 6, 1955, memo to Dillon Anderson, President Eisenhower's National Security Advisor, Hoover reported that reliable confidential informants (CI's) had passed on information detailing the campaign of the CPUSA district of Illinois and Indiana to protest the lynching of Till. Claude Lightfoot, chairman of the Illinois-Indiana district of the Party and based around Chicago (Till's hometown), set up the Illinois campaign to include a letter writing campaign to President Eisenhower and a leaflet campaign that included delivering

⁸ Memorandum, National Administrative Committee (CPUSA), "Re: Emmett Louis Till Lynching," September 29, 1955. White House Office of the Special Assistant for National Security Affairs, FBI Series, Box 3, FBI T-Z (1), Digital Document, Eisenhower Library.

⁹ Ibid.

over 6000 leaflets throughout Chicago (particularly on the heavily-black south side of the city).¹⁰ The campaign included leaflets, “Punish the Child Lynchers,” calling for President Eisenhower to dismiss Attorney General Brownell for his lack of action towards Mississippi and for the President to “end the disgrace of racism and Jim Crow.”¹¹ Lightfoot’s campaign also included holding large memorial meetings for Emmett Till and reaching out to Chicago’s religious community to sermonize on the death of Emmett Till and the racial situation in Mississippi.¹² The Illinois-Indiana Party district further established delegations to Washington to publicly petition Attorney General Brownell or, failing that, the Senate Judiciary Committee to pressure federal authorities and “condemn them for not protecting constitutional guarantees in the State of Mississippi because of the failure of the state to protect these guarantees.”¹³ Lightfoot’s organization of the Party’s Illinois-Indiana district, including reaching out to the black community of Chicago and organizing delegations to Washington, D.C., established the blueprint that would be set out in the September 29 national Party memo.

The growing concern of the FBI over Lightfoot’s organizing in Chicago and the Party’s push at working closer with the black community in other major cities focused as much on the goals of the CPUSA as it did with potential violence and incitement to violence. Director Hoover reported to Dillon Anderson indications that members of the black community in Chicago, Detroit and other cities had been “purchasing small firearms and sending them by

¹⁰ Letter, J. Edgar Hoover to Dillon Anderson, Re: Communist Party, Chicago, and Emmett Till, September 6, 1955. White House Office of the Special Assistant for National Security Affairs, FBI Series, Box 3, FBI T-Z (1), Digital Document, Eisenhower Library.

¹¹ Letter, J. Edgar Hoover to Dillon Anderson, Re: Communists and Emmett Till, September 13, 1955. White House Office of the Special Assistant for National Security Affairs, FBI Series, Box 3, FBI T-Z (1), Digital Document, Eisenhower Library.

¹² Letter, J. Edgar Hoover to Dillon Anderson, September 6, 1955. White House Office of the Special Assistant for National Security Affairs, FBI Series, Box 3, FBI T-Z (1), Digital Document, Eisenhower Library.

¹³ Letter, J. Edgar Hoover to Dillon Anderson, September 13, 1955. White House Office of the Special Assistant for National Security Affairs, FBI Series, Box 3, FBI T-Z (1), Digital Document, Eisenhower Library.

various means to relatives in the South.”¹⁴ The FBI remained concerned that the weapons, ostensibly for self-defense, could be used to escalate racial violence in the South. Hoover reported that the informant believed that the Party itself was not directly involved in the purchase or shipping of the weapons, but noted that individual members and local leaders boasted about helping to ship weapons south.¹⁵

The growing racial tension in the south and the possibility of greater violence on both sides led to a FBI briefing on the existing racial tension for the President and cabinet, March 1956. Hoover’s briefing provided background for the current racial tension and included detailed briefings on proponents for integration, including the CPUSA. Arguing that the CPUSA was using “the Negro as a rallying point to further its aim of weakening the United States,” Hoover noted that Party had been attempting to exploit areas of racial tension, such as the Emmett Till lynching, to expand into Southern states – particularly Alabama, Georgia, and Mississippi, states that had a burgeoning industrial economy.¹⁶ The Party intended to use the period of racial tension in the 1950s as a means to expand its influence outside of labor organizations and into black organizations such as the NAACP. In 1953, the CPUSA instructed all its black members to join the NAACP in an attempt to subvert the organization from within, arguing that:

¹⁴ Letter, J. Edgar Hoover to Dillon Anderson, Re: Emmett Till, October 11, 1955. White House Office of the Special Assistant for National Security Affairs, FBI Series, Box 3, FBI T-Z (1), Digital Document, Eisenhower Library.

¹⁵ Ibid.

¹⁶ Statement, J. Edgar Hoover, “Racial Tension and Civil Rights,” 10, March 9, 1956. Dwight David Eisenhower’s Papers as President, Cabinet Series, Box 6, Cabinet Meeting of March 9, 1956, Digital Document, Eisenhower Library.

the time has come to put an end to the self-imposed isolation from the Negro community of key Negro cadres. [The Party] must insist that all Negro Party members, without exception, develop and strengthen their ties with the organized sections of the Negro community [ie. the NAACP].¹⁷

By ordering its black membership to join the NAACP, the CPUSA hoped to bring its views closer in line with that the Party. However, the black membership of the CPUSA simply did not have the numbers (the black membership totaled an estimated 1400 in 1953) nor were able to break into the long-standing leadership cadre of the NAACP. The organization reasserted itself as a decidedly anti-communist organization at its 1955 national convention. The CPUSA found it easier to work with the NAACP on the local level, dealing primarily with local issues, but with the odd broader-based success such as that of Claude Lightfoot's organizing in Chicago.¹⁸

In 1957, the FBI, under Hoover's direction, investigated the possible infiltration of other black civil rights groups, including the Southern Christian Leadership Conference (SCLC). The FBI's interest in civil rights organizations corresponded with the growing influence of Stanley Levison with the civil rights movement in general, and Dr. Martin Luther King, Jr., in particular. Levison, born in New York City in 1912 to Jewish parents, received two law degrees from St. John's School of Law in New York City in 1938 and 1939, while avoiding military service in World War II because of a medical deferment.¹⁹ Levison and his brother Roy owned a car dealership, and Stanley entered into a number of business arrangements including import/export

¹⁷ Federal Bureau of Investigation, "The Communist Party and the Negro, 1953-1956," 39. White House Office of the Special Assistant for National Security Affairs, FBI Series, Box 10, The Communist Party and the Negro, October 1956, Digital Document, Eisenhower Library.

¹⁸ Statement, J. Edgar Hoover, "Racial Tension and Civil Rights," 8, March 9, 1956. Dwight David Eisenhower's Papers as President, Cabinet Series, Box 6, Cabinet Meeting of March 9, 1956, Digital Document, Eisenhower Library.

¹⁹ David J. Garrow, "The FBI and Martin Luther King" *The Atlantic* (July/August 2002), <http://www.theatlantic.com/magazine/archive/2002/07/the-fbi-and-martin-luter-king/2537/>; Federal Bureau of Investigation, Security Matter Report, "Stanley David Levison," 8, June 19, 1953. <http://foia.fbi.gov/levison/levison1.pdf> [Hereafter FOIA – FBI Digital Document].

and real estate that allowed him the financial freedom to engage in radical causes.²⁰ Levison became involved with the CPUSA in the late 1940s and the American Jewish Congress in the early 1950s.²¹ By 1953, the FBI had started learning the exact role that Levison had played in the Party in the late 1940s and early 1950s. As early as 1945, Levison started providing significant financial support to the Party and creating business fronts to help support the Party. By 1954, Levison had become so integrated in the financial business of the Party that he became, in essence, the Party's chief financial officer.²² The "Solo" reports to the FBI led the agency to increase surveillance on Levison, including physical surveillance by field agents and electronic surveillance of Levison's hotel rooms.²³ Levison began pulling away from the CPUSA at the same time as he became more involved in civil rights. In 1956, Levison became involved with "In Friendship," an organization used to raise money for various civil rights organizations, and by 1957 had seemingly removed himself from the CPUSA.²⁴

Stanley Levison's involvement with the Southern Christian Leadership Conference (SCLC) dates almost from its inception. Levison was introduced to Martin Luther King in 1956 through mutual friends, Bayard Rustin and Ella Baker.²⁵ Rustin and Levison stayed in an organizing capacity, creating the agenda and writing the planning memo for King, Rev.

²⁰ FBI, Security Matter Report, "Stanley David Levison," 20-23, 33, June 19, 1953, FOIA – FBI Digital Document.

²¹ Garrow, *The FBI and Martin Luther King, Jr.*, 40.

²² In 1952, the FBI started receiving information on Levison from two brothers who had split from the Party, Jack and Morris Childs (codenamed "Solo"). The Bureau convinced the brothers to re-engage with the Party and to continue feeding information on Levison and others within the Party apparatus. By 1953, the FBI had a significant security file on Levison. Garrow, "The FBI and Martin Luther King," *The Atlantic* (July/August 2002); Garrow, *The FBI and Martin Luther King, Jr.*, 35-37, 40-41.

²³ Garrow, *The FBI and Martin Luther King, Jr.*, 41.

²⁴ FBI, Security Matter Report, "Stanley David Levison," 14-17, February 8, 1957, FOIA – FBI Digital Document; Garrow, *The FBI and Martin Luther King, Jr.*, 42; David J. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* (New York: Harper Perennial, 2004), 83-4.

²⁵ Garrow, *Bearing the Cross*, 84.

Theodore Jemison of Baton Rouge, Louisiana, and other Southern religious leaders to create the SCLC in 1957.²⁶ The FBI curtailed its surveillance of Levison after his apparent break with the CPUSA – going so far as attempting to turn Levison into an FBI informer in 1960 – but as the SCLC became more successful in its civil rights agenda and the growing closeness of Levison and King became more apparent to the FBI, Director Hoover ordered surveillance to be placed on both Levison and King and informed Attorney General Robert Kennedy about his growing concerns of communist influence in the civil rights movement.²⁷

The FBI initially placed electronic and physical surveillance on Martin Luther King, Jr. in 1962 on the basis of his relationship with Stanley Levison and Jack O'Dell. Like Levison, O'Dell spent time as a member of the CPUSA in the 1950s before removing himself in from the Party to work in the civil rights movement. Working in the New York office of the SCLC, O'Dell was brought south to work with Reverend King as his executive assistant.²⁸ The close proximity of two former members of the CPUSA lent credence in the White House to FBI charges of communist influence over the civil rights movement, leading both President John F. Kennedy and Attorney General Robert Kennedy to pressure Reverend King to sever ties with both Levison and O'Dell in mid-1963.²⁹

The greater interest placed on the issue of civil rights and communism also placed a spotlight on King's former associations with left-leaning organizations such as the Highlander

²⁶ *Ibid.*, 85-86; Adam Fairclough, *To Redeem the Soul: The Southern Christian Leadership Conference and Martin Luther King, Jr.* (Athens: University of Georgia Press, 2001), 11-36.

²⁷ Garrow, *The FBI and Martin Luther King jr.*, 45-47; Athan Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan* (Philadelphia: Temple University Press, 1978), 172-73; James W. Hilty, *Robert Kennedy: Brother Protector* (Philadelphia: Temple University Press, 1997), 338-340; Nicholas Katzenbach, *Some of it was Fun: Working with RFK and JFK* (New York: W. W. Norton, 2008), 182, 185-87.

²⁸ Nick Kotz, *Judgment Days: Lyndon Baines Johnson, Martin Luther King Jr., and the Laws that Changed America* (New York: Mariner Books, 2006), 72-73.

²⁹ Garrow, *The FBI and Martin Luther King, Jr.*, 57-63.

Folk School, the Southern Conference for Human Welfare, and the Southern Conference Educational Fund. Reverend King's appearance at the Highlander Folk School's 25th anniversary in 1957 was portrayed by both state and federal sources as a meeting amongst communists and as proof positive of the connection between civil rights and communism.³⁰

While the FBI continued to investigate the possible communist infiltration of black civil rights groups in the late 1950s and 1960s, states continued the anti-communist crusade with their own anti-communist investigations and legislation. Rather than one spurring along the other, the federal and state versions of the anti-communist crusade developed simultaneously and along parallel lines. As Congress debated the McCarran Internal Security Act in 1950, both New York and Maryland debated and passed similar anti-subversion legislation. New York's Feinberg Law used the Attorney General's list of subversive organizations to provide a basis for disqualifying employees of New York's public school system, while Maryland's Ober Act used the Attorney General's list as a basis of disqualification from public office.³¹ Similar to the Federal Internal Security Act, the Ober Act attempted to define and ban subversive organizations in the state of Maryland.³² The Maryland State Attorney General's office would investigate possible subversive organizations and convene grand juries to determine whether the state should indict the suspect organization. Should an organization be declared subversive, the state would

³⁰ The Georgia Commission on Education, the chief anti-Communist organ of the state, sent a photographer undercover to the Highlander Folk School anniversary to collect pictures of leading Civil Rights leaders with known or alleged Communists. Heale, *McCarthy's Americans*, 258-261.

³¹ Seth F. Kreimer, "Sunlight, Secrets, and Scarlet Letters: The Tension between Privacy and Disclosure in Constitutional Law," *University of Pennsylvania Law Review*, vol. 140, no. 1 (November 1991): 35-36; Van Alstyne et al., *Freedom and Tenure in the Academy*, 105-07.

³² The Ober Act resulted from recommendations made by a state commission investigating the issue of subversion in Maryland. Governor William Preston Lane chose Baltimore attorney Frank B. Ober to chair the committee. Ober had impeccable legal credentials, graduating from Princeton and Harvard, was well-respected in the legal community, and, most importantly, was not an anti-communism ideologue. Vernon L. Pedersen, *The Communist Party in Maryland, 1919-57* (Champaign: University of Illinois Press, 2001), 160; Heale, *McCarthy's Americans*, 62-66; Donald L. Smith, *Zechariah Chaffee, Jr.: Defender of Liberty and Law* (Cambridge, Mass.: Harvard University Press, 1986), 193, 256.

dissolve the organization, seize the property and records of the organization, and submit members of these organizations to fines and punishment.³³

The Ober Act played an important role in the developing state-level anti-subversion legislation throughout the country. The Ober Act included a loyalty oath requirement for all appointed and elected offices and most states passed similar loyalty oath legislation based on that of the Ober Act. Following the lead of the federal government and Maryland, other states began passing anti-subversive legislation or using old sedition laws already on their books. In Pennsylvania, the state began using its 1919 state sedition law to go after communists, while states from Florida, Mississippi, and Louisiana in the South, to New Hampshire and Connecticut in the Northeast, to Washington State on the West Coast followed Maryland's lead and, in some cases, copied large parts of the Ober Act for its own.³⁴ While each state attempted to deal with the national issue of communism through the passage of these laws, the use of anti-subversive legislation varied widely with the local political situation. On the West Coast, an area that had experienced significant radical action, states took their cue from Congressional investigative committees and created investigative committees along the lines of House Committee on Un-American Activities (HUAC) and the Senate Internal Security Subcommittee (SISS). In California, the long-lived Tenney Committee investigated a wide range of organizations,

³³ Cauter, *The Great Fear*, 70-71; Heale, *McCarthy's Americans*, 65-69.

³⁴ The Pennsylvania sedition law would end up being struck down in 1956 when the Supreme Court found that the Federal government had adequately occupied the area of internal security with the McCarran Act and the Communist Control Act and, therefore, Federal subversion laws superseded State subversion laws. *Pennsylvania v. Nelson* would invalidate most of the state level anti-subversive legislation. *Pennsylvania v. Nelson* 350 U.S. 497 (1956).

including unions and teachers, while Washington State had its own “little HUAC” in the form of the Canwell Committee, focused primarily on communists in higher education.³⁵

The use of anti-subversive legislation in the south differed from the rest of the nation in that local politicians used a combination of legislation and investigative committees to not only investigate suspected communists and radicals within their respective states, but also as a legal means to participate in the massive resistance to integration that occurred in the post-*Brown* south – an intersection of the “Red Scare” and attempts to maintain the racial status quo. The Communist Party’s attempts to agitate on the racial issue and expand into the South in the first half of the 20th century led southern politicians to equate racial agitation with communism.³⁶ Most southern states adopted similar legislation to Maryland’s Ober Act: Mississippi, for example, copied a majority of the Ober Act for their anti-subversive legislation, while Louisiana and Georgia patterned their anti-subversion laws after the Federal Internal Security Act. Louisiana’s experience with its anti-subversive legislation and investigative committees and its use of such tools against pro-integration individuals and organizations can be seen as the typical experience of the southern states during this period.

³⁵ The Tenney Committee, from 1940 to 1970, proved to be the longest-lived of the “little HUACS.” For the Tenney Committee, see: William Issel, “‘Still Potentially Dangerous in Some Quarters’: Sylvester Andriano, Catholic Action, and Un-American Activities in California,” *Pacific Historical Review* vol. 75, no. 2 (May 2006): 231-270; M. J. Heale, “Red Scare Politics: California’s Campaign against Un-American Activities, 1940-1970,” *Journal of American Studies* vol. 20, no. 1 (April 1986): 5-32; Ingrid Winther Scobie, “Jack B. Tenney and the ‘Parasitic Menace’: Anti-Communist Legislation in California, 1940-1949,” *Pacific Historical Review* vol. 43, no. 2 (May, 1974): 188-211; Edward L. Barrett jr., *The Tenney Committee* (Ithaca, NY: Cornell University Press, 1951). For the Canwell Committee and higher education, see: Vern Countryman, *Un-American Activities in the State of Washington* (Ithaca, NY: Cornell University Press, 1951).

³⁶ The CIO’s “Operation Dixie” – the organization’s attempt to organize black and white workers in the South between 1946 and 1953 – was an example of the type of outside agitation Southern politicians attempted to prevent through anti-subversion legislation and investigations. See, for example: Barbara S. Griffith, *The Crisis of American Labor: Operation Dixie and the Defeat of the CIO* (Philadelphia: Temple University Press, 1988).

To deal with communism, the Louisiana legislature passed a series of laws that became the “Subversive Activities and Communist Control Law.”³⁷ Fashioned after the Internal Security Act and the Communist Control Act, Louisiana’s anti-subversive law focused on regulating subversive activities in the state. Organizations suspected of being a communist-affiliated – using the federal designations of communist-Action, -Front, or -Infiltrated organizations under the Communist Control Act – or otherwise subversive organizations would have civil proceedings brought against it before the appropriate district court and be given the opportunity to cross-examine evidence and witnesses. Organizations and individuals determined to be subversive would be required to register with the state as such; be disqualified from holding public office and appearing on election ballots; and have any printed material marked in bold red ink as “disseminated by [organization name], a Communist/Subversive Organization.”³⁸ As with other states, Louisiana also adopted a loyalty oath requirement for public officials, employees, and candidates for public office. Louisiana’s “Subversive Activities and Communist Control Law” was amended in 1965 in response to two changes on the federal level: first, to conform with the Civil Rights Act of 1964 and the Voting Rights Act of 1965, explicitly stating that the law would not apply to the regulation of race relations in the state; and second, to conform with the Supreme Court’s decision in *Dombrowski v. Pfister* (1965) that said that the use of the “Subversive Activities and Communist Control Law” against Dombrowski and the Southern

³⁷ Louisiana Legislature, “Subversive Activities and Communist Control Law,” Revised Statutes, Title 14, §§ 358-373.

³⁸ Ibid., 14:360-67.

Conference Educational Fund contributed a “chilling effect” to the organization’s freedom of speech.³⁹

The major targets of Louisiana’s anti-subversive legislation were the Southern Conference Educational Fund (SCEF), and its parent organization, the Southern Conference for Human Welfare (SCHW). The SCEF was a progressive organization established to expand educational opportunities among the southern poor regardless of race. Initially set up as the educational wing of the Southern Conference for Human Welfare in 1946, the SCEF outlived its parent organization by focusing primarily on education and avoiding the political entanglements that led to the SCHW to disband in 1948 over charges of communist infiltration. Based in Birmingham, Alabama, the SCHW was a progressive organization whose goal was to bring New Deal political reforms to the South. Initially supported by a coalition of progressive southerners, including Supreme Court Justice Hugo Black, Alabama Governor David Graves, and Aubrey Williams (a key member of Roosevelt’s Works Progress Administration), and northern liberals (including former First Lady Eleanor Roosevelt), the SCHW intended to bring people of both races together to address significant issues affecting the South – particularly the problems of poverty and racism.⁴⁰ After the SCHW’s first convention in 1938, the organization came under attack by conservative, predominately southern, politicians charged with being a communist-front organization. The interracial nature of the SCHW and its goals of economic improvement – including organizing workers into labor unions, and racial integration of the south – opened the organization to charges of being pro-communist. The organization as a whole refused to take a

³⁹ *Dombrowski v Pfister* 380 U.S. 479 (1965). The Court decided that the Louisiana anti-subversive laws created a “chilling effect” on the speech of the members of the organizations, forcing them into self-censorship to avoid prosecution by the state.

⁴⁰ Virginia Foster Durr, *Outside the Magic Circle: The Autobiography of Virginia Foster Durr* (Tuscaloosa: University of Alabama Press, 1985), 116-134; Frank Adams and Myles Horton, *Unearthing Seeds of Fire: The Idea of Highlander* (Winston-Salem, N.C.: John F. Blair publishing, 1975), 97-100.

hard anti-communist position, leading many prominent liberals to distance themselves from the SCHW, and HUAC initiated investigations of the organization in 1947.⁴¹ The HUAC investigations in 1947 and divisions over the question of supporting Henry Wallace's campaign as Presidential candidate for the Progressive Party in 1948 led to a split within the SCHW, resulting in the dissolution of the organization in 1948.⁴² While the SCEF was created in the waning years of the SCHW, the former organization found itself tainted by the charges of communist infiltration.

While conservative anti-communists focused on the suspected communist roots of the Southern Conference Educational Fund, anti-communists also pointed to the connection between the SCEF and the Highlander Folk School located in Tennessee. The organizations shared a number of individuals among their leadership, including Myles Horton and Dr. James Dombrowski – both of whom served on the Southern Conference on Human Welfare as well as being key members of the SCEF and Highlander Folk School – which would lead anti-Communists to view the SCEF as merely a front for the other organizations. The Highlander School was founded in 1932 in Monteagle, Tennessee by Horton, Dombrowski, and Don West, with a goal to promote and develop leaders and organizers focused on social justice and social change throughout the South.⁴³ The Highlander Folk School would focus initially on developing labor leaders, assisting the Congress of Industrial Organizations (CIO) in organizing labor

⁴¹ Thomas A. Krueger, *And Promises to Keep: The Southern Conference for Human Welfare, 1938-1948* (Nashville: Vanderbilt University Press, 1967), 167-83; for the full HUAC report, see: House Committee on Un-American Activities, *Report on Southern Conference for Human Welfare*, 80th Cong., 1st sess., (Washington: United States Government Printing Office, 1947).

⁴² Walter Gelhorn, "Report on a Report of the House Committee on Un-American Activities," *Harvard Law Review* Vol. 60, no. 8 (October 1947): 1193-1234. Had the SCHW continued to exist after the creation of the McCarran Internal Security Act in 1950, it would have most likely found itself required to register with the government as a Communist-Front organization.

⁴³ Myles Horton and Lawrence L. Bostian, "Highlander Folk School" in *Encyclopedia of Southern Culture*, Eds. Charles Reagan Wilson et al. (Chapel Hill: University of North Carolina Press, 1989), 1417-18; John M. Glen, *Highlander: No Ordinary School, 1932-1962* (Lexington: University of Kentucky Press, 1988), 21-23.

throughout the South by acting as its principal training center for the region. In a November 1939 speech in Nashville, Tennessee, Dr. James Dombrowski, chairman of the school, enunciated the purpose of the Highlander Folk School as providing “a cultural and educational center for the training of the native leadership for the southern labor movement” through a six-week residency program.⁴⁴ The residency program split its teaching into two categories: The first set of courses focused on the practical “tools” needed for labor organizing, including public speaking, poster making, parliamentary law, and major issues in trade unionism; while the second set of courses focused on the cultural background of the South, including folk dancing and singing, and history.⁴⁵ The Highlander Folk School continued its work with labor organizations through 1947 before breaking with the CIO over the school’s continuing support of left-leaning labor unions within the labor organization in the face of the CIO’s increasingly anti-communist stance.⁴⁶

After the Highlander Folk School’s break with organized labor, the school shifted its focus to emphasize the issue of southern segregation, initiating a number of workshops for early civil rights leaders and offering classes for poor blacks to teach them to read and how to register to vote. While southern politicians were unhappy with the Highlander Folk School and its involvement in organizing labor in the South, they actively went after the school once it had shifted its emphasis towards civil rights. In 1957, the Georgia Commission on Education (GCE) – the primary anti-communist investigative body for the state – sent a photographer undercover

⁴⁴ Federal Bureau of Investigation, Memorandum, “Subversive Activities: Highland [sic] Folk School,” 8, January 29, 1940, FOIA – FBI Digital Document.

⁴⁵ Ibid., 8.

⁴⁶ Horton and Bostian, “Highlander Folk School,” 1418. The CIO shifted to a more anti-Communist position to stave off attacks on labor by the Taft-Hartley Act in 1947, expelling unions with predominately Communist membership. The CIO unsuccessfully urged the Highlander Folk School to end support for left-leaning labor unions.

to the 25th anniversary celebration of the Highlander Folk School to uncover any connections between the school and leading civil rights leaders. The photographer, Edwin Friend, returned with pictures of civil rights leaders Martin Luther King Jr. and Bayard Rustin with Highlander Folk School founders Aubrey W. Williams and Don West. The GCE quickly used the photographs to create a “Highlander Folk School” folder, designed as propaganda depicting both the Highlander Folk School and major civil rights leaders as involved in communist-front activities, and mailed the folder throughout the south to interested individuals and state investigative committees.⁴⁷

In addition to attempting to tie the SCEF with other suspect organizations, the SCEF experienced direct investigations from both federal and state investigative committees. In 1954, Senator James Eastland (D – Mississippi) convinced Senator Pat McCarran to authorize a Senate Internal Security Subcommittee task force, consisting of Senators Eastland, McCarran, and John D. McClellan (D – Arkansas), to investigate claims that the SCEF was either a Communist-Front or Communist-Infiltrated organization. The taskforce arrived in New Orleans, home of the SCEF headquarters, in March of 1954, consisting of only Senator Eastland – Senator McCarran did not make the trip due to health issues, while Senator McClellan chose to remain in Washington on the advice of Senate Minority Leader Lyndon Johnson.⁴⁸ Eastland, junior Senator from the neighboring state of Mississippi, was a prototypical politician from the “Solid South” when it came to race relations, believing in the strict social segregation of the races. Eastland’s focus on the SCEF came not only from his anti-communist beliefs, but also from his

⁴⁷ Heale, *McCarthy’s Americans*, 258-261; Glen, *No Ordinary School*, 217-18.

⁴⁸ Ybarra, *Washington Gone Crazy*, 730-31; Dorothy M. Zellner, “Red Roadshow: Eastland in New Orleans, 1954,” *Louisiana History: The Journal of the Louisiana Historical Association* vol. 33, no. 1 (Winter 1992): 35-36; Durr, *Outside the Magic Circle*, 254-273. Mrs. Virginia Durr used her social contacts in Washington, including her friendship with Ladybird Johnson, to limit the scope of Eastland’s taskforce.

strident racism and desire to maintain the racial status quo throughout the South; Eastland truly believed in the intertwining issues of communism and integration and their threat to internal security.

Senator Eastland subpoenaed four high-ranking individuals associated with the SCEF: Dr. James Dombrowski, the organization's executive director; Aubrey W. Williams, the president of SCEF; Virginia Durr, former Board Member of the SCEF; and Myles Horton, another SCEF board member.⁴⁹ Dombrowski, Williams, and Horton were subpoenaed to testify on their roles in the SCEF and the organization's association with the CPUSA. Durr was subpoenaed less for her involvement with the SCEF and more for her family relations: Durr was Justice Hugo Black's sister-in-law and calling her to testify on her involvement in a possible communist-front organization was Eastland's way to obliquely attack Justice Black for his views on racial integration and his suspected views on the upcoming *Brown* case.⁵⁰

Dombrowski and his colleagues were faced with the question of whether or not to invoke the Fifth Amendment protections against self-incrimination. Dombrowski, for example, simply refused to "take the Fifth," and chose to answer questions directly and forthrightly. When the issue of the organization's records came before the task force, Senator Eastland was not satisfied with the statement of the organization's finances and the list of officers and board members supplied by Dombrowski. Eastland wanted the full records and membership lists of the SCEF turned over to the government for inspection and, as expected, experienced resistance from the SCEF leadership.⁵¹ Dombrowski avoided the stigma of invoking the Fifth Amendment

⁴⁹ Zellner, "Red Roadshow," 33-34.

⁵⁰ Newman, *Hugo Black*, 428-30. Black's votes in *McLaurin v. Board of Regents* (339 U.S. 637, 1950) and *Sweatt v. Painter* (339 U.S. 629, 1950) helped mark the end of the "separate but equal" doctrine in graduate education.

⁵¹ Eastland attempted to hold Dombrowski and Williams in contempt of Congress for refusing to turn over the SCEF records, but failed to secure support for an indictment from the full Senate. Sarah Hart Brown, "Redressing

protections against self-incrimination by suggesting to Senator Eastland that the subpoena requesting the financial and membership information of the SCEF was open to interpretation and that the SCEF had complied with the subpoena within acceptable parameters.⁵²

Senator Eastland's hearings on the SCEF in New Orleans followed the typical pattern of congressional hearings during this period. Hostile witnesses would refuse to cooperate with the investigative committee through invoking their Fifth Amendment protections or, in the case of Virginia Durr, simply ignore most of Senator Eastland's questions and remain mute during questioning. Faced with uncooperative witnesses, Eastland relied on professional witnesses such as Paul Crouch to associate Dombrowski and the others with communism and communist organizations.⁵³ That growing lack of testimony linking the SCEF and the scant evidentiary trail led Senator Eastland to wrap up his hearings in New Orleans quickly and return to Washington empty handed.

While Eastland's campaign against the SCEF proved to be little more than a sideshow in the growing number of congressional investigations – the Army-McCarthy hearings, for example, convened at the same time as Eastland's task force, with witnesses appearing in April and lasting through the Summer of 1954 – individual states took up the mantle of investigating potentially communist-affiliated organizations. With the SCEF headquartered in New Orleans, Louisiana took the lead in investigating the organization and tying together the issue of subversion and racial unrest.

Southern 'Subversion': The Case of Senator Eastland and the Southern Lawyer," *Louisiana History: The Journal of the Louisiana Historical Association*, vol. 43, no. 3 (Summer 2002): 299.

⁵² Zellner, "Red Roadshow," *Louisiana History*, 43, 46.

⁵³ Paul Crouch was a prototypical professional witness for a number of Congressional investigative committees, paid for his sometimes contradictory testimony. In a two-year period from August 1951 through August 1953, Crouch earned almost ten thousand dollars for his services. "National Affairs: Absurd," *Time*, July 19, 1954, <http://www.time.com/time/magazine/article/0,9171,857458,00.html>.

On the heels of Eastland's failed investigation of the SCEF in 1954, the Louisiana legislature initiated state-level investigations of the SCEF and other progressive organizations. The legislature created a Joint Legislative Committee to look into the question of subversion and racial unrest in 1957. Chaired by State Senator Willie Rainach, one of the state's most vehement anti-segregationists and chair of the state's committee on segregation, the joint legislative committee on subversion and racial unrest convened in 1957 determined to bring together the issues of integration and subversion.⁵⁴ In addition to Rainach, the Joint Legislative Committee contained a number of determined segregationists from throughout the state, including Rainach's protégé, John S. Garrett; E. W. Gravolet; and Louis H. Folsé, the latter two members of the political machine of Leander Perez in southeast Louisiana.⁵⁵ Unlike Senator Eastland's taskforce, the initial inquiry by the Louisiana Joint Legislative Committee did not call any members of the leadership of the SCEF or any of the organization's board members to testify before the committee. Instead, Rainach decided to lay the foundation of future investigations by attempting to prove a concrete link between communism (i.e. subversion) and civil rights organizations, particularly the SCEF and the NAACP. The Joint Legislative Committee focused its witness list with former "red hunters" from the FBI, professional anti-communist witnesses, and segregationist local politicians.

⁵⁴ State Senator Rainach was one of the strongest segregationist politicians in Louisiana during the period of "massive resistance" to desegregation. Rainach created and led the White Citizens Council in Louisiana and worked with other White Citizen's Councils in other states, particularly the original Councils in Mississippi, to promote the cause of segregation in the South. Shelby Scates, *War and Politics by Other Means: A Journalist's Memoir* (Seattle: University of Washington Press, 2000), 56-57; Neil R. McMillon, *The Citizens' Council: Organized Resistance to the Second Reconstruction* (Champaign: University of Illinois Press, 1994), 117-119.

⁵⁵ Leander Perez was an important political figure in Southeast Louisiana as political boss of Plaquemine and St. Bernard parishes. A one-time district judge, Judge Perez controlled the votes along the Southeast gulf coast parishes and combined to work with segregationist politicians in the North Louisiana, including Willie Rainach, to spearhead the campaign of "massive resistance" to desegregation in Louisiana. Garry Boulard, *The Big Lie: Hale Boggs, Lucille May Grace, and Leander Perez in 1951* (Gretna, LA: Pelican publishing company, 2001); Glen Jeansonne, *Leander Perez: Boss of the Delta*, 2nd ed. (Lafayette, LA: Center for Louisiana Studies, University of Louisiana – Lafayette, 1995).

The hearings took place over a three day period from March 6-9, 1957. The first witness before the committee was W. Guy Banister, at the time Assistant Superintendent of Police for the New Orleans police department.⁵⁶ Banister – who, as an FBI agent, was assigned early in his career to New York City, where he developed his anti-communist views in his investigation of CPUSA activities in the region – provided the committee with a background of communist ideology and tactics. Banister’s testimony was typical of any law-enforcement officer discussing the CPUSA at the time, focusing on the conflicting ideology between the United States and Soviet Union and the tactics of infiltrating liberal organizations as a means to undermine and eventually control the organization. Banister emphasized the CPUSA’s focus on the racial division in the nation, suggesting to the committee that Party goal was to split the nation along racial lines.⁵⁷

The next two witnesses to testify before the committee were professional anti-communist witnesses: Joseph Z. Kornfeder and Manning Johnson. Kornfeder, born Joseph Zack in Trenčín, Austria-Hungary in 1897, started as a prominent member of the CPUSA, working with future General Secretary of the Party, William Foster, in early attempts to organize communist trade unions shortly after the creation of the Party. Kornfeder was thought highly enough within the

⁵⁶ Banister would become better known for his post-law enforcement career. After being dismissed from the NOPD for threatening a waiter with his sidearm in June 1957, Banister became a private investigator, involved with a number of anti-Cuba/anti-Castro organizations based in New Orleans. Banister was implicated in supplying weapons for the anti-Castro groups; some claim that Banister was involved with Lee Harvey Oswald and the assassination of President John F. Kennedy through Banister’s connections with anti-Cuban groups. U.S House, Select Committee on Assassinations, *Report of the Select Committee of Assassinations of the U.S. House of Representatives* (Washington: United States Government Printing Office, 1979), <http://www.archives.gov/research/jfk/select-committee-report/part-1c.html>; David E. Kaiser, *The Road to Dallas: The Assassination of John F. Kennedy* (Cambridge, Mass.: Harvard University Press, 2008), 198-205.

⁵⁷ Louisiana Legislature, Joint Legislative Committee on Segregation, *Subversion in Racial Unrest: An Outline of a Strategic Weapon to Destroy the Governments of Louisiana and the United States* (Homer, LA: *Guardian-Journal*, 1957), Louisiana State University, Hill Memorial Library, Special Collections. [Hereafter referred as JLCS]. In a purely political move, State Senator Rainach arranged it so that the *Guardian-Journal*, the newspaper of record of his Parish seat, would publish the Joint Legislative Committee’s report and arranged for report’s sale throughout the state.

Party to be sent to Moscow in the 1920s to participate in the training schools set up by the Kremlin, where he met his wife.⁵⁸ After spending time in Moscow, Kornfeder was sent to South America before returning to the United States in 1931. Kornfeder broke from the CPUSA in 1934 and turned away from communism in 1936 when reports of the purges in the Soviet Union began to emerge. His wife and son, still residing in the Soviet Union, were arrested by the secret police after Kornfeder attempted to get them out via the U.S. State Department.⁵⁹ Kornfeder turned into a professional anti-communist witness for the government, including testifying before the Dies Committee in 1939 and the Canwell Committee in Washington State in 1947 before appearing before the Joint Legislative Committee in Louisiana.⁶⁰ After relating his background and former communist affiliations to the Committee, Kornfeder proceeded to testify on the Party's position vis-à-vis race.

Kornfeder began by claiming that Joseph Stalin was directly involved with the CPUSA, testifying that Stalin, as the "principal director" of the Foster faction of the Party, "laid the strategy and tactics down for that particular faction," including supporting Foster's election as General Secretary.⁶¹ Turning more towards race and communism, Kornfeder attempted to link progressive racial organizations to communist-front organizations; he testified that high-ranking members of the NAACP, SCEF, and other organizations interested in integration were also affiliated with communist organizations. Kornfeder gave the Committee documents showing that individuals such as Channing H. Tobias, chairman of the NAACP, James Dombrowski, and Eleanor Roosevelt had ties, however tenuous they may have been, to communist-related

⁵⁸ JLCS, "Subversion in Racial Unrest," 19.

⁵⁹ Ibid., 19.

⁶⁰ Countryman, *Un-American Activities in the State of Washington*, 37.

⁶¹ JLCS, "Subversion in Racial Unrest," 20.

organizations. The connections made by Kornfeder ranged from individuals attending the Southern Conference for Human Welfare to simply signing a petition protesting the lack of civil rights in the South, but Kornfeder portrayed his lists as definitive membership in communist-front organizations and marked an interest in communist activities and ideology. Kornfeder alleged that Channing Tobias, for example, joined over forty-two communist-front organizations and, as chairman of the NAACP, was in a position to spread communist ideology throughout the organization.⁶²

Kornfeder explained the tactics used by the CPUSA to agitate on racial issues. Kornfeder suggested that the sit-ins occurring throughout the South were instigated and coordinated by the Party:

But there were some restaurants, though, in all these cities where they wouldn't serve a Negro. So the Communists would pick out just that one particular place, go in there with a group of them – Negroes and Whites – and start a rumpus – a riot – a disturbance.⁶³

Kornfeder's testimony made it appear to the Committee that the CPUSA was more organized, coordinated, and involved in instigating racial unrest than it was in reality. The image Kornfeder presented to the Joint Legislative Committee – an image of the Party ready with “a couple of squads on the outside [of cities], sort of nearby in case an important fight developed” – was one that found a receptive audience.⁶⁴

The second professional anti-communist witness to appear before Joint Legislative Committee was Manning Johnson. Johnson was different from Kornfeder not only in that Johnson was born in the United States, but, as a black man, experienced racism on both sides of

⁶² Kornfeder provided lists on Communist connections for almost every major Southern progressive and every Board member of the NAACP and SCEF as associated with Communist-Fronts. JLCS, “Subversion in Racial Unrest,” 47-74.

⁶³ JLCS, “Subversion in Racial Unrest,” 75.

⁶⁴ Ibid., 75.

the ideological divide. Johnson was a former CPUSA candidate for Congress, running as the Party's candidate for a New York seat in the House of Representatives, before falling out with the Party over the Nazi-Soviet non-aggression pact in 1939. Becoming a professional anti-communist witness, Johnson testified before the Canwell Committee in Washington State in 1947; in the perjury trial of Harry Bridges in 1949; and before HUAC in 1953 prior to testifying before the Joint Legislative Committee in Louisiana. Johnson, based on his race, focused his testimony on the role of race and the CPUSA.

Johnson focused his testimony on the SCHW and SCEF, telling the Joint Legislative Committee that both organizations were communist-fronts. Those two organizations, according to Johnson, were "set up for a specific purpose to win over the Negro and bring him under the influence of the Party."⁶⁵ He argued that the goal of the SCEF was to lure blacks into the organization and to indoctrinate them in communist thought, while talking of civil rights. The Committee's questions incorporated Johnson's testimony to connect communist tactics and race with the civil rights leadership in the South. Johnson, when asked his impressions of Dr. Martin Luther King, Jr., Reverend Abraham L. Davis of New Orleans, and Reverend Theodore J. Jemison of Baton Rouge, testified that:

It seems as if Rev. Davis in New Orleans has been instrumental in bringing Rev. King to this state to assist in organizing a movement similar to that in Montgomery. Now, I'm not saying that Rev. King is a Communist, but I am saying that Rev. King is doing the Negroes considerable harm.⁶⁶

Johnson's testimony is interesting in that it damns both the communist approach to civil rights as well as that of civil rights leaders, apparently leaving no middle ground in the question of racial unrest except to maintain the racial status quo.

⁶⁵ Ibid., 155.

⁶⁶ Ibid., 203.

One of the final witnesses before the Joint Legislative Committee was a former FBI informant inside the CPUSA. Martha Edmiston, and her husband John, informed on the CPUSA for the FBI, and were veteran witnesses before investigative committees; both testified before HUAC in 1950. Martha Edmiston's testimony focused on Don West, his association with the Highlander Folk School, and his supposed involvement in communism. Edmiston testified that she had seen West at a communist congregation and that West was:

not a man of God who switched over to the materialistic side. That young man [West], I would say, was a party member, who, like many ministers have been sent to theological school by the party for the express purpose of preaching the doctrine of the Communist Party under the cloak of Religion.⁶⁷

Similar to the testimony of Manning Johnson, Martha Edmiston attempted to devalue the importance of religion in the civil rights movement by suggesting that the CPUSA used religion as an avenue to infiltrate civil rights groups. If, as Martha Edmiston testified, Don West was a communist, then not only had the Highlander Folk School been infiltrated by communism from its founding, but other organizations affiliated with the School, such as the SCEF, had likely been compromised as well.

While the hearings of State Senator Rainach's Joint Legislative Committee on Segregation focused on the general question of race and communism, the hearings set the table for not only targeted hearings, but also the potential prosecution, of the Southern Conference Educational Fund by the state of Louisiana. The Louisiana legislature created its own "little HUAC" when it passed legislation creating the Joint Legislative Committee on Un-American Activities (LCUA) in its 1960 session. Chaired by State Representative James Pfister of New Orleans, the LCUA made the SCEF as its first target for investigation.

⁶⁷ Ibid., 223.

The first hearings held by the LCUA occurred in early November, 1963. Similar to the hearings held by the Joint Legislative Committee on Segregation years before, the LCUA focused more on proving the case that the SCEF was a Communist-Front organization rather than an impartial hearing. It is important to note that a month before the LCUA initiated its investigations of the SCEF, the state and New Orleans city police raided and ransacked the organization's New Orleans headquarters and placed James Dombrowski, Benjamin Smith, and Bruce Waltzer under arrest for violating the "Subversive Activities and Communist Control Law." While it did take time for legislative committees to initiate investigations, the arrests of Dombrowski, Smith, and Waltzer likely shaped the course of the investigation. The LCUA hearings on the SCEF in early November called only three witnesses: Major Homer Bryant of the Caddo Parish Sheriff's Department; Reverend C. H. Kilby of Tracy City, Tennessee; and LCUA Counsel Jack N. Rogers.

The LCUA chose to avoid the professional anti-communist witnesses that other state and federal investigative committees relied on, in part for the increasingly unreliable nature of the witnesses.⁶⁸ Similar to most investigative committees of the era, the LCUA did not pursue an unbiased investigation; the committee started with a thesis – that the SCEF was a communist organization – and used the hearings to prove its thesis correct. The LCUA called its first witness, Major Homer Bryant, to testify on Louisiana law enforcement's position on the

⁶⁸ Professional anti-communist witnesses had become increasingly suspect by the time the LCUA initiated their investigations. By the time of the LCUA investigations, Harvey Matusow had already revealed that he had committed perjury before Congressional committees in his book *False Witness*, while the FBI had been internally questioning the reliability of Louis Budenz as a witness. See, for example: Harvey Matusow, *False Witness* (New York: Cameron & Kohn, 1955); and Robert M. Lichtman, "Louis Budenz, the FBI, and the 'List of 400 Concealed Communists': An Extended Tale of McCarthy-Era Informing" *American Communist History* vol. 3, no. 1 (June 2004): 25-54.

organization even though Major Bryant had only limited dealings with the SCEF.⁶⁹ Major Bryant's testimony focused on the communist affiliations of members of the SCEF and the nature of the organization itself. Major Bryant described the organization as a communist-front organization, operating openly to promote racial harmony in the South, while in fact promoting the communist teachings and ideology.⁷⁰ The SCEF, according to Major Bryant, promoted communism with propaganda:

through its subversive organ, "The Southern Patriot", which has a large circulation. At no time have [law enforcement] ever found that this organization has attacked the Communist Party, it has consistently stayed with the Party-line.⁷¹

The fear within the law enforcement community, according to Major Bryant, was the dissemination of communist thought through the "Southern Patriot" to unwitting recipients. Major Bryant described the organization as led by a tightly-knit cadre that included Dr. James Dombrowski; the organization's counsel, Benjamin Smith; Aubrey Williams; Carl and Anne Braden, White activists who wrote for the "Southern Patriot;" and William H. Melish, a writer for left-leaning publications.⁷² Major Bryant testified that the leadership of the SCEF, as a group, had been previously identified as communists by numerous eyewitnesses in other federal and state investigations, indicating to the committee that the leadership of the SCEF was undeniably communist and, therefore, that the goals and direction of the organization were towards communist ends.

⁶⁹ A concerned citizen gave the Caddo Parish Sheriff's Department unsolicited letters received from the SCEF asking for donations and support. Louisiana Legislature, Joint Legislative Committee on Un-American Activities, "Activities of the Southern Conference Educational Fund, Inc. in Louisiana" (Baton Rouge: Joint Legislative Committee on Un-American Activities, 1963), 16. [Hereafter referred as LCUA].

⁷⁰ LCUA, "Activities of the Southern Conference Educational Fund, Inc. in Louisiana," 16.

⁷¹ Ibid., 16.

⁷² Ibid., 17.

Major Bryant singled out Benjamin Smith in his testimony as someone of particular interest to the LCUA. Smith was singled out not only for his association with the SCEF, but also for speaking out against the LCUA at a SCEF meeting in North Carolina. In his speech, Smith argued that the LCUA had:

fulfilled its real function in attempting to create a public awareness of its full and terrifying use. Its procedures do not vary materially from those of the House Un-American Activities Committee; this committee operates in an atmosphere just as poisonous, but slightly different from the House-Un-American Activities Committee.⁷³

By focusing on Smith and his attacks on the LCUA, Major Bryant created greater credibility for himself in the eyes of the Committee. Major Bryant testified to Benjamin Smith's career as a "radical," explaining Smith's associations with radical organizations to the Committee. Smith's radical associations, according to Bryant, included signing an open letter to President Eisenhower urging the President to grant amnesty to people charged with crimes under the Smith Act in 1954; being elected to the executive board of the National Lawyers Guild in 1956 and 1957; and defending Winifred Feise, a school librarian and member of the Jefferson Parish PTA over charges of communism.⁷⁴ These associations, particularly Smith's membership in, and presence on the executive board of, the National Lawyers Guild – a left-leaning counterpart to the American Bar Association – lent credibility to the charges that Smith, and other members of the SCEF leadership, were communists.

The second witness called before the LCUA focused on the association between the SCEF and the Highlander Folk School in Tennessee. Reverend C. H. Kilby of Tracy City, Tennessee appeared before the Committee to testify to the relationship between the Highlander Folk School, the Southern Conference Educational Fund and communism. Reverend Kilby –

⁷³ Ibid., 15-16.

⁷⁴ Ibid., 15. Brown, "Redressing Southern 'Subversion'," 300-01.

from Tracy City, in Grundy County, Tennessee, not far from Monteagle, the site of the Highlander Folk School – was in a position to provide the committee with first-hand testimony of the influence that the Highlander Folk School had on the county level. Reverend Kilby’s interest in the Highlander Folk School was far from benign, however; Kilby was secretary of the Tennessee Consolidated Coal Company, as well as the chairman of a local mechanics union. The Highlander Folk School’s education program, particularly during the period the school was geared towards labor education, posed a threat to Kilby’s livelihood and provided incentive for Kilby to discredit and attack the Highlander Folk School at every opportunity.⁷⁵ Reverend Kilby’s testimony shows the connections that developed between the various investigative committees throughout the South; Kilby’s testimony echoed the testimony provided to the “little HUAC” in Tennessee and its investigation of the Highlander Folk School. Reverend Kilby provided the LCUA with affidavits from individuals in Grundy County claiming that Aubrey Williams and James Dombrowski, among others, were actual members of the CPUSA. Kilby claimed that he was able to procure the affidavits through his contacts and standing in the county and from individuals who were unwilling or unable to deal with the FBI.⁷⁶ The first affidavit, signed by William Eldridge of Summerfield Tennessee, talked about the atmosphere of the Highlander Folk School. Eldridge claimed to have seen:

⁷⁵ Kilby’s activities against the Highlander Folk School stretched back to the early 1940s and including organizing the Grundy County Crusaders, a county level vigilante-style organization consisting of employees of the Tennessee Consolidated Coal Company, county police, and members of the American Legion. LCUA, “Activities of the Southern Conference Educational Fund, Inc. in Louisiana,” 29; Glen, *Highlander: No Ordinary School*, 75; Paula Webb Battistelli, “English for the Masses: English Instruction at Nontraditional Educational Institutions” (unpublished PhD. Dissertation, Washington State University, 2009), 102.

⁷⁶ LCUA, “Activities of the Southern Conference Educational Fund, Inc. in Louisiana,” 29. Glen, *Highlander: No Ordinary School*, 78. Kilby’s animosity towards the Highlander school was such that, likely, Kilby dictated the affidavits and had supporters and like-minded individuals sign the affidavits.

the Communist emblem, the “Hammer and Sickle” on newspapers such as the “Daily Worker” and the “Daily Masses”, in the library of the Highlander Folk School, and also on posters hanging on the walls of the School building.⁷⁷

In addition to the appearance of communist periodicals in the Highlander Folk School library, Eldridge claimed to have had access to Dr. Dombrowski’s room connected to the library, where “Dr. Dombrowski had books in his room library that could only be obtained through himself, Myles Horton and other members of the faculty and staff.”⁷⁸ Both Reverend Kilby and William Eldridge created a link between communist periodicals in the library and Dombrowski’s private library to make it appear Dombrowski had communist affiliations.

The common thread throughout the three affidavits presented by Reverend Kilby was that all witnesses claimed to have seen Myles Horton and James Dombrowski in possession of Young Communist League Pledge and Membership cards. In addition to William Eldridge’s affidavit, Ed Westerfield and Roy Lane – both of Tracy City, Tennessee – also provided affidavits against Horton and Dombrowski. Westerfield worked construction during the building of the Highlander Folk School in 1934 and claimed to have seen James Dombrowski in possession of the Youth Communist League cards and explaining to the workers his belief in the Soviet system as being “good for the laboring class of people.”⁷⁹ Lane’s affidavit claimed that he attended meetings involving Dombrowski and Horton for a short period of time and claimed to have overheard the pair promoting the Youth Communist League and advocated “that the Russian form of Government was much better than [the American].”⁸⁰ Lane’s affidavit differed from that

⁷⁷ LCUA, “Activities of the Southern Conference Educational Fund, Inc. in Louisiana,” 31.

⁷⁸ Ibid., 31.

⁷⁹ Ibid., 32.

⁸⁰ Ibid., 34.

of Eldridge and Westerfield in that Lane claimed to have heard Dombrowski explain his plans to the meeting. According to Lane, Dombrowski stated:

it might possibly be twenty years before we would be successful in having the Russian form of Government and would give the following plans: That we should bring up the youths of the country in this belief and train them, have them join the U.S. Army, and if the necessary vote could not be mustered, then they would be able to overthrow the Government from within the army by our own boys in the service.⁸¹

Lane's affidavit was essential for both the LCUA and the prosecution against James Dombrowski as Lane's claim, if accurate, tied Dombrowski not merely to advocating ideas, but inciting others to action.⁸²

Jack N. Rogers, counsel for the LCUA, appeared as the final witness before the committee. Rogers did not testify on first-hand experience with the SCEF or James Dombrowski, but introduced voluminous documentary evidence that alleged communist influence of the SCEF. Rogers relied on guilt by association to build his evidentiary case against the SCEF, providing the committee with letters and documentation claiming to prove the SCEF as a Communist-Front organization. One example of the evidence provided by Rogers to illustrate "Dombrowski's compliance with request of Communist front" was a May 16, 1962 letter from Dombrowski to the White House. Dombrowski, acting as Executive Director of the SCEF, wrote to President Kennedy to "express the deep hope that whenever a vacancy occurs in the Supreme Court that [...] [Kennedy] will give consideration to the appointment of a non-

⁸¹ Ibid., 34.

⁸² By suggesting that Dombrowski not only advocated Communist ideas, but actively incited others towards those goals, Lane and Kilby allowed the Committee to counteract any claims of First Amendment protections by Dombrowski in future prosecutions.

Caucasian justice.”⁸³ Other evidence provided by Rogers included letters written by Dombrowski in the 1950s to Attorney General Howard McGrath and President Eisenhower requesting amnesty for those convicted under the Smith Act.⁸⁴ Letters such as these presented to the committee as evidence of Dombrowski following the Communist Party line.

After hearing Roger’s testimony on the evidence against Dombrowski and the SCEF, the Committee presented its conclusions on the question of the SCEF and communism. On the question of the SCEF as a communist-front organization, the Committee found that the SCEF followed FBI Director Hoover’s definition of a communist front. Director Hoover’s definition, from his 1958 book *Masters of Deceit*, defined a communist front as an organization that portrays itself to be non-partisan, but whose literature and leadership follow the perceived communist line.⁸⁵ In the case of the SCEF, the evidence provided by Reverend Kilby and Jack Rogers convinced the Committee that the leadership of the SCEF was communist, making the entire organization suspect. In its findings on James Dombrowski, the Committee was more explicit in its finding:

The public record of James Anderson Dombrowski, his Marxist-Leninist philosophy as set forth in 1936 in his dissertation, the evidence offered by Rev. C. H. Kilby as to his activities at the Highlander Folk School, his repeated espousal of Communist causes and his open and close associations with other identified Communists, plus his positive identification as a Communist by two separate witnesses before the Senate Internal Security SubCommittee in 1954, leads to the logical conclusion that he is and has been for many years, a “concealed Communist”. He has proven himself truly more dangerous than an “open member”. His files and records are a completely documented record of over

⁸³ *Ibid.*, 64. The letter to Kennedy, listed as Exhibit 22a, was prompted by correspondence from the African-American Heritage Association – directed by Ishmael Flory, an avowed member of the Communist Party – urging support in their quest for a non-white Justice on the Supreme Court.

⁸⁴ LCUA, “Activities of the Southern Conference Educational Fund, Inc. in Louisiana,” 68-69.

⁸⁵ *Ibid.*, 120-121; J. Edgar Hoover, *Masters of Deceit: The Story in Communism and How to Fight it* (New York: Holt, 1958).

twenty five years of successful subversive activities, primarily in the field of race relations.⁸⁶

This devastating critique of Dombrowski's career and characterization as a "concealed Communist" by the Committee was important as this conclusion helped bolster the ongoing prosecution of Dombrowski by the state and to diminish Dombrowski in his lawsuit against Chairman Pfister and the rest of the Committee.

James Dombrowski filed federal suit against the Joint Committee on Un-American Activities over the 1963 hearings. In his initial complaint, Dombrowski sued for the state to return all papers seized in the October 1963 raid on the SCEF headquarters and for half a million dollars in damages. A three-judge panel of the District Court of the East District of Louisiana dismissed Dombrowski's claim for "failure to state a claim upon which relief can be granted," while abstaining from the constitutional questions before it.⁸⁷ Appealing to the Supreme Court, Dombrowski alleged that the Louisiana anti-subversion laws and the Joint Committee on Un-American Activities violated his and the SCEF's First and Fourteenth Amendment rights of free expression. The anti-subversive laws, alleged Dombrowski, were overly broad and the state had applied them in bad faith, using the laws to curtail the civil rights efforts of the organization rather than to secure valid convictions. Justice William Brennan, writing for a 5-2 Court (Justices Hugo Black and Potter Stewart abstained from the decision), decided that the state's use of its "Subversive Activities and Communist Control Act" and continued harassment of Dombrowski and the SCEF created a "chilling effect" on the organization. With regard to the police raid on the SCEF headquarters in early October 1963, Justice Brennan noted that harassment of the organization continued after a state judge ruled the arrest of Dombrowski,

⁸⁶ LCUA, "Activities of the Southern Conference Educational Fund, Inc. in Louisiana," 121.

⁸⁷ *Dombrowski v. Pfister*, 227 F.Supp 556 (E. D. La. 1964).

Smith and Waltzer invalid as the arrest warrants were not based on probable cause. The evidence seized in the raid was also quickly ruled to be inadmissible in court.⁸⁸ The hearings of the Joint Legislative Committee on Un-American Activities and continued attempts by the State to indict Dombrowski under the “Subversive Activities and Communist Control Act” created an environment that “frightened off potential members and contributors” and “paralyzed operations and threatened exposure of the identity of adherents to a locally unpopular cause.”⁸⁹ Justice Brennan further argued that both the oath and registration requirements of Louisiana’s anti-subversion law were unconstitutional for violating due process (the oath requirement) and creating a “danger zone” within which protected expression could be violated (the registration requirement).⁹⁰

While the anti-communist crusade lost steam on the federal level with both the death of Senator Pat McCarran and the loss of influence of Senator Joseph McCarthy in 1954, the fear of communists in American society continued. On both the State and Federal levels, the growing civil rights movement became a target of the anti-communist crusade. Director Hoover shifted the investigation of the FBI towards the growing radicalism of the civil rights movement, while individual states, particularly in the South, quickly wed the idea of communism with integration and civil rights. The growing civil rights movement in the South, the federal pressure on the South to integrate, and the state’s legal and social responses drew the eyes of the nation southward, so that by 1963, one of the key domestic issues was race and the South. The federal government became preoccupied with the issue of race and the South to such a degree that the waves of urban racial violence through the North and the West in the mid-1960s came as a shock

⁸⁸ *Dombrowski v. Pfister* 380 U.S. 479 (1965).

⁸⁹ Ibid.

⁹⁰ Ibid.

to most in government. The idea of racial radicalism and communism had become intertwined to such a degree in the public mind that when urban racial riots exploded in the North and the West between 1964 and 1968, one of the major strains of thought behind the causes of the riots was the idea of communist-trained instigators travelling throughout the country igniting racial violence. This idea remained prominent during congressional attempts between 1966 and 1968 at legislation designed to make the nation safer during this internal security crisis.

Chapter 4 Riots of the 1960s as an Internal Security Crisis

As the Supreme Court decided on the applicable rights to members of the CPUSA, a second internal security crisis emerged. During the mid-1960s, the urban centers of the nation seemed to explode in episodes of racial violence. Between 1963 and 1968, riots occurred in cities as geographically disparate as Newark, New Jersey; Detroit, Michigan; Chicago, Illinois; Philadelphia, Pennsylvania; and Los Angeles, California. The race riots of the mid-1960s should be considered separate from both the violent political demonstrations in the late 1960s (ie. the Chicago Democratic National Committee demonstration in 1968) and the racial violence occurring in the South. The race riots on the 1960s were a result of longstanding social and political grievances in the black community within these urban centers, often excited by conflict between members of the community and the police force.¹ While these riots have been examined as social crises, these riots were also termed as an internal security crisis in Congress. Both the executive and legislative branches understood the danger posed to the nation's internal security, but approached the problem in different ways. The Johnson administration approached the problem of the race riots from a social perspective, attempting to change the perceived problems that led to the riots.² Congress responded to the riots from a "law-and-order"

¹ For the Watts riot in 1965, for example, see: Gerald Horne, *Fire This Time: The Watts Riots and the 1960s* (Cambridge, Mass.: Da Capo Press, 1997), 31-36, 45-53. For Detroit, racial discrimination, and the 1967 riot, see: Sidney Fine, *Expanding the Frontier of Civil Rights: Michigan, 1948-1968* (Detroit: Wayne State University Press, 2000), 229-270, 313-334; Thomas J. Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* (Princeton: Princeton University Press, 1996), 181-258; and Sidney Fine, *Violence in the Model City: The Cavanagh Administration, Race Relations, and the Detroit Race Riot of 1967* (Ann Arbor: University of Michigan Press, 1989), 71-125. For general overviews of theories on racial violence, see: Donn C. Worgs, "'Beware of the Frustrated...': The Fantasy and Reality of African American Violent Revolt," *Journal of Black Studies* vol. 37, no. 1 (September 2006): 20-45; James B. Rule, *Theories of Civil Violence*, volume 1 (Berkeley: University of California Press, 1989), 200-74; and James N. Upton, "The Politics of Urban Violence: Critiques and Proposals," *Journal of Black Studies* vol. 15, no. 3 (March 1985): 243-58.

² After the urban riots of 1964 and 1965, President Johnson established a presidential commission to explore the causes of urban riots and crime within American society in March, 1966. Lyndon B. Johnson, "Special Message to the Congress on Crime and Law Enforcement, March 9, 1966," *Public Papers of the President of the United States:*

perspective. Congressional leaders felt that the riots occurred because of a lack of federal support for city and state police forces and that the root cause of the riots was not the social and political inequalities, but the appearance of outside agitators.³ Some politicians, in politically charged rhetoric, went so far to refer to the riots as “guerrilla warfare” in the cities and “insurrections” requiring the force of the federal government to put them down.⁴ As the Supreme Court was in the process of limiting the ability of the government to compel the registration of perceived internal security threats (such as the CPUSA) – lists that could be used for preventative detention in cases of national defense and internal security crises – Congress and the Johnson administration were forced to shift tactics from registration to wiretapping and electronic surveillance in the investigation of potential internal security threats. The differing approaches to the problems created by the race riots culminated in the Omnibus Crime Control and Safe Streets Act of 1968, which created new legislation governing wiretapping and surveillance. The use and abuse of surveillance by various government agencies would lead to executive and legislative commissions exploring surveillance abuse and privacy concerns, eventually culminating in the creation of the Foreign Intelligence Surveillance Act in 1978.

Lyndon Baines Johnson, 1966, vol. 1 (Washington: United States Government Printing Office, 1967), 291-299. For the commission report, see: President’s Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society : A Report by the President’s Commission on Law Enforcement and Administration of Justice* (Washington: United States Government Printing Office, 1967). [Hereafter referred as *Crime Commission Report – 1967*].

³ Members of both the House and the Senate believed that the riots were the result of outside agitation and believed that the earlier riots (particularly the riots in New York) were the result of Communist agitation. Early attempts at preventing future riots included punishing outside agitators. See proposed antiriot legislation in 1967 as an example of legislation intended to prevent outside agitation: *Antiriot Bill – 1967*, HR 421, 90th Cong., 1st sess.

⁴ For the description of the racial riots as “insurrections,” see Senator Strom Thurmond’s statements in both the hearings of the Senate Judiciary Committee on proposed antiriot legislation in 1967. Thurmond, in describing the riots, suggested that the “insurrections which have been sweeping the major cities of the North have reached the proportions of anarchy.” Senate Committee on the Judiciary, “Statement by Senator Strom Thurmond,” *Antiriot Bill – 1967: Hearings on HR 421*, 90th Cong., 1st sess., (Washington: United States Government Printing Office, 1967), 19. [Hereafter referred as *Senate Antiriot hearings, 1967*].

In the first nine months of 1967 alone, there were over one hundred and sixty four instances of civil disorder. The Presidential Commission on Civil Disorders (the Kerner Commission) identified eight of these disorders as “major” disorders characterized by a number of factors, including, but not limited to: intensive looting and reports of snipers; violence lasting two or more days; sizeable crowds involved in the disorder; and the use of National Guard and/or federal troops to control the disorder.⁵ Areas as diverse as Buffalo, New York; Detroit, Michigan; Milwaukee, Wisconsin; Newark and Plainfield, New Jersey; and Tampa, Florida all experienced civil disorders considered to be “major” disorders by the Kerner Commission. Coupled with riots in Harlem, New York and Chicago, Illinois in 1964; Watts, a largely African-American neighborhood in Los Angeles, California in 1965; and Cleveland, Ohio in 1966, it truly seemed to the public that the nations urban centers were at the brink of outright war between the black community and the police. The riot in Watts, in particular, came as a shock to members of the Johnson administration and members of Congress whose attention was focused on the South with respect to racial concerns. Watts seemed particularly jarring as it occurred less than a week after the highly publicized passage of the Voting Rights Act in August 1965. Ramsey Clark, Deputy Attorney General and President Johnson’s point man during the Watts riot, said that:

Only a week before the explosion in Watts, President Johnson, the nation’s most powerful political figures and the united Negro civil rights leadership had gathered under the dome of the Capitol in Washington to witness the signing of the Voting Rights Act of 1965, promising reform through the democratic process. But for the blacks of Watts voting was not the issue. There had been no outright prohibition and little systematic restraint of their right to vote. It seemed irrelevant in the hopeless urban environment. The great moral crusade led by Martin Luther King seeking change through nonviolence and exemplified by the

⁵ President’s National Advisory Commission on Civil Disorders, *Report of the National Advisory Commission on Civil Disorders*, New York Times edition (New York: E.P. Dutton & Co., 1968), 47, 113. [Hereafter referred as *Kerner Commission Report*]. President Johnson established the Kerner Commission in the aftermath of the explosive summer riots of 1967, including Detroit and Newark.

Selma-to-Montgomery march in the spring of the year lost its luster with the explosion in Watts.⁶

The Watts riot proved to be the jarring impetus for the federal government to deal with issues of racial equality not just in the South, but nationwide. While the Watts, Newark, and Detroit riots were the largest of the over three hundred riots that occurred between 1963 and 1968, they were also important as the only riots that required the use of federal troops to help the state and local police to control and contain the rioting. The extent of the rioting between 1963 and 1968 was such that “law and order” was the number one domestic issue in the 1968 election, behind only the Vietnam War.

Each riot, while distinct geographically, contained a number of commonalities that led politicians and the public to feel that the nation’s urban centers were at the edge of breaking down. First, the racial rioting of the 1960s often was a symptom of greater social ills within the nation’s urban centers. A second commonality was the extent of the damage to the urban infrastructure. Finally, the extent of the rioting led to the governors of these states to request the aid of federal troops to contain the riot.

The black community in many northern and western cities started feeling socially and politically underrepresented in city politics as the urban landscape began to change; the growth of suburban areas led to the rise of urban ghettos and the increasing political and social marginalization of the urban black community. African-Americans became increasingly underrepresented in urban politics even as they became an increasingly higher percentage of the population. Feeling politically underrepresented and living in areas of economic underdevelopment, the African American community also felt that the police was more a

⁶ Ramsey Clark, *Crime in America: Observations on its Nature, Causes, Prevention, and Control* (New York: Simon and Schuster, 1970), 166.

repressive, than protective, force for their community.⁷ A common complaint within the black community prior to explosions of rioting was the charge of police brutality against African-American suspects and the feeling of a different standard in justice being applied to African-American suspects than to white suspects.

This growing feeling of the police acting as a repressive force often led to the spark that ignited the rioting; often a proximate cause of rioting was an incident between the police and the black community that, while the incident may be seen as “typical” under other circumstances, stirred up resentment in the black community causing the rioting. In Detroit, for example, the proximate cause of the riot was a police raid of an unlicensed after-hours bar (a “blind pig”) and subsequent arrest of the patrons. A crowd began to congregate around the excitement of the police raid and rumors began to spread of police brutality against suspected patrons of the bar.⁸ The spark for the Newark riot was the arrest of a black cabdriver for improperly overtaking a police vehicle. The officers used force when the suspect became uncooperative and rumors spread over cab radios and through the black community that the suspect had died in police custody (he had not).⁹ In the Hough riots in Cleveland in 1966, the violence started when police were called to disperse a crowd that had gathered around a local white-owned business. On June 18, the owners of the Seventy-Niner’s café forcibly removed a woman for soliciting funds from patrons of the café and, in a separate incident later in the evening, refused to serve water to a black customer. After the owners placed a homemade sign on the front door declaring “No Water for Niggers,” a crowd understandably began to gather and harass the owners. The owners

⁷ *Ibid.*, 154.

⁸ Fine, *Violence in the Model City*, 155-162.

⁹ Kevin Mumford, *Newark: A History of Race, Rights, and Riots in America* (New York: New York University Press, 2007), 98, 127-129.

armed themselves and appeared before the crowd to protect their establishment. Once the police arrived, they began forcibly and violently to disperse the crowd. As the crowd began to move away from the Seventy-Niner's café, they began to throw rocks at nearby businesses and the riot began.¹⁰ While the police behavior in these instances was seen as "typical" behavior among city and police officials, within the black community such actions were seen as part of a continuing pattern of abuse against the black community.

The size and the extent of the damage caused by each of these riots further led to the feeling that the urban centers were on the edge of breaking down. The riots classified as "major disorders" caused extensive damage to the city and city infrastructure. Of the eight cities that experienced "major disorders" in 1967, Detroit, Newark, and Cincinnati experienced the most damage. Along with Watts in 1965, the damage inflicted on these four cities by riots exceeded \$100 million dollars. Detroit and Watts led the way with an estimated \$45 million dollars in riot-related damage each, followed by Newark and Cincinnati with \$10.6 million and \$1 million in damage respectively.¹¹ In Watts, over six hundred buildings were damaged during the rioting, with one-third of those buildings being completely destroyed by fire.¹² The rioting in Detroit accounted for 477 buildings damaged by arson and looting during the 1967 riot, of which 364

¹⁰ Louis H. Masotti and Jerome R. Corsi, *Shoot-out in Cleveland: Black Militants and the Police: July 23, 1968* (New York: Frederick A Praeger, Publishers, 1969), 12-13; Marc E. Lackritz, *The Hough Riots of 1966* (Cleveland, OH.: Regional Church Planning Office, 1968), 7.

¹¹ *Kerner Commission Report*, 115; Governor of California's Commission on the Los Angeles Riots, "144 Hours in August 1965," in *Violence in the City: An End or a Beginning? The Governor's Commission on the Los Angeles Riots*, accessed electronically at <http://www.usc.edu/libraries/archives/cityinstress/mccone/part4.html> [Hereafter referred as the *McCone Commission Report*]. Both the estimates by the Kerner Commission and the McCone Commission on riot-related damage are more conservative than those reported during and shortly after the rioting, but also are more accurate due to the assistance of various state and local insurance organizations.

¹² *McCone Commission Report*, "144 Hours in August 1965," <http://www.usc.edu/libraries/archives/cityinstress/mccone/part4.html>

(76 percent) were declared demolished by Fire Marshal Bernard DeCoster and the city.¹³

Newark managed to avoid the physical damage that plagued Watts and Detroit, with most of the economic cost of the riot coming from looting and superficial damage to storefronts. Of the \$10.6 million in riot-related damage, approximately \$8 million was attributable to loss of inventory and stock while approximately \$2 million was attributable to damages to glass, and building fronts. While the physical damage was more widespread than in Detroit and Watts – 889 total buildings were damaged in the Newark rioting – the damage was not as deep. Only 18 percent, or 161 buildings, were declared demolished or heavily damaged.¹⁴ In addition to the physical damage incurred by urban centers during the rioting of the 1960s, there was also a human cost to the rioting. In 1967 alone, 83 people lost their lives during rioting, while 1897 received injuries with a majority of the casualties in the Detroit and Newark riots. According to official tallies, 43 people died and 324 people received injuries in the Detroit riot, while 25 people died and 725 were injured in the Newark riot.¹⁵

The arrest records of rioters also suggest the intent of rioting as expressing frustration against local symbols of power, particularly white businesses in predominately black neighborhoods. In the Kerner Commission's examination of arrest records in nineteen of the cities that experienced rioting, most of the charges were property-related: 31 percent of the charges levied were for breaking and entering or trespassing, while 15 percent were for burglary, robbery, or theft. Only 7 percent of the charges were for breach of peace violation (disorderly conduct, disturbing the peace, or loitering) or incitement to riot, while 19 percent were for

¹³ "List of Buildings Hit by \$100 Million Riot Fires," *The Detroit News*. August 5, 1967, A3.

¹⁴ *Kerner Commission Report*, 115-116, 164.

¹⁵ *Ibid.*, 162

curfew violations.¹⁶ Focusing on the arrest record of Cincinnati, one of the cities examined in the Kerner commission's review of arrest records, a majority of charges (54 percent) laid in relation to the riot were breach of peace charges, particularly disorderly conduct and loitering.¹⁷ Cities that experienced the riots in the 1960s not only underwent the short-term physical, human, and economic damage of the rioting, but also experienced longer-term economic damage in the form of higher insurance rates and harming the economic reputation of the city and stunting further economic growth by scaring away potential investment through fears of future rioting.¹⁸

The extent of the rioting led to the governors of states experiencing "major disorders" to request the aid of federal troops to contain rioting. Prior to the Detroit riot in 1967, federal troops had only been used to help contain the Watts riot in 1965. As Ramsey Clark notes:

The governors, once their inhibitions were broken by the request for the Army at Detroit, have been inclined to call quickly for troops. Their hesitancy, until Governor Romney asked for federal help at Detroit in 1967, stemmed in the main from a desire common to governors to seem strong enough to handle any trouble in their own states. With increasing fear, the demand for early overwhelming force grew.¹⁹

After Governor Romney requested the assistance of federal troops in addition to local and state police and Michigan National Guard units, other governors were more likely to do the same during possible civil disturbances. President Johnson acted proactively to call up federal troops to prevent and assist cities against possible rioting after the assassination of Dr. Martin Luther King Jr. on April 4, 1968. The problem with using federal troops, or even National Guard units,

¹⁶ *Kerner Commission Report*, 177.

¹⁷ "Testimony of Jacob W. Schott, Chief of Police, Cincinnati, Ohio, August 2, 1967," *Senate Antiriot Hearings, 1967*, 129.

¹⁸ Jonathan J. Bean, "'Burn, Baby, Burn': Small Business in the Urban Riots of the 1960s," *The Independent Review* vol. 5, no. 2 (Fall 2000): 165-187.

¹⁹ Clark, *Crime in America*, 276.

to help restore order in these riot situations was that the military had limited training in the use of non-lethal force.

When dealing with a riot situation, cities often have three tiers of protection. The first line of defense is the local and state police force. During the riots of the 1960s, most affected states employed both metropolitan police forces and state police force against rioters, to varying degrees of success. While the size of the average metropolitan police force varied depending on the size of the municipality, an average police officer received eight weeks of training, of which approximately eighteen hours consisted of crowd- and riot-control training.²⁰ When dealing with a riot situation, police officers were often left only with their police baton and sidearm for protection, leaving the officer with few options between the use of lethal and non-lethal force for self-protection or in dispersing the riot situation should the situation escalate. Urban police forces often had tear gas and other deployable chemicals for crowd and riot dispersal, but often lacked gas masks for police use, limiting the effectiveness of chemical dispersals.²¹ The state police forces, however, tended to be rather small – the average size of a state police force was approximately one thousand men – and focused primarily on traffic policing. Most members of the state police force received about half the training of an average police officer (10 hours or less) in crowd- and riot-control, so these state police forces served as an auxiliary, rather than a true reserve force, to urban police forces during times of civil disturbances in the 1960s.²²

Should the local and state police force be unable to handle the situation, a request was sent to the governor of the state for mobilization of the state National Guard. The use of National Guard units was often the first option for governors in assisting beleaguered city police

²⁰ *Kerner Commission Report*, 489.

²¹ *Kerner Commission Report*, 491-92; *Crime Commission Report – 1967*, 112-13.

²² *Kerner Commission Report*, 496-97.

forces during times of riot. National Guard units were called to aid local police units in most “serious” and “major” disorders, including: Rochester, New York in 1964; the Watts riot in 1965; Cleveland, Ohio in 1966; Detroit, Michigan and Newark, New Jersey in 1967; and Baltimore, Maryland and Washington, D. C. in 1968.

The third and final tier of protection for urban centers experiencing intense rioting was for the governor of the impacted state to request federal troops to assist local police and state National Guard units. The most prominent uses of federal troops were the Watts riot, and the riots in Detroit and Newark. The problem with the use of National Guard and federal units was that, outside of the psychological effect that military units had on rioters, these forces offered little by way of the application of non-lethal force. Military units, by their very nature, emphasized the application of lethal force against an opponent. The use of bayonets and rifles against American citizens, even those engaged in major rioting in urban centers, was considered a politically untenable situation to be avoided. During the Detroit rioting, all troops under federal control (both regular military and Michigan National Guard units) were issued rules of engagement to use the minimum force necessary to restore law and order in Detroit. Deputy Secretary of Defense Cyrus Vance was on-site at the Detroit riots and reported the following orders distributed to troop commanders:

Troop commanders were instructed to apply force in the following order of priority: a) Unloaded rifles with bayonets fixed and sheathed b) Unloaded rifles with bare bayonets fixed c) Riot control agent CS – tear gas d) Loaded rifles with bare bayonets fixed.²³

Based on these rules of engagement, military forces were used first and foremost for their psychological effect. The appearance of military units bearing rifles with fixed bayonets

²³ Cyrus R. Vance, *Final Report of Cyrus R. Vance, Special Assistant to the Secretary of Defense, Concerning the Detroit Riots, July 23 through August 2, 1967*, Lyndon Baines Johnson Library. [Hereafter referred as *Johnson Library*], <http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/Vance-C/DetroitReport.asp>.

(sheathed or unsheathed) was designed to break the will of rioters and to end the riot with the minimal possible bloodshed. Should the psychological effect of the appearance of military units not be enough to end the riot, the use of tear gas with properly equipped military units allowed the military to disperse large crowds with the minimal use of force. Loaded rifles and bare bayonets remained the last resort of military units for self-defense. The rules of engagement provided to military units during the Detroit riot allowed the military to perform two limited tasks: first and foremost, military units could be directly used to disperse rioters; second, civilian and military commanders could choose to use military units to limit the expansion of rioting and cordon off riot-inflicted areas, leaving local police forces to deal with the rioters.

There existed a fourth tier of crisis protection for cities that often was ignored or misused: the use of so-called counter-rioters, members of the affected community who worked with city politicians and urban police forces to diffuse rioting and to serve as a conduit of communication between authorities and rioters. Rather than seen as collaborators, counter-rioters were seen by both the police and rioters as a plausible means of preventing the expansion of rioting throughout all parts of the city and a means to convey grievances of the black community to city politicians. The most effective use of counter-rioters was found during the Tampa riots when a group of young men, recruited by members of the Community Relations Board, went out and confronted the rioters on a youth-to-youth level rather than police-rioter confrontations. With rioters expressing anger against city power structures, particularly the police forces, it proved to be effective to limit interaction between the police and rioters through the use of counter-rioters if possible.

Congress was already debating antiriot legislation as some of the nation's cities burned in the summer of 1967. The House passed H.R. 421 designed to prevent future rioting and sent it to

the Senate for consideration. The House believed that most of the rioting in the summer of 1967 was caused by outside agitators and designed the legislation to make it a federal crime to travel interstate with intent to incite rioting or other civil disturbances. The proposed bill shows the underlying thinking of Congress with respect to the rioting that had been occurring summer after summer for the previous four years. For the majority of Congress, the rioting was less a symptom of underlying social issues, but part and parcel of the Cold War where agitators, including Communists, travelled throughout the nation agitating the race issue and attempting to undermine the security of the United States from within. Based on these assumptions, Congress designed the proposed 1967 antiriot legislation to limit the movement of possible agitators and, thereby, prevent future racial riots. Less than one week after order had been re-established in Detroit, the Senate Judiciary Committee started hearings over H.R. 421. During the month of August, 1967, the Senate Judiciary Committee heard from leading state law enforcement officials, social scientists, and local and state politicians on their views of the riots of 1967.

One of the major concerns of the Senate Judiciary Committee was discovering the extent, if any, to which outside agitation within the affected cities contributed to the cause of the riots. In particular, the committee was concerned with possible outside agitation by “black nationalists” and communists. Two major strains of thought emerged with respect to the witness lists for the committee hearings. On the one hand, Senator Eastland, by this time chairman of the committee, focused on witnesses heavily involved in law enforcement in riot-affected cities. These witnesses, as law enforcement officials, have internalized biases with respect to rioting; often they focus on perceived short-term immediate causes of rioting within their respective cities and tend to downplay police involvement as the reasons behind the rioting. Senators Philip Hart (D-Michigan) and Edward Kennedy (D-Massachusetts) pursued a different track with

witnesses, having a witness list that emphasized the social ills underlying the anger behind the racial rioting.

Senator Eastland's witness list included: Jacob W. Schott, chief of police in Cincinnati, Ohio; Captain George C. Campbell and Lieutenant Daniel S. Hennessey of the police department of Plainfield, New Jersey; Police Sergeant J. S. de la Llana of Tampa, Florida; Detective William Millard of the Newark, New Jersey police department; and Police Sergeant John S. Ungvary of Cleveland, Ohio. The importance of these cities laid in the fact that each city experienced severe enough racial and urban rioting that National Guard units were required to aid the police in re-establishing law and order in the affected areas. Committee questioning of these witnesses often started with a description of the rioting within the various cities, followed by questions regarding the witness's views on the proposed legislation, outside agitation of urban problems as a cause for the particular riot, and community-police relations.

The Senate Judiciary Committee, operating on the assumption that outside agitation substantially contributed to the cause of the riots, focused their questioning on outside agitation. Cincinnati police chief Schott testified that he believed that the riot in his city was preplanned and organized because of the fact that as soon as the police began making arrests, a defense fund was already organized and established. Chief Schott testified that a:

black power group formed the civil defense fund. They raised money to get these people out on bond. They hired counsel for them, and after they are once represented by counsel [...] [the police] cannot go in and interrogate that person unless counsel is there.²⁴

The existence, or pre-existence, of a defense fund for African-Americans in Cincinnati was not the only evidence of outside agitation presented to the Committee by Chief Schott. Chief Schott argued that it was not growing social racial ills in Cincinnati that led to the explosion of violence

²⁴ "Testimony of Jacob W. Schott, Chief of Police, Cincinnati, Ohio, August 2, 1967," *Senate Antiriot Hearings, 1967*, 64.

in June 1967, but rather the arrival of outsiders that pushed the Avondale neighborhood of Cincinnati into violence.

In particular, Chief Schott laid the blame for the riots at the emergence of black power groups within Cincinnati and outside agitators. Between 1965 and the onset of the Avondale riot in June 1967, a number of black power advocates spoke to the African-American community in Cincinnati, including Stokely Carmichael in April, 1965. Schott testified that after Carmichael spoke, “attempts were made to upset police cars. Windows were broken in nearby stores. Motorists passing through the area were stoned, and some firebombs were thrown.”²⁵ The inflammatory speech of Carmichael and others, in Schott’s view, changed the racial politics in Cincinnati, with the emergence of black power groups displacing moderate blacks within the community:

Up until this time [April 1967] the Negro community was represented by old line traditional leaders, people in responsible positions, professional people; and these people were completely intimidated, threatened – that some of them actually moved their families out of the city of Cincinnati.²⁶

What Chief Schott failed to explain to the committee, however, was the reason behind both Carmichael’s speech in April and the rising racial tension in the city. As with other Northern and Western cities that experienced rioting in the mid-1960s, tensions existed between the local police force and the black community in Cincinnati. The tilting point in the tension between the Cincinnati police force and the black community was the arrest, in December, 1966, of Postel Laskey, an African-American jazz musician. Laskey was arrested and charged with being the “Cincinnati Strangler,” a serial killer who raped and strangled seven women in Cincinnati between 1965 and 1966. By May 1967, Laskey was convicted and sentenced to death; a

²⁵ Ibid., 62.

²⁶ Ibid., 62.

conviction that most of the black community felt unjust, believing that Laskey did not receive a fair trial. This feeling of a double standard of justice for blacks and whites seemed born out when, almost simultaneously to Laskey's sentencing, a white man charged with manslaughter of his girlfriend received a suspended sentence.²⁷ The growing feeling of powerlessness within the black community of Cincinnati did more to radicalize the younger members of the community than did outside agitators. Speeches by Stokely Carmichael and others could only push the black community to action if they fell upon fertile ground.

Chief Schott's testimony about the Cincinnati riots was more accurate when discussing the effect of outside agitators during the riot. H. Rap Brown, a leading member of the Student Nonviolent Coordinating Committee, arrived in Cincinnati on June 15 and began issuing demands to the city government. Some of Brown's demands reflected the political desires of the black community of Cincinnati, while others reflected the growing black power movement. Among Brown's moderate demands were calls for greater representation of the black community in city government, while other demands included veto power for the black community over city law enforcement officers and the hiring of black commanders of police and fire departments within predominately black communities.²⁸ While H. Rap Brown represented a radical element brought into the community, his demands failed to galvanize the community into more violence once the demands were rejected by the city government.²⁹

In their testimony to the Senate Judiciary Committee, Captain George Campbell and Lieutenant Daniel Hennessey of the Plainfield, New Jersey police department echoed similar

²⁷ *Kerner Commission Report*, 47. Although the Laskey and other manslaughter cases were legally in no way similar, the black community felt that the sentences reflected a double standard in justice.

²⁸ "Testimony of Jacob W. Schott, Chief of Police, Cincinnati, Ohio, August 2, 1967," *Senate Antiriot Hearings, 1967*, 101-2.

²⁹ *Kerner Commission Report*, 52; "Newark: Post-Riot Summit for Black Power," *Life*, August 4, 1967, 26-28.

concerns of outside agitation in the Plainfield rioting between July 14 and July 21, 1967. In a slight twist on the issue of outside agitation, Captain Campbell suggested that the riot was part of a greater conspiracy among rioters between cities – particularly between Plainfield and Newark, New Jersey. Lieutenant Hennessey, as commanding officer of Plainfield’s bureau of criminal investigation, was in a position to provide intelligence to the committee on the Plainfield riot. Hennessey testified that the second night of rioting (July 15) brought outsiders into the equation, seemingly bent on organizing the rioters:

The organization of these people [the rioters] continued during Saturday [July 15], and by Sunday [July 16] there were other people in charge that had been drilling youths to form squads of five, to work by hand signal and to work by a whistle. When the guns were brought into town, they were distributed on the street with one instruction, “Go out and kill whitey.”

We know that looting parties were led by squads of five men or boys that were armed with these carbines. We know two squads laid siege to the firehouse. We know that two more squads shot up automobiles on Central Avenue. We know that one more squad was present at the looting of a tavern.³⁰

Based on the arrest numbers brought to the committee by Campbell and Hennessey, however, it seems unlikely that outside agitators played a major role in the intensification of the rioting. According to Campbell, only 1 of the 158 people arrests came from outside the state of New Jersey, while only 11 came from outside the Plainfield area proper. Although reliable intelligence had about 10-15 people characterized as “Black Muslims” arriving from Newark (approximately fifteen miles from Plainfield), this doesn’t lend credence to Campbell’s assertion of a greater conspiracy as, similar to Cincinnati, rioting had already started prior to the arrival of outside agitators to the scene.³¹

³⁰ “Testimony of Lt. Daniel S. Hennessey, Department of police, Plainfield, New Jersey, August 3, 1967,” *Senate Antiriot Hearings, 1967*, 198.

³¹ “Testimony of Capt. George C. Campbell, Department of police, Plainfield, New Jersey, August 3, 1967,” *Senate Antiriot Hearings, 1967*, 198-99.

The main danger, indeed the crisis point, in the Plainfield rioting was the theft of forty-six M1 rifles from the Plainfield machine shop shortly before the rioting occurred. The theft of these weapons, coupled with a previous theft of fifteen weapons from the same shop two years prior, created a viable threat for law enforcement and fire department officers faced with a riot situation. Justifiably concerned with rifles being used against his officers, Campbell argued that stronger national firearm legislation was not only preferred, but required.

In attempting to support the proposed bill, Captain Campbell undermined his position during questioning by Senator Kennedy. After admitting to Kennedy that Elizabeth and Newark New Jersey are relatively close to Plainfield, 12 and 20 miles respectively, and that there would be little difficulty for people to travel between the three cities, Campbell expressed his opinion on whether H.R. 421 would prevent or assist in preventing riots in neighboring cities. Campbell argued that H.R. 421 would benefit a situation like that in Plainfield as a deterrent for non-locals for agitating and escalating any riot situation. The problem with Campbell's position was that, based on his previous testimony, most of the arrests for rioting or riotous acts (86% of the arrests) were local to Plainfield and its immediate surroundings and that most outside agitators came from within New Jersey (particularly from Newark and Elizabeth). The antiriot legislation before the committee would not apply to a situation like Plainfield and would do little with regard to the other riots as well.

The testimony of Detective William Millard of the Newark Police Department provided a better indication of outside agitation with regard to rioting than the representatives from the Plainfield police department. The Newark riots occurred almost concurrently with the Plainfield riot, lasting from July 12 to July 17, 1967. In the case of Newark, there was clear evidence of outsiders arriving in Newark in the months prior to the rioting and actively attempting to

radicalize the black community. One Albert Roy Osborne, also known as Colonel Hassan, a member of the Black Liberation Party, arrived in Newark from Washington D.C. in late April 1967. Colonel Hassan began integrating himself in the black community and announced one Darrel Dawson of Newark, also known as Captain Lafite, as one of his prime recruiters in Newark.³² At various meetings in the city between May and July 1967, Hassan moved around the community arguing, among others things, that the federal government would eventually move blacks into concentration camps as they did to Japanese-Americans during the Second World War. At a meeting of the major leadership of the black communist of Newark, Hassan suggested that if the people were not willing to effect change, then he had an army ready to step up.³³ Further agitation by Hassan and his followers included disrupting Board of Education and Planning Board meetings, at one point ripping out the recording tape of the meeting and smashing the tape recorder.³⁴ Hassan and other black militants had a significant role in escalating the violence starting to occur within Newark by circulating inflammatory material charging the police with brutality and calling for a protest rally in front of the police station.³⁵

While outside agitation did play a significant role in escalating the Newark riot, it remains unlikely that legislation such as that proposed by H.R. 421 would have prevented or deterred the escalation. Although some agitators were from out of state, most were already ensconced in the city for several months or were locals. The testimony given by law

³² Mumford, *Newark*, 112-116.

³³ “Testimony of Detective William Millard, Department of police, Newark, New Jersey, August 4, 1967,” *Senate Antiriot Hearings, 1967*, 265-67; Mumford, *Newark*, 113-114.

³⁴ *Kerner Commission Report*. p. 59-60; “Testimony of Detective William Millard, Department of police, Newark, New Jersey, August 4, 1967,” *Senate Antiriot Hearings, 1967*, 265-66.

³⁵ *Kerner Commission Report*, 63-64; Mumford, *Newark*, 115.

enforcement officials such as Detective Millard and Chief Schott helped show that H.R 421 would have done little as preventative or deterrent legislation for rioting.

Several prominent witnesses testified to the lack of outside agitation with respect to the riots within the city they represent. Sergeant J. S. de la Llana of the Tampa police department testified that the riots within Tampa lacked the outside agitation found in some of the cities of his fellow law enforcement brethren. When testifying about the use of Molotov cocktails during the riots, seen by some conservative members of the committee as evidence of outside interference, Sergeant de la Llana noted that:

They [Molotov cocktails] were made right there by the people participating in the disturbance themselves. This also carried on through to the following night. The people involved in this disturbance, this rioting, were mostly of the younger class, juveniles and teenagers. It was evident at times that some of these Molotov cocktails or firebombs, that they were not familiar with the construction of them due to the fact that we found some that instead of gasoline had kerosene, and of course did not ignite.³⁶

The lack of expertise with the construction of Molotov cocktails indicates the absence of outside experts or agitators operating within the black community during the Tampa riots. Sergeant de la Llana further testified that, unlike several northern cities that experience rioting, all riot-related arrests involved Tampa locals, further indicating the lack of outside agitation. In addition, de la Llana noted that there was no sense of leadership or organization among the rioters and that rioting within the city was sporadic rather than directed at particular targets.³⁷

In discussing the Watts riots in 1965, Dr. Nathan Cohen of UCLA testified to the lack of outside agitation in the outset of the riot. In discussing the major agitators that law enforcement officers believed to have contributed to the causes of the riots of 1967, Dr. Cohen noted that:

³⁶ “Testimony of Sergeant J. S. de la Llana, Department of police, Tampa, Florida, August 4, 1967,” *Senate Antiriot Hearings, 1967*, 248.

³⁷ *Ibid.*, 250, 258.

it might be helpful to keep in mind the fact that [Stokely] Carmichael and [H. Rap] Brown were not on the scene in 1965. In fact, at that time Malcolm X had not achieved his status as a martyr. It might be helpful to keep in mind, too, that riots are not new in the United States. What is new is the change in their form.³⁸

The lack of outside agitation from prominent members of Black Nationalist groups in Los Angeles did not mean a lack of violence in Watts in 1965. Dr. Cohen was also correct in noting that urban riots were not a recent phenomenon, but had occurred sporadically in first half of the 20th century. While there had been racial riots, particularly in East St. Louis in 1917 and Chicago in 1919, these were primarily white-on-black riots that involved lower-class whites using force to prevent black encroachment into the white-dominated housing and labor markets.³⁹ The riots of the 1960s were primarily the black community expressing their frustration at the social and political realities of the urban centers through violence.

The committee received further testimony on the Watts riots from former head of the CIA, John A. McCone. Governor Pat Brown of California appointed McCone to head up a committee to study the causes of the Watts riots shortly after the riots. Considered by all the members of the Judiciary Committee to be an expert on rioting, McCone's testimony carried weight among all members of the committee. McCone's testimony was similar in nature to that of Dr. Cohen's. McCone testified that he believed that there was no singular cause of the Watts riots, but rather growing dissatisfaction amongst the black community towards local government. The growing sense of the police as an oppressive force towards the community, according to McCone, was the single greatest factor in the lead-up to the rioting in Los Angeles in 1965.

³⁸ "Testimony of Nathan Cohen, professor of community planning and community organization, University of California, Los Angeles, August 21, 1967," *Senate Antiriot Hearings, 1967*, 599.

³⁹ Charles L. Lumpkins, *American Pogrom: The East St. Louis Race Riot and Black Politics* (Athens: Ohio University Press, 2008), 109-142; William M. Tuttle, *Race Riot: Chicago in the Red Summer of 1919* (Champaign: University of Illinois Press, 1996), 32-53.

When pressed by Senator Eastland about his views on the bill in front of the committee, McCone testified that:

I have no opposition to restrictions that might be placed by the Federal Government as to a person who travels from State to State and aggravates a situation, and there are many people doing this. I must say, however, that *I do not think that the riots we examined were caused by out-of-State agitators.*⁴⁰

The lack of outside agitation with regard to the Watts riots in 1965 provided more evidence that legislation punishing interstate travel for the purposes of inciting riots would not be applicable to the racial riots occurring throughout the nation in the 1960s. In fact, Mr. McCone believed that stopping the interstate movement of agitators would not solve the problem of rioting as “in every area of the United States, everything that is going on is known through the various media of communication.”⁴¹ Agitation of existing social conditions could take place, for example, when one group watches on television the mistreatment of a similar community by police forces and starts questioning their own treatment by the police force of their community.

Major General George M. Gelston, the highest ranking military officer in the Maryland National Guard, testified on his views of the rioting in Maryland and elsewhere during 1967. Based on his experience with the riots throughout Maryland in 1967, Gelston testified on the effective use of teargas by National Guard troops in clearing streets of potential agitation, but more importantly told the committee his views on the causes of these riots:

Much has been said about, and indeed, this law is aimed at, so-called outside agitators. As a matter of fact, I have seen no evidence that at Watts, Detroit, or Newark, there were any outside agitators or indeed any agitation beyond an event that triggered an already existing disenchantment.

⁴⁰ “Testimony of John A. McCone, Los Angeles, August 22, 1967,” *Senate Antiriot Hearings, 1967*, 655. Emphasis added to original; *McCone Commission Report*, “The Crisis – An Overview,” <http://www.usc.edu/libraries/archives/cityinstress/mccone/part3.html>.

⁴¹ “Testimony of John A. McCone, Los Angeles, August 22, 1967,” *Senate Antiriot Hearings, 1967*, 655.

Many civil rights organizations, locally led, have called in outsiders to dramatize and call attention to themselves and to their problems. Were there no problem, there would be no need for an invitation.⁴²

General Gelston's argument regarding the lack of outside agitation in Maryland was further bolstered when Senator Samuel Ervin of North Carolina began questioning regarding the riots in Cambridge, Maryland. Basing his questioning on the previous testimony of Cambridge police chief Kinnamon, Senator Ervin pushed General Gelston about outside agitation in Cambridge.

Senator Ervin. As a matter of fact, you did have an outside agitator in Cambridge just before this last confrontation, didn't you?

Mr. Gelson. No, sir; that is not correct.

Senator Ervin. How long was it between the time that Rap Brown closed his speech, in which he advocated burning, and the time the school building was set afire?

[...]

Mr. Gelston. At a quarter after 9, Mr. Brown started speaking. At 10 minutes of 10, he ceased. Until 10:30, nothing happened. At 10:30, the police, Mr.

Kinnamon stated in his testimony, stopped what he felt was a mob coming down into the Race Street area, which is the white business section.

Senator Ervin. And who was at the head of the mob when they started down?

Mr. Gelston. I understand Brown was, sir. And they stopped it. And they went back in at that particular point.⁴³

Brown's attempt to protest in Cambridge was stopped in short order by the Cambridge police department. The rioting proper in Cambridge started with fires being set around four hours later at about 2:30 AM. The fact that there was no continuous rioting action after Brown's speech and that things had quieted down to the point where the National Guard had actually been ordered to stand down in Cambridge at approximately midnight July 25 led General Gelston to the opinion that outside agitation had little to no influence on the root causes of the riots.

One area where the testimony of law enforcement officials influenced the committee and future antiriot legislation was in community-police relations during the rioting. Most law

⁴² "Testimony of George M. Gelston, Adjutant General, State of Maryland, August 25, 1967," *Senate Antiriot Hearings, 1967*, 729.

⁴³ *Ibid.*, 734.

enforcement officers testified to the necessity of better police-community relations in the prevention of further riots and disturbances, but that lack of funding often prevented the expansion of effective programs and the greater training of police officers in community relations.

One of the most effective examples of police-community relations during a period of rioting was the development of the “White Hat” group during the Tampa riots. James Hammond, administrator of the Tampa Community Relations Bureau, contacted a number of youths in various hotspots to see if they would be willing to work with the city to calm things down and limit to control the rioting amongst the black community. After consulting with the Mayor of Tampa, Nick Nuccio, and his top law enforcement officials, Hammond brought in a number of the leading youths to try to convince city officials to allow groups of pro-city youths to go around town to convince people not to riot rather than rely on the Tampa police (which would cause more agitation than it would resolve). In exchange for withdrawing police from affected areas and placing them on standby alert with state troopers and National Guard, roving gangs of youths wearing white hats would go among the trouble spots and resolve the situation on a youth-to-youth level.⁴⁴ One of the leaders of the White Hats, Norris Morrow, testified to the committee that while the White Hat groups were able to, for the most part, talk to groups of potential rioters and dissuade them from engaging in illegal activities through promises of better community-police relations. On occasion, force was required to deal with groups of potential rioters:

One young man, I guess the spokesman for the group, and he don't want to be made to look small, so he said, “We are going to burn it.” I said, “You are not going to burn it.” “We are going to burn it.” So there was nothing to do then but to go to war [...] I guess if he whipped me he would burn the lumberyard up. I

⁴⁴ “Testimony of Norris Morrow, Member of the White Hat Group, Tampa Florida, August 23, 1967,” *Senate Antiriot Hearings, 1967*, 680-81.

won. So after we finished, the police officer wanted to take him to jail, but that wouldn't have created nothing but another conflict. I said, "Let him go home."⁴⁵

By eliminating the threat of further damaged community-police relations, the White Hats allowed for conflict resolution on a peer-to-peer level rather than a forced resolution from a police-to-suspect level. Sergeant de la Llana testified as to the effectiveness of the White Hats during the Tampa riot under questioning from Senator Kennedy:

Senator Kennedy. Was this white hat force organized prior to your riot?

Mr. de la Llana. It was only in the talking stages. It was organized during the riot, yes, sir.

Senator Kennedy. And did you find it a helpful and useful measure in bringing security and peace to the community?

Mr. de la Llana. Definitely, and even today certain problems arise that they go right in and they themselves handle the situation, if a misunderstanding has been made on either party.⁴⁶

In Tampa, the White Hat group remained an integral part of police-community relations in the period following the riots. Community groups such as the White Hats, groups that were willing to work as a conduit between the police and disgruntled youths within the community, helped alleviate potential problems before they exploded.

Other law enforcement officials and legal specialists testified that enhanced funding for police and community relations would be essential in helping to prevent future riots. Chief Schott put it best when he told the committee:

I think the police departments need help. There is not a police department in the country that is large enough to handle a full-blown riot. If you heard the expression, "The thin blue line," when these things break out, you realize how thin that thin blue line is. We need help and we need it very badly.⁴⁷

⁴⁵ *Ibid.*, 691.

⁴⁶ "Testimony of Sergeant J. S. de la Llana, Department of police, Tampa, Florida, August 4, 1967," *Senate Antiriot Hearings, 1967*, 251.

⁴⁷ "Testimony of Jacob W. Schott, Chief of Police, Cincinnati, Ohio, August 2, 1967," *Senate Antiriot Hearings, 1967*, 66.

There is only so much that local and state police can do without federal financial assistance. Community relations programs are one key way of addressing the financial and manpower shortcoming faced by the local police. Chief Curtis Broston of the St. Louis police department testified to the committee on the effectiveness of police community relations committees in each of St. Louis' nine police districts. As police shifted from foot patrols to vehicle patrols, this created greater separation between the police and the community as the police lost the face-to-face contact with the community. In St. Louis, the police community relations committees provided an intermediary between the police and the community to air grievances and to address community issues before they become community problems.⁴⁸

While the proposed antiriot legislation in 1967 illustrated the approach of Congress towards the riots of the 1960s, the Johnson administration's approach to the riots and the greater problem of crime is to be found in the President's Commission on Law Enforcement and Administration of Justice (the Crime Commission). As the riots continued through the summers of 1964 through 1966, the issue of crime in society became a political issue used by the Republican Party against the Johnson administration. In a similar manner to claiming the Democratic Party was "soft on communism" in the 1940s and early 1950s, leading Republicans claimed that the Johnson administration was "soft on crime" and used the "law and order" issue as a political wedge issue. Richard Nixon, attempting to position himself as a frontrunner for the Republican nomination in 1968, attempted subtly and indirectly to shift blame for the civil disorders to Democrats and civil rights leaders in an August 1966 article:

Who is responsible for the breakdown of law and order in this country? I think it both an injustice and oversimplification to lay blame at the feet of the sidewalk demagogues alone. For such a deterioration of respect for law to occur in so brief a time in so great a nation, we must look to more important collaborators and

⁴⁸ "Testimony of Curtis Broston, Chief of Police, St. Louis, Missouri, August 22, 1967," *Senate Antiriot Hearings, 1967*, 805-06.

auxiliaries. It is my belief that the seeds of civil anarchy would never have taken root in this nation had they not been nurtured by scores of respected Americans: public officials, educators, clergymen and civil rights leaders as well. When the Junior Senator from New York (Robert Kennedy) publicly declares that "there is no point in telling Negroes to obey the law," because to the Negro "the law is the enemy," then he has provided a rationale and justification for every Negro intent upon taking the law into his own hands.⁴⁹

Nixon took the familiar language and the ideas of agitators and collaborators contributing to the deterioration of American society (i.e. law and order) and applied it as an attack to potential political enemies. Nixon continued to build up his political credentials on law and order through 1967 with speeches and articles lamenting the rise of "mob rule" with the "law and order" portion of his campaign culminating a series of political ads extolling the breakdown of "law and order" under the Johnson administration. In a television ad entitled "crime," Nixon attempted to play on the fear of voters by using images of rioting, drug use, and guns with jarring music, claiming that "crimes of violence will double by 1972" and urging voters to "vote like your whole world depended on it."⁵⁰ President Johnson created the Crime Commission both as a means to deflate the issue of "law and order" as a political issue and to find and fix the underlying problems of crime.

There are two key areas examined by the Crime Commission directly related to the racial riots of the 1960s: the issue of juvenile crime and the role of the police in American society. Juvenile crime constituted a serious issue in the urban race riots between 1964 and 1968. A majority of those involved in rioting were 25 years of age or younger, while a majority of

⁴⁹ Richard Nixon, "If Mob Rule Takes over the United States – A Warning From Richard Nixon," August 15, 1966, *U.S. News and World Report*, 64.

⁵⁰ "Nixon Campaign Television Advertisement: Crime," 1968, *Museum of the Moving Image: The Living Room Candidate, Presidential Campaign Commercials, 1952-2008*. <http://www.livingroomcandidate.org/commercials/1968/crime#4023> Nixon's ad campaign concentrated on the issue of "law and order" and crime, with four of his ten major television ads focused on the issue. Only one ad focused solely on the perceived key issue of the campaign, the Vietnam War, while three others were positive campaign ads.

indexed crimes for 1965 were committed by persons in the same age group.⁵¹ By treating the issue of juvenile crime, the Crime Commission believed that it would limit the possibility of future rioting. In a similar finding to the Kerner commission a year later, the Crime Commission noted the role that environment played in juvenile crime rates. The Crime Commission found that crime rates often radiated outwards from the inner city out to the suburbs, with the highest rates for both juveniles and adults occurring in the inner city. The environment of the inner city was often the most economically underdeveloped and the “social institutions generally relied on to guide and control people in their individual and mutual existence simply are not operating effectively in the inner city.”⁵² When discussing the environment that begat juvenile crime, the Crime Commission followed the same themes as the Johnson administration’s “war on poverty.” The Crime Commission made a number of recommendations designed to improve the infrastructure and social conditions of the inner city. To deal with the issues of poor family life as a contributing factor of juvenile crime, the Crime Commission recommended increased funding for inner city housing and recreation facilities, while expanding efforts to reduce unemployment in the inner city and devise methods to ensure a minimum family income.⁵³ The commission further noted that schools within the inner city often produced educationally-handicapped students and incurred high dropout rights: it recommended increased funding for teachers and investment in inner city school infrastructure.⁵⁴ Finally, the Crime Commission noted that unemployment and underemployment in the inner city often led to juvenile and youth crime. The commission recommended that the federal government make a concerted effort to

⁵¹ *Crime Commission Report – 1967*, 5.

⁵² *Crime Commission Report – 1967*, 59.

⁵³ *Ibid.*, 66.

⁵⁴ *Ibid.*, 73-74.

combat unemployment and underemployment through job creation programs, job training programs, and reduced barriers to employment posed by racial discrimination.⁵⁵ The Crime Commission believed that by increasing education and employment opportunities in the inner city, youth crime would decline and limit the possibility of future rioting.

The other key area studied by the Crime Commission was the role of the police in American society. The key problem faced by urban police forces was, and continues to be, “the struggle to maintain a proper balance between effective law enforcement and fairness to individuals.”⁵⁶ It was the perception of a growing imbalance between law enforcement and fairness that was one of the root causes of the urban racial disorders in the 1960s. The black community increasingly felt that the presence of the urban police force was there not so much to protect the black community but to repress it. The commission noted that social tensions between the police and the community were an urgent problem to be dealt with, arguing that:

Bad community feeling does more than create tensions and engender actions against the police that in turn may embitter policemen and trigger irrational responses from them. It stimulates crime.⁵⁷

Thus, the Crime Commission placed special emphasis on the community service function of the police. The commission emphasized that any community-relations program should not be used as a public-relations program by the police but rather used as a long-term, full-scale effort to ensure that both the police and community were acquainted with the problems of the other and could engage in positive action to solve problems if necessary. Furthermore, the commission emphasized that community relations should not be seen as a specialized division of the police department, but rather should be part of the entire department from the chief to the beat patrol

⁵⁵ Ibid., 77.

⁵⁶ Ibid., 93

⁵⁷ Ibid., 100.

officer.⁵⁸ One of the chief recommendations made by the commission was that each precinct stationed in a minority neighborhood should create citizen advisory committees that work with police officials to create solutions to any areas of conflict between the police and the community.⁵⁹ In addition to citizen advisory committees, the commission recommended that clear procedures be introduced in all police departments to ensure that grievances against police officers, such as charges of misconduct or police brutality, be given a full, fair and open hearing to ensure that both the police and the community are satisfied that justice was served.⁶⁰

One of the key ways identified by the Crime Commission to addressing problems of relations between the black community and the police was through minority hiring. While most law enforcement professionals who testified before the Senate Judiciary Committee in 1967 suggested that their respective police force was integrated, they also agreed that more could be done to integrate their departments, particularly those of larger cities. The problem encountered by the police departments was twofold: hiring standards and publicity. Police departments obviously wanted to maintain standards of hiring for their departments, but African-American candidates often fell short of police minimum standards. The Commission noted that:

Recruitment from minority groups will be all but impossible in the immediate future if rigid higher education entry standards are instituted for all police jobs. According to a 1966 census report, 78 percent of all white males between the ages of 20 and 24 have completed at least 4 years of high school while only 53 percent of nonwhite males have. In the 18-to-19 year age group the gap is somewhat greater: 63 percent of white and 37 percent of nonwhite males have completed high school.⁶¹

⁵⁸ Ibid., 100.

⁵⁹ Ibid., 101.

⁶⁰ Ibid., 102-03.

⁶¹ Ibid., 107.

The commission recommended the creation of a new position to allow for a greater number of nonwhite members of the police department. The “community service officer” (CSO) would be a means of entry into the force for both whites and nonwhites who did not meet the requirements of entrance into the force as a police cadet. A CSO would essentially be considered an apprentice police officer, working in conjunction with police officers, and would often be assigned to minority neighborhoods to serve as part of the community service function of the police department.⁶² A renewed emphasis on community relations by most urban police forces and increased minority hiring would go a long way in reducing tensions between the police department and the minority community it has sworn to protect. Increased openness in investigating charges made by the community against the police department would also work in reducing tension between the police and the community.

Dean Jefferson Fordham of the University of Pennsylvania agreed with Vice President Humphrey’s assessment of the urban situation and echoed his call for a “domestic Marshall plan.”⁶³ Calling the urban crisis the number one national crisis, Dean Fordham urged the committee to explore a greater variety of legislation; to enact anti-riot legislation of this sort as part of a larger and well-coordinated legislative plan against the underlying problems of the urban crisis. While the President and his advisors agreed with Fordham’s assessment and viewed social problems within the inner city as the underlying cause of rioting, congressional leaders approached their solution to the riots from a “law-and-order” perspective, viewing the riots and the growing crime rate of the 1960s as threatening the “peace, security, and general

⁶² *Ibid.*, 108

⁶³ “Testimony of Jefferson Fordham, Dean, University of Pennsylvania Law School, August 22, 1967,” *Senate Antiriot Hearings, 1967*, 670.

welfare of the Nation and its citizens.”⁶⁴ Congressional leaders designed the “Omnibus Crime Control and Safe Streets Act” to deal with the perceived causes of the riots (ie. the issue of outside agitation), the lack of economic and material support for police, and crime control in general. The Crime Control and Safe Streets Act approached these issues in two different ways. First, seeing local and state police ill-prepared and under-equipped to deal with the magnitude of some of the rioting, Title I of the Crime Control and Safe Streets Act dealt with ways and means that the federal government could assist state and local law enforcement.⁶⁵ Next, Title III clarified procedures dealing with law enforcement and wiretapping; an issue that law enforcement, particularly the FBI, felt strongly about, but had little by way of Congressional guidance.⁶⁶

Title I, the section most influenced by the Crime Commission report, focused on strengthening state and local police forces. Title I focused primarily on providing economic assistance to states through a variety of grants. The federal government would provide start-up and operating funds for states to establish a state planning agency for law enforcement. These state planning agencies would:

- (1) develop [...] a comprehensive statewide plan for the improvement of law enforcement throughout the State;
- (2) define, develop, and correlate programs and projects for the State and the units of general local government in the State or combination of States or units for improvement in law enforcement; and
- (3) establish priorities for the improvement in law enforcement throughout the State.⁶⁷

⁶⁴ *Omnibus Crime Control and Safe Streets Act*, 82 Stat. 197

⁶⁵ Constitutionally, most law enforcement is a state or local matter. The Federal government enters into law enforcement only when Federal law is involved.

⁶⁶ In *Berger v. New York* (388 U.S. 41, 1967) and *Katz v. United States* (389 U.S. 346, 1967), the Supreme Court decided that surveillance of electronic communications constituted a “search and seizure” under the Fourth Amendment and therefore subject to the Constitutional requirements of a search and seizure.

⁶⁷ *Omnibus Crime Control and Safe Streets Act*, Title I, Part B, Section 203 (b).

By establishing and funding these state planning agencies, both the state and federal governments could identify problem issues and weaknesses with state and local law enforcement and target economic assistance to where it could do the most good. In particular, federal grants delivered through these state planning boards would be used to improve community-police relations, to hire and train more police (both white and nonwhite), and to implement other recommendations of the Crime Commission.

The most far-reaching influence of the Crime Control and Safe Streets Act was Title III, dealing with wiretapping and electronic surveillance. The act constituted the first congressional legislation dealing with wiretapping and surveillance. Prior to this federal legislation, the FBI based its policy of conducting electronic surveillance on authorization initially granted by President Franklin Roosevelt during the Second World War and re-authorized and continued in one form or another by subsequent presidents until explicitly limited by President Johnson in 1965. President Roosevelt authorized the FBI to wiretap in situations dealing with “national defense” investigations and stated this policy in a letter to Attorney General Robert Jackson:

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 person suspected of subversive activities against the Government of the United States, including suspected spies.⁶⁸

After Roosevelt’s death, Attorney General Tom Clark forwarded part of Roosevelt’s memo to President Truman, urging him to re-authorize the policy of electronic surveillance on national security grounds. The surveillance policy remained rather static until microphone surveillance was explicitly authorized by Eisenhower’s Attorney General Herbert Brownell. In response to

⁶⁸ “Memorandum, President Franklin D. Roosevelt to Attorney General Robert Jackson, May 21, 1940,” in Theoharis, ed., *From the Secret Files of J. Edgar Hoover*, 134.

Irvine v. California (347 U.S. 128, 1954), declaring the use of microphones as a trespass and therefore an illegal seizure under the Fourth Amendment, Attorney General Brownell directed the FBI that the:

Department should adopt that interpretation which will permit microphone coverage by the FBI in a manner most conducive to our national interest. I [Brownell] recognize that for the FBI to fulfill its important intelligence function, considerations of internal security and the national safety are paramount and, therefore, may compel the unrestricted use of this technique in the national interest.⁶⁹

The FBI wiretapping and electronic surveillance policy remained relatively consistent until President Johnson explicitly prohibited its use in June 1965. In a memo to all executive departments, President Johnson set down guidelines for future surveillance:

- (1) No federal personnel is to intercept telephone conversations within the United States by any mechanical or electronic device, without the consent of one of the parties involved (except in connection with investigations related to the national security)
- (2) No interception shall be undertaken or continued without first obtaining the approval of the Attorney General.
- (3) All federal agencies shall immediately conform their practices and procedures to the provisions of this order.⁷⁰

Attorney General Katzenbach instituted a stricter policy with respect to electronic surveillance, placing limits on the ongoing surveillance and being very thorough in instigating new investigations.⁷¹

Title III of the Crime Control Act provided the executive branch a uniform basis of “circumstances and conditions under which the interception of wire and oral communications

⁶⁹ “Memorandum, Attorney General Herbert Brownell to FBI Director, May 20, 1954,” in *From the Secret Files of J. Edgar Hoover*, 141.

⁷⁰ “Memorandum, President Lyndon B. Johnson to Heads of Executive Departments and Agencies, June 30, 1965,” in *From the Secret Files of J. Edgar Hoover*, 147.

⁷¹ Katzenbach, *Some of It Was Fun*, 182-85.

may be authorized.”⁷² Operating under its authority to regulate interstate commerce, Congress argued that the facilities used to communicate intrastate and interstate are part of a greater interstate network and, therefore, under the purview of Congress to regulate communications and to determine where and how these communications can be intercepted in the course of criminal or national security investigations. Title III allowed for federal investigative agencies (primarily the FBI) to apply for warrants to authorize the specific interception of oral or wire communications in pursuit of a criminal or national security investigation. Title III also authorized state prosecuting attorneys to apply for warrants for intercepting oral and wire communications pursuant to state law, thereby allowing both the federal government and state governments (when applicable) to apply for warrants to intercept communications in the course of criminal and national security investigations. Warrants could only be applied for with the investigative officer showing probable cause to the judge to whom the application is made.

Investigative officers were required to follow a procedure laid out by Title III:

- (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
 - (a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;
 - (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including
 - (i) details as to the particular offense that has been, is being, or is about to be committed,
 - (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted,
 - (iii) a particular description of the type of communications sought to be intercepted,
 - (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

⁷² *Omnibus Crime Control and Safe Streets Act*, Title III, Section 801 (b).

- (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;
- (d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;
- (e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and
- (f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.⁷³

As a means to protect the privacy of citizens, the investigative officer was required to be very specific in his application and to show the judge, in detail, the probable cause underlying this application to intercept communications.

Many in Congress viewed the racial riots of the 1960s in much the same manner as the second Red Scare of the 1940s and 1950s: as an internal security crisis. Such political leaders believed that the internal security of the United States was under direct threat from agitators travelling throughout America's cities, agitating on the race issue and imploring the urban black communities to rise up against the legitimate democratic government. With the Supreme Court ruling against the government in cases involving registration legislation (*Albertson v. SACB* in 1965), Congress shifted away from registration of subversive organizations in preparation for preventative detention towards the greater use of wiretapping and electronic surveillance in cases of national defense and internal security. The revelations of misconduct within the Executive branch with respect to wiretapping and electronic surveillance in the early-1970s led to a number

⁷³ 18 USC 2518.

of Congressional investigations and the eventual passage of the Foreign Intelligence Surveillance Act (FISA) to limit the use of domestic electronic surveillance in 1978.

Chapter 5

Congress and Surveillance as an Internal Security Tool

The passage of the Omnibus Crime Control and Safe Streets Act in 1968 provided state and federal law enforcement agencies with another weapon in the growing “War on Crime” taking place in the late 1960s and early 1970s. The ability for these agencies to establish, with probable cause, limited electronic surveillance for investigative purposes over individuals and organizations allowed government agencies to keep tabs on possible subversive groups without requiring them to register with the government. The politics of registration had given way to the politics of surveillance.

Similar to the internal security crisis posed by the second Red Scare in the 1940s and 1950s, the tactics chosen to meet the crisis arising out of the riots of the 1960s came under scrutiny a short time after the crisis passed. Unlike the legislation passed during the second Red Scare – organizations resisting government attempts to enforce the registration of communist-action, communist-front, or communist-infiltrated organizations, as required by law, prompted judicial review of the legislation – the surveillance portions of the Omnibus Crime Control and Safe Streets Act became of public concern with revelations of executive branch misconduct of surveillance. In particular, the issue of the Watergate break-in and subsequent cover-up led to extensive press and congressional investigations into surveillance in general. While the Senate committee investigating the Watergate affair limited itself solely to issues pertaining to Watergate, both the House and the Senate established select committees to investigate the use of domestic surveillance by America’s intelligence apparatus and its various constituent agencies.¹

¹ In an attempt to bring greater Congressional oversight to intelligence organizations, both the House and the Senate created select committees examining CIA and FBI abuses in 1975. The findings of the House Select Committee on Intelligence (Pike Committee) and the Senate Select Committee on Intelligence Activities within the United States (Church Committee) led to the creation of permanent intelligence committees in their respective areas overseeing intelligence spending and operations. For the Pike Committee, see: *Report of the House Select Committee on*

The expanded investigation into the use of surveillance by the executive branch, particularly the use of warrantless surveillance outside of judicial review, led to the eventual passage of the Foreign Intelligence Surveillance Act (FISA) – legislation that limited the use of surveillance on national defense and internal security grounds, but allowed for temporary warrantless surveillance in carefully delimited cases.

While the passage of the Omnibus Crime Control and Safe Streets Act in 1968 established wiretapping and electronic surveillance requirements for law enforcement, the legislation included an exception for wiretapping and surveillance on national security grounds. The drafters inserted a clause ensuring that nothing in the legislation regarding surveillance shall:

limit the constitutional powers of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything [...] be deemed to limit the constitutional power of the President to take such measure as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.²

The exemption clause created by the Omnibus Crime Control and Safe Streets Act for executive action was broad and deliberately vague. The legislation did not limit the scope of presidential authority in the area of national security; it allowed for the continuation of most FBI authorized warrantless wiretaps on those grounds. Prior to the passage of the legislation, most warrantless wiretapping authorized by the President and the Justice Department was based on national defense and internal security grounds, and authorized by the executive branch interpretation of

Intelligence, 1976, ed. Gregory Andrade Diamond (New York: McGraw-Hill, 1976). [Hereafter referred as *Pike Committee Report*]. For the Church Committee, see: Senate Select Committee on Intelligence Activities within the United States, *Intelligence Activities and the Rights of Americans: 1976 Senate Report on Illegal Wiretaps and Domestic Spying by the FBI, CIA and NSA* (St. Petersburg, Florida: Red and Black Publishers, 2007; initially published by Washington: Government Printing Office, 1976). [Hereafter referred as *Church Committee Report*].

² 18 USC 2511, subsec. 2 (f).

the *Nardone* decision (1937), that allowed for wiretapping and surveillance on matters of national security.³ President Franklin Roosevelt, along with his Attorney General Robert Jackson, used this interpretation to bypass the judicial restrictions placed on wiretapping, a policy continued in the Truman, Eisenhower, and Kennedy administrations, until the creation of limitations placed on the FBI and warrantless wiretapping and surveillance by Johnson's Attorney Generals, Nicholas Katzenbach and Ramsey Clark. The Omnibus Crime Control and Safe Streets Act established the new standard for wiretapping and surveillance used by the Justice Department in investigations after 1968.

Under Attorney General John Mitchell, the Nixon Justice Department in a number of cases used the national security exemption to secure warrantless wiretaps. One such case was the September 28, 1968, bombing of a CIA recruiting office in Ann Arbor, Michigan. John Sinclair, Laurence Robert ("Pun") Plamondon, and John ("Jack") Waterhouse Forest – all leading members of the White Panther Party, an organization associated with the Black Panther Party – were indicted for the bombing; which caused significant property damage, but no loss of life. The case went before Judge Damon J. Keith of the U.S. District Court for the Eastern District of Michigan in late 1970.⁴

At the time the case was before Judge Keith, neither the prosecution nor the defense knew about warrantless wiretaps that Attorney General Mitchell had authorized against

³ The Supreme Court, in *Nardone v. United States* (302 US 379, 1937), decided that wiretapping was in violation of the Communications Act of 1934 and evidence gained through such means was inadmissible in Court. President Roosevelt believed that the *Nardone* decision did not apply to cases involving national defense and internal security. John Earl Haynes and Harvey Klehr, *Early Cold War Spies: The Espionage Trials that Shaped American Politics* (New York: Cambridge University Press, 2006), 13-14.

⁴ Samuel C. Damren, "The Keith Case," *The Court Legacy: The Historical Society for the United States District Court for the Eastern District of Michigan* vol. XI, no. 4 (November 2003): 1-7. http://www.mied.uscourts.gov/HistoricalSociety/media/newsletters/200311_Court_Legacy.pdf. See also: Jeff Hale, "The White Panthers' 'Total Assault on the Culture'," in *Imagine Nation: The American Counterculture of the 1960s and '70s*, ed. Peter Braunstein and Michael William Doyle (New York: Routledge, 2002), 149; and Jeff Hale, "Wiretapping and National Security: Nixon, the Mitchell Doctrine, and the White Panthers" (PhD. diss., Louisiana State University, 1995).

Plamondon. In pretrial hearings, Plamondon's defense team requested any and all government "logs, records, and memoranda of electronic surveillance directed at any of the defendants or co-conspirators not indicted" on the belief that the defense was "familiar with prior instances in which the government had conducted illegal surveillance against so-called counter-culture radicals."⁵ The prosecution, told by the Michigan FBI office that there was no such evidence, agreed to a stipulation with the defense to turn over all electronic surveillance. The U.S. attorney's office further inquired to the Justice Department about any surveillance evidence against the defendants, and told both Judge Keith and the defense that any results of the inquiry would be turned over to Judge Keith.⁶ On December 14, 1970, Attorney General Mitchell submitted an affidavit to Judge Keith stating that several of Plamondon's conversations were monitored by wiretaps authorized under the exclusion clause of the Omnibus Crime Control and Safe Streets Act and turned over the sealed records for Keith to review.⁷ As Judge Keith received the material from Attorney General Mitchell, the Government filed a motion to dismiss the defense request to disclose the surveillance evidence.

In the hearing to decide the Government's motion, Attorney General Mitchell argued that the exclusion clause in the Omnibus Crime Control and Safe Streets Act allowed for warrantless wiretaps in this case on national security grounds. Mitchell asserted what became known as the "Mitchell Doctrine," arguing that the president possessed the inherent constitutional power to wiretap "'domestic radicals; *without a court order* if [the President], and he alone, believes them

⁵ *United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971); Damren, "The *Keith* Case," 4; Hale, "Wiretapping and National Security," 417-19. One of the White Panther Party's lawyers, William Kuntsler, had achieved a modicum of celebrity for defending left-wing groups and individuals. Kuntsler had previous experience with the government wiretapping his defendants when he was lead counsel for the "Chicago Seven" defendants in 1968, and wanted to sidestep similar issues in the White Panther Party case.

⁶ Hale, "Wiretapping and National Security," 423-25.

⁷ Damren, "The *Keith* Case," 5.

to be threatening to the national security.⁸ Mitchell argued that the legislation allowed the Attorney General, as representative of the Executive branch, the inherent authority to authorize warrantless wiretaps in national security cases.⁹ Judge Keith rejected this interpretation as violating the Fourth Amendment protection against unreasonable search and seizure, as well as the requirement for issuing warrants for probable cause. In deciding the issue of surveillance, Mitchell's interpretation, Keith argued, would remove "the impartial judgment of the Court between the Citizen and the Government" in favor of the judgment of an unelected government official.¹⁰ Judge Keith impounded the evidence turned over by Mitchell, forcing the government to appeal its case first to the Sixth District Court of Appeals and finally to the Supreme Court.

The Supreme Court took on the Constitutional issues presented by *United States v United States District Court* (better known as the "Keith case," after Judge Keith) in 1972. In an 8-0 decision – newly appointed Justice William Rehnquist recused himself from the case due to his involvement in the Nixon Justice Department – the Court upheld the prior rulings of the Appellate and Michigan courts, agreeing with Keith that warrantless domestic electronic surveillance violated the Fourth Amendment. The Court also provided its own interpretation of the exclusion clause in the Omnibus Crime Control and Safe Streets Act, holding the clause as "merely a disclaimer of congressional intent to define presidential powers in matters affecting national security, [...] not a grant of authority to conduct warrantless national security surveillances."¹¹ Here, in the *Keith* case, the Supreme Court clearly and definitively rejected the

⁸ Hale, "The White Panthers' 'Total Assault on the Culture'," 149. Italics in original.

⁹ Trevor W. Morrison, "The Story of *United States v. United States District Court* (Keith): The Surveillance Power," *Columbia Public Law & Legal Theory Working Papers*, Paper 08155 (2008), 8-9. http://lsr.nellco.org/columbia_pllt/08155

¹⁰ *United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971).

¹¹ *United States v. United States District Court*, 407 U.S. 197 (1972). [Hereafter referred as "*Keith Case (1972)*"]

Nixon administration's policies with the use of warrantless surveillance on domestic national security grounds. The Court's decision, ironically, came down just days after the arrest of James McCord and others for breaking into the Watergate Complex to install illegal electronic surveillance on orders from the White House.

A shift in intelligence gathering policy occurred with the election of President Nixon in 1968. Nixon wanted greater coordination of intelligence gathering among the various federal agencies. In particular, the Nixon administration was concerned with the growing political demonstrations of the anti-Vietnam War movement, the rise of Black Power groups, and the extent to which, if any, these groups were directed by foreign governments. Furthermore, President Nixon wanted to allow for greater monitoring and direction of intelligence gathering agencies by the White House.¹² To this, a White House aide, Tom Charles Huston, was made responsible in 1969 for developing a coordinated intelligence strategy with the FBI.¹³ Huston worked with Assistant Director William C. Sullivan to develop a number of options to present to President Nixon.¹⁴

From Sullivan's perspective, the problem regarding intelligence gathering started in the mid-1960s. The last years of J. Edgar Hoover's administration of the FBI, from a public relations and political perspective, involved distancing the Bureau from politically dangerous areas. The Director followed the requests of Attorney Generals Katzenbach and Clark between

¹² *Church Committee Report*, 81-82.

¹³ Theoharis, *Spying on Americans*, 13.

¹⁴ William Sullivan started his career with the FBI in the 1940s. By the 1960s, Sullivan worked his way through the Bureau to become head of the Domestic Intelligence division, overseeing intelligence operations including surveillance of Martin Luther King, Jr. Sullivan's relationship with Hoover became increasingly strained over Hoover's overemphasis, in Sullivan's mind, of the CPUSA. As Hoover restricted the Bureau's intelligence operations in the late 1960s, Sullivan became increasingly, and openly, hostile towards the Director before being fired in 1971 for insubordination. Garrow, *The FBI and Martin Luther King, Jr.*, 87-91; Richard Gid Powers, *Broken: The Troubled Past and Uncertain Future of the FBI* (New York: The Free Press, 2004), 250-258.

1965 and 1967 with respect to wiretapping and surveillance, limiting the number of wiretaps used and ensuring that requests went through the Attorney General's office. Between 1966 and 1968, Director Hoover began to limit the number of concurrent warrantless wiretaps and prohibited the use of "black bag jobs" (i.e. breaking and entering for investigative purposes) except in cases of installation of microphone surveillance.¹⁵ Hoover believed that the continued use of these techniques without explicit White House approval would be detrimental to the Bureau if, and when, the operations became public knowledge through either press or congressional inquiries. While the Omnibus Crime Control and Safe Streets Act clarified the process by which the FBI would be allowed to use electronic surveillance in the course of its investigations, the general political atmosphere made Director Hoover tread more carefully in the realm of surveillance. As Hoover noted in a March 31, 1970, letter to Director of Central Intelligence Richard Helms:

The use of these measures [electronic surveillance and mail coverage] in domestic investigations poses a number of problems which might not be encountered in similar operations abroad. There is widespread concern by the American public regarding the possible misuse of this type of coverage. Moreover, various legal considerations must be borne in mind, including the impact such coverage may have on our numerous prosecutive responsibilities. The FBI's effectiveness has always depended in large measure on our capacity to retain the full confidence of the American people. The use of any investigative measure which infringe on traditional rights of privacy must therefore be scrutinized most carefully.¹⁶

Public and political considerations shifted Hoover's views on electronic surveillance. While the FBI continued to engage in both warranted and warrantless surveillance, it did so in a more limited fashion.

The plan developed by Huston and Sullivan and presented to Nixon in mid-1970 focused on four key areas: intelligence coverage and surveillance on citizens and groups posing internal

¹⁵ *Church Committee Report*, 84.

¹⁶ Letter, Hoover to Richard Helms, DCI, March 31 1970, quoted in Theoharis, *Spying on Americans*, 18-19.

security threats; greater surveillance of, and use of informants in, selected campus organizations; intelligence and surveillance on foreign nationals and priority foreign intelligence; and greater coordination between the various federal intelligence agencies.¹⁷ With respect to surveillance of American citizens, the Huston plan recommended that the President authorize an intensification of electronic surveillance against those citizens and groups deemed to pose a threat to the internal security of the nation and to authorize the NSA to intercept the communications of American citizens using international companies to communicate.¹⁸ Huston justified this increased surveillance by arguing that the electronic surveillance of internal security threats was less than adequate, including surveillance on the CPUSA, and that the national security situation required greater scrutiny of potential threats. Responding to the limitations placed by Director Hoover on surveillance, Huston observed that:

Mr. Hoover's statement that the F.B.I. would not oppose other agencies seeking approval for the operating electronic surveillances is gratuitous since no other agencies have the capability. Everyone knowledgeable in the field, with the exception of Mr. Hoover, concurs that existing coverage is grossly inadequate. C.I.A. and N.S.A note that this is particularly true of diplomatic establishments, and we have learned at the White House that it is also true of New Left groups.¹⁹

The FBI was, and is, the only federal agency with the legal authority to conduct intelligence operations on American citizens on American soil. Director Hoover's limitations, in Huston's view, limited not only the FBI, but the nation's entire intelligence community. Huston believed that the intensified electronic surveillance would allow the government to maintain eyes and ears on the leaders of groups that were not only speaking out against the government, but also arguing

¹⁷ *Church Committee Report*, 84.

¹⁸ *Ibid.*, 84.

¹⁹ Senate Select Committee on Presidential Campaign Activities, "Domestic Intelligence Gathering Plan: Recommendations," *The Watergate Hearings: Break-in and Cover-up. Proceedings of the Senate Select Committee on Presidential Campaign Activities*, ed. Gerald Gold (New York: Viking Press, 1973), 749. [Hereafter referred as *Senate Watergate Hearings*].

for action to be taken against the government. The surveillance would also allow the government to determine the extent to which these people were being directed or assisted by foreign governments.

One of the primary concerns of the Nixon administration and the domestic intelligence community at large was the growing agitation and militancy of anti-war campus organizations, particularly Students for a Democratic Society (SDS). In conjunction with removing the limitations on domestic surveillance, the Huston plan recommended to the President that he authorize the FBI to relax its restrictions on the use of undercover agents regarding student organizations and to enhance and intensify its surveillance on these organizations.²⁰ The Huston plan showed concern over a lack of intelligence sources within these organizations, particularly due to the FBI policy of not recruiting individuals younger than 21 years of age as campus sources. FBI policy limited recruitment of campus sources to 21 years of age and older due to Director Hoover's fear of press and public reaction to using sources younger than 21.²¹ Huston argued against Director Hoover's rationale by noting that:

the campus is the battleground of the revolutionary protest movement. It is impossible to gather effective intelligence about the movement unless we have campus sources. The risk of exposure is minimal, and where exposure occurs the adverse publicity is moderate and short-lived. It is a price we must be willing to pay for effective coverage of the campus scene. The intelligence community, with the exception of Mr. Hoover, feels strongly that it is imperative [to] increase the number of campus sources this fall in order to forestall widespread violence.²²

The arguments used against implemented FBI policy show Sullivan's influence on Huston and his recommendations to President Nixon. By recommending the reversal of the limitations placed on warrantless surveillance and the recruitment of undercover agents in student

²⁰ *Church Committee Report*, 84.

²¹ Theoharis, *Spying on Americans*, 18, 36, 188.

²² "Domestic Intelligence Gathering Plan: Recommendations," *Senate Watergate Hearings*, 750.

organizations by Director Hoover, the Huston plan hoped to provide the White House with greater intelligence regarding the growing anti-war and black power movements and to provide the Justice Department with an evidentiary trail to begin prosecutions against the organizations. Furthermore, the use of undercover agents could be used in a similar manner to their use in the CPUSA: undercover agents could attempt to influence both individuals and the organization in directions more beneficial to the government.

Both of Huston's domestic surveillance recommendations provided for the possible re-authorization of "black bag jobs" previously restricted by Hoover. This shows the influence of William Sullivan in developing the ideas behind the recommendations. Sullivan was increasingly disappointed with the limitations on surveillance and Hoover's continued emphasis on the issue of communism and worked with Huston to undermine Hoover. The Huston plan recommended modifying the restrictions on the use surreptitious entry against "urgent security targets."²³ Huston defended his recommendation of clearly illegal acts to obtain foreign intelligence by arguing that the ends justified the means. Calling "black bag jobs" clearly illegal and amounting to burglary, Huston claimed that "it is also the most fruitful tool and can produce the type of intelligence which cannot be obtained in any other fashion."²⁴ Recalling the threat of subversive elements within American society, Huston noted that:

Surreptitious entry of facilities occupied by subversive elements can turn up information about identities, methods of operation, and other invaluable investigative information which is not otherwise obtainable. This technique would be particularly helpful against the Weathermen and Black Panthers.²⁵

²³ Ibid., 749.

²⁴ Ibid., 749.

²⁵ Ibid., 749.

For Huston, the utility of the technique in obtaining intelligence unlikely to be gathered in another manner clearly outweighs the obvious illegality of the actions. Through the selective use of “black bag jobs” on selective internal security threats, Huston argued that the Bureau would be able to defend itself legally on national and internal security ground through Presidential authorization of the illegal entry.

In addition to domestic intelligence gathering, Huston and Sullivan also provided recommendations to the President regarding foreign intelligence gathering. The Huston plan recommended that the President allow intelligence agencies to relax limitations on, or in some cases to re-implement, mail opening programs in which intelligence agencies opened and examined the mail of “selected targets of priority foreign intelligence and internal security interest.”²⁶ The Huston plan stated that the surreptitious mail opening operation of the CIA produced beneficial results and the cooperation between the FBI and CIA (known as Project Hunter) should be expanded.²⁷ Huston and Sullivan viewed the mail program as an essential tool to protect the United States. By examining outgoing and incoming mail of selected internal security risks and foreign governments, intelligence could be gathered and analysts could decode encrypted material to determine its possible value to the United States.

To aid in decoding and decrypting foreign intelligence, the Huston plan recommended that “black bag jobs” be permitted for the “procurement of vitally needed foreign cryptographic material.”²⁸ In addition to recommending that the FBI relax its restrictions on surreptitious entry

²⁶ *Ibid.*, 749; *Church Committee Report*, 84, 344-347.

²⁷ Project Hunter was the program in which the FBI received information from the CIA’s New York-based mail surveillance program. Between 1958 and 1973, the FBI received copies of 57,846 items of the 198,358 items opened by the CIA (29% of total items opened). *Church Committee Report*. 350-51.

²⁸ “Domestic Intelligence Gathering Plan Recommendations,” *Senate Watergate Hearings*, 749.

on foreign targets within the United States, the Huston plan noted that the National Security Agency (NSA):

has a particular interest [in surreptitious entry programs] since it is possible by this technique to secure material with which N.S.A. can break foreign cryptographic codes. We spend millions of dollars attempting to break these codes by machine. One successful surreptitious entry can do the job successfully at no dollar cost.²⁹

Not only would “black bag jobs” against foreign facilities possibly secure beneficial intelligence, but the Huston plan portrayed the technique as a money-saving program. Furthermore, although the discovery of such a program would cause an international incident, domestically the program would be defended as essential to national security.

Based on the foreign and domestic recommendations of the Huston report, it is clear that both Huston and Sullivan believed that the restrictions on intelligence-gathering mandated by the Justice Department, and in Hoover’s revised policies, damaged the national security of the United States. The Huston report also recommended greater coordination between the various intelligence agencies. To this end, the report recommended that the President appoint a “permanent committee consisting of the FBI, CIA, NSA, DIA [Defense Intelligence Agency], and the military counterintelligence agencies” to “provide evaluations of domestic intelligence estimates” and to coordinate domestic intelligence.³⁰ This recommendation was designed to prevent surveillance overlap between agencies and to ensure intelligence sharing to provide for greater analysis of potential threats to the nation’s internal security.

President Nixon approved the Huston report on July 14, 1970, though he rescinded his approval less than two weeks later. The primary reason for the reversal was FBI Director Hoover’s continued opposition to the Huston plan. During meetings to develop a draft report of

²⁹ *Ibid.*, 749-50.

³⁰ “Domestic Intelligence Gathering Plan Recommendations,” *Senate Watergate Hearings*, 751.

a review of domestic intelligence gathering, Huston conveyed Hoover's position to White House Chief of Staff H. R. Haldeman. Huston reported that:

Mr. Hoover refused to go along with a single conclusion drawn or support a single recommendation made. His position was twofold: (1) Current operations are perfectly satisfactory and (2) No one has any business commentating procedures for the collection of intelligence by the F.B.I.³¹

Haldeman directed Huston to meet with Hoover after the FBI received Nixon's approval of Huston's recommendations. Hoover understood the political pressure, but refused to return to the old FBI methods and policies without explicit written approval from President Nixon, particularly for renewed use of "black bag jobs." Hoover believed that future illicit activities would inevitably be uncovered and exposed to the public, thereby embarrassing the government both on foreign and domestic fronts.³² Any public exposure of illicit activities by the FBI would open the door for investigations into past activities by the FBI, something that Hoover was eager to avoid. For example, investigation into past FBI activities might reveal the extent to which the FBI investigated Martin Luther King Jr. and provided political intelligence to a number of administrations.³³

In addition to avoiding possible future embarrassment to the Bureau should any illicit activities come to public light, Hoover opposed sharing FBI information and sources with other intelligence agencies. Huston should not have been surprised by Hoover's attitude, as the FBI director was notorious for keeping information close to his chest (or, in this case, within his

³¹ *Ibid.*, 752.

³² Powers, *Broken*, 282-87; Curt Gentry, *J. Edgar Hoover: The Man and the Secrets* (New York: W. W. Norton, 1991), 653-58

³³ For the FBI investigation of Martin Luther King Jr., see: Garrow, *The FBI and Martin Luther King Jr.*, 101-150, and Garrow, "The FBI and Martin Luther King." For the use of the FBI providing political surveillance for the Executive branch, see: Theoharis, *Spying on Americans*, 156-195.

agency) and using information for the benefit of himself and the FBI.³⁴ Hoover's opposition to the Huston plan recommendations that the FBI re-engage in activities such as "surreptitious entry" to gain foreign and domestic intelligence without express written authorization from President Nixon forced White House Chief of Staff H. R. Haldeman to recommend that Nixon rescind his approval of the Huston plan. Haldeman and other members of the White House wanted to insulate Nixon from any fallback should some of these illicit activities come to light; something that could not happen by meeting Hoover's preconditions.

The White House development of the Huston plan was but one way that the role of White House expanded in domestic and political intelligence gathering during the Nixon administration. Rather than relying purely on the FBI to provide political intelligence for the President, the Nixon White House, under Chief of Staff Haldeman and the Chief Domestic Advisor John Ehrlichman, developed its own political intelligence apparatus as an alternative to the FBI. Concerned about a growing number of "leaks" emanating from the White House, Nixon directed Ehrlichman to put a stop to these leaks.³⁵ The White House appointed Egil Krogh and David Young to create and head the White House Special Investigations Unit, commonly referred to as the "White House Plumbers" (or simply the "Plumbers") for their job plugging non-authorized information leaks from the White House.

The precipitating event that caused the White House to create the "Plumbers" was the release of the "Pentagon Papers" by David Ellsberg to the *New York Times* and *Washington Post* in June, 1971. President Nixon told Krogh and Young that he viewed the leak as "a matter of

³⁴ Hoover was known for sharing political information with members of Congress to facilitate both FBI appropriations and law enforcement legislation. During the second Red Scare, for example, it was an open secret that Hoover supplied Senator Joseph McCarthy with political information. David M. Oshinsky, *A Conspiracy So Immense: The World of Joe McCarthy* (New York: Oxford University Press, 2005), 256-258.

³⁵ Stanley I. Kutler, *The Wars of Watergate: The Last Crisis of Richard Nixon* (New York: W. W. Norton, 1992), 108, 110-11.

critical importance to national security” and ordered them to “find out how the leak had happened and keep it from happening again.”³⁶ To this end, Krogh and Young met with two members of the “Plumbers,” G. Gordon Libby and E. Howard Hunt, to develop a plan to deal with Ellsberg and the release of the Pentagon Papers. Liddy and Hunt proposed a plan in which a team would burglarize the office of Dr. Lewis Fielding, Ellsberg’s psychiatrist, to search for potentially damaging information against Ellsberg to discredit him for releasing the Pentagon Papers. Liddy and Hunt believed that Fielding’s notes on Ellsberg’s mental state would provide the White House with damaging information portraying Ellsberg as having mental problems and discrediting him as someone who released these classified papers in a fit of mental pique rather than in a fit of patriotism. Krogh forwarded this proposal to Ehrlichman, his immediate supervisor, and received authorization for the burglary to proceed. Hunt, Liddy, and other members of the “Plumbers” broke into Dr. Fielding’s office, but were unable to locate his file on Ellsberg.³⁷ Liddy proposed a second break-in of Fielding’s home to search for information on Ellsberg, but was denied by Ehrlichman and Krogh. Although proposed more than a year later, the plans by Liddy and Hunt were examples of the types of operations envisioned by the Huston Plan, albeit under the guise of the official American intelligence community.

As White House Chief of Staff and Chief Domestic Advisor, respectively, it fell to H.R. Haldeman and John Ehrlichman to keep President Nixon politically safe from any political fallout over the White House collecting political intelligence. Haldeman’s and Ehrlichman’s attempts to protect Nixon eventually led to the congressional investigations into past illicit activities by the American intelligence community. As predicted by Director Hoover, once small

³⁶ Egil Krogh, “The Break-In that History Forgot,” *New York Times*, Op-Ed, June 30, 2007. <http://www.nytimes.com/2007/06/30/opinion/30krogh.html>.

³⁷ Kutler, *The Wars of Watergate*, 114-15.

operations came to the public eye, such as the break-in of Dr. Lewis Fielding's office, other past activities would soon come under investigation.³⁸ During the 1972 Presidential campaign, members of the "Plumbers" were folded into a new organization: the Committee to Re-Elect the President (CREEP). The President and his advisors designed the committee to fund President Nixon's re-election campaign directly, thereby bypassing the Republican National Committee and its fundraising wing. To run the organization, Nixon convinced Attorney General John M. Mitchell to resign from the cabinet and appointed him to head the organization.

During the 1972 Democratic primary, CREEP engaged in "dirty tricks" designed to manipulate the primary to get a more favorable opponent for the President. Haldeman approved the hiring of Donald Segretti by the Committee to engage in dirty tricks against the Democratic primaries.³⁹ In March 1972, Segretti attempted to manipulate the Florida Democratic primary through illicit means. Using illegally obtained letterhead from Senator Edward Muskie's campaign, Segretti sent forged letters to voters only days before the primary asserting that one primary opponent, Senator Henry Jackson, had fathered illegitimate children and had twice been arrested on charges of homosexual behavior in 1955 and 1957. The letter further charged that another primary opponent, Senator Hubert Humphrey, had been arrested for driving while intoxicated and engaged the services of a well-known Washington D.C. call girl.⁴⁰ CREEP

³⁸ The break-in of Fielding's office would not be made public until April 1973, during the trial of Daniel Ellsberg and Anthony Russo for charges under the Espionage Act. The revelation of the break-in, coupled with the discovery of illicit surveillance of Ellsberg, led to the dismissal of the charges against Ellsberg and Russo, with Judge Byrne remarking that "the bizarre events have incurably infected the prosecution of this case." Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (New York: W.W. Norton, 2004), 515.

³⁹ Donald Segretti was an operative in the Republican Party who specialized in engaging in "dirty tricks" against Democratic opponents. Segretti had initially worked on state level campaigns against Democrats, before being recruited to focus on the three primary Democratic Party candidates. Fred Emery, *Watergate: The Corruption of American Politics and the Fall of Richard Nixon* (New York: Touchstone, 1994), 95-96; Samuel J. Ervin, *The Whole Truth: The Watergate Conspiracy* (New York: Random House, 1980), 6-9.

⁴⁰ Theodore H. White, *The Making of the President, 1972* (New York: Harper Perennial, 2010), 89.

believed that all three candidates – Humphrey, Jackson, and Muskie – would be difficult opponents for the President during the general election, and this operation negatively affected all three: Humphrey and Jackson were damaged by the alleged improprieties, while the supposed use of dirty tactics against his opponents damaged Muskie.⁴¹ White House sanctioning of activities such as those perpetrated by Segretti was motivated by the desire of President Nixon to receive a mandate-type victory in 1972 after losing one Presidential election in 1960 and barely winning another in 1968. The success of the Segretti operation prompted the committee to engage in other activities against political opponents. This included the ill-fated operations against the Democratic National Committee offices located in the Watergate Complex.

The first step leading to the numerous investigations of American intelligence agencies was a botched intelligence operation by the Committee to Re-Elect the President in early 1972, and the subsequent attempt to cover up White House involvement and to protect the President from political fallout. Between January and April 1972, the first suggestions of an illicit surveillance operation against the DNC and its chief, Larry O'Brien, were made by members of CREEP to the Nixon White House. Liddy and Hunt, on the heels of their failed burglary of Dr. Fielding's office, proposed to John Mitchell two plans for operations against O'Brien and the DNC.⁴² The first proposal focused on surveillance of the Muskie and McGovern campaign headquarters in Washington D.C., and the Democratic National Convention offices in Miami, with a proposed budget of one million dollars. Mitchell rejected Liddy and Hunt's first plan on cost issues, rather than legal ones. A week after the first was rejected, the pair approached

⁴¹ Ervin, *The Whole Truth*, 6-7.

⁴² The series of plans, known as "Operation Gemstone," all focused on ways of collecting political intelligence on major democrats and other operations against the Democratic Party ahead of the 1972 election. Kutler, *The Wars of Watergate*, 199-204; "Transcript of a recording between President Nixon, John Dean, and H.R. Haldeman, March 21, 1973, from 10:12 to 11:55 AM," Richard M. Nixon Presidential Library, 6-14. <http://www.nixonlibrary.gov/forresearchers/find/tapes/watergate/wspf/886-008.pdf>. [Hereafter referred as *Nixon Meeting Transcript – March 21, 1973*].

Mitchell with a second surveillance operation with a pared down budget of five hundred thousand dollars and a more focused target list of the DNC. There was some contradiction in the testimony from the conspirators whether the initials “DNC” used during the meeting referred to the Democratic National Convention offices in Miami or the Democratic National Committee offices located in the Watergate Complex in Washington D.C. Mitchell gave his approval of a surveillance operation against the Democratic Party, but approved only a budget of two hundred and fifty thousand dollars.

The Watergate burglaries themselves were a relatively straightforward affair. On May 28, 1972, Hunt and Liddy led a team to the Watergate Complex and successfully broke into the offices of Larry O’Brien, taking a number of photographs of material on O’Brien’s desk and installing listening devices. Once it was discovered that the listening devices were not working as expected, a second burglary was planned by Hunt and Liddy to correct technical matters. The team assigned to the second break-in, once again lead by Hunt and Liddy, failed in their mission, being discovered by a security guard and apprehended by police. The trial of the Watergate burglars lasted throughout the rest of the year; Liddy received a 20-year sentence for conspiracy, burglary, and wiretapping; Hunt received a 33-month sentence for conspiracy.⁴³ Attempts by the White House, particularly the actions of Haldeman and Ehrlichman, to cover up CREEP and White House involvement in the burglary were counterproductive. The White House authorized CREEP to provide funds for counsel for Hunt, Liddy and the other Watergate conspirators to prevent them from revealing White House connections and attempted to stymie the grand jury investigating the Watergate break-in by pressuring the conspirators to commit perjury and to

⁴³ President Jimmy Carter would later commute Liddy’s sentence on April 12, 1977 from twenty years to eight, making Liddy instantly eligible for parole. Libby was released on parole on September 7, 1977.

prevent connecting the break-in back to the White House.⁴⁴ Such involvement was not revealed until after the 1972 general election in which President Nixon won the decisive mandate he was looking for.

The growing friction between the White House (both the Johnson and Nixon administrations) and the legislative branch over domestic and foreign policies between 1965 and 1972 provided the backdrop to the creation of the Senate Select Committee on Presidential Campaign Activities, also known as the “Ervin Committee” (after its Chairman, Sam Ervin D – North Carolina) or the “Watergate Committee.” The importance of the Select Committee lay both in the fact that evidence uncovered during the hearings implicated high ranking White House officials and led to Nixon’s resignation before possible impeachment hearings could begin. The Ervin Committee also opened the floodgates into executive and legislative branch investigations into the use and misuse of surveillance techniques used for internal security and political intelligence purposes.

The politicized atmosphere in Washington and the proximity of the Presidential election led Majority Leader Mike Mansfield of Montana to try to make the committee as non-partisan as possible. To that end, he looked over the rosters of the two Senate Committees under which investigations would logically fall – the Senate Committee on Governmental Affairs and the Senate Judiciary Committee – and selected Sam Ervin to head the Select Committee. Senator Ervin’s seniority and chairmanship of the Senate Committee on Government Affairs placed his name near the top of Mansfield’s list, but the trait that led Mansfield to recommend Ervin to chair the Select Committee was his lack of Presidential aspirations. Ervin was nearing the end of

⁴⁴ The White House actions to ensure the silence of the Watergate conspirators would be revealed in a March 19, 1973 letter from James McCord to Judge John Sirica describing how the White House applied pressure to ensure their silence. John McCord to Judge John Sirica, March 19, 1973, Gerald R. Ford Presidential Library, digital document, http://www.ford.utexas.edu/museum/exhibits/watergate_files/content.php?section=1&page=c&doc=1. [Hereafter referred as *Digital Document – Ford Library*]

a long Senate career, already setting his sights on retirement, and, as a Southern Democrat, was viewed as a moderate, rather than a liberal, within the Democratic Party.⁴⁵ These qualifications made Ervin a better choice to head the select Committee over other more prominent members of the Judiciary and Government Affairs committees, including Senators Hubert Humphrey, Edward Kennedy, and Henry Jackson, all of whom either had just lost the Democratic primary less than a year earlier or still had or indicated future presidential aspirations. Mansfield convinced Ervin that by chairing the select Committee, the committee would not be perceived as a partisan attack on the President.

Ervin wrote the resolution establishing the Select Committee narrowly to focus on the events surrounding the 1972 Presidential election and to avoid any sense that the committee was set up as a “fishing expedition” against the President. The Select Committee was established to:

conduct an investigation and study of the extent, if any, to which illegal, improper, or unethical activities were engaged in by any persons, acting either individually or in combination with others, in the presidential election of 1972, or in any related campaign or canvas conducted by or in behalf of any person seeking nomination or election as the candidate of any political party for the office of President of the United States in such election, and to determine whether in its judgment any occurrences which may be revealed by the investigation and study indicate the necessity or desirability of the enactment of new congressional legislation to safeguard the electoral process by which the President of the United States is chosen.⁴⁶

Ervin rejected calls from more partisan Senate colleagues for the Select Committee to examine the 1964 and 1968 elections, choosing to focus only on alleged improprieties during the 1972 election. Ervin argued that, as there were no criminal investigations over any alleged improprieties coming from the 1964 and 1968 elections, an expanded investigation would taint the Select Committee as a partisan fishing committee. The resolution also gave subpoena power

⁴⁵ Ervin, *The Whole Truth*, 17-19.

⁴⁶ *A Resolution to Establish a Select Committee of the Senate to Investigate and Study Illegal or Improper Campaign Activities in the Presidential Election of 1972*, S. Res. 60, 93rd Cong., 1st Sess.

over the executive branch to the Select Committee to compel both testimony and other evidence requested by the committee.⁴⁷

The hearings of the Ervin Committee were originally closed to the public, but after leaks during the first day of hearings, Senator Ervin opened the hearings to the public. The televised hearings were carried by all the major networks and were a major television and political event. Three hundred and nineteen hours of hearings were broadcast on all three major networks (ABC, NBC, and CBS), averaging five hours of broadcasting per day, with networks agreeing to rotate broadcast every three days with each network retaining an option to broadcast more than required by the rotation agreement.⁴⁸ As the hearings unfolded on television, the public learned the extent to which the White House had covered-up the Watergate break-ins. The main issue before the Select Committee was not the Watergate break-ins themselves – those were dealt with through criminal prosecutions in the latter half of 1972 – but rather the attempted cover-up perpetrated by the White House. The key question of the hearings was succinctly put forth by Republican Senator Howard H. Baker of Tennessee: What did the President know and when did he know it?⁴⁹

The key witnesses called to testify before the Select Committee were former White House Counsel John Dean, former Chief of Staff H. R. Haldeman, and Nixon's former Chief

⁴⁷ The subpoena power of the select Committee would cause great distress for President Nixon once the committee discovered the existence of a tape system for the White House and Oval Office. The "Battle for the Tapes" ensued once the committee subpoenaed the tapes, with the White House doing everything within its power to prevent the damning evidence from reaching the committee.

⁴⁸ "Watergate." *The Museum of Broadcast Communications*, <http://museum.tv/eotvsection.php?entrycode=watergate> The only time that all three networks exercised their option to broadcast more hours than required by the rotation agreement was during the appearance of John Dean before the committee.

⁴⁹ "Senator Howard Baker questioning John Dean," *Senate Watergate Hearings*, 353.

Domestic Advisor John Ehrlichman.⁵⁰ Dean believed that the White House intended to set him up as the scapegoat for the conspiracy and portray him as its mastermind, and became the first high-ranking White House official to break ranks with the Nixon White House. Dean cooperated with the Select Committee on the understanding that he would receive limited immunity from prosecution with respect to his actions in the Watergate cover-up.⁵¹ Dean's belief that the White House would portray him as the mastermind behind the Watergate cover-up proved well-founded when, during his testimony before the Select Committee, the new White House Counsel (Leonard Garment) sent the Select Committee a memo stating that Dean was "perfectly situated to mastermind and to carry out a cover up since, as Counsel to the President and the man in charge for the White House, he had full access to what was happening in the investigation."⁵² Dean's testimony on White House involvement would end up being corroborated by the Nixon recordings of meetings between the President and his advisors.

Dean explained the position the White House favored vis-à-vis the Select Committee, as well as his relationships with Haldeman, Ehrlichman, President Nixon and the Watergate cover-up. When the Senate started to debate investigating improprieties with the 1972 election cycle, Ehrlichman and Haldeman developed the White House strategy for dealing with the Select Committee. They believed the best way to deal with the Select Committee would be for the White House to publically adopt a posture of full cooperation with the Select Committee, while working behind the scenes to derail its investigation. Dean testified that:

⁵⁰ All three left the White House on April 30, 1973. Dean was officially fired from his position, while Haldeman and Ehrlichman were allowed to resign. Kutler, *The Wars of Watergate*, 304-310.

⁵¹ Dean would later plead guilty to charges of obstruction of justice and be sentenced to 1-4 years. His sentence would later be reduced to time served (4 months) as a result of his cooperation with the Watergate special prosecutor and his testimony in trials against other Watergate conspirators, including Haldeman, Ehrlichman, and former Attorney General John Mitchell.

⁵² "Testimony of John W. Dean 3rd, June 27, 1973," *Senate Watergate Hearings*, 320.

a behind-the-scenes media effort would be made to make the Senate inquiry appear very partisan. The ultimate goal would be to discredit the hearings and reduce their impact by attempting to show that the Democrats have engaged in the same type of activities.⁵³

The White House strategy illustrated the pattern that would dominate the Nixon White House with its dealings with the Watergate break-ins and investigations. Rather than addressing the issue head-on, the Nixon White House preferred to obfuscate the issues and redirect the focus on a slightly different issue.

Haldeman and Ehrlichman actively pursued the strategy of covering up White House involvement in the Watergate break-ins and made it difficult for different perspectives to reach the President. Dean, in his position as White House Counsel, did have limited access to the President, but reported directly to Haldeman. During the Watergate crisis, Dean provided legal analysis and advice for the White House, but acted primarily as a go-between for the White House and those associated with CREEP. When Dean was able to meet with the President, he testified that he attempted to advise the President to back away from continuing the cover-up. In a March 21, 1973, meeting with President Nixon, Dean testified that he attempted to convince the President that it was necessary to move away from the cover-up and that advisors within his inner circle may be leading the President astray.⁵⁴ In one of the memorable lines from Dean's appearance before the select Committee, Dean testified that he warned the President that "there was a cancer growing on the Presidency and that if the cancer was not removed that the President himself would be killed by it. [Dean] also told him that it was important that this cancer be

⁵³ "Testimony of John W. Dean 3rd, June 25, 1975," *Senate Watergate Hearings*, 283.

⁵⁴ *Nixon Meeting Transcript – March 21, 1973*, 6-14

removed immediately because it was growing every day.”⁵⁵ In the same meeting, Dean testified that he tried to impress on the President the seriousness of the situation, concluding that “it was going to take continued perjury and continued support of these individuals [the Watergate conspirators] to perpetuate the cover-up.”⁵⁶ The March 21, 1973, meeting resulted in an effort by Haldeman and Ehrlichman to convince John Mitchell to step forward and take the blame for both the burglaries and the subsequent attempted cover-up to deflect any investigations toward the White House.⁵⁷ Mitchell’s refusal to accept the blame for Watergate convinced Dean that he was next in line to be portrayed by Haldeman and Ehrlichman as the head of the conspiracy

The reading of James McCord’s letter to John Sirica, the judge presiding over the Watergate break-in trial, in March, 1973 turned Dean into an enemy of Nixon’s. James McCord, one of the men on trial for the Watergate break-in, wrote that members of the White House placed political pressure on the accused to remain silent about White House involvement and to plead guilty and/or commit perjury.⁵⁸ This public revelation marked the break for John Dean with the conspiracy to cover-up the break-in.

Unlike Dean’s testimony, Haldeman and Ehrlichman remained loyal to Nixon in their testimony, continuing to attempt to distance the President from the cover-up. Ehrlichman’s testimony provides insight to the view of the Nixon White House regarding actions taken against

⁵⁵ “Testimony of John W. Dean 3rd, June 25, 1975,” *Senate Watergate Hearings*, 290; *Nixon Meeting Transcript – March 21, 1973*, 5. It is unclear whether Dean was referring to an individual such as Haldeman or Ehrlichman (or both) when he was referring to a “cancer” in the White House or if he was referring to a general culture that had developed.

⁵⁶ *Nixon Meeting Transcript – March 21, 1973*, 5; “Testimony of John W. Dean 3rd, June 25, 1975,” *Senate Watergate Hearings*, 291.

⁵⁷ Mitchell, Nixon’s former Attorney General and Director of the Committee to Re-Elect the President, was involved in both the funding and cover-up of the Watergate break-ins, but refused in late-March 1973 to bow to pressure from Haldeman and Ehrlichman to take responsibility for the entire escapade. Mitchell was eventually found guilty, and served 19 months for conspiracy and perjury.

⁵⁸ John McCord to Judge John Sirica, March 19, 1973, *Digital Document – Ford Library*.

leaks. When asked about the break-in to steal Dr. Lewis Fielding's notes on Ellsberg, Ehrlichman responded:

Number one that episode was a part of a very intensive national security investigation which had been impressed with a very high security classification. The likelihood of that being disclosed was very slight. Number two, those people were operating, at least I believe they were operating, under express authorization [...] Under a national security situation, under a situation of considerable moment to the nation in the theft of top secret documents, and their apparent delivery to the Soviet Embassy [...] In other words, they were operating in a national security setting.⁵⁹

Ehrlichman used the cover of national security to defend the use of illegal activities for intelligence purposes. Additionally, Ehrlichman cited parts of the Omnibus Crime Control and Safe Streets Act of 1968 to defend the break-in of Dr. Fielding's office. In a colloquy between Ehrlichman and Senator Ervin, Ehrlichman forwarded the White House interpretation of the exclusion clause that removed limitations in cases of national or internal security (areas often under the purview of the President), under which Ehrlichman believed the Ellsberg break-in fell. This interpretation allowed the President the authority to authorize operations such as the one directed against Ellsberg under the guise of National Security. The Pentagon Papers were deemed essential intelligence for American national security, which allowed the White House to engage in covert activities to investigate the leak.

The testimony of Bob Haldeman, Nixon's Chief of Staff, most directly addressed Dean's testimony. Haldeman's position throughout his testimony remained that John Dean was the point person with respect to Watergate. Dean, according to Haldeman, kept both Ehrlichman and himself informed on developments regarding Watergate and, through them, the President. Haldeman did note that he felt that Dean "apparently did not keep us fully posted and it now

⁵⁹ "Testimony of John D. Ehrlichman, July 24, 1973," *Senate Watergate Hearings*, 510-11.

appears he did not keep us accurately posted.”⁶⁰ Haldeman’s recollection of meetings between President Nixon and Dean portrayed Dean as more concerned with the legal issues of executive privilege regarding members of the White House testifying before the Watergate grand jury and the Senate Select Committee than he was with providing a detailed and accurate accounting of the Watergate crisis. As head of the White House investigation of Watergate, Haldeman assumed that Dean would concern himself with the task at hand and any deviation from that task suggested to Haldeman that Dean would be involved in the cover-up.⁶¹

The evidence that eventually confirmed Dean’s testimony of the Watergate events within the White House was the revelation that a taping system existed within the White House.⁶² In the White House itself, both the Oval Office and the Cabinet room were confirmed to have recording devices, while the President’s office in the Executive Office Building (EOB) and the offices of key White House personnel, including Chief of Staff Haldeman, were likewise recorded. In addition to recording devices in offices, certain telephones also had recording devices installed, including the Oval Office, the Lincoln sitting room, and the President’s cabin at Camp David. According to Alexander Butterfield, the devices were primarily installed in the interest of historical accuracy, recording the President’s actions in the White House for historical preservation.⁶³ After a long battle with the White House over access to the tapes, the Committee

⁶⁰ “Testimony of H. R. Haldeman, July 30, 1973,” *Senate Watergate Hearings*, 560.

⁶¹ *Ibid.*, 552-73.

⁶² The existence of a taping system was revealed in the open hearings in the testimony of White House aide Alexander Butterfield. Hired by Haldeman, Butterfield was placed in charge of setting the President’s schedule and the day-to-day administration around the White House, reporting directly to the Chief of Staff. “Testimony of Alexander P. Butterfield, July 16, 1973,” *Senate Watergate Hearings*, 435. See also: Samuel Dash, *Chief Counsel: Inside the Ervin Committee – the Untold Story of Watergate* (New York: Random House, 1976), 176-180.

⁶³ “Testimony of Alexander P. Butterfield, July 16, 1973,” *Senate Watergate Hearings*, 435-37.

was able to listen to the tapes and heard confirmation of Haldeman's, Ehrlichman's, and other's participation in a conspiracy to cover-up White House direction of the Watergate break-ins.⁶⁴

The so-called "smoking gun tape" was a recording of a conversation between Nixon and Haldeman on June 23, 1972, regarding the Watergate break-in. Taking place less than a week after the second Watergate burglary, Haldeman reported to Nixon that there might be a problem with the FBI investigating the burglary. Acting Director L. Patrick Gray did not appear to be able to control or limit the FBI investigation, leading Haldeman to advise President Nixon to use the CIA to close down the FBI investigation.⁶⁵ James McCord, appointed the on-site leader of the burglary team by Hunt and Liddy, had former ties to the CIA and the use of Cuban-Americans on McCord's team gave the perception that the burglary was a CIA operation. Haldeman, after consulting with Mitchell and Dean, recommended to President Nixon:

the way to handle this now is for us to have [Deputy Director of the CIA Vernon] Walters call Pat Gray and just say "Stay the hell out of this. This is – there's some business here we don't want you going any further on." That's not an unusual development [...] [Gray will] call them in and say "We've gotten a signal from across the river to put the hold on this." And that'll fit rather well because the FBI agents who are working the case, at this point, feel that's what it is: This is CIA.⁶⁶

Nixon agreed with Haldeman's recommendation to have the CIA derail the FBI investigation into the burglaries. The so-called "smoking gun" tape shows that Nixon understood that the

⁶⁴ The so-called "Battle for the Tapes" consisted of civil suits filed against President Nixon by both the Senate select Committee and the Special Prosecutor and the Nixon White House's attempt to retain control of the Watergate Tapes. The Federal order for the White House to release the tapes for the court to examine the tapes was eventually appealed to the Supreme Court where, in a unanimous decision, the Court ordered the White House to release the tapes under subpoena and rejected Nixon's claim to an absolute and unqualified interpretation of executive privilege against the judicial process. *United States v. Nixon* 418 U.S. 683 (1974). See also: Ervin, *The Whole Truth*, 220-227; Ken Gormley, *Archibald Cox: Conscience of a Nation* (Cambridge, Mass.: Perseus Publishing, 1997), 290-319; and Emery, *Watergate*, 408-434.

⁶⁵ Haldeman believed that by convincing the FBI that the burglaries were CIA operations, the FBI investigations would be dropped.

⁶⁶ Richard Nixon, "The Smoking Gun," *Recorded Conversation between Richard Nixon and H. R. Haldeman*, June 23, 1972 – 10:04 AM-11:39 AM. <http://whitehousetapes.net/transcript/nixon/smoking-gun>.

Watergate burglaries were tied to CREEP – and therefore to the White House – and understood that, by requesting that the both Director and Deputy Director of the CIA approach the FBI and ask them to cease the investigation into the Watergate burglaries, he would be ordering the interference of a federal investigation and covering up White House involvement in the Watergate operation.

On August 9, 1974, Vice President Gerald Ford assumed the presidency after President Nixon resigned as a result of the public revelation on August 5 of the “smoking gun” tape.⁶⁷ While attempting to put the investigations of Watergate behind the nation, Ford issued a pardon to Nixon for any crimes committed against the United States while President. The ghost of Nixon’s actions as President reared its head when, on December 21, 1974, the *New York Times* published an article by Seymour Hersh alleging CIA surveillance against antiwar demonstrators and other dissident groups. Hersh claimed that the CIA had violated its charter against having “police, subpoena, law enforcement powers or internal security functions inside the United States” and had gathered intelligence files on over 10,000 American citizens.⁶⁸ CIA officials attempted to minimize the extent of CIA domestic actions by claiming that the laws in this area “were fuzzy in connection with the so-called ‘gray’ area of the C.I.A.-F.B.I. operations” while others, including Dr. Harry Howe Ransom and William Colby, who replaced Richard Helms as Director of CIA after Helms became Ambassador to Iran, argued that less of a grey area existed; the FBI was legislatively set up to deal with domestic intelligence, while the CIA was set up to

⁶⁷ Nixon’s original Vice President, Spiro Agnew, had resigned on October 10, 1973, facing charges of tax evasion. Ford was nominated by the House shortly thereafter, and confirmed by a majority of both Houses of Congress by December 6, 1973.

⁶⁸ Seymour Hersh, “Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years,” *New York Times*, December 21, 1974, A1.

deal with foreign intelligence.⁶⁹ The revelations of the Hersh article put the allegations of CIA involvement in the Watergate crisis in the forefront of the American consciousness. In an effort to get ahead of Congress in dealing with these allegations and, once again, to try and put the issues of intelligence agencies operating domestically against American citizens to rest, President Ford on January 4, 1975, established the Presidential Commission on CIA Activities Within the United States and tasked the Commission to:

- (a) Ascertain and evaluate any facts relating to activities conducted within the United States by the Central Intelligence Agency which give rise to questions of compliance with the provisions of 50 U.S.C. 403;
- (b) Determine whether existing safeguards are adequate to prevent any activities which violate the provisions of 50 U.S.C. 403.⁷⁰

The commission was set up to deal with the allegations in the Hersh article that the CIA had acted against the charter creating the Agency (50 USC 403) and conducted domestic intelligence operations.⁷¹ President Ford wanted to show the public the importance and the impartiality of the Commission by appointing Vice President Nelson Rockefeller to chair the commission.⁷²

The Executive Order establishing the Rockefeller Commission limited the Commission's inquiry exclusively to CIA activities and allegations of improper intelligence gathering by the agency; it was not to be a comprehensive examination of American intelligence-gathering. The Commission focused on two major areas: First, foreign intelligence operations with significant domestic components; and second, CIA involvement in purely domestic related operations.

⁶⁹ Ibid., A26.

⁷⁰ President's Commission on CIA Activities within the United States, *Report to the President by the Commission on CIA Activities Within the United States*, (New York: Manor Books, 1975), 271. [Hereafter referred as *The Rockefeller Report*].

⁷¹ The CIA was created under the National Security Act of 1947 (61 Stat. 496), with a clear mandate in the realm of foreign intelligence. 50 USC 403 to 50 USC 403x delineates the current legal authority of the CIA.

⁷² President Ford believed that Nelson Rockefeller's position as the leader of the dwindling number of prominent moderate Republicans and as a former political adversary of Nixon created enough distance between the Commission and the Nixon administration for the Commission to be seen as non-partisan.

The two major foreign intelligence operations with significant domestic components examined by the Commission were the CIA mail program and “Operation CHAOS” – the CIA operation to collect intelligence to determine the extent of foreign influence on domestic dissent. The CIA mail program consisted of four separate programs producing mail “covers” (copying the front and back of individual envelopes) and the opening of mail.⁷³ The main component of the mail program was based in New York and lasted between 1953 and 1973. Smaller programs were temporarily established in cities such as San Francisco and New Orleans, and the then-territory of Hawaii.⁷⁴ The CIA approached the Post Office Department and initially requested to set up the New York program to collect “covers” of mail going to and from the Soviet Union through New York. The program started as a small program in 1952-53, consisting of two agents working with a postal inspector to “cover” a number of envelopes going to and from the Soviet Union. By 1954, the program had gained enough substantive and technical intelligence that the Director of Central Intelligence (DCI) Allen Dulles approached Postmaster General Arthur Summerfield with a plan to expand the program and to include the limited opening of letters based on active intelligence.⁷⁵ The program expanded through the 1950s and 1960s to involve a larger staff with designated equipment to produce covers of these letters and to allow for the opening of a larger number of letters. This period included an expansion of the program

⁷³ Michael Holzman, *James Jesus Angleton, the CIA, and the Craft of Counterintelligence* (Amherst: University of Massachusetts Press, 2008), 172-73.

⁷⁴ The San Francisco, Hawaii, and New Orleans programs were set up similar to that of the New York program. The difference between the four programs was the length of time each program was in effect. The New York program lasted approximately 20 years; the San Francisco program existed for a four month period between 1969 and 1971; the Hawaii program less than half a year in 1954-55; and the New Orleans program lasted for three weeks in 1957. *The Rockefeller Report*, 101.

⁷⁵ Holzman, *James Jesus Angleton*, 172.

to include sharing of information developed from this program with the FBI.⁷⁶ By the last year of operation in 1973, the New York mail program examined the outside of approximately 2.3 million letters, opening approximately 8,700 of those.⁷⁷

Throughout the lifetime of the New York mail program, the CIA approached and briefed the Postmaster General of the program. After the 1954 briefing that expanded the New York program, DCI Dulles met with incoming Postmaster General J. Edward Day to explain the background and current status (as of 1961) of the mail program. Day allegedly agreed that the program should continue, but did not want to be informed in any greater detail on the handling of the program.⁷⁸ A similar meeting occurred between DCI Richard Helms, Postmaster General Winton Blount, and Attorney General John Mitchell in June 1971. Mitchell and Blount agreed on the value of the program and its continued operation.⁷⁹ The mail program started to wind down after the resignations of Blount and Mitchell in 1972 and the appointment of James Schlesinger as DCI in 1973. Operators of the mail program advised Schlesinger that the program should be terminated if he was not able to brief and obtain approval from the new Postmaster General and Attorney General. The program was terminated in February 1973, with the caveat that it would be renewed once the appropriate authorization was obtained. The events of the day, particularly Watergate, overtook everything and the program was never reauthorized during Nixon's administration.⁸⁰

⁷⁶ *The Rockefeller Report*, 102-112.

⁷⁷ *Ibid.*, 112.

⁷⁸ *Ibid.*, 106-07.

⁷⁹ *Ibid.*, 110.

⁸⁰ *Ibid.*, 111.

The CIA established “Operation CHAOS” in response to Presidential concerns over domestic dissent. Presidents Johnson and Nixon were concerned with foreign contacts and foreign influence over domestic dissent. Starting in 1967 and ending in 1974, “Operation CHAOS” compiled dossiers on over 7200 American citizens and gathered intelligence on a number of “New Left” organizations. Prior to 1969, “Operation CHAOS” was limited to gathering intelligence from abroad, as well as from interagency intelligence reports (particularly from the FBI). In 1969, “Operation CHAOS” expanded to such a point that the CIA was capable of contacting, recruiting, and running its own agents/informants within these organizations. The shift in operations for “Operation CHAOS” was due to a number of factors, primarily political pressure from the Executive Branch and the lack of actionable intelligence being gathered from previous methods. Between 1969 and 1972, “Operation CHAOS” recruited approximately thirty agents and distributed them both domestically and abroad.⁸¹ By 1972, “Operation CHAOS” began winding down as American involvement in Vietnam, and domestic dissent against the war, began to wind down as well. Less domestic dissent led to resources being reassigned to other foreign intelligence operations. The agency officially terminated “Operation CHAOS” in March 1974. The Hersh article was based primarily on revelations of the existence of “Operation CHAOS.”

With respect to the mail program, the Rockefeller Commission recommended that the DCI be instructed that the CIA should not engage in mail operations without express statutory (i.e. legislative) authority in time of war.⁸² The Commission further recommended that Presidents should refrain from requesting that the CIA engage in internal security operations and

⁸¹ Ibid., 132-40.

⁸² Ibid., 115.

that DCIs should resist any pressure to engage in operations outside of its charter.⁸³ The recommendations made by the Commission were not really actionable recommendations, but rather admonitions against the DCI and the President for past and future actions.

The Commission also investigated CIA involvement in purely domestic activities. In particular, the Commission investigated what, if any, involvement the CIA had with improper activities on behalf of the White House, including Watergate. Regarding the release of the Pentagon Papers and subsequent illicit activities by members of CREEP, the Commission found that the CIA participation was minimal at most and, while inappropriate, was not illegal. Former members of the Agency, including E. Howard Hunt, participated in the illicit activities involving Watergate, but the Commission found no direct CIA involvement. The Agency did supply Hunt and Liddy with alias identification, as a matter of courtesy to former members of the Agency, but without knowledge that the identification would be used in the commission of a felony. Furthermore, the Commission did acknowledge the impropriety of the CIA creating a psychological profile of Daniel Ellsberg after the failed attempt by CREEP to break-in and steal Dr. Fielding's notes, but noted that the Agency acted with no prior knowledge of the break-in.⁸⁴

The Commission did not limit its investigation to Agency activity prior to Watergate, but focused also on Agency activities during the Watergate crisis. The Commission commended the Agency for not participating in the Watergate cover-up and for attempting to keep CIA-FBI communications at the highest of levels to prevent any perception of CIA involvement in the break-ins or subsequent cover-up. The Commission did admonish the Agency for refusing to participate willingly in the investigation, with DCI Helms claiming that no Agency involvement meant that the Agency should not participate in the investigation.

⁸³ Ibid., 150.

⁸⁴ Ibid., 176-190.

The Commission released its public report on June 10, 1975, less than six months after the Commission began their investigation. Unfortunately for President Ford, the Commission's report and recommendations failed to have its desired effect: House and Senate investigations into the American intelligence community and intelligence-gathering continued apace. Shortly after the Hersh article, both the Senate and House established committees to investigate American intelligence gathering.⁸⁵ On January 27, 1975, the Senate created the Select Committee to Study Governmental Operations with Respect to Intelligence Activities – better known as the “Church Committee” after its chairman, Frank Church (D-Idaho) – while the House created the Select Committee on Intelligence, chaired by Otis Pike (D-New York), six months later in July 1975. Both the House and Senate select committees pushed the issue of intelligence and American society, leading to the creation by 1977 of permanent (standing) intelligence committees in both the House and Senate and the passage of the Foreign Intelligence Surveillance Act in 1978.

Both the Pike and the Church committees focused their investigations on the intelligence agencies and overall intelligence community, but approached their investigations in different ways. The Church committee, with an eye towards asserting Congressional (in this case, Senate) oversight of the intelligence community, quickly fashioned a *Modus Vivendi* between the Senate select committee and the White House that allowed for the easy transfer of information and requested documents from federal intelligence agencies to the select committee. By taking this approach, the Senate select committee appeared to engage in a non-partisan investigation while distant enough to avoid appearing overly friendly to the intelligence agencies.

The Pike committee took a more aggressive approach in part due to circumstance, in part due to design. Otis Pike was not the first chairman of the House Select Committee on

⁸⁵ Hersh, A1, A26.

Intelligence. Initially established in January 1975, the House selected Representative Lucien Nedzi (D-Michigan) to chair the select committee. Nedzi, however, himself faced charges of impropriety. As chair of the CIA oversight subcommittee of the Armed Forces Committee, Nedzi had been briefed by Director of Central Intelligence (DCI) William Colby on the “Family Jewels” file a year before Hersh published his article. Charges of impropriety, coupled with concern among several more liberal members of the select committee that Nedzi was overly cautious in establishing the investigation (some charged Nedzi with stonewalling the committee), forced Nedzi to resign from the select committee. The House selected Otis Pike to replace him.⁸⁶ As chair of the 1969 House subcommittee investigation on the *Pueblo* incident, Pike had experience chairing intelligence investigations and seemed well-positioned to lead an effective investigation for the House. However, when Pike took over the select committee in July, 1975, he faced a number of problems that the Church committee had avoided. Pike inherited a committee that was fractured along ideological lines, with a Democratic majority intent on persecuting both the intelligence agencies and the Republican administrations of Nixon and Ford; a committee staff not of his choosing; and a six-month deadline to finish the investigation. Those problems forced Pike to take a more aggressive approach to the federal intelligence agencies.

The reports of the Pike Committee and the Church Committee received very different receptions. The draft report on the Pike Committee passed out of committee on a strictly party-line vote, but the House voted to suppress the select committee’s final report by a 246 to 124

⁸⁶ Kathryn S. Olmstead, *Challenging the Secret Government: The Post-Watergate Investigations of the CIA and FBI* (Chapel Hill: University of North Carolina Press, 1996), 112-114.

vote.⁸⁷ The House voted to suppress the final report not because of its recommendations, but because the committee refused to purge sensitive material within the final report. The final report was leaked by an unidentified source to journalist Daniel Schorr who released it for print in the *Village Voice*.⁸⁸ The Pike committee report focused more on the question of the cost-effectiveness of intelligence-gathering, not on its morality. This focus is evident when looking at the questions the committee asked in its report on domestic intelligence. The Pike committee report focused on two major questions: “Are they [investigations] effectively and dispassionately controlled, in keeping with criminal priorities? Are they efficiently terminated when clearly unproductive?”⁸⁹ The Pike committee report focused on investigations of the Socialist Workers Party (SWP) – a Trotskyite offshoot of the CPUSA – and the Institute of Policy Studies (IPS). The committee report noted that in the IPS investigation – instigated by a belief of a strong connection between the IPS and student radical groups, particularly Students for a Democratic Society (SDS) – the field office reported a negative connection between the IPS and SDS after a nine-month investigation; yet the Bureau continued investigating the IPS for five more years.⁹⁰ The Pike committee report made a similar admonition of the FBI for their 34 year investigation of the SWP as a subversive organization. The committee found that the Bureau could find no illegal connection between the SWP and international communism and was unable to prove that the organization engaged in illegal activities.

⁸⁷ Frank J. Smist, Jr., *Congress oversees the Intelligence Community, 1945-1994* (Knoxville: University of Tennessee Press, 1994), 162.

⁸⁸ *Ibid.*, 163-65, 170.

⁸⁹ Section II, Part B, (Performance), subpart 7 (Domestic Internal Security and Counterintelligence),” in *Pike Committee Report*, 106.

⁹⁰ *Ibid.*, 107-108.

The Pike committee report did not blame twenty years of intelligence-gathering completely on the nation's intelligence services. The committee report explicitly dismissed the theory of the CIA acting as a rogue agency within government, noting that:

all the evidence at hand suggests that the CIA, far from being out of control, has been utterly responsive to the instructions of the President and the Assistant to the President for National Security Affairs.⁹¹

The committee majority believed that the CIA followed the requests of the executive branch to the best of its ability. The committee report, however, criticized the Agency for failing to anticipate a number of foreign crises. The report criticized the agency for failing to anticipate the 1974 coup in Portugal, referring to the incident as a case where the United States was “caught napping,” as well as the Soviet invasion of Czechoslovakia in 1968.⁹²

While the Pike committee report was suppressed by the House, the Church committee report sailed through the Senate. The Church committee report concluded that:

intelligence activities have undermined the constitutional rights of citizens and that they have done so primarily because checks and balances designed by the framers of the Constitution to assure accountability have not been applied.⁹³

The lack of oversight of intelligence activities on the legislative and judicial levels allowed for the executive branch to expand intelligence operations during the period of crisis in the 1960s and 1970s. This created a lack of accountability in intelligence and allowed for abuses of power with the expansion of surveillance from allegedly subversive organizations to organizations that merely dissented from government policy.

⁹¹ Section II, Part C (Risks), subpart 1 (Covert Action), in *Pike Committee Report*, 121.

⁹² Section II, Part B (Performance), Subparts 2 (Czechoslovakia) and 4 (Portugal), in *Pike Committee Report*, 81-82, 91-94; Andrew Downer Crain, *The Ford Presidency: A History* (Jefferson, N.C.: McFarland & Company Publishers, 2009), 127-28.

⁹³ *Church Committee Report*, 197.

The Church committee report noted three main departure points that led to the abuse of intelligence activities: (1) excessive power in the executive branch; (2) excessive secrecy in the intelligence community; and (3) avoidance of the rule of law.⁹⁴ The Church committee report deplored the expansion of power by the executive branch – a natural position for a congressional committee to take – and argued that intelligence activities essentially had become exempt from the system of checks and balances in this expansion of presidential power. Flowing from the growing power of the Presidency was the increased secrecy amongst intelligence agencies. While secrecy is inherent and essential in intelligence operations, the Church committee report noted that “secrecy has been extended to inhibit review of the basic programs and practices themselves.”⁹⁵ The Church committee did not argue for an expansion of the public’s “need to know” into every aspect of intelligence gathering, but insisted that the fundamental premises, assumptions, and practices of intelligence gathering be open to debate. The growing secrecy of the nation’s intelligence apparatus allowed for the rationalization within the executive branch and the intelligence community that illicit operations were exempted from the rule of law because they contributed an essential service to the national security of the United States. An intelligence agency could rationalize an illegal surveillance operation against an organization or individual on the basis of the target being an internal security risk and by asserting that not conducting the surveillance would constitute negligence on the part of the agency.

The Church committee report phrased its conclusions in such a way as to argue the necessity of congressional (i.e. Senate) oversight of intelligence agencies. Church and his fellow senators on the committee wanted to expand Senate authority into the intelligence field over and above simple appropriations. Legitimate abuses within the intelligence field occurred with the

⁹⁴ Ibid., 199.

⁹⁵ Ibid., 199.

authorization of the executive branch and, the Church committee report argued, congressional oversight of intelligence was necessary to prevent future intelligence abuses. Congress would use the congressional reports detailing intelligence abuses to establish permanent intelligence committees in both the House and Senate and to enact legislation intended to delineate and limit domestic and foreign intelligence operations. These newly created permanent intelligence committees would replace the House Internal Security Committee – the successor to the House Committee on Un-American Activities starting in 1969 – and the Senate Internal Security Subcommittee – initially created by the Internal Security Act of 1950.

In response to the Congressional reports of surveillance abuse by both the FBI and CIA, Congress passed the Foreign Intelligence Surveillance Act (FISA) in 1978. As the Omnibus Crime Control and Safe Streets Act established limitations for domestic surveillance, FISA performed the same task for foreign surveillance. The process for conducting surveillance under FISA was similar to conducting surveillance on American citizens. To initiate electronic surveillance, the requesting intelligence agency petitioned the court, showing probable cause for a warrant to be issued. Each warrant petition had to specify the identity of the individual or facility to be placed under surveillance; the type of information sought by the applying agent; the means by which the surveillance will be conducted; and the duration of the surveillance.⁹⁶ FISA provided for the designation of seven federal judges to constitute a court to deal with warrant petitions for foreign surveillance. Each surveillance warrant petition would be handled by an individual judge, with a three judge panel convened to decide on the validity of any warrant requests denied by individual judges.⁹⁷ Once a warrant had been issued, the intelligence agency initiated surveillance for a period of 90 days or until the surveillance has achieved its goal,

⁹⁶ *Foreign Intelligence Surveillance Act*, 92 stat. 1783, sec. 104. [Hereafter referred as *FISA*].

⁹⁷ *Ibid.*, sec. 103(a) and (b).

whichever is less. If necessary, agents could apply for the warrant to be extended for another 90 day period.⁹⁸

There are several key differences, however, between domestic and foreign surveillance. Foreign surveillance tends to be more time-sensitive, so FISA allowed for a period of warrantless surveillance between the initiation of surveillance and the application for a FISA warrant. Emergency orders could be made by the Attorney General to allow for a period of 24 hours of warrantless electronic surveillance while a warrant petition was being reviewed.⁹⁹ In addition, FISA allowed for the President to authorize warrantless electronic surveillance to acquire foreign intelligence for a period of up to fifteen days after a declaration of war by Congress.¹⁰⁰ Additionally, intelligence agencies were allowed a period of electronic surveillance for a year, on the condition that the Attorney General provided a written affidavit proving that there was no substantial likelihood that the electronic surveillance could intercept the communication of an American citizen and the electronic surveillance was directed at communications between two foreign powers.¹⁰¹ This ensured a clear delineation between the authority for Congress to legislate surveillance and the executive branch's authority to conduct foreign policy, including surveillance of foreign powers, remained intact.

With the creation of the House and Senate committees on intelligence in 1976 and the passage of FISA in 1978, Congress established itself and the judiciary as limiting factors in the intelligence field. The system of checks and balances found lacking by the Church committee report had been reestablished in the intelligence field and would become the status quo for the

⁹⁸ Ibid., sec. 105 (d).

⁹⁹ Ibid., sec. 105 (e).

¹⁰⁰ Ibid., sec. 111.

¹⁰¹ Ibid., sec. 102 (a).

next 20 years in intelligence. The crisis created by the September 11, 2001, terror attacks on the United States would be the first major national security crisis faced by this new system of intelligence oversight and the responses by all three branches of government established the boundaries for the debate over internal security in the 21st century.

Epilogue

The USA PATRIOT Act and the Future of Internal Security Legislation

On the morning of September 11, 2001, nineteen members of Al-Qaida hijacked four passenger airliners and used them as human guided missiles to fly into designated targets – including both World Trade Center towers in New York City and the Pentagon building in Virginia. Three of the four hijackings were successful.¹ The first hijacked plane hit the North Tower of the World Trade Center at 8:46 AM (EST), followed by the second plane hitting the South Tower at 9:03 AM. Initially thought as an unfortunate accident, the nation watched in shock and horror as the second plane hit the South Tower and reports started coming in about a third plane striking the Pentagon Building at 9:37 AM. As the World Trade Center towers continued to burn from the airline fuel, first responders from throughout New York arrived at the scene to respond to the attack, including fully half of the New York City Fire Department. As surrounding buildings were being evacuated, however, the South Tower suffered a structural collapse, bringing down debris and ash and causing widespread damage. The North Tower suffered a similar collapse less than half an hour later.

Initial casualty reports varied between four to six thousand dead. As recovery efforts continued, however, the casualty figures steadily dropped and stabilized at approximately three thousand killed in the September 11 terror attack. Including the 246 passengers and crew on the airliners, 2,606 people lost their lives in the New York attacks; 125 died in the attack on the Pentagon building. Included in the losses in New York City were 411 emergency workers of the New York City Fire Department, Police Department, and the Port Authority of New York.

¹ National Commission on Terrorist Attacks, *The 9/11 Commission Report: Final Report on the National Commission on Terrorist Attacks upon the United States* (New York: W.W. Norton, 2004), 1-14. [Hereafter referred as *9/11 Commission Report*]. See also: Bob Woodward, *Bush at War* (New York: Simon & Schuster, 2003), 1-14; and Richard A. Clarke, *Against All Enemies: Inside America's War on Terror* (New York: The Free Press, 2004), 1-15. Passengers of United Airlines Flight 93 confronted the hijackers after hearing about the initial attacks on the World Trade Centers, causing the airline to crash in a field in Pennsylvania rather than a populated target.

The Bush administration immediately directed the FBI to investigate the September 11 attacks. In its largest investigation to date, the FBI initiated investigations of the Pentagon and Twin Towers attack, designating the operation “PENTTBOM” (Pentagon/Twin Towers Bombing Investigation). Using over 63 percent of its total manpower (7000 out of 11000 total Special Agents), the FBI managed to identify the hijackers within two weeks of the attack and to provide a clear link between the hijacking and Al-Qaida.² By December 2001, the FBI indicted Zacarias Moussaoui as the “20th hijacker” and one of the planners behind the September 11 attack.³

The September 11, 2001, terror attacks represented both the first major internal security challenge to the United States since the passage of Foreign Intelligence Surveillance Act in 1978, and a major intelligence failure. The United States had suffered setbacks in foreign intelligence in the 1980s and 1990s – notably failure to anticipate the 1983 bombing of the Marine barracks in Lebanon; the 1989 collapse of communist regimes; and the 1993 bombing of the World Trade Center – but nothing that equaled the magnitude of the 2001 terror attacks. As an intelligence failure, questions were asked to determine how such an event could be planned and executed against the United States without warning from the major intelligence agencies. The September 11th attack prompted a wide ranging examination of American intelligence gathering and its on-going effectiveness.

The 2001 terror attacks created a different internal security crisis than existed in either the anti-communist crusade in the 1940s and 1950s or the race riots of the 1960s. With the anti-

² FBI Press Release, “The FBI Releases Nineteen Photographs of Individuals Believed to be the Hijackers of the Four Airliners that Crashed on September 11, 2001,” <http://www.fbi.gov/about-us/history/famous-cases/9-11-investigation/press-release-9-27-2001-with-photos>.

³ *United States of America v. Zacarias Moussaoui*, Grand Jury Indictment, <http://www.justice.gov/ag/moussaouiindictment.htm>. *9/11 Commission Report*, 273-76. Although indicted in December, 2001, prosecutors had difficulty tying Moussaoui to the September 11 attack. Moussaoui was finally convicted in May 2006, and is serving a life sentence.

communist crusade, the initial concern of internal subversion directed by an external enemy gave way to a contest over constitutional rights of citizens. The race riots of the 1960s included urban centers exploding in rioting and racial violence; there was no evidence of violence directed by an external enemy. The 2001 terror attacks contained both elements of an attack from within and direction and funding from without. To deal with the internal security crisis posed by the 2001 terror attacks, the federal government and Congress focused on expanding surveillance laws as the preferred method to enhance the internal security of the nation. In so doing, it harkened back to the reliance on surveillance in the 1970s. To this end, both the George W. Bush administration and Congress began expediting anti-terrorism legislation.

The push for greater surveillance on the part of the Bush administration can be attributed, in part, to the personalities in the administration. Several of Bush's key advisors and cabinet officials had experience in the Nixon and Ford administrations and were active proponents of expanding the powers of the presidency, including in the realm of internal security. Vice President Dick Cheney, for example, served as White House Chief of Staff for Gerald Ford, while Secretary of Defense Donald Rumsfeld preceded Cheney as Ford's Chief of Staff, as well as serving as Secretary of Defense for Ford. Both men had strong personalities, believed in a strong executive branch vis-à-vis the legislative and judicial branches, and found in President George W Bush a receptive audience.⁴

Less than two weeks after the terror attacks, on September 24, 2001, Attorney General John Ashcroft appeared before the House Committee on the Judiciary and testified to what

⁴ See, for example: Bruce P. Montgomery, "Congressional Oversight: Vice President Richard B. Cheney's Executive Branch Triumph," *Political Science Quarterly* vol. 120, no. 4 (Winter 2005/2006): 581-617; Jane Mayer, "Letters from Washington: The Hidden Power – The Legal Mind Behind the White House's War on Terror," *New Yorker*, July 3, 2006, 44, http://www.newyorker.com/archive/2006/07/03/060703fa_fact1; Barton Gellman and Jo Becker, "A Different Understanding with the President," *Washington Post*, June 24, 2007, A1, http://voices.washingtonpost.com/cheney/chapters/chapter_1/.

changes he, and the administration, believed were necessary to better protect the homeland – with an emphasis on means and methods of surveillance – in hearings on the administration’s proposed anti-terrorism.⁵ Attorney General Ashcroft explained the deficiencies to the committee, noting that the current laws on terrorism:

reflect two facts. First, our laws fail to make defeating terrorism a national priority. Indeed, we have tougher laws against organized crime and drug trafficking than terrorism. Second, technology has dramatically outpaced our statutes. Law enforcement tools created decades ago were crafted for rotary telephones, not e-mail, the Internet, mobile communications and voice mail.⁶

Ashcroft described the government in general and the Justice Department in particular as fighting an uphill battle against terrorism; one that would be difficult to win if not given the proper tools by Congress.

One of the main arguments advanced by Ashcroft was something everyone agreed about: the necessity to remove technology-dependent clauses from surveillance statutes. In his testimony to the House Judiciary committee, Ashcroft noted the technological advances in satellite and telecommunications that occurred between 1978 and 2001 were not clearly covered under existing surveillance statutes. The advent of cell phone and satellite phones facilitated verbal communication not only within the United States but around the world. The rise of the internet and email communication further enhanced worldwide communication. Both communication advances tremendously expanded the range of communication not only domestically, but worldwide. Ashcroft argued for the necessity of technologically-neutral language for surveillance statutes to account for not only the current state of communication technology, but further advances as well. The administration proposal, as argued by Ashcroft

⁵ House Committee on the Judiciary, *Hearing on Administration’s Draft “Anti-Terrorism Act of 2001”* 107th Cong., 1st Sess., September 24, 2001. http://commdocs.house.gov/committees/judiciary/hju75288.000/hju75288_of.htm [Hereafter referred as *House Anti-Terrorism Hearings – 2001*]

⁶ *Ibid.*, 14.

before the House Judiciary committee, proposed that a single court warrant – ostensibly from the FISA court – apply to all the providers within a communications chain to allow the government to track the information of suspects. Ashcroft assured the committee that the information captured through this warrant:

would be limited to the kind of information you might find in a phone bill, such as the phone numbers dialed by a particular telephone. The content of these communications in this setting would remain off limits to monitoring by intelligence authorities, except under the current legal standards where content is available under the law which we now use.⁷

The ability of suspects to cover their tracks by changing cell phones and re-routing email and other electronic information required government officials to rapidly track and follow the suspects through multiple jurisdictions. A single warrant would prevent the loss of time and speed when tracking suspects through multiple jurisdictions.

Members of the House committee were fairly consistent in their concerns over wireless surveillance in their questioning of Attorney General Ashcroft and his subordinates testifying before the committee: Larry Thompson, Deputy Attorney General; Michael Chertoff, then Assistant Attorney General heading the criminal division; and Viet Dinh, Assistant Attorney General who developed much of the administration's proposals for increased internal security. Representative Barney Frank (D-Massachusetts), for example, expressed concern over past patterns of abuse of intelligence gathering by the federal government and government officials, while Representative Bob Goodlatte (R-Virginia) focused his questioning on the information being captured under the proposed legislation.⁸ Attorney General Ashcroft assured Representative Frank that information would not be gathered or used for domestic political reasons. Assistant Attorney General Chertoff expanded on the type of information being

⁷ Ibid., 16.

⁸ Ibid., 27-28, 45-46.

captured by the government under the proposed legislation and the relationship between the administration's proposals and existing surveillance legislation (i.e. the 1968 Omnibus Crime Control and Safe Streets Act and the 1978 FISA). Chertoff told the committee that:

What we're looking for is addresses and information that tells us who sent the material and where the sender is addressing the material. We're not looking to get into content. Everybody understands that if you want to get into the area of content, you have to go and get a Title III order [under the 1968 Omnibus Crime Control and Safe Streets Act].

So, as we understand this provision, it's not going to alter the fundamental legal distinction between getting a pen and trap for addressing information and getting a title III for content. We're not looking to get subject lines. We're not looking to get into the specifics of what somebody read when they were on the Internet, without going to get a Title III.⁹

The pen and trap registers – devices used to determine the recipient of outgoing calls from a particular telephone, but unable to listen or record the conversation – would be used to determine probable cause on suspected telephones and allow the government to petition for a search warrant for electronic surveillance.¹⁰

In addition to surveillance reform, the administration's proposals argued the necessity of attacking the finances of suspected terrorist organizations. Attorney General Ashcroft believed that by expanding the executive branch's power to deport aliens who had been shown knowingly to provide material support to known and suspected terrorist organizations and by legislatively expanding the government's power to seize and freeze assets of terrorist organizations, the government would be able to limit to the financial capabilities of terrorist organizations to engage in operations against the United States.

⁹ *Ibid.*, 46.

¹⁰ Transcript, Former Special Agent of the FBI Carmine F. Russo Interview, 6/18/2008, by Brian R. Hollstein, *Society of Former Special Agents of the FBI*, <http://www.socxfbi.org/s/900/start.aspx>

The problem that some members of the House Judiciary Committee had with expanding the government's power to freeze and seize assets of suspect organizations was the possible use of front organizations by terrorists. The arguments used by the committee members harkened back to the arguments used by liberals talking about communist-front organizations in the 1950s: how to deal with the individual innocently contributing to the front organization without knowledge of other activities? Representative George Gekas (R-Pennsylvania) posed the question to Attorney General Ashcroft, asking "if the donor believes that it truly is going for a hospital, but another arm of this organization is dealing with dynamite and terrorist activities," would that person be absolved from any complicity in terrorist activities?¹¹ Ashcroft acknowledged the issue of innocent people being associated with terrorist activities, but argued that:

Front organizations, so-called NGOs, advertise themselves as charitable organizations, but frequently divert very substantial assets to the perpetration of terrorist acts or the maintenance of terrorist networks. We need to be able to curtail the resources of those organizations [...]

but for individuals, in our proposal, who know or should know, in other words, the evidence is clear, and there's reason to know that this is not really a charity, that this is a front organization, then the responsibility would attach to such individuals.¹²

Attorney General Ashcroft further compared the economic weapons needed to fight terrorists to those used to fight domestic organized crime. He argued for economic warfare against terrorist organizations and legislation to allow the government "to seize the assets, not just to freeze them, not just to curtail activity, but to take those assets."¹³ The thinking among Bush administration officials was that by providing the government with the power and authority to seize assets of

¹¹ *House Anti-Terrorism Hearings – 2001*, 24.

¹² *Ibid.*, 24-25.

¹³ *Ibid.*, 25.

designated terrorist organizations, the government would be able to fund anti-terrorist organizations while depriving terrorist organizations of needed financial wherewithal.

Within a month of Attorney General Ashcroft's testimony before the House Judiciary Committee, Congress produced an omnibus bill enhancing the federal government's intelligence-gathering and counter-terrorist capabilities. The USA PATRIOT Act was a combination of the Senate's Uniting and Strengthening America (USA) Act (S. 1510) and the Provide Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act (H. 2975) proposed by the House. While containing provisions dealing with immigration and with other aspects of counter-terrorism, such as tightening money-laundering laws, the primary emphasis of the USA PATRIOT Act was the surveillance and early detection of terrorists and others who threatened the internal security of the United States

The USA PATRIOT Act addressed three main issues regarding surveillance. First, it gave intelligence services the right to intercept electronic communications as they pertain to possible terrorism and terrorist-related activities. Second, the USA PATRIOT Act provided the federal government with a broader scope to address terrorism under the Foreign Intelligence Surveillance Act. Finally, the USA PATRIOT Act expanded the government's surveillance ability with respect to search warrants, particularly expanding the use of so-called "sneak-and-peek" search warrants. These three issues comprised the bulk of surveillance legislation within the USA PATRIOT Act.

One of the major concerns of the federal government when it approached Congress about increased surveillance capability was bringing the surveillance capability of the FBI and CIA into the 21st century; to create "technology-neutral" legislation in the words of Attorney General

Ashcroft.¹⁴ Congress complied by granting the federal government the “authority to intercept wire, oral, and electronic communications relating to terrorism.”¹⁵ This gave the FBI and the CIA the ability to intercept email, public internet access, cell phone conversations, voice-mail recordings, and other forms of electronic communication pursuant to terrorism investigations. This authority extended as far as the ability of the law enforcement agencies to obtain warrants of probable cause for said communication.

This enhanced ability for the FBI and CIA to intercept electronic communications pushed Congress to use the USA PATRIOT Act to expand the FISA legislation to accommodate the new authority of the intelligence agencies. In order for the NSA, FBI, or CIA to perform surveillance on an American citizen, permanent resident alien, or aliens within the United States, the agencies had to go before a specially designated FISA court and show reasonable suspicion, rather than probable cause, in order to obtain a warrant. The USA PATRIOT Act expanded the duration under which the intelligence agencies could perform surveillance of “non-United States persons” from ninety days to up to one hundred twenty days and expanded the time frame of search warrants against those same persons from forty-five to ninety days, with extensions for both available for up to one year.¹⁶ This extra time allowed the intelligence agencies to investigate more thoroughly possible terrorists and other subversive aliens without time restraints they deemed too restrictive.

The other major change to FISA was the authorization of expanded authority for the CIA and FBI to use pen registers and trap and trace devices with regard to electronic communications.

¹⁴ Ibid., 14.

¹⁵ *The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act*, Title II, Section 201, 115 Stat. 272. [Hereafter referred as *USA PATRIOT Act*].

¹⁶ Ibid., Title II, Sec. 207.

Pen registers are defined by the government as any “device which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted.”¹⁷ Pen registers are limited in that they cannot include the contents of the communication, but rather trace the locations of other recipients of this communication. Trap and trace devices are similar to pen registers in that they are designed to trace the location of other recipients of communication, but these devices capture, rather than record, the information.¹⁸ Both these devices are used to determine the contact information (i.e. telephone numbers and email addresses) of outgoing and incoming communication to the device under surveillance. The USA PATRIOT Act expanded both these definitions to include the routing agencies, such as internet protocol providers (, to allow the FBI and CIA to track and trace electronic communication such as email and cell phones.¹⁹ The information gained from the routing agencies would allow intelligence agencies to more effectively track suspects as they attempt to elude surveillance through use of multiple IP addresses. The information gained through these devices could be used to determine probable cause to obtain a warrant under Title III of the Omnibus Crime Control and Safe Streets Act to expand domestic surveillance (if necessary) on suspects, and to access the information contained within the communication.

In addition to expanding and amending FISA to deal with the changing technological world, the USA PATRIOT Act expanded search warrants in two important ways. First, the Act exerted federal jurisdiction over the crime of domestic and international terrorism. Similar to

¹⁷ *Pen Registers and Trap and Trace Devices*, 18 USC 3127 (3).

¹⁸ Trap and trace devices simply capture the email address or phone number of the people under surveillance rather than any information within the communication.

¹⁹ *USA PATRIOT Act*, Title II, Section 214.

how *Pennsylvania v. Nelson* (1956) exerted federal jurisdiction over internal security matters, the USA PATRIOT Act declared that only “a Federal Magistrate judge in any district in which activities related to the terrorism may have occurred” can issue a search warrant in a terrorism-related investigation.²⁰ This placed terrorism investigations solely within the realm of the federal government and its intelligence agencies, ensuring that additional barriers to sharing any terrorism-related intelligence did not exist. Second, and more importantly, the USA PATRIOT Act amended the U.S. code to allow for so-called “sneak-and-peek” search warrants. Under normal procedures for executing a search warrant, the investigating officer provides notification to the owners of the premises listed on the search warrant and serves the warrant at the time of the search or, if the owner of the premises is unavailable, a copy of the warrant is left notifying the occupant of the search and providing a receipt of all property seized during the search. The USA PATRIOT Act allowed for a delay in serving the search warrant, provided:

- (1) The court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result [...];
- (2) The warrant prohibits the seizure of any tangible property, any wire, or electronic communication [...] or, except as expressly provided in Chapter 121, any stored wire or electronic information, except where the court finds reasonable necessity for the seizure; and
- (3) The warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.²¹

This “sneak-and-peek” amendment allowed for the investigating party to delay serving the search warrant, thereby executing the search of the premises or property without notifying the owner, provided that the investigating party show good cause to a Federal judge. This “sneak-and-peek” amendment included search warrants for electronic information, such as that provided by pen registers and trap and trace devices.

²⁰ *Ibid.*, Title II, Section 219.

²¹ *Ibid.*, Title II, Section 213.

Although Congress was under pressure from both the administration and the general public to pass the USA PATRIOT Act – in essence, to do something about internal security – a vigorous debate occurred over the USA PATRIOT Act. Senator Patrick Leahy (D-Vermont), while not arguing expressly against the Act, remained leery of its constitutionality. Leahy argued for “proposed checks on Government powers – checks that were not contained in the Attorney General’s original proposal” to Congress, including stricter limits to “sneak-and-peak” warrants than requested by the government.²² Senator Leahy suggested that the government provide good cause for delaying execution of the warrant to a court prior to the execution of the search rather than the government’s plan that “broadly authorized officers not only to conduct surreptitious searches, but to also to secretly seize any type of property without any additional showing of necessity.”²³ In Senate Judiciary committee hearings on September 21, 2001, Senators Barbara Feinstein (D-California), John Edwards (D-North Carolina) and Arlen Specter (R-Pennsylvania) expressed concern about the government’s request for an unlimited expansion of FISA into domestic surveillance. Attorney General Ashcroft forwarded the Bush administration’s broad interpretation of FISA’s mandate to investigate “agents of a foreign power” to include occasions of domestic surveillance. Ashcroft testified to the government’s position that a United States person – defined by FISA as a citizen of the United States or permanent resident – could be subject to surveillance under FISA provided the government show probable cause that the person is engaged in criminal activity.²⁴ These three senators found this interpretation troubling, as it expanded FISA’s reach into domestic surveillance, and worked to

²² *Cong. Rec.*, 107th Cong. 1st Sess., S10548.

²³ *Ibid.*, S10557.

²⁴ Senate Committee on the Judiciary, *Hearing on Homeland Defense*, 107th Cong., 1st Sess., September 25, 2001. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_senate_hearings&docid=f:81140.wais.pdf [Hereafter referred as *Senate Homeland Defense Hearing – 2001*].

craft the compromise between the government request for FISA expansion into domestic surveillance and the protection of civil liberties that found its way into the USA PATRIOT Act.

Concern over maintaining a balance between expanded governmental power versus civil liberties is evident in the inclusion of “sunset” clauses for certain provisions of the USA PATRIOT Act, including the surveillance provisions. These “sunset” clauses required congressional renewal of certain provisions in the USA PATRIOT Act by December 31, 2005. The provisions included in the “sunset” clauses were the expanded governmental authority regarding electronic surveillance and expanded FISA coverage. Many in Congress viewed portions of the USA PATRIOT Act, such as the expanded duration of FISA warrants, as temporary, or “emergency” measures, and not permanent changes.²⁵

The importance that the government placed on surveillance is seen in the way the government used the powers provided it by the USA PATRIOT Act. One indicator of the emphasis placed on FISA by the Bush administration was the number of FISA warrants applied for by the government. In the five years prior to the passage of the USA PATRIOT Act (1997 to 2001 inclusive), the Justice Department petitioned for an annual average of 873 warrants for conducting foreign intelligence. In the five years after the passage of the USA PATRIOT act (2002 to 2006 inclusive), FISA warrant requests nearly doubled to an annual average of 1,793 petitions.²⁶ Using surveillance evidence acquired through FISA and other surveillance programs, the government built cases against suspected terrorists and engaged in preventative detention of

²⁵ Congress would reauthorize and make permanent 14 of the 16 sections under the sunset provisions in 2005 with the passage of the *USA Patriot Act Improvement and Reauthorization Act of 2005* (120 Stat. 192). The two sections not made permanent in 2005 – the “roving” wiretaps and orders for business records under FISA, and the so-called “lone wolf” amendment to FISA (eliminating the need to establish a connection between an individual and organization or foreign power) – would be up for renewal by December 31, 2009.

²⁶ U.S. Justice Department, National Security Division, *Annual Foreign Intelligence Surveillance Act Report to Congress*, http://www.justice.gov/nsd/foia/reading_room/foia_readingroom.htm. It is important to note that the numbers for the FISA petitions for surveillance do not include the warrantless surveillance under the terrorist surveillance program run by the National Security Agency between 2001 and 2006.

the suspected terrorists. Suspected terrorists were detained by the government and sent to Guantanamo Bay, Cuba – the U.S. military base in Cuba – where they were housed initially in Camp X-Ray, until transferred to a permanent detainee camp, Camp Delta. The government chose Guantanamo Bay as the detention site for primarily legal reasons. As a legal entity, Guantanamo Bay has been referred to as a “black hole:” territory controlled by the United States, yet – according to the Justice Department – outside of U.S. legal jurisdiction.²⁷ By placing detainees in preventative detention in Cuba rather than in federal prisons, the Bush administration placed detainees outside of the federal court system.

Legal challenges to the preventative detention began shortly after detainees, most of who were captured during the U.S. war in Afghanistan, arrived at Guantanamo Bay. The Center for Constitutional Rights, a liberal non-profit legal organization based in New York, filed for writs of habeas corpus for several detainees – including Shafiq Rasul, a British national, and Mamdouh Habib, an Australian national. Each claimed that they did not take up arms against the United States military, but were armed only for self-defense. Both the District Court of Washington, D.C., and the U.S. Court of Appeals for the District of Columbia denied the petitions for writs of habeas corpus, agreeing with the government’s position that the United States had no legal jurisdiction in Guantanamo Bay. The case was appealed to the Supreme Court in 2004 to decide the issue of sovereignty regarding Guantanamo Bay and, therefore, whether the U.S. court system had authority to determine if detainees were wrongfully imprisoned. In a 6 to 3 decision, the majority opinion, written by Justice John Paul Stevens, decided that the degree of effective control exercised by the United States over Guantanamo Bay

²⁷ The Justice Department argued that the treaty language and lease agreements governing Guantanamo Bay “recognize the ‘continuance of the ultimate sovereignty of the Republic of Cuba’ during the lease period,” meaning Guantanamo was not part of the sovereign United States. See, for example, *Bush v. Gherebi*, petition for writ of certiorari to Ninth Circuit, U.S. Court of Appeals, 9, <http://www.justice.gov/osg/briefs/2003/2pet/7pet/2003-1245.pet.aa.pdf>.

was sufficient to trigger the application of habeas corpus rights.²⁸ *Rasul v. Bush* placed Guantanamo Bay clearly within the jurisdiction of the U.S. district court system and allowed petitions for writs of habeas corpus to be brought before the district court of Washington, D.C.

Announced the same day as *Rasul v. Bush*, *Hamdi v. Rumsfeld* dealt with the issue of the legal rights of Americans held at Guantanamo Bay, Cuba. Yaser Hamdi, an American citizen, was captured by the Northern Alliance in Afghanistan in 2001, placed in American military custody, and transferred for preventative detention to Guantanamo Bay. The Bush administration detained Hamdi as an “enemy combatant,” claiming that such a designation deprived Hamdi access to an attorney or the court system. Hamdi’s father, Esam Hamdi, challenged his son’s detention and petitioned for a writ of habeas corpus. The Supreme Court heard the case after a divided District court and Court of Appeals could not agree on the proper definition under which Yaser Hamdi was detained. In a plurality decision, eight out of the nine Justices agreed that the executive branch did not have the power to detain American citizens indefinitely without due process and judicial review.²⁹ Justice O’Connor’s opinion argued for the necessity of limited due process for American citizens under preventative detention and called for the creation of an impartial body to determine whether a detainee merited continued detention.³⁰

²⁸ *Rasul v. Bush*, 542 U.S. 466 (2004). See also: Kermit Roosevelt, III, “Guantanamo and the Conflict of Laws: Rasul and Beyond,” *University of Pennsylvania Law Review*, vol. 153, no. 6, Symposium: Current Debates in the Conflict of Laws (June 2005): 2023-28.

²⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Although eight out of nine Justices agreed on limiting the power of the Executive branch, *Hamdi* remained a plurality, rather than a majority, decision as no one opinion could obtain a five Justice majority. Justice Sandra Day O’Connor’s opinion held the plurality with four Justices.

³⁰ See: *Hamdi v. Rumsfeld* (2004); and James B. Anderson, “*Hamdi v. Rumsfeld*: Judicious Balancing at the Intersection of the Executive’s Power to Detain and the Citizen-Detainee’s Right to Due Process,” *The Journal of Criminal Law and Criminology*, vol. 95, no. 3 (Spring 2005): 689-724. Had the Bush administration looked back to the preventative detention legislation passed in the Internal Security Act of 1950, the Justice Department may have pushed for an independent body such as the Subversive Activities Control Board to determine whether a detainee

In conducting foreign intelligence surveillance, the intelligence and security agencies of the federal government are given the ability to place foreign aliens under electronic and physical surveillance through FISA. The FISA legislation also provided these agencies with the ability to place citizens of the United States under surveillance provided that reasonable suspicion is demonstrated to a secret court established by FISA and a search warrant is obtained. On December 16, 2005, the *New York Times* published an article detailing domestic electronic surveillance executed without either FISA or Title III approved warrants. These “warrantless taps” grew out of a presidential order to the NSA to monitor “the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants.”³¹ The revelations of warrantless wiretaps ordered by the President Bush reopened the debate over the USA PATRIOT Act, FISA, and government surveillance in the War on Terror.

Administration officials argued that the authority to grant warrantless wiretaps rested in the assertion that “the president has broad powers to order such searches” and these powers are derived, in part, from “the September 2001 Congressional resolution authorizing him to wage war on Al Qaeda and other terrorist groups.”³² Furthermore, Attorney General Alberto Gonzalez testified before the Senate Judiciary committee on February 6, 2006, and, in a prepared statement, argued that:

merited continued detention and thereby creating the limited due process discussed in Justice O’Connor’s plurality opinion.

³¹ James Risen and Eric Lichtblau, “Bush Lets U.S. Spy on Callers without Courts: A Secret Order to Ease Domestic Monitoring,” *New York Times*, December 16, 2005, A1, A22. See also: James Risen, *State of War: The Secret History of the CIA and the Bush Administration* (New York: The Free Press, 2006), 43-60.

³² Risen and Lichtblau, “Bush Lets U.S. Spy on Callers without Courts,” A22. See also: Memorandum, John Yoo, Deputy Assistant Attorney General, to David S. Kris, Associate Deputy Attorney General, *Re: Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the “Purpose” Standard for Searches*, 6-7, Department of Justice, Office of Public Affairs, <http://www.justice.gov/opa/documents/memoforeignsurveillanceact09252001.pdf> [Hereafter referred as *DOJ Digital Document*].

The terrorist surveillance program is firmly grounded in the President's constitutional authorities. The Constitution charges the President with the primary responsibility for protecting the safety of all Americans, and the Constitution gives the President the authority necessary to fulfill this solemn duty. See, e.g., *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863). It has long been recognized that the President's constitutional powers include the authority to conduct warrantless surveillance aimed at detecting and preventing armed attacks on the United States.

Presidents have repeatedly relied on their inherent power to gather foreign intelligence for reasons both diplomatic and military, and the federal courts have consistently upheld this longstanding practice. See *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002).³³

Attorney General Gonzalez and the administration claimed that the executive branch had the constitutional authority and, indeed, was required to conduct warrantless surveillance – provided it was “aimed at detecting and preventing armed attacks on the United States.”³⁴

Before the Senate Judiciary Committee, Attorney General Gonzalez forcefully argued for the constitutionality of the terrorist surveillance program, the program initiated by the National Security Agency to conduct warrantless electronic surveillance. Gonzalez argued that the authorization to use military force (AUMF) by Congress for the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attack” implicitly included the authorization to create the terrorist surveillance program.³⁵ Gonzales argued that the AUMF allowed the executive branch the leeway to effectively engage Al Qaeda and other terrorist organizations.

³³ Senate Committee of the Judiciary, *Hearing on Wartime Executive Power and the NSA's Surveillance Authority*, 109th Cong. 2nd Sess., 266, February 6, 2006, <http://www.access.gpo.gov/congress/senate/pdf/109hrg/27443.pdf> [Hereafter referred as *Senate Surveillance Hearings – 2006*]. In the *Prize Cases* (67 U.S. 635), the Taney Court, in a 5 to 4 decision, upheld the blockade of the Confederate States of American as Constitutional under the President's authority as Commander-in-chief. *In Re: Sealed Case*, the Foreign Intelligence Surveillance Court of Review met for the first time to review a warrant granted to the FBI with the restriction that any evidence gathered under the warrant could not be used in criminal cases. The Court of Review decision upheld the Constitutionality of FISA, reversed the restrictions placed on the particular warrant, and noted the President's inherent authority to conduct warrantless foreign surveillance.

³⁴ *Senate Surveillance Hearings – 2006*, 266.

³⁵ *Ibid.*, 21.

This justification was most clearly revealed in the Attorney General's answers to friendly questioning by Senator Orrin Hatch (R-Utah):

Senator Hatch: That sweeping language goes a lot further than the usual single sentence declaration of war, right?

Attorney General Gonzales: It is a very broad authorization which makes sense. I do not think anyone in those days and weeks, certainly not in the Congress, were thinking about cataloguing all of those authorities that they wanted to give to the President. I think everyone expected the President of the United States to do everything he could to protect our country, and the Supreme Court has said that those words, "all necessary and appropriate force" mean that the Congress has given to the President of the United States the authority to engage in all the activities that are fundamental and incident to waging war.

Senator Hatch: So you are relying on an Act of Congress, a joint resolution. You are relying on the inherent powers of the President to protect our borders and to protect us, and you are relying on the Fourth Amendment which allows reasonable searches and seizures in the best interest of the American public; is that a fair analysis?

Attorney General Gonzales: That is a fair analysis, yes, sir.³⁶

Congress authorized the President to use whatever tools necessary to combat terrorism, and Attorney General Gonzales and other members of the Bush administration believed that the terrorist surveillance program was one of those essential tools.

The revelations of the terrorism surveillance program in December, 2005 and the hearings on its legality in February and March 2006, raised several questions concerning the politics of surveillance and the balance of power within the government. The primary question raised within the USA PATRIOT Act is the issue of separation of powers between the executive and legislative branches. The federal government approached Congress shortly after September 11, 2001 and requested changes to FISA in order to gather intelligence relating to the security of the United States in a timelier manner. Congress complied and amended the FISA legislation in the USA PATRIOT Act. If the President and the administration believed that the power to

³⁶ Ibid., 25-26.

authorize warrantless wiretaps was within the President's constitutional authority, why approach Congress and request changes to FISA at the same time the administration was requesting other internal security changes? These actions suggest that the administration went forward with the warrantless wiretapping program prior to the passage of the USA PATRIOT Act on the assumption that the requested changes by the administration would simply be rubberstamped by Congress in the name of national security. Why else would President Bush confront Congress on what the administration essentially considered a non-issue? Part of the problem faced by the administration is that Congress placed the sole power of electronic surveillance in the FISA legislation:

The Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.³⁷

This means that, although Congress authorized the President to use any means necessary to combat terrorism in the joint resolution authorizing the use of military force in combating terrorism, the President was still forced to use the FISA courts for any domestic surveillance regardless of claims of constitutional authority.³⁸ As long as FISA remains on the books, and is thus constitutional, the President should be forced to use the FISA courts in the course of domestic surveillance. This clash between the President and Congress over control of domestic surveillance and internal security would help determine Congress' future power vis-à-vis the Presidency and its role in internal security.

The struggle between the executive and legislative branches over domestic surveillance carried over in the debate to amend the Foreign Intelligence Surveillance Act. As Attorney

³⁷ *Interception and Disclosure of Wire, Oral, or Electronic Communications Prohibited*. 18 USC 2511 (2) (f).

³⁸ Senate, *Authorization for Use of Military Force*, 107th Cong., 1st Sess., S. J. Res 23.

General Gonzalez testified before the Senate Judiciary Committee in February and March 2006, members of Congress moved to modernize FISA and to reassert congressional authority in the realm of internal security. On March 16, 2006, a group of moderate and conservative Republican senators introduced the Terrorist Surveillance Act of 2006. Introduced by Senator Mike DeWine of Ohio and co-sponsored by Lindsey Graham of South Carolina, Chuck Hagel of Nebraska, and Olympia Snowe of Maine, the Terrorist Surveillance Act attempted to address Bush administration requests for a responsive surveillance program while ensuring congressional oversight of the program. The Terrorist Surveillance Act essentially approved the terrorist surveillance program initiated by the Bush administration, allowing the federal government a forty-five day period in which to conduct warrantless electronic surveillance provided the government follow the procedures for electronic surveillance laid out in FISA. The Terrorist Surveillance Act went further, establishing a terrorist surveillance watch list – similar to the Attorney General’s subversive organizations list of the 1940s and 1950s – that contained the names of individuals and organizations who:

- (1) has engaged in an act of international terrorism against the United States, its citizens, or its interests, whether inside the United States or outside the United States;
- (2) intends to engage in an act of international terrorism against the United States, its citizens, or its interests, whether inside the United States or outside the United States; or
- (3) is engaged in activities in preparation for an actual or potential act of international terrorism against the United States, its citizens, or its interests, whether inside the United States or outside the United States.³⁹

In addition to creating a terrorist surveillance watch list for the government to use to list individuals and organizations subject to the terrorist surveillance program, the Terrorist Surveillance Act would also create a terrorist surveillance subcommittee in both the House and Senate tasked with providing congressional oversight to the terrorist surveillance program. By

³⁹ *Terrorist Surveillance Act of 2006*, Sec. 3 (b), S. 2455, 109th Cong., 2nd Sess.

providing the President with the surveillance program he desired, albeit with congressional oversight of the program, Senate Republicans believed they were crafting a suitable compromise between the executive and legislative branches. The proposed Terrorist Surveillance Act of 2006 failed to pass Congress by the end of the year, but provided the context for the continuing battle to reform FISA.

The Bush administration missed its opportunity to have its terrorist surveillance program enacted into law with its reaction to the congressional investigations into the program. Attorney General Alberto Gonzales and the administration's continued insistence of the program's constitutionality under an expanded interpretation of the executive branch's inherent authority to protect the nation and the congressional authorization to use military force (AUMF) meant the administration was not in a position to support attempts by congressional Republicans to pass pro-administration anti-terrorist legislation. By the time the Bush administration was willing to work with Congress to modernize FISA in early 2007, the Republican Party had lost control of the Senate and faced a Congress more willing to exert influence over internal security issues.

In early 2007, members of the Bush administration testified before Congress to determine how best to modernize the Foreign Intelligence Surveillance Act.⁴⁰ Kenneth Wainstein, Assistant Attorney General for National Security, was the Bush administration point man to Congress for modernizing FISA. In presenting the administration's views on modernizing FISA, Wainstein focused on the issue of use of technologically-dependent language in the original FISA. The Bush administration's position was to shift from "focusing, as FISA does today, on *how* a communication travels or *where* it is intercepted, we should define FISA's scope by

⁴⁰ FISA had been previously amended to deal with the changing technological situation during the 1990s with President Clinton's Executive Order 12949 in February 1995 and Title VIII of the Intelligence Authorization Act of 1995 – both of which added physical surveillance to FISA – as well as Title VI of the Intelligence Authorization Act of 1999 which allowed the use of pen registers and trap and trace devices.

reference to *who is the subject of the surveillance*.”⁴¹ In Wainstein’s interpretation of FISA, domestic surveillance fell under the scope of FISA in certain situations. Wainstein argued that “if the Government intentionally targets a particular, known U.S. person in the United States for foreign intelligence purposes, it is within FISA’s scope, period.”⁴² This interpretation would allow the government to conduct warrantless foreign surveillance while retaining FISA to apply to any surveillance that may involve American citizens. This view of FISA and domestic surveillance followed the Bush administration’s thinking on expanded surveillance to protect the internal security of the nation.

Introduced by Senator Mitch McConnell (R-Kentucky), and co-sponsored by Senator Christopher Bond (R-Missouri), the Protect America Act of 2007 proved to be an important piece of transitional legislation between the competing Bush administration and Congressional leadership views on surveillance. Managing bipartisan support, the Protect America Act allowed the Director of National Intelligence and the Attorney General to authorize the acquisition of foreign intelligence for a period of one year, provided they can show that the subject can be “reasonably believed to be located outside the United States;” that the acquisition of intelligence did not constitute electronic surveillance; the “significant purpose” of the action was to collect foreign intelligence; and any information collected from American citizens would be subject to FISA regulations.⁴³ The Protect America Act, like the failed Terrorist Surveillance Act of 2006,

⁴¹ “Statement of Kenneth L. Wainstein, Assistant Attorney General, National Security Division, Department of Justice, before the Select Committee on Intelligence, United States Senate, Concerning the Need to Bring the Foreign Intelligence Surveillance Act into the Modern Era,” 7, May 1, 2007, U.S. Department of Justice, <http://www.justice.gov/nsd/testimony/WainsteinTestimony5-01-07SSCI.pdf> [Hereafter referred as *Wainstein Statement – May 2007*]. Italics in original.

⁴² *Ibid.*, 4.

⁴³ *Protect America Act of 2007*, 121 Stat. 552. FISA ensures that any information inadvertently collected from American citizens on American soil are subject to “minimization procedures” which minimize the collection, retention, and dissemination of information collected from Americans.

ensured both congressional and judicial oversight of the program. The act required the Attorney General to report to the FISA Court after each authorization of warrantless acquisition of foreign intelligence the procedures used to determine that the methods used did not constitute electronic surveillance.⁴⁴ Most importantly, sunset provisions applied to the Protect America Act, requiring Congress to reauthorize the entirety of the legislation every three months. The continual reauthorization of the act reflected the desire of its authors to exert greater congressional control over warrantless surveillance by providing Congress the ability to remove the legal authorization for warrantless surveillance.

As a temporary stopgap, the Protect America Act served its purpose to bridge the competing views between the Bush administration and congressional leadership.⁴⁵ Congress reauthorized the Protect America Act three times before passing the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 in July 2008.⁴⁶ The FISA Amendments Act incorporated many of the changes made with respect to foreign surveillance by the Protect America Act, including the legislation allowing for warrantless foreign surveillance for up to one year.⁴⁷ The act provided for the technology-neutral language urged by the Bush administration

⁴⁴ *Ibid.* Any methods used that constitute electronic surveillance would immediately fall under the scope of FISA, thereby requiring a warrant issued by the FISA court to continue the surveillance.

⁴⁵ The FISA Court of Review affirmed the warrantless surveillance of the Protect America Act in August 2008, one month after the passage of the FISA Amendments Act. A heavily redacted copy of the decision was released in January, 2009. James Risen and Eric Lichtblau, “Court Affirms Wiretapping Without Warrants,” *New York Times*, January 15, 2009. http://www.nytimes.com/2009/01/16/washington/16fisa.html?_r=2&hp.

⁴⁶ *Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008*, 122 Stat. 2436. [Hereafter referred as *FISA Amendments Act*].

⁴⁷ The FISA Amendment Act extended the sunset provisions for the two remaining USA PATRIOT Act amendments to FISA – the “roving” wiretaps and orders for business records under FISA, and the so-called “lone wolf” amendment to FISA (eliminating the need to establish a connection between an individual and organization or foreign power) – from December 31, 2009 to February 28, 2011. At the time of writing, Congress extended the amendments for a three month period (through May 31, 2011) and is debating both a long-term extension and making the amendments permanent. Lisa Mascara, “Patriot Act Extension goes to Obama,” *Baton Rouge Advocate*, February 18, 2011; “A Patriot Act Surprise,” editorial, *New York Times*, February 12, 2011; Paul Kane and Felicia Sonmez, “Patriot Act Extension Fails in House by Seven Votes,” *Washington Post*, February 8, 2011; Tom Gantert,

and expanded the scope of FISA to include not only electronic surveillance, but domestic wire, oral and electronic communications.⁴⁸ The expanded scope and definitions of FISA, particularly the use of the terms “oral” and “electronic” communications, allowed for the possible interception of intelligence coming from any number of communication devices, including oral and written communications via the World Wide Web. The FISA Amendments Act also provided immunity from prosecution for telecommunication companies and internet providers who supplied surveillance assistance to intelligence organizations provided that the Attorney General either certified that the assistance was pursuant to a legal surveillance warrant from FISA or provided a written request indicating such activity was authorized by the President and determined to be lawful.⁴⁹ The passage of the FISA Amendments Act provided the executive branch with the surveillance power it believed necessary to effectively protect the nation, while providing a check on possible abuse through ensuring congressional and judicial oversight over the surveillance program.

The saliency of the War on Terror in the years after September 11, 2001, led to the debate over domestic and foreign surveillance in the first decade of the 21st century as the government tried to find a means to protect the nation. The debate focused primarily on the role of government in society, particularly the issue of individual liberty versus national security. Using expansive interpretations of both the inherent powers given to the executive branch under the

“Civil Liberties Concerns Caused Amash to Vote against PATRIOT Act,” *Michigan Capitol Confidential*, <http://www.michigancapitolconfidential.com/14549>.

⁴⁸ *FISA Amendments Act of 2008*, Title I. The FISA Amendment Act did not change the requirements for any domestic surveillance. The domestic surveillance would still be subject to the restrictions created by FISA, including minimization procedures for inadvertent information collected on American citizens through surveillance and limiting domestic surveillance to those engaged in foreign intelligence.

⁴⁹ *Ibid.*, Title II. In order to ensure that telecommunication companies and internet providers did not feel pressured in providing surveillance assistance to the government, immunity from prosecution was also provided for those companies who did not provide any assistance for government surveillance.

Constitution and the congressional authorization to use military force, the Bush administration expanded the federal government's authority to conduct surveillance both domestically and abroad. Congress has, in recent years, attempted to limit the scope of surveillance available to the federal government and to ensure proper congressional and judicial oversight of surveillance programs. The imbalance created by the internal security crisis driven by the War on Terror has thus continued to shift towards the side of national security at the expense of individual liberty to a degree deemed acceptable by the American public.

Conclusion

During times of internal security crisis, the state restricts civil liberties with the rationale of protecting the nation's internal security from the threat of an alien other. During the Cold War, the perceived threat was from communists infiltrating government and American society and attacking the nation from within. The fear of internal subversion initially focused on communists within the federal government who advocated positions detrimental to American long-term interests or provided intelligence to the Soviet Union. As the CPUSA diminished in size and importance in the 1950s, fear shifted to communists and radicals allegedly provoking racial discord amongst the urban black community or advocating violence to resolve racial inequality in the nation. The collapse of the Soviet Union at the end of the Cold War deprived the United States of its primary adversary; the terror attacks on September 11, 2001, created a new internal security crisis with a new alien other.

Throughout the 2004 presidential election, President Bush ridiculed his opponent, Senator John Kerry (D-Massachusetts), for his position on national security and the War on Terror. Kerry argued for a return to pre-9/11 approach to the War on Terror, focusing on intelligence and law enforcement. President Bush argued against this approach in a number of speeches and debates, culminating in the third presidential debate at Arizona State University in Tempe, Arizona, on October 13, 2004. Arguing that Senator Kerry believed that terrorism could be "reduced to a nuisance, comparing it to prostitution, [and] illegal gambling" and that the War on Terror was a "matter of intelligence and law enforcement," President Bush portrayed himself as a forward-thinking leader with new solutions to new problems, while depicting his opponent as someone out of touch with the War on Terror, a politically effective strategy during the 2004

election campaign.¹ President Bush's campaign rhetoric in 2004 obscured the fact that his administration also emphasized intelligence and law enforcement as essential pillars in its strategy to protect the internal security of the nation.

The Bush administration looked at both law enforcement and intelligence-gathering as central tools in securing the internal security of the nation. The use of Guantanamo Bay, Cuba, as a preventative detention facility echoed the desire of legislators in the 1940s and 1950s to segregate possible subversives from society. The expanded use of foreign and domestic surveillance by the government to track and monitor suspected individuals and organizations recapitulated the shift towards stronger tools for law enforcement in the 1960s and 1970s. Both the executive and legislative branches fell back into familiar Cold War patterns as they developed strategies to deal with the new world situation created by the September 11, 2001, terror attacks.

In dealing with internal security crises during the Cold War, the primary focus was on law enforcement and intelligence gathering. During the second Red Scare, the focus remained on identifying and removing possible subversive threats from government. Central to this goal was the use of registration requirements to determine ideological affiliations. Senator Pat McCarran and others focused on the use of registration requirements due to the existence of the Attorney General's subversive organizations list; allowing Congress and the executive branch to identify possible subversives and remove them from sensitive positions. The Emergency Detention amendment of the Internal Security Act of 1950 was also premised on the Attorney General's list, allowing the President to segregate possible subversives during declared periods of national emergency. As the crisis of the second Red Scare receded and the judiciary rejected

¹ "Transcript: Third Presidential Debate," October 13, 2004, *Washington Post*, http://www.washingtonpost.com/wp-srv/politics/debatereferee/debate_1013.html; Wilentz, *The Age of Reagan*, 432-459.

the registration requirements of the Internal Security Act of 1950, new law enforcement and intelligence tools needed to be implemented to deal with the internal security crisis created by the urban race riots of the 1960s. The perceived internal security threat of communists and radicals inciting racial violence throughout the country created an environment in which both law enforcement and Congress agreed on the necessity of increased surveillance legislation as essential to combatting the internal security crisis of the 1960s. Limited domestic surveillance allowed law enforcement agencies to track and investigate possible subversive threats and to more easily procure evidence against subversive elements in society. In drafting internal security legislation for the twenty-first century, both the executive and legislative branches took their cues from the earlier responses to internal security crises during the Cold war.

The digital revolution and the value of the World Wide Web to distribute information quickly and cheaply has been difficult for both law enforcement and security/intelligence agencies to respond to in protecting the internal security of the nation. While the legislation amending FISA in 2008 was a first step towards creating technology-neutral language for foreign intelligence surveillance, recent activities suggest that the United States still has a way to go before securing the nation against cyber-terrorism and protecting the nation's secrets. Between 2006 and 2010, the "WikiLeaks" organization released government documents and videos that proved embarrassing to the United States, including: a March 2003 copy of the Standard Operating Procedures for Camp Delta in Guantanamo Bay, Cuba, in November 2007; over 6,500 confidential reports from the Congressional Research Service in February 2009; and a July 2007 military recording of a United States helicopter attack in Baghdad that caused the death of two Reuters reporters in April 2010.² In July 2010, WikiLeaks began releasing confidential Pentagon

² John F. Burns and Ravi Somaiya, "Who is Julian Assange?" in *Open Secrets: Wikileaks, War, and American Diplomacy*, ed. Alexander Star (New York: New York Times, 2011), 22-23.

material regarding the war in Afghanistan, and followed that with the release of material regarding the war in Iraq in October 2010. WikiLeaks' major coup was the November 2010 release of thousands of State Department diplomatic cables from the 1960s to the present, causing America major embarrassment. WikiLeaks worked in conjunction with five major world newspapers to release the information: *The New York Times* (United States); *El Pais* (Spain); *Le Monde* (France); *Der Spiegel* (Germany); and *The Guardian* (Great Britain). WikiLeaks claims to have a total of 251 287 total embassy cables dating from December 28, 1966 to February 2010 – of which only 6 percent were classified as “secret;” 40 percent were classified as “confidential;” and over half (53 percent) were unclassified.³ These cables included blunt assessments of foreign politicians and governments by State Department officials and caused considerable embarrassment for the State Department.⁴

Described as a “media insurgency” by one author, WikiLeaks is an organization dedicated to collecting documents and other media that governments and corporations consider confidential and exposing them to the public via the internet.⁵ The infrastructure of WikiLeaks is based on over twenty servers throughout the world, with access to hundreds of domain names; such a setup makes it extremely difficult for governments to shut down WikiLeaks; as one server

³ “Secret U.S. Embassy Cables,” *WikiLeaks – Cablegate: 250, 000 U.S. Embassy Diplomatic Cables*, <http://www.wikileaks.ch/cablegate.html>. It is important to note that many governments, including the United States, have begun pressuring servers that host Wikileaks to cease and desist. As of writing, the primary site for Wikileaks is <http://www.wikileaks.ch/> with a list of mirror sites located at <http://wikileaks.info/>.

⁴ Some have begun to claim that the State Department cables released by WikiLeaks have contributed to the January 2011 unrest that occurred in Tunisia. While Tunisian economic issues such as unemployment and inflation led to unrest in the nation, the exposure of economic malfeasance by the ruling family of Tunisia confirmed what many Tunisians suspected about their government. Gregory White, “This is the Wikileaks that Sparked the Tunisian Crisis,” January 14, 2011, *Business Insider*, <http://www.businessinsider.com/tunisia-wikileaks-2011-1>.

⁵ Raffi Khatchadourian, “No Secrets: Julian Assange’s Mission for Total Transparency,” 1, *The New Yorker*, June 7, 2010, http://www.newyorker.com/reporting/2010/06/07/100607fa_fact_khatchadourian.

or domain is shut down, another comes online to host the site and information.⁶ The public face of WikiLeaks is an Australian, Julian Paul Assange. Born in 1971, Assange had an atypical childhood: living with his non-conformist mother and home-schooled – his mother believed that formal education would instill a respect for authority that she steadfastly opposed – Assange moved over thirty seven times by the time he was fourteen.⁷ As a young man, Assange became fascinated with computers and, learning to program code on Commodore 64's, quickly became a proficient hacker, working with a group calling itself the “International Subversives.”⁸ Assange's hacking came to the attention of the Australian authorities, who investigated Assange and raided his house in 1991; Assange plea bargained and plead guilty to twenty-four charges of computer crimes in exchange for a \$2100 fine rather than the possibility of a ten-year prison sentence.⁹ Assange continued to maintain links with hackers throughout the world before forming WikiLeaks in 2006.

With the formation of WikiLeaks, Assange began a nomadic lifestyle, moving from country to country promoting WikiLeaks and establishing contacts to contribute to and host the site. It was during one of these trips to Sweden that Assange ran into legal troubles. While in Sweden in July 2010, Assange was charged with multiple counts of rape and sexual molestation against two women, identified as Ms. A and Ms. W. Assange and his lawyers asserted that sex with both women was consensual, but, under Swedish laws, the sexual interaction between

⁶ At present, Wikileaks, in addition to its primary site, has twelve mirror sites running throughout North America and Europe. For a listing of current mirror sites, see: <http://wikileaks.info/>. Katchadourian, “No Secrets,” 1. The server and domain fees are paid primarily through individual donations; although donations have steadily dwindled as Visa, MasterCard, and PayPal have refused to be conduits for contributors to Wikileaks. Bill Keller, “The Boy Who Kicked the Hornet's Nest: Dealing with Julian Assange and his Secrets,” 47, *The New York Times Magazine*, January 30, 2011.

⁷ Katchadourian, “No Secrets,” 6.

⁸ Burns and Somaiya, “Who is Julian Assange?” in *Open Secrets*, 21.

⁹ *Ibid.*, 21; Katchadourian, “No Secrets,” 7.

Assange and the two women fell under the category of rape.¹⁰ Supporters of Assange assert that the charges were part of a political vendetta against Assange by the Swedish government to silence and incarcerate Assange.¹¹ A warrant for Assange's arrest was issued by the Swedish government on November 18, 2010, shortly after the first release of the State Department cables by WikiLeaks.¹²

WikiLeaks received the State Department cables through Bradley Manning, a disgruntled, disillusioned young Army private who came from a broken home. His parents divorced when he was thirteen, Manning lived with his mother in Wales until he returned at seventeen to Oklahoma City to live with his father.¹³ Manning joined the Army after his father refused to allow an openly-gay son to remain in the family. Manning trained as an intelligence analyst, assigned to 2 Brigade, 10th Mountain Division, and spent a tour of duty in Iraq. Operating under the policy of "don't ask, don't tell," Manning felt increasingly isolated and marginalized. Superiors seemingly routinely disregarded his analyses. One particular incident involved a report Manning wrote investigating fifteen Iraqi detainees charged with hostile acts against the Iraq government. Manning concluded that the detainees were arrested for a simple

¹⁰ Ms. A admitted to consensual intercourse with Assange, but insisted that, after he attempted to engage in unprotected sex with her and was rebuffed, Assange "did something" to the condom prior to intercourse. Ms. A further asserted that Assange tried to initiate a second sexual encounter by rubbing himself against her. Ms. W. admitted to engaging in consensual intercourse with Assange as well, but that she woke up to find Assange having sex with her for a second time (under Swedish law, unprotected sex with a sleeping woman constitutes rape). Burns and Somaiya, "Who is Julian Assange?" in *Open Secrets*, 24-26.

¹¹ Supporters point to the shifting charges against Assange as evidence of a political vendetta. The initial charges against Assange were simple molestation before a senior prosecutor changed the charges to sexual misconduct and rape, asserting that the evidence supports such a charge. Burns and Somaiya, "Who is Julian Assange?" in *Open Secrets*, 25.

¹² Matthew Weaver, "Sweden to Issue Arrest Warrant for Julian Assange," *The Guardian*, November 18, 2010, <http://www.guardian.co.uk/media/2010/nov/18/sweden-arrest-warrant-julian-assange>; John F. Burns and Ravi Somaiya, "WikiLeaks Founder in Court to Fight Extradition Effort," A9, *New York Times*, February 8, 2011.

¹³ Denver Nicks, "Private Manning and the Making of Wikileaks: The Inside Story of the Oklahoman behind the Biggest Military Intelligence Leak Ever," *This Land Press*, September 23, 2010, <http://thislandpress.com/09/23/2010/private-manning-and-the-making-of-wikileaks-2/>.

political critique of Iraqi Prime Minister Nuri Kamal al-Maliki and posed no security threat. His commanding officer refused to listen to Manning, explaining that the American role was to support the Federal Police and detain more Iraqis if necessary.¹⁴ Manning downloaded hundreds of thousands of State Department cables which he then sent to hacker friends under the guise of sending them burned copies of Lady Gaga CD's.

The ease by which Manning could download and distribute thousands of confidential State Department cables, as well as the video of the 2007 helicopter attack, shows that the age of the ideological spy has not yet passed.¹⁵ However, unlike those committing espionage for foreign governments or corporations, Julian Assange, Bradley Manning, and others focus more on collecting information for exposure's sake. Individuals involved in WikiLeaks, with Assange as the front man, are more focused on releasing information damaging to the State writ large rather than focusing on any one particular government.¹⁶ While the release of State Department cables has been the most spectacular release of information by WikiLeaks, the organization claims to have information on the Bank of America that could "expose [...] an ecosystem of corruption," while a former Swiss banker recently supplied WikiLeaks with information from his former employer, Swiss bank Julius Bar.¹⁷

¹⁴ Ginger Thompson, "Who is Bradley Manning?" in *Open Secrets*, 30-31.

¹⁵ See, for example, Haynes and Klehr's assertion that the spy who commits espionage for ideological reasons has been overtaken by the spy who commits espionage for monetary reasons. Haynes and Klehr, *Early Cold War Spies*, 230-242.

¹⁶ There has been some recent dissent within the Wikileaks organization as several staff members have broken away from Wikileaks due to Assange and his behavior. Led by former Wikileaks staff member Daniel Domscheit-Berg, the breakaway group has taken large amounts of Wikileaks' material and started a new site, OpenLeaks. Domscheit-Berg and other members of OpenLeaks do not intend to leak any of this material, but merely claim to be storing it until Assange can "prove that he can store the material securely and handle it carefully and responsibly." Ravi Somaiya, "WikiLeaks Angry about Former Staff Member's Book," A9, *New York Times*, February 11, 2011; Ravi Somaiya, "Former WikiLeaks Colleagues Forming New Web Site, OpenLeaks," A10, *New York Times*, February 7, 2011.

¹⁷ For Bank of America, see: Michael J. De La Merced, "Wikileaks' Next Target: Bank of America?" *New York Times*, November 30, 2010, <http://dealbook.nytimes.com/2010/11/30/wikileaks-next-target-bank-of-america/>; for

While WikiLeaks focused primarily on information, there has been an increased focus on cyber-warfare by both hackers and governments. In mid-2010, a number of computer systems throughout the world were the target of a computer worm known as “Stuxnet.” The worm was easily spread electronically, but was targeted primarily at systems using specific equipment from the German computer company Siemens.¹⁸ The Stuxnet worm targeted equipment primarily used by Iran in their nuclear reactors and other “high value Iranian assets.” Experts agree that the sophistication of the Stuxnet worm, coupled with the precise nature of the worm, suggest that it was created by a government agency, most likely one of the Israeli intelligence agencies.¹⁹ The ability of a government to target high-value assets, such as the Iranian nuclear facilities, with a cyber-attack rather than a military strike is appealing to governments who have grown more averse to using military forces for fear of loss of life.²⁰ The possible use of government computer viruses to disable enemy electronics and computer capabilities is compelling – the political advantages of disabling an enemy without military force would be appealing to any number of American politicians – but the issue of keeping the electronic and cyber-warfare capabilities of the American government would be ever-present. As we have seen with the rise of WikiLeaks, disgruntled and ideological individuals are capable of obtaining large amounts of supposedly classified information.

Swiss bank Julius Bar, see: “Wikileaks Given Data on Swiss Bank Accounts,” *BBC News*, January 17, 2011, <http://www.bbc.co.uk/news/business-12205690>.

¹⁸ Josh Halliday, “Stuxnet Worm is the ‘Work of a National Government Agency,’” *The Guardian*, September 24, 2010, <http://www.guardian.co.uk/technology/2010/sep/24/stuxnet-worm-national-agency>.

¹⁹ Richard A. Falkenrath, “From Bullets to Megabytes,” A27, *New York Times*, January 27, 2011; John Markoff, “Malware Aimed at Iran hit Five Sites, Report Says,” A12, *New York Times*, February 13, 2011; Jonathan Fildes, “Stuxnet Worm ‘Targeted High Value Iranian Assets,’” *BBC News*, September 23, 2010, <http://www.bbc.co.uk/news/technology-11388018>.

²⁰ See, for example, the growing reliance of the United States on unmanned Predator drones and sea-launched cruise missiles to conduct precision strikes.

The rise of WikiLeaks and other cyber-related espionage and terrorist attempts raise similar questions regarding the challenge of balancing liberty and security in a democratic society. The state does have the right and authority to defend itself and its citizens against internal and external threats, but with the ubiquity of the internet in American society and the explosion of social networking and hand-held telecommunications and wireless internet use, the question arises as to how much privacy can an individual expect to give up to ensure a secure nation? In the 1967 decision *Katz v. United States*, the Supreme Court, in a 7-1 decision, argued that, regardless of the location, a conversation is protected from unreasonable search and seizure under the Fourth Amendment if it is made with a “reasonable expectation of privacy.”²¹ With the rise of social networking, has the reasonable expectation of privacy changed? For example, can an individual under suspicion by the government update his social networking sites to indicate a meeting with another individual to discuss a certain topic and still have a reasonable expectation of privacy? Most modern cell-phones are equipped with GPS trackers that can allow the government, with the cooperation of the cell-phone carrier, to track individuals via their cell-phones.

The rapid expansion of the digital revolution and the continued evolution of telecommunication devices require that future internal security legislation remain technology-neutral to avoid legislation from becoming obsolete in the face of rapid changes in technology. The digital and hand-held revolutions have made more difficult the question of balancing liberty and privacy, on the one hand, with security, on the other. While the government used similar techniques, such as preventative detention and warranted surveillance, in protecting American internal security in the twenty-first century, the rapid pace and growth of technology means that

²¹ *Katz v. United States*, 389 U.S. 347 (1967). Technology played an important role in the case. Charles Katz used a public phone booth to make his phone call and the FBI physically connected an electronic listening device to the phone booth.

new techniques will soon have to be found to protect the nation. The growing interconnectivity of individuals through social networking and other telecommunication advances means that an individual should lower their expectation of privacy in their communications. Provided that the government continues to follow the rule of law and apply judicial oversight – that is, shows probable cause for the surveillance before a judge – before conducting surveillance on individuals, then national security will remain balanced with individual liberty and privacy.

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APPENDIX:

REGISTRATION FORM FOR INDIVIDUALS

Pursuant to Section 8(a) or (b) of the Internal Security Act of 1950

(NOTE: This form should be accompanied by a Registration Statement, Form IS—52)

__ (Name of individual—Print or type) hereby registers as a member of __ a Communist-action organization.

/s/ __

(Signature)

(Date)

(Typed or printed name)

(Date)

__ d n

(Address—type or print) Form IS—52 is as follows:

Budget Bureau No. 43—R301.2

Approval expires July 31, 1966

UNITED STATES DEPARTMENT OF JUSTICE WASHINGTON, D.C.

FORM IS—52 for REGISTRATION STATEMENTS OF INDIVIDUALS

Pursuant to section 8 of the Internal Security Act of 1950

INSTRUCTION SHEET—READ CAREFULLY

1. All individuals required to register under section 8 of the Internal Security Act of 1950 shall use this form for their registration statements.

2. Two copies of the statement are to be filed. An additional copy of the statement should be prepared and retained by the Registrant for future references.

3. The statement is to be filed with the Internal Security Division, Department of Justice, Washington, D.C.

4. All items of the form are to be answered. Where the answer to an item is 'None' or 'inapplicable,' it should be so stated.

5. Both copies of the statement are to be signed. The making of any willful false statement or the omission of any material fact is punishable under 18 U.S. Code, 1001.

6. If the space provided on the form for the answer to any given item is insufficient, reference shall be made in such space to a full insert page or pages on which the item number and item shall be restated and the answer given.

FOR AN INDIVIDUAL

a. Who is a member of any Communist-action organization which has failed to file a registration statement as required by Section 7(a) of the Internal Security Act of 1950.

OR

b. Who is a member of any organization which has registered as a Communist-action organization under Section 7(a) of the Internal Security Act of 1950 but which has failed to include the individual's name upon the list of members filed with the Attorney General.

1. Name of the Communist-action organization of which Registrant was a member within the preceding twelve months.

2. (a) Name of Registrant.

(b) All other names used by Registrant during the past ten years and dates when used.

(c) Date of birth.

(d) Place of birth.

3. (a) Present business address.

(b) Present residence address.

4. If the Registrant is now or has within the past twelve months been an officer of the Communist-action organization listed in response to question number 1:

(a) List all offices so held and the date when held.

(b) Give a description of the duties or functions performed during tenure of office.

The undersigned certifies that he has read the information set forth in this statement, that he is familiar with the contents thereof, and that such contents are in their entirety true and accurate to the best of his knowledge and belief. The undersigned further represents that he is familiar with the provisions of Section 1001, Title 18, U.S.Code (printed at the bottom of this form).*

/S/ __

(Signature)

(Date)

/T/ __

(Name)

(Date)

(Print or type)

Vita

Marc Allan Patenaude was born in Prince Albert, Saskatchewan, Canada. Marc spent his formative years living in Canada's Arctic, before heading to the Deep South. He received his Bachelor of Arts degrees in history and English from the University of Arkansas at Little Rock in 2003 and his Master of Arts degree from Louisiana State University in 2006.