

Athen Theoharis

To Quin Cline From Harold Weisberg

11/25/79

Secret FBI files (not searched, of course)

Illegal electronic surveillances

Hoover's "personal and confidential files" (also not searched)

FBI leaks

The captioned matters figure in my various cases and requests.

They are addressed in the attached article by Professor Athen G. Theoharis  
in the May 1979 issue of USA Today.

I send this in the event you have not seen it.

In all instances what Professor Theoharis states is opposed to the FBI's  
representations in my various suits and requests.

# The Attorney General: and the FBI:

## A PROBLEM OF OVERSIGHT

*"The current skepticism about executive actions and claimed authority is to be welcomed, not lamented."*

by **Athan G. Theoharis**  
Professor of History,  
Marquette University, Milwaukee, Wis.

**G**IVEN Congressional enactment in October, 1978, of the Foreign Intelligence Surveillance Act of 1978, Arthur Schlesinger's account of former Attorney General Robert Kennedy's electronic surveillance policy in his recently published book, *Robert Kennedy and His Times*, is quite timely. Schlesinger recounts in particular, albeit sketchily, the controversy surfacing publicly in December, 1966, over whether or not Attorney General Kennedy had known of and authorized the FBI's installation of microphones (bugs) by means of trespass (break-ins) during criminal investigations. This public controversy of December, 1966, had been precipitated by a letter, and accompanying memorandums, which FBI Director J. Edgar Hoover had sent to Republican Congressman H. R. Gross claiming "your impression that the FBI engaged in the usage of wiretaps and microphones only upon the authority of the Attorney General of the United States is absolutely correct." When then-Senator Robert Kennedy vigorously de-

nied this contention and disputed the supporting documentation, his denial was greeted with skepticism. Writing in the *Washington Post*, for one, Richard Harwood argued that Kennedy either had known about the bugging and thus his denial lacked credibility or else did not know, in which case "his executive competence could be brought into question."

Reviewing the nature and context of the documentation which Hoover had released in 1966 and supplementing this review by interviewing former high-level FBI and Justice Department officials knowledgeable about FBI microphone surveillance policy, Schlesinger convincingly establishes that Kennedy had neither known nor authorized the FBI's installation of such illegal bugs. However, Schlesinger's review of this issue, because both narrowly and insufficiently researched, fails to develop fully the context and significance of this 1966 controversy. Such a fuller review raises questions not, in Harwood's phrasing, about Kennedy's "executive competence," but about the effectiveness of the oversight exercised by Attorneys General over the FBI and thereby calls into question the wisdom of basing Federal electronic surveillance policy on the premise of

"executive competence." As such, this more comprehensive history supports the dual premises of the 1978 Foreign Intelligence Surveillance Act—namely, that future abuses can be precluded only if all wiretaps and bugs, including in the "national security/foreign intelligence" area, are installed after prior judicial authorization (a warrant requirement) and if the Department of Justice reports semi-annually to and is obligated to testify before Congressional oversight committees about such uses. The premise here is that executive oversight can not be relied upon to insure proper use and responsible control.

The timing of Hoover's 1966 leak to "document" Kennedy's prior knowledge and authorization was not purposeless. Although there was no raging public controversy in December, the release stemmed from developments dating from July of that year in a Federal criminal case, *U.S. v. Black*. Apprised during its review of the appeal of conviction that the defendant in this case, Fred Black, had been the subject of an illegally installed microphone, the U.S. Supreme Court ordered government attorneys to file a brief outlining the legal authority for this practice. In the course of responding to



this court order, Attorney General Nicholas Katzenbach and Deputy Attorney General Ramsey Clark reviewed a draft brief submitted by FBI Director Hoover claiming that such FBI microphone surveillances had been directly authorized by Attorneys General since 1954. Since this claim contravened their own experience, Katzenbach consulted his predecessors, Kennedy, Herbert Brownell, and William Rogers. Not only did Kennedy deny this claim, so did Brownell and Rogers, who apprised Katzenbach that they had never authorized the use of microphones outside of the internal security area and, further, were completely unaware that any microphones had been installed by means of break-ins. Accordingly, acting on Katzenbach's behalf, Clark advised Hoover that the Department of Justice proposed in its response to the court's order to state only that the resort to microphones had been a departmental practice of long usage and that "the FBI consistently interpreted and understood our [the various Attorneys General] decisions to apply to major crimes."

Concerned over "the gravity of the issues presented by the Justice Department's actions in the Black Case," FBI officials frantically sought other documentation "in connection with our continuing search for authorization for the Bureau's use of these devices." Among these efforts: Hoover demanded that FBI agents in Chicago prepare affidavits stating that, during a meeting with them, Kennedy had heard the tapes of microphones these agents had installed during a criminal investigation; FBI Assistant Director Cartha DeLoach contacted former FBI Assistant Director, Alan Belmont to ascertain whether he recalled having been advised by the FBI liaison with Kennedy, Courtney Evans, that Evans had briefed Kennedy about FBI microphone surveillance uses; DeLoach telephoned former Attorney General Rogers for the purpose of neutralizing his position and securing his support for the FBI; and FBI Assistant Directors DeLoach and James Gale visited IRS Commissioner Sheldon Cohen to elicit his support for the FBI's claim to having proper authorization for such microphone installations. Ultimately, the FBI's political efforts failed. The Justice Department's brief tacitly denied that FBI microphone uses had been directly authorized by the Attorney General in this or other criminal investigations.

Nonetheless, the FBI's actions in July and in the past posed certain political problems. First, owing to the sensitivity of the memorandums which FBI officials had prepared recording their contacts with Belmont, Rogers, and Cohen (including what was, in fact, an end-run on Katzenbach in a crude appeal to Rogers'

partisan interests) and, further, their failure to document the FBI's contention of having prior authorization, these memorandums were filed separately from other FBI documents in Hoover's tightly controlled so-called Personal and Confidential files. Moreover, perceiving his and the Bureau's vulnerability posed by the Justice Department's formal brief in the Black case, in July, 1966, Hoover formally ordered termination of the FBI's break-in program (which Hoover had formally authorized in 1942) and severely curtailed the uses of microphones and wiretaps. Then, in December, still smarting from this blow and seeking public exoneration, Hoover resorted to what had become a traditional political device—releasing publicly through a "friendly" Congressman, H. R. Gross, selected documents confirming the FBI's position.

### The basis for Hoover's dilemma

What these released documents could not disclose, however, was the basis for Hoover's political dilemma in 1966—namely, the questionable methods employed by the FBI Director since 1946 to obtain the Attorney General's formal authorization for FBI electronic surveillance. Either relying on the deference or ignorance of Attorneys General Tom Clark, Herbert Brownell, and Robert Kennedy, Hoover had acted purposefully and duplicitously. For one, because opposed to the restrictions of Pres. Roosevelt's May, 1940, wiretapping directive, which limited FBI wiretapping to aliens and to "national defense" investigations, Hoover first drafted a letter and then convinced Attorney General Tom Clark to send it to Pres. Truman in July, 1946. Selectively quoting from Roosevelt's order, the Hoover/Clark letter implied that, when signing the letter, Truman would merely reaffirm an ongoing policy. In fact, Hoover's crafty maneuver meant that Truman would be giving his assent to expanding FBI wiretapping authority to include investigations of "subversive activities."

The Roosevelt order and Hoover/Clark letter applied only to wiretapping. Until February, 1952, the FBI installed microphones on its own authority without the Attorney General's prior knowledge or authorization. In February, however, Attorney General J. Howard McGrath (having been apprised by Hoover in October, 1951, of FBI wiretapping and bugging practices) advised the FBI Director that he could not authorize microphone installations which required trespass. The FBI continued, nonetheless, to install microphones and, in 1954, exploiting the opportunity of a recent U.S. Supreme Court ruling, in *Irvine v. California*, urged

Attorney General Brownell to approve an FBI draft memorandum authorizing FBI microphone surveillance. Agreeing to issue such a memorandum, however, Brownell revised the Hoover draft to authorize microphone installations (including installations through break-ins) during "national security" investigations. Brownell's memorandum specifically required the Attorney General's prior authorization for each installation and confined use to the national security area.

Despite these requirements, the FBI installed microphones without the Attorney General's prior authorization in each case and during criminal investigations. To neutralize the possibility that the Kennedy Administration might reverse this practice, Hoover sent a memorandum in 1961 to Deputy Attorney General Byron White ostensibly outlining FBI wiretapping and bugging authority. This memorandum, however, was disingenuous. Lifting a sentence from Brownell's 1954 memorandum out of context, Hoover left the impression that Brownell had directed the FBI to install microphones without the Attorney General's prior authorization and had approved such uses during criminal investigations.

In point of fact, then, the FBI had employed both wiretaps and bugs during investigations of dissident political activities since 1942. Cognizant of the illegality of these practices and thus desirous of reducing any political fall-out, FBI officials, on the one hand, had devised secretive separate filing procedures to preclude their discovery and, on the other hand, whether by misinformation or selective quotation, had secured the Attorney General's formal authorization for what, in fact, were ongoing FBI practices. Clearly, then, the problem of Robert Kennedy's ignorance was not a case of "executive [in]competence." A more zealous and assertive Attorney General might still have hesitated to challenge the immensely popular FBI Director in 1961, or might have concluded for policy reasons that the use of such illegal methods was desirable. Congress' 1978 legislative action, thus, is a necessary and wise reform offering the only prospect that future abuses can be precluded. Moreover, this action constitutes a return to the checks and balances principles underpinning the U.S. Constitution. Only through external accountability provided by court-ordered warrants and by delimiting executive authority by statute (as opposed to reliance on executive self-restraint) can we be assured against future abuses of power. In its recent actions, then, the Congress has moved to restore the proper balance between the various branches of government. Moreover, the current skepticism about executive actions and claimed authority is to be welcomed, not lamented.