BUREAUCRATS ABOVE THE LAW

Double-Entry Intelligence Files

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Historians and archivists will welcome the Final Report of the National Study Commission on Records and Documents of Federal Officials (really two reports, one from the majority and one an alternate). Both versions affirm what has been in some question—not least because of Richard Nixon's acquisitive instincts—that the papers of all federal officials (not only Presidents but bureaucrats, members of Congress and judges) are public property and must be held available for scrutiny by the public. But having made this vitally important finding, the Study Commission evidently felt that the bulk of its task was done. It cites the Federal Records Act of 1950, which obliges the head of each federal agency to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency . . . ," and notes that, to insure compliance with such requirements, the Code of Federal Regulations of 1976 stipulates that "With particular regard to the formulation of basic Government policy, Federal officials are responsible for incorporating in the records of their agencies all essential information on their major actions." The two reports agree that these statutes, together with the Freedom of Information Act, provide sufficient guarantees for the preservation of, and access to, such records, within reasonable bounds of confidentiality and the safeguarding of national security.

This optimism I find unwarranted, in view of recently acquired knowledge about the separate records-keeping and document-destruction practices of government agencies, and particularly the intelligence agencies. When devising multiple filing systems and document-destruction procedures, intelligence bureaucrats have in the past fully recognized that their agencies' reputations and thus

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authority could be damaged should "sensitive" documents of a certain kind ever be publicly disclosed. Despite the assurance of confidentiality provided by "national security" classifications, these officials devised filing procedures that separated extremely sensitive from other "national security" classified documents. This system had a double objective: to permit the prompt destruction of these sensitive documents without leaving behind any clue that such documents had ever existed. Moreover, although some of these record-keeping practices were established before, and others after, the 1950 Act, the legislative requirements that adequate records be created and preserved were deliberately ignored.

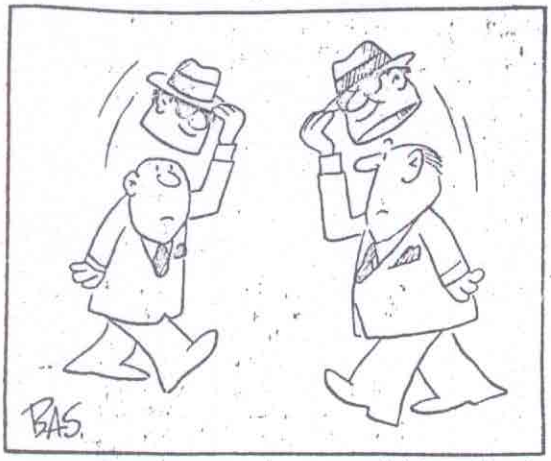
Apparently, the National Archives personnel responsible for reviewing agency documents before permitting their destruction had been unaware of these procedures intended to avoid public knowledge of illegal activities. For, on March 26, 1976, the appraiser in the Records Disposition Division of the National Archives' Office of Federal Records Centers who had responsibility for FBI documents authorized (and the archivist subsequently signed) the destruction of *"Closed* files of the Federal Bureau of Investigation *containing investigative reports, inter- and intro-office communications, related evidence* . . . collected or received during the course of public business in accordance with the FBI investigative mandate." (Emphasis added.) Thus, extensive files were destroyed without the responsible Archives personnel ascertaining their historical and public importance. The limited number of personnel (ten) in this Archives Division explains why such voluminous files could not be reviewed. Yet the National Archives has not requested money to hire additional staff for the purpose.

In memorandums of April 11, 1940, November 15, 1941, March 1, 1942, January 16, 1943, March 9, 1943 and November 9, 1944, FBI Director J. Edgar Hoover advised bureau officials (both those in Washington and Special Agents in Charge of field offices) how to prepare for submission to headquarters memorandums that were not to be retained and filed in the FBI's general files. These communications were to be typed on pink paper (later blue) the better to keep them separate from white-paper memorandums which, on receipt by Washington, would be given a serial number for filing purposes. In part, Hoover's reason for setting up this color code had been to reduce paper work. A deeper purpose, however, was to enable FBI field offices to convey sensitive information in writing to the FBI Director or Washington headquarters without running the danger that a retrievable record would thereby be created. His April 11, 1940 memorandum identified documents to be destroyed as including those "written merely for informative purposes, which need not be retained for permanent filing." The March 1, 1942 instruction more specifically identified these as including memorandums "prepared solely for the benefit of the Director and other officials and eventually to be returned to the dictator [of the memorandum] to be destroyed, or retained in the Director's office."

In 1942 the bureau instituted a "Do Not File" procedure for all field-office requests for authorization to conduct break-ins, along with the documents that formally approved these requests. Such papers were not to be given serial numbers, nor to be filed under the appropriate case or caption category. Whenever Hoover or his headquarters staff deemed it advisable to destroy them, they could vanish without a trace. An internal bureau memorandum of July 19, 1966, from William Sullivan to Cartha De Loach (both men at the time were assistants to the Director) describes in detail the Do Not File procedure. To prevent excessive recourse to break-ins—which Sullivan characterized as "clearly illegal"—and to make sure that sufficient care was taken to prevent their discovery, prior written authorization from the Director or assistant director was required for all such crimes. Under normal procedures, of course, this would create a retrievable record, and the Do Not File device was invented to avoid that hazard. In September 1975 Congressional testimony, former FBI Assistant Director Charles Brennan conceded that this was indeed one purpose of the Do Not File procedure. It would also enable the bureau to comply with court disclosure orders, since witnesses could affirm that a search of FBI records had been made and no evidence uncovered of illegal government activities.

The recent discovery of this separate file keeping raises additional questions about the FBI's way with its records. In the course of reviewing the "Official-Confidential" files formerly retained by Hoover in his personal office, the staff of the Senate Select Committee on Intelligence Activities came across the Sullivan-to-De Loach memorandum mentioned above. Mark Gitenstein, the staff counsel who made this find, then noticed that a caption, "PF," had been crossed out in the upper-right-hand corner, and the notation added that, in November 1971, the document had been transferred to Hoover's Official-Confidential files. Further investigation established, first, that "PF" stood for Hoover's "Personal Files"; second, that this document, along with seven other documents, had been transferred from the "B" entry in the Personal Files ("B" for "Black Bag" jobs or break-ins) to Hoover's Official-Confidential files and, third, that shortly after his death in May 1972, Hoover's Personal Files had been sent to his home. There, following Hoover's instructions but allegedly after first reviewing the voluminous Personal Files to insure that they contained no official documents, the FBI Director's personal secretary, Helen Gandy, destroyed them. In her December 1975 testimony, Ms. Gandy maintained that she had found no other official documents.

Given the decidedly official character of the Do Not File memorandum (the seven other items remain classified, but assuredly Hoover in 1971 considered them official), we confront the not very credible possibility that the only alphabetical entry in Hoover's Personal Files to contain official documents had been the letter "B." The process by which documents were selected for transfer and destruction prevents us from knowing whether the requirements of the 1950 Act and the 1976 Code were actually met.



Tachydromos (Greece)

Obviously, a Do Not File procedure allows those concerned to deny knowledge of the extent and nature of recognizably illegal or "sensitive" activities, and other recent disclosures suggest that such separate filing procedures were not confined to break-ins. Thus, Sullivan's 1969 reports from Paris to Washington headquarters on his surveillance of nationally syndicated columnist Joseph Kraft were sent under the Do Not File procedure. In addition, despite Atty. Gen. Nicholas Katzenbach's 1966 requirement that all requests for authority to wiretap be submitted in writing and the names of those subject to such surveillances be included in a special file (an ELSUR Index), the wiretap records of the seventeen individuals (White House and National Security Council aides and reporters) tapped between 1969 and 1971, allegedly to uncover the source or sources of national security leaks, were not placed in this Index or filed with other FBI "national security" wiretap records. (Nor were the 1972 wiretap records on Charles Radford, a lower-level military aide suspected of having leaked National Security Council documents to the Joint Chiefs of Staff, included in the ELSUR Index or filed with other FBI "national security" taps. And FBI reports on its surveillance of Anna Chennault in October/November 1968 were "protected and secured" to insure that they would not be discovered and thereby affect that year's Presidential race.) Accordingly, when Sullivan told Asst. Atty. Gen. Robert Mardian in July 1971 that Hoover might use these taps to blackmail the President, Mardian, after consulting with Nixon, transferred the tap records from the FBI to the safe of White House aide John Ehrlichman. Because they were not listed originally in the ELSUR Index, there was no record either that these files had been transferred or that the wiretaps had been carried out.

In another area, when Congress in September 1971, repealed the emergency detention title of the McCarran Internal Security Act of 1950, Hoover asked Atty. Gen. John Mitchell how to handle the policy documents of the Justice Department's independently established, broader—and illegal—detention program. On February 19, 1972, Mardian advised Hoover to destroy these materials. Furthermore, upon concluding the study that resulted in the recommended changes of intelligence procedure (known as the Huston Plan), Hoover in June 1970 advised other intelligence officials who had participated to destroy this plan's working copies.

During the pretrial hearings in the Judith Coplon case, the FBI's extensive and illegal use of wiretapping was revealed because Federal District Judge Albert Reeves ruled that certain FBI reports be submitted as evidence. Hoover then devised yet another filing procedure. In Bureau Bulletin No. 34 of July 8, 1949, he ordered that "facts and information which are considered of a nature not expedient to disseminate or would cause embarrassment to the bureau, if distributed" were henceforth to be omitted from agent reports, but detailed in the administrative pages that accompanied these reports. Normally, agents employed administrative pages to highlight investigative findings or to outline future investigative efforts. Because those pages could be kept separate from the reports, Hoover's order would allow the FBI to conduct questionable or illegal activities, and profit from their findings without risking disclosure during trial proceedings or even without responsible Justice Department officials ever learning of them.

This need to prevent discovery of illegal FBI investigative activities had also led Hoover on October 19, 1949 to advise all Special Agents in Charge how to hide the fact that the bureau was conducting an extensive "security index" program. It predated passage of the McCarran Internal Security Act and was partially based on a secret directive of August 3, 1948 from Atty. Gen. Tom Clark. The FBI, however, began to compile additional indexes—a Communist Index, a "Detcom (Communist Detention) program" and a "Comsab (Communist Saboteurs) program"—without the Attorney General's direction or knowledge. To guard against discovery of this program by the press and the Congress—as well as to prevent the Attorney General from discovering the bureau's independent extension of his authorization—Hoover advised SACs: "No mention must be made in any investigative report relating to the classifications of top functionaries and key figures, nor to the Detcom or Comsab programs, nor to the security index or the Communist Index. These investigative procedures and administrative aids are confidential and should not be known to any outside agency."

Then, when the FBI after February 1958, began to receive copies of letters illegally obtained through the agency's closely guarded mail cover/intercept program in New York City, similar filing procedures were set down, as described in a November 26, 1962 memorandum. Copies of intercepted mail were to be destroyed (if of no value) or filed in a secure area, separate from other FBI files. Such copies were also not to be included in the subject's case file, although a cross-reference would permit retrieval. When significant information found in this intercepted mail was sent on to FBI field offices or other divisions, it was to be paraphrased to disguise the source. Agents in Charge of this project in New York were specifically warned not to disseminate the obtained information outside the bureau and not to cite it in any investigative report.

Are there other FBI files? Obviously, this question cannot be answered definitively. When interviewed by David Wise, author of *The Police State*, William Sullivan claimed that John Mohr (then an FBI assistant director) had removed "very mysterious files" from Hoover's office after the FBI Director's death. These were "very sensitive and explosive files," Sullivan maintained, and not all of them were located by Atty. Gen. Edward Levi when he found "164 such files in the Justice Department."

Nor were these separate filing procedures and the attendant document destruction confined to the FBI. The CIA's drug program documents were destroyed in January 1973. Also, during the September 1975 Congressional testimony, CIA Director William Colby affirmed that the agency's record-keeping practices made it impossible to reconstruct past CIA activities involving the production and retention of highly poisonous toxins: "Only a very limited documentation of activities took place"; the desire for compartmentation involving sensitive matters "reduced the amount of record keeping."

In 1969, the National Security Agency devised similar filing and destruction procedures. In 1967, the NSA had begun to intercept the international electronic communications of targeted American citizens and organizations. The NSA had the equipment necessary to intercept all electronic messages, and could isolate particularly desired messages according to pre-selected names or code words. To exploit this capability, the CIA and the FBI provided the NSA with a so-called Watch List of individuals or organizations whose messages were to be intercepted. Informal document transmittal and separate filing methods were then devised. Being perfectly aware that such interception was illegal, NSA officials in 1969 worked out procedures to hide the existence of the activity and their involvement in it. Reports produced through this eavesdropping were given no serial numbers, were not filed with other NSA reports, were hand-delivered only to those officials having knowledge of the program, and were distributed "For Background Use Only." Agencies receiving the material were directed either to destroy it or return it to the NSA within two weeks.

Are these separate file-keeping and destruction procedures merely aberrational practices that have now been abandoned? Unfortunately, in the absence of proof to the contrary we must assume that they may be continuing or might be resumed. It is unlikely that before 1975 responsible, informed citizens would have accused the intelligence agencies of such practices, and if they had, few Americans would have taken them seriously. Further-

FBI break-ins during domestic security investigations had ceased in 1966, and that the exact number of such past FBI break-ins could not be provided because, thanks to the Do Not File procedure, written records did not exist. In 1976, however, in response to a court order involving a damage suit brought against the government by the Socialist Workers Party, the FBI not only produced break-in documents but these documents disclosed that FBI domestic security break-ins continued after 1966 and as late as July 1976.

In addition, William Colby testified in September 1975 that the CIA could not be fully responsive to the Senate Select Committee's queries concerning the CIA's drug programs and specifically its toxin program. Not only had documents concerning the CIA's general drug programs been destroyed in January 1973, but the agency's desire for compartmentation of sensitive materials had "reduced [the] amount of record keeping" and thus there had been "only a very limited documentation of [the] activities [which] took place." But in July 1977, contradicting Colby's assertions, CIA Director Stansfield Turner advised the Senate Select Committee that documents pertaining to the CIA's past drug program had been discovered after "extraordinary and extensive search efforts." These, Turner reported, had been found in retired archives filed under financial accounts. The newly discovered documents showed that CIA drug testing on American citizens had been more extensive than had been disclosed in 1975.

The file-keeping procedures, and their underlying intent to prevent public/Congressional knowledge of questionable or patently illegal activities, challenge the assumptions underlying the National Study Commission recommendations. Existing law and regulations do not appear adequate to guarantee retention of public papers, thus assuring that the Freedom of Information Act will give access to the full record of federal agency practices. The problem is more complex and thorny than the commission recognized. Perhaps the preservation and access to such papers cannot be insured. But the attempt should nevertheless be made, and a number of additional safeguards are required. First, the Congress should enact legislation specifically forbidding the maintenance of separate files and requiring federal officials to create a unitary and complete filing system. Heavy fines and criminal penalties should be provided for noncompliance. Second, an oversight committee should be created to insure that more dual, triple or even more elaborate systems do not continue, will not be devised, or if devised cannot remain undetected. An independent board of archivists, journalists and historians might well be created to provide this oversight. It must have subpoena powers