[COMMITTEE PRINT]

STATUTORY AUTHORITY FOR THE FBI'S DOMESTIC INTELLIGENCE ACTIVITIES

AN ANALYSIS

PREPARED FOR THE USE OF THE

COMMITTEE ON INTERNAL SECURITY

HOUSE OF REPRESENTATIVES

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PRINCIPAL STATUTES CITED

Chapter 33, title 28, United States Code, sections 531–537 (establishing the Federal Bureau of Investigation in the Department of Justice).
18 U.S.C. 3052 (arrest authority of FBI).
18 U.S.C. 351 (congressional assassination, kidnaping, and assault).
18 U.S.C. 844 and 846 (explosives).
49 U.S.C. 1472 (aircraft piracy and crimes aboard aircraft).
5 U.S.C. 1304 (loyalty and security investigations).
This statute presently covers the following agencies:
(1) The International Labor Organization (22 U.S.C. 271 and 272b).
(2) World Health Organization (22 U.S.C., 290 and 290a).
(3) U.S. Information and Educational Exchange Programs (22 U.S.C. 1431–1434).
(4) National Science Foundation (42 U.S.C. 1874(a)).
(5) District of Columbia Office of Civil Defense (6 D.C. Code 1203).
50 U.S.C. App. 2255 and 2263 (Federal Civil Defense Administration).
42 U.S.C. 2165 (Atomic Energy Act).
42 U.S.C. 2455 (National Space Program).
22 U.S.C. 2519 (the Peace Corps).
22 U.S.C. 2585 (U.S. Arms Control and Disarmament Agency).
National Security Act of 1947 (50 U.S.C. 401–403).
Immigration and Nationality Act of 1952 (8 U.S.C. 1105).
Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510 et seq.).
3 U.S.C. 301–304 (Presidential power of delegation).
28 U.S.C. 509, 510 (Attorney General's power of delegation within the Department of Justice).
5 U.S.C. 301 (powers of heads of departments).
5 U.S.C. 552 (Freedom of Information Act).

COURT DECISIONS CITED

Anderson v. *Dunn*, 6 Wheat. 204 (1821).
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Barenblatt v. *United States*, 360 U.S. 109 (1959).
Bowles v. *Baer*, 142 F. 2d 787 (1944).
Cole v. *Richardson*, 405 U.S. 676 (1972).
Cole v. *Young*, 351 U.S. 536 (1956).
Communist Party v. *Subversive Activities Control Board*, 367 U.S. 1 (1961).
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Dennis v. *United States*, 341 U.S. 494 (1951).
First National City Bank v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972).
Golden v. *Zwickler*, 394 U.S. 103 (1969).
Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123 (1951).
Laird v. *Tatum*, 408 U.S. 1 (1972).
Lewis v. *United States*, 385 U.S. 206 (1966).
McGrain v. *Daugherty*, 273 U.S. 135 (1927).
Menard v. *Mitchell*, 430 F. 2d 486 (1970) and 328 F. Supp. 718 (1971).
Miller v. *California*, U.S. Supreme Court, decided June 21, 1973.
Talley v. *California*, 362 U.S. 60 (1960).
United States v. *Barsky*, 167 F. 2d 241 (1948).
United States v. *Biswell*, 406 U.S. 311 (1972).
United States v. *Marzani*, 71 F. Supp. 615 (1947).
United States v. *Rosen*, 343 F. Supp. 804 (1972).
United States v. *U.S. District Court*, 407 U.S. 297 (1972).
Wisconsin v. *Constantineau*, 400 U.S. 433 (1971).

The House Committee on Internal Security is a standing committee of the House of Representatives, constituted as such by the rules of the House, adopted pursuant to article I, section 5, of the Constitution of the United States which authorizes the House to determine the rules of its proceedings.

RULES ADOPTED BY THE 93D CONGRESS

House Resolution 6, January 3, 1973.

RESOLUTION

Resolved, That the Rules of the House of Representatives of the Ninety-second Congress, together with all applicable provisions of the Legislative Reorganization Act of 1946, as amended, and the Legislative Reorganization Act of 1970, as amended, be, and they are hereby adopted as the Rules of the House of Representatives of the Ninety-third Congress * * *

* * * * * * *

RULE X

STANDING COMMITTEES

1. There shall be elected by the House, at the commencement of each Congress,

* * * * * * *

(k) Committee on Internal Security, to consist of nine Members.

* * * * * * *

RULE XI

POWERS AND DUTIES OF COMMITTEES

* * * * * * *

11. Committee on Internal Security.

(a) Communist and other subversive activities affecting the internal security of the United States.

(b) The Committee on Internal Security, acting as a whole or by subcommittee, is authorized to make investigations from time to time of (1) the extent, character, objectives, and activities within the United States of organizations or groups, whether of foreign or domestic origin, their members, agents, and affiliates, which seek to establish, or assist in the establishment of, a totalitarian dictatorship within the United States, or to overthrow or alter, or assist in the overthrow or alteration of, the form of government of the United States or of any State thereof, by force, violence, treachery, espionage, sabotage, insurrection, or any unlawful means, (2) the extent, character, objectives, and activities within the United States of organizations or groups, their members, agents, and affiliates, which incite or employ acts of force, violence, terrorism, or any unlawful means, to obstruct or oppose the lawful authority of the Government of the United States in the execution of any law or policy affecting the internal security of the United States, and (3) all other questions, including the administration and execution of any law of the United States, or any portion of law, relating to the foregoing that would aid the Congress or any committee of the House in any necessary remedial legislation.

The Committee on Internal Security shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation, the Committee on Internal Security, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether the House is in session, has recessed, or has adjourned, to hold such hearings, and to require, by subpena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

* * * * * * *

28. (a) In order to assist the House in—

(1) its analysis, appraisal, and evaluation of the application, administration, and execution of the laws enacted by the Congress, and

(2) its formulation, consideration, and enactment of such modifications of or changes in those laws, and of such additional legislation, as may be necessary or appropriate,

each standing committee shall review and study, on a continuing basis, the application, administration, and execution of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee.

* * * * * * *

FOREWORD

In the advancement of the legislative work of the Congress, it has been my view, and a view shared by many, that the "oversight function" of the standing committees of the House is of vital importance to the legislative process. It is, of course, important that necessary laws be enacted by the Congress in the effectuation of its constitutional duties and within the limitations prescribed by that celebrated document which established a system for the separation of powers. But it is of little value to enact laws which are not enforced. They then cease to be "laws." Laws are enacted with a view toward their effective execution by the executive branch. It is therefore an aspect of the lawmaking power that the legislative branch take the time to see that the laws which it has made are duly enforced.

It also frequently appears that there are factors or deficiencies which militate against the effective execution of the laws or the achievement of the purposes for which they were enacted. Moreover, laws may become obsolete or inapplicable to existing circumstances. Their retention may thus prove unwise or even dangerous. When it appears that particular laws are not effective for their purpose or are not susceptible of effective execution or become obsolete, it behooves the committees having jurisdiction over subjects encompassed within the enacted laws to inquire into any such deficiencies and to recommend legislation by way of amendment or by way of repeal.

Recently in his appearance before the Bolling committee, a select committee to study the committee structure of the House under existing rules, our Speaker, the Honorable Carl Albert, had this to say:

> Policymaking for the national government is the major responsibility of the Congress and is of primary concern to the American people. The people of the country are entitled to have proposed legislative programs considered intelligently and in depth. They are likewise entitled to have existing programs reviewed by legislative committees to determine whether they are serving the purpose intended and, further, whether they should be continued, modified, or terminated.

These, then, are the essential purposes which are served by the oversight function of the standing committees.

In recognition of the importance of the oversight function, the Legislative Reorganization Act of 1970 amended House rule XI, clause 28. It is now required that each standing committee submit to the House, not later than January 2 of each odd-numbered year, beginning on or after January 1, 1973, a report on its activities under this clause. The act also reiterated more specifically the long-standing requirement of that clause by which each such committee is to assist the House in (1) the analysis, appraisal, and evaluation of the administration of laws enacted by Congress, and (2) the formulation, consideration, and enactment of such changes or additions as may be necessary or appropriate. Each standing committee is explicitly

required to review and study, on a continuing basis, the administration of laws or parts of laws the subject matter of which is within the jurisdiction of each such committee. Thus it is also clear that the exercise of the oversight function is not the exclusive province of any one committee, but it is a responsibility shared by all.

As chairman of the Committee on Internal Security, I regard the exercise of this committee's oversight function to be one of its primary and most useful duties. While the committee's oversight duties are spelled out in the above noted clause of general application, additional duties in this respect are imposed upon us by the provisions of clause 11 of House rule XI. This clause, by which the House established this committee, also uniquely and specifically enlarged upon this committee's oversight functions.

Clause 11 assigns to us as a bill reference function all bills relating to "Communist and other subversive activities affecting the internal security of the United States." In relation to this duty, the committee is also authorized to make investigations of specified categories of organizations which utilize unlawful means for the effectuation of their purpose to overthrow the Government of the United States or the government of any State, or to obstruct the authority of the Government of the United States in the execution of any law or policy affecting the internal security of the United States. To this end, the committee is authorized to investigate all other related questions, including the administration and execution of any law of the United States or any portion of law relating to such subjects that would aid the Congress or any committee of the House in any necessary remedial legislation. Its duties thus encompass not solely laws within the jurisdiction of this committee, but also any law relating to its assigned functions that would aid the Congress as a whole and other committees in any necessary remedial action. And we are required to make a report both of the results of our investigations and such recommendations as the committee deems advisable.

Recently, following the death of the late distinguished Director of the FBI, J. Edgar Hoover, questions have been raised in various quarters with respect to the basis of the authority of the FBI, and the efficiency, extent, and character of its domestic intelligence operations, including issues as to their impact on individual liberties and whether there is a need for remedial legislation. In the course of the Watergate hearings, additional questions were posed more specifically as to the adequacy of the FBI's investigations of subversive activities by reason of a creation of a so-called "plumbers unit" in the White House. It was said to have a purpose of providing the Administration with additional information on this subject. Apparently operating outside of normal channels, the Administration's action raises the question as to whether the established investigative agencies, for which alone appropriations were authorized by the Congress, are in some way not adequately serving their purposes.

In my reference to "Watergate" I want to make clear that I in no wise wish to indicate or imply that I entertain the view that the FBI or its late distinguished Director have in any manner or in any degree failed in the execution of their responsibilities. On the contrary, I share with the vast number of Americans an intense pride in the work and accomplishments of this world renowned institution. It is also a matter of pride that a fellow citizen of my State of Missouri,

Clarence M. Kelley, one of the great law enforcement officers of the Nation, has succeeded to the position of Director. I have implicit confidence in his ability and capacity to lead this agency and to maintain its high level of performance.

This September, in response to Senator Byrd's (Democrat, West Virginia) inquiry whether the Senate Judiciary Committee might expect the cooperation of the Department of Justice in the committee's newly established FBI oversight subcommittee, Deputy Attorney General William D. Ruckelshaus reportedly replied, "I think Congress should have a large role to play giving guidance where it is needed to determine what the role of the FBI should be. Instead of a wide gulf between Congress and the FBI, there should be closer coordination." Now it is clear that the adequacy of the FBI's domestic intelligence operations on the subject of subversion is an issue with which this committee is intimately concerned. Extensive investigations conducted by this committee since its foundation in 1969, particularly and most recently our inquiries into the administration of the Federal loyalty and security personnel programs, make clear that the due execution of congressional policy in this field depends in large degree, if not entirely, upon the adequacy and efficiency of the FBI's domestic intelligence functions. It is a matter within the scope of the oversight duties imposed upon this committee by the rules of the House.

With a view toward exploring these issues and as a starting point for any inquiry that may be undertaken, I have directed our legislative counsel, Alfred M. Nittle, to prepare this analysis of the statutory authority for the agency's domestic intelligence activities. But in doing so it is not my purpose or my desire to embark upon any such inquiry with a view toward obstructing or inhibiting the FBI in the performance of its vital intelligence functions which are, without doubt, essential to the protection of this Nation and the continued, effective, free functioning of our political institutions. Just the opposite. It is my view that its work should be continued, facilitated and, if possible, improved. That is my interest.

A reading of this analysis discloses several facts that I am sure will, to some extent at least, be a matter of surprise to those who have not had occasion to delve more deeply into this subject. We see here a picture of an agency whose duties and authority have not been clearly delineated by the Congress, nor in general have standards been specified. Essentially, the Congress has established the FBI as an investigative agency in the Department of Justice—as an instrumentality offered to the Attorney General for the conduct of such investigations as he may direct, in the detection and prosecution of crimes and "such other investigations" as are within the jurisdiction of the Department of Justice and the Department of State.

While it is true that the FBI presently possesses a plenary authority and jurisdiction for the conduct of its domestic intelligence investigations, it does so more generally by virtue of a delegation from the President and the Attorney General. Their authority of delegation in turn has its foundation in powers expressed or implied in the Constitution or granted to them by statute. There is, however, very little guidance given by the statutes in explication of the FBI's duties, and very little in the statutes that confer upon it direct, coherent, or clearly defined responsibilities respecting the initiation and conduct of domestic intelligence investigations. While given an arrest authority

for all Federal penal offenses, its investigative duties, apart from that which may be committed to it by the Attorney General and the President, are generally not defined. There are only four criminal offenses which the Congress has specifically directed the FBI to investigate. It is also required in general terms to conduct personnel investigations for the determination of the eligibility or suitability of persons on loyalty or security grounds for Federal employment in specified agencies and for access to classified information, a responsibility which it shares with other agencies. It is given certain broad intelligence functions under the National Security Act of 1947 and it has liaison duties under the Immigration and Nationality Act of 1952. Otherwise, generally, whatever functions it is to perform are purely those which are delegable to it, either by the Attorney General or by the President.

In light of this very limited statutory commitment to the FBI, there are many questions which remain unanswered and which will, without further inquiry, remain obscure. But the FBI has long been regarded as the principal source of information on subjects vital to the internal or national security, and, upon the basis of such information as may be provided, in large degree rests our capacity to protect and preserve our national institutions. It is important, I believe, that we in the Congress, and the public, fully understand the nature of the issues involved. Each generation must embark anew upon the educational process. This process is an intensely personal and individual commitment. That it be pursued is also in the public interest. Thus I commend this study to the Members of the committee and of the House.

RICHARD H. ICHORD,
Chairman.

OCTOBER 3, 1973.

or authority. It is indirect when the authority or duty is delegated to it, and which it receives as an agent, the authority being originally conferred upon its principal, whether he be for example the President or the Attorney General. Hence the authority of the FBI, as will appear, is either directly conferred upon it by statute or received by delegation, the delegating authority, in turn, being derived either from statute or from the Constitution. Whether conferred directly or by delegation, the authority which the FBI exercises is either express or implied, and it may be mandatory or permissive.

In an analysis of the authority of the FBI to acquire domestic intelligence, it is thus a point of concern to ascertain the extent to which a duty to act in this field is imposed as distinguished from a permissible or discretionary authority. From the standpoint of the legislative oversight of this committee, the control of the exercise of official discretion is a point of concern. The question whether the agency "may" act is obviously quite a different thing from the question whether the agency is obliged to act. While a duty to investigate also includes an authority to investigate, it is not so clear that an authority to investigate imposes in all instances a clear duty to investigate. A statute or directive which grants an authority, but imposes no specific duty, in terms of "must" or "shall," is relevant to the nature and extent of the discretion which may be exercised by the head of the agency in undertaking or omitting such investigations.

Answers to these and other questions do not always appear on the face of the statutes or directives. We are thus intimately involved in issues of statutory or legal construction. But legal drafting is not an exact science. Moreover, one is left with the impression that the terms and effect of statutes and directives are frequently obscured because they are the product of a political process with all that this implies. Familiar principles of construction do not always provide a precise answer. Where we are in doubt as to the effect to be given to a statute, it is said for example that we must look to the objective to be accomplished or the evils or mischief sought to be remedied; that a statutory grant of power or right carries with it, by implication, everything necessary to make it effectual and complete. On the other hand, we are admonished that a power specifically conferred cannot be extended by implication where to do so is merely convenient. It must be so essential to the exercise of some power expressly conferred as plainly to appear within the intention of the legislature.

In applying these principles, we do so however in a context in which, as will appear, the Congress has given every indication of desiring to control the investigative power and, with few exceptions, has not directly conferred this power, unfettered or unsupervised, upon the "intelligence" agencies in the business of conducting investigations. But a determination of the agency's general authority does not end the inquiry. We are necessarily involved in the question of its application to particular investigations, the standards to be observed, and the propriety of investigative techniques as well as the permissible scope of the investigation. We are likewise involved in related issues, the authority and standards to be applied in the preservation, use, and dissemination of intelligence as distinguished from its collection.

It must be recognized that the authority to investigate is an exercise of power. That power which may be inferred is the least possible power adequate to the end proposed. See *Anderson* v. *Dunn*, 6 Wheat.

204, 230 (1821). Both the means and the proposed ends are limited in relation to the separation of powers, the Bill of Rights, and the increasing expansion of the "rights" of privacy. Hence, the question of the nature and extent of the investigative authority is a matter into which the judicial branch frequently interposes, as it did for example in *United States* v. *Marzani*, 71 F. Supp. 615 (1947), on a motion to dismiss an indictment on the ground that the FBI was not authorized to make the investigation; in a suit against Federal officers for malicious prosecution, as in *Cooper* v. *O'Connor*, 99 F. 2d 135 (1938); in a suit to enjoin the conduct of investigation, as in *Laird* v. *Tatum*, 408 U.S. 1 (1972) and *Anderson* v. *Sills*, 56 N.J. 210 (1970); or in a suit to enjoin the maintenance or use of investigative records, as in *Menard* v. *Mitchell*, 430 F. 2d 486 (1970).

The occasion for this analysis has arisen by reason of some questions posed following the death of the late J. Edgar Hoover, Director of the Federal Bureau of Investigation. In a February 16, 1973, address before the Wisconsin Bar Association, titled "FBI—Change of Command," L. Patrick Gray III, Acting Director of the Federal Bureau of Investigation, declared that on taking command, and while continuing prior policies and procedures, he had resolved to make a careful examination and evaluation of those policies and procedures. From the inception, he said, the "topmost priorities" among his avenues of inquiry "were the areas of organized crime, general crime, espionage and subversion, drug abuse, and our grant of jurisdictional authority from the Congress and the President of the United States by Federal statute and executive order." He then went on to say, with emphasis his own:

> As to our jurisdictional authority, the obvious and only question is: *Do we have the jurisdictional authority to investigate?* Are we commanded by Federal law or executive order to act? If not, we will not act . . . we will not move in . . . and we will not investigate.

Again, on February 28, 1973, in an appearance before the Senate Committee on the Judiciary, on the question of his confirmation, he indicated that he was making an evaluation of policies and investigative priorities, that he was following a course of continuity and change, with a careful examination and evaluation being conducted simultaneously. Among his "avenues of inquiry" were items relating to subversion and FBI jurisdiction. He spelled them out as follows:

> (2) Subversion (Specifically include in this paper a detailed analysis and justification for our current policies with regard to the investigation of individuals where there has been no specific violation of Federal law. Is additional legislation needed in this area?)
>
> * * * * * * *
>
> (6) FBI Jurisdiction (Should we have an office specifically set up for the evaluation of pending legislation and to study the needs for any additional legislation? Are FBI jurisdictional lines sharply defined? Is there any need for legislation to transfer some of our responsibilities to other Federal agencies?)

We have previously suggested that a distinction is to be made between an authority to act and a duty to act. The relevance of this point is emphasized in the foregoing remarks of the then Acting Director when he made, or possibly failed to make, an apparently similar distinction between a "jurisdictional authority" to investigate and a Federal law or Executive order commanding action. He said that if he were not commanded to act, he would not act and he would

not investigate. Yet, I cannot say that it is wholly clear from his statement that he is not confusing the "jurisdictional authority" with a "command."

If words have any meaning, then we must recognize that there is at least a difference of emphasis, and perhaps a difference of result, in the use of these diverse terms. If a statute declares that the FBI "may" investigate, or "may" do this or that, does it impose a command or a choice? Does the statute confer only a *power* or does it impose a *duty*? These questions relate not only to such issues as an officer's culpable nonfeasance, civil and criminal, or the authority to remove him from office, whether for malfeasance or nonfeasance, but also to the important question whether the action authorized by the statute is mandatory or permissive, whether it is an authorization but not a command, or whether it is both an authorization and a command. While experience teaches that commands are not always fulfilled, it is certain that an authorization without a command is even less likely to produce the desired results.

It is evident that questions relating to the authority of the FBI in the field of domestic intelligence are receiving increasing attention, and from varying points of view. Opposite extremes in the spectrum of interest range from those who seek to suppress all domestic intelligence activity in the field of subversion, to those who are concerned that this tendency to curb a vital function is endangering the national interests, and are determined to see that the work be done. In the June appearance of Clarence M. Kelley, then Director-designate of the FBI, Senate Majority Leader Robert C. Byrd noted that there was "a different atmosphere" during Mr. Hoover's tenure, but observed that now the Congress must establish statutory authority for the Bureau's domestic intelligence gathering.[1] The Washington Post reported that Mr. Kelley, the nominee, "had astonished" some members of the Senate committee when he said that he knew of no Bureau surveillance in the area of domestic intelligence that is not connected with the prosecution of specific criminal offenses.[2] Subsequently, in August, Attorney General Richardson was quoted as saying, "Whether there ought to be a more specific statutory basis for intelligence functions of the FBI and other Federal law enforcement agencies," was one of the issues he was reviewing concerning the relationship between the FBI and the Department of Justice.[3]

For the purposes of perspective, there is attached hereto an extract of the March 2, 1973, statement of the late Director of the FBI, J. Edgar Hoover, before the House Subcommittee on Appropriations, in which he has presented an overall and generalized summary of the statutory authority, objectives, and narrative of the work of the FBI.[4] It may be noted that the budget request for the FBI for the 1973 fiscal year exceeded $300 million. It provided for a personnel staff of 19,857 full-year employees of whom 8,631 are agents and 11,226 are clerks.

In this 1972 statement to the House, J. Edgar Hoover cites chapter 33 of title 28, United States Code, and the provisions of title 18,

[1] Washington Post, June 21, 1973, p. A3.
[2] Ibid., June 20, 1973, p. A1 (continued). For the complete text of Mr. Kelley's statement, see "Nomination of Clarence M. Kelley to be Director of the Federal Bureau of Investigation," Hearings before the Senate Committee on the Judiciary, June 19, 20, and 25, 1973.
[3] Ibid., Aug. 5, 1973, p. A1 (continued).
[4] See app. A, pp. 49–55.

United States Code, section 3052 as the basic statutory authority for the activities of the FBI. No further citations of authority are included within the statement but he advises that, as the investigative arm of the Department of Justice, the FBI has been "vested with authority for certain auxiliary, specific, and general investigative responsibilities by the Congress, Attorney General, and the President of the United States."

Of particular interest are the late Director's references (paragraphs 2, 3, and 4) to objectives and responsibilities in the areas of domestic intelligence, the coordination and dissemination of security data, and specialized security programs. In speaking of the FBI's internal security operations, Mr. Hoover said:

> The FBI's work in the internal security field continues to mount and there is every reason to expect these matters will place an increasingly heavier burden upon our investigative staff. Constituting a major responsibility of the FBI, investigations of internal security matters are conducted to develop evidence for legal proceedings as well as to enable Government officials responsible for the safety and welfare of the citizenry to take appropriate corrective or preventive action.

He then presents a summary of the agency's investigations relating to, and captioned, new left terrorism, antiwar demonstrations, student agitation, Communist Party, USA, Progressive Labor Party, Socialist Workers' Party, racial extremism, the Black Panther Party, Student National Coordinating Committee, other black extremist groups, black extremists in penal institutions, klan-type organizations, Cuban unrest, urban guerrilla warfare, antiriot laws, bombing matters, reports on bombing incidents, espionage and counter intelligence, the Soviet bloc, Cuban intelligence activities, coverage of subversive groups, and electronic surveillance, all of which pertain to the FBI's general domestic intelligence activities of concern to us. In a separate heading he deals with the "criminal and civil operations" of the FBI which he described as accounting "for the great majority of the Bureau's investigative work."

In the matter following I shall deal more specifically with the FBI's statutory and other authority in relation to the conduct of domestic intelligence investigations. That will be followed with a discussion of the authority which may be delegable to it, a reference to some specific delegations by Presidential directives, and finally I touch upon issues related to the dissemination of intelligence.

II. GENERAL STATUTORY MANDATES

Chapter 33 of Title 28, United States Code

In this chapter, a codification of laws relating to the FBI pursuant to the act of September 6, 1966 (28 U.S.C. 531–537), it is provided that the Federal Bureau of Investigation "is in the Department of Justice." [5] It is to be observed that while section 531 of this chapter

[5] The earliest predecessor agency of the FBI was created administratively in 1908 in the Department of Justice as the "Bureau of Investigation," and in that year funds were authorized to the Department for the assistance of that Bureau in the prosecution of crimes. By executive order issued in 1933 its functions, together with the investigative functions of the "Bureau of Prohibition," were transferred to and consolidated in a "Division of Investigation" in the Department of Justice. The Division of Investigation was subsequently, by the act of March 22, 1935, designated as the "Federal Bureau of Investigation," and has been so designated in statutes since that date.

places the FBI in the Department of Justice, and section 532 declares the Director to be the "head" of the FBI, there is very little said as to the Director's more specific duties or the functions of the FBI. Indeed except for the fact of the Bureau's creation within the Department and the designation of the Director as its head, there is nothing said in the entire chapter in explication of their authority, with the exception of the provision in section 535 declaring that the Attorney General and the FBI "may investigate" any violation of title 18 "involving Government officers and employees," and the provision of section 537 making appropriations for the FBI available "for expenses of unforeseen emergencies of a confidential character." Otherwise, the whole of the investigative authority confided by the chapter is vested in the Attorney General and not in the FBI.

This investigative authority, specified in section 533, provides that the Attorney General "may appoint" officials (1) to detect and prosecute crimes against the United States, (2) to assist in the protection of the person of the President, and (3) to conduct such other investigations regarding "official matters under the control" of the Department of Justice and the Department of State as may be directed by the Attorney General. Moreover, it is the Attorney General, and not the FBI, who is directed to collect and preserve crime "and other records" and to exchange these records with Federal and State officials. It is thus clear that what investigative authority the FBI possesses by virtue of this chapter is, with the exception noted, only such as may be delegated to it by the Attorney General. The Bureau is only an agency which is made available to the Attorney General as one source for the conduct of such investigations as he may direct.

We are also made aware in the language of the section that the authority for the investigation of "crimes" against the United States is not committed solely to the Attorney General, or by his power of delegation to the FBI, but that it is shared by others. This is implicit in the provision which declares that the section does not limit the authority of departments and agencies to investigate crimes against the United States when investigative jurisdiction has been assigned by law to such departments and agencies. Thus in paragraph 2 of section 533 of this chapter, the authority conferred upon the Attorney General is "to assist" in the protection of the person of the President in recognition of the primary responsibility for the protection of the President which has been vested in the U.S. Secret Service by the provisions of 18 U.S.C. 3056. The provision also recognizes, for example, that the enforcement of the internal revenue laws is a function of the Secretary of the Treasury as provided in 26 U.S.C. 7801, although in conferring this authority the Congress has provided that nothing in that provision shall be considered to affect the powers vested in the Department of Justice by law prior to May 10, 1934. The Coast Guard, by the provisions of 14 U.S.C. 2, is specifically directed to "enforce or assist in the enforcement of all applicable Federal laws on or under the high seas or waters subject to the jurisdiction of the United States. . . ." Subject to the direction of the Secretary of the Treasury, the Secret Service is, inter alia, specifically authorized by the provisions of 18 U.S.C. 3056 to "detect and arrest" any person committing any offense against the laws of the United States relating to coins, obligations, and securities of the United States and of foreign governments.

18 U.S.C. 3052

This section, previously noted and cited by the late Director as a basic statutory authority underlying the powers of the FBI, authorizes the Director, his Associate and Assistant Directors, inspectors and agents of the FBI to carry firearms, serve Federal warrants and subpenas, and to make arrests without warrant for any offense against the United States committed in their presence or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed, or is committing, such felony.

In this section, the distinction between a felony and a misdemeanor is made only to define authority to make arrests without a warrant, but is not a limitation upon the general authority conferred to make arrests with respect to all Federal penal offenses.[6] The question at issue and with which we are concerned is the extent to which, if any, this provision confers an investigative authority upon the FBI, either expressly or by implication. Apart from the authority to carry firearms, it is evident that the provision explicitly confers a general authority upon the FBI only to serve Federal warrants and to make "arrests" for Federal crimes. This would include, of course, warrants for search as well as for arrests and other seizures (of property, see 18 U.S.C. 3107) in relation to the commission of unlawful acts or offenses, whether felonies or misdemeanors. We thus receive little or no guidance in the explicit language of this section as to the fact or extent of the FBI's investigative authority as distinguished from the authority conferred with respect to the making of arrests.

If we view this statute in its most restrictive and limited expression as only an arrest authority, it is clear that arrests may be made without warrant both for misdemeanors and felonies when committed in the "presence" of FBI officers. By the very nature of this limitation, it would seem obvious that little or no investigation in connection with the arrest is required under such circumstances, for the authority relates only to on-sight activities. On the other hand, as to making arrests without warrant for felonies not committed in the presence of the officers, we must conclude that at least some investigative authority is implied toward ascertaining the identity of the individual to be arrested and the circumstances in relation to the committal of the felony to satisfy the condition that there be reasonable grounds to believe that the person to be arrested has, in fact, committed or is committing a felony. This investigative authority, however, is obviously of a very limited sort. It is exercised after the crime has been committed or after its commission has been initiated. It would seem to imply only action following complaint or on information received. It would not appear to be an express authorization for the conduct of ongoing intelligence operations either for the *prevention* of crime or for the purpose of ascertaining the *potential* of its commission.

Nevertheless, it may be urged with some plausibility that, in conferring upon the FBI an arrest authority for all Federal crimes, section 3052 must be held to confer a general "police" jurisdiction for

[6] Title 18, United States Code, section 1, defines a felony as an offense punishable by death or imprisonment for a term exceeding 1 year. Any other offense is a misdemeanor, although a misdemeanor, the penalty for which does not exceed imprisonment for not more than 6 months or a fine of not more than $500, or both, is described as a "petty" offense.

the ongoing investigation of all Federal crimes, qualified only to the extent that a concurrent, primary, or even exclusive authority has been delegated to other agencies, or withheld from the FBI pursuant to specific and exceptional statutes. If the concept of arrest includes the power of investigation, then of course we may conclude that the section confers an express authority upon the FBI for the conduct of investigations for general enforcement purposes, as distinguished from a limited authority hereinbefore observed, following complaint or information received to determine the propriety of the arrest and identity of the individual to be arrested. On the other hand, if the authority to conduct such investigations is not within the meaning of the term arrest, but is to be implied as a necessary and proper authority to effectuate the arrest authority, then section 3052 may be held to confer such investigative authority by implication as distinguished from an express authority.

However, the term "investigation" has been described as a proceeding to obtain information to govern future action as distinguished from a proceeding in which action is taken against any person. See *Bowles* v. *Baer*, 142 F. 2d 787, 788 (1944). It seems evident that the arrest and investigative functions are separable incidents of the overall law enforcement function. While we may agree that arrest is an incident of the law enforcement function, and that the enforcement of penal laws presupposes an investigative and arrest authority, it does not necessarily follow, *e converso*, that all incidents of law enforcement are either embraced within the term "arrest" or are vested in one agency. The Attorney General has statutory authority in the prosecution of crimes and in the conduct of litigation, but he has no personal arrest authority, at least none apart from that which he possesses as a private citizen. While possessing an arrest authority, it is obvious that the FBI possesses no general law enforcement or investigative authority equivalent in extent to that conferred upon the Attorney General. In the statutory treatment of the FBI's arrest and investigative authority, I believe that we must conclude that these are separate functions and are not necessarily inclusive of each other.

That the FBI is constituted as an investigative agency appears of course from the title of the agency itself. But the duties and authority of the agency are not to be inferred from its title alone. While identifying and descriptive of the agency, it is clear that the title confers no specific authority, nor does it elucidate what investigative authority it may possess. Congress in four instances only has imposed a positive mandate upon the FBI to investigate a penal violation. It has provided that the Attorney General and the Federal Bureau of Investigation "may investigate" any violation of title 18 involving Government officers and employees (28 U.S.C. 535); that violations of section 351, title 18, United States Code, relating to congressional assassination, kidnaping, and assault "shall" be investigated by the FBI; that the Attorney General and the FBI, together with the Secretary of the Treasury, "shall have authority to conduct investigations" with respect to certain violations relating to explosives (18 U.S.C. 846); and that violations relating to aircraft piracy or crimes aboard aircraft "shall be investigated" by the FBI (49 U.S.C. 1472).[7] If the authority

[7] Moreover, a right of inspection of records is accorded to the Federal Bureau of Investigation under 15 U.S.C. 1173 with respect to gambling devices.

to investigate is to be inferred from the arrest authority of section 3052, one may well inquire why the Congress in these instances thought it desirable to confer an investigative authority or duty by express terms?

In establishing the FBI in the Department of Justice, chapter 33 of title 28 did not, as we have observed, further enlarge upon its "duties" (or authority) except to provide that it, together with the Attorney General, "may investigate any violation of title 18 involving Government officers and employees." It is the Attorney General who is given the general authority "to detect and prosecute crimes" and "to conduct such other investigations" under the control of his Department and the Department of State as he may direct. It has been said that under particular circumstances the words "detection" and "investigation" are synonymous. 26A C.J.S., page 876. This authority is not, by the provisions of this chapter, with one exception above noted, explicitly (if at all) conferred upon the FBI. On the contrary it is the Attorney General who is given authority to "appoint officials" to "detect" and prosecute crimes and to conduct such other investigations. Hence, the statutory scheme appears to vest in the FBI a separable arrest authority only, but makes it available as an agency or source of manpower for employment by the Attorney General. Only in that sense is the FBI an "authorized agency," but not in the sense that it may initiate or conduct investigations, with the exceptions hereinbefore noted.

Certainly when the Congress has sought to confer an "enforcement," police, or investigative authority, it has done so in more explicit language. In conferring authority upon the Secret Service for example, the Congress has provided that, subject to the direction of the Secretary of the Treasury, that agency is authorized "to detect and arrest" persons for certain specified offenses and has expressly authorized the Agency to "offer and pay rewards for services or information looking toward the apprehension of criminals." In the provisions of 14 U.S.C. 2, a duty was imposed upon the Coast Guard "to enforce or assist in the enforcement" of all applicable Federal laws on or under the high seas or waters subject to the jurisdiction of the United States"; and by the provisions of 16 U.S.C. 776d, the Coast Guard, together with U.S. marshals, were authorized "to enforce" the provisions of the convention relating to the protection of sockeye fishing and "to arrest" for violations of the convention. In establishing the Capitol Police, the Congress provided that "it shall police the United States Capitol building and grounds," and gave it authority "to make arrests" for specified offenses and in specified areas (40 U.S.C. 212a).

On the other hand, it is clear from the provisions of section 3052 that no general "police" function was expressly conferred by it upon the FBI, nor does it charge the agency with the maintenance of "law and order," or even generally with a duty to "detect" the commission of crimes, from which we may infer an ongoing duty or authority to collect information and to plan for or to prevent the commission of Federal crimes and Federally punishable civil disorders. Hence, if any broad investigative authority exists, it must, in my opinion, be conferred by other provisions of law—as has been the case in specified instances such as hereinbefore noted—or it must come from other sources having authority, by statute or by the U.S. Constitution, to delegate the function or to prescribe that duty. In this sense it would

appear from the statutory scheme that we cannot imply a duty—or "authority"—to investigate from the authority conferred upon the FBI by this section to make arrests.

This construction is indeed confirmed by the section's legislative history.[8] The act, as amended, was intended only to remedy a deficiency in the FBI's arrest power. As ultimately enacted it appears that the purpose of Congress was to give the FBI the same powers of arrest as then possessed by U.S. marshals and their deputies. Nevertheless, if we do concede that, within the scope of this particular section, some authority to investigate may be implied from the authority to arrest, any authority derived from this section must be narrowed to its purpose of criminal law enforcement.

For the host of offenses embraced within title 18 and other Federal statutes, it would seem obvious that ongoing domestic intelligence investigations, although helpful, would not be necessary to give effect to the authority to make arrests. Most violations involve individual acts of an isolated and not of a continuing or frequently recurring nature, such as in the commission of bribery, homicide, kidnaping, perjury, and embezzlement, to name but a few. There are, however, offenses with respect to which broader and continuous investigations would seem to be necessary, if the authority conferred is to be effectively executed for the purposes of criminal law enforcement. This is generally true of organized activities, both with respect to "organized crime" and subversive organizations.

The teachings, doctrines, history, and purposes of subversive organizations, those for example which are Marxist-Leninist, revolutionary socialist, Klan-type, and similar extremist groups, would appear to provide a reasonable basis for the conduct of ongoing intelligence investigations to ascertain the extent to which they, their members and agents, have committed, or are probably committing, a violation of the large number of Federal penal statutes which may, to a greater or lesser extent in particular instances, be relevant to their doctrinal objectives, teachings, and practices. They include not only those offenses directly pointed toward subversion, such as the Smith Act (18 U.S.C. 2385), violations of the registration requirements with respect to certain organizations (the Voorhis Act, 18 U.S.C. 2386), the Foreign Agents Registration Act of 1938 (22 U.S.C. 612 et seq.), and section 4 of the Internal Security Act, but other penal statutes of general application as well, including for example title 18 offenses in chapter 13 (civil rights), chapter 12 (pertaining to civil disorders), chapter 39 (explosives), and offenses specified in other chapters relating to espionage and sabotage.

III. STATUTORY AUTHORITY, FEDERAL LOYALTY AND SECURITY PERSONNEL INVESTIGATIONS

5 U.S.C. 1304

This section confers a divided and concurrent authority upon both the Civil Service Commission and the Federal Bureau of Investigation for the conduct of investigations to determine the eligibility or suitability of persons on loyalty and security grounds for Federal em-

[8] See H. Rept. No. 3228, 81st Cong., 2d sess. (Dec. 20, 1950); and S. Rept. No. 2464, 81st Cong., 2d sess. (Aug. 29, 1950).

ployment in certain specified capacities and agencies, including the International Labor Organization, the Institute of Inter-American Affairs (now obsolete), the World Health Organization, the U.S. Information and Educational Exchange Programs, the National Science Foundation, and the Office of Civil Defense in the District of Columbia.

The section makes available to the Civil Service Commission "a revolving fund," without fiscal year limitation, "for financing investigations, training, and such other functions as the Commission is authorized or required to perform on a reimbursable basis." This is provided to permit the Commission to recover the expenses of operation for services performed for other agencies. These agencies are authorized to use available appropriations to reimburse the Commission or the FBI for the cost of investigations, training, or functions performed for them under this section, and the reimbursements are credited directly to the applicable appropriations of the Commission or the FBI.

The Civil Service Commission is required to conduct the investigations and issue the reports required by the statutes specified in this section. The agencies involved and the applicable statutes now include:

(1) The International Labor Organization (22 U.S.C. 272b), which provides that no person shall serve as representative, delegate, or alternate from the United States "until such person has been investigated as to loyalty and security by the Civil Service Commission."

(2) The World Health Organization (22 U.S.C. 290a), which provides that no person shall serve as representative, delegate, or alternate "until such person has been investigated as to loyalty and security by the Civil Service Commission."

(3) The U.S. Information and Educational Exchange Programs (22 U.S.C. 1434), which provides that no citizen or resident of the United States, whether or not now in the employ of the Government, may be employed or assigned to duties under this chapter "until such individual has been investigated by the Civil Service Commission and a report thereon has been made to the Secretary of State." This provision does not apply to an officer appointed by the President by and with the advice and consent of the Senate.

(4) The National Science Foundation (42 U.S.C. 1874(c)), which provides that no employee of the Foundation shall be permitted to have access to restricted information or property "until the Civil Service Commission shall have made an investigation into the character, associations, and loyalty of such individual and shall have reported the findings of said investigation to the Foundation, and the Foundation shall have determined that permitting such individual to have access to such information or property will not endanger the common defense and security."

(5) The District of Columbia Office of Civil Defense (6 D.C. Code 1203), which provides that no person shall be employed to carry out this program "until the Civil Service Commission shall have made an investigation and report to the Director concerning the loyalty of such person" and shall make a finding on the basis of the report that the employee is suitable for employment.

Although the primary and initial responsibility for the conduct of the foregoing investigations is imposed by these provisions upon the

Civil Service Commission, it is required by the terms of the section that when any of them "develops data indicating that the loyalty of the individual being investigated is questionable," the Commission shall refer the matter to the FBI for a full field investigation and a report thereon to the Commission. The President, however, may require any group or class of the foregoing investigations to be made by the FBI rather than the Commission when he considers it in the "national interest." Moreover, any of the above investigations and reports must be made by the FBI with respect to "specific positions" which the Secretary of State certifies are of a "high degree of importance or sensitivity."

Although section 1304 deals with the specific and limited investigations required with respect to the designated agencies, it contains an extraordinary provision [subsection (g)] in the nature of a "saving clause" which declares, "This section does not affect the responsibility of the Federal Bureau of Investigation to investigate espionage, sabotage, or subversive acts." Why this provision, which at first glance seems wholly unnecessary and extraneous to the purpose of the section, should have been included raises an interesting question. Of course the commission of acts of espionage, sabotage, and subversion are relevant criteria in the determination of an individual's eligibility for employment in the specified agencies on loyalty and security grounds. However, the purpose toward which this saving clause is directed is not clear. It seems to be directed toward preserving the responsibilities (whatever they may be) of the FBI with respect to the investigation of espionage, sabotage, and acts of subversion, in light of the concurrent responsibilities imposed by the section upon the Civil Service Commission for the conduct of investigations.

Even more confusing is a similar provision which appears in the Civil Defense Act (50 U.S.C. app. 2251 et seq.), briefed under the next subheading of this study. Following the general provisions establishing the Civil Defense Administration, and a provision requiring loyalty and security investigations of its employees, there is appended a separate section (section 2263), which provides that nothing in the Civil Defense Act "shall be construed to authorize investigations of espionage, sabotage, or subversive acts by any persons other than personnel of the Federal Bureau of Investigation." Although an equally oblique reference to the FBI, it differs materially from the preceding proviso in its import. Apparently while likewise inspired by reason of the relevance of investigations on these subjects to the conduct of investigations in relation to the employee loyalty and security program, it goes further toward recognizing the existence of an exclusive authority in the FBI on these subjects, while not expressly conferring it.

Indeed, in this proviso the Congress appears to be making clear that it is not expected, at least with respect to investigations required by the Civil Defense Act, and possibly other statutes of a similar type as well, that agencies other than the FBI should get into this field of investigation solely by reason of the duties imposed upon them by the Congress for the conduct of employee investigations. However, in view of Presidential or executive directives on this subject, hereinafter considered, which alone appear to be the source of any such commitment to the FBI, I do not believe that this or the foregoing reservation should be construed, expressly or by implication, as a statutory grant of exclusive authority to the FBI for the conduct of investigations on

the subjects of espionage, sabotage, and subversive acts, either generally or in relation to the employee programs. It appears only that we may safely conclude that the Congress was not intending to countermand any executive directives which may confer such an exclusive authority. Nevertheless, the statutory scheme raises questions as to the extent of the concurrent jurisdiction of the Civil Service Commission upon the same subjects.

Other Statutes

There are several other statutes which impose specific responsibilities by name upon the FBI in relation to the administration of Federal personnel loyalty and security programs. It must, however, be kept in mind that Federal personnel loyalty and security is not a sole responsibility of the FBI. There are several statutes with respect to designated agencies conferring investigative responsibility upon the Civil Service Commission. This fact, I believe, is significant in our speculations upon such programs as a foundation by implication of the nature and extent of the authority conferred upon the FBI for the acquisition and maintenance in general of its domestic intelligence operations for this particular purpose. The following additional statutes specifically confer investigative duties upon the FBI in the execution of Federal employee loyalty and security programs:

(1) Federal Civil Defense Administration (50 U.S.C. app. 2255)—This section of the Civil Defense Act requires the Administrator to establish security requirements and safeguards, including restrictions regarding access to information and property, and prohibits access by an employee of the administration to information or property with respect to which access restrictions have been established "until it shall have been determined that no information is contained in the files of the Federal Bureau of Investigation or any other investigative agency of the Government indicating that such employee is of questionable loyalty or reliability for security purposes, or if such information is so disclosed, until the Federal Bureau of Investigation shall have conducted a full field investigation concerning such person and a report thereon shall have been evaluated in writing by the Administrator." As to positions of "critical importance from the standpoint of national security," it is required that a full field investigation be conducted by the Civil Service Commission. If such investigation develops data reflecting upon the loyalty or reliability for security purposes of an applicant for such a position, the Administrator may refer the matter to the FBI for the conduct of a full field investigation. Moreover, each employee of the Administration is required to execute a loyalty oath disclaiming advocacy of violent overthrow of the Government or membership in an organization so advocating. He is also required to promise that he will not so advocate or become a member of an organization so advocating during such time as he is a member of the civil defense organization.

I have already noted, in the discussion under the foregoing heading relating to 5 U.S.C. 1304, the significant provisions of section 2263 of the Civil Defense Act with respect to the authority of the FBI to conduct investigations of espionage, sabotage, and subversive acts.

(2) Atomic Energy Act (42 U.S.C. 2165)—This section, in the interest of the "common defense and security," requires investigations

"on the character, associations, and loyalty" both of (*a*) contractors or licensees of the Commission, and any individual who may have access to restricted data, and (*b*) of employees of the Commission. I shall not enlarge upon the specific provisions except to say that responsibility for the conduct of the investigations is imposed upon the Civil Service Commission. When the investigations develop data reflecting that the individual is of questionable loyalty, the Civil Service Commission is required to refer the matter to the FBI for the conduct of a full field investigation. Also in cases where the Atomic Energy Commission certifies specific positions which are "of a high degree of importance or sensitivity," all investigations and reports with respect to them are to be made by the FBI rather than the Civil Service Commission.

(3) National space program (42 U.S.C. 2455)—By the provisions of this section the Administrator of the National Aeronautics and Space Administration is required to establish security requirements and is authorized to arrange with the Civil Service Commission "for the conduct of such security or other personnel investigations" of the agency's employees, its contractors, subcontractors, and employees as he deems necessary in the interest of the national security. If any such investigation develops data reflecting that the individual is of questionable loyalty, it is required that the matter shall be referred to the FBI for the conduct of a full field investigation.

(4) The Peace Corps (22 U.S.C. 2519)—This section requires all persons employed or assigned to duties under the Peace Corps Act to be "investigated to insure that the employment or assignment is consistent with the national interest in accordance with standards and procedures established by the President." The duty of making this investigation is not by the act assigned to any particular agency, but it is provided that if an investigation made pursuant to the section develops data reflecting that the individual is "of questionable loyalty or is a questionable security risk," the investigating agency shall refer the matter to the FBI for the conduct of a full field investigation.

(5) U.S. Arms Control and Disarmament Agency (22 U.S.C. 2585)—This section requires the Director of the Agency to establish such security and loyalty requirements, restrictions, and safeguards as he deems necessary in the interest of the national security. The Civil Service Commission is assigned responsibility for the conduct of full field background security and loyalty investigations of all employees of the Agency, consultants, persons detailed from other Government agencies, contractors and subcontractors, and their employees. Where the information developed by this investigation discloses information that the individual may be of "doubtful loyalty" or "may be or may become a security risk," the report of the investigation is required to be turned over to the FBI for a full field investigation. However, with respect to contractors and subcontractors and their employees, the Director is authorized to accept a report of investigation conducted by a Government agency other than the Civil Service Commission or the FBI when he determines that the completed investigation meets the foregoing standards. An exception to the requirement for full field investigations is made for contractors and subcontractors and their employees for access to information classified no higher than "confidential," in which event a minimum national agency check is required.

In this agency's authority to accept reports of investigation by agencies other than the Civil Service Commission or the Federal Bureau of Investigation, although in the limited category of contractors or subcontractors or their employees, we are again reminded that there are also other investigative agencies in the business of investigating eligibility of personnel for access to positions or to classified information on loyalty or security grounds. Indeed, for this and other purposes, several agencies, including the Departments of State, Defense, Treasury, and the U.S. Postal Service, have their own investigative facilities. It is, however, important to observe that, without exception, all agencies by Executive order and departmental regulations are required to check the "files" of the FBI in the course of conducting their loyalty-security investigations. Thus, while such agencies here possess, to some extent at least, a concurrent jurisdiction with the FBI, it is recognized, particularly in light of specific commitments by Presidential directives to the FBI of authority to conduct investigations on the subjects of espionage, sabotage, and subversive acts, as well as its more general function of maintaining criminal and fingerprint records pursuant to a delegable authority of the Attorney General, that these files will be a special source of information for their use. This raises questions as to the degree of specification of responsibility for the collection, preservation, and dissemination of such information and the coordination of the investigative jurisdictions shared by these various agencies.

In viewing the total statutory authority of the FBI under 5 U.S.C. 1304, and the other statutes to which reference has above been made, it would seem that this statutory scheme must be held to confer, by implication, a broader authority for the conduct of investigations than that which the FBI is authorized to conduct with respect to violations of penal statutes. In one sense, of course, the loyalty and security investigations are also of a closed-end type. In that they are investigations of individuals, they begin and end upon the reference of a specific case and on the agency's report with respect to each. Nevertheless, it is apparent that the FBI cannot effectively execute the special role committed to it in this type of investigation, which embraces such factors as espionage, sabotage, and subversive acts, without the conduct of extensive and continuous investigations, both with respect to individuals and relevant organizations, and certain activities of foreign powers and agents as well. None of the foregoing statutes, however, makes specific reference to any loyalty-security criteria, except for the very general and oblique references to the commission of "sabotage, espionage, and subversive acts" found in the provisions of subsection (g) of section 1304 of title 5, United States Code, and in section 2263 of title 50, United States Code Appendix (the Civil Defense Act), hereinabove noted. Of course two of the statutes, the National Science Foundation Act and the Atomic Energy Act, make reference to the individual's "associations" as a subject of investigation. Otherwise, none of them in any degree enlarges upon applicable criteria toward which the investigations are to be directed and by which their scope may be more precisely determined.

Nevertheless, in light of the historical context in which these statutes, and others of their type, were enacted, content to a large extent has been given as to the scope and character of the investiga-

tions contemplated within the brief expression of their terms. It is not necessary to expand upon this history and background. It has been fully dealt with in the Preyer report, a report of a subcommittee of the Committee on Internal Security, "The Federal Civilian Employee Loyalty Program," House Report 92–1637. It was in the wake of extensive and continuing congressional investigations, particularly those of the McCormack-Dickstein and Dies committees, whose reports preceded the enactment of the foregoing statutes as well as President Truman's promulgation in 1947 of a "loyalty" program under E.O. 9835, that the present loyalty and security programs, which such statutes were intended to advance, fitfully evolved. Statutes were enacted and implementing orders published or applied which had a purpose of forestalling the employment or to effect the removal of persons then commonly described as "security risks." In this context we receive some guidance toward determining the character and scope of investigations embraced within the intendment of the foregoing statutes.

Among such statutes was Section 9A of the Hatch Act of 1939, a provision of general application, since repealed, which prohibited the employment of any person in any capacity in the Federal Government who held membership "in any political party or organization which advocated the overthrow of our constitutional form of government in the United States." Subsequently other special enactments were likewise adopted and made applicable to selected "sensitive" agencies. The Congress had also in 1950 enacted a statute generally authorizing the suspension and removal of so-called "security risks." This was the act of August 26, 1950, now 5 U.S.C. 7531–7533, authorizing the heads of eleven named "sensitive" departments and agencies, and others to whom the President may extend it, to suspend summarily and, after investigation and review, to terminate the employment of persons when found necessary or advisable "in the interest of the national security of the United States." The provisions of this act were in fact later extended to all departments and agencies of the government by explicit provisions of E.O. 10450, an order promulgated by President Eisenhower in 1953 which superseded E.O. 9835 and has since been in effect.

E.O. 9835, in effect for the period 1947–53, imposed a personal responsibility upon the head of each department and agency in the executive branch "to insure that disloyal civilian officers or employees are not retained in employment in his department or agency." The standard for the refusal of employment or the removal from employment, as amended in 1951, was whether, on all the evidence, there is "a reasonable doubt as to the loyalty of the person involved to the Government of the United States." To this end the Civil Service Commission and the employing departments and agencies were required to conduct investigations to ascertain the suitability of individuals for employment under the standard. It was further required that these investigations should include a reference to "the files" of the FBI. Activities and associations which were relevant to a determination of "disloyalty" were specified as follows:

(*a*) Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

(*b*) Treason or sedition or advocacy thereof;

(c) Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

(d) Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or nonpublic character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

(e) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(f) Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, Fascist, Communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

These "loyalty" criteria were readopted substantially in that form by the superseding order E.O. 10450 [section 8(a)(2) through (8)], together with "security" criteria which it added in the provisions of section 8(a)(1) and specified as follows:

(1) Depending on the relation of the Government employment to the national security.

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omission of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

These expanded criteria, it is clear, go beyond strictly "loyalty" considerations, and yet they are factors relevant to an individual's fitness for access to restricted information or property or to policy making and supervisory positions. As related to such peculiarly "sensitive" positions they are without doubt "security" factors, but if applied to the generality of positions commonly, but not always accurately, described as "non-sensitive," they may also be related to the more comprehensive concept of "suitability," a concept more generally applied to factors affecting an individual's fitness for federal employment without limitation to the more restricted loyalty and security concepts. Accordingly present regulations of the Civil Service Com-

mission, 5 CFR 731.201, under the heading of "Suitability," specify the following bases for disqualification for federal employment:

(a) Dismissal from employment for delinquency or misconduct;

(b) Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct;

(c) Intentional false statement or deception or fraud in examination or appointment;

(d) Refusal to furnish testimony as required by § 5.3 of this chapter;

(e) Habitual use of intoxicating beverages to excess;

(f) Reasonable doubt as to the loyalty of the person involved to the Government of the United States; or

(g) Any legal or other disqualification which makes the individual unfit for the service.

While the Commission's regulations retain, although in a modified form and without further enlargement, the loyalty standard initially prescribed in the Truman order, the standard was abandoned in the superseding order E.O. 10450, presumably to accommodate the expanded criteria of the order. In substitution a new standard was adopted "to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security." Nevertheless it was said on its promulgation that the order was intended to apply both loyalty and security factors in the determination of an individual's eligibility for employment in all positions, whether sensitive or nonsensitive. Hence duties similar to that imposed by the preceding Truman order were likewise imposed by E.O. 10450 upon the Civil Service Commission and the employing departments and agencies for the conduct of investigations with the exception that where loyalty-related information was developed the investigations were to be referred to the FBI for a full field investigation. By the terms of the order the scope of the investigation is to be determined in the first instance according to the degree of adverse effect the applicant for the position sought to be filled could bring about on the "national security" but in no event shall the investigation include less than a national agency check, including a check of the fingerprint files of the FBI, and written inquiries to appropriate law enforcement agencies, former employers and supervisors, references and schools attended by the person under investigation. To this end the heads of departments and agencies are required to designate those positions as "sensitive" which could bring about any such adverse effect on the national security. Full field investigations are required to be made for employment in positions so designated.

It may be important to observe that in the application of the investigative programs established by the foregoing statutes, as well as in the concurrent or implementing regulations, the terms "national security," "security," and "loyalty," have become "words of art." However they have not been consistently applied in the patchwork of statutes, Executive orders, and regulations. Although overlapping in varying degrees these concepts are not identical. They convey not only significant differences in meaning but in consequences. Indeed, the failure in the drafting of E.O. 10450 to heed these points of distinction resulted in the emasculation of the order in *Cole* v. *Young*, 351 U.S.

536 (1956). The abovementioned act of August 26, 1950, authorizing the suspension and dismissal of federal employees "in the interest of the national security," which had been extended by E.O. 10450 to apply to all agencies of Government, was held to apply only to positions which had been determined to be "sensitive" in the interest of the national security. The court construed the term "national security" as used in the act to comprehend "only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare." The court accordingly, in the absence of the agency's prior determination that the employee occupied a position in which he could adversely affect the "national security," construed the act as inapplicable to the dismissal of an individual who was found ineligible for continued employment because of his alleged close association with communists and a subversive organization.

It now seems clear that the concept of "security" embraces "loyalty," and is ordinarily related to so-called "sensitive" positions. Moreover, positions declared sensitive in the interest of the "national security" should be distinguished from the host of positions which are indeed sensitive on other grounds. Positions or places in agencies not directly concerned with the protection of the Nation from internal subversion or foreign aggression, but in which persons who occupy them may have access to information affecting life or property, including for example information identifying covert informants in aid of investigations, such as narcotics investigations, or which are supervisory in character and may thus extend to persons occupying them the opportunity to compromise or affect the mission of the agency by a distortion, diversion, or obstruction of Federal programs or policies not directly related to the national security but to the Nation's general welfare, are surely positions that are sensitive although perhaps more aptly described as sensitive in the "national interest" as distinguished from the "national security."

On the other hand the loyalty concept is not necessarily limited to the concept of security or of national security. It has been treated as a suitability factor applicable to all positions in Federal employment. Yet a disloyal person is also undoubtedly a security risk although all security risks are not disloyal persons. An individual committed to the interests of a hostile foreign power, or to the destruction of the system of government we enjoy, must be regarded as a disloyal person. He is also a security risk because it would be unwise and unsafe to entrust him with the secrets of the Nation or to place him in any position in which he could adversely affect the defense of the Nation or do any grave injury to its economic, social, or political structure. An individual who has no such commitments but has some bad habits, such as addiction to alcohol or loose talk for example, or whose character has been sullied or debased by criminal associations other than those of a treasonable or subversive nature, cannot be classified as disloyal but may fall within the category of security risk.

In any event we must conclude that the investigations required for the effective execution of the Federal personnel loyalty and security programs in general, and of the foregoing statutes in particular, necessarily involve a broad range of subjects, including the involvement of individuals in activities which are subversive in character to-

gether with a determination of the existence and character of organizations commonly described as subversive and the membership, affiliation, or association of individuals with them. The statutes as well as the supplemental Executive orders and regulations have imposed a dual role upon the FBI. The FBI is expected to provide and maintain a compendium of relevant intelligence in its "files," upon the subjects of espionage, sabotage, subversion, and related matters, including criminal and fingerprint records, which is to be made available to other agencies in which are confided primary, initial, or other investigative responsibilities. It also has a duty to conduct full field investigations in those cases specified in the statutes and generally in all cases where the specified loyalty-security factors are disclosed in the investigations conducted by others. It is the virtually inescapable conclusion that, if the FBI is to execute its vital responsibilities effectively, it shall be required, and it is therefore authorized, for these purposes, to conduct extensive ongoing domestic investigations for the acquisition of that information or intelligence upon the broad range of subjects comprehended either expressly or by implication in these statutes.

Finally, it seems important to note that in the Federal investigative program as regulated by Executive orders, apart from any special statutory requirements on the subject, "loyalty" investigations with respect to "nonsensitive positions" and the loyalty and security investigations with respect to "noncritical sensitive positions" (in which access to information classified as secret is authorized), are generally limited in extent to a national agency check, although accompanied by "written inquiries" to appropriate law enforcement agencies, former employers, references given by the applicant, and schools attended. Such "investigations" (those for Federal civilian employees) are conducted by the Civil Service Commission, on a postappointment basis as to nonsensitive positions, and ordinarily on a preappointment basis as to noncritical sensitive positions. They include primarily a reference only to "the files" of the FBI. Unless these files provide the intelligence collage which is obviously necessary to make them effective, it is equally obvious that this more limited "investigation" will not be effective for its purpose.

In the absence of this general intelligence collage we shall be required either to forego any such loyalty and security program or else to conduct in each case a full field investigation which would otherwise be necessary to obtain the necessary information. When we consider that about 95 percent of all positions in the entire Federal civil service are brought within the categories of nonsensitive and noncritical sensitive, either result would be unthinkable. If we forego such investigations we open the door to the total debasement of the Federal civil service. On the other hand if we were to undertake full field investigations of the literally millions of Federal employees occupying such positions it would be necessary to create a formidable apparatus to conduct them. Apart from the policy questions that would be raised by any such course its impact upon the economy would be appreciably serious. In cost the national agency check averages only about $6 per individual whereas the full field investigation involves an expenditure of about $552 for each.

IV. THE FBI'S STATUTORY INTELLIGENCE FUNCTIONS

There are three statutes of major significance in recognition of the domestic intelligence functions of the FBI: (1) The National Security Act of 1947 (50 U.S.C. 401 et seq.), (2) the Immigration and Nationality Act of 1952 (8 U.S.C. 1101 et seq.), and (3) title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510–2520, dealing with the interception of wire and oral communications).

National Security Act of 1947

In enacting this statute the Congress declared that it was its intent to provide a comprehensive program for "the future security of the United States." To this end it established a National Security Council composed of the President, Vice President, the Secretary of State, the Secretary of Defense, the Director of Mutual Security, and chairman of the National Security Resources Board, together with the Secretaries and Under Secretaries of other executive departments and of the military departments, the chairman of the Munitions Board, and the chairman of the Research and Development Board when appointed by the President by and with the advice of the Senate. The function of the Council is principally "to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security." It is also required to perform "such other functions" as the President may direct.

For the purpose of coordinating "the intelligence activities" of the Government in the interest of "national security," the act also establishes a Central Intelligence Agency under the direction of the National Security Council. The CIA is generally required to perform such functions and duties "related to intelligence affecting the national security" as the Council directs, and among the specific duties imposed upon it is—

> to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: Provided, That the Agency shall have no police, subpena, law-enforcement powers, or internal-security functions: Provided further, That the departments and other agencies of the Government shall continue to collect, evaluate, correlate, and disseminate departmental intelligence. . . .

To the extent recommended by the National Security Council and approved by the President, all such intelligence relating to the national security as may be acquired by other departments and agencies of the Federal Government is to be open to the inspection of the Director of Central Intelligence and made available to him for correlation, evaluation, and dissemination. It is provided, however, that upon the "written request" of the Director of the CIA, the Director of the FBI shall make available to him all such information "for correlation, evaluation, and dissemination as may be essential to the national security."

It is to be observed that in the provisions of this act we find the use of three related but diverse expressions, "security of the United States," the "national security," and the "internal security." These terms are not defined. It seems in context that the term "national security" is meant to embrace forces or activities both external and internal to the United States affecting the Nation's "security"; and that the term "internal security" is meant to distinguish those forces and activities affecting the "security" of the United States which operate within the United States, without regard to whether they may include or be affected by external forces. Nor does the statute expressly elucidate such activities or the nature and extent of investigations as are embraced within the expression "departmental intelligence."

We may of course infer from the provisions of this act that the CIA is established as the intelligence arm of the National Security Council. While presumably denied the power to conduct domestic intelligence investigations it is nevertheless charged with the responsibility to correlate, evaluate, and disseminate all intelligence acquired and possessed by the departments and agencies so far as it relates to the "national security." Curiously, although the exercise of "internal-security functions" is denied to the CIA, external functions are not prohibited to the FBI. But in view of the investigative schemata provided in other statutes, and the particularly condensed treatment of the functions prescribed for the CIA and FBI in the program laid down by the National Security Act, the respective roles of these agencies in the collection, correlation, evaluation, and dissemination of national security intelligence is not wholly made clear.

In the context of the act, and in view of the confinement of the CIA to "external" functions, it would appear that the CIA's point of focus is upon that aspect of "national security" intelligence more directly related to the perhaps narrower subsidiary concept of the "national defense." Its external intelligence activities would thus seem to converge more directly upon that which is relevant to the protection of the Nation and its system of government against *foreign* incursions or the threat of *foreign* incursions from whatsoever source they may come, whether from foreign states (*inter-state* conflict), foreign movements (*systemic* conflict, such as that posed by the "international communist and workers' movement"), or by the activities of individuals abroad, and whether or not such foreign states, movements, or activities have appendages or contacts with each other or within the United States. It is evidently expected that the FBI, among other agencies, and among other duties which it is required to perform in the "departmental intelligence" field, will focus upon the domestic manifestations of the threats and evils posed by foreign powers, movements, and activities, but that the primary responsibility for the correlation, evaluation, and dissemination of the results of the total "national security" intelligence effort, both foreign and domestic, is reposed in the CIA.

It may also be desirable to observe that, apart from the fact that the FBI is required to make such national security intelligence as it possesses available to the CIA on request, there is no positive duty imposed upon the FBI by this act, or upon other domestic agencies, for the collection of such information, otherwise than what may be inferred by way of a proviso to the specification of the functions of the

CIA, that the departments and agencies of the Government "shall continue to collect, evaluate, correlate, and disseminate departmental intelligence." This is no more than to say that they shall "continue" to do whatever they have been doing with respect to the acquisition of "departmental intelligence." Of course departments and agencies of the United States concerned mainly with domestic functions or investigations will necessarily acquire intelligence of value to the CIA in relation to that agency's intelligence duties and the protection of the "national security." Undoubtedly, moreover, such activities as espionage, sabotage, and subversion are frequently set in motion by, and related to, forces and activities external to the United States although conducted within it.

Immigration and Nationality Act of 1952

This act, of course, sets up a comprehensive program on the subject of immigration and naturalization. By its provisions the Attorney General is charged with the administration and enforcement of the act and all other laws relating to immigration and naturalization of aliens, with the exception of functions and duties conferred upon the President, the Secretary of State, and officers of the Department of State, although the determination and ruling by the Attorney General with respect to all questions of law are declared to be controlling. The Commissioner of Immigration and Naturalization, appointed by the President, by and with the advice and consent of the Senate, is charged with the responsibilities and authority conferred upon the Attorney General as may be delegated to him by the Attorney General.

The Secretary of State is charged with the administration and enforcement of the provisions of the chapter and all other immigration and nationality laws relating to the function of diplomatic and consular officers (except those relating to the granting or refusal of visas), the functions of the Bureau of Security and Consular Affairs, and the determination of nationality of a person not in the United States. The Bureau of Security and Consular Affairs is established in the Department of State, headed by an Administrator, appointed by the President by and with the advice and consent of the Senate. The Administrator is required to maintain close liaison with "the appropriate committees of Congress in order that they may be advised regarding the administration of this act by consular officers," and he is also granted authority and responsibility for such other duties in the administration of the Bureau as are conferred on the Secretary of State and as may be delegated to him by the Secretary. Within this Bureau are created a Passport Office and a Visa Office, each to be headed by a Director.

This act includes provisions which make aliens excludable from admission into the United States, makes aliens in the United States deportable, and prohibits the naturalization of persons of the following classes: anarchists; communists; those who advocate or teach the economic, international, and governmental doctrines of world communism, the establishment in the United States of a totalitarian dictatorship, opposition to all organized government, the overthrow by unconstitutional means of the Government of the United States, the propriety of the unlawful assaulting or killing of officers of the Government of the United States, the unlawful damage of property, and sabotage; and membership or affiliation with any organization

that so advocates or teaches, or in the Communist Party of the United States, or any other communist or totalitarian party of any State of the United States or of any foreign state. Moreover it is provided that membership in or affiliation with any such organization within 5 years following naturalization is considered "prima facie" evidence of lack of attachment to the Constitution of the United States and forms a basis for revocation of citizenship. (8 U.S.C. 1182, 1251, 1451.)

In the provisions of the act (8 U.S.C. 1105), a particular duty is imposed upon the Federal Bureau of Investigation in relation to the act's enforcement. The Commissioner of the Immigration and Naturalization Service, and the Administrator of the Bureau of Security and Consular Affairs, are authorized "to maintain direct and continuous liaison with the Directors of the Federal Bureau of Investigation and the Central Intelligence Agency and with other internal security officers of the Government for the purpose of obtaining and exchanging information for use in enforcing the provisions of this chapter in the interest of the internal security of the United States."

It must be clear that much of this information which is to be obtained and exchanged relates to the identification and activities of the above mentioned organizations, the membership therein of aliens either seeking admission to, or admitted to, the United States, and naturalized citizens who within 5 years become members of or affiliated with them. Also within the scope of the above noted provisions are individual activities of advocacy without regard to formal organizational affiliations or associations. The specified organizations and individual activities, both foreign and domestic, are of the types commonly described as subversive. Accordingly, the duties imposed upon the FBI and CIA for enforcement purposes are described as being in the interest of the "internal security." This is understandable in view of the fact that we are dealing here with persons seeking or maintaining domestic residence. It has already been suggested that the "national security" interest has both internal and external aspects. The interest then is with respect to the domestic aspects of the national security. Thus the Congress assumes that the two principal agencies obtaining and possessing such information or intelligence in relation to the enforcement of the Act are the FBI and the CIA.

In the instance of this act, as is equally true with respect to the National Security Act, there is a clear implication that the FBI is authorized generally to acquire—and there is no prohibition upon the acquisition of—relevant intelligence. However, unlike the National Security Act, this act makes more specific reference to subjects toward which the FBI's intelligence operations may be directed, namely, the individual and organizational activities above noted. But the liaison duties prescribed by the act do not appear to be of such character as to impose an unqualified duty upon either the FBI or the CIA with respect to the collection of information in contradistinction to what it should exchange. Nor do they relieve the FBI from the supervision and direction of the Attorney General, or the CIA from the supervision and direction of the National Security Council and President, in the determination of the scope of their respective intelligence operations for enforcement purposes. We must conclude, however, that the responsibilities imposed upon the FBI by this act would require, and establish a basis for, the conduct of broad ongoing domestic intel-

ligence operations, with respect to the specified organizations and individuals, commensurate with the purposes to be accomplished.

Omnibus Crime Control and Safe Streets Act of 1968

Our interest in this section springs from an authorization conferred upon the Federal Bureau of Investigation with respect to the interception of wire or oral communications. This act (sec. 2516) authorizes the Attorney General to apply to a Federal judge for an order "authorizing or approving the interception of oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of" certain specified offenses or violations of criminal statutes, or any conspiracy to commit any of the specified offenses.

The offenses specified include, inter alia, the principal crimes affecting the national or internal security. Among them are all offenses within chapter 115 of title 18, United States Code, relating to treason, rebellion or insurrection, seditious conspiracy, advocacy of overthrow of the Government (Smith Act), the registration of certain subversive organizations (Voorhis Act), activities affecting the Armed Forces, and recruiting for service against the United States; other title 18 offenses relating to espionage, sabotage, unlawful use of explosives, Presidential and congressional assassinations, kidnaping and assault, and riots. Not included are offenses embraced within the Subversive Activities Control Act of 1950, the Communist Control Act of 1954, or the Foreign Agents Registration Act of 1938.

This act makes no specific commitment or direction to the FBI to conduct domestic or other intelligence operations, nor does it impose any duty or authority upon it except to the extent authorized or directed by the Attorney General, and then only for the interception of wire or oral communications with respect to the investigation of designated offenses. Moreover, by the terms of the act, this authority is shared with other agencies having responsibility for the investigation of particular offenses. We have previously observed that statutory responsibilities for the investigation of certain offenses have been committed, although not exclusively, under other acts to agencies other than the FBI. This section thus also recognizes that responsibility for the investigation of some of the specified offenses may be committed to other agencies.

There are indeed some offenses under other statutes, as previously noted, with respect to which the FBI by name is specifically authorized to conduct investigations. But it is clear that, for the host of offenses specified in title 18, United States Code, and other titles, specific authority for the conduct of investigations is not committed to any particular agency. As to them, the Attorney General, in the exercise of the authority accorded him under the provisions of chapter 33 of title 28, United States Code, hereinbefore noted, may undoubtedly delegate a responsibility for their investigation to the FBI. It also seems clear that by virtue of this authority conferred upon him, the Attorney General may utilize the services of the FBI in connection with the investigation or enforcement of crimes, the responsibility for which is primarily committed to other agencies.

It is important to note that title III of the Omnibus Crime Control and Safe Streets Act authorizes the use of electronic surveillance or the interception of wire or oral communications when such interception may provide evidence of specified crimes. Such surveillance is subject to prior court order which can be obtained only in accordance with procedures specified in section 2518. This section authorizes the granting of an application for approving such interception only when the judge determines, inter alia, that "there is probable cause for belief that an individual is committing, has committed, or is about to commit" one of the particular offenses specified. The act prohibits all interception, or the use of any device for interception, of wire or oral communications except as specifically provided in the act, or, without regard to the limitations of the act, when in the exercise of the President's "constitutional power."

What this constitutional power of the President might authorize was the subject of a recent landmark case decided by the Supreme Court on June 19, 1972, *United States* v. *U.S. District Court*, 407 U.S. 297. The relevant proviso in the act [section 2511(3)] contained the following language:

> Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1103; 47 U.S.C. § 605) shall limit the constitutional power 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 contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.

The Court refused to recognize this proviso as an exception to the prohibitions of the act, but took the view that Congress did not legislate upon the subject and preferred to describe its impact on the President's electronic surveillance power as essentially neutral language.

In this case, the Government, without warrant or prior court order, had employed wiretaps "to gather intelligence information deemed necessary to protect the Nation from attempts of domestic organizations to attack and subvert the existing structure of the Government," and concededly did so primarily for the purpose of collecting and maintaining intelligence with respect to subversive forces and not as an attempt to gather evidence for specific criminal prosecutions. There was, moreover, no claim in this case that the organizations concerned had any significant connection with a foreign power, its agents, or agencies.

The Court held that this type of surveillance was subject to judicial warrant requirements of the fourth amendment, but made clear that it was not passing upon, and expressed no opinion, as to the effect of the proviso with respect to the Presidential authority, without prior court order, to conduct surveillance of the activities of foreign powers and their agents. It is the net result of this decision and the act that, in the conduct of domestic intelligence operations, neither the FBI nor other Federal agencies may now pursue their investigations by the interception of wire or oral communications without prior judicial approval. While holding that prior judicial approval is required for

this type of domestic security surveillance, the Court, however, pointed out that such approval may be made in accordance with such reasonable standards as the Congress may prescribe.

Nevertheless, the judicial construction of this act is of broader significance in assessing the investigative authority of the FBI. It is apparent that we are concerned not only with the question of a general authority for the conduct of investigations but also with its permissible scope and the special techniques that may be applied in its execution. We are reminded that both the conferral of authority, whether by statute or by delegation, and the manner of its exercise are subject to the limitations and protections afforded by the Bill of Rights. The authority, moreover, is circumscribed by the particular circumstances, the objective and purpose of the investigation, and the character of the governmental interest sought to be advanced. Previously in *Lewis* v. *United States*, 385 U.S. 206, 209 (1966), the Court emphasized that in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents, but admonished that the various protections of the Bill of Rights provide checks upon such official deception for the protection of the individual. In *United States* v. *U.S. District Court*, supra, which focuses upon the fourth amendment protection of individuals, the Court recognized that domestic security surveillance may involve different policy and practical considerations from that involved in the surveillance of ordinary crime, and held that the same type of standards and procedures, such as prescribed by title III of the Omnibus Crime Control and Safe Streets Act of 1968, were not necessarily applicable. Indeed, in pointing out that different standards may be compatible with the Bill of Rights as between criminal surveillance and that which is involved in domestic security surveillance, it also suggested that it might apply different standards as between domestic security surveillances which involve foreign powers or their agents and those which do not.

Subsequently in *Laird* v. *Tatum*, 408 U.S. 1 (1972), the Court focused upon first amendment rights. The plaintiff claimed that the Army's surveillance activities of a police type were enjoinable. It appeared that the Army was involved in the gathering by lawful means of intelligence or information with respect to potential or actual civil disturbances or street demonstrations in the execution of its duties to quell insurrection and other domestic violence pursuant to the authority granted the President by 10 U.S.C. 331. The complainant alleged that his first amendment rights were being chilled by the mere existence, without more, of a governmental investigative and data gathering activity that was alleged to be broader in scope than reasonably necessary for the accomplishment of a valid governmental purpose. It was a fact in the case, as the Court observed, that there was no "clandestine intrusion" by a military agent, and that so far as was shown the information gathered was nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand. While the Court held that the complainant had not stated a justiciable controversy since the record had shown no actual present or immediately threatened injury to him resulting from unlawful Government action, the dicta in the case indicated that where an investigation not appropriate to the mission or purpose

of the agency is undertaken for the purpose of withholding a right or benefit from him, or where he is presently or prospectively subject to the regulatory, proscriptive, or compulsory effect of the challenged exercise of governmental power, the activity might be enjoined.

In *Anderson* v. *Sills*, 56 N.J. 210 (1970), a suit to enjoin the statewide operation of a civil disorder intelligence system of the New Jersey State Police, it was held that the State court had jurisdiction to determine whether the scope of the challenged State intelligence system was overly broad in view of both the legitimate State interest in collecting information, or planning for and preventing civil disorders, and the possible burden on the exercise of the first amendment freedoms involved. In its remand order the Court admonished that "if it should be found that the police are gathering information which they could not reasonably believe to be relevant to the police function," the injunctive order must be precisely limited to the offending material or practice, but must not otherwise interfere with police activity that is proper.

Apart from their communication to us of such general principles, and holding us to a standard of "reasonableness," the courts have not wholly elucidated the extent and character of investigations authorized by the concept of national security. In this setting neither the meaning of this term nor the related term "subversive acts," repeatedly embodied in the foregoing statutes and noted in the decisions of the courts, has been more precisely defined. While recognizing "the inherent vagueness of the domestic security concept," Mr. Justice Powell, writing for the majority in *United States* v. *U.S. District Court*, was content to observe—

> Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillance to oversee political dissent.

Although one may have hoped that he would have done more toward elucidating the concept, as well as being more precise in his use of the term "political dissent," which is now frequently applied as a euphemism for subversive activities, we must recognize that any such expanded analysis of the meaning of the terms was not necessary to the decision in that case.

What the decision made clear, however, was that the Court did not "rest," as it said, on the language of the proviso of the Omnibus Crime Control and Safe Streets Act, hereinbefore quoted in full, or any other provision of that act, as descriptive of the term "national security." It said that the act did not attempt to define or delineate the powers of the President to meet domestic threats to the national security. A fortiori, the Court did not approve any construction of the proviso which would limit the concept of national security, or the constitutional powers to be exercised in its interest, to instances or circumstances of "clear and present danger to the structure or existence of the Government." It is obvious that if any such limitation or restraint were to be imposed upon this intelligence-gathering function, it would have the effect not only of unduly circumscribing, but possibly totally prohibiting, its exercise, and might well be as fatal to the execution of the Federal interest as was the restraint upon the prosecution of obscenity under the standard of "utterly without

redeeming social value," now lately and necessarily rejected this June 21, 1973, in *Miller* v. *California*.

In *Cole* v. *Richardson*, 405 U.S. 676 (1972), the Court, although in a different context, has warned us of the dangers inherent in the indulgence of "verbal calisthenics," suggesting that any word or phrase may be rendered vague or ambiguous "by dissection with a semantic scalpel." In any event, some light is thrown upon the concept of national security in the decided cases. Earlier in *Cole* v. *Young*, 351 U.S. 536 (1956), as hereinbefore noted, the Court had before it the question of the meaning of the term "national security" as used in the act of August 26, 1950 (5 U.S.C. 7531–7533), an act which gave to the heads of certain departments and agencies of the Government summary suspension and unreviewable dismissal powers over their civilian employees when deemed necessary "in the interest of the national security of the United States." It was there held that while the term was not defined in the act, it was thought clear from the statute as a whole that the "term was intended to comprehend only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare." Yet, while thus defining the term "national security" in the context of that act, its subsidiary concept of "internal subversion" was not defined.

In this respect one may well say, as was said in the report of the Royal (Canadian) Commission on Security (1969):

> We have been unable to trace in any legal or other references or to devise ourselves any satisfactory simple definition of "subversion". Perhaps the most that can usefully be said is that subversive organizations or individuals usually constitute a threat to the fundamental nature of the state or the stability of society in its broadest sense, and make use of means which the majority would regard as undemocratic. At this stage we can do no more than state that we have in our inquiring borne in mind the whole range of such activities and the application of security procedures to them.

The difficulty in formulating any such "simple definition" is, I think, made clear in other passages of the Canadian Commission's report:

> The area of subversion involves some even more subtle issues, and the range of activities that may in some circumstances constitute subversion seems to us to be very wide indeed: overt pressures, clandestine influence, the calculated creation of fear, doubt, and despondency, physical sabotage or even assassination—all such activities can be considered subversive in certain circumstances. Subversive activities need not be instigated by foreign governments or ideological organizations; they need not necessarily be conspiratorial or violent; they are not always illegal. Again fine lines must be drawn. Overt lobbying or propaganda campaigns aimed at effecting constitutional or other changes are part of the democratic process. They can, however, be subversive if their avowed objectives and apparent methods are cloaks for undemocratic intentions and activities. Political or economic pressures from domestic or foreign sources may be subversive, particularly when they have secret or concealed facets, or when they include attempts to influence Government policies by the recruitment or alienation of those within the Government service or by the infiltration of supporters into the service.

On the other hand, the proviso contained in the Omnibus Crime Control Act, above quoted, did not expressly use the term "internal subversion" in making reference to the President's constitutional powers which, as the Court held, were not covered by that act. The proviso's first sentence referred only to the constitutional power of the President to take such measures as he deems necessary (a) to protect

the Nation against (1) actual or potential attack or other "hostile acts" of a foreign power, (2) to obtain foreign intelligence information deemed essential to the "security of the United States," and (3) to protect "national security information" against foreign intelligence activities. Thus in the first sentence of the proviso, the President's authority is conceived as directed exclusively against activities of foreign origin. Then in the second sentence of the proviso which follows, a separate category of activities is specified in relation to the constitutional powers of the President. He is also authorized to take such measures as he deems necessary (b) to protect the "United States" against the overthrow of the Government "by force or other unlawful means," or (c) against "*any other* clear and present danger" to the structure or existence of the Government. [Emphasis supplied.] This category is obviously not confined solely to activities of foreign origin.

Implicit in this language of the act's proviso are the concepts that the "measures" which the President may take are limited, first, to the specified activities of foreign powers or their agents; and second, irrespective of foreign involvement, (A) to illegal acts of overthrowing the Government, *and* (B) only when such or other activity present a "clear and present danger" to the "structure" or "existence" of the Government. The "measures" which may be taken are not delineated. Presumably they may include, inter alia, the use of the militia, the regular Armed Forces, and the imposition of martial law. They may also include a measure with which we are here directly concerned: the conduct of ongoing intelligence operations.

It must be obvious, however, that if the second sentence of the proviso is construed as expressing a limitation upon the investigative powers of the President to initiate investigations only when the activity presents a "clear and present danger" to the structure or existence of the Government, this is neither practical nor is it a construction compelled by the Constitution. The fact of "clear and present danger" may justify differing *techniques* of investigation, but surely it cannot sensibly be held to bar all intelligence operations.

The exercise of the investigative power is not conditioned upon the existence of a clear and present danger. It was so held in *United States* v. *Barsky*, 167 F. 2d 241 (1948), certiorari denied, 344 U.S. 846, rehearing denied, 339 U.S. 971, with respect to the analogous congressional power of investigation. "In our view," said Judge Prettyman, speaking for the court, "it would be sheer folly as a matter of governmental policy for an existing government to refrain from inquiry into potential threats to its existence or security until danger was clear and present." "How," asked Judge Prettyman, "except upon inquiry, would the Congress know whether the danger is clear and present? There is a vast difference between the necessities for inquiry and the necessities for action."

The propriety of the standard of "clear and present danger" has even been questioned in its application to the actual prosecution of crime. Thus it must be said, even more cogently in its present application, as was said by Mr. Justice Jackson in *Dennis* v. *United States*,[9] with respect to its application to the prosecution of communists for conspiracy to violate the Smith Act, that—

[9] 341 U.S. 494, 570 (1951), concurring opinion.

> The authors of the clear and present danger test never applied it to a case like this, nor would I. If applied as it is proposed here, it means that the Communist plotting is protected during its period of incubation; its preliminary stages of organization and preparation are immune from the law; the Government can move only after imminent action is manifest, when it would, of course, be too late.

Similarly, Mr. Chief Justice Vinson, in announcing the judgment for the Court, in this case, said:

> Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.[10]

Again, as the Canadian commission explained, "security procedures are not necessarily related to the detection and prosecution of illegality, where precise legal definitions would be of central importance, but are mainly concerned with the collection of information and intelligence, with the prevention and detection of leakages of information and with protection against attempts at subversion." Hence, in *Laird* v. *Tatum*, supra, the Court rejected the effort by private parties armed, as it said, with the subpena power of a Federal district court and the power of cross-examination, to probe into the Army's intelligence-gathering activities, with the district court determining at the conclusion of that investigation, the extent to which those activities may or may not be appropriate to the Army's mission. It declared that absent actual present or immediately threatened injury resulting from unlawful governmental action, it was not the role of the judiciary to monitor the wisdom and soundness of executive action. This role, it said, is appropriate for the Congress acting through its committees and the "power of the purse."

The necessarily broad and continuing nature of intelligence gathering was fully recognized by the Court in *United States* v. *U.S. District Court*, supra. It observed that the emphasis of domestic intelligence gathering is on the "prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency." It was also recognized in *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 55f (1961), that in meeting threats to the national security, both the Congress and the President have broad powers, and it was there expressly held that the compulsion of the first amendment must not be read as reaching only those activities whose ultimate purpose of overthrowing existing government is expressed in illegal action or the incitement to illegal action. Speaking for the Court, Mr. Justice Frankfurter said:

> We think that an organization may be found to operate to advance objectives so defined although it does not incite the present use of force. Nor does the First Amendment compel any other construction. The Subversive Activities Control Act is a regulatory, not a prohibitory statute. It does not make unlawful pursuit of the objectives which § 2 defines. In this context, the Party misapplies *Yates* v. *United States*, 354 U.S. 298, and *Dennis* v. *United States*, 341 U.S. 494, on which it relies. See *Barenblatt* v. *United States*, 360 U.S. 109; *Uphaus* v. *Wyman*, 360 U.S. 72; *American Communications Assn.* v. *Douds*, 339 U.S. 382.

V. INVESTIGATIVE AUTHORITY DELEGABLE TO THE FBI

In the foregoing we have dealt with the authority or power which has been directly and specifically delegated to the FBI by the Congress.

[10] Ibid., at 509.

This authority, it may be concluded, is relatively limited in extent. On the other hand, the authority, powers, and duties which may be delegated to and imposed upon the FBI by directives and orders of the Attorney General and the President are of great extent. They are, and continue to be, the possible source of a plenary authority for the conduct of domestic intelligence investigations in relation to subversive activities. This authority of delegation finds its source as well as its limitations both in the Constitution and in statutory enactments. Taken together, the constitutional and statutory base is indeed vast and comprehensive. From these sources of authority, as we shall see, the President and Attorney General are accorded adequate powers to direct the FBI to acquire the necessary intelligence and, to that end, to conduct appropriate investigations, subject only to the restraints of the Bill of Rights within a system for the separation of powers.

In sorting out the investigative powers and duties that may thus be delegated to the FBI, it is relevant to distinguish those which are delegable to it by the Attorney General and those which are delegable to it directly or indirectly by the President. As the head of a department in the executive branch, the Attorney General's powers are essentially those which may be delegated to him either by the President or by acts of Congress. On the other hand, the total executive power is vested in the President by the Constitution and in such capacity he additionally possesses, above and beyond such powers as the Congress may also delegate to him, those powers which the courts have held "inhere" in him or are "implicit" by virtue of the nature and duties of his office. We thus have in relation to the Presidential power of delegation a concept of inherent constitutional powers not possessed by the Attorney General, except to the extent that they may in turn be delegated to him by the President.

If there was any question as to the President's constitutional power to delegate a duty or discretion to the heads of departments and agencies, such doubt has been largely laid to rest by the act of October 31, 1951 (3 U.S.C. 301–303). By the provisions of this act the President is authorized to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform any function (defined as to include any discretionary power as well) which is vested in the President by law, if such law does not affirmatively prohibit delegation of the performance of such function or specifically designated the officer or officers to whom it may be delegated. On the issue of the chain of command and chain of authority, it is clear that by virtue of this act the President may, in general, delegate such function to the Attorney General or directly to the Director of the FBI.

The bases for the respective authority of the President, the Attorney General, and indeed of other agencies and persons, in the conduct of intelligence operations on the subject of subversion has not always been clearly defined and in some respects overlaps. For purpose of analysis, and indeed for the purpose of determining in specific instances the propriety of the investigation and its allowable extent, it is necessary to apprehend the underlying authority for the conduct of the particular investigation, both with respect to the source and purposes of the authority conferred.

As previously indicated, there is both a constitutional and a statutory base for the President's authority to obtain intelligence for the protection of the Government itself against unlawful conduct or the potential for unlawful conduct and, more generally, for the protection of the Government against those who would subvert or overthrow it. Under the Constitution the President possesses an inherent authority independent of statute as well as a general power to see to the execution of statutes whose enforcement is committed to the executive branch. On the other hand, the bases for particular departmental or agency action, apart from that which may be delegated to it by the President, must rest directly upon statutory grant.

The inherent constitutional authority of the President to conduct both domestic and foreign surveillance to safeguard the national security was, as previously noted, asserted and upheld in *United States* v. *U.S. District Court*, supra. It was there said that the President has the fundamental duty under article II, section 1, clause 7, of the Constitution, to "preserve, protect, and defend the Constitution of the United States." "Implicit in that duty," said the Court, "is the power to protect our Government against those who would subvert or overthrow it by unlawful means." It is, however, important to observe that the Court did not say that the President's constitutional powers of investigation or surveillance flow only from that portion of the cited clause of the Constitution or were limited to national security purposes only. It said that that portion of the constitutional oath, which it cited, as noted above, placed the President under a *duty* to protect our Government against those who would overthrow or subvert it by unlawful means, and that implicit in this duty was a *power* to conduct domestic surveillance for that purpose.

Certainly, if powers of surveillance may be inferred from that portion of clause 7 of the oath, then, a fortiori, some power of surveillance or investigation might well be implicit in the preceding portion of the oath, "I will faithfully execute the office of President of the United States * * *." Implicit in this provision of the oath is the duty, and hence the power, to conduct such domestic intelligence or surveillance operations, both for "national welfare" and subsumed "national security" purposes, as are necessary to fulfill those responsibilities which, in their totality, have been vested in the President by that provision of the Constitution—article II, section 1, clause 1—by which the whole of the "executive power" has been committed to him. These duties and powers thus flow from, and are to be measured by, other related provisions of the Constitution and by reference to that which is said, as well as that which is left unsaid, in the overall constitutional scheme. Specific provisions constitute the President as Commander-in-Chief of the Army and Navy. Powers commensurate with that position may be inferred toward providing for the common defense, or in the employment of the militia in the service of the United States, as in case of insurrection or rebellion, although there are responsibilities in this area which the President shares with the Congress. In the general constitutional scheme, the President has also certain duties regarding the Nation's external relations, both in time of peace and in time of war, specifically in the exercise of his treaty-making powers, the appointment of ambassadors, public ministers, and consuls, and beyond that in the appointment of Federal officers and employees. On

the other hand, the President's duties as the Nation's "sole organ" and "its sole representative" in relations with foreign powers, an historic function frequently reiterated, most lately in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972), is more broadly derived from the constitutional scheme for the separation of powers.

Perhaps even more pointedly, the provisions of Article II, section 3, require the President "from time to time to give to the Congress information on the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient * * *." Congressional power of investigation is indeed largely justified on the basis and for purposes similar to that expressed in this section. See *McGrain* v. *Daugherty*, 273 U.S. 135 (1927) and *Barenblatt* v. *United States*, 360 U.S. 109 (1959). The conduct of such investigations are more generally related to national welfare or national interest concepts as well as to the more specific national security concept, a concept indeed which, as indicated, may also be regarded as subsumed within those broader concepts. Moreover, security surveillances within the national security (or possibly "State" security) concept may surely be justified as a power implicit within the requirements of article IV, section 4, requiring that "[t]he United States shall guarantee to every State in the Union a republican form of Government, and shall protect each of them against invasion; and on application of the Legislature, or of the Executive, (when the Legislature cannot be convened) against domestic violence." Certainly in the execution of his duties—those thus expressed, implied, or which may be inferred—both foreign and domestic investigations of broad scope must necessarily be conducted to acquire the broad range of information necessary to fulfill the President's responsibilities.

There is, however, an additional basis for "national security" surveillances or investigations distinguishable in kind or degree from that which rests solely on the President's inherent or implicit constitutional power. It derives from explicit statutory duties committed to the President, the Attorney General, and other agencies and officials as well. These statutes are of varying types. Some are "preventive" or regulatory in nature, with or without specified penal sanctions, and others are of a conventional penal type. It is not my purpose to detail these various statutory enactments, but to elucidate a point of distinction that may be made in recognition of the fact that they confer an authorization within their more limited scope and specified purpose, and that different standards, procedures, and techniques of investigation may be applicable or permissible with respect to each.

Illustrative of statutes of the first or regulatory category, conferring a broad investigative authority and surveillance, are the Magnuson Act of 1950 (50 U.S.C. 191), which authorizes the President, when he "finds that the security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activities," to institute measures "to safeguard against destruction, loss, or injury against sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States"; the National Security Act of 1947, which, as previously noted, confers broad authority and duties upon the President, the National Security Council, the Central Intelligence Agency, and the FBI, and other departments and agencies in relation to the collection and dissemination of "national security" intelligence;

the Immigration and Nationality Act of 1952, which confers upon the Attorney General and other officers certain duties with respect to the enforcement of its provisions, particularly the internal or national security aspects of this Act; and various statutes authorizing or requiring the conduct of investigations in aid of the execution of loyalty and security programs for determing access on "national security grounds" to classified information, or eligibility for Federal employment. Statutes of a mixed or intermediate category embrace the Foreign Agents Registration Act of 1938, the Voorhis Act (18 U.S.C. 2386), the Internal Security Act of 1950, and the Act of August 1, 1956 (50 U.S.C. 851 requiring the registration of persons trained in espionage and sabotage tactics). Typical penal statutes involving "national security" offenses include the Smith Act of 1940 (18 U.S.C. 2385), and those relating to the crimes of espionage, sabotage, sedition, insurrection, and treason, particularly offenses specified within chapters 37, 105, and 115 of title 18, U.S. Code.

It may also be fruitful for purposes of analysis to advert to a category of penal statutes not in their terms directed more explicitly toward coping with subversion or protecting the "national security," but the enforcement of which may involve subversive organizational activities of a continuing or repetitive nature, and thus necessarily enlarge the scope of relevant investigations. Such activities frequently include rioting, looting, bombing, murder, arson, traffic violations, and similar offenses, both of Federal and State jurisdictional interest. Activities of this type may well be illustrated by reference to *Laird* v. *Tatum*, supra, in which the plaintiffs sought declaratory and injunctive relief on the claim that their rights were being invaded by the Army's alleged "surveillance of lawful civilian political activity," an activity which was described by the Army in response as "gathering by lawful means, * * * [and] maintaining and using for intelligence activities, * * * information relating to potential or actual civilian disturbances [or] street demonstrations." The Army maintained in this case that its surveillance was justified in light of the constitutional and statutory authority to suppress insurrection (10 U.S.C. 331–333).

Violations of Federal offenses, such as those relating to riots (18 U.S.C. 2101), conspiracy (18 U.S.C. 371), civil rights (chapter 13 of title 18, U.S. Code), and explosives (chapter 39 of title 18), are increasingly of subversive involvement or origin. Unlike violations committed by individuals as an occasional and exceptional act, those committed for example by Marxist-Leninist and revolutionary socialists, or other extremist groups, are of a continuing or frequently recurring nature. They do not spring from conventional motivations but, as in the case of Klan-type and some black extremist groups, have racial motivations, and, as to anarchist, revolutionary socialist, and communist groups, are largely in support of doctrinal techniques of "propaganda by deed" or for the general purpose of wrecking our social, economic, and political institutions, with a view toward ultimately supplanting them with a socialist system. Broader investigations for penal enforcement purposes with respect to such organizational activities, as well as for the purpose of preventing potential civil disturbances, are thus necessary and justified. Hence, the statutory base underlying their authorization may be viewed in a more expansive light.

In the effectuation of both the President's relevant inherent constitutional duties and the enforcement of the regulatory and penal acts of Congress, the Attorney General shares a responsibility both by virtue of the delegation to him by the President and by statutory delegation from the Congress. In turn, and by virtue of this authority, the Attorney General has delegated responsibilities to the FBI. By the terms of four Presidential directives or orders, more fully discussed in the section following, the Attorney General has been required to commit the investigation of "espionage, sabotage, subversive activities, and related matters" to the FBI. This duty the Attorney General has fulfilled by regulation in which he has directed the FBI, subject to his general supervision, "to carry out" the specified Presidential directives. This he has done without further elucidation than designating the FBI "to take charge of investigative work in matters relating to espionage, sabotage, subversive activities, and related matters." As we shall see, the Attorney General has thus done no more than to quote the language of the directives he received from the President. Neither the scope nor extent and character of the investigations are specified in the regulation.

This regulation, published in 28 CFR 0.85,[11] likewise directs the FBI, subject to the general supervision of the Attorney General, to "[i]nvestigate violations of the laws of the United States and collect evidence in cases in which such responsibility is by statute or otherwise not specifically assigned to another investigative agency." That agency is also required to conduct "personnel investigations requisite to the work of the Department of Justice and whenever required by statute or otherwise." Thus in general terms the Attorney General has delegated to the FBI responsibility for the investigation of subversion, violations of all Federal laws other than those committed or assigned specifically to another investigative agency, and personnel investigations pertinent to the aforementioned loyalty and security programs.

As indicated, this authority of delegation rests on a network of constitutional and statutory authority. The authority to investigate subversive activities generally, is derived from the President's constitutional powers. It is also supported in large degree, and for some purposes, by the pertinent regulatory and penal statutes which were hereinbefore cited in reference to the President's executive authority. The Attorney General's power of delegation to the FBI may rest directly upon the authority of section 533 of chapter 33, title 28, United States Code, hereinbefore noted, which authorizes the Attorney General to appoint officials "to detect and prosecute crimes against the United States," and "to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General." Moreover, by the provisions of 28 U.S.C. 509, all functions of agencies and employees of the Department of Justice are vested in the Attorney General (with certain exceptions not here relevant), and by the provisions of 28 U.S.C. 510 the Attorney General is accorded a general power of delegation to authorize "the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." By the pro-

[11] See app. B, pp. 56–57.

visions of 5 U.S.C. 301, the head of any executive department "may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property."

Hence, the authority of the Attorney General to delegate to the FBI those investigative matters which he has delegated in the attached and above referred-to regulation is complete. However, what possibly remains incomplete, and an appropriate subject for inquiry by this committee, is the question of the specification of standards for the conduct of such investigations, the dissemination of intelligence, and the coordination of this function with respect to other agencies. Only then may we assess the performance of the Attorney General and the FBI as to the adequacy and efficiency of their efforts to meet the dangers which subversion poses to the national or internal security.

VI. PRESIDENTIAL DIRECTIVES AND ORDERS

The Attorney General's regulations (28 CFR 0.85),[12] to which reference was made in the preceding section, direct the FBI "to take charge" of investigative work in matters relating to espionage, sabotage, subversive activities, and related matters. In this regulation [paragraph (d)], the Attorney General, without further elucidation, wholly delegates to the FBI all duties and responsibilities encompassed in four Presidential directives or orders, three of which were issued by President Roosevelt, and one by President Truman. They are attached hereto, dated respectively June 26, 1939; September 6, 1939; January 8, 1943; and July 24, 1950.[13] These directives, and hence the delegation, have all of the vices and virtues of brevity. The underlying authority, purposes, and the extent or focus of the investigative authority conferred by them, are not made explicit. Taken individually, it is not possible, without more, to ascertain precisely what meaning they convey either to the Attorney General or to the FBI, and we cannot fully determine what action they were then or now to take pursuant thereto.[14] All of them were obviously issued during times of great peril either immediately preceding or during periods of war. One may broadly infer on their face that they were issued for "national security" purposes, but the effect of the directives can only be fully assessed in relation to the history of the times, the circumstances of their issuance, and their practical application. In light of this background and in light of subsequent developments, both in relation to congressional enactments and national policy, it would seem that they are possibly outdated or require updating or expansion.

The first directive of June 26, 1939, appears to be a directive to the Attorney General. It was issued at a point in history following the appointment of the McCormack-Dickstein Committee To Investigate Nazi and Other Subversive Propaganda Activities (1934–35), and the appointment of the Dies Committee To Investigate Un-American Propaganda Activities. The latter was created as a special committee in May of 1938, and its mandate was extended in each Congress thereafter until the creation of the Committee on Un-American Activities

[12] See app. B, pp. 56–57.
[13] See app. C, pp. 58–59.
[14] Some light is shed on their origin and application in Don Whitehead's book, *The FBI Story*, Random House, New York, 1956. See particularly chapters 18 and 19.

as a standing committee in 1945. The directive shortly preceded the Nazi invasion of Poland on September 1, 1939, and the enactment of section 9A of the Hatch Act of August 2, 1939, by which the Congress made unlawful the employment of any person in any capacity in any agency of the Federal Government having "membership in any political party or organization which advocates the overthrow of our constitutional form of Government in the United States," and required that any person violating that prohibition should be immediately removed from the position or office held by him.

Taking this first directive on its face, it does not appear to do anything more than to make an administrative determination for centralizing the investigation "of all espionage, counterespionage, and sabotage matters" in three named agencies: (1) the Federal Bureau of Investigation of the Department of Justice; (2) the Military Intelligence Division of the War Department; and (3) the Office of Naval Intelligence of the Navy Department, and designated the Directors of these three agencies to function as a committee to coordinate their activities. There is nothing in the directive specifically referring to subversive activities.

The second directive of September 6, 1939, apparently making reference to the preceding directive of June 26, 1939, seems only to reiterate the prior directive to the FBI, but added to its "investigative work" violations of the "neutrality regulations." In declaring that the FBI had previously been instructed "to take charge of" investigative matters relating to "espionage and sabotage," without particular reference to counterespionage, it appears to reflect careless drafting and creates some confusion as to whether this is in limitation of the previous directive to the War and Navy Departments, which vested in them, together with the FBI, "all espionage, counterespionage, and sabotage matters." This order, however, issued 5 days following the Nazi invasion of Poland, appears to have been issued for the more limited purpose of exhorting the agencies to perform the task thus imposed in a "comprehensive and effective manner on a national basis." No direction is given as to subversive activities, except perhaps to the extent we may infer in their limited relation to domestic efforts at espionage, sabotage, and violations of the neutrality regulations. No doubt the latter specification of "neutrality regulations" was inspired by the impulsions within the Nation of certain groups and individuals, for various reasons, to aid one or more of the contending powers in the conflict then in progress. There is, however, one other difference in this order of September 6, 1939. It initiated the concept of cooperative action between Federal and State law enforcement officers in these matters of national concern and responsibility.

The third directive issued by President Roosevelt on January 8, 1943, following the declaration of war against the Nazi and Fascist powers, and titled "Police Cooperation," makes reference to the preceding directive of September 6, 1939. It is obviously only for the purpose of reiterating and emphasizing the need for cooperative action by all "enforcement officers," presumably referring to State officers, in channeling "information" promptly to the FBI, but extended this invitation to "patriotic organizations and individuals." In this directive there is thus no expansion of any investigative authority that may have been conferred by the prior orders. Likewise it makes no specification relating to subversive activities. What "information"

on the subjects of espionage, sabotage, and violations of the neutrality regulations, and "related matters," were intended to be embraced was not made clear, but we do know, as congressional investigations revealed, that during this period both communist and fascist agitators within the United States were highly organized and active. It may be thought that the directive was meant to point toward subversive organizational, as well as individual, activities.

It was in the fourth directive, issued June 24, 1950, by President Truman, titled "Information Relating to Domestic Espionage, Sabotage, Subversive Activities and Related Matters," that reference was now explicitly made in any of the aforesaid Presidential directives to the broader subject of "subversive activities." Referring specifically to the prior Roosevelt orders of September 6, 1939, and January 8, 1943, the 1950 directive of President Truman incorrectly refers to those prior directives as ordering the FBI to "take charge" of investigative work relating to subversive activities and related matters. That expression was not used by President Roosevelt in any of his directives. Moreover, both in this directive, and the preceding Roosevelt directives of September 6, 1939, and January 8, 1943, no mention was made of the intelligence divisions of the War and Navy Departments which were among the agencies he had directed should "control" and "handle" all "espionage, counterespionage, and sabotage matters."

President Truman's directive of June 24, 1950, we must recall, was issued at the height of the cold war. On June 25, 1950, communist forces had invaded South Korea, and on June 27, 1950, President Truman had directed General MacArthur to aid South Korea. Shortly following, Congress on August 9, 1950, enacted the Magnuson Act (50 U.S.C. 191), hereinbefore noted, and thereafter, on September 23, 1950, the Internal Security Act. Similarly, in this emergency situation President Truman, as did President Roosevelt previously, sought by his directive to enlist the assistance of Federal and State enforcement officers, and patriotic organizations and individuals, to report "all such information relating to espionage, sabotage, and subversive activities" to the FBI.

It is thus apparent that in the Truman order of July 24, 1950, we move from the more narrowly expressed concepts of "espionage, sabotage, and violations of neutrality laws," to the broader expression of "subversive activities and related matters." What investigations were contemplated or committed to the FBI is not entirely clear. Indeed, the directive itself required only that the FBI "take charge of investigative work" in this area, but in no further degree made this work imperative or provided guidelines for the extent and manner in which this work was to be performed, nor did it prescribe principles for the dissemination of this information or its use. Some light, however, may be thrown upon the issue, although perhaps indirectly, by reference to an event which occurred in 1947, of the utmost significance in the history of the investigation of subversion and its underlying bases. This was President Truman's promulgation, on March 21, 1947, of Executive Order 9835, "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government."

It is not necessary to relate the history and development of Executive Order 9835. That has been fully and recently explored in the

Preyer report, a report of a subcommittee of this committee on the Federal civilian employee loyalty-security program with which we are familiar. (H. Rept. 92–1637) This order, however, requiring a "loyalty investigation" of every person entering civilian employment in the executive branch of the Federal Government, and promulgated prior to President Truman's directive of July 24, 1950, conferred particular roles upon the FBI and the Attorney General. As the President declared in the preamble to the order, it was issued pursuant to the authority vested in him by the Constitution and statutes of the United States. Specific reference was made to the Civil Service Act of 1883, section 9A of the Hatch Act, and to his capacity as Chief Executive. His action was declared to be "in the interest of the internal management of the Government." While requiring that the employing departments and agencies conduct appropriate investigations in execution of the program, those departments or agencies which did not have an "investigative organization" were directed to utilize the investigative facilities of the Civil Service Commission. Only one role was specifically assigned to the FBI. It was in relation to the requirement of the order that the investigation to be made of all applicants shall include reference to "the files" of the FBI, as well as files of other specified agencies, including the Civil Service Commission and those of military, naval, and "other appropriate" Government investigative or intelligence agencies. Nevertheless, the Department of Justice was required to furnish the Loyalty Review Board, for dissemination to the departments and agencies, "the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of Government of the United States by unconstitutional means."

What relation E.O. 9835 of 1947 bears, either to the prior directives of President Roosevelt above referred to, or the subsequent July 24, 1950, directive of President Truman, is not clear. It seems obvious, however, that the directive of 1950 was not issued for the limited purpose of "internal management of the Government," as was the declared purpose of E.O. 9835, although by the latter we have some elucidation, if not of the whole range of what was embraced within the expression "subversive activities and related matters," then, at least, of specified categories of some organizations which were obviously thought to be embraced within the concept of "subversive."

E.O. 9835 was revoked by President Eisenhower in April of 1953 on the promulgation of E.O. 10450. This new order, while ostensibly having similar objectives to that which it replaced, and reciting essentially the same constitutional and statutory authority, declared its promulgation to be "necessary in the best interest of the national security." In likewise requiring the appointment of each civilian officer or employee of the Government to be made subject to investigation, it too specifically required that a check be made of the files of the FBI, but imposed responsibility for the conduct of investigations on the Civil Service Commission as to persons entering the competitive service, and as to others as well. However, employing

departments and agencies having investigative facilities of their own were authorized to conduct investigations of those entering the excepted service. The FBI was required to conduct investigations only when those conducted by other agencies developed information indicating that the individual was ineligible on the specified loyalty-security grounds, including that of association with subversive organizations of the types similar to and as previously specified in E.O. 9835.

In this order, however, no specific duty was imposed upon the Attorney General to supply the names of subversive organizations, but he was requested to render "such advice as may be requisite" to enable the departments and agencies to maintain the program. Subsequently on July 2, 1971, President Nixon amended E.O. 10450. By the amending order, E.O. 11605, he revived the prior Truman requirement that the Attorney General "shall" furnish the head of each department and agency with the "names" of the designated organizations, but required the Subversive Activities Control Board to make that designation. (See H. Rept. 92–1056, "Additional Function for Subversive Activities Control Board.") In February of this year by reason of the failure of the President to request appropriations for the Board, and by reason of a limitation imposed upon the appropriations to the Department of Justice in the preceding Congress prohibiting their application for this use, this activity of the Attorney General has since been undercut.

Other programs, likewise established by Executive order, and utilizing the system of designations of subversive organizations by the Attorney General, have been similarly affected, including that administered under E.O. 10173 (Oct. 20, 1950), for the security of vessels and waterfront facilities, which had been issued pursuant to the Magnuson act, and E.O. 10865 (Feb. 20, 1960) for the safeguarding of classified information within industry.

Thus as of this date the range of duties imposed upon the Attorney General, at least in relation to the investigation and designation of subversive organizations for the purposes of Federal employment, have doubtlessly been diminished, if they have not totally ceased. We may expect no further designations unless the order is amended or policies changed. To date, so far as we are aware, there has been no rectification of the order or remedial action with respect to it. There is no indication that the executive branch has formulated or adopted any precise policy. Recently in the May 19, 1973, hearings before this committee on H.R. 6241, the Constitutional Oath Support Act, the Deputy Assistant Attorney General, Criminal Division, Department of Justice, expressed doubt as to the desirability of continuing this system of designation, and has left us with the impression that the Department's position on the subject is both ambiguous, uncertain, and undefined.

At the same time, the President's action in February of this year in failing to request appropriations for the Subversive Activities Control Board closed the door to one of the public's principal sources of information with respect to the nature of the threat posed to the national security by some major subversive forces in the world communist movement. While the investigations conducted in support of the Federal civilian employee and industrial security programs were largely only for internal governmental management and thus not exposed to the public view, on the other hand the execution of the

program under the Subversive Activities Control Act of 1950 was intended for the information of the public, and this was the purpose of the investigations conducted in the enforcement of that act of Congress. This, however, is not a point of emphasis either for the conduct of investigations or the dissemination and control of information in other security programs. We are thus inevitably led to consider some questions involved in the preservation, use, and dissemination of intelligence.

VII. PRESERVATION, USE, AND DISSEMINATION OF INTELLIGENCE

We have already noted that, by the provisions of section 534, chapter 33 of title 28, U.S. Code, it is provided that the Attorney General "shall" acquire, collect, classify, and preserve "identification, criminal identification, crime, and other records," and exchange these records "with authorized officials of the Federal Government, the States, cities, and penal and other institutions." Although it is further provided that the exchange of records is subject to cancellation if dissemination is made outside the receiving departments or related agencies, this statute, as is evident, does not otherwise endeavor to specify standards for the conduct of this activity. Nor has the Attorney General done so in delegating his authority to the FBI. By the Department's regulations, 28 CFR 0.85, paragraph (b),[15] the FBI is required, subject to the "general supervision and direction of the Attorney General," to—

> Conduct the acquisition, collection, exchange, classification, and preservation of identification records, including personal fingerprints voluntarily submitted, on a mutually beneficial basis, from law enforcement and other governmental agencies, railroad police, national banks, member banks of the Federal Reserve System, FDIC-Reserve-Insured Banks, and banking institutions insured by the Federal Savings and Loan Insurance Corporation; provide expert testimony in Federal or local courts as to fingerprint examinations; and provide identification assistance in disasters and in missing-persons type cases, including those from insurance companies.

The FBI is also required, in the provisions of paragraph (f) of this regulation, to operate a central clearinghouse for police statistics under the uniform crime reporting program and a computerized nationwide index of law enforcement information under the National Crime Information Center.

In *Menard* v. *Mitchell*, 430 F. 2d 486 (CA DC, 1970), the court of appeals construed this record collection and dissemination authority, in light of its legislative history, as a statutory authority to maintain "criminal" records, and the district court, following remand (328 F. Supp. 718), observed that this authority, pursuant to which certain record functions were delegated to the FBI, had to be narrowly interpreted as designed only to facilitate coordinated law enforcement activities between the Federal and local governments and was never intended to, nor did it in fact, authorize dissemination of "arrest records" to any State or local agency for purposes of employment, licensing, and related purposes.

In this case Menard sought to expunge from the records of the FBI an arrest record for a State offense for which he was never convicted. He argued that the maintenance and use of his arrest record for any

[15] See app. B, p. 56.

purpose whatsoever violated several constitutional guarantees: the presumption of innocence, due process, the right of privacy, and the freedom from unreasonable search under the fourth amendment. While denying his prayer for expungement, the district court ordered that his arrest record could not be revealed to prospective employers except in the case of any agency of the Federal Government if he seeks employment with such agency, and that his arrest record may be disseminated to law enforcement agencies (Federal and State) for "law enforcement" purposes only.[16]

In the course of its decision, the court made significant observations. Where the Government engages in conduct such as the wide dissemination of arrest records, that which invades individual privacy, its action, the court pointed out, cannot be permitted unless "a compelling public necessity" has been clearly shown. "Neither the court nor the executive," said Judge Gesell, "absent very special considerations, should determine the question of public necessity *ab initio*. The matter is for the Congress to resolve in the first instance and only congressional action taken on the basis of explicit legislative finding demonstrating public necessity will suffice." He added:

> The Bureau needs legislative guidance and there must be a national policy developed in this area which will have built into it adequate sanctions and administrative safeguards. It is in the function of the courts to make these judgments, but the courts must call a halt until the legislature acts. Thus the Court finds that the Bureau is without authority to disseminate arrest records outside the Federal Government for employment, licensing, or related purposes whether or not the record reflects a later conviction.

In *U.S.* v. *Rosen*, 343 F. Supp. 804 (SDNY 1972) the Court construed the provisions of section 534, which provided that the Attorney General "shall" acquire and preserve identification materials and records, as mandatory. Following acquittal of certain Federal offenses, the defendants in this case sought return of arrest records, photographs, and fingerprints. The demand was refused. It was observed that the word "shall" in the section "is not merely an authorization but an imperative direction." The exchange of records with receiving departments or agencies of the Federal and State governments, the court noted, was made subject to cancellation, as provided, only when dissemination "is made outside the receiving departments or related agencies." In reaching this result, the court moreover took the position that the issue was one "of a balancing of equities," and that while the retention of arrest records, fingerprints, or photos under certain circumstances may be viewed as an invasion of a right of privacy, this "right" is not absolute, and under certain circumstances is not superior to the rights of the public. The "broad discretion" conferred upon the police in retaining arrest records, said the Court, enables them to utilize more efficiently their facilities for combating crime.

It was the court's conclusion that even in the situation where a person has been acquitted of charges against him, the arrest records and materials of identification may be retained unless (1) there is a

[16] Following this decision the Congress in the Supplemental Appropriations Act, 1972, P.L. 92-184, approved December 15, 1971, and in the Appropriation Act, 1973, P.L. 92-544, approved October 25, 1972, specifically authorized the use of funds appropriated for salaries and expenses of the FBI for the "exchange of identification records" with officials of State and local governments for purposes of employment and licensing if authorized by State statute and approved by the Attorney General, such exchange to be subject to cancellation if dissemination is made outside the receiving departments or related agencies of State government. Thus to that extent and only with respect to the use of appropriations for the fiscal year concerned, the permanent provisions of 28 U.S.C. 534, as relate only to the exchange of "identification records," were indirectly amended or affected.

statute that directs return of such arrest records, (2) the arrest was unlawful, or (3) the record of the arrest is the "fruit" of an unlawful seizure. It made clear, however, that if law enforcement officials clearly "abused" their discretion in the use of retained arrest records and other materials of identification, then the court might well order the return of such records or restrain such use. Illustrative of situations in which restraints on the use of such records may be imposed, the court observed, were those in which the person's arrest records are publicly displayed in a so-called "Rogues' Gallery," are disseminated to potential employers, where there is a showing of harassment by law enforcement officials against the individuals, or where there is a concrete showing that retention of arrest records has made the person more susceptible to suspicion and to injurious investigation when subsequent crimes, particularly of a similar character, are being inquired into.

Of course the principles asserted and the conclusions reached by the above courts in the application of section 534 must be regarded as the pronouncements of lower Federal courts. In the absence of their sanction by the Supreme Court itself, the conclusions reached by lower Federal courts are to that extent to be regarded as tentative. It should be pointed out that, in *Menard*, the court concededly endeavored to restrict the application of the power of exchange conferred by section 534 to the provision's unexpressed but obvious purpose of facilitating and coordinating law enforcement activities between Federal and local governments. Judge Gesell was of the opinion that the statute was not to be applied for other than its "law enforcement" purposes. It was on the basis of these premises that he concluded that the statute was not to be construed as authorizing the dissemination of arrest records to any State or local agency outside the Federal Government "for employment, licensing, or related purposes whether or not the record reflects a later conviction." But this conclusion did not necessarily flow from his premises. If the Federal Government may utilize the records of the FBI for Federal employment, licensing, or related purposes, then why should this statute, which requires an exchange of records, not also authorize such use by the State governments? In view of the mobility and interstate travel of criminals (and subversives), the centralization and computerization of records is essential both to effective and economical law enforcement. Hence, would this result not more fully serve the purposes of the statute and the ends of economy as well? Could not such a use by State governments, at least for State employment, State licensing requirements, and similar governmental purposes—that is in the execution of State laws—be reasonably held a use of information for "law enforcement" purposes within the sense of that term? Moreover, are not records of criminal convictions *public* records?

It is, however, not our purpose to indulge in an exploration of the deficiencies of these decisions, but to point out that the courts are viewing the statutory enactments on this subject with increasingly restrictive results. Earlier, in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951), involving the designation by the Attorney General of subversive organizations pursuant to Executive Order 9835, the Court had already warned that, even where intelligence is collected and applied purely for intragovernmental use, if a broad public dissemination is incidental to its exchange within the Federal Estab-

lishment, and the information is of such character as to defame or injure organizations or individuals affected by it, the demands of due process may require that they first be accorded an opportunity to be heard and to challenge its accuracy. This principle and this case was recently cited with approval in *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971), in which the Court held unconstitutional, for due process reasons, a State statute authorizing, without notice or hearing, the posting in retail liquor outlets of the names of excessive drinkers of intoxicating liquor in order to proscribe its sale to them for a period of 1 year. It thus behooves the legislative branch to heed and meet these requirements by the drafting of statutes which are sufficiently explicit and comprehensive, but practical in their application and consistent with their essential purposes.

We are, however, not solely concerned with statutes which confer an authorization for intragovernmental use and dissemination of intelligence information. The national security and other national interests cannot be effectively advanced without the participation of the public. The free functioning of our constitutional system is dependent upon an informed public. This was a major consideration in the adoption of the first amendment. Efforts to subvert our national institutions are conspiratorial in nature. They are usually conducted under the cloak of secrecy. They cannot be exposed except by continuous and ongoing investigations. Certainly to a reasonable extent such information must be communicated to the public. It is of little value if retained in the files of a few bureaucrats. Any failure of the Government to take the public into its confidence, to make available to it the identity of subversive organizations, their objectives, activities, and operational techniques, their fronts, officers, and spokesmen, could be as fatal to the national security and the national interests as an assault by a foreign power and may indeed expedite it.

In its implementation of E.O. 10450, the Federal employee security program, the Department of Justice had contemporaneously with its issuance suggested to the agencies that for the purposes of the order the term "national security" be defined in relation to "the protection and preservation of the military, economic, and productive strength of the United States, including the security of the Government in domestic and foreign affairs, against or from espionage, sabotage, and subversion and any and all other illegal acts designed to weaken or destroy the United States." No explicit reference, either then or now, was made to the protection and preservation of the Nation's "political strength," although the threat which subversive activities posit to the "national security" is fundamentally to the political system and the integrity of political discourse essential to its maintenance. It is a threat, as Mr. Justice Frankfurter has said, to the "effective, free-functioning of our national institutions." *Communist Party* v. *SACB*, supra at 97.

While the Court in this cited case was divided on other issues, there was otherwise no disagreement, with the exception of that expressed by Mr. Justice Black, upon the question whether the first amendment prohibited the public disclosure of the identity of communist-action organizations, their officers and members. Speaking for the majority, Mr. Justice Frankfurter made clear that—

> Where the mask of anonymity which an organization's members wear serves the double purpose of protecting them 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 mask.

Mr. Justice Douglas said—

If lobbyists can be required to register, if political parties can be required to make disclosure of the sources of their funds, if the owners of newspapers and periodicals must disclose their affiliates, so may a group operating under the control of a foreign power.

The Bill of Rights was designed to give fullest play to the exchange and dissemination of ideas that touch the politics, culture, and other aspects of our life. When an organization is used by a foreign power to make advances here, questions of security are raised beyond the ken of disputation and debate between the people resident here. Espionage, business activities, formation of cells for subversion, as well as the exercise of first amendment rights, are then used to pry open our society and make intrusion of a foreign power easy. These machinations of a foreign power add additional elements to free speech just as marching up and down adds something to picketing that goes beyond free speech.

These are the reasons why, in my view, the bare requirement that the Communist Party register and disclose the names of its officers and directors is in line with the most exacting adjudications touching first amendment activities.

Yet, it is a curious fact that within the Government the general trend of policy in this field is toward the suppression of information on this subject as if our citizens were children with sensitive digestive systems and unable to cope with it. The emphasis, of course, in preserving the "privacy" of individuals and organizations is essential and commendable, but it is both unwise and dangerous to permit subversive organizations and individuals who deliberately engage in public controversy to have the field without opposition, and to deny to others the information which is essential to maintain the integrity of political discourse. By their voluntary act of entering the public forum such organizations and individuals must be held, at least in some degree, to have shed the cloak, or any legitimate claim to a right, of privacy. Surely the disclosure of the nature and character of their activities poses no threat to "justifiable expectations of privacy." [17] To withhold this information and to bury it in the files of the Department of Justice or some other agency of the Government, it would seem, is a retreat from realities. It invites public disorder, the corruption of our political processes, undermines the stability of our institutions, and lays a basis for the total transformation and ultimate destruction of our system of freedom.

Apart from the authority that may be derived from the Constitution itself, there are, of course, statutes of general application which would appear to authorize the public dissemination of information on this subject. The provisions of 5 U.S.C. 301 authorize the head of each executive department to "prescribe regulations for the Government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." It is specifically provided that this section "does not authorize withholding information from the public or limiting the availability of records to the public." More lately the concern of Congress to make available to the public the records and proceedings of agencies of the Government led to the

[17] The within quoted expression is borrowed from the Court in *United States* v. *Biswell*, 406 U.S. 311, 316 (1972). Also on the subject of anonymity, see *Talley* v. *California*, 362 U.S. 60, 67 (1960); *Golden* v. *Zwickler*, 394 U.S. 103 (1969); and *Wisconsin* v. *Constantineau*, supra.

enactment, on June 5, 1967, of what is commonly known as the Freedom of Information Act, codified at 5 U.S.C. 552 as a provision of the Administrative Procedure Act. While the act requires each agency to make available to the public the broad categories of information therein specified, there is excepted from the requirements of the act matters, inter alia, that are (a) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy, (b) personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, and (c) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency. It is, however, specifically provided that the section is not to be regarded as authority to withhold information from Congress, and it must be emphasized that the provisions of the act, while authorizing the withholding of information in the excepted categories, does not prohibit their disclosure or availability to the public except as may otherwise be required by law.

Nevertheless, the dissemination of intelligence information with which we are concerned in relation to the activities of subversive organizations and individuals has not to any extent been explicitly authorized by the regulations of the Department of Justice. So far as the published regulations of the Department of Justice are concerned, this is literally a forgotten subject except for a reference in 28 CFR 16.5 to the exemptions authorized in 5 U.S.C. 552 (the Freedom of Information Act). This regulation provides—

> 5 U.S.C. 552 exempts from all of its publication and disclosure requirements nine categories of records which are described in subsection (b). These categories include such matters as national defense and foreign policy information, investigatory files, internal procedures and communications, materials exempted from disclosure by other statutes, information given in confidence, and matters involving personal privacy. The scope of the exemptions is discussed in the Attorney General's Memorandum referred to in § 16.1.

Similarly, in the Attorney General's advisory memorandum on the public information section of the Administrative Procedure Act, issued by Attorney General Ramsey Clark in June of 1967, which was noted in the above regulations of the Department of Justice, we see no explicit reference to this subject.

Otherwise, with the exception of the particular and limited disclosures required in the provisions of the Foreign Agents Registration Act of 1938 (22 U.S.C. 612 et seq.), the Voorhis Act (18 U.S.C. 2386, requiring the registration of certain organizations, presently a barren record), the act of August 1, 1956 (50 U.S.C. 851, requiring registration of persons trained in espionage and sabotage techniques), and the public disclosure provisions of the Subversive Activities Control Act of 1950, now defunct, there is neither a statute nor agency regulation explicitly authorizing or requiring that information on the subject of subversion be made available for dissemination to the public.

Some information, it is true, has hitherto been made available to the public indirectly in the implementation of E.O. 10450, the employee security program, pursuant to which the Attorney General designated and identified subversive organizations of the character therein specified and to which previous reference has been made. However, no designations have been made under this order since October 20, 1955,

a matter previously dealt with in the extensive hearings which this committee conducted in the 91st and 92d Congresses.[18] Moreover, some sketchy information on the subject of subversion has been supplied in the brief comments of the late Director of the FBI in the course of his appearances over the years before the House Appropriations Committee in support of his annual request for appropriations to the agency. It seems clear, however, that what is made available can hardly be described as adequate.

VIII. QUESTIONS

It must be apparent from the foregoing that there are many areas into which inquiry might and perhaps should be undertaken to resolve the many issues raised by the foregoing analysis. Both with respect to the FBI and other agencies, what is the extent and scope of investigation of subversive activities? Are the purposes and scope of investigations clearly delineated? Are the investigations adequate and effective for their purposes? What standards are applied in the preservation, use, and dissemination of intelligence on this subject? Are investigations effectively and economically coordinated among the agencies and within the Government? Are their results effectively applied? Are we properly balancing the equities between the national and individual interests? What information can and should be made available to the public? What are the respective Federal and State interests in the conduct and results of investigation of subversive activities? How are these interests coordinated and effected?

Our interest must likewise focus upon issues as to the respective responsibilities of the Director of the FBI, the Attorney General, and the President in the organization and execution of investigations on the subject of subversion. Are their respective responsibilities clearly or adequately defined? Is it desirable to continue the present statutory subservience of the Director of the FBI to the Attorney General and the President? In light of this and other responsibilities imposed upon the FBI, is it desirable to establish the FBI as an independent agency, and, if so, to what extent? Is it desirable, in any degree or in any aspect, to separate the FBI's domestic intelligence functions and to repose them elsewhere? Where and why?

Is remedial action desirable or necessary? What are the responsibilities toward remedial action on these subjects as between the executive and legislative branches? Needless to say these are vital, profound, complex, and delicate avenues of inquiry. It may, however, be necessary to pursue them if we are to acquire that information which is necessary to lay the basis for any remedial action which on the face of this study may appear to be desirable.

[18] The committee has published four volumes of hearings, Part 1 in the 91st Congress, and Parts 2, 3, and 4 in the 92d Congress, titled "Hearings Regarding the Administration of the Subversive Activities Control Act of 1950 and the Federal Civilian Employee Loyalty-Security Program." See also the report of the subcommittee, issued in the 92d Congress, titled "Federal Civilian Employee Loyalty Program," House Report 92-1637.

APPENDIXES

APPENDIX A

[Extract from testimony of John Edgar Hoover, former Director, FBI, before the House Subcommittee on Appropriations, Mar. 2, 1972, FBI reprint]

Federal Bureau of Investigation

PURPOSE STATEMENT

BASIC STATUTORY AUTHORITY

The fundamental authority for the activities of the Federal Bureau of Investigation is contained in chapter 33 of title 28, United States Code.

Title 18, section 3052, United States Code, as amended January 10, 1951, provides that "The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony."

The FBI, as the investigative arm of the Department of Justice, has also been vested with authority for certain auxiliary specific and general investigative responsibilities by the Congress, the Attorney General and the President of the United States. Many of these responsibilities play a direct part in defense matters affecting the Nation's security. Specific authority therefor is set forth under the immediately following section designated "objectives."

OBJECTIVES

There are summarized below the principal objectives and responsibilities for which funds will be utilized by the Federal Bureau of Investigation.

1. *Criminal investigations.*—The investigation of violations of Federal criminal statutes; collecting evidence in cases in which the United States is or may be a party in interest; and performing other duties imposed by law.

Under this authority, the Federal Bureau of Investigation has investigative jurisdiction over a wide variety of Federal investigative matters. This authority covers all Federal statutes except those specifically assigned to another agency. Included in this group are various statutes concerned with kidnaping; extortion; crime aboard aircraft;

bank robbery; Presidential assassination; police killing; theft from interstate shipment; interstate transportation of stolen property; automobile theft; impersonation; the unlawful flight of certain local fugitives; illegal wearing of the uniform; crimes on Indian and Government reservations; theft and embezzlement of Government property; bribery; the interstate transmission of wagering information; interstate transportation of wagering paraphernalia; interstate travel or transportation in aid of racketeering; illegal gambling; violations of the Selective Service Act; violations of civil rights; frauds against the Government; antitrust matters; and other matters in the criminal and civil fields of activity. Investigations to locate deserter fugitives are also conducted by the FBI upon request of the respective branches of the Armed Forces.

2. *Domestic intelligence.*—The FBI's responsibilities in the domestic intelligence field are authorized under legislative enactments, Presidential directives, and instructions of the Attorney General. They include investigative jurisdiction over matters relating to espionage, counterespionage, sabotage, treason, sedition, subversion, and related internal security functions. Subjects of investigation include the activities of the Communist Party, USA, communist-front groups, and other totalitarian organizations, including individuals or groups who are alleged either to seek the overthrow of the Government of the United States by force or violence or to conspire against the rights of citizens. The FBI has primary responsibility for investigating matters of these types in the United States, Puerto Rico, and the Virgin Islands.

3. *Coordination and dissemination of security data.*—By reason of various Presidential directives, the FBI has the responsibility of correlating information regarding espionage, sabotage, subversive activities and related matters on a national basis and of referring matters under the jurisdiction of any other Federal agencies in these fields to the appropriate agencies. Under these Presidential directives the FBI disseminates a large volume of information to other agencies in the executive branch of the Federal Government. During the course of the Bureau's investigations particular attention is given at all times to information indicating any hostile action by totalitarian governments. As part of this overall program, the FBI makes name checks of its files for the various agencies of the Government. By reason of these functions, the FBI is inescapably tied in with all defense matters. The FBI also conducts considerable research in all phases of communism and the intelligence operations of the Soviets, their satellites and other communist nations in order to determine their tactics. Many of the various studies prepared in this field are furnished to other intelligence agencies which have, on a number of occasions, commented favorably concerning the value of these research studies to their own agencies. The FBI has certain specialized security functions in respect to which it operates as a member of the Interdepartmental Intelligence Conference and the U.S. Intelligence Board and other bodies created by the National Security Council. In connection with its participation in the work of such bodies, the FBI makes plans and recommendations on various problems concerned with strengthening the internal security of the Nation.

4. *Specialized security programs.*—FBI responsibilities in the field of specialized security programs are largely concerned with various sensitive types of applicant and employee investigations. The bulk of the work derives from legislative enactments and Presidential directives requiring the FBI to ascertain facts pertinent to the loyalty and security risk of employees and applicants for positions in the Government service or in activities incident to which the Government has an official interest.

5. *Identification functions.*—Tc gather, maintain, classify, and preserve identification data received from cities, States, penal institutions, Federal agencies and private citizens. To furnish information concerning such records to duly authorized agencies of Federal, State, and local governments and institutions in the interest of law enforcement.

6. *Scientific crime detection.*—To maintain a well-equipped technical laboratory as an aid in scientific crime detection. The facilities of the FBI laboratory are made available on a cost-free basis to local law enforcement agencies as well as Federal Government circles. The FBI's scientific personnel are made available to testify in court upon the request of prosecuting officials.

7. *Uniform crime reporting.*—To maintain a program of uniform crime reporting on a countrywide basis for the compilation of statistics concerning the extent and fluctuation of crime, arrests, convictions, and related crime data. This information is collected by the FBI and published in the form of four quarterly reports to demonstrate current crime trends as well as in a comprehensive annual report. These are furnished to all law enforcement agencies, other governmental sources, social scientists, the news media, and the general public on request.

8. *National Crime Information Center.*—To maintain a computerized national index of documented law enforcement information on stolen identifiable property and criminals. This national system is designed to tie local computerized police information systems to the national network so as to improve the efficiency and effectiveness of all law enforcement through a more efficient handling and exchange of information.

9. *Computerized criminal history program.*—This computerized program commenced operational service in November 1971. It is designed to replace eventually the present manual storage of criminal history records and to improve vastly both the quality of the records and the means of exchange of this data. Through the National Crime Information Center communications network this file will service duly authorized agencies of the Federal, State, and local governments.

* * * * * * *

Narrative

IDENTIFICATION BY FINGERPRINTS

The FBI received 6,710,518 sets of fingerprints for processing during the 1971 fiscal year. Correspondence, miscellaneous forms, and name checks handled reached a record 4,389,455 items, up 15 percent over the previous year.

SETS OF FINGERPRINTS AND ESTIMATED PERSONS REPRESENTED, JAN. 1, 1972

Type o fprint	Sets of prints	Estimated persons
Police	65, 703, 094	19, 991, 014
Civil	131, 353, 585	61, 223, 768
Total	197, 056, 679	81, 214, 782

MAINTENANCE OF INVESTIGATIVE RECORDS AND COMMUNICATIONS SYSTEM

The Files and Communications Division has the responsibility for maintaining the data which the FBI gathers as a result of its investigative and auxiliary responsibilities and, among other things, enables the FBI to carry out its responsibility for coordinating and disseminating security and intelligence data to authorized Federal sources. A total of 2,361,372 name checks, of which 1,936,326 emanated from other agencies, was processed during the fiscal year 1971. There has been a downward trend of name check receipts since 1968 due primarily to a continued slowdown in hiring, the reduction in overall military requirements and a lessening of foreign travel control activities.

CRIMINAL AND SCIENTIFIC LABORATORY

A record 462,595 scientific examinations were conducted by the FBI laboratory in the 1971 fiscal year. This represented a 20-percent increase over the volume received in the prior fiscal year and extended a steadily rising trend which has spanned many years. The laboratory strives to make science a more useful weapon to law enforcement through research and studies to develop new and improved ways to apply this body of knowledge to law enforcement work. The volume of scientific examinations is expected to reach 470,000 during the 1972 fiscal year and 480,000 in 1973.

SCIENTIFIC EXAMINATIONS MADE ,FISCAL YEAR 1971 ,CLASSIFICATION BY AGENCY

	Number	Percent
FBI field investigative staff	311, 322	67
Other Federal agencies	53, 236)	33
States, territorial possessions and foreign countries	98, 037)	
Total	462, 595	100

TRAINING AND INSPECTIONAL SERVICES

The FBI, in addition to training its own personnel, provides cooperative training services to other law enforcement agencies at all levels of government. The long-established field police training program continues to expand and in the 1971 fiscal year, FBI agents contributed almost 84,000 hours of instruction in a record 9,110 schools attended by 311,210 officers. Two sessions of the FBI National Academy were held during the 1971 fiscal year, each with 100 experienced law enforcement officers in attendance. A total of 24,023 persons representing 7,105 agencies attended 283 law enforcement

conferences sponsored nationwide by the FBI during 1971 to discuss organized crime controls.

Completion of the new FBI Academy at Quantico, Va., expected during the 1972 calendar year, will provide the FBI with the capability to expand greatly its cooperative training services. Specifically this facility will permit the FBI to accommodate 2,000 National Academy trainees annually instead of the present 200 and to provide shorter courses of training to another 1,000 law enforcement officers. The expansion of these training programs was authorized by the Omnibus Crime Control and Safe Streets Act of 1968.

All phases of FBI operations, both in the field and at headquarters, are reviewed and assessed on an annual basis to assure maximum efficiency and economy are being achieved.

NATIONAL CRIME INFORMATION CENTER

The National Crime Information Center (NCIC) provides computerized information on crime and criminals to law enforcement agencies in all 50 States and the District of Columbia, as well as to the Royal Canadian Mounted Police. The NCIC central computer, containing almost 3.5 million records, handles over 80,000 transactions a day with daily positive responses numbering about 625. The computerized criminal history program, which became operational in November 1971, will provide a much-needed service to the Nation's courts, corrections agencies, prosecutors and law enforcement agencies through an expanded NCIC communications network.

INTERNAL SECURITY OPERATIONS

Work in the internal security field continued on the increase during the 1971 fiscal year and there is every reason to expect this work will continue to increase and become more complex. A major responsibility of the FBI, internal security investigations are conducted to develop evidence for legal proceedings and to enable Government officials responsible for the safety and welfare of the citizenry to take appropriate corrective or preventive action. Heavy demands are placed upon the FBI to provide coverage of the activities of hard-core New Left terrorists and black and white extremists. Urban guerrilla warfare espoused by some of these groups poses a very serious threat to law enforcement and to the entire Nation. Old-line communist organizations are continuing their efforts to achieve a greater measure of recognition from the American people. Substantial resources must be devoted to investigation of these groups dedicated to the overthrow of our Government, as well as to the countering of espionage activities directed against our Nation by communist countries.

GENERAL CIVIL AND CRIMINAL OPERATIONS

The investigative work in the criminal and civil fields remains at a high level and there is every reason to expect it will increase as crime throughout the Nation moves upward. In 1970, serious crimes reported to the law enforcement agencies throughout the country increased 11 percent over the prior year and for the first 9 months of 1971 serious crime continued to mount, increasing 6 percent over the comparable period in 1970.

ORGANIZED CRIME

The FBI's campaign against organized crime resulted in a record 631 convictions of hoodlum, gambling, and vice figures during the 1971 fiscal year. As of December 1, 1971, there were 2,257 other individuals of this type in various stages of prosecution, including six national syndicate leaders. Participating in the overall Government drive against the organized underworld, the FBI, at the end of the 1971 fiscal year had 12,712 racketeers and their associates under investigation for violations within the FBI's jurisdiction. The use of court-approved electronic surveillances provided for under the Omnibus Crime Control and Safe Streets Act of 1968 has proven to be of inestimable value as a weapon against the organized criminal element. A substantial commitment of the FBI's investigative resources will continue to be required to combat the organized crime menace.

CIVIL RIGHTS INVESTIGATIONS

The FBI, during the fiscal year 1971, handled a record 6,995 cases under the civil rights criminal statutes dealing with interference with constitutional rights. In addition to the work handled under the basic civil rights statutes, there were 1,191 cases handled under provisions of the Civil Rights Acts of 1964 and 1968 which prohibit discrimination in employment, public education, public facilities, housing, and places of public accommodation. Civil rights work, along with work covering racial disturbances and keeping abreast of the activities of extremist and hate groups, required the participation of an average of 2,311 agents each month in the 1971 fiscal year as compared to the monthly averages of 2,139 in 1970 and 1,974 in 1969. There is every reason to believe the work in this area will continue to call for large amounts of manpower in the future.

AIR TRAVEL CRIMES

FBI investigations of air travel crimes have been increasing. Reported to the FBI in the fiscal year 1971 were 1,010 cases involving aircraft piracy, interference with flight crews and related crimes aboard aircraft as compared to the 678 cases reported the previous year. In addition, 1,640 cases involving reports, many false, of destruction of aircraft and passenger-carrying motor vehicles were handled.

BANK ROBBERY

Violations of the Federal bank robbery and incidental crimes statute reached a record 3,354 during the 1971 fiscal year, up 20 percent over the prior year. Robbery, the most serious crime covered by the statute, increased 26 percent over the previous year.

FEDERAL RESERVE ACT

A record 5,494 cases of embezzlement and related offenses by bank officers and employees were referred for investigation to the FBI during the fiscal year 1971, an increase of 33 percent over 1970. The 1971 cases involved amounts totaling over $113 million as compared to the $73 million involved in the cases reported the prior year.

FUGITIVE INVESTIGATIONS

Fugitives located in FBI-investigated cases totaled 33,863 during the 1971 fiscal year, a new record and a 12-percent increase over the 30,318 located in 1970. Increasing amounts of manpower are being required to handle this important work.

INTERSTATE TRANSPORTATION OF STOLEN MOTOR VEHICLES

A record 32,076 stolen motor vehicles were recovered in cases investigated by the FBI during the 1971 fiscal year, an increase of 5 percent over the previous year. Since the incidents of auto theft throughout the Nation continue to increase, there is every reason to expect the FBI's work in this area will also mount.

The work of the FBI accrues as the result of statute, Executive order, instructions from the Attorney General and the like and encompasses activities of the highest national priority. The estimate for 1973 does not provide for unforeseen contingencies such as those arising from additional investigative responsibilities or service function activities that may be conferred upon the FBI through subsequently enacted laws or that may later accrue through departmental or other sources.

APPENDIX B

CODE OF FEDERAL REGULATIONS

Title 28—Judicial Administration

Chapter I—Department of Justice

Subpart P—Federal Bureau of Investigation

CROSS REFERENCE: For regulations pertaining to the Federal Bureau of Investigation, see Part 3 of this chapter.

§ 0.85 General functions.

Subject to the general supervision and direction of the Attorney General, the Director of the Federal Bureau of Investigation shall:

(a) Investigate violations of the laws of the United States and collect evidence in cases in which the United States is or may be a party in interest, except in cases in which such responsibility is by statute or otherwise specifically assigned to another investigative agency.

(b) Conduct the acquisition, collection, exchange, classification, and preservation of identification records, including personal fingerprints voluntarily submitted, on a mutually beneficial basis, from law enforcement and other governmental agencies, railroad police, national banks, member banks of the Federal Reserve System, FDIC-Reserve-Insured Banks, and banking institutions insured by the Federal Savings and Loan Insurance Corporation; provide expert testimony in Federal or local courts as to fingerprint examinations; and provide identification assistance in disasters and in missing-persons type cases, including those from insurance companies.

(c) Conduct personnel investigations requisite to the work of the Department of Justice and whenever required by statute or otherwise.

(d) Carry out the Presidential directive of September 6, 1939, as reaffirmed by Presidential directives of January 8, 1943, July 24, 1950, and December 15, 1953, designating the Federal Bureau of Investigation to take charge of investigative work in matters relating to espionage, sabotage, subversive activities, and related matters.

(e) Establish and conduct law enforcement training programs to provide training for State and local law enforcement personnel; operate the Federal Bureau of Investigation National Academy; develop new approaches, techniques, systems, equipment, and devices to improve and strengthen law enforcement and assist in conducting State and local training programs, pursuant to section 404 of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 204.

(f) Operate a central clearinghouse for police statistics under the Uniform Crime Reporting Program, and a computerized nationwide index of law enforcement information under the National Crime Information Center.

(g) Operate the Federal Bureau of Investigation Laboratory, to serve not only the Federal Bureau of Investigation, but also to provide, without cost, technical and scientific assistance, including expert testimony in Federal or local courts, for all duly constituted law enforcement agencies, other organizational units of the Department of Justice, and other Federal agencies, which may desire to avail themselves of the service.

(h) Make recommendations to the Civil Service Commission in connection with applications for retirement under 5 U.S.C. 8336(c).

(i) Investigate alleged fraudulent conduct in connection with operations of the Federal Housing Administration and other alleged violations of the criminal provisions of the National Housing Act, including section 1010 of title 18 of the United States Code.

§ 0.86 Seizure of gambling devices.

The Director, Associate Director, Assistants to the Director, Assistant Directors, inspectors and agents of the Federal Bureau of Investigation are authorized to exercise the power and authority vested in the Attorney General under the act of January 2, 1951, 64 Stat. 1135, as amended, and section 2513 of title 18, United States Code, to make seizures of gambling devices and wire or oral communication intercepting devices.

§ 0.87 Representation on committee for visit-exchange.

The Director of the Federal Bureau of Investigation shall be a member of the committee which represents the Department of Justice in the development and implementation of plans for exchanging visits between the Iron Curtain countries and the United States and shall have authority to designate an alternate to serve on such committee.

§ 0.88 Certificates for expenses of unforeseen emergencies.

The Director of the Federal Bureau of Investigation is authorized to exercise the power and authority vested in the Attorney General by 28 U.S.C. 537, to make certificates with respect to expenses of unforeseen emergencies of a confidential character: *Provided*, That each such certificate made by the Director of the Federal Bureau of Investigation shall be approved by the Attorney General.

§ 0.89 Authority to seize arms and munitions of war.

The Director of the Federal Bureau of Investigation is authorized to exercise the authority conferred upon the Attorney General by section 1 of E.O. No. 10863 of February 18, 1960 (25 F.R. 1507), relating to the seizure of arms and munitions of war, and other articles, pursuant to section 1 of title VI of the act of June 15, 1917, 40 Stat. 223, as amended by section 1 of the act of August 13, 1953, 67 Stat. 577 (22 U.S.C. 401).

APPENDIX C

[Directives of Presidents Roosevelt and Truman]

DIRECTIVE OF THE PRESIDENT OF THE UNITED STATES

JUNE 26, 1939

"It is my desire that the investigation of all espionage, counter-espionage, and sabotage matters be controlled and handled by the Federal Bureau of Investigation of the Department of Justice, the Military Intelligence Division of the War Department, and the Office of Naval Intelligence of the Navy Department. The directors of these three agencies are to function as a committee to coordinate their activities.

"No investigations should be conducted by any investigative agency of the Government into matters involving actually or potentially any espionage, counterespionage, or sabotage, except by the three agencies mentioned above.

"I shall be glad if you will instruct the heads of all other investigative agencies than the three named, to refer immediately to the nearest office of the Federal Bureau of Investigation any data, information, or material that may come to their notice bearing directly or indirectly on espionage, counterespionage, or sabotage."

DIRECTIVE OF THE PRESIDENT OF THE UNITED STATES

SEPTEMBER 6, 1939

"The Attorney General has been requested by me to instruct the Federal Bureau of Investigation of the Department of Justice to take charge of investigative work in matters relating to espionage, sabotage, and violations of the neutrality regulations.

"This task must be conducted in a comprehensive and effective manner on a national basis, and all information must be carefully sifted out and correlated in order to avoid confusion and irresponsibility.

"To this end I request all police officers, sheriffs, and all other law enforcement officers in the United States promptly to turn over to the nearest representative of the Federal Bureau of Investigation any information obtained by them relating to espionage, counterespionage, sabotage, subversive activities and violations of the neutrality laws."

THE WHITE HOUSE,
Washington, D.C., January 8, 1943.

POLICE COOPERATION

On September 6, 1939, I issued a directive providing that the Federal Bureau of Investigation of the Department of Justice should take charge of investigative work in matters relating to espionage, sabotage,

and violations of the neutrality regulations, pointing out that the investigations must be conducted in a comprehensive manner, on a national basis, and all information carefully sifted out and correlated in order to avoid confusion and irresponsibility. I then requested all police officers, sheriffs, and other law enforcement officers in the United States, promptly to turn over to the nearest representative of the Federal Bureau of Investigation any such information.

I am again calling the attention of all enforcement officers to the request that they report all such information promptly to the nearest field representative of the Federal Bureau of Investigation, which is charged with the responsibility of correlating this material and referring matters which are under the jurisdiction of any other Federal agency with responsibilities in this field to the appropriate agency.

I suggest that all patriotic organizations and individuals likewise report all such information relating to espionage and related matters to the Federal Bureau of Investigation in the same manner.

I am confident that all law enforcement officers, who are now rendering such invaluable assistance toward the success of the internal safety of our country, will cooperate in this matter.

(Signed) FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
Washington, D.C., July 24, 1950.

INFORMATION RELATING TO DOMESTIC ESPIONAGE, SABOTAGE, SUBVERSIVE ACTIVITIES AND RELATED MATTERS

On September 6, 1939 and January 8, 1943 a Presidential Directive was issued providing that the Federal Bureau of Investigation of the Department of Justice should take charge of investigative work in matters relating to espionage, sabotage, subversive activities and related matters. It was pointed out that the investigations must be conducted in a comprehensive manner on a National basis and all information carefully sifted out and correlated in order to avoid confusion. I should like to again call the attention of all Enforcement Officers, both Federal and State, to the request that they report all information in the above enumerated fields promptly to the nearest Field Representative of the Federal Bureau of Investigation, which is charged with the responsibility of correlating this material and referring matters which are under the jurisdiction of any other Federal Agency with responsibilities in this field to the appropriate agency.

I suggest that all patriotic organizations and individuals likewise report all such information relating to espionage, sabotage and subversive activities to the Federal Bureau of Investigation in this same manner.

HARRY TRUMAN.

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