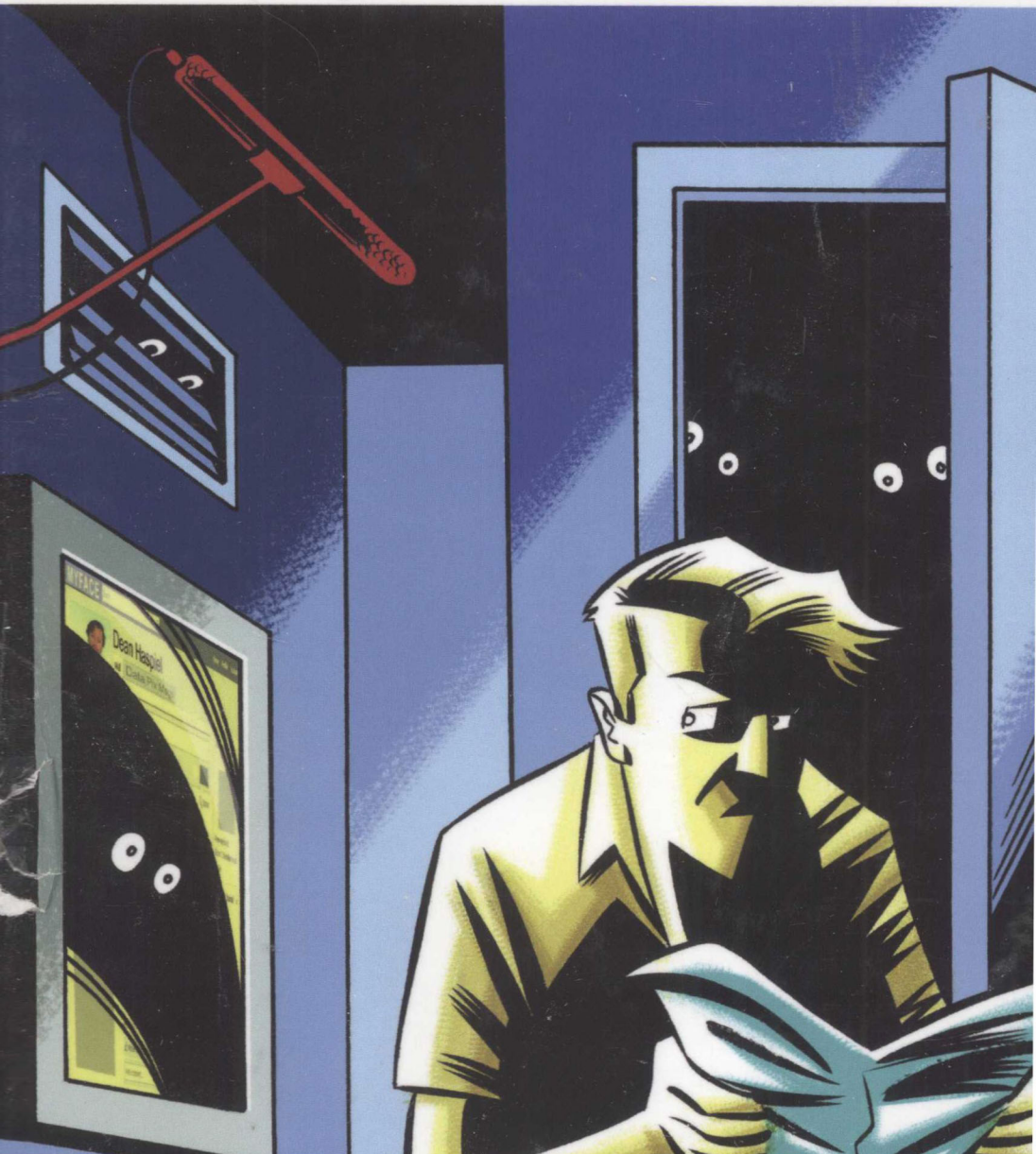
THE DANGERS OF DISSENT

THE FBI AND CIVIL LIBERTIES SINCE 1965

IVAN GREENBERG



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THE DANGERS OF DISSENT

To my father, Bob, and my son, Andrew

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Ivan Greenberg,
Bronx, New York

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Introduction

In 1970, a federal grand jury charged Roger Lippman, along with seven other individuals, with conspiracy to organize a riot in Seattle. Lippman, a local leader of Students for a Democratic Society (SDS), recently had quit Reed College to work full time against the war in Vietnam. He remembers unpaid, sixty-hour weeks dedicated to building a social movement for peace and justice. Among his organizing efforts, he attended several political meetings in preparation for a street demonstration to be held on February 17, 1970, outside the federal courthouse to rally support for the defendants in the Chicago Conspiracy trial. The Seattle protest was one of many organized across the nation in response to Judge Julius Hoffman's jailing of the Chicago defendants (Abbie Hoffman, Jerry Rubin, Tom Hayden, David Dellinger, Rennie Davis, Lee Weiner, Bobby Seale, and John Froines) for contempt of court. When about two thousand protestors, led by the Seattle Liberation Front, tried to shut down the Seattle courthouse by throwing rocks, bottles, and paint, an extended melee broke out with police. Lippman later wrote, "Tear gas drifted into a courthouse elevator just as the door was closing to take a prosecutor upstairs. The newspapers reported that a demonstrator threw a grenade at the building."[1] Twenty people were injured in the riot and seventy-six were arrested.

In fact, Lippman did not attend the protest, having moved to San Francisco several weeks earlier to edit *The Movement*, a radical newspaper representing SDS and Friends of SNCC. But he was indicted anyway for conspiracy to cause damage to federal property. The government built its case on the 1968 antiriot statute, which Congress enacted in the wake of urban unrest following the assassination of Martin Luther King Jr. The criminalizing of intent

to create social disorder was a clear attack on political dissent, and Lippman spent a month in jail before the beginning of what became known as the Seattle Conspiracy Trial.[2]

Lippman believes his arrest was part of an effort to "blame protest leaders for the national chaos caused by the war in Vietnam, as well as to tie up leading organizers and get us off the streets." As he put it, "The conspiracy indictment was a frame-up, at least as regards me and one or two of the others. I was charged with attending two meetings (and nothing else!), in planning for the demonstration but those two meetings were only tangentially about the demonstration, and I barely participated, if at all." While he played very little part in organizing the protest, his mere presence at the SLF meetings provided the opportunity for the government finally to pin a criminal charge on him in an effort to curtail his activism. Such "counterintelligence" activity has a long history in the United States and persists into the twenty-first century. Lippman added, "I doubt I said anything publicly in those two SLF meetings I attended, and if so, nothing about The Day After Protests [TDA]. I was there more as an observer. Government spies knew me as an anti-war leader in Seattle; they must have assumed I was involved in planning TDA; and I'm sure they wanted me as a defendant, despite the lack of evidence, because I provided a political target that could be used as part of their scare tactics." When he later obtained his FBI file under the Freedom of Information Act, he learned that "I was awarded the FBI's highest rating, Security Index-Level 1, which meant that my activities were under continuous surveillance."[3]

In 1968, the FBI began a major counteroffensive against the New Left, opening a new section of its COINTELPRO (Counter Intelligence Program), and the Bureau designated leading New Left leaders as "key activists" subject to intensive surveillance in everyday life. The Bureau defined key activists as "extremely active and most vocal in their statements denouncing the United States and calling for civil disobedience and other forms of unlawful and disruptive acts." FBI Headquarters told agents to use informers and physical and electronic surveillance to identify "their sources of funds, foreign contacts, and future plans." By 1971, about half of seventy-three people designated as key activists had been prosecuted in some form by federal or local officials.[4] Lippman says about his FBI file, "At various times I was flagged as being on the Agitator Index, Rabble-Rouser Index, and Security Index. My FBI file is most notable for demonstrating how little they knew or understood of what I was doing."[5]

The Seattle Conspiracy Trial garnered substantial public attention and supporters formed the Seattle 8 Defense Collective to raise money and awareness. In a civil lawsuit Lippman later filed against the Justice Department, he charged that a government informant, David Sannes, infiltrated the Defense

Collective for the purpose of spying on the defense lawyers as well as "advocating wild, far-out, and often violent schemes offered ostensibly to aid the defense but in truth designed to discredit the Seattle 8 Defendants and their attorneys."[6] Sannes was a former army intelligence officer and urged kidnapping and a bombing, as law professor Paul Chevigny wrote in *Cops and Rebels* (1972). Though as Lippman says, "I don't think the Defense Collective worried about infiltration—it was an almost unknown phenomenon in those early days. So much was based on personal relationships."[7]

During the trial, the star witness, an FBI informer, admitted routine lying in his role to neutralize SDS and other groups. According to Lippman, the informer, known as Horace "Red" Parker, "had joined the anti-war movement but remained a peripheral figure. Most activists who knew Parker did not particularly trust him, but nonetheless there was shock in the courtroom that day when we learned that he had become a paid FBI informer. Over the next several days of testimony, Parker spun a remarkable tale of efforts to ingratiate himself with activists by supplying drugs, explosives, spray paint, and firearms training." For example, Parker admitted he supplied the spray paint used to deface the federal courthouse, one component of the property damage charge brought against the defendants. He was a provocateur arrested during prior demonstrations while working undercover. When defendant Chip Marshall, who acted as his own attorney, cross-examined Parker in court, the informer admitted he engaged in lying to further the prosecution. A problem emerged for the FBI and the Justice Department in this case and in others because informer misbehavior, including illegal acts, was so common that jurors did not know what to believe when these government representatives testified under oath. Undermining the credibility of government witnesses became a key defense strategy and is illustrated in the courtroom exchange between Marshall and Parker:

Marshall: Did you recruit others into violent acts?

Parker: The answer would have to be yes.

Marshall: While with the FBI, have you ever encouraged anyone to violate the law?

Parker: Yes.

Marshall: You feel very strongly that we are bad people and should be brought to justice?

Parker: That is one way of putting it.

Marshall: So you would go to almost any length of trickery to bring us to justice?

Parker: Yes, any length.

Marshall: Are you willing to lie to get us?

Parker: Yes.

Lippman recalled, "Chip got Parker to admit that he had lied to us and would do anything to get us. Chip left the clear implication hanging thickly in the courtroom air that Parker was lying in the courtroom."[8]

Eventually the charges were dropped against Lippman and the others, including a young Michael Lerner, who later became well known as a rabbi and editor of *Tikkun* magazine. Lippman kept at his activism and remained under surveillance. He looked for the opportunity to challenge the FBI and initiated a civil rights lawsuit in 1974 to contest illegal wiretaps and other violations of his constitutional rights in connection with the conspiracy trial and earlier political activism. Initiating a lawsuit was bold: By 1974, very few lawsuits of its kind had been started. He later told me he was encouraged "by the release of information on illegal government wiretapping and other extensive FBI misconduct. This information became public in response to pretrial motions in two major conspiracy cases brought against SDS in Chicago and Detroit. My thinking included the recognition that Watergate was exposing major crimes of the Republicans against the Democrats, and I wanted to show that they had been doing the same sort of thing to the anti-war movement long before Watergate. I wanted to make a political statement of my slant on the Watergate scandal. I had no idea if I would win."[9]

The civil suit, seeking $1 million in damages, charged the government with illegal wiretaps and break-ins. Lippman alleged that an FBI "black bag job" or illegal break-in occurred against at least one of the defendants and one of the defense attorneys. Lippman and the defense lawyers also believed the FBI illegally wiretapped their phones at eight locations, including the law office of attorney Michael Tigar in Seattle. Putting the FBI on trial for surveillance crimes was not an easy task. As I write about later in *The Dangers of Dissent*, wiretap lawsuits almost always failed, although other types of anti-spying civil cases were won by plaintiffs. In the case of illegal wiretapping, the government often admitted that they had done such eavesdropping in defense of national security. Federal judges ruled that such illegal conduct did not create damages. Indeed, for judges to rule otherwise would have opened up the government potentially to hundreds, if not thousands, of lawsuits. Tapping the phones of political dissidents ("subversives and "extremists") was standard practice under J. Edgar Hoover, who ruled the FBI as director for nearly forty-eight years (1924–1972).

Lippman lost his civil case. But he recalls that the suit served a purpose by receiving extensive media coverage: "All of the newspapers covered it, as I recall, and radio and TV too. The roll-out press conference was a big event."[10]

Roger Lippman is one of four brothers who came of age in the 1960s and early 1970s, joined Left social movements, and directly confronted state

power. David Lippman, the second youngest of the Lippman brothers, also sued the FBI—only his lawsuit contested government spying in a different era, the post-9/11 "War on Terror." Government intrusions on civil liberties were not confined to the COINTELPRO era and constitute a continuing problem for democratic society. In 2003, David Lippman had been working as a freelance journalist for Free Speech Radio News on Pacifica and journeyed to Miami to report on the Free Trade Area of the Americas (FTAA) summit meetings. Free Speech Radio broadcasts a daily news show carried on ninety-three radio stations. The FBI put Lippman under surveillance for being a "known protestor w/history" as he traveled from his home in North Carolina to Miami to cover protests outside the FTAA meetings. The police expected street demonstrations by antiglobalization forces, which emerged as a significant social movement since the World Trade Organization meetings in Seattle in 1999. As federal, state, and municipal agencies braced for protests in Miami, they monitored individuals and groups. On November 19, 2003, Lippman's car was searched, damaged, and seized by police without probable cause. FBI agents instructed local police to break into his car and take it away, which prevented Lippman from reporting on the protests. Maybe the FBI wanted his computer, which was left in the car. The official reason for seizing the vehicle was to check for a bomb. A police bomb squad team found nothing. According to an FBI report, the Bureau's "Miami Intel Unit" used a "robot to remove the contents from the rear of the pick-up truck. All items were manually searched as was the interior of the cab."[11] Lippman told journalist Amy Goodman on *Democracy Now!*:

> I had just parked in a municipal garage, and it was about two hours later I happened to be standing on a corner when I saw my truck go by behind a tow truck. . . . It took me two days to get it back, and I found padlocks on the back broken and everything quite disordered, so the ACLU came into the case, the ACLU of Florida, and eventually they discovered documents indicating that several different law enforcement agencies have been involved, in not entirely clear ways, including the Miami police, the Broward County Sheriffs, and the F.B.I. . . . It was not the only vehicle taken or damaged, but it does say in the documents that the vehicle was followed from North Carolina, where I live, to Miami, because I'm a protester with a known history.

What type of known history? The FBI report did not describe his past activism, but Lippman said, "I have spent a lot of time as a performing artist, but doing political material. I do music and comedy around the country, but I was involved in North Carolina in local antiwar activities, local organizations, campus, community organizations, starting around 2001, and so I had been doing that for the last two years."[12]

During the "terror scare," the FBI did not need much evidence to track dissidents. Lippman's political activism made him a target. So were others at the protest.

In 2006, Lippman sued the FBI and the city of Miami, with the help of the Florida American Civil Liberties Union (ACLU), for violating his rights to free press, speech, and assembly, as well as for an unreasonable search and seizure. In his legal complaint, ACLU attorneys Rosalind Matos and Jeanne Baker wrote that "multiple protestors, reporters, photographers, film makers, and bystanders" were "illegally searched" in an effort to chill speech. The police security policy deliberately was "designed to limit lawful public expression to preempt wholly speculative violence."[13] This type of coercive preemptive strategy by the authorities had become an integral part of the "War on Terror." All street protest is suspect. As Attorney General John Ashcroft said in a February 10, 2003, speech, "In order to fight and to defeat terrorism, the Department of Justice has added a new paradigm to that of prosecution—a paradigm of prevention." Law professors David Cole and Jules Lobel in *Less Safe, Less Free* (2007) worried about the development of a "very troubling form of anticipatory state violence—undertaken before any wrongdoing has actually occurred and often without good evidence for believing that any wrongdoing will in fact occur. Such preventive coercion places tremendous stress on the rule of law."[14] How many civil liberties will be sacrificed in the name of preventing another terrorist attack? Is the terror scare being used cynically to clamp down on liberal and radical dissent?

In the United States, it may seem inappropriate to speak of the "repressive apparatus of the state." Yet the American government in the twentieth century waged systematic campaigns to chill progressive and radical viewpoints. Government spying and repression formed a major feature of the American political system. Since the founding of the FBI in 1908, several million Americans became the subject of government investigation, often with harmful results, based solely on their political beliefs. The height of FBI abuse of power occurred during COINTELPRO between 1956 and 1971. The mid-1970s U.S. Senate Church Committee concluded about COINTELPRO: "Many of the techniques used would be intolerable in a democratic society even if all the targets had been involved in violent activity, but COINTELPRO went far beyond that. The unexpressed major premise of the programs was that a law enforcement agency has the duty to do whatever is necessary to combat perceived threats to the existing social and political order."[15] Intrusive spying raises a fundamental issue: What constitutes "protected speech" under the U.S. Constitution? The First Amendment states, "Congress shall make

no law . . . abridging the freedom of speech, or of the press; or of the right of the people peacefully to assemble, and to petition the Government for a redress of grievances." However, the Constitution does not forbid the FBI from monitoring speech and assembly it finds offensive or dangerous, and harassing individuals and groups based on their political views. The First Amendment generally protects political activists from *arrest* based on speech but does not exempt the government from amassing large dossiers on a wide range of political activity. Presidents and Congress both have sanctioned spying on dissent, finding it a legitimate exercise of government power. The federal judiciary proved reluctant to place limits on secret monitoring and covert action.

In a recent scholarly book on surveillance practices, the authors argue that we need to move beyond the idea of the Panopticon and the writings of Michel Foucault, studying not the ways surveillance is imposed from above as a disciplinary mechanism but rather how it is received by people in everyday society.[16] From an American social-historical perspective, the leading disciplinary agency for surveillance for most of the twentieth century has been the FBI. How political dissidents have been treated by the surveillance state and the ways they adapt to and resist this treatment forms a major approach of *The Dangers of Dissent.* I begin the study in approximately 1965, after the passage of the Civil Rights Act and the emergence of Lyndon Johnson's Great Society. FBI spying persisted under liberal Democratic leadership, as it had under Republicans in earlier years. As the study moves forward in time into the present, I examine the impact of investigations on subjects, the methods and techniques used against them, and the politics on both sides: FBI versus dissident. This is a study of political contention. Investigations became sites of struggle. Crimes were committed by the state. Police agencies attempted to disrupt political challengers to achieve what political scientists call "dissident demobilization." This occurred in both "hard" and "soft" forms: the hard forms included violence, false arrests, and economic sanctions; the soft forms included overt and covert surveillance, ridicule, stigma, and silencing.[17]

The imposition of "political policing" is a neglected topic. What exactly is political policing? A relatively basic definition holds that the government targets people because it disagrees with their politics. The government framed the subjects of investigation as "threats" to society and demonized them as enemies. The investigations took place at all levels of government. According to the political policing framework, law enforcement combated perceived challenges to the existing political order. The FBI developed a "police science" to guide their efforts to monitor and neutralize those with whom they had strong political disagreements.[18] Remarkably, a constitutional democracy is capable of tolerating a high level of official repression.

While the two leading scholars of the FBI, Athan G. Theoharis and Richard Gid Powers, recently published synthetic histories of the Bureau,[19] neither wrote from the bottom up. Theoharis has published several books on the Hoover era and treats the Bureau as a conservative bureaucracy. As a bureaucracy, he finds the FBI hostile to opening its records, embracing a culture of secrecy to conceal its widespread abuse of power and illegal political intelligence gathering.[20] Theoharis privileges the role of Director Hoover, calling him an unaccountable "boss," and believes the FBI under his leadership broadly undermined the Constitution and broke the law.[21] But rather than focus on top leaders, I hope to shift the ground to subjects. I've never been an advocate of the "great man theory" of history. Historians should not give too much agency to one individual. Both Democratic and Republican party leaders supported broad spying on Americans to contain and suppress movements for social change, thus undermining the notion that political policing reflects the will of one individual or even one party.

Powers, unlike Theoharis, approaches the subject matter as a "conservative" and views FBI secrecy not as an effort to hide misconduct and to stop accountability, but as a necessary ingredient in the fight against internal subversives. He argues for robust spying and secret power to defend the nation against enemies. He calls the FBI "one of the great institutions in American Government."[22] According to this line of thinking, historians too often underemphasize the threat posed by radicals to society. Those who defend the Red Scares, while often criticizing their excesses, argue that the government "exaggerated" only in hindsight because real enemies were intent on undermining the government.

If Theoharis writes as a civil liberties liberal and Powers as a conservative, the controversial Ward Churchill writes unabashedly from the Left about FBI repression of social movements. He and Jim Vander Wall open *The COINTELPRO Papers* with the following salvo: "The FBI documents collected in this book offer a unique window into the inner workings of the U.S. political police. They expose the secret, systematic, and sometimes savage use of force and fraud, by all levels of government, to sabotage progressive political activity supposedly protected by the U.S. Constitution."[23] I also analyze repression, but my analysis largely shifts the focus to the post-Hoover period. In fact, few historians study the recent past of the FBI, which is more complicated in key respects as previously illegal methods of surveillance became legal. The Bureau now applies for legal warrants for bugs, wiretaps, and break-ins, which courts rarely reject. The complicity of the judicial branch in political policing is greater than in the past. Moreover, both surveillance and harassment is abetted by new forms of technology. Surveillance technology has advanced to the point where the monitoring of cell phones, computers, email, and fax has become routine. The impact on subjects of investigations continues to be great.

Liberating Information

Declassified FBI spy files form the primary research for this book. This material includes dozens of files recently obtained by the ACLU in legal action. I also liberated information on my own: During the last ten years, I filed approximately ninety-five FOIA requests with the FBI and obtained approximately forty-five declassified files constituting about thirty-five thousand pages. These efforts are modest but significant: Most of this material has not been used before in scholarly writing and helps to recast our understanding of spying during the last forty years. Yet there still is much more to be discovered and unfortunately scholars and other writers greatly underuse the FOIA. Regarding the FBI, the government holds an astonishing 4.5 billion pages of records (in 2003) and only a fraction—about six million pages—has been declassified under the FOIA.[24] While not all of the material consists of investigatory files, there still remains an untapped well that can be used in writing history in many areas: biography, social movements, the history of the Left and the Right, civil liberties, state power, and the law.

I made my first FOIA request on December 22, 1999, asking for FBI files on John Jay College of Criminal Justice, CUNY. I taught at the college for two and a half years in the early 1990s and know the Bureau runs a large Northeast Regional Training Facility at the school. I had been thinking about writing the letter for some time but I wondered how it might change my relationship with the state. Would the act of requesting secret police files define me as a "troublemaker" by the government? Would the FBI open a file on me simply because I asked them for files? Looking back, the timing seems significant: It was just a week before the new millennium and anxiety gripped the nation. What will happen when the year 2000 arrives? Will computers crash? Will terrorists strike? I began FOIA activism in this nervous environment, embracing the movement for openness and transparency in government.

About four months later I received from the FBI their file on John Jay College. While I expected to receive at least several hundred pages, the Bureau sent me just sixteen pages. And herein lies a problem: The FBI greatly resists releasing their records. Their response to requestors is not trustworthy. Unless one files an administrative appeal with the Justice Department or sues them in federal court, the requestor is not likely to receive a full accounting of records.

My FOIA activism eventually led to litigation, *Greenberg v. FBI*, filed in 2008 to obtain the FBI files on FBI directors L. Patrick Gray III and Clarence M. Kelley. Both served during the 1970s and are deceased. No one yet had requested their files. The dispute began when I filed a simple FOIA request on both individuals. Anyone studying the history of 1970s state surveillance practices would want these files to uncover a broad range of FBI activity. I

knew from reading Hoover's surviving files, which total about 17,700 pages, that key information is collected by the director. Declassification could shed light on a broad range of issues. At first, the FBI offered a "mute response" to my Gray and Kelley requests—that is, they ignored them. Not content with the "mute response," I wrote a follow-up letter to the FOIA office at FBI Headquarters. They ignored this letter as well. It had become clear to me that the FBI did not want to release these files. Their resistance increased my interest in obtaining them. What were they trying to conceal?

Several months later the FBI finally responded to my FOIA requests. Late is better than never. The FOIA office informed me the size of the Kelley file was estimated at fifty-eight thousand pages. I would be charged 10 cents per page, nearly $6,000. They did not know yet the size of the Gray file but it was expected to be smaller because Gray served less than a year as director. And herein lies a second ruse: As I later found out, the FBI greatly exaggerated the size of the Kelley file. Why? To discourage me from seeking it in terms of the financial costs. But they misfired. The longer the file, the more I wanted it. I did some research and learned that in recent years the FBI has selectively released files in an electronic form on CD-ROM, which greatly reduces the cost to researchers. Why couldn't they release the Gray and Kelley files in this way? I spoke on the phone with a representative from the FBI FOIA office, asking for an electronic release. At first they agreed to my request, indicating that the Gray and Kelley files, once declassified, would be placed in the FBI's Reading Room in Washington, D.C., in an electronic form. However, in a subsequent conversation and in correspondence, the FOIA office reneged on this verbal agreement. Why is unclear. Maybe they still hoped they could evade declassification.

The issue of electronic versus paper record releases is not a minor matter. The FBI tries to pose as many obstacles as possible to obtaining their records. Charging 10 cents per page for large files makes the financial costs a burden for most requestors. It is obstructionism pure and simple in an effort to suppress the historical record. What information might be contained in directors' files? Why is Kelley's so much larger than Hoover's file? Hoover served as director for nearly forty-eight years, while Kelley served only five years (1973–1978). On the one hand, it seemed logical that the total number of records increased in scope over time (i.e., the FBI generated many more documents as it grew in size as an organization). But this is only one explanation. The other, as I noted, was deception to dissuade openness. The total Kelley file later was determined to be about nine thousand pages. Meanwhile, the Gray file was determined to be only about sixty-five hundred pages. There is sound reason for researchers to question the legitimacy of the whole declassification process.

After much thought, I wrote Mark S. Zaid, a prominent FOIA lawyer in Washington, D.C., about initiating a lawsuit. He agreed to take the case. We