

How the FBI Spied on the High Court

Thirty Years of Snooping and Over 2,000 Pages of Private Files on the Justices

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By Alexander Charns

IF WILLIAM O. Douglas had been appointed chief justice in 1946, what would the Supreme Court be like today? Since Douglas did not retire until 1975, Earl Warren would not have gotten the job in 1953 nor Warren Burger in 1969. The appointment of Douglas's successor in 1975 would have gone to President Gerald Ford—and the chief justice of the United States today might well be John Paul Stevens.

Why speculate about what might have been? Because once-secret government records disclose that warrantless FBI wiretaps that captured some of Douglas's conversations may have helped convince President Harry Truman to abandon his consideration of Douglas as chief justice and nominate his

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friend Fred Vinson instead—thereby changing history.

Nor was Douglas the only Supreme Court justice inadvertently recorded on FBI wiretaps or bugs. From 1945 to 1975, at least 12 justices were overheard on at least 106 occasions—including Chief Justices Warren and Vinson and Associate Justices Douglas, Felix Frankfurter, Hugo Black, Stanley Reed, Robert Jackson, Frank Murphy, John Harlan, Potter Stewart, Harold Burton and Abe Fortas. Warren was overheard six times between 1961 and 1965, including one conversation on March 9, 1964, about a month after the Warren Commission started hearing testimony about the assassination of President Kennedy. Except for the transcripts involving Douglas, almost all wiretapped conversations remain secret—as do even the dates of the more recent ones.

The FBI's interest in the Supreme Court was especially vigorous under J. Edgar Hoover, who died in 1972. Evidence is con-

tained in a file of more than 2,000 pages entitled "Supreme Court." The bureau continued to maintain this file as recently as 1985, but there's no evidence that in recent years it contained much more than relatively mundane items—newspaper clippings and Congressional Record excerpts—that demonstrate the FBI's interest in pending cases, in training the court police and in other legitimate matters.

But some documents from the Hoover era are truly startling. They show, for example, that his FBI had three sources among high-level court employees during the Rosenberg atomic spy case in 1953, that it closely watched the political beliefs of justices and a "left-wing ring" of law clerks during the 1950s and that it performed favors for selected justices. There is also evidence that Hoover—in reaction to Warren Court decisions in 1956 and 1957—worked to place conservatives on the court. On a May 1958 Hoover wish list

See WIRETAP, C4, Col. 1



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were Potter Stewart, who that October became President Eisenhower's next Supreme Court appointment, and Warren Burger, a federal appeals court judge who was Hoover's first choice and finally was named chief justice in 1969 by Richard Nixon.

The bulk of the Supreme Court file has been released to me in a Freedom of Information action, but other documents have been withheld or are classified. The file may be active to this day, but gaining access to it will require another FOI action. In addition, federal privacy laws generally protect records of living individuals against disclosure.

There's no evidence that the FBI ever directly tapped a justice. The justices were overheard during their conversations with other people, who *were* tapped. Still, there are some troubling questions. Why was the FBI keeping a political file on the court during the Hoover years? What business does it have recording conversations by or about justices and keeping the transcripts available?

What answers we have come largely from government records released through FOI actions in recent years to me and a handful of historians and reporters. As a law student in 1982, I became interested in David Garrow's research about FBI surveillance of Dr. Martin Luther King Jr. and decided to investigate whether the bureau had kept track of two other presumed Hoover enemies—Warren and Douglas. My FOI request produced hundreds of documents about them, but when I asked for the FBI file on the Supreme Court itself in 1984, I was told none existed. I later learned that FBI personnel had in fact located such documents in 1984; in the winter of 1988, I filed suit and in July 1988 the FBI released them to me. All told, I have received some 20,000 pages of records about the Supreme Court and the federal judiciary in response to six years of FOI requests and two FOI lawsuits.

But as disturbing as their disclosures are, they do not explain the who-what-when-where-why of the still-secret wiretaps, and the Justice Department and the FBI decline to elaborate. Some electronic surveillance records concerning Warren, Douglas, Fortas, Murphy, Jackson, Harlan and Burton, they say, "must be kept secret in the interest of national defense or foreign policy." In other instances, the government asserts, Jackson, Murphy, Harlan, Fortas and Burton were merely mentioned by others during conversations of wiretap targets, but it refuses to say why these mentions were kept on file or whether they concerned official court business. Two con-

versations in which Potter Stewart was a party were wiretapped, but the government contends that their release would violate the privacy of the target even if the target's name were deleted. My effort to get the transcripts and additional records is continuing in court. In the meantime I can report only what I have learned so far.

The most detailed eavesdropping account available concerns those conversations of William O. Douglas overheard in the spring of 1946. The target was not Douglas but Thomas G. Corcoran, a member of President Franklin D. Roosevelt's brain trust who continued to exert wide-ranging political influence after Truman became president. Truman requested the taps on Corcoran, and Hoover obliged without getting the required attorney general's approval. Hoover kept the politically explosive summaries in his office but regularly sent copies to the White House, sometimes within a week, and occasionally excised conversations he didn't want the president to know about.

According to Athan Theoharis, professor of history at Marquette University and co-author with John Cox of "The Boss: J. Edgar Hoover and the Great American Inquisition," the Truman White House perceived Corcoran to be so powerful that he was said to be acting as *de facto* attorney general. The true head of the Justice Department, Attorney General Tom Clark, did not authorize the taps until five months after they were installed by the FBI and after Clark's own conversations with Corcoran had been recorded. Truman told Clark the taps were needed to ensure that Corcoran was not breaking the law or interfering with "the proper administration of government." Theoharis told me he believes that the White House was simply gathering political intelligence.

If so, it was a wish fulfilled. Among the luminaries picked up in the 1946 taps were Sens. Robert La Follette and Claude Pepper, Speaker Sam Rayburn, former New York mayor Fiorello La Guardia and Washington attorneys David Bazelon, Joseph Rauh Jr. and Paul Porter.

Douglas was a party in more than 50 Corcoran conversations monitored by the FBI between 1945 and 1948 and in at least nine other conversations between 1960 and 1975. In one 1945 conversation, Corcoran alluded to Douglas's presidential ambitions and said: "[I]f there is a Chief Justiceship, [Truman] ought to make Douglas the Chief in order to make Douglas a captive for political purposes . . . [It] would keep him out of the political arena."

On April 22, 1946, the day Chief Justice

Harlan Stone died. An FBI summary records that at 7:55 p.m. Douglas phoned Corcoran to tell him about Stone's death.

TC: Oh Lord, does the world know that?

WD: You're the first one . . . I just got a flash from his house. His secretary just called me . . . Cerebral hemorrhage. He passed out on the bench at 2 o'clock and we carried him out . . .

TC: Well, the lightning is striking, isn't it?

WD: Another great oak has fallen . . .

TC: Can I see you in the morning?

WD: Yes, I'll drive by and get you.

Soon the wiretaps were picking up conversations about the chief justice vacancy, giving Truman and Hoover unprecedented access to the behind-the-scenes discussions among members of the court and influential

New Dealers. Initially, the battle for the post was between Justices Jackson, Douglas and Black. But virulent feuding between Jackson and Black became public and Truman clearly could not elevate either man without damage to the court. According to Corcoran, Black then began lobbying for Douglas, with support from Corcoran and Justice Reed—though Corcoran told one caller that he could not publicly support Douglas because that would be the "kiss of death." Frankfurter, meanwhile, was exerting his political muscle on behalf of Jackson.

During the month and a half between Chief Justice Stone's death and Truman's nomination of Vinson to succeed him, Douglas was a party in 10 FBI-wiretapped conversations and was discussed in another 18. In one call to Douglas at his Supreme Court chambers, Corcoran tapped the phone receiver with his pencil and said: "I'm doing my own tapping now." Douglas and Corcoran both laughed. Later, Corcoran commented to a number of his callers that he was "awfully afraid of this wire," referring to his phone.

Wiretap summaries on May 4, 1946, reported that newspaper columnist Drew Pearson called Corcoran and told him that Douglas had been in the lead to become chief justice but that Frankfurter had started lobbying against him. Corcoran said Truman had been decided on Jackson until the left-wing of the court objected. The next chief justice, he said, would be someone outside the court, possibly Secretary of the Treasury Fred Vinson or Secretary of State James Byrnes.

"Is it lost for Bill?" Pearson asked. Apparently it was. On June 6, 1946, Truman appointed Fred Vinson chief justice of the United States.

The wiretap summaries, among other

things, may have turned Truman against Douglas. Later, Truman referred to Douglas as a "professional liberal" and wrote in his memoirs that "[Douglas] belongs to that crowd of Tommy Corcoran, Harold Ickes, Claude Pepper—crackpots whose word is worth less than Jimmy Roosevelt's." It may be no coincidence that all of these men were overheard in the Corcoran wiretaps.

Hoover continued to have important intelligence, apparently from FBI electronic eavesdropping, about court-related politics. In 1948 Hoover learned that someone high in the Democratic Party had mentioned Hoover as Douglas's running-mate if Douglas decided to challenge Truman for the presidential nomination and that Abe Fortas and other Douglas advisers were cool or openly opposed to the idea because such a ticket would smack of a police state. The memo to Hoover was marked "Do Not File," meaning that it was not to be placed in regular FBI files. For obvious reasons, this information was not passed on to the Truman White House.

The idea of a Douglas-Hoover ticket sounds bizarre today, but the two men remained on good personal terms from the 1930s until the late 1940s. Later the FBI questioned Douglas's loyalty and kept a close eye on his contacts in the 1950s and the civil-rights, counter-culture and Vietnam years.

(Earl Warren, too, had a fascinating po-

litical alliance with Hoover prior to his nominations as chief justice—one that included a secret FBI program titled "Cooperation With Governor Earl Warren." But Warren, like Douglas, had a falling out with Hoover after he became chief justice.)

Douglas suspected for years that he was being tapped. According to Dagmar Hamilton, who in 1969 was editing a volume of Douglas' autobiography, the justice told her his chambers were bugged and insisted that they walk outside the court building before discussing his book. During the height of the 1973 Senate Watergate hearings, he proclaimed in one dissenting opinion that he was "morally certain that the Conference Room of the Supreme Court has been 'bugged.'"

While visiting on the West Coast in 1973, Douglas temporarily reinstated a lower-court ruling that the bombing in Cambodia was unconstitutional and dictated his ruling to employees at the Supreme Court from a pay phone. Douglas believed that his dictation was overheard, possibly by an FBI agent posing as a telephone operator, and hired former justice Fortas to investigate. The FBI assured Fortas that the pay phone had not been tapped and that the long-dis-

tance operator who handled the call worked for the phone company. It did not check phones at the Supreme Court building.

Four of Hoover's nominal bosses in the 1950s, '60s and '70s denied knowledge of any such bugging, and it may never have happened. Former attorneys general William Rogers (1957-1961), Nicholas Katzenbach (1965-66), Ramsey Clark (1967-69) and Richard Kleindienst (1972-73) told me they neither authorized nor were told of any electronic surveillances of the justices. Clark, whose father as Truman's attorney general finally authorized the tap on Corcoran, speculated that the surveillances might have been directed at foreign embassies. Katzenbach said flatly that the FBI had no business taking notes about conversations involving Supreme Court justices.

Little of this history has emerged until recently. In 1976, the Senate Select Committee on Intelligence did report that Frankfurter was a party on a few occasions in a wiretap installed in 1945 and that in 1970 a "currently sitting" justice was a party in one of "17" wiretaps directed at government officials and reporters. The report also said that an unidentified former aide to FDR was tapped from 1945 to 1948. The summaries of the taps we now know targeted Corcoran were made public by the Truman Presidential Library in 1982, but their connection with Justice Douglas was not generally recognized until this year.

Aside from the justices' overheard words, the FBI had other sources of information about the court. According to FBI records, the clerk of court, its marshal and its police chief served as FBI sources of information during the Julius and Ethel Rosenberg atomic espionage case pending before the court in 1953. Police Capt. Philip H. Crook was described as having "furnished immediately all information heard by his men stationed throughout the Supreme Court building. He kept Special Agents advised of the arrival and departure of persons having important roles in this case." A few days after the execution of the Rosenbergs, an FBI

memo recommended that Hoover send Crook, court clerk Harold B. Willey and court marshal T. Perry Lippitt a "letter of appreciation" for their wholehearted cooperation.

In May 1957, the FBI received an allegation it took seriously about a "ring of left-wing law clerks." The FBI checked its files for subversive references on law clerks of both the Supreme Court and the U.S. Court of Appeals for the District of Columbia. U.S. District Court Federal Judge John H. Druf-

fel of Cincinnati passed along information on at least one law clerk. Later that year, a man said by the FBI to be psychotic alleged that the father of one of the Supreme Court law clerks was a communist. Though the FBI memo said the accusations should be disregarded, the Washington field office was ordered to "discreetly ascertain identities of newly appointed law clerks" to one of the justices—possibly William Brennan.

The FBI not only kept track of Douglas and his political statements and nonjudicial writings, but it looked out for its judicial friends as well. In 1955 the FBI's Boston office received a complaint from U.S. District Court Judge William T. McCarthy of Boston about the "insidious influence that has been exercised by Justice Felix Frankfurter in our government for many years." Hoover was informed that "Judge McCarthy, who has been a vigorous and outspoken opponent of Frankfurter and Communism, has been a long time friend of the Bureau." Other documents contain similar references to Douglas, Reed, Warren and Fortas as subversives.

Under Hoover, agents also assisted vacationing justices, made hotel reservations, offered chauffeur services, served as a private-detective agency, took family pictures, arranged special FBI tours and provided other perks to select justices and their families. In 1958, when Justice Burton returned from a European vacation, an FBI driver was made available. During the drive, Burton talked in very general terms about the pending Little Rock desegregation case. The agent reported this discussion to his superiors.

More recently—in 1985—a memo described FBI assistance in expediting delivery of Oriental rugs that Chief Justice Burger ordered from London for use at the court.

The story of the courts and the FBI isn't over. My original lawsuit is still pending in U.S. District Court in Greensboro, N.C., and seeks all other FBI records about the Supreme Court as a body and the wiretap records of the two conversation to which Potter Stewart was a party. I filed a second lawsuit this year asking for, among other things, any electronic surveillance records about 34 former justices and a 5,600-page subject file called "Federal Judges" that extends from the 1930s to the present day.

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