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ABUSE OF POWER

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HOW COLD WAR SURVEILLANCE
AND SECRECY POLICY SHAPED
THE RESPONSE TO 9/11

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ATHAN G. THEOHARIS

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Abuse of Power

*How Cold War Surveillance
and Secrecy Policy Shaped the Response to 9/11*



Athan G. Theoharis



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Abuse of Power

*To Jeanne, Ella, and Sophia,
two generations of achievement and promise*

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Introduction

Those who cannot remember the past are condemned to repeat it.

—GEORGE SANTAYANA, *The Life of Reason*

Blind-sided by the devastating terrorist attack of September 11, 2001, George W. Bush administration officials endorsed what they contended were unprecedented changes in federal surveillance policy. Such changes, they claimed, were essential to anticipating and preventing future terrorist attacks. First, administration officials drafted and successfully lobbied the Congress to enact the USA PATRIOT Act, a far-reaching law that legalized Federal Bureau of Investigation (FBI) interception of the communications and records of suspected terrorists without having to obtain a prior court warrant. Second, seven months later, in May 2002, at a joint press conference with FBI Director Robert Mueller III, Attorney General John Ashcroft issued new FBI investigative guidelines to change the “culture” of the FBI from that of a “reactive” law enforcement agency to one that was “proactive,” put “prevention above all else,” and would anticipate and prevent crime.

The administration’s contentions, however, were misleading and, in fact, misrepresented the more complex history of long-term FBI operations and authority. For the FBI did not first abandon a law-enforcement approach in May 2002, having sixty-six years earlier (under a secret August 1936 oral directive of President Franklin Roosevelt) conducted investigations having as their objective to anticipate and prevent crime (in this case, espionage or sabotage orchestrated by Nazi Germany, the Soviet Union, and their American recruits). Thereafter, FBI intelligence operations exceeded those based on a criminal standard.¹ In Chapter 1,

I chronicle the evolution of the FBI's intelligence operations, the attendant changes in tactics and priorities instituted during the World War II and cold war eras, and the ways these changes transformed the FBI's culture, conduct, and approach.

Nor was it the case that FBI agents had been hamstrung in the months and years preceding the 9/11 attack because they were denied the authority essential to uncovering potential terrorist operations. In fact, FBI agents already commanded broad legal authority—under the 1968 Omnibus Crime Control and Safe Streets Act and the 1978 Foreign Intelligence Surveillance Act—to intercept domestic and international communications when conducting intelligence and counterintelligence operations. In addition, under a key provision of the 1996 Antiterrorism and Effective Death Penalty Act, investigations could be launched based on the nebulous standard that a suspected individual or organization provided “material support” to terrorism. Furthermore, dating from the 1980s and intensifying in the 1990s, counterterrorism became an FBI priority. Under new “domestic security/terrorism” guidelines that Attorney General William French Smith issued in March 1983, FBI agents were authorized to “anticipate or prevent crime” and “initiate investigations in advance of criminal conduct.” Moreover, in the 1990s, FBI officials established special units to coordinate such investigations—a Radical Fundamentalist Unit in 1994 and an Usama² Bin Laden Unit in 1999.

Significantly, during the World War II and cold war years, even though the 1934 Communications Act banned wiretapping and the Supreme Court in 1937 and 1939 ruled that this ban applied to federal agents, FBI agents (under a secret presidential directive) employed wiretaps during national-defense investigations. FBI officials on their own authorized FBI agents to conduct break-ins, mail openings, and bugs when investigating suspected subversives. FBI officials privately conceded that such techniques were illegal or contravened the Fourth Amendment ban against unreasonable searches and seizures. In Chapter 2, I survey the history of FBI wiretapping authority; in Chapter 3, I identify the targets of such interceptions, some of which extended well beyond legitimate national-security threats.

Resisting public and congressional requests for access to records documenting FBI surveillance operations, Bush administration (and, subsequently, Barack Obama administration) officials claimed that disclosure would imperil the nation's security interests. Their claims reiterated the justifications of FBI and White House officials during the World War II and cold war years. In Chapter 4, I describe the various programs and procedures that were adopted during this earlier era to preclude discovery of the scope and targets of FBI surveillance operations.

Because of their ability to conduct policy in secret, FBI officials were able to preclude an independent assessment of the effectiveness of the FBI's coun-

terintelligence operations, a history discussed in detail in Chapter 5. Chapter 6, in turn, discusses how FBI counterintelligence investigations moved far beyond legitimate security concerns to monitor the personal and political activities of prominent, as well as radical, Americans and then to act covertly to promote what has been inaptly described as “McCarthyism.”

In contrast to other books and commentary on U.S. counterterrorist operations instituted in response to the 9/11 terrorist attacks, some of which criticized their violations of civil liberties, this book uses the lens of the World War II and cold war eras to examine current counterterrorism policy and does so for two reasons. First, a survey of World War II and cold war surveillance operations places those of the post-9/11 era in a needed historical context, highlighting the striking similarities of the response and the consequences of this expansion beyond the issue of the potential threat to civil liberties. This history moves the criticism of civil libertarians from the abstract and theoretical (potential for abuse) to the realm of predictable reality. Second, current stringent restrictions denying access to relevant records of 9/11 surveillance operations have inevitably precluded a fuller understanding of their scope and consequences and, in this respect, highlight the need to learn from the recently uncovered reality of the World War II and cold war eras.

There is a further dimension in light of the fact that the FBI’s World War II and cold war surveillance programs became known only when the wall of secrecy that had theretofore shrouded FBI (but also National Security Agency [NSA] and Central Intelligence Agency [CIA]) operations was first breached by the so-called Church and Pike Committee hearings and reports of 1975–1976. The enactment of a series of amendments to the Freedom of Information Act (FOIA) in 1974 concurrently made possible an informed assessment of these operations for the first time. By exploiting the mandatory review and disclosure provisions of the amended FOIA, researchers were able to obtain some of the formerly secret FBI records.

Research in these released records documents that the FBI’s intrusive investigations had not simply targeted suspected criminals and the nation’s enemies (foreign spies and their recruits) but had extended, for example, to monitoring the political and personal activities of prominent Americans (First Lady Eleanor Roosevelt, Illinois governor and Democratic presidential nominee Adlai Stevenson, Ensign/President John F. Kennedy, the Reverend Martin Luther King, Jr.), an author of a critical history of the FBI (Max Lowenthal), and even an infamous influence-peddler (John Monroe) after senior FBI officials learned that he had privately bragged to being immune from prosecution because he could prove that J. Edgar Hoover was a homosexual. The released records further document that FBI officials, despite commanding broad powers, had in many instances neither anticipated nor apprehended those individuals who actually engaged in espionage. Having ensured their operations would remain

secret through special records procedures to preclude the discovery of their abusive practices and the ineffectiveness of their counterintelligence programs, FBI officials purposefully used the acquired information (and misinformation). This acquired information did not molder in the FBI's massive records system, either because it was unusable for prosecution purposes (having been obtained illegally) or because an illegal activity was not confirmed. Instead, and on their own, FBI officials regularly and surreptitiously leaked this information to favored reporters and members of Congress with the objective either to discredit critics and/or to promote militantly anti-Communist politics.

Significantly, these revelations of widespread abuses and of the limitations of FBI counterintelligence capabilities had not been uncovered through the findings of the Church and Pike Committees or through the records released under the disclosure provisions of the amended FOIA. The FOIA might have provided the opportunity to obtain FBI records. Nonetheless, such access required, at minimum, that the requestor be able to identify the FBI's most-sensitive records and be willing to wait decades to obtain them. Diligence, creativity, and steadfastness have underpinned my most significant findings, detailed in the following chapters.

For, in contrast to other journalists, historians, and political activists, I have not simply requested FBI files on named individuals, cases, or organizations. Instead, I have sought to understand how FBI officials created and maintained sensitive records. Based on a careful reading of congressional hearings and reports; of court cases involving senior FBI officials; of released FBI files, some of which were declassified at presidential libraries; and of references in released CIA records, I have successfully identified and thereby obtained through the FOIA some of the FBI's most sensitive records: extant secret office files of senior FBI officials (Hoover, Clyde Tolson, Louis Nichols), code-named programs (COMRAP, CINRAD, COMPIC, American Legion Contact), and special policy files (SAC letters, FBI Manual of Rules and Regulations, June Mail, Surreptitious Entries, Symbol Number Sensitive Source Index [the last renamed the National Security Electronic Surveillance Index Card File]).

This successful identification strategy, however, did not ensure that the requested records were immediately released. I then encountered the reluctance of FBI officials to make public these records by adopting broad, at times capricious, interpretations of the FOIA's exemptive provisions (claiming "national security," "sources and methods," or "personal privacy" grounds and sometimes asserting two different grounds when withholding the same information on different occasions). My challenges to these withholding claims led to long delays in processing my ultimately successful appeals. For example, one of my requests, submitted in 1982, for former FBI Director Hoover's extant Official and Confidential File led to an appeal that continued

for more than twenty years before the totality of this sensitive file was eventually released. When originally processing my request for this massive file (numbering 17,700 pages), the FBI released slightly more than 6,000 heavily redacted pages. Because of the publicity that my acquisition of this file triggered (which became the subject of *U.S. News and World Report's* special "1984" edition of December 18, 1983), Justice Department officials granted me multiple appeals, eventually totaling five. I was able to successfully challenge the FBI's claimed withholdings. I could do so because of my acquired knowledge of the general contents of the withheld records, based on a review of the memoranda prepared for Attorney General Edward Levi in February 1975 that outlined the contents of each of the 164 folders composing the FBI director's secret office file and my evolving research in FBI records released in response to other FOIA requests or deposited in presidential libraries. The fact remains and bears emphasis: Bureau officials were committed to a stance of secrecy well after programs were no longer operational—and long after the end of the cold war.

This time-consuming and, at times, frustrating experience has direct relevance for an informed assessment of the post-9/11 history. It underscores the commitment of intelligence bureaucrats (and, as well, senior administration officials) to secrecy—highlighted by their resistance to releasing dated FBI records, some created eighty years ago. And although we currently know more about the FBI's World War II and cold war operations than contemporaries did during those eras, and also following the initial releases of FBI records during the 1970s and ensuing decades, the ability of intelligence bureaucrats to delay releasing these records does suggest that our evolving knowledge of dated policies and practices might not reflect the full reality. This experience has particular relevance for our understanding of current counterterrorist policy and practices.

Seemingly contradicting this latter contention, some of the surveillance programs and policies of the post-9/11 era became known within five years after the 9/11 attacks (not, as in the case of the World War II era, forty years later). These discoveries, it should be emphasized, were inadvertent. Furthermore, the basis for these discoveries indirectly confirms the limits of our current knowledge, for these discoveries were the results either of a series of isolated leaks of highly classified information to reporters of the *New York Times* and the *Washington Post* or the release by inspectors general (of the Justice Department and the intelligence agencies) of unclassified sections of reports on some of the post-9/11 surveillance operations. In the latter case, when enacting legislation rescinding the sunset provisions of the USA PATRIOT Act pertaining to the use of National Security Letters (NSL) or when legalizing the NSA's surveillance program and immunizing telecommunication companies from criminal prosecution, Congress had concurrently required

that the inspectors general (of the Justice Department or the intelligence agencies) review and report on the FBI's uses of NSLs or the operation of the NSA surveillance program. Neither the leaked information nor the reports of the inspectors general constitute a comprehensive (let alone independently verifiable) account of post-9/11 surveillance operations. The releases do not, for example, describe the scope and the targets of these surveillance operations (and whether the interceptions as a whole advanced legitimate national-security interests) or how the acquired information was used and continues to be used (whether, as in the cold war era, to advance the policy and political interests of presidents and senior intelligence agency officials). There is no reason to believe that the politics of secrecy does not continue to undermine accountability and invite abuses of power.

Abuse of Power

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1

A New Intelligence Paradigm

Surveillance and Preventive Detention

The crisis of the Great Depression transformed American politics. Capitalizing on the severe economic downturn and the seeming ineptitude of Herbert Hoover, the incumbent Republican president, Democratic presidential nominee Franklin Roosevelt easily captured the presidency in the 1932 election. Candidate Roosevelt, however, had offered no specific blueprint for the New Deal he pledged to enact if elected beyond promising bold new initiatives and a willingness to experiment. His commitment to change course and commanding personality, nonetheless, captured the public's mood, enabling the new president to steer through Congress in the ensuing years a far-reaching legislative agenda that radically expanded the federal government's regulatory and spending roles while at the same time focusing public attention on his leadership as president. In the process, Roosevelt undercut the checks on executive power that Congress and the media traditionally exercised.

Roosevelt's success in enacting the so-called New Deal for that very reason precipitated criticisms from many American conservatives and progressives. Roosevelt's conservative critics decried the undermining of limited government and the emergent more powerful presidency. For fundamentally different reasons, progressives also criticized Roosevelt's presidency, dismissing New Deal legislative reforms as half-hearted and as co-opting needed fundamental change. Conservatives and progressives, moreover, extended their divergent criticisms to the president's foreign-policy initiatives.

Their criticisms of Roosevelt's attempts to extend U.S. international commitments struck a responsive chord in the mid- to late 1930s, given the public's principal concerns, in the depths of the Great Depression, centering on the domestic economy and viewing with great skepticism an activist international role. Disillusioned over U.S. involvement in World War I, the public had come to perceive international involvement as unnecessary and counterproductive. This antipathy was greatly influenced by the highly publicized hearings conducted by the so-called Nye Committee during the years 1934–1937 that triggered enactment of the so-called Neutrality Acts of 1935, 1936, and 1937. Intended to avert U.S. involvement in foreign wars, these acts limited the nation's financial and commercial relations with belligerent powers and the president's discretion to counter Nazi Germany's expansionism. Moreover, by the mid-1930s, progressives and conservatives directly connected an interventionist foreign policy with the shaping of domestic reform. For many conservatives, President Roosevelt's justification for the expanded federal regulatory and spending policies under the New Deal as having precedence in the nation's emergency responses during World War I confirmed this connection, while for many progressives the consequences of President Woodrow Wilson's unneutral policies that resulted in U.S. intervention in World War I had created the repressive political climate that not only led to the Red Scare of 1920 but also underpinned the conservative politics of the 1920s.

These convictions shaped the political context that President Roosevelt felt compelled to address in the mid- to late 1930s through a series of tactical decisions to counter a perceived internal security threat that a resurgent Nazi Germany and Soviet Union posed. These governments, as “subversive” powers, Roosevelt feared, could influence the actions of the American Fascist and Communist movements. To contain this perceived subversive threat, Roosevelt concluded, required a fundamental shift in the role of the Federal Bureau of Investigation (FBI)—from a law enforcement agency that sought to develop evidence to prosecute violators of federal laws to an intelligence agency that would seek to acquire advance information about the plans and capabilities of suspected spies and saboteurs. Under this scenario, the FBI should anticipate and thereby frustrate potential acts of espionage and sabotage and furthermore contain “subversive” activists and movements from being able to influence the public debate about the president's interventionist initiatives. These goals, the president further concluded, could not be achieved through new legislation authorizing FBI intelligence investigations, given prevailing suspicions about executive and presidential powers. President Roosevelt, his attorneys general, and the FBI director instead opted for secret executive directives, a method that had as a central purpose the foreclosure of a potentially divisive and contentious debate. The FBI's new proactive approach meant that agents