# WARRANTLESS SURREPTITIOUS ENTRIES: FBI "BLACK BAG" BREAK-INS AND MICROPHONE INSTALLATIONS

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## I. INTRODUCTION

### *A. FBI Policy and Practice*

Since 1948 the FBI has conducted hundreds of warrantless surreptitious entries to gather domestic and foreign intelligence, despite the questionable legality of the technique and its deep intrusion into the privacy of targeted individuals. Before 1966, the FBI conducted over two hundred "black bag jobs." [1] These warrantless surreptitious entries were carried out for intelligence purposes *other than* microphone installation, such as physical search and photographing or seizing documents. Since 1960, more than five hundred warrantless surreptitious *microphone installations* against intelligence and internal security targets have been conducted by the FBI, a technique which the Justice Department still permits. Almost as many surreptitious entries were conducted in the same period against targets of criminal investigations.[1a]

Although several Attorneys General were aware of the FBI practice of break-ins to install electronic listening devices, there is no indication that the FBI informed any Attorney General about its use of "black bag jobs."

Surreptitious entries were performed by teams of FBI agents with special training in subjects such as "lock studies." Their missions were authorized in writing by FBI Director Hoover or his deputy, Clyde Tolson. A "Do Not File" procedure was utilized, under which most records of surreptitious entries were destroyed soon after an entry was accomplished.

The use of surreptitious entries against domestic targets dropped drastically after J. Edgar Hoover banned "black bag jobs" in 1966. In 1970, the relaxation of restraints on domestic intelligence techniques such as surreptititous entries was proposed in the Huston Plan. Hoover opposed this proposal, although he expressed a willingness to follow the Huston Plan, if directed to do so by the Attorney General.[2]

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[1] Memorandum from FBI to Senate Select Committee, 1/13/76.

Throughout this report, the FBI's term "black bag job" will be used, as in FBI memoranda, to refer to warrantless surreptitious entries for purposes other than microphone installation, e.g., physical search and photographing or seizing documents. The term "surreptitious entries" will be used to refer to all warrantless entries by the FBI, including both "black bag jobs" and entries for the purpose of microphone installation. Surreptitious entries of either type often involved breaking and entering the targeted premises. See the Committee's report on FBI Electronic Surveillance for a general treatment of microphone installations.

[1a] Memorandum from FBI to Senate Select Committee, 10/17/75, p. 3.

[2] Memorandum from J. Edgar Hoover to Attorney General Mitchell, 7/27/70.

*B. The Legal Context: United States* v. *Ehrlichman*

The legality of warrantless surreptitious entries for intelligence purposes is highly questionable. An FBI official who administered "black bag" operations in the 1960s expressed the opinion that they were "clearly illegal," [3] even though a 1954 memorandum from Attorney General Herbert Brownell to J. Edgar Hoover had provided the color of legal authority for surreptitious entries to install microphones.[4]

*U.S.* v. *Ehrlichman* is the only judicial decision on the legality of a warrantless surreptititous entry and physical search where the action was justified by the claim that it was "in the national interest." [5] In that case—which did not involve intelligence agencies—President Nixon's assistants, John Ehrlichman and Charles Colson, were among five defendants accused of conspiring to deprive a Los Angeles psychiatrist of his Fourth Amendment rights "by entering his offices without a warrant for the purpose of obtaining the doctor's medical records relating to one of his patients, Daniel Ellsberg, then under Federal indictment for revealing top secret documents." [6]

Ruling on the defendant's discovery motions, Federal District Judge Gerhard Gesell found the break-in and search of the psychiatrist's office "clearly illegal under the unambiguous mandate of the Fourth Amendment" because no search warrant was obtained:

> [T]he Government must comply with the strict constitutional and statutory limitations on trespassory searches and arrests even when known foreign agents are involved. . . . To hold otherwise, except under the most exigent circumstances, would be to abandon the Fourth Amendment to the whim of the Executive in total disregard of the Amendment's history and purpose.[7]

Gesell also pointed to a passage in the landmark "Keith" case to emphasize that surreptitious entries should be viewed by the courts as more intrusive than other forms of search such as wiretapping:

> physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.[8]

Despite the national security defense raised by the defendants, Judge Gesell concluded that "as a matter of law . . . the President . . .

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[3] Memorandum from William C, Sullivan to C. D. DeLoach, 7/19/66. This memorandum was written by Section Chief F. J. Baumgardner and approved on Sullivan's behalf by his principal deputy, J. A. Sizoo.

[4] Memorandum from Brownell to Hoover, 5/20/54.

[5] *U.S.* v. *Ehrlichman*, 376 F. Supp. 29, 31 (1974).

[6] *U.S.* v. *Ehrlichman*, 376 F. Supp. 29, 31 (1974).

[7] Ibid, p. 33, Gesell wrote: "Defendants contend that, over the last few years, the courts have begun to carve out an exception to this traditional rule for purely intelligence-gathering searches deemed necessary for the conduct of foreign affairs. However, the cases cited are carefully limited to the issue of wiretapping, a relatively nonintrusive search, *United States* v. *Butenko*, 494 F.2d 593 (3rd Cir. 1974); *United States* v. *Brown*, 484 F.2d 418 (5th Cir. 1973); *Zweibon* v. *Mitchell*, 363 F. Supp. 936 (D.D.C. 1973), and the Supreme Court has reserved judgment in this unsettled area. *United States* v. *United States District Court*, 407 U.S. 297, 322 n. 20, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972)." *Ibid*, p. 33.

[8] *U.S.* v. *Ehrlichman*, supra at 33, n. 3 citing *U.S.* v. *U.S. District Court*, *supra* at 313. This decision, known as the Keith case, after its author, Judge Damon Keith, is discussed in detail in the report on FBI Electronic Surveillance.

lacked the authority to authorize the Fielding break-in." [9] Gesell commented that break-ins in the interest of "national security" cannot be excepted from the requirement of a judicial warrant; the Fourth Amendment cannot be obviated, he wrote,

> . . . whenever the President determines that an American citizen, personally innocent of wrongdoing, has in his possession information that may touch upon foreign policy concerns. Such a doctrine, even in the context of purely information-gathering searches, would give the Executive a blank check to disregard the very heart and core of the Fourth Amendment and the vital privacy interests that it protects. Warrantless criminal investigatory searches—which this break-in may also have been—would, in addition, undermine vital Fifth and Sixth Amendment rights." [10]

Judicial decisions on electronic surveillance have encompassed surreptitious entries for the purpose of installing electronic listening devices. The leading case, *Katz* v. *United States*,[11] abandoned previous judicial decisions in which the legality of microphone surveillance depended upon whether or not a "constitutionally protected area," such as a home or office, had been physically invaded.[12] Instead, the Court declared that "the Fourth Amendment protects people, not places," wherever they have a "reasonable expectation of privacy." [13] In *Katz* the Court recognized a possible exception to the warrant requirement for "a situation involving the national security"—an exception which might apply to all forms of electronic surveillance, including surveillance accomplished by trespass to install a microphone.[14]

The possible exception to the warrant requirement, articulated by the Supreme Court and sustained by some lower courts in electronic surveillance cases,[15] probably would not apply to surreptitious entries conducted for the purpose of physical search. As Attorney General Edward H. Levi testified:

> The nature of the search and seizure can be very important. An entry into a house to search its interior may be viewed as more serious than the overhearing of a certain type of conversation. The risk of abuse may loom larger in one case than the other.[16]

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[9] *U.S.* v. *Ehrlichman*, *supra*, at 34.

[10] Ibid, pp. 33–34. The *Ehrlichman* decision has been appealed and the Justice Department has filed a memorandum in the Court of Appeals contesting Judge Gesell's ruling on the President's power. The Justice Department's position is set forth later in this report at pp. 369–370.

[11] *Katz* v. *United States*, 389 U.S. 347 (1967).

[12] For example, *Goldman* v. *United States*, 316 U.S. 129 (1942).

[13] *Katz* v. *United States*, 389 U.S. at 351, 360.

[14] 389 U.S., at 358 n. 23.

[15] Although the Supreme Court has never held that there is such an exception, at least two lower courts have so held in the foreign intelligence and counterintelligence field. *United States* v. *Butenko*, 494 F.2d 593 (3rd Cir. 1974), *United States* v. *Brown*, 484 F.2d 418 (5th Cir. 1973); but cf., *Zweibon* v. *Mitchell*, 516 F.2d 594 (D.C. Cir. 1975, en banc).

[16] Levi testimony, 11/6/75, Hearings, Vol. 5, p. 97.

II. OPERATIONAL PROCEDURE, AUTHORIZATION, AND TARGETING

*A. Internal Procedure and Authorization*

The only internal FBI memorandum located by the Select Committee which discussed the policy for surreptitious entries stated:

> We do not obtain authorization for "black bag" jobs from outside the Bureau. Such a technique involves trespassing and is clearly illegal; therefore, it would be impossible to obtain any legal sanction for it. Despite this, "black bag" jobs have been used because they represent an invaluable technique in combating subversive activities of a clandestine nature aimed directly at undermining and destroying our nation.[17]

The FBI described the procedure for authorization of surreptitious entries as follows:

> When a Special Agent in Charge (SAC) of a field office considered surreptitious entry necessary to the conduct of an investigation, he would make his request to the appropriate Assistant Director at FBIHQ, justifying the need for an entry and assuring it could be accomplished safely with full security. In accordance with instructions of Director J. Edgar Hoover, a memorandum outlining the facts of the request was prepared for approval of Mr. Hoover, or Mr. Tolson, the Associate Director. Subsequently, the memorandum was filed in the Assistant Director's office under a "Do Not File" procedure, and thereafter destroyed. In the field office, the SAC maintained a record of approval as a control device in his office safe. At the next yearly field office inspection, a review of these records would be made by the Inspector to insure that the SAC was not acting without prior FBIHQ approval in conducting surreptitious entries. Upon completion of this review, these records were destroyed.[18]

One FBI agent who performed numerous "black bag jobs" stated that he obtained approval from some officer at FBI headquarters, although not always the Director, before performing a study of the feasibility of an entry.[19] He said that a feasibility study was intended to determine: whether the entry could be accomplished in a secure manner, who owned the building and whether a key could be obtained. Floor plans of the building were often procured. If a building owner appeared to be a "patriotic citizen," FBI agents would approach him for assistance in entering a unit of his building—"show our credentials and wave the flag."[20] If the FBI agents decided that they would be unable to obtain the building owner's con-

[17] Memorandum from W. C. Sullivan to C. D. DeLoach, 7/19/66, Subject: "Black Bag" Jobs.

[18] Memorandum from the FBI to the Senate Select Committee, September 23, 1975.

[19] Staff summary of interview with former FBI Agent 1, 9/5/75, p. 3.

[20] *Ibid*, p. 4.

sent to enter the target's premises, the agents would examine the building and the area to determine the feasibility of a break-in.[21]

The FBI agent stated that if an entry was considered feasible he would write a memorandum to "Director, FBI" and, in response, would invariably receive an authorizing memorandum from headquarters initialled "JEH" [J. Edgar Hoover].[22] Another FBI agent who frequently participated in break-ins, stated that the directives for such operations were sometimes initialled by Hoover and usually initialled by the Assistant Director in charge of the Domestic Intelligence Division.[23]

One agent, who served on a special squad responsible for installing electronic surveillance devices, stated that in the majority of cases he was able to obtain a key to the target's premises, either from a landlord, hotel manager, or neighbor. In other cases, he simply entered through unlocked doors. He stated that only in a small proportion of the cases to which he was assigned was it necessary to pick a lock.[23a] Once a bug was planted, it was generally necessary for Bureau agents to monitor the conversations from a location close to the targeted premises.

Selected FBI agents received training courses in the skills necessary to perform surreptitious entries. An FBI technician provided formal instruction in "lock studies" as in-service training for experienced agents; "specialized lock-training" was also provided to each agent who received training in electronic surveillance at "sound school."[24] These courses were conducted at the direction of the Assistant Director in charge of the Bureau Laboratory. The Unit Chief who taught the courses stated that he had participated in numerous "black bag jobs" in which his only role was to open locks and safes; all other activities were performed by other agents accompanying him. He said that he would ordinarily receive an incentive award for a successful entry.[25]

One agent involved in surreptitious entries stated that he never knowingly conducted an entry for, or with the assistance of, a local police force; nor was he aware of any information being provided by the FBI to local police about an entry.[26]

The agent said that he performed two microphone installations against CIA employees at the request of the CIA. He also stated that he was never accompanied on an entry operation by a CIA officer.[27]

*B. Targets: Counterintelligence and Domestic Subversives*

The FBI has identified two broad categories of targets for surreptitious entries from 1942 to April 1968: (1) groups and individ-

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[21] *Ibid*, p. 4.

[22] Staff Summary, FBI Special Agent 1 Interview, 9/5/75, p. 4; FBI Special Agent 1 Interview, 6/27/75, p. 4.

[23] Staff Summary, FBI Special Agent 2 Interview, 9/10/75, p. 2.

[23a] FBI Special Agent 1 interview, 9/5/75.

The Committee did not conduct a detailed examination of all operational techniques and procedures involved in surreptitious entry operations.

[24] Unaddressed memorandum from J. Edgar Hoover, Director, 6/22/64.

[25] FBI Special Agent 2 Interview, 9/10/75. pp. 1–4.

[26] FBI Special Agent 1 Interview, 9/5/75, p. 5.

[27] FBI Special Agent 1 Interview, 9/5/75, pp. 5, 8.

uals connected with foreign intelligence and espionage operations; and (2) "domestic subversive and white hate groups." [28]

A Domestic Intelligence Division memorandum summarized the fruits obtained from surreptitious entries against domestic groups:

> We have on numerous occasions been able to obtain material held highly secret and closely guarded by subversive groups and organizations which consisted of membership lists and mailing lists of these organizations.[29]

The memorandum also cited a warrantless surreptitious entry against the Ku Klux Klan as an example of the utility of the technique:

> Through a "black bag" job, we obtained the records in the possession of three high-ranking officials of a Klan, organization. . . . These records gave us the complete membership and financial information concerning the Klan's operation which we have been using most effectively to disrupt the organization and, in fact, to bring about its near disintegration.[30]

A former FBI agent has stated that the locations of break-in operations included the residences of targets of investigation as well as organizational headquarters.[31]

The FBI was "unable to retrieve an accurate accounting" of the number of warrantless surreptitious entries from their files: "there is no central index, file, or document . . . no precise record of entries" due to the "Do Not File procedure." [32] Relying upon a general review of files and upon the recollections of FBI agents at headquarters, the Bureau estimated that, in the "black bag job" category (warrantless surreptitious entries for purposes other than microphone installation):

> There were at least 239 surreptitious entries conducted against at least fifteen domestic subversive targets from 1942 to April 1968. . . . In addition, at least three domestic subversive targets were the subject of numerous entries from October 1952 to June 1966.[33]

"An entry against one white hate group" was also reported.[34] One example of a "domestic subversive target" against whom numerous entries were conducted is the Socialist Workers Party, which may have

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[28] Memorandum from the FBI to the Select Committee, 9/23/75, p. 1. The FBI compiled a list of the "domestic subversive" targets, based "upon recollections of Special Agents who have knowledge of such activities, and review of those files identified by recollection as being targets of surreptitious entries." The Bureau admits that this list is "incomplete."

The Select Committee has reviewed this list and has determined that the specific targets listed fell within what was understood at the time of the surreptitious entries to be the "domestic subversive" category, as defined in FBI Manual Section 87 as permissible targets for full investigations (Committee Staff Memorandum, September 25, 1975.) [See the discussion of the overbreadth of FBI full investigations in the Report on the Development of FBI Domestic Intelligence Investigations; 1916-1976.]

[29] Memorandum from W. C. Sullivan to C. D. DeLoach, 7/19/66, p. 2.

[30] Memorandum from W. C. Sullivan to C. D. DeLoach, p. 2.

[31] Staff Summary, Interview of Former FBI Special Agent 3, 5/21/75, p. 4.

[32] Memorandum from the FBI to Senate Select Committee, 9/23/75.

[33] Memorandum from the FBI to Senate Select Committee, 1/13/76.

[34] Memorandum from the FBI to Senate Select Committee, 1/13/76.

been targeted for as many as ninety-two break-ins during the period from 1960 to 1966.[35]

To have a more complete picture of the extent of "black bag" operations, two other FBI estimates, also based on incomplete records, must be considered along with this partial accounting of the number of "black bag job" entries against domestic subversive groups. First, the Bureau estimated that between 1960 and 1975, 509 surreptitious microphone installations took place against 420 separate "targets of counterintelligence, internal security, and intelligence collection investigations." [36] It is impossible to determine from the FBI estimates exactly how many of these installations involved a surreptitious entry because other techniques were also utilized, such as installing a microphone prior to the occupancy of the target or encapsulating it in an article which was sent into the premises. It is also impossible to determine the number of these targets who were American citizens.

Second, the FBI estimated that between 1960 and 1975, there were 491 surreptitious entries to install electronic surveillance devices against 396 targets of criminal investigations.[37]

*C. Operations Directed Against the Socialist Workers Party*

Recently disclosed FBI memoranda pertaining to surreptitious entries directed at the Socialist Workers Party (SWP) in 1960–1966 provide additional details on FBI procedures.[38] Most of the documents were to be filed in the "Personal Folder" of the Special Agent in Charge of the New York field office.[39]

The "purpose of assignment" for surreptitious entries against an SWP affiliate, the Young Socialist Alliance (YSA), was described as follows:

> To locate records and information relating to the national organization of the YSA, [and] the identity of national members located throughout the country. Also it is anticipated that records of the local organization will be made available.[40]

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[35] Sixth Supplementary Response to Requests for Production of Documents of Defendant Director of the Federal Bureau of Investigations, *Socialist Workers Party, et al,* v. *Attorney General, et al,* 73 Civ. 3160 (S.D.N.Y.), 3/24/76.

[36] Memorandum from the FBI to Senate Select Committee, 10/17/75, p. 3. The FBI reporting of these statistics does not make clear how many of these installations, if any, were included in the estimate of the number of surreptitious entries cited above.

[37] Memorandum from the FBI to Senate Select Committee, 10/17/75, pp. 4–5. See Appendix for the complete yearly breakdown of these statistics.

[38] These materials have been described by the FBI as a response to the Socialist Workers Party request for "documents relating to any intelligence gathering burglaries perpetrated by or with knowledge of the F.B.I. against the S.W.P., the Y.S.A. (Young Socialist Alliance) or anyone suspected to be a leader or member thereof." (Sixth Supplementary Response to Requests for Production of Documents of Defendant Director of the Federal Bureau of Investigation, *Socialist Worker's Party, et al.* v. *Attorney General, et al.,* 73 Civ. 3160 (S.D.N.Y.), 3/24/76.)

[39] This method of filing of documents relating to the *operational details* of surreptitious entries should be distinguished from the "Do Not File" procedure which led to the destruction of documents recording the *authorization* of surreptitious entries.

[40] Memoranda from New York Field Office to FBI Headquarters, 6/23/60 and 9/26/62.

To carry out this assignment, the FBI prepared memoranda which contained detailed plans for post-midnight burglarizing of YSA headquarters. The FBI's entry plans included descriptions of "security aspects" such as building floor plans, locks, lighting, surrounding streets, entrances, and the occupants' living habits.[41]

The FBI's Los Angeles field office obtained "photographs of material maintained in the office of James P. Cannon, National Chairman of the SWP," including letters to and from Cannon.[42] The field office reports about this material carried the warning:

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[41] Several memoranda describe the "security aspects" of the FBI agents' plans for securing entry into the headquarters of the Young Socialist Alliance. One reads as follows:

"The headquarters entrance is a store front on the street level. There is only one entrance to the headquarters. The door is locked with a Master padlock only. . . .

"The entrance to the building is located approximately 75 feet on the north side of [the] Street from Second Avenue. The headquarters is a street front located adjacent to the entrance to the apartment building. . . . East of the headquarters store front are located 4 similar store fronts within the same building. These are described as follows from the headquarters going east: New York Telephone Company; empty store front; law office; empty store front.

"There are 4 floors of apartment dwellings above these store fronts in the building.

"There is a street light located on the north side of [the] Street, approximately five store fronts east of the headquarters. Inasmuch as the nearest other street light is located on the southeast corner of [the street] and Second [street], the immediate area of the headquarters is reasonably dark in evening hours.

"Previous spot checks on numerous occasions have shown that there is a very limited amount of pedestrian and automobile traffic after 12 Midnight. These spot checks have also shown that the lights of the apartments in the building are darkened.

"Entrance will be made between the hours of 12 Midnight and 4 AM, June 30, 1960." (Memorandum from FBI Headquarters to New York Field Office, 6/23/60.)

When the YSA headquarters moved in 1962, the "security aspects" of the FBI's entry plans were re-evaluated:

"This building is a three-story edifice approximately 25 feet wide by 75 feet in depth. The second and third floors are loft premises. The first floor is occupied by [a paint company]. The entrance to the second and third floors of the building is a door located beside the paint store. This door leads directly to stair flights to the second and third floors and is secured with a cylinder lock. This entrance does not connect with the paint store on the street level. . . .

"The third floor loft of this building is occupied by an artist . . . who maintains a studio. This individual pursues his profession, together with holding occasional art classes, in this loft. This activity transpires during the daytime. [The artist] does not reside on these premises and is not known to frequent the premises in the evening hours.

"The YSA Headquarters are located on the second floor loft space. The YSA moved into these headquarters on 9/21/62. Numerous spot checks of the area have shown very limited pedestrian and automobile traffic after midnight. The buildings adjacent to this location . . . on both sides of the street, are commercial establishments and lofts, and contain no residence.

"It has been ascertained that the paint store at this building closes at 6:00 p.m. and that all of the commercial establishments in this area close business between 5:00 and 6:00 p.m. . . .

"Entrance will be made between the hours of twelve midnight and 4:00 a.m., on 9/28/62." Memorandum from FBI Headquarters to New York Field Office, 9/26/62.

[42] Memorandum from Los Angeles Field Office to New York Field Office, 6/16/60; memorandum from Los Angeles Field Office to FBI Headquarters, 6/17/60.

EXTREME CAUTION SHOULD BE EXERCISED IN UTILIZING INFORMATION FURNISHED BY [DELETED] IN ORDER THAT THE IDENTITY OF THIS HIGHLY CONFIDENTIAL SOURCE IS NOT COMPROMISED.[43]

Several of the reports were "classified" because disclosure could "compromise effectiveness of the source."[44] Moreover, upon receipt of this information, FBI headquarters advised the Los Angeles field office:

> Due to the sensitive nature of [deleted], which may become a further source of valuable information concerning the Socialist Worker's Party, any data obtained from that source should be paraphrased when submitted to the Bureau or other offices in memorandum form suitable for dissemination.[45]

The Bureau apparently required such paraphrasing because it contemplated the dissemination outside the FBI of data obtained from surreptitious entries.

The material photographed by the FBI included membership lists, photographs of members, contribution lists, and correspondence concerning members' public participation in United States presidential campaigns, academic debates, and civil rights and antiwar organizing. For example, the following items were among those photographed by Bureau agents at the national offices of the Socialist Worker's Party:

> —"Items of correspondence between SWP National Headquarters and various branches detailing plans to obtain petition signatures to get on the ballot in 1960 elections."
>
> —"Letter sent by [SWP leader] to President Eisenhower (1/21/60) against loyalty program." [46]
>
> —"SWP members active in trade unions—identity of union and members disclosed." [47]
>
> —"Letter dated 6/1/60 setting forth the topic of speech to be given by . . . SWP Vice-Presidential candidate at opening of tour at Detroit, and listing complete schedule of cities to be visited thereafter in nationwide tour." [48]
>
> —"Correspondence identifying contributors to SWP election campaign fund."
>
> —"Letter proposing picket activity at Democratic Convention." [49]
>
> —"List naming all students at each session of Trotsky School from beginning in 1947 to the present." [50]
>
> —"Letter setting forth that [deleted] was cancelling balance of her national tour because her husband . . . had suffered a stroke." [51]

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[43] For example, memorandum from Los Angeles Field Office to New York Field Office, 6/16/60. (Deletion by FBI.)
[44] For example, memorandum from Los Angeles Field Office to FBI Headquarters, 6/17/60.
[45] Memorandum from FBI Headquarters to Los Angeles Field Office, 7/1/60. (Deletion by FBI.)
[46] Memorandum from FBI Headquarters to New York Field Office, 1/29/60.
[47] Memorandum from FBI Headquarters to New York Field Office, 3/25/60.
[48] Memorandum from FBI Headquarters to New York Field Office, 6/3/60.
[49] Memorandum from FBI Headquarters to New York Field Office, 7/11/60.
[50] Memorandum from FBI Headquarters to New York Field Office, 9/26/60.
[51] Memorandum from FBI Headquarters to New York Field Office, 10/24/60.

—"Correspondence re arrangements for [deleted] to debate at Yale University."

—"Letter announcing death of [deleted] . . . and plans for NY memorial meeting. . . ." [52]

—"Letter of Young Socialist Alliance (YSA) of 5/23/61 organizing Northern support for Southern students in integration struggle." [53]

—"Note from SWP member . . . requesting new key to headquarters so he could continue delivering newspapers there when he finished work at night." [54]

—"Letter . . . detailing health status of . . . Nat'l Chairman." [55]

—"Several current items of correspondence to and from SWP members active in integration activities in Georgia." [56]

—"Letters from National office to all branches re March on Washington." [57]

—"Voluminous correspondence from many areas re SWP getting on the ballot in 1964 Presidential elections." [58]

—"Complete tour schedule for SWP Presidential candidates Sept.–Oct. 1964." [59]

—"Plans of [deleted] to write a book." [60]

—"Reports on SWP participation in March on Washington (against the Vietnam War)." [61]

—"Correspondence re new veterans anti-war organization."

—"Current photographs of SWP members."

—"Correspondence re new anti-war front in Cleveland." [62]

—"Confidential address book of National-international Trotskyites." [63]

In addition to these items, the FBI obtained information about other activities of SWP members, leaders and affiliates, including publishing plans, financial status, international travels and contacts, legal defense strategy,[64] and the political conflicts within the party. For example, information about "proposed legal maneuvers" by a committee to aid indicted Young Socialist Alliance members in Bloomington, Indiana, was obtained by the FBI.

The number of documents photographed during a single operation reached as high as 220 [65] and regularly was above 100.

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[52] Memorandum from FBI Headquarters to New York Field Office, 12/16/60.
[53] Memorandum from FBI Headquarters to New York Field Office, 6/6/61.
[54] Memorandum from FBI Headquarters to New York Field Office, 9/15/61.
[55] Memorandum from FBI Headquarters to New York Field Office, 11/3/61.
[56] Memorandum from FBI Headquarters to New York Field Office, 8/24/62.
[57] Memorandum from FBI Headquarters to New York Field Office, 8/16/63.
[58] Memorandum from FBI Headquarters to New York Field Office, 2/10/64.
[59] Memorandum from FBI Headquarters to New York Field Office, 7/10/64.
[60] Memorandum from FBI Headquarters to New York Field Office, 10/30/64.
[61] Memorandum from FBI Headquarters to New York Field Office, 4/30/65.
[62] Memorandum from FBI Headquarters to New York Field Office, 12/17/65.
[63] Memorandum from FBI Headquarters, to New York Field Office, 4/22/66.
[64] Memorandum from FBI Headquarters to New York Field Office, 7/10/64; memorandum from FBI Headquarters to New York Field Office, 5/14/65; memorandum from FBI Headquarters to New York Field Office, 7/16/65.
[65] Memorandum from FBI Headquarters to New York Field Office, 4/30/65.

## III. FBI POLICY AND THE QUESTION OF AUTHORIZATION OUTSIDE THE BUREAU

### *A. FBI Policy: The Hoover Termination of "Black Bag Jobs"*

After apparently approving hundreds of warrantless surreptitious entries, J. Edgar Hoover changed the FBI policy in 1966. In response to a Domestic Intelligence Division memorandum of July 19, 1966, outlining the procedures used for approval and reporting on "black bag jobs," Hoover appended the following handwritten note: "No more such techniques must be used." [67] Six months later, Hoover formalized this directive in a memorandum:

> I note that requests are still being made by Bureau officials for the use of "black bag" techniques. I have previously indicated that I do not intend to approve any such requests in the future, and, consequently, no such recommendations should be submitted for approval of such matters. This practice, which includes also surreptitious entrances upon premises of any kind, will not meet with my approval in the future.[68]

The FBI's accounting of surreptitious entries indicated that Hoover's prohibition applied only to "black bag jobs." Break-ins to install microphones were not banned. [69] Moreover, Hoover's order did not finally terminate "black bag jobs" against foreign targets.[70] Despite Hoover's directive, there is evidence that at least one "black bag job" directed against a "domestic subversive target" took place between 1966 and 1968.[71]

### *B. Presidential and Attorney General Authorization*

#### *1. The Huston Plan: Proposal to Lift the Ban*

In 1970, a plan for the inter-agency coordination of domestic intelligence activity was presented to President Nixon. The "Huston Plan" proposed, among other things, that restrictions against "black bag" entries "should be modified to permit selective use of this technique against foreign intelligence targets and other urgent and high priority internal security targets." [72] Presidential assistant Tom Charles Huston, the proponent of this plan, which received the support of many high officials in the intelligence community, was of

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[67] Memorandum from W. C. Sullivan to C. DeLoach, 7/19/66, p. 3.

[68] Memorandum from Hoover to Tolson and DeLoach, 1/6/67. Hoover's motivation for issuing this order in 1966 is unclear. His order came during the same period in which the Bureau's mail opening programs were halted. (See the report on "CIA and FBI Mail Opening", Sec. III—Termination of the FBI Mail Opening Programs, for a discussion of the possible motivation for Hoover's termination of both mail opening activities and surreptitious entries.) One agent who participated in "black bag" operations indicated that he was unaware of any previous FBI opposition to them. (FBI Special Agent 1 Interview, 9/5/75, p. 8)

[69] Memorandum from Director, FBI, to Attorney General, 6/26/75, p. 1. Even today Justice Department policy permits warrantless surreptitious entries both to install microphones and for other purposes in the area of "foreign espionage or intelligence." See pp. 369–371.

[70] See pp. 369–371.

[71] Memorandum from the FBI to Senate Select Committee, 9/23/75.

[72] Memorandum from Tom Charles Huston to H. R. Haldeman, 7/70, p. 2.

the opinion that "black bag jobs" were illegal but should be utilized nonetheless:

> Use of this technique is clearly illegal: it amounts to burglary. It is also highly risky and could result in great embarrassment if exposed. However, it is also the most fruitful tool and can produce the type of intelligence which cannot be obtained in any other fashion.
>
> The FBI, in Mr. Hoover's younger days, used to conduct such operations with great success and with no exposure. The information secured was invaluable.
>
> . . . . . .
>
> Surreptitious entry of facilities occupied by subversive elements can turn up information about identities, methods of operation, and other invaluable investigative information which is not otherwise obtainable. This technique would be particularly helpful if used against the Weathermen and Black Panthers.[73]

In a memorandum to Attorney General John Mitchell, J. Edgar Hoover expressed his "clear-cut opposition to the lifting of the various restraints" proposed in the Huston Plan, but he also indicated a willingness to participate in the plan if it were adopted:

> [T]he FBI is prepared to implement the instructions of the White House at your direction. Of course, we would continue to seek your specific authorization, where appropriate, to utilize the various sensitive investigative techniques involved in individual cases.[74]

Although President Nixon granted approval for the Huston Plan, he revoked this approval within five days, in part because of Hoover's opposition.[75]

*2. Justice Department Policy*

(*a*) *Historical Development.*—There is no indication that any Attorney General was informed of FBI surreptitious entries for domestic intelligence purposes other than microphone installation.[76]

During World War II Alexander Holtzoff, a Special Assistant to the Attorney General, submitted a memorandum to Director Hoover on the "admissibility of evidence obtained by trash covers or microphone surveillance," in response to a series of hypothetical questions posed by an FBI official. Holtzoff declared flatly:

> The secret taking or abstraction of papers or other property from the premises without force is equivalent to an illegal

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[73] Memorandum from Huston to H.R. Haldeman, 7/70, p. 3.

[74] Memorandum from Hoover to Mitchell, 7/27/70, p. 3.

[75] See report on The Huston Plan: Sec. VI, Rescission of the Huston Plan: A Time for Reconsideration.

[76] For a full treatment of memoranda between FBI Director Hoover and successive Attorneys General on microphone installation policy and an analysis of legal developments in the field of electronic surveillance, see Report on FBI Electronic Surveillance.

> search and seizure, if the taking or abstraction is effected by a representative of the United States. Consequently, such papers or other articles are inadmissible as against a person whose rights have been violated, i.e., the person in control of the premises from which the papers or other property has been taken, *Gouled* v. *United States*, 255 U.S. 298.

However, Holtzoff interpreted prevailing court decisions as permitting a "microphone installation . . . where an actual trespass is committed." He stated that:

> evidence so obtained should be admissible, although no precise case decided by the courts involving such a situation has been found. The basic principle governing the situation is . . . that microphone surveillance is not equivalent to an illegal search and seizure, *Goldman* v. *United States*, 316 U.S. 129.[77]

In fact, the *Goldman* decision did not support Holtzoff's conclusion, since the microphone surveillance in the case did not involve trespass; and the Court did not address the question of microphone surveillance accomplished by surreptitious entry.

In 1952, Attorney General J. Howard McGrath advised Director Hoover that he could not "authorize the installation of a microphone *involving a trespass* under existing law." McGrath added, "Such surveillances as involve trespass are in the area of the Fourth Amendment, and evidence so obtained and from leads so obtained, is inadmissible." [78]

A 1954 directive from Attorney General Brownell provided at least the color of legal authority for microphone surveillance involving trespass, but did not deal with surreptitious entries for other purposes.[79]

The Justice Department policy toward warrantless surreptitious entry for the purpose of microphone installation apparently remained unchanged until 1965, when Attorney General Katzenbach required the FBI to seek his prior approval for microphone surveillances in-

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[77] Memorandum from Holtzoff to Hoover, 7/4/44. Holtzoff also advised the FBI that it could legally use cooperating sources or informants to obtain access to private materials:

"Where a person (A), having possession of the membership records of an organization, is told by a person (B) who is a member of the same organization but who is working in conjunction with the Bureau, that a particular place is a safe one in which to leave the membership records of the organization. After the records have been so left agents of this Bureau who have the legal permission of (B) enter the premises where the material was left, obtain the records and remove them to another place where they are completely photographed. The records are then returned to their original place where they are subsequently obtained by the depositor (A). It can be assured that both the Agent and the person (B) can testify on behalf of the Government.

The foregoing evidence is probably admissible. No entry to the subject's premises was involved, nor was the property abstracted from him. He left it voluntarily in the possession of (B) whose possession was lawful and who thereafter was in a position to grant permission to Bureau Agents to photograph it."

[78] Memorandum from McGrath to Hoover, 2/26/52.

[79] Memorandum from Brownell to Hoover, 5/20/54. See full discussion in Report on FBI Electronic Surveillance.

volving trespass, and he restricted the purpose of such operations to the collection of intelligence affecting the national security.[80]

(*b*) *FBI Briefings of Attorney General Robert Kennedy.*—In 1961, the FBI reiterated to the Justice Department that the Bureau's practice was to install microphones, sometimes by trespass, without informing the Justice Department. In May 1961, Byron White, Deputy Attorney General under Robert Kennedy, was told by Director Hoover that:

> in the internal security field we are utilizing microphone surveillances on a restricted basis even though trespass is necessary to assist in uncovering the activity of [foreign] intelligence agents and Communist Party leaders. . . . In the interest of national safety, microphone surveillances are also utilized on a restricted basis, even though trespass is necessary, in uncovering major criminal activities.[81]

A memorandum by Courtney Evans, Assistant Director of the FBI for the Special Investigative Division, indicates that he discussed microphones in "organized crime cases" with Attorney General Kennedy in July 1961:

> It was pointed out to the Attorney General that we had taken action with regard to the use of microphones in (organized crime) cases and . . . we were nevertheless utilizing them in all instances where this was technically feasible and where valuable information might be expected. The strong objections to the utilization of telephone taps as contrasted to microphone surveillances was stressed. The Attorney General stated he recognized the reasons why telephone taps should be restricted to national-defense-type cases and he was pleased we had been using microphone surveillances, where these objections do not apply, wherever possible in organized crime matters.[82]

Evans testified that the purpose of this meeting was to secure the Attorney General's approval for the leasing of a telephone line from a private company for a wiretap operation.[83]

Evans stated that he was "purposely vague" in this conversation and did not describe to the Attorney General the kinds of technical surveillance the Bureau was using or their methods for installing surveillance devices.[84] He explained that his "purposely vague" briefing was consistent with Director Hoover's policy.

> Mr. EVANS. Mainly because of a feeling the Director had expressed, that one shouldn't discuss confidential techniques used by the Bureau any more than was absolutely necessary.

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[80] Memorandum from Katzenbach to Hoover, 9/27/65. See full discussion in Report on FBI Electronic Surveillance.
[81] Memorandum from Director, FBI, to Attorney General Byron White, 5/4/61.
[82] Memorandum from C. A. Evans to A. Belmont, 7/7/71.
[83] Courtney Evans, testimony, 12/1/75, p. 24.
[84] Evans, 12/1/75, p. 25.

*Question.* It was your understanding that the admonition applied to the Attorney General as well as all other persons outside the Bureau?

Mr. EVANS. It was my understanding that if exceptions were to be made, the Director was going to make them himself.[85]

Evans, who was responsible for the FBI's liaison with Attorney General Kennedy, testified that it was "entirely possible" that the Attorney General did not understand that surreptitious entries might be used in connection with the "microphone surveillance" and leased telephone line taps which he subsequently authorized. Evans himself understood that the operation for which the Attorney General's signature was obtained "could have in some instances" included microphone installation by means of surreptitious entry, although Evans indicated that there were several methods by which the Bureau could make a "legal entry to a location and effect a microphone installation." [86]

(*c*) *Present Policy.*—The Justice Department under Attorney General Edward H. Levi has addressed, for the first time, the legal issues arising from "black bag jobs." This occurred in a statement submitted by Acting Assistant Attorney General John C. Keeney in the appeal of the conviction of John Ehrlichman for the break-in by the White House "plumbers" at the office of Daniel Ellsberg's psychiatrist. Assessing the "plumbers" break-in, the Justice Department declared:

> The physical entry here was plainly unlawful . . . because the search was not controlled as we have suggested it must be, there was no proper authorization, there was no delegation to a proper officer, and there was no sufficient predicate for the choice of the particular premises invaded.[87]

At the same time, however, the Justice Department defended the President's constitutional authority to conduct warrantless surreptitious entries in limited circumstances and with proper executive authorization:

> It is the position of the Department that such activities must be very carefully controlled. There must be solid reason to believe that foreign espionage or intelligence is involved. In addition, the intrusion into any zone of expected privacy must be kept to the minimum and there must be personal authorization by the President or the Attorney General. The Department believes that activities so controlled are lawful under the Fourth Amendment.
>
> In regard to warrantless searches related to foreign espionage or intelligence, the Department does not believe there is a constitutional difference between searches conducted by wire-

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[85] Evans, 12/1/75, pp. 25, 29.

[86] Evans, 12/1/75, p. 31; Memorandum from Evans to Belmont, 8/17/61.

[87] Department of Justice Letter, Acting Assistant Attorney General John C. Keeney to Hugh E. Kline, Clerk of U.S. Court of Appeals for the District of Columbia, 5/9/75.

> tapping and those involving physical entries into private premises. One form of search is no less serious than another. It is and has long been the Department's view that warrantless searches involving physical entries into private premises are justified.[88]

The Justice Department and the FBI have not terminated the use of warrantless surreptitious entry for electronic surveillance purposes in cases of "foreign espionage or intelligence". Warrantless surreptitious entry for other forms of search is not presently being conducted but, as indicated in the Justice Department statement, has not been ruled out as a matter of policy in foreign intelligence cases.

The FBI has stated that "microphone surveillances have been continued and in some instances physical entry of the premises has been necessary" against foreign counterintelligence targets. In addition, "a small number" of surreptitious entries which apparently did not involve microphone installation "were conducted in connection with foreign counterintelligence investigations having grave impact on the security of the nation." Entries for the purpose of installing electronic surveillance devices have also provided an opportunity to conduct other forms of search. The Bureau has stated:

> Based on available records and discussions with FBI personnel, it has been determined that in connection with microphone surveillances in the United States, there have been occasions when observations and recordings were made of pertinent information contained within the premises.[89]

According to the FBI, this "opportunity" has been "exploited" exclusively against foreign agents.[90]

Warrantless surreptitious entries against American citizens who have "no significant connection with a foreign power, its agents or agencies" are undoubtedly unconstitutional.[92] The constitutional issues arising from warrantless surreptitious entries against foreign agents within the United States have not been definitely resolved by the courts. The Committee recommends as a matter of policy that all governmental search and seizure "should be conducted only upon authority of a judicial warrant" issued in narrowly defined circumstances

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[88] Letter from Keeney to Hugh Kline, clerk of U.S. Court of Appeals for the District of Columbia, 5/9/75.

[89] Memorandum from the FBI to Senate Select Committee, 7/16/75.

[90] Memorandum from the FBI to Senate Select Committee, 6/26/75.

In contrast to the surreptitious entires conducted against "domestic subversive" targets until 1966, one such foreign intelligence operation studied by the Committee demonstrated an FBI pattern of conscientiously obtaining authorization from executive branch officials outside the Bureau: the CIA initially requested the aid of the FBI in performing the operation; the FBI secured State Department approval and then submitted the plan to the Attorney General for his authorization. (Committee staff summary of FBI memoranda.)

[92] 407 U.S. 297, 309, n. 8 (1972). The *Keith* case did not specifically address the question of the legality of "black bag jobs." However, by holding that the President's constitutional powers do not enable him to authorize warrantless electronic surveillance of domestic organizations, the logic of the decision compels the conclusion that warrantless surreptitious entires are unconstitutional.

and with procedural safeguards "to minimize the acquisition and retention of non-foreign intelligence information about Americans." [93]

APPENDIX [1]

SURREPTITIOUS ENTRIES FOR THE INSTALLATION OF MICROPHONES IN CRIMINAL INVESTIGATIONS

| | 1. Entries since since 1960 | 2. Separate targets each year since 1960 |
|---|---|---|
| 1960 | 11 | 11 |
| 1961 | 69 | 49 |
| 1962 | 106 | 84 |
| 1963 | 84 | 66 |
| 1964 | 83 | 67 |
| 1965 | 41 | 35 |
| 1966 | 0 | 0 |
| 1967 | 0 | 0 |
| 1968 | 0 | 0 |
| Subtotal | 394 | 312 |
| According to the FBI, the following entries were conducted pursuant to judicial warrants issued under title III of the Omnibus Crime Control and Safe Streets Act of 1968: | | |
| 1969 | 3 | 3 |
| 1970 | 8 | 8 |
| 1971 | 7 | 6 |
| 1972 | 19 | 18 |
| 1973 | 27 | 20 |
| 1974 | 22 | 21 |
| 1975 | 11 | 8 |
| Total | 491 | 396 |

[1] FBI memorandum from the FBI to Senate Select Committee, Oct. 17, 1975, re request pertaining to surreptitious entries for installation of electronic surveillance.

[93] Senate Select Committee Report on "Intelligence Activities and the Rights of Americans," Recommendations 51–54, pp. 327–328.

The Committee made the following recommendation to restrict the use of the technique of warrantless surreptitious entry (referred to as "unauthorized entry"—entry unauthorized by the target):

"Unauthorized entry should be conducted only upon judicial warrant issued on probable cause to believe that the place to be searched contains evidence of a crime, except unauthorized entry, including surreptitious entry, against foreigners who are officers, employees, or conscious agents of a foreign power should be permitted upon judicial warrant under the standards which apply to electronic surveillance described in Recommendation 52." (Recommendation 54, p. 328.)

This recommendation on "unauthorized entry" incorporates by reference the standards set forth in Recommendation 52 on electronic surveillance:

"All non-consensual electronic surveillance should be conducted pursuant to judicial warrants issued under authority of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

"The Act should be amended to provide, with respect to electronic surveillance of foreigners in the United States, that a warrant may issue if

"(a) There is probable cause that the target is an officer, employee or conscious agent of a foreign power.

"(b) The Attorney General has certified that the surveillance is likely to reveal information necessary to the protection of the nation against actual or potential attack or other hostile acts of force 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 hostile foreign intelligence activity.

"(c) With respect to any such electronic surveillance, the judge should adopt procedures to minimize the acquisition and retention of non-foreign intelligence information about Americans.

"(d) Such electronic surveillance should be exempt from the disclosure requirements of Title III of the 1968 Act as to foreigners generally and as to Americans if they are involved in hostile foreign intelligence activity (except where disclosure is called for in connection with the defense in the case of criminal prosecution)." (Recommendation 54, pp. 327–28.)

It should be noted that there are well established exceptions to the warrant requirement for searches in exigent circumstances.